

## THE PRELIMINARY REFERENCE DANCE BETWEEN THE CJEU AND DUTCH COURTS IN THE FIELD OF MIGRATION

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*This article examines the relationship between national courts and the Court of Justice of the European Union (CJEU) based on a legal-empirical research consisting of interviews and a legal analysis of judgments. It empirically tests which factors shape (i) Dutch national courts' motivations to refer a case to the CJEU, (ii) how the CJEU's preliminary rulings are received and implemented by national courts, and (iii) the extent to which the reception of the CJEU's preliminary ruling influences the national courts' future decision to refer. This argument is presented through a case study in the field of migration law in the Netherlands (2013-2016). This article shows that earlier theories about judicial empowerment and bureaucratic politics, emphasising politico-strategic reasons for (non)referral, have a limited explanatory*

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*value in the context of migration. It is so despite the expectation that strategic reasons are particularly applicable in a highly Europeanised, judicialised and politicised field such as migration law. Judges primarily operate pragmatically when deciding to refer (or not) and when applying the requested CJEU judgments. Even though several national judges expressed criticism about the CJEU and some of its judgments, this has not affected them to such an extent that they felt discouraged from referring future cases or were reluctant to follow-up on CJEU judgments.*

Keywords: preliminary ruling procedure; judicial dialogue; national courts; motives to refer; judicial empowerment; follow-up to CJEU judgments

### TABLE OF CONTENTS

I. INTRODUCTION.....	103
II. RESEARCH DESIGN .....	106
1. <i>Literature Review</i> .....	106
A. Politico-strategic Considerations to (not) Refer .....	107
B. Non-strategic Reasons to (not) Refer .....	109
C. Follow-up.....	112
D. Feedback Loops.....	114
2. <i>References in Migration Law in the Netherlands (2013-2016) as a Case Study</i> .....	114
3. <i>Research Design and Methodology</i> .....	117
A. Motives to Refer .....	120
B. Follow-up .....	121
C. Feedback Loops .....	121
III. NATIONAL COURT'S DECISION TO REFER.....	122
1. <i>Politico-strategic Reasons</i> .....	122
A. Judicial Empowerment: Protection vis-à-vis the Legislator .....	122
B. Leapfrog: Bureaucratic Struggles among Courts.....	124
2. <i>Non-strategic Reasons</i> .....	129
A. Compliance Pull/ Legal Formalism .....	131
B. Pragmatism.....	133
C. Personal/ Psychological Factors .....	136
D. Institutional.....	138
E. The Role of the Parties.....	138
IV. THE NATIONAL COURT'S FOLLOW-UP .....	142

1. <i>Judges' Satisfaction with the Usefulness of CJEU Judgments</i> .....	142
2. <i>Unclear and Problematic CJEU judgments</i> .....	144
3. <i>Judges' (Dis)Satisfaction with their Interaction with the CJEU</i> .....	146
4. <i>The Referring Court's Follow-up</i> .....	148
V. FEEDBACK LOOPS? .....	149
VI. CONCLUSION .....	151

## I. INTRODUCTION

The EU has had a tremendous impact on national law and politics. One of the most important drivers of the European integration project has been the Court of Justice of the European Union (CJEU). The CJEU has been able to have such an impact only as a result of the cooperation of national courts and their references about the interpretation and the validity of EU law.<sup>1</sup> There are, however, growing indications that the referral procedure, which is the 'keystone' of the EU legal system,<sup>2</sup> is not working optimally. National court judges seem to lack the necessary knowledge of EU law or they simply appear unwilling to refer.<sup>3</sup> Prechal, the current judge from the Netherlands at the CJEU, for example held that 'the quality and capacity of the national courts to apply [EU] law and to do so correctly is a matter for serious concern. [...] national judges, even the 'younger' generation, are rather still struggling with

<sup>1</sup> Karen J Alter, *Establishing the supremacy of European Law. The Making of an international rule of law in Europe* (Oxford University Press 2001) 320; George Tridimas, Takis Tridimas, 'National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure' (2004) *International Review of Law and Economics* 1215.

<sup>2</sup> The power of national courts to make a reference 'constitutes the very essence of the [Union] system of judicial protection'. *Opinion 2/13* EU:C:2014:2454, para. 176; Case C-300/99 *P Area Cova* EU:C:2001:71, para. 54.

<sup>3</sup> Michal Bobek, 'Of feasibility and silent elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams et al (eds), *Judging Europe's judges: the legitimacy of the European Court of Justice Examined* (Hart 2013) 197, 212-213; 'Wallis report. Report on the role of the national judge in the European judicial system', 2007/2027(INI), 4 June 2008, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2008-0224+0+DOC+XML+V0//EN>, last accessed 31 July 2018.

[EU] law than smoothly applying it'.<sup>4</sup> The actual implementation of the consequent CJEU rulings is also far from ideal, because judgments sometimes only contain a limited number of arguments or lack a clear answer.<sup>5</sup> Hence, many important principles developed by the CJEU have simply remained unimplemented.<sup>6</sup> In addition, several constitutional and supreme courts have openly rebelled against or showed their criticism about the CJEU. The recent years were marked by some high-profile cases, including the Danish *Ajos* case, the Italian *Taricco* saga as well as the German *Gauweiler* episode, that brought some of these problematic features of the procedure to the surface.<sup>7</sup>

The question is whether these often anecdotal allegations about the improper functioning of the preliminary reference procedure are real. Are these three high profile cases merely the tip of the iceberg or the exceptions that prove the rule that the preliminary ruling procedure is generally working well? In other words, is the surge in integration-sceptical national judgments representative of the relationship between national courts and the CJEU or is there a silent majority of integration-friendly courts? If the procedure indeed functions sub-optimally this is crucial to know. Certainly, it would mean that the effectiveness of EU law could be affected if these shortcomings

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<sup>4</sup> Sacha Prechal, 'National courts in EU judicial structures' (2006) 25 *Yearbook of European Law* 429, 432-433.

<sup>5</sup> Anthony Arnall, 'Judicial dialogue in the European Union', in Julie Dickson, Pavlos Eleftheriadis (eds), *Philosophical foundations of EU law* (OUP 2012) 109, 129; Marc de Werd, 'Dynamics at play in the EU preliminary ruling procedure' 22 *Maastricht Journal of European and Comparative law* (2015) 149, 152; Eleanor Sharpston, 'Making the Court of Justice of the European Union more productive' (2014) 21 *Maastricht Journal of European and Comparative law* 763.

<sup>6</sup> Gareth Davies, 'Activism relocated. The self-restraint of the European Court of Justice in its national context' (2012) 19 *Journal of European Public Policy* 76; Thomas de la Mare, Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Paul Craig, Grianne de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 363; Takis Tridimas, 'Constitutional review of Member State action: the virtues and vices of an incomplete jurisdiction' (2011) 9 *International Journal of Constitutional Law* 737.

<sup>7</sup> Case C-441/14 *Dansk Industri* EU:C:2016:278; Case C-105/14 *Taricco* EU:C:2015:555; Case C-62/14 *Gauweiler* EU:C:2015:400; Oliver Garner, 'The borders of European integration on trial in the Member States: *Dansk Industri*, *Miller*, and *Taricco*' (2017) *European Journal of Legal Studies* 1.

were not addressed. When national courts are frequently confronted with a deficient 'dialogue'<sup>8</sup> or unsatisfactory answers from the CJEU, this might discourage them to refer in future. Why would a judge refer when he or she considers the interaction with the CJEU, in the words of a Spanish judge, 'a monologue'?<sup>9</sup> The President of the Danish Supreme Court pointed to another dysfunctional element in the relationship between the European Court of Justice and the national courts: 'If the interpretation of the European Court of Justice is taking national courts by surprise, one may fear a growing unwillingness of national courts and parties to a legal conflict to present matters before the Court of Justice'.<sup>10</sup> Omissions to refer could mean that breaches of EU law remain unaddressed. This could in turn have severe implications for the judicial protection of individuals, and most certainly for individuals who are in vulnerable positions such as asylum seekers.<sup>11</sup> This is not to say, however, that more references are necessarily a good thing. Indeed, the average time taken by the CJEU to deal with references could also have negative consequences for the parties and justice objectives in general.

Given the identified problems, it is crucial to understand, firstly, why and how national courts use the preliminary ruling procedure and engage with the CJEU. More specifically, what are judges' (individual) motives to refer or not to refer (section III)? Secondly, how are the requested CJEU's rulings received and implemented by national courts (section IV)? Answers to these questions, which are also depicted in figure 1, enable the third question to be

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<sup>8</sup> The author deliberately aims to avoid the rather normative term 'dialogue' and prefers using the more neutral term 'interaction'. As will be outlined in section IV.3, judges often do not experience their interaction with the CJEU as being a dialogue.

<sup>9</sup> Mario García, 'Cautious Openness: the Spanish Constitutional Court's approach to EU law in recent national case law', *European Law Blog*, 7 June 2017, <https://europeanlawblog.eu/2017/06/07/cautious-openness-the-spanish-constitutional-courts-approach-to-eu-law-in-recent-national-case-law/>, last accessed 31 July 2018.

<sup>10</sup> Ulla Neergaard, Karsten E. Sørensen, 'Activist infighting among courts and breakdown of mutual trust? The Danish Supreme Court, the CJEU, and the *Ajos* case' (2017) *Yearbook of European Law* 275, 312.

<sup>11</sup> Takis Tridimas, 'Knocking on heaven's door: Fragmentation, efficiency and defiance in the preliminary reference procedure' (2003) 40 *Common Market Law Review* 9.

addressed. This third question relates to whether there is a feedback relationship between the national judges' perception of their interaction with the CJEU and the national court judges' willingness to refer cases in future (section IV). This article answers these questions on the basis of a case study on the practice of referral in the field of migration in the Netherlands (see section II.2 for a justification of this selection). These questions are not only relevant from a practical point of view, but also from an academic perspective since so far they have not received much attention in the literature (see section II.1).

The results of this research suggest that there is no need to worry about the functioning of the preliminary ruling procedure. The main reason for this optimistic conclusion is that judges primarily operate 'pragmatically' when deciding to refer (or not) and when applying the requested CJEU judgments. Even though several judges expressed criticism as to the CJEU and some CJEU judgments, this has not affected them to such an extent that they were reluctant to follow-up on CJEU judgments or felt discouraged from referring future cases. Another important contribution of this article is that it casts doubt upon the explanatory power of theoretical accounts that portray national courts as strategic actors that primarily refer for 'political' strategic reasons. Above all, judges consider pragmatic reasons, including practical considerations related to the consequences of referring in terms of delays or the importance of the issue at stake. Before turning to these findings, the article firstly gives a literature review, a justification of the selection of migration in the Netherlands as case study and an outline of the methodology (section II.3).

## II. RESEARCH DESIGN

### *1. Literature Review*

With respect to the first question, the motives to refer, the literature to date has primarily consisted of quantitative studies using econometric models. In addition, those studies primarily tested structural factors at the *Member State level* in order to explain why courts in some Member States refer more than courts in other Member States. Such factors include the level of GDP, the willingness to litigate, support for European integration, presence of judicial

review and the monist or dualist nature of the legal system.<sup>12</sup> Despite ample research, these findings on their own are not wholly satisfactory, since different and sometimes conflicting factors have been identified and because differences within Member States and across time have often been overlooked.<sup>13</sup> Rather than examining these aggregate-level factors, this article looks into the motives of *individual* judges as a way to fill the gaps in earlier research. In doing so, it aims to contribute to a growing literature on the factors and motives shaping the willingness of courts and judges to refer.<sup>14</sup>

One could basically distinguish two types of theoretical perspectives on the motives of judges (not) to refer: politico-strategic reasons and other non-strategic reasons, which are operationalised in Tables 1 and 2.

#### A. Politico-strategic Considerations to (not) Refer

There are three dominant perspectives in the Europeanisation literature on national courts' motives to refer. Firstly, based on neo-functional theories on European integration, the judicial empowerment hypothesis posits that national courts refer to compel the government to change its laws when they

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<sup>12</sup> Stacy A. Nyikos, 'The preliminary reference process. National court implementation, changing opportunity structures and litigant desistment' (2003) 4 *European Union Politics* 397; Marlene Wind, Dorte S. Martinsen, Gabriel P. Rotger, 'The uneven legal push for Europe: Questioning variation when national courts go to Europe' (2009) 10 *European Union Politics* 63.

<sup>13</sup> For a good discussion of these differences, see Arthur Dyevre, Nicolas Lampach, 'The Choice for Europe: Judicial Behaviour and Legal Integration in the European Union' (2017) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2926496](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926496), last accessed 31 July 2018, 3-4.

<sup>14</sup> Such individual motives have not received much attention (yet). There have been studies on Poland, Denmark and Sweden and (recently) Italy, Germany and France. See for example, Marlene Wind, 'The Nordics, the EU and the reluctance towards supranational judicial review' (2010) 48 *Journal of Common Market Studies* 1039; Urszula Jaremba, 'Polish civil judiciary vis-à-vis the preliminary ruling procedure: in search of a mid-range theory' in Bruno de Witte et al (eds), *National courts and EU law. New issues, theories and methods* (Edward Elgar 2016) 49; Tommaso Pavone, 'Revisiting judicial empowerment in the European Union: Limits of empowerment, logics of resistance' (2018) *Journal of Law and Courts*, pages yet unknown.

are of the opinion that a national measure violates EU law.<sup>15</sup> Referring is hence used as a 'sword' vis-à-vis the legislator or executive. Asking for a preliminary ruling would increase the chance of government compliance.<sup>16</sup> Secondly, based on neo-realist or intergovernmentalist theories, the sustained resistance view, takes the opposite stance and argues that national courts have a strong incentive to 'shield' national legislation from the CJEU by withholding references because of national interest considerations. They prefer to 'shield' national policy and legislation from undesirable influence of the CJEU, especially in politically sensitive cases.<sup>17</sup> This preference could stem from the national court's loyalty towards the executive, its resistance against the dynamic interpretation by the CJEU, the pressure from the public or other domestic political considerations.<sup>18</sup> Thirdly, the bureaucratic politics model developed by Alter implies that EU law is used in bureaucratic struggles between different levels within the judiciary.<sup>19</sup> This model explains why different national courts have their own (different) incentives to refer and why there is divergence in the number of references among lower and higher courts within and between Member States. It also points out that lower courts use the preliminary reference procedure to 'leapfrog' the national judicial hierarchy in order to seek support from the CJEU as protection against reversal of their decisions by a higher court or the government.<sup>20</sup> This theory spells out why most of the references are made by lower courts in the majority of EU Member States, albeit not in the

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<sup>15</sup> Joseph H.H. Weiler, 'A Quiet revolution: The European Court of Justice and its interlocutors' (1994) 26 *Comparative Political Studies* 510, 523; Jonathan Golub, 'The politics of judicial discretion: Rethinking the interaction between national courts and the European Court of Justice' (1996) 19 *West European Politics* 360, 379; Davies (n 6) 85; Alter (n 1) 219 and 228.

<sup>16</sup> Andreas J Obermaier, 'The national judiciary. Sword of European Court of Justice rulings: the example of the *Kobll/Decker* jurisprudence' (2008) *European Law Journal* 735; Tridimas & Tridimas (n 1) 1215.

<sup>17</sup> Golub (n 15) 375-379; Wind et al (n 12) 63.

<sup>18</sup> Wind et al (n 12) 75-76; Wind (n 14) 1053; Golub (n 15) 377; Karen J. Alter, 'Explaining national court acceptance of European Court jurisprudence: A critical evaluation of theories of legal integration', in: Anne-Marie Slaughter, Alec Stone-Sweet, Joseph H. Weiler (ed.), *The European Courts and National Courts* (Hart 1998) 225, 236.

<sup>19</sup> Alter (n 18) 241-247.

<sup>20</sup> Alter (n 18) 242.



Netherlands.<sup>21</sup> Note, however, that recent studies suggest that the highest courts in other EU Member States have in recent years 'reconquered' control from the lowest courts over the application of EU law and references to the CJEU.<sup>22</sup>

Table 1: operationalisation of strategic reasons to refer

Motivations (not) to refer	Theory	Proxy
Political/ strategic considerations (section III.1)	Sword	Strike down national law or policy; considerable financial consequences
	Shield	Protect national legislation from EU law
	Leapfrog	Challenge (another) higher court

#### B. Non-strategic Reasons to (not) Refer

These three politico-strategic perspectives have for a long time dominated the research on the interaction between national courts and the CJEU. The recent literature, however, have not found much support for the theories construing courts as politico-strategic actors. Several authors highlighted the increasing reluctance of lower courts to refer, coupled with a greater usage of the reference procedure by the highest courts in recent years across the EU. In doing so, they showed that earlier accounts which emphasise the important share of lower courts' references in the case docket of the CJEU are no longer telling the full story.<sup>23</sup> Instead of primarily strategic reasons,

<sup>21</sup> In the Netherlands 66% of the references have been made by the highest courts while in 11 Member States, including Belgium, France, Spain and the UK, more than 70% of the references have been made by lower courts. Chantal Mak, Elaine Mak, Vanessa Mak, 'De verwijzende rechter. Rechtspolitieke verandering via prejudiciële vragen van lagere rechters aan het Europese Hof van Justitie' [The referring judge. Legal political change via preliminary references of lower courts to the CJEU] (2017) *Nederlands Juristenblad* 1724.

<sup>22</sup> Since the situation in most EU Member States currently reflects the practice in the Netherlands, this point does not seem very relevant to consider in relation to the country selection. Daniel R. Kelemen, Tommaso Pavone, 'The European Court of Justice's evolving relationship with national judiciaries' (2017), *unpublished*.

<sup>23</sup> Francisco P. Coutinho, 'European Union law in Portuguese courts: An appraisal of the first twenty-five years after accession' (2017) *Yearbook of European Law* 358; Arthur Dyevre, Angelina Atanasova, Monika Glavina, 'Who asks most? Institutional

Pavone concluded, based on a thorough empirical research on Italy, Germany and France, that (a lack of) references can be explained by path-dependent, every-day practices within national courts.<sup>24</sup>

While the literature has focused on strategic reasons for courts to refer, it has not yet formulated hypotheses about the possible non-strategic reasons for the courts to do so. Against this background, five mechanisms can be distilled from existing theoretical and empirical accounts. Firstly, legal-formalist or 'compliance pull' motives based on the 'power of the law'.<sup>25</sup> National courts refer because they feel responsible for a correct application of EU law or, in the case of the highest court, they consider themselves obliged to refer.<sup>26</sup> The highest courts are required to refer when they have doubts about the interpretation and validity of EU law unless it would 'in no way affect the outcome of the case'.<sup>27</sup> This being said, there are two other exceptions for the highest courts to refer, which are commonly referred to as *Cilfit*-exceptions: no reference is necessary when the CJEU has 'already dealt with the point of law in question' (*acte éclairé*) or when 'the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved' (*acte clair*).<sup>28</sup> Secondly, pragmatic considerations other than strict legal obligations to refer also play an important role.<sup>29</sup> This includes, for example, case specific reasons which relate to the importance of the questions concerned or efficiency reasons

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incentives and referral activity in European Union legal order' (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3051659](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051659), last accessed 31 July 2018; Kelemen & Pavone (n 22).

<sup>24</sup> Pavone (n 14); Compare also with Jaremba (n 14) 49; Denise C. Hübner, 'The decentralized enforcement of European law: national court decisions on EU directives with and without preliminary reference submissions' (2017) *Journal of European Public Policy* 1.

<sup>25</sup> Weiler (n 15) 520; see recently Hübner (n 24).

<sup>26</sup> Alter (n 1) 230.

<sup>27</sup> Case 283/81 *Cilfit* EU:C:1982:335, para. 10.

<sup>28</sup> *Ibid*, para.14 and 16.

<sup>29</sup> See more generally about 'pragmatic adjudication' Richard Posner, *How judges think* (CUP 2008); Urszula Jaremba, *Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes* (2012), <https://repub.eur.nl/pub/37318/>, last accessed 31 July 2018, 352.

concerning the consequences of referring in terms of the delay in the specific case or other cases involving the same EU law issue.<sup>30</sup> Thirdly, personal and psychological factors related to the individual judge have been mentioned as well. This includes, for example, the limited knowledge about EU law and/or the preliminary ruling procedure as a reason for non-referral.<sup>31</sup> It has also been noted that some judges might be reluctant to refer, because they are afraid that they ask a wrong question and that the CJEU declares their question inadmissible.<sup>32</sup> Fourthly, institutional and organisational factors related to the institutional dynamics of a particular court have also been put forward. These factors include, for example, the need to meet 'production targets' which discourages references to the CJEU.<sup>33</sup> Fifthly, the literature has also noted that the parties and their requests to refer can influence the courts willingness to refer.<sup>34</sup>

Table 2: operationalisation of non-strategic reasons to refer

Motivations (not) to refer	Theory	Proxy
Non-strategic considerations (section III.2)	Compliance pull/legal formalism	The need to comply with the obligation to refer/ correct application of the <i>Cilfit</i> doctrine

<sup>30</sup> Judges primarily refer because this is simply necessary for them to solve the national dispute efficiently. If they are not able to interpret EU law on their own, the CJEU might provide the required clarity. Hans-W. Micklitz, *The politics of judicial cooperation in the EU. Sunday trading, equal treatment and good faith* (CUP 2005) 437; Jaremba (n 14) 67.

<sup>31</sup> Jaremba (n 29); Tobias Nowak et al, *National judges as European Union judges: Knowledge, experiences and attitudes of lower court judges in Germany and the Netherlands* (Eleven 2011) 49.

<sup>32</sup> Jaremba (n 29) 229-230; Hanna Sevenster, Corinna Wissels, 'Laveren tussen *Ferreira en Van Dijk*' [Plying between *Ferreira en Van Dijk*] in M. Bosma et al (eds), *Graag nog even bespreken. Liber amirocum Henk Lubberdink* (Raad van State 2016) 83, 90; Kees Groenendijk, 'Waarom rechters niet naar Luxemburg gaan: politieke structuur of rechtscultuur?' [Why judges do not go to Luxembourg: political structure or legal culture?] in R. Baas et al (eds), *Rechtspleging en rechtsbescherming. Liber amicorum voor prof. dr. Leny E. de Groot-van Leeuwen* (Kluwer 2015) 302.

<sup>33</sup> Groenendijk (n 33); Nowak et al (n 31) 54.

<sup>34</sup> Wind (n 14) 1053; Wind et al (n 12) 283.

	Pragmatism	Need of legal clarity; answer perceived necessary to resolve the case
		Reasonable reading of <i>Cilfit</i>
		Natural reluctance (e.g. decide themselves)
		Importance of the question
		Consequences of referring for the parties
		Efficiency reasons (delay in case, and other cases)
		Resources necessary to write question, time
	Personal/ psychological	Position in the career
		Background/ expertise
		Knowledge of EU law procedure
		Self-perception: e.g. lower courts as fact finders
		Fear to ask (wrong) questions
		Satisfaction of writing a reference/ contributing to EU law
	Institutional	Awareness (e.g. specialised EU law committees in courts)
		Case management (backlog of cases)
	Request of the parties	Parties requested referral

So far, strategic and non-strategic reasons have not been tested in the field of migration. The findings presented in this article further corroborate recent studies, such as Pavone's, and challenge some major assumptions of the dominant theoretical approaches, namely that politico-strategic reasons alone do not explain the motivation of national judges to refer. In addition, it shows that the influence of parties on national judges' decision to refer is rather limited.

### C. Follow-up

There is not much research on the second question dealing with the follow-up to CJEU judgments, except for some older studies finding high rates of

implementation.<sup>35</sup> Bobek observed that 'very little or nothing at all is known [...] whether or not national courts are satisfied with the Court's decision(s) once they receive them, whether they consider them authoritative, and whether the Court's case law is in fact followed'.<sup>36</sup> There is an assumption that preliminary rulings of the CJEU are implemented by the requesting national courts, but there is little systematic evidence supporting that view.<sup>37</sup> While some older studies found high implementation rates,<sup>38</sup> others noted that implementation is not always achieved or straightforward.<sup>39</sup> Other outcomes than full application of the CJEU judgment include: partial application, a reinterpretation of the facts so that the CJEU judgment does not apply, re-referral to the CJEU and concealed or open non-compliance.<sup>40</sup>

This article will thus fill an empirical gap and provide reflection on the current discourse which tends to overemphasise integration-sceptical national judgments.<sup>41</sup> It shows that Dutch judges have generally adopted a positive attitude towards the CJEU and its judgments. It will also be argued

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<sup>35</sup> An implementation rate of 90% was found for the Netherlands in the period 1961-1985. Nyikos likewise found an 'extremely high' rate of 96%. Joest Korte (ed), 'Primus inter pares: The European Court and national courts. The follow-up by national courts of preliminary rulings ex Art. 177 of the Treaty of Rome: A report on the situation in the Netherlands' (1990) EUI Law Working Paper; Nyikos (n 12) 410; see also Arjen W.H. Meij, *Prejudiciële vragen van Nederlandse rechters en hun gevolgen* [Preliminary references of Dutch judges and their consequences] (W.E.J. Tjeenk Willink 1993); G. Wils, *Prejudiciële vragen van Belgische rechters en hun gevolgen* [Preliminary references of Belgian judges and their consequences] (W.E.J. Tjeenk Willink 1993).

<sup>36</sup> Bobek (n 3) 197.

<sup>37</sup> Nyikos (n 12) 398.

<sup>38</sup> Korte found an implementation rate for Dutch references (1961-1985) of 90%. Korte (n 35). Nyikos also found an 'extremely high' implementation rate of 96%. Nyikos (n 12) 410. 89% of the respondents in a 2007 survey found the CJEU judgment readily applicable. Wallis report (n 3) 23.

<sup>39</sup> Davies (n 6) 81 and 89; Alter (n 18) 233-234; See, for example, the way in which the Danish Supreme Court was unwilling to change its ruling after *Ajos*. Neergaard & Sørensen (n 10).

<sup>40</sup> Nyikos (n 12) 399-401.

<sup>41</sup> Andreas Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) *International Journal of Law in Context* 258.

that national judges' personal background and institutional position play an important role in their perception of the CJEU's case law.

#### D. Feedback Loops

Even less research has been conducted on the relationship between the motives of judges to (not) refer and their perception of the CJEU and CJEU judgments. It is difficult to clearly connect the idea of feedback loops to specific theoretical accounts or previous empirical studies. The notion of feedback loops relates, however, to a certain extent to Mayoral's notion of 'trust', which he defines as 'national judges' belief about whether the CJEU will follow an expected course of action under conditions of uncertainty'.<sup>42</sup> The limited (theoretical) attention warrants further work in this direction. It also explains the more inductive and explorative approach that this study takes with respect to this third question (see further section II.3.C).

#### *2. References in Migration Law in the Netherlands (2013-2016) as a Case Study*

Given the shaky empirical support for the theories which portray courts as strategic actors, it is best to select an area of case law where one would expect these theories to apply. The field of asylum, migration and integration, one of the most contested issues that the EU is confronted with nowadays, lends itself to 'test' those theories. This is so because the aforementioned area has been greatly Europeanised in a relatively short period of time. It is also highly judicialised and politicised because many EU Member States, including the Netherlands, have adopted restrictive policies in this area, often testing and sometimes transcending the limits of EU law. It is not only the legislator which has become more restrictive in this field, but also some (highest) courts, such as the Dutch Council of State.<sup>43</sup> This has led to increasing

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<sup>42</sup> Juan A. Mayoral, 'In the CJEU judges trust: A new approach in the judicial construction of Europe' (2017) *Journal of Common Market Studies* 551.

<sup>43</sup> The *Salah Sheekh* judgment of the ECtHR as an illustration of the restrictive approach of the Council of State. In this judgment, the ECtHR dismissed the Dutch government's plea of inadmissibility for non-exhaustion of domestic remedies even though the applicant had not lodged appeal with the Council. The ECtHR justified this by ruling that the Council 'may in theory have been capable of reversing the decision of the Regional Court, in practice a further appeal would have had virtually

litigation at both the national and European level, offering room for courts to challenge (or 'shield') national legislation or the restrictive approach of other courts.<sup>44</sup> Courts are generally reluctant to strike down democratically adopted rules, especially in such a controversial and politically sensitive field as migration. Referring to the CJEU could give national courts an authoritative cover to do so.

In addition, the Netherlands is also a suitable Member State to test these theories. Dutch courts have been 'integration friendly', they generally ask a high number of questions and are eager to engage with EU law.<sup>45</sup> Dutch courts are also at the forefront in the field of migration. The Council of State was, for example, the first national court in the EU to ask questions about the Qualification Directive 2004/83, the Family Reunification Directive 2003/86, as well as the Directive 2003/109 on third-country nationals who are *long-term* residents.<sup>46</sup>

Table 3: Overview relevant cases studied for the period 2013-2016

References by the highest courts	References by lower courts (Rb.)
C-601/15, PPU, <i>J.N. (ABRvS)</i>	C-550/16, <i>A. and S.</i>
C-133/15, <i>Chavez-Vilchez (CRvB)</i>	C-331/16, <i>K.</i>
C-153/14, <i>K. and A. (ABRvS)</i>	C-18/16, <i>K.</i>
C-579/13, <i>P. and S. (CRvB)</i>	C-63/15, <i>Gbezelbash</i>
C-554/13, <i>Zh. and O. (ABRvS)</i>	C-158/13, <i>Rajaby</i>
C-383/13 PPU, <i>G. and R. (ABRvS)</i>	

no prospect of success.' ECtHR nr. 1948/04 *Salah Sheekh*, CE:ECHR:2007:0111JUD000194804, para. 123.

<sup>44</sup> Möriz Baumgärtel, 'Part of the game': government strategies against European litigation concerning migrant rights', in Tanja Gammeltoft-Hansen & Thomas Aalberts (eds), *The Changing Practices of International Law* (Cambridge University Press 2018), forthcoming.

<sup>45</sup> Bobek (n 3) 213.

<sup>46</sup> Respectively C-465/07 *Elgafaji* EU:C:2009:94 (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12); C-578/08 *Chakroun* EU:C:2010:117 (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12); C-502/10, *Singh* EU:C:2012:636 (Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44).

C-171/13, <i>Demirci</i> (CRvB)	
C-148/13-150/13, A., B., C. (ABRvS)	

For this article all referred cases and decisions not to refer in the four-year period (2013-2016) were selected.<sup>47</sup> As Table 3 shows, thirteen cases have been referred to the CJEU in this period. Five references came from lower courts (*rechtbank* or *Rb.*) who are not obliged to refer on the basis of Article 267 TFEU.<sup>48</sup> Eight cases were referred by the two highest administrative courts which are active in this area: the Administrative Division of the *Council of State* (the *Council of State* or *ABRvS*) and the *Central Appeals Tribunal* (the *Tribunal* or *CRvB*). There had only been sixteen references in the thirteen years before (2000-2012), which illustrates the increasing Europeanisation in this area. The Europeanisation might of itself also be a factor that has contributed to the growing number of references. There are simply more EU (asylum and migration) rules, as well as more cross-border movements giving rise to more disputes and hence more case law of the CJEU. Lawyers have also become more specialised in EU (migration) law and, hence, increasingly appeal to EU law and request a reference to be made. There is also a reinforcing effect in the sense that once the CJEU has ruled on an issue, this almost unavoidably leads to new questions. One good example is the *Zambrano* ruling which has caused courts to ask new questions regarding the rights of residence of third country nationals with minor children who are EU citizens.<sup>49</sup>

This article will not engage in a systematic comparison of migration with other fields of law. It will, nonetheless, provide some reflections on the

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<sup>47</sup> It was decided to focus on the most recent references that reflect the current operation of the procedure and dynamic between courts. The analysis included only references before 31 December 2016 in order to be able to study most, albeit not all, CJEU judgments and the national follow-up. This is so because it usually takes 15 months before the CJEU answers the reference and often at least half a year before the referring court decides the dispute. The limited period does not mean that older or more recent cases and developments are excluded, especially when they were mentioned during interviews or in the literature, but simply that no structured database search was conducted for this period.

<sup>48</sup> Unless they have doubts about the validity of EU law. Case 314/85 *Foto-Frost* EU:C:1987:452, paras. 15 and 16; E.g. NL:RBDHA:2016:265, para. 8.2.

<sup>49</sup> Case C-34/09 *Zambrano* EU:C:2011:124.



specific nature of the legal field of migration in comparison with other fields based on some provisional findings from a broader 4.5 years research project on the interaction between the CJEU and Dutch, Irish and British courts.<sup>50</sup> These provisional findings suggest that the field of law is an important factor affecting especially the national judges' motives to refer.<sup>51</sup>

### *3. Research Design and Methodology*

This article will address the three research questions presented in the introduction on the basis of a legal-empirical research combining legal analysis and interviews (see figure 1). A doctrinal legal analysis alone is insufficient to answer the three questions. While previous studies primarily relied on interviews and or surveys with judges, this article combines interviews with a comprehensive and structured analysis of judgments of both national courts and the CJEU.<sup>52</sup>

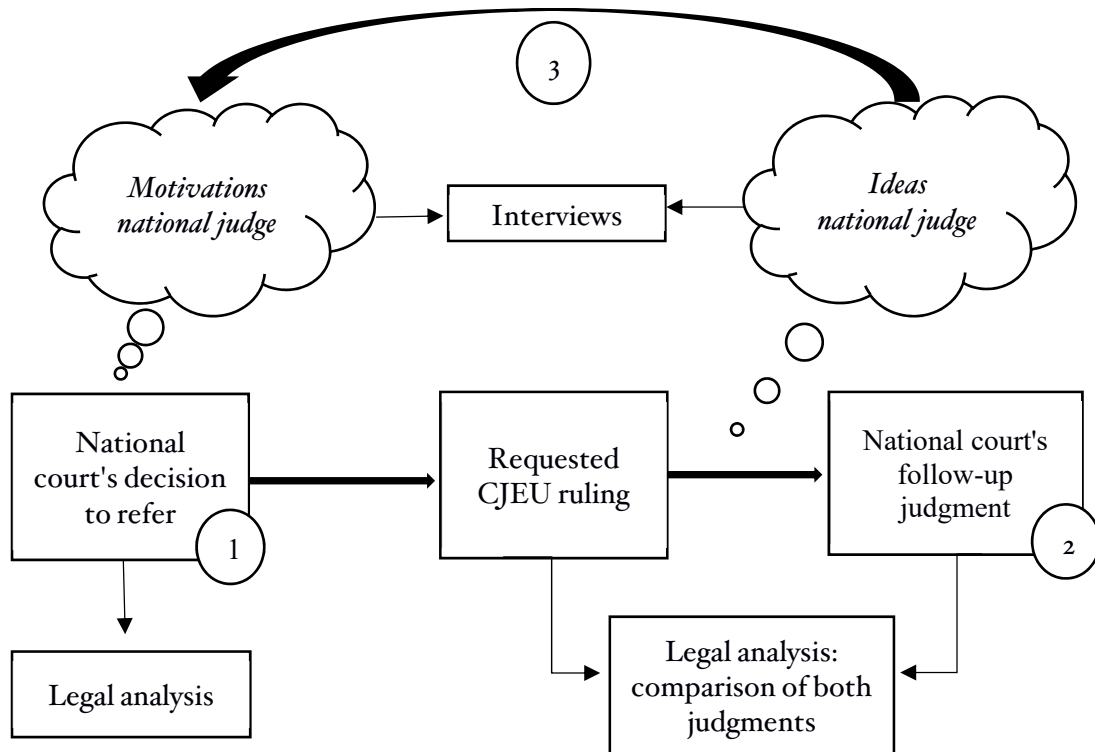
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<sup>50</sup> In order to obtain a good insight in judicial motives, this project considers Member States with a different practice of referring by looking at the relative number of references per 1 million inhabitants. UK courts make relatively little use of the preliminary reference procedure. By contrast, Dutch courts ask a high number of questions and are eager to engage with EU law. Ireland is somewhere in between. Complementary to this project, a PhD researcher (Jesse Claassen) is conducting a similar research project on Austria and Germany.

<sup>51</sup> The research on the Netherlands, found, for example, a greater willingness to refer to the CJEU in the field of intellectual property or criminal cooperation and European arrest warrants. This could be compared with the idea of 'hotspots' of references of certain judges in particular fields of law. R.D. Kelemen & T. Pavone, 'The political geography of European legal integration' (2017) *unpublished*; see also Dyevre et al (n 23).

<sup>52</sup> Wind (n 14); Pavone (n 14).

Figure 1: Research design



This article builds on an innovative dataset gathered through semi-structured interviews with sixteen judges and court clerks involved in the referred migration cases listed in Table 3, as well as cases that were *not* referred. The dataset also includes judges who have no experience in referring ensuring a representative picture.<sup>53</sup> Eleven interviewees work at the two highest administrative courts (ABRvS and CRvB). Five interviews were conducted with asylum judges from lower courts (Rb.). Given this limited number, findings with respect to lower courts should be interpreted with more care.<sup>54</sup> In order to protect the anonymity of interviewees, their names and identities

<sup>53</sup> In order to make this selection, an overview was made of all judges involved in the referred cases as well as decisions not to refer. Two interviews were conducted in 2015, while all others took place between April and November 2017. Almost all judges and court clerks that were approached for an interview were willing to cooperate. Only six judges refused or where unable to meet.

<sup>54</sup> Interviews 14, 22, 39, 51, 83.

are not disclosed.<sup>55</sup> Note that this research is part of a broader research project for which, so far, 36 judges and court clerks have been interviewed.<sup>56</sup>

There are clear limitations to interviews as a research instrument to identify motives.<sup>57</sup> One problem is that asking judges about motives might encourage them to provide *ex post* rationalisations that do not reflect the decision making at the time they decided the case. To mitigate this problem, a recent time period (2013–2016) was chosen.<sup>58</sup> As a result, most interviewees were also generally able to reflect on almost all cases in the selected time period. Another drawback of interview method is that interviewees might be tempted to give socially desirable answers and/or conceal their real motivations. Judges might also be reluctant to acknowledge that politico-strategic reasons played a role in their decision to refer (or not) and conceal that they have engaged in such strategies. As it might conflict with their self-perception or professional ethos of being an independent judge who decides on the basis of the law. Despite the secrecy of judicial deliberations, interviewees were relatively open, seemed honest and were willing to discuss individual cases. To alleviate the aforementioned problems, interviewees were, firstly, encouraged not to reflect on motives in general and *in abstracto*. Rather, they were asked to give concrete examples or probed to reflect on several specific judgments that were identified earlier during the legal analysis. Secondly, the idea was to interview more than one judge involved in certain (important) cases. Interviewees were, thirdly, given a convincing guarantee of confidentiality.<sup>59</sup> Fourthly, the interview data were

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<sup>55</sup> A number between 0 and 100 was randomly selected for the interviews. Note that references to interview numbers is omitted when specific cases are discussed, because this would still make it possible to trace the identity of the interviewees on the basis of the published judgments.

<sup>56</sup> Jasper Krommendijk, 'De hoogste Nederlandse bestuursrechtters en het Hof van Justitie: geboren danspartners? Het hoe en waarom van verwijzen' [The highest Dutch administrative courts and the CJEU; natural born dance partners? The how and why of referring], *Nederlands Tijdschrift voor Bestuursrecht* (2017) 305.

<sup>57</sup> 'Asking someone to identify his or her motive is one of the worst methods of measuring motives'. Lee Epstein, Gary King, 'The rules of inference' (2002) 69 *University of Chicago Law Review* 1, 93.

<sup>58</sup> *Ibid* (n 46).

<sup>59</sup> *Ibid* (n 55).

complemented with the analysis of case law, extra-judicial writing of judges and secondary literature to triangulate the data as far as possible. As mentioned before, the triangulation of different sources illustrates the methodological originality of the article.

#### A. Motives to Refer

To establish the motives of judges to refer, all national court decisions to refer and to not refer in the time period 2013-2016 were analysed on the basis of the following three questions (see '1' in figure 1): Which considerations played a role in decisions (not) to refer to the CJEU? What were the reasons (not) to refer in the particular cases? How have the *Cilfit*-exceptions been interpreted and applied?

The national court decisions *not* to refer were found on the basis of a careful database search of all published Dutch judgments with the search terms 'prejudiciële vragen' [preliminary questions], '267 VWEU' [267 TFEU] and 'Cilfit'.<sup>60</sup> The disadvantage of this approach is that there could still be some cases in which a reference was appropriate, but which do not mention the issue of referring at all. It seems that the highest courts have been more eager in recent years to carefully reason why a reference is not necessary when one of the parties requested a reference as a result of the case law of the ECtHR (see section III.2.E). To alleviate the problem of discovering 'silent' judgments, two other strategies were used. First judgments of the lower courts in cases that were eventually referred to the CJEU by the highest court were consulted. Second, judgments were also found in the secondary literature.

This being said, an analysis of judgments is not enough to establish the motives of judges to refer, especially because court judgments are often silent on other relevant considerations and calculations beyond purely legal (formalist) reasons. The analysis of judgments did not clarify why questions were raised in one case and not in another. Semi-structured interviews with judges were therefore conducted. The three open-ended questions set out above were raised during the interview to give judges the freedom to come up with reasons out of their own motion without being directed too much. Only

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<sup>60</sup> This search was conducted on rechtspraak.nl for the period 1-1-2013 t/m 31-12-2016.

at a later stage of the interview the judges were asked to reflect on some, but certainly not all, motives and factors identified in the literature discussed in section II.1. Lower court judges were also asked about their reasons not to refer the cases that were later referred by the highest court. In addition, judges were confronted with criticism from the relevant literature about the lack of referral in these cases. Tables 4 and 5 in section III provide an overview of the considerations mentioned by the 16 migration judges during interviews.<sup>61</sup>

### B. Follow-up

For the second question, the national court's follow-up judgment was compared with the requested CJEU ruling to establish whether and how that court has applied the CJEU judgment (see '2' in figure 1). Secondary literature and commentaries were useful in conducting this analysis because they often contain criticism on the reasoning and approach of the CJEU and/or follow-up by the referring court.

This legal analysis was complemented with interviews with judges involved in these cases (see 'ideas national judge' in figure 1). The following questions were firstly asked in general in an open way, whereby judges were encouraged to discuss specific cases out of their own motion: Is the reasoning of the CJEU sufficiently clear? Can CJEU judgments be applied easily in the national court case and be used to solve the dispute? Are there cases of incomplete follow-up, and why? Interviewees were subsequently questioned about specific CJEU rulings identified during the doctrinal analysis that were not mentioned by the interviewees themselves.

### C. Feedback Loops

The third question on the feedback loops (see '3' in figure 1) was primarily answered on the basis of interviews during which judges were asked whether their interaction with the CJEU and its answers had an effect on their

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<sup>61</sup> Note, however, that one should be careful in drawing conclusion from this table. It was often difficult to classify whether an interviewee argued in line with a certain reason or factor, also because an interviewee could partly (dis)agree. It was therefore also decided not to mention in percentages how many judges considered a reason (ir)relevant.

willingness to refer cases in future. In addition, judges were also asked to reflect on the question as to whether they take the expected answer of the CJEU into account when deciding to refer or not.

### III. NATIONAL COURT'S DECISION TO REFER

This section takes the motivations of judges (not) to refer as identified in the literature. As will be shown below, politico-strategic reasons play a more limited role in the context of migration than one would expect based on the literature. Moreover, the results also do not support the expectation that such reasons play an important role in the highly Europeanised, judicialised and politicised field of migration (section III.1). The study, in fact, shows that non-strategic reasons can better explain the judges' decision (not) to refer (section III.2).

#### *1. Politico-strategic Reasons*

Section II.1 outlined three dominant theoretical perspectives on the politico-strategic reasons for courts to refer: judicial empowerment ('sword'), sustained resistance ('shield') and bureaucratic politics ('leapfrog'). Only a few 'sword' references (section II.1.A) and a couple more 'leapfrog' references, especially from lower courts (section III.1.B), were found in this study. This research did not find any support for the second theory that courts deliberately shield cases from the CJEU.<sup>62</sup>

#### A. Judicial Empowerment: Protection vis-à-vis the Legislator

The highest national courts have acted in line with the judicial empowerment hypothesis in a few instances. Several interviewees acknowledged this. But almost all of them mentioned the same two references of the Council of State in the area of migration as examples, one of which (*Chakroun*) precedes the 2013-2016 time period. *Chakroun* dealt with a Dutch rule stipulating that family reunification could be refused to a sponsor who does not have a lasting

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<sup>62</sup> Nonetheless, it could be argued that when national courts do not refer in order to shield the national legislator they would not raise the issue of referral, because this would throw light on their 'disloyalty', at least from an EU perspective. For a discussion of the strategy to alleviate this problem, see section II.3.

and independent net income equal to at least 120% of the minimum wage in order to maintain himself and the members of his family.<sup>63</sup> There was already quite a lot of criticism regarding the validity of this rule in the light of the Family Reunification Directive and the Council of State referred the case to the CJEU.<sup>64</sup> Similar doubts about the legality of a national rule under EU law also played a role in a second case, *K. and A.*, albeit more in the background. This case dealt with a Dutch rule which required the family members of a third country national residing lawfully in the Netherlands to pass a civic integration exam to enter the Netherlands. The Council of State referred to written observations of the Commission that this rule amounted to a breach of EU law.<sup>65</sup> In cases such as *Chakroun*, it could be argued more cynically, as some interviewed judges did, that national courts are 'hiding behind the back' of the CJEU and that the CJEU is simply 'pulling the chestnuts out of the fire' for national courts.<sup>66</sup> Some judges noted that in case of democratically adopted laws a judge should only make a decision after careful deliberation also in the light of the separation of powers.<sup>67</sup> Some judges acknowledged that the CJEU is sometimes used by national courts to say what they already know with respect to an issue that is actually *clair*.<sup>68</sup> Again, with respect to *Chakroun*, it was quite clear for the Council of State that the rule was contrary to EU law. At the same time, it should be acknowledged that the Dutch courts have not shun away from striking down provisions in Dutch law in the field of migration without referring a question to the CJEU.<sup>69</sup> The latter illustrates that the CJEU is not an indispensable ally. In addition, it also

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<sup>63</sup> Case C-578/08 *Chakroun* EU:C:2010:117.

<sup>64</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12. The European Commission held that this Dutch rule 'raise[s] particular concerns'. European Commission, 'On the application of Directive 2003/86/EC on the right to family reunification', COM(2008) 610/3, 7.

<sup>65</sup> These observations were made in the case of *Imran*, which was withdrawn. ABRvS 1 April 2014 NL:RVS:2014:1196, para. 16, 20.1 and 28; Case C-153/14 *K. and A.* EU:C:2015:453.

<sup>66</sup> Interviews 18, 44.

<sup>67</sup> Interviews 18, 72.

<sup>68</sup> Interviews 10, 12, 18.

<sup>69</sup> ABRvS 26 April 2017 NL:RVS:2017:1109.

shows that Dutch courts are in general not acting in line with the shield-thesis, protecting national legislation from EU law.<sup>70</sup>

Table 4: overview of the interview replies in relation to the politico-strategic reasons

Theory	Proxy	Mentioned by judges out of their own motion as relevant	Judges considered factor relevant when asked	Judges considered factor irrelevant when asked
Sword	Strike down national law or policy; considerable financial consequences	44; 10; 18	66	72; 89
Shield	Protect national legislation from EU law			
Leapfrog	Challenge (another) higher court	39		14; 22; 52

### B. Leapfrog: Bureaucratic Struggles among Courts

Comparatively, more evidence was found in support for the leapfrog thesis of the bureaucratic politics model. At first sight, the quantitative data seems to give solid empirical support to this thesis, but this data is slightly misleading on its own, as will be discussed towards the end of the section.

Four out of the five references in the period 2013-2016 of lower asylum courts were actually used by those courts to explicitly question the interpretation of EU law by the Council of State and to prompt the CJEU to 'correct' this restrictive interpretation.<sup>71</sup> There are also two older cases that clearly illustrate the way in which lower asylum courts have turned to the CJEU as

<sup>70</sup> Ibid (n 46) for the general willingness of Dutch courts to apply EU law.

<sup>71</sup> NL:RBDHA:2013:BZ5462 (*Rajaby*), para. 2.5.5; NL:RBDHA:2015:1004 (*Ghezelbash*); NL:RBDHA:2016:6389 (*K.*), para.19; NL:RBDHA:2016:12824 (*A. and S.*), para. 5.2.



their ally.<sup>72</sup> The first case is *Y.S.* and dealt with the right of access of asylum seekers to the minutes relating to the decision of the Immigration and Naturalisation Service to grant a residence permit. These minutes are internal preparatory documents containing arguments and considerations which are relevant for the decision-making process.<sup>73</sup> They include personal data but also a legal analysis of these data in the light of the applicable rules.<sup>74</sup> The Council of State ruled in several cases that this legal analysis in the minutes does not constitute 'personal data' in the sense of the Law on the Protection of Personal Data transposing the Data Protection Directive, but contains the personal opinions of the case officer.<sup>75</sup> Based on these considerations, the Council of State held that there is no right of access to these minutes.<sup>76</sup> These judgments were criticised by scholars.<sup>77</sup> In light of the criticism, it was not surprising that a lower judge saw a possibility to refer the matter to the CJEU in 2012. In its order for reference, the single-judge section of the district court Middelburg explicitly questioned the Council's restrictive interpretation of 'personal data' in the sense of the Data Protection Directive.<sup>78</sup> The court also implicitly criticised the fact that the Council of State had not referred the matter to the CJEU. What makes this case so interesting is that the Council did not stand by idly, but also made a

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<sup>72</sup> Earlier the district court Zwolle asked questions in *Imran* about the compatibility of the civic integration exam with the Family Reunification Directive after the Council of State had ruled positively about this. The court, however, did not explicitly express its disagreement with the Council. Rb. 's-Gravenhage 31 March 2011 NL:RBSGR:2011:BQ0453; C-155/11 *Imran* EU:C:2011:387.

<sup>73</sup> Joined cases C-141/12 and C-372/12 *YS* EU:C:2014:2081.

<sup>74</sup> *ABRvS* 26 June 2008 NL:RVS:2008:BD6230, para. 2.1.1 and 2.1.2; Rb. Middelburg 15 March 2012 NL:RBMID:2012:BV8942, para. 3.2.

<sup>75</sup> Directive 95/46/EC of the European **Parliament** and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

<sup>76</sup> *ABRvS* 2 February 2011 NL:RVS:2011:BP2831; *ABRvS* 19 October 2011 NL:RVS:2011:BT8554; *ABRvS* 2 November 2011 NL:RVS:2011:BU3136, para. 2.3.1.

<sup>77</sup> The critique was related to the restrictive interpretation of 'personal data', the limited reasoning of the Council of State, the insufficient attention for the Data Protection Directive as well as the Charter of Fundamental Rights. Overkleeft-Verburg in *JB* 2011/66; Klingenberg in *JBP* 2013/6.

<sup>78</sup> Rb. Middelburg 15 March 2012 NL:RBMID:2012:BV8942, para. 9.

reference for a preliminary ruling in a similar case. In its order, the Council made clear that it had not changed its opinion and explained its approach, while implicitly criticising the interpretation of the lower court.<sup>79</sup> While Council's previous judgments on the same matter were motivated relatively shortly, the Council seemed to pull out all the stops to 'defend' itself in its order. By doing so, the Council also aimed at moving the CJEU in its direction by formulating the questions differently than the district court and in line with its own approach.<sup>80</sup> The latter illustrates that rather than being merely a dialogue between CJEU and national courts, the preliminary ruling procedure also becomes a forum for dialogue between different national courts.

The interpretation by the Council of State regarding the sufficiency of the safeguards in relation to mobile security monitoring checks was also challenged by a lower court in *Jaoo/Adil*.<sup>81</sup> The Dutch law enabled officials to carry out such checks up to 20 kilometres from the land border to examine whether the persons stopped satisfied the residence requirements under certain safeguards.<sup>82</sup> Confronted with a rebellious lower court that challenged its approach, the Council again referred the matter to the CJEU in order to 'defend' itself and explain the Dutch legal system more elaborately than the district court did.<sup>83</sup> Note that the Council of State did not react to the four more recent leapfrog cases by referring to the CJEU as it previously

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<sup>79</sup> ABRvS 1 August 2012 NL:RVS:2012:BX3309, para. 2.23.

<sup>80</sup> The CJEU eventually sided with the Council of State. E.g. the first question: 'Should the second indent of Article 12(a) of [Directive 95/46] be interpreted to mean that there is a right to a copy of documents in which personal data have been processed, or is it sufficient if a full summary, in an intelligible form, of the personal data that have undergone processing in the documents concerned is provided?' With this question the Council of State seems to sketch some sort of middle way. In addition, the Council also sketches that a broad right of access would imply that reasons will no longer be included in the minute which would also disrupt the free and orderly decision making process. ABRvS 1 August 2012 NL:RVS:2012:BX3309, para. 2.27.

<sup>81</sup> Rb. Roermond 16 February 2012 NL:RBROE:2012:BV6172, para. 11. Case C-88/12 *Jaoo* EU:C:2012:573.

<sup>82</sup> Such safeguards related to the intensity and frequency of the checks. The CJEU concluded that EU law did not prevent such checks. Case C-278/12 *PPU Adil* EU:C:2012:508.

<sup>83</sup> ABRvS 4 June 2012, NL:RVS:2012:BW7489.

did in *Y.S.* and *Jaoo/ Adil*. A possible legal reason or justification for this silence could be that the CJEU has made it easier for higher courts to stick to their earlier finding of an *acte clair* in the case of *Van Dijk*. In this judgment, the CJEU held that the fact that other (national) courts ruled differently or did refer a question does not preclude the higher court from determining that the matter is *clair*.<sup>84</sup>

The Council of State has not only been challenged by lower courts, but also by its administrative counterpart, the Tribunal, albeit in a more indirect way. In *Chavez Vilchez*, the Tribunal questioned the restrictive reading of *Zambrano* as laid down in the Aliens Circular, which contains the policy rules as applied by the Immigration and Naturalisation Service.<sup>85</sup> The Circular only applied *Zambrano*, giving mothers a right of residence derived from the right of residence of their children, to situations where the father is not in a position to care for the child.<sup>86</sup>

These cases suggest that the leapfrog thesis could explain a high number of references. The previous overview, however, neglects that many lower court judges are actually reluctant to refer.<sup>87</sup> Three out of the five interviewed lower court judges clearly rejected the idea of 'leapfrogging'. The majority of lower court judges think that it is primarily up to the highest courts to refer, given their more limited law making function as first instance courts or because they are simply more loyal to the highest courts.<sup>88</sup> This preference for the highest courts to refer was not only mentioned during interviews, but is also laid down in a memo issued by the Committee of the Presidents of the

<sup>84</sup> Joined cases C-72/14, C-197/14 *X. & Van Dijk* EU:C:2015:564, paras. 56-63.

<sup>85</sup> CRvB 16 March 2015 NL:CRVB:2015:665, para. 4.2; C-133/15 *Chavez-Vilchez* EU:C:2017:354; Case C-34/09 *Zambrano* EU:C:2011:124.

<sup>86</sup> The Tribunal did, however, not mention the case law of the Council of State upon which this restrictive reading was based. ABRvS 9 August 2013 NL:RVS:2013:2837.

<sup>87</sup> Table 3 shows that lower court judges referred five cases to the CJEU in four years. It could be argued that this is not a lot in the light of the fact that Dutch lower courts handle hundreds of migration cases every year. EU law plays an important role in these cases, because migration is almost completely Europeanised. See *supra* n 50. Kees Groenendijk & Mirjam van Riel, 'Migratierecht is bijna helemaal Unierecht' [Migration law is almost completely EU law] *Asiel & Migratierecht* 9 (2017) 405.

<sup>88</sup> Interview 14, 22, 51.

Administrative Law Departments of District Courts.<sup>89</sup> Likewise, Groenendijk referred to a 'gentlemen's agreement' between the Council of State and lower asylum courts that is the Council of State who should in principle refer.<sup>90</sup> Only one interviewed judge seemed to endorse the 'leapfrog' argument, since he/she referred to 'a bad taste in his/her mouth' as a result of the restrictive case law of the Council of State and mentioned the option of referring as an important mechanism to challenge this case law.<sup>91</sup> Another judge took a more middle-ground position to give the highest courts the chance to rule on an issue first. He/she would only refer when the highest courts are not taking up their responsibility and do something 'strange'.<sup>92</sup>

Summing up, there have been several references in which politico-strategic reasons played a role, especially leapfrog-references of lower migration courts in which they challenged the restrictive approach of the Council of State. However, politico-strategic reasons can only explain a limited number of references and certainly not explain the cases that have not been referred. These strategic reasons also fail to explain the reluctance of many lower court judges to refer given their respect for the judicial hierarchy. As the interviews show, the idea of leapfrogging is not widely shared among lower court judges. This is further illustrated by the fact that the great majority of Dutch references come from the highest courts.<sup>93</sup> The composition of the interview sample – 11 higher court versus 5 lower court judges – can also explain the seeming difference between the outcomes on the basis of the legal analysis – finding some leapfrog cases – and the denial of strategic reasons by judges. In addition, the differences could also stem from the earlier mentioned fact that

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<sup>89</sup> One advantage for the highest courts is that they could more easily bundle similar cases. In addition, the highest courts have more experience, time and staff to prepare references. Interview 83. Memo van het Landelijke Overleg Voorzitters sectoren Bestuursrecht van de rechtbanken (LOVB), Sandra van 't Hof, 'Werkwijze stellen van prejudiciële vragen', 12 June 2013. For further discussion and analysis, see Jasper Krommendijk, 'De lagere rechter aan banden. Is er nog ruimte voor de lagere rechter om te verwijzen naar het HvJ?' [The lower court judge restricted. Is there still room for the lower court judge to refer to the CJEU?] (2018) SEW 183.

<sup>90</sup> Groenendijk (n 32).

<sup>91</sup> Interview 39.

<sup>92</sup> Interview 83.

<sup>93</sup> Ibid (n 22).

judges (un)consciously hide strategic reasons, because acknowledging such considerations would conflict with their self-image and professional ethos of being a judge.<sup>94</sup> More research is thus necessary to further substantiate the claim that non-strategic reasons matter most.

The research conducted so far on Dutch references suggests that politico-strategic reasons play an even more limited role in fields other than migration.<sup>95</sup> One former asylum judge who now practices in tax law observed that the confrontational relationship between different levels in the judicial hierarchy is typical for asylum law, where emotions and moral or ethical considerations play a bigger role than in an area such as tax law.<sup>96</sup>

## *2. Non-strategic Reasons*

This section examines non-strategic reasons for (not) referring which have been described in section II.1.B. It shows that judges primarily decide (not) to refer for pragmatic reasons (section III.2.B), whereby personal – and to a lesser extent institutional – factors also play an important role (section III.2.C-D). The parties have only a limited influence on this referral decision (section III.2.E). The interviews and legal analysis found hardly any support for the legal formalist idea attributing references to the judges' eagerness to comply with their obligation to refer, or more broadly, to apply EU law (section III.2.A).

Table 5: overview of the interview replies in relation to the non-strategic reasons

<b>Theory</b>	<b>Proxy</b>	<b>Mentioned by judges out of their own motion as relevant</b>	<b>Judges considered factor relevant when asked</b>	<b>Judges considered factor irrelevant when asked</b>
Compliance pull/ legal	The need to comply with the obligation	66; 24; 91; 72		

<sup>94</sup> Ibid (n 58-60).

<sup>95</sup> Krommendijk (n 89).

<sup>96</sup> Interview 51.

formalism (2.2.1)	to refer/ correct application of the <i>Cilfit</i> doctrine			
Pragmatism (2.2.2)	Need of legal clarity; answer perceived necessary to resolve the case	83; 66; 43; 91; 89; 10, 72		
	Reasonable reading of <i>Cilfit</i>	44; 66; 89; 10; 18; 72		
	Natural reluctance (e.g. decide themselves)	22, 14;25; 66; 81; 44; 72; 89		
	Importance of the question	12; 24; 66; 44; 12; 72; 18		
	Consequences of referring for the parties	22; 66; 24; 91		
	Efficiency/ delay in the case (and other cases)	22; 83; 14; 91; 72; 10; 18		39
	Resources necessary to write question, time		24; 66	39
Personal/ Psychological (2.2.3)	Position in the career	10, 44		
	Background/ expertise	10, 44		
	Knowledge of EU law/ procedure	14		
	Self- perception: e.g. lower	22; 83; 14; 51		

	courts as fact finders			
	Fear to ask (wrong) question	14		
	Satisfaction of writing a reference/ contributing to EU law	12; 10; 39		44
Institutional (2.2.4)	Awareness (e.g. specialised EU law committees in courts)	66; 24; 18, 44, 81, 89.		
	Case management (backlog of cases)	44; 18; 89		
Request of the Parties (2.2.5)	Parties requested referral	22; 91; 44		83; 66; 24; 43; 10, 12, 91; 72

#### A. Compliance Pull/ Legal Formalism

During the interviews, only some judges mentioned the formalist reason that a case is referred with the idea of complying with the obligation to refer under Article 267 TFEU. Most judges emphasised that a referral is made because there is uncertainty regarding the meaning of a particular provision, for example, because it is used in contradictory ways in EU rules or has not been interpreted by the CJEU before.<sup>97</sup>

Further support for the idea that legal formalist considerations do not figure prominently in judges' mind is that almost all judges of the highest courts

<sup>97</sup> Interviews 10, 43, 66, 72, 83, 89, 91. One example is the case of *Zb. and O.* in which it was unclear whether there are differences in the interpretation of 'public order' for EU citizens or third country nationals. Case C-554/13, *Zb. and O.* EU:C:2015:377.

generally employ a 'reasonable reading' of the *Cilfit*-exceptions.<sup>98</sup> Several judges held that when the question is 75-80% *clair*, there is no need to refer, especially in the field of migration where it would be possible to send a handful of cases to Luxemburg every week.<sup>99</sup> The question is not only whether there is doubt, but also whether the reference is 'worth the effort'. These views thus suggest that *Cilfit* is in practice not applied word-for-word, but rather with 'common sense' where other considerations play a role.<sup>100</sup> Some judges acknowledged that they (implicitly) apply the less strict *Köbler* 'test'. On the basis of this test, there is only a problem, namely state liability, 'in the exceptional case where the court has manifestly infringed the applicable law' which does not include the incorrect reading of CJEU judgments.<sup>101</sup> Given the reasonable reading of *Cilfit*, it is not surprising that judges of the Council of State interpreted the CJEU judgments in *Ferreira* and *Van Dijk* as giving more leeway to national courts.<sup>102</sup> Especially in *Van Dijk*, the CJEU confirmed that the fact that other (national) courts ruled differently or did refer a question does not detract from the highest court's conclusion that the matter is *clair*. The Council used these judgments as an additional justification for non-referral in several migration cases.<sup>103</sup> One lower court judge held that this reasonable *Cilfit*-reading by the Council of State is done selectively whereby *van Dijk* is merely used as a fig leaf, while

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<sup>98</sup> 'A reasonable reading of *Cilfit*' is also mentioned in Association of the Councils of State and Supreme Administrative Jurisdictions of the EU and Network of the Presidents of the Supreme Judicial Courts of the EU (ACA), 'Report of the working group on the preliminary rulings procedure', [www.aca-europe.eu/seminars/2007\\_DenHaag/Final\\_report.pdf](http://www.aca-europe.eu/seminars/2007_DenHaag/Final_report.pdf), last accessed 31 July 2018, 10-11.

<sup>99</sup> Interviews 44, 66, 89; Sevenster & Wissels (n 32) 90.

<sup>100</sup> Interviews 18, 44, 72; Hanna Sevenster, 'Good old *Cilfit* – pleidooi voor een 'make-over'' [Good old *Cilfit* – plea for a 'make-over'] in Tristan Baumé et al (eds), *Today's Multi-layered Legal Order: Current Issues and Perspectives: Liber Amicorum in Honour of Arjen W.H. Meij* (Paris 2011) 297; Sevenster & Wissels (n 32) 91.

<sup>101</sup> Interviews 10, 18; Case C-224/01 *Köbler* EU:C:2003:513, paras. 53.

<sup>102</sup> Joined cases C-72/14 & C-197/14 X. & *Van Dijk* EU:C:2015:564, paras. 56-63; Case C-160/14 *Ferreira da Silva* EU:C:2015:565, paras. 40-42; Sevenster & Wissels (n 32) 87-89.

<sup>103</sup> See several post-*J.N.* cases; ABRvS 13 May 2016 NL:RVS:2016:1624, 1383 and 1384. See also the credibility assessment cases. ABRvS 13 April 2016 NL:RVS:2016:890, 891; ABRvS 5 December 2016 NL:RVS:2016:3231.



another judge noted that the Council of State should have referred more (or other) questions.<sup>104</sup>

## B. Pragmatism

The interviews and legal analysis clearly show that judges primarily operate in a pragmatic way and include various considerations in their decision (not) to refer. There is a natural tendency among judges to avoid referring a case to the CJEU all too easily, especially among judges from the highest courts. It is further illustrated by the reasonable reading of *Cilfit*.<sup>105</sup> This 'natural reluctance' means that disputes are primarily solved on other grounds, preferably national grounds. Both existing literature and interviews show that national court judges' first instinct is to decide themselves even though they do not resist CJEU intervention as such, as will be later argued (section IV.2).<sup>106</sup> This also means that a case is not immediately referred when there is only the slightest doubt.<sup>107</sup> The reluctance to refer among lower court judges primarily stems from the way in which they perceive their judicial function as 'primary' courts of fact finding (see section III.1.B).

The first reason for the general reluctance is that formulating questions, as well as the order of reference, is extremely time consuming and labour intensive.<sup>108</sup> One judge stated that formulating a preliminary reference is as difficult as answering it.<sup>109</sup> A lower court judge also noted that it is easier to decide the case yourself.<sup>110</sup> A second reason for the reluctance is that a referral means that not only the referred case, but also similar cases are put on hold until the CJEU hands down a judgment.<sup>111</sup> Such a delay plays an especially important role in the field of migration where there are often many, possibly

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<sup>104</sup> Interviews 39 and 83.

<sup>105</sup> Interviews 10, 44, 89; Sevenster (94) 305.

<sup>106</sup> Sevenster & Wissels (n 34) 187; Interviews 10, 66, 72, 81, 89.

<sup>107</sup> Interviews 18, 44.

<sup>108</sup> This is also because the highest courts have the practice of involving many judges and référendaires. Interviews 24, 66, 81.

<sup>109</sup> Sevenster (94) 301.

<sup>110</sup> This judge also stated that it costed two months of extra work in addition to normal work flow. Interview 39.

<sup>111</sup> Interviews 14, 39, 83. Sevenster & Wissels (n 32) 90.

hundreds of cases, in which the same question is discussed.<sup>112</sup> The interviewed judges acknowledged that justice would come to a standstill if every question of EU law about which there is doubt was immediately referred to the CJEU.<sup>113</sup> In the same vein, the current President of the Aliens Chamber of the Council of State, Nico Verheij, stated that a responsible judge takes into consideration the consequences of such a delay.<sup>114</sup> The consequences of a referral on other cases seems to be less of a relevant consideration for lower court judges.<sup>115</sup> These two reasons for the general reluctance also have an institutional dimension which relate to the capacity and case management system within courts (see section III.2.D).

Having described the general reluctance and the pragmatic mindset of judges, the following questions remain: how do judges make the decision (not) to refer in concrete cases and what considerations play a role? The decision (not) to refer primarily boils down to a balancing exercise between conflicting interests: the importance of the question versus the costs of the delay in terms of cases that need to be put on hold and the impact on society.<sup>116</sup> Judges held that referral is less likely when an issue is only incidental or relates to legislation which has been changed already or will be changed in the near future. An exception to this is when it relates to an important matter of principle.<sup>117</sup> Nonetheless, when the question is too important in terms of the number of people and cases affected, it could be more logical not to refer, because it is not considered desirable to put all too many cases on hold for an uncertain period of time.<sup>118</sup> A recent example in which this dilemma played a role are the cases on the intensity of review of the credibility assessment of the asylum claim in relation to Article 46(3) of

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<sup>112</sup> Interview 14. See also ABRvS 14 July 2011 NL:RVS:2011:BR3771, para. 2.8.4. Sevenster & Wissels (n 31) 92; Groenendijk (n 32).

<sup>113</sup> Interviews 10, 18.

<sup>114</sup> Nico Verheij, 'Voorwoord' [Foreword], in Bosma et al (n 32) 83.

<sup>115</sup> Interview 39. One judge was silent on this, while another also brought up these consequences. Interviews 22, 83.

<sup>116</sup> Interviews 44, 72, 89; De la Mare and Donnelly (n 6) 372

<sup>117</sup> Interviews 12, 18, 24, 32, 44, 66; Sevenster (94) 301.

<sup>118</sup> Interview 18.

the Asylum Procedures Directive.<sup>119</sup> The Council of State explicitly acknowledged that the text of Article 46(3) of the Procedures Directive does not provide a definite answer and noted that there was no case law of the CJEU (yet) clarifying this provision.<sup>120</sup> Instead of referring those open questions to the CJEU, the Council answered those questions itself and held that the judicial review of the credibility assessment should be more intensive than was common practice to that date. This was also because a referral would mean that the Council 'could almost shut down' as these questions went to the core of its work and would imply that a very large number of cases had to be put on hold. Nonetheless, sometimes judges considered that a referral was unavoidable in order to give judgment, despite the high number of affected cases. This has been seen for instance in the case *A., B., C.* which considered the intensity of review of the credibility of a declared sexual orientation of an asylum seeker.<sup>121</sup> Some judges, also from lower courts, stated that they also consider the position of the affected person(s) and examine whether a reference has negative consequences for the parties.<sup>122</sup> One lower court judge, for example, noted that judges should be careful in referring a legal question when this is not 'helping' the asylum seeker. This judge argued that he/she would have never referred *Ghezelbash*, which concerned the right to an effective legal remedy under the Dublin III Regulation for this reason.<sup>123</sup> This is because a reference would lead to considerable delay with an uncertain outcome that could also be against the interests of the asylum seeker. Another court decided to refer the case, but the Council of State annulled the judgment of the referring lower court leaving *Ghezelbash* empty handed.<sup>124</sup>

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<sup>119</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.

<sup>120</sup> ABRvS 13 April 2016 NL:RVS:2016:890-891, para. 5.2.

<sup>121</sup> Joined cases C-148/13 until C-150/13 *A., B., C.* EU:C:2014:2406.

<sup>122</sup> Interviews 22, 32, 91.

<sup>123</sup> Regulation (EU) No.604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31; Case C-63/15 *Ghezelbash* EU:C:2016:409.

<sup>124</sup> ABRvS 18 May 2017, NL:RVS:2017:1326; Interview 22.

Judges from the highest courts mentioned other pragmatic and practical considerations. Sometimes judges decide not to refer and to wait until a case that lends itself better for referral comes before the court. That way, the latter case allows the court to show the full picture of the issue to the CJEU.<sup>125</sup> At the same time, judges occasionally considered it necessary to refer even though similar questions were already referred to the CJEU by other courts. The reason was to 'feed' the CJEU with the view of the court and to make clear that certain issues also play a role in other Member States. One example is the case of *G. and R.* on the right to be heard in relation to the extension of detention of illegally staying third-country nationals.<sup>126</sup> The Dutch Supreme Court had already asked similar questions about the right to be heard and the consequences of breaches of those rights from the perspective of the rights of defence.<sup>127</sup> The Council of State considered it necessary to refer this case to underline the differences between the context of the two different fields of law, namely customs and asylum. Moreover, the Council wanted a quick answer in *G. and R.* because the claimant was in detention. It therefore successfully submitted a question via the urgent preliminary ruling (PPU) procedure. The Council also decided to refer in *K. and A.* about civic integration requirements despite there being partly similar question raised by a German court in *Dogan*.<sup>128</sup> However, the German court's question had a subsidiary character which entailed the risk of the CJEU not answering it.<sup>129</sup>

### C. Personal/ Psychological Factors

This study also found that personal factors and personal differences among judges influence to what extent the judges are willing and able to refer. This research did not find much support for the thesis that the limited knowledge of EU law and the preliminary ruling procedure is an obstacle for referring.<sup>130</sup> This is illustrated by the relatively high number of references in the field of

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<sup>125</sup> Interview 10; Sevenster & Wissels (n 33) 91.

<sup>126</sup> Case C-383/13 PPU *G. and R.* EU:C:2013:533.

<sup>127</sup> Case C-437/13 *Unitrading* EU:C:2014:2318.

<sup>128</sup> Case C-138/13 *Dogan* EU:C:2014:2066.

<sup>129</sup> ABRvS I April 2014 NL:RVS:2014:1196, para. 27.

<sup>130</sup> Only one lower court judge mentioned this as an obstacle. Interview 14. Another lower court judge also acknowledged that there is too limited expertise to refer in *Zambrano* cases. Interview 22.

migration and the eagerness of judges to engage with EU law.<sup>131</sup> In addition, migration law is highly Europeanised which means that judges are simply forced to be experts in EU law.<sup>132</sup> Having said that, the (EU law) background of judges matters. Judges, who have an academic or governmental background and/or have more EU law expertise, have a more positive attitude towards the CJEU and are more accustomed with working with a supranational court as the highest authority. By contrast, career judges find it more annoying to refer since it disturbs their autonomy as a judge deciding on disputes, as well as the national judicial process.<sup>133</sup> One judge with a background in EU law held that it is not surprising that career judges who have had a lifelong career in the judiciary and have made it to the top court are not all of a sudden completely devoted to the CJEU, but instead have a more sceptic attitude in the sense of 'Is it up to the CJEU to determine this?'<sup>134</sup> As mentioned before, there are also clear differences between lower court judges in terms of their perception of their judicial function as 'primary' courts of fact (see section III.1.B).

The literature has also identified psychological considerations. During interviews, very few judges actually mentioned those. Only some lower court judges expressed a fear that they might miss essential points in their reference and, hence, prefer not to refer at all.<sup>135</sup> There were, however, a couple of judges who argued in the opposite way by stating that they enjoy writing a good reference.<sup>136</sup> Some judges even mentioned that they derive satisfaction from referring to the CJEU, also because they could contribute to the development of EU law.<sup>137</sup>

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<sup>131</sup> Ibid (n 44-45).

<sup>132</sup> Groenendijk & van Riel (n 87).

<sup>133</sup> Interviews 10, 44.

<sup>134</sup> Interview 10.

<sup>135</sup> Interview 14. Another judge gave this as an explanation as to why a reference costs so much time. Interview 39.

<sup>136</sup> Interviews 10, 44.

<sup>137</sup> At the same time, they noted that the primary purpose of the procedure is to solve a dispute. Interviews 10, 12, 39.

#### D. Institutional

Institutional factors matter as well and can explain why the two highest courts have become less reluctant to refer over time, also in the field of migration. While the Council of State was criticised years ago for not paying sufficient attention to EU law and withholding references from the CJEU, experts acknowledge that this has improved in recent years.<sup>138</sup> Several institutional reasons account for this, including better coordination of EU law questions, the creation of a committee on EU law and a documentation service that keeps close track of EU law developments.<sup>139</sup> Both the Council of State and Tribunal have regular meetings where EU law developments are discussed.<sup>140</sup> In addition, more judges with a prominent EU law background have been appointed to the Council since 2005.<sup>141</sup>

There are some institutional factors that discourage references. Some judges acknowledged that the case management system within courts affects the general (reluctant) attitude towards referring. Both the financial system rewarding judges based on the number of cases they decide and the increasing pressure on the capacity of courts favour a tendency to solve disputes without referring.<sup>142</sup>

#### E. The Role of the Parties

Another factor influencing the courts willingness to refer is the role of the parties and their requests to refer. The legal analysis and the interviews show that such requests have only had a minimal impact to the highest courts and most decisions to refer were made by courts from their own motion.<sup>143</sup>

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<sup>138</sup> Groenendijk held that the Council of State did not take its task as highest court in relation to EU migration and asylum law seriously before 2008. Kees Groenendijk in *JV* 2011/4, par. 1.

<sup>139</sup> Interviews 18, 44, 81, 89.

<sup>140</sup> Interviews 24, 66, 89.

<sup>141</sup> This could also be partly attributed to Mortelmans (2005-2016), who also championed the use of the preliminary ruling procedure. Interview 44.

<sup>142</sup> Interviews 14, 20.

<sup>143</sup> Interview 10, 12, 43, 91. It could also be that the parties themselves are not in favour of referring because of the delay, which is, however, also not considered to be decisive for a court. E.g. NL:RVS:2014:27; Interview 10, 72.

National courts are not obliged to act on – or even take into account – such requests.<sup>144</sup> It seems, however, that lower court judges attach more importance to parties' requests.<sup>145</sup> The limited impact of requests is illustrated by Table 6 which indicates that in the majority of decisions of the lowest and highest courts not to refer there was an explicit reference to a request by (one of) the parties. This number is possibly even higher, because it could well be that courts do not explicitly mention that there was a request. Judges of both the Council of State and Tribunal noted that they have started to refer to the parties' requests consistently as a result of the case law of the ECtHR which requires courts to do so on the basis of Article 6 ECHR.<sup>146</sup> Several lower court judges were not aware of this case law, but nonetheless emphasised the importance of providing reasons when a well-founded request was made.<sup>147</sup> Table 7 shows that in only two of the thirteen referred cases there was a request of the parties to refer. Nonetheless, it could be that courts sometimes omit a reference to a request because they do not consider such reasoning necessary.<sup>148</sup> Even though one should be careful in interpreting the quantitative data on their own, those data were confirmed during the interviews. An explanation for the limited impact of requests of the parties is that, as several interviewees noted, the quality of the requests differs and only few of them are serious and well-founded.<sup>149</sup>

Table 6: The decisions not to refer that mention a request of (one of) the parties

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<sup>144</sup> Case 283/81 *Cilfit* EU:C:1982:335, para. 9.

<sup>145</sup> One judge even held that he would almost never refer without one of the parties making such a request. Interview 22.

<sup>146</sup> Interviews 5, 10, 12, 31, 69, 77; *Sevenster & Wissels* (n 32) 89; *Dhabbi v Italy* ECHR nr. 17120/09 CE:ECHR:2014:0408JUD001712009; *Schipani v Italy* ECHR nr. 38369/09; CE:ECHR:2015:0721JUD003836909.

<sup>147</sup> Interviews 22, 83. One judge was aware of this case law and also held that this case law is applicable to lower courts, despite this being far from clear. Interview 39. For a discussion, see Jasper Krommendijk, 'Open Sesame!' Improving access to the CJEU by obliging national courts to reason their refusals to refer' (2017) 1 *European Law Review* 46.

<sup>148</sup> Interview 89.

<sup>149</sup> Interviews 10, 12, 24, 72.

	Council of State		Tribunal		Lower asylum courts		Total	
	N	%	N	%	N	%	N	%
Request is explicitly mentioned	18	69%	0	0%	35	73%	53	71%
Request is not mentioned	8	31%	1	100%	13	27%	22	29%
Total	26	100%	1	100%	48	100%	75	100%

Table 7: The referred cases that mention a request of (one of) the parties

	Council of State		Tribunal		Lower asylum courts		Total	
	N	%	N	%	N	%	N	%
Request is explicitly mentioned	1150	20%	0	0%	1151	20%	2	15%
Request is not mentioned	4	80%	3	100%	4	80%	11	85%
Total	5	100%	3	100%	5	100%	13	100%

Despite the limited impact of parties' requests to refer in the investigated period, there have been a couple of successful instances whereby a joint and organised endeavour of asylum lawyers, academic EU law experts and NGOs managed to obtain a referral.<sup>152</sup> This includes *Imran*, referred to the CJEU in 2011 by the district court of Zwolle, which concerns the compatibility of the civic integration exam with the Family Reunification Directive.<sup>153</sup> Also *Sabin*,

<sup>150</sup> NL:RVS:2014:1196 (*K. and A.*).

<sup>151</sup> NL:RBDHA:2016:12824 (*A. and S.*), para. 3. Interviews confirmed that there was no request in *Rajaby* and *Gbezelbash*. For the other two referral it is (yet) unknown.

<sup>152</sup> For an account of a successful case of bottom-up legal mobilisation in relation to the Return Directive in Italy, see Virginia Passalacqua, 'El Dridi upside down: a case of legal mobilization for undocumented migrants' rights in Italy', *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2016) 215.

<sup>153</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12. Jos Hoevenaars, *A people's court? A bottom-up approach to litigation before the Court of Justice of the European Union* (Eleven International Publishing 2018) 209.



referred to the CJEU by the Council of State in 2006, was instigated by a Working Group set up in 2003 with a view to obtain a reference to the CJEU in order to challenge the increased administrative fees for residence permits.<sup>154</sup> In several other cases, such (academic) experts have only got involved after references were made.<sup>155</sup> A Strategic Litigation Committee, consisting of academics and asylum lawyers, has been active since 2014 and is actively looking for cases which can be brought before the CJEU or the ECtHR. This Committee has so far had little impact.<sup>156</sup> Of the thirteen referred cases included in this article, the Committee was only involved after the reference was made in *J.N.* and *Gbezelbash*.

When discussing the role of the parties in relation to the instigation of a reference it is also important to discuss the position of the State Secretary for Justice and Security which is responsible for asylum and migration. It could be argued that this 'party' has had a greater effect on the willingness or ability of courts to refer. This is because the State Secretary has used its power in, for example, *Imran* and *Rajaby* to issue a residence permit strategically in order to avoid a referral or prevent a reference from being answered by the CJEU.<sup>157</sup> When the State Secretary does so, a ruling from the CJEU is no longer necessary because it can obviously not affect the outcome of the case. As a result, the case is withdrawn from the docket of the CJEU. There are also cases where the court expressed an intention to refer, and draft questions were already prepared, but the case was settled (shortly) before being lodged with the CJEU.<sup>158</sup> The risk or threat of a reference can thus change the behaviour of the State Secretary.

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<sup>154</sup> Hoevenaars (n 152) 215.

<sup>155</sup> Examples include the case of *Elgafaji* (n 46) and *Zambrano* (n 49). Hoevenaars (n 152) 212-213.

<sup>156</sup> The project leader, Sadhia Rafi, confirmed that until March 2017 the work of the committee has not caused a court to refer. The request of the parties as well as a note of the committee were, however, referred to in NL:RVS:2016:890-891. See also the, so far unsuccessful, strategic litigation case of the Dutch Public Interest Litigation Project with respect to Afghan iF'ers. NL:RBDHA:2017:11809.

<sup>157</sup> C-155/11 *Imran* EU:C:2011:387; C-158/13 *Rajaby*. See also Baumgärtel (n 45) 11-13.

<sup>158</sup> Groenendijk (n 32) 17-18.

In sum, this section provided an overview of a myriad of reasons and factors affecting the willingness of judges to refer, even though some have a more limited explanatory value (see table 9 for an overview). The preceding analysis shows that several non-political reasons or factors play a more important role than political reasons for the decision (not) to refer. There is often more than one reason that could explain a decision (not) to refer, sometimes even conflicting reasons for and against. Hence, it is very difficult to explain the judicial decision-making in relation to referring to the CJEU by a single factor.

#### IV. THE NATIONAL COURT'S FOLLOW-UP

The second question of this article deals with the follow-up to the preliminary rulings by the national court. Dutch judges have generally been content with their interaction with the CJEU and its judgments (section IV.1). At the same time, the judges discussed several unclear and problematic judgments during the interviews (section IV.2). They also expressed concerns about the functioning of the preliminary ruling procedure and the limited 'dialogue' with the CJEU (section IV.3). However, these factors did not affect their willingness to apply the CJEU judgment to the national dispute. On the contrary, they applied almost all judgments fully and automatically (section IV.4). This once again bears witness to the pragmatism on the part of national judges.

##### *1. Judges' Satisfaction with the Usefulness of CJEU Judgments*

What is interesting about the perception of CJEU rulings by national judges is that they assess them not so much from an analytical perspective. They are not interested in whether the CJEU answered all questions satisfactorily and in line with its earlier jurisprudence. Rather, what matters most for national judges is whether the CJEU judgment helps them to solve the case at hand.<sup>159</sup> This means that judges primarily look at what the CJEU has said and whether that is easily applicable, instead of focusing on what the CJEU failed to say.<sup>160</sup> This is not to say that judges disagreed with the shortcomings identified in

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<sup>159</sup> See also Micklitz (n 30) 433.

<sup>160</sup> Interviews 10, 18, 91.

the academic literature, such as the insufficient judicial reasoning, incorrect rephrasing of the question, or a neglect of some questions or the reasoning of the referring court. Almost all judges acknowledged these deficiencies. But it did not prevent them from concluding that a ruling by the CJEU was useful. During the interviews, most judges named several judgments – elsewhere criticised as deficient – that they considered adequate, as illustrated in Table 8. One example that shows the difference of perspective is *J.N.*, which concerned the detention of third country nationals with a view to their removal. While the CJEU only paid relatively limited attention to the relationship between Article 8(3) of the Reception Conditions Directive and the case law of the ECtHR, which was explicitly included in the questions of the Council of State, the judgment was considered useful.<sup>161</sup>

Table 8: Overview of cases that were explicitly discussed during interviews<sup>162</sup>

Referring court	Clear and useful judgments	In between	Unclear and problematic judgments
Council of State	C-383/13 PPU, <i>G. and R.</i> C-554/13, <i>Zb. and O.</i> C-153/14, <i>K. and A.</i> C-601/15 PPU, <i>J.N.</i>	C-148/13-150/13, <i>A., B., C.</i> C-187/10, <i>Unal</i>	C-225/12, <i>Demir</i>
Tribunal		C-579/13, <i>P. and S.</i>	C-485/07, <i>Akdas</i>
Lower courts	C-63/15, <i>Ghezalbash</i>		

Almost all interviewed judges held that the judgments of the CJEU are generally useful.<sup>163</sup> Some interviewees were a bit more critical and emphasised that the quality varied.<sup>164</sup> At the same time, they acknowledged that such criticism with respect to certain judgments is normal and is something they

<sup>161</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96; Case C-601/15 PPU *J.N.* EU:C:2016:84.

<sup>162</sup> The following judgments of the Tribunal were not discussed in interviews: C-171/13 *Demirci*; C-133/15 *Chavez-Vilchez*. The same holds true for the district court cases C-550/16 A. and S; C-331/16 K.; C-18/16 K. (no CJEU judgments at the moment of interviewing); C-158/13 *Rajaby* (removed).

<sup>163</sup> Interviews 10, 12, 18, 24, 44, 66, 72, 91.

<sup>164</sup> Interviews 18, 24, 89.

are familiar with themselves.<sup>165</sup> One judge held that approximately 80% of the requested CJEU rulings were answered in a satisfactory way, while another noted that three out of ten cases were less satisfactory.<sup>166</sup>

## 2. *Unclear and Problematic CJEU judgments*

There have hardly been any judgments that judges considered impossible to implement. The exception is the 'extremely difficult' case of *Demir* concerning the meaning of the term 'legally resident' in Article 13 of the Association Council Decision 1/80. This judgment was referred to as a true 'brainteaser' that needed to be studied for days to grasp its meaning.<sup>167</sup>

Despite their general satisfaction, judges discussed several CJEU judgments that they considered problematic. What judges found most troublesome is that CJEU judgments contain an unclear answer or no answer at all. Some judges held that especially in the migration law area, the CJEU renders too many judgments that lack an unambiguous answer, while including several criteria for individual assessments instead of clear-cut and automatic limits.<sup>168</sup> One lower court judge noted that referring courts should be critical towards themselves as well, because an unclear question inevitably leads to an unclear or vague answer from the CJEU.<sup>169</sup> The Tribunal was confronted with a rather ambiguous judgment in *P. and S.* about the obligatory integration exam under pain of a fine. The CJEU gave the Tribunal the difficult task to examine whether the means of implementing that obligation jeopardise the objectives of the Directive on third-country nationals who are long-term residents. The CJEU required the Tribunal to consider the 'specific individual circumstances'.<sup>170</sup> The case *A., B., C.* was also mentioned as an example in this context, because according to some judges, the CJEU only mentioned what courts could *not* do in order to assess the credibility of a

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<sup>165</sup> Interviews 10, 44.

<sup>166</sup> Interviews 91, 10.

<sup>167</sup> Several flow charts were made for this purpose. Case C-225/12 *Demir* EU:C:2013:725.

<sup>168</sup> Interviews 66, 72, 81, 89.

<sup>169</sup> Interview 83.

<sup>170</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44; Case C-579/13 *P. and S.* EU:C:2015:369, para 49.

declared sexual orientation of an asylum seeker.<sup>171</sup> One judge even asked whether it was useful to refer in the end, because of the loss in time and the fact that the CJEU completely left it to the national court to solve the case on the basis of considerations that the Council of State had already identified and discussed before referral.

Instead of these 'deference' judgments with very general answers that completely defer to the national court on the point of law, the interviewed judges preferred so-called 'outcome' judgments, as they give a very specific answer that leaves no margin for manoeuvre for the national court.<sup>172</sup> This goes contrary to the argument in the literature that national courts actually do not like CJEU judgments that are too 'interventionist', because judges perceive such 'excessive intervention' as an usurpation of their own jurisdiction or as infantilisation of their own role.<sup>173</sup> In fact, the interviews provide very little support for the argument that national courts disfavour 'interventionist' judgments. Only one judge was critical about a very detailed CJEU judgment that closely interpreted national law, but this judgment was outside the field of migration.<sup>174</sup> Judges opted for the contrary view and expressed their content with CJEU rulings that almost solved the case at hand. One example is *K. and A.* about the requirement for family members of a third country to pass a civic integration exam. The CJEU went into great detail in interpreting Dutch law and by hinting at a breach of EU law. It left little room for manoeuvre to the Council of State because it held itself that the requirement and the high fees make it impossible or excessively difficult to exercise the right to family reunification.<sup>175</sup> Judges did not consider the approach of the CJEU problematic, but valued the clear directions offered.

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<sup>171</sup> Joined cases C-148/13 until C-150/13 *A., B., C.* EU:C:2014:2406.

<sup>172</sup> *Tridimas* (n 6).

<sup>173</sup> Gareth Davies, 'Abstractness and concreteness in the preliminary reference procedure: implications for the division of powers and effective market regulation', in Niamh N Shuibne (ed), *Regulating the Internal Market* (Edward Elgar 2006) 210, 232; Jan Komárek, 'In the Court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure' (2007) 32 *European Law Review* 467; *Tridimas* (n 6) 754; De la Mare and Donnelly (n 6) 391.

<sup>174</sup> Case C-137/09 *Josemans* EU:C:2010:774.

<sup>175</sup> Case C-153/14 *K. and A.* EU:C:2015:453.

In the exceptional case that the CJEU does not answer the question, courts feel sometimes compelled to send the question back again. The Tribunal considered this option after the CJEU judgment in *Akdas* in 2011 concerning the exportability of social security allowances for migrant workers from Turkey, because the ruling was unclear in several respects.<sup>176</sup> It was eventually decided not to resubmit the same case, but the Tribunal asked new questions about the same issue in *Demirci I*, where the Turkish workers had, unlike in *Akdas*, acquired the Dutch nationality.<sup>177</sup> In addition, judges also considered it bothersome when the CJEU offers the impression that it does not take certain issues that are considered to be important in the Netherlands seriously.<sup>178</sup> The same holds true for the CJEU going into another direction than anticipated by the referring court. This in itself is not a problem but can become one if the CJEU ignores the reasoning or the suggested answer of the referring court and/or does not provide sufficient arguments for this different interpretation. The only case that falls into this category is *Unal* about the withdrawal of the residence permit of a Turkish worker with retroactive effect.<sup>179</sup>

### 3. Judges' (Dis)Satisfaction with their Interaction with the CJEU

In addition to criticising particular CJEU judgments, some judges were also critical about the CJEU more generally and noted the absence of a genuine dialogue with the CJEU.<sup>180</sup> Some judges observed in this context that the CJEU sometimes presents itself as a 'know-it-all' who is only communicating

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<sup>176</sup> Case C-485/07 *Akdas* EU:C:2011:346.

<sup>177</sup> Case C-171/13 *Demirci* EU:C:2015:8.

<sup>178</sup> Interviews 10, 12, 89, 91.

<sup>179</sup> In addition, the Council of State explicitly held that there was no fraud, but that did not prevent the CJEU from dealing with this matter. Case C-187/10 *Unal* EU:C:2011:623, paras. 45-48.

<sup>180</sup> Several judges spoke about a 'black box' and the fact that the referring court does not play a role in the period of 1.5 years during which the case is considered by the CJEU, because it can, for example, not express its opinion on the submissions of the parties and/or interventions of the Commission and Member States. Others who do not necessarily have the required expertise are involved to a greater extent. Interviews 10, 24, 44, 66, 81, 89, 91.

in one direction.<sup>181</sup> One judge, for example, held that he/she got the feeling during a visit in Luxembourg that the attitude of CJEU judges was: 'you come to us, we determine the rules'.<sup>182</sup> Another judge noted the defensive reaction of CJEU judges when he/she raised shortcomings in the CJEU's case law.<sup>183</sup> Other judges mentioned an ivory tower mentality and even wondered whether CJEU judges are sufficiently in touch with the society at large. This was because the CJEU, in the national judges' view, paid insufficient attention to societal concerns and questions related to the feasibility of the implementation of CJEU judgments, especially in the area of migration.<sup>184</sup> Some judges also pointed to the translation of CJEU judgments in Dutch that they considered not always suitable because this is primarily carried out by Flemish professional translators.<sup>185</sup>

The earlier mentioned difference between career judges and judges with an academic, governmental or EU law background also plays a role with respect to the perception of the (interaction with the) CJEU. More EU-oriented judges have a relatively better understanding of the difficult legal and political context that the CJEU is working in and the fact that it has to take into account 28 different legal systems. They are also more aware of the fact that the CJEU has considerably reduced the average time to decide on the preliminary references in the last twenty years.<sup>186</sup> Some noted that colleagues with less direct EU-law experience complain more frequently about the long delay.<sup>187</sup> In addition, those who are less enthusiastic about referring are more critical about the CJEU judgments; either the CJEU limits the room for

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<sup>181</sup> Interviews 18, 44, 89.

<sup>182</sup> Interviews 44.

<sup>183</sup> Interviews 12.

<sup>184</sup> Interviews 72, 89.

<sup>185</sup> Interviews 24, 43, 81, 89. One example outside the field of migration is the social security case *Franzen* where the reference to 'onvermindend' ('leaving aside') should have been 'met uitzondering van' ('with the exception of') in the following statement: 'Consequently, leaving aside the exclusion provided for in Article 6a(b) of the AKW and the AOW, which aims to transpose the single State principle into national legislation, the mere fact of residence in the Netherlands is sufficient for entitlement to child benefits.' Case C-382/13 *Franzen* EU:C:2015:261.

<sup>186</sup> Interviews 18, 39, 43, 44, 91.

<sup>187</sup> Interviews 10, 89.

manoeuvre of the national judge too much, or it gives too limited direction.<sup>188</sup> The interviewed lower court judges seemed on average more positive about the CJEU case law, especially the judge who argued in line with the leapfrog argument and clearly perceived the CJEU as an 'ally'.

#### 4. *The Referring Court's Follow-up*

The dissatisfaction with some CJEU judgments and the interaction with the CJEU has not affected the national judges' willingness to act upon the requested CJEU rulings. Both the legal analysis and the interviews did not find support for the earlier mentioned accounts in the literature that national courts do not always comply with the CJEU. No follow-up judgments were found where the referring court went into a different direction than suggested by the CJEU. During the interviews no such instances were mentioned, even when the CJEU required courts to alter their jurisprudence. In the area of migration and asylum law, courts have generally opted for a minimalist reading of CJEU judgments in order to avoid extend the rights of the asylum seeker too much.<sup>189</sup>

The interviewed judges presented the follow-up to CJEU judgments almost as an automatic mechanism even when this meant that they had to change their own case law. Interviewed judges considered changing their case law to be 'part of the game'. They noted that when the CJEU rules in a certain way, 'that is just the way it is'. The court is simply obliged to comply with the CJEU judgment.<sup>190</sup> Judges even considered it more bothersome when the CJEU does not give an answer than when the CJEU gives a rap over the knuckles of the referring court in a clear and insightful way.<sup>191</sup> Examples that were also mentioned in interviews include *Zh and O*, where the CJEU required an individual assessment of the risk to public security or national security for third country nationals and EU citizens alike, contrary to what the Council

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<sup>188</sup> Interviewees primarily noted this about other judges. Interviews 10, 39, 44.

<sup>189</sup> One example is the broadly formulated (or vague) judgment of *Elgafaji* on subsidiary asylum protection which was interpreted in a restrictive way by the Council of State so that it only applied to a very limited number of situations. Hoevenaars (n 153) 213.

<sup>190</sup> Interviews 18, 72, 89, 91; Sevenster & Wissels (n 33) 93.

<sup>191</sup> Interviews 12, 18, 72, 91.



of State initially thought.<sup>192</sup> The Council did not show any difficulty in implementing this assessment in its follow-up judgment.<sup>193</sup> The Council also rather easily changed its practice after it was warned by the CJEU in *Ĵ.N.* that the Council's more fundamental-rights-friendly approach was not in line with the principle of the Reception Conditions Directive that requires a removal to be carried out as soon as possible.<sup>194</sup>

## V. FEEDBACK LOOPS?

The third question of this article is whether there is a relationship between the national judges' perception of their interaction with the CJEU and its answers (question 2) and their willingness to refer cases in the future (question 1). Even though judges were critical about the CJEU or some CJEU judgments, this has not affected them to such an extent that they became less inclined about referring future cases. This once again shows the pragmatism on the part of judges.

Judges hardly take their previous experiences into account when making the calculation of referral, besides for two exceptions showing that they take into consideration the expected answer of the CJEU. Firstly, it is not always considered useful and time efficient to refer when there is the perception that the CJEU merely gives very general, already-known criteria (so-called 'deference cases'), and/or leaves the assessment entirely to the referring court (see section IV.2).<sup>197</sup> Secondly, when making a decision (not) to refer, judges also consider whether it is possible to clearly explain the legal problem within the maximum of 20 pages for the order of reference to judges who are not familiar with the legal system.<sup>195</sup> It could also happen that the details of the

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<sup>192</sup> Case C-554/13 *Zh. and O.* EU:C:2015:377.

<sup>193</sup> Interviews 10, 89. ABRvS 20 November 2015 NL:RVS:2015:3579, para. 7.

<sup>194</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96. The Council of State held that the introduction of an asylum application by a person who is subject to a return decision automatically causes all return decisions that may previously have been adopted in the context of that procedure to lapse. Case C-601/15 PPU *Ĵ.N.* EU:C:2016:84, paras. 75-76; ABRvS 8 April 2016 NL:RVS:2016:959, para. 3.2.

<sup>195</sup> Interviews 10, 18.

Dutch legal system are lost in translation to French, the working language of the CJEU.<sup>196</sup> These considerations played a role in the earlier discussed cases about the intensity of judicial review of the administration's assessment of the credibility of the asylum claim.<sup>197</sup> The idea was that it would be difficult to have the CJEU rule on this issue related to a matter of principle, namely the relationship between the judiciary and the administration. Additionally, interviewees considered that there are notable differences in opinions as to the intensity of review within the Netherlands, let alone in the EU with 28 different legal systems. Likewise, a lower court judge argued that a reference to the CJEU was in principle possible in a case in which an asylum seeker from Afghanistan sought subsidiary protection on the basis of art. 15, sub c, of the Qualification Directive because of a serious and individual threat in Afghanistan 'by reason of indiscriminate violence in situations of international or internal armed conflict'.<sup>198</sup> The judge had to grapple with the question about the required level of violence necessary to establish such protection. He/she considered, however, that this question does not lend itself to be referred to the CJEU because it would be nearly impossible for the CJEU to come up with concrete and helpful guidelines.<sup>199</sup> The expectation was that a referral would only lead to a deference case not worth the burden of the delay in this case.

This relatively short explorative analysis of the third question on feedback loops raises several questions that would be worth exploring in further research. One pertinent question is, for example, to what extent one can speak of feedback loops with respect to the great majority of judges that have never referred or referred only once or twice? One might also wonder, do feedback loops play a more important role in EU Member States in which courts, and especially constitutional courts, tend to be more critical of the

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<sup>196</sup> Interview 10.

<sup>197</sup> Interviews 10, 18.

<sup>198</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9.

<sup>199</sup> Rb. 3 March 2017 NL:RBDHA:2017:3443, para. 5; Rb. 16 May 2017 NL:RBDHA:2017:5164.

CJEU and CJEU judgments? In addition, which factors affect feedback loops more: primarily CJEU related factors (question 2) or the motives and attitude of judges towards referral (question 1)? It could be that judges and courts that have been more critical towards the CJEU and EU law *from the outset* also perceive the CJEU in a more critical way than Dutch courts and judges do. The implication of this is while looking at roughly the same glass, more critical courts will describe the glass as half empty, while more positive courts will perceive the glass as half full.

Answering these questions requires a broader comparative research project on a considerable number of EU Member States, possibly also examining the interaction between CJEU and national courts over a longer period of time. If a great variance in the prevalence of feedback loops across EU Member States is found this could perhaps mean that the (prefixed) attitudes of judges are more important than CJEU related factors. It might even be so that those attitudes are hardly affected by the way in which the CJEU operates and handles requests for preliminary rulings. This also implies that the CJEU has limited control over and possibilities to change the way in which national courts engage with it. In contrast, if CJEU related factors matter more, this could mean that the CJEU can better control and change its perception by national courts. This also suggests that it is worthwhile exploring whether and how the preliminary ruling procedure needs to be reformed to ensure continuing engagement of national courts.

## VI. CONCLUSION

This article examined two aspects of the referral procedure: the motives to refer and the national judges' perception of the CJEU judgments, and their ability to solve the national dispute on the basis of the CJEU judgments. With respect to the motives to refer, this article examined several theoretical assumptions and empirical claims put forward in the existing literature (see Table 9 for an overview). This article showed that judges mainly operate in a pragmatic way and predominantly include pragmatic and practical considerations in their decision (not) to refer, such as the consequences of referring in terms of delays or the importance of the issue at stake. Only a limited number of references were made by lower asylum courts, to 'leapfrog' the national judicial hierarchy and challenge the more restrictive approach of

the supreme administrative courts. Most lower court judges do not support the leapfrog argument. Even less cases were referred to get an authoritative pronouncement ('sword') on the existence of a breach of EU law by a national measure that would subsequently compel the government to change legislation.

Table 9: Overview of findings with respect to motives (not) to refer

<b>Motives (not) to refer</b>	<b>Prevalence (Absent, very low, low, moderate, high)</b>
<b>Politico-strategic reasons</b>	<b>Low</b>
Judicial empowerment ('sword')	Low (in some referred cases)
Sustained resistance ('shield')	Absent
Bureaucratic politics (leapfrog')	Moderate (in some referred cases)
<b>Non-strategic reasons</b>	<b>High</b>
Legal formalism (Compliance pull)	Very low
Pragmatism	High (in all cases, both referred and non-referred)
Personal/ psychological	High
Institutional	Moderate
Request of the parties	Low (in some referred cases)

As to the second follow-up question, this study shows that the referring court implements the requested CJEU judgment fully and automatically. This is the case despite the fact that most interviewed judges were not necessarily satisfied with all CJEU judgments, the procedure before, or the dialogue with the CJEU. The judges' own personal background and institutional position also plays an important role in their perception of the CJEU's case law. National court judges seem to like strong guidance by the CJEU providing clear solutions for the case at hand. This finding contrasts with prevailing assumptions about the relationship between CJEU and national courts that consist in criticising 'interventionist' CJEU judgments. With respect to the third question about feedback loops, this study demonstrates that the willingness of judges to refer is not affected by their previous experiences and dissatisfaction. The national judges' responses to these two questions once

more bear witness to their pragmatic attitude towards the preliminary reference procedure.

In sum, the interaction between the CJEU and Dutch courts in the field of migration does not give rise to concerns about the functioning of the preliminary ruling procedure. What does this finding tell us about the broader picture? More specifically, is there cause for concern given the allegedly growing number of integration-sceptical national judgments as mentioned in the introduction? Even though the scope of this article is limited, focusing on Dutch migration cases for a limited period of time, it is still possible to offer some meaningful reflections. It is safe to say that the literature tends to overemphasise a few high profile cases over the large majority of 'often extremely boring' rulings which are neatly implemented.<sup>200</sup> The procedure functions well in the great majority of cases.<sup>201</sup> This also suggests that the growing pessimism in the literature could be the result of the fact that there are more high profile CJEU judgments which are extensively discussed and criticised in the popular press and in the academic literature. The seemingly growing criticism is also a natural development that could simply be the result of the growing competences of the EU in fields of law, which have traditionally been the sole domain of EU Member States, such as criminal law. In addition, the legally binding effect of the EU Charter of Fundamental Rights in 2009 also means that the CJEU is operating in an area that has long been dominated by generally more EU sceptic constitutional courts. These two developments have consequently stirred those constitutional courts into action, which is not necessarily a positive sign of their willingness to engage with EU law. Referring to the CJEU is also a way for such courts to challenge the authority and legitimacy of the CJEU. This is a source of concern that should be examined at greater depth, also in the light of the unresolved questions formulated earlier in relation to the feedback loops. At the same time, we should not forget that 'hard cases', such as *Ajos*, *Gauweiler* or *Taricco* receive a disproportionate amount of attention,

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<sup>200</sup> De Werd (n 5) 156.

<sup>201</sup> This was also the outcome of the ACA Europe Seminar on the preliminary ruling procedure in The Hague on 7 November 2016. See [www.aca-europe.eu/index.php/en/seminars/511-seminar-in-the-hague-on-7-november-2016](http://www.aca-europe.eu/index.php/en/seminars/511-seminar-in-the-hague-on-7-november-2016), last accessed 31 July 2018.

often to the detriment of the great majority of cases in which the preliminary ruling procedure functions well.