

Some observations about the role of courts in dispute resolution and the development of EU law
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Introduction

Madame la Présidente de FIDE, Mesdames et Messieurs, chers collègues, chers amis européens. Es freut mich außerordentlich Sie alle hier in Den Haag begrüßen zu dürfen. Good morning ladies and gentlemen.

It is an honour and a pleasure that I may speak to you at this opening ceremony of the 2021 FIDE congress in the Netherlands. At FIDE, professionals within the world of European law unite to discuss the state of EU law on both European and national level.¹ For the Hoge Raad, working with EU law is daily practice. In my introduction I would like to share some observations about the role of courts in dispute resolution and the development of EU law. I will do this from my own perspective as a judge and as an academic interested in dispute resolution.

The task of the Hoge Raad in dispute resolution and development of the law

The Hoge Raad is the Supreme Court of the Kingdom of the Netherlands for civil, criminal and tax cases and for some specialized administrative cases. It is a court of cassation. The Hoge Raad is not competent to establish the facts of a case anew, but reviews whether the previous court interpreted the law correctly, followed the right procedure, and sufficiently substantiated its judgment.

The Hoge Raad provides judgments in individual cases, within the judicial space of the wider dispute resolution system in the Netherlands. The tasks of the Hoge Raad go beyond the particularities of the individual court case. The law distinguishes three different tasks; the Hoge Raad is expected to promote legal unity, to further the development of the law and to safeguard legal protection of the people. The idea is that judgments given with an eye not only on the individual case, but also on these core tasks, encourage legal certainty in society, a vital aspect of the rule of law.

I learned at the Hoge Raad that it requires a sort of judicial group sensitivity to assess which case might be suitable for which steps in contributing to legal unity and the development of the law, or in filling gaps in the legal protection of the people. This sensitivity is part of the respect for the division of powers between the legislator, executive and judiciary. But in particular, this sensitivity supports the Hoge Raad to take care of two main features of the case law of a court. One feature is that the outcome of a case must make sense in light of the facts of that case. Another feature is that the effectiveness of the law must be guaranteed in the living situation of citizens. The contribution to the legal system by judgments of national and international courts remains part of dispute resolution between citizens, companies and organs of the State. Thus, for a court, an individual case functions both as an incentive and a restraint to seek for the appropriate contribution to the development of the law. The case to case approach of a court enables judges to seek for an interpretation or application of the law that suits the current case and leaves enough space for dispute resolution in forthcoming cases.

¹ FIDE Congress The Hague 2021 website, *Welcome to The Hague*, [Welcome - FIDE 2021 \(fide2020.eu\) \(2021\)](https://www.fide2020.eu/).

The custom to deal with cases from the combined perspectives of dispute resolution and the three core tasks in the law system, is also prevalent while working with EU law. In cases with an EU law dimension, I perceive a third perspective in the daily practice of the Hoge Raad, which is the principle of loyal cooperation with the Court of Justice of the European Union. I will provide you with some examples of the way the Hoge Raad gives effect to the principle of loyal cooperation in requests for preliminary ruling and generally in its dialogue with the Court of Justice in judgments. Before that, as an introduction to these examples, I will speak about the duty of national last instance courts to ask for a preliminary ruling.

The duty of national last instance courts to ask for a preliminary ruling

At a FIDE congress, it needs neither explanation nor emphasis that EU law directly affects the national legal order. The Hoge Raad is one of the larger questioners to the Court of Justice. If a decision on a question concerning the interpretation of EU law is necessary to enable the Hoge Raad to give judgment, the Hoge Raad will, as a national last instance court, bring the matter before the Court of Justice on the basis of article 267 of the Treaty on the Functioning of the European Union (TFEU). The Court of Justice reasserted in its recent judgment in the case of *Conorzio Italian Management and Catania Multiservizi*² the criteria identified in its judgment in *Cilfit*³ - exactly 39 years ago – for the exceptions under which a last instance national court does not need to ask the Court of Justice for a preliminary ruling.

As an academic, I read with great interest the opinion of Advocate-General Bobek to the *Conorzio* case and his elaborated proposal for a new standard in stead of the *Cilfit* criteria. As a judge, I was not surprised about the choice of the Court of Justice not to follow this proposal. In its judgment, the Court of Justice called article 267 TFEU “the keystone of the judicial system established by the Treaties, setting up a dialogue between one court and another, specifically between the Court of Justice and the courts of the Member States, having the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties”.⁴ The proposal of the Advocate-General was to relocate this keystone by creating another balance in the functioning of article 267 TFEU, in which the development of EU law by courts is given priority over the intertwined judicial tasks of dispute resolution and the development of EU law.

In this proposal, I appreciate the recognition of difficulties of last instance national courts with identifying whether a question of EU law falls within the scope of the duty to ask for a preliminary ruling. But I doubt if such difficulties are - in light of article 267 TFEU – to be considered a legitimate reason to overrule the part of *Cilfit* in which the duty to refer was made subject to conditions of the specific case. Article 267 TFEU integrates the interpretation of EU law by the Court of Justice in the national dispute resolution systems of the member states. Therefore, the assessment whether the answer to a question of EU law is necessary to enable a national court to give judgment, cannot be dominated by the perspective of the development of EU law. The Advocate-General suggests that national courts will only be obliged to refer if three cumulative conditions are met. These are that –

² Court of Justice of the European Union, Judgment of 6 October 2021, *Conorzio Italian Management and Catania Multiservizi*, C-561/19, [ECLI:EU:C:2021:799](https://eur-lex.europa.eu/eli/jud_2021/799).

³ Court of Justice of the European Union, Judgment of 6 October 1982, *Cilfit and Others*, C-283/81, [ECLI:EU:C:1982:335](https://eur-lex.europa.eu/eli/jud_1982/335), par. 7).

⁴ Court of Justice of the European Union, Judgment of 6 October 2021, *Conorzio Italian Management and Catania Multiservizi*, C-561/19, [ECLI:EU:C:2021:799](https://eur-lex.europa.eu/eli/jud_2021/799), par. 27.

in the words of the Advocate-General – a case raises (i) a general issue of interpretation of EU law; (ii) to which there is objectively more than one reasonably possible interpretation; (iii) for which the answer cannot be inferred from the existing case-law of the Court of Justice. I doubt whether the effectiveness and equivalence of EU law for citizens would improve if national courts would be able to refrain from asking questions in all cases that do not fall within the scope of these three conditions.⁵ The role of courts within the rule of law is intrinsically linked to the need for a type of legal certainty that is developed by deciding on the merits of cases, with judicial sensitivity for the incentives and restraints in a specific case to contribute to the development of the law.

Some Dutch examples in the context of identifying the scope of article 267 TFEU

Now let us have a closer look at the sometimes difficult task of courts to identify whether a question of EU law in a case should be referred for a preliminary ruling. As I said, I would like to provide you with some examples of Hoge Raad judgments. These examples show different aspects of the way the Hoge Raad gives effect to the principle of loyal cooperation in requests for preliminary ruling and generally in its dialogue with the Court of Justice.

In the *Conorzio* case, an Italian court had to deal with a party bringing forward questions of EU law twice. The Court of Justice highlighted in its judgment the aspect that the system of direct cooperation between the Court of Justice and national courts, is completely independent of any initiative by the parties.⁶ This aspect was explicitly mentioned by the Hoge Raad in 2018, in a judgment in a case about state liability in which it rejected the complaint of a party according to which the Hoge Raad previously unlawfully failed to ask the Court of Justice for a preliminary ruling.⁷

As to whether different language versions of a provision influence the decision to ask for a preliminary ruling, the Court of Justice recognized in the *Conorzio* judgment that a national judge cannot be required to examine each of the language versions of the provision in question. It however advises national courts to bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified.⁸

This has been common practice at the Hoge Raad. Sometimes, English, French and German versions are explicitly mentioned in judgments of the Hoge Raad to identify or even clarify doubts about the meaning of a Dutch translation or implementation of an EU law provision. Sometimes, this comparison gives reason to ask for a preliminary ruling,⁹ sometimes to a final judgment without a request for preliminary ruling.¹⁰

The Court of Justice added in the *Conorzio* judgment a duty for a last instance national court to provide the reasons for refraining from making a reference on the basis of the reasserted *Cilfit* criteria.¹¹ With regard to giving reasons, I would like to mention that it is not uncommon for the

⁵ Opinion of Advocate-General Court of Justice of the European Union Bobek in the case of *Conorzio Italian Management and Catania Multiservizi*, C-561/19, [ECLI:EU:C:2021:291](#), paras. 134 and 135.

⁶ Court of Justice of the European Union, Judgment of 6 October 2021, *Conorzio Italian Management and Catania Multiservizi*, C-561/19, [ECLI:EU:C:2021:799](#), par. 53.

⁷ HR 21 December 2018, [ECLI:NL:HR:2018:2396](#), par. 3.3.3.

⁸ Court of Justice of the European Union, Judgment of 6 October 2021, *Conorzio Italian Management and Catania Multiservizi*, C-561/19, [ECLI:EU:C:2021:799](#), par. 44.

⁹ For instance: HR 28 September 2012, [ECLI:NL:HR:2012:BW7507](#), par. 3.7.2.

¹⁰ For instance: HR 21 May 2021, [ECLI:NL:HR:2021:749](#), paras. 3.2.2-3.3.3.

¹¹ Court of Justice of the European Union, Judgment of 6 October 2021, *Conorzio Italian Management and Catania Multiservizi*, C-561/19, [ECLI:EU:C:2021:799](#), par. 51.

Hoge Raad to do the opposite, under the principle of loyal cooperation: to demonstrate the need for a preliminary ruling by giving reasons for the perceived absence of an *acte clair* or an *acte éclairé*.¹² In the case of summary proceedings, the eventual lack of an *acte clair* is sometimes explicitly mentioned as not enough to ask for a preliminary ruling.¹³

The Court of Justice mentioned in its *Conorzio* judgment¹⁴ that a last instance national court can even be obliged to make a reference for a preliminary ruling in a case in which the Court of Justice already answered questions. A similar situation arose in the *Franzen and others* case, although not at the same court. The dispute concerned the social security position of cross-border workers. Initially, in 2013, the Dutch appeal court requested for a preliminary ruling.¹⁵ The Court of Justice did not answer one of the questions,¹⁶ probably because of a mistake in the understanding of national law. Even though the answer of the Court of Justice could have been interpreted as a sign that this question might not be regarded relevant, the Hoge Raad decided to ask additional questions in the following cassation procedure in this case. The Hoge Raad stuck faithfully to the *Cilfit* exceptions: if these are not met, there is still uncertainty on a particular part of EU law and follow-up questions should be asked. In 2018, in its additional questions to the Court of Justice, the Hoge Raad further explained national social security law.¹⁷ The second time around, the Court of Justice provided clarity on the matter.¹⁸

Contributing to the development of EU law

A recurring theme in judgments of the Hoge Raad is the commitment to contribute to the development of EU law. This is not just because national law prescribes that one of the three core tasks of the Hoge Raad is to contribute to the development of the law, or because article 267 TFEU demands a judicial dialogue. It also relates to the role of the Hoge Raad as a substantial stakeholder on the rule of law in the Netherlands. This role stands in a wider picture in the context of EU law. This is especially relevant with regard to requests for preliminary ruling that relate to fundamental rights. One might think of questions on procedural law, such as various references in 2013 in customs cases, on the interpretation of the principle of respect for the rights of the defence.¹⁹ Nevertheless, Dutch first instance courts, courts of appeal, and administrative courts may just as much contribute to the debate on fundamental rights. This contribution may for instance be found in references for preliminary ruling on consumer protection.²⁰

¹² For instance: HR 12 March 2010, [ECLI:NL:HR:2010:BK4932](#), par. 5.2.7.

¹³ For instance: HR 17 April 2015, [ECLI:NL:HR:2015:1063](#), par. 3.8.5.

¹⁴ Court of Justice of the European Union, Judgment of 6 October 2021, *Conorzio Italian Management and Catania Multiservizi*, C-561/19, ECLI:EU:C:2021:799, par. 59.

¹⁵ Centrale Raad van Beroep 1 July 2013, *Franzen and others*, [ECLI:NL:CRVB:2013:783](#).

¹⁶ Court of Justice of the European Union, Judgment of 23 April 2015, *Franzen and others*, C-382/13, [ECLI:EU:C:2015:261](#).

¹⁷ HR 2 February 2018, *Giesen and Van den Berg*, [ECLI:NL:HR:2018:126](#); HR 2 February 2018, *Franzen and others*, [ECLI:NL:HR:2018:127](#).

¹⁸ Court of Justice of the European Union, Judgment of 8 November 2019, *Franzen and others*, joined cases C-95/18 en C-96/18, [ECLI:EU:C:2019:767](#).

¹⁹ HR 22 February 2013, [ECLI:NL:HR:2013:BR0666](#); HR 22 February 2013, [ECLI:NL:HR:2013:BR0671](#).

²⁰ Such as Rechtbank Amsterdam 19 September 2019, [ECLI:NL:RBAMS:2019:7062](#); Gerechtshof Amsterdam 5 March 2019, [ECLI:NL:GHAMS:2019:657](#) and Gerechtshof Den Haag 2 April 2019; [ECLI:NL:GHDHA:2019:630](#); CbB 3 July 2015, [ECLI:NL:CBB:2015:210](#).

Dispute resolution and development of EU law in the frame of confidence

In the wider European picture, the Hoge Raad is hence a link in a judicial discourse that goes beyond the particularities of the individual court case. By a loyal practice of submitting references for preliminary ruling, the Hoge Raad aims to hold a constructive dialogue. In this dialogue, the Hoge Raad speaks directly to the Court of Justice and Dutch national courts, and indirectly to numerous other national courts in the European Union. It also listens closely to the European Court of Human Rights. This wider conversation enables courts to resolve disputes and at the same time contribute to the development of EU law. The dialogue is principally based on mutual trust in the Court of Justice, national courts, and other institutions in the three powers of state. In such a dialogue, it should also be a possibility to openly discuss whether legal or moral borders have been crossed, without creating a conflict. The confidence amongst the judiciary and between the judiciary and other state institutions can in this context be viewed as a prerequisite for the confidence of EU citizens to have faith in the judiciary as well as in parliament and government, both on a national and EU level.

Closing

These remarks bring me to the end of this opening speech. I wish you an interesting congress, with rich discussions and lots of opportunities to connect in person. Thank you for your attention.