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CORE ANALYSIS

The law and facts of the preliminary reference procedure: a critical assessment of the EU Court of Justice's source of knowledge

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Abstract

The preliminary reference procedure is today the 'infringement procedure of the European citizen'. Although it was initially designed as a mechanism for judicial cooperation, the procedure soon became an instrument for supranational judicial review of national legislation. Such a discrepancy between the intended role of the preliminary reference procedure and its actual use in practice has important consequences that are yet to be fully explored in the literature. Indeed, how can the Court of Justice appropriately review national legislation through a procedure designed for interpreting EU law? Is the procedure governing the preliminary reference mechanism suitable to perform such a role? In this paper, we focus on one issue in particular: the way in which the Court of Justice gains information regarding the legal and factual background of the case. The Court has long recognised that appropriate knowledge of the factual and legal context of the referred case is a necessary prerequisite to performing its scrutiny and that, in accordance with the judicial cooperation model, such information is provided by the national judge. The Article critically examines the rules of procedures and the case law to show that the national judge certainly plays a key role, but other actors contribute to shaping the Court's knowledge too. After an analysis of each actor's role, the Article concludes that the procedure offers few guarantees as to the effective participation of individual parties to the advantage of other actors in the proceedings, increasing the risk of having partial or unbalanced information regarding the legal and factual background of the cases.

Keywords: European Court of Justice; preliminary reference procedure; judicial dialogue; referring judge; intervening parties

1. The transformation of the preliminary reference procedure: some introductory remarks

The preliminary reference procedure is a cornerstone of the European Union's (EU) constitutional architecture.[1] It enables national judges to refer to the Court of Justice of the European Union (CJEU) questions regarding the validity and interpretation of EU law. The response by the CJEU, the preliminary ruling, often has a decisive impact on the outcome of the case, both for legal and practical reasons. First, national judges can only raise questions that, according to Article 267 of the Treaty on the Functioning of the European Union (TFEU), are 'necessary' to decide on the case. Second, since the preliminary reference is a rather burdensome and time-consuming procedure, national courts tend to use it sparingly, only when they consider that the CJEU intervention can have a real impact. In this context, the division of labour between the CJEU and the referring national

[1]Or a 'keystone' as done by the CJEU in *Opinion 2/13*, ECLI:EU:C:2014:2454, para 176.

judge seems quite clear: the CJEU rules on EU law and the national court applies it to the facts of the case.[2] Yet, this distinction looks far more blurred if we move from theory to practice.[3]

If we look at the preliminary reference procedure's *praxis*, we will realise that the nature of the CJEU's scrutiny has greatly changed. Originally, the mechanism was introduced to grant a uniform interpretation and application of EU norms across the different Member States. However, since the judgements *Van Gend and Loos* and *Costa v ENEL*, and the introduction of the judicial doctrines of supremacy and direct effect, litigants and national courts started referring questions addressing the compatibility of national law *vis à vis* EU law standards, thereby transforming the preliminary reference into a mechanism for supranational judicial review.[4] Formulas such as '*EU law X must be interpreted as precluding national legislation Y*' are regularly used by the CJEU to convey the message that a certain national norm is contrary to EU law and must be set aside. Interestingly, this use of the preliminary reference procedure as a tool for judicial review was not envisaged by the drafters of the Treaty of Rome and neither was it desired by the Member States, quite the opposite.[5]

To be sure, 'pure questions of interpretations' still exist, as well as preliminary questions that ask clarifications regarding the validity of EU law.[6] But today, a great portion of the questions referred to the CJEU can be defined as 'citizens' infringement procedure',[7] for they question the compatibility of Member States' acts with EU law. Although Member State governments tried to oppose this use of the procedure since the *Van Gend and Loos* case,[8] the CJEU has ever since maintained that this type of reference is not only admissible but is even essential to protect individual rights stemming from EU law.[9] Despite this transformation, the procedure's governing rules remained constrained within the old clothes: having been conceived as a means for judicial cooperation, this is still organised as 'a procedure from court to court'[10] that follows its peculiar structure.

[2]As often reiterated by the CJEU 'Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation', see Cases C-585/18, C-624/18, C-625/19, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982, para 132.

[3]Zglinski compellingly shows how law/interpretation and facts/application are not binary concepts but 'the extreme poles of a sliding scale'. See J Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020) 108. On the 'blurring line between interpretation and application of EU law' see also Case C-561/19, *Consorzio Italian Management*, ECLI:EU:C:2021:291, Opinion of AG Bobek, para 98.

[4]JHH Weiler, 'A Quiet Revolution. The European Court of Justice and its Interlocutors' 26 (4) (1994) Comparative Political Studies 514; K Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice' 52 (1) (1998) International Organization 121; B de Witte, 'The Impact of *Van Gend En Loos* on Judicial Protection at European and National Level: Three Types of Preliminary Questions' in A Tizzano and S Prechal (eds), *50th Anniversary of the Judgment in Van Gend en Loos, 1963–2013* (Office des Publications de l'Union Européenne 2013) 93.

[5]P Pescatore, 'Les Travaux Du "Groupe Juridique" Dans La Négociation Des Traités de Rome' 34 (1981) *Studia Diplomatica* 173; K Alter (n 4) 129; B de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P Craig and G De Búrca (eds), *The Evolution of EU law* (3rd edn, Oxford University Press 2021) 210.

[6]B de Witte (n 4) 100.

[7]P Pescatore, 'Van Gend en Loos, 3 February 1963 – A View from Within' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 7; de Witte (n 4) 95.

[8]In *Van Gend and Loos* the governments of the Netherlands and Belgium raised the objection 'whether an alleged infringement of the Treaty by a Member State can be submitted to the judgement of the Court by a procedure other than that laid down by Article 169 or 170, that is to say on the initiative of another Member State before the Commission. It maintains in particular that the matter cannot be brought before the Court by means of the procedure of reference for a preliminary ruling under Art 177. The Court, according to the Netherlands Government, cannot, in the context of the present proceedings, decide a problem of this nature, since it does not relate to the interpretation but to the application of the Treaty in a specific case.' (Case 26/62, *Van Gend en Loos* ECLI:EU:C:1963:1).

[9]Ibid., 12. Also *Opinion 1/09 (European and Community Patents Court)* ECLI:EU:C:2011:123, paras 84 and 86. On this point see D Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa* (Giuffrè editore 2018) 65–81.

[10]P Pescatore, *Court of Justice of the European Communities: References for Preliminary Rulings under Article 177 of the EEC Treaty and Cooperation between the Court and National Courts* (Office for Official Publications of the European Communities 1986) 18.

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This Article focuses on the procedural implications of this transformation of the preliminary reference system and points out the existence of a weak spot. In Lenaerts' words, to provide a '*réponse utile*' that would enable the referring court to grant effective protection to individuals' EU rights, 'the CJEU has steadily come to provide more "concrete", as opposed to "abstract", rulings warranting a complex analysis of the facts, national legislation and other aspects of the main action.'[11] To do so, the CJEU needs adequate knowledge of the factual and legal context of the case, which can be hard to possess for a supranational court not familiar with the national legal system and that intervenes only in a small fraction of the national proceedings.[12]

But what is adequate knowledge in the context of the preliminary reference procedure? In our opinion, this has a quantitative component and a qualitative one.

The quantitative component concerns the amount of relevant information regarding the factual and legal background of the case that the CJEU needs to adopt a well-informed ruling on the compatibility between national and EU law.[13] From that perspective, adequate means, thus, complete. The notorious *Taricco* saga is a cautionary tale in this regard, as the CJEU almost triggered a 'constitutional clash' out of a misinterpretation of national norms.[14] Indeed, in the *Taricco II* case, the CJEU explicitly admitted that some aspects of Italian constitutional and criminal laws 'were not drawn to its attention' in the first preliminary reference, making a second ruling on the same question necessary.[15] The same problem resurfaced in the *Consorzio Italian Management* case, where the Italian *Consiglio di Stato* decided to re-submit a preliminary reference following a first judgement by the CJEU on the case. The referring court maintained that the CJEU did not take a position on a key aspect of the main dispute, and this was due to the fact that, comprehensibly, the CJEU was not aware of some common practices of the Italian public administration, which diverge quite substantially from what is provided in the written law.[16]

Secondly, an adequate knowledge should not concern only the amount of information available to the CJEU, but also its quality. The fundamental judicial principle of the equality of arms, guaranteeing that 'any document submitted to the court may be examined and challenged by any party to the proceedings, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[17] This principle acquires special importance in the context of the transformed preliminary reference procedure, where the object of the dispute is a national act's compatibility with EU law. Here, the legal and factual background of the case is contested terrain, where parties compete to provide the court with their own reconstruction of law and facts. Indeed,

[11]K Lenaerts, 'The Unity of European Law and the Overload of the CJEU – The System of Preliminary Rulings Revisited' in I Pernice, J Kokott, and C Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective: 6th International Ecln-Colloquium/Iacl Round Table Berlin, 2–4 November 2005* (Nomos Verlagsgesellschaft 2006) 217.

[12]See the interview with Judge Sacha Prechal on the European Law Blog, available at <https://europeanlawblog.eu/2013/12/19/interview-with-judge-sacha-prechal-part-ii-cooperation-with-national-judges-embedding-the-internal-market-and-transparency-at-the-cjeu/> accessed 4 November 2022.

[13]Joined cases C-320/90, C-321/90 and C-322/90, *Telemarsicabruzzo,* ECLI:EU:C:1993:26.

[14]M Bassini and O Pollicino, 'The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution' (*Verfassungsblog*) <https://verfassungsblog.de/the-taricco-decision-a-last-attempt-to-avoid-a-clash-between-eu-law-and-the-italian-constitution/> accessed 4 November 2022.

[15]'It is therefore for the Court, in the light of the questions raised by the referring court with regard to that principle, which were not drawn to its attention in the case in which the *Taricco* judgment was given, to clarify the interpretation of Article 325(1) and (2) TFEU in that judgment', Case C-42/17, *M.A.S*, ECLI:EU:C:2017:936, para 28. On the saga see C Amalfitano (ed), *Primato del diritto dell'Unione europea e controlimiti alla prova della 'saga Taricco'* (Giuffrè editore 2018).

[16]The CJEU failed to clarify whether cleaning services were functionally linked to the transport service. This omission was due to poor knowledge of the Italian administrative practice. Indeed, as clarified by Advocate General Bobek, 'the Court assumed that, as stated in the initial invitation to tender, the duration of the contractual relationship could not be extended. However, that does not reflect the situation in Italy where service contracts are frequently extended by public authorities, sometimes indefinitely, thus creating a situation of contractual imbalance.' Case C-561/19, *Consorzio Italian Management*, ECLI:EU:C:2021:291, Opinion of AG Bobek, para 14.

[17]Case C-580/12 P, *Guardian Industries Corp.,* ECLI:EU:C:2014:2363, para 31.

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the representation of facts and law is never objective or univocal, but changes according to the perspective adopted.

This Article will analyse the norms that regulate the way in which the Court can acquire adequate information about the legal and factual background of the case, pointing out some structural limitations of the preliminary reference procedure, which is closed and unbalanced. By this, we mean that, first, the procedure exposes the Court to the risk of having only partial or incomplete information regarding the legal and factual context; and, second, that the procedure places some parties in a privileged position while limiting or excluding the capacity of intervening of other actors that could valuably contribute to the making of informed rulings.

This Article develops as follows. Section 2 explains why the legal and factual background of the dispute is essential for enabling the CJEU to rule on preliminary questions. Section 3 will look at the referring court, illustrating its key role in providing factual and legal information to the CJEU at the beginning of the proceedings and its disappearance once it has submitted the preliminary reference. Section 4 focuses on the other actors that take part in the proceedings, the main parties, the Member State governments, the Commission and third parties, to understand how the procedural rules shape their ability to provide information regarding the facts and the national law.

2. The relevance of the factual and legal context in the preliminary reference procedure

The CJEU has long recognised the importance of properly knowing the factual and legal context of the case to carry out its task.[18] According to well-established case law, a clear description of the facts and/or of the legal background of the main proceedings represents one of the requirements to be met for the reference to be declared admissible.[19] The CJEU has repeatedly stressed that its interpretative activity is necessarily context-related, and this is for two main reasons. First, the factual and legal context enables the CJEU to provide an answer which is concretely useful to the referring judge. Second, an appropriate description of the context allows the Member State governments and other interested parties to have a full understanding of the dispute and, thus, to be in the position to exercise their right of intervening in the preliminary reference proceedings, as provided for by Article 23 Statute.

A. The knowledge of the factual and legal context to assess admissibility

In the absence of sufficient information on the factual and legal context of the national dispute, the CJEU cannot even determine whether it has jurisdiction to rule on the case. Indeed, without context, the Court cannot understand whether the case has been artificially created by the parties just to make the CJEU express its position on a matter, whether the case has a hypothetical nature or whether the question is unrelated to the facts or the purpose of the main action.[20] Initially, the CJEU adopted an extremely deferential approach in applying these criteria so to encourage

[18]Case C-567/07, *Minister voor Wonen* ECLI:EU:C:2009:593, para 50; Case C-83/91, *Meilike* ECLI:EU:C:1992:332, para 26.

[19]*Telemarsicabruzzo* (n 13). Zglinski rightly notes that in this respect the Court contradicts itself: 'If fact- finding is the exclusive domain of the national judge, it is puzzling how the Court of Justice's inadequate knowledge of the factual setting can matter – factual questions belong with the national judge, anyway (even if the Court has sufficient information).' J Zglinski (n 3) 101.

[20]Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* ECLI:EU:C:2010:300, paras 35–36. See also C-348/22 *Autorità Garante della Concorrenza e del Mercato (Comune di Ginosa)* ECLI:EU:C:2023:301, para 83 where the CJEU declared inadmissible one of the preliminary questions, by pointing out that 'since the referring court has failed to set out the factual and legal material characterising the situation at issue in the main proceedings, the Court is unable to give a useful answer to the ninth question'.

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national judges to rely on this mechanism and increase the number of cases brought to its attention. As time passed, and the number of referred cases increased, the CJEU progressively switched to a less permissive approach, putting more emphasis on the role of national judges as the gatekeepers of the procedure.[21] This is quite evident in the increased number of cases in which the CJEU, already in a very early stage of the procedure, declares the reference inadmissible for failure to meet the requirements set forth by Article 94 Rules of Procedure (RP).[22]

These criteria aim at preserving the nature of the preliminary reference procedure as an instrument to be used by national judges to seek the assistance of the CJEU on issues that bear concrete relevance to a real case. The procedure has not been conceived as an instrument enabling the CJEU to dwell on hypothetical issues concerning the European integration process, but as a tool to concretely help national judges in the administration of justice as first judges of EU law.

This point has been confirmed in the *Miasto Łowicz* judgement.[23] The case concerned the references submitted by two Polish regional courts, asking whether the new Polish disciplinary regime for judges was compatible with the right of individuals to effective judicial protection, guaranteed in the second subparagraph of Article 19(1) TEU. In particular, the referring judges expressed concern that disciplinary actions could be brought against them in the future and that these would be heard by disciplinary bodies that are not independent from the executive power; however, no disciplinary action had been brought yet. The CJEU declared these references inadmissible, since there was no 'connecting factor' between Article 19 TEU and 'the disputes in the main proceedings, and which makes it necessary to have the interpretation sought so that the referring courts may, by applying the guidance provided by such an interpretation, make the decisions needed to rule on those disputes'.[24] In so doing, the CJEU recalled what is the ultimate function of the preliminary reference mechanism, ie providing 'national courts with the points of interpretation of EU law which they need to decide the disputes before them' and not enabling 'advisory opinions on general or hypothetical questions to be delivered'.[25]

The control over each of these requirements presupposes the possibility for the CJEU to have a sufficiently clear and detailed knowledge of the facts of the main action, as well as of the national legal provisions applicable thereto. For instance, in *Foglia v. Novello (I)*, the seminal case on the inadmissibility of non-genuine cases, the CJEU concluded that the reference brought by the Pretore di Bra was inadmissible after a detailed analysis of the factual context of the dispute and, more specifically, of the behaviour of the parties involved. The CJEU pointed out that '[t]he artificial nature of this expedient is underlined by the fact that Danzas did not exercise its rights under French law to institute proceedings over the consumption tax although it undoubtedly had an interest in doing so in view of the clause in the contract by which it was also bound and moreover of the fact that Foglia paid without protest that undertaking's bill which included a sum paid in respect of that tax'.[26] The case was too blatantly orchestrated to be true.

[21]J Krommendijk, 'Wide Open and Unguarded Stand our Gates: the CJEU and References for a Preliminary Ruling in Purely Internal Situations' 18 (2017) German Law Journal, 1362. L Prete and N Wahl, 'The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings' 55 (2018) Common Market Law Review 511.

[22]On this trend, with a specific focus on the Italian situation, see C Iannone, 'Le ordinanze di irricevibilità dei rinvii pregiudiziali dei giudici italiani' (2018) *Il Diritto dell'Unione europea* 249.

[23]C-558/18, *Miasto Łowicz* ECLI:EU:C:2020:234. On the judgement see S Platon, 'Preliminary References and Rule of Law: Another Case of Mixed Signals from the Court of Justice Regarding the Independence of National Courts: *Miasto Łowicz*. Joined Cases C-558/18 & C-563/18, *Miasto Łowicz*, Judgment of the Court of Justice (Grand Chamber), of 26 March 2020, ECLI:EU:C:2020:234' 57 (2020) Common Market Law Review 1843.

[24]*Miasto Łowicz* (n 23), para 52.

[25]*Miasto Łowicz* (n 23), para 44.

[26]Case 244/80, *Foglia v Novello* ECLI:EU:C:1981:302, para 10. See A Tizzano, 'Litiges fictifs et compétence préjudicielle de la Cour de justice européenne' 85 (1981) Revue générale de droit international public, 514.

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B. The knowledge of the factual and legal context to assess whether a situation is purely internal

Knowledge of the factual and legal context of the main proceedings is equally important when assessing the applicability of EU law. A fitting example in this regard is the case of purely internal situations. The CJEU elaborated this doctrine in the '70s as a counterbalance to the judicially induced expansion of the scope of internal market rules into the regulatory choices made by the Member States. According to this doctrine, EU law provisions having an inherently transnational character, such as free movement rules, do not apply in cases that are confined within the territory of a single Member State[27]; consequently, the CJEU has no jurisdiction to rule on such cases.[28] Despite the apparent clarity of this statement, the criteria to identify which situations fall in this category have been highly controversial, also due to a less-than-linear development of the case law.

The CJEU has finally brought some clarity – without, however, solving all the problems – with the *Ullens de Schooten* judgement.[29] The ruling, representing just a step in what has been aptly defined as a saga, has the merit of codifying previous decisions, by identifying the baseline rule and better articulating possible exceptions. As for the former, the CJEU plainly stated that 'the provisions of the FEU Treaty on the freedom of establishment, the freedom to provide services and the free movement of capital do not apply to a situation which is confined in all respects within a single Member State'.[30] Subsequently, the judgement identified four situations that, despite having a purely internal character, fall under the jurisdiction of the CJEU. First, when the national legislation at stake is capable to produce effects beyond the borders of the enacting State, since 'it was not inconceivable that nationals established in other Member States had been or were interested in making use of those freedoms for carrying on activities' there.[31] Second, the CJEU has jurisdiction to rule on the requests made in the context of national actions for the annulment of national provisions applying equally to nationals of the enacting State and to nationals of other Member States.[32] Third, the same applies when the reference originates from a national legal system that obliges national judges to grant to nationals of its own Member States the same rights as those that a national of another Member State could derive from EU law, so as to prohibit reverse discrimination.[33] Fourth and lastly, the CJEU can rule on cases where national legislation reproduces EU law provisions, making them applicable to situations that would be outside their reach.[34]

The case law on the purely internal situation doctrine has already been the object of rich academic literature and there is no need to retrace it. What matters the most, at least from the perspective of this Article, is that the qualification of a case as purely internal or not presupposes a clear understanding of the facts and the national norms at stake. This is already necessary to apply the baseline rule, as the CJEU needs to ascertain whether all the relevant factors are confined within the concerned State. In *Ullens de Schooten*, for instance, it found that the situation at stake had just a domestic relevance, by pointing out that the main action had been brought by a Belgian national, who operated a laboratory in Belgian territory, to obtain from the Belgian State compensation for damages that he had allegedly suffered due to the application of Belgian legislation that he claimed was in breach of EU law.

[27]See A Arena, 'The Wall Around EU Fundamental Freedoms: The Purely Internal Rule at the Forty-Year Mark' 38 (2019) Yearbook of European Law 153.

[28]The case law is not clear as to whether this is an issue concerning the competence of the CJEU or the admissibility of the case. On this point see Krommendijk (n 21), 1366–8; R Grimbergen, 'How Boundaries Have Shifted: On Jurisdiction and Admissibility in the Preliminary Ruling Procedure' 8 (2015) Review of European Administrative Law 50.

[29]Case C-268/15, *Ullens de Schooten* ECLI:EU:C:2016:874.

[30]Ibid., para 46.

[31]Ibid., para 50.

[32]Ibid., para 51.

[33]Ibid., para 52.

[34]Ibid., para 53.

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C. The knowledge of the factual and legal context to judge on the merits

Lastly, the factual and legal context of the main action is also relevant to deciding on the merits of the preliminary reference proceedings. This is especially true in the 'citizens' infringement' cases, where the CJEU is asked, more or less openly, whether a national norm, case law or administrative practice is compatible with EU law. The CJEU has constantly excluded that it has jurisdiction to decide on questions of national law or on the application of EU law to specific facts since these activities fall within the exclusive jurisdiction of national judges. To conceptualise the division of labour between different judicial authorities, the CJEU has often referred to the distinction between the interpretation of EU law and its application.[35]

However, this distinction is not as watertight as the CJEU seems to suggest. Craig and De Búrca observed that there are many cases where the dividing line becomes 'perilously thin', almost non-existent, depending on the specificity of the question and the answer given by the Court.[36] In that regard, Tridimas identified three different scenarios, according to whether the CJEU gives a very specific answer to the referring judge (outcome cases); it provides the referring court with guidelines (guidance cases); or it replies in generic terms, leaving to the national judge the task of defining the issue (deference cases).[37] Especially in outcome cases, the CJEU is very assertive and specific in evaluating the compatibility of national legislation with EU law, engaging with the law and the facts characterising the national dispute. In the *Grundig Italiana* case, for instance, the Court not only held that the 90-day transitional period granted by the Italian legislation was not enough, but it even set a new time limit, of six months.[38]

The factual and legal context of the main action, as reconstructed by the CJEU, shapes and directs the interpretation of EU law and, ultimately, the outcome of the case. A fitting example in this regard is the *Dano* ruling, concerning the request by a Romanian woman to have access to social benefits provided for by German legislation. In describing the dispute in the main proceedings, the CJEU offered a damning description of the situation of Ms Dano, portraying her as the prototype of the social tourist wishing to take advantage of the generosity of the German welfare state without having to pay the price for it. In particular, the CJEU observed that 'Ms Dano attended school for three years in Romania, but did not obtain any leaving certificate. She understands German orally and can express herself simply in German. On the other hand, she cannot write in German and her ability to read texts in that language is only limited. She has not been trained in a profession and, to date, has not worked in Germany or Romania. Although her ability to work is not in dispute, there is nothing to indicate that she has looked for a job'.[39] The choice to overemphasise this side of the story laid the groundwork for the subsequent adoption of a strictly literal reading of the Citizenship Directive, so as to reassure Member States that EU law was firmly on their side in combating what they perceive as a major threat to the financial sustainability of their welfare systems.[40]

[35]See, more recently, Case C-561/19, *Consorzio Italian Management* ECLI:EU:C:2021:799, paras 29–30.

[36]P Craig and G De Búrca, *EU Law. Text, Cases and Materials* (7th edn, Oxford University Press 2020) 527–9.

[37]T Tridimas, 'Constitutional Review of Member States in Action: The Virtues and Vices of an Incomplete Jurisdiction' 9 (2011) *I-CON* 739.

[38]Case C-255/00, *Grundig Italiana* ECLI:EU:C:2002:525, paras 39–42.

[39]Case C-333/13, *Dano* ECLI:EU:C:2014:2358, para 39.

[40]P Phoa, 'EU Citizens' Access to Social Benefits: Reality or Fiction? Outlining a Law and Literature Approach to EU Citizenship' in F Pennings and M Seleeib-Kaiser (eds), *EU Citizenship and Social Rights* (Edward Elgar 2018) 210; C O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' 53 (2016) Common Market Law Review 937, 946; D Thym, 'When Union Citizens Turn into Illegal Migrants: The *Dano* Case' 40 (2015) European Law Review 252. More in general, for a critical analysis of the involution of the case-law on access to social benefits by mobile economically inactive citizens see F Costamagna and S Giubboni, 'EU Citizenship and the Welfare State' in D Kostakopoulou and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar 2022) 225. There are commentators that challenge the idea that this case law can be seen as a sign of a restrictive turn by the CJEU, arguing that the different judgements simply mirror the different position of individual applicants: in this sense G Davies, 'Has the Court Changed, or

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The importance of the description of the factual context of the main action for the outcome of the preliminary procedure is further confirmed by comparing two other cases concerning the access to social benefits by mobile EU citizens, *Alimanovic* and *Jobcenter Krefeld*. The first one concerned the case of a Swedish mother and her three daughters; they returned to Germany where the mother and the elder daughter worked for 11 months before losing their job and applying for social minimum subsistence benefits. German authorities rejected the application, on the basis that Ms Alimanovic and her daughter could no longer rely on a right of residence as workers, having lost this status according to the German law that transposed Article 14 of Directive 2014/38/EC. The key question was whether the loss of the status was enough to automatically exclude them from the benefit or whether German authorities had to take into consideration the specific situation of Ms Alimanovic and her family. The CJEU went for the first option,[41] focusing exclusively on Directive 2004/38/EC and the limits to the right of residence and equal treatment set therein. By so doing, it concluded that German authorities did not violate EU law in excluding Ms Alimanovic and her family from entitlement to the social minimum subsistence benefits.[42]

The second case concerned the refusal by German authorities to keep paying basic social security benefits to JD, a Polish national, and his two daughters, who were under his exclusive custody.[43] The Jobcenter Krefeld motivated the refusal by referring to the status of JD, who at that time had lost his job more than six months earlier and he was residing in Germany only to seek new employment. JD brought a judicial action against the refusal and the case was then referred to CJEU, to understand whether the exclusion of an EU citizen like JD from basic social security benefits was compatible with EU law. Quite interestingly, the German Government intervened in the preliminary proceedings, arguing that the case at hand was just a replica of *Alimanovic* and the CJEU should have adopted the same solution elaborated there. The CJEU disagreed, coming to a completely different conclusion. Moving from the fact that JD was the sole carer of two children, who started to attend school in Germany when he was a worker and who, therefore, were entitled to reside in the host State even if their father had subsequently lost his job, it held that he could derive this right and the right to equal treatment from those enjoyed by his daughters, on the basis of Article 10 and Article 7 of Regulation (EU) 492/2011.[44] Therefore, it concluded that German authorities were bound to keep paying basic social security benefits to JD.

The gulf between the conclusions reached by the CJEU in the two cases has been the object of divergent explanations. Advocate General Pitruzzella, in his Opinion in *Jobcenter Krefeld*, justified the choice not to consider whether Ms Alimanovic could claim a right to reside in Germany on the basis of Article 10 of Regulation (EU) 492/2011 by simply referring to the fact that the issue had not been brought to its attention by the referring judge.[45] This reading has been rightly criticised for being too narrow and formalistic, failing to acknowledge that the CJEU has on multiple occasions gone beyond the *petitum* so to offer guidance on questions that it considered relevant to solve the main dispute even if not mentioned in the preliminary reference.[46] In this regard, it is worth mentioning that this was the course of action taken by Advocate General Wathelet. In his

Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' 25 (2018) Journal of European Public Policy 1442.

[41]Case C-67/14, *Alimanovic* ECLI:EU:C:2015:597, paras 56–62.

[42]See A Iliopoulou-Penot, 'Deconstructing the Former Edifice of Union Citizenship? The *Alimanovic* Judgment. Case C-67/14, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, Judgment of the Court (Grand Chamber) of 15 September 2015. ECLI:EU:C:2015:597' 53 (2016) Common Market Law Review 1022.

[43]Case C-181/19, *Jobcenter Krefeld* ECLI:EU:C:2020:794.

[44]*Jobcenter Krefeld* (n 43), paras 34–55.

[45]Case C-181/19, *Jobcenter Krefeld* ECLI:EU:C:2020:377, Opinion of AG Pitruzzella, para 45.

[46]F Ristuccia, 'The Right to Social Assistance of Children in Education and their Primary Carers: *Jobcenter Krefeld*. Case C-181/19, *Jobcenter Krefeld Widerspruchsstelle v. JD*, judgment of the Court (Grand Chamber) of 6 October 2020, EU:

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Opinion in *Alimanovic*, he suggested to the Court to clarify that the presence of children attending school in the host State could trigger the protection offered by Article 10 of Regulation (EU) 492/2011 and then leave to the national court the task of ascertaining whether Valentina and Valentino Alimanovic were continuing their education within an establishment situated in Germany. While it is hard not to concur with this view, from the perspective of this Article this whole story can be read in two ways. First, it offers a stark reminder of the importance of providing the CJEU with all the relevant legal and factual elements, as one omitted fact might be determinant for the result of the case.[47] Second, the case of *Alimanovic* also shows how sometimes it can be very difficult for the referring judges to foresee in advance what legal and factual circumstances will be actually relevant or even determinant for the CJEU, complicating their task quite a bit. The next paragraphs will critically analyse the roles and responsibilities of the different actors involved in providing such information to the CJEU, starting from the referring judge.

3. The role of the referring judge in describing the factual and legal context of the main action: formal and informal tools

As said in the previous section, a correct understanding of the legal and factual context is vital for the CJEU's assessment of the admissibility, competence and merits of the case. The CJEU has repeatedly stated that 'it is necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'.[48] Thus, the responsibility of describing and defining the relevant factual and normative elements of the case falls primarily on the referring judge. To be sure, the CJEU has its own Research and Documentation Directorate that, upon request, compiles research notes on the law as applied in the Member States and prepares the '*fiche de préexamen*' that sets the stage for the CJEU's judgement.[49] While the Directorate's research notes are of a general and comparative character, the *fiche de préexamen* is compiled by a Directorate member who is of the same nationality of the Member State from where the reference comes from and can then provide a useful complement to the referring court's description of the law.[50] Still, the national judge is in a unique position to understand and describe the law and the facts applicable to the case and the CJEU rightly recognises its role.

A. The order for reference and the subsequent disappearance of the referring judge from the preliminary proceedings

The definition of the factual and legal context must occur in the very initial phase of the preliminary reference proceedings, when the referring judge drafts the order for reference. According to Article 94 RP, the request for a preliminary ruling has to contain, besides the text of the referred questions, a summary of the subject matter and the relevant findings of fact; the tenor of the national legislation applicable to the case and the relevant case-law; a statement of the reasons that prompted the national judge to pose these questions to the CJEU. Attaching to the

C:2020:794' 58 (2021) Common Market Law Review 877, 886–7; K Hyltén-Cavallius, 'Who Cares? Caregivers' Derived Residence Rights from Children in EU Free Movement Law' 57 (2020) Common Market Law Review 428.

[47]On this point, see J Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar 2021) 123.

[48]*Telemarsicabruzzo* (n 13), para 6.

[49]See the description provided by the Court at https://curia.europa.eu/jcms/jcms/Jo2_11968/en/, last visited 8 November 2022.

[50]C Krenn, *The Procedural and Organisational Law of the European Court of Justice. An Incomplete Transformation* (Cambridge University Press 2022) 79. See also S O'Leary, *Employment Law at the European Court of Justice. Judicial Structure, Policies and Processes* (Hart Publishing 2002) 32.

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reference the dossier/file of the main proceedings, as referring courts often do, is not enough, since this file is not translated and, thus, its accessibility is very limited.[51]

The reference order is considered a very important step in the preliminary reference proceedings, being it the 'best, if not only, way the referring court can exercise (some) control over the direction taken by the procedure in Luxembourg'.[52] Nevertheless, as a matter of fact, the control exercised by the national court over the CJEU seems rather limited, as Wallerman Ghavanini has compellingly shown.[53] And this risks to be true also regarding the provision of information to the Court, especially if one considers that the national judge, despite being the only one that can set the whole process in motion, is not among the authorities that are authorised to participate in the judicial procedure in front of the CJEU.[54] After having sent the questions, the national judge 'is [. . .] relegated to the role of a spectator for the remainder of the proceedings'.[55]

The reference order is crucial for the admissibility of the case: should the national judge fail to provide the Court with a satisfactory description of the factual and legal context of the main action, the CJEU can declare the reference inadmissible. According to Article 53 RP, when the inadmissibility is manifest, the CJEU can adopt, after hearing the Advocate General, a reasoned order at any moment and 'without taking further steps in the proceedings'. This is what happened, for instance, in the *OM v MIUR* case, where the CJEU rejected a request made through a 1-page hand-written order, in which the national judge simply referred to the questions raised by the applicant in the introductory act of the main proceeding without even trying to explain the factual and legal context, nor the reasons why it was seeking help from the CJEU.[56]

In less extreme cases, the CJEU can ask the referring judge to shed more light on those aspects that are unclear. In particular, Article 101 RP allows the CJEU, after hearing the Advocate General, to send a request for clarification to the national judge. The decision to make such a request is collectively adopted by the CJEU at the general meeting, which comes at the end of the written phase of the proceedings. Such a decision is taken after a proposal by the Judge-Rapporteur: according to Article 59 RP, the proposal to send a request for clarification to the national judge is one of the components of the preliminary report presented by the Judge-Rapporteur in that context.[57] In sending the request, the CJEU also sets a deadline for the reply by the national judge; but there is no sanction if the deadline is not met, nor if there is no reply at all. In some cases, the CJEU simply informs the national judge that the preliminary reference can be declared inadmissible if its request does not receive a satisfactory answer.

This is what happened in *EBS Le Relais Nord-Pas-de-Calais*, where the CJEU had sent several questions to the referring judge concerning the use and treatment of certain wastes. The Rechtbank te Rotterdam answered that it was unable to provide a timely response because it had to hear the parties on these points. The CJEU had no other option than declaring the reference inadmissible, but it added that the national judge could send another request *'lorsqu'il sera en mesure de fournir à la Cour l'ensemble des éléments permettant à celle-ci de statuer'*.[58]

[51]See S Prechal, 'Communications within the Preliminary Rulings Procedure' 21 (4) (2014) Maastricht Journal of European and Comparative Law 757. Court of Justice of the European Union, 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' (2019/C 380/01 of 8 November 2019).

[52]J Langer, 'Article 267 TFEU. Celebrating the Jewel in the Crown of the Community Legal Architecture and Some Hot Potatoes' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration. Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 459.

[53]A Wallerman Ghavanini, 'Mostly Harmless: The Referring Court in the Preliminary Reference Procedure' 27 (2022) European Law Review 310. The author, relying on the results of an empirical research conducted on 192 orders for reference received by the CJEU from 1 January 2008 and 31 March 2017, argues that the orders, even if well drafted, bear little influence on the decision of the CJEU.

[54]Art 23 of the Statute.

[55]A Wallerman Ghavanini (n 53) 313.

[56]Case C-569/19, *OM v MIUR* ECLI:EU:C:2019:951.

[57]For more information on the role of the Judge-Rapporteur see C Krenn (n 50) 81–4.

[58]Case C-240/12, *EBS Le Relais Nord-Pas-de-Calais* ECLI:EU:C:2013:173, para 22.

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Article 101 RP specifies that the reply by the national judge is to be sent to the interested persons referred to in Article 23 of the Statute, to fully safeguard their right to participate in the proceedings.

Should the need to obtain clarifications arise at an earlier moment than the general meeting, the CJEU can resort to other instruments of dialogue with the national judge. This can occur, for instance, when there is the need to clarify some aspects of the factual or legal context that are decisive to ascertain whether the case falls in the CJEU's jurisdiction or if it is admissible. In these cases, the Judge Rapporteur and/or the Advocate General can have recourse to the mechanism regulated by Article 62 RP or send a request to the national judge by simply referring to Article 24 of the Statute, despite neither of these provisions including national judges among the potential addressees of such requests. More specifically, Article 62 RP empowers the Judge Rapporteur and/or the Advocate General to ask 'the interested persons referred to in Article 23 of the Statute to submit within a specified time limit all such information relating to the facts, and all such documents or other particulars, as they may consider relevant'. The information obtained through this channel is communicated to the other parties and interested persons.

In some cases, the Judge Rapporteur may even send an informal request to the national judge via the Registry to obtain clarifications. Due to their informal nature, it is almost impossible to track down these exchanges and assess their relevance.[59] Moreover, recourse to such informal mechanisms is problematic, since the information obtained therewith is not made available to the other parties or interested persons, putting them in a potentially disadvantaged position.

Despite certainly being relevant in specific cases, the use of Articles 62 and 101 RP is not widespread.[60] Thus, they do not deprive the order of reference of its role as the main vehicle of information between the referring judge and the CJEU, nor do they challenge the idea that the referring judge substantially disappears from the preliminary reference proceedings after having set it up. From a practical point of view, the CJEU's tendency to use these tools sparingly can be seen as a strategy to avoid overburdening national judges and, thus, avoid the risk of suppressing their appetite for using the preliminary reference mechanism.[61] Moreover, there is now increasing pressure on the CJEU to contain and reduce the duration of its proceedings: the choice to have limited recourse to these instruments can be considered a response to this need. If viewed from a different perspective – a more systemic one –, this tendency can be seen as yet another element confirming the unidirectional nature of the preliminary reference mechanism, strengthening the position of those that argue that it is misleading to depict it as a dialogue.[62]

B. Challenging the information provided by the referring judge: taken seriously, but often rejected

The CJEU has constantly maintained that it is not its task to dispute the validity of the description of the facts and law given by the referring court. This can be seen as an aspect of the

[59]Conversation with Roberto Schiano, Registry at the CJEU, 6 May 2020. See also B Van Gestel and J De Poorter, *In the Court We Trust. Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts* (Cambridge University Press 2019) 128–9.

[60]With specific reference to Art 101 RP, see J Hoevenaars and J Krommendijk, 'Black Box in Luxembourg: The Bewildering Experience of National Court Judges and Lawyers in the Context of the Preliminary Ruling Procedure' 46 (1) (2021) European Law Review 76.

[61]Van Gestel and De Poorter (n 59) 129–30.

[62]A growing number of scholars challenge the traditional understanding of the preliminary reference mechanism as a dialogue between the national judge and the CJEU, proposing instead to reconceptualise it as a monologue. See, *ex multis*, A Wallerman Ghavanini (n 53) 311; U Šadl and A Wallerman Ghavanini, '"The Referring Court Asks, in Essence': Is Reformulation of Preliminary Questions by the Court of Justice a Decision Writing Fixture or a Decision-Making Approach?' 25 (4) (2019) European Law Journal 416–33; Krommendijk (n 47)) 112–8; A Turmo, 'A Dialogue of Unequals – The European Court of Justice Reasserts National Courts' Obligations under Art 267(3) TFEU: ECJ 4 October 2018, Case C-416/17, Commission v France' 15 (2019) European Constitutional Law Review 340.

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above-mentioned division of labour between the supranational and the national court in the context of the preliminary reference procedure. As for the challenges coming from other actors participating in the preliminary proceedings, Broberg observed that '[o]nly exceptionally will the Court of Justice be willing to consider supplementary information presented to it during the preliminary procedure – and in even more exceptional cases will it base its judgement on an understanding of the facts (including national law) which conflicts with the one presented by the referring court.'[63] This statement reflects a widespread opinion in EU scholarship, although it is difficult to assess its validity: the documents of the case are not public, thus we cannot possibly know whether the Court has based its judgement on further factual or legal elements provided by the parties or the intervening governments. What we can observe is that, at least in some cases, the CJEU has openly discussed in its ruling the existence of a divergent version regarding the factual and legal context of the main action and, in most cases,[64] it ended up upholding the description put forward by the referring court.

This is what happened, for instance, in *Navtiliaki Etairia Thasou AE* where the Greek Government disagreed with the referring court as to whether the examined Greek law set up an authorisation system.[65] When answering to this challenge, the CJEU first pointed out that 'as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference'. However, it subsequently felt the need to engage with the merit of the challenge and to provide an answer in that regard. In particular, it held that '[i]n the present case, since, according to the orders for reference, the Greek administration does not just accept the shipowners' operating declarations, but can also amend the transport plans proposed by the shipowners, particularly with regard to the departure times of the ships, the legal effects of such an amendment are equivalent to those of an authorisation. It follows that Law 2932/2001 in fact establishes a system of prior authorisation for the provision of maritime cabotage services.'[66]

A substantial scrutiny was conducted also in *Bichat*, a case concerned with the interpretation of the notion of 'undertaking controlling the employer' in Directive 98/59 relating to collective redundancies.[67] The German Government challenged the admissibility of the reference because the question concerned a hypothetical problem and the CJEU was unable, considering the description of the facts and law by the referring court, to give a useful reply. While AG Sharpton stated that the preliminary questions should be presumed relevant and quickly set the challenge aside by saying that 'this Court cannot adopt an interpretation of national law provided by a Member State Government in preference to that of the referring court',[68] the CJEU conducted a deeper and more substantial scrutiny. First, it recalled the case-law giving national courts, and not other authorities, the power to determine if a preliminary ruling is necessary and that a preliminary reference request can be turned down only if it is 'quite obvious' that the problem is hypothetical or that the referring court has not given all the necessary information to receive a useful answer. This notwithstanding, the CJEU first sent a request for clarification to the referring court,[69] which replied by confirming the relevance of the questions and then it looked at the merit

[63]M Broberg, 'Preliminary References as a Means for Enforcing EU Law' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 106.

[64]There a very few exceptions in this regard. One of them is Case 343/90, *Lourenço Dias* ECLI:EU:C:1992:327, which will be discussed in Section 4.B of this Article.

[65]Cases C-128-129/10, *Navtiliaki Etairia Thasou AE* ECLI:EU:C:2011:163, para 39.

[66]Ibid., paras. 40–41.

[67]Cases C-61-62/17 and C-72/17, *Bichat* ECLI:EU:C:2018:653, paras 22–27. See also Case C-22/12 *Haasovà* ECLI:EU:C:2013:692, paras 43–52.

[68]AG Sharpston added the following: 'Should a court of a Member State have doubts as to the application of EU law to a situation otherwise governed by national rules, those doubts must be presumed, for all the reasons set out in the case-law referred to above, to be relevant. The German Government's submissions must accordingly be rejected.'

[69]The judgement did not specify if it was a request under Art 101 RP.

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of the plea holding that, contrary to the opinion of the German Government, the referring judge did provide sufficient elements to formulate an answer.

The CJEU has adopted the same approach also when the challenge came from other subjects intervening in the proceedings. In *Stichting Brein*,[70] for instance, the Commission submitted that the third and fourth questions were hypothetical since, contrary to what was argued by the referring judge, they related to the streaming of works protected by copyright and not to the sale of a multimedia player. Initially, the CJEU seemed to be rejecting this plea on the grounds of the division of labour argument.[71] Yet, also in this case, to fully dismiss the Commission's challenge, the CJEU went further and conducted a substantial scrutiny: it asked for new information from the national court via Article 101 which confirmed that 'a reply to those questions is necessary for it to rule on the arguments of the applicant in the main proceedings'.[72] From these examples, it seems that the Court in principle wants to entrust national courts with the evaluation of the relevance and non-hypothetical nature of the orders, but the fact that it then engages nonetheless in substantial scrutiny casts some doubts on the stated division of competences and the presumed relevance of the questions.

The issue at stake acquired salience in the context of the so-called rule of law cases referred by Polish courts. In these cases, the challenges by the intervening government to the way in which the national legal and factual context is presented by the referring judge were not just the fruit of occasional disagreements but the sign of a deeper conflict between different State powers. Indeed, as is well known, these references concern measures adopted by the Polish legislator or the executive systematically targeting courts, judges and prosecutors, to bring them under political control.[73] As shown by the *A.K.* judgement,[74] the CJEU followed the above-examined reasoning also in these circumstances. The case concerned the independence of the then newly-instituted – but not yet operative – Disciplinary Chamber of the Supreme Court. Once functioning, this Chamber would have been competent to rule on the action brought by three judges of the Supreme Court and of the Administrative Supreme Court against the decision to force them to retire by applying a previously enacted legislation that had lowered the retirement age from 70 to 65 years. The applicants challenged it in front of the Supreme Court and the Administrative Supreme Court, claiming that the law was discriminatory and, thus, contrary to EU law. Conscious that the matter should be passed on to the Disciplinary Chamber, the two courts harboured, to put it mildly, some doubts on its independence and its capacity to provide effective judicial protection as requested by Directive 2000/78 and Article 47 of the Charter. Indeed, the judges of the Disciplinary Chamber were to be nominated by the Polish President, acting on a proposal by another politically controlled body, the National Council for the Judiciary.[75]

Polish authorities intervened in the preliminary proceedings arguing, *inter alia*, that the description of the national legal framework did not consider that the contested law on the reduction of the retirement age was repealed in the meanwhile, depriving the preliminary

[70]Case C-527/15, *Stichting Brein*, ECLI:EU:C:2017:300.

[71]Ibid., para 55; the Court recalled that 'it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court'.

[72]Ibid., para 57.

[73]For a detailed account of this set of illiberal reforms and of their ideological and historical backgrounds see W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

[74]*A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (n 2).

[75]The CJEU was quite cautious in answering to this question, elaborating a set of criteria that national judges should use in deciding the matter, but avoiding giving its own answer on the merit. This act of self-restraints has been welcomed by some commentators: see M Krajewski and M Ziólkowski, 'EU Judicial Independence Decentralized: *A.K.*' 57 (2020) Common Market Law Review 1109–10. Others were less positively impressed by it: see L Pech, P Wachowiec, and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' 13 (2021) Hague Journal on the Rule of Law 1, 32–3.

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reference request of its purpose. In response, the CJEU mentioned the 'division of labour argument' – according to which it is solely for the referring court to determine the relevance of the questions –, but it also took into consideration the substance of the challenge. As done in the above-examined cases, it reverted to the referring judge asking whether the question was still relevant and then it extensively explained why it concurred with the view that the new law did not really repeal the contested one, nor its legal effects *ex tunc*.[76] Once again the two dimensions worked in parallel, leading to the rejection of the challenge brought against the information provided by the referring judge. Yet, at least on paper, this approach can be problematic in situations, like the Polish one, where in the time between the order for reference and the beginning of the proceedings in Luxembourg the individual judge can be removed and substituted with someone more aligned with the ruling party. At the same time, it must be highlighted that requiring further information from the national court is not a duty and, thus, the CJEU can avoid the problem by relying exclusively on the information provided by the order for reference.

4. Knowledge supplied by parties and interveners in the preliminary reference procedure

The previous section has analysed the role of the referring judge as main information provider in the preliminary reference procedure regarding the legal and factual background of the cases. But crucially, during the proceedings, the Court of Justice can acquire information also via other actors. This section examines how the rules governing the preliminary reference procedure modulate the ability of the parties and interveners to file submissions and inform the CJEU. Article 23 of the Statute lists the actors that hold a right to participate in the preliminary reference procedure by submitting written or oral observations to the Court.[77] We will examine how each of these actors contributes to building the bulk of knowledge that lies at the basis of the CJEU's evaluation, assessing the interests they represent and how these are balanced against each other. We focus first on the role of the main parties to the national proceedings, then on third-party interveners, both Member States' governments and non-state actors, and finally on the 'repeat player' *par excellence*, the Commission.[78] Because this Article does not deal with preliminary questions that dispute the validity of an EU act, we will not deal with the other EU institutions.

We will see that these actors do not have equal standing before the Court, neither procedurally nor substantially. As noted by Krenn, the Court's rules of procedure have created two types of participants in the preliminary reference procedure: those who belong to the Court's 'inner circle', namely the Commission and the Member States, and the 'outsiders', who have more limited chances to participate.[79] This section argues that this procedural setting empowering some actors over others, risks exposing the Court to unbalanced information.

A. The parties to the main proceedings

The parties to the main proceedings have three main ways to provide the CJEU with information on the factual and legal background of the case. First, they may contribute to the drafting of the order for reference. To be sure, parties do not have a right to refer a case to the Court of Justice,

[76]*A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (n 2) paras. 87–106.

[77]Art 23 reads 'the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute'.

[78]Marc Galanter argued that in the proceedings we can identify two ideal types of parties: the one-shotter and the repeat player; the first only occasionally recourses to courts, while the second litigates often similar cases, develops expertise, and 'can play for rules as well as for immediate gains'. M Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' 9 (1974) Law & Society Review 95.

[79]Krenn (n 50) 59–80.

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as the decision to refer is on the national court alone 'whether or not the parties to the main proceedings have expressed the wish that it do so'.[80] Notwithstanding, national judges can draw on parties' suggestions when writing the order for reference, and in some Member States such as Ireland, they leave to the parties the task of writing the first draft of the order with the description of the facts of the case.[81] This *modus operandi* has the not-negligible advantage of providing the CJEU with a version of the factual and legal context of the case that has been already agreed upon by the parties, avoiding situations where the Court has to decide on a case the basic elements of which are still under dispute, which may even lead it to decline its jurisdiction.[82]

Second, parties can submit written observations to the Court within two months from the notification by the Registry that an order for reference was received.[83] Notably, the parties and all the other intervening actors must submit their written observations at the same time, thus without having seen the observations by the other participants in the case.

Third, and finally, the parties can participate in the oral hearing, if provided.[84] In preparation for the hearing, the Court can request the parties to provide certain information: Articles 61 and 62 RP enable the CJEU to ask the parties specific questions that it deems useful to solve doubts over the background of the case.[85] Given the absence of tools for inquiry, the hearing and Article 62 are very useful instruments for the Court, which regularly uses them to clarify disputed facts or unclear norms. Moreover, the hearing is especially important as it is the only opportunity where the Court can 'clarify points which the written observations have left unclear or even untouched' and where the parties 'have their only opportunity to respond to the written observations of others.'[86]

Still, concerns have been generally raised at the oral hearing and its suitability to adequately provide for a balanced discussion: because of its limited duration and strict rules, it is considered 'a dry and unhelpful affair', generating frustration among judges and lawyers.[87] Not to mention the fact that the Court may decide to rule without an oral hearing, thus depriving the parties of the only possibility they have to respond to observations and submissions.

Moreover, while on paper parties seem to have the relevant means to participate in the procedure, in practice they often do not. Recent empirical research reveals that in one-third of cases parties do not submit any oral or written observation,[88] which challenges the idea that the

[80]Court of Justice of the European Union, 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' (2019/C 380/01 of 8 November 2019), para 10. The question of whether the preliminary procedure should be treated as a judicial remedy is subject of an intra-courts debate: the ECtHR has declared that, even if the national court has the power to refuse to submit a reference upon a party's request, it has the duty to justify its decision in accordance with Art 6 ECHR (see *Dhahbi v Italy*, no. 17120/09, judgement of 8 April 2014, para 31). See also *Georgiou v Greece*, no. 57378/18, judgment of 14 March 2023, paras 22–26; Sanofi Pasteur v France, no. 25137/16, judgment of 13 February 2020, paras 74–79; *Vergauwen and Others v Belgium*, no. 4832/04, 10 April 2012, paras 89–90. See C Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References' 53 (2016) Common Market Law Review 698–703; A Arnull, 'The UK Supreme Court and References to the CJEU' 36 (2017) Yearbook of European Law 314, 318.

[81]This is a common practice in common law countries, the UK and Ireland, where the parties, often after lengthy discussions, jointly prepare a first draft containing a description of the facts and the questions to be referred, which will then be finalised by the referring court. See J Krommendijk, 'Why Do Lower Courts Refer in the Absence of a Legal Obligation? Irish Eagerness and Dutch Disinclination' 26 (2019) Maastricht Journal of European and Comparative Law 770, 786.

[82]K Lenaerts, 'Form and Substance of the Preliminary Reference Procedure' in DM Curtin, T Heukels, and HG Schermers (eds), *Institutional dynamics of European Integration* 2 (Martinus Nijhoff Publishers 1994) 361. See also Case 52/76, *Luigi Benedetti v Munari*, ECLI:EU:C:1977:16.

[83]Art 23 of the Statute.

[84]Art 76(2) of the Rules of Procedure.

[85]Art 61 and 62 of the Rules of Procedure.

[86]O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies, and Processes* (n 44) 47.

[87]Ibid., 48.

[88]L Boulaziz, S Hermansen, and T Pavone, 'Instrument of Power or Weapon of the Weak? Judicial Entrepreneurship and Party Capability at the European Court of Justice' Draft Paper Presented at the ECPR's Pre-Conference Workshop, 'European Legal Mobilization', 7 June 2022, Rome.

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individual is at the centre of the preliminary reference procedure.[89] The problem is that the procedure merely offers *potential* tools to participate. Think of the order for reference: parties may contribute to its drafting, but it is under the discretion of the national court to let them do so, as it can perfectly refer without involving them. The same is true for Article 62 RP: this is activated upon the CJEU's discretion, without the parties having the possibility to submit clarifications or information *motu proprio* after they have sent their initial observations. Also controversial is the case of the Advocate General Opinion: being issued after the hearing, the parties cannot respond to it even if it misrepresents the facts or the law in the case.[90]

These considerations reveal a problematic aspect regarding the parties' role: they are welcome to intervene, but there are few guarantees to ensure their effective participation in the procedure; this can amplify the disadvantage of so-called 'one-shotters', ie private parties (mainly individuals) with little knowledge of the preliminary reference procedure and without expert legal support. If for any reason one of the parties was unheard or unrepresented during the preliminary reference procedure, the CJEU will rule on the case anyways, with potentially huge consequences on the outcome of the national dispute and on the assessment of the compatibility between national and EU law.[91]

The *Celaj* case well exemplifies this problem. This concerned a third-country national citizen accused of entering Italy in violation of an entry ban and who risked being condemned to spend up to four years in jail. The national court decided to refer the case to the CJEU *ex officio*, independently from the parties, because in light of previous case law (*El Dridi* and *Achughbabian*) it deemed that sanctioning undocumented migrants to long criminal detention could be considered contrary to the EU Return Directive.[92] However, in Luxembourg, things did not go as the referring court expected. Mr Celaj and his lawyer did not file any oral or written observations, while five Member States intervened in support of the Italian criminal provision, along with the Commission.[93] This led to a rather predictable ending: nobody argued for the incompatibility between Italian law and EU law and the CJEU upheld the view of the Commission and the Member States, stating that the Return Directive does not preclude long prison sentences against undocumented migrants that violated an entry ban. Although we cannot know whether the Court would have decided otherwise had Mr Celaj been present, it is legitimate to think that his absence represented a missed opportunity to present arguments in favour of the incompatibility of the Italian law. Besides the many criticisms that the *Celaj* ruling received,[94] it is telling that a judgement able to impact the personal liberty of many individuals could be taken in the context of a procedure where nobody defended their position.

Another case that epitomises the lack of guarantees for parties' participation is that of *Chain*.[95] This case was referred by a Cypriot court and concerned a worker's request to retrieve unpaid social security contributions from his employer. As Butler and Šadl observed, 'the case was

[89]On the limited empowerment of individuals in the preliminary reference procedure see also the dissertation by J Hoevenaars, *A People's Court? A Bottom-Up Approach to Litigation Before the European Court of Justice* (Radboud University 2018).

[90]T Koncewicz, 'Procedural Friend or Foe? The Advocate General in the Court of Justice of the European Union Revisited' 42 (2) (2019) Gdańskie Studia Prawnicze 385–400.

[91]This is very different from the rules and practice of the European Court of Human Rights, where at any stage of the proceedings the Court can ask the lawyers to demonstrate that they are still in contact with the applicant by renewing their power of attorney and in case they are not, the case is terminated. See Art 37 of the European Convention of Human Rights.

[92]Case C-61/11 PPU, *El Dridi,* ECLI:EU:C:2011:268; Case C-329/11, *Achughbabian* ECLI:EU:C:2011:807.

[93]Case C-290/14, *Celaj*, Opinion AG Szpunar ECLI:EU:C:2015:285.

[94]A Romano, '"Circumstances . . . Are Clearly Distinct": la detenzione dello straniero per il delitto di illecito reingresso nella sentenza *Celaj* della Corte di Giustizia' 2 (2015) *Diritto, Immigrazione e Cittadinanza* 109; A M Kosińska, 'The Problem of Criminalisation of the Illegal Entry of a Third-Country National in the Case of Breaching an Entry Ban. Commentary on the Judgment of the Court of Justice of 1 October 2015 in Case C 290/14, *Skerdjan Celaj*' 18 (2016) European Journal of Migration and Law 243.

[95]Case C-189/14*, Chain v Atlanco Ltd*, EU:C:2015:432.

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apparently processed without the involvement, knowledge or awareness of the litigant [Mr Chain] in the main proceedings, with the same law firm representing both parties in the proceedings before the referring national court.'[96] What is even more troubling is that Mr Chain, once informed about the reference by some journalists, tried to communicate with the CJEU to end the procedure, but he remained unheard. The case was eventually terminated by the CJEU with an Order, but only because the Cypriot court withdrew its reference request.

One could argue that cases such as *Celaj* and *Chain* are exceptional and do not represent the CJEU's general attitude towards private parties and especially individuals. Indeed, recent studies reveal that individuals tend to succeed before the CJEU, even compared to more resourceful actors such as businesses.[97] But the same studies point out that about one in four individuals and one in ten companies do not submit any observation in their own case, meaning that levels of participation in the preliminary reference proceedings are sensitive to parties' capabilities.[98] The fact that the Court generally has a positive attitude towards individuals does not prove that parties' participation is adequately guaranteed. Even if preliminary reference proceedings with unaware parties are rare, the fact that they can happen should be enough to raise concerns about the adequate protections in place, and the equity and equality of arms within the preliminary reference procedure.

In conclusion, the rules governing the preliminary procedure treat parties' submissions as superfluous: they have a right to submit observations and to participate in the oral hearing, but if they decide not to, the proceedings continue without them. This confirms what Wallerman Ghavanini noted: 'the "dialogue" at its core is intended not to be inclusive (of national courts), but rather exclusive (of the parties to the national proceedings).'[99] Here emerges starkly the distinction that the Treaties drafters had in mind when designing the Community judicial system: on the one hand, there are direct actions (infringement, annulment, failure to act, and action for damages) which have a contentious nature and give parties relevant procedural rights; on the other, there is the preliminary reference procedure, a tool for dialogue among judges with little regard for parties' role. But if confining the parties to the main proceedings to a marginal role can be reasonable, or even desirable, in the context of a judicial cooperation procedure, it becomes more problematic when the preliminary reference procedure functions as a tool for supranational judicial review against Member States' violations of EU law. In this case, usually, the parties are not just passive spectators in a dialogue between courts: the case regards the protection of their EU rights before a national court, and they often have an interest in the CJEU declaring that the national act is incompatible with EU law. Moreover, relegating parties to a marginal role might have repercussions on the information that reaches the Court during citizens' infringement proceedings, shielding the CJEU from important points in favour of the incompatibility between national and EU law. We can thus say that this procedural setting presents a challenge for the CJEU's capacity to acquire adequate information, both quantitively and qualitatively.

B. The intervening Member States

In the citizens' infringement type of references, the private party's counterpart is normally the Member State government. Indeed, this type of reference greatly changes the role of the Member State, which often takes up the role of the defendant: given that the Court scrutinises the compatibility of national law with EU law, the Member State expectedly defends the legitimacy of its legislation or eventually of analogous norms of other Member States.

[96]G Butler and U Šadl, 'The Preliminaries of a Reference' 43 (2018) European Law Review 120.
[97]Boulaziz, Hermansen and Pavone (n 88).
[98]Ibid., 21.
[99]Wallerman Ghavanini (n 53), 316.

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Member States occupy a privileged position in Luxembourg. Along with the Commission, they can be considered repeat players, as they are always notified about new preliminary references and often intervene with their agents and legal experts. In recent years, we can say that their position became even stronger. First, because they have significantly increased their participation in the preliminary reference procedure.[100] Second because they have started coordinating their interventions before the Court:

> In 2002, an informal network of national agents before the CJEU was set up at the initiative of the Netherlands. [. . .] Information on new cases before the CJEU, for example, is frequently shared via email to inform other agents of the importance of a specific case, or to inquire whether other Member States are considering intervening in a specific case. More substantive coordination as to the position adopted in specific cases takes place on a bilateral basis. For instance, in situations where a number of Member States have a shared interest, national agents may exchange views and align positions.[101]

The Member States' interest in a case can be of legal or political nature and determines whether they will ultimately intervene or not.[102]

Member States' observations are an important source of information during the preliminary reference procedure, as they might provide information that not even the referring judge possesses. An eminent example is the landmark case of *Defrenne II,* where the intervening Member States (UK and Ireland) submitted evidence in the form of tables and surveys to show the high economic burden that the principle of equal pay for men and women would have entailed; this led the CJEU to rule that the horizontal direct effect of Article 119 EEC should not be retroactive, a decision which probably had negative impacts on Ms Defrenne and many other women.[103] The information provided by the Member States contribute to building the CJEU's knowledge, helps it adjudicate on the legal and factual context, and sometimes poses a challenge to the referring court's account.

As noted in Section 3, the CJEU, relying on the division of labour argument, most of the time dismisses challenges to the referring court's reconstruction of the legal and factual context. However, quite exceptionally, Member States manage to rebut the presumption of the Court. For instance, in the case of *Lourenço Dias,* the referring Portuguese court submitted eight questions of compatibility, which the intervening Member States challenged as irrelevant to decide the case. Although the Court also repeated in this case that in principle the national court is in the best position to assess whether a preliminary ruling is necessary to give a judgement in the case,[104] it eventually agreed with the Member States and declared six out of eight questions irrelevant.[105] Even if the national court's questions enjoy a presumption of relevance, this can be rebutted also thanks to Member States' submissions.[106]

In *Lourenço Dias* the information provided by the Portuguese government was used against the plaintiff and the referring judge. However, this is not always the case: in *Alluè v Università di*

[100]M-PF Granger, 'When Governments Go to Luxembourg . . . the Influence of Governments on the Court of Justice' 29 (1) (2004) European Law Review 8.

[101]M Bulterman and C Wissels, 'Strategies Developed by – and between – National Governments to Interact with the CJEU' in B de Witte, E Muir, and M Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 269.

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

[103]S Tas, '*Defrenne v SABENA*: A Landmark Case with Untapped Potential' 6 (2) (2021) European Papers 881, 888.

[104]*Lourenço Dias* (n 64) para 15.

[105]See paras 25, 28, 32, 35, 38, 41.

[106]See what said in previous section. See also Lenaerts (n 82) 377. A seminal case where the national court questions were declared irrelevant thanks to a Member State's submission is that of *Foglia v Novello.* But obviously in most cases the CJEU defended the prerogatives of the national court, as in *Pigs Marketing Board.*

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Venezia, the Italian government provided statistics that showed a higher percentage of foreigners among the foreign-language assistants working in Italian universities under a contract of limited duration, and this data was used by the CJEU to prove that there was a discrimination of foreign workers in the Italian academic sector.[107]

Although the Member States emerge as privileged actors in the proceedings, we must also note that some of the limitations that we observed for the parties apply to them as well. As Schermers and Waelbroeck pointed out, the Member State is 'not allowed to reply in writing to the comments of the other parties. It does not know in making its submissions what the position of the Commission, or of other Member States, or of the private litigants will be. After its written submissions it has only one brief opportunity for extremely succinct oral comment.'[108] As said for the parties, there is no guarantee that the Court will hold an oral hearing, and 'where the CJEU decides to rephrase one or more of the preliminary questions, this effectively undermines the possibility of submitting observations.'[109] This compression of parties' rights is again a legacy of the fact that the preliminary reference was designed as a non-contentious procedure.

In conclusion, the Member States' observations can be crucial to filling the CJEU's gaps of knowledge in the legal and factual context of the cases, but we should bear in mind that they are not neutral or disinterested parties. The Member States, especially in citizens' infringement cases, are very much interested in a certain outcome of the procedure, whereby they defend their own policies; by providing or withholding information, they can stir the results of the preliminary reference in a way that the referring judge or the other parties did not foresee.

C. Non-state third-party interveners

The qualification of the preliminary reference mechanism as a non-contentious procedure is the main reason behind the exclusion of non-state third parties from the right to intervene during the preliminary reference procedure. Indeed, Article 40 of the Statute generally states that 'Member States and institutions of the Union may intervene in cases before the Court of Justice. The same right shall be open to the bodies, offices, and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court.' However, the scope of this Article was restrictively interpreted by the Court in an Order issued in the context of the famous case of *Costa v. Enel* where the CJEU rejected the request to intervene of Edison, an Italian energy company.[110]

The CJEU explained its refusal to grant Edison the right to intervene with an argument related to the nature of the proceedings. The preliminary reference 'does not envisage contentious proceedings designed to settle a dispute but prescribes a special procedure whose aim is to ensure a uniform interpretation of Community Law'.[111] As such, it is governed by special rules established in Article 23 (then Article 20) of the Court's Statute, which goes as follows: 'the parties, the Member States, the Commission and, where appropriate, the institution, body, office, or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court'.[112] According to this reading of the Court, third-party interveners are admitted only if they were already a party to the national proceedings, in line with Article 97 RP that establishes: 'The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.'[113]

[107]Case 33/88, *Pilar Allué and Carmel Mary Coonan* ECLI:EU:C:1989:222, para 12.

[108]HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* (6th edn, Kluwer Law International 2002) 649.

[109]M Broberg (n 63) at 110.

[110]Case 6/64, *Costa v. Enel,* Order of the Court of 3 June 1964, ECLI:EU:C:1964:34.

[111]Ibid.

[112]K Lenaerts, I Maselis, and K Gutman, *EU Procedural Law* (Oxford University Press 2014) 569.

[113]See also the Order of the President of the Court in Case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* ECLI:EU:C:2007:507 where the Court denied to the European Data Supervisor the possibility to intervene.

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An important consequence of Article 97 RP is to create a rather fragmented situation for what concerns the legal standing rules before the CJEU, to the point that it is fair to say that the CJEU has as many standing rules as the number of different standing rules in the Member States.[114] This might not be a trivial issue as it means that individuals and legal persons residing in Member States with more relaxed standing rules have better chances to intervene and bring their views before the CJEU. A case in point is the UK, which has rather generous rules regarding third-party interventions and which in fact referred one of the most famous strategic litigation cases, with five intervening NGOs.[115] And it is not by chance that it is again from the UK the only case where the CJEU has refused the intervention of a party despite the referring court had admitted it; in *Football Association Premier League,* the Court refused the intervention of five legal persons even if recognised as parties by the referring judge because 'the applications have been made only with a view to participating in the proceedings before the Court and that the applicants do not intend to play an active part in the proceedings before the national court after delivery of the judgment giving a preliminary ruling.'[116] The Court here applied similar reasoning to that of *Foglia v. Novello,* where the division of labour between the national court and the CJEU can be somehow reconsidered if there is a risk of abusing the preliminary reference procedure.

Arguably, the CJEU's restrictive interpretation of the right to intervene in the preliminary reference procedure can have detrimental consequences on the Court's capacity to acquire relevant information on the case. Third parties might greatly contribute to the CJEU's knowledge by providing information on the factual and legal background of the case, especially when they represent public interests or underrepresented groups.[117] De Schutter calls this the 'participatory adjudicatory' argument in support of public interest litigation; his view is based on the idea that 'the judicial decision will be legitimate to the extent that it is adequately informed and that it is the outcome of a truly deliberative process, in which all the relevant interests are represented and can bring before the judge their diverse perspectives.'[118] This argument would support an extension in the possibility of having third-party interventions before the CJEU, as they can bring different views and contexts, increasing the quality of judgements with high resonance and impact.

D. The Commission

The last actor that can supply information to the Court is the repeat player par excellence, the European Commission. This occupies a very special position, particularly in citizens' infringement types of references, for at least three reasons. First, the Commission is the Guardian of the Treaties, and these references are the private enforcement alternative to the infringement procedure, which is the more orthodox way to sanction the incompatibility between national acts and EU law.

[114]To be precise, within the same Member State standing rules may vary depending on the procedure (whether administrative, criminal or civil procedure etc.).

[115]Cases C-411/10 and C-493/10, *N S and M E and Others* ECLI:EU:C:2011:865. On the role of civil society actors in migration litigation see S Carrera and B Petkova 'The Potential of Civil Society and Human Rights Organizations through Third-Party Interventions before the European Courts: The EU's Area of Freedom, Security and Justice' in B De Witte, E Muir, and M Dawson (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar Publishing 2013), 233; and V Passalacqua 'Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU' 15 (2021) Law and Development Review 381.

[116]See Order of the President of the Court, 16 December 2009, in *Football Association Premier League Ltd*, Joined Cases C-403/08 and C-429/08, para 9, cited in R Schiano 'La procedura del rinvio pregiudiziale' in C Iannone and F Ferraro (eds), *Il rinvio pregiudiziale* (Giappichelli 2020) 181. More recently, the Court seems to have adopted a less restrictive stance in the Case C-266/16, *Western Sahara Campaign UK v. HM Revenue and Customs*, ECLI:EU:C:2018:118, see J Krommendijk and K van der Pas, 'To Intervene or Not to Intervene: Intervention Before the Court of Justice of the European Union in Environmental and Migration Law' 26 (2022) The International Journal of Human Rights 1399.

[117]Ibid., at 1396.

[118]O De Schutter, 'Public Interest Litigation before the European Court of Justice' 13 (1) (2006) Maastricht Journal of European and Comparative Law 11.

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Second, the Commission is notified of any preliminary reference submitted to the Court and always intervenes with oral and/or written statements, playing the role of the permanent amicus curiae of the CJEU. Finally, the Commission bears a lot of influence on the Court: empirical studies consistently indicate that the CJEU in most cases follows the opinion of the Commission, more than that of any other actors in the procedure, Member State governments included.[119]

The Commission participates in litigation with its Legal Service, which has the task of representing it before the CJEU. The Legal Service operates in strict collaboration with the Commission agents but has a degree of independence, also because at least one of the appointees to a case 'must have a command of the language of the case'.[120] According to one of its own directors, 'the Commission occupies a unique place among the interveners, having the broadest resources in terms of access to *travaux préparatoires* or technical details, and knowledge of national legal systems. It may also propose additional legal rules to be applied and is in a good position to comment on the economic, financial or other consequences of particular interpretations.'[121] The Legal Service can thus provide great help in understanding the legal and factual background of the case, first because its lawyers can read and understand the dossier of the case which is only available in the language of the Member State of origin, and then because of the Commission's involvement in the making of EU laws and in parallel infringement cases that give it access to important information.

When it comes to reconstructing the national legal and factual context of the case, the Commission Legal Service does not only have a language advantage. In citizens' infringement references, the issue at stake is Member States' non-compliance with EU law, which is regularly investigated by the Commission. Thus, this can draw on its own investigations of Member States' violations of EU law to feed its opinions on the preliminary reference at stake. And in practice, it happens very often that preliminary references challenging the compatibility of national law arrive at the CJEU when there is already a Commission's investigation on the same topic. Arguably, this can be seen as an effective strategy to guarantee supranational enforcement: Member States that act in violation of EU law will find themselves between the Commission on the one hand and the CJEU on the other, persecuted via public and private enforcement.

This synergy between citizens and Commission's infringement procedure has been studied and theorised by Van der Vleuten in the field of anti-discrimination law. She argues that reluctant Member States will eventually comply if they are 'squeezed between pincers', that is 'put under pressure by supranational and domestic actors simultaneously', via the Commission's infringement and the preliminary references.[122] Interestingly, she highlights how the Commission creates alliances with domestic actors by creating 'transnational networks of experts and societal actors, which provide it with information and indirectly offer access to the domestic process.'[123] This liaison between the Commission and national actors can also be seen critically: Hofmann argues that in recent years the Commission has substantially reduced its efforts to enforce EU environmental law centrally (alias via infringement) and it is at the same time 'outsourcing' this task to private actors, such as environmental NGOs, which however do not have the same capability to bring actions.[124]

In sum, these studies show that the Commission uses litigation before the CJEU strategically and has great leverage on the Court, not least because it has access to information that other actors

[119]A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[120]Director-General Romero Raquena cited in P Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021) 176.

[121]Ibid., 177.

[122]A van der Vleuten, 'Pincers and Prestige: Explaining the Implementation of EU Gender Equality Legislation' 3 (2005) Comparative European Politics 464.

[123]Ibid., 477.

[124]A Hofmann, 'Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union' 28 (2019) Environmental Politics 342.

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do not have. This, on the one hand, counterbalances the position of the Member State, which is the hidden defendant in citizens' infringement types of procedures. On the other hand, the Commission's privileged position casts a long shadow on the nature of a procedure which is clearly strategic to pursue its own political goals.

5. Conclusion

The preliminary reference procedure, designed as a non-contentious type of procedure, quickly became a crucial means to test Member States' compliance with EU law. While many commentators focused on whether we can still talk about a genuine judicial dialogue, this Article focused on whether the CJEU can build up an adequate knowledge of the factual and legal background of the case, given that the rules of procedure still reflect a judicial cooperation type of proceedings.

The Article identifies a series of challenges for the CJEU. First and foremost, the role of the referring judge. The procedure situates its reference order at the heart of the sources of information, as the main way for the CJEU to know about the context of the case. In this regard, it is worth observing that the CJEU tends to reject the challenges to the description of the facts or the law applicable to the main action provided for by the referring judge brought by other actors participating in the preliminary proceedings. However, the order for reference can provide lacking, partial, and contradictory information. The Article reports the existence of formal and informal tools that allow the CJEU to seek clarification from the referring judge, but they are used sparingly. This tendency can be explained as an attempt by the CJEU to contain the duration of the proceedings and not to overburden national judges, but also as an element confirming the unidirectional nature of the preliminary reference mechanism.

Another challenge consists of the fact that the procedure limits or excludes the intervention from actors that are not the main parties to the national proceedings but that could yet valuably contribute to the making of informed rulings. To some extent, the most important example of an actor excluded from the proceedings is again that of the national court itself, which after referring is not entitled to further intervene before the CJEU. Another example is civil society: although amicus curiae and third-party interventions are widely accepted in other national and international courts, the CJEU does not admit them. Also significant is the fact that this structural closure is unbalanced: if third-party interventions by civil society are always excluded, those by Member State governments are always admitted. This might be problematic, especially in cases where individual parties must confront several intervening governments.

The hidden adversarial nature of the citizens' infringement types of reference makes this structural closure of the procedure even more problematic. Although the Court claims that its rulings concern abstract questions of interpretations, the parties and the Member States have conflicting interests in the outcome of the case, and their written and oral observations reflect this. The preliminary reference procedure, however, as the Article explains, does not offer them a level playing field. It does not give parties and interveners the opportunity to confront their different views, as they cannot respond to the respective submissions in writing and have very limited time to do that orally at the hearing (when it is held). Moreover, while private individuals often do not participate in the proceedings, the government of the state where the reference comes from is almost always present, with a team of well-skilled agents and lawyers eventually supported by other intervening governments. In these cases, the procedure's inherent imbalance risks amplifying the voice of the governments at the expense of that of private parties.

Vis à vis all these challenges, the Commission comes to the rescue of the CJEU and plays an important balancing role. Indeed, the Commission is the natural counterpart of the governments in the classical infringement procedure, and it can offer a useful counterbalance to the views of the governments in the name of the defence of the correct enforcement of EU law. Still, arguably, the

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Commission's pro-EU integration position cannot be seen as a proxy or a substitute for the main parties and third parties' perspectives and insights. The Commission thus can be a useful counterbalance to the government's interventions but cannot fully remedy the partiality or scarcity of information regarding the national legal and factual context.

Once outlined the challenges for the CJEU, it remains difficult to identify a solution. The Court should probably give more consideration to the hidden contentious nature of some preliminary references, paying close attention to whether all the parties have had equal opportunities to provide their views on the case. This also concerns the parties' availability of sufficient financial means to fully participate in the proceedings: legal aid often does not cover the expenses of a potential travel to Luxembourg to participate in the hearing, putting less-resourced parties at a disadvantage. The role of third parties can be reconsidered too, as they can offer crucial insights into the possible broader implications of a single case. To be sure, this would require a careful evaluation of the pros and cons by the Court, which surely does not want to be flooded by observations from interest groups from all over Europe. Still, we believe that the analysis presented in this Article can be the starting point of a reflection to re-think the balance struck between the different parties and interveners in the preliminary reference procedure.

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