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ARTICLES

IT TAKES TWO TO TANGO: THE PRELIMINARY REFERENCE DANCE BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND NATIONAL COURTS

edited by Jasper Krommendijk

ENVIRONMENTAL DEMOCRACY AND JUDICIAL COOPERATION IN ENVIRONMENTAL MATTERS: MAPPING NATIONAL COURTS BEHAVIOUR IN FOLLOW-UP CASES

LORENZO SQUINTANI* AND SJOERD KALISVAART**

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ABSTRACT: Judicial cooperation in environmental matters is a key aspect of the move towards environmental democracy undertaken by the European Union. This *Article* presents the preliminary findings about the kind of behaviour that national courts can show with their judgments once they received a preliminary ruling from the Court of Justice of the European Union, so-called follow-up judgments. It first shows the results of the latest two empirical studies, namely that Italian and Belgian courts tend to cooperate fully with the Court of Justice in environmental matters. Besides, only one new category of judicial cooperation is highlighted, that of suspended cooperation. The unfolding of the categories of judicial cooperation seems to have reached the saturation point. Accordingly, this *Article* presents the first quantitative and qualitative findings that emerge when looking at judicial cooperation in follow-up judgments from five jurisdictions: next to Belgium and Italy, also the United Kingdom (UK), Sweden, and the Netherlands. This comparison suggests that coun-

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try-by-country, theme-by-theme and case-by-case circumstances influence national courts behaviour, potentially affecting the level of environmental democracy enjoyed in certain Member States. Accordingly, this *Article* introduces an empirical research agenda to investigate factors and reasons explaining the findings, therefore contributing to the improvement of judicial cooperation in environmental matters.

KEYWORDS: environmental democracy – judicial protection – preliminary ruling – judicial subsidiarity – follow-up judgments – national courts behaviour.

I. INTRODUCTION

This *Article* focuses on the cooperation between national and EU courts under the preliminary reference procedure as a means to advance environmental democracy in the EU.

The “von der Leyen” Commission underlined the need to involve the people in climate change policy and in the transition to a healthy planet.¹ It thus demonstrates the willingness to advance environmental democracy, as a form of transparent and accountable government which involves people in decisions which affect the quality of their lives and their environment.² The debate on environmental democracy is long-standing in the EU and beyond.³ Democracy is deeply entrenched in the EU Treaties, with Arts 1, 10, paras 1 and 3, and 11, para. 1, TEU referring to the need to take decisions as near as possible to the citizens, the foundational character of representative democracy to the EU, the right of every citizen to participate in the democratic life of the EU, and the right to make their views publicly known in all areas of Union action. Both representative democracy, *i.e.* democracy through elected representatives, and direct democracy, *i.e.* democracy through direct involvement of people in decision making, are thus envisaged under the TEU. In environmental matters, these grounds are reinforced by the fact that the EU and all of its Member States are members of the United Nations-based Aarhus Convention of 1998,⁴ which yielded several implementing acts.⁵ This Convention establishes environmental

¹ Commission, *The von der Leyen Commission: for a Union that strives for more*, Brussels, 10 September 2019, Press release no. IP/19/5542.

² E.g. G. BÁNDI, *Introduction into the Concept of “Environmental Democracy”*, in G. BÁNDI (ed.) *Environmental Democracy and Law*, Zutphen: Europa Law Publishing, 2014, p. 4, with further references.

³ *Ibid.*; W.F. BABER, R.V. BARTLETT, *Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law*, Cambridge: The MIT Press, 2009, all with further references; F. LA CAMERA, *Economy, Ecology and Environmental Democracy*, in M. PALLEMAERTS (ed.), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Zutphen: Europa Law Publishing, 2011; A. KLINKE, *Democratizing Regional Environmental Governance: Public Deliberation and Participation in Transboundary Ecoregions*, in *Global Environmental Politics*, 2012, p. 79 *et seq.*; G. PAROLA, *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship*, London: Versita, 2013.

⁴ 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

⁵ Most notably, Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participa-

democracy on three pillars: a) access to information, b) public participation and c) access to justice.⁶ This *Article* focuses on the third pillar, access to justice, by looking at the functioning of the preliminary reference procedure in environmental matters.

There is, indeed, an ongoing dispute between the EU and the Aarhus Convention Compliance Committee (ACCC) concerning whether the EU complies with the Aarhus Convention requirements.⁷ The ACCC considers current EU provisions insufficient because of the barrier imposed by the well-known *Plaumann* doctrine⁸ to the concept of “individually concerned” under Art. 263 TFEU. The EU disagrees, arguing that a full system of remedies is foreseen, where alleged barriers under Art. 263 TFEU are addressed by means of the preliminary reference procedure under Art. 267 TFEU.⁹ The preliminary reference procedure is thus an intrinsic component of the EU system for environmental democracy envisaged under the Treaties.

The preliminary reference procedure is not an ordinary procedure, however, as it establishes a peculiar relationship between national courts and the Court of Justice. The Court of Justice is tasked with ensuring the uniform interpretation and effective application of the large body of EU regulation across the EU. EU environmental law began developing even before its official introduction in the Treaties in 1987. It is composed today of hundreds of binding acts covering the vast majority of environmental aspects. Under the Treaties, the Court of Justice acts as the ultimate interpretative authority on

tion in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. On environmental justice, Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final, was withdrawn in 2014.

⁶ J. WATES, *The Aarhus Convention: a Driving Force for Environmental Democracy*, in *Journal for European Environmental & Planning Law*, 2005, p. 2 *et seq.*; J. JENDROŠKA, *Citizen's Rights in European Environmental Law: Stock-Taking of Key Challenges and Current Developments in Relation to Public Access to Information, Participation and Access to Justice*, in *Journal for European Environmental & Planning Law*, 2012, p. 71 *et seq.*; G. BÁNDI, *Introduction into the Concept of “Environmental Democracy”*, *cit.*

⁷ For a political science approach of the dispute, N. BERNY, *Failing to Preach by Example? The EU and the Aarhus Convention*, in *Environmental Politics*, 2018, p. 757 *et seq.*; M. VAN WOLFEREN, *To Justify the Ways of God to Men: Limits to the Court's Powers of Interpretation*, doctoral thesis, University of Groningen, 2018, www.rug.nl, p. 210 *et seq.*; See also R. LANCEIRO, *Access to Justice in Environmental Matters in the EU: Cooperation and Tension between the Aarhus Compliance Committee and the Court of Justice of the EU*, in M. BELOV (ed.), *The Role of Courts in Contemporary Legal Orders*, Den Haag: Eleven International, 2019, p. 483 *et seq.*; M. VAN WOLFEREN, M. ELIANTONIO, *Access to Justice in Environmental Matters – The EU's Difficult Road Towards Non-Compliance With the Aarhus Convention*, in M. PEETERS, M. ELIANTONIO (eds), *Research Handbook on European Environmental Law*, Cheltenham: Elgar, 2020, pp. 148-165.

⁸ Court of Justice, judgment of 15 July 1963, case 25/62, *Plaumann v. Commission of the EEC*.

⁹ M. VAN WOLFEREN, *To Justify the Ways of God to Men*, *cit.*

questions of EU (environmental) law.¹⁰ Opinions 2/13 and 1/17 underline the peculiar character of the Court of Justice's jurisdiction and the Court of Justice's determination to protect its prerogatives,¹¹ as an essential element of the EU legal order. This role is also pivotal when the Court of Justice and national courts from the Member States enter into judicial dialogue.¹² Both the Court of Justice and the national courts work together to rule on matters of EU law.¹³ The preliminary reference plays a crucial role in this shared responsibility,¹⁴ as the only "bridge" between the Court of Justice and national courts,¹⁵ at least legally speaking.

How the tandem formed by the Court of Justice and the national courts contributes to ensuring access to justice in environmental matters to support the functioning of environmental democracy in the EU needs consideration. Little is known about what national judges do with the answer they receive to a preliminary ruling in their "follow-up judgments".

Building on the studies of Bogojević,¹⁶ Squintani, Rakipi and Annink,¹⁷ who provided empirical evidence on follow-up judgments in Sweden, the United Kingdom (UK) and the Netherlands, we first explain the state-of-the-art and the persisting knowledge gap as regards follow-up judgments (section II). Section II also refines the research question and introduces the cases studies on Italy and Belgium. The empirical data are then presented in section III. Section IV presents a synthesis of the results. From the Italian and Belgian studies, only one new category of judicial cooperation appears, that of *suspended* cooperation. This finding suggests the possibility that the number of categories of

¹⁰ C.O. LENZ, G. GRILL, *The Preliminary Ruling Procedure and the United Kingdom*, in *Fordham International Law Journal*, 1995, p. 844 *et seq.*; E. PAUNIO, *Conflict, Power, and Understanding – Judicial Dialogue Between the ECJ and National Courts*, in *No Foundations: Journal of Extreme Legal Positivism*, 2010, p. 5 *et seq.*; Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*; Arts 19 TEU and 267 TFEU.

¹¹ Court of Justice: opinion 2/13 of 18 December 2014; opinion 1/17 of 30 April 2019. On opinion 2/13 see in particular J. LINDEBOOM, *Why EU Law Claims Supremacy*, in *Oxford Journal of Legal Studies*, 2018, p. 328 *et seq.* On the Court's approach to international dispute settlement mechanisms see M. FERMEGLIA, A. MISTURA, *The Fate of EU Environmental and Investment Law after the Achmea Decision*, in *Journal for European Environmental & Planning Law*, 2020, p. 29 *et seq.*

¹² A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *European Journal of Legal Studies*, 2007, p. 121 *et seq.*

¹³ The "bridge" metaphor was used by F. JACOBS, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, in *Texas International Law Journal*, 2003, p. 547 *et seq.*

¹⁴ J. LANGER, *The Preliminary Ruling Procedure: Old Problems or New Challenges?*, University of Groningen, 2016, available at papers.ssrn.com.

¹⁵ F. JACOBS, *Judicial Dialogue and the Cross-Fertilization of Legal Systems*, *cit.*

¹⁶ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary*, in *Journal of Environmental Law*, 2017, p. 263 *et seq.*

¹⁷ L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, in *Environmental Law Reports*, 2018, p. 89 *et seq.*; L. SQUINTANI, D. ANNINK, *Judicial Cooperation in Environmental Matters: Mapping National Courts' Behaviour in Follow-up Cases*, in *Journal for European Environmental & Planning Law*, 2018, p. 147 *et seq.*

judicial cooperation identified and distinguished might be nearing *saturation*.¹⁸ Accordingly, section V provides a first initial reflective analysis of the findings from the Netherlands, UK, Italy, Belgium and Sweden, in light of the move towards environmental democracy. It also sets a research agenda for an in-depth comparative project aiming to unveil the reasons for the empirical findings presented in this mapping project.

II. MAPPING JUDICIAL COOPERATION: THE UNCHARTERED WATERS OF FOLLOW-UP JUDGMENTS

The novelty of this *Article* stems from the fact that scholarly works on the functioning of the preliminary reference mechanism, both generally¹⁹ and specifically on environmental matters,²⁰ mainly focus on the *upload* phase, thus on whether questions are asked and answered. Less is known about what national courts do with the answers they receive from the Court of Justice, the *download* phase. Most scholars focus only on landmark cases,²¹ or on the dialogue between the constitutional courts and the Court of Justice on specific aspects.²² A systematic study of the download phase is missing.²³

¹⁸ C. SEALE, *Grounding Theory*, in C. SEALE (ed.), *The Quality of Qualitative Research*, London: Sage, 1999, p. 87 *et seq.*; G.A. BOWEN, *Naturalistic Inquiry and the Saturation Concept: A Research Note*, in *Qualitative Research*, 2008, p. 137 *et seq.*; M. O'REILLY, N. PARKER, "Unsatisfactory Saturation": A Critical Exploration of the Notion of Saturated Sample Sizes in Qualitative Research, in *Qualitative Research*, 2013, p. 190 *et seq.*

¹⁹ F. JACOBS, A. DURAND, *References to the European Court: Practice and Procedure*, in *Cambridge Law Journal*, 1976, p. 192 *et seq.*; T. TRIDIMAS, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling System*, in *Common Market Law Review*, 2003, p. 9 *et seq.*; C. TIMMERMANS, *The European Union's Judicial System*, in *Common Market Law Review*, 2004, p. 393 *et seq.*; M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, Oxford: Oxford University Press, 2010, p. 37 *et seq.*; M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, Oxford: Oxford University Press, 2014; L. HOINUF, S. VOIGT, *Analyzing Preliminary References as the Powerbase of the European Court of Justice*, in *European Journal of Law and Economics*, 2015, p. 287 *et seq.*; J. LANGER, *The Preliminary Ruling Procedure*, *cit.*

²⁰ V. HEYVAERT, J. THORNTON, R. DRABBLE, *With Reference to the Environment: The Preliminary Reference Procedure, Environmental Decisions and the Domestic Judiciary*, in *Law Quarterly Review*, 2014, p. 413 *et seq.*

²¹ E.g., A. TORRES PÉREZ, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2010, p. 308 *et seq.*; M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, in *European Constitutional Law Review*, 2014, p. 54 *et seq.*; M. BOBEK, *EU Law in National Courts: Viking, Laval, and Beyond*, in M.R. FREEDLAND, J. PRASSL (eds), *Viking, Laval and Beyond*, Oxford: Hart, 2014, p. 323 *et seq.*; U. ŠADL, S. MAIR, *Mutual Disempowerment: Case C-441/14 Dansk Industri*, in *European Constitutional Law Review*, 2017, p. 347 *et seq.*

²² E.g., A. DYEVE, *European Integration and National Courts: Defending Sovereignty Under Institutional Courts?*, in *European Constitutional Law Review*, 2013, p. 139 *et seq.*; O. POLLICINO, *From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court*, in *European Constitutional Law Review*, 2014, p. 143 *et seq.*; A. TORRES PÉREZ, *Melloni in Three Acts*, *cit.*; B. GUASTAFERRO, *The Unexpectedly Talkative "Dumb Son": The Italian Constitutional Court's Dialogue with The European Court of Justice in Protecting Temporary Workers' Rights in the Public Education Sector*, in *European Constitutional Law Review*, 2017, p. 493 *et seq.* See also M. ELIANTONIO, C. FAVILLI, *When Two Preliminary Questions Result in One and Half Answers: A Constitutional Tragedy in Four Acts*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 911 *et seq.*

A study of the download phase has two dimensions: general and specific. The general dimension concerns how the *national judiciaries* across the EU react to the Court of Justice's answer in the light of the unwritten *stare decisis* system confirmed by the "*acte éclairé*" doctrine declared in *Da Costa*²⁴ and *CILFIT*.²⁵ The specific dimension, which is this *Article's* focal point, concerns how the *referring* national court responds to the Court of Justice's answer – the follow-up judgment. Section II.1 explains the criteria for distinguishing follow-up judgments as judicial cooperation or uncooperation. Section II.2 presents known examples of the two kinds. Section II.3 delimits the research question while introducing the new studies.

II.1. THE CRITERIA FOR ASSESSING JUDICIAL COOPERATION IN FOLLOW-UP JUDGMENTS

Although there are various kinds of judicial dialogue,²⁶ Jacobs highlights two main features about the judicial dialogue internal to the EU legal system. The first main feature is the "constitutional" judicial dialogue, *i.e.* the jurisdiction of the Court of Justice to hear complaints lodged by other EU institutions or the Member States.²⁷ Second, and the object of this *Article*, is the judicial dialogue through the preliminary reference mechanism.

In summary,²⁸ lower courts have the right to ask a preliminary question,²⁹ courts of last instance are obliged to ask,³⁰ and the Court of Justice has a duty to respond. The national court referring the question is obliged to comply with the Court of Justice's an-

²³ See however, J. KROMMENDIJK, *Irish Courts and the European Court of Justice: Explaining the Surprising Move from an Island Mentality to Enthusiastic Engagement*, in *European Papers*, 2020, Vol. 5, No 2, www.europeanpapers.eu, p. 825 *et seq.*, who albeit by means of a qualitative methodology, provides a more holistic approach to the Irish follow-up practice, without touching on environmental law in particular.

²⁴ Court of Justice, judgment of 27 March 1963, joined cases 28/62, 29/62 and 30/62, *Da Costa en Schaake NV and Others v. Administratie der Belastingen*.

²⁵ Court of Justice, judgment of 6 October 1982, case 283/81, *CILFIT v. Ministero della Sanità*; see also H. RASMUSSEN, *The European Court's Acte Clair Strategy in C.I.L.F.I.T.*, in *European Law Review*, 1984, p. 242 *et seq.*; A. ARNULL, *The Use and Abuse of Article 177 EEC*, in *Modern Law Review*, 1989, p. 622 *et seq.*; F. MANCINI, D. KEELING, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, in *Yearbook of European Law*, 1991, p. 1 *et seq.*; P. ALLOTT, *Preliminary Rulings: Another Infant Disease?*, in *European Law Review*, 2000, p. 538 *et seq.*; P. WATTEL, Köbler, *CILFIT and Welthgrove: We Can't Go on Meeting Like This*, *Common Market Law Review*, 2004, p. 177 *et seq.*; N. FENGER, M. BROBERG, *Finding Light in the Darkness: On the Actual Application of the Acte Éclairé Doctrine*, in *Yearbook of European Law*, 2011, p. 180 *et seq.*; V. HEYVAERT, J. THORNTON, R. DRABBLE, *With Reference to the Environment*, *cit.*

²⁶ A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *European Journal of Legal Studies*, 2007, p. 125.

²⁷ F. JACOBS, *Judicial Dialogue and the Cross-Fertilization*, *cit.*

²⁸ On the various aspects of this procedure see the seminal work of M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, *cit.*

²⁹ Art. 267, para. 2, TFEU.

³⁰ Art. 267, para. 3, TFEU.

swer,³¹ but it does not have to report its final judgment to the Court of Justice. Despite the Court of Justice having recommended that follow-up judgments should be communicated,³² CURIA and EUR-Lex usually lack information about follow-up judgments, as discussed further in section V, *infra*. When asked, the Court of Justice only confirmed that the preliminary ruling is binding on the referring court without providing any comment on why the majority of national cases could not be located.³³ The national courts' responses to the Court of Justice's answers cannot therefore be considered as ever reaching the Court of Justice, therefore at best amounting to a *dialogue of the deaf*.³⁴ Proposals have been made to improve the dialogue, ranging from making better use of Art. 101 of the Rules of Procedure to inviting national referring judges to participate in the hearing before the Court of Justice, but they are not actually applied.³⁵

In light of the above, this *Article* will approach the subject in terms of sincere *cooperation* rather than judicial dialogue. Indeed, the principle of sincere cooperation goes hand-in-hand with the objective of the preliminary reference itself. First, because a judicial system built on the division of competences between the national courts and the Court of Justice calls for a greater cooperation.³⁶ Second, because it is through the correct application of preliminary references that the national courts are enabled to demonstrate a cooperative attitude towards the Court of Justice *par excellence*.³⁷ In this regard, it could perhaps be argued that the willingness of the national courts to refer questions to the Court of Justice might also indicate their willingness to give effect to its rulings.³⁸ Yet judicial cooperation does not need to be based on mutual understanding: it can highlight conflicts and power struggles.³⁹ Ascertaining the source of this willing-

³¹ Court of Justice, judgment of 24 June 1969, case 29/68, *Milch, Fett und Eierkontor v. Hauptzollamt Saarbrücken*; see also H. SCHERMERS, *Judicial Protection in the European Communities*, Den Hague: Kluwer, 1976, who at p. 392 showed that, at least until the 1970s, most national courts seemed to support this rule.

³² CJEU, Recommendations of 6 November 2012 to national courts and tribunals in relation to the Initiation of preliminary ruling proceedings.

³³ E-mail correspondence with the Court of Justice, through the Press and Information Unit, received on 9 March 2017, on file with the Authors.

³⁴ Theories on dialogue define dialogues as a process in which "there is no attempt to gain points, or to make your particular view prevail. Rather, whenever any mistake is discovered on the part of anybody, everybody gains. It's a situation called win-win [...] in which we are not playing a game against each other, but with each other. In a dialogue, everybody wins". D. BOHM, L. NICHOL, *On Dialogue*, London, New York: Routledge, 1996, p. 7; M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court*, cit.

³⁵ J. LANGER, *The Preliminary Ruling Procedure*, cit.; see also R. BARENTS, *Procedures en procesvoering voor het Hof van Justitie en het Gerecht van eerste aanleg van de EG*, Deventer: Kluwer, 2005.

³⁶ T. TRIDIMAS, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, in *International Journal of Constitutional Law*, 2012, p. 737 *et seq.*

³⁷ S. PRECHAL, *Communication Within the Preliminary Rulings Procedure Responsibilities of the National Courts*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 754 *et seq.*

³⁸ H. SCHERMERS (ed.), *Judicial Protection in the European Communities*, The Hague, London, New York: Springer, 1979, p. 392.

³⁹ E. PAUNIO, *Conflict, Power, and Understanding*, cit.

ness or unwillingness would require inquiry into national courts' perceptions of EU law,⁴⁰ and a sociological inquiry into a Member State's approach to the EU as such,⁴¹ which is not the objective of this *Article*, as discussed further in section II.3, *infra*.

We focus on classifying national courts' follow-up judgments in terms of sincere cooperation. To this extent, the criteria to distinguish when national courts engage in sincere cooperation or uncooperation can be based on the two main positive obligations and three negative obligations binding the national courts according to Verhoeven.⁴² The positive obligations are that the courts should ensure the effective application of EU law and the protection of rights stemming from Union legislation, and the negative obligations are that they should refrain from measures which impede the effectiveness of EU law, the proper functioning of the internal market or the process of Union integration. National courts' behaviour in follow-up judgments can be assessed and categorised based on these criteria.

II.2. KNOWN CATEGORIES OF JUDICIAL COOPERATION AND UNCOOPERATION

When considered from the perspective of Verhoeven's criteria, Bogojević's findings all show varying degrees of judicial uncooperation.⁴³ Four different kinds of judicial interaction emerged from Sweden: interchanged, gapped, interrupted and silenced. *Interchanged* cooperation means that there is an interchange of values. The preliminary reference is absorbed into national law and applied as though it were national case law.⁴⁴ For example, in *Gävle Kraftvärme* the Court of Justice had clarified what "incinerator" meant under the Waste Incineration Directive.⁴⁵ The Swedish Supreme Court tasked a lower court to apply the criteria set out by the Court of Justice. In doing so, the lower court only referred to the Swedish Supreme Court ruling and not to the Court of Justice's ruling.⁴⁶ The lower national court did not therefore treat the preliminary reference as though the information had been provided by the Court of Justice.⁴⁷ *Gapped* cooperation signifies that there is a lack of judicial dialogue between the Court of Justice and the national court. There can be instances where a national court questions the validity of the Court of Justice's ruling.⁴⁸ For example, in *Billerud* the national court considered

⁴⁰ C.O. LENZ, G. GRILL, *The Preliminary Ruling Procedure and the United Kingdom*, cit.

⁴¹ P. CRAIG, *Report on the United Kingdom* in A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds), *The European Court and National Courts: Doctrine and Jurisprudence*, Oxford: Hart, 1998, p. 197.

⁴² M. VERHOEVEN, *The Costanzo Obligation: The Obligations of National Administrative Authorities in the Case of Incompatibility Between National Law and European Law*, Cambridge: Intersentia, 2011, p. 41.

⁴³ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

⁴⁴ *Ibid.*

⁴⁵ Court of Justice, judgment of 11 September 2008, case C-251/07, *Gävle Kraftvärme*.

⁴⁶ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

after receiving the Court of Justice's ruling whether the Court of Justice's interpretation of the Emissions Trading System Directive complied with the European Convention of Human Rights.⁴⁹ This was done without further references to the Court of Justice. *Interrupted* cooperation means that national law may in the meantime have been revised and/or facts added, rendering the preliminary reference useless while the procedure remains ongoing.⁵⁰ For example, in *Jan Nilsson* the relevance of the Court of Justice's answer to the question of whether mounted specimens fell under the regulation transposing the Convention on International Trade in Endangered Species became moot as the criminal offence for trading in such species was abrogated, leading to the criminal charges against Mr Nilsson being dropped.⁵¹ Finally *silenced* cooperation covers cases where the national court ignores the preliminary ruling.⁵² For example, in *Mickelsson and Roos* the national court ultimately cleared Mr Mickelsson and Mr Roos of the criminal charges on grounds different from the ones considered in the Court of Justice's ruling, which was not even mentioned.⁵³

While Bogojević's categories represent cases of uncooperative dialogue, Squintani and Rakipi's categories, focusing on the UK judiciary, represent three different cases of cooperative dialogue.⁵⁴ First, they identified cases of *full* cooperation, *i.e.* cases where the national court applies the Court of Justice's judgment to the letter. This was the case for example in *R v. Secretary of State for the Environment (ex parte Society of Birds)*.⁵⁵ Exactly in accordance with the Court of Justice's interpretation,⁵⁶ the House of Lords quashed the decisions handed down by the Court of Appeal and the High Court and declared invalid the Secretary of State's decision on the delineation of a special protection area under the Wild Birds Directive. Second, they identified cases of *fragmented* cooperation, where the Court of Justice decides to reformulate the question and the national court applies the Court of Justice's ruling inasmuch as it can be applied to the part of the answer it considers relevant. This category differs from Bogojević's *gapped* category in that in the latter the national court would omit certain parts of the issue when requesting a preliminary reference, and the Court of Justice would rule only on the other parts. In the former, the national court does not omit any part of the problem in its

⁴⁹ Court of Justice, judgment of 17 October 2013, case C-203/12, *Billerud Karlsborg and Billerud Skärblacka*.

⁵⁰ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

⁵¹ Court of Justice, judgment of 23 October 2003, case C-154/02, *Nilsson*.

⁵² S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

⁵³ Court of Justice, judgment of 4 June 2009, case C-142/05, *Mickelsson and Roos*.

⁵⁴ L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, cit. Although after Brexit the UK no longer is an EU Member State, findings from this jurisdiction are still useful for unfolding the categories of judicial cooperation in follow-up judgments and to set a follow-up research agenda.

⁵⁵ *Ibid.*, p. 99.

⁵⁶ For the ruling of the Court of Justice see judgment of 11 July 1996, case C-44/95, *Regina v. Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds*.

question, but instead chooses to only engage with the parts of the preliminary reference response it deems helpful for its judgment, while ignoring the reasoning of the rest. This was done in *Client Earth*, concerning air quality management.⁵⁷ The Court of Justice rephrased the UK Supreme Court's question about a temporary exception under Art. 22 of the Air Quality Directive. In turn, the UK Supreme Court considered the Court of Justice's answer to solve part of the case. The Supreme Court was willing to apply the Commission's reasoning and deem Art. 22 non-mandatory, but the court considered this irrelevant as the legal deadlines had already expired.⁵⁸ Finally, Squintani and Rakipi introduced the *presumed* cooperation category, where the Court of Justice's judgment is not applied because the unsuccessful party before the Court of Justice withdraws from the proceedings, anticipating the decision being applied in full by the national judge. In such cases, the judicial cooperation chain breaks, and the national decision "disappears", making it impossible to gauge the national court's degree of compliance.⁵⁹ However, these are examples of presumed *cooperation* rather than uncooperation, because the parties dropped their claims in the anticipation of full compliance by the national judges. This happened for example in *Seaport (NI) and Others*.⁶⁰ Seaport withdrew its claim on delivery of the judgment, which had gone against it, so the case was never considered further by the national court.⁶¹

Squintani and Annink uncovered a fourth category of judicial cooperation when studying the behaviour in follow-up cases in the Netherlands, that of *withdrawn* cooperation.⁶² A peculiarity of the EU judiciary system is its unwritten *stare decisis* system, as stated in section II, *supra*. Consequently, preliminary questions which are similar to those in an earlier case will be answered by the Court of Justice recommending that the national court apply the Court of Justice's ruling in these earlier cases and withdraw its preliminary ruling request, as occurred in the *Stichting Greenpeace* case.⁶³ This case concerned a permit issued for the cultivation of genetically modified corn. As similar questions had already been asked, the Dutch Council of State (Raad van State) was asked to

⁵⁷ UK Supreme Court, judgment of 29 April 2015, [2015] UKSC 28, *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*.

⁵⁸ *Ibid.*

⁵⁹ This type of withdrawal must be distinguished from when, for instance, parties agree a settlement and the national court withdraws the reference request. In this case the Court of Justice will not rule on the matter, unless it has already given notice of a date on which its decision will be communicated. Art. 100, para. 1, of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012.

⁶⁰ Court of Justice, judgment of 20 October 2011, case C-474/10, *Seaport (NI) and Others*.

⁶¹ As confirmed by email from the case counsel James Maurici, Landmark Chambers, 8 March 2017.

⁶² L. SQUINTANI, D. ANNINK, *Judicial Cooperation in Environmental Matters*, cit.

⁶³ Court of Justice, judgment of 2 April 2009, joined cases C-359/08, C-360/08, C-361/08, *Stichting Greenpeace Nederland*; follow-up Dutch Council of State, judgment of 9 September 2009, C-200702758/3/M1.

withdraw its preliminary reference and apply *Azelvandre* instead.⁶⁴ This is exactly what the Dutch Council of State did.⁶⁵ In doing so, the Dutch Council of State included the questions asked in the preliminary reference and a substantial account of the answers provided in *Azelvandre*. It also based its final decision on these findings, showing full cooperation.

II.3. CHARTERING NEW WATERS: ITALY AND BELGIUM

Despite the pioneering work of Bogojević, Squintani, Rakipi and Annink, the vast majority of the map remains uncharted, and new categories of judicial cooperation could still be discerned.

To further develop the map of judicial cooperation in environmental matters, this *Article* focuses on judicial cooperation between the Court of Justice and the national courts in Italy and Belgium. Focusing on these jurisdictions is justified because Italian and Belgian courts have both used the preliminary reference procedure in environmental matters several times. Italy's legal tradition differs from the states in the previous studies. The Belgian legal tradition in environmental matter might not differ too much from the Dutch one. Yet Belgium's federal structure makes it an excellent candidate for assessing whether there can be cultural differences among courts within a single jurisdiction. This conclusion is reinforced by the fact that the Belgian legislator has the peculiar practice of enabling permit decisions by legislative act, as further discussed in section III, *infra*. This peculiarity has fostered an active role for the Belgian Constitutional Court in the context of judicial cooperation in environmental matters, something not encountered in any of the previous case studies.

Accordingly, as with the previous studies,⁶⁶ we searched the CURIA database for preliminary references from Italy and Belgium using the term "environment". The results were then filtered to exclude judgments which did not concern EU acts, as defined in Art. 288 TFEU, having as their primary or explicit secondary objective the protection of the environment.

As noted above, we focus on classifying follow-up judgments as judicial cooperation or uncooperation based on the criteria set out in section II.1. It goes without saying that the behaviour of national courts in follow-up judgments can be influenced by several factors, firstly related to the quality of communication,⁶⁷ such as the quality of the preliminary reference,⁶⁸ the translating officers' work,⁶⁹ and whether the Court of Justice

⁶⁴ Court of Justice, judgment of 17 February 2009, case C-552/07, *Azelvandre*.

⁶⁵ Dutch Council of State, C-200702758/3/M1, cit.

⁶⁶ L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, cit.; L. SQUINTANI, D. ANNINK, *Judicial Cooperation in Environmental Matters*, cit.

⁶⁷ S. PRECHAL, *Communication Within the Preliminary Rulings Procedure*, cit.

⁶⁸ J. LANGER, *The Preliminary Ruling Procedure*, cit.

⁶⁹ M. BOBEK, *Landtová, Holubec, and the Problem of an Uncooperative Court*, cit.

wants to make a general point or solve the specific case before it.⁷⁰ Judgments clarifying theoretical aspects could cause national courts to consider the Court of Justice's ruling too theoretical to resolve the case in question.⁷¹ Judges might then choose not to apply such rulings.⁷² At times the Court of Justice tries to help preserve the interpretative uniformity of EU law by delivering *guidance cases*, which explain general principles or rules while presenting a specific criteria to guide national courts in solving the actual case.⁷³ A further step in controlling the outcome of national cases is when the Court of Justice delivers *outcome cases*,⁷⁴ where the Court of Justice states expressly that a Member State, for instance, has failed to implement a directive correctly, thus leaving to the national court only the task of annulling the contested national measure.

All these variables are important in understanding why a national court behaves in a particular way, but they are irrelevant to this *Article's* mapping exercise. Indeed, as in the previous studies, the question at the heart of this *Article* is *how* national courts react to a Court of Justice's ruling, and not *why* they react that way. The variables indicated in this section are relevant for follow-up studies explaining the meaning and relevance of the finding presented in this *Article*, as discussed in section V, *infra*. Such follow-up studies will also have to take into account the meta-judicial aspects related to judicial cultures and national attitudes towards the EU integration process. The comparative methodology needed to link the national experiences together would require a rigid framework to avoid comparing "apples" and "pears", thus requiring a broad-based interdisciplinary research project. Accordingly, while we keep these variables in mind, we do not address the "why" question in this *Article*, but confine ourselves to indicating whether, based on the information available, any or all of the variables mentioned in this section can be observed. This does not detract from this *Article's* relevance. It is not possible to organise and conduct research into the reasons for how the judicial dialogue in environmental matters is shaped before obtaining empirical data on this dialogue.

III. ITALIAN AND BELGIAN JUDGES AS EUROPEAN JUDGES IN THE CONTEXT OF PRELIMINARY REFERENCES IN ENVIRONMENTAL MATTERS

As presented in section II.2, so far *eight* categories of judicial cooperation and uncooperation have been identified. Five forms of cooperation emerge from the conduct of Italian and Belgian courts in environmental matters: full, presumed, fragmented, interrupted and gapped. One new form of cooperation was also distinguished: *suspended*

⁷⁰ G. DAVIES, *Activism Relocated: The Self-restraint of the European Court of Justice in Its National Context*, in *Journal of European Public Policy*, 2012, p. 76 *et seq.*

⁷¹ M. BOBEK, Landtová, Holubec, and the Problem of an Uncooperative Court, *cit.*

⁷² *Ibid.*

⁷³ T. TRIDIMAS, *Knocking on Heaven's Door*, *cit.*

⁷⁴ *Ibid.*

cooperation. These categories are discussed below, starting with the two categories to emerge both in Italy and Belgium, full and presumed cooperation (sections III.2 and III.3, respectively). Evidence of fragmented, interrupted and gapped cooperation was only found in Italy (sections III.4 to III.6). We will then describe the new form, suspended cooperation, visible in both jurisdictions (section III.7). Before presenting the empirical data, section III.1 provides a general overview of the context in Italy and Belgium.

III.1. PRELIMINARY REFERENCES IN ENVIRONMENTAL MATTERS IN ITALY AND BELGIUM

a) Italy.

The preliminary reference procedure in environmental cases is used relatively often by Italian national courts compared other Member States.⁷⁵ Between 1986 and April 2019, 46 judgments concerning EU environmental law were handed down by the Court of Justice in referrals from national courts from Italy, not counting joined cases.⁷⁶ Of the 46 judgments, thirteen follow-up cases could be retrieved. Four of these cases mainly concern nature conservation,⁷⁷ three waste management,⁷⁸ two renewable energy sources,⁷⁹ two environmental damage,⁸⁰ one genetically modified organisms⁸¹ and one landscape

⁷⁵ Evincible from, L. KRÄMER, *The Commission's Omission to Use Article 267 TFEU as a Tool to Enforce EU Environmental Law*, in *Journal for European Environmental & Planning Law*, 2016, p. 255 et seq.

⁷⁶ Counting for the joined cases, the total number is 64.

⁷⁷ Court of Justice, judgment of 3 April 2014, case C-301/12, *Cascina Tre Pini*; follow-up case Italian Council of State, judgment of 30 March 2015, no. 1635/2015; Court of Justice, judgment of 21 July 2011, case C-2/10, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*; follow-up case Italian Regional Administrative Court (Puglia), judgment of 3 May 2013, no. 674/2013; Court of Justice, judgment of 21 December 2016, case C-444/15, *Associazione Italia Nostra Onlus*; follow-up case Italian Regional Administrative Court (Veneto), judgment of 13 November 2017, no. 1005/2017; and Court of Justice, judgment of 16 September 1999, case C-435/97, *WWF and Others*; follow-up case Italian Regional Administrative Court (Bolzano), judgment of 12 January 2000, no. 114/2000.

⁷⁸ Court of Justice, judgment of 28 July 2016, case C-147/15, *Edilizia Mastrodonato*; follow-up case Italian Council of State, judgment of 21 September 2017, no. 4690/2017; Court of Justice, judgment of 11 November 2004, case C-457/02, *Niselli*; follow-up case Italian First Instance Court (Terni), judgment of 29 June 2005, no. 546/2005; and Court of Justice, judgment of 25 February 2010, case C-172/08, *Pontina Ambiente*; content of the follow-up case available only via the judgment of the Italian Court of Cassation, judgment of 24 June 2016, no. 13123/2016.

⁷⁹ Court of Justice, judgment of 14 April 2005, joined cases C-128/03 and 129/03, *AEM Torino*; follow-up case Italian Council of State, judgment of 15 July 2005, no. 6362/2005; and Court of Justice, judgment of 26 November 2014, case C-66/13, *Green Network*; follow-up case Italian Council of State, judgment of 7 July 2015, no. 5421/2015.

⁸⁰ Court of Justice: judgment of 9 March 2010, case C-378/08, *ERG and Others (ERG I)* [GC]; judgment of 9 March 2010, joined cases C-379/08 and 380/08, *ERG and Others (ERG II)* [GC]; in both cases the follow-up case is Italian Regional Administrative Court (Sicilia) no. 2117/2012.

⁸¹ Court of Justice, judgment of 6 September 2012, case C-36/11, *Pioneer Hi Bred Italia*; follow-up case Italian Council of State, judgment of 11 September 2012, no. 2361/2016.

protection.⁸² The other cases could not be retrieved: four Court of Justice's judgments were too recent at the time we gathered our data to have follow-up cases;⁸³ the difficulties with retrieval for the rest lay in the repartition of competences in environmental matters under the Italian legal order and its enforcement system. Although the legislative competence in environmental matters is reserved to the central legislator under Art. 117 of the Italian Constitution, regulatory, application and enforcement activities are shared with the regions and lower territorial bodies. The majority of environmental law falls under Italian administrative law, explaining why most of the follow-up cases which could be retrieved come from the administrative courts, in particular from the court of last resort in administrative cases, the Italian Council of State (Consiglio di Stato). But enforcement can also occur in criminal law, especially in the field of waste management. Most of the cases which could not be retrieved were from criminal investigation judges,⁸⁴ whose judgments are difficult to obtain in general, as these are lower instance judges tasked with guiding the pre-judicial phase. Some matters can also concern fiscal measures, in particular environmental taxes, which explains why certain referrals come from tributary courts, pertaining to the civil law circuit in Italy. The follow-up judgments from these courts are also generally difficult to find, unless they reach higher courts.⁸⁵

b) Belgium.

Between 28 February 1982 and 12 June 2019, 31 environmental law judgments were published by the Court of Justice following preliminary references from Belgium. Of the 31 cases, 18 follow-up judgments could be retrieved:⁸⁶ six on environmental impact assessments,⁸⁷ one on habitats conservation,⁸⁸ six on waste management,⁸⁹ two

⁸² Court of Justice, judgment of 6 March 2014, case C-206/13, *Siragusa*; follow-up case Italian Regional Administrative Court (Sicilia), judgment of 7 December 2016, no. 2264/2016.

⁸³ Court of Justice: judgment of 28 March 2019, joined cases C-487/17 to 489/17, *Verlezza and Others*; judgment of 4 October 2018, case C-242/17, *L.E.G.O.*; judgment of 28 February 2018, case C-117/17, *Comune di Castelbellino*; judgment of 26 July 2017, joined cases C-196/16 and C-197/16, *Comune di Corridonia*.

⁸⁴ E.g., Court of Justice, judgment of 28 March 1990, case C-359/88, *Zanetti and Others*.

⁸⁵ E.g., *Pontina Ambiente*, cit.

⁸⁶ Mind that with regard to Court of Justice, judgment of 1 April 2004, joined cases C-53/02 and C-217/02, *Commune de Braine-le Château and Others*, a follow-up judgment for each respective case is included. Further to that, Court of justice, judgment of 26 September 2013, case C-195/12, *IBV & Cie*, yielded two follow-up judgments.

⁸⁷ Court of Justice, judgment of 7 June 2018, case C-671/16, *Inter-Environnement Bruxelles and Others (II)*; follow-up case Belgian Council of State (FR), judgment of 24 October 2018, no. 242.764; Court of Justice, judgment of 27 October 2016, case C-290/15, *Patrice D'Oultremont and Others*; follow-up case Belgian Council of State (FR), judgment of 16 November 2017, no. 239.886; Court of Justice, judgment of 9 April 2014, case C-225/13, *Ville d'Ottignies-Louvain-la-Neuve and Others*; follow-up case Belgian Council of State (FR), judgment of 11 August 2015, no. 232.028; Court of Justice, judgment of 28 February 2012, case C-41/11, *Inter-Environnement Wallonie and Terre wallonne* [GC]; follow-up case Belgian Council of State (FR), judgment of 13 November 2013, no. 225.473; Court of Justice, judgment of 22 March 2012, case C-567/10, *Inter-Environnement Bruxelles and Others (I)*; follow-up case Belgian Constitutional Court (NL), judgment of 19 July 2012, no. 95/2012; Court of Justice, judgment of 17 March 2011, case C-275/09, *Brussels Hoofd-*

on judicial protection in environmental matters,⁹⁰ and three on animal trade and capture.⁹¹ Six of those for which follow-up judgments could not be retrieved were preliminary questions originating from courts other than the Belgian Council of State (Conseil d'Etat/Raad van State) or the Belgian Constitutional Court (Cour Constitutionnelle/Grondwettelijk Hof).⁹² Three were too recent at the time that the empirical data was collected.⁹³ No clear reason could be construed for the rest.⁹⁴

In Belgium, the Regions are mainly competent in matters relating to environmental protection.⁹⁵ An important part of environmental law is administrative law and administrative regulations and permit decision fall under the jurisdiction of the Belgian Council of State, from which most of the retrieved cases originate. The Belgian Constitutional Court is competent to review acts of the federal or regional parliaments (called decrees or ordinances). This court can also decide to refer questions to the Court of Justice, because it combines constitutional review with the review of conformity of the legislation with EU and International law. Enforcement can also be conducted through criminal or civil law.

stedelijk Gewest and Others; follow-up case Belgian Council of State (NL), judgment of 28 February 2013, no. 222.678.

⁸⁸ Court of Justice, judgment of 21 July 2016, joined cases C-387/15 and C-388/15, *Hilde Orleans and Others*; follow-up case Belgian Council of State (NL), judgment of 20 December 2016, no. 236.837.

⁸⁹ *IBV & Cie*, cit.; follow-up case Belgian Council of State (NL), judgment of 12 November 2014, no. 229.118 and Belgian Constitutional Court (FR), judgment of 17 December 2015, no. 180/2015; Court of Justice, judgment of 19 April 2012, case C-121/11, *Pro-Braine and Others*; follow-up case Belgian Council of State (FR), judgment of 27 May 2013, no. 223.602; Court of Justice, judgment of 17 June 2010, joined cases C-105/09 and 110/09, *Terre Wallonne and Inter-Environnement Wallonie*; follow-up case Belgian Council of State (FR), judgment of 13 November 2013, no. 225.473; Court of Justice, order of 28 January 2005, case C-208/04, *Inter-Environnement Wallonie*; follow-up case Belgian Council of State (FR), judgment of 23 March 2006, no. 156.825; *Commune de Braine-le Château*, cit.; follow-up case Belgian Council of State (FR), judgment of 11 July 2005, no. 147.570 and Belgian Council of State (FR), judgment of 16 October 2008, no. 187.140; Court of Justice, judgment of 18 December 1997, case C-129/96, *Inter-Environnement Wallonie v. Région wallonne*; follow-up case Belgian Council of State (FR), judgment of 25 January 2001, no. 92.669.

⁹⁰ Court of Justice, judgment of 16 February 2012, case C-182/10, *Solvay and Others*; follow-up case Belgian Constitutional Court (NL), judgment of 21 February 2013, no. 11/2013; Court of Justice, judgment of 18 October 2011, joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus and Others* [GC]; follow-up case Belgian Council of State (FR), judgment of 14 July 2014, no. 228.078.

⁹¹ Court of Justice, judgment of 19 June 2008, case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers Andibel*; follow-up case Belgian Council of State (NL), judgment of 9 March 2009, no. 191.161; Court of Justice, order of 1 October 2004, case C-480/03, *Clerens*; follow-up case Belgian Constitutional Court (FR), judgment of 9 February 2005, no. 28/2005.

⁹² E.g., Court of Justice, judgment of 10 February 1982, case 21/81, *Bout*.

⁹³ Court of Justice: judgment of 29 July 2019, case C-411/17, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* [GC]; judgment of 12 June 2019, case C-321/18, *Terre Wallonne and Inter-Environnement Wallonie*; and judgment of 12 June 2019, case C-43/18, *CFE*.

⁹⁴ E.g., Court of Justice, judgment of 21 April 2005, case C-186/04, *Housieux*.

⁹⁵ Art. 6, paras 1-2, Loi spéciale du 8 août 1980 de réformes institutionnelles (Special Law on institutional reform of 8 August 1980).

III.2. FULL COOPERATION

In light of the principle of sincere cooperation, national courts have to conduct themselves cooperatively in applying the Court of Justice's guidance. Italian and Belgian courts tend to cooperate fully with the Court of Justice. Indeed, the relative majority of national cases – seven out of thirteen for Italy⁹⁶ and sixteen out of eighteen for Belgium⁹⁷ – fall under the category of full cooperation. In these cases, the national courts applied the EU provisions in the manner that the Court of Justice explained. Two cases, one per Member State, will illustrate this full cooperation.

For Italy, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* concerns an Italian regional measure introducing a *general* prohibition on the construction of wind farms in and near areas covered by the Natura 2000 network.⁹⁸ The main question put to the Court of Justice was essentially whether the Italian measure was a legally imposed more stringent protective measure under Art. 193 TFEU.⁹⁹ The Court of Justice answered this question in the affirmative. After concluding that the Italian measure does indeed fall under Art. 193 TFEU, the Court of Justice cleared the measure on condition that the principles of non-discrimination and proportionality are respected.

In its follow-up ruling, the Italian Regional Administrative Court (Puglia) quoted the operative part of the Court of Justice's ruling¹⁰⁰ and applied the two conditions to determine whether the regional measure complied with EU law,¹⁰¹ concluding that it did.

For Belgium, the follow-up case following the Court of Justice's judgment in *Boxus and Others*¹⁰² represents a case where full cooperation was achieved thanks the joined efforts of the Belgian Council of State and Belgian Constitutional Court, which however ended with a peculiar twist. This case concerns authorisation and consent orders for works and the operation of installations in connection with *inter alia* the Liège-Bierset and Brussels South Charleroi airports and the transport links to them. While actions against the permits were being brought before the Conseil d'Etat, the Walloon parlia-

⁹⁶ See cases *Edilizia Mastrodonato*, cit.; *Cascina Tre Pini*, cit.; *AEM Torino*, cit.; *Green Network*, cit.; *Pontina Ambiente*, cit.; *WWF and Others*, cit.; and *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, cit.

⁹⁷ See cases *Inter-Environnement Bruxelles and Others (I)*, cit.; *Hilde Orleans and Others*, cit.; *Patrice d'Oultremont and Others*, cit.; *Ville d'Ottignies-Louvain-la-Neuve and Others*, cit.; *IBV & Cie*, cit.; *Pro-Baine ASBL*, cit.; *Inter-Environnement Bruxelles and Others (II)*, cit.; *Solvay and Others*, cit.; *Brussels Hoofdstedelijk Gewest*, cit.; *Terre Wallonne and Inter-Environnement Wallonie*, cit.; *Inter-Environnement Wallonie v. Région wallonne*, cit.; *Clerens*, cit.; *Antoine Boxus and Others*, cit.; *Inter-Environnement Wallonie*, cit.; *Commune de Braine-le-Chateau*, cit.; and *Inter-Environnement Wallonie and Terre wallonne*, cit.

⁹⁸ *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, cit.

⁹⁹ On the classification of such measure as such, see L. SQUINTANI, *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law*, Cambridge: Cambridge University Press, 2019, p. 13 et seq.

¹⁰⁰ Italian Regional Administrative Court (Puglia), no. 674/2013, section "Fatto", para. 6.

¹⁰¹ *Ibid.*, section "Diritto", para. 1.1.

¹⁰² *Boxus and Others*, cit.

ment and government ratified them on the basis of overriding reasons of public interest, giving them legislative status and thus depriving the Belgian Council of State of jurisdiction.¹⁰³ Jurisdiction therefore shifted to the Belgian Constitutional Court, before which several actions for annulment of the ratifying decree were brought. This caused the Belgian Council of State to stay the proceedings and to refer preliminary questions to the Court of Justice, on the compatibility of the Walloon Parliament's act with the Environmental Impact Assessment Directive and the Aarhus Convention. Similar questions were referred to the Belgian Constitutional Court,¹⁰⁴ which in turn referred similar questions to the Court of Justice.¹⁰⁵

The Court of Justice first noted that a simple ratifying act without a substantive legislative process enabling the conditions in Art. 1, para. 5, of the Directive to be fulfilled, is not sufficient to exclude a project from the ambit of the Directive.¹⁰⁶ The Court of Justice then noted that it must be possible to subject such a legislative act to review by an independent and impartial body established by law. If such a review option is lacking, any court before which a claim is brought must carry out the review and may disapply that legislative act.¹⁰⁷ The case is then sent back to the Belgian Council of State for further ruling. However, so long as the contested legislative act is not annulled, the Belgian Council of State continues to have no jurisdiction. It is therefore necessary to turn to the Belgian Constitutional Court.¹⁰⁸

In *Solvay* the Court of Justice had ruled almost identically to the judgment in *Boxus*, though a few more questions were answered regarding the Aarhus Convention, which fall outside the scope of this research.¹⁰⁹ The judgment was quoted extensively by the Belgian Constitutional Court on multiple occasions¹¹⁰ and the contested legislative act was annulled.¹¹¹ We returned to the Belgian Council of State, which again had jurisdiction.

The Belgian Council of State referenced the Court of Justice's ruling,¹¹² but did not delve into its substance. It claimed jurisdiction in line with the Court of Justice's ruling, nonetheless, therefore cooperating fully. Interestingly, however, when considering the merits, the Belgian Council of State concluded that the project did not transgress the limits set out in the Directive and was therefore outside its scope of application, clearing the pro-

¹⁰³ *Commune de Braine-le Château*, cit., para. 14.

¹⁰⁴ Belgian Constitutional Court (FR), judgment of 22 November 2012, no. 144/2012, p. 3 *et seq.*

¹⁰⁵ *Solvay and Others*, cit.

¹⁰⁶ *Boxus and Others*, cit., para. 48.

¹⁰⁷ *Ibid.*, para. 57.

¹⁰⁸ Belgian Constitutional Court (FR), no. 144/2012, cit.

¹⁰⁹ *Solvay and Others*, cit., para. 80.

¹¹⁰ Belgian Constitutional Court (FR), no. 144/2012, cit., paras B.9.2, B.9.3, B.11, B.12.1, B.12.2, B.12.3, and B.13.

¹¹¹ *Ibid.*, para. B.15.3.

¹¹² Belgian Council of State (FR), judgment of 14 July 2014, no. 228.078, p. 2.

ject.¹¹³ It is of course debateable whether this outcome is in line with EU law. Yet if any kind of uncooperation occurred, it did not concern the Belgian Council of State's conduct in the follow-up judgment on the point of its jurisdiction. It cooperated fully on that question.

III.3. PRESUMED COOPERATION

In a study focusing on follow-up judgments, it is logical to expect that a judgment from the national referring court will follow the Court of Justice's. However, it is possible that the party losing the case before the Court of Justice will *withdraw* from the national proceedings. In such cases the judicial cooperation chain will end, resulting in there being no follow-up judgment from the referring court on the points raised in the preliminary ruling.

An example of this form of cooperation in the Italian legal order is *Associazione Italia Nostra Onlus*.¹¹⁴ This case concerns both the meaning and validity of Art. 3, para. 3, of the Strategic Environmental Assessment Directive. Italian public authorities had agreed on a construction project planned for an island in the Venetian Lagoon without performing an environmental assessment, despite the fact that part of the Lagoon is part of the Natura 2000 network under the Habitats Directive. *Associazione Italia Nostra Onlus*, an environmental non-governmental organisation (ENGO), disagreed with this decision and appealed before the administrative judge. The case turned on the meaning and validity of Art. 3, para. 3, of the Directive, establishing that for small areas at local level an environmental assessment should be carried out only if Member States so decide. The Court of Justice first ruled that this provision is valid and then clarified that the term "small areas at local level" must be defined with reference to the size of the area concerned where the plan or programme is prepared and/or adopted by a local authority, as opposed to a regional or national authority, and the area within the territorial jurisdiction of the local authority is small relative to that territorial jurisdiction.

Based on the Court of Justice's judgment, the ENGO withdrew the point in its appeal based on the Directive, and continued proceedings only on the remaining points.¹¹⁵ Presumably, the ENGO expected the Italian court to follow the Court of Justice's judgment and to conclude accordingly. The ENGO presumed therefore the national court's full cooperation with the Court of Justice.

Something similar occurred in the *Siragusa* case,¹¹⁶ in which however, another form of cooperation, or rather uncooperation, seemed also to emerge. Accordingly, this case is dealt with under the section on gapped cooperation (section III.6, *infra*).

A case of presumed cooperation can also be retrieved from Belgium in *Nationale Raad van Dierenkwekers*. This case deals with an absolute prohibition on importing, hold-

¹¹³ *Ibid.*, p. 9 *et seq.*

¹¹⁴ *Associazione Italia Nostra Onlus*, cit.

¹¹⁵ Italian Regional Administrative Court (Veneto), no. 1005/2017, cit., section "Fatto".

¹¹⁶ *Siragusa*, cit.

ing or trading in mammals belonging to species not included on a list established by Royal Decree. The Belgian Council of State considers that this prohibition undeniably influenced trade.¹¹⁷ It then referred questions to the Court of Justice on whether this prohibition conflicts with Art. 30 TEC [current 34 TFEU]. The Court of Justice ruled that Arts 28 and 30 TEC and/or the Convention on International Trade in Endangered Species Regulation¹¹⁸ do not preclude national legislation such as that at issue in the proceedings, so long as it can be justified.¹¹⁹ The Court of Justice then set out the requirements to be applied by the referring court to determine whether the contested decree complied with EU law.

The Belgian Council of State, having received the judgment, reopened the proceedings. However, the parties did not enter a request to continue proceedings within 30 days, which triggered a fast-track procedure.¹²⁰ Since the auditor recommended the annulment of the decree and the applicants did not object properly, the decree was annulled.¹²¹ While the Belgian Council of State did not reflect on the actual contents of the Court of Justice's ruling, cooperation can be presumed, since the parties were seemingly unwilling to contest the outcome.

III.4. FRAGMENTED COOPERATION

Referring courts do not always follow the Court of Justice's judgment in its entirety. National courts can separate what they consider relevant to resolving the dispute from what they consider irrelevant. This we term *fragmented* cooperation.

The follow-up cases in *ERG I* and *ERG II* present elements of this form of cooperation.¹²² Both concerned a dispute over the restoration of a polluted site on the basis of the Environmental Liability Directive. The Italian authorities had charged several parties, including ERG, with tasks in this respect and in particular ordered the construction of a containment wall on part of the site. The national court asked questions on the interpretation of the Directive in three different proceedings (two of which were joined by the Court of Justice). In both cases, the Court of Justice stated *of its own motion* that the scope of application of the Directive is limited in time. It nevertheless left it to the national court to decide whether the cases fell within the scope of application of the Directive. It then interpreted the Directive as requested by the national court.

In *ERG I* the Court of Justice concluded in short that the Directive was not an obstacle to Italy's interpretation of the casual link criterion, as long as the polluter pays prin-

¹¹⁷ *Nationale Raad van Dierenkwekers*, cit., para. 11.

¹¹⁸ Council Regulation (EEC) 3626/82 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora.

¹¹⁹ *Nationale Raad van Dierenkwekers*, paras 33-36.

¹²⁰ Belgian Council of State (NL), judgment of 9 March 2009, no. 191.161, p. 3.

¹²¹ *Ibid.*

¹²² *ERG I* [GC], cit., and *ERG II* [GC], cit.

principle was respected.¹²³ It also decided that proving fault, negligence or intent is not required under Arts 3, para. 1, 4, para. 5, and 11, para. 2, of the Directive, as long as the authorities conduct a prior investigation into the origin of the pollution found, and establish a causal link between the activities of the operators to whom the remedial measures are directed and the pollution.¹²⁴

In *ERG II* the Court of Justice decided in particular that the Directive permits competent authorities to alter substantially measures for remedying environmental damage chosen at the conclusion of a procedure conducted on a consultative basis with the operators concerned and which had already been implemented or begun to be put into effect. However, it subjected this competence to a series of conditions, which were for the national court to review.¹²⁵

In the follow-up proceedings, in which both Court of Justice judgments were considered in one case, the national court clearly quotes the relevant passages of the Court of Justice's ruling and applies the criteria set out therein to determine the various aspects of the case,¹²⁶ showing full collaboration.

However, in the follow-up judgment there is no trace of the part of the Court of Justice's rulings concerning the applicability of the Directive to the subject matter of the dispute. The relevant passages of the Court of Justice's ruling are not mentioned by the national court. The Court of Justice had also left this matter to the national court to decide. The silence of the follow-up judgment as regards this aspect of the Court of Justice's rulings cannot therefore be considered a case of gapped cooperation, *i.e.* a case in which the national court disagrees with the Court of Justice. The cooperation was very successful as regards the core parts of the Court of Justice's rulings. Accordingly, this is an example of fragmented cooperation.

III.5. INTERRUPTED COOPERATION

In one case the Italian Council of State did not sincerely cooperate with the Court of Justice, and engaged in interrupted cooperation. This means that by the time the follow-up judgment was handed down, national law may have been revised and/or the facts changed, rendering the preliminary reference useless.¹²⁷ This is what seems to have happened in the follow-up judgment to *Pioneer Hi Bred Italia*.¹²⁸

This case concerns the interpretation of Art. 26 of Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms (GMOs). Pio-

¹²³ *ERG I* [GC], cit., operative part.

¹²⁴ *Ibid.*

¹²⁵ *ERG II* [GC], cit., operative part.

¹²⁶ Italian Regional Administrative Court (Sicilia), no. 2117/2012, cit.

¹²⁷ S. BOGOJEVIĆ, *Judicial Dialogue Unpacked*, cit.

¹²⁸ *Pioneer Hi Bred Italia*, cit.

neer challenged a note from the Italian Ministry of Agricultural, Food and Forestry Policies informing Pioneer that, pending the adoption by the regions of rules to ensure the coexistence of conventional, organic and genetically modified crops, it could not consider the company's application for permission to cultivate hybrids of genetically modified maize, even when listed in the EU common catalogue of varieties of agricultural plant species. The Italian Council of State had doubts about the meaning of EU law on this issue and addressed the Court of Justice for clarification. The Court of Justice answered that EU law prohibits first subjecting to a national authorization procedure the use and marketing of those GMOs varieties which are authorised pursuant to Art. 20 of Regulation (EC) 1829/2003¹²⁹ and those included in the EU common catalogue. Second, national authorities cannot even issue a general ban on the cultivation of such GMOs pending the adoption of coexistence measures to avoid the unintended presence of genetically modified organisms in other crops.

In light of this judgment it is not surprising that Pioneer expected no longer to be restricted in its undertaking.¹³⁰ Yet the Italian Council of State sought to wind down the clock in its follow-up judgment. Rather than issuing its verdict, it asked the relevant Ministry to express its opinion on the matter in light of the Court of Justice's ruling. This was done not once, but several times as the Ministry's answers were not conclusive. In the meanwhile, the Italian regulatory framework for GMOs changed. While in all other follow-up judgments concerning the Italian Council of State analysed in this *Article*, a follow-up judgment was obtained within two years of the Court of Justice's judgment, in this case, it took the Italian Council of State four years to issue its verdict. By that time, the Italian legal framework was so altered that the Italian Council of State decided that it was not possible to continue the proceedings and Pioneer would have to start new proceedings should it continue to want to. Not once in its judgment did the Italian Council of State engage with the Court of Justice's judgment, in striking contrast with what we observed in all other follow-up judgments concerning this court as reviewed in this research.

III.6. GAPPED COOPERATION

Following the case of interrupted cooperation described in the previous section, *Siragusa*¹³¹ presents the contours of a gapped cooperation. Two things occurred in the follow-up case. This case concerns the interpretation of Art. 17 of the Charter of Fundamental Rights of the European Union and of the principle of proportionality in the context of proceedings in which Mr Siragusa appealed against a decision to the Regione Sicilia mandating Mr Siragusa to restore a site on which Mr Siragusa had built without permis-

¹²⁹ Regulation (EC) 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.

¹³⁰ Italian Council of State, no. 2361/2016, cit.

¹³¹ *Siragusa*, cit.

sion. In the preliminary reference, the Italian court had made a link between landscape protection and EU environmental law. The Commission, however, concluded that the case did not fall under any provision of EU environmental law. In light of the lack of link with EU law, the Court of Justice ruled the matter outside its jurisdiction.

Having received the Court of Justice's judgment, the Italian Regional Administrative Court (Sicilia) asked Mr Siragusa whether he wanted to continue the proceedings.¹³² Mr Siragusa did not reply to the Italian Regional Administrative Court (Sicilia), at least not within the time limit of 90 days available in this regard, and therefore the Italian Regional Administrative Court (Sicilia) ended the proceedings.

In light of the above, this case presents all the characteristics to be qualified as presumed cooperation, as discussed in section III.3, *supra*. It does not seem unreasonable to consider that Mr Siragusa expected the national court to cooperate fully with the Court of Justice and therefore that the national court would have considered the arguments based on EU law as unfounded. However, the Italian Regional Administrative Court (Sicilia)'s follow-up judgment contains another element which suggests that the Italian court did not completely agree with the Court of Justice. Indeed, when deciding upon the costs of the proceedings, the Italian Regional Administrative Court (Sicilia) indicated circumstances allowing the granting of an exception to the rule that the losing party, Mr Siragusa in this case, should pay the winning party's costs, the Regione Sicilia. According to the national court, the special circumstances consisted in the doubtful compatibility of the Regione Sicilia's order with EU law. Despite the Court of Justice's judgment indicating the non-applicability of EU law to the case concerned, the Italian court seemed convinced that this was in doubt. Accordingly, this case could also be categorised as gapped cooperation.

III.7. SUSPENDED COOPERATION

Among the follow-up cases retrieved in this *Article*, there are two – one per jurisdiction – which while hinting at the national court's intention to cooperate fully with the Court of Justice, cannot be considered examples of full cooperation because the national courts suspended the proceedings and made a fresh preliminary reference rather than render judgment. In such cases, the cooperation with the Court of Justice is *suspended* while awaiting the ruling in the further reference. Judicial cooperation or uncooperation will therefore only become visible after an answer is received to the further reference.

This occurred in Italy in *Niselli*,¹³³ which ended with a further reference to the Italian Constitutional Court. This case concerns criminal proceedings against Antonio Niselli who was charged with managing waste without a permit in breach of national law transposing the Old Waste Directive. In 2002 a subsequent Italian law had redefined the concept of

¹³² Italian Regional Administrative Court (Sicilia), no. 2264/2016, cit.

¹³³ *Niselli*, cit.

waste in such a manner that Mr Niselli's behaviour no longer constituted a breach of Italian law. Yet the Italian First Instance Court (Terni), hearing the case, had doubts about the compatibility of this subsequent Italian law with the definition of waste as prescribed under the Old Waste Directive. Accordingly, it turned to the Court of Justice for clarification of the meaning of the Directive. The Court of Justice concluded essentially that the Directive could not be interpreted in the manner indicated by the subsequent Italian law. In the follow-up judgment, the Italian First Instance Court (Terni), quotes the relevant passages from the Court of Justice's ruling and concludes that Italian law is incompatible with the Directive.¹³⁴ However, the Italian court doubted whether it was correct in such a case to set aside the conflicting national norm, given that this could for instance lead to criminal charges. In this regard the national court quoted the landmark cases of the Court of Justice on the direct effect of directives in criminal proceedings to sustain its doubts.¹³⁵ The Italian court framed its doubts in the context of the Italian Constitution and therefore decided that the matter needed to be considered by that court.

We also retrieved an example of suspended cooperation from Belgium. As in the Italian case, the reference in Belgium was made to the national Constitutional Court. This example concerns one of the follow-up cases to *Commune de Braine-le Château and Others*.¹³⁶ In this case, one of the applicants challenged a permit granted to BIFFA Waste Services SA to extend and operate a landfill site in Braine-le-Château. The other applicant sought the annulment of a ministerial order, allowing the Société anonyme "Propreté, Assainissement, Gestion de l'environnement" (PAGE) to continue operating a landfill site at "Les trois burettes" in Mont-Saint-Guibert. The Belgian Council of State essentially asked the Court of Justice whether Art. 7 of the Old Waste Directive required Member States to mark on a geographical map the precise locations of a planned waste disposal site, or to determine location criteria which are sufficiently precise to ascertain whether applicants for a permit fall within the management framework, and whether not having done so within the period prescribed precludes Member States from issuing individual permits to operate waste disposal installations, such as landfill sites. Thirdly, the Court of Justice was asked if Art. 7, para. 1, of the Directive meant that drawing up plans relating to suitable disposal sites or installations must be drawn up before the period prescribed for transposing the Directive into national law, or whether this must be done within a reasonable period, which may exceed the transposition-deadline. The Court of Justice first ruled that it is indeed required either to pinpoint locations on a geographical map, or to draw up sufficiently precise selection criteria within a reasonable period,

¹³⁴ Italian First Instance Court (Terni), no. 546/2005, cit.

¹³⁵ On this matter, see extensively, L. SQUINTANI, J. LINDEBOOM, *The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction Between Obligations and Mere Adverse Repercussions*, in *Yearbook of European Law*, 2019, p. 18 et seq.

¹³⁶ *Commune de Braine-le Château*, cit.

which may well exceed the transposition period.¹³⁷ Finally, the Court of Justice ruled that, though it is true that a failure to fulfil the above obligation can be grounds for an infringement procedure against the Member State concerned, this failure does not preclude Member States from issuing new permits.¹³⁸

The Belgian Council of State in its follow-up judgment quotes the Court of Justice's ruling.¹³⁹ It then goes on to consider that having seen the Court of Justice's ruling and the debate by the parties involved, there is cause to address additional questions to the Belgian Constitutional Court, thus suspending a final ruling.¹⁴⁰ In doing so the Belgian Council of State showed cooperative behaviour.

IV. SYNTHESIS AND COMPARISON

Section II.2, *supra*, noted that judicial cooperation in environmental matters in Sweden ranged from complete non-implementation of the Court of Justice's ruling to the non-referral of certain legal issues raised in the national proceedings. Conversely, UK judges tend to follow the Court of Justice's rulings as closely as possible. They give full account of the Court of Justice's reasoning, thus refraining from engaging in silenced cooperation. Almost all of the cases retrieved from Belgium were also of full cooperation (16 out of 18), with one case indicating presumed cooperation and one suspended cooperation.

A somewhat mixed practice emerges from Italy, like the Netherlands, with follow-up judgments situated at both ends of the spectrum of judicial interaction, though with a greater variety of behaviours on display in Italy than in the Netherlands. While in the Netherlands, only three categories were highlighted, this *Article* found six different kinds. Only the interchanged, silenced, and withdrawn cooperation were not encountered among the thirteen environmental law cases retrieved in the Italian legal order in this research. In twelve such cases the Italian courts displayed cooperative behaviours. Judicial uncooperation could only be clearly identified in one case, as interrupted cooperation. Another case of potential gapped cooperation could only be regarded as modestly so, given that this case also showed characteristics of presumed cooperation.

It can therefore be concluded that the national courts of both Italy and Belgium tend to cooperate with the Court of Justice in environmental matters. In their successful interactions the national courts apply the interpretations provided by the Court of Justice in ways which do not deviate from the intention of that interpretation, which can be observed in particular in the practice of quoting the relevant passages and the operative part of the Court of Justice's ruling.

¹³⁷ *Ibid.*, paras 35 and 38.

¹³⁸ *Ibid.*, paras 41-42.

¹³⁹ Belgian Council of State (FR), no. 187.140, cit., p. 4 *et seq.*

¹⁴⁰ *Ibid.*, p. 8 *et seq.*

As regards Italy, this is not true of the interrupted interaction observed in *Pioneer Hi Bred Italia*, where the Italian Council of State delayed its follow-up judgment and, intentionally or not, permitted the applicable national framework to change in the meantime. As a consequence, the national court dispensed with its judgment, which means that the Court of Justice's ruling was not applied in this follow-up case. Considering that the subject matter of this case, GMOs, is highly politicised in Italy,¹⁴¹ it would be interesting to research whether and to what extent the political unwillingness to allow GMO cultivation in Italy influenced the *modus operandi* of the Italian Council of State in this case.



FIGURE 1. Map of judicial dialogue in environmental matters in the EU (five Member States; year: 2014), available at: www.lovelljohns.com.

In addition, a new category of judicial interaction was identified in both jurisdictions: suspended cooperation. The application of the Court of Justice's ruling in such cases is suspended while further doubts requiring further clarification are resolved. The

¹⁴¹ For an account in English of the Italian legislative initiatives to block GMO cultivation, see the site of the Library of Congress, under the heading "Restrictions on Genetically Modified Organisms: Italy", available at www.loc.gov.

cases identified in Italy and Belgium led to a national court process to request further clarification from the respective national Constitutional Courts. Because these Italian and Belgian follow-up procedures involving further references indicate the courts' willingness to cooperate with the Court of Justice, these postponed cooperation cases can be considered examples of judicial cooperation. However, such cases could result in uncooperation in future, or in other jurisdictions.

In light of the above, the known part of the judicial dialogue in environmental matters map can be shaped as depicted in Figure 1.

V. INITIATION REFLECTION FOR A PRELIMINARY RESEARCH AGENDA

The empirical studies performed so far have considered a total of 64 follow-up judgments for the behaviour of national courts in the jurisdictions investigated.¹⁴² When subdividing this according to the kind of interaction between the national courts and the Court of Justice, the following overview emerges:

Cooperation Countries	Cooperative behaviour					Uncooperative behaviour			
	Full	Presumed	Fragmented	Suspended	Withdrawn	Gapped	Interrupted	Silenced	Interchanged
SE	-	-	-	-	-	2/9	2/9	2/9	3/9
NL	13/16	-	-	-	1/16	2/16	-	-	-
UK	5/8	2/8	1/8	-	-	-	-	-	-
IT	7/13	2/13 ¹⁴³	2/13	1/13	-	0/13149	1/13	-	-
BE	16/18	1/18	-	1/18 ¹⁴⁴	-	-	-	-	-
Total	41/64	5/64	3/64	2/64	1/64	4/64	3/64	2/64	3/64
Aggregated Total	52/64					12/64			

TABLE 1. Overview of follow-up cases per category of judicial cooperation.

¹⁴² It should be noted that this figure depends on how joined cases are considered.

¹⁴³ In addition to being a case of presumed cooperation, *Siragusa*, cit., could also be categorised as gapped cooperation.

¹⁴⁴ *Commune de Braine-le-Chateau*, cit., was a joined case. While the follow-up for case C-53/02 falls under full cooperation, the follow-up for case C-217/02 falls under suspended cooperation.

Overall, a tendency in favour of judicial *cooperation* in the context of Art. 267 TFEU in environmental matters seems to emerge. It could thus be argued that this aspect of the access to justice pillar is functioning effectively, at least in the majority of the cases. Environmental democracy thus seems guaranteed, at least in this regard. This finding would however be premature. First, because only a minority of jurisdictions have been investigated. Even if the categories of judicial cooperation seem to have *unfolded* almost to saturation point, given that the studies in Italy and Belgium revealed the presence of only one new category, this does not mean that national courts' behaviour in the EU has been *mapped* well enough. Indeed, 23 jurisdictions still need to be mapped. Comparative research could surely help improve the quality of the picture in this regard.

Second, a close look at the findings reveals some marked differences. In Sweden the findings show a tendency towards uncooperative behaviour. Differently, in the UK first and now Belgium, the findings show a tendency towards *cooperative* behaviour. The marked difference in the findings of the empirical research in Sweden, the UK and Belgium suggests that the national judicial cultures have a strong impact on judicial dialogue.¹⁴⁵ A specific research question in this regard is whether the presence of a national environmental law tradition distinct from EU mainstream environmental law influences national court behaviour in follow-up judgments. Sweden, for instance, has a specialised court dealing with environmental matters with unique features, such as technical judges (judges who are not lawyers but ecologists).¹⁴⁶ Moreover, Swedish environmental law is generally considered at the forefront of environmental protection. The same cannot be said for the UK, Italian and Belgian environmental law. The former in particular is known to base its environmental law almost verbatim on EU environmental law.¹⁴⁷ Follow-up research could establish whether the more national environmental law departs from EU environmental law, the greater is the chance that judicial uncooperation will occur. Comparative research focusing both on legislative standards and case law practice will provide a quantitative answer in this regard. Qualitative interviews with national judges could also help understanding whether peculiarities concerning environmental law in one country create a sense of judicial identity, explaining marked differences in judicial cooperation.

In contrast to Sweden, the UK and Belgium, the findings from the Netherlands first, and even more those from Italy now – especially the examples of interrupted cooperation – suggest that rather than discussing judicial cultures in general, a case-by-case analysis of the reasons beyond national court behaviour is necessary. The noticeably peculiar approach adopted by the Italian Council of State in the case of *Pioneer Hi Bred*

¹⁴⁵ L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, cit.

¹⁴⁶ M. SCHULTZ, *Scientific Evidence in Swedish Courts: The Use of Technical Judges for Better Integration of Scientific Data in Environmental Decision-Making*, in L. SQUINTANI J. DARPO, L. LAVRYSEN, P-T. STOLL (eds), *Managing Fats and Feelings in Environmental Governance*, Cheltenham: Elgar, 2019, p. 118 *et seq.*

¹⁴⁷ L. SQUINTANI, *Beyond Minimum Harmonisation*, cit.

Italia on GMOs could even indicate that within each jurisdiction, judicial interaction differs on a theme-by-theme basis. Empirical research going beyond the “how” question posed in this *Article* is thus necessary to uncover judicial dialogue fully. Qualitative interviews with key stakeholders, such as judges and lawyers active in the proceedings, could provide a first set of data in this regard.

Considered from the perspective of access to justice as a fundamental pillar of environmental democracy, the finding that the functioning of the link between national courts and the Court of Justice changes on a case-by-case, theme-by-theme or even country-by-country basis is concerning. Especially differences on a country-by-country basis are problematic in the context of environmental democracy. Indeed, it could suggest the existence of ranks of environmental citizenship, with first-rank environmental citizenship being provided in those countries where judicial cooperation is complete, and second or even lower rank environmental citizenship in those countries in which judicial cooperation is not cooperative.

An easy rebuttal to this argument is that it concerns a failure by the Member States, not by the EU institutions.¹⁴⁸ This rebuttal is problematic for several reasons, including the absence of infringement procedures for failure to comply with the Court of Justice’s rulings in uncooperative follow-up judgments.¹⁴⁹ The well-known *Köbler* case shows that errors in follow-up judgments can lead to state liability for breach of EU law.¹⁵⁰ *Köbler* started as a case of *withdrawn* cooperation, with the national court withdrawing its questions once the Court of Justice had ruled that the question had already been answered in *Schöning-Kougebetopoulou*.¹⁵¹ After withdrawing the referral, the referring court should have noticed that the Court of Justice’s answer did not fit the new national normative framework. Accordingly, it should have suspended the proceedings and asked for a fresh clarification. Yet, instead of engaging in *suspended* cooperation by asking another question of the Court of Justice, the national court handed down a wrong judgment, thus engaging in *interrupted* cooperation. It is because of this interrupted cooperation that Mr Köbler started a case based on state liability. If state liability for wrongful court follow-up is possible, at least in theory,¹⁵² an infringement procedure is also possible. Of course, the burden of proof for the Commission to prove the existence of a manifest breach could be high. Still, *Commission v. France* shows that there is no

¹⁴⁸ We are thankful towards Matthijs van Wolferen for sharing his thoughts with us about this aspect.

¹⁴⁹ We searched for infringement procedures on the CURIA database using the C-number of the preliminary rulings for which the follow-up judgments showed uncooperative behaviour.

¹⁵⁰ Court of Justice, judgment of 30 September 2003, case C-224/01, *Köbler*.

¹⁵¹ Court of Justice, judgment of 15 January 1998, case C-15/96, *Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg*.

¹⁵² In this specific case the Court of Justice ruled that there was not liability as there was not a *manifest* breach of EU law.

need to prove systematic mistakes.¹⁵³ Accordingly, not only Sweden, in which basically all cases show examples of uncooperative behaviour, but also Italy and the Netherlands could face infringement procedures for wrongful follow-up judgments. Nevertheless, no infringement procedure can be found on CURIA. Certainly, the lack of case law on this point does not automatically mean that informal phases of infringement procedures have never taken place. However, a peculiarity of wrongly decided follow-up judgments must be that they cannot be restored and prevented. If initiated, an infringement procedure for a wrongly decided follow-up judgment should lead to a case before the Court of Justice. Moreover, Krämer already noted the lack of Commission's effort to assess whether national implementing legislation is in accordance with rulings in preliminary references on environmental matters.¹⁵⁴ Accordingly, the finding that there have been no infringement procedures regarding the follow-up judgments included in this *Article* which show uncooperative behaviour seems most plausible. Further research could focus on whether such an absence of infringement procedures is caused by a lack of capacity on the part of the Commission, lack of political will or more simply due to a lack of information.

The lack of information is surely a plausible explanation, considering the difficulties encountered in all jurisdiction in retrieving follow-up judgments. Further research into national approaches to the storage of judgments, and into ICT services, could provide further clarification. The relatively low number of follow-up judgments retrieved in the various jurisdictions surely highlights the difficulty of providing a complete picture of the functioning of the preliminary reference procedure, not only for academics, but also for the Commission.

In this regard, we would like to underline the lack of data available on CURIA. On its website, the Court of Justice refers to the database of national case law on EU law handed down by supreme administrative courts, the Dec.Nat database, which is regularly updated,¹⁵⁵ including with national jurisprudence in follow-up cases. However, as shown in Table 2, only about 28 per cent of follow-up cases retrieved in our study are included on this database.

¹⁵³ Court of Justice, judgment of 4 October 2018, case C-416/17, *Commission v. France (Précompte mobilier)*.

¹⁵⁴ L. KRÄMER, *The Commission's Omission to Use Article 267 TFEU*, cit. Even when action is undertaken, the overall outcome might not be sufficient to ensure full compliance, see M. ELIANTONIO, F. GRASHOF, *Wir müssen reden! – We Need to Have a Serious Talk! The Interaction between the Infringement Proceedings and the Preliminary Reference Procedure in Ensuring Compliance with EU Environmental Standards: A Case Study of Trianel, Altrip and Commission v. Germany*, in *Journal for European Environmental & Planning Law*, 2016, p. 325 *et seq.*

¹⁵⁵ On 7 October 2019, when we checked for the last time, it stated that it was current to 18 September 2019.

Countries	Follow-up available on Dec.Nat
SE	6/9
NL	0/16
UK	2/8
IT	2/13
BE	8/18
TOTAL	18/64

TABLE 2. Overview of follow-up cases available on www.aca-europe.eu.

Most interestingly, even though the Italian national court in *Green Network*¹⁵⁶ explicitly mandates the transmission of the judgment to the Court of Justice in the operative part of the follow-up judgment, it is not available on the Court of Justice's site.

No pattern emerges to explain why one case is included and another not from the cases available or absent from the Court of Justice's database. In particular, it is hard to establish a link between cooperation and inclusion in this database. While the Dutch judiciary shows complete cooperation in 13/16 cases, none are included in the database. On the other hand, most of the Swedish referral judgments were included, even though the Swedish judiciary showed signs of uncooperative behaviour.

Transparency is a key element of any democratic system. A current and reliable database would therefore be invaluable for the mapping exercise. The difficulties encountered at national level, especially in Italy and more generally as regards first instance courts, and the generalised lack of data on the CURIA database cannot be considered to contribute to transparency on the functioning of Art. 267 TFEU as a tool to guarantee environmental democracy.

VI. CONCLUSIONS

The studies presented in this *Article* show that Italian and Belgian courts tend to cooperate fully with the Court of Justice, aligned to the findings from the Netherlands and the UK. Moreover, with only one new category of judicial cooperation being found, these case studies suggest that the *unfolding* of the categories of judicial cooperation is almost complete. Yet many more jurisdictions need to be investigated to complete the *mapping* exercise.

From the perspective of access to justice as a pillar of environmental democracy, a comparative perspective on the findings from Sweden, the Netherlands, the UK, Italy and Belgium shows the presence of different approaches, displaying a case-by-case,

¹⁵⁶ *Green Network*, cit.

theme-by-theme or even a country-by-country approach to judicial cooperation. This points to the existence of different levels of environmental democracy across the Member States. More generally, the lack of readily available information at national and EU level about follow-up judgments shows that transparency can be improved.

In conclusion, these findings are essential reading if the “von der Leyen” Commission seriously intends to advance on environmental democracy, and further research should be carried out to understand their origin of such findings, enabling the development of strategies to improve the functioning of preliminary references in environmental matters, and more generally, the quality of environmental democracy in the EU.

