The Dutch Preliminary Ruling Procedure in the light of the European Directive on Representative Actions

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Practice

The Dutch Preliminary Ruling Procedure in the Light of the European Directive on Representative Actions

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Abstract

Dutch civil law allows courts of first and second instance to refer preliminary questions to the Supreme Court. In mass claim disputes there may be a concurrence between the safeguards of the preliminary ruling procedure and the protection provided by Directive 2020/1828 on representative actions for the protection of the collective interests of

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consumers. This working paper addresses several issues regarding this concurrence. These include legal certainty, the influence of non-parties, the costs and the duration. The authors come to the conclusion that the preliminary ruling procedure can be very useful in mass claim disputes, albeit that both the lower courts and the Supreme Court need to align their practice more closely with the safeguards of the Directive on a number of points. These findings may be relevant for other European jurisdictions that recently introduced a preliminary ruling procedure, or that are about to insert a preliminary ruling procedure in their civil procedural law system.

Keywords

Dutch Supreme Court – EU Directive 2020/1828 – mass claim actions – preliminary ruling procedure

1 Preliminary Rulings in Representative Actions[1]

The Dutch Code of Civil Procedure (DCCP) allows courts of first and second instance to submit preliminary questions to the Dutch Supreme Court during first and second instance proceedings. The questions must relate to questions of law that are not only relevant to the current case, but also to many other cases pending or that may be pending in the future. Once the Supreme Court has answered the preliminary questions, the case will be referred back to the court that asked the questions. This court, bound by the Supreme Court's answers, will continue to deal with the case.

To this point, preliminary questions have been referred to the Supreme Court in two class actions by representative organisations protecting the collective interests of consumers.[2] In cases such as these, the rules on the preliminary reference procedure may coincide with the national rules on representative actions, implementing Directive (EU) 2020/1828 of the European Parliament

1 This article has been written on the occasion of the Summer School of the International Association of Procedural Law at Complutense University in Madrid in June 2023. The text is finalized on 9 January 2024 and published as a working paper 2024/09 of the European University Institute, Robert Schuman Centre, Florence, Italy.

2 DSC (*Dutch Supreme Court*) 28 March 2014, ECLI:NL:HR:2014:766; DSC 11 February 2022, WOEKERPOLIS/NATIONALE NEDERLANDEN, ECLI:NL:HR:2022:166. In 11 years, a total of over 120 preliminary questions have been submitted to the Supreme Court. Considering these numbers and the scope of the law, the preliminary ruling procedure is considered a great success in the Netherlands. This success has led to the introduction of the preliminary ruling procedure in tax and criminal law as well.

and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (which we refer to as the Directive).

In this article, we will analyse the concurrence of both sets of rules, discussing the Dutch preliminary ruling procedure from the perspective of the Directive. Where relevant, cases where consumers have litigated individually and where preliminary questions were raised are also discussed and compared. After all, there may be similar interests at stake in these cases, namely the protection of consumers against traders. First, we will introduce the Dutch preliminary ruling procedure (section II). Then we will briefly analyse the objectives of the Directive and its implementation in the Dutch Civil Code (DCC) and the Dutch Code of Civil Procedure (section III and IV). Next, we will discuss some aspects of representative actions in the context of the preliminary ruling procedure: legal certainty (section V), influence of third parties (section VI), costs (section VII) and duration of proceedings (section VIII). This will lead to the conclusion that although the preliminary ruling procedure is a useful mechanism that can be used in collective actions, in some respects the Directive offers greater protection to parties than the preliminary ruling procedure does.

2 Introduction of the Preliminary Ruling Procedure

2.1 *Embedding in Civil Procedural Law*

In the Netherlands, every judgment of a civil court potentially contributes to the development of the law, across the boundaries of the dispute of the litigants involved. This is particularly true for Supreme Court judgments, which according to the law are supposed to preserve legal uniformity and to steer the development of law.[3] Since the achievement of this goal depends on the willingness and the financial ability of litigants to litigate all the way to the Supreme Court, it must be assumed that many relevant questions of law are not referred to the Supreme Court.[4]

Against this background, the introduction of a preliminary ruling procedure came into play.[5] At first, the Supreme Court did not favor a system

3 As mentioned in art. 81 lid 1 of the Dutch law on the Organisation of the Judiciairy (RO). See Explanatory Memorandum (MvT), *Parliamentary Documents II* 1950/51, 2070, nr. 3, p. 7 and (MvA), *Parliamentary Documents II* 1962/63, 2079, nr. 5, p. 2.

4 W.D.H. Asser, H.A. Groen, J.B.M. Vranken, *Een nieuwe balans, Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, Den Haag 2003, p. 219

5 W.D.H. Asser, H.A. Groen, J.B.M. Vranken, *Een nieuwe balans, Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, Den Haag 2003, p. 223.

of preliminary questions, for the meaning of a preliminary ruling would be limited, depending, as ever, on the context and facts of the case at hand. Moreover, asking preliminary questions could lead to serious delays in the main proceedings. The Supreme Court also feared an extensive use of the possibility to ask preliminary questions, resulting in an overburdening of the Supreme Court.[6]

Nevertheless, the Minister of Justice introduced a law on the preliminary ruling procedure, especially in view of mass claims.[7] Lower courts are able to submit preliminary questions to the Supreme Court, if an answer to them is necessary to decide on the claim or request and is directly relevant to a multitude of claims based on the same or similar facts and arising from the same or similar related causes, or to the resolution or termination of numerous other disputes arising from similar facts, in which the same question arises (article 392-1 DCCP). They may do so even if the facts of the case have not yet been determined. Indeed, many legal questions may be answered in abstracto, while information about the general context of those questions – for example on the practical consequences of possible answers – may possibly be derived from third party submissions.[8]

2.2 *Requirements*

What kind of questions may be submitted to the Supreme Court? Three core criteria can be distilled from article 392 DCCP. First, only questions of law can be submitted to the Supreme Court. Questions of a factual nature are not eligible for consideration. In addition, it is required that the preliminary question is of direct relevance to the resolution of a case. Answering the question of law must be necessary to decide on the claim or request at issue. Thirdly, the answer to the preliminary question must be of direct relevance to numerous other cases (future or otherwise) in which the same question arises. This may involve mass claims and representative actions, as well as cases involving a question of law that is or may be involved in many similar cases.[9] Although the preliminary ruling procedure was originally introduced with collective actions in mind, practice has shown that many questions are in fact raised on the basis of the latter category. The criterion that the answer must be directly relevant to a large number of other cases is, by definition, met in mass claims.

6 Cited in W.D.H. Asser, H.A. Groen, J.B.M. Vranken, *Uitgebalanceerd, Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, Den Haag, 2006, p. 155–156.

7 Letter of the Minister of Justice, 23 October 2008, *Parliamentary Documents II* 2008/09, 31 762, nr. 1.

8 See for the draft *Parliamentary Documents II* 2010/11, 32 612, nr. 1.

9 *Parliamentary Documents II* 2010/11, 32612, nr. 3, p. 5–7.

If a court in first instance or an appeal court intends to refer a preliminary question to the Supreme Court, it must ask the parties for their views. The parties are given the opportunity to comment in writing on both the intention to ask a question and the content of the question to be asked. Still, the judge has the final say. Even if one, or even both, parties indicate that they prefer not to have preliminary questions asked in their case, the court may still decide to ask a preliminary question. Once the court has decided to ask a preliminary question, it will stay the decision on the claim until the Supreme Court has answered the preliminary question.[10] Similarly, if in other pending proceedings the answer to the question is directly relevant to deciding the claim or request, the court may, at the request of a party or *ex officio*, stay the decision until the Supreme Court has ruled.

A case of the The Hague Court of Appeal may serve as a fine example. An association of policyholders, named *Woekerpolis*, filed a claim against the insurance company *Nationale Nederlanden*. The case is about an investment insurance, in which an interest is taken in one or more investment funds for the benefit of the policyholder, using the premium paid. The interest can be used to accumulate capital, which is paid out upon the realization of an insured event. The policyholder runs the investment risk associated with that interest. The court of appeal had to assess the concurrence of several legal instruments, concerning European based consumer law and the Third life assurance Directive on the duties to inform and the duty of care incumbent on the insurer.[11]

During the oral argument on appeal, the parties discussed the possibility of submitting preliminary questions to the Supreme Court. Both parties responded positively, or, as the court of appeal noted, moderately positively. In an interlocutory decision the court of appeal went into extensive and precise detail about how differently the issue was thought of by various courts. In the same decision the court formulated two preliminary questions and invited the parties to comment on them in a written statement.[12] *Nationale Nederlanden* filed a statement of preliminary questions, after which *Woekerpolis* filed a statement of reply followed by another statement by *Nationale Nederlanden*. Finally, the Court assessed the statements and issued its referral decision with the final preliminary questions to the Supreme Court.[13]

10 Art. 392-5 DCCP.

11 Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive); at present, the matter is dealt with in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

12 The Hague Court of Appeal 31 March 2020, ECLI:NL:GHDHA:2020:543 at 14.1–14.4.

13 The Hague Court of Appeal 23 February 2021, ECLI:NL:GHDHA:2021:302.

2.3 *Proceedings at the Supreme Court*

The Supreme Court then decides whether the preliminary question is suitable to being answered by preliminary ruling. The decision by the Supreme Court on whether the questions are suitable is sometimes called the 'red/green light decision'. Only when the Supreme Court has given 'green light', the questions will be considered.[14] If it is clear from the onset that the questions are not suitable for the preliminary ruling procedure or their weight is insufficient to justify answering it, the Supreme Court will give a red light immediately, without further debate.[15]

So far, the Supreme Court has given a red light in ten cases.[16] For this reason, it has been noted that the threshold for putting a question to the Supreme Court in the initial phase of the proceedings is not too high.[17] Some authors argue that the Supreme Court should be more cautious in answering preliminary questions.[18] It is stated that in some cases the requirements of article 392 DCCP have not been met.[19] However, it cannot be denied that the Supreme Court in some cases has been somewhat strict, declining to answer some questions.[20]

After the Supreme Court has given the 'green light', the parties are given another opportunity to submit written comments.[21]

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14 Art. 393 DCCP.

15 Art. 393-1 jo. 393-8 DCCP.

16 See e.g.: DSC 31 May 2013, ECLI:NL:HR:2013:CA1614; DSC 13 July 2018, ECLI:NL:HR:2018:1218; DSC 4 March 2022, ECLI:NL:HR:2022:336; DSC 13 May 2022, ECLI:NL:HR:2022:685; DSC 10 June 2022, ECLI:NL:HR:2022:861.

17 J. de Bie Leuveling Tjeenk & J.W.M.K. Meijer, De prejudiciële procedure: verschillen met de cassatieprocedure, aandachtspunten en wensen voor de toekomst, vol. 33, Nederlands Tijdschrift voor Burgerlijk Recht (2016).

18 E. Tjong Tjin Tai, Cassatie in belang der wet als instrument van rechtsvorming, vol. 71, Ars Aequi, p. 982 (2022); J. de Bie Leuveling Tjeenk & J.W.M.K. Meijer, De prejudiciële procedure: verschillen met de cassatieprocedure, aandachtspunten en wensen voor de toekomst, vol. 33, Nederlands Tijdschrift voor Burgerlijk Recht (2016); M.E.A. Möhring & S.M. Kingma, De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudidiciële vragen aan de Hoge Raad, vol. 30, Tijdschrift voor Civiele Rechtspleging, p. 24 (2022). tijd

19 M.E.A. Möhring & S.M. Kingma, De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudidiciële vragen aan de Hoge Raad, vol. 30, Tijdschrift voor Civiele Rechtspleging, p. 22 (2022); P. Louwers, Prejudiciële vragen: de troetelkindjes van de Hoge Raad, vol. 18, Mr., p. 51. (2022); J.P. Heering, De prejudiciële procedure: troetelkindje (met waterhoofd)?, in: D.H. Dongelmans et al. (eds.), *Rechtsontwikkeling in rechterlijke dialoog*, p. 74–76 (Den Haag; Boom juridisch 2023). Heering mentions several examples of cases in which he believes the requirements of Section 392 have not been met: DSC 5 December 2014, ECLI:NL:HR:2014:3536, DSC 22 April 2016, ECLI:NL:HR:2016:726, DSC 19 November 2021, ECLI:NL:HR:2021:1720 and DSC 25 February 2022, ECLI:NL:HR:2022:331.

20 See: DSC 16 March 2018, ECLI:NL:HR:2018:345 and DSC 10 June 2022, ECLI:NL:HR:2022:861.

21 Art. 393 DCCP.

Moreover, in addition to the parties, third parties can also play a role in the proceedings. In par. 6 we will discuss the position of third parties as *amicus curiae*.

Subsequently, the Advocate General will advise the Supreme Court on the answer to the preliminary ruling question by way of a submission.[22] Within two weeks, the parties may submit a letter to the Supreme Court, reflecting on the Advocate General's advice.[23] The Supreme Court then answers the preliminary question before it. A lead time of six to twelve months is sought.[24] Therefore, answering preliminary questions has high priority.[25] The Supreme Court ensures that the proceedings are conducted expeditiously and that judgments are given as soon as possible.[26]

2.4 *Referral to the Lower Court*

Once the Supreme Court has answered the questions, the district court or court of appeal that asked the questions resumes handling the case. It is the legislator's hope that answering the preliminary question will increase the parties' willingness to settle.[27] If the parties do not reach a settlement, the court will give the parties an opportunity to comment in writing on the Supreme Court's decision. The court then decides on the claim or application taking into account the Supreme Court's decision.[28]

Once the final judgment has been rendered by the district court or court of appeal, the parties are still free to appeal that judgment. After a decision in appeal, the parties are entitled, in principle, to refer the case to the Supreme Court by using the ordinary cassation procedure. Thus, the case can reach the Supreme Court for the second time, but this time in a different form.

In the *Woekerpolis/Nationale Nederlanden* case, the Supreme Court referred the case to the The Hague Court of Appeal. Back at the court of appeal, both parties filed a memorandum in which they commented on the Supreme Court's decision. In doing so, *Woekerpolis* submitted further exhibits, whereafter *Nationale Nederlanden* responded again. Subsequently, the court of appeal rendered another interlocutory decision, finally deciding on several but not all issues. It expressly provided that the interlocutory judgment could be appealed in cassation in the interim.[29]

22 Art. 393-6 DCCP.
23 Art. 3.3.13.3 of the Rules of Procedure of the Supreme Court of the Netherlands.
24 *Parliamentary Documents II* 2010/11, 32612, nr. 6, p. 4.
25 *Parliamentary Documents II* 2010/11, 32612, nr. 6, p. 6.
26 Art. 3.3.4.1 and 3.3.15.1 of the Rules of Procedure of the Supreme Court of the Netherlands.
27 *Parliamentary Documents II* 2010/11, 32612, nr. 3, p. 3.
28 Art. 394-1 DCCP.
29 The Hague Court of Appeal 26 September 2023, ECLI:NL:GHDHA:2023:1854.

3 The Directive and its Implementation in Dutch Civil and Civil Prodecural Law

Consumers seeking the protection offered by the European consumer law face obstacles in individual actions. They are uncertain about their rights and about the availability of procedural mechanisms. They may encounter psychological reluctance to take action and they may refrain from action due to the negative balance of the expected costs relative to the benefits. The Directive enables qualified entities, such as consumer organisations, to act with the aim of overcoming these obstacles and ensuring that traders comply with relevant provisions of Union law. It aims to ensure that at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers in all Member States, for the benefit of consumers, fair competition and a level playing field for traders.[30]

The Directive seeks to strike a balance between improving consumers' access to justice and providing appropriate safeguards for traders to avoid abusive litigation that would unjustifiably hinder the ability of businesses to operate in the internal market. To prevent the misuse of representative actions, it prescribes certain procedural aspects, such as the designation and funding of qualified entities. However, it does not contain provisions on every aspect of proceedings in representative actions, under the condition that national rules should not hamper the effective functioning of the procedural mechanism for representative actions required by the Directive.[31]

The Directive has been implemented both in the DCC and in the DCCP.

Article 305a of Book 3 DCC enables representative organisations to initiate actions for injunctive measures and for redress measures. Several conditions must be met. First, the organisation must have a specific legal structure: a foundation or an association with full legal capacity. Second, the action must seek the protection of similar interests of other persons. Their interests must be suitable for bundling, so that efficient and effective legal protection can be promoted for the benefit of the interested parties. Third, the organisation must promote these interests pursuant to its bylaws and these interests are sufficiently safeguarded. The proceedings are governed by art. 1018b-1018n DCCP, including provisions about:

– the specific requirements that the writ must meet for the court to assess whether the case lends itself to a class action[32]

30 Directive (EU) 2020/1828, preamble at 7, 9 and 24.
31 Directive (EU) 2020/1828, preamble at 10 and 12.
32 Art. 1018c DCCP.

– which claimant organisation is the most appropriate to act as exclusive representative and which narrowly defined group of persons will it represent in this class action[33] and
– the position of persons belonging to the narrowly defined group of persons whose interests are represented in this class action.[34]

Article 907 of Book 7 DCC covers one of the possible outcomes of a representative action, an agreement between the representative organisation with one or more other parties, which have committed themselves by this agreement to compensate the damage caused by an event or similar events. This agreement may be declared binding by the Amsterdam Court of Appeal,[35] at the joint request of these foundations, associations, and other parties, on persons to whom the damage has been caused, provided that the foundations or associations look after the interests of these persons pursuant to their articles of association. The proceedings are governed by art. 1013-1018a DCCP, including provisions about:

– the suspension of proceedings concerning disputes in the termination of which the agreement provides[36] and
– the position of the persons entitled under the agreement.[37]

4 Directive and Preliminary Ruling Procedure

At first sight, the relation between procedural possibilities to initiate a mass claim and the preliminary ruling procedure is not problematic from the perspective of the Directive. The Directive is not intended to replace existing national procedural mechanisms that may serve to protect collective or individual consumer interests.[38] Therefore, the Preliminary Ruling Procedure, which was not included in the implementation of the Directive in the Dutch Civil Code and the Dutch Code of Civil Procedure, may be regarded as an extra feature regarding facilitating mass claims.[39]

However, there may be concurrence between the two sets of rules. If an interest group initiates collective action on behalf of consumers, preliminary

33 Art. 1018e DCCP.
34 Art. 1018f DCCP.
35 Art. 1013-3 DCCP.
36 Art. 1018m DCCP.
37 Art. 1018k DCCP.
38 Art. 1–2 Directive (EU) 2020/1828 and Directive (EU) 2020/1828, preamble at 11.
39 Art. 305a-305e of Book 3 of the Dutch Civil Code (DCC), art. 240-6 of Book 6 DCC; art. 1018b-1018n DCCP.

questions can be asked in that procedure. Embedding preliminary ruling proceedings in a consumer mass claim procedure may cause some tension between on the one hand the goals and consequences of a preliminary ruling and on the other hand the protection of consumer's interests, fair competition and a level playing field for traders.

In one respect, the Dutch legislator has decided to limit the possibility to ask preliminary questions. The Amsterdam Court of Appeal, assessing a request for declaring an agreement binding on the basis of article 7:907 DCC, does not have the power to ask preliminary questions to the Supreme Court.[40] The reason is as follows. The agreement is a settlement agreement, which – in the words of article 7:900-1 DCC- is concluded to end uncertainty or dispute, be it on the facts or the law. A reopening of the debate does not fit in with this. Furthermore, the Amsterdam Court of Appeal must test whether the agreement submitted to it is reasonable.[41] It is not called to assess the agreement with regard to legal issues. Agreements like these are usually the result of negotiations in which all parties make concessions, for example with regard to legal uncertainties. If one of the pending legal issues would be singled out by the Court of Appeal as a preliminary question to be answered by the Supreme Court, this could upset the balance achieved by the parties. All in all, a preliminary ruling is considered not compatible with the nature of the proceedings in the context of article 7:907 DCC at the Amsterdam Court of Appeal.[42]

What is important for this contribution is that even in cases where the directive does not apply, one can give thought to the relationship between the two mechanisms. Prejudicial questions can also be raised in consumer cases in which an individual consumer is a party. Indeed, the rationale behind the directive (and other consumer protection directives) may still come into play then.

Below, we discuss the relationship between the directive and the preliminary ruling procedure in more detail. We will now examine whether referring questions to the Supreme Court for a preliminary ruling is in line with the purpose of the Directive. We will consider cases in which the preliminary questions are raised in collective actions, but also in cases that do not fall within the scope of the directive but in which consumer rights are also at stake. Is there still a sufficient balance then?

40 Art. 392-1 DCCP.

41 Art. 7:907-3 at b DCC.

42 *Parliamentary Documents II* 2010/11, 32612, nr. 3, p. 6–7.

5 Legal Certainty

The Directive is intended to further legal certainty for consumers. So does the preliminary ruling procedure, since the Supreme Court's answer is supposed to be binding on the lower court and the parties.[43] For this reason, the lower court must decide with due regard to the preliminary ruling of the Supreme Court.[44] Moreover, Supreme Court rulings have precedential effect, in practice. Even though third parties are not bound by a preliminary ruling formally, the answers are intended to offer guidance in other disputes.[45]

The legal certainty, offered by the preliminary ruling procedure, is focused on questions of law in a general sense rather than the rights and obligations of the parties in a specific case. The Supreme Court is supposed to adopt a legal-question-related, rather than a case-related, attitude. The answer should be given at a greater distance from the facts and circumstances of the case at hand, as it is intended to be relevant to other factually similar cases. To establish all the relevant facts before initiating the preliminary ruling procedure. Furthermore, the Supreme Court's answer may be based on other facts than established by the lower court. The Supreme Court may also consider facts which may have become apparent due to the comments of third parties. In its core, the answer is not a specific ruling on a concrete individual dispute, but an answer that, based on common facts, provides guidance for a multitude of cases based on those facts.[46]

For example, a court of first instance had asked the preliminary question whether a clause in an insurance contract is unfair, without determining the meaning of the clause first. According to the Supreme Court, the question couldn't be answered without prior interpretation of the clause. Consequently, the Supreme Court took the liberty to examine which interpretation seems most plausible, acknowledging that interpretation of contractual terms in principle belongs to the domain of the lower court deciding the facts.[47]

Once the case is referred to the lower court again, the lower court must establish the facts, if it had not done so previously. These facts may cast a

43 *Parliamentary Documents II* 2010/11, 32612, nr. 3, p. 22.

44 Artikel 394-1 DCCP.

45 J.F. de Groot, Prejudiciële vragen aan de Hoge Raad, in: N.T. Dempsey, J.F. de Groot, A. Knigge, A.E.H. van der Voort Maarschalk en B.T.M. van der Wiel, with assistance of M.M. Stolp (eds), *Cassatie*, p. 386–387 (Deventer: Wolters Kluwer 2019).

46 *Parliamentary Documents II* 2010/11, 32 612, nr. 4, p. 5–6.

47 See H.B. Krans and A.G. Castermans, Het bewijsrecht in de schijnwerper, voortdurend, in: R.H. de Bock, R.J.Q. Klomp & E.L. Schaafsma-Beversluis (eds), *Voor Daan Asser*, p. 171–173 (Deventer: Wolters Kluwer 2020).

different light on the case. As a result, the question of law and its answer may have become irrelevant to the case's outcome. According to the Explanatory Memorandum this does not mean that the judgment in the preliminary ruling procedure must be adjusted or reconsidered. Legal certainty may preclude the Supreme Court from adjusting or reconsidering its answer.[48]

Although this turn of events may be beneficial for the parties, for either the consumers or the other party, there is a form of uncertainty attached to the preliminary ruling procedure which could be regarded as an obstacle to initiate an individual or representative action. This is not only a matter of extra time and expense. Making a preliminary ruling based on an incomplete factual record also entails a procedural risk for the parties. The case may take a legal turn that may be difficult to change.

However, this does not mean that preliminary questions should be waived in consumer cases. Above all, the legal uncertainty associated with a lack of factual basis could be avoided by asking the questions only after the facts have been established as far as possible.

Furthermore, in some cases it may be considered helpful to wait and see which facts the Supreme Courts deems relevant. For example, In the *Woekerpolis/Nationale Nederlanden c*ase, the court of appeal deliberately left out the factual context and formulated the questions in the abstract.[49] I It argued that the purpose of the questions was to clarify the assessment framework. On this basis, the issues raised by the parties can be assessed by the courts of first and second instance. At that stage, circumstances pertaining to a specific case can also be considered. This worked out well because the court was able to apply the Supreme Court's ruling without further ado.[50]

6 Third Parties: Comments in the Preliminary Ruling Proceedings

Questions submitted for preliminary ruling are published on the Supreme Court's website.[51] Others than litigants can therefore also see which questions have been submitted. Are they also allowed to submit written comments to the Supreme Court in preliminary ruling proceedings? According to the text of section 393-2 DCCP, the Supreme Court 'may' provide that others than parties are given the opportunity to submit written observations with a certain period to be determined

48 *Parliamentary Documents II* 2010/11, 32 612, nr. 3, p. 9.
49 The Hague Court of Appeal 23 February 2021, ECLI:NL:GHDHA:2021:302, at 3.2 and 5.6.
50 The Hague Court of Appeal 26 September 2023, ECLI:NL:GHDHA:2023:1854.
51 https://www.hogeraad.nl/prejudiciele-vragen/.

for that purpose. According to the Supreme Court's website, third parties may submit comments in civil cases 'after permission to do so'. So, as a kind of *amicus curiae*, third parties may be granted to submit written comments.[52] We are not aware of any cases where third parties were refused to submit comments.[53] This does not alter the fact that the power to determine whether third parties may submit written comments lies with the Supreme Court.

The Supreme Court is by no means obliged to give everyone the opportunity to submit comments. For example, it may take into account whether comments are relevant for answering the preliminary questions. It is supposed to take a decision on the issue "explicitly".[54]

The *amicus curiae* is an important figure because the adversarial debate – which in proceedings is fully conducted at first instance and on appeal – is partly absent in this preliminary procedure. After all, the preliminary question is raised at an earlier stage of the proceedings. As a result, it may be more difficult for the Supreme Court than in regular cassation proceedings to oversee the societal consequences of its ruling.

It can therefore be useful if others, such as professional and interest groups, civil society organisations and academics join in this debate and inform the Supreme Court. The comments of these third parties may be important to enhance legal development, for they may help to identify the consequences of the various interpretations of the law at stake. They can give the Supreme Court a more complete overview by helping to identify the interests and relevant facts involved.[55] It may enable the Supreme Court to formulate a sharper and more considered answer to the question. At the same time, there may also be reason to take a closer look at possible comments of third parties.

In practice, third parties make written submissions in about one-third of the cases.[56] In particular, organisations such as the *Consumentbond* (Consumer Association) or the Royal Association of Bailiffs are regularly involved.[57] Parties and third parties may submit written submissions only if they are represented

52 Art. 393-2 DCCP.

53 R.H. de Bock, Tien jaar inspraak van derden in de prejudiciële procedure, in: D.H. Dongelmans et al. (eds), *Rechtsontwikkeling in rechterlijke dialoog*, p. 94 (Den Haag: Boom juridisch 2023).

54 *Parliamentary Documents II* 2010/11, 32612, nr. 6, p. 18.

55 E. Daalder & R. de Graaff, Rome, Luxemburg, Den Haag: De prejudiciële procedure als rechtsvormend instrument, vol. 64, Ars Aequi, p. 330, (2015).

56 M.E.A. Möhring & S.M. Kingma, De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudidiciële vragen aan De Hoge Raad, vol. 30, Tijdschrift voor Civiele Rechtspleging, p. 20 (2022).

57 e.g.: DSC 11 February 2022, WOEKERPOLIS/NATIONALE NEDERLANDEN, ECLI:NL:HR:2022:166; see also M.E.A. Möhring & S.M. Kingma, De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudidiciële vragen aan de Hoge Raad, vol. 30, Tijdschrift voor Civiele Rechtspleging, p. 20 (2022).

by a lawyer who is admitted to the bar of the Supreme Court.[58] This relates to the knowledge and experience they have in litigating at the Supreme Court.[59]

The Act on Preliminary Rulings Proceedings does not impose any requirements on third parties submitting submissions. As said, third parties may include professional and interest groups, NGOs and other civil society organisations, individuals and academics. They may therefore be organisations as referred to in the Directive that submit comments, but they may also be organisations or bodies that do not comply with what the Directive requires.

From the perspective of the Directive, this is not problematic, formally, whereas these third parties are not parties in the case pending in the District Court or the Court of Appeal. In cases involving preliminary rulings that do not fall within the scope of the Directive, for example because an individual consumer is litigating, but are referred to the Supreme Court for a preliminary ruling, there is no pure concurrence between the Directive and the Preliminary Rulings Act, because the Directive does not then formally play a role. Yet, the purpose of the Directive is to strike a balance between improving consumers' access to justice and providing appropriate safeguards for traders to avoid abusive litigation that would unjustifiably hinder the ability of businesses to operate in the internal market. Thus, materially, there is reason to question the consequences of the role of third parties in preliminary ruling proceedings.

We refer to how the Supreme Court deals with submissions submitted by third parties. At the time of finalising this contribution, the Supreme Court issued preliminary rulings in two class action proceedings.[60] In addition, the Supreme Court has issued preliminary rulings in 15 consumer cases.[61] In eight of those 17 cases, third parties submitted comments.

It is ultimately up to the Supreme Court to decide which third-parties are allowed to submit comments and, consequently, to assess the relevance and importance to be attributed to these comments.

It is striking that none of the Supreme Court's preliminary rulings offer information on the question why third parties have been invited or accepted

58 Art. 393-2 DCCP.

59 *Parliamentary Documents II* 2010/11, 32612, nr. 3, p. 18.

60 DSC 28 March 2014, ECLI:NL:HR:2014:766 and DSC 11 February 2022, WOEKERPOLIS/NATIONALE NEDERLANDEN, ECLI:NL:HR:2022:166.

61 DSC 13 June 2014, ECLI:NL:HR:2014:1385, DSC 1 May 2015, ECLI:NL:HR:2015:1198, DSC 9 October 2015, ECLI:NL:HR:2015:3018, DSC 16 October 2015, ECLI:NL:HR:2015:3099, DSC 12 February 2016, ECLI:NL:HR:2016:236, DSC 25 November 2016, ECLI:NL:HR:2016:2704, DSC 21 April 2017, ECLI:NL:HR:2017:773, DSC 8 November 2019, ECLI:NL:HR:2019:1731, DSC 12 November 2021, ECLI:NL:HR:2021:1677, DSC 12 November 2021, ECLI:NL:HR:2021:1677, DSC 19 November 2021, ECLI:NL:HR:2021:1725, DSC 10 June 2022, ECLI:NL:HR:2022:861, DSC 10 February 2023, ECLI:NL:HR:2023:198 and DSC 26 May 2023, ECLI:NL:HR:2023:778.

to comment and what influence these opinions had on the ruling. Only the advocate-generals, in their opinions, tend to refer to third party comments.

In the Woekerpolis case, for instance, it is not clear why and how the Supreme Court took third-party comments into account. In this case, three different third parties submitted comments. For two of these parties, it is not clear what their source of funding is. Moreover, one of these third parties – Stichting Wakkerpolis – had been refused intervention by the court at an earlier stage of the proceedings.[62] By submitting comments as a third party, Stichting Wakkerpolis was still able to influence the proceedings. From the perspective of the Directive's purpose, it is advised that the input of such a party should be treated with caution, in at least a transparent way.

There is also generally a good reason for this. De Bock noted that only parties who are well-versed, who have legal knowledge and who have the financial means to engage a cassation lawyer take advantage of the opportunity. The *amicus curiae* effectively acts as a lobbyist, De Bock argued.[63] In itself, this need not be objectionable, as judges always have to deal with reviewing documents prepared by partisan authors. The point, however, is that when judges are dealing with documents prepared by litigants, they always know what interests are served by those documents. With third-party documents, this will not always be clear. It would therefore be worth considering publishing letters received from third parties to enhance transparency.[64]

It is therefore worth considering requiring third parties to clearly explain their interests. The Supreme Court may develop a list of questions to be answered by third parties that are invited or seeking to comment on preliminary questions, with the aim to get information on their interests. The requirements of the Directive with regard to representative organisations, as implemented, for example, in art 3:305e-2 DCC, may serve as a source of inspiration.

The Rules of Procedure of the Supreme Court of the Netherlands also provide that the parties may comment on written submissions made by themselves and third parties.[65] If the information on the third parties and their interests would be shared with the parties, the latter would be enabled to

62 Court of Appeal The Hague, 31 March 2020, ECLI:NL:GHDHA:2020:543, r.o. 1.3.

63 R.H. de Bock, Tien jaar inspraak van derden in de prejudiciële procedure, in: D.H. Dongelmans et al. (eds), *Rechtsontwikkeling in rechterlijke dialoog*, p. 94 (Den Haag: Boom juridisch 2023).

64 See also: Bart Krans & Marije Ploum, Preliminary Questions in the Netherlands: questions from lower courts to the Dutch supreme court, Ritsumeikan Law Review, no. 42, p. 59-60.

65 Art. 3.3.9.3 of the Rules of Procedure of the Supreme Court of the Netherlands. Third parties do not have this possibility; see C.A. Streefkerk, De prejudiciële procedure bij de Hoge Raad. Een voorlopige balans, vol. 38, nr. 8, Trema, p. 251 (2015).

reflect on the third party comments and their background. Consequently, the Supreme Court would be able to reflect explicitly on how it deals with third-parties in the specific instance: why are their comments admitted; to what extent do those comments weigh into the Supreme Court's judgment? Thus, it may contribute to the balance that the Directive seeks to realize between improving consumers' access to justice and providing appropriate safeguards for traders to avoid abusive litigation.

7 Costs

A common problem in consumer cases is that consumers refrain from filing a lawsuit due to fact that they merely have a small claim. The benefits of litigation simply do not justify the costs. The Directive aims at solving this problem by introducing a representative action and seeing to it that qualified entities do not refrain from bringing an action for financial reasons. The Directive therefore explicitly addresses procedural costs, distinguishing two issues: (i) who bears the procedural costs? And (ii) how can Member States ensure that qualified entities can go to court without undue financial obstacles?

On the first issue, the Directive is crystal clear. The procedural costs of the prevailing party are borne by the losing party.[66] Thus, in the case where the qualified entity is the losing party, the trader's legal costs are to be paid by that entity. In any event, the Directive provides that those procedural costs should not be borne by individual consumers involved in a representative action for redress measures.[67] Thus consumers, apart from exceptional circumstances, never have to pay the procedural costs.[68]

66 Art. 12-1 Directive (EU) 2020/1828. See also: Directive (EU) 2020/1828, preamble at 38: "In representative actions for redress measures, the unsuccessful party should pay the costs of the proceedings incurred by the successful party, in accordance with the conditions and exceptions provided for in national law. However, the court or administrative authority should not order the unsuccessful party to pay the costs to the extent that those costs were incurred unnecessarily. Individual consumers concerned by a representative action should not pay the costs of the proceedings. However, in exceptional circumstances, it should be possible to order individual consumers concerned by a representative action for redress measures to pay the costs of the proceedings that were incurred as a result of those individual consumers' intentional or negligent conduct, for example, the prolonging the proceedings because of unlawful conduct. The costs of the proceedings should include, for example, any costs resulting from the fact that either party was represented by a lawyer or another legal professional, or any costs resulting from the service or translation of documents."

67 Art. 12-2 Directive (EU) 2020/1828. See also: Directive (EU) 2020/1828, preamble at 36.

68 Art. 12-3 Directive (EU) 2020/1828.

On the second issue, the Directive seeks to reduce financial barriers to litigation for qualified entities, to enhance consumer protection. Member States are expected to support qualified entities, ensuring that they are not prevented from bringing representative actions under this Directive due to the costs associated with the procedures.[69] Examples of such measures could include public funding, reduction of applicable court or administrative fees, or access to legal aid.[70]

The question is whether in class actions, and more broadly in consumer cases, the costs of a preliminary ruling procedure may form an obstacle that the Directive seeks to evade. At first sight, this is not the case as far as we are concerned. According to article 20 of the Directive, financial obstacles should not prevent qualified entities from exercising their right to seek the measures as referred to in the Directive. The question of whether preliminary questions should be raised often arises only during the course of the proceedings. In this sense, the raising of preliminary questions does not prevent parties from bringing a claim, as the proceedings are already pending at that time. In addition, neither the parties nor third parties appearing in the preliminary ruling procedure have to pay court fees.[71]After all, it is the lower court that decides whether to use its power to request preliminary rulings.[72] This seems to be in line with the Directive, at least at first glance It should be noted that appearing at the preliminary ruling procedure involves the additional cost of a cassation lawyer. However, it is not compulsory to appear at the preliminary ruling procedure, so these costs could also be avoided. At this stage we would therefore argue that the additional costs that the preliminary ruling procedure may entail do not conflict with the Directive.

With regard to the order for costs of litigation, it is first of all important to note that under Dutch law, in the majority of the civil cases the losing party does not have to reimburse the full costs of his opposing party. Furthermore, the basic principle is that the parties themselves bear the costs they have incurred in the preliminary ruling proceedings. These include, for example, costs for making written comments (article 393-3 DCCP) and any written or oral explanations to the Supreme Court (article 393-4 DCPP).

According to article 393-10 DCCP the Supreme Court quantifies the extent of these costs of each party in its preliminary ruling. Because parties can only appear in the preliminary proceedings represented by a cassation lawyer,

69 Art. 20-1 Directive (EU) 2020/1828. See also: Directive (EU) 2020/1828, preamble at 70.
70 Art. 20-2 Directive (EU) 2020/1828. See also: Directive (EU) 2020/1828, preamble at 70.
71 Art. 4-1 at f Civil Court Fees Act.
72 *Parliamentary Documents II* 2010/11, 32612, nr. 3, p. 22.

as said, their costs mainly concern the costs of this lawyer.[73] It is ultimately the court of fact that asked the preliminary question that decides whether a party actually has to pay the costs of the proceedings.[74] He is not obliged to order the parties to pay the costs of the proceedings.[75] Thus, the preliminary ruling procedure does not regulate as clearly as the Directive who bears the legal costs. The court has discretionary power to include or exclude the costs incurred by the parties in the preliminary ruling procedure in the order for costs of proceedings costs. Despite the fact that not all follow-up judgments have been published and consumers in individual cases often do not appear,[76] a few things have caught our eye.

In collective actions in which preliminary questions have been raised so far, we see that parties have to bear their own costs. For example, in *Woekerpolis/Nationale Nederlanden* the Supreme Court quantified the costs at € 1.800,-- on the side of Woekerpolis and € 1.800,-- on the side of Nationale Nederlanden. We also observe in cases where consumers litigate as individuals that the parties have to bear their own costs,[77] even if the Supreme Court answers the preliminary question to the disadvantage of the trader.[78] Therefore, the courts of fact sometimes caution consumers about the cost of preliminary proceedings. The court for example reminds parties that making written submissions is not mandatory.[79] This course of action is hence inconsistent with the Directive. For the Directive provides that the losing party pays the costs. It is our view that the Directive thus provides a higher level of consumer protection than the preliminary ruling procedure on this aspect. To what extent should the preliminary ruling procedure try to align with that principle? It is clear from the legislative history that article 394-2 DCCP allows the court to make the costs incurred by the parties in the preliminary ruling proceedings part of the legal costs in which a party is ordered to pay in the proceedings before the court that asked the question.[80] Our proposal would therefore be

73 Third-party costs are not included when calculating the procedural costs. Third-parties are required to bear their own costs (art. 393-2 DCCP).

74 Art. 394-2 DCCP.

75 *Parliamentary Documents II* 2010/11, 32612, nr. 3, p. 22.

76 DSC 12 February 2016, ECLI:NL:HR:2016:236; DSC 25 November 2016, ECLI:NL:HR:2016:2704; DSC 8 November 2019, ECLI:NL:HR:2019:1731; DSC 12 November 2021, ECLI:NL:HR:2021:1677; DSC 10 June 2022, ECLI:NL:HR:2022:861; DSC 10 February 2023, ECLI:NL:HR:2023:198; DSC 26 May 2023, ECLI:NL:HR:2023:778.

77 DSC 13 June 2014, ECLI:NL:HR:2014:1385; DSC 1 May 2015, ECLI:NL:HR:2015:1198; DSC 21 April 2017, ECLI:NL:HR:2017:773.

78 DSC 21 April 2017, ECLI:NL:HR:2017:773.

79 Rotterdam District Court 2 July 2021, ECLI:NL:RBROT:2021:6260, at 2.14.

80 *Parliamentary Documents II* 2010/11, 32 612, nr. 3, p. 22.

that if a quantified entity wins the case, the trader – losing party – should indeed be ordered to pay the costs of the preliminary ruling procedure. Should the quantified entity lose the case, the court could consider making the parties bear the costs they incurred in the preliminary ruling procedure themselves. After all, as a repeat player, the trader benefits from the certainty that the outcome of the case provides him. All this applies barring the case where the consumer abuses procedural rights.

8 Duration of the Procedure

The Directive (if not indirectly) calls for efficient and effective litigation.[81] This means, among other things, that the representative actions for injunctive measures should be dealt with with due procedural expediency.[82] We take this to mean that the proceedings must be conducted expeditiously.

What about the preliminary ruling procedure? Can the duration of the preliminary ruling procedure be considered "efficient" and "effective"? First, the Supreme Court is not required to rule within a specific time frame. But, since answering preliminary questions is a priority within the Supreme Court,[83] it was expected that the Supreme Court would always rule within six to twelve months.[84]

The Dutch literature is predominantly positive about the duration time of the preliminary ruling procedure. When writing about the processing times of preliminary ruling proceedings, consideration is given to the time between the referral decision and the preliminary ruling. Möhring and Kingma, assessing the first 100 cases, found an average of 32,6 weeks (228 days).[85] Giesen calculated the average of the following 15 cases, resulting in an average of 34,4 weeks (240 days).[86]

Indeed, if we focus, on the one hand, the decision of the lower court with preliminary questions to the Supreme Court and, on the other hand, the ruling of the Supreme Court its answers, the preliminary ruling procedure – on the

81 See: art. 4-4 Directive (EU) 2020/1828 and Directive (EU) 2020/1828, preamble at 9.

82 Art. 17 Directive (EU) 2020/1828. See also: Directive (EU) 2020/1828, preamble at 67.

83 Art. 3.3.4.1 and 3.3.15.1 of the Rules of Procedure of the Supreme Court of the Netherlands.

84 *Parliamentary Documents II* 2010/11, 32612, nr. 6, p. 4 (Nota).

85 M.E.A. Möhring & S.M. Kingma, De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudidiciële vragen aan de Hoge Raad, vol. 30, Tijdschrift voor Civiele Rechtspleging, p. 22 (2022).

86 I. Giesen, Tien jaar prejudiciële vragen aan de civiele kamer van de Hoge Raad: kroniek van een aangekondigde ondergang?, in: D.H. Dongelmans et al. (eds), *Rechtsontwikkeling in rechterlijke dialoog*, p. 40–41 (Den Haag: Boom juridisch 2023).

basis of 116 cases, including the cases in which the Supreme Court has referred to the European Court of Justice and including the cases in which the Supreme Court refused to answer – lasts on average 34 weeks (237 days).

However, asking and answering preliminary questions involves more time than the period from the referral order to the Supreme Court's answer. In every case, there is a moment when the lower court notifies the parties that it is considering asking preliminary questions, either on the occasion of an oral hearing or in an interlocutory ruling. From that moment, according to article 392 DCCP, several steps must be followed. The parties must be given the opportunity to comment on the proposed decision of the court and on the phrasing of the questions before the lower court actually refers the preliminary questions to the Supreme Court. On average, taken the notification of the lower courts as a starting point, it will last 48,5 weeks (340 days) on average until the Supreme Court comes to an answer.

After receiving the preliminary ruling of the Supreme Court, the court will then, in accordance with article 394-1 DCCP, give the parties the opportunity to submit their written observations on the Supreme Court's ruling before it giving its decision. In the cases that are known from the website rechtspraak.nl, the lower courts rendered an interlocutory decision. Thus, the period between the Supreme Court ruling and the follow up interlocutory ruling may be taken into account as well. Calculated in this way, the average duration of the preliminary procedure is 67 weeks (470 days).

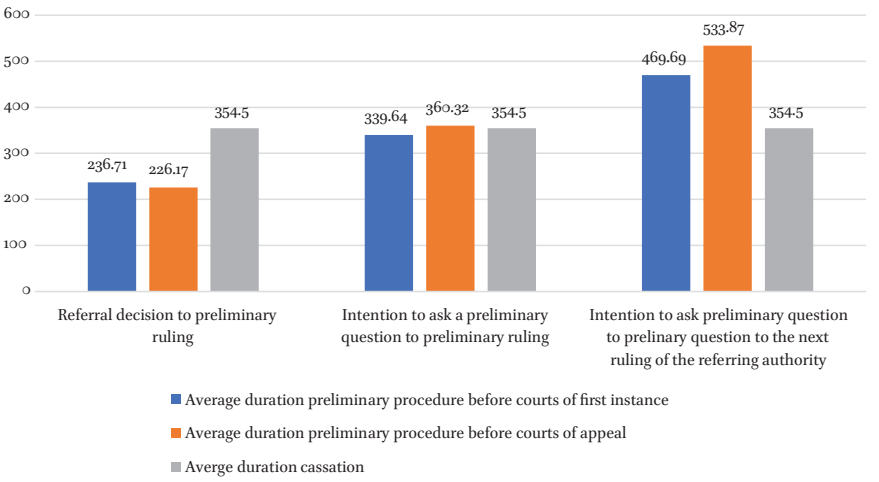
One may wonder whether it would be more expedient to stick to the normal cassation procedure instead of initiating preliminary rulings proceedings, particularly when a case is pending at a court of appeal. We are tempted to answer this question in affirmative way, as the average duration of a preliminary ruling procedure initiated by a court of appeal turns out to be even longer than the overall figures show: from the very moment the court of appeal considers to ask preliminary questions until the preliminary ruling the average is 51 weeks (360 days) and until the interlocutory decision after the preliminary ruling the average is 76 weeks (533 days). To put these numbers into perspective: according to the Supreme Court's annual reports, normal cassation proceedings from the time a summons is filed with the Supreme Court until the Supreme Court's decision takes an average of between 292 (2014) and 422 days (2022).[87] It is therefore not inconceivable that a preliminary ruling procedure will take more time than a normal cassation procedure.

87 We do not take into account that a party may take three months after the decision of the court of appeal to formulate a writ to initiate a normal cassation procedure, which may be submitted at a later date. Furthermore, it is to be noted that a normal decision of the Supreme Court is not necessarily the final decision in a case.

In view of these figures, it doesn't seem to be more expedient to refer preliminary questions to the Supreme Court than it would be to fully litigate a case on appeal and then to go to cassation after the appeal. If a case is on appeal, this may in our view be a reason to be more reluctant to refer preliminary questions, especially when a case falls within the Directive's scope. After all, the time gained may be relatively limited. At the same time, it is possible that other considerations, such as the likelihood that the parties will go in cassation, will weigh more heavily in the decision whether or not to request a preliminary ruling. As a result, it may still be justified to refer preliminary questions to the Supreme Court.

Thus, if a court of appeal is dealing with a representative action in the field of consumer law, it should consider that the Directive calls for an expedient procedure. Take for example the preliminary ruling procedure in the *Woekerpolis/Nationale Nederlanden* case. The The Hague Court of Appeal considered to initiate a preliminary ruling proceedings in its decision of 31 March 2020.[88] On 23 February 2021 it referred the questions to the Supreme Court.[89] On 11 February 2022 the Supreme Court rendered its ruling.[90] It was

TABLE 1 Average duration in the preliminary ruling procedure and cassation



SOURCE: OWN ELABORATION, BASED ON DATA PUBLISHED ON WWW.RECHTSPRAAK.NL

88 The Hague Court of Appeal 31 March 2020, ECLI:NL:GHDHA:2020:543.
89 The Hague Court of Appeal 23 February 2021, ECLI:NL:GHDHA:2021:302.
90 DSC 11 February 2022, WOEKERPOLIS/NATIONALE NEDERLANDEN, ECLI:NL:HR:2022:166.

not until 26 September 2023 that the Hague Court of Appeal reached a final decision.[91] This means that the proceedings lasted 1247 days. We doubt one can speak of "effective" and "efficient" litigation in this case. It may be that Covid-19 related issues were at stake, but the same applies to the average duration of normal cassation proceedings.

9 Conclusion

When preliminary questions are referred to the Supreme Court in a collective action on behalf of consumers, there may be concurrence between the Directive and the preliminary ruling procedure. We have noticed that if there is indeed concurrence, in some respects the Directive offers more protection than the preliminary ruling procedure. We have therefore made recommendations regarding the influence of third parties on the preliminary procedure, the costs and the duration of the procedure.

Given that third parties (may) have their own interest in submitting comments, it would be desirable for the Supreme Court to be more transparent about the influence third parties have on a preliminary ruling. The publication of written comments by third parties, for example, could be a step in the right direction. All the more so because the Directive's requirements on parties, such as transparency about their source of funding, can be circumvented by third parties. Such parties should not be able to have back-door influence on the process.

Regarding the award of costs, in our view judges should try to follow the guiding principle of the Directive that the losing party is ordered to bear the costs of the proceedings. When the qualified entity is the losing party, the court could still choose to have parties bear their own costs. After all, as a repeat player, the trader benefits from the certainty provided by a preliminary ruling.

Finally, it can sometimes be questioned whether the preliminary ruling procedure contributes to "effective" and "efficient" litigation. The value of asking a preliminary question also depends on the stage of the proceedings. In particular, where preliminary questions are raised in an appeal, it may in some cases be more expedient to wait for an appeal in cassation.

At the same time, a preliminary ruling also provides certainty for both consumers and traders. This is a great advantage that additionally serves the goals of the Directive. The preliminary ruling procedure can complement the protection offered by the Directive in this respect. In conclusion, preliminary

91 The Hague Court of Appeal 26 September 2023, ECLI:NL:GHDHA:2023:1854.

rulings in collective actions can be very useful. In our view, however, it is desirable that both the trial courts and the Supreme Court should seek to comply as far as possible with the safeguards provided by the Directive.