Paving the road to ‘legal revolution’: The Dutch origins of the first preliminary references in European law (1957–1963)

Karin van Leeuwen*

Abstract
This article reconsiders the driving forces behind the active role of Dutch courts in the early development of European law by analysing the histories of the 1962 Bosch and 1963 Van Gend en Loos preliminary references. The legal context of these path-breaking references and their crucial impact on the development of a constitutional doctrine in European law are evident. Yet for understanding the emergence of the cases, their political and economic contexts need to be added to the well-known favourable constitutional settlement from which they arose. Adding contingency to the narrative of the Netherlands as the proverbial ‘good European’, this article reports how the pavement for the ‘road to Luxembourg’ was made up of materials as diverse as an open stance towards international law, a black market in electronic equipment, and a dispute on the definition of Harnstoffharz.

1 | INTRODUCTION

Dutch courts took an extraordinarily large share in the early development of a constitutional practice in European law. Until 1964, no less than 15 of the first 18 questions sent to the European Court of Justice (ECJ) via the preliminary ruling mechanism (Article 177 EEC, now Article 234 TFEU) were in fact Dutch requests. Moreover, the first two Dutch references—the 1962 Bosch case and the 1963 Van Gend en Loos case—blazed the trail for the rest to follow. The former was used by the ECJ to transform the preliminary reference mechanism into a route for private
litigants to challenge national policies via EEC law. In the latter case, the ECJ launched the direct effect doctrine confirming that the Treaties of Rome could, under certain conditions, create rights for individuals.3

The ECJ’s ‘legal revolution’—which was cemented with the 1964 Costa/ENEL ruling5—has always been one of the key riddles in scholarly literature on European law.6 As they laid the foundations for the advancement of ‘European integration through law’, the early 1960s landmark cases not only figure prominently in legal literature, but also in political science theory explaining how the ECJ was enabled to develop its active role in integration by aggregate mechanisms such as domestic court politics,7 or judicialization in more general terms.8 More recently, sociologist Vauchez added the ‘Euro-lawyers’ to this narrative, who as ‘legal entrepreneurs’ ‘brokered’ the new constitutional system while trying to establish a European law ‘field’.9 Remarkably, in these multi-faceted analyses, the crucial Dutch case is not considered very extensively. Reduced to the unusual constitutional settlement and legal culture that provided an excellent occasion for a practice of preliminary references to develop,10 the present narrative on the Netherlands does not sufficiently explain why this practice emerged.

This article argues that the important contribution Dutch courts made to the early 1960s ‘legal revolution’ can only be explained when a broader, economic and political context is taken into account. On the basis of archival research in a number of yet unexplored collections, it will demonstrate that indeed, the Dutch constitution created an almost ideal context by explicitly acknowledging the primacy of international law. However, in order for Dutch courts to actually apply this primacy, an initial reticence had to be overcome,11 which followed from the traditionally consensual Dutch legal culture.12 Detailed analysis of the two court cases that were eventually referred to the ECJ suggests that the substance of the cases was just as crucial in overcoming this reticence as more fundamental considerations on primacy. Also, it substantiates with new empirical evidence that indeed, a small group of well-informed Dutch ‘Euro-lawyers’ actively promoted the emergence of a European legal order by spreading knowledge about the new treaties and their possible application in court.13 Yet, this analysis also finds that the seminal Bosch and Van Gend en Loos cases themselves were not filed as test cases by this same group of pro-integration lawyers,14 but produced by lawyers who had in mind the more daily demands of companies that found themselves confronted with the realities of market integration. Thus, while building on the growing body of scholarship referred to as ‘new EU legal

---

2Case 13/61, De Geus en Uitdenbogerd v. Robert Bosch, ECLI:EU:C:1962:11; Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, ECLI:EU:C:1963:1.

4M. Rasmussen, ‘Revolutionizing European Law: A History of the Van Gend En Loos Judgment’ (2014) 12 International Journal of Constitutional Law, 136.

6Case 6/64 Costa v. ENEL ECLI:EU:C:1964:66.

5Case 6/64 Costa v. ENEL ECLI:EU:C:1964:66.

6M. Rasmussen, ‘Rewriting the History of European Public Law: The New Contribution of Historians’, (2013) 28 American University International Law Review, 1187.

7E. Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’, (1981) 75 American Journal of International Law, 1 and J.H. H. Weiler, The Constitution of Europe (Cambridge University Press, 1999) are the classics on the role of the ECJ, while Alter, above, n. 2, authoritatively introduced national courts as relevant actors.

8A. Stone Sweet, The Judicial Construction of Europe (Oxford University Press, 2004).

9A. Vauchez, Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity (Cambridge University Press, 2015).

10M. Claes and B. de Witte, ‘Report on the Netherlands’, in A.M. Slaughter, A. Stone Sweet and J.H.H. Weiler, (eds.), The European Court and National Courts: Doctrine and Jurisprudence (Hart Publishing, 1998), at 171.

11M. Waelbroeck, Traité internationaux et juridictions internes dans les pays du Marché commun (CIDC, 1969), at 270–271; J. de Wit, Artikel 9 Grondwet toegepast (BJU, 2012), at 66–79.

12F. van Waarden and Y. Hildebrand, ‘From Corporatism to Lawyocracy? On Liberalization and Juridification’, (2009) 3 Regulation & Governance, 259, 263.

13Vauchez, above n. 9, at 119–121; M. Rasmussen, ‘Establishing a Constitutional Practice: The Role of the European Law Associations’, in W. Kaiser and J.H. Meyer (eds.), Societal Actors in European Integration: Polity-Building and Policy-Making, 1958–1992 (Palgrave Macmillan, 2013), at 173.

14Cf. Vauchez, ‘The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU Polity’, (2010) 16 European Law Journal, 1, 10; similarly, K.J. Alter, The European Court’s Political Power (Oxford University Press, 2009), at 74; Rasmussen, above n. 13, at 183.
history, this article renews earlier pleas to link the debates and developments regarding European law and its enforcement to the market integration that was at the heart of the EEC Treaty.

Aiming to understand better the origins of both the 1962 Bosch preliminary reference and the 1963 Van Gend en Loos case, this study deals chronologically with the separate yet narrowly intertwined contexts of these two cases. In the first three sections, it demonstrates how the possibility of using the preliminary reference procedure had already come up in Dutch legal debate in 1957, in the context of the EEC Treaty clauses on competition. While specialized competition lawyers took the lead in these discussions, their concerns regarding the application of these treaty clauses in the Netherlands met with more general considerations vis-à-vis the uniform application of EEC law voiced by a small group of legal professionals gathering around Leiden University’s new Europa Instituut. In addition, the opening of the road to Luxembourg in 1961 fed in to a well-established practice of litigation on cartel agreements. Similarly, the famous Van Gend en Loos reference that is dealt with in the last two sections followed up on scholarly explorations on the question of direct effect, as well as the important precedent created by the Bosch preliminary reference. However, it was also a successful application of the new EEC legal framework to a specialist dispute over import tariffs that went back to long before the founding of the EEC.

2 ▪ SETTING THE SCENE: THE PRELIMINARY REFERENCE PROCEDURE AND THE INTERPRETATION OF ARTICLE 85

Before the Bosch case in 1961 led to sending the first preliminary reference to the ECJ—an occasion that allegedly was celebrated with champagne in Luxembourg—the use of the procedure described in Article 177 of the EEC Treaty was all but self-evident. It was contested even among the ECJ judges, as became clear during their visit to the Netherlands in 1959. However, in 1957, P.W.L. Brijnen and H.W. Wertheimer, in-house lawyers of the Dutch multinationals Bataafse Petroleum Maatschappij (BPM, currently part of Shell) and N.V. Philips had been amongst the first to address the possible use of the procedure in a joint article on the interpretation of the EEC Treaty’s competition clauses. Where did their interest in this procedure come from?

Indeed, the articles on competition provided a major challenge to Dutch national competition legislation. In general, the Dutch legal order was very open to treaty obligations. In 1953 and 1956, constitutional reforms had cleared the way for an almost unlimited transfer of competences to international organisations, safeguarding key constitutional competences by no more than a two-thirds majority in parliament. Also, the reforms had introduced new provisions on the primacy of self-executing provisions of international treaty law—in the terminology of the constitution: those provisions considered ‘binding on anyone’. The far-reaching reform built on an earlier monist doctrine, which in practice was applied rather reticently by courts that at the same time had to consider a constitutional ban on judicial

15B. Davies and M. Rasmussen, ‘From International Law to a European Rechtsgemeenschap: Towards a New History of European Law, 1950–1979’, in J. Laursen (ed.), Institutions and Dynamics of the European Community, 1973–83 (Nemos Verlag, 2014) and M. Pollack, ‘The New EU Legal History: What’s New, What’s Missing’, (2013) 28 American University International Law Review, 1257.

16A convincing plea to study policy building and market construction in their symbiosis is presented in N. Fligstein and A. Stone Sweet, ‘Constructing Politics and Markets: An Institutionalist Account of European Integration’, (2002) 107 American Journal of Sociology, 1206.

17The procedure, for example, was not mentioned in an exploration of legal remedies for individuals in the prominent Nederlands Juristenblad: R.P. Besseling, ‘Beschouwing over de Rechtsmiddelen ten Dienste van Particulieren Krachtens het Verdrag der Europese Economische Gemeenschap’, (1960) Nederlands Juristenblad, 851. Cf. L. Erades, ‘Recht en Rechter in Nederland en in de Europese Gemeenschappen’, (1960) 7 Netherlands International Law Review, 334, at 352.

18Rasmussen, above n. 4.

19P.W.L. Brijnen and H.W. Wertheimer, ‘De Interpretatie van de Kartelbepalingen in het Europese Economische Gemeenschapverdrag’, (1957) 5 Sociaal-Economische Wetgeving, 253, at 257. Philips and Shell represented two of the ‘big four’ Dutch multinationals, who, with many other large companies behind them, increasingly dominated the Dutch postwar economy. The other two were Unilever and AKU. K.E. Suytbergen, Kerende Kansen: Het Nederlandse Bedrijfsleven in de Twintigste Eeuw (Boom, 2003), at 212–213 and 225–227.
review of laws. Moreover, the reform had been inspired by a strong pro-integrationalist spirit in the Dutch parliament, which outweighed the concerns for national sovereignty defended by government.20 In the same spirit, ratification of the Treaties of Rome in 1957 as such had posed no problem for the Dutch constitutional order.21

Notwithstanding this favourable constitutional settlement, the Netherlands had been the only Member State openly contesting the direct applicability of the one treaty article broadly assumed to possess it: Article 85 EEC on competition.22 In general, the EEC Treaty was considered to be addressed to the Member States, for example by obliging them to establish a common agricultural policy (Article 40 EEC) or not to increase tariffs (Article 12 EEC). The ‘rules applying to undertakings’ presented in Articles 85–86 EEC, however, clearly spoke to businesses where stating that agreements or decisions preventing, restricting or distorting competition in the trade between Member States ‘shall be automatically void’ (Article 85.2 EEC). Since the EEC policy that had to apply the rules set out in Articles 85–86 EEC was only to be set up within three years after the treaty entered into force, the treaty further stated that during this transition period, the authorities of the Member States were to apply these rules ‘in accordance with their respective municipal law’ (Articles 87–88 EEC).23 

Here, a major problem for the Dutch government arose. Unlike in most other Member States, where competition legislation was either non-existent (Italy, Belgium, Luxembourg) or in line with the EEC Treaty (Germany), Dutch competition legislation was rather tolerant towards cartels and other sorts of collusion, banning only those forms of cooperation that were contrary to public interest.24 Thus, applying both Articles 85–86 EEC and the Dutch law presented an impossible task for the Dutch competition authorities.

At the instigation of Dutch businesses, the problems posed by the competition provisions had been a key issue during the ratification of the EEC Treaty in autumn 1957.25 However, Minister of Economic Affairs J. Zijlstra, backed by a majority of parliamentarians, refused to acknowledge that the EEC Treaty called for a reform of the Economic Competition Act that had just been passed in 1956.26 Zijlstra acknowledged that the German-inspired phrasing of the EEC Treaty seemed to point in the direction of a rather strict, ordo-liberal approach to competition. Yet, the negotiations on the EEC competition policy could still lead to a system more resembling the Dutch abuse system, granting regulators wide discretion to regulate competition in the public interest—this, after all, had been the dominant system in Europe since the interwar period.27 To regulate the consequences of the treaty until a common

---

20K. van Leeuwen, ‘On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms “Towards” Europe’, (2012) 21 Contemporary European History, 357.

21J. Hollander, Constitutionalising Europe Dutch Reactions to an Incoming Tide (1948–2005) (Europa Law Publishers, 2013), at 110.

22Public statement of the head of delegations, 6 May 1957, as cited in Rasmussen, above n. 4, at 143.

23S. Hambloch, ‘EEC Competition Policy in the Early Phase of European Integration’, (2011) 17 Journal of European Integration History, 237, at 241.

24H. Schröter, ‘Cartelization and Decartelization in Europe, 1870–1995’, (1996) 25 Journal of European Economic History, 129; B. Bouwens and J. Dankers, ‘The Invisible Handshake: Cartelization in the Netherlands, 1930–2000’, (2011) 84 Business History Review, 751.

25Handelingen Tweede Kamer (proceedings of Second Chamber, HTK) 1956–1957, at 19–174. Hambloch’s claim that several parties threatened not to ratify the EEC Treaty because of the nature of Article 85.3, however, severely overstates the importance of the subject. Cf. S. Hambloch, Europäische Integration am Beispiel der Wettbewerbspolitik in der Frühphase der Europäischen Wirtschaftsgemeinschaft (Habilitationschrift Universität Siegen, 2007), at 101. For the involvement of business, see the many requests addressed to parliament in National Archives (NA) The Hague, House of Representatives, 202.28/2097; and the lobbying via, e.g., the employers’ union and via MP and ex-Philips employee P. Blaise in letter Wertheimer to Brijnen, 8 November 1957, Philips Company Archives (PCA), inv. no. 4072.

26A. Mulder and M.R. Mok, Kartelrecht (Samsom, 1962).

27R. Daniel Kelemen, Eurolegalism: The Transformation of Law and Regulation in the European Union (Harvard University Press, 2011), at 150. At the time of the negotiations, it was not at all certain that the ordoliberal system would eventually prevail: S. Ramírez Pérez and S. van de Scheur, ‘The Evolution of the Law on Articles 85 and 86 EEC’, in K.K. Patel and H. Schweitzer (eds.), The Historical Foundations of EU Competition Law (Oxford University Press, 2013), at 19.
competition policy was established, Zijlstra introduced a temporary, special law.\textsuperscript{28} However, this law, which upheld the Dutch system while leaving the enforcement of the contradictory national and EEC rules to the discretion of the Minister of Economic Affairs, far from solved the problems signalled in business circles.

The solution found by Zijlstra met the intention of the signatory states to leave the application of Article 85.2 EEC up to the Member States until a joint policy was agreed.\textsuperscript{29} And the Minister of Economic Affairs could be trusted to implement the treaty obligations in agreement with the Dutch cartel-tolerant legislation. However, as various members of parliament were eager to point out, the special law did not provide any legal security for companies involved in cartel agreements if these agreements were challenged in court. Since the Dutch constitution granted priority to treaty provisions with direct effect, companies had no guarantee that the special law would hold when courts were to rule on the direct applicability of Article 85 EEC.\textsuperscript{30} The grounds for such private legal actions—which were rare in national competition policies in Europe—were found in tort law, based on which claims challenging the breach of distribution agreements had been produced since 1937. In the pro-cartel climate of the late 1930s, courts had upheld the challenged distribution agreements.\textsuperscript{31} The possibility that, from 1957 onwards, Article 85 EEC might lead courts to annul such agreements, posed an immediate threat to many Dutch business sectors, where cartel arrangements prevailed as a legacy of a long period of crisis, war economy and post-war reconstruction.\textsuperscript{32}

Indeed, in Brijnen and Wertheimer’s 1957 discussion of Article 85 EEC, the lack of legal security for businesses engaged in cartel agreements figured as a key concern. Soon, three different interpretations of Articles 85–86 EEC emerged. Firstly, the German negotiator of the treaty and later president of the Bundeskartellamt, E. Günther, authoritatively claimed that the articles concerned directly applicable (direktwirkend) citizen binding norms. This interpretation, however, was challenged by a senior officer from Zijlstra’s department, future director general of the EEC Commission’s DG Competition, P. VerLoren van Themaat. Setting the frame for the Dutch special law, VerLoren van Themaat had argued that Articles 85–86 EEC were principles or guidelines for national policy making that would only turn into binding rules after a common EEC competition regulation had been established.\textsuperscript{33} A third alternative regarded the articles as authorization norms for the national competition authorities, binding the Member States but not citizens until a common policy was adopted.\textsuperscript{34}

Brijnen and Wertheimer had suggested that a joint statement of the Member States should end the uncertainty resulting from these contradictory interpretations.\textsuperscript{35} Wertheimer in particular had made a similar claim through a resolution of the newly created European organization of industrialists, the later Union des Industries des Six Pays de la Communauté Européenne (UNICE) which, in spite of the support of influential bodies such as the International Chamber of Commerce, got no response.\textsuperscript{36} The European Commission did address the interpretation of Article 85

\textsuperscript{28}HTK 1956–1957, Bijl. 4778, no. 1–2. The special law was dubbed ‘Sinterklaaswetje’, because it was accepted on 5 December 1958, when the Dutch celebrate the patron’s day of St. Nicolaas.

\textsuperscript{29}L.F. Pace and K. Seidel, ‘The Drafting and the Role of Regulation 17’, in Patel and Schweitzer, above, n. 27, at 64.

\textsuperscript{30}HTK 1957–1958 at 28–29; Handelingen Eerste Kamer (Senate proceedings, HEK) 1957–1958 at 46, 84.

\textsuperscript{31}Hoge Raad, Kolynos (11 November 1937), Nederlandse Jurisprudentie no. 1096. I thank Rob Mok for pointing this out.

\textsuperscript{32}Bouwens and Dankers, above n. 24, 763.

\textsuperscript{33}R. VerLoren van Themaat, ‘De Kartelprocess in de Europese Economische Gemeenschap’, (1957) 5 Sociaal-Economische Wetgeving, 224; P. VerLoren van Themaat, ‘Naschrift’, (1957) 5 Sociaal-Economische Wetgeving, 257. VerLoren van Themaat left this position after he started working as official for DG IV.

\textsuperscript{34}B. Baardman, ‘Enkele Gevolgen van het E.E.G.-Kartelrecht voor het Nederlands Privaatrecht’, in De Kartelbepalingen in het E.E.G.-Verdrag: Praeadvicezien (Tjeenk Willink, 1960), 51, 62; Hambloch, above, n. 23, at 101.

\textsuperscript{35}Brijnen and Wertheimer, above, n. 19, at 257.

\textsuperscript{36}Statement of the Conseil des Fédérations Industrielles d’Europe (CIFE), 18 July 1957. The original French text was reproduced in Brijnen and Wertheimer, above, n. 19, at 256–257. Wertheimer had attended the expert meeting of UNICE on this resolution and, together with Brijnen, tried to organise explicit support for this resolution in the European League for Economic Cooperation (ELEC), a network of European entrepreneurs and one of the founding members of the European Movement—without success. Letter, Wertheimer to Mme de Wergifosse, 8 July 1957, PCA inv. no. 4072. In December 1957, the International Chamber of Commerce (ICC) followed suit: ICC resolution 225/58 ‘The Rules Governing the Competition Applicable to Enterprises in the European Economic Community’, NA, Ministry of Foreign Affairs 1955–64, 2.05.118/20762.
EEE, at the instigation of the Dutch officials participating in the so-called ‘competition conference’ set up by Competition Commissioner Hans von der Groeben. In a January 1959 press release, it stated that ‘the participants [to the cartel conference] unanimously agreed that Articles 85 and 86 EEC treaty are not just guidelines but have force of law in the Member States. (...) They are part of the national legal order and have preference over national law’.37 As a Dutch official hastened to add, this, however, did not rule out the authorizing norms interpretation binding states rather than citizens.38 As a consequence—as was also concluded by the national experts participating in the Commission’s cartel conference—an absolute interpretation of Article 85 EEC required a court case to be presented to the ECJ.39 This confirmed what Brijnen and Wertheimer had already observed in their 1957 analysis of the ‘puzzling’ interpretation of the competition clauses.40 Yet, the knowledge of how to do this took some time to emerge.

3 | EURO-LAWYERS AND THE UNIFORM APPLICATION OF EUROPEAN LAW

It did not take long before a case was brought to a Dutch court in which Article 85 EEC was invoked to challenge the validity of a competition agreement. In the case in point—a procedure in which a Dutch paper manufacturer tried to use the EEC Treaty to declare an agreement it had with a Belgian counterpart, Tuberies Louis Julien S.A., null and void—no reference at all was made to the possibility of using the preliminary reference procedure. In its 1958 decision on this remarkable case, which suggests that the tide with regard to competition was turning in the highly cartelized paper industry,41 the Zutphen district court had simply followed its normal habit of finding its own interpretation of the treaty clause invoked. In fact, it accepted the argumentation of the Belgian company—and the Dutch government—understanding Article 85 EEC as principles guiding national policy as long as the Common Market had not been fully established.42

While the interpretation of Article 85 EEC was a central subject in competition law debates across the EEC, news of the Zutphen court ruling quickly spread.43 In the Netherlands, the question of the interpretation of Articles 85–86 EEC was one of the central issues in the special working group on cartel law that had been established under the umbrella of Leiden University’s new Europa Instituut, as well as at various major conferences.44 As in 1957, the in-house lawyers of Dutch multinationals maintained a prominent role in these discussions. While Philips had instigated the establishment of the Leiden cartel law group in order to share expertise with law professors and senior officials,45 B. Baardman, an in-company lawyer at Unilever, published an authoritative analysis of the impact of the EEC Treaty’s cartel provisions.46

37 Voorlichtingsdienst Europese Gemeenschappen, ‘Het Kartelbeleid in de EEG. Tweede Bijeenkomst van Karteldeskundigen’, 21 January 1959, in NA MinEcon/BEB, inv. no. 532.
38 J.C. van Alphen de Veer, ‘Art. 88 van het Verdrag van Rome en de Kartelpolitiek van de Europese Economische Gemeenschap’, (1959) Sociaal Economische Wetgeving, 52.
39 Verslag van de eerste conferentie van karteldeskundigen van de Lidstaten van het EEG-verdrag met de Europese Commissie, 18 November 1958, NA MinEcon/BEB, inv. no. 532. This position was seconded by the European Parliament in a resolution dated 15 January 1959: OJ 7 (1959) p. 165.
40 Brijnen and Wertheimer, above, n. 19, at 257.
41 Figures in W. Asbeek Brusse and R. Griffiths, ‘Early Cartel Legislation and Cartel Policy in the Netherlands. In Memoriam’ (1997) 4 Acta Politica, 375.
42 Zutphen District Court, Tuberies Louis Julien S.A. v. N.V. Van Katwijk’s Papier en Cartonverwerkende Industrieën (11 July 1958), (1959) Nederlandse Jurisprudentie, 426.
43 It was, for example, covered in the international business newspaper Neue Zürcher Zeitung: Letter, Wertheimer to A.J.M. Weebers, 29 July 1858, PCA inv. no. 4208.
44 Dutch Association for International Law (Nederlandse Vereniging voor Internationaal Recht) in 1959 and the very well attended meeting of the Association for Company Law (Vereniging Bedrijfsrecht) in 1961.
45 Letter, C.H.F. Polak to J.R. Schaafsma 25 November 1958, PCA inv. no. 4281 and archive Europa Instituut, Leiden (EIL) (private); Interview, B.H. ter Kulie, The Hague, 23 September 2013.
46 Baardman, above, n. 34.
In parallel to these specialist discussions on Articles 85–86 EEC, a more general debate on European law had developed in the Netherlands around an informal working group initiated in 1954 by Leiden law professors C.H.F. Polak, specializing in administrative law, and F.M. von Asbeck, who held a chair in international law. As successor to Von Asbeck, I. Samkalden in 1959 transformed this informal working group into a formal Europa Instituut, providing postgraduate education and a meeting ground for Dutch lawyers and law students interested in European law. From September 1960 onwards, lawyers working in the new field of European law also met in the newly established Nederlandse Vereniging voor Europees Recht (NVER), one of the founding associations of the international Fédération Internationale de Droit Européenne (FIDE). Meanwhile, the journal *Sociaal-Economische Wetgeving* functioned as an exchange space for specialists and generalists, by offering a platform for articles, case notes and reviews on all topics concerning national and European 'social and economic legislation'. It was through the exchange with these more generalist 'Euro-lawyers' that the possibility of a preliminary reference re-entered the discussion on competition law.

Generally, the Dutch pioneers of European law who met in the Leiden working group and the NVER shared a 'constitutional' approach to European law. Polak and Samkalden, for example, explicitly regarded the ECSC and EEC Treaties as introducing a new, supranational legal order. Aside from occasional opponents, such as Foreign Affairs *jurisconsulte* W. Riphagen, this approach met with little resistance in Dutch legal debate, in which the idea of a strict separation of international and national legal spheres had turned into a minority view by 1960. The open Dutch constitutional setting importantly contributed to this lack of discussion, as the practical consequences of both views on European law did not differ very much. Instead, the Dutch 'Euro-lawyers' directed their attention outwards. Arguing for the uniform application of EEC law in all Member States, they concluded, would be vital to protect Dutch (business) interests. This also defined their engagement with the preliminary reference procedure that appeared in Dutch legal debate in mid-1960. As Samkalden argued, using this procedure would not only be an important step in the development of a supranational legal order, but more specifically, it would ensure Dutch businesses and consumers a uniform interpretation of Article 85 EEC.

The Leiden pioneers would be instrumental in introducing the possibilities of EEC law in general and Article 177 EEC in particular to a large audience of legal practitioners in the Netherlands. In September 1960, Samkalden and Polak authoritatively opened the debate on the use of Article 177 EEC at a conference organized by the Dutch Bar Association (Nederlandse Orde van Advocaten). Invited to inform a broad audience of lawyers on European law in general, Samkalden asserted that 'behind the European treaties is the grand scheme of a new legal order that needs to be elaborated', and encouraged lawyers to use the EEC Treaty to enforce compliance for their clients vis-à-vis more powerful Member States. Polak more specifically addressed the issue of the...
preliminary reference, which by that time had been brought up in another Dutch court case on competition, but had been refused by the court that dealt with the matter.55 Here, Polak suggested to his audience that, if courts continued to refuse to use this procedure, the use of Article 177 EEC was to be made subject to a preliminary reference itself.56

In the same month, at the inaugural meeting of the NVER, EC Director General of Competition VerLoren van Themaat called on a dedicated audience of European law specialists to help 'synchronize' the speed of development of national competition policy and European competition policy.57 Indeed, arguments raised by Polak, Samkalden and VerLoren van Themaat fed into pending court cases on Article 85 in which the preliminary reference was explicitly considered. Yet, the cases in point emerged independently, in particular from disputes regarding the trade in radios and other electronic equipment.

4 TELEVISIONS, FRIDGES AND A PRACTICE OF PRELIMINARY REFERENCE

Although a nationwide ‘radio cartel’ had been prohibited in 1956—one of the few times the Minister of Economic Affairs made use of his authority to prevent ‘abuse’—the market for radios and other electronic equipment in the Netherlands was dominated by distribution agreements between (mostly German) producers and their official agents for the Dutch market.58 Yet, many small retailers bypassed these agreements, buying their products more cheaply on the German market. As a consequence of the 1930s jurisprudence on distribution agreements, these entrepreneurs risked being brought to court for deliberately violating the contract of the official agent—which a coalition of agents and producers increasingly did in the late 1950s, when the booming sale of these products challenged traditional sales chains.59 The EEC Treaty however provided them with a new possibility to challenge the validity of such contracts and thus defend their ‘illegal’ trade.

While various cases had already been fought on the matter, the first time the EEC Treaty was referred to in these cases was September 1959, in a dispute between the Amsterdam bicycle retailer K.I.M. and Sieverding, the official distributor of Grundig radios and televisions in the Netherlands.60 Not only did the lawyer representing K.I.M. bring into the discussion the articles on competition, as had been done before in the Zutphen case, but the option of starting a preliminary reference procedure was also mentioned. However, the Amsterdam Court of Appeal refused to use Article 177 EEC because it found the procedure incompatible with the nature of the case—as so-called summary proceeding (kort geding) that should be rapid.61 In its role as cassation court, the Hoge Raad also rejected the demand, considering the interest of Sieverding in this case insufficient.62

55Amsterdam Court of Appeal, K.I.M. Rijwielfabriek N.V. v. Sieverding (3 March 1960), (1960) Sociaal-Economische Wetgeving Europa, 80.
56Polak, above, n. 49, at 362.
57Minutes, NVER founding meeting, 24 September 1960, and opening speech VerLoren van Themaat, in archive NVER, The Hague (private).
58On this 'radiocartel', see HTK 1955–1956 (8 March 1956), 3768; HTK (Aanhangsel) 1959–1960, no. 3116.
59See, on this so-called 'Kolynos-jurisprudence', above, n. 31.
60See ‘Verdrag is richtsnoer’, De Tijd/Maasbode (3 March 1960). Previous cases included a 1957 Philips v. De Geus en Uitdenbogerd case and a 1959 Graetz v. K.I.M. case. See ‘Philips in het gelijk gesteld’, Het vrije volk (23 December 1957); ‘Amsterdamse fabriek beschuldigd van deloyale concurrentie’, Algemeen Handelsblad (13 November 1959).
61Amsterdam Court of Appeal, K.I.M. Rijwielfabriek N.V. v. Sieverding (3 March 1960), (1960) Sociaal-Economische Wetgeving Europa, 80. In addition to demanding a quick procedure, a kort geding also did not allow the court to make irreversible decisions such as nullifying cartel agreements unless the case was unambiguous—and it was very clear that the interpretation of Article 85.2 was not. I thank Michel Waelbroeck for pointing this out.
62High Court, K.I.M. Rijwielfabriek N.V. v. Sieverding (13 January 1961), (1962) Nederlandse Jurisprudentie, 245; (1961) Sociaal Economische Wetgeving, 315.
In Brussels, these procedural arguments provoked an EC official to think that Dutch courts were ‘conveniently avoiding’ a difficult and perhaps also politically unwelcome ruling that might set aside national law. Busy exploring the possibilities of the preliminary reference procedure, Dutch lawyers, however, mainly responded by asking for ‘better’ court cases, in other words: a full proceeding. When in Rotterdam a similar case was brought before court by the German fridge manufacturer Linde, Samkalden publicly called for an ECJ ruling on the matter. Indeed, the next case, filed in October 1960 by Linde’s parent company Bosch against the same reseller, V.o.f. Kledingverkoopbedrijf De Geus en Uitdenbogerd, concerned a full proceeding. And while this made no difference for the Rotterdam district court, which in both rulings rejected the direct applicability of Article 85 EEC, the Hague Court of Appeal decided to refer the case to Luxembourg—thus producing the first preliminary reference under Article 177 EEC.

What had caused this change in the practice of Dutch courts with regard to the use of Article 177 EEC? Although experience with the EEC Treaty was still limited at the time, the Hague Court of Appeal did not make its decision from ignorance. On the contrary: by requesting a preliminary reference in June 1961, it passed over the opinion of Advocate-General P. Eijssen of the Hoge Raad in the K.I.M.-Sieverding case, which had been published in January of the same year. Distancing himself from the messages conveyed by Polak and Samkalden in their late 1960s speeches, Eijssen had argued against the use of the preliminary reference procedure. In his opinion, Dutch courts themselves were responsible for deciding whether treaty provisions had the ‘direct effect’ stipulated as the condition for the supremacy of international law in Article 66 of the Dutch constitution—not the ECJ. Eijssen’s opinion importantly stimulated the debate on the use of Article 177 EEC in Dutch academia, which may have fed in to the decision of the Hague Court of Appeal to go against it. Whether it also was inspired by debates on the increasingly divergent interpretation of Article 85 EEC across the EEC Member States, which hit particularly hard in the sector of (German imported) electronic equipment, cannot be traced in archival sources. Yet, it can be concluded that the opening of the road to Luxembourg in 1961 with the Bosch case reflected the establishment of a new legal field in the Netherlands in which both generalists and (competition) specialists played their part.

Once the reference was filed, the ‘Euro-lawyers’, who so far had mainly played their part in speeches and publications, also came to take a more active role in the case. For example, NVER secretary C.R.C. Wijckerheld Bisdom was now added to the team of lawyers representing Bosch before the ECJ in Luxembourg as well as in the cassation case he may have suggested Bosch to file at the Hoge Raad on the lawfulness of the preliminary reference. Wijckerheld’s critical discussion of some imperfections in the phrasing of the Hague Court’s request helped sharpen the Hoge Raad’s ruling in this cassation case. However, the fact that the Hoge Raad moved beyond the Eijssen

63 G. Bebr, Judicial Control of the European Communities (Stevens, 1962), at 197. Bebr was an American scholar employed at the Legal Service of the EEC Commission from 1960 onwards with the task of monitoring the reception of European law in the Member States. See Rasmussen, above, n. 4.
64 M.R. Mok, ‘Van Kolynos tot KIM-Sieverding’, (1961) Sociaal Economische Wetgeving, 98; J. Geertman, ‘Vrije import’, (1961) 2281 Economisch-Statistische Berichten, 379.
65 Rotterdam District Court, Linde and Heybroeck Zelander v. De Geus en Uitdenbogerd, 19 July 1960, (1960) Sociaal-Economische Wetgeving, 180.
66 Rotterdam District Court, Robert Bosch GmbH and W. van Rijn N.V. v. De Geus en Uitdenbogerd, 26 October 1960, (1960) Nederlandse Jurisprudentie, 159; Hague Court of Appeal, Bosch & Van Rijn v. De Geus en Uitdenbogerd, 30 June 1961, (1961) Nederlandse Jurisprudentie, 375.
67 Eijssen’s opinion was published together with the case in the Hoge Raad, K.I.M. Rijwielfabriek N.V. v. Sieverding, 13 January 1961, (1961) Sociaal-Economische Wetgeving, 315. The Hoge Raad itself did not rule on the matter as considered the interest of one of the proceeding parties insufficient.
68 See Sk.’s comment on Linde v. De Geus en Uitdenbogerd, 19 July 1960, (1960) Sociaal-Economische Wetgeving, 180.
69 List of founders in archive, NVER (private); Court files ECJ in NA, Foreign Affairs 1955–64, 205.118/21194; Court Files, High Court in NA, High Court, 2.09.65/180; similar M. Rasmussen, ‘Constructing and Deconstructing “Constitutional” European Law: Some Reflections on How to Study the History of European Law’, in H. Koch et al. (eds.), Europe: The New Legal Realism (Djof Publishing, 2010), 639, 647.
opinion and approved the use of Article 177 EEC probably was mainly due to a recent government memorandum confirming the practice of explaining treaty provisions by clarifying the ‘intentions’ behind them.\(^{70}\)

For the activist trade companies such as K.I.M. and De Geus en Uitdenbogerd, and the many competition experts who had prepared the stage for this breakthrough by exploring the possibilities of the new EEC competition clauses, the results of the preliminary reference were rather disappointing. First, the ECJ cautiously postponed its judgment until the new competition regulation 17/62 had become effective. Then, in April 1962, the ECJ ruled that Article 85 EEC was indeed directly applicable, but during the transition period only those agreements expressly declared by Member States’ authorities to come within the realm of Article 85.1 EEC were to be considered void.\(^{71}\) Thus, while the argument was won, the case was lost: the ECJ acknowledged the restrained attitude Dutch courts had taken towards nullification of cartel agreements.

For the ‘Euro-lawyers’, however, the decision of the Hague Court of Appeal and the consequent ruling of the Hoge Raad importantly opened the gate for new references to follow.\(^{72}\) This was also encouraged by the ECJ, which had expressed itself on the interpretation of Article 177 EEC. Its confirmation that it was competent to receive requests for a preliminary reference for which, moreover, no particular form was to be prescribed encouraged the stream of cases that followed. These emerged from a question that had recently engaged several members of the Dutch European law community: direct effect. The origins of the ‘landmark case’ in this field however, Van Gend en Loos, are to be traced further back in time, in the disputes developing from the new 1960 tariff law.

5 | THE QUESTION OF DIRECT EFFECT

The first Dutch court to follow the example of the Hague Court of Appeal was the Court of last instance in matters of trade and industry (College voor Beroep voor het bedrijfsleven, CBB). In January 1962, so before either the ECJ or the Hoge Raad had ruled on the use of the preliminary reference procedure in the Bosch v. De Geus en Uitdenbogerd case, this administrative court decided to refer a question on direct effect to Luxembourg. This time, it concerned a case not considered obvious at all, since the treaty provision under scrutiny—Article 12 EEC, stating that ‘Member States shall refrain from introducing between themselves any new customs duties on imports and exports (...) and from increasing those which they already apply in their trade with each other’—was generally held to be addressed to Member States.\(^{73}\) Notwithstanding the phrasing of this article, the Dutch trading company Meattrading N.V. had filed a complaint against an export levy for shipping pigs and pork to France, arguing that this new levy was incompatible with Article 12. If this claim was granted, it would open a road for individual complaint seemingly unintended in the EEC Treaty.\(^{74}\) Thus, all eyes were focused this case. However, before the ECJ could rule on the matter, the parties decided to settle the dispute out of court.\(^{75}\)

Meanwhile, the possible direct effect of EEC Treaty articles had developed into one of the key discussion points. The second FIDE conference that was scheduled in The Hague in October 1963 dedicated one of its

\(^{70}\)HR 18 May 1962, (1965) Nederlandse Jurisprudentie, 115. The method it introduced of explaining treaty law through the intentions of the community of states expressed when concluding the treaty had been confirmed in a government memorandum: HTK 1959–1960, Bijlage 5784, no. 3.

\(^{71}\)ECJ, Bosch & Van Rijn v. De Geus en Uitdenbogerd, 13–61. One commentator remarked that the ruling resembled the interpretation defended in Baardman, above, n. 34: H.F. van Panhuys, ‘Reflecties over Volkenrechtelijke Reflexen’, (1963) Nederlands Juristenblad, 73, 79.

\(^{72}\)Samkalden praised the leading role of the Hoge Raad: I. Samkalden, ‘Het Arrest van het Hof van Justitie der Europese Gemeenschappen van 6 April 1962 in de Zaak 13–62 [Bosch]’, (1962) Sociaal-Economische Wetgeving, 216, 220.

\(^{73}\)Even though a practice existed of national courts applying international treaties in national legal orders, this seems not to have been on the minds of the negotiators of the EEC Treaty. Rasmussen, above, n. 4, at 143.

\(^{74}\)Rasmussen, above, n. 4, at 143–146.

\(^{75}\)In a memorandum to W. Riphagen dated 19 February 1962, Foreign Affairs official C.W. van Santen deemed this withdrawal ‘sad for academia’: NA-NL, Foreign Affairs 1955–1964, inv. no. 21195.
two sessions to the question of ‘self-executing provisions in international law and its applicability regarding the European treaties’. The theme originated from the Dutch FIDE section, where a working group of 14 lawyers, most of whom were members of the Bar, had set out to study the matter as early as late 1961. Their analysis was clearly stimulated by the Dutch constitutional arrangements on the effect of self-executing provisions in the Dutch legal order. For, where other national reports focused on the theoretical question of the possibility of direct effect, the Dutch report, after asserting that the members of the working group had not found agreement on this doctrinal matter, simply listed the numerous articles of the EEC Treaty, discussing the possibility of direct effect for each of them.76

Before the European lawyers got to discuss the matter at the FIDE conference, however, the ECJ had its say on direct effect in the second preliminary reference it received, again produced by a Dutch court: the 1963 Van Gend en Loos case. One of the lawyers defending Van Gend en Loos in Luxembourg, prominent European law specialist L.F.D. ter Kuile, had, pending the case, joined the Dutch FIDE working group in order to provide his colleagues with the most up-to-date procedural knowledge.77 Yet the case did not emerge as a test case: it already had been brought before the referring court—the Tariff Commission (Tariefcommissie)—by a tax law specialist months before the NVER committee had started its study on direct effect.

6 | TARIFFS, TRADE AND THE EMERGENCE OF A LANDMARK CASE

While it eventually led to the development of a constitutional practice in European law, the Van Gend en Loos case emerged from a rather technical debate on the content of a substance imported by this Dutch transport firm called Harnstoffharz 70. This substance, usually used as a glue for wooden doors, had been the source of many disagreements between taxation officers and transport companies because its classification, and hence taxation, depended on a rather arbitrary definition of its characteristics. The Tariff Commission, consisting of both technical and legal experts, had ruled on this matter repeatedly before the 1960 tariff reform introduced a new, uniform Benelux tariff.78 In the preparation of this reform, companies had lobbied in vain for a uniform classification of Harnstoffharz in the category with the lowest tariff.79 The government thus seemed not only to have ignored previous rulings of the Tariff Commission, but also to have deliberately raised the tariffs—and this was to be considered a violation of Article 12 EEC.80

Concerns about the incompatibility of this specific category in the new tariff law and the EEC Treaty had already been expressed by various Members of Parliament in late 1959—as would be documented in the case file that later was sent to Luxembourg.81 Their concerns, however, were addressed in terms of a possible infringement procedure started by the Commission against the Netherlands (Article 169 EEC). In reply, the Dutch government had assured parliament that some leeway could be expected from both the Commission and the other Member States as the new nomenclature for the tariff law had been developed in close consultation with these partners. Moreover, the

76‘Theme I—rapport néerlandais’, in: I. Samkalden et al. (eds.), Deuxième colloque international de droit européen, La Haye, 24–26 October 1963 (Tjeenk Willink, 1966), 49; W. Alexander, ‘Compte rendu’, in idem, 257–290; M.J. van Emde Boas, ‘Europees Babel in de Rolzaal’, (1963) Sociaal-Economische Wetgeving, 603, 604.
77Letter, W. Alexander to D.J. Veegens, M.R. Mok, D.H.M. Meuwissen, L.F.D. ter Kuile and F. Salomonson, 22 February 1963, in Archive Michel Waelbroeck (private).
78F.H. Possen (ed.), Van Tariefcommissie naar Douanekamer (Ars Aequi Libri, 2002).
79HTK 1959–1960 Bijl. 5314, nr. 6; HTK 1959–1960, at 331.
80Minutes, Tariff Commission, 12 May 1962, First Chamber. NHA, Tariff Commission (609), inv. no. 148. Indeed, Droog found a weak point here: at a meeting on 15 January 1962, the Tariff Commission discussed its discontent with reform in chambers. NHA, archive, Tariff Commission (609), inv. no. 2.
81Annex IV of the request dated 14 August 1962: NA-NL, Foreign Affairs 1955–1964, inv. no. 21197. In his opinion, AG Roemer explicitly referred to these concerns: Case 26/62, above, n. 2.
tariff harmonization was very much in line with the objectives of the EEC, it argued. The possibility of companies taking the matter to court was not addressed. Nevertheless, this was exactly what was done by the various transport firms who, as soon as the tariff reform had been established, hired tax advisor P.N. Droog to make a complaint. Droog, who as a tariff specialist held close connections to the Dutch transport sector, consequently selected the most pressing cases to bring before the Tariff Commission.

It took several cases sent to the Tariff Commission before these complaints were turned into a preliminary reference. In the first case, regarding Article 95 EEC on internal taxation, the preliminary reference option was neither mentioned by Droog, nor considered by the court. Consequently, the Tariff Commission presidium internally brought up the procedure when discussing a case regarding Article 12 EEC filed by the import firm N.V. Jacob Meijer—only to reject it because none of the parties had asked for it and the case seemed clear enough. On the third occasion, however, again discussing Article 12 EEC in the Van Gend en Loos case, the same presidium decided otherwise and started a preliminary reference procedure. Relying on the presidium's minutes, a curious mix of circumstances seems to have caused this decision. Firstly, the appellant party this time had explicitly demanded it. Secondly, Droog's suggestion that the rise in tariffs for Harnstoffharz concerned a deliberate choice of the government touched a nerve with some commission members, who found their earlier rulings ignored. Thirdly, Droog had in his plea specifically emphasized the lack of alternatives for citizens to have their rights protected: not only had the government in this case acted unfairly by deliberately increasing tariffs, but also attempts to raise attention in other Member States to the infringement of the treaty on this point had failed because of the national interests of those states, he argued. Finally, though it was not mentioned in the minutes, it seems no coincidence that the Tariff Commission's decision to ask for a preliminary reference was made only three days after the Hoge Raad's Bosch ruling, in which the Supreme Court had declared that the application of EEC law was indeed a matter of treaty interpretation for which the preliminary reference mechanism could be used.

The rather inexpert phrasing chosen by the Tariff Commission for the request—following Droog, it asked the ECJ whether Article 12 EEC had 'internal effect, in other words whether individuals can directly derive rights from the article that are enforceable by the judge'—contributed importantly to the fame of the ECJ's answer. Especially the mention of individual 'rights' to explain 'internal effect', which was based on the terminology used during the

---

82 HTK 1959–1960 Bijl. 5314, nr. 6 and nr. 7; HTK 1959–1960 (15 December 1959) 332–334. Similarly, questions asked by Robert Margulies in the European Parliament about the tariff reform also had only looked at investigations by the Commission: written question no. 20 in OJ 49 (1960) p. 1077.

83 See, for example, the cases 8296 T (Van Swieten), 8297–8298 T (Da Costa & Schaake), 8302–8304 T and 8322–8323 T (Hollandsche Stoomboot Maatschappij) and 8847–8848 T (Van Gend & Loos). Noord-Hollands Archief (NHA), Tariff Commission (609): inv. no. 139. Remarkably, many of these cases concerned the import from either the United States or the United Kingdom and thus did not even fall under Article 12 of the EEC Treaty. Droog worked at the M.A. Wisselink & Co. tax advisers office in Amsterdam. For information on his background, I thank his former colleague D. van Vliet (telephone interview, 29 May 2015).

84 Minutes, Tariff Commission, 21 May 1962, First Chamber. NHA, Tariff Commission, inv. no. 148.

85 Tariff Commission, case 8115 T (Van Es & Van Ommeren). NHA, Tariff Commission (609), inv. no. 139.

86 Minutes, Tariff Commission, 15 January 1962 and 22 January 1962, and Presidium minutes, 7 May 1962. NHA, Tariff Commission (609), inv. nos. 2 and 107.

87 Minutes, Tariff Commission, 21 May 1962. NHA, Tariff Commission, inv. no. 148.

88 Soon after, the Tariff Commission decided to also send the previously discussed case filed by Jacob Meijer N.V. to Luxembourg as well as similar cases filed by Da Costa en Schaake N.V. and Hoechst-Holland N.V. (ECJ cases 28–30/62). Minutes, Tariff Commission presidium, 19 June 1962. NHA, Tariff Commission, inv. no. 108.

89 Translation by Claes and De Witte, above, n. 10, at 178. In the official ECJ publication, 'internal effect' is translated as 'direct application within the territory of a Member State', while the second part reads 'whether nationals of such a state can, (...) lay claim to individual rights which the court must protect.' In the Bosch case, the defendants (Bosch c.s.) had used the term 'direct applicability to nationals of signatory states', a terminology that was then adopted by the Hoge Raad (but not by the ECJ). The terminology used by the Tariff Commission was criticized by e.g., international law specialist L. Erades, 'De Verhouding van de Rechtspraak van het Hof der Europese Gemeenschappen Tot die van de Nationale Rechters in de Lid-Staten. Preadvies,' (1964) Mededelingen van de Nederlandse Vereniging voor Internationaal Recht, 22.
Dutch constitutional reform that introduced the clause on provisions ‘binding on anyone,’ was precisely the type of language which proponents of a constitutional approach to EEC law like the EC Legal Service could use to defend their case. The core logic was that direct effect was crucial for the legal security of citizens and companies in order to force Member States to comply with their treaty obligations. In spite of the rejections of this interpretation of the EEC Treaty sent in by the governments of Germany, Belgium and the Netherlands, the ECJ followed this argumentation. It confirmed that the EEC Treaty, with its aim to create a common market which directly concerned national citizens, also had created rights that citizens could pursue in court. Thus, the ECJ took a decisive step away from an international public law interpretation of the EEC Treaty and towards a constitutional interpretation—to which it would add an even more important next step in 1964 with its Costa/ENEL ruling on the primacy of EEC law.

7 | CONCLUSIONS

Elsewhere, the effect of (critical) legal history on the study of law has been defined as to ‘pull down, to render contingent, and to politicize’ law. Analysing why history developed as it did challenges claims to a timeless rationality and introduces contingency as well as actorness into the historical narrative. This article on the one hand follows this approach by challenging the narrative that reduces the leading role of Dutch lawyers, courts and companies in the early development of European law to the favourable constitutional context in which they were allowed to operate. On the other hand, however, this article also tests earlier critical histories that seem to overemphasize contingency and actorness by focusing on a narrow group of ‘Euro-lawyers’. Certainly, these lawyers played an important role in brokering information and thus widening the imaginings of less prominent lawyers on what European law could mean in their everyday legal practice. By reconstructing the chronology of the Bosch and Van Gend en Loos cases, this article confirms that developments in the Netherlands would probably not have been the same without their mobilization of the field. Yet, more structural elements also stand out from this case study, suggesting that contingency should not be overstated.

Added to the internationalist set-up of the constitution, which not only created favourable legal structures for the preliminary references, but also in a broader sense influenced the way in which the failing compliance of the Dutch government to the new European legal frameworks was regarded, a key element in this regard is the open Dutch economy. As this article demonstrates, the Dutch debate on European law, in which business lawyers prominently figured, often kept a close eye on the practical concerns of Dutch business. Prominent voices in this debate held that a strong role of courts in overseeing the uniform application of European law not only presented Dutch business circles with considerable challenges—as with regard to competition—but also served very well the interests of companies in a small state that, while economically relying heavily on intra-European trade, lacked the means to

\[90^*]HTK 1952–1953, B 2700, no 63a.

\[91^*]Rasmuszen, above, n. 4, at 153.

\[92^*]Case 26/62, above, n. 2.

\[93^*]K.M. Parker, Common Law, History and Democracy in America 1790–1900 (Cambridge University Press, 2011), 279, as quoted in I. Venzke, ‘Possibilities of the Past: Histories of the NIEO and the Travails of Critique’ (2017) Amsterdam Law School Research Paper No. 2017–36.

\[94^*]According to the OECD data that the Dutch government presented to parliament at the ratification of the EEC Treaty, the Dutch export to other ECSC states in 1955 amounted to 38.3% of its total export (2687 mn., around 35% of its national income (NI))—leading to an ‘ECSC export quote’ (eq) of 13.4%), a number only topped by the Belgian-Luxembourg economic union (44.7%, total export equaling 28% of NI, ECSC-eq being 12.7%), while France and Germany calculated to 24.2% (total export 4848 mn. or 10% of NI, ECSC-eq 2.5%) and 28.8% (total German export 6138 mn. or 15.7% of NI, ECSC-eq 4.5%) respectively. Import figures show a similar tendency: Dutch import from the ECSC area amounted to 40.7% of its total import (3207 mn. or 42% of NI, the ECSC import quote (iq) 17.0%), Belgian-Luxembourg import 41.1% (but only 2831 mn. or 29% of NI, ECSC-iq 11.9%), French 19.7% (total import 4733 mn. or 10% of NI, ECSC-iq 2.0%) and German 25.8% (total import 5822 mn. or 15% of NI, ECSC-iq 3.8%). HTK 1957–1958, B 4725, no. 4. In 1962, data reveal that the gap between the Benelux countries (with EEC import/export amounting to 17–20% of their NI) and France and Germany (showing percentages of only 4–5%) only grew larger in the first EEC years. HTK 1962–1963, B 7182, no. 1, at 4.
confront the larger Member States on a political level. In particular, the cases in the competition field were to a large extent driven by the aim to create uniformity among the six Member States, from which Dutch businesses were considered to benefit.

A second element that arises from the case studies is the conciliatory style of dealing with rule-making deeply ingrained in both political and legal culture in the Netherlands. In spite of the recent constitutional reforms, the option of challenging national legislation in court was hardly considered in Dutch politics. This created room for court cases to emerge from areas where compliance of the Dutch government with the new European legal frameworks was lacking. Both the 1957 special law on competition and the complex operation of introducing a new, harmonized nomenclature for tariffs demonstrate that this lack of compliance did not result by accident, but rather from a different style of policy-making that was soon contested in courtrooms.

As the first archive-based history of the first two Dutch preliminary references, however, this article also adds new elements of contingency to the history of European law. Thus, the typical arrangements of competition law in the Netherlands, combined with a practice of tort law, created the ideal setting for testing the preliminary reference procedure. And, apart from the recent Bosch ruling by the Dutch Hoge Raad, it is most likely that the Tariff Commission was only convinced to leave its usual conciliatory approach to solve a conflict between national and European law in its Van Gend en Loos ruling because of the way the government had dealt with the classification of Harnstoffharz, a substance the Tariff Commission had ruled on in several earlier cases. These ‘coincidences’ too are crucial for solving the puzzle of why the ideas on a European legal order pushed by a few pioneers in the field could lead Dutch lawyers, courts and companies eventually to take up such a prominent role in the early development of European law.

ORCID

Karin van Leeuwen http://orcid.org/0000-0003-0912-4432

How to cite this article: van Leeuwen K. Paving the road to 'legal revolution': The Dutch origins of the first preliminary references in European law (1957–1963). Eur Law J. 2018;24:408–421. https://doi.org/10.1111/eulj.12296