A Strasbourg Story of Swords and Shields: National Courts' Motives to Request an Advisory Opinion from the ECtHR Under Protocol 16

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Abstract

This article aims to answer the question: what motivates national courts (not) to make a request for an advisory opinion from the European Court of Human Rights under Protocol 16 (P16)? An initial answer is given based on literature on the ECHR and the EU preliminary ruling procedure. This article also conducts a case study on a most likely case for the use of P16 given the prominent role of the ECHR: the Netherlands. We conclude that the potential eagerness of national courts to use P16 is limited. The three identified different motives (legal, pragmatic, and politico-strategic) all point in the direction of timid courts foregoing a request based on P16. We therefore call on Strasbourg to sharpen the sword offered by P16 and discourage the inclination of national courts to arm themselves with sizeable shields to resist Strasbourg's involvement.

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Keywords

Protocol 16 – request for an advisory opinion – judicial dialogue – preliminary ruling procedure

1 Introduction

Since 1 August 2018, Strasbourg has a new instrument in its toolkit to engage in dialogue with national courts: Protocol 16 (‘P16’) to the European Convention on Human Rights (‘ECHR’). So far, only six requests have been made in the three years of operation. One wonders why more courts have not made use of this instrument, since P16 empowers 41 courts in 16 ratifying states to request an advisory opinion from the European Court of Human Rights (‘ECtHR’). These numbers raise questions as to what motives drive courts to request an advisory opinion. Now that P16 has been operational for some time, this is a timely moment to provide some initial reflections on these questions. Prior to discussing the research question of this article, which will lead to such reflections, we briefly outline the P16 procedure and its background.

Only the highest domestic courts can request an advisory opinion in the context of a case pending before them. A Grand Chamber panel decides

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1 We do not discuss the events leading up to the adoption of P16 as this has been discussed by others. See, for example, K. Dzehtsiarou and N. O’Meara, ‘Advisory Jurisdiction and the European Court of Human Rights: a Magic Bullet for Dialogue and Docket-Control?’ (2014) 34(3) Legal Studies 444, 451–457.


4 Article 1(1–2) of Protocol No 16 to the Convention.
whether to accept requests, which should concern a ‘question of principle’ relating to the Convention’s interpretation or application.\(^5\) Despite the arguably ‘vague phrasing’ of the requirement of eligibility, it has been proposed that an advisory opinion, like a request for referral to the Grand Chamber, should concern a ‘serious question affecting the interpretation or application of the Convention […] or a serious issue of general importance’.\(^6\) The ECtHR has clarified that previous cases concerning suspects’ access to a lawyer whilst in police custody\(^7\) and Dublin returns of asylum seekers\(^8\) are examples of cases that raised questions that could have been addressed in an advisory opinion.\(^9\)

If the request is accepted, the Grand Chamber delivers the – non-binding – advisory opinion.\(^10\)

Although the first proposal to give the ECtHR the competence to adopt advisory opinions stemmed from 2005,\(^11\) the state parties only gave the green light for drafting Pi6 in the Brighton Declaration of 2012. In that document, the states noted that ‘the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court’.\(^12\) Pi6 echoes the idea put forward in the Brighton

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\(^5\) Article 1(1) of Protocol No 16 to the Convention.


\(^7\) See, amongst others, Brusco v France 1466/07 (ECtHR, 14 October 2010).

\(^8\) See, mss v Belgium and Greece [GC] 30696/09 (ECtHR, 21 January 2011).


\(^10\) Articles 2(2) and 5 to Protocol No 16 to the Convention.


Declaration, as it provides that the procedure should contribute to enhancing interaction between the ECtHR and domestic courts. This should, in turn, reinforce implementation of the Convention in the states parties as required by the principle of subsidiarity. The advisory opinion should give the domestic court guidance, without transferring the dispute to the ECtHR. In addition, the ECtHR has noted that, although P16 risks ‘initially [generating] more work, the longer term objective would clearly be to ensure that more cases were dealt with satisfactorily at national level’, thereby reducing its burden.

Clearly, the procedure can only contribute to the aims of enhanced interaction and possibly even to eventually decreasing the Court’s workload and reinforcing its “constitutional” role when domestic courts actually request advisory opinions. In light of this and the figures mentioned above, this article explores the question: which motives help to explain why domestic judges do or do not request advisory opinions? This question is answered in two sections, each with its own approach. Section 1 gives an inventory of potentially relevant motives. This inventory is based on two strands of literature. The first consists of publications about P16, which analyse the procedure from a different or more general perspective than this article, usually before its entry into force. In these publications, the authors often reflect, sometimes only in passing,
on whether and why domestic judges would request an advisory opinion. Publications on the motives for domestic judges (not) to request a preliminary ruling from the European Court of Justice (‘CJEU’) form the second strand of literature. Unlike the motives for invoking P16, the motives for making a reference for a preliminary ruling have been studied rather extensively, based on empirical data such as interviews.20 The advisory opinion procedure and the preliminary ruling procedure are comparable in that they ‘require high time commitments on the part of judges involved, and similar quasi-diplomatic factors (in terms of refusing to deliver references/advisory opinions, and in delivering the rulings/advisory opinions) apply’,21 which makes it possible to rely on the second strand of literature in the current study. However, there are also important differences between both procedures, which will be factored in whenever relevant. Three important differences are that, unlike the preliminary reference procedure, P16 advisory opinions are not binding and only the highest domestic courts can request an advisory opinion under P16. Moreover, domestic courts are never required to make a request under P16, whereas the highest courts may be required to request an opinion from the CJEU.22

In section 2, we will use the motives collected in section 1 to conduct a case study of judgments and opinions of advocates general (‘AGs’) in the Netherlands in which the possibility of requesting an advisory opinion was discussed.23 More precisely, we will try to establish whether the motives described in section 1 played a role in the discussion. This will help with understanding whether the motives identified in section 1 indeed played a role and, if so, how they influenced the decision (not) to request a preliminary opinion. The Netherlands provides for an interesting case study. Together with France and Ukraine, it is one of the biggest jurisdictions out of the sixteen states that have ratified P16. In addition, the ECHR plays an important role in
the Dutch legal order because of the prohibition of constitutional review, whereas national laws can be disapplied when they are in conflict with the provisions of treaties that are binding on all persons. The Dutch courts ‘refer standardly’ to the ECtHR’s case law, regardless of whether the Netherlands was the respondent state. Moreover, Dutch courts ‘generally apply’ and ‘closely follow’ the Strasbourg standards. One would thus expect that the highest Dutch courts have sufficient knowledge about P16 and are not unwilling to make use of it. As the sample size is still rather limited, section 2 provides some tentative reflections. Another limitation of this doctrinal legal case law study is that this methodology only enables the study of explicitly stated reasons and not the ‘real’ motives or considerations that may have played a role in the background. In addition, if one wants to know what has guided judges in their decision-making, other (empirical) research methods than doctrinal legal analysis are necessary, for instance, semi-structured interviews with judges, AGs, and law clerks.

This article is of societal and academic relevance despite the fact that experiences with P16 to date are rather limited. Given the article’s close connection to existing empirical and theoretical studies, the nature of this article goes beyond a mere descriptive account of (potential) motives. The combined empirical and theoretical grounding forms an innovative contribution to the academic literature. Insights into these motives are also of practical relevance and may be of help to domestic judges who are considering making a request and to the lawyers interested in encouraging courts to refer. Additionally, these insights may help the ECtHR if it wishes to stimulate advisory opinions or when it wants to understand why it receives certain types of questions, but not others. We conclude that the potential eagerness of national courts to use P16 is limited. The three identified different motives (legal, pragmatic, and politico-strategic) all point in the direction of timid courts foregoing a request.

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24 Article 120 Grondwet (Dutch Constitution).
25 Ibid Article 94.
27 For the sake of simplicity and readability, we sometimes use the term ‘refer’ and ‘reference’ to the ECtHR, even though the most proper way of framing it is: ‘requesting an advisory opinion from the ECtHR’.
based on P16. We therefore call on Strasbourg to make P16 attractive and to discourage the inclination of national courts to resist Strasbourg’s involvement. In the conclusion, we provide several recommendations for the ECtHR, such as minimising delays as well as providing more reasons in case a request is declared inadmissible.

2 Linking Research on the EU Procedure to P16 Insights

This section provides an overview of the possible motives for national courts to request an advisory opinion from the ECtHR. It does so by starting with a succinct summary of relevant insights from (empirical) EU studies in each subsection. The relevance of these motives for the ECHR context is discussed in light of literature concerning P16, the features of P16 and the Convention system more generally.

Prior to delving into the motives, it is useful to note that Article 267 TFEU obliges the highest courts to refer questions on the interpretation and validity of EU law to the CJEU when ‘a decision on the question is necessary to enable it to give judgment’. Lower domestic courts may refer a question in these circumstances. An exception to the obligation applies when the question has already been answered (acte éclairé) or when there is no reasonable doubt about the answer (acte clair). EU literature has found that the highest domestic courts do not follow the obligation equally conscientiously; some apply it faithfully, whereas others use the exceptions more leniently and pragmatically.

Constitutional courts in particular have not been eager to submit references. Due to the voluntary nature of P16, the hesitancy of domestic courts to make a P16 request is ‘even stronger’ in the ECHR system than in the EU legal system.

This also stems from the non-committal nature of the ECHR more generally. While domestic courts are required to apply EU law because of the primacy of EU law and the duty of loyal cooperation, there is no such duty in relation to the ECHR. This means that ECHR questions are often framed as questions of domestic fundamental rights law without recourse to the ECHR. The impact


30 Dicosola, Fasone, and Spigno (n 6) 1411.

31 Article 1(1) of Protocol No 16 to the Convention; Dicosola, Fasone, and Spigno (n 6) 1411.
of the voluntary nature of the P16 procedure on the willingness of domestic courts to use the procedure should, however, not be overstated considering that lower courts have been particularly active in using the EU preliminary ruling procedure despite having discretion whether to refer.32

Domestic courts have different motivations when contemplating whether they should invoke P16. These do not necessarily have to do (solely) with the existence of a legal obligation, as the differences in conscientiousness of highest domestic courts in following Article 267 TFEU illustrate (section 2.1). Therefore, the motives found in the EU literature can be used for the purposes of the current research, although it is expected that they play out differently than in the EU system. As will be discussed in this section, it is expected that pragmatic motives play a bigger role (section 2.2), while politico-strategic motives are expected to figure less prominently in national courts’ decision-making in relation to P16 (section 2.3).

2.1 Legal Motives

Relevant EU literature has firstly and not surprisingly emphasised legal motives for courts (not) to refer.33 This means that the domestic courts submit references for a preliminary ruling because they do not know how to answer a question on the interpretation of EU law, thus they need an answer to that question in order to decide the case before them. Requests are, therefore, informed by a legal assessment of the clarity of the relevant question involved. This legal motive is particularly forceful when the court in question is a highest domestic court, although the legal obligation that may rest on them does not necessarily mean that they always submit a question when there is doubts as to the interpretation of EU law.34 This section first deals with a question of principle in cases pending before a domestic court as a legal motive, and will then deal with various other legal motives.

2.1.1 A Question of Principle in the Case Pending Before it

Applying the legal logic to the ECHR context, the first and probably most obvious reason for a domestic court to request an advisory opinion is that it is

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confronted with a question of principle relating to the interpretation or application of a Convention right. The domestic court is not sure how to solve that question based on existing case law and is genuinely interested in the ECtHR's advice on how to solve this question. In this respect, it is important to repeat that the requesting court ‘may seek an advisory opinion only in the context of a case pending before it’. Therefore, courts ‘need’ relevant cases in order to be able to ask a question to the ECtHR. According to Giannopoulos, this does not have to be problematic, because there is ‘at least one pending case that could form the object of a request for an advisory opinion’ in each state party.

Even when a relevant question in the sense of P16 pops up, the domestic court may consider that the case does not warrant an advisory opinion because it does not involve a question of principle of considerable importance. Another reason may be that it is clear how the question needs to be resolved in line with Strasbourg case law. This may be clear, for example, if the Grand Chamber adopted a judgment in which it summarised a line of case law. This reflects the acte clair exception to the obligation for the highest courts to refer in EU law. The ECtHR has come up with a variant of this doctrine when deciding not to accept a request of the Supreme Court of Slovakia. The ECtHR concluded that the Supreme Court did not need guidance since it had already formulated ‘indications as to the answer’ in its own unifying opinion. The ECtHR thus did not point to its own case law as a reason not to refer, but to the already available national case law.

2.1.2 Other Legal Considerations

Other legal considerations, tied to domestic law rather than to P16, may reinforce a domestic court’s interest in referring. Domestic law may, for example, prescribe that the domestic courts need to mirror the ECtHR and that they cannot provide more protection than the level of protection in the ECHR case law. Domestic courts that are bound to such a rule and that want to give more protection than the ECtHR provided previously may submit an advisory

35 Article 1(1) of Protocol No 16 to the Convention.
37 Article 1(2) of Protocol No 16 to the Convention.
39 Decision gc Panel (n 2) paras 22–24.
opinion for that reason. Domestic law can also impose restraints on domestic courts that may want to refer. To illustrate, the explanatory memorandum to the Dutch law ratifying P16 includes reflections on the types of cases in which domestic courts can request an advisory opinion. Even when a relevant question in the sense of P16 pops up, the domestic court may, therefore, consider that the case does not warrant an advisory opinion for another legal reason.

Another such reason may be that the domestic court is required to send its question to another court, whilst the P16 procedure is not mandatory. Two possibilities can be identified. The first possible alternative for P16 is submitting a referral to the constitutional court about a question that is one of both constitutional and ECHR law. For example, in Belgium a supreme administrative court may be obliged to refer such a question to the constitutional court. A legal duty for national highest courts to give precedence to such a national procedure is allowed under P16, whereas EU law imposes clear limits on such a legal construction.

The second possible alternative for a request to the ECtHR is the EU preliminary reference procedure. The EU procedure can be used to help to clarify how the EU Charter for Fundamental Rights (‘CFR’) ought to be interpreted and applied in cases in which a member state is implementing EU law. In light of the considerable overlap between the meaning and scope of a number of CFR and ECHR rights, certain questions that can be sent to the ECtHR can

40 We assume that, because advisory opinions have res interpretata effect (see, section 2.3), advisory opinions would be a sufficient basis for mirroring the ECtHR in line with domestic law. Contrarily, wanting to go beyond the ECtHR may also be reason not to submit a request for an advisory opinion when the domestic court expects that the ECtHR will provide less protection than that it wants to provide (see, section 2.3).

41 According to the current Dutch ECtHR Judge, Judge Schukking, the explanatory report to the Dutch implementing law explicitly (‘uitdrukkelijk’) states that an advisory opinion can only be requested when a domestic court is confronted with a systemic problem. See, J Gerards and LR Glas, ‘Ruim 100 dagen in Straatsburg: Interview met EHRM-rechter Jolien Schukking’ (2017) 42(4) NTM-NJCM-bulletin 495, 501. The Dutch and the Norwegians proposed that advisory opinions ‘should be restricted to cases revealing potential systemic or structural problems’. See, 2012 Reflection Paper (n 9) para 20.


43 Lemmens (n 42) 709. Even though an advisory opinion may only be sought in the context of the case pending before the domestic court (Article 1(2) of Protocol No 16 to the Convention), this does not exclude a constitutional court from ‘forwarding’ a question posed to it by a domestic court to the ECtHR. See, Advisory Opinion 2 (n 2).

potentially also be sent to the CJEU based on their content. Domestic courts, also those that are not last instance courts, may feel obliged to ask a question to the CJEU and not to the ECtHR whenever possible. This is because asking (solely or simultaneously) the ECtHR could ‘adversely […] affect the autonomy and effectiveness’ of the preliminary reference procedure.45 The Dutch government concluded that this obligation exists, indicating in the explanatory report to the law ratifying P16 that a question concerning the interpretation of a CFR provision that concerns EU law should be asked to the CJEU, even when the fundamental right at stake can also be found in the ECHR.46 This also seems to be the position of the (CJ)EU. The EU proposed in the context of the negotiations of the EU to the ECHR that the advisory opinion procedure is suspended when the request was made in violation of EU law.47 Particularly as a result of this second (mandatory) alternative, one would possibly expect courts in non-EU member states to be more eager to use P16. Two of the six requests made so far come from the same non-EU state (Armenia), however.

2.2 Pragmatic Motives

Research on the EU procedure found that legal motives alone do not explain referral decisions. This is especially so when courts have no obligation to refer or are of the opinion that the obligation is subject to flexible interpretation. Courts weigh in other, pragmatic factors than those officially permitted under Article 267 TFEU, such as the importance of the question, the consequences of referral for the parties, as well as the consequences in terms of delays in the specific case or other cases involving the same EU law issue.48 Delays were found to play a bigger role in environmental planning cases when a referral would have adverse (economic) consequences for companies, in family law cases involving child custody and foster care, or criminal law cases with a suspect in detention.49 Even a PPU reference via the procedure préjudicielle

45 Case Opinion 2/13 Opinion 2/13 of the Court (Full Court) [2014] 1, para 199.
46 Kamerstukken ii 2014/15, 34235, number 3, 4 (Memorie van Toelichting (Explanatory Memorandum).
d’urgence with a delay of on average 3.9 months was ‘intolerable’ for some courts and a reason not to refer.\textsuperscript{50} The Dutch Supreme Court decided not to refer questions on the right of access to a lawyer in criminal proceedings, even though it was not sure about the answer, because a reference would hamper ‘an effective and expeditious’ criminal justice system.\textsuperscript{51} Research on the EU procedure also shows that workload and production targets can be a dissuading factor for lower courts, especially when they have limited support staff.\textsuperscript{52} It remains to be seen whether delays and workload really affect decisions related to P16. Such considerations play a more limited role at the highest court level, because these courts have more support staff and there is probably also less urgency when a case has made its way all the way to the highest court. Another pragmatic reason found in this body of research is that courts sometimes take into account the answers expected from the CJEU when pondering whether to make a reference. This has prevented some courts from referring when they thought that they themselves were equally well equipped to answer questions or when they expected no useful answer from the CJEU.\textsuperscript{53}

The remainder of this section will analyse whether the delay caused by a request, the additional work that a request leads to and the expected answer by the ECtHR potentially persuade domestic courts to make a request under P16 or, on the contrary, decrease the likelihood that they will do so.

2.2.1 Delays

The ECHR literature has also abundantly pointed to similar pragmatic considerations whereby courts balance the costs with the perceived benefits of requesting an advisory opinion. Given the absence of an obligation to refer one would expect such pragmatic considerations to play an even bigger role in relation to P16. The issue of delays has been picked up, especially in the ECHR context, considering that requesting an advisory opinion almost inevitably


\textsuperscript{51} Hoge Raad 22 December 2015, ECLI:NL:HR:2015:3608 (hereinafter ‘Dutch SC’).


introduces a delay into national proceedings, including in cases that are comparable to the case in which the question was posed. The Dutch Council for the Judiciary estimated, prior to P16’s entry into force, that using the procedure would lead to a delay of approximately two years. Although it is formally for the requesting court to decide ‘whether the domestic proceedings are to be suspended pending the delivery of the Court’s advisory opinion’, it can be expected that domestic courts will ‘usually’ take this step. This reality may hold domestic judges back, especially when legal proceedings have already taken a number of years before reaching the highest domestic court. This is even more so in states with already lengthy court proceedings. Moreover, the delay added by the request could result in a violation of the right to a fair trial within a reasonable time as protected by Article 6 ECHR. This result will only materialise, however, when the ECtHR were to hold that the request is ‘part of the ‘reasonable time’ allowed to decide cases under Article 6 ECHR’. This logic is not applied by Dutch courts in relation to the EU preliminary ruling procedure, whereby the Luxembourg period is treated as a time out.

57 Guidelines to P16 (n 6) para 21.
60 Thorarensen (n 18) 92; Dzehtsiarou (n 38) 132.
61 J Gerards, ‘Advisory Opinion: European Court of Human Rights (ECHR)’ (2019) in Max Planck Encyclopedias of International Procedural Law [MPEiPro] R Wolfrum (ed), (online edn) para 49. The Dutch government assumes that this will not be the case. See, Kamerstukken II 2014/15, 34235, number 3, 8 (Memorie van Toelichting (Explanatory Memorandum)).
So far, the ECtHR has reacted rather swiftly to the requests. It decided the first and second request in about six and nine months respectively, and it rejected the third request in less than a month. It usually takes the ECtHR much longer to decide contentious cases, including the 'average' Grand Chamber case, which takes about seventeen months to decide. The ECtHR's policy to deal with requests for an advisory opinion 'as a matter of priority' explains the relatively speedy decision-making process. This policy is in line with the ECtHR's general priority policy, as part of which it grants priority to cases 'raising an important question of general interest' which advisory opinions likely do. If the requesting court 'thinks there is even more urgency to the matter', it can submit a motivated request for an even speedier ruling.

If the number of requests increases, it is questionable whether the Grand Chamber will be able to decide them as fast as it decided the first three requests. The point here is that only the Grand Chamber has the competence to adopt an advisory opinion and that this formation can only examine about twenty to thirty cases per year. It is likely that the number of requests will increase. We are currently still in a 'period of confidence-building', which needs to elapse before more domestic courts start filing requests. It also took

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64 Advisory Opinion 1 (n 2); Advisory Opinion 2 (n 2).
65 Decision GC Panel (n 2).
67 Guidelines to P16 (n 6) para 29.
69 Thorarensen (n 18) 92; 2012 Reflection Paper (n 9) para 39.
70 Gerards (n 61) para 15.
71 Guidelines to P16 (n 6) para 29.
73 Article 2(2) of Protocol No 16 to the Convention.
74 Giannopoulos (n 6) 343; Voland and Schiebel (n 18) 85; Thorarensen (n 18) 92.
a while in the EU legal system before national courts overcame their reluctance ‘to involve another “foreign” court in “their” business’. At the same time, it is unlikely that the number of requests will increase steeply, considering that currently only 41 courts can file a request about a question as described in P16 in a case pending before them. Moreover, the ECtHR panel can filter requests.

2.2.2 Additional Work
Aside from delays, an additional reason not to request an advisory opinion may be that it clearly means extra work for the requesting court in terms of spending additional and already scarce resources on the case pending before it. The court must submit a reasoned request setting out the ‘subject matter’ and the ‘relevant legal and factual background’ of the case, ‘the relevant domestic legal provisions’, and the ‘relevant Convention issues’. If relevant, the court may also draw up ‘a summary of the arguments of the parties to the domestic proceedings on the question’. Additionally, ‘if possible and appropriate’, the court may give its ‘own views on the question’ and it has the opportunity to comment on any third party interventions. Furthermore, although a request may be submitted in the national official language, an English or French translation of the request must be filed within a time-limit set by the ECtHR’s President. The Dutch Council for the Judiciary estimated that each request would cost about 10,000 Euros. Domestic courts may consider the costs in terms of additional work (and, to some extent, delays) particularly problematic in relation to P16 for three reasons.

First, the domestic judgment that the referring highest court adopts after it received the ECtHR’s advisory opinion does not necessarily end the legal proceedings in the case as is the case when the highest court refers to the CJEU. A party involved in the domestic case can still bring an individual application to the ECtHR, although the ECtHR will likely declare elements of the application relating to ‘the issues addressed in the advisory opinion’ inadmissible.

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76 Ibid.
77 Voland and Schiebel (n 18) 85. See also, Jozwicki (n 59) 231.
78 Rules of Court (n 68) Rule 92(2)(1). See also, Article 1(3) of Protocol No 16 to the Convention.
79 Ibid Rule 92(2)(1).
80 Ibid Rule 92(2)(1). See also, Explanatory Report to P16 (n 11) Article 12.
81 Rules of Court (n 68) Rules 44 and 94(3). See also, Article 3 of Protocol No 16 to the Convention.
82 Guidelines to P16 (n 6) para 18; Rules of Court (n 68) Rule 34(7).
83 Raad voor de Rechtspraak (n 56) 1.
84 Explanatory Report to P16 (n 11) para 26.
However, if this expectation does not hold true, the additional work associated with requesting an advisory opinion could be regarded as having been in vain.

A second reason why the additional work possibly plays a relatively important role in the ECHR context is the potential for the request to be rejected. The likelihood of this possibility does not seem very high, however, due to the ‘prominent status of referrals’, because a refusal would not be in ‘the interest of a functioning dialogue’ and accepting a request would be a ‘sign of respect’ for the requesting court. Despite these considerations, it is still currently difficult for domestic courts to estimate the likelihood of a rejection, because neither P16 nor its Explanatory Report provide much clarity regarding the standards for accepting a request. Furthermore, since the panel has decided only two requests and rejected one request so far, there is not a lot of practice as of yet on which the domestic courts can rely for an educated guess. Nonetheless, given the burden on the Grand Chamber and the seemingly inevitable future increase of cases as discussed above, it seems logical that the panel will become rather strict in holding requests admissible. Perhaps the decision in the request by the Slovakian SC provides a good example of this.

Third, particularly considering the immature nature of P16 and the current uncertainties, one would expect courts to critically weigh the added value of an advisory opinion. Courts in ‘States where there is already a good record of compliance with the Convention and a high level of protection of human rights’ may especially wonder whether an advisory opinion is of much added value, taking into account the costs that it brings with it. What is more, especially when there are alternative courts in the form of a national or EU procedure, one would expect courts to be rather reluctant. When the alternative compares favourably to that of the ECtHR in terms of experienced costs or expected outcome for example, the domestic court may opt for the alternative rather than the ECtHR. Again, this calculation and cold feet of national courts might change in the future when the P16 practice really kicks off.

2.2.3 Expected Answer

As in the EU system, expectations about the answer could equally play a role in the decision whether to request an advisory opinion from the ECtHR. Courts

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85 Article 2(1) of Protocol 16 to the Convention.
86 Voland and Schiebel (n 18) 83; Gragl (n 18) 239; Dicosola, Fasone, and Spigno (n 6) 1047; G de Groot, ‘Beginselen van procesrecht en de hoogste rechter: mag, moet en gaat de Hoge Raad ooit in dialoog met het ehrm?’ (2016) 4 Tijdschrift voor Civiele Rechtspleging 8, 11.
87 See, Gerards (n 61) para 45.
88 See, section 2.2.
89 Gerards (n 61) para 39.
could be reluctant to refer when they expect that the content of the advisory opinion will not be to their approval or, put differently, will limit ‘their discretion to find the most suitable solution for the domestic jurisdiction’. It has been proposed that the answers that the ECtHR gives in an advisory opinion will be especially useful to the requesting court if the ECtHR finds a middle ground between abstractness and concreteness. Overly abstract advisory opinions could give too little guidance and could even lead the requesting court to apply the advisory opinion wrongly, whilst overly specific advisory opinions could lead to circumscribing the discretion of that court. When the ECtHR does not manage to balance these two extremes well in its first advisory opinions, domestic judges may be discouraged from submitting requests. However, given the small P16 case docket, the expected answer probably does not play a role of great significance yet.

Another reason that courts are not (yet) expected to weigh in the expected answer is that academic commentators have characterised the first two advisory opinions differently. Lavrysen has noted that the first decision lacked guidance and that it may have raised more questions than it resolved. However, although the ECtHR indicated that it was for the French domestic courts to decide whether the domestic adoption law that was at issue satisfied the criteria set out in the advisory opinion, the ECtHR ‘nuanced’ this rather abstract approach by going ‘quite far in suggesting that French adoption law may not satisfy [these] criteria’, as Lavrysen and Moonen note. As such, the decision could be regarded as giving at least some guidance. Vogiatzis is more positive. He writes that the ECtHR seems to have succeeded in reconciling the need to give guidance with its subsidiary role. Comparably, Margaria commends the Court for ‘managing to advance the interpretation of the Convention as a ‘living instrument’ whilst respecting (some) national variations’.

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91 Dicosola, Fasone, and Spigno (n 6) 1412. See also, Jacqué (n 36) 22.
92 Moonen and Lavrysen (n 19) 33; Spronken (n 55) 1131.
93 Moonen and Lavrysen (n 19) 34. See also, Thorarensen (n 18) 90.
94 Dzehtsiarou and O’Meara (n 1) 465. This could be also regarded of problematic because the ECtHR would go beyond its subsidiary role. See, Moonen and Lavrysen (n 19) 34.
95 Lavrysen 2019 (n 19).
96 Advisory Opinion 1 (n 2) para 58.
97 Moonen and Lavrysen (n 19) 31.
decide the domestic case, but also on the issue of legal motherhood in general.\textsuperscript{100} Buyse takes a middle ground. He observes that the ECtHR ‘clearly tried to formulate answers that should be useful to the domestic court at hand’.\textsuperscript{101} On the one hand, it succeeded at this, because it clarified that a full refusal of transcribing foreign birth certificates of children born out of a gestational surrogacy arrangement into the French civil status register would be in violation of the Convention. On the other hand, the ECtHR failed to do this, because it transferred the interpretational challenges to different, more detailed issues.\textsuperscript{102}

The second advisory opinion has come across to Lavrysen and Moonen as not ‘particularly useful’, because the ECtHR seems to have signalled to the domestic courts ‘that they should figure out the Convention issues for themselves’.\textsuperscript{103} Vogiatzis is again less critical, noting that the ‘ECtHR appears to have succeeded in providing useful guidance to the requesting Court whilst respecting its subsidiary role’, which ‘inevitably requires a degree of abstraction’.\textsuperscript{104} We nevertheless propose that the rejection of the third request may, in particular, discourage domestic courts, as it can be seen as a rap over the knuckles of the referring Slovak court, giving the message that it could have answered the question itself. However, given that the refusal seems to have escaped the attention of academics, it may also have escaped the attention of domestic judges.\textsuperscript{105}

\subsection*{2.3 Politico-Strategic Motives}

The EU literature has given much attention to politico-strategic motives of courts to refer, whereby courts employ considerations beyond the actual text of the law.\textsuperscript{106} Four perspectives can be discerned. First, the judicial empowerment thesis posits that courts use a reference as a ‘sword’ vis-à-vis the legislator or executive in order to instigate a change in domestic laws and policies breaching

\begin{thebibliography}{99}
\bibitem{Margaria} Margaria (n 99) 425.
\bibitem{Ibid.} Ibid.
\bibitem{Moonen and Lavrysen} Moonen and Lavrysen (n 19) 34. See also, Lavrysen 2020 (n 19).
\bibitem{Vogiatzis} Vogiatzis (n 98) 7–8.
\bibitem{No blogs} No blogs seem to have been written about the decision, except the following news item: ‘ECtHR Rejects Advisory Opinion Request from the Slovak Supreme Court’ (EU Law Live, 2 March 2021): <https://eulawlive.com/ecthr-rejects-advisory-opinion-request-from-the-slovak-supreme-court/> . See also, LR Glas and J Krommendijk, ‘Hard to Get? Hoe het EHRM op onduidelijke wijze onduidelijke prejudiciële vragen onbeantwoord laat, of toch niet...’ (2021) EHRC Updates.
\end{thebibliography}
EU law. A reference enhances the likelihood of compliance following a CJEU judgment and ensures that the disputed law or policy is in conformity with EU law. This thesis could explain why some national courts have referred rather straightforward and easy questions to the CJEU to which they knew the legal answers themselves already. There is also an institutional element to this sword-thesis, namely the wish to shift the responsibility and blame to a supra-national court for what could be a controversial decision for which otherwise a domestic court could draw fire in the domestic context. Secondly, neo-realist or intergovernmentalist theories primarily explain courts’ reluctance to refer and point to a tendency of courts to not-refer in order to ‘shield’ national laws and policies from CJEU review, especially in politically sensitive cases. This inclination has been attributed to the loyalty of courts to the executive, the existence of a strong doctrine of parliamentary sovereignty, or a weak culture of judicial review. Another explanation is a court’s wariness with an all too dynamic or progressive interpretation by the CJEU. Some scholars argue that the latter is also influenced by popular sentiment and a critical political climate. The Dutch criminal chamber of the Supreme Court and the UK Supreme Court have employed a shield logic in some of their decisions in order to preclude an all too far-reaching interpretation of EU law that would hamper the constitutional set-up or the national legal system. Some Dutch Supreme Court judges seem suspicious of the growing impact of EU legislation and the CJEU’s case law on domestic criminal law, which they consider rather traditionally a sovereign issue to be regulated nationally. In an interview with

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109 Krommendijk (n 53) 97–102.

110 Golub (n 107) 375–379.


113 ML Volcansek, Judicial Politics in Europe: An Impact Analysis (Peter Lang 1986) 206 and 217; Golub (n 107) 377.

114 Krommendijk (n 53) 90–97.
Claassen, one judge held that Pandora's Box is opened up when criminal procedural law is brought within the EU's competences.\textsuperscript{115} Thirdly, the inter-court competition model highlights how (primarily lower) courts have used the EU procedure to 'leapfrog' the national judicial hierarchy to obtain support from the CJEU in cases in which they disagree with another, often higher, national court.\textsuperscript{116} Clearly, considering that only the highest domestic courts can rely on P16 to ask a question, this explanation will not be relied upon in this section, even though the EU procedure has also at times been used in judicial clashes between different highest courts.\textsuperscript{117} Fourthly, courts have also referred questions to put an issue on the EU agenda, especially when they consider that there are problems in EU legislation or in the application of EU law by other states.\textsuperscript{118} The relevance of the first, second, and fourth perspective for the P16 context is now discussed.

2.3.1 The Shield Logic

It is perhaps not unreasonable to presume that politico-strategic reasons dissuading a reference, namely the shield logic, play a relatively important role in the ECHR context given the amount of criticism that has been levied against the ECtHR by academics, politicians, and domestic judges in recent years.\textsuperscript{119} Consequently, domestic judges may want to shield domestic law from advisory opinions that would be overly intrusive in the eyes of (certain) domestic judges.

\textsuperscript{115} The judges interviewed by Claassen were, by contrast, more positive about the ECtHR's judgments in the sphere of criminal law. For example, one judge mentioned that he understands the ECtHR better. Similar sentiments were expressed by judges of the UK sc. See, Krommendijk (n 53) 113–114.


\textsuperscript{117} See, for example, the Melki case in which the French Cour de Cassation referred to the ECJ to prove its case against the Conseil constitutionnel and the Conseil d’Etat. See, Joined Cases C-188/10 and C-189/10 (n 44). See also, the reference of the Dutch Central Appeals Tribunal challenging the interpretation of the Dutch Council of State: Case C-133/15 Chavez-Vilchez (CJEU, 7 July 2017).

\textsuperscript{118} For example, M Bobek, ‘Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts’, in Judging Europe’s Judges. The Legitimacy of the Case Law of the European Court of Justice Examined, M Adam and others (eds), (Hart Publishing 2013) 223.

actors. Nonetheless, one may wonder whether the shield logic indeed applies considering the formally non-binding status of advisory opinions, meaning that the requesting court 'decides on the effects of the advisory opinion in the domestic proceedings'.\textsuperscript{120} At first sight, one could thus argue that a request has no consequences and that there is no reason to withhold reference from Strasbourg. Nonetheless, for three reasons, not following an advisory opinion is a largely 'theoretical liberty' for domestic courts and other actors.\textsuperscript{121}

The first reason concerns the \textit{res interpretata} effect. Even though advisory opinions are not formally binding on the requesting court, the ECtHR considers the advisory opinions 'as valid case law which it would follow when ruling on potential subsequent individual applications'.\textsuperscript{122} Consequently, advisory opinions have 'undeniable legal effects'.\textsuperscript{123} More precisely, the advisory opinions have \textit{res interpretata} or force of interpretation.\textsuperscript{124} This means that the 'general interpretations' that concern 'well-established interpretations and general principles' in an advisory opinion will 'be \textit{de facto} binding on the national courts'.\textsuperscript{125} However, how these courts apply these principles to the facts of the case before them remains for them to decide.\textsuperscript{126} The \textit{res interpretata} effect 'stems from the Court’s monopoly on the interpretation of the Convention established by Article 32’ \textsc{echr}, as a consequence of which ‘national authorities are bound by the dynamic standard of human rights protection expressed in the Court's current case law'.\textsuperscript{127}

The second reason why a domestic court may find it hard to ignore an advisory opinion is that domestic judges in different states parties 'have expressed...
their willingness to consider Strasbourg judgments and follow these judgments’ in principle. Moreover, domestic judges ‘usually follow the ECtHR and even try to solve incompatibilities between domestic law and the ECHR as interpreted by the ECtHR’, even when domestic law does not oblige them to do so. Reasons for following a Strasbourg judgment include the ECtHR’s interpretation being constant, well-established, and clear, and that the Grand Chamber adopted a judgment. What applies to judgments will probably also apply to advisory opinions: the domestic judges likely want to follow the ECtHR’s interpretation, not (just) due to the legal status of the advisory opinion, but (also) out of judicial comity, particularly given that the Court’s most authoritative formation, the Grand Chamber, adopts advisory opinions.

Third, if a domestic court chooses to ignore an advisory opinion, one of the parties to the domestic proceedings may file an application under Article 34 ECHR. This prospect and the likelihood of the ECtHR finding a violation because the requesting court did not follow the advisory opinion may dissuade the requesting court from ignoring the advisory opinion. After all, courts will probably not like being overruled by the ECtHR. Moreover, the subsequent judgment would be binding on the domestic court under the ECHR. It remains to be seen whether this feature of a looming individual complaint favours a reference or not. Requesting an advisory opinion could be a means of reducing the risk of ‘being “corrected”’ by the ECtHR in a subsequent judgment adopted in a case brought by one of the parties to the domestic proceedings. The threat of such a correction by the affected parties is a major difference between P16 and the EU procedure, which leaves (almost) no real remedies for the parties to challenge decisions not to refer. The threat could thus work

128 LR Glas, ‘The Boundaries to Dialogue with the European Court of Human Rights’ (2018) European Yearbook on Human Rights 287, 313. There is a duty for domestic judges to take the Court’s jurisprudence into consideration in some legal systems. See, Dicosola, Fasone, and Spigno (n 6) 1395.

129 Glas (n 128) 313.

130 Ibid 314.

131 Dicosola, Fasone, and Spigno (n 6) 1396, 1410.


133 Jacqué (n 36) 23.

134 Article 46(1) ECHR. See also, Kamerstukken II 2014/15, 34 235, number 4, 7–8.

135 Lubbe-Wolff (n 121) 14. See also, Lemmens (n 42) 710; Dzehtsiarou and O’Meara (n 1) 468.

136 Both infringement procedures started by the European Commission and state liability actions (Case C-224/01 Gerhard Kölber v Republik Österreich [2003] ECR I-10239) before national courts remain a theoretical possibility. The only infringement action in relation
against a shield tendency, especially when the ECtHR will extend its Dhahbi case law on the failure of the highest courts to give reasons for their decisions not to refer to the CJEU as a breach of Article 6 ECHR.\textsuperscript{137} At the same time, courts might also adopt a more pragmatic approach whereby the possibility of a subsequent individual complaint to the ECtHR is actually a reason not to request an opinion.

In sum, these three reasons may limit the enthusiasm of courts to use P16 and provide an incentive to shield domestic law from external interference.

2.3.2 The Sword Logic
The sword logic has also been recognised in the ECHR literature, especially its institutional blame-shifting dimension. Gerards, for example, noted that domestic courts may submit advisory opinions to ‘forward a hot potato’ and ‘to help them solve delicate and politically sensitive issues which they would prefer not to take on themselves’.\textsuperscript{138} When the ECtHR adopts a (controversial) advisory opinion, they can ‘easily hold the European Court responsible for obliging them to take a debatable or activist decision, while keeping their own records clean’\textsuperscript{139} and avoiding ‘pressure by and conflict with their respective national governments’.\textsuperscript{140} The French Court of Cassation, which submitted the first request for an advisory opinion, may have submitted it for strategic reasons, since the request concerned a controversial issue.\textsuperscript{141}

There are three reasons to assume that the sword logic does not play a role of great importance in the ECHR context.\textsuperscript{142} Firstly, as mentioned above, the strategic value of an advisory opinion might be (more) limited because of its non-binding nature,\textsuperscript{143} although not following an opinion mainly seems to be a theoretical option. Secondly, research on the EU procedure found that

\begin{thebibliography}{10}
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\bibitem{Dhahbi} Dhahbi v Italy 17120/09 (ECtHR, 8 April 2012); Schipani v Italy 38369/09 (ECtHR, 21 July 2015); Baltic Master v Lithuania 55092/16 (ECtHR, 16 April 2019); Sanofi Pasteur v France 25137/16 (ECtHR, 3 February 2021).
\bibitem{Gerards} Gerards (n 41) 318; Gerards (n 22) 646–647.
\bibitem{Gerards2019} Gerards (n 22) 646–647.
\bibitem{Lubbe-Wolff} Lubbe-Wolff (n 121) 14. See also, Dzehtsiarou (n 38) 130.
\bibitem{Gerards2021} Gerards (n 61) para 43. The ECtHR seemed to suggest that the French law was not in line with the standards outlined in its opinion. See, Moonen and Lavrysen (n 19) 29.
\bibitem{EckhardtBakker} See, in comparison, Eckhardt and Bakker (n 90) 1886.
\bibitem{ArticleP16} Article 5 of Protocol 16 to the Convention; Explanatory Report to P16 (n 11) para 35. See also, ECtHR, ‘Opinion of the Court on Draft Protocol No. 16 to the Convention Extending its Competence to Give Advisory Opinions on the Interpretation of the Convention’ (6 May 2013) para 12.
\end{thebibliography}
certain lower courts, such as Dutch migration courts, sometimes used the EU procedure as a sword vis-à-vis the legislature. The predisposition of some individual judges to use the procedure in such a way stems from clear personal views on the application of the law and its consequences. For instance, one migration law judge stated that they had ‘a bad taste’ of the migration case law of the Council of State. Personal preferences, such as career prospects or prestige, play a more limited role at the highest court level where almost all decisions are made by a chamber of judges. Such a chamber often neutralises personal views and hobby horses. Since the ECHR procedure is only available for the highest courts, a potential repeat player likely to use P16 as a sword is excluded from the game. Thirdly, the P16-sword is likely ‘smaller’ and ‘blunter’ than the EU-equivalent because of the disputed legitimacy of the ECtHR. The likelihood of (strategic) usage of the ECHR procedure depends on the perceived authoritativeness of the ECtHR in the eyes of the judges in the highest courts, but also other relevant domestic authorities. As noted above, this authority has been questioned and could decrease the likelihood that P16 is used as a sword. In some countries, the sword is arguably sharper, especially when domestic courts enjoy more limited legitimacy than the ECtHR. The latter could perhaps explain the request of the Armenian Constitutional Court.

2.3.3 Agenda Setting
The agenda setting function has been highlighted in literature about P16 as well. A requesting court has the possibility to give its own view on the question that it poses, and can thereby influence the case law of the ECtHR more directly than without P16. With P16, courts are no longer ‘mere recipients of the interpretation of fundamental rights provided by the ECtHR’ but can become ‘agents of fundamental rights in Europe’ and partners of the ECtHR. Moreover, P16 also enables courts to voice their disagreement with judgments of the ECtHR adopted in contentious procedures and engage in a direct dialogue over particular interpretations.

144 Krommendijk (n 53) 102–105.
145 Ibid 104.
146 Ibid 76.
147 Voland and Schiebel (n 18) 84; Dicosola, Fasone, and Spigno (n 6) 1389; Thorarensen (n 18) 93; Gerards (n 22) 646.
148 Rules of Court (n 68) Rule 92(2)(1). See also, Explanatory Report to P16 (n 11) Article 12.
149 Dicosola, Fasone, and Spigno (n 6) 1426.
150 Gerards (n 22) 646. See also, Eckhardt and Bakker (n 93) 1885.
A Dutch Case Study

In order to reflect on the motives put forward in the literature on the EU preliminary ruling procedure and P16, we conducted a case law analysis of judgments of the highest Dutch courts. Four courts are empowered to use P16. This includes the Supreme Court (‘SC’) that acts as a third-instance cassation court in civil, criminal, and tax law, and can only examine questions of law. The SC is assisted by AGs who advise it on how to decide particular cases. There are three supreme administrative courts acting as second-line courts of fact: the Trade and Industry Appeals Tribunal (‘CBB’), the Administrative Division of the Council of State (‘ABRvS’), and the Central Appeals Tribunal (‘CRvB’).

There has been no request for an advisory opinion from a Dutch court (yet). Still, the case law search identified seventeen cases in which the option of submitting an advisory opinion was mentioned, including six cases from before the entry into force of P16.151 Six judgments were rendered by one of the three highest administrative courts, the Council of State, while no judgments of the other two highest administrative courts were found. The other eleven cases served before the SC: three tax, five civil, and three criminal law cases. In all but one (Urgenda), the option of using P16 was only mentioned by the AG. AGs advised the SC to request an advisory opinion in three cases. This section is also based on extra-judicial writings of judges in the relevant courts and AGs before the Dutch SC and on a memorandum written for a seminar about P16 and its significance to the Dutch legal order. This memorandum was written on the request of a preparatory committee consisting of representatives of the five highest Dutch courts able to refer.152

In addition to the motives discussed in section 1, research on the EU procedure found that the parties could also affect the courts’ predisposition towards a referral.153 The parties’ requests to refer played a considerably smaller role before the Dutch highest courts than in common law countries such as Ireland. Most references to the CJEU were made by courts on their own motion.154

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151 Judgments of lower courts acting in last instance dealing with cases for which there is no judicial remedy under national law are excluded. Courts decided that they cannot request an advisory opinion on the basis of P16. See, for example, Rechtbank Den Haag 25 May 2020, ECLI:NL:RBDHA:2020:4558 para 6 (hereinafter ‘District Court’).

152 Van Swaanenburg-van Roosmalen and Vermeulen (n 62).


154 Krommendijk (n 53) 82–88.
Given the absence of a Dutch request for an advisory opinion, it is too early to examine whether this EU finding also applies to the ECHR context. Nine out of the seventeen cases referred to a request of (one of) the parties, including the six Council of State judgments. Only three of the eleven SC cases refer to a request of the parties. In the three cases in which the AG advised the SC to request an advisory opinion, the AG did not refer to a request of (one of) the parties. Although it could well be that a request was made but that the AG or the SC did not mention it, these figures suggest that AGs have been quite keen in exploring the option of using P16 irrespective of the position of the parties.

The remainder of this section examines the reasons provided by the Dutch courts and the AGs of the SC for their decisions not to request an opinion from the ECtHR. The subsections mirror the structure of the second section of this article, starting off with legal motives (3.1), then discussing pragmatic motives (3.2), and finishing off with politico-strategic motives (3.3). This overview also illustrates the type of cases in which P16 can potentially be used and could thus be of interest to non-Dutch lawyers too.

### 3.1 Legal Motives

Section 2.1 pointed to several legal hurdles for courts to use P16, including the absence of an obligation for courts to request an advisory opinion and the competing obligation to use the EU preliminary ruling procedure. It should, therefore, not come as a surprise that Dutch courts preliminary used legal reasons relating to the lack of a relevant question of principle to argue against using P16, often pointing out that there is already sufficient guidance in the Strasbourg case law. Some of the cases falling in this category are hardly worth discussing, whereas others have proven to be more interesting for the purposes of this article.

Several decisions not to refer are rather unsurprising or not worth discussing at length and include arguably valid legal reasons for not using P16. For instance, the Council of State easily dismissed a request to refer in three cases because P16 had not entered into force. Additionally, the Council of State

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155 National courts do not have to provide (extensive) reasoning for a decision not to request an advisory opinion from the CJEU when they apply Article 80a of 81 RO (Baydar v Netherlands 55385/14 (ECtHR, 24 April 2018)). In comparison, see, Harteveld in AG Conclusion Dutch SC 1 October 2019, ecli:nl:phr:2019:951 paras 7.6 –7.7.

156 Exceptionally, no substantive reasons were provided (by the AG) as to why a reference was not necessary. See, AG Lückers in AG Conclusion Dutch SC 12 October 2018, ecli:nl:phr:2018:1156 para 2.24.

157 The Council also noted that it is unclear whether P16 applies to already pending cases. See, Council of State 23 August 2017, ecli:nl:rvs:2017:2250 para 3.4; Council
saw no reason to refer a question about Article 6 ECHR, despite a request of the applicants, because the argument that this provision had been breached was legally untenable.\textsuperscript{158} In another case, the Council of State determined that the legal issue brought forward in relation to P16 was not made in the right procedure.\textsuperscript{159} Another reason not to use P16 is that a request is not necessary to solve the dispute in the pending case, because it can be decided on other (national) grounds. AG Paridaens advised against referral to the ECtHR in an Aruban case involving related questions about Article 5 ECHR concerning the execution of substitute pre-trial detention due to an inability to pay. She pointed to the possibilities under Aruban law to prevent a violation of Article 5 ECHR.\textsuperscript{160}

Other cases are worthy of further elaboration, because they illustrate how the lack of a question of principle can be a reason not to refer. Three cases primarily illustrate that the major reason for not using P16 is that the ECHR does not fully apply or because there is (arguably) sufficient guidance from Strasbourg. The first reason is visible in the first case, which concerned the execution of substitute detention in case of an inability to pay in the light of Article 5 ECHR.\textsuperscript{161} AG Langemijer considered it unnecessary to refer on the basis of an extensive study of the case law of the ECtHR. He concluded that imprisonment in lieu of payment in the event of a failure to pay does not violate the ECHR. He also pointed to the cautious approach of the ECtHR, since the imposition of a custodial sanction and determination of the length of this sanction fall within the domain of the national judge. Hence, ‘matters of appropriate sentencing’ fall outside the scope of the ECHR in principle, unless the sanction is arbitrary or when other Convention rights are violated.\textsuperscript{162} The SC did not deal with the Article 5 ECHR argument, but merely paid attention to Article 7 ECHR and concluded that this provision had not been violated.\textsuperscript{163}

The presence of sufficient guidance from the ECtHR as a reason not to use P16 is illustrated by a second case in which the civil chamber of the SC

\begin{itemize}
  \item 158 For example, Council of State 18 January 2021, ecli:nl:rvs:2021:84 para 3.2.
  \item 162 For example, Saadi v the United Kingdom [GC] 13229/03 (ECtHR, 29 January 2008) para 71.
  \item 163 Dutch SC 26 March 2021, ecli:nl:hr:2021:442.
\end{itemize}
answered preliminary questions from the court of appeal about the so-called 'proven innocence criterion'. This criterion deals with a civil action for damages brought by the former defendant against the state on the ground that his innocence has been proven. The SC applied a rather strict criterion to limit liability, in part to prevent civil courts from assessing criminal law cases all too easily. The court of appeal asked the SC about this criterion's compatibility with the presumption of innocence, as set out in Article 6(2) ECHR. This question arose because the grounds for rejection of civil liability by the civil court can be regarded as an accusation against the former defendant by a government body. Recent ECtHR case law gave the Dutch court of appeal reason to doubt whether the SC case law is in accordance with the ECHR. The SC decided not to follow AG Bleichrodt, who advised to do away with the criterion. The SC determined that liability on the basis of this criterion is thus not incompatible with Article 6(2) ECHR, but that the manner in which the criterion is applied and the grounds of the decision to reject a claim for damages on this basis may be in conflict with that provision. It determined that the civil court cannot express an independent opinion that deviates from the judgment of the criminal court acquitting the defendant irrevocably. AG Bleichrodt examined in five paragraphs whether a reference to the ECtHR was necessary. First, he paid attention to the question as to whether a request for an advisory opinion can be made in a case in which the court is dealing with a reference for a preliminary ruling from a lower Dutch court. According to the Dutch government, such a case does not satisfy the requirement of Article 1(2) of Protocol 16 of a 'case pending before it'. According to the Minister of Justice, the case itself is not taken up by the SC but remains pending before the requesting court. One reason for this restrictive interpretation is that the ECtHR must be able to assess the legal issue submitted to it in the context of a concrete case, whereas only a legal issue is formulated in national references. In response to the Minister, AG Bleichrodt pointed to the different approach of the ECtHR in its second advisory opinion on the basis of a request from the Armenian Constitutional Court following preliminary references from a lower Armenian court. He

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166 The ECtHR considered the application of criterion ‘unfortunate’ and ‘inappropriate’ in Bok v Netherlands 45482/06 (ECtHR, 18 January 2011); Allen v the United Kingdom [GC] 25424/93 (ECtHR, 12 July 2013) paras 92–105 and 120–126.
168 Ibid paras 74–78.
169 Advisory Opinion 2 (n 2). In relation to this question, see also, J Valk, ‘Advisering door het EHRM in civiele zaken’ (2019) 2 Tijdschrift voor Civiele Rechtspleging 68, 72.
thus concluded that a reference is in principle allowed. Nonetheless, he held
that a reference was not necessary because a request would not have ‘added
value’ in light of the availability of the general considerations made by the
ECtHR on the presumption of innocence in several judgments and especially
in the Grand Chamber judgment in Allen v the United Kingdom, summarising
the case law.\footnote{Allen v the United Kingdom [GC] 25424/09 (ECtHR, 12 July 2013) paras 92–105 and
120–126.} As an additional reason, he also noted rather cryptically that
the ECHR’s review takes place on the basis of the specific circumstances of the
case.\footnote{AG Conclusion Dutch SC 11 December 2020, ecli:nl:phr:2020:1194 para 78.} He seemed to suggest that the SC is merely required to examine the legal
consistency of the criterion without any regard to the facts of the case.
This seems to reflect the earlier mentioned reasoning of the Dutch govern-
ment that he discredited.

AG Bleichrodt also advised against posing questions to the ECtHR in the
third case following a very specific request of the suspect.\footnote{The SC rejected this complaint without giving reasons on the basis of Article 81 (1) of
hemp cultivation and electricity theft was confronted with an administrative
decision closing his house for six months. The suspect challenged this based on
ne bis in idem\footnote{AG Conclusion Dutch SC 17 March 2020, ecli:nl:phr:2020:259 paras 19–21.} and proposed two specific questions as to whether the adminis-
trative decision amounts to a ‘criminal charge’ within the meaning of Article 6
ECHR and how the degree of severity of the penalty needs to be established.\footnote{Mihalache v Romania 51012/10 (ECtHR, 8 July 2019) para 61.}
The AG held that one reason for not referring the questions to the ECtHR is
that the Netherlands has not ratified the Seventh Protocol to the ECHR, which
contains the ‘ne bis in idem’ principle in Article 4. He also held that the ECtHR
has already answered the question as to whether the sanction imposed or the
threat of sanction is decisive in the application of the third Engel criterion.\footnote{AG Conclusion Dutch SC 1 October 2019, ecli:nl:phr:2019:951 para 7.4.}

The preference for the mandatory EU procedure was mentioned in one
case. AG Harteveld mentioned this overlap as a reason not to refer in a case
concerning the reasonable time period in Articles 6 and 13 ECHR. In his view,
it is best to refer to the CJEU when the case falls within the scope of EU law
given that EU law offers at least the same level of protection as the ECHR and
because national courts are obliged to refer to the CJEU.\footnote{AG Conclusion Dutch SC 1 October 2019, ecli:nl:phr:2019:951 para 7.4.}
3.2 **Pragmatic Motives**

Given the absence of a legal obligation, section 2.2 referred to the hypothesis that national courts would be even more inclined to rely on pragmatic considerations in the context of P16 than in the context of the EU procedure. This section discusses cases in which the pragmatic reason of delays was primarily used to justify the decision not to use P16, even though it seems that judges and AGs are positive about the limited delays so far. For example, writing extra- judicially, AG Spronken commented positively on the time that it took for the ECtHR to adopt the first advisory opinion, qualifying it as fairly fast, which demonstrates that they consider the ECtHR to take the procedure seriously.176

One good illustration of the relevance of delays is the opinion of AG Harteveld in a case concerning the reasonable time period in Articles 6 and 13 of the ECHR. The AG concluded, just like the SC, that the request for appeal in cassation should be declared inadmissible.177 The opinion of the AG is, nonetheless, revealing, in that it admits that reasons other than purely legal reasons may be relied upon when considering using P16, because there is no obligation for the court to ask the ECtHR for an advisory opinion. He explicitly pointed to the expected duration of the advisory procedure and noted that it is no secret that the workload of the ECHR is high, with proceedings taking years. He expected that this workload would only increase because of P16, and argued that the first (French) advisory opinion with a processing time of 24 weeks does not set a standard because the ECtHR exercised special diligence. He thus expected that, over time, the processing time would mirror the Luxembourg practice of approximately one and a half years.178

The only time when the SC paid attention to the question of requesting an advisory opinion is in its landmark judgment, Urgenda. The only official reason for not referring was that the answer to the question as to whether Articles 2 and 8 ECHR apply to the global problem of climate change was sufficiently clear.179 Therefore, it provided the answer to this question itself and even determined that ‘no other conclusion is possible’ than the conclusion that it reached.180 This conclusion is quite surprising given that the ECtHR has not yet issued any judgments relating to climate change, as the SC itself also acknowledged.181 AGs Langemeijer and Wissink also noted in their opinion that it is not

176 Spronken (n 55) 1131.
180 Ibid para 5.6.2.
181 Ibid para 5.6.3.
certain how the ECHR itself would rule on a case such as Urgenda.\textsuperscript{182} The legal motive and assumption that there is sufficient guidance does not seem to fully capture the decision not to use P16. Therefore, another reason, which was not mentioned by the SC but only by the AGs, probably better explains the decision not to refer, namely the urgency required. Both parties asked the SC to rule in 2019 because of the time before which the district court’s order needed to be complied with, namely by the end of 2020.\textsuperscript{183} The AGs also explicitly mentioned these ‘practical considerations’ arguing against referral.\textsuperscript{184} They noted that a request would mean that the district court’s order that was declared provisionally enforceable would have to be implemented without a SC judgment because of proceedings before the ECtHR. Moreover, the subsequent continuation before the SC would take time and, in any case, (most of) the year 2020. As will be discussed in section 3.3, the decision not to refer in Urgenda can also be explained from a shield perspective.

The previous two cases show that courts weigh the costs and delays with the perceived benefits of requesting an advisory opinion. This point is also discussed in the memorandum mentioned above. It notes that the decision whether or not to request an opinion essentially boils down to balancing the advantage of having an early and authoritative opinion versus delays in the resolution of the particular case, but also in related ‘clone cases’ that need to be put on hold.\textsuperscript{185} At the same time, the memorandum mentions that a request could result in efficiency gains under certain circumstances, without really specifying those gains.\textsuperscript{186} It seems that efficiency gains are primarily foreseen in relation to the legal issues that have been decided upon by the ECtHR in relation to the Netherlands in recent years, namely administrative (migration) law and criminal law issues. A request in these areas diminishes the need for an individual complaint afterwards. This suggests that Dutch courts would be particularly keen in referring questions that would otherwise end up in Strasbourg anyhow. This reasoning is also reflected in the extra judicial writing of the SC President De Groot, who expects that the Dutch SC will primarily use P16 in relation to ‘nationally highly conflictive cases’.\textsuperscript{187} She also suggested that the threshold for sending a request should be quite high since she notes that P16 is one of the measures taken to decrease the ECtHR’s workload. In addition, she notes that only sufficiently weighty cases should be brought to

\textsuperscript{183} Ibid para 5.6.4.
\textsuperscript{185} Van Swaanenburg-van Roosmalen and Vermeulen (n 62) 15.
\textsuperscript{186} Ibid 13.
\textsuperscript{187} De Groot (n 86) 11.
the ECtHR’s attention. Domestic judges may hesitate to ask a question when the case before them does not concern a somewhat structural problem that could lead to multiple ECHR applications in the future and is not sufficiently weighty. These extra-judicial sources thus illustrate that there is a certain reluctance to use P16. One argument pointing in a similar direction are the three earlier mentioned decisions of the Council of State, which mentioned the possibility for the applicant to file a complaint with the ECtHR based on Article 34 ECHR.

3.3 **Politico-strategic Motives**

It is difficult to determine with certainty and without reliance on, for example, interviews whether politico-strategic reasons play a(n additional) role in judicial decision making. This section is thus to a large extent speculative and merely emphasises possible politico-strategic motives.

3.3.1 The Shield Logic?

Two cases were found that could possibly be (partly) explained by the shield logic and the SC’s wish to shield domestic law from Strasbourg interference. Firstly, the decision not to use P16 in Urgenda can perhaps be explained by the wish of the SC to maintain autonomy and to provide a higher level of fundamental rights protection on the basis of national law. As was mentioned already in section 3.2, the SC’s conclusion that ‘no other conclusion is possible’ than the decision reached is questionable. It seems that the SC wanted to take up the legal question itself instead of leaving it to the ECtHR because of the expectation that the ECtHR would come up with a lower level of protection in light of its environmental case law. Scholars have criticised the ECtHR for being (too) cautious in environmental cases and for being reluctant to formulate precise positive obligations in this area. Had the SC referred, it

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188 Ibid.
189 This echoes the idea in the explanatory report accompanying the Dutch law implementing P16. See, sources cited in (n 41).
191 The earlier mentioned memorandum mentioned Urgenda as an example of a possible question of principle. See, Van Swaenemburg-van Roosmalen and Vermeulen (n 62).
would thus be questionable whether the ECtHR would have reached a similar (progressive) interpretation of Articles 2 and 8 ECHR as the SC did given the absence of a self-standing provision on the right to a healthy environment and the restrictive approach of the ECtHR.\(^ {194} \)

A second SC decision not to use P16 deals with the state’s obligation to repatriate female IS supporters/fighters and their children in light of Article 1 ECHR and provisions in UN human rights treaties. Aside from pragmatic motives relating to the urgency of the case, the decision not to refer might also be partly related to the desire to prevent a too far-ranging interpretation. After an extensive analysis of ECtHR case law, AG Valk determined that it is not logical to ask for an advisory opinion given the urgent nature of the case. He also pointed to the interlocutory nature of the proceedings and noted that there is no obligation to refer to the CJEU in summary proceedings if the question at issue can be decided again in the main proceedings.\(^ {195} \) The SC did not pay attention to the option of referral but extensively discussed the case law of the ECtHR and eventually arrived at the conclusion that there is no legal obligation for the state to repatriate on the basis of a restrictive interpretation of the territoriality principle allowing for extraterritorial jurisdiction only in exceptional circumstances, such as the exercise of effective control.\(^ {196} \) Several authors noted that it is uncertain whether the ECtHR would arrive at the same conclusion in a currently pending French case.\(^ {197} \) Ryngaert, for example, noted that recent ECtHR judgments suggest that the Dutch nationality of the claimants could lead to extraterritorial jurisdiction.\(^ {198} \)

As said, it is far from clear that the shield logic indeed played a role in Urgenda and the female IS fighters case. At the very least, both cases are indicative of a reluctance to use P16 because of this logic.

### 3.3.2 The Sword Logic?

One would at first sight reason that the sword logic has been absent since there have been no actual Dutch requests for an advisory opinion. Nonetheless, three cases were found in which the AG advised the SC to possibly use P16 with a sword logic in mind, aside from obvious legal reasons to refer. In each case, the

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\(^ {194} \) Norges Høyesterett 22 December 2020, Case No 29-051052SIV-HRET para 168.


\(^ {196} \) For example, Banković and Others v Belgium 52207/99 (ECtHR, 19 December 2001) paras 79–80; Dutch SC 26 June 2020, ECLI:NL:HR:2020:1148.

\(^ {197} \) H F and M F v France 24384/19 (ECtHR). Van der Werf in JB 2020/144 paras 6–7.

conformity of Dutch legislation with the ECHR was at stake. Previous research on the EU procedure demonstrated that courts are particularly eager to refer in such instances to receive support from an international court vis-à-vis the legislator or executive in order to instigate a change in domestic laws and policy breaching EU law. One could argue that these are, in the words of SC President De Groot, ‘nationally highly conflictive cases’ in which courts not only want a quick solution (from a pragmatic perspective) but also strategically aim to obtain an authoritative argument (‘a sword’).199 Interesting to note is that the AGs may have used the ‘threat’ of P16 as a way to convince the SC that they are right, based on the expectation that the ECtHR would side with them.

First, AG Wattel advised the SC to refer in a tax case about income taxation of savings interests and green investment income, so-called box 3 taxation based on a fictive average yield percentage instead of the actual income obtained. The claimant argued that the tax was close to or far over 100% of her income from assets. She complained that the tax levy violated the right to property laid down in Article 1 of Protocol 1 ECHR (‘P1’) and the ban on discrimination in Protocol 12 ECHR (‘P12’). The reliance on P12 is particularly legally noteworthy, because comparable previous litigation that focused on P1 did not establish a violation because the individual did not bear an excessive burden.200 P12 applies a lower threshold at first sight, since it ‘only’ requires discrimination or preferential treatment without a proper legal justification. The claimant put forward that the alleged discrimination consists of taxpayers paying too much tax since they obtain a lower income from their assets than the fictive yield tax, while some earn (much) more. AG Wattel eventually argued that the taxation does indeed lead to systemic discrimination, basing himself on a study about the heterogeneity of capital gains of all Norwegian income taxpayers. In relation to the justification of the interference, he concluded that the legislature did not pursue a legitimate aim. Nonetheless, he noted that, should the SC hold a different view, a reason to refer the question to the ECHR would exist.201 AG Wattel thus basically urged the SC to follow his advice or otherwise refer. He also used this tactic in relation to another legal point, namely the justification of the interference. He concluded that the fact that the tax authorities find it too difficult to tax the capital income of taxpayers for implementation reasons cannot justify such an income tax. Even with the broadest imaginable margin of appreciation, the conclusion remains that there is a systemic violation. He added: ‘Should you have any doubts about this, I think that this question should

199 De Groot (n 86) 11.
200 Compare, De Haan in NTFR 2021/1340.
be put to the ECHR for an advisory opinion. The SC did not engage with the P12 point of law or the option of referral. Rather, it referred the case back to the Court of Appeal for consideration of whether the tax poses an individual and excessive burden on the complainant in light of P1. The SC thus did not engage with the systemic problems identified by the AG. Had it done so, a referral to the ECtHR would have been a logical option, since a determination of a violation of the ECHR would have considerable financial consequences for the state. In such a case a ‘helping hand’ from Strasbourg might be helpful when the interpretation of the ECHR is not straightforward. Even when this interpretation is clear, P16 could provide an alibi, whereby Strasbourg is pulling the chestnuts out of the fire for the SC.

A second tax law case also entailed possible financial consequences when a violation of the ECHR was to be detected. AG IJzerman proposed to refer the question whether Article 7 ECHR (no punishment without law) prevented the application of a later voluntary tax disclosure scheme (‘inkeerregeling’) that was less favourable to the person concerned than the previous scheme. He pointed to conflicting judgments of lower courts with respect to the principled question as a reason to request an advisory opinion. When the SC rendered its judgment, P16 had not yet entered into force. It is nonetheless interesting to examine more closely the content of the case, because it is not unthinkable that the SC would otherwise have referred or at least give due consideration to this option. The case dealt with a taxpayer who had informed the inspector about her Swiss bank accounts by applying the voluntary disclosure scheme. She was consequently confronted with corrections of her personal income tax and a 30% penalty for the years 2001–2013. Until July 2009, the General States Taxes Act nonetheless stipulated that no penalty could be imposed in the event of voluntary disclosure. The applicant argued that the fine for the years 2001–2008 violated Article 7 ECHR. The SC decided that this provision applied, but determined that the penalty could be applied before the entry into force of the legislative amendment because of the foreseeability of the increase of the penalty at the moment of repentance (instead of at the time

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202 Ibid para 6.41.
204 One explanation is that the legal questions were also part of a mass objection procedure (‘massaalbezwaarpocedure’) as a result of which it is not possible to raise such questions in ‘individual’ proceedings. See, Dutch SC 2 July 2021, ecli:NL:HR:2021:3963.
of the commission of the offence). This judgment has been criticised by some authors in light of Strasbourg case law, including *Scoppola v Italy*.207

A third criminal law case dealt with the so-called *Salduz* issue of access to a lawyer from the first police interview of a suspect based on Article 6(3) (c) *ECHR*. The ECtHR judgment in *Salduz* had a considerable impact in the Netherlands and created quite some difficulties.208 In December 2015, the SC decided – in anticipation of the entry into force of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings – that as of 1 March 2016 a suspect has a right to legal assistance during their interrogation by the police.209 The question remained as to the consequences of *Salduz* prior to that date. AG Wattel questioned the SC’s limitation in time of the effect of ECtHR judgments, which in his view contravenes the *ECHR*. He noted in passing that a request for an advisory opinion from the ECtHR ‘might be useful’ when the SC is addressing the particular claim on the merits.210 Wattel saw no reason to refer questions to the CJEU on the interpretation of the EU ‘Salduz’ Directive in light of the Charter (‘I would not know what to ask’).211 The SC quashed the decision of the court of appeal on other grounds than lack of access to a lawyer, and thus did not get to this particular legal point. This illustrates that case-specific legal reasons may matter and can prevent relevant and logical questions from being referred. It is not unlikely that the issue of referring the question as to whether *Salduz* should be extended to the period prior to March 2016 pops up in other future cases. If so, it is not unthinkable that the SC forwards this hot potato to an international court for authoritative support, because of the considerable consequences for the criminal justice system and judgments already decided.212 Another conflicting and perhaps more realistic tactic may be shielding this controversy from international interference, as the SC did in December 2015 when it decided not to refer to the CJEU and instead answer the unanswered questions of EU law itself.

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207 *Scoppola v Italy* (No 2) [GC] 10249/03 (*ECHR*, 17 September 2009). Some expect the case to be submitted to the ECtHR. See, H van Dyck-Jagersma in *NTFR* 2018/2551. However, also see, Haas in *BNB* 2019/7 and Sanders in *FED* 2019/21.


211 *Salduz v Turkey* 36391/02 (*ECHR*, 27 November 2008).

3.3.3 Agenda Setting

It remains to be seen whether the highest Dutch courts will use P16 to set the agenda or to influence the Strasbourg case law. Writing extra-judicially, SC President De Groot has pointed out that the dialogue of Dutch courts with the ECtHR has historically been case-based in the sense that the domestic judges verify whether a Strasbourg judgment exists that is of relevance to the case pending before them. She characterises this type of dialogue as a ‘vertical dialogue’, which can be contrasted with the approach of, for example, English and German judges, who at times critically discuss Strasbourg jurisprudence. Such a critical discussion is rare in the Netherlands, albeit existent.213 The foregoing may mean that the Dutch highest judges will not be much inclined to use P16 for the purpose of setting a certain matter on the ECtHR’s agenda. Perhaps the idea is that they can have more impact on the development of the law by interpreting the ECHR themselves, as the SC did in Urgenda.214 These views on P16 also correspond to the rather timid position of Dutch judges in relation to the EU procedure. The Dutch SC has been particularly reluctant to use the procedure to influence the CJEU.215 Nonetheless, interviews conducted by Claassen about the EU procedure hint that the issue of agenda setting might play a role in the context of P16. Claassen interviewed a judge from the Council of State who highlighted the importance of developing fundamental rights case law in the ECHR context. This judge pointed to a danger that all the cases from the ‘more developed democracies’ go to Luxembourg, whilst Strasbourg receives cases from the non-EU states parties, such as Russia and Turkey. He questioned whether this will be good for the development of the law.216

4 Conclusion

This article has attempted to give an overview of possible motives for national courts to request an advisory opinion from the ECtHR under P16. An analysis of ECHR literature and empirical and theoretical studies on the EU preliminary ruling procedure led to quite a pessimistic outlook in terms of the

213 De Groot (n 86) 10.
215 Krommendijk (n 34).
potential eagerness of national courts to use P16. It obviously remains to be seen whether the actual practice proves us wrong, even more so because P16 is still rather young. The different motives identified point in the direction of timid courts foregoing a request based on P16. In terms of legal motives, one would point to the absence of an obligation to refer as well as the possible availability of an obligatory alternative in the form of the EU preliminary ruling procedure or a domestic constitutional court. This suggests that there is even more room for weighing in pragmatic reasons, such as delays and workload. Additionally, one would expect P16 to be used less frequently as a sword than the EU preliminary reference procedure, partly because of the contested authority of the ECtHR in various states. Rather, national courts might be more tempted to shield their national laws and policies from being scrutinised in Strasbourg, precisely because of the ECtHR's contested authority and because advisory opinions are hard to ignore despite their formally non-binding nature. Yet, two other motives for domestic courts not to ask a question may be that the expected answer of the Strasbourg judges is not to their approval or that domestic implementation legislation can be interpreted as circumscribing the type of questions of principle that can be asked, as is the case in the Netherlands. However, we also found some motives that may stimulate domestic judges to request an advisory opinion. First and foremost, P16 offers a unique opportunity for domestic judges to set an issue directly on the ECtHR's agenda. Additionally, judges who must mirror the ECtHR's case law may be motivated to submit a request when they would like to expand the extent of protection offered by the ECHR.

The Dutch case study presented in section 3 shows that the highest Dutch courts (and their AGs) have primarily explained their decision not to ask a question with reference to the legal question that they need to answer, which does not concern a question of principle or primarily involves the application of the already existing guidance from Strasbourg. The decisions not to use P16 are understandable and not problematic per se. The required urgency in cases such as Urgenda and the case about IS fighters worked against a reference. These two salient cases illustrate a shield temptation, whereby courts decide ECHR questions themselves in order to preserve their autonomy. Furthermore, Dutch courts seem to put the threshold for a suitable (principled) case rather high, also with a view of preventing an increase in the workload of the ECtHR. The idea seems to be that suitable cases are those that would otherwise end up in Strasbourg on the basis of an individual complaint. The findings, covering only the short period of two years after the ratification of P16 by the Netherlands, call for more in-depth research going beyond stated reasons in the judgments covering multiple member states. Semi-structured interviews
with judges, AGs, and law clerks would be a logical option to uncover the ‘real’ motives or considerations that are not mentioned explicitly in judgments.

This rather pessimistic outlook calls for a reflective approach of the ECtHR, in order to help to make sure that P16 can become the instrument for dialogue and for strengthening respect for the subsidiarity principle that it is supposed to be. Considering this outlook, there is every reason for the Strasbourg Court to make P16 attractive and to accommodate national courts, as the CJEU also did in the early days of the preliminary ruling procedure by reformulating poorly drafted questions instead of declaring them inadmissible. It also means that the ECtHR should continue minimising delays as far as possible. In addition, it should provide clear(er) instructions to courts when it declares requests inadmissible.217 The ECtHR is encouraged to provide national courts with recommendations and best practices as helpful guidance for national judges when (not) to refer, in line with the CJEU’s recommendations for national courts.218

Acknowledging that courts sometimes refer with politico-strategic motives in mind also means that the ECtHR should not all too easily show its disapproval when national courts submit legally ‘easy’ questions that they could have answered themselves, as in the Slovak case. Such an approach could discourage courts from referring future cases.219 Strasbourg should thus sharpen the sword offered by P16 and discourage the inclination of national courts to arm themselves with sizeable shields to resist Strasbourg’s involvement.

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217 Compare, Moonen and Lavrysen (n 20) 34; Glas and Krommendijk (n 105).
219 Krommendijk (n 53) 165–167.