# Preliminary Questions in the Netherlands: Questions from Lower Courts to the Dutch Supreme Court

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## 1. A new procedural instrument

A symposium organised by the Dutch Supreme Court took place on 8 July 2022. The reason for the symposium was the tenth anniversary of the Dutch national so-called preliminary ruling procedure.[1)] This is an innovative procedure that allows courts of first instance and second instance to submit complex legal questions to the Supreme Court during proceedings (in first or second instance). In this way, it can be decided early in the proceedings how a legal problem should be interpreted. The questions should concern matters of law to which the answer may be relevant for numerous other (possible) cases. After the Supreme Court answers the preliminary question, the case is further dealt with by the court that referred the question. Since the introduction of the preliminary ruling procedure, more than 120 questions on a wide variety of topics have reached the Supreme Court. On the whole, Dutch legal practice is enthusiastic about the new procedure.

In this contribution we will consider the reason for the introduction of the preliminary ruling procedure (section 2), the advantages and disadvantages of the procedure (section 3) and how the procedure usually proceeds (sections 4-7). In addition, we will provide various figures to gain more insight into how the procedure works in practice (section 8). Finally, we will take stock – what has the procedure brought so far? (sections 9–10)?

## 2. Why was the preliminary procedure introduced?

In 2008, a report on the reinforcement of the Cassation Court was published which identified several problems on jurisprudence in cassation. Among other things, it noted that cases submitted to the Supreme Court vary in importance, complexity and size. The report's authors took the view that some of these cases do not actually merit the attention of the

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1) Art. 392-395 DCCP.

Cassation Court as answering certain questions contributes little to legal uniformity and development of the law.[2] It was also noted that in the civil sector, important points of law did not reach the Supreme Court or did not reach it in time. On the basis of these findings, the authors of the report concluded that the Supreme Court was not performing its lawmaking function optimally. As a result of the suboptimal fulfilment of this normative role of the Supreme Court, legal unity and legal certainty cannot be optimally served either. The authors of the report proposed several solutions to this problem, including the introduction of the preliminary ruling procedure.[3] The Dutch legislature responded positively to this proposal and subsequently initiated the necessary legislative process. In July 2012, the Act on prejudicial questions to the Supreme Court entered into force.

## 3. Possible pros and cons: What was expected?

Prior to the introduction of the preliminary ruling procedure, research was carried out into the (possible) impact of the preliminary ruling procedure on the civil justice system. Parliamentary documents show that the main rationale for adopting the Act is that timely and expeditious answering of important legal questions enables the Supreme Court to better fulfil its lawmaking task. It is important to obtain clarity quickly, especially since cases in which these kinds of questions arise often involve major interests in society.[4]

By referring preliminary questions, there is no need to wait until the Supreme Court deals with the matter in regular cassation proceedings. So, there is no need to wait for ordinary cassation proceedings to get answers to the legal questions. As a result, parties learn at an earlier stage of the proceedings how questions of law that have arisen in their dispute should be answered. Being able to clarify the legal position more quickly is not only beneficial for legal certainty of the parties, it can also prevent individual proceedings from being brought before the court.[5] It was expected – especially in collective actions – that answering preliminary questions could contribute to the parties' willingness to settle and that acceptance of the content of that settlement could also be increased.[6] In addition, legal unity also benefits from prompt answers to important questions of law; indeed, it prevents lower courts from issuing conflicting judgments.[7] In this way, the judiciary can operate more efficiently and effectively.[8]

Yet the authors of the report that formed the basis for this Act were also critical of their own proposal. For instance, the report points out that it should be considered whether

2) *Rapport Versterking van de cassatierechtspraak*, The Hague, February 2008, p. 12.
3) *Rapport Versterking van de cassatierechtspraak*, The Hague, February 2008, p. 50.
4) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 4.
5) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 4.
6) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 3.
7) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 4.
8) *Parliamentary Documents II* 2010/11, 32612, no. 5, p. 1.

making preliminary rulings will merely cause a shift in the workload, rather than a reduction. However, this is something that is difficult to examine. For example, it is difficult to say how many parties refrain from bringing proceedings as a result of a preliminary question being answered. Another concern voiced in the report was that proceedings might be delayed and complicated by the submission of a preliminary question.[9] Under certain circumstances, this could be inconvenient for parties – especially since the court of first instance or the court of appeal may also ask a preliminary question ex officio, so of its own accord. Thus, even if one or both parties indicate that they do not consider their case suitable for preliminary rulings, the court may disregard those objections.

## 4. Conditions for submitting questions

What kind of questions may be submitted to the Supreme Court? Three core criteria can be distilled from Article 392 of the Dutch Code of Civil Procedure (DCCP). First, only questions of law can be submitted to the Supreme Court; questions of a factual nature are not eligible for consideration. Second, the preliminary question must be of direct relevance to the resolution of a case; answering the question of law must be necessary to decide on the claim or request at issue. Third, the answer to the preliminary question must be of direct relevance to numerous other cases (future or otherwise) in which the same question arises; this could involve mass claims, for example collective actions.[10] Nevertheless, when questions of law arise in numerous factually similar disputes, a case may be suitable for submission to the Supreme Court. In fact, preliminary questions are raised most frequently in these types of cases.

So, what types of cases should be considered? A good example are the preliminary questions raised about renting business premises during the corona pandemic. As a result of government measures, such as the mandatory closure of bars and restaurants, business premises could not be operated by tenants for some months, or only to a limited extent. This resulted in a sharp drop in turnover for many businesses. Since these businesses continued to owe the full rent for their premises, many were soon facing financial difficulties. The Supreme Court was therefore asked whether these tenants were entitled to rent reductions.[11] Many cases were before courts nationwide at the time the preliminary questions were raised on this issue and it was expected that many more would follow.[12] Therefore, the requirement that the question of law must arise in numerous other disputes was clearly met.

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9) *Rapport Versterking van de cassatierechtspraak*, The Hague, February 2008, p. 51.

10) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 5-7.

11) District Court Limburg 31 March 2021, ECLI:NL:RBLIM:2021:2982 and Dutch Supreme Court (SC) 24 December 2021, ECLI:NL:HR:2021:1974.

12) District Court Limburg 31 March 2021, ECLI:NL:RBLIM:2021:2982, r.o. 4.5.

## 5. Preliminary questions: The first steps

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

The Supreme Court then decides whether the preliminary question is suitable to be answered by preliminary ruling. The decision on whether or not the questions raised by the Supreme Court lend themselves to being answered in preliminary ruling proceedings is sometimes referred to as the red light/green light decision. Only when the Supreme Court has given the 'green light', will the question be considered.[13] If it is immediately clear that the question does not lend itself to being answered by preliminary ruling or is of insufficient weight to justify answering it, the Supreme Court will immediately decide not to answer it.[14] In practice so far, however, this has turned out to be relatively rare. This can be explained by the notion that the threshold for putting a question to the Supreme Court in the initial phase of the proceedings should not be too high.[15] However, with the procedure gaining in popularity, criticism is being voiced in the literature that the Supreme Court is allowing too many preliminary questions. It is argued that the Supreme Court should be more cautious in answering preliminary questions[16] and that questions are raised that, strictly speaking, do not meet the requirements of Article 392 DCCP.[17] In such cases,

13) Art. 393 DCCP.

14) Art. 393-1 jo. Art. 393-8 DCCP.

15) J. de Bie Leuveling Tjeenk & J.W.M.K. Meijer, 'De prejudiciële procedure: verschillen met de cassatieprocedure, aandachtspunten en wensen voor de toekomst', *NTBR* 2016/47.

16) E. Tjong Tjin Tai, 'Cassatie in belang der wet als instrument van rechtsvorming', *AA* 2022/12, p. 982; J. de Bie Leuveling Tjeenk & J.W.M.K. Meijer, 'De prejudiciële procedure: verschillen met de cassatieprocedure, aandachtspunten en wensen voor de toekomst', *NTBR* 2016/47; M.E.A. Möhring and S.M. Kingma, 'De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudiciële vragen aan de Hoge Raad', *TCR* 2022/1, p. 24.

17) M.E.A. Möhring and S.M. Kingma, 'De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudiciële vragen aan de Hoge Raad', *TCR* 2022/1, p. 22; P. Louwers, 'Prejudiciële vragen: de troetelkindjes van de Hoge Raad', *Mr*. 2022, afl. 4, p. 51; J.P. Heering, 'De prejudiciële procedure: troetelkindje (met waterhoofd)?', in: D.H. Dongelmans e.a. (red.), *Rechtsontwikkeling in rechterlijke dialoog*, Den Haag; Boom juridisch 2023, p. 74-76. Heering mentions several examples of cases in which he believes the requirements of Article 392 have not been met: SC 5 December 2014, ECLI:NL:HR:2014:↗

the Supreme Court should refrain from answering. However, it should be noted that recently the Supreme Court has been somewhat stricter and has declined to answer certain questions.[18)]

## 6. Preliminary procedure: After the 'green light'

After the Supreme Court has given the 'green light' (and therefore will answer the questions), the parties are given another opportunity to submit written comments.[19)] Moreover, in addition to the parties, third parties may – after approval from the Supreme Court – also play a role in the proceedings.[20)]

Preliminary questions referred to the Supreme Court are published on its website,[21)] so it is transparent which questions are pending. Third parties, known as amicus curiae, may then submit written observations on their own initiative or at the invitation of the Supreme Court.[22)] The amicus curiae is an important figure because the adversarial debate – which in proceedings is fully conducted in first instance and on appeal – is partly absent in the preliminary procedure. After all, preliminary questions are raised at an earlier stage of the proceedings. As a result, it may be more difficult for the Supreme Court to oversee the societal consequences of its ruling compared to regular cassation proceedings.

It is therefore useful if others, such as professional and interest groups, civil society organisations and academics, join in this debate and inform the Supreme Court. They can provide the Supreme Court with a more complete overview by helping to identify the interests and relevant facts involved.[23)] In our view, this could enable the Supreme Court to formulate a sharper and more considered answer to the question before it. However, the Supreme Court is not very transparent about how third party submissions are considered. We believe that the publication of third party submissions could increase the transparency of the Supreme Court.

In practice, third parties make written submissions in about one-third of the cases. Organisations such as the Consumers' Association and the Royal Association of Bailiffs, in

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↘3536, SC 22 April 2016, ECLI:NL:HR:2016:726, SC 19 November 2021, ECLI:NL:HR:2021:1720 and SC 25 February 2022, ECLI:NL:HR:2022:331.

18) See: SC 16 March 2018, ECLI:NL:HR:2018:345 and SC 10 June 2022, ECLI:NL:HR:2022:861.

19) Art. 393 DCCP.

20) The text of the Code of Civil Procedure states that the Supreme Court may provide that persons other than the parties be given the opportunity to submit written observations within a period to be determined for that purpose. In addition, the Supreme Court's website indicates that third parties (in civil cases) must be permitted to submit observations. As a matter of nuance, we are not aware of any cases in which the Supreme Court has refused to allow third parties to submit observations.

21) https://www.hogeraad.nl/prejudiciele-vragen/

22) Art. 393-2 DCCP.

23) E. Daalder & R. de Graaff, 'Rome, Luxemburg, Den Haag: de prejudiciële procedure als rechtsvormend instrument', *AA* 2015/4, p. 330.

particular, are regularly involved.[24] Parties and third parties may submit written submissions only if they are represented by a cassation lawyer.[25] This relates to the experience of cassation lawyers have in litigating at the Supreme Court.[26]

The Advocate General also gives advice on the answer to the preliminary ruling question by way of a submission.[27] The Supreme Court then answers the preliminary question before it. A lead time of six to twelve months is sought.[28] Therefore, answering preliminary questions has high priority.[29] The Supreme Court ensures that the proceedings are conducted expeditiously and that judgments are given as soon as possible.[30]

## 7. After the answer from the Supreme Court

Once the Supreme Court has answered the question(s), the district court or court of appeal that referred the question(s) resumes handling the case. It is the legislature's hope that answering the preliminary question will increase the parties' willingness to settle.[31] If the parties do not reach a settlement, the court will give the parties an opportunity to comment in writing on the Supreme Court's decision. The court then decides on the claim taking into account the Supreme Court's decision.[32] The court and the parties are bound by the Supreme Court's decision, unless in the meantime the facts of the case have changed to such an extent that the preliminary ruling lacks relevance.[33] Although third parties are not formally bound by a preliminary ruling, the answers are relevant to them. Indeed, in practice, Supreme Court rulings have precedential effect.[34]

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

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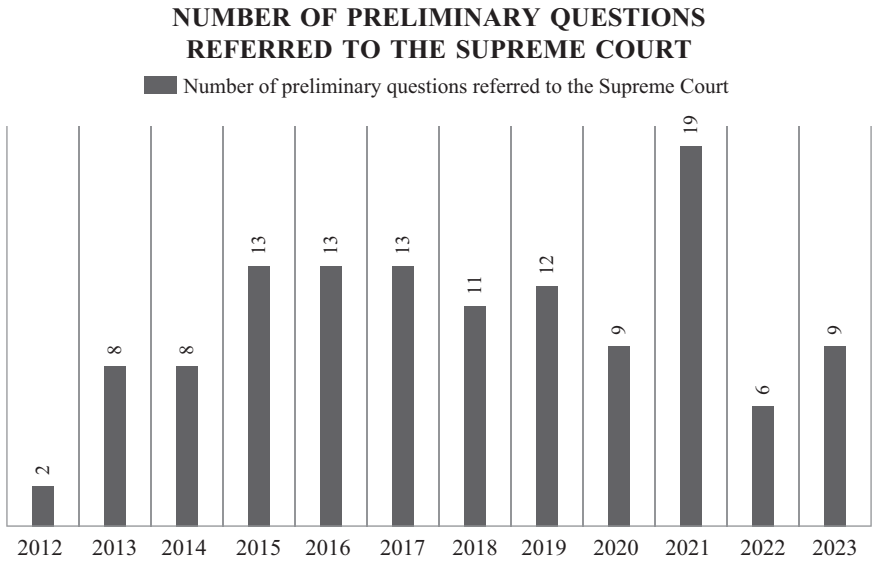
24) M.E.A. Möhring en S.M. Kingma, 'De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudiciële vragen aan de Hoge Raad', *TCR* 2022/1, p. 20.
25) Art. 393-3 DCCP.
26) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 18.
27) Art. 393-6 DCCP.
28) *Parliamentary Documents II* 2010/11, 32612, no. 6, p. 4; In practice, however, this aspiration does not always prove attainable.
29) *Parliamentary Documents II* 2010/11, 32612, no. 6, p. 6.
30) Art. 3.3.4.1 and 3.3.15.1 of the Rules of Procedure of the Supreme Court of the Netherlands.
31) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 3.
32) Art. 394-1 DCCP.
33) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 22.
34) J.F. de Groot, in: N.T. Dempsey, J.F. de Groot, A. Knigge, A.E.H. van der Voort Maarschalk en B.T.M. van der Wiel, with assistance of M.M. Stolp,. Cassatie (Burgerlijk Proces & Praktijk no. 20), Deventer: Wolters Kluwer 2019, chapter 9, no. 454.

## 8. Some figures

In practice, district courts and courts of appeal put the preliminary ruling procedure to good use and regularly submit preliminary questions. As of 1 January 2024, 123 preliminary questions have already been submitted to the Supreme Court.[35] This means that, on average, some 10 questions are asked every year. It was the legislature's expectation that at most 10 questions a year would be asked.[36] So, this expectation has proved to be correct in practice. That said, there are years that deviate from this number. In 2021, for instance, as many as 19 preliminary questions were raised. Although that is double the workload originally expected by the legislature, the Supreme Court still seems very willing to answer all preliminary questions. Moreover, this outlier could be a consequence of the corona pandemic. Still, a 'red light' is only given in a very small percentage of the cases. The preliminary ruling procedure is therefore sometimes criticised for being the Supreme Court's 'darling project' in that it is not strict enough when deciding which cases to accept.[37]




We also know from research that courts of first instance submit questions more often than courts of appeal. For instance, it appears that of the first 100 questions, 68 were asked

35) According to www.rechtspraak.nl

36) *Parliamentary Documents I* 2011/12, 32612, C, p. 1.

37) P. Louwers, 'Prejudiciële vragen: de troetelkindjes van de Hoge Raad', *Mr*. 2022, afl. 4, p. 48-53; J.P. Heering, 'De prejudiciële procedure: troetelkindje (met waterhoofd)?', in: D.H. Dongelmans e.a. (red.), *Rechtsontwikkeling in rechterlijke dialoog*, Den Haag; Boom juridisch 2023, p. 69-81.

by courts of first instance. Courts of appeal submitted 'only' 32 questions.[38)]

The preliminary questions asked so far concern various areas of civil law. Insolvency law, procedural law, labour law, family law, liability law and consumer law are particularly well represented. Often, there is also some overlap between areas of law in the questions. All the more so because, in practice, judges often submit more than one preliminary question to the Supreme Court.[39)]

An example of a case in which this occurred concerned gas drilling in Groningen. Groningen is a northern province in the Netherlands where gas has been extracted since the 1960s. This gas extraction has resulted in regular earthquakes in Groningen. The case raised preliminary questions about the earthquake damage that residents of Groningen have suffered and continue to suffer.[40)] The Supreme Court was asked on what grounds the *Nederlandse Aardolie Maatschappij* – the company that extracts gas – can be held liable for the damage caused as a result of these earthquakes and what forms of damage are eligible for compensation. In addition, questions were raised about the scope of the presumption of evidence under Article 6:117a of the Dutch Civil Code. Thus, preliminary questions on both liability law and procedural law were raised.[41)]

## 9. Ten years after its introduction: What to think of the preliminary ruling procedure?

More than a decade after the introduction of the preliminary ruling procedure, legal practitioners are generally positive about its functioning.[42)] An evaluation report on the procedure was published in 2016 which underlined that the procedure is a success and meets its own objectives.[43)] Thus, the prevailing view is that the procedure does indeed contribute to the development of law. By asking preliminary questions, even cases of principle where the financial interest was presumably too small to go to cassation can reach the Supreme Court. Furthermore, the Supreme Court's answers enable courts of first and second instance dealing with similar cases to take the same line. This is not only good for legal unity, but

38) M.E.A. Möhring and S.M. Kingma, 'De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudiciële vragen aan de Hoge Raad', *TCR* 2022/1, p. 17.

39) The court is free to ask multiple questions, provided they all meet the criteria set out in Art. 392 DCCP.

40) SC 19 July 2019, ECLI:NL:HR:2019:1278.

41) Another example is SC 12 November 2021, ECLI:NL:HR:2021:1766 on ex officio application of Directive 2011//83/EU on Consumer Rights.

42) I. Giesen & E.R. de Jong, 'Een succesverhaal voor rechtsvorming, rechtseenheid en rechtszekerheid: de Wet Prejudiciële vragen aan de Hoge Raad', *NTBR* 2016/46; M.E.A. Möhring and S.M. Kingma, 'De prejudiciële procedure presteert prima. Indrukken uit de eerste 100 prejudiciële vragen aan de Hoge Raad', *TCR* 2022/1, p. 15-24; G. de Groot, Ruimte voor rechtsontwikkeling in civiele procedures bij de Hoge Raad, NTBR 2016/45.

43) I. Giesen e.a., *De Wet prejudiciële vragen aan de Hoge Raad. Een tussentijdse evaluatie mede in het licht van de mogelijke invoering in het strafrecht*, Den Haag: Boom juridisch 2016, p. 161.

also for legal protection. Litigants benefit from the Supreme Court being able to say what the legal position is at an earlier stage. That said, it is difficult to say with certainty whether the preliminary ruling procedure reduces the number of proceedings.[44]

Besides the positive assessment, however, there is also criticism. As mentioned above, it is argued that the Supreme Court should be more strict in testing whether a preliminary question meets the requirements of Article 392 DCCP. Questions that arise only incidentally would then no longer need to be answered. Another, related, criticism is that prioritising preliminary rulings may be to the detriment of cassation cases. For example, preliminary rulings are always substantiated in detail, while cassation cases are also often disposed of without substantive reasoning.[45] This sometimes leads to frustration.[46] Another criticism discussed in the literature is the potential tension between the legislature and the courts.[47] After all, the position of the Supreme Court is very strong in the preliminary ruling procedure. It should be noted, however, that the Supreme Court did recently refrain from answering preliminary questions in two cases because it was up to the legislature to rule on the issue. One case involved questions about non-binary sex registration and the other case raised questions about international surrogacy.[48] In both cases, the Supreme Court ruled that answering the preliminary questions would go beyond its task of law formation.

Another point is the tension between law formation and legal protection. Asking preliminary questions will in many cases complicate and delay the proceedings. Moreover, apart from court fees, the costs should be borne by the parties.[49] It is conceivable that parties to the proceedings are not keen on this, despite the fact that a case may be suitable for preliminary ruling.[50] It is therefore important for courts of first or second instance to try to strike a balance and not to wave away any objections that the parties may have to initiating preliminary ruling proceedings. As to costs, the Supreme Court can also assist parties in some cases. For example, in a case in which questions on spousal maintenance were raised, the Supreme Court ruled that the nature of the proceedings may mean that no estimation of the costs is to be made.[51]

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44) P. Louwers, 'Prejudiciële vragen: de troetelkindjes van de Hoge Raad', *Mr*. 2022, afl. 4, p. 48.

45) Art. 81 of the Judiciary Organisation Act.

46) P. Louwers, 'Prejudiciële vragen: de troetelkindjes van de Hoge Raad', *Mr*. 2022, afl. 4, p. 51; J.P. Heering, 'De prejudiciële procedure: troetelkindje (met waterhoofd)?', in: D.H. Dongelmans e.a. (Ed.), *Rechtsontwikkeling in rechterlijke dialoog*, Den Haag; Boom juridisch 2023, p. 71.

47) E. Daalder and R. de Graaff, 'Rome, Luxemburg, Den Haag: de prejudiciële procedure als rechtsvormend instrument', *AA* 2015/4, p. 332.

48) SC 4 March 2022, ECLI:NL:HR:2022:336, *NJ* 2022/106, r.o. 4.3; SC 13 May 2022, ECLI:NL:HR:2022:685, *NJ* 2022/185, r.o. 3.3.2.

49) *Parliamentary Documents II* 2010/11, 32612, no. 3, p. 22.

50) E. Daalder & R. de Graaff, 'Rome, Luxemburg, Den Haag: de prejudiciële procedure als rechtsvormend instrument', *AA* 2015/4, p. 332.

51) SC 7 July 2017, ECLI:NL:HR:2017:1273, *NJ* 2017/303, with annotation from S.F.M. Wortmann, r.o. 3.7.

## 10. Final remarks

As a result of the success of the preliminary ruling procedure in civil law, it has been introduced in tax law (since 2016) and criminal law (since 2022) as well. It is argued that it should also be possible to submit preliminary questions to the highest court in administrative law.[52] However, the procedure's introduction would be different when it comes to administrative law, as the Supreme Court is not the highest authority in this field of law. Moreover, saving time would not be an important objective of the procedure in this case. The path to the highest court in administrative law in regular proceedings is actually much faster than in civil law. Therefore, by asking preliminary questions, a time saving of only a few weeks would be achieved.[53] The literature points, in particular, to the need for preliminary rulings when new regulations are required to be transposed into many individual decisions.[54] There are also further opportunities for improvements to the preliminary ruling procedure and we hope to discuss possible improvements later in a different context. In any case, at this time it is clear that this instrument does meet a need.

52) C. Blankenstein, 'Daar is het laatste woord nog niet over gezegd. Een onderzoek naar de mogelijkheid van een prejudiciële procedure in het bestuursrecht', in: Preadviezen Jonge VAR 2020, Experimenten in het bestuursrecht, Den Haag: Boom Juridisch 2021; I. Giesen & R. Ortlep, 'De prejudiciële vraagprocedure in het bestuursrecht', *Trema* 2017/4; T. Barkhuysen & Y. Schuurmans, 'Een prejudiciële procedure in het bestuursrecht?', *AA* 2013/0736, p. 736-729.

53) N. Groeneveld-Tijssens, 'Het nut en de noodzaak van de prejudiciële procedure in het bestuursrecht', *NTB* 2021/8.

54) I. Giesen & R. Ortlep, 'De prejudiciële vraagprocedure in het bestuursrecht', *Trema* 2017/4.