
INTRODUCTION

Roadmap on Comparative Law in the Case-Law and Practice of the Supreme Courts of the EU

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This document was developed following research and debates of the Network of Presidents of the Supreme Judicial Courts of the European Union. The document is intended to support the courts in this network in a practical way when considering and implementing the use of comparative law in the decision of a case pending before their court. Without pretention of completeness or scientific reliability, it summarizes the decisions to be made and the dilemmas to be solved by the Supreme Courts in this process. It mentions viewpoints which may be relevant when making choices at crossroads in the decision-making process. In addition, it gives practical information for this process, inspired by useful practices amongst the member courts of the network.

Keywords: Comparative law; Supreme courts; judicial interpretation

1. Introduction

During the meeting of the Network of Presidents of the Supreme Judicial Courts of the European Union (hereafter: the Network) in Karlsruhe on 27–28 September 2018, the use of comparative law by these Supreme Courts was discussed. The use of comparative law by judges implies that judges, when making a decision on a controversial legal issue, look (amongst others) at the solutions which have been chosen for similar problems in other legal systems. The discussion in Karlsruhe was based on the outcome of (i) a questionnaire which was sent to all the members of the Network (hereafter: the questionnaire)¹ and (ii) a General Report, written by Maarten Feteris, President of the Supreme Court of the Netherlands, making use of the answers to the questionnaire. During the discussion in Karlsruhe, it was decided that it would be useful to develop a document in which practical aspects of the use of comparative law by Supreme Courts are described in the form of a roadmap. It was not the intention that such a document should contain instructions to the courts in the Network; the aim was to develop a document which can be helpful for the courts in the Network in a practical way when considering and implementing the use of comparative law. The present document contains this roadmap. Without any pretention of completeness or scientific reliability, it summarizes the decisions to be made and the dilemmas to be solved by the Supreme Courts in this process.² It mentions viewpoints which may be relevant when making choices at crossroads in the decision-making process. In addition, it gives practical information for this process, inspired by useful practices amongst the member courts of the Network. This document is based on the answers to the questionnaire, the General Report mentioned above, the discussion on the subject in Karlsruhe, and scientific literature concerning the use of comparative law.

It must be admitted that a comparative law analysis, by scientists and judges, will never be perfect and therefore can give rise to criticism. One should also be aware that a risk of arbitrariness is inherent in the use of comparative law by (Supreme) Courts. Although most of the Supreme Courts in the European Union make use of comparative law, at least to some degree, it proves to be quite difficult to precisely determine

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¹ The questionnaire was answered by almost all members of the Network. For the text of the questionnaire see Annex 1.

² Some Supreme Courts are provided with independent advice in the form of opinions of an Advocate-General. This roadmap can also be useful for a comparative law analysis in such opinions.

the reasons for doing so, and to answer the question to what categories of cases the comparative law method is applied in practice. The same applies to the question which foreign legal systems are taken into account in the comparative law analysis. Especially if the grounds for such decisions are absent or unclear, or if the application of comparative law is not transparent, there is a risk that the decision of the courts whether and how they use the comparative law method in a specific case may seem to be arbitrary. In addition, it should be observed that the knowledge of judges of foreign legal systems can never be complete. All these factors might have an unfavourable effect on the authority of the decisions of Supreme Courts which are based on an – imperfect – comparative law analysis.

The aforementioned imperfections and risks of comparative law have been extensively debated in legal literature. It is realistic to admit that these risks cannot be completely avoided. However, that should not be an argument for courts to completely ignore the legal situation in other countries. Such a one-sided approach would have more negative effects than an approach in which the courts widen their horizon to foreign experiences, keeping in mind the imperfections and risks of a comparative law analysis. And, in practice, Supreme Courts do in fact make use of comparative law more or less frequently.³ This follows from the answers to the questionnaire and has also been observed in legal literature.⁴ Andenas and Fairgrieve even state that courts are laboratories of comparative law, and try out different methods in their practical work.⁵ In some cases, courts are even *obliged* to conduct research into the legal situation abroad.⁶

In sum, it must be taken as a starting point that courts do make use of comparative law, and that on practical grounds they are limited in their possibilities for research into foreign law. The use of a systematic roadmap for a more or less conscious decision-making process can – to some degree – diminish the imperfections and risks which are inherent in the use of comparative law by courts. In the process of drafting the current roadmap, attention has been paid to the relevant pitfalls which have been described in legal literature on comparative law; in addition, this roadmap contains several practical tips (mostly in sections 3.2 and 3.3) which are derived from that same literature and from the experience of courts in the Network.

This document is structured as follows. In the general part (Chapter 2), a short overview will be given of some of the difficulties and risks of a comparative law analysis, as discussed in legal literature. In the special part (Chapter 3), five subtopics will be discussed in order to illustrate the various steps and decisions which Supreme Courts could encounter when considering and choosing to use comparative law. In the first place, the use of comparative law analysis by the Supreme Court: when and why (section 3.1)? In the second place, for cases in which a Supreme Court has decided to make use of a comparative law analysis, questions regarding the selection of countries for comparison: why and how does one choose a certain country for comparison (section 3.2)? In the third place, the question how the comparative law research can be conducted (section 3.3). In the fourth place, the actual influence which a comparative law analysis can or should have on the decision (section 3.4). In the fifth and final place, the (possible) acknowledgement of comparative law in the judgment (section 3.5).

The comparison with views abroad can also be focused at legal rules that apply equally in both countries, such as treaties between these countries. Actually, this cannot be regarded as comparative law, because the comparison is not made with another legal system but with the views in another country on a common legal instrument. Nevertheless, this form of comparison has several (practical) features in common with comparative law. Therefore, research into the application of common legal rules in another country will be discussed at the end of this roadmap, in Chapter 4. The roadmap concludes with a short summary, Chapter 5.

³ It is important to realize that in these days (most) national legislators (also) rely on comparative research. See TK Graziano, *'Is it legitimate and beneficial for judges to compare?'*, in M Andenas and D Fairgrieve (eds) *Courts and comparative law* (Oxford Scholarship Online 2015) 34, who gives some examples of recent codifications that have taken inspiration from comparative studies.

⁴ Graziano, referring to analysis by the British Institute of International and Comparative Law, writes that: 'Comparative law is increasingly recognized as an essential reference point for judicial decision-making.' According to Canivet, 'the use of comparative law is essential to the fulfilment of a supreme court's role in a modern democracy.' Andenas and Fairgrieve come to the conclusion that, '[c]ourts make use of comparative law, and make open reference to it, to an unprecedented extent ... Comparative law has become a source of law.' Tom Bingham concludes that: 'Judicial horizons have widened and are widening.' See Graziano (n 3) 40.

See also the following statement of the former president of the Supreme Court of Israel, A. Barak: 'I have found comparative law to be of great assistance in realizing my role as a judge. (...) Indeed, comparing oneself to others allows for greater self-knowledge. With comparative law, the judge expands the horizon and the interpretive field of vision. Comparative law enriches the options available to us. (...) Thus, comparative law acts as an experienced friend.' See Aharon Barak, *The judge in a democracy* (Princeton University Press 2008) 197–198.

⁵ M Andenas and D Fairgrieve, *'Courts and comparative law. In search of a common language for open legal systems'* in M Andenas and D Fairgrieve (eds) *Courts and comparative law* (Oxford Scholarship Online 2015) 3, 4.

⁶ See section 3.1, regarding the Cilfit judgment of the Court of Justice of the EU.

2. Comparative law in legal literature, some difficulties and risks of a comparative law analysis

As mentioned in the Introduction (Chapter 1), the imperfections and risks of a comparative law analysis have been extensively debated in legal literature. Before setting out a practical roadmap for the application of such analyses, it is useful to keep these downsides of comparative law in mind. Therefore, this Chapter 2 will contain a brief summary of some of these negative sides.⁷

When studying legal literature on comparative law, the reader may get a gloomy picture as to the practicality of this part of legal science. According to Lemmens, ‘the question “how to compare?” may be frequently asked in comparative writings, but the answer is often abstract, worded in general terms and sometimes downright vague.’⁸ Such an observation does not give much hope that scientific insights can provide the courts with a specific and manageable method for the use of comparative law. In addition, it is practically impossible to conduct a perfect comparative law analysis, apart from the fact that there seems to be no consensus amongst scholars on what the perfect analysis should be like. It is for good reason that Sauveplanne – already more than four decades ago – observed that a good legal comparatist is not a perfectionist, and that a perfectionist cannot be a good legal comparatist.⁹ Ideally, the person conducting comparative legal research should have profound knowledge of the (legal) language and the legal rules of the countries concerned. In addition, it is perhaps even more important to have good knowledge of the legal system as a whole of these countries. It is for instance possible that the legal ways by which a problem is solved are completely different in various countries.¹⁰ In order to put the legal rules in the right context, ideally, it is also necessary to have thorough knowledge of society in the countries concerned.¹¹ The extensive requirements which all this imposes on a legal researcher, can hardly be fulfilled when the comparison is limited to two legal systems (the domestic system and one foreign legal system). When the comparative law method is applied to several legal systems, research based on such an in-depth insight is hardly realistic. In addition, it should be observed that for a scientifically sound choice of the foreign legal system(s) which will be the object of research, a much larger amount of foreign systems has to be assessed in the selection phase. Pieters and Demarsin therefore conclude that comparative law research is almost illusively complex.¹² The limited amount of time and resources available to judges are an additional impediment to a comparative law analysis on a scientifically sound basis.¹³

With this gloomy picture in mind, the researcher choosing to conduct a comparative law analysis should be aware of various kinds of pitfalls in the research process. As observed before, in Chapter 2, this does not have to be a reason to refrain from comparative law research. In fact, Supreme Courts do conduct such an analysis more or less frequently. Moreover, in an increasingly globalizing world, the use of comparative law is likely to increase. As Andenas and Fairgrieve rightly state: ‘one can hardly expect always to find the ideal

⁷ See for a more exhaustive analysis of arguments against and for the legitimacy of the comparative method when it comes to applying domestic law, Graziano (n 3) 26 ff. Graziano concludes (page 51) that none of the arguments against the legitimacy of the comparative approach is convincing.

⁸ K Lemmens, ‘Comparative law as an act of modesty: a pragmatic and realistic approach to comparative legal scholarship’ in M Adams and J Bomhoff (eds) *Practice and theory in comparative law* (Cambridge University Press 2012) 302, 303.

⁹ JG Sauveplanne, *De methoden van privaatrechtelijke rechtsvergelijking. Preadvies voor de Nederlandse vereniging voor rechtsvergelijking* (Deventer 1975) 38.

¹⁰ Cf Sauveplanne (n 9) 7. Compare also Bell: ‘...there are nation-specific forms of social and private insurance, as well as health care, which could mean that it is right to give tort compensation in one country and to refuse it in another for a similar accident, given the insurance and welfare context in which it occurs.’ See J Bell, ‘Comparing public law’, in A Harding and E Örüçü (eds) *Comparative law in the 21st century* (Kluwer Academic Publishers 2002) 247.

¹¹ See Lemmens (n 8) 307 about the question of whether this is possible and necessary. Lemmens discusses Legrand’s point of view that comparatists should have ‘a profound and intimate knowledge of the culture of the foreign legal system’. According to Lemmens ‘(t)his claim is not unproblematic. It does of course make sense to expect comparatists to be thoroughly familiar with the cultural context of the legal system they are studying. The real question is, of course, what this means in practice. How far should comparatists go to internalize this cultural context? It is also far from clear what “cultural context” means and how comparative scholars can get a handle on it. (...) The real issue is to what extent this is also necessary and practicable.’ Lemmens promotes a ‘more pragmatic’ approach to ‘the practicability of comparative law,’ starting ‘from comparative reality: every day jurists around the world do comparative research and produce satisfactory results.’ Lemmens (n 8) 324.

See also Barak (n 4) 198: ‘A useful comparison can exist only if the legal systems have a common ideological basis. The judge must be sensitive to the uniqueness of each legal system. Nonetheless, when the judge is convinced that the relative social, historical, and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system for a source of comparison and inspiration.’

¹² D Pieters and B Demarsin, *Rechtsvergelijking. De uitdagende wereld van het recht* (Acco 2019) 15.

¹³ Cf Pieters and Demarsin (n 12) 65. The authors place a comment on ‘excursions in foreign law’ or ‘quick comparative studies’ in handbooks or at conferences. According to them, this relates to real comparative law such as a tourist trip to geography.

solution to problems of globalization within one's own jurisdiction.¹⁴ Indeed, comparative law has a lot to offer to courts. However, when conducting this kind of research and analysis, it is obviously useful to be fully aware of the pitfalls associated with comparative law. The roadmap contained in this document will therefore discuss various pitfalls which frequently occur, and will provide tips to prevent or at least diminish the risks associated with these pitfalls (see sections 3.2 and 3.3, letter a).

3. Roadmap on comparative law analysis

3.1. Use of comparative law analysis by the Supreme Court: when and why?

*There are no rules or guidelines on when to rely on comparative law.*¹⁵

Before considering how to conduct a comparative law analysis in a specific case, a Supreme Court should obviously first decide whether it will apply such an analysis at all. Ideally, such decisions are based on a systematic approach and not on more or less random factors, such as the spontaneous idea of the reporting judge that comparative law might be interesting in the case at hand.¹⁶

In spite of the risks connected with any form of comparative law analysis (see Chapter 2 and section 3.3), there are various reasons which may lead a Supreme Court to conduct such an analysis. This is also reflected in the answers to the questionnaire.¹⁷ These reasons will in many cases depend on the purpose for which the analysis can be made: can it be expected that this analysis will have added value for the decision-making process and the argumentation of the judgment in the case at hand?

The most important **reason** for engaging in comparative law seems to be that the Supreme Court is *seeking inspiration and trying to learn from the experience of others*,¹⁸ especially when dealing with new issues for which the national system does not provide sufficient guidance and the Supreme Court therefore feels like a pioneer within its own legal system. Other main reasons are:

- The *societal impact of the case*, which may require an extra strong and convincing argumentation of the Supreme Court's decision.¹⁹
- To have a *better benchmark* for a decision, which may increase the quality and also the authority of the decision.²⁰

¹⁴ Andenas and Fairgrieve (n 5) 11. See about globalization in the judicial domain also (former president of the Supreme Court and Chief Justice of Ireland) JL Murray, 'Report of Mr. Justice John L. Murray, President of the Supreme Court and Chief Justice of Ireland. Methods of Interpretation – Comparative Law Method' in *Actes du colloque pour le cinquantième anniversaire des Traités de Rome, Court of justice of the European Union*, 26 March 2007, 39, 41 <http://eur-lex.europa.eu/resource.html?uri=cellar:de4d38f2-300c-442e-ae5-1ec55dfae686.0001.03/DOC_1&format=PDF> accessed 12 February 2021.

¹⁵ Contribution by the Supreme Court of Belgium as response to the questionnaire.

¹⁶ Some Supreme Courts have a special unit conducting comparative research. Cooperation with and within such a unit can contribute to a more systematic and consistent approach regarding the question when to conduct comparative law research.

¹⁷ See for a more comprehensive typology (and examples) of the use of comparative law by courts – mostly based on an analysis of UK en US cases –, Andenas and Fairgrieve (n 5) p. 12 ff.

¹⁸ A clear example of this is the case law concerning 'wrongful life' / 'wrongful birth'. Graziano mentions various cases from courts in various countries and concludes '(i)n truth, judgments relating to this issue that have not referred to foreign case law are very rare.' See Graziano (n 3) 50.

See also the statement of former president of the Supreme Court of Ireland, JL Murray (n 14) 45: '(F)rom my perspective, the interpretation of the Constitution of Ireland, which contains express and implicit guarantees concerning due process and the fundamental rights of citizens, may at times be greatly assisted by recourse to the comparative law method of interpretation where decisions of other courts, are not determinative, but may illuminate the search for a judicial solution relating to the application of common principles in analogous situations.'

¹⁹ See for example the British answer to question 1d of the questionnaire (under 19): 'Where a party argues that a particular interpretation of the law would have unworkable consequences, that argument might be rejected with reference to the feasibility of a similar approach in another jurisdiction. For example, in *Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80; [2018] 1 WLR 192 Lord Wilson noted: 'The relevance of the jurisdiction of the courts of Ontario and New South Wales to entertain a claim in tort on the basis only of secondary damage sustained there is necessarily limited. But the long-standing existence of the jurisdiction there should allay fears that a broader interpretation of para 3.1(9)(a) would encourage abuse.'

²⁰ See for example the Irish answer to question 1d of the questionnaire (under 1) referring to: *The People (D.P.P.) v. J.C.* [2015] IESC 31: 'The reason for the comparative analysis was to ascertain the comparable position in other common law jurisdictions with a written constitution. One of the judges noted that the area of law concerning the exclusionary rule was "an area where it is particularly appropriate to consider how this question has been dealt with in other common law countries sharing a comparable value system." Another of the judges who delivered a judgment noted that the Director of Prosecutions had put forward the comparable position in other common law jurisdictions with written constitutions to demonstrate that an absolute exclusionary rule does not apply in any other such country. A further judge indicated that the positions in such jurisdictions are "informative, instructive and are of real value so as to understand the manner in which other common law systems have grappled with similar complex legal issues" which arose in that case.'

- To *determine and clarify the Supreme Court's position* in the light of international developments.²¹

The decision to apply the comparative law method can also depend on **practicalities** which are not related to the substance of the case, and which may limit the use of this method. Such practicalities can be, for instance:

- Whether the *parties have drawn attention* to foreign law and decisions of foreign courts in their arguments before the Supreme Court.
- The *judge's personal approach*,²² regarding the use of the comparative law method, which could be related to somewhat incidental factors such as his or her language skills,²³ openness to foreign sources and cultures, particular knowledge of international and comparative law, and professional experience and contacts in foreign countries.²⁴

From the answers to the questionnaire, it seems to follow that there are two main **categories of cases** in which Supreme Courts in the European Union apply the comparative law method in practice:

- The comparative law method is applied due to the *historical foreign origin* of a particular domestic provision or legal instrument, which has been derived from the legal system of another country.
- The comparative law method is applied in order *to make use of the experience in other countries* when a particular legal issue also arises in other legal systems, especially if the issue is new in the country where the Supreme Court has to make a decision on the issue for the first time. One can think especially of decisions regarding socially and politically sensitive topics or controversial legal matters.²⁵

3.2. Selecting countries for comparison: how and why?

When a Supreme Court decides to use comparative law in a specific case, it will be practically impossible to study all foreign legal systems. A (strict) selection is inevitable, due to limits in resources and time available. Ideally, the selection of the legal systems which will be studied will depend on the purpose for which the

²¹ See, for example, the British answer to question 1b of the questionnaire which mentions *the Fairchild v Glenhaven* decision, [2002] UKHL 22, frequently quoted in literature about comparative law. Lord Bingham noted in that case: 'Development of the law in this country cannot of course depend on a headcount of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, evenhandedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question.'

Also interesting is the following quote from Ruth Bader Ginsburg, Justice in the Supreme Court of the United States, concerning the Supreme Court's March 2005 decision in *Roper v. Simmons*: 'Holding unconstitutional the execution of persons under the age of 18 when they committed capital crimes, the Court declared it fitting to acknowledge "the overwhelming weight of international opinion against the juvenile death penalty ..."' Justice Kennedy wrote for the Court that '[t]he opinion of the world community ... provide[s] respected and significant confirmation for our own conclusions.' See Ruth Bader Ginsburg, *A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, 1 *FIU L. Rev.* 27 (2006) 42. <<http://ecollections.law.fiu.edu/lawreview/vol1/iss1/7>> accessed 12 February 2021.

²² Mak's observations illustrate this: 'Based on a comparative and empirical analysis, this book makes two central claims. The first claim is that a judge's personal approach is a highly determinative factor as regards both the influence granted to binding foreign legal sources, such as international law and the law of the European Union (EU), and the use of non-binding foreign legal materials, such as foreign case law, in the deciding of cases. In a general manner, the working methods and style of reasoning of courts can enable or constrain the possibilities of including foreign law in judicial deliberations and of the citation of foreign law in judgments. However, the interviews conducted for the research make clear that individual judges have an important influence on the way in which foreign law is used in their court.' E Mak, *Judicial decision-making in a globalised world. A comparative analysis of the changing practices of western highest courts* (Hart Publishing 2015) 4.

²³ For the sake of brevity, hereafter only the masculine term will be used, intended as a gender neutral description.

²⁴ When another person within the organization of the Supreme Court will conduct the comparative law research, such factors regarding that other person (e.g. his language skills) may also be of influence.

²⁵ See e.g. the recent advice of the Dutch Procurator-General to the Supreme Court in a case concerning euthanasia <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1338>> accessed 12 February 2021 The Procurator-General extensively describes the way Belgium, France and England deal with the matter at hand (see section 3 of the advice).

See also the Estonian answer to question 1d of the questionnaire: 'The Civil Chamber has stated that analogous legal acts of other countries and the case law of other countries can be used as reference material to determine the content and the aim of the Estonian law. This is the more so if there is no case-law of Estonian courts concerning the application of a certain provision but in other countries there exists well established case law (The Civil Chamber of the Supreme Court case no 3-2-1-89-14, p 26; case no 3-2-1-145-04, p 39; case no 3-2-1-129-13, p 38).'

court has decided to conduct comparative research in this case: which foreign legal system will probably provide the most useful information for the decision-making process and the argumentation of the judgment (cf section 3.1 above)?

For the best results, it would be desirable in many cases to start with an orientation into a larger group of foreign legal systems, in order to make an informed decision which foreign system(s) will probably give the most rewarding information for a comparative law analysis. Practically speaking, however, there are serious limitations to what a Supreme Court can do in this respect. Such limitations in the orientation process may consist of language barriers, lack of thorough knowledge of other legal systems, limited access to relevant sources and inherent limitations to the resources and the time available for judicial decision-making.²⁶ The final choice of the foreign system(s) to be studied can also be influenced by such practical limitations. Consequently, the choice for one or more countries will in many cases be more or less arbitrary, in the sense that the choice cannot be made exclusively on legal substantive grounds.²⁷ Therefore, there is an inherent risk that an analysis based on such a choice does not provide the most rewarding information for the case at hand.

It is, however, possible to reduce this risk to a certain extent. This can be done for example by an enhanced overview of accessible sources and by actively sharing knowledge via networks.^{28, 29} These could be useful measures to reduce the risk of missing valuable 'unknown unknowns' and thereby to make a better informed selection. As an aside, it is worth mentioning that it can be very helpful for other Supreme Courts (as well as researchers) if a Supreme Court translates and publishes decisions which it deems 'internationally important' into a current foreign language (e.g. English) and publishes the translations.³⁰

In the process of deciding which foreign legal system(s) will be studied, it is recommended to keep in mind **two general points of attention:**

- As the legal system under investigation further deviates from the national system of the researcher,³¹ he must examine more critically whether or not he is comparing apples and oranges, and whether a solution that works well within the foreign legal system will also be appropriate in the national system.³² In concrete terms, this means that one should not perform the comparison at micro level, but also have a broader view of the legal system of the other country, including its social context.³³
- Nevertheless, it can also be useful to look and think 'out of the box.' The researcher can consider to look for inspiration outside the circle of countries with a similar legal system. If he only looks at the most obviously comparable countries, he might miss out on useful information and inspiration that can possibly be found at unexpected places.

There are no hard and fast rules to determine which particular legal system(s) should be studied for comparison. The choice will depend on the specific case and circumstances at hand. Taking into account the first general point of attention, it could be beneficial to identify **linking factors** between the domestic law of the Supreme Court and the foreign legal system which could be researched. In this respect one can think of factors such as:

- *Shared legal traditions or legal families.*³⁴
- Both countries are *parties to an international treaty* for which a uniform interpretation is desirable.³⁵

²⁶ Handbooks on comparative law may contain a general overview of the systems of various countries, but usually only give a superficial image of those systems. Cf the pitfalls mentioned in section 3.3, under a).

²⁷ Cf Chapter 2 about the imperfections and risks of comparative law analyses.

²⁸ Tips on sources of foreign law can be found in Section 3.3, under b).

²⁹ Ibid.

³⁰ E.g., the judgment of the Estonian Supreme Court of 22 December 2009 <www.riigikohus.ee/en/judgements/constitutional-judgments?> accessed 12 February 2021, as mentioned in answer 1b to the questionnaire, and the decision of the Dutch Supreme Court in the climate case *State of the Netherlands vs Stichting Urgenda* <<http://uitspraken.rechtspraak.nl/inziendocument?id=EC LI:NL:HR:2019:2007>> accessed on 12 February 2021.

³¹ The term 'researcher' may refer to any person conducting the research (a judge, an Advocate-General or a member of a research unit within the Supreme Court).

³² Compare Bell (n 10).

³³ Cf Chapter 2.

³⁴ From the answers to the questionnaire, it follows for instance that Supreme Courts in Nordic countries concentrate their comparative research in many cases to the legal system of other Nordic countries.

³⁵ Cf section 3.1 and Chapter 4.

- A *common, historic origin* of the particular provision.³⁶
- Whether the foreign legal system *has regulated the subject matter* about which the Supreme Court has to decide (or similar matters).³⁷

Apart from these more substantial grounds, based on linking factors between the legal systems concerned, there are also **practical reasons** for choosing a specific foreign legal system for research. One should always be aware that such practical reasons, understandable as they may be, will not necessarily lead to the most useful research results.³⁸ Such practical reasons may be the following:

- Often the choice is directed by the *level of foreign language proficiency* of the researcher. This factor can seriously restrict the potential number of countries to include in a comparative law analysis.³⁹ This can result in a preference for comparative research limited to a small number of neighbouring countries. For the most valuable research results, it can be desirable to widen the horizon. There are several ways to reduce the limiting effect of the language factor. One could think, for example, of the following:
 - Stimulating language training for judges, law clerks and other employees within their courts could be helpful.
 - Researchers may thus master a number of frequently used languages in order to ‘enter’ various legal systems.⁴⁰ For instance, knowledge of German, French and English will afford access to legal systems including the most prestigious of the German and French legal family, the law of the UK and the US, as well as many other common law countries.
 - The establishment of departments for maintaining international relations or conducting comparative law research could stimulate and extend the use of the comparative law method.⁴¹
 - Several international networks could also be of use in this context, as can be seen in section 3.3.⁴²
 - Handbooks on comparative law may be available in a language which the researcher can read. Such handbooks may contain a general overview of the systems of various countries.⁴³
- The *availability and accessibility of sources* concerning foreign law, such as legislation,⁴⁴ literature and case-law.⁴⁵ This factor may for instance lead to a focus on the case-law of courts in larger jurisdictions, as it is more probable that judicial decisions of those courts have dealt with the legal problem in question.
- The availability of particular *contact persons* within courts or universities of other countries.

³⁶ For example, from the Estonian answer (1b) to the questionnaire it follows that ‘the Estonian Commercial Code is based on the relevant German Act (Aktengesetz) and has been referred to by the Civil Chamber of the Supreme Court in two times (The Civil Chamber of the Supreme Court 21.12.2004 judgement no. 3-2-1-145-04 and 29.10.2014 judgement no. 3-2-1-89-14, p. 27). In the year 2014 decision, the Civil Chamber noted that in the current case the Estonian law and German legislation were not similar enough to apply as a model the mechanism for protection of small shareholders established in German law. However, the Chamber established that it would be possible and necessary for the Estonian legislature to consider establishing such mechanisms.’ See also Ginsburg (n 21).

³⁷ Supra note 19 and 21 (British answers to the questionnaire).

³⁸ Cf Chapter 2.

³⁹ See also Gelter and Siems who conclude that ‘courts are more likely to cite each other when they are from the same legal tradition and the same *language group*. Furthermore, we found that larger jurisdictions are cited more frequently than smaller ones. Given these constraints, we would not expect legal systems to freely pick and choose “the most efficient solution” (however defined), as had been suggested by Ugo Mattei.’ (italics added). See M Gelter and M Siems, ‘Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe’s Highest Courts’ 2012 8(2) Utrecht Law Review 88, 98 <www.utrechtlawreview.org/articles/abstract/10.18352/ulr.196/> accessed 12 February 2021.

⁴⁰ When it is difficult for one researcher to master various foreign languages, the problem could be solved by expansion of the number of researchers.

⁴¹ The Supreme Court of the Czech Republic is for instance provided with a Department of Analytics and Comparative Law equipped with the extended language capabilities.

⁴² In its response to the questionnaire, the Supreme Court of Estonia observed that the ACA-Europe forum helps to mitigate the role of language skills and provides the opportunity to obtain information about the countries that do not use English, French or German as their official language.

⁴³ However, such handbooks must be used with caution because they usually only give a superficial image of those systems, cf. the pitfalls mentioned in section 3.3, under a).

⁴⁴ See section 3.3 under b) for a link to a site containing the English translation of some German legislation.

⁴⁵ See section 3.3, under b) for tips about possible sources for comparative law research.

3.3. How to conduct the comparative law research

Conducting comparative law research, after making a decision which legal systems will be investigated,⁴⁶ raises a number of methodological and practical questions. Above in Chapter 2 the risks and limitations inherent in comparative law research were discussed. The person conducting the research should be aware of a number of pitfalls in this area. This Chapter discusses the main pitfalls and provides tips on how to minimize the inherent risks (see below under a). An important other practical point in conducting comparative law research concerns the sources that are used to obtain information about foreign law. Suggestions for this practical point are included below under b).

3.3.1. Important pitfalls and tips for limiting their danger

What are the most important **pitfalls** if one wants to conduct a comparative law analysis? The researcher should in general be aware that he is most probably not more than an amateur when it comes to foreign law. Most pitfalls are connected with this 'amateurism.' Without pretention to be complete, the following pitfalls can be mentioned:

- The risk of using words that in their form resemble words from another language, but do not have the same meaning (in literature these type of words are often called '*faux amis*' / false friends).⁴⁷ Also there is the risk of homonyms, identical words or expressions, which may have a different meaning in different languages.⁴⁸
- A related point of attention is the risk of comparing 'apples and oranges' if one is not sufficiently aware of the differences between the relevant legal systems.
- Misunderstanding the system from which conclusions are drawn.
- The foreign literature and the judgments the researcher had found do not reflect the most current state of affairs.
- The researcher is not sufficiently aware how controversial a judicial decision from a court in the other country is.⁴⁹
- The researcher is not aware of the fact that in another country more or less the same problem can be regulated at a different place in the system.⁵⁰
- The researcher is not sufficiently informed about the difference between 'law in the books' and 'law in action' in the other country.⁵¹
- The researcher does not have sufficient knowledge of society in the other country in order to put the legal rules of that system in the right context.⁵²
- The researcher has no insight in the fact that the solution emerging from the law of the foreign system does not work out in practice.

⁴⁶ The selection of the legal systems to be investigated should be ideally based on an orientation towards a larger number of potentially relevant other legal systems. The comments in this section apply equally to that exploratory study.

⁴⁷ See Pieters and Demarsin (n 12) 59. They give the following examples: the English word 'law' does not describe the same as the French word '*loi*,' which means 'act.' And 'civil law' is not the same as the French '*droit civil*.' Pintens addresses the following example: The German term '*öffentlicher Dienst*' refers to something other than the French and Belgium term '*service public*.' See W Pintens, *Inleiding tot de rechtsvergelijking* (Universitaire Pers Leuven 1998) 54.

⁴⁸ Pintens, for example points out that the English term 'jurisprudence' does not correspond with the French term 'jurisprudence', Pintens (n 47) 53. See also Komárek: '... when I use the word "precedent," I noticed that people from the common law jurisdictions, who listened to my presentations or read various parts of my work, projected their own legal system's understanding of the concept. After one such experience I decided to change the title of my project to "reasoning with previous decisions".' See J Komárek, 'Reasoning with previous decisions', in M Adams and J Bomhoff (eds) *Practice and theory in comparative law* (Cambridge University Press 2012) 49, 54.

⁴⁹ Sauveplanne quotes the English saying 'if a doctor makes a mistake, he buries it, if the judge makes a mistake, it becomes part of the law of the land,' Sauveplanne (n 9) 39. In other words: one has to consider how a judgment or a legislative act fits into the specific national system and how it is evaluated.

⁵⁰ See Pintens (n 47) 89–90 and Bell (n 9).

⁵¹ Compare amongst others Pieters and Demarsin (n 12) 17 and 52–53. Compare also Vogenauer: 'as a result, the comparative lawyer, in his attempt to ascertain what "the law" of another system actually is, cannot rely on official or semi-official statements and doctrines of sources. He must, to speak with Merryman once more, look beyond the "folklore" and develop a certain sensitivity as to what is regarded as a source of law and as to how various sources are perceived to be ranked in the other system.' See S Vogenauer, 'Sources of law and legal method in comparative law', in M Reimann and R Zimmerman (eds) *The Oxford handbook of comparative law* (Oxford University Press 2006) 878, 884–885.

⁵² See Chapter 2.

Some **tips** to prevent or at least reduce the risks associated with these pitfalls are:

- Outsource the legal research in a foreign system to an expert in the country concerned, making use of networks and contacts.⁵³
- When asking questions to an expert in the other country, the questions should be asked in a language that is understandable for both parties. It is also important to make these questions as clear as possible and to use as few specific legal terms as possible. Describe the legal concept, instead of looking for a precise translation of the legal term used in your own system.⁵⁴
- Sketching the context of the applicable law in your country and giving examples can help to get an accurate answer from a foreign expert.⁵⁵
- Verify whether the most current state of affairs is reflected in the foreign literature and the judgments you found, taking into account whether the court decisions you found are final or not.⁵⁶

3.3.2. Sources, networks and other ways to obtain information

*In case of arising the question of comparative analysis of the law, such forums are very useful, since we are in a favourable position to learn more about good practices in legislative solutions and in the case-law of the European highest courts.*⁵⁷

The availability and accessibility of sources containing foreign legislation, literature and case-law seem to play an important, if not essential, role in the decision to conduct a comparative analysis of the law of a particular country.⁵⁸ This factor is obviously also of large practical importance once the choice has been made to research a certain foreign legal system. This paragraph will give an overview of some online databases, networks and other ways to obtain sources of foreign law. Useful **online databases** for obtaining foreign legislation, case-law and literature include, among others:

- National databases for (translated) legislation, case-law, legal research and commentaries. See for example legislation.gov.uk (United Kingdom), legifrance.gouv.fr (France), Gesetze-im-internet.de and Beck-online (Germany), CanLII (Canada), and AustLII (Australia).
- As far as EU-law is concerned, EUR-Lex is worth mentioning: <http://eur-lex.europa.eu>. This database in 24 official EU languages contains the authentic Official Journal of the European Union, EU legislation, preparatory documents, EU case-law, international agreements regarding the EU, EFTA documents, summaries of EU legislation and other public documents on EU law.
- Commercial databases for case-law, legislation, treaties, and legal research of multiple countries and organizations such as the United States, the Commonwealth of Nations, Canada, and the European Union. See for example Westlaw, and LexisNexis Academic.
- Other databases, search engines and knowledge platforms that can be found via relevant networks of courts (see below),⁵⁹ universities etc., or on the local intranet.
- Although they are not databases, it is useful to mention that some countries have published translations of statutory acts on the internet, e.g., Germany: www.gesetze-im-internet.de/Teilliste_translations.html.

⁵³ See, e.g., Italy's answer to question 3a of the questionnaire: 'Moreover, in the framework of the judicial cooperation activities of the Italian Ministry of Justice there are liaison magistrates operating in EU countries (96/277/JHA Joint Action of 22 April 1996 adopted by the EU Council) who contribute to the exchange of information on the Member States' judicial and legal systems and their functioning.'

⁵⁴ This way, the pitfalls of the '*faux amis*' and homonyms can – to some extent – be avoided.

⁵⁵ See Pieters and Demarsin, (n 12) 61–62.

⁵⁶ See Pieters and Demarsin (n 12) 49–50.

⁵⁷ Contribution by the Supreme Court of Montenegro as response to the questionnaire.

⁵⁸ See section 3.2.

⁵⁹ Claes and De Visser provide (in Chapter 3 of their paper) 'an overview of horizontal European networks, that is to say transnational networks which bring together judges who are more or less at the same level and have similar functions in their respective legal systems.' They also address some databases of these networks (e.g. DEC-NAT and JURIFAST). See M Claes and M De Visser, 'Are you networked yet? On dialogues in European Judicial networks' (2012) 8 (2) *Utrecht Law Review* 100 <www.utrechtlawreview.org/articles/abstract/10.18352/ulr.197/> accessed 12 February 2021.

Useful **networks** for obtaining these comparative law sources are, for example:⁶⁰

- The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe forum) (www.aca-europe.eu/index.php/en/).
- The Association of European Administrative Judges (AEAJ) (www.aeaj.org/).
- The Association des Hautes Jurisdictions de Cassation des pays ayant en partage l' usage du Français (AHJUCAF) (www.ahjucaf.org/).
- The European Commission for Democracy through Law (Venice Commission) of the Council of Europe (www.venice.coe.int/).
- The European Judicial Network (EJN) (www.ejn-crimjust.europa.eu/ejn/ejn_home/EN).
- The European Judicial Network in Civil and Commercial Matters (EJN in civil and commercial matters) (https://e-justice.europa.eu/content_about_the_network-431-en.do).
- The Judicial Network of the European Union (Réseau judiciaire de l'Union européenne, 'RJUE') (https://curia.europa.eu/jcms/jcms/p1_2170157/en/).
- The Network of the Presidents of the Supreme Judicial Courts of the European Union (<https://network-presidents.eu/>).
- The Superior Courts Network of the Council of Europe (SCN) (www.echr.coe.int/Pages/home.aspx?p=court/network).

In addition to the aforementioned databases and networks, there are also other relatively **informal ways** to obtain sources of foreign law, such as:

- Some courts have departments for maintaining international relations or conducting comparative law research.
- Queries sent to specific courts in another country.
- Private knowledge on foreign law of the judges or other researchers,⁶¹ and informal contacts with colleagues in courts and universities of other countries.
- Meetings and discussions held between Supreme Courts.

Handbooks on comparative law may contain a general overview of the systems of various countries, but usually only give a superficial image of those systems.

Finally, as a more formal instrument, the **European Convention on Information on Foreign Law** can be mentioned.

3.4. The influence of the comparative law analysis on the Supreme Court's decision

*The actual impact of a comparative law analysis varies greatly from one case to another. However, if there was essentially no possibility of an actual influence of an analysis on the decision-making process, it would not be performed at all, as the goal of a comparative work is to provide a judge with the useful answer.*⁶²

From the answers to the questionnaire it seems to follow that the **actual impact** of a comparative law analysis on the decision of a Supreme Court in the EU varies greatly from one case to another:

- In the majority of the cases, it seems that the foreign legal material is used as a *source of inspiration*.
- The comparative law analysis could also produce *additional arguments* to strengthen the grounds for the decision of the Supreme Court. In those cases, the foreign material does not typically have a decisive impact on the outcome of the case, but it is used as a supporting element.⁶³

⁶⁰ See also Graziano who mentions 'some of the particularly active institutions and names.' Graziano (n 3) 31.

⁶¹ Being an amateur in the field of foreign law, one should be cautious with the use of such private knowledge. See the pitfalls mentioned under a).

⁶² Contribution by the Supreme Court of the Czech Republic as response to the questionnaire.

⁶³ About the influence of 'foreign arguments' Bell writes the following: 'So, in brief, if we are to understand correctly where foreign citations fit into legal reasoning, we need to get away from the common lawyer's obsession with the rare cases in which a single decision provides a binding or an exclusionary reason for a decision. Rather, we are looking at such a decision operating within a combination of reasons to add force to reasons that exist within the system. Indeed, as the cross-fertilization idea suggests, it is often the domestic reason stimulated by the foreign legal idea, rather than the foreign decision itself, which actually provides the strongest justification for a particular legal solution.' See J Bell, 'The argumentative status of foreign law,' 8 (2) (2012) *Utrecht Law Review* 8, 11 <www.utrechtlawreview.org/articles/abstract/10.18352/ulr.192/> accessed 12 February 2021.

- In a number of cases, comparative law can *provide important or even decisive arguments* for a Supreme Court decision. This can for instance be the case if the legislation which the Supreme Court has to interpret is historically based on the legislation of another country.

The intensity of the impact of comparative law on the Supreme Court's judgment may also be relevant when deciding whether the results of this analysis will be mentioned in the judgement of that court. That decision will be dealt with in section 3.5.

When several foreign systems are included in a comparative law analysis, it will often turn out that the solutions in other countries differ. In that case the difficult question arises **which of these different solutions will influence the decision** of the Supreme Court and to what extent. There is no hard and fast rule to solve this dilemma. Supreme Courts should be aware of the potential danger of 'cherry picking' when they choose their preferred solution and in that context only refer to other legal systems which support that solution, without further argumentation about systems with a different approach. This method of argumentation may be perceived as flawed and as a sign that comparative law did not really influence the decision-making process and was merely used as an opportunistic argument for a decision which the judges had already reached on other grounds. Such an impression can undermine the acceptance and authority of the court's decision and of the comparative law method as such. Explicitly using **principles of priority** when choosing between various foreign legal systems can minimize this risk. Some approaches which could be used are the following:

- If the comparative law analysis includes several countries representing different legal systems, one could legitimately choose to – explicitly – prefer the solution in *the legal system which is most closely connected* to the domestic one.
- One could also lay emphasis on the merits of the various legal solutions and therefore award the strongest significance to the *persuasiveness of the reasoning* on which the preferred solution of the Supreme Court is based. The choice will be the more convincing if the grounds for adopting the preferred solution are mentioned in the argumentation of the Supreme Court's decision.⁶⁴ *'Ultimately the Court is concerned with the persuasive force of the reasons given by the foreign courts, and how those reasons apply to the issue under appeal.'*⁶⁵
- Special attention is required if a court considers to adopt the solution of one specific country and it appears that the country concerned stands alone in that solution. In such a case it is also relevant to know why this unique solution was reached in that country. After all, it is quite conceivable that this solution is connected with a specific context in that country, and therefore does not automatically and logically apply in a different legal system.

3.5. Acknowledgement of the comparative law analysis in the Supreme Court's decision

*The Supreme Court occasionally explains the reasons for the selection of a legal system for comparative law analysis, in particular where Polish provisions are based on such legal system, the solution under consideration is predominant in foreign legal systems or has a long tradition, the regulation is also used in European and international law, or it promotes the objective of legal certainty.*⁶⁶

In cases where the Supreme Courts in the EU have conducted a comparative law analysis, they do not systematically refer in their judgments to that analysis and its influence on their decision.⁶⁷ It appears to be unclear what the underlying reasons are for including or excluding comparative law arguments in the judgement of a Supreme Court in cases where comparative law was used. It may depend on the usual format for the argumentation of court decisions in the member state concerned.⁶⁸ In addition, in countries where the usual format gives sufficient possibilities to refer to a comparative law analysis, it may be dependent on the preferences of the judges in the case at hand whether and to what extent they mention the analysis in the argumentation of their decision. However, some guidelines or viewpoints in this respect can be given.

⁶⁴ See also section 3.5 about Acknowledgement of the comparative law analysis in the Supreme Court's decision.

⁶⁵ Contribution by the Supreme Court of the United Kingdom as response to the questionnaire.

⁶⁶ Contribution by the Supreme Court of Poland as response to the questionnaire.

⁶⁷ When an Advocate-General has conducted a comparative law analysis, the outcome will usually be mentioned in his written opinion.

⁶⁸ See also M Gelter and M Siems (n 39) 93.

They could be the following, largely depending on the purposes for which the comparative method was used:⁶⁹

- When the comparative law analysis has been mainly used to gain inspiration, it might not be necessary to mention its existence and impact on the judgment of the Supreme Court. One could think in this context of cases in which foreign law was used as a source of fresh ideas, and has led to the choice of a solution which can be construed on the basis of national law but has not been thought of before. This choice can be assessed and challenged without knowledge of the source of inspiration.
- When the results of a comparative law analysis are used as an argument for the Supreme Court's decision, it is recommended for reasons of transparency to clearly mention this in the relevant part of the judgement,⁷⁰ especially when the analysis provides important or even decisive arguments for the court decision. This could be done in the same way as references to national sources, i.e., the text of a judgement may include citations from and references to foreign statutes, legal doctrine, case-law or other sources for a comparative law analysis.
- If the customary format or usual style of Supreme Court judgments in a member state makes it difficult to (elaborately) mention the results of a comparative law analysis,⁷¹ an alternative could be to incorporate such analysis in the written opinion of an Advocate-General, in member states where such opinions exist. The opinion could be published alongside the judgement.

When comparative law is mentioned in the judgement, it almost never seems to be accompanied by an explanation regarding the decisions of the Supreme Court (a) as to the legal systems which were included in the analysis and (b) as to which of the analysed legal systems have inspired the Supreme Court's decision. It proves to be quite difficult to precisely indicate the reasons for such decisions.⁷² However, if criteria are absent or unclear or if the application of the criteria is not transparent, there is a risk that the decisions of a Supreme Court whether and how to use the comparative law method in a specific case, seem to be arbitrary. This might have an unfavourable effect on the authority of their decisions.⁷³ Therefore, it could be useful that Supreme Courts in judgements (partly) based on a comparative law analysis, give an explanation regarding the decisions that were made as to:

- which legal systems to include in the analysis; and
- which of the analysed legal systems were used as arguments in the court's decision.

4. Research into the application of common legal rules in another country

As mentioned in the introduction (Chapter 1), the comparison with views abroad can also be focused on legal rules that apply equally in both countries. These common rules can be treaties concluded between these countries or supranational rules which are applicable in both countries (such as rules of European Union Law). It follows from the answers to the questionnaire that this form of comparative research is often conducted by Supreme Courts in the EU. Under EU-law, research into the case-law of the courts of other member states may even be mandatory for a Supreme Court. According to the judgment of the Court of Justice in the *Cilfit* case, foreign case-law can be relevant when a Supreme Court has to establish whether the answer to a question of EU-law is so clear that there is no need to ask for a preliminary ruling from the Court of Justice. According to this judgment, the Supreme Court of a member state must establish in that context whether the matter is equally obvious to the courts of the other Member States.⁷⁴

Comparative research regarding the views abroad on a common legal instrument cannot actually be regarded as comparative law, because the comparison is not made with another legal system. Therefore, several challenges which are connected with comparative law do not occur when the comparison is made with a view to common legal rules. For instance, this form of comparison does not require an overview of

⁶⁹ See section 3.1.

⁷⁰ Cf Smits: 'The question whether it is legitimate for a national legislature or court to undertake voluntary comparative reasoning only arises when foreign law is used as a normative argument.' See JM Smits, 'Comparative law and its influence on national legal systems' in M Reimann and R Zimmerman (eds) *The Oxford handbook of comparative law* (Oxford University Press 2006) 513, 527.

⁷¹ A Supreme Court could also consider to change the usual format for this purpose, at least for cases in which comparative law is used, provided that its national legislation permits such a change.

⁷² Cf sections 3.2 and 3.4.

⁷³ See section 3.4.

⁷⁴ Case 283/81 *SRL Cilfit (in liquidation) and 54 other societies v Ministero della Sanità* [1982] ECR 3417 [16].

the legal system of the other country and thorough knowledge of society in that country, at least not to the same degree as comparative law research. Nevertheless, research into the application of common legal rules in another country has several features in common with comparative law. Therefore, several elements discussed in this roadmap in Chapter 3 can also be useful when conducting this type of research:

- In the process of selecting countries for comparison, the practical factors mentioned in section 3.2 will also apply.
- Some of the pitfalls and tips mentioned in section 3.3, letter a) will equally apply.
- Several sources mentioned in section 3.3, letter b) can be useful.⁷⁵
- The observations made in section 3.4 about the influence of the comparative law analysis on the Supreme Court's decision are also valid in this context.
- The same applies to section 3.5 about the acknowledgement of the comparative law analysis in the Supreme Court's decision.

5. Summary

This document is intended as a roadmap for Supreme Courts in the EU that consider or have decided to conduct a comparative law analysis in the preparation of a judicial decision.

First (in section 3.1), the roadmap goes into the question *for which reasons and in which kind of cases* such an analysis can be useful. The most important reason for engaging in comparative law seems to be that a Supreme Court is seeking inspiration and is trying to learn from the experience of others. The decision to apply the comparative law method can also depend on practicalities, which are not related to the substance of the case, and which may limit the use of this method. Such practicalities are also mentioned in section 3.1, which ends with a list of two main categories of cases in which Supreme Courts in the European Union apply the comparative law method in practice.

Next (in section 3.2), the roadmap discusses the *selection of countries for comparison*. Ideally, the selection of the legal systems which will be studied will depend on the purpose for which the Supreme Court has decided to conduct comparative research. In addition, for the best results, it would be desirable in many cases to start with an orientation into a larger group of foreign legal systems, in order to make an informed decision which foreign system(s) will probably give the most rewarding information for a comparative law analysis. Practically speaking, however, there are serious limitations to what a Supreme Court can do in this respect. The final choice of the foreign system(s) to be studied can and will often also be influenced by practical limitations, such as language barriers and limited resources. The final choice will depend on the specific case and circumstances at hand. It could be beneficial in this respect to identify linking factors between the domestic law of the Supreme Court and the foreign legal system which could be researched. Examples of such factors are mentioned in section 3.2, as well as various practical reasons which may play a role in the selection of one or more foreign legal systems for investigation.

Section 3.3 of the roadmap is dedicated to the question *how comparative research can be conducted*. This section discusses the main pitfalls in this field and provides tips on how to minimize the inherent risks. It also contains a list of sources, networks and other ways to obtain information about foreign law.

The *influence of the comparative law analysis on the Supreme Court's decision* is dealt with in section 3.4. It turns out that the actual impact of a comparative law analysis on the decision of a Supreme Court in the EU varies greatly from one case to another. In cases where the research reveals that the solutions in various foreign countries differ, the difficult question will arise which of these solutions should influence the decision of the Supreme Court and to what extent. There is no hard and fast rule to solve this dilemma. Supreme Courts should be aware of the potential danger of 'cherry picking.' Explicitly using principles of priority when choosing between various foreign legal systems can minimize this risk. Some approaches which could be used in this respect are discussed in section 3.4.

In cases where the Supreme Courts in the EU have conducted a comparative law analysis, they do not systematically *refer in their judgments to that analysis and its influence on their decision*. It appears to be unclear what the underlying reasons are for including or excluding comparative law arguments in the reasons for the judgement. However, some guidelines or viewpoints in this respect can be given, and are mentioned in section 3.5.

⁷⁵ As far as EU-law is concerned, EUR-Lex is worth mentioning <<https://eur-lex.europa.eu/>>. This database in 24 official EU languages contains the authentic Official Journal of the European Union, EU legislation, preparatory documents, EU case-law, international agreements regarding the EU, EFTA documents, summaries of EU legislation and other public documents on EU law.

Finally, Chapter 4 is dedicated to research *into views abroad about legal rules that apply equally in the countries concerned*, such as treaties concluded between these countries and rules of European Union Law. Several elements discussed in this roadmap on comparative law can also be useful when conducting this type of research.

Additional File

The additional file for this article can be found as follows:

- **Annex 1:** Questionnaire on the topic of 'Comparative law in the case law and practice of the Supreme Courts'. DOI: <https://doi.org/10.36633/ulr.692.s1>

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