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# (Re)search and Discover: Shared Judicial Authority in the European Union Legal Order

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## Abstract

*The relationship between the Court of Justice of the European Union and national courts has fascinated generations of jurists. After more than 50 years of development of European law, questions on the precise role of national courts in the EU's judicial system are still very intriguing. Most notably, questions on the authority, meaning and significance of national European case law, i.e. the judgments issued by national courts regarding European Union law within the EU's judicial system, are still open for debate. How can we really understand the finer nuances and peculiarities of the relationship and interaction between national courts and the Court of Justice? Is this relationship growing towards a 'hierarchical' one? Does the Court of Justice really have the final say on all European legal matters within the European Union legal order? If a context of shared judicial authority is emerging, what does that entail? The aim of the present contribution is to revisit these perennial issues and follow in the quest for shared judicial authority in the EU's judicial system.*

## 1 Introduction

In basic and advanced European Union law courses at universities throughout Europe, generations of students are normally taught that the Court of Justice of the European Union (hereinafter: Court of Justice) has a 'monopoly' on interpreting European law:[1] the final authority on the interpretation of all European legal matters rests solely with the Court of Justice. But is such an approach feasible and justified, in light of the leading role played by national courts in effecting European law in everyday practice? Judicial protection in the European Union (hereinafter: EU) context lies mainly with the courts in the Member States. In practice, citizens and companies who wish to bring a

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1 In the present contribution, European law is used as a synonym for the law of the European Union.

dispute concerning European law before the court nearly always have to deal with the 'ordinary' courts in the Member States; bringing a case before the Court of Justice is exceptional and restricted to the limited areas of direct actions (on the basis of Articles 263 and 277 Treaty on the Functioning of the European Union (TFEU)) or always dependent on the willingness of a national court to refer a case using the preliminary reference procedure (Article 267 TFEU). The extent to which European law is interwoven with the legal systems of the EU Member States, combined with the development of the EU's judicial system, allows us to conclude that the bulk of European judicial work is carried out by the national courts, as part of the day-to-day legal practice of the EU Member States. This is not a new insight.[2] It is in this day-to-day practice that courts must issue decisions, cut Gordian knots and resolve cases... in short: administer justice.

Taking serious account of these national court practices for the study of the EU's judicial system is very important for a comprehensive understanding of the functioning of the EU legal order. From the cognitive perspective of legal realism, one might even take the position that what national courts do not apply in reality, does not exist in practice.[3] Or as Prechal once observed in a somewhat different context: 'Although there is no point in advocating that theoretical designs always be adjusted to everyday practice, a system of judicial protection constituted in a way which does not sufficiently take reality into account is nothing more than a castle built in the sky.'[4]

After more than 50 years of development in European law, questions on the precise role of national courts in the EU's judicial system are still very intriguing. In contrast to the somewhat simplistic picture presented in EU law textbooks, the reality of interpretation and application of European law and the respective roles of the courts involved seems to be much more complex and nuanced. Most notably, the still open question on the authority, meaning and significance of national European case law, i.e. the judgments issued by national courts regarding European Union law, within the EU's judicial system. Furthermore, how can we really understand the finer nuances and peculiarities of the relationship and interaction between national courts and the Court of Justice? Is this relationship growing towards a 'hierarchical' one? Does the Court of Justice

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2 Consider already A.M. Donner, 'Les rapports entre la compétence de la Cour de justice des Communautés européennes et les tribunaux internes', in: *Recueil des Cours (Académie de droit international)* 115, 1965, p. 1-61 at p. 22-24. Furthermore: S. Prechal, R.H. van Ooik, J.H. Jans, K.J.M. Mortelmans, *'Europeanisation' of the law: consequences for the Dutch judiciary*, Den Haag: Raad voor de Rechtspraak 2005, p. 8.

3 Cf. J.H. Jans, R. Macrory, A.-M. Moreno Molina, *National Courts and EU Environmental Law*, Groningen: Europa Law Publishing 2013, p. 3.

4 S. Prechal, 'National Courts in EU Judicial Structures', in: *Yearbook of European Law* 25, Oxford: Oxford University Press 2006, p. 431.

really have the final authority on all European legal matters? Or is an environment of shared judicial authority emerging and if so, how would that look?

What is my aim with this paper? Like the courts, who converse with one another from case to case as time goes by, research is essentially a conversation with previous authors. I wish to continue this conversation below. Firstly, I take a brief look at the relationship between national courts and the Court of Justice in general (section 2). Next, I revisit some common characteristics of the preliminary reference procedure and the classic distinction between interpretation and application of European law (section 3). Furthermore, I examine the question of who actually has the final say on European legal matters in reality (section 4), and finally I embark on a quest for shared legal authority in the EU's judicial system (section 5). This quest is not yet over. I therefore leave my paper open-ended, with a discussion of the further possibilities for (re)searching and discovery (section 6).

## 2 National Courts as Guardians of the European Legal Order

Nowadays, administration of European law is an 'ordinary' part of a court's job within the EU.[5] For the purposes of the current contribution a brief overview of the EU's judicial system is sufficient; more detailed consideration can be found in the general literature.[6] The Treaties have 'established a complete system of legal remedies and procedures' in line with settled case

5 See e.g. Case T-51/89 *Tetrapak* in which the General Court famously considered: 'national courts are acting as Community courts of general jurisdiction.' Or as A. Rosas writes: 'In has become almost trite to observe that the courts and judges of the EU Member States play an important role not only at the purely national level but also as part of the Union judicial system.' See: A. Rosas, 'The National Judge as EU Judge: Opinion 1/09', in: P. Caronnel, A. Rosas, N. Wahl, *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh*, Oxford: Hart Publishing 2012, p. 105-121 at p. 105.

6 For a general explanation see D. Chalmers, G. Davies, G. Monti, *European Union Law*, Cambridge: Cambridge University Press 2010, chapters 4 and 7; P.J.G. Kapteyn, A.M. McDonnell, K.J.M. Mortelmans, C.W.A. Timmermans, *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International 2008, chapters 6 and 7; K. Lenaerts, P. van Nuffel, *Europees recht* [European law], Antwerp/Cambridge: Intersentia 2011, part VI, J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law*, Groningen: Europa Law Publishing 2007, chapter 7, M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford: Hart Publishing 2006, K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', *CMLR* 44, 2007, p. 1645.

law at the Court of Justice,[7] which includes the 'necessary consistency'[8] or 'necessary coherency'.[9] Ever since the inception of the European Coal and Steel Community there has been a division of tasks between the Court of Justice and the national courts:[10] but who does what?[11]

In any case, according to European law textbook pictures, it is clear that the national courts must deliver rulings that are consistent with European law, whether they want to or not.[12] In other words, the national courts are not expected to rely on their own understanding of the law or to take decisions as fair and equitable men, but know that they are bound by the state of European law at a particular point in time.[13] When making judicial findings of law in a European case, the national court must take into account what the European legislator has laid down on that subject as well as any previous interpretations given by the Court of Justice.

According to Article 19 (1) of the Treaty on the European Union (TEU), it is the task of the Court of Justice to 'ensure that in the interpretation and application of the Treaties the law is observed'; here, the role of the national courts remains implicit. The provision explains approaching the Court of Justice as the most authoritative source, or monopolist, for the interpretation and application of European law. The Treaty of Lisbon however, has brought an innovation with regard to this 'classic' provision. The second sentence of Article 19 (1) TEU now reads 'Member States shall provide remedies sufficient to ensure effective judicial protection in the fields covered by Union law.' The meaning of this addition is still open for debate.[14] It might be understood as a codification, ad-

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7 This development was initiated with Case 294/83 *Les Verts* [1986] ECR 1339 and repeated and slighty developed in, among others, Case 112/83 *Société des produits de maïs* [1985] ECR 719, Case 314/85 *Foto-Frost* [1987] ECR 4199, Case C-321/95 P *Greenpeace* [1998] ECR I-1651, Case C-50/00 P *UPA* [2002] ECR I-6677, Case C-550/09 *E en F* [2010] ECR I-06209, Case C-538/11P *Inuit* [2013] nyr.

8 See e.g. Case 112/83 *Société des produits de maïs* [1985] ECR 719.

9 See e.g. Case 314/85 *Foto-Frost* [1987] ECR 4199.

10 Article 41 ECSC Treaty contained a form of preliminary cooperation in light of questions on the validity of ECSC-measures. See: M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, Oxford: Oxford University Press 2010, p. 2 and 8.

11 Also A. Prechal used a slightly different formulated question as a starting point for analysing the division of tasks between the Court of Justice and national courts. See: A. Prechal, 'Administration of Justice in the EU – who should do what?', in: *La Cour de justice des Communautés européennes 1952-2002: Bilan et perspectives, Actes de la conférence organisée dans le cadre du cinquantième anniversaire de la Cour de justice*, Bruxelles: Bruylant 2004, p. 63-85.

12 Cf. Prechal 2006, p. 429-430.

13 According to the Court of Justice, already in Case 14/68 *Walt Wilhelm*, European law constitutes 'its own system of law, integrated into the legal systems of the Member States and which must be applied by their courts.'

14 For instance, it is striking that this provision does not in itself, strictly speaking, specify the level at which Member States must provide legal remedies to actually ensure effective legal protection: within the individual context of each Member State or in the joint context of the Member States at European or regional level?

dressed to the Member States, of the principle of effective judicial protection of European law as accepted and developed by the Court of Justice in its case law.[15]

One may also read Article 19 (1) 2nd sentence TEU as a possibility to further strengthen the role of national courts within the EU's judicial system, in a way compared to the strengthening of the role of national parliaments within the EU institutional framework by Treaty of Lisbon in Article 12 TEU.[16] The addition must be of (some) significance; in the years ahead, it will be necessary to give proper form and substance to this Treaty provision. In *Opinion 1/09*[17] and more recently in the *Inuit* case[18], on the conditions for admissibility in direct actions on the basis of the fourth paragraph of Article 263 TFEU, the Court of Justice took the opportunity to use Article 19 (1) TEU to underline the complete system of legal remedies and procedures of the EU's judicial system and seems to read the role of the national courts within the first sentence of Article 19 (1) TEU. In other words, the guardians of the European legal order and its judicial system are the Court of Justice *and* the courts (and tribunals) of the Member States.[19]

Apart from the new codification in Article 19 (1) TEU, the Treaties barely refer to the role of national courts. Still, paradoxically enough, citizens or companies who wish to bring a dispute involving European law before a court almost always have to deal with the courts of the Member States and the domestic legal system. How can that be explained? It is mainly thanks to the development of the four fundamental European legal doctrines with regard to the effects of

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15 See also Article 47 Charter of Fundamental Rights of the European Union. The principle has mainly been used by the Court of Justice to guarantee access to the courts and legal remedies in the national context for the enforcement of European law and, as it were, gives the national courts the freedom to act as protectors of legal rights under the complete system of legal remedies and procedures under Treaty law. See for instance Case C-97/91 *Borelli*, Case C-50/00 *UPA*, Case C-263/02 *Jégo-Quéré*; see Jans et al. 2007, p. 243-244.

16 National parliaments have been allocated their own position in the EU institutional framework. In the preparations for the intergovernmental conference on the European Constitution, the Due Report advocated that the role of the national courts be set out explicitly in the context of the Treaties. See O. Due et al., *Report by the Working Party on the Future of the European Communities' Court System*, January 2000, available at: http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf. Meij was also in favour of codifying the important role of the national courts within the European justice administration system, see A.W.H. Meij, 'Constitutionalizing Effective Remedies: Too Much on EU Courts, Too Little on National Courts', in: D. Curtin, A.E. Kellermann, S. Blockmans (eds), *The EU Constitution: The Best Way Forward?*, The Hague: T.M.C. Asser Instituut 2005. However, he had previously argued that recognising the responsibilities of the national courts in a Treaty 'would change nothing but appearances – even if, by the way, this itself could be of some use.' See A.W.H. Meij, 'Guest editorial: architects or judges? Some comments in relation to the current debate', *CMLR* 37 2000, p. 1039-1045. See also the supporting argument in Claes 2006, chapter 22.

17 Opinion 1/09 of 8 March 2011 (The Draft Agreement on the European and Community Patents Court), paras 66-60.

18 Case C583/11 P *Inuit* [2013] nyr, paras 90, 99-102.

19 Cf. Rosas 2012, p. 118-119.

European law in a national context – direct effect, primacy, consistent interpretation and lastly, Member States liability for violations of European law – that the courts of EU Member States have been granted step-by-step a more dominant role in administering European law.[20] Apart from these jurisprudentially developed fundamental doctrines, the role of national courts was mainly implied and reflected in the principle of sincere co-operation (Article 4 (3) TEU).[21] The duty to rule consistently with European law arises from this principle. It is on the basis of this principle that the Court of Justice has imposed duties and expectations on the national courts. According to the Court's landmark judgment in *Simmenthal,* 'every national court must, in a case within its jurisdiction, apply Community law in its entirety.'[22] If a national measure comes into conflict with European law, it must be set aside.[23]

Interestingly enough, this process of Europeanisation of the national judiciaries and the mentioned fundamental doctrines were all developed within the context of the preliminary reference procedure. This very famous procedure found in Article 267 TFEU established that, in virtually all areas of European law, any national court or tribunal of a Member State may – and under certain circumstances, should – refer questions to the Court of Justice to give a ruling on the interpretation of European law and/or the interpretation or validity of secondary European law, if it considers that a decision on the question is necessary to enable it to give judgment.[24]

## 3 Application and Interpretation of European Law Revisited

The preliminary reference procedure does not ever really come into play until a national court decides to refer a case to the Court of Justice for a preliminary ruling.[25] The procedure is the only formal channel of judicial

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20 Consider on these doctrines for instance W.T. Eijsbouts, J.H. Jans, L.A.J. Senden & A. Prechal, *Europees recht – Algemeen Deel*, Groningen: Europa Law Publishing 2012, chapter 8.

21 See Prechal 2006, p. 429.

22 Case 106/77 *Simmenthal II*, at 21.

23 Case 106/77 *Simmenthal II*, at 24. *Simmenthal* prompted an abundance of literature. For a concise discussion of the essential elements of this judgment see Prechal 2006, p. 442 et seq. For detailed background information, see the work of Claes, who studied this mandate of the national courts under the European constitution from a European law perspective in her PhD thesis, adding a national perspective based on the national constitutions and national constitutional case law. See Claes 2006.

24 See exhaustively on the functioning of this procedure: M. Broberg, N. Fenger, *Preliminary references to the European Court of Justice*, Oxford: Oxford University Press 2010.

25 The story goes, by eye-witnesses to the event that the very first preliminary reference from a national court to the Court of Justice was celebrated with champagne in Luxembourg. Cf. A.P. Komninos, *EC Private Antitrust Enforcement. Decentralised Application of EC Competition by National Courts*, Oxford: Hart Publishing 2008, p. xiii. This concerned Case 13/61 *De Geus/Bosch* after a preliminary reference of the Court of Appeal of The Hague.

dialogue between the Court of Justice and the national courts.[26] As the Court put it explicitly in the *Cartesio* case, 'the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary.'[27] The 1965 case *Schwarze* characterised the relationship between the Court of Justice and the national courts in the context of this procedure as:

'an instituted cooperation between the courts, as part of which the national courts and the Court of Justice – each according to its own competence – aim to contribute directly and reciprocally to reaching a decision that guarantees the uniform application of Community law in all Member States.'[28]

Is there any hierarchy in this 'cooperation between the courts'? For a proper understanding, we may refer to a still highly readable and enlightening article written by Donner in the early 1970s, titled: 'Interpretation and Application'.[29] In this article, the then Dutch judge and later President of the Court of Justice discusses the problematic distinction between the interpretation and application of European law – more on that later on. It is interesting to see how Donner formulates the relationship between the national courts and the Court of Justice:

'Even in relation to the application of Community law, the national courts [are] not subject to the authority of the Community court, but stand alongside it. The Communities, after all, have not yet formed a federation in which the federal court is situated above its fellow national courts, whose judgements it would be able to review or monitor. The only relationship between the Community court and the national courts within the communities is one of coordination, in which each court must respect the other's jurisdiction, and any attempts to solve problems involving both must be made through cooperation.'[30]

Following on from the *Schwarze* ruling and Donner's remarks, the relationship between the Court of Justice and the national courts is not to be understood as

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26 Cf. C. Timmermans, 'Multilevel Judicial Co-operation', in: P. Caronnel, A. Rosas, N. Wahl, *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh*, Oxford: Hart Publishing 2012, p. 15-23. See on 'traditional patterns of European "judicial dialogues"' M. de Visser, M. Claes, 'Courts United? On European Judicial Networks', in: A. Vauchez & B. de Witte, *Lawyering Europe. European Law as a Transnational Social Field*, Oxford: Hart Publishing 2013, p. 75-100 at p. 84-92.

27 Case C-210/06 *Cartesio* [2008] ECR I-9641, para. 91.

28 Case 16/65 *Schwarze* [1965] ECR 1104.

29 A.M. Donner, 'Uitlegging en toepassing', in: *Miscellanea W.J. Ganshof van der Meersch*, Bruxelles: Bruylant 1972, p. 103-126 (title translated by author).

30 Donner 1972, p. 114-115 (translation by author).

a hierarchical one, but one of coordination and cooperation. Evidence that such an understanding of the relationship between the Court of Justice and national courts is still valid to date is presented by a recent article by former Court of Justice judge Timmermans, in which he remarks:

'It is certainly true that the ECJ is not hierarchically superior to Member States' Supreme Courts. It cannot quash or annul their judgments. It can answer questions for a preliminary ruling, but the final say in applying the answers received belongs to the national court.'[31]

A rather paradoxical impression is created by the fact that at the same time, under the doctrine of the primacy of European law, the Court of Justice actually seems to assume a kind of hierarchical relationship between the European and national legal systems.[32] Where the two systems intersect or collide, precedence must be given to European law. In other words, the principle of primacy of European law over national law suggests a hierarchical relationship within the law, which at the end of the day, both implicitly and controversially, entails a hierarchical relationship between the Court of Justice and national courts.

In legal literature, it has been suggested that the horizontal and bilateral relationship between the Court of Justice and the national courts has been transformed into a vertical and multilateral relationship with the coming into being of a judicial hierarchy with the Court of Justice as the ultimate constitutional court of the EU at its apex and assisted by the national courts.[33]

Be that as it may, if we assume alongside Donner and Timmermans that the relationship between the Court of Justice and the national courts is not a hierarchical one, what *is* the difference between their tasks, and who has the final say?

I believe that the matter is clear enough when it comes to assessing the validity of secondary European law via preliminary rulings on questions of validity:[34] here, the Court of Justice evidently acts as the constitutional court of the European Union, therefore making it reasonable to entrust the assessment of validity as much as possible to the Court of Justice. The matter is, however, more complicated when it comes to interpretation of European law. Needless

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31 Timmermans 2012, at p. 15.

32 Cf. A.W.H. Meij, 'Circles of Coherence: On Unity of Case-Law in the Context of Globalisation, *EUConst* 2010, p. 84-101 at p. 91.

33 See De Visser, Claes 2013, at p. 85, P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press 2011, ch 13 at p. 482.

34 On the basis of Article 267 sub b TFEU a national court or tribunal can ask the Court of Justice to give a preliminary ruling on the validity of acts of the institutions, bodies, offices or agencies of the EU whenever this validity is disputed in a case at hand. The Court of Justice has the sole jurisdiction to assess the validity of these measures. See on this aspect of the preliminary reference procedure the landmark Case 314/85 *Foto-Frost* [1987] ECR 4199.

to say, that matters of interpretation of European law may boil down to questions of a constitutional nature, such as, for instance, in particular cases on the scope of Union citizenship, the Charter of Fundamental Rights or the interpretation of the powers of European institutions. In those cases the Court of Justice acts as the central constitutional court of the European Union as well. The question remains however, whether the Court of Justice needs to have a final say on all interpretation matters of European law.

Strictly speaking, within the context of the preliminary ruling procedure, it falls within the authority of the Court of Justice to provide an interpretation of European law and it is the task of the national court to apply that law.[35] This would seem to imply that in principle, according to the case law of the Court of Justice, the national courts play no particular authoritative role in the interpretation of European law. This suggestion is supported by the principled obligation to refer questions included in Article 267 (3) TFEU: 'where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall bring the matter before the Court*' (emphasis added). As former judge Meij once observed, the structure of the present system confers a monopoly for the answering of any (interpretation) question of European law on the Court of Justice:[36] if the main proceedings lead to (new) questions on the interpretation of European law or validity of secondary European law, a national court of last instance is in principle obligated to make a reference for a preliminary ruling, unless one of the *Cilfit* exceptions to this rule is applicable.[37]

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35 Cf. Broberg, Fenger 2010, p. 1-2, 105-106, 156-157; P.J.G. Kapteyn, A.M. McDonnell, K.J.M. Mortelmans, C.W.A. Timmermans, *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International 2008, p. 484-485; G. Davies, 'Abstractness and concreteness in the preliminary reference procedure: implications for the division of powers and effective market regulation', in: N. Nic Shuibne (ed.), *Regulating the Internal Market*, Cheltenham: Edward Elgar Publishing 2006, p. 210-244 at p. 214-215; F.G. Jacobs, 'The role of national courts and of the European Court of Justice in ensuring the uniform application of community law: is a new approach needed?', in: *Studi in onore di Francesco Capotorti – II*, Giuffrè editori 1999, p. 175-189 at p. 175. However, for instance, Lenaerts en Van Nuffel do not use this distinction in their study book *Europees recht* with regard to the division of tasks between the Court of Justice and national courts: seemingly interpretation and application of law is a task for national courts in their view. See K. Lenaerts, P. van Nuffel, *Europees recht*, Antwerpen: Intersentia 2011, p. 635-638.

36 Cf. Meij 2010, p. 94-95.

37 Case 283/81 *Cilfit* [1982] ECR 3415. See in general Broberg, Fenger 2010, chapter 6. Shortly summarised in the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* of the Court of Justice, para. 12: 'courts or tribunals against whose decisions there is no judicial remedy under national law must bring such a request before the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied in that instance), or unless the correct interpretation of the rule of law in question is obvious.'

This obligation to refer gives the background and explains the classical difference between interpretation and application of European law. According to this distinction the Court of Justice does not formally apply European law in the preliminary reference procedure, but only offers an interpretation of law in preliminary rulings on the interpretation of that law.[38] Application and creating coherence and uniformity between national measures and European law is left to the judgment given by national courts, who are obliged to apply the Court of Justice's interpretation in concrete cases.[39]

The distinction suggests that the task of the national courts in European law is seemingly limited to that of *bouche de la loi* – those who simply apply the law. Such a reading raises several questions. Does this mean that in practice, the task of the national (highest) courts is restricted to application of European law? Or do national courts also play a part in interpreting European law? This touches on the central issue of who has the final say on such matters.

In my dissertation, I put forward that this classic doctrine, i.e. the distinction between interpretation and application of European law, creates a legal fiction.[40] The boundary between the interpretation and application of law is rather vague, and is, to say the least, at odds with the reality of judicial administration in the EU.[41] In any case, it is clear that this dubious distinction has given headaches to generations of European jurists. Let me illustrate by way of two quotations. In 1972, Donner observed a jurisprudential development in favour of interpretations for the specific case at hand, in order to achieve uniformity in application. However, at the same time he emphasised that the real problem is:

'that although a distinction can be drawn between interpretation and application, the two cannot be separated. They belong together. The judge applying the law to a certain legal issue or case is engaged in a constant process involving both its interpretation and application.'[42]

In 2008 Kapteyn, a former Court of Justice judge, also called the distinction between interpretation and application into question:

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38 Cf. Timmermans 2012, p. 15. See also the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* of the Court of Justice, para. 7: 'under the preliminary ruling procedure the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings. That is the task of the national court or tribunal [...].' In direct actions, however, the General Court, and in appeal the Court of Justice, interpret as well as apply European law to the concrete case at hand.

39 Cf. Broberg, Fenger 2010, p. 156, and Jacobs 1999 on p. 176.

40 H.J. van Harten, *Autonomie van de nationale rechter in het Europees recht,* Den Haag: Boom Juridische uitgevers 2011, p. 42.

41 Cf. Davies 2006, p. 215: 'It remains far from obvious what this formula means, and what difference between interpretation and application actually is.'

42 Donner 1972, p. 117 (translated by the author).

'The strict separation between interpretation of Community law on the one hand and application of Community law *in concreto* on the other tends of course to give rise to considerable difficulties in practice. The process of thought leading to a judicial decision cannot be readily separated into two independent parts: the interpretation of general rules and the subsequent application of the rules thuis interpreted to the facts. The interpretation given by a court is also determined by the facts. A study of the various judgments given by the Court pursuant to Article 234 [now Article 267 TFEU] makes it quite obvious that the Court was inspired by the facts of the case in its interpretation of Community law and has given an interpretation for a concrete case'[43]

Moreover, the Court of Justice itself also blurs the distinction between interpretation and application. In the – not binding but nonetheless authoritative – guidelines drawn up by the Court of Justice for national courts with regard to the proper use of the preliminary reference procedure, the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*[44] multiple mentions of 'interpretation' of European law on the part of national courts are made:[45]

'The reference for a preliminary ruling is a fundamental mechanism of European Union law aimed at *enabling the courts and tribunals of the Member Statesto ensure uniform interpretation and application of that law* within the European Union' (para. 1, emphasis added)

The Court of Justice grants particular freedom to national courts with regard to situations where previous case law provides sufficient guidance:

'Thus, *a national court or tribunal may*, in particular *when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law* and its application to the factual situation before it. However, *a reference for a preliminary ruling may prove particularly useful* when there is a *new question of interpretation of general interest for the uniform application of European Union law*, or where the existing case-law does not appear to be applicable to a new set of facts.' (para. 13, emphasis added)

The national court is also urged, when deciding whether to make a reference for a preliminary ruling, to include details of its doubts concerning interpretation

43 Kapteyn et al. 2008, p. 485.
44 2012/C 338/01. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:338:0001:0006:EN:PDF.
45 *OJ* 2012/C 338/01.

in its reference.[46] Finally, the national courts are explicitly invited to include their own answer to the questions of law at issue.[47]

In cases where a preliminary ruling has been given by the Court of Justice, the national court must then give a definitive judgment on the case.[48] This 'fact of life' of the preliminary reference procedure boosts the authority of the national courts in the EU's judicial system, because although they are in principle bound by the preliminary ruling, the final decision remains the task and responsibility of the national courts.[49] The Court of Justice is clearly aware of this.[50]

Despite the fact that the Court of Justice seems to take a nuanced approach to the interpretation/application distinction in this soft law instruction guide for national courts, in its case law the Court continues to adhere strictly to the formal theory on the division of tasks between itself and the national courts.[51]

The question remains of whether a strict distinction between interpretation and application is still, or ever has been, realistic. In thinking about this question, it is worth remembering that in the majority of legal disputes entailing elements of European law in the EU, it is the national courts themselves that deliver judgment. This applies even in cases where the proceedings have included a reference for a preliminary ruling. Strictly speaking, it is only the national court that decides on the legality of a national rule in light of European law (notwithstanding the Treaty infringement procedure against Member States based on Article 258 TFEU). In the vast majority of European law cases, it is *de facto* the national court that arrives at the final interpretation of European law.[52]

It may even be submitted that pure application of European law only takes place in circumstances when clear, previous European case law is applied (*acte*

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46 Recommendations, para. 22.

47 Recommendations, para. 24.

48 This leads Chalmers et al. 2010, on p. 150, to the conclusion that the national courts essentially have a monopoly in cases involving a European law component:'subject to Article 274 TFEU national courts have a monopoly of adjudication over disputes that come before them that involve EU law. Article 267 TFEU sets out circumstances when they may or must refer points of EU law to the Court of Justice and these judgments are binding on them. It is national courts, however, who decide the dispute. They decide not only points of national law that may be pertinent but, even more centrally, they decide the facts to the dispute and, on the basis of this, they decide how to apply EU law to the dispute.'

49 According to the established case law of the Court of Justice, it is solely the national court 'before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision' that decides on the necessity of making a reference. See for example Case C-415/93 *Bosman*, para. 59.

50 Recommendations, para. 35.

51 Broberg and Fenger refer in this connection to Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] I-12175 and Case C-162/06 *International Mail Spain* [2007] ECR I-9911. See Broberg, Fenger 2010, p. 156.

52 Despite the fact that, according to the Court of Justice, in cases in which a reference has been made for a preliminary ruling, that ruling is binding on all judicial authorities that may subsequently become involved with the case.

*éclairé*) or the answer to the question of law is obvious (*acte clair*). In most of the other cases, some form of interpretation of European law will take place. Adapting to the particular circumstances of the case and making a ruling in response to those circumstances is an inherent part of administering justice. Interpretation and application are therefore both tasks that fall to the national courts in offering judicial protection under European law,[53] as guardians of the EU's judicial system.

Given the development of European law and the relative clarity that has arisen regarding its general fundamental doctrines, it should be possible for well-equipped national courts to dispense with the majority of cases independently. As the fundamental principles of European law have been clarified, it has become more common for the national courts to interpret that law in a reasonable manner. If they possess enough knowledge of the tests to be applied under the case law of the Court of Justice, they can recognise and decide on the European law aspects of the case and identify potential questions of European law while able to parry potential threats to the unity of European law.[54]

If the national courts have a degree of freedom regarding the ultimate interpretation and application of the law in cases where a preliminary ruling has been sought, then it follows that they will have even more room for manoeuvre in cases where they come to their own independent judgment regarding the meaning of European law in a specific case without making a preliminary reference to the Court of Justice.[55] In practice, the national courts offer judicial protection under European law without involving the Court of Justice; therefore they make a *de facto* contribution to shaping European law and the EU legal order. If we accept the realistic hypothesis that a substantial portion of the current administration of European Justice falls within this category, then it is clearly important to take note of the significance of that case law.

To a certain extent, and at least at a factual level, we must conclude that the Court of Justice shares the task of interpreting European law with the national courts in general, and, perhaps, the highest courts of the EU Member States in particular. But who really has the final say on matters of interpretation?

## 4 Which Court has the Final Say?

The question of which court ultimately has the final say in European law is related to the perspective adopted with regard to the authority

53 Cf. Lenaerts, Van Nuffel 2011, p. 635-638.
54 Cf. Meij 2010, p. 95.
55 See Prechal 2006, p. 447: 'In general, national courts have a considerable scope for manoeuvre (and imagination and creativity!) to satisfy the requirements of the ECJ.'

on the interpretation of European norms. The common characteristics of the preliminary reference procedure, and the obligation on courts of last instance to refer under the *Cilfit* criteria, led Meij to remark:

'It is noteworthy that this system presupposed a threat to unity of the law and therefore confers a monopoly for the answering of any question of European law on the Court. There was every reason for such conferral at the outset where a law without the backing of a state had to apply initially in 6, later in 9, 12, 15 and henceforth 27 Member States. Now, around fifty years later, the situation is different, at least in the old Member States where courts have gained wide experience in the application of European law. Such national courts are as a matter of principle conversant with their European mandate, well-equipped and provided with ready knowledge of the tests to be applied under the case-law of the ECJ by means of which they can recognise questions of European law, and are able to parry potential threats to the unity of EU law.'[56]

In a recent *Rheinmühlen* revisited annotation, Timmermans does not challenge this formal monopoly. He writes:

'After all, whenever the interpretation of EU law is concerned, the higher (highest) court does not have the last word, which is reserved exclusively for the Union Court.'[57]

It would appear cut and dried from such perspective: however you look at it, the final say lies with the Court of Justice. This latter approach can be understood when viewed against the backdrop of the autonomy of the European legal order as developed in the classic *Van Gend & Loos* and *Costa/ENEL* rulings,[58] from which comes the postulate of the uniformity of European law. Or, which Barents uses for his hypothesis in *The Autonomy of Community Law:*

'Because of its contents, Community law constitutes an indivisible system of law. As a consequence, Community law determines its own scope (subject-matter, personal scope, geographical scope, temporal scope), its legal effects on situations coming within its scope (validity, application and interpretation) and its relation to other areas of law (national and international law). This means

56 Meij 2010, p. 94-95.
57 C.W.A. Timmermans, 'Annotatie bij het arrest Rheinmühlen', in: Beukers et al. 2010, p. 78-82 at p. 80 (translation by author).
58 Case 26/62 *Van Gend & Loos* [1962], 3 en Case 6/64 *Costa/ENEL* [1964], 1141.

that the normative content of Community law (i.e. its character as 'law') is independent from any other rule or system of law.'[59]

According to this theory, the uniformity of European law entails that it is inseparable in character: legal consequences as such should not vary solely due to the fact that it is applied and interpreted in a certain Member State.[60] However, this does not alter the fact that objects and subjects can be subject to regulations in different ways.[61] Therefore, the unity of law and consistency in its interpretation and application should not necessarily be equated with uniformity. Divergence and differentiation must be accepted and are in fact sometimes necessary to properly reflect social, economic, political and legal diversity *and* reality in the European Union as a whole.[62] Room for legal diversity has been included in the Lisbon Treaty among the general provisions concerning the area for freedom, security and justice. Article 67(1) TFEU states:

'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the *different legal systems and traditions of the Member States*.' (emphasis added)

However, when it comes to scope for differentiation in the sphere of application of the law, both Barents and Prechal for instance take the approach that this differentiation, in the words of Barents, 'cannot be determined in any way unilaterally by national law since this would imply, by definition, a territorial partitioning of Community law which would deprive it of its 'Community' character'.[63] Or, as worded slightly differently by Prechal:

'There is room for differences, however what is important is that the frameworks within which differences are admissible and the authority on the relevant applicable regulations lie with the EC and its institutions.'[64]

In my dissertation, I propose that Timmermans essentially adopts a similar approach when he writes that the Court of Justice has the final say when it comes to interpretation of EU law.[65]

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59 R. Barents, *The Autonomy of Community Law*, The Hague: Kluwer Law International 2004, at p. 12.
60 Barents 2000, p. 243, 246-247.
61 Cf. W. van Gerven, 'Of rights, remedies and procedures', *CMLR* 37, 2000, p. 501-536 at p. 505, p. 521-522.
62 Cf. A. Prechal, *Juridisch cement voor de Europese Unie*, Groningen: Europa Law Publishing 2006, p. 14 (hereafter: Prechal 2006A).
63 Barents 2004, p. 212.
64 Prechal 2006A, p. 14 (translation by author).
65 Van Harten 2011, p. 49.

The position of these authors gives rise to the question of what the Court of Justice's monopoly or 'control over the legal rules' actually entails. Is it a monopoly in abstract terms or concrete terms?

It would be very difficult to argue the case for a monopoly in concrete terms and perhaps even *non sequitur*: in practice, the EU and its formal institutions do not actually have control over the interpretation and application of European law in specific cases. Given the importance of the national courts in the EU's judicial system and their role in offering judicial protection under European law, they cannot be dismissed as being 'without control' or as mere appliers of the law, lacking any authority. At the very least, their European law decisions have a *de facto* influence on the European legal order and bear significance for judicial protection as well as for the coherence, unity and development of European law. Furthermore, certainly not all cases involving aspects of European law end up before the Court of Justice (and thankfully so). In concrete terms, the Court of Justice shares authority over European law with the national courts when the latter pass judgment on cases involving European law.

This means that case law of the Court of Justice does not always represent the last word on such issues. In concrete terms and in day-to-day legal reality, the interpretation and application of European law is both a shared authority and responsibility for national courts and the Court of Justice.[66] To a certain extent, Timmermans seems to agree with this statement. In 2012, he wrote that although the Court of Justice answers the requests for a preliminary ruling:

'but the final say in applying the answers received belongs to the national court.'[67]

But what about in the abstract? Does the Court of Justice have a last-word monopoly in an abstract sense? In a strict legal sense, given its Treaty status outlined in Article 19 (1) TEU, this is a justifiable and easily defendable statement. The Court of Justice is the principle body that ensures that European law is observed in the interpretation and application of the Treaties, even though the innovation of the 2nd sentence of Article 19 (1) TEU seems to lead to a further strengthening of the position of national courts in the EU's judicial system as is witnessed by *Opinion 1/09* and the *Inuit* case mentioned above, while earlier case law of the Court of Justice in the past few decades has helped to give national courts a role in offering judicial protection and the safeguarding European law.

66 Cf. Parret 2009, at p. 49.
67 Timmermans 2012, p. 50.

A view that the Court of Justice should have the final authority on the interpretation of European law in an abstract sense is however, not (any longer) entirely convincing or satisfactory. The proposition is at odds with the coexistence relationship that exists between the Court of Justice and the national courts as described by Donner in the quotation above.

Moreover, a court (including the Court of Justice when making preliminary rulings) rarely issues a ruling purely in an abstract sense, but is always bound to the specific case at hand. In other words, any monopoly on the final say in an abstract sense must always be adapted to suit the concrete case before the court. The Court of Justice sometimes seems to deliberately leave the final say to the national court (e.g. in proportionality assessments, empirical research into the existence of indirect discrimination, etc.). Sometimes the interpretation of European law among the national courts is actually more refined, or even further developed than in the case law of the Court of Justice. In many European law cases in the EU, use of the preliminary reference procedure is actually the exception, and it is in fact nearly always the national courts that have the final say.

It is against this backdrop that I defend the idea that also the abstract position of who has the final authority on the interpretation of European law is partly compromised through the influence and role of national European judicial administration, and that the monopoly on interpretation in essence has developed into a dominant position for the Court of Justice whereby rulings by national courts on European norms compete with those by the Court of Justice on certain points.[68] Perhaps this qualified view of the monopoly is not yet in line with the current Treaty framework, however it does do justice to the facts, which form the basic foundations for the life of the law.

This brings us to the question of how best to understand the relationship between the European legal order and the national legal orders. This remains a subject of lively debate in European legal and, especially, constitutional doctrine. In recent times, there has been a strong focus on 'constitutional pluralism'.[69] The prediction made by Koopmans in 1994 seems to have come true. He foresaw that, by the end of the 20th century, we seemed to be entering a new period of legal pluralism, the likes of which Western Europe had not seen for roughly a century.[70] Broadly speaking, 'constitutional pluralism' is meant to refer to the phenomenon in which constitutional actors are confronted with

68 Van Harten 2011, p. 50.

69 See for example M. Poiares Maduro, *Interpreting European law – judicial adjudication in a context of constitutional pluralism*, Working Paper IE Law school 2008/02, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134503.

70 T. Koopmans, 'Sources of Law: the New Pluralism', in: *Festskrift til Ole Due*, København: G.E.C. Gads Forlag 1994, p. 190-205 at p. 202.

a plurality of constitutional sources.[71] These sources may come into conflict in a way that cannot be resolved by hierarchical considerations, as a consequence of which the individual legal system ultimately has the last word. Applied to the relationship between the European and national legal systems, both are seen as autonomous legal systems, existing alongside each other 'each being its own ultimate frame of reference with the result that the question as to a normative hierarchy of precedence does not arise'.[72] I do not necessarily consider such a constitutional pluralist approach to be fruitful. In any case, I do not believe that such a strict distinction needs to be drawn between the national legal order and the European legal order as such.[73] Although it might be desirable from the perspective of theoretical clarification, it reflects nothing of the multifaceted, fuzziness of the present-day legal reality.[74] A reality, where courts from a variety of backgrounds, legal traditions and systems, diverse legal vocabularies, diversity in remedies and diverse procedures together build and construct the European legal order in a case by case fashion.

In light of the above, it should come as no surprise that to my mind, the best way to view the relationship between European law and national law is as a shared European legal order with shared authority.[75] European law and national law are so closely linked that they form an integrated whole. The European legal order is shared by the institutions of the EU with the Member States and their various bodies. The basis for this was already laid down by the *Costa/ENEL* judgment, where the Court of Justice positioned the autonomous legal order as an 'integral part of the legal systems of the Member States'. Thanks to the development of the doctrines of direct effect, primacy and consistent interpretation and the influence of national law concepts as a source of inspiration for European legal developments, there has been integration between the national legal orders and the European legal order. European law and national law continuously interact with one another. The autonomy of European law can best be understood as a *de facto* shared autonomy. Whenever national actors fulfil

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71 However, it has become rather a fashionable term and is used in a variety of different ways. For the different approaches to the term, see for instance: M. Avbelj, J. Komárek, 'Four Visions of Constitutional Pluralism', *EUConst* 2008, 4, p. 524-527.

72 Meij 2010, p. 92.

73 This is an inherent weakness in the profound theoretical edifice set out in Barents 2004.

74 Cf. Koopmans expressed similar criticism of Kelsen's legal theory on sources of law: 'It has the advantage of great clarity and simplicity, but its fatal flaw is that it is so far removed from the actual life of the law that it can neither offer an explanation of what happens, nor a guideline for how to act.' See Koopmans 1994, at p. 193.

75 Cf. R.J.G.M. Widdershoven, 'Naar een bestuurs(proces)rechtelijk Ius Commune in Europa' [Towards a Ius Commune in Europe in substantive and procedural administrative law] (VAR-reeks 116), Alphen aan den Rijn 1996, p. 97-200 on p. 100, Jans et al. 2007, p. 7 and 18 et seq; Eijsbouts et al. 2012, chapter 11 refer in this connection explicitly to the notion of shared authority in a shared legal order. See also L.F.M. Besselink, *A Composite European Constitution*, Groningen: Europa Law Publishing 2007.

their roles within the context of European law, they also project an authority on the European legal order to a greater or lesser extent: the shared legal order entails a form of shared authority.

Such an approach also has consequences for the significance of national European case law within the European judicial system. To date, national case law on European law does not, in fact, enjoy much of an established position within European legal doctrine.[76] In the annual Commission report on the monitoring of the application of Community law, the section on the 'Application of EU law by national authorities' is generally relegated to rather a modest role in the form of an annex.[77] It is very difficult to say what level of authority should be given to national judicial decisions on the interpretation of European law. In the literature it is recognised that various European law concepts have their roots in the legal traditions of the Member States (for instance the proportionality principle, the principle of legal certainty and the conditions for state liability for breaches of European law).[78] However, when it comes to the authority of national judicial decisions on European law as a source of European legal facts, the European law textbooks are deafeningly silent and only occasionally refer to national case law mainly to illustrate the impact of European law.[79] This case law has – in any event in a concrete sense, and in some ways perhaps also in an abstract sense – a form of authority within the autonomy of European law, the European legal order, which brings us to our next port of call in our search for answers.

## 5 In Search of Shared Authority in the EU's Judicial System

If we accept that the Court of Justice and national courts share authority over European law in the EU's judicial system and both have desig-

76 This may be related to the fact that the public and private databases dealing with national judicial decisions on European law have failed to function or to function adequately in the past few decades. The current plans with regard to the European e-justice portal and the European Case Law Identifier (ECLI) may open up new possibilities.

77 See the last reports (the relevant section is usually Annex VI) at: http://ec.europa.eu/community_law/infringements/infringements_annual_report_nl.htm.

78 See for example T. Koopmans, 'Sources of Law: the New Pluralism', in: *Festskrift til Ole Due*, København: G.E.C. Gads Forlag 1994, p. 190-205, on p. 196-197, W. van Gerven, 'Bridging the gap between Community and national laws: Towards a principle of homogeneity in the field of legal remedies?', *CMLR* 32, 1995, p. 701, K. Lenaerts, 'Interlocking legal orders in the European Union and comparative law', *ICLQ* 52, 2003, p. 873-906, Timmermans 2004, p. 400, J.H. Jans et al. 2007, p. 365 et seq., R. Caranta, 'Pleading for European Comparative Administrative Law. What is the Place for Comparative Law in Europe?', *REALaw* 2, 2009, p. 159 et seq.

79 See, for instance, W.T. Eijsbouts, J.H. Jans, L.A.J. Senden & A. Prechal, *Europees recht – Algemeen Deel*, Groningen: Europa Law Publishing 2012, Jans et al. 2007.

nated tasks in the European legal context, such a view supposes significance whenever a national court passes a ruling on European legal norms: such rulings have their own expressive power, a form of authority.

The question of judicial authority is a perennial legal question. If we refine the notion of judicial authority in terms of the EU's judicial system, it turns out that whenever a national court issues a judgment concerning a European norm, it serves primarily as an evaluation and decision for the parties involved. This is the 'usual disclaimer' that applies to any court ruling. In the oft-cited words of Lauwaars and Timmermans in the Netherlands: 'Courts do not write textbooks with their rulings, but first and foremost decide on legal matters.'[80] It is true that a court's principal task and role is to adjudicate in the legal dispute between parties. Nonetheless, a broader authority might be appurtenant to the (national) court's judgment, the core of which can possess an element of authority concerning the interpretation of the law. It is in this way that a closer inspection of case law reveals trends,[81] which have a significance relating to more than just specific cases.

How is judicial authority distributed in the European Union? This is not an easy question to answer. Eijsbouts et al. once stated that it is:

'easier to agree on substantive matters than on claims to authority. It must be possible to reconcile various validity claims, without them fighting for primacy. This claim to authority is therefore commonly left in the middle between various legal bodies and not fought over, although occasionally some big words are bandied about.'[82]

It is clear that the European Court of Justice enjoys at least a dominant position of legal authority in the European system of legal administration, given its task under Article 19 (1) TEU. Both via direct actions and via the preliminary reference procedure, the Court of Justice issues authoritative rulings in concrete cases in order to ensure that European law is observed. As mentioned above, these rulings can also carry meaning that extends beyond the specific case at hand. Incidentally, the task defined under the Treaty does not mean that all questions regarding the Court's legal authority are answered. One example is that of how national courts should act in situations in which the case law of the Court of Justice itself provides multiple directions with regard to the interpretation of European law.

Very little tangible information is available on the authority of European case law at the national level, however. If we place the authority of national

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80 Cf. R.H. Lauwaars, C.W.A. Timmermans, *Europees Gemeenschapsrecht in kort bestek*, Deventer: Kluwer 2003, p. 198 (translated by author).

81 See e.g. K.J.M. Mortelmans in Kapteyn et al. 2008, at p. 577.

82 Eijsbouts e.a. 2010, p. 382 (translated by author).

European judicial administration against the background of the European legal order and the framework of the Treaties, it becomes clear that the official status of this authority is still rather vague, even though the the Court of Justice puts the role of national courts within the complete system of legal remedies resources and procedures. Donner writes:

'Even in relation to the application of community law, the national courts [are] *not subject to the authority of the community court, but stand alongside it.*'[83]

Donner implies that the national courts have some authority in the application of European law.

Prior to this, Samkalden for instance assigned a certain authority to national judgments on European law in his 1963 annotation to the *Van Gend & Loos* ruling.[84] However, it has become clear earlier in the article above that in the division of tasks between the Court of Justice and the national courts, various other authors seem to reserve control – and therefore final authority over European law (probably in the abstract sense, at least) – for the Court of Justice. Such approaches will not recognise national European case law as such as a source of law at European level. This situation is also perpetuated by the Court of Justice itself, since in the preliminary reference procedure it still maintains the strict official distinction between interpretation and application.

Based on research into Dutch case-law on the free movement of services and freedom of establishment between 1975 and 2008, I reach the conclusion in my dissertation that such a position can be somewhat qualified. In Dutch European case law, interpretations of European legal norms by national courts gain authority in various ways through national European precedents and in practice constitute an authoritative source for the interpretation of European norms.[85] In addition, various characteristics of the autonomy of national courts dealing with European law that I identify result in the emergence of judicial authority. For example, in nearly all cases (i.e. those not involving a direct action to the Court of Justice), the national court acts as the European court of first instance, finds the facts, assesses the evidence and issues the final judgment (including post preliminary ruling decisions).

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83 Donner 1972, p. 114-115 (translated by author).

84 See I. Samkalden, Annotation of Case 26/62, *Van Gend & Loos* in *SEW* 1963, p. 111-112 in which he remarks: 'The current decision was already decided by the Italian Council of State for Article 31. It demonstrates the need for a Community register of European law judgments of national courts and decisions of national administrative authorities which are directly relevant for the application of Community law. The fact that the Council decided to drop it from the draft budget of the European Commission is sad evidence of lack of insight in the way in which knowledge and interest for European law could be effectively promoted for the sake of interested parties.' (translated by author).

85 Van Harten 2011, p. 202.

Broadly speaking, perhaps all court rulings in the EU on European law are potential sources of authority. A judicial ruling on a European legal norm is a legal fact that has significance in the context of the law. To my mind, this fact need not be clothed in terms of constitutional pluralism; I myself tend to describe it more as a form of judicial pluralism within the context of a shared European legal order.

A ruling by the Court of Justice carries meaning for the entire European Union. A ruling on European law by a national court is primarily of significance in the member state in which the presiding court operates. A national ruling on a European matter also potentially possesses a broader scope, with possible material effects in other Member States by virtue of its authority regarding the interpretation of European law. This is not a necessity for the acceptance of the European judicial authority of a national ruling on European law, but additionally, it does present a (possibly major) opportunity for legal development. In recent national court practice with regard to the use of the preliminary reference procedure, one may envisage the first steps of such judicial horizontal interaction taking place. In for instance two recent preliminary references by the Dutch Council of State as administrative court of last instance in the Netherlands, other referrals to Luxembourg by courts of Germany and/or France are cited and used as a reason to also refer the case at hand.[86] In another reference by the Dutch Council of State a United Kingdom Supreme Court judgment is used to illustrate that a particular question of law is relevant in other Member States.[87] In the (near) future, such court practice may lead to some form of transnational coordination between national courts bringing particular topics under attention of the Court of Justice and allowing the Court of Justice to decide on a legal problem from a variety of cases and angles.

It is understandable that a judicial decision on European law from one Member State may be 'transplanted' to another Member State less readily than that of a judgment given by the Court of Justice. However, the same can be said of some preliminary rulings by the Court of Justice. While several preliminary rulings can be labelled as 'rulings of principle', others are rather case specific. If in a particular case a preliminary ruling is too specific to the concrete facts of the case and the national law framework in which the interpretation must be applied, the precedent setting value would be limited.

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86 See e.g. Afdeling bestuursrechtspraak van de Raad van State, 14 May 2008, ECLI:NL:RVS:2008:BD148, referring to a preliminary reference of the German Verwaltungsgericht (Joined Cases C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07, *Markus Stoss*); Afdeling bestuursrechtspraak van de Raad van State, 5 July 2013, ECLI:NL:RVS:2013:239 referring to preliminary references by the Tribunal administratif de Melun, 3 april 2013 (Case C-166/13) and the Tribunal administratif de Pau, 6 mei 2013 (Case C-249/13).

87 Afdeling bestuursrechtspraak van de Raad van State, 20 March 2013, ECLI:NL:RVS:2013:BZ4985 citing *HJ (Iran) v. Secretary of State for the Home Department* [2010] UKSC 31.

As mentioned above, the notion unity of law plays an important part in European legal doctrine. Nevertheless, there is scope for divergence and differentiation. That idea merits acceptance 'because the necessary coherence of the Community legal system can actually only be achieved by accepting and where necessary bridging differences'.[88] The Treaty of Lisbon itself lays down scope for legal diversity in the European Union by affirming and respecting the equality of its Member States, 'as well as their *national identities, inherent in their fundamental structures*, political and *constitutional*, inclusive of regional and local self-government' (Article 4 (2) TEU; emphasis added). In other words, the Treaty leaves explicit room for national constitutional identity. Furthermore, the development of the area of freedom, security and justice, will include 'respect for fundamental rights and the different legal systems and traditions of the Member States' (Article 67 (1) TFEU).

Seen in that light, the argument that the unity of European law and decisions on differentiation within European law must be reserved to the Court of Justice seems somewhat utopian. It is an illusion to assume that control, responsibility and the final authority regarding the unity of European law is exclusively a matter for the Court of Justice. The fact that national judicial decisions on European law do not always guarantee the unity of European law in the same way that the Court of Justice does, need not be problematic in itself; it is simply an essential consequence of shared authority in the shared European legal order in practice. A 'troublesome' national judicial decision on European law need not present an immediate problem either; sometimes mistakes are bound to happen. Donner spoke volumes on this subject and he observed that uniformity in the case law will remain relative as long as there continue to be a variety of judicial authorities:

'Article 177 EEC [now Article 267 TFEU] cannot therefore guarantee the uniform application of law(29). Creating the possibility of appeal to the Community court against decisions by national courts in relation to breaches of Community law might improve the unity of law in this respect, but would not guarantee it. The unity of case law will remain relative as long as there continue to be a variety of judicial authorities.

(29) Anyone making a complaint in this respect should remember that, even at national level, having a cassation procedure or procedure for the review of decisions by a supreme court cannot guarantee uniformity in the application of law. Take for instance the differences in the sentences imposed by different judges. There are many more examples as well!'[89]

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88 Prechal 2006A, p. 14 (translated by author). Similarly, see Jans et al. 2007, p. 370.
89 Donner 1972, p. 115 (translated by author).

There is no reason to take a different view now.

Unity of law is important in a judicial system, but safeguarding the balance between the various functions is more important. In legal doctrine, courts (including the highest courts) are generally considered to have three tasks in a judicial administration. These tasks can be expressed by the following concepts, which can be distinguished from each other although not completely separated:
– Judicial protection
– Unity of law
– Legal development.[90]

In the shared European legal order, there is a division between the Court of Justice of the European Union and the national courts in their role as European law courts. As was previously considered, a shared legal system also implies shared authority and shared responsibility for European law. How can the three tasks best be divided between these courts while preserving mutual respect for judicial authority?

It is submitted that all three functions arise (or may arise) in relation to the Court of Justice or the national courts. It is more a matter of differences of emphasis and priorities than of a strict separation and division between both types of European courts.

Offering judicial protection through European law in concrete cases primarily falls within the responsibility and authority of the national courts and, ultimately, the highest national courts. In this connection, the national courts must take into account general legal developments and the importance of the unity of European law so that when a judge makes a ruling on a European legal norm, it ought to be in conformity with European law. In this context, it may also be noted that the principle of effective judicial protection was primarily developed against the background of the national judicial administration and, to a much lesser extent, for the Court of Justice's litigation and preliminary reference procedure.

The refinement of certain European case law in national judicial decisions falls under the *de facto* responsibility and authority of the national courts. Even where a reference has been made for a preliminary ruling, the Court of Justice has made such a ruling and it must be 'translated' into a final decision, a further specification and interpretation takes place that is a natural task of the national

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90 See for instance the following, albeit largely geared towards the tasks and position of the highest courts, J.A. Jolowicz, C.H. van Rhee, *Recourse against judgments in the European Union*, The Hague: Kluwer Law International 1999, W.D.H. Asser, H.A. Groen, J.B.M. Vranken, in collaboration with I.N. Tzankova, *Een nieuwe balans: interimrapport fundamentele herbezinning Nederlands burgerlijk procesrecht* [A new balance: interim report on fundamental reconsideration of the Dutch law of civil procedure], The Hague: Boom Juridische uitgevers 2003, p. 210-211.

court. From the previous two points, it follows that national judicial decisions on European law help to spark new developments in European law; generally speaking, new cases will arise before the national courts first. Consequently, it can be concluded that legal development will also occur in first instance judicial decisions. This may in fact cause a form of national European law to arise or add a national refinement or 'twist' to European law, but I do not believe that this phenomenon should be rejected; it may instead be a source of development.

In the preliminary ruling procedure, I think that safeguarding the unity of law and legal development should be more important to the Court of Justice than offering judicial protection in specific cases. Support for this argument can be found in the objectives of the preliminary ruling procedure. Its main function is to safeguard the unity of law against the backdrop of ensuring that European law obtains its full effect. Furthermore, each reference for a preliminary ruling is based on one or more legal questions, which means almost by definition, given the authority of its interpretations, that the Court of Justice has an essential role to play in legal development. This is underlined by the history of European law over the last few decades. The case law of the Court of Justice has in fact been fundamental for the development of the core doctrines of European law (i.e. direct effect, primacy, consistent interpretation, state liability, but also procedural autonomy, protection of fundamental rights). Naturally, the concept of judicial protection is a recurring theme in relation to all of those developments. In its preliminary rulings, the Court of Justice has often paid particular attention to the development of rights that legal subjects can derive from European law.[91] Nevertheless, when it comes to allocating the aforementioned three judicial functions within the European justice administration system, despite the essential role played by the national courts in offering judicial protection, the Court of Justice is a more natural forum for safeguarding the unity of law and legal development.

Given the allocation of tasks outlined above, the subsidiarity principle may play a significant role and be further operationalised. European law leaves scope for action to be taken at the national level, a principle explicitly laid down in what is now Article 5(3) TEU:

'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

91 See for instance Koopmans 1994, Eilmansberger 2004, p. 1201-1231.

Perhaps the subsidiarity principle can offer guidance in relation to allocating authority to judicial decisions in the EU and the functions of the courts in the future. Certain functions (for instance, offering judicial protection in specific cases, further refining the law, applying the proportionality test) would appear to me to be more appropriate at the level of the national court, whereas, for the sake of the unity of law and legal development, the Court of Justice would appear to be *locuta, causa finita* for judgments determining matters of principle and laying down guidance.

## 6 Further Discovery

Has our knowledge increased since reading the above? Surprisingly, very little perhaps, the cooperative relationships between courts in the shared European legal order continue to pose intriguing questions of judicial authority, coherence and division of tasks between courts. Although we will most likely never find definitive answers, we may find temporary ones. To me, it seems clear that judicial hierarchy does not provide a satisfactory answer that truly provides a proper understanding of the old and new transnational judicial relationships. Or, to use Meij's words:

'Instead of forming a part or the apex of a single hierarchical system, the courts have now become mediators or brokers of legal claims from different sources and orders. This has radically changed the nature of their functions.'[92]

While the Court of Justice has a dominant position on the most principled legal questions of European law and will provide the most authoritative interpretation of European law, the courts in the Member States also have their own, specific role to play with regard to European law and in the EU's judicial system which cannot be underestimated and ignored.

Which court has the final say? That all depends. Time plays an important part in this respect. Over time, for example, it may initially be the national courts that have the final say in certain cases within the European legal order, whose words are then superseded by new interpretations or refinements by the Court of Justice, which can in turn be further refined within the context of national European case law. Over time, conflicts of interpretation are reconciled through a series of concrete disputes. A leading role is played by the national courts, who are fully integrated into the EU's judicial system and have the main responsibility for the effective enforcement of European law.[93] In this context, the

92 Meij 2010, p. 90.
93 Cf. Timmermans 2012, p. 23.

Court of Justice shares authority on European law with the national courts in the Member States. However, the precise effect that European-law rulings by national courts will have on the development of European law is not yet clear. I therefore invite you to continue to (re)search, and discover.