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# THE ROLE OF THE NATIONAL JUDGE IN A EUROPEAN JUDICIAL AREA FROM AN INTERNAL MARKET TO CIVIL COOPERATION

Marjolaine ROCCATI\*

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The idea of a European judicial area could be surprising since European law is applied in Member States alongside with domestic law. Indeed, it has very early been stated, in a ruling of the European court of justice – hereafter the E.C.J., that “it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law”,<sup>1</sup> referred later as the principle of procedural autonomy. Therefore, the European judicial area should leave room to a juxtaposition of domestic judicial areas.

Nonetheless, the European legislator was given specific attributions by Member States to build an area of justice, freedom and security, duly separated from the internal market. The European judicial area seems to refer to this European space, born with the Amsterdam Treaty in 1997. This space covers policy areas that range from management of the European Union’s external borders to judicial cooperation in civil and criminal matters. Regarding judicial cooperation in civil matters, numerous legal instruments have been adopted since the entry into force of the Amsterdam Treaty. Through enactment of various judicial rules, they aim to improve collaboration between Member States in the resolution of cross border litigations. The European judicial area could be confused with this specific area of justice.

In fact, the European judicial area refers to a broader space than this specific area of justice. The E.C.J. has originally made clear that the principle of procedural autonomy applies “in the absence of community rules on the subject”.<sup>2</sup> European judicial rules are not to be found only in the area of justice, freedom and security. Many E.U. instruments on various subjects contain spare judicial rules elaborated to ensure protection of rights derived from other provisions. Furthermore, European authorities have brought limits on domestic judicial rules to ensure protection of the rights guaranteed by European law. The E.C.J. plays a major part in this respect. These different ways of building legal protection of European rights are also parts of the European judicial area.

More than the European legislator or the E.C.J., the national judge is the central figure of this European judicial area. Privileged interlocutor of the E.C.J., he is also the direct addressee of instruments in judicial cooperation in civil matters, which do not need any transposition law to be enforceable in Member States. With the increase of rules composing this European judicial area, the national judge faces as well a new dimension in his role: developing horizontal cooperation with other judges in the European Union. Enforcement of European rights used to be considered only in a vertical way, through the relationship between European authorities and national judges of each Member State. The development of horizontal cooperation among judges constitutes the first step of a real horizontal European justice.

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<sup>1</sup> Judgments of 16 December 1976, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case 33-76 and *Comet BV v Produktschap voor Siergewassen*, Case 45-76.

<sup>2</sup> *Idem*.

All these components of the role of the national judge in the European judicial area deserve a regain of attention. In order to analyse this role, it is interesting to examine the role of the national judge compared to the national legislator and then his role compared to other European actors, *i.e.* the European legislator and the E.C.J. Indeed, if such a role seems to be clearly recognized and admitted in the domestic legal order (I), it remains to be reinforced and is mainly expected in the European legal order (II).

## **I. An Asserted Role in the Domestic Legal Order**

The role of the national judge in ensuring this European judicial area is particularly important, given the number of judicial rules dealing with this matter. Therefore, highlighting the role of the national judge implies previous developments on these judicial rules, composed of European restrictions brought directly to domestic judicial rules (A) and to the application of these rules (B).

### **A. European Restrictions on National Judicial Rules**

European restrictions on domestic judicial norms operate in different manners. On one hand, general restrictions on domestic judicial rules may directly derive from the elaboration of European rules (1). On the other hand, particular restrictions aim more specifically at controlling domestic judicial rules (2).

#### ***1. General Restrictions Derived from the Elaboration of European Rules***

European judicial law occupies a specific area, elaborating rules in judicial cooperation in civil matters. Outside this area, European law has also brought restrictions on domestic judicial rules to ensure enforcement of rights contained in several European instruments. These two types of general restrictions on domestic judicial rules (a) may be compared (b).

##### ***a) Two Types of Restrictions of Domestic Law by European Judicial Rules***

The intervention of the European Union on judicial rules has operated through the intervention of the European legislator as well as the E.C.J. The legislator introduced judicial provisions in many instruments, to ensure that rights inserted in the rest of the concerned instruments were enforced in front of national courts. Indeed, in several directives or regulations, the European legislator has inserted some judicial provisions. Some of them invite Member States to provide for review

procedures<sup>3</sup> or give precisions on the burden of proof between litigants.<sup>4</sup> Other provisions specify such procedures, which could lead Member States to create new review procedures.<sup>5</sup>

In parallel, the E.C.J. has elaborated a set of principles to ensure the enforcement of rights contained in European instruments. The cornerstone is probably the principle of sincere cooperation, initially grounded on article 5 EEC Treaty<sup>6</sup> and now expressly formulated by article 4 § 3 of the Treaty on European Union. This principle has been broadly interpreted by the E.C.J., who has extended this obligation to national courts.<sup>7</sup> Together with the principles of immediate application and primacy<sup>8</sup> as well as direct effect,<sup>9</sup> the E.C.J. ensures the effectiveness of rights derived from European rules in domestic legal orders.

Such an action is nonetheless limited, as being solely related to the specific instrument which contains judicial provisions or which is interpreted by the E.C.J. The judicial protection may thus vary from one European instrument to the other, because of the lack of a general and coordinated intervention. Such an intervention does already exist, for judicial provisions that compose the specific area of judicial cooperation. This field has its first foundations in the Rome Treaty, which started to build cooperation between Member States, leading to the conclusion of

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<sup>3</sup> See for instance Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, *OJ L* 143, 30.4.2004, p. 64, Article 13; Directive 92/59/EEC of 29 June 1992 on general product safety, *OJ L* 228, 11.8.1992, p. 30, Article 14.

<sup>4</sup> See for instance Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, *OJ L* 14, 20.1.1998, p. 6–8; Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L* 1, 4.1.2003, p. 10, Article 2.

<sup>5</sup> See for instance Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, *OJ L* 395, 30.12.1989, p. 33-35 and Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, *OJ L* 76, 23.3.1992, p. 14-20; both modified by Directive 2007/66/EC of 11 December 2007; Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L* 95, 21.4.1993, p. 32, Article 7 on the necessity to enable organizations to take action.

<sup>6</sup> Article 5 of the EEC Treaty was thus formulated: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. [...]”

<sup>7</sup> Judgment of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, case 14/83, § 26: “The Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 of the Treaty [...], is binding on all the authorities of Member States including, for matters within their jurisdiction, the Courts”.

<sup>8</sup> Judgment of 15 July 1964, *Flaminio Costa v E.N.E.L.*, case 6/64.

<sup>9</sup> Judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, case 26-62.

international conventions such as the Brussels convention.<sup>10</sup> Nonetheless, the major step in the construction of a judicial European area is related to the entry into force of the Amsterdam Treaty, whereby judicial cooperation in civil matters was transferred to European institutions.<sup>11</sup>

On the basis of orientations given in Tampere in October 1999 and by following European Councils,<sup>12</sup> many instruments have been enacted. Some of them contain provisions on jurisdiction and enforcement of judgments,<sup>13</sup> others provide for entire European procedures<sup>14</sup> or contain rules on service of documents<sup>15</sup> or related to taking of evidence.<sup>16</sup> This area of judicial cooperation in civil matters, which seemed to be dependent of the internal market, may pursue other objectives than the proper functioning of the market.<sup>17</sup> Alongside with the traditional objective of mutual recognition of judgments, without barriers, in the European Union, the

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<sup>10</sup> Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, based on Article 220 of EEC Treaty.

<sup>11</sup> Title IV of the EC Treaty, Article 65.

<sup>12</sup> The Hague in November 2004; Stockholm in May 2010.

<sup>13</sup> Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ L* 160, 30.6.2000, p. 1-18; Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 12, 16.1.2001, p. 1-23; Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, *OJ L* 338, 23.12.2003, p. 1-29; Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ L* 7, 10.1.2009, p. 1-79.

<sup>14</sup> Regulation (EC) No. 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJ L* 143, 30.4.2004, p. 15-39; Regulation (EC) No. 1896/2006 of 12 December 2006 creating a European order for payment procedure, *OJ L* 399, 30.12.2006, p. 1-32; Regulation (EC) No. 861/2007 of 11 July 2007 establishing a European small claims procedure, *OJ L* 199, 31.7.2007, p. 1-22; Regulations “order for payment” and “small claims procedure” contain uniform procedures from introduction of action to enforcement of decision, whereas Regulation “European Enforcement Order” aims only to simplify recognition of a judgment rendered in compliance with internal procedure of another Member State.

<sup>15</sup> Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, *OJ L* 160, 30.6.2000, p. 37-52; now repealed by Regulation (EC) No. 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), *OJ L* 324, 10.12.2007, p. 79-120.

<sup>16</sup> Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, *OJ L* 174, 27.6.2001, p. 1-24.

<sup>17</sup> See Article 81 § 2: “the European Parliament and the Council [...] shall adopt measures, particularly when necessary for the proper functioning of the internal market”; the adjunction of the term “particularly” shows that other aims may be pursued by European authorities.

necessity to provide easier access to justice for all citizens<sup>18</sup> and to strengthen mutual trust has been reasserted.<sup>19</sup>

Thus, the European authorities intervene in the judicial area of Member States. On the one hand, they create a specific area of judicial cooperation in civil matters and on the other hand, they adopt more widespread restrictions on judicial domestic rules to ensure the effectiveness of rights issued from European instruments. A parallelism may be made between these two ways of European intervention.

#### *b) A Parallelism Between the Two Types of Restrictions*

European institutions seem to use indifferently the means they have at disposal for the construction of this European judicial area. These different means are leaning towards a common objective: the elaboration of a right to an effective legal protection in front of national Courts.

Indeed, European instruments have normally different effects in internal legal orders. A classification is usually drafted, with the distinction between unification, harmonisation and coordination, the latest having usually a specific meaning in the European context.<sup>20</sup> Nonetheless, the area of judicial cooperation in civil matters reveals how difficult it is to determine if the instruments enacted aim specifically at unifying, harmonising or coordinating domestic procedures. For instance, a regulation, whose nature is to unify, creating a European Enforcement Order for uncontested claims,<sup>21</sup> has established minimum standards,<sup>22</sup> which are normally used by directives in order to harmonize domestic rules. Furthermore, the European intervention in this field seems to be limited to a simple “coordination” of judicial procedures in Member States. However, the European legislator may also suggest a European model to be followed by the parties, such as the European order for payment procedure<sup>23</sup> or the European small claims procedure.<sup>24</sup> Nonetheless, such procedures are not replacing other domestic procedures but coexist with the formers. Unification, harmonisation and cooperation appear thus to interact in judicial cooperation in civil matters. There is no direct equation between the type of instrument and the level of integration operated.

The action of the E.C.J. is grounded on different principles, which tend to interact as well. For instance, even if the principle of direct effect has been presented as deriving from the principle of sincere cooperation,<sup>25</sup> the E.C.J. may

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<sup>18</sup> The Stockholm Programme — An open and secure Europe serving and protecting citizens, *OJ C* 115, 4.5.2010, p. 1-38, § 3.4.1.

<sup>19</sup> *Ibid.*, § 3.1 et 3.2.

<sup>20</sup> See Articles 5 and 6 TFEU.

<sup>21</sup> Regulation (EC) No. 805/2004, aforementioned.

<sup>22</sup> See whereas (12).

<sup>23</sup> Regulation (EC) No. 1896/2006, aforementioned.

<sup>24</sup> Regulation (EC) No. 861/2007, aforementioned.

<sup>25</sup> Judgment of 27 February 1980, *Hans Just I/S v Danish Ministry for Fiscal Affairs*, case 68/79, § 25.

also refer to the principles of immediate application and primacy as well as direct effect in the same decision<sup>26</sup> to ensure the application of rights guaranteed by European law. The E.C.J. may also have relied solely on “the effectiveness of Community law”.<sup>27</sup> Furthermore, the application of such principles may evolve. Direct effect has thus been denied and subsequently granted to the same disposition.<sup>28</sup> It is therefore difficult to determine a role specifically attributed to any of these principles. They may be used indifferently to ensure the effectiveness of European law.

Both the European legislator and the E.C.J. use indifferently several means, but these means appear to lean towards the same objective: the construction of a right to legal protection in front of national Courts.

The action of the European Union is evaluated according to the “objectives set out in the Treaties”.<sup>29</sup> As far as the judicial cooperation in civil matters is concerned, such objectives seem to be related to an easier access to justice in reducing obstacles for litigants involved in cross-borders cases. Access to justice is similar to legal protection, whose reference may be found since 1991 in the internal market area.<sup>30</sup> For the latter, objectives set out in European instruments require ensuring in front of national Courts legal protection of rights contained in such instruments. This right to a legal protection has thus to be developed in the different areas of the European Union, from the internal market to judicial cooperation. In that sense, the Lisbon Treaty has introduced a general reference in the UE Treaty, according to which “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.<sup>31</sup>

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<sup>26</sup> Judgment of 17 May 1972, *Orsolina Leonesio v Ministero dell'agricoltura e foreste*, § 21 and 22.

<sup>27</sup> Judgment of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, case C-213/89, § 20; Judgment of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, joined cases C-46/93 and C-48/93, § 20.

<sup>28</sup> See for an example Article 6 of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ L 39*, 14.2.1976, p. 40-42; Judgment of the Court of 10 April 1984, *Sabine von Colson* (note 7), § 27, and then judgment of the Court of 2 August 1993, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, case C-271/91, § 36.

<sup>29</sup> See for instance Article 352 § 1 TFEU: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties...”.

<sup>30</sup> Judgment of 21 February 1991, *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*, joined cases C-143/88 and C-92/89.

<sup>31</sup> Article 19 § 1 TEU.



## 2. *Particular Restrictions Focused on the Control of Domestic Rules*

Legal protection is not just a broad concept whose concrete applications are left to the Member States. In order to apply this concept, the European legislator and the E.C.J. exercise a direct control on domestic rules in the judicial field. The control is traditionally exercised through the principles of equivalence and effectiveness (a). Another principle has also been encountered in civil cooperation which tends to the same aim, the principle of mutual trust (b).

### a) *The Equivalence and Effectiveness Principles*

The E.C.J. developed the equivalence and effectiveness principles in 1976, just after having asserted that each Member State designates the courts having jurisdiction and determines the procedural conditions governing actions intended to ensure the protection of the rights derived from European law.<sup>32</sup> Indeed, the Court immediately added that “such conditions cannot be less favourable than those relating to similar actions of a domestic nature”<sup>33</sup> and cannot render “virtually impossible or excessively difficult”<sup>34</sup> the exercise of rights conferred by Community law.

Through these principles of equivalence and effectiveness, the E.C.J. is not formulating a general standard but checks on a case-by-case basis whether domestic procedural rules ensure the legal protection of rights contained in European instruments. The Court has thus stated, concerning the principle of effectiveness, that “each case [...] must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances”.<sup>35</sup> The domestic context in which the contested rule is grounded explains that in many decisions, the E.C.J. refers to the national judge for their concrete application.

The equivalence and effectiveness principles cannot be easily delimited as they depend on the domestic context. Furthermore, as far as the principle of equivalence is concerned, it is difficult to evaluate if domestic procedures are “similar”. As regards the principle of effectiveness, an exercise “excessively difficult” of rights conferred by Community law may be as well difficult to establish. These principles thus give a great room for manoeuvre in their interpretation and may be considered as the direct vectors of legal protection of European law in front of national Courts. Indeed, the E.C.J. has referred to the “Community principles of effectiveness and equivalence of judicial protection”.<sup>36</sup>

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<sup>32</sup> Judgments of 16 December 1976, *Rewe* and *Comet* (note 1).

<sup>33</sup> *Idem*.

<sup>34</sup> *Idem*; condition precised in a later case: see Judgment of 9 November 1983, *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, case 199/82, § 14.

<sup>35</sup> Judgment of 14 December 1995, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, case C-312/93, § 14.

<sup>36</sup> Judgment of 24 April 2008, *Arcor AG & Co. KG, v Bundesrepublik Deutschland*, intervening party: *Deutsche Telekom AG*, case C-55/06, § 190.

In the area of judicial cooperation in civil matters, the E.C.J. ensures that domestic judicial rules do not impair effectiveness of European instruments. The Court was already doing this control with the application of the previous Brussels convention.<sup>37</sup> More than an application of equivalence and effectiveness principles, such restrictions may directly be related to the “useful effect” of any European instrument.

Alongside with these principles ensuring legal protection, in front of national Courts, of rights contained in EU instruments, the E.C.J. seems to use another type of control in the area of judicial cooperation in civil matters, related to the mutual trust principle.

#### *b) The Mutual Trust Principle*

In the area of judicial cooperation in civil matters, many European instruments contain references to a principle or concept of mutual trust.<sup>38</sup> Nonetheless, such references are to be found in recitals of the concerned regulations and are not legally binding. The European legislator relies on the principle of mutual trust to elaborate a principle of mutual recognition. The latter aims at removing obstacles to the free movement of judgments. This interpretation has been followed by the E.C.J.<sup>39</sup>

Nonetheless, principles of mutual trust and mutual recognition do not receive the same meaning in the area of judicial cooperation than in other fields of European law, in particular the internal market. Indeed, already in the *Cassis de Dijon*<sup>40</sup> case, the E.C.J. asserted the free movement of goods but also made clear that obstacles must be accepted when requirements laid down by the State of origin are deemed to be insufficient. Therefore, mutual recognition should not be confused with complete freedom of movement and the sole removal of intermediate barriers. In judicial matters, the E.C.J. has once characterized a restriction but has considered it justified by overriding reasons in the general interest.<sup>41</sup> This traditional meaning of mutual recognition should be transposed to the area of judicial cooperation in civil matters.

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<sup>37</sup> Judgment of 15 May 1990, *Kongress Agentur Hagen GmbH v Zeehaghe BV*, case C-365/88, § 20.

<sup>38</sup> See for instance whereas (22) of Regulation (EC) No. 1346/2000, aforementioned; whereas (21) of Regulation (EC) No. 2201/2003, aforementioned.

<sup>39</sup> For an application concerning Regulation (EC) No. 1346/2000, see Judgment of 2 May 2006, *Eurofood IFSC Ltd*, case C-341/04, § 40.

<sup>40</sup> Judgment of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, case 120/78.

<sup>41</sup> Judgment of 12 December 1996, *Reisebüro Broede v Gerd Sandker*, case C-3/95; in this case, the national rule prohibited an undertaking established in another Member State from securing judicial recovery of debts on the ground that the exercise of that activity in a professional capacity was reserved to the legal profession. The objective accepted was to protect recipients of services against the harm which they could suffer as a result of using the services of persons not possessing the necessary professional or personal qualifications and to safeguard the proper administration of justice.

Furthermore, the E.C.J. extended implications of mutual trust, using this principle at an earlier stage, in applying rules of *lis pendens*<sup>42</sup> and jurisdiction. Indeed, in the *Gasser*,<sup>43</sup> *Turner*<sup>44</sup> and *West Tankers*<sup>45</sup> cases, the E.C.J. justified a strict compliance to European rules by the principle of mutual trust. According to the E.C.J., mutual trust comes from a common agreement of Member States. As they have agreed to be bound by common rules in adopting European Regulations, they transferred to the E.C.J. the competence to enforce these rules and to make sure that they prevail. Therefore, mutual trust may be seen as a tool at disposal of the European legislator, who on the same time also encourages Member States to develop it.

In fact, the E.C.J. could have based its decisions directly on the effectiveness principle rather than the principle of mutual trust, to achieve the same results. Nonetheless, the Court has chosen to ground its decisions on the principle of mutual trust in order to depart from a vertical control between the Court and the national judge. The invocation of such a principle reasserts the role of mutual trust in the adoption of common rules. As a consequence, the E.C.J. does not blame national judges for having violated EU law but for having mistrusted their neighbours. The shift in the grounds of its restrictions is therefore highly symbolical.

## **B. European Restrictions on the Application of National Judicial Rules**

The European intervention does not apply in a static way on domestic rules. The European legislator and the E.C.J. pay particular attention to the national judge, who ensures legal protection of rights derived from European law (1). This preeminent role in applying European rules gives to the national judge a new authority towards the national legislator (2).

### **1. The National Judge, Relay of European Intervention**

The national judge is the necessary vector of the application of European rules. This long-standing role in European history has pre-existed in the internal market (a). Together with this traditional role, the national judge is also the direct addressee of the European legislator to apply the judicial cooperation in civil matters provided for in European regulations (b).

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<sup>42</sup> *Lis pendens* occurs where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, see Article 27 of Regulation (EC) No. 44/2001 of 22 December 2000, aforementioned.

<sup>43</sup> Judgment of 9 December 2003, *Erich Gasser GmbH v MISAT Srl*, case C-116/02, § 72.

<sup>44</sup> Judgment of 27 April 2004, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, case C-159/02, § 24.

<sup>45</sup> Judgment of 10 February 2009, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*, case C-185/07, § 30.

a) *A Pre-Existing Function Necessary for the Internal Market*

The national judge has first and foremost a function of guardian in the internal market. The national judge ensures that domestic rules respect European law. To this end, any judge, even a judge of first instance, may refer for a preliminary ruling in interpretation and validity to the E.C.J. and is not bound by the ruling of a superior court.<sup>46</sup>

Furthermore, the E.C.J. elaborated an obligation for national judges to raise of their own motion an issue concerning the breach of provisions of European law, if examination of that issue would not oblige them to go beyond the ambit of the dispute defined by the parties themselves.<sup>47</sup> Thus, the European court transformed a possibility for national judges into an obligation. The E.C.J. also sets conditions and permits to prescribe any necessary interim measure when judges are faced to European violations.<sup>48</sup> Finally, once a violation has been established, the E.C.J. empowered the national judge to hold its Member State responsible<sup>49</sup> and compel it to refund national charges which have been levied in breach of European law.<sup>50</sup> The Court also set aside domestic rules which could prevent from such a refunding, such as the condition to produce proof that charges have not been transferred to third parties.<sup>51</sup>

The national judge is not only the guardian of European law, ensuring that violations by Member States are sanctioned in front of a court. He also promotes objectives of the European Union. Indeed, even if there is no violation of a European law provision, the E.C.J. has considered that “effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate [unfair terms of a contract] of its own motion”.<sup>52</sup> The Court has thus

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<sup>46</sup> Judgment of 16 January 1974, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, case 166-73.

<sup>47</sup> Judgment of 14 December 1995, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*. - References for a preliminary ruling: *Hoge Raad – Netherlands*, joined cases C-430/93 and C-431/93, § 15.

<sup>48</sup> Judgment of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, case C-213/89, § 21 and § 23; Judgment of 21 February 1991, *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*, joined cases C-143/99 and C-92/89, § 27; Judgment of 9 November 1995, *Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft*, case C-465/93, § 51.

<sup>49</sup> Judgment of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, joined cases C-6/90 and C-9/90.

<sup>50</sup> Judgment of 27 February 1980, *Hans Just I/S v Danish Ministry for Fiscal Affairs*, case 68/79, § 27.

<sup>51</sup> Judgment of 9 November 1983, *Amministrazione delle Finanze dello Stato* (note 34), § 18.

<sup>52</sup> Judgment of 27 June 2000, *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98), § 26; Judgment of 26 October 2006, *Elisa María Mostaza Claro v Centro*

precluded a procedural rule preventing the national court from doing so, on expiry of a limitation period.<sup>53</sup> Together with the objective of protection of the consumer, European rules on competition may justify the same behaviour from the national judge.<sup>54</sup> The question lies in a possible extension of this case-law to other objectives of the European Union.

Decisions of the E.C.J. do not only concern the duty of the national court to examine of its own motion certain terms of contracts. In some decisions, the Court reversed the burden of proof, in various areas of European law, such as non-discrimination between men and women<sup>55</sup> or free movement of goods.<sup>56</sup> These decisions show a range of possible adjustments of domestic judicial rules in order to ensure effectiveness of European law. These adaptations shall be done by the national judge, on the request of the Court of justice. This preeminent role of the national judge in its domestic legal order may be noticed in the area of judicial cooperation in civil matters as well, following a choice of the European legislator.

#### *b) A Desired Function in Civil Cooperation*

While enacting European regulations on judicial cooperation in civil matters, the European legislator has relied on the national judge for the development of mutual trust between Member States.

In fact, the national judge has the possibility to limit mutual trust when it conflicts with the proper administration of justice. For instance concerning service of documents, he “may give judgment even if no certificate of service or delivery has been received, if [among other conditions] no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed”.<sup>57</sup> In parallel, mutual trust between Member States may be improved notably through the initiatives of national judges. For instance, the French Supreme Court has granted an appeal on jurisdiction even though the Court of Appeal had not ruled on the

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*Móvil Milenium SL*, case C-168/05, § 39; Judgment of 4 June 2009, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, case C-243/08, § 35.

<sup>53</sup> Judgment of 21 November 2002, *Cofidis SA v Jean-Louis Fredout*, case C-473/00, § 38.

<sup>54</sup> Judgment of 4 June 2009, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, case C-126/97, § 41.

<sup>55</sup> Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, case 109/88.

<sup>56</sup> Judgment of 8 April 2003, *Van Doren + Q. GmbH v Lifestyle sports + sportswear Handelsgesellschaft mbH and Michael Orth*, case C-244/00.

<sup>57</sup> Regulation No. 1393/2007 on service of documents, aforementioned, Article 19 § 2.

substance of the case,<sup>58</sup> in order to determinate jurisdiction of courts as fast as possible in cross-border context.

Further strengthening of mutual trust will be possible through the development of direct cooperation between judges, without the need of any diplomatic entity, which is the major innovation of regulations in this area. Indeed, the legislator decided to adopt mechanisms of a concrete collaboration between judges to improve judicial cooperation between Member States in civil matters. This cooperation is particularly important in the field of taking of evidence,<sup>59</sup> where the judges clearly collaborate to this aim, but may also be found in other instruments of judicial cooperation in civil matters. For instance, if a competent court considers that a court of another Member State is best suited to hear a case on parental responsibility, courts shall cooperate to decide whether the case should be transferred or not.<sup>60</sup> As regards the same instrument, the E.C.J. has also encouraged national courts to cooperate in cases of *lis pendens*.<sup>61</sup>

This direct cooperation between judges may be supported by the European judicial network in civil matters.<sup>62</sup> Networks in the administration of justice already existed in other areas of the European Union. The European competition network is now well established between the different authorities of Member States. However, the application of common rules on competition – articles 101 and 102 TFEU – facilitates its functioning. Indeed, there is no such cooperation between national courts in the same area. As regards the European judicial network, it has first appeared in criminal matters.<sup>63</sup> This network was intended to favour establishment of appropriate contacts between contact points in Member States, organise periodic meetings and provide a certain amount of up-to-date background information. Parallel activities take place in the judicial network in civil matters, thus enabling direct cooperation to be strengthened. Improvement of direct cooperation will then necessarily permit to develop mutual trust between judges.

This new authority of national judges to apply European law has also enabled them to gain authority towards national legislators.

## **2. The National Judge, Leading the Evolution of Domestic Rules**

Domestic law is influenced by European law. The national judge may conduct this influence in applying European law in some occasions beyond what seemed to be

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<sup>58</sup> Cour de cassation, 1<sup>ère</sup> chambre civile, 7 May 2010, No. 09-11177, No. 09-11178 & No. 09-14324.

<sup>59</sup> Regulation (EC) No. 1206/2001, aforementioned.

<sup>60</sup> Regulation (EC) No. 2201/2003, aforementioned, Article 15 § 6.

<sup>61</sup> Judgment of 9 November 2010, *Bianca Purucker v Guillermo Vallés Pérez*, case C-296/10, § 81.

<sup>62</sup> Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, *OJ L* 174, 27.6.2001, p. 25-31.

<sup>63</sup> Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, *OJ L* 191, 7.7.1998, p. 4-7.

its initial boundaries (a). Furthermore, if some major reforms related to the influence of European law are passed by the national legislator, the national judge has an important role in interpreting such new rules in compliance with EU law (b).

a) *Extension of European Law*

European law may extend to domestic situations. This expansion can be explained by the difficulty to determine precisely what a European situation is. For instance in the internal market, the E.C.J. has applied provisions relating to freedom of movement to situations which could be considered as purely internal to a Member State.<sup>64</sup> In the area of judicial cooperation in civil matters, European regulations do not adopt the same criteria in order to define the situations they cover. Although the regulation in matrimonial matters and matters of parental responsibility contains a list of criteria,<sup>65</sup> the European situation covered by the Regulation creating a European order for payment procedure<sup>66</sup> is much more restrictive, for instance.

The difficulty to determine if one situation is falling into the scope of European rules may give rise to the application of European law to domestic situations. For example, a British Court of Appeal relied on an E.C.J. case in a domestic litigation.<sup>67</sup> Indeed, Lord Justice explained that it is “anomalous that, as a result of *Reg. H v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* (Case C 213/89) [1991] 1 A.C. 603 and the operation of European Community law, [the courts] now have comprehensive powers even where a central government is involved, but only in relation to rights under Community law”.<sup>68</sup> The E.C.J. may thus give to the national judge a range of tools that could be used in internal situations.

Extension of European law may then be found in situations involving third States. The E.C.J. has made clear that a judge having jurisdiction under a European instrument cannot transfer the case to a third State on the basis of a domestic procedural tool – in this case the exception of *forum non conveniens*.<sup>69</sup>

Furthermore, European provisions on competition law and protection of consumers have been included in the public policy exception and opposed to

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<sup>64</sup> Judgment of 2 October 2003, *Carlos Garcia Avello v Belgian State*, case C-148/02; Judgment of 8 March 2011, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, case C-34/09.

<sup>65</sup> Regulation (EC) No. 2201/2003 of 27 November 2003, aforementioned, Article 3.

<sup>66</sup> Regulation (EC) No. 1896/2006 of 12 December 2006, aforementioned, Article 3.

<sup>67</sup> Court of Appeal, *M. v. Home Office*, 29 November 1991, [1992] 4 All ER, p. 139; [1992] Q.B., p. 270.

<sup>68</sup> [1992] Q.B., p. 306-307, §§ C and A.

<sup>69</sup> Judgment of 1 March 2005, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, case C-281/02.

arbitral awards.<sup>70</sup> They may be opposed as well to decisions not covered by European instruments such as decisions rendered in third States. Nonetheless, the application of an exception of “European public policy” may so far have been justified by the existence of numerous connecting factors between the situations concerned and Member States, through the place of arbitration or the law applied by arbitrators. Before integrating such rules in its public policy exception, the national judge may similarly control if there is a sufficient link between the European Union and the situation to be recognized.

All these illustrations reveal a willingness to apply European law beyond what seemed to be its initial boundaries. The role of the national judge is particularly important in such an extension. Nonetheless, the role of the national judge should not be neglected as regards domestic reforms passed by the legislator due to the application of European law.

#### *b) Domestic Reforms Due to the Application of European Law*

There are different kinds of domestic reforms due to the application of European law. Reforms may be necessary for its application or may be spontaneous, European law being followed as a model by the national legislator. In both cases, the national judge has an important part to play.

Firstly, the national legislator implements rules that are necessary for the application of European law. Even European regulations, directly applicable in domestic legal orders, may give rise to some domestic measures of implementation.<sup>71</sup> Furthermore, domestic rules contrary to European law must be repealed.<sup>72</sup> The intervention of the legislator is essential, but the national judge is also in charge of ensuring effectiveness of European law. Initially related to the legislation adopted for the implementation of a directive, the technique of consistent interpretation enables the judge to “interpret and apply the legislation [...] in conformity with the requirements of community law, in so far as it is given discretion to do so under national law”.<sup>73</sup> This discretion has been broadly interpreted. For instance, the E.C.J. has invited the national judge to refer to general provisions of civil and labour law and set aside provisions normally applicable to reparation in case of discrimination as regards access to

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<sup>70</sup> Judgment of 1 June 1999, *Eco Swiss China Time Ltd v Benetton International NV*, case C-126/97; Judgment of 26 October 2006, *Elisa María Mostaza Claro* (note 52); Judgment of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, case C-40/08; Order of 16 November 2010, *Pohotovost' s.r.o. v Iveta Korčková*, case C-76/10.

<sup>71</sup> In France, see for instance *Décret n°2008-1346 du 17 décembre 2008 relatif aux procédures européennes d'injonction de payer et de règlement des petits litiges (J.O.R.F. n°295 du 19 décembre 2008)*.

<sup>72</sup> For instance, the Italian legislator has enacted a law in 1990 and 2007 in order to comply with the judgment of the E.C.J. of 9 November 1983, *Amministrazione delle Finanze dello Stato* (note 34).

<sup>73</sup> Judgment of 10 April 1984, *Sabine von Colson* (note 7), § 28.



employment.<sup>74</sup> Whenever possible, the national judge must interpret domestic rules in compliance to European law. He thus compensates the eventual lack of intervention of the national legislator.

In other cases, the national legislator may have spontaneously reformed domestic law. In these situations, European law is used as a model for domestic law. For instance, the French legislator has extended the application of European review procedures, related to public supply and public works contracts, to other domestic situations.<sup>75</sup> In Italy, the statute on private international law adopted in 1995 uses the same criteria than the Brussels convention outside its scope of application.<sup>76</sup> When applying such domestic rules, the national judge may seek a preliminary ruling from the E.C.J. on interpretation of European law which served as a source of inspiration. The European Court has always retained jurisdiction to interpret European rules even though they are not legally binding, since domestic rules inspired by them are enacted outside the scope of European law.<sup>77</sup>

When applying domestic rules implementing European instruments or only inspired by such instruments, the national judge has to adopt reconciling interpretation between domestic and European rules. To this aim, he has a great room of manoeuvre and asserts his authority in the domestic legal order. This authority has now to be extended in front of the European legislator and the E.C.J.

## II. An Expected Role in the European Legal Order

The importance of the national judge in his domestic legal order seems to contrast with his apparent timidity in the European legal order. Able to stand up to the national legislator, the national judge would be under the authority of the European legislator and the E.C.J. in the European legal order. In fact, the national judge asserts his role outside any kind of supervision coming from European authorities (A), being on an equal footing with them (B).

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<sup>74</sup> Judgment of 22 April 1997, *Nils Draehmpaehl v Urania Immobilienservice OHG*, case C-180/95, § 30.

<sup>75</sup> Directive 89/665/EEC of 21 December 1989 and Directive 92/13/EEC of 25 February 1992, both modified by Directive 2007/66/EC, aforementioned; on the subject, see Bernadette LE BAUT-FERRARÈSE, *Arrêts récents de la Cour de justice des Communautés européennes en matière de mesures provisoires: réflexions sur l'effet de « modèle » des procédures issues de la Communauté européenne*, *Rec. Dalloz* 1998, p. 310, § 14.

<sup>76</sup> *Legge* No. 218 of 31 May 1995, *Riforma del sistema italiano di diritto internazionale privato*, Article 3.2.

<sup>77</sup> Judgment of 18 October 1990, *Massam Dzodzi v Belgian State*, joined cases C-297/88 and C-197/89.

## A. The National Judge, Outside any European Supervision

European rules are enacted alongside to domestic law, and a certain number of questions are left by the European legislator to be solved by the national judge. In the application of such norms, the national judge thus benefits from a distinctive autonomy (1), which is not further challenged by the E.C.J. (2).

### I. A Distinctive Autonomy

The autonomy of the national judge lies in questions that are left unresolved (1) or are only partly resolved (2) by the European legislator or the Court of justice.

#### a) Questions Unresolved by European Law

Questions left unresolved by the European legislator and the E.C.J. may expressly be referred to domestic law. This behaviour is predictable in the internal market, since the European legislator has no express authorization from Member States to enact rules in the judicial area, traditionally associated to the principle of procedural autonomy. This principle is linked to the *Rewe and Comet* cases in 1976, in which the E.C.J. asserted that “it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law”.<sup>78</sup> Nonetheless, similar expressions already existed in the previous E.C.J. case-law.<sup>79</sup> Procedural autonomy gives a great role to the national judge, who may have to choose among several domestic remedies those that are appropriate for the application of European law.

European instruments that contain some judicial provisions leave details of their implementation to national authorities. For instance, it is up to Member States, on the burden of proof in cases of discrimination based on sex, to “take such measures as are necessary, in accordance with their national judicial systems, to ensure that [...] it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”.<sup>80</sup> The European legislator grants discretion to Member States, concerning the choice of domestic remedies, to ensure the effectiveness of European rules.

Furthermore, the E.C.J. tries to coordinate existing domestic rules and European law more than to impose European standards. For instance, the Court made clear in a case that it is for the national court to interpret and apply domestic rules in conformity with the requirements of European law, “in so far as it is given discretion to do so under national law”.<sup>81</sup> The approach of the Court is therefore very cautious.

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<sup>78</sup> Judgments of 16 December 1976, *Rewe and Comet* (note 1).

<sup>79</sup> Judgment of 21 May 1976, *Société Roquette frères v Commission of the European Communities*, case 26-74, § 11; Judgment of 4 April 1968, *Firma Gebrüder Lück v Hauptzollamt Köln-Rheinau*, case 34-67.

<sup>80</sup> Directive 97/80/EC of 15 December 1997, aforementioned, Article 4.

<sup>81</sup> Judgment of 10 April 1984, *Sabine von Colson* (note 7), § 28.

Even in a field where the European legislator has an express authorization from Member States to enact rules, *i.e.* in the field of judicial cooperation in civil matters, the legislator relies on national rules and takes into account disparities among Member States. For example, article 13 of the Regulation on service<sup>82</sup> enables any Member State to refuse service by diplomatic or consular agents.<sup>83</sup> Furthermore, it is not rare that European instruments contain optional rules offering alternatives to Member States.<sup>84</sup>

Details of the implementation of European instruments are also deliberately left to Member States, such as the designation of competent authorities in charge of the judicial cooperation provided for in European rules<sup>85</sup> or some details of the procedure left to domestic law.<sup>86</sup> Some referrals to domestic law may be more complex, requiring the concurring application of different domestic laws. For instance, in the taking of evidence, a person may refuse to be heard, relying either on the law of the Member State of the requesting court or the law of the Member State of execution of the measure.<sup>87</sup> The national judge may also execute a request in accordance with a special procedure provided for by the law of the requesting State, thus having to conciliate the foreign and its domestic laws.<sup>88</sup> It is for the national judge to ensure a coordinated application of different laws to the same situation.

If they contain express referrals to domestic laws, the European instruments may also remain silent on certain issues. For instance, nothing is mentioned on possible review proceedings in case of a litigation on the application of European instruments. Potential appeals are thus to be solved in compliance with domestic rules, the national judge eventually taking into account the European context.<sup>89</sup>

These are questions left unresolved by European law; others may only be partly resolved.

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<sup>82</sup> Regulation (EC) No. 1393/2007 of 13 November 2007, aforementioned.

<sup>83</sup> § 2: “Any Member State may make it known [...] that it is opposed to such service within its territory, unless the documents are to be served on nationals of the Member State in which the documents originate”.

<sup>84</sup> By considering several means to comply with minimum standards for uncontested claims procedures in Chapter III of Regulation (EC) No. 805/2004 of 21 April 2004, aforementioned.

<sup>85</sup> Article 2 of Regulation (EC) No. 1393/2007 of 13 November 2007, aforementioned; Article 2 § 2 of Regulation (EC) No. 1206/2001 of 28 May 2001, aforementioned.

<sup>86</sup> See for instance Article 63 § 1 of Regulation (EC) No. 4/2009 of 18 December 2008, aforementioned: “Notification of the data subject of the communication of all or part of the information collected on him shall take place in accordance with the national law of the requested Member State”.

<sup>87</sup> Article 14 § 1 of Regulation (EC) No. 1206/2001 of 28 May 2001, aforementioned.

<sup>88</sup> Article 10 § 3 of Regulation (EC) No. 1206/2001 of 28 May 2001, aforementioned.

<sup>89</sup> See for instance the decision of the French Supreme Court, referred to in note 58.

b) *Questions Partly Resolved by European Law*

Even when European instruments seem to address specific issues in the field of judicial cooperation in civil matters, some questions may remain unanswered.

First of all, the proliferation of instruments in the same area may create difficulties as regards their articulation. In particular, some international conventions may coexist with European regulations, but the E.C.J. has made clear that conventional rules may be applied provided that “they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union”.<sup>90</sup> The Court was asked on the articulation of the Convention on the Contract for the International Carriage of Goods by Road (CMR)<sup>91</sup> and the Brussels 1 Regulation,<sup>92</sup> but this solution may be extended to the other instruments in the same area.

If European instruments may be difficult to articulate, the delimitation of European concepts may also be hard to draw with precision. In the internal market, the definition of State liability for violations of its obligations may give rise to different interpretations, according to which objectives are prioritised. Indeed, the objective to sanction the State may prevail to the objective to repair loss suffered by individuals, or conversely. The absence of delimitation of such concept gives great latitude to the national judge when deciding to trigger liability of the State or not.

In the area of judicial cooperation in civil matters, the national judge may also have a strict or extensive vision of concepts contained in European instruments. To take an example, the *lis pendens* rule may be interpreted differently whether a strict or a broad conception of the identity of cause of action is adopted.

The absence of precise delimitation of concepts gives rise to requests for precisions, such as questions deliberately remained unsolved by European authorities. The national judge may use the preliminary ruling procedure but the E.C.J. does not restrain its autonomy.

## 2. *An Uncontested Autonomy*

The autonomy of national judges is not subject to the supervision of the E.C.J. and may be considered as uncontested. Indeed, the action of the E.C.J. is limited for internal (a) as well as external reasons, related to a relative abandon of sovereignty from national Courts (b).

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<sup>90</sup> Judgment of 4 May 2010, *TNT Express Nederland BV v AXA Versicherung AG*, case C-533/08, § 56.

<sup>91</sup> Convention of the United Nations signed in Geneva, 19 May 1956.

<sup>92</sup> Regulation (EC) No. 44/2001 of 22 December 2000, aforementioned.

a) *The Limited Action of the E.C.J.*

The action of the E.C.J. is limited because of the particularity of its role. In fact, the European Court has to face a very large mission but within the very limited conditions of submission of the cases heard.

Indeed, the European Court of justice is the sole Court on the top of the legal order of European Union. Its mission is very large. The Court “shall ensure that in the interpretation and application of the Treaties the law is observed”.<sup>93</sup> Because of the specificity of the European legal order, composed of disparate and non-hierarchized rules, the E.C.J. becomes a very important actor in the construction of the European legal order. This very large mission must however be exercised in restrictive conditions.

First of all, only Courts of last resort are compelled to request the European Court to give a ruling on a question concerning the interpretation or validity of European law raised before them.<sup>94</sup> Such a procedure is optional for lower judges. Furthermore, the national judge may always consider that the European rule is clear and that there is no need for a preliminary ruling in interpretation and validity.<sup>95</sup> To clarify the conditions of submission of a case, the E.C.J. held that a national judge is not obliged to refer to the Court of justice a question if “it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt”.<sup>96</sup> The Court thus gives room for manoeuvre to the national judge, which is free to decide on the reasonable doubt. Once the European Court is seized by the national judge, its function is to assist with the resolution of a particular case. The Court then refuses to deliver advisory opinions on general or hypothetical questions.<sup>97</sup> The factual elements of the case are taken into account, thus enabling the judge to depart from the interpretation of the E.C.J. in subsequent cases, provided the facts are slightly different.

When interpreting European law, the E.C.J. uses different methods: exegetic, historical, comparative, systematic and teleological. These methods are often combined to enlighten the meaning of a disposition, even if the teleological method seems to be preferred. This method, which refers to the objectives of the legislation, gives also a great latitude to the judge, since there may be manifold and evolving objectives. For instance in the area of judicial cooperation in civil matters, the E.C.J. may adopt a strict or large interpretation of the head of jurisdiction

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<sup>93</sup> Article 19 § 1 of the EU Treaty.

<sup>94</sup> Article 267 of the TFEU Treaty.

<sup>95</sup> See the theory of the “*acte clair*” that may have been used in an abusive way: *Conseil d’Etat*, 22 December 1978, *Cohn Bendit*, Rec. D-S 1979 Jur. 155.

<sup>96</sup> Judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, case 283/81, § 21.

<sup>97</sup> See for instance Judgment of 16 July 2009, *Zuid-Chemie BV v Philipppo's Mineralenfabriek NV/SA*, case C-189/08, § 36.

“where the harmful event has occurred”<sup>98</sup> whether the Court decide to give priority to the objective of legal certainty or to the objective of protection of victims. Consequently, the national judge keeps great latitude in interpreting European rules, the rulings of the E.C.J. cannot really restrict its action.

b) *The Relative Abandon of Sovereignty from National Courts*

National judges never abandoned their sovereignty, refusing to give up all controls to the insertion of European rules. Resistance of national judges may have been particularly strong in the past. The most famous example is the case “*Solange I*” rendered by the German Supreme Court in 1974,<sup>99</sup> in which the Court asserted that the national judge will keep controlling fundamental rights as long as (“*so lange*”) these rights wouldn’t be adequately protected at a European level. Similar resistance has been observed in France<sup>100</sup> or in Italy.<sup>101</sup>

This resistance has been tempered in subsequent cases.<sup>102</sup> Nonetheless, even in the most recent decisions, these Supreme Courts showed that they “keep an eye” on European rules, which do not prevail over their domestic constitution.<sup>103</sup> They refuse to give a blank cheque to European authorities.

This refusal to insert European rules in the domestic legal order without any control goes along with a persistent control in their application. Indeed, in the area of judicial cooperation in civil matters, national Courts remain suspicious about the complete trust they should place in foreign courts. The E.C.J. must thus regularly reassert the automatic recognition clearly stated in some regulations, concerning insolvency proceedings<sup>104</sup> or decisions ordering the return of a child.<sup>105</sup> Even if the

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<sup>98</sup> Regulation (EC) No. 44/2001 of 22 December 2000, aforementioned, Article 5 § 3.

<sup>99</sup> *Bundesverfassungsgericht*, 2<sup>nd</sup> chamber, 29 May 1974, *Internationale Handelsgesellschaft*.

<sup>100</sup> *Conseil constitutionnel*, Decision No. 76-71 DC of 30 December 1976 *relative à la Décision du Conseil des communautés européennes relative à l’élection de l’Assemblée des Communautés au suffrage universel direct*, § 2; *Conseil constitutionnel*, Decision No. 92-308 DC of 9 April 1992, in which the Constitutional court declared that Articles 3A §2, 109G al. 2 et 109L §4 of the EC Treaty violated the Constitution.

<sup>101</sup> *Corte costituzionale*, No. 183, 18 December 1973 – *deposito in cancelleria*: 27 December 1973, *Frontini*, § 9.

<sup>102</sup> See for instance in Germany the decision of the *Bundesverfassungsgericht*, 22 October 1986, *Wünsche Handelsgesellschaft*, named “*Solange II*”; in Italy the decision of the *Corte costituzionale*, No. 170, 5 June 1984 – *deposito in cancelleria*: 8 June 1984, *Granital*.

<sup>103</sup> *Conseil constitutionnel*, Decision No. 2010-79 QPC of 17 December 2010 *à la suite d’une question de M. Kamel D. [Transposition d’une directive]*, § 3; *Conseil d’Etat Ass.*, No. 287110, 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*; *Bundesverfassungsgericht*, 30 June 2009, 2 BvE 2/08; *Corte costituzionale*, No. 129, 23 March 2006 – *deposito in cancelleria*: 28 March 2006, § 5.3; *Consiglio di Stato*, No. 4207, 8 August 2005, *Federfarma*.

<sup>104</sup> Regulation (EC) No. 1346/2000 of 29 May 2000, aforementioned.

text of European instruments is clear, many national judges keep asking to the European Court questions on this automatic recognition, more difficult to assert in sensitive situations such as a child's removal. This reveals a certain distrust of national courts towards this automatic recognition, which has needed to be reasserted in various decisions by the E.C.J.<sup>106</sup>

Furthermore, several specific regulations abolish all intermediate measures, at the stage of the *exequatur*, to the free movement of judgments.<sup>107</sup> This tendency has not prevented Member States from keeping a public policy exception in a subsequent regulation, at a later stage than the *exequatur*, *i.e.* directly at the stage of enforcement.<sup>108</sup> Through this exception, they may refuse to execute a foreign decision deemed contrary to their fundamental principles. It is difficult for the E.C.J. to control the limits of the public policy exception. Therefore, it is up to national judges to decide to trigger such exception.

The national judge may rely on the Court of justice but is also relatively free not to do so. Consequently, the Court of justice does not act as a supervisory authority. The national judge must be aware to be on an equal footing with the European court and thus proceeds in a more active way in its contribution to the uniform interpretation of European rules.

## **B. The National Judge, on a European Equal Footing**

The action of the national judge on the interpretation of European law is not really constrained by the European Court of Justice. The latter is already conscious of the complementary action of both actors and develops a real dialogue with the national judge (1). Nonetheless, due to the increasing number of European rules, the sustainability of this procedure requires to develop new forms of cooperation to assist national judges in the interpretation of European law (2).

### **1. The Complementary Action of E.C.J. and National Judge**

The procedure of preliminary ruling is not limited to an answer given by the E.C.J. to a question asked by the national judge. A real dialogue operates between them, with an increasing pro-national standing of the E.C.J. (a) that encourages a pro-European standing of the national judge (b).

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<sup>105</sup> Regulation (EC) No. 2201/2003 of 27 November 2003, aforementioned.

<sup>106</sup> On insolvency proceedings, see Judgment of 21 January 2010, *MG Probud Gdynia sp. z o.o.*, case C-444/07; on decisions ordering the return of a child, see Judgment of 11 July 2008, *Inga Rinau*, case C-195/08 PPU or Judgment of 22 December 2010, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, case C-491/10 PPU.

<sup>107</sup> Regulation (EC) No. 805/2004 of 21 April 2004, Regulation (EC) No. 1896/2006 of 12 December 2006 and Regulation (EC) No. 861/2007 of 11 July 2007, aforementioned.

<sup>108</sup> Article 45 § 1 (a) of the Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ L* 351, 20.12.2012, p. 1-32, replacing Regulation No. 44/2001.

a) *A Pro-National Standing of the E.C.J.*

The pro-national standing of the E.C.J. does not come from referrals to national law. Even if similarities may be observed between some European and national concepts in the case-law of the Court, the E.C.J. does not explicitly state the particular origin of such concepts, in order to remain independent and impartial towards all Member States. This requirement of neutrality legitimates its decisions for all Member States.

In fact, the European Court may refer to the differences of legislation between Member States.<sup>109</sup> It does so in order to adopt a solution that could be suitable for all domestic legal orders. In their opinions, if Advocates general may refer to a specific legal order, these references are not replicated by the Court.<sup>110</sup> Furthermore, if the European Court relies on “the constitutional traditions common to the Member States”,<sup>111</sup> this vague reference may not really be considered as a referral to precise domestic laws but more as a means to legitimate the interpretation of the Court, grounded on national constitutions.

In reality, the pro-national standing of the E.C.J. may be observed by its reliance on the national judge. The Court reasserted the trust placed in national courts. It stated that “the possibility thus given to the national court by the second paragraph of Article 267 TFEU of asking the Court for a preliminary ruling before, if necessary, disapplying directions from a higher court which prove to be contrary to European Union law cannot be transformed into an obligation”.<sup>112</sup> The Advocate general was even of the view to go one step further, saying that “European Union law must be interpreted as meaning that it does not preclude a lower court [...], in proceedings in which it has already given a first judgment, from being required under national law, after the case has been referred back to it, to apply the directions set out in the judgment on appeal given by a higher court in the same proceedings”.<sup>113</sup> The Advocate general thought that time had come for the European Court to trust Supreme Courts in their interpretation of European law. If this position has not yet been followed by the European Court, an increasing number of interpretations is delegated to its national counterpart. For instance, as far as liability of a State for violation of its European obligations is concerned, the

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<sup>109</sup> See for instance Judgment of 8 May 2008, *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin*, case C-14/07, § 43.

<sup>110</sup> For an example, see Judgment of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, case C-40/08 and the Opinion of Advocate general TRSTENJAK delivered on 14 May 2009.

<sup>111</sup> See, for instance, Judgment of 15 May 1986, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, case 222/84, § 18.

<sup>112</sup> Judgment of 5 October 2010, *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa*, case C-173/09, § 28.

<sup>113</sup> Opinion of Advocate general CRUZ VILLALON delivered on 10 June 2010 in the *Elchinov* case, § 38.



Court rendered many decisions in which it is impossible to know whether this liability has eventually been triggered or not.<sup>114</sup>

Furthermore, the Court is rather reluctant to sanction national judges if they violate their European obligations. Indeed, the E.C.J. admitted that an infringement of European law may stem from a decision of a court adjudicating at last instance.<sup>115</sup> Nonetheless, the Court refused to establish the violation in the concerned case, although a careful reading of the decision shows that the violation of the Court seemed quite obvious, as demonstrated by the Advocate general.<sup>116</sup> The Court appears to act with good will in order to ensure a peaceful cooperation with national judges and encourage their pro-European standing.

#### *b) Towards a Pro-European Standing of the National Judge*

The pro-European standing of the national judge needs to be encouraged notably through their real contribution to the interpretation of certain European notions.

For instance, implementation of the equivalence and effectiveness principles require the assistance of national judges. Indeed, thanks to their knowledge of domestic remedies, they are at the best place to determine that remedies ensuring the respect of European law are not less favourable than those relating to similar actions of a domestic nature and cannot render virtually impossible or excessively difficult the exercise of rights conferred by European law. That is why, in many cases, the E.C.J. directly refers to the national judge for the interpretation of such notions,<sup>117</sup> giving neutral precisions<sup>118</sup> or giving orientations but without final answers.<sup>119</sup> If the European Court appears to give a clear answer, it is mostly relied on the elements previously given by the national

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<sup>114</sup> Lately, Judgment of 23 April 2009, *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis (C-378/07)*, *Charikleia Giannoudi v Dimos Geropotamou (C-379/07)* and *Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou (C-380/07)*, §§ 202 and 203 or Judgment of 25 November 2010, *Günter Fuß v Stadt Halle*, case C-429/09, § 59.

<sup>115</sup> Judgment of 30 September 2003, *Gerhard Köbler v Republik Österreich*, case C-224/01.

<sup>116</sup> Opinion of Advocate general LÉGER delivered on 8 April 2003 in the *Köbler* case.

<sup>117</sup> See for instance Order of 1 October 2010, *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*, case C-3/10, § 60; Judgment of 13 April 2010, *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH*, case C-91/08, § 65.

<sup>118</sup> See for instance Judgment of 28 January 2010, *Belgische Staat v Direct Parcel Distribution Belgium NV*, case C-264/08, § 35; Order of 24 April 2009, *Archontia Koukou v Elliniko Dimosio*, case C-519/08, § 72.

<sup>119</sup> See for instance Judgment of 8 July 2010, Judgment of 8 July 2010, *Susanne Bulicic v Deutsche Büro Service GmbH*, case C-246/09, §§ 34 and 42; Order of 18 January 2011, *Souzana Berkizi-Nikolakaki v Anotato Symvoulío epilogis prosopikou (ASEP) and Aristoteleio Panepistimio Thessalonikis*, case C-272/10, § 59.

judge.<sup>120</sup> The interpretation of the equivalence and effectiveness principles seem therefore given with “four hands”, showing as much implication of the national judge as the European Court.

This collaboration between the E.C.J. and the national judge for the interpretation of European notions goes beyond the area of internal market to be noticed as well in the field of judicial cooperation in civil matters. Indeed, the European Court may adopt the pragmatic approach of determining jurisdiction on the basis of a set of corroborating evidence (“*faisceau d’indices*”). Several notions are thus concerned, such as the habitual residence<sup>121</sup> or the “activity directed to the Member State of the consumer’s domicile”.<sup>122</sup> In this way, the Court increasingly delegates the interpretation of notions to the national judge, free to assess the strength to be given to the different criteria. The European Court thus acknowledges the great importance of the factual and legal domestic context of questions that are raised on the interpretation of European law. Therefore, the E.C.J. affirms the importance of the national judge, best suited to interpret such notions in their context.

The Court may delegate the interpretation of such notions because of better understanding and collaboration of the national judge. These growing understanding and collaboration are revealed by the increasing number of preliminary rulings and the appropriation of European “logics” by national judges, trying to follow the reasoning of the European Court. As regards British judges for instance, traditionally considered as refractory to the European Union, an author observed “the increasing readiness of the United Kingdom courts to depart from the literal approach to statutory interpretation and to adopt a more purposive approach [that] may be partly explained by the influence of European law itself”.<sup>123</sup>

The implication of national judges in interpreting the case law of the E.C.J. must be encouraged. To this end, mechanisms of current cooperation in the European judicial area must be rethought.

## 2. Consolidation of Current Cooperation

In the European judicial area, cooperation refers *prima facie* to the sole procedure of preliminary ruling. Nonetheless, victim of its success, it is now necessary to develop other mechanisms of cooperation to ensure a uniform interpretation of

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<sup>120</sup> See for instance, Judgment of 6 May 2010, *Club Hotel Loutraki AE and Others v Ethnico Symvoulío Radiotileorasis and Ypourgos Epikrateias (C-145/08)* and *Aktor Anonymi Techniki Etaireia (Aktor ATE) v Ethnico Symvoulío Radiotileorasis (C-149/08)*, § 77; Judgment of 3 September 2009, *Amministrazione dell’Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl*, case C-2/08, § 29.

<sup>121</sup> Judgment of 2 April 2009, A., case C-523/07, § 44; Judgment of 22 December 2010, *Barbara Mercredi v Richard Chaffe*, case C-497/10 PPU, § 47.

<sup>122</sup> Judgment of 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08)* and *Hotel Alpenhof GesmbH v Oliver Heller (C-144/09)*, § 93.

<sup>123</sup> F. G. JACOBS, *Approaches to Interpretation in a Plurilingual Legal System*, in M. HOSKINS/ W. ROBINSON (dir.), *A true european. Essays for Judge David Edward*, Oxford 2003, p. 300

European rules. Consequently, if the procedure of preliminary ruling must be maintained (a), it must be accompanied by a reinforcement of horizontal cooperation between judges (b).

a) *Keeping Preliminary Ruling*

Maintaining preliminary rulings is not obvious, since this procedure has originally been planned for six Member States. There is, indeed, a real threat of clogging the E.C.J. provided the huge increase of European legislation since the implementation of such procedure.

Proposals for replacing such a procedure have been put forward, but they do not offer the same advantages. In fact, the procedure of preliminary ruling offers a direct cooperation with each national judge. Such a direct cooperation is desirable, since every single judge may be faced to difficulties in interpreting European law. Several alternatives have been suggested, in order to accompany or suppress preliminary rulings, but they are not convincing.

First of all, it has been suggested to introduce more selection in front of the E.C.J. At the time being, Article 53 § 2 of the Rules of Procedure of the Court states that “where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may [...] at any time decide to give a decision by reasoned order without taking further steps in the proceedings”. The E.C.J. assesses a presumption that questions referred by national courts are relevant and may be rebutted only in exceptional cases.<sup>124</sup> Increasing filtering could result in prejudicing the direct cooperation with any national judge.

Secondly, a part of preliminary rulings could be delegated to the General Court, such a possibility being already provided for in Article 256 § 3 TFEU. Nonetheless, the General Court faces as well an increasing number of questions in the field of its own jurisdiction. Similarly, the Court of justice considered in 1999 “the potential advantages and drawbacks arising from a “decentralisation” of the preliminary ruling procedure. This would involve setting up, in each Member State, judicial bodies having either European or national status, with responsibility for dealing with references for preliminary rulings from courts within their territorial jurisdiction”.<sup>125</sup> Such a possibility would nevertheless put an end to the direct dialogue between the E.C.J. and the national judge.

Thirdly, it has been proposed to add a supranational Constitutional Court, composed of members from national Constitutional courts. This Court would have jurisdiction after the drafting of European legislation and before their entering into force, on the delimitation of competences between the European Union and

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<sup>124</sup> See for instance Judgment of 17 February 2011, *Artur Weryński v Mediatel 4B spółka z o.o.*, case C-283/09, § 34.

<sup>125</sup> Press release No. 36/99, 28 May 1999, “The President of the Court of justice presents the Council of Justice ministers with a number of proposals and ideas on the future of the judicial system of the European Union”.

Member States, especially on the application of the principle of subsidiarity.<sup>126</sup> However, some drawbacks were outlined: the decisions of this Constitutional Court would not be more convincing than the decisions of the Court of Justice; members of the Constitutional Court could give precedence to political concerns of their colleagues on the Bench; the jurisdiction would not extend to decisions on the application of European legislation, ruled by the E.C.J., whose decisions raised some of the most sensitive conflicts between the Court of Justice and the national constitutional courts.<sup>127</sup>

Therefore, such alternative procedures are not totally satisfactory and may threaten the direct dialogue between the E.C.J. and national judges. Furthermore, the E.C.J. has introduced several mechanisms in order to improve rapidity and publicity of its decisions. A reply by reasoned order is possible under several circumstances, for instance where the answer to the question referred for a preliminary ruling admits of no reasonable doubt.<sup>128</sup> An expedited preliminary ruling procedure has also been created, where the nature of the case requires that it be dealt with within a short time.<sup>129</sup> In the area of judicial cooperation, the E.C.J. may also deal with a request under another urgent procedure, the urgent preliminary ruling procedure.<sup>130</sup>

Furthermore, in the Programme Civil Justice of 2007, the European authorities specified among their specific objectives their intention “to promote the training of legal practitioners in Union and Community law”.<sup>131</sup> The knowledge of the E.C.J. case-law should be improved through increasing consistency of the case-law, the E.C.J. referring to the European legal order as a whole and not to a particular instrument. A reflection must also be conducted on a better implication of the national judge in the preliminary ruling procedure. This implication should go along with the development of horizontal cooperation between national courts.

#### *b) Reinforcing Horizontal Cooperation*

The development of horizontal cooperation requires the implementation of a network among national judges. In fact, such networks do exist. If the European

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<sup>126</sup> See J.H.H. WEILER/ U.R. HALTERN, *The Autonomy of the Community Legal Order – Through the Looking Glass*, *Harv. Int. Law Journal* 1996, p. 411-448, esp. p. 447.

<sup>127</sup> M. CLAES, *Kompetenz Kompetenz*, in *The National Courts’ Mandate in the European Constitution*, Oxford 2006, p. 719-722.

<sup>128</sup> See Article 99 of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 for all hypothesis.

<sup>129</sup> *Ibid.*, Article 105.

<sup>130</sup> *Ibid.*, Article 107.

<sup>131</sup> Decision No. 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme “Civil Justice” as part of the General Programme “Fundamental Rights and Justice”, *OJ L* 257, 03.10.2007, p. 16-22, Article 3 (e).

Judicial Network in civil and commercial matters<sup>132</sup> is the most well-known, many other networks coexist, such as the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union<sup>133</sup> or the network of the Presidents of the Supreme Judicial Courts of the European Union.<sup>134</sup>

These networks have similar activities. Indeed, they facilitate the exchange of information among their members; organize meetings in order to share experiences and draft reports or studies enabling a deeper reflection on some specific issues. These activities reveal their common concerns towards improving a uniform application of European law. Nonetheless, the links between these different networks seem to be rare, although their objects of studies may overlap. Cooperation should be improved to that regard. Furthermore, judicial networks may also rely on other networks of legal professions, such as the Council of the Notariats of the European Union,<sup>135</sup> the Council of Bars and Law Societies of Europe<sup>136</sup> or the European Union of *Rechtspfleger*.<sup>137</sup>

European authorities already support the different actions of these networks.<sup>138</sup> However, further actions may be suggested. For instance, the E.C.J., through its Library, Research and Documentation service, could directly collaborate with these networks on some studies, for instance involving judicial cooperation in civil matters.

The role of networks is indeed essential in the exchange of judicial practices between Member States. The European Judicial Network was also established in order to “identify best practices in judicial cooperation in civil and commercial matters and ensure that relevant information is disseminated within the Network”.<sup>139</sup> Such exchange of practices is especially organised in judicial cooperation in civil and commercial matters but has to be extended to all areas of interpretation and application of European law, among the different networks. Indeed, the exchange of practices promotes a mutual understanding and develops mutual trust between Member States. In the judicial area, it could also give rise to a gradual approximation of domestic judicial norms, in order to ensure similar legal protection of European rights in the whole European Union. As a consequence, a real European justice could be associated to this European judicial area.

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<sup>132</sup> See <[https://e-justice.europa.eu/content\\_ejn\\_in\\_civil\\_and\\_commercial\\_matters-21-en.do](https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do)>.

<sup>133</sup> See <<http://www.juradmin.eu/index.php/en/>>.

<sup>134</sup> See <<http://www.network-presidents.eu/>>.

<sup>135</sup> See <<http://www.cnue.be/>>.

<sup>136</sup> See <<http://www.ccbe.eu/>>.

<sup>137</sup> See <<http://www.rechtspfleger.org/>>; *Rechtspfleger* are judicial officials to whom judicial tasks were transferred to be done by themselves independently and in their own responsibility. They belong to the higher staff of the judicial organization.

<sup>138</sup> See Article 4 of the Decision No. 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme “Civil Justice”, aforementioned.

<sup>139</sup> Article 10 § 1 (c) of the Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, aforementioned.