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# National Judicial Autonomy

The Example of National European Law Precedents in the Dutch Case-Law on the Free Movement of Services and the Freedom of Establishment

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## Abstract

*This contribution elaborates on the existence of national judicial autonomy in European law. In the context of this paper, the main example used to demonstrate this phenomenon will be 'national European law precedents'. National European law precedents are in fact a demonstration of a broader notion of national judicial autonomy. Questions that I particularly propose to address are the following: What is a 'national European law precedent'? What sort of precedents can we think of in the context of Dutch European case-law? What consequences may follow from the existence of national European law precedents? What is the significance of these precedents? Suppose, a need for correction mechanisms exists, which practical solutions are the most obvious? In this paper I hope to shed some further light on these questions.*

## 1 Introduction

The subject of this paper is part of a Greater Story. It concerns the story of the case-law of the Member States of the EU in which European law comes forward. National courts give judgment on the application and interpretation of relevant European law. Nowadays these cases are seldom adjudicated with the use of the preliminary reference procedure.

National European case-law has a truly ambivalent nature. On the one hand, this case-law is somehow linked with the case-law of the European Court of Justice (hereafter: ECJ) and the law as laid down by the European legislator. On the other hand, this national case-law has partly separated itself from those European sources: it is in the Member States' *national context* that norms of European law are applied and interpreted and, ultimately, adjudicated upon by the national courts.

This body of 'decentralized European case-law', with its own peculiar characteristics, plays a fundamental role in the day-to-day practice of the administration of justice in the EU. The importance of national courts is underlined by a resolution which the European Parliament adopted last year. It concludes that national courts are 'the keystone of the European Union judicial system and [...] play a central and indispensable role in the establish-

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ment of a single European legal order.'[1] 'Community law', according to the same European Parliament resolution, 'remains a dead letter if it is not properly applied in the Member States, including by national judges.' But what does 'properly applied' mean? How much discretion and autonomy does the national judge have for an autonomous interpretation of norms of European law?

In European law, the European institutions and a predominant part of the European legal doctrine tend to expect an awful lot of the national judge as a keystone of the European judicial architecture. Particularly from a 'top-down' focus, those very same actors demonstrate a tendency to set the standard of what a national court should do, what is expected of the national judge.

The attention for what is *actually* happening with European law at the level of national courts, in their independent practice, stays rather marginal and somewhat unsatisfactory. This goes especially for national case-law that never reaches the stage of the preliminary reference procedure.

This brings forth a few problematic effects. First of all, a *knowledge problem* is the result. Accountable knowledge on the application and interpretation of European case-law at the national level is lacking. Of course, now and then attention is paid to this case-law, but that is the exception rather than the rule.

Consequently, the development of doctrinal theories on European law is threatened by a move away from law's reality in the EU Member States. While the development of the law on the European level advances, we know remarkably little about the reception of the case-law of the ECJ by the national courts.

Because of this, interesting questions remain unanswered: What is actually happening in national European case-law? What are the bottlenecks? What are the consequences of that for European law? And if the national European judicial practice diverges from the case-law of the ECJ, what does this mean? National European case-law could be a possible way of factual counter pressure against unwanted developments on European level. But we hardly know it.

This all underlines the benefits of research fora such as the first *Realaw Research Forum*, around the theme '*top-down, bottom-up*'. It is praiseworthy that attention is paid to the mutual effects or influence of the dependent levels and actors in European law for the realization of an integrated European legal order.

I am in a somewhat prejudiced position, though. My PhD research is along the lines of this interaction. It aims at the meaning of the Dutch Euro-

[1] Resolution of the European Parliament of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)).

pean case-law in which the EC Treaty provisions on the freedom of establishment and/or the free movement of services come forward.

The core of the research concerns a bottom-up perspective on the meaning of the national European case-law. It focuses on what we could learn from the course European law takes at the Dutch courts. One of the main findings of the research is that national judicial autonomy exists, but that such a notion is hardly ever explicitly articulated.

During the research, I encountered the fascinating phenomenon of a development in the Dutch European case-law: 'national European law precedents'. In their Dutch European case-law on the freedom of establishment and the free movement of services, Dutch courts demonstrate remarkably often that they are inspired or guided by previous case-law of their *Dutch colleagues*, and not so much by the case-law of the ECJ itself.

This phenomenon has not received – at least not as far as I am aware – much attention in the European legal doctrine as such. That is undeserved. This development leads us to all sorts of interesting questions, a few of which I will further elaborate on in the following sections.

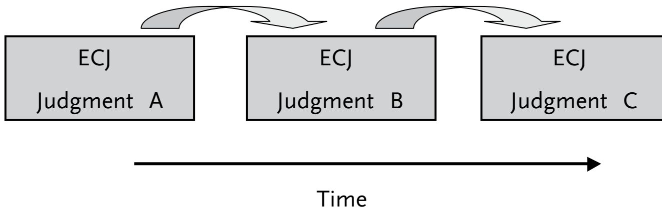
## 2 Concept

Traditionally, the concept of precedent is placed within the context of a common law tradition. In legal systems based on that tradition, precedent plays a fundamental role in law and for the judiciary. It often has its own peculiarities, nature and substance (e.g. a doctrine of *stare decisis*). But also in legal systems based on a civil law orientated approach various forms of precedent play an important role (e.g. 'settled case-law'; *jurisprudence constante*).

This is not the place for an in-depth analysis of the general role of precedent in European law. It easily leads to a topic for a PhD dissertation.

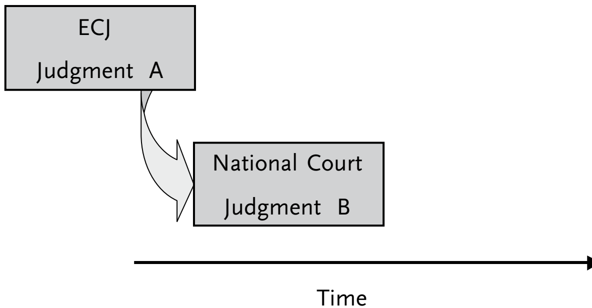
Although there is not (yet) an explicit theory or doctrine of precedent in European law, from a functional perspective precedent demonstrates the practical relevance of case-law in European law. I see precedent in European law primarily as a functional concept.

## 2.1 Horizontal European Precedent Law




We know that the Court uses its own previous decisions as a fundamental guideline for the subsequent interpretation of Community law. We can see this as a form of precedent. I would like to call that the *horizontal* dimension of precedent. The Court gives authoritative decisions and therefore uses them for determining later cases. It may bind the other European institutions by its interpretation of the law. This is a logical consequence of the important provision of 220 EC which lays down that the Court is required to 'ensure that in the interpretation and application of this Treaty the law is observed'. The majority of the great doctrines of European law are established in its case-law: direct effect, supremacy, consistent interpretation, state-liability; all are judge made law – and, once established, subsequently referred to by the ECJ many times.

## 2.2 Vertical European Precedent Law




Precedent in European law plays, of course, an important role in the *vertical* constitutional relations within the European Union as well. The case-law of the Court is of great importance to the national courts.

We see this illustrated in the exception to the obligation to refer to the ECJ for national courts of last instance on interpretation questions of European law. In its famous *Cilfit* judgment,[2] the Court made clear that 'previ-

[2] Case 283/81 *Cilfit* [1982] ECR 3415.

ous decisions of the Court [that] have already dealt with the point of law in question' may deprive this obligation of its purpose and empty its substance (*Cilfit*, par. 14).

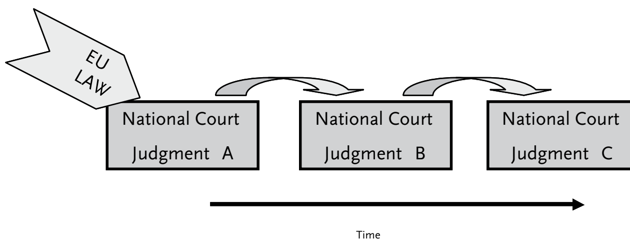
But also in more general terms, one could state that the case-law of the ECJ has a vertical precedential dimension as an important – and to a certain extent binding – guideline for the application of European law by the national courts.

The importance of the vertical dimension of European law precedents may be illustrated by reference to the *Simmenthal* mantra, which implied that the national court

> 'which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.' (*Simmenthal*, operative part)[3]

The ultimate acceptance of direct effect and supremacy by the courts of the Member States caused the vertical dimension of European precedent to develop enormously. The *Simmenthal* mantra in the case-law of the ECJ explains why European law research tends to focus on a top-down approach. However this paper suggests 'national European law precedents'. What to think about that?

### 2.3 National European Precedent Law




In the case of national European law precedents, it starts with European law input in a case before a national court. It is then followed by an interpretation of another or the same national court which in turn has precedential value for national courts for determining later cases.

In a way it is European law in an 'implemented' form that is applied in the subsequent cases. It is still the interpretation of European law; however the author is no longer the ECJ but the precedent is set by the national court.

[3] Case 106/77 *Simmenthal* [1978] ECR 645.

If one asks for a definition of a 'national European law precedent', I would suggest defining it rather broad and functional:

> 'autonomous interpretations of European law by national courts that set precedents for future cases in a certain field of law.'

From this functional perspective, we could speak of the application of national European law precedent whenever a national court, in the application and interpretation of European law, explicitly mentions or is implicitly guided by the previous national European case-law as a source for its decision.

This phenomenon receives remarkably little attention as such. From a traditional perspective on European law, it is for the ECJ to interpret the law and it is for the national court just to apply these interpretations. The preliminary reference procedure is based on this idea. Between national courts and the ECJ there exists, at least in theory, a clear separation of functions. The *practice* of national European case-law however shows another reality. As for instance Kapteyn rightly notes, '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 thus interpreted to the facts'.[4]

## 3 Practice

So what sort of precedents could we think of? The main function of a national European law precedent is to clarify the law (1). Furthermore, precedents are used for abstract judgments on basic tenets of free movement law (2) and Dutch courts seem to use precedents for delivering 'well-founded judgments' (3).

### 3.1 Clarification of the Law

First of all, the *clarification* of the case-law of the ECJ by Dutch courts must be mentioned.

In their nature and substance judgments are often strongly case-specific. By means of a concrete case an interpretation of law may be given. Against this background, it is hardly surprising that the case-law of the ECJ does not

[4] P.J.G. Kapteyn a.o., *The Law of the European Union and the European Communities* (Alphen aan den Rijn: Kluwer Law International 2008), p. 485.

always give guidelines that are easily applied by the national courts. Judicial vagueness is a receptive ground for new cases. Now and then it is necessary that the case-law of the ECJ is made more workable in a specific national context. The clarification concerns the interpretation of certain notions that came forward in the case-law of the ECJ by national courts.

The Dutch case-law on cross-border healthcare services provides us with a good example. The first landmark cases of the ECJ in this field (*Decker, Köhll, Smits Peerbooms* and *Müller-Fauré*)[5] created a flood of cases at the level of the Dutch public law courts. In essence, those cases concerned disputes on the costs for medical services incurred in another Member State. In the case-law of the ECJ, amongst other criteria, a distinction was introduced between hospital treatment and non-hospital treatment. Hospital treatment in another Member State, restricted by a system of prior authorization was in principle a justifiable restriction of the free movement of services. For non-hospital treatment, such a system was not justified. But what should we see as a 'hospital treatment'? Different Member States have different rules and traditions in this respect. How should a national court clarify such a notion?

After the judgment in *Müller-Fauré* (brought to the ECJ by the Central Appeals Tribunal, hereafter: *Centrale Raad van Beroep*), the *Centrale Raad van Beroep* gave judgment on 18 June 2004 in a couple of cases concerning the reimbursement of medical costs incurred in another Member State in the light of the freedom of services.[6] These judgments have functioned as a national European law precedent both for that court itself, as well as for other, subordinate Dutch courts.[7] In its judgments, the *Centrale Raad van Beroep* elaborates on some of the notions mentioned in the *Müller-Fauré* judgment of the ECJ. Notably, it gives an interpretation of paragraph 92 of the *Müller-Fauré* judgment. The latter reads as follows:

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5 Case C-120/95 *Decker* [1998] ECR I-1831; Case C-158/96 *Köhll* [1998] ECR I-1931; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473; Case C 385/99 *Müller Fauré* [2003] ECR I-4509.

6 In the case *Linkerheupoperatie* (18 June 2004, LJN: AP4731), concerning hospital treatment the waiting times are exceeded. In the case *Zes kronen* the *Centrale Raad van Beroep* judges that the nature of the treatments is non-hospital: a prior authorisation is not allowed. In the case *Arthroscopie* (18 June 2004, LJN: AP4794) the *Centrale Raad van Beroep* gives a practical definition of hospital treatment.

7 The precedent in these cases is used by the *Centrale Raad van Beroep* (sometimes more implicit than explicit) in, for example the cases *Vleesboom*, 20 July 2004, LJN: AQ6277; *Spondylodese*, 20 October 2004, LJN: AR4949; *Crisisopnames*, 24 November 2004, LJN: AR6847; *ICSI en MESA*, 13 July 2005, LJN: AT9545 en op 29 June 2006 in LJN: AT9602. The precedent is, for instance, also used in: *Rechtbank* Arnhem 4 August 2004, LJN: AR3576 en *Rechtbank* Roermond, 25 February 2005, LJN: AS9108.

> '92. However, a refusal to grant prior authorisation which is based not on fear of wastage resulting from hospital overcapacity but solely on the ground that there are waiting lists on national territory for the hospital treatment concerned, without account being taken of the specific circumstances attaching to the patient's medical condition, cannot amount to a properly justified restriction on freedom to provide services. It is not clear from the arguments submitted to the Court that such waiting times are necessary, apart from considerations of a purely economic nature which cannot as such justify a restriction on the fundamental principle of freedom to provide services, for the purpose of safeguarding the protection of public health. On the contrary, a waiting time which is too long or abnormal would be more likely to restrict access to balanced, high-quality hospital care.'

In this paragraph the *Centrale Raad van Beroep* reads that no prohibited restriction exists as long as there are 'waiting times that can be considered necessary for the planning of health care which aims at guaranteeing adequate and permanent access to a balanced supply of quality care.' If the link between planning and access is weak, a refusal must be seen as an unjustified restriction to the freedom to receive services. Then, the *Centrale Raad van Beroep* makes this notion workable:

> 'the longer existing waiting times, the less grounds there are to accept a justification for the impediment of free movement of services. If waiting times, necessary for a good planning and for the prevention of vacancy and waste, are exceeded significantly, refusal of requested permission will not be considered justifiable, even if, on the grounds of the state of health and other antecedents of the patient, treatment in the near future is not imperative.'

In one of these cases the *Centrale Raad van Beroep* also gives an interpretation of the notion of 'hospital treatment'. According to the *Centrale Raad van Beroep,* we could speak of 'hospital treatment'

> 'in case of treatments for which according to international-medical standards at least one night in hospital is medically considered customary. In principle, all other treatments are to be regarded as extramural care.' (Arthroscopie)

Hence, instead of referring to the ECJ for a second time, the highest Dutch court in social security matters takes its own responsibility and gives a more specific, autonomous interpretation of the case-law of the ECJ.

The main purpose of these precedents is to make the case-law of the ECJ more workable for national courts of the Member States.

Similar examples of further clarification can be found in the recent case-law of the Dutch Council of State (*Afdeling bestuursrechtspraak Raad van*

*State*, hereafter: *Raad van State*) concerning fines which are given to employers by the Dutch *Arbeidsinspectie* (labour inspection) for breaches of the rules on work permits as laid down in the relevant Dutch law (the *Wet Arbeid Vreemdelingen*). In those cases it often boils down to the question of how to make a distinction between the free movement of workers, the freedom of establishment and/or the free movement of services in a diffuse factual context. In addition, the case-law of the *Raad van State*, clarifies under which circumstances the national measure or practice is a justified restriction of the free movement of services

> A case concerning Slovak carpenters gives an example. The *Raad van State* refers to its own previous case-law in which it had already clarified the relevant case-law of the ECJ:
>
> '2.6. 'As the Council of State has considered before (judgment of 30 January 2008 in case no. 200702763/1, she deduces from the judgments of the European Court of Justice (hereafter: ECJ) of 27 March 1990 in case C-113/89 (RV 1990, 89), 9 August 1994, in case C-43/93 (RV 1994, 89), 21 October 2004 in case nr. C-445/03 (RV 2004, 92), 19 January 2006 in case C-244/04 (RV 2006, 31) and 21 September 2006 in case C-168/04 (RV 2006, 43) that the restriction of the freedom of services by means of national measures can be justified in a situation in which the posting of workers aims at making the worker, other than temporarily for as far is needed, enter the labour market of the member state of posting or to bypass the restrictions on the free movement of workers. According to the ECJ this situation generally does not occur if employment between the posted worker and the service provider, the worker performs his main duties in the Member State of origin and returns to that Member State after the provision of services.'
>
> 'As the Council of State has also considered, with regard to the question if the freedom of service may be restricted by means of a tewerkstelling in this case, all relevant facts and circumstances ought to be included.'[8]

Especially in cases in which a choice for a particular freedom has to be made, the Dutch courts strongly tend to follow previous interpretations, or: how the law should be applied.

An illustrative example can be seen in the *Van Schijndel* case before it ended up before the ECJ. In that case, it was the Advocate General Koopmans of the Dutch Supreme Court (hereafter: *Hoge Raad*) who proposed that it was not necessary to refer the question whether the freedom of establishment or the free movement of services provisions applied in a case that concerns compulsory membership of an occupational pension scheme:[9]

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[8] *Raad van State*, 6 August 2008, LJN: BD9458.

[9] *Hoge Raad*, 22 October 1993, NJ 1994/94, AB 1994/135.

> 'On the other hand, it does not seem necessary to me to ask questions about a possible breach with the freedom of services. Foreign insurance companies occupy the same position as the Dutch ones. Their access to the pension market are not impeded by the restriction of cross-border movement of services between Member States, but by the quasi-monopoly position ascribed to the professional pension fund. This can fall under Art. 81 or 82, it is outside the scope of Art. 49 EC Treaty. Subdivision c also lends itself for immediate rejection. In addition it may be noted that the freedom of establishment, which is also mentioned, but not worked out, in the explanation is totally out of order i.c.'

In accordance with its AG Koopmans, the *Hoge Raad* decided to only refer the points of competition law. The *Hoge Raad* followed this approach in the similar *Drijvende Bokken* case[10] and also in the *Albany* case.[11] After the previous precedents, the *Hoge Raad* is confident of its own opinion:

> 'with regard to the appeal to freedom of establishment and services repeatedly made in these cases (in the words of the 1997 arrest which do not differ substantially from the 1993 one): "reasonably cannot doubt that in the present case there are no restrictions of these freedoms." This implies that if cases such as the present are a matter of incompatibility with the national arrangement with the EG-treaty, their essential characteristic lies within the scope of Art. 81, 82 or 86 EG-treaty, and that, accordingly, questions on the terrain of freedom of establishment and the freedom of services are superfluous.'

Such a decision, as to the necessity of a reference, falls within the discretion of the *Hoge Raad*. As the ECJ ruled in the *Cilfit* case, it is for each national court, including supreme courts, to decide whether a question on the interpretation of European law is necessary for deciding the dispute. But at the same time: the decisiveness of its approach is somewhat remarkable. A statutory monopoly position could well be seen as an impediment of the freedom of establishment and the free movement of services. It is a questionable approach and it might impede the effectiveness of European law in a national context. Be that as it may, the ruling of the *Hoge Raad* further clarifies the application of European law in the context of the Netherlands.

Most (test) cases concerning European law end up on the plate of the national courts. Variations on the case-law of the ECJ are fertile soil for the setting of national European law precedents. National courts have to decide in the new cases, give an interpretation and decide on the necessity of preliminary references.

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[10] *Hoge Raad*, 6 June 1997, NJ 2000/232. The *Hoge Raad* did refer for preliminary ruling to the ECJ on the application and interpretation of European competition law.

[11] *Hoge Raad*, 5 February 1999, NJ 2000/451. The *Hoge Raad* decided the case by itself.

Sometimes a national court exports the case-law of the ECJ from one freedom to decide on a case in which another freedom is applicable: converging interpretation is used to decide a case by itself instead of referring for a preliminary ruling to the ECJ.

> An example gives, for instance, the *Hoge Raad* when it uses the *Denkavit* case[12] (on the freedom of establishment) for deciding on a case in which the free movement of capital is applicable.[13] The *Hoge Raad* concludes that it is beyond reasonable doubt that similar conclusions may be deduced in the context of case concerning free movement of capital.

A reference to a national European law precedent is sometimes used as a justification for not referring to the ECJ. The national precedent has already made clear why the case-law of the ECJ is '*acte clair*' and no relevant questions of European law exist. This especially goes for the level of courts of last instance.

### 3.2 Abstract Judgments of Basic Tenets

In the second place, there is the type of precedent that boils down to a judgment in a concrete case which sets a precedent for new abstract judgments of a basic tenet of free movement law. As you might know, the European law on free movement follows basic patterns: Which freedom is applicable? Is there an impediment of the freedom? If there is an impediment, is it justifiable on grounds of the general interest? And if so, does it meet the proportionality principle?

In the Dutch case-law on the freedom of establishment and the free movement of services, it is quite common that whenever a Dutch court has decided on a basic tenet, that court itself but also other Dutch courts tend to be explicitly inspired by that previous decisions.

This type of precedent is apparent in the field of nearly all the basic tenets of free movement law:

- in the delineation between freedoms
- in the scope of a particular freedom
- in the existence of an impediment and the nature of the impediment
- in the sphere of the justification and proportionality.

Abstract judgments on the distinction between the freedoms are very prominent in the context of tax cases in which a distinction between the freedom of establishment and the free movement of capital often has to be made.

[12] C-170/05 *Denkavit* [2006] ECR I-11949.

[13] *Hoge Raad*, 30 November 2007, BNB 2008/103.

As regards the existence and the nature of an impediment, examples can be found in the Dutch case-law on gambling in connection with the free movement of services. After the judgments of the Court of Appeal (hereafter: *Gerechtshof*) Arnhem and the *Hoge Raad* in interim proceedings in the *Lotto* v. *Ladbrokes* case (licensee vs. gambling company without a permit) the *Hoge Raad* made clear that the Dutch gambling legislation does *not* directly or indirectly discriminate against gambling service providers of other Member States. Subsequently, lower courts were inclined to replace an autonomous decision of their own (as regards the compatibility of Dutch gambling legislation with the freedom to provide services) with the national European law precedents.

> Two weeks after the judgment of the *Gerechtshof* Arnhem, the President of the *Rechtbank* in Utrecht gave judgment in the case of the *Dutch State Lottery v. Stargames*.[14] Although the judgment does not explicate this, it seems strongly inspired by the judgment of the *Gerechtshof*, given the wording used in the President's ruling. The same goes, to a lesser extent, for the judgment in appeal in this case at the *Gerechtshof* Amsterdam.[15]

An explicit example gives can be found in the judgment of the *Rechtbank* Arnhem in the case of *Lotto* v. *Mr Bookmaker*. On the basis of the above mentioned precedents of the *Gerechtshof* and the *Hoge Raad*, the *Rechtbank* dealt with the case only summarily.[16]

Also the *Hoge Raad* itself has had, after the interim proceedings in the case of *Lotto* v. *Ladbroke*, a period in which the justifiability of the Dutch gambling law in the light of European law seemed *acte clair*: in the appeal case of Betfair, the *Hoge Raad* reduced the appellant's plea, as regards the application of the free movement of services, to a so-called Article 81 RO case: the case does not include questions of law which are important for the unity of law or the development of law, it is not necessary to give further grounds for judgment.[17]

Once a court has decided that a certain impeding measure is justified, a strong tendency exists to follow that precedent. The Dutch gambling European case-law provides us with an example of this practice. But examples are also found in Dutch tax law in the light of the fundamental freedoms.

> A judgment of the *Gerechtshof* Amsterdam gives us an example.[18] The case concerns the compatibility with the free movement of capital and/or estab-

[14] *Voorzieningenrechter Rechtbank* Utrecht, 18 September 2003, KG 2003/219.

[15] *Gerechtshof* Amsterdam, 16 December 2004, IER 2005/54.

[16] *Voorzieningenrechter Rechtbank* Arnhem, 21 November 2005, LJN: AU8824.

[17] *Hoge Raad*, 21 April 2006, LJN: AV0641.

[18] *Gerechtshof* Amsterdam, 18 January 2006, LJN: AU9845.

> lishment of an extended period of time for the Dutch Tax and Customs Administration for tax assessment. The extension is applied under certain circumstances, for instance, in the case of non-disclosing foreign bank account assets. Without assessing the character of a possible restriction or choosing for a particular freedom, the *Gerechtshof* makes clear that a restriction is justified in any case on the grounds of combating tax-evasion and effective fiscal control. This precedent is, for instance, used by the *Rechtbank* Haarlem in a couple of cases. It cites the relevant paragraphs of the judgment of the *Gerechtshof* and follows its judgment: '4.2.2. In its judgment of 18 January 2006 (number 03/4059, LJN AU9845, NTFR 2006/125) in the matter of said conflict of the lengthened navorderingstermijn with the EG-Treaty, the Court of Appeal of Amsterdam has considered and decided the following [...]
> 4.2.3. The Court adopts this consideration and conclusion and embraces it. Therefore there is no conflict with the EG-Treaty.[19]

The interesting question is to what extent it remains necessary for a national court to autonomously review such national measures in the light of the free movement provisions if a litigant invokes these norms. Of course, a problem occurs with cases in which an autonomous, concrete review would lead to *different* outcome of the case.

To date, the case-law of the ECJ does not consider the existence of national European law precedents explicitly. Its current guidelines are incomplete in this field. This especially goes for the review intensity in free movement law when national European law precedents exist. To what extent is it necessary to review a similar case in a concrete manner? How much autonomy does the national European case-law have in this respect?

### 3.3 Well-Founded Judgments

A third type of precedent consists of the cases in which a national court simply makes references to similar previous national case-law: as a way to better found the judgment, give better grounds for the judgment in a particular case. The precedent has a functional role in the sense that it is used to justify one's judgment. Positively said, it is a way of securing the legal soundness of the judgment. However, there are also examples in which the reference to a national European law precedent creates a way to avoid deciding upon the matter by itself.

In the Dutch European case-law it is also common to make a 'mixed reference': reference to earlier case-law of the ECJ as well as to case-law of Dutch courts which tackle the same topic. This indicates the similarities of

[19] Citation from *Rechtbank* Haarlem, 9 November 2007, LJN: BC2916. The nearly same phrasing is used in: *Rechtbank* Haarlem, 14 January 2008, LJN: BC2895.

certain cases and underlines the consistency of the judgment with previous decisions.

> For an example of this practice, we could turn to a case of the Dutch *Raad van State*:
>
> 'As the Council of State has considered before in the judgment of 14 March 2007, case no. 200600283/1 (attached) there has been no harmonization of legislation in the field of betting games. In this case, nor in the present conflict an appeal has been made to the exceptions on the free movement given in articles 46 in conjunction with 55. In both cases an appeal has been made to the constrained reasons of public interest, developed in the judgment of the Court.'[20]

Nothing is wrong with such an approach. It has a signaling function.

## 4 Consequences

### 4.1 The Existence

The mere existence of these precedents has consequences for the judicial system in the EU. It develops the judicial protection of litigants within the context of a Member State. To a certain extent the existence of national European law precedents should be seen as an inherent fact of the far-reaching decentralized judicial protection within the EU. It is a logical consequence of the acceptance of the doctrines of direct effect and the principle of effective judicial protection vs national procedural autonomy. Furthermore, the fact that not every case at the level of national courts is suitable for the preliminary reference procedure makes it quite logical that national European law precedents develop.

The vast majority of today's European case-law is created at the level of the national courts. The fact that some of that case-law has precedential value is quite understandable from a practical point of view. At the same time, the idea of the existence of national European law precedents has not always been acknowledged, realized and accepted as such. The European legal doctrine often focuses solely on how the law evolves at the level of the ECJ.

The acceptance of the existence of national European law precedents might give a complementing perspective of how the European law stands at a certain time and place. That brings us to the following question: what kind of meaning does a national European law precedent have?

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[20] *Raad van State*, 18 July 2007, LJN: BA9831.

### 4.2 The Meaning

Of course, a judgment on points of European law is 'just' a judgment within the context of a Member State. At the same time, it is of value for the application and interpretation of European law. For whom does the precedent have meaning: for courts of the same Member State?

This paper tried to demonstrate that national European law precedents play a role in the decentralized judicial protection of European law. Such precedents have meaning as authoritative decisions on European law for the Dutch context. It forms a source of law for the adjudication of a case by Dutch courts as European judges.

The question is: should a national judge be bound by the previous judgments of their national colleagues? A flexible approach is preferable. National European law precedents may not impede the discretion of a national court to decide within its own autonomy on points of European law. On the other hand it is reasonable from a practical point of view that a court follows the previous outlines in the national European case-law.

Do these precedents have a meaning for courts of other Member States? To date, this is not so common in the Dutch European case-law analyzed for the purpose of this paper. However, in some recent judgments of the *Hoge Raad* and the Dutch *Raad van State,* reference to case-law of national courts of other Member States is used as an argument to decide on referring the case to the ECJ for a preliminary ruling. In the gambling case of *Ladbroke* v. *Lotto,* the *Hoge Raad* considers:

> 'Furthermore it is of importance that, in the conclusion of the Advocate-General under 2.6, several judges in other Member States have found reason to ask prejudicial questions, and that the *Raad van State* [...] has asked prejudicial questions in the case that is mentioned in the conclusion under 2.10.'[21]

It is interesting to note in these cases that the case-law of other Member States in these cases supports *not* deciding the case by itself but referring to the ECJ after all.

It seems as if there is enough potential in national European case-law (apart from the practical barriers such as knowledge of languages, knowing the relevant case-law in other Member States, etc.) as a fertile source for further development of European law.

Having said this, it is interesting to note the pivotal question if and how national European law precedents may serve as a bottom up source of

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[21] *Hoge Raad,* 13 June 2008, LJN: BC8970. The mentioned judgment of the *Raad van State* is of 14 May 2008, LJN: BD1483. The *Raad van State* refers to the German *Verwaltungsgerichte* which also referred to the ECJ in Joined Cases C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07 *Markus Stoss.*

inspiration for the ECJ or its Advocate Generals. In other words: what is the significance of these precedents for the development of European law at the central level of judicial protection in the EU?

National European law precedents are set in the Member States' context. But it concerns the interpretation of norms of European law. Considering the keystone role of the national courts in the EU judicial system, it would be too simplistic and unsatisfactory to give these interpretations of European law no substantive legal meaning at all at the European level.

Trying to define this legal significance we find a 'black box'. The case-law of the ECJ focuses much more on what the national court should do instead of taking the national European case-law seriously. It does not refer to national European case-law as a source of law or as some sort of factual guideline (apart from mentioning the main proceedings in the preliminary reference procedure), with the result that the status of national European case-law stays rather obscure.

National European law precedents could at least have factual relevance for the ECJ. It is questionable if the EJC would ever explicitly refer to national European law precedents as a source of law (why not?), but the national European case-law could have a function as some sort of factual counter pressure. National European case-law must have some influence on an integrated European legal order. Or, it in its essence, how authoritative is a judgment of a national court on points of European law?

### 4.3 Correction Mechanisms

Suppose, there is sometimes need for correction of the national European case-law. What sort of mechanisms are the most obvious? Of course it is interesting to think of practical ways in which undesirable national European law precedents might be corrected. Within the context of a Member State we could think of:

*Litigation pressure: pleas for a change of the interpretation of law*

The law evolves by new cases which test the opinion of the courts. This illustrates the importance of skillful advocates to point out to the national courts wherever a national European law precedent should be reconsidered.

In the context of Dutch case-law on the provision of gambling services, we have seen in the recent years that the Dutch courts moved away from the idea that the Dutch gambling law is justified per se. Possibly litigation pressure has played a role in this respect.[22]

[22] As mentioned above, the *Raad van State* and the *Hoge Raad* made references to the ECJ for a preliminary ruling after a quite some national case-law that defended the justifiability of the Dutch gambling legislation in the light of the freedom of services.

*A referral to the ECJ after all: but parties are dependent on the willingness of a national court to do so*

A referral for a preliminary ruling is after all an elegant solution.

It depends from the willingness of a national court to refer a case to the ECJ. This underlines that a flexible approach towards national European law precedents is also necessary by the national courts.

Correction mechanisms at a European level:

*File a complaint at the Commission*

One could file a complaint at the Commission whenever one is of the opinion that a national European law precedent leads to a misinterpretation of European law. However, the examples of infraction proceedings on the basis of misinterpretation of European law by national courts are rather rare until now.[23]

*Towards a principle of consistent interpretation of national European law precedents?*

The ECJ could anticipate in its case-law the existence of national European law precedents, for instance by extending the principle of consistent interpretation to national European law precedents. Such an extension should contain the acceptance of national European law precedents as such (1) and imply a duty for national courts (especially of last instance) to place national European law precedents against the background of the current case-law developments at the ECJ.

*A role for the Advocate General at the ECJ to inform the Court about relevant national European case-law*

It is questionable whether the ECJ will explicitly refer to national European law precedents in its case-law. However, it would be a great possibility to give a boost to the importance of national European case-law.

It might also be a rewarding task for the Advocate Generals at the ECJ. In their opinions, they could integrate national European case-law and where necessary signal that certain interpretations should be altered. The ECJ is at least informed that there are relevant developments in Member States on the issues involved.

*Solutions in the sphere of informal contacts between national courts and the ECJ*

In the informal contacts between national courts and the ECJ lays also a possibility to influence or correct each other on certain concepts or notions.

[23] See however Case C-129/00 *Commission* v. *Italy* [2003] ECR I-14637. And the recent Case C-154/08 *Commission* v. *Spain* concerning the national judicial interpretation of Directive 77/388/EEC.

Thinkable is also that national courts provide a copy of their European law judgments to the ECJ.

In this respect, a role is reserved for European legal scholarship to identify the outlines in national European case-law and to start or integrate more research into the practical application and interpretation of European law by national courts.

*Last and also least, the rough remedy of the* Köbler-*liability may be mentioned.*[24]

In the *Köbler* case the ECJ accepted a state liability arising from a decision of a national court adjudicating at last instance for judicial infringement of European law. This is a rather rough remedy. It should only be used in exceptional circumstances. In my opinion, it is rarely suitable. Furthermore, the relationship between the ECJ and the national courts in the spirit of loyal cooperation is put under pressure. In addition, it is questionable that a misinterpretation in a national European law precedent leads to a 'manifest infringement' of European law as a required condition in the *Köbler*-judgment.

## 5 Concluding Remarks and Discussion Topics

Where does this lead us? European law seems to be implemented by the national judiciary in its case-law, by setting precedents for future cases. This limited research demonstrates a strong tendency of the Dutch Courts to follow previous decisions of their colleagues. It illustrates that for the interpretation of European law the ECJ does not have a monopoly position. National European law precedents function as a source for deciding on points of European law in new disputes at the level of Dutch courts. It is interesting to find out if this development is also felt within other fields of European law in a national context and if the same goes for the national European case-law in other Member States.

National European law precedents are a development of fact and law. The fact that national courts are inspired by the previous decisions of their colleagues is a development that is understandable in today's administration of justice within the EU. European law leaves room for actors on a national level. Consequently, a national court has in principle the autonomy to interpret European norms by itself. The phenomenon of national European law precedents is an example of the judicial autonomy of national courts in European law.

Hopefully, the ideas presented in this paper give some impetus to further discussion on the topic of national European law precedents and the broader notion of national judicial autonomy. Raising more questions than answers:

[24] Case C-224/01 *Köbler* [2003] ECR I-10239; C-173/03 *Traghetti* [2006] ECR I-5177.

What to think about these concepts? How authoritative is a national European law precedent? Should the ECJ anticipate the existence of national European law precedents for instance by developing a principle of consistent interpretation of national European case-law?

Which future role for national European law precedents in the EU's judicial system? (Especially in connection with the development of the area of freedom, security and justice and the development of a 'free movement of judgments'). And finally: are we moving towards an explicit acceptance of a principle of national judicial autonomy in European law?