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The Dual Identity of National Judges in the EU and the Implausibility of Uniform and Effective Application of European Law throughout the European Union

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Abstract

In this article the social sciences-concept of 'collective identity' will be laid alongside the legal reality of national judges in the EU. National judges in the EU are under the obligation to provide for a uniform application and full effectiveness of European Law, while at the same time being judges in their national jurisdictions. The possible implications from finding that national judges have a dual collective identity, with the European identity being contingent upon the national identity, but with an inherent tension between them, will be explored. My main contention is that the duality of identities of national judges explains why full effectiveness and uniform application of EU law is implausible.

1 Introduction

National judges in the member states of the EU are part of different collectives and may therefore combine different identities.[1] They are judges of their country: Dutch, Romanian, Swedish or Maltese judges. They share this identity with other Dutch, Romanian, Swedish or Maltese judges who are judges in the same country. But they are also EU-judges, an identity shared with every national judge in the EU.[2] In this article the concept of collective identity (section 3) will be contrasted to the legal reality stemming from different legal obligations under EU and national law confronting national judges (section 2). The possible implications from the finding that national judges have a dual (collective) identity,

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1 In this article 'national judge' is shorthand for judges in the legal systems of the member states of the EU. This article does not refer to the judges at the European Courts: the ECJ or ECrtHR; 'European judge' is used to indicate the national judge in her capacity as common European judge (see further below).

2 There may be other layers to this identity: competition law judges for example, will share this with other competition law judges, in their home-country, in the EU but also abroad, as do judges in other specialised fields. For reasons of simplification these are unexplored in this article.

with the European identity being contingent upon the national identity, but with inherent tension between them, will be explored (section 4). My main contention here is that the duality of identities of national judges explains why full effectiveness and uniform application of EU law is implausible. I will end with some concluding remarks (section 5).

The identity of a national judge as an EU-judge stems directly from EU law itself. Though the EU legal realm and the national legal realm are integrated in some ways, the (legal) expectations and obligations relating to the judge as a national judge are different from the expectations and obligations resulting from European law.[3] The doctrines involved are well-known to readers with knowledge of European law though the context in which I will revisit them is new. The concept of collective identity will be introduced further below, so it suffices here to indicate that it connotes a construct, a (perceived or concrete) community, involving a specific context – values, traditions, history, language – and has an in- and an out-group. A collective identity may be a result of collective action but may also lead to collective action. In this article it is posited that the national judge has a *dual* identity: she is part of the collective of national judges in her member state,[4] and she is part of the collective of European judges.

1.1 Purpose and Methods Used

The purpose of this article is to both sketch the contours of the dual identity of the national judge, identify the connection between legal reality and the notion of collective identity and exploring the possible implications that this finding of dual identities might have. The notion of collective identity is linked to collective action for which, though usually related to protest movements or fringe groups, there seems no ex ante reason not to transpose this to the legal reality. Thus, the duality of collective identities, their relative strengths, their juxtaposition, overlap or nestedness, may provide a new frame for discussing why full effectiveness and uniform application of EU law on the national level is, in reality, not achievable. In turn, these insights might provide input for an answer to the normative question that underlies this article (and one that has intrigued me since becoming involved in applying European law in judging): should not the normative framework governing the interplay between the national and the European level (of the judiciary) include room for differentiation in the national courtrooms within the member states of the EU?

At this point a word on methodology seems fitting. The method used in this article is multidisciplinary: ideas from other areas of scholarship are taken up, such as the social sciences, and are combined with legal scholarship with a view

3 'EU-law' and 'European law' are used as synonyms throughout this article.

4 Or the jurisdiction if a member states has several legal systems within its boundaries.

to using them to enrich the understanding of legal reality. As I am a legal academic, at home in European law, specifically in competition and regulatory law, the dominant view on the combination and resulting interpretation is the *legal* view.[5] There are drawbacks to such a method as the European law-adepts might feel that nuances related to the European legal obligations and theories applicable to the interplay of the national and European realms will not be given the attention they are due. The social scientists may regard the lack of empirical data disparagingly; the work presented here does not rest on empirical data (i.e. based on field-work, experimentation or questionnaires).[6] It is however, empirical in the sense that it relates to the reality of every-day judging. The advantages of this multidisciplinary method, however, override the flaws. In combining concepts and using insights from one field in the other, a different way of looking is encouraged and a deeper understanding may be gained.[7] A final preliminary remark: as ever, a researcher brings her own experience to the table. For me that means academic experience, but also experience in the court system of the Netherlands,[8] and experience through meeting, lecturing and discussing with students and judges from different legal backgrounds.[9]

2 Expectations and Obligations

In this section I will explore the obligations for a national judge that arise from European law (section 2.1), discuss the features of European law that enable the national judge to fulfil her European obligations (section 2.2), and assess the differences between these obligations and those inherent in national law (section 2.3). Then I will discuss limitations to the European obligation, stemming from both European and national law (section 2.4). This legal mapping exercise leads to a roughly sketched picture that will provide a

5 The findings in this article are not limited to certain areas of European law, but combining differences between areas of law with the idea of a dual identity is obviously a factor of complication.

6 Though a small pilot for such empirical research was conducted in the margins of the Conference Removing Further Obstacles, in Ljubljana in October 2013.

7 And in the meantime the intellectual gratification of this type of research should not be underestimated.

8 I was 'referendaire' (*senior juridisch medewerker*) at the Chamber for Competition Cases of the Court of Rotterdam (the first instance court for appeals against decisions of the Dutch Competition Authority) and am currently honorary judge (*raadsheer-plaatsvervanger*) at the Tribunal for Tariffs and Trade (the higher appeals court for these types of cases).

9 For example students who partake in the LL.M. programme Law and Economics or the LL.M. programme European Law, where more students are non-Dutch than are Dutch. Judges from different backgrounds I have met through teaching, both in the Netherlands and abroad (for example in Croatia), and other venues.

good sense of the legal reality, the reality of 'law in action', of the national judge.[10]

2.1 EU Law's Expectations and Obligations

European law's expectations of national judges are high.[11] The primary and most basic, but inherently expansive, expectation when it comes to European law is that the national judge is also a *juge commun Européen*,[12] applying European law as 'law of the land'.[13] This involves a difficult duty: the national judge is called to ensure the uniform application of EU law.[14] The reason for this obligation stemming from European law is, as is well-known, that uniform application ensures the effectiveness of EU law throughout its member states.[15] In this sense the obligation to ensure the uniform application of EU-law is closely related to the concepts of supremacy and direct effect.[16] It is also closely tied to the general obligation of sincere and loyal cooperation,

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10 See R. Pound, 'Law in Books and Law in Action', *44 AM. L. Rev.* 12 (1910), p. 12-36, but also. J.L. Halpérin, 'Law in Books and Law in Action: The problem of legal change', *Maine Law Review* Vol 64:1 (2012), p. 45-64, and E. Hondius, 'Precedent and the Law', *EJCL* Vol. 11.3 (2007).

11 See the apt job description that Andrea Biondi proposed: 'Of graduate calibre, already an expert in his/her own system of procedural law, should have proven experience and background in delivering and applying existing EU rights. The successful candidate will have the ability to think dynamically, handle a large amount of responsibility, and make decisions under pressure with the aim of developing new and effective strategies. While independence and autonomy are indispensable, he/she should be willing to seek guidance from the European Court of Justice when needed. A working knowledge of the French language is desirable for future career prospects. A strong commitment to the EU aims and values would be an advantage but is not required.' In: A. Biondi, 'How to go ahead as a national judge', *European Public Law*, Vol. 15 (2009), p. 225-238.

12 J. Temple Lang, 'The Duties of National Courts under Community Constitutional Law', *E.L.Rev.*, Vol.22 (1997), p. 3-18 at p. 3 states: 'Every national court in the European Community is now a Community law Court. (...) [E]very national court, whatever its powers, is a Community court of general jurisdiction, with power to apply all rules of Community law'.

13 See e.g. H. de Waele, 'European Rules as "The Law of the Land"? Towards Optimalisation of EU Member State Compliance', *Research Centre for State and Law research papers* 04/10.

14 See, for example, the joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR, p. I-415, para. 25: 'Such uniform application is a fundamental requirement of the Community legal order [...]'. But also implicit in a judgment as Case 26/62 *Van Gend en Loos v. Nederlandse belastingadministratie* [1963] ECR p. 12, where the Court stated that "to secure uniform interpretation of the Treaty by national courts (...) community law has an authority which can be invoked by nationals before those courts" and Case 16/65 *Schwarze v. Einfuhr- und Vorratsstelle Getreide* [1965] ECR 877.

15 See on effectiveness e.g. F. Snyder, 'The effectiveness of European Community law: institutions, processes, tools and techniques', *MLR* 56.1 (1993), p. 19, who discerns seven meanings in relation to effectiveness of EU law, one of them being the application and enforcement of EU law by national courts. Also see M. Accetto & S. Zleptnig, 'The principle of effectiveness: rethinking its role in community law', *EPL* 11.3 (2005), p. 386-388.

16 Supremacy, or primacy, in short meaning that EU law trumps conflicting national law and direct effect (again, in short) meaning that directly effective EU law can be relied upon in national court.

laid down in article 4 (3) TEU which applies to national courts as much as to other governmental bodies and which has been used a basis for detailing the obligations laid on the national judge.[17]

Considering the differences between the current legal regimes of the member states, and of the six founding states[18], it is not just useful to designate the national judges as 'common EU judges', it is a genius idea: in pure numbers national courts are most often confronted with cases in which European law plays a role. They are the ECJ's eyes and ears. Though this potentially influential role was hinted at in the original Treaties by way of the preliminary reference procedure, the ECJ almost immediately gave it a strong push.[19] It is, states the Treaty (now in article 19 TEU), the ECJ who 'shall ensure that in the interpretation and application of the Treaties the law is observed'; the role of national courts is not mentioned here.[20] But if European law was to have real effect a strong role for national courts is a necessary requirement.[21] On the one hand, that means giving national judges instruments to be able to fulfil this role. On the other hand, it means instituting safeguards to prevent the different jurisdictions applying European law in such a way as to end up moving in different directions. Thus, the obligation to provide a uniform application of European law effectuates both the level playing field envisaged by the internal market and is a safeguard for equity and legal certainty in its own right.[22]

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17 See in relation to article 5 EEC (but still valid): J. Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty', *CMLR* 27 (1990), p. 645-691; also Snyder 1993, at p. 37.

18 Now, of course, their jurisdictions come from even more different legal families or legal traditions. See on legal families K. Zweigert & H. Kötz, *An Introduction to Comparative Law (*transl. Tony Weir), Oxford: Clarendon Press 1998, at p. 143. See also H.P. Glenn, *Legal traditions of the world: Sustainable diversity in law*, Oxford: Oxford University Press 2007.The concept has been put in question but it is still a useful starting point for many comparative law studies (cf. Hondius 2007, at p. 5).

19 Already present in the ECSC-Treaty, see also. H. van Harten, 'Zoekt en gij zult (rechts)vinden', *Ars Aequi* 7/8 (2012), p. 541-549; M. Broberg & N. Fenger, *Preliminary references to the European Court of Justice*, Oxford: Oxford University Press 2010. See on the empowerment of private litigants in this system also K. Alter, 'European Legal System and Domestic Policy', *International Organization*, 54 (2000), p. 489-518.

20 Van Harten 2012, at p. 542.

21 The role of private litigants in this push has been highlighted as well. See e.g. on how private practice, together with the national courts and the ECJ has advanced European integration (and penetration of EU law into national domains): A. Burley & W. Mattli, 'Europe before the Court: a political theory of legal integration', *International organization* 47 (1993), p. 41-76; A. Stone Sweet & T. Brunell, 'Constructing a supranational constitution: Dispute resolution and governance in the European community', *APSR* 92 (1998), p. 63-81.

22 In relation to uniform application of competition law also see A. Waller, 'Decentralisation of the Enforcement Process of EC Competition Law — The Greater Role of National Courts' 1996 *L.I.EI* 1 (1996), p. 1-34.

In this interplay between national courts and ECJ a fairly difficult division of labour is implied in the language used. It is the ECJ who is solely responsible for the *interpretation* of European law; it is the national courts who are the only ones *applying* European law.[23] The division of labour has been criticised as untenable in practice:[24] it is almost impossible to point to where interpretation ends and application begins. If recognised, this difficulty may be a starting point for accepting differentiation in outcomes of application of European law.[25] In contrast, it is also possible to hold to a 'differentiation should not be accepted as reality'-line. Differentiation is then, at best, a non-intentional side-effect.[26] The middle ground would state that yes, there may be room for differentiation, uniformity not being synonymous with being identical, but the boundaries for this differentiation are set by European law itself.[27] The notion of effectiveness, in the sense of providing for effective European law on the national level, can then be seen as a mediating principle between uniformity and 'inevitable' differentiation.[28] But it is also possible to hold that in light of what is really happening ('law in action'),[29] there should be ways of accommodating differentiation in conceptual terms.[30] This strand of thought posits that the national judge also interprets European law and has to in order to judge and that this power should be recognised. Not only is differentiation thus acknowledged but it is accommodated. The notion of a dual collective identity adds to this debate.

One of the reasons for differentiation's existence must surely be that the role for EU law in national court procedures comes in so many guises. It can be a starring role, a case hinging upon an issue of European law and a claim built purely on rights derived from EU law. Or a supporting role where EU law is

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23 See Van Harten 2012.

24 H. van Harten, *Autonomie van de nationale rechter in het Europees recht. Een verkenning van de praktijk aan de hand van de Nederlandse Europeesrechtelijke rechtspraak over de vestigingsvrijheid en het vrije dienstenverkeer* (diss. Amsterdam UvA), Den Haag: Boom Juridische uitgevers 2011. Also: P.J.G. Kapteyn & P. VerLoren van Themaat, *Het recht van de Europese Unie en van de Europese Gemeenschappen*, Deventer: Kluwer 2003, at p. 398.

25 See Van Harten 2012, p. 545.

26 E.g. R. Barents, *De communautaire rechtsorde: over de autonomie van het gemeenschapsrecht*, Deventer: Kluwer 2000; C.W.A. 'Timmermans, case note on case 166/73, Rheinmühlen', in: T.W.B. Beukers, H.J. Van Harten & S. Prechal (eds), *Het recht van de Europese Unie in 50 klassieke arresten*, Den Haag: Boom Juridische uitgevers 2010, p. 80.

27 Prechal 2006, p. 14.

28 Accetto & Zleptnig 2005, p. 390.

29 E.g. L.Y.J.M. Parret, 'En wat met de rechtsbescherming? Het Verdrag van Lissabon en de communautaire rechter', in: R.H. Ooik & R.A. Wessel, *Europa in beeld na Lissabon*, Deventer: Kluwer 2009, p. 49.

30 E.g. A.J.W. Meij, 'Zoeken naar hiërarchie: is rechtseenheid passé?', *Ars Aqui* 7/9 (2012), p. 584-591. See also Halpérin 2012, p. 70: '... we can presume that the same regulations or guidelines that emanate form the European authorities are interpreted (and linked to other norms) in a different way in the United Kingdom, in Germany and in France'. See also Townley 2014.

used for a secondary claim, as an interpretative help, or in a supporting argument. Fairly often, the European law-source is almost invisible as the implementing national legislation is applied. Often its role is limited to the backstage, in the preparation of a national judge before a hearing or in the deliberation afterwards. There is also a difference between the European law-aspect being of substantive law, or of a procedural nature. The effects of either claim may be felt both on national law far removed from EU law or on national law that is almost completely Europeanised: these are in themselves bewildering options, and endless morphing-possibilities during procedures make for limitless roles. In all these circumstances the *same* thing is expected of the judge, whether she is member of the supreme court or a first instance judge. That the European law-issue is recognised, and that European law is applied according to the principles that EU law *itself* sets for such application: the national judge has to ensure the effectiveness and uniform application of European law.

2.2 Characteristics of EU Law Enabling Uniform Application

National judges are enabled to ensure the uniform application of EU law by making use of characteristics of that same EU law. Specifically by applying the doctrines of supremacy and direct effect uniform application is ensured, though the judge will usually try to apply the doctrine of conform interpretation first.[31] The benefit of using the conform interpretation-route is that a direct conflict between European and national law is avoided, in that national law is applied and uniformity of European law is ensured.[32]

EU law is to be given effect in a national procedural environment.[33] National procedural law can thus be seen as the foundation on which the effectiveness of European law rests. Though procedural autonomy is recognised,[34] EU law requires that this environment conforms to the European standards of equiva-

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31 Conform or harmonious interpretation: the obligation under EU law to interpret the national law provisions applicable in the case at hand in light of the EU law provisions.

32 Where, as is the case in European environmental law, on the European level much use is made of directives the use of conform interpretation becomes especially important in practice. See e.g. B.A. Beijen, 'The Implementation of European Environmental Directives: Are Problems Caused by the Quality of the Directives?', *European Energy and EnvironmentalLaw Review* 20 (2011), p. 150-163; B.A. Beijen, *De kwaliteit van milieurichtlijnen* (diss. Utrecht), Utrecht University 2010.

33 J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law*, Groningen: Europa Law Publishing 2007, at p. 40.

34 See for a discussion on the (non-)existence of procedural autonomy C.N. Kakouris, 'Do the Member States possess Judicial Procedural "Autonomy"', 34 *CMLR* (1997), p. 1389-1412; A.M. van den Bossche, *Europeesrecht in de kering. Over winterbedding, potpolder en schorre*, Antwerpen: Kluwer 2001; Kapteyn & VerLoren van Themaat 2003, p. 451.

lence and effectiveness.[35] On top of this, especially article 4(3) TEU places the national judge in a position to create remedies, to set aside national law, to grant interim relief, and to provide damages if necessary, even if these possibilities are non-existent under national law.[36] In this interplay between the national and the European level, bolstered and shaped by the general obligation of loyal cooperation governing this relationship, the preliminary procedure plays an important role. Making use of the preliminary procedure is not only always a possibility for a national court, but, under certain circumstances, also an obligation. Here the fabric of European law's net on the national judge becomes especially clear, as the doctrines of supremacy and direct effect have pushed the preliminary procedure to its central position, considerably empowering the national courts too.[37] This specific procedure has also provided the language and the inherent obligations and boundaries of the division of powers between the national and the European courts. The mere fact of its existence, its possibility, has thus enabled the national judge to take on European law's robes.[38]

The general principles and doctrines of European law (supremacy, direct effect, conform interpretation, equivalence and effectiveness of national procedural law), together with the preliminary procedure provide the mechanics of making the notion of the national judge as a 'common EU judge' possible, thus providing the mechanisms the national judge uses to ensure effectiveness and uniform application of EU law. Though not limitless (section 2.4. below), these are powerful tools in the hands of all national judges, enabling them to fulfil the obligations of European law.

2.3 No Comparable Expectations under National Law

An important question as to the identity of the national judge is whether she has the same obligations in her national legal system as to those described above. Does she have a duty to ensure effectiveness and uniform application of national law? Does she need to be reminded that her national law is to be applied as the law of the land?

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35 And that in general effective judicial protection is guaranteed. See on these requirements generally: Jans et al. 2007, p. 54.

36 See Temple Lang 1997 for an overview of these requirements.

37 See e.g. Burley & Mattli 1993; Stone Sweet & Brunell 1998; G. Garrett, 'The Politics of Legal Integration in the European Union', *International Organization* 49 (2005), p. 171-181; C.J. Carrubba & L. Murrah, 'Legal integration and use of the preliminary ruling process in the European Union' *International organization* 59 (2005), p. 399-418; K. Alter, 'The ECJ's Political Power', *West European politics* 9 (1996), p. 458-87; K. Alter, *Establishing the supremacy of European Law*, Oxford: OUP 1998.

38 Finally, the national judge is – under certain limited circumstances – also obliged to apply EU law *ex officio*. See generally Jans et al. 2007, p. 308.

First, is the national judge under a legal obligation, enshrined in national law, to provide uniform application of national law? I would suggest that in general she is not.[39] Of course the answer will differ depending on the jurisdiction of the national judge, as shown by the difference between a system including 'precedent as such' and a system in which only the 'gravitational force' is recognised (generally aligning with the common law and private law traditions).[40] In most member states, however, there is no real system of precedents. The answer might also differ according to the place of the judge in the court-hierarchy and whether she is part of a federalised system. However and again in general, it seems that ensuring uniform application of national law is nota primary task of the national judge. Indeed, it is important to note that the national judge is generally seen as *autonomous* in finding the law, in the sense of 'freedom from an external causal influence'.[41] This encompasses an autonomous sphere in relation to interpreting the law and in applying the law in light of the situation at hand.[42]

Law being law, there are nuances, of course. For example, some courts do have an explicit duty to further the development of the law and guarding the coherence of the law. Constitutional courts may be charged with providing binding interpretations of the constitution. But these are usually courts at the highest level of their respective jurisdictions and though clearly of great importance, in numbers the lesser group. Another nuance is that judges do have an ingrained and profound respect for the importance of legal certainty. The concepts of *jurisprudence constante* and *ständige Rechtsprechung* have been developed to this effect[43] Therefore, no judge will easily reject a highly respected interpretation, especially if the interpretation is given in a standard-setting judgment by the highest court. The 'gravitational force' of such a judgment is significant. That still leaves a legal difference in the sense that though a judge may feel the shared responsibility not to deviate from a respected line and preserve coherence of the legal system, there is not necessarily an obligation to do so. This difference between the national expectations and the European obligations is reinforced

39 See also Meij 2012, p. 586.

40 Hondius 2007, p. 4; N. MacCormick & S. Summers, *Interpreting Precedents: a Comparative Study*, Aldershot: Dartmouth Publishing Company 1997.

41 This is the definition of N.A. Luhmann, *Law as a social system*, Oxford: Oxford University Press 2004.

42 See G.J. Wiarda, *Drie typen van rechtsvinding*, Deventer: Kluwer 1999, p. 19-30. Wiarda, at p. 19, does pose that in many cases, the everyday type cases, there is not much room for autonomous finding of the law: both the facts are clear and the legal rule to be applied is clear.

43 See already e.g. R.L. Henry, 'Jurisprudence Constante and Stare Decisis Contrasted', *ABAJ* 15 (1929), p. 11.

by the characteristics of European law that enable the judge to apply European law that are generally not present in the national systems.

Second, judges having a role in providing the effectiveness of national law is, at the very least, not usually made explicit. Effectiveness on the European level is very much entwined with notions of *instrumentality*.[44] European law is an instrument in the making of the internal market (and the now broader European project).[45] Effectiveness then connotes upholding the European legal rule to further this integrationist goal. As such that goal is not present in the national legal order. On the contrary, upholding individuals' rights and providing a check on executive powers is an important rationale for the being of judges.[46] This protective rationale of procedures might (or even: will generally) trump the instrumental rationale, which is primarily also effectiveness' rationale.[47] Of course, also on a national level the judge applies the law, giving it effect and of course also on the European level the protection of individual's rights is growing in importance. But the balance between instrumentality and protecting individuals' rights still seems subtly different. And of course, a national judge will very often see her primary role neither in effectively upholding the law, nor providing protection of individual's rights, but as providing conflict resolution. This might mean settling the case outside court and even outside the (application of) law altogether. In such instances the judge is not necessarily providing an effective application of the (substantive) law at issue, nor is she upholding a uniform application of that law, though she might very well be engaged in providing for a very effective solution.

The question of whether a national judge has an obligation to apply national law as 'the law of the land' seems an odd question, which already points to the differences between the European law obligations and obligations under national law. The European obligations are logical and not even very surprising: clearly European law *needs* to possess different characteristics. Its tailor-made principles

44 Though, as mentioned above, there is an aspect of providing for legal certainty, and legal protection in general, inherent in the concept as well as is apparent in the obligation to provide for effective judicial protection. The right judicial protection is also a separate general principle of law, not just stemming from European law, but also from the constitutional traditions of the Member States: see Tridimas 2006, p. 443, A. Gerbrandy, Convergentie in het Mededingingsrecht (diss. Utrecht), Den Haag: Boom Juridische uitgevers 2009, p. 18-39.

45 See on integration through law: M. Cappelletti, M. Seccombe & J. Weiler (eds), *Integration Through law: Europe and the American Federal Experience – A General Introduction*, Berlin: Walter de Gruyter 1986; critized by e.g. C. Semmelmann, 'Legal Principles in EU Law as Expression of a European Legal Culture between Unity and Diversity', M-EPLI, working paper no 2012/7, 2012, p. 10.

46 See also below on tradition and values (subsection 3.2).

47 See K. Hellingman & K.J.M. Mortelmans, *Economisch Publiekrecht: Rechtswaarborgen en Rechtsinstrumenten*, Deventer: Kluwer 1989.

are necessary for its effective application. But although it is logical from the point of view of European law, from the perspective of a national judge European law will have a different template. It is strange and foreign law. This suggests that from the perspective of the national judge European law and national law may indeed inhabit a common legal space, but continue still to be very different.

2.4 Limitations to the Obligations Posed by EU-Law

As the previous subsections show, the obligations placed on the national judge by European law are expansive. But though the role of EU law in national courts can be very great, it is not unlimited. There are limits firstly in EU law, paradoxically governed by EU law itself, secondly in national law, thirdly in practical everyday concerns, and fourthly in the theoretical notion of the 'autonomous European legal order'. These limits also provide indications of the perceived identity of national judges.

Limitations that European law itself provides on the obligation for uniform and effective application can, for example, be found in the doctrine of direct effect. This notion of direct effect is especially complicated in relation to the application of directives and European law recognises these limitations.[48] Similarly, the obligation of conform interpretation, though theoretically expansive, only applies 'as far as possible'.[49] Furthermore, the obligation of providing for uniform application is always held back by the (European) principle of legal certainty. A difficulty of a somewhat different nature involved in providing uniform application of EU law is the vagueness of the concepts it often presents. Of course, most legal provisions contain vague concepts or open norms, but uniform application may be made more difficult for lack of *travaux preparatoires,* thus cutting off its use as interpretational help.[50] The preliminary procedure can be useful to address this interpretational problem. There are, however, legal limitations inherent in the preliminary ruling system as well, as the doctrines of *acte clair* and *acte éclairé* demonstrate in establish where there is no need to ask a preliminary ruling. And, of course, the obligation to refer an interpretative question does not rest on all courts.

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48 Directives having only direct effect after the transposition period has expired, and not having horizontal direct effect at all (but still being able to have effects in tripartite conflicts); see for difficulties in environmental law specifically Beijen 2011.

49 There is no duty of conform interpretation *contra legem*, and for directives only after the transposition period has expired; see Jans et al. 2007, at p. 105 and 169.

50 It has been shown that environmental law directives may contain concepts – referred to by the using the same terminology – that have a different substantive meaning from one directive to the next, see on this extensively Beijen 2011.

A second group of limitations is found in national law. As noted above, the stage on which EU law plays its role is provided by national procedural law. Here, for example, the EU law requirement of *ex officio* application (of EU law itself) will generally only come into play if there is a similar requirement under national law. And where EU law limits national procedural surroundings by its requirements of equivalence, effectiveness and the principle of effective judicial protection, it does this by first recognising these boundaries-on-play set by national procedural law. Even though the principles governing these boundaries are *themselves* governed by European law, there are important differences between the national procedural law regimes that are thus recognised.[51]

A third group of hindrances that the national judge might find when ensuring effectiveness and uniform application of EU law is more practical. For example, if a national judge is primarily concerned with conflict resolution, this might make her lean towards the most pragmatic solution available, not necessarily being the solution giving full effect to European law obligations. In this vein there is also the undeniable fact that time cannot be stopped; particularly relevant to the preliminary procedure. Even if the procedure at the ECJ is one without delays, the adding of a preliminary reference procedure adds much more time to the proceedings before the national judge.[52] This extension of procedure might place a heavy burden on the parties,[53] a legitimate reason for not referring. Furthermore, a practical obstacle is presented when there is no one involved in the procedure, including the national judge, realising that European law is applicable. This ties in with the problem of a lack of knowledge (or access to knowledge), for example where judges are not as confident in their knowledge of European law as they are in their knowledge of national law.[54] Sometimes

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51 In relation to competition law D.I. Hall, 'Enforcement of EC Competition Law by National Courts', in: P. Slot & A. McDonnell (eds), *Procedure and Enforcement in EC and US Competition Law*, London: Sweet & Maxwell 1993, p. 41-42 mentions differences in fact finding, in rules on nullity, on interim relief, on damages and on costs.

52 First, the decision to refer has to be made, which takes research effort (to ascertain at the very least whether the matter has not been clarified already by the court) and an effort to answer the question as to 'how do I ask a question?'. Then the referring judgment has to be drafted. That takes quite a bit of effort, as the referring judgment contains not only the questions, but also the facts and an insight into national legislation. The judge is also expected to indicate a possible answer. If posed by a chamber deliberation-time is added. Parties may be heard on the questions. Interim measures may have to be taken. Even if the answer received is clear – and it might not be – extra time is needed before giving judgment, including a possible hearing and more deliberation and drafting involved.

53 For example in environmental law cases where, on the one hand the protection of the environment is at stake, but on the other hand economic damage to a planned project may be quite large, the time issue may be a very real stumbling block.

54 Even in member states as Germany and the Netherlands, founding member states and therefore long familiar with EU law, less than half of judges in the EP report rate their knowledge of EU law as reasonable/good/very good. Only 20% feel 'well informed' about developments in EU law; see T. Nowak, F. Amtenbrink, M. Hertogh & M. Wissink, *National judges as European Union Judges; Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands*, The Hague: Eleven International Publishing 2011.

these problems add up:[55] not all judgments of the ECJ have been translated into all national languages and there are member states where academic texts in a language accessible to judges are not widely available, nor do they cover all aspects of EU law.[56]

A fourth obstacle, the notion of the 'autonomous EU legal order', seems a fairly theoretical issue, however with possible ramifications in legal reality.[57] The notion concerns the idea that European law, and its workings in the national legal orders, is not dependent on these national legal orders.[58] EU law does not *need* the national legal order in order to sort legal effect.[59] The paradoxical effect of such a notion however, is that the EU legal system and the national legal system are seen as separate and having their 'own ultimate reference points'.[60] It is an open question whether the notion of an autonomous legal order, which seemed necessary in overcoming some of the dualist constitutional doctrines of the then-member states, is as relevant today. Concepts of composite pluralism, multiple legal orders and composite constitutionalism are much more nuanced.[61]

Still, the notion cannot be completely rescinded; indeed that might in itself pose a threat to the effectiveness of European law in the member states. The notion of autonomy of the European legal order is also very much tied to the function of the ECJ as ultimate interpreter of European law.[62] So, having the

55 And in newer member states there may be some who feel hostile towards EU law, as seemingly parallel to the 'law of the victorious'; see C. Himsworth, 'Things Fall Apart: The Harmonization of Community Judicial Procedural Protection Revisited', 22 *ELRev.*(1997), p. 291-311.

56 Personal and anecdotal experience suggests this, but also see A.F. Tatham, 'The impact of Training and Language Competence on Judicial Application of EU Law in Hungary', *European Law Journal* 18 (2012), p. 577-594.

57 See R. Barents, *The autonomy of community law*, Deventer: Kluwer Law International 2004; J.W. van Rossem, 'The EU at Crossroads: A Constitutional Inquiry into the Way International Law is Received within the EU Legal Order', in: E. Cannizzaro, P. Palchetti & R.A. Wessel (eds), *International Law as Law of the European Union*, Boston and Leiden: Martinus Nijhoff Publishers 2011.

58 This means that European law is not dependent on the characteristics described by national law on international legal norms, which would be the starting point for looking at European law when it came into being first. In a slightly different terminology the EU system would be an *autopoietic* system. If autopoiesis is taken seriously (in the sense that there can be no 'somewhat' autopoietic; see: H. Baxter, 'Niklas Luhmann's Theory of Autopoietic Legal Systems', *Annu. Rev. Law Soc. Sci.* 9 (2013), p. 167-184), then the national system and the EU system should be described as separate systems.

59 In contrast international law, generally, is dependent on its haven given some form of effect by a national legal act.

60 A.W.H. Meij, *Kringen van coherentie. Over eenheid van rechtspraak in de context van globalisering* (oratie Utrecht), Utrecht: G.J. Wiarda Instituut 2009.

61 See e.g. N. Walker, 'The Idea of Constitutional Pluralism', Modern Law Review 65 (2002) p. 317-359; L. Besselink, A Composite European Constitution, Groningen: Kluwer 2007. Though a composite or multiple legal order can be seen as an integrated legal system, the ultimate reference points – or even multiple reference points – remain.

62 Van Rossem 2011.

autonomous legal order in place, the question is whether this poses a problem for the national judge. In a very extreme sense this might entail that the judge cannot be part of two systems *at once* as this would contradict the very autonomy of the European legal system. But that does not fit reality. The autonomy of the EU legal order does however, reinforce the different provenance of obligations under European law as contrasted to obligations under national law and might lead the national judge to find her rationale in national law first.

That brings us neatly to the next section where the concept of collective identity, in relation to the national judge as both a national judge and European judge, will be explored further.

3 Collective Identity and the National Judge

In this section I will first explore the concept of collective identity in general (section 3.1) before embarking on an investigation in which the notion of 'collective identity' is used to develop the idea of the national judge combining overlapping, but separate, identities (section 3.2). The differences between obligations, as explored above, is one of the building blocks in this development, though other aspects of judging and legal culture such as history, language, values, some of which have alluded to above will be included as well. As a result, I posit that the national judge has a dual identity. This is a nested identity, as the European collective identity is nested in the national collective identity. However, as will be explored below, there are some cross-cutting features (at tension with each other) to the duality of identities as well (section 3.3).

3.1 The Concept of Identity

'Identity', as 'collective identity', is a broad concept and thus needs some further delineation. In this section I will introduce the general concept (subsection 3.1.1), link the exploration of this article to the idea and research related to the concept of a European identity (subsection 3.1.2), and point to the relationship between collective identity and collective action (subsection 3.1.3). These elements form the stepping stones towards linking the legal reality of national judges with the notion of collective identity in section 3.2.

3.1.1 Identity and Collective Identity

Identity is a concept familiar to social psychology, political science and to the broader realm of social sciences. It is a broad concept that

has different meanings in different contexts.[63] What is important from the multitude of uses is that identity does not connote a single dimension, but is multivalent and changeable: there can be multiple identities, relating to one individual.[64] In this article the concept of collective identity, as used in the social sciences, is seen as a useful point to detail the relation between the legal reality of the national judge and the notion of identity. On an intuitive level this provides a coat hook on which to hang the coat the national judge wears: both as a national judge and an EU judge as she shares this identity with either other judges from her state, or – the greater collective – with national judges from the EU (and the aptness of the hook is explored in section 3.2).

A collective identity 'describes imagined as well as concrete communities, involves an act of perception and construction as well as the discovery of preexisting bonds, interests and boundaries. (...) It channels words and actions, enabling some claims and deeds but delegitimating others'.[65] Though a diffuse concept, several (overlapping) elements of its meaning seem to be well established.[66] It is a dynamic identity, dependent on context;[67] and a constructed identity, dependent upon institutions. Language has meaning in this context as being a tool by which identity is signalled, shared and shaped. The collective identity rests on a certain tradition or maintains a particular relationship to history. Collective identity is often expressed through shared traditions[68] or it is through a reconstruction of history that collective identity is formed.[69] There is a system of values that is shared by the collectivity. And, of course, it draws borders, in that it has an in-group and an out-group.[70] The concept of collective

63 There are different uses though, e.g. in psychology and social identity theory identity is concerned with individual, internal processes, such as identification, sublimation, fantasy, and identity formation. In sociolinguistics identity is seen as function of language, constructed in social relations (e.g. N. Mendoza Dentor, 'Language and identity', in: J.K. Chambers, P. Trudgill, N. Schilling-Estes (eds), *The handbook of language variation and change*, Blackwell Publishing 2002, p. 476). See for its many meanings also R.K. Herrmann & M.B. Breuer, 'Identities and Institutions: Becoming European in the EU', in: R. K. Herrmann, T. Risse, M.B. Breuer, *Transnational Identities: Becoming European in the EU*, Oxford: Rowman & Littlefield Publishers 2004, at p. 4.

64 A short introspective moment will usually suffice to confirm this point.

65 F. Polletta & J.M. Jasper, 'Collective identity and social movements', *Annual review of Sociology* (2001), p. 298.

66 A. von Busekist, 'Uses and Misuses of the Concept of Identity', 35 *Security Dialogue* (2004), p. 81-98.

67 See e.g. A. Melucci, *Nomad of the Present*, Philadelphia: Temple University Press, 1989; A. Melucci, *The Process of Collective Identity*, Philadelphia: Temple University Press, 1995.

68 Polletta & Jasper 2001.

69 For example: I. Gabel, 'Historical memory and collective identity: West Bank settlers reconstruct the past', *Media, Culture & Society* 35 (2013), p. 250-259.

70 Von Busekist 2004; see also H. Tajfel (ed.), *Social identity and intergroup relations*, Cambridge: Cambridge University Press 1982, p. 104.

identity is often said to include an emotional or individual-affective component,[71] governing the relation between individual and collectivity.[72] However, such an emphasis on feelings has also been criticised[73] and in this article the emotional aspect of collective identity is not taken further into account.

3.1.2 European Identity

Especially in the context of the discussion on European integration, the democratic legitimacy of the (further) integration project and the political foundations of the European Union also empirical research has been undertaken on the forming of a 'European identity';[74] the Eurobarometer being a fertile ground for theorising how such European identity is formed and which variables are relevant for shaping one.[75] Though the identities of national judges relates to their professional identities, there is overlap between the general idea of European identity and the professional identities of judges, as, at the very least, in both studies the national level-identity is combined with the European level-identity. Thus, several outcomes of the general research are also relevant to this article. For example, one interesting outcome is that the European identity is seen as a 'non-emotional' identity (as opposed to the national iden-

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71 As result (in the sense of: 'to feel solidarity amongst themselves', see: N. Fligstein, A. Polyakova & W. Sandholtz, 'European integration, nationalism and European identity', *JCMS: Journal of Common Market Studies* 50 (2012), p. 106-122; see also R. Brubaker & F. Cooper, 'Beyond Identity', *Theory and Society* 29 (2000), p. 1-47) or as cause of the identity forming.

72 See e.g. V. Kaina & I.P. Karolewski, 'EU governance and European identity', *Living Reviews in European Governance*, 4 (2009) p. 1-41, at p. 13.

73 By pointing out that there are two other, equally important, elements guiding the attitude of the individual to the collective identity: cognitive, and evaluative: Kaina & Karolewski 2009, p. 15; Tajfel 1982, p. 70. Constructivist theories, almost in contrast, emphasize that collective identities are constructed and rests on norms, values and symbols, see e.g. R. Hettlage, 'European identity – between inclusion and exclusion', in: H. Kriesi, K. Armingeon, H. Siegrist & A. Wimmer (eds), *Nation and National Identity: The European Experience in Perspective*, Chur/Zürich: Rüegger 1999.

74 Hettlage, 1999; Lepsius 2006; Kaina & Karolewski 2009; M. Petithomme, 'Is there a European Identity? National attitudes and Social identification toward the European Union', *JIMS* 2 (2008), p. 15-36; Fligstein, Polyakova & Sandholtz 2010; G. Garib, 'Why do we feel European? Social Mechanisms of European Identity', *Journal of Identity and Migration Studies*, 5 (2011), p. 108-124.

75 Garib 2011 proposes a model that includes both political mechanisms and psychological mechanisms that are drivers for shaping a European identity; Petithomme 2008 correlates the level of education (in years), age and socio-economic status with identifying with a European identity or not.

tity),[76] the European identity being 'civic' in character.[77] Also useful is the concept of double allegiance, which is used to indicate that the European identity originates in the national identity and is therefore secondary. Thus, the identities are *nested* within each other.[78] This idea of nested identities means not only that people have multiple identities, but also that these are not conflicting because they are 'activated' under different circumstances.[79] This contrasts with identities that are 'cross-cutting', which might be conflicting. A possible reaction to such a conflict may be to include the larger into the smaller, for example by using what has been called a 'hyphenated identity' including both, for example an Irish-American or Afro-American identity.[80] These notions of nested, cross-cutting and hyphenated identities will be used below to explain the intricacies of the identity of national judges.

3.1.3 Collective Identity and Collective Action

Collective identity seems inextricably linked to collective action, research in this field began its life in the study of social movements in the '80's of last century.[81] The relationship between collective action and collective identity however, seems much debated: is it the *result* of the collective identity or is identity formed in the process of protest?[82] In other words: what is the *explanans* and what is the *explanandum* here? This relationship between what is the explaining factor and what is the thing to be explained, is also relevant here. The collective identity, or duality in collective identities, can be explained as a result of legal factors, including but not limited to the obligations and expectations

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76 There seems to be a correlation between support for the EU and defining oneself as 'European', where support for the EU is often thought to be primarily economic in nature; see S. Carey, 'Undivided Loyalties Is National Identity an Obstacle to European Integration?' *European Union Politics* 3 (2002), p. 389. M. Guibernau, 'Prospects for a European Identity', *Int J. Polit Cult Soc* 24 (2011), p. 31-43; also M. Bruter, *Citizens of Europe?: the emergence of a mass European identity*, Basingstoke, UK: Palgrave Macmillan 2005.

77 '(P)eople who identify as European view themselves as in favor of peace, tolerance, democracy and cultural diversity and as in general agreement with Enlightenment values', state Fligstein, Polyakova & Sandholtz 2010, p. 112. Interesting too is the discussion on it being a 'political'identity: see Herrmann & Breuer 2004, p. 6; and different: G. Nevola, *Politics, Identity, Territory. The 'Strength' and 'Value' of Nation-State, the Weakness of Regional Challenge*, Universita degli Studi di Trento, Quaderno 58 (2011).

78 K. Kersbergen, 'Political allegiance and European integration', *European Journal of Political Research* 37 (2000), p. 1-17; E. Lawler, 'Affective attachments to nested groups: a choice-process theory', *American Sociological Review* 57 (1992), p. 327–339.

79 N. Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe*, Oxford: Oxford University Press 2008, at p. 128

80 Fligstein 2008, at p. 128.

81 See specifically A. Melucci 1989.

82 J. Scott & G. Marshall, *A dictionary of sociology* (3d edition), Oxford: Oxford University Press 2009: 'That which needs to be explained (explanandum) and that which contains the explanation (explanans) – either as a cause, antecedent event, or necessary condition.'

placed on the national judge. The notion of collective identity is thus used as a concept to describe something that the group 'is' or 'has', not necessarily something that they 'do'. Collective identity is used as *explanandum* (in section 3.2). But the immediate following question is whether the dual identity is not also an *explanans* for action; maybe not in the sense of a protest-movement ('national judges burning their robes in protest against the ECJ'?), but in the sense of acting or not acting in relation to the obligations placed by European law.[83] This question will be tackled after having established whether it can indeed be said that the national judge has a dual identity (section 4).

3.2 The Collective Identity of the National Judge

It seems intuitively true to suggest that an identity as a national judge, be it Croatian, Latvian, Irish or German, will not be supplanted by an identity as common European judge any time soon. Just to point out the obvious, there is indeed no European obligation *not* to be embedded in the national legal system. On the contrary, the effectiveness of European law is dependent on the national legal system and the powers of the national judge as European judge are dependent on the judge being a national judge. This context alone would lead one to expect national judges having a dual identity. The concept of nested identities, the European identity nested in the national identity, seems especially fitting. This would mean that, depending on context, one of either identity is called upon. However, as will be shown, there are aspects to the interplay between identities that are in possible conflict. In this section I will map the elements of the concept of collective identity as discussed above (section 3.1) to the legal reality of the national judges, of which an important part was sketched above (section 2). I will focus on the dynamism and context-dependency of a collective identity (subsection 3.2.1), its separate traditions and history (subsection 3.2.2), its values and principles (subsection 3.2.3), collective identity as construct and the role of language (subsection 3.2.4) and its borders (subsection 3.2.5). Though for reasons of space some elements are only touched upon, the intention is to explore whether each of these elements point to different collectives for a national judge and indicate the relationship between them: are they in conflict and contrast, or do they flow smoothly from one into the other? In section 3.3 I will draw some conclusions as to this relationship.

3.2.1 Dynamism and Context-Dependency

As indicated above, the concept of collective identity connotes a *dynamic* identity, *dependent on context*. Obviously, it is the legal context that

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[83] See Kaina & Karolewski 2009.

is relevant in relation to the identity of national judges. As explained in section 2 above, it is precisely this legal context that differs and that shifts. The national legal context is different and separate from, though a necessary requirement for, the European context. One of the difficulties involved in being a national judge in the EU is precisely this: deciding on the legal regime to be applied. The legal context *shifts* depending on the facts of the case at hand (and the pleadings of the parties) suggesting a shifting of the identity, being called upon by circumstances of the case and thus dependent on context. Such an analysis would provide an easy dichotomy between the European and national identities, an either-or situation. However, that provides a picture that is too simplified as national procedural law is also an element of this legal context. Clearly, the procedural context of a national-law governed case is given by national law, leading to an inherent seamlessness to such a case as both national substantive law and national procedural law are used. But as explained above, as European law enters the picture, the national procedural law itself does not change, it is still national procedural law and still the stage on which a case rests, but the perspective of looking at the stage shifts. It is now European law that questions the procedural context; the seamlessness disappears, the national legal stage does not vanish in a puff of smoke! So, the legal context and the point of view changes, but part of the national context is still there. No either-or situation but one bringing possible tension and an un-seamlessness to the fore.

There is yet another element of complexity here, also bringing differentiation between national judges within one jurisdiction. Different judges may experience the shift much more consciously, as some areas of law are much less Europeanised than others. In competition law for example, the European and national contexts are very much brought together, in the sense that both European substantive norms and national substantive norms are (broadly) alike. This means that it is less necessary (in a legal sense) to differentiate between applying European law or national law. Even so, the national interpretation may differ subtly from the European interpretation, bringing the difference and the shift in context closer. However, the interweave of substantive national and European law might lead to the expectation that judges active in these areas of law, all else being constant, do not deal with the shift of context as explicitly as judges active in non-Europeanised areas of law. It may not be effortless but in these very Europeanised areas of law the shift might be less of an effort and the rift between national and European law not so great.

The place of the judge within her national system is another element in this context. It seems realistic to expect that there is a difference between a first instance judge, primarily involved in conflict-resolution, or a judge at a constitutional court or supreme court. The position influences the role, and thus identity of the national judge. For example, one might expect a supreme court judge to be more concerned with guarding coherence and uniform application of the

law. This latter context will provide an overlapping role to the one in the European context and is therefore, potentially, less conflicting.

These complexities might lead to a dual identity (dual, because the legal contexts are different), but also one that is not so much split, in the sense that it is either-or, but that is brought together and is overlapping. How much the identities overlap however, might very well depend on the specific situation of the national judge, both as to the area of law she is involved in, and as to her position in the national judicial system.

3.2.2 Tradition and History

Collective identities rest on *tradition* and maintain a particular relationship to *history*.[84] There are several strands that connect this general element of collective identities to the legal realm. Obviously, the histories of the nation-states of the national judge are tied to these nations coming into being.[85] The legal system, and with it, the judge, is part of this national history.[86] More specifically, the legal histories of each of the member states of the EU contain their own stories (intrinsically tied to jurisdictions),which have their own traditions.[87] The national legal tradition can be seen as strongly connected to the legal history, and tied to the norms of the legal system.[88] There are obvious differences: some countries in the Eastern European member states of the EU have come into their current incarnations relatively recently but for some of these countries their 'Eastern bloc'part of their histories are only seen as interruption of the nation that already was before, whereas other countries are relatively newly formed.[89]

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84 Or the collective identity poses a specific re-enactment of history, which may say the same in somewhat different words.

85 For many European nations that is either late 17th or 18th or even 19th century, though usually not out of the blue and separate from existing histories. See: M. van Creveld, *The rise and decline of the state*, Cambridge University Press, 1999; T. Jankowski, *Eastern Europe! Everything You Need to Know About the History (and More) of a Region that Shaped Our World and Still Does*, Williamstown: New Europe 2013.

86 See on the link between the forming of the national states and national legal traditions e.g. H. Patrick Glenn, 'The National Legal Tradition', in: K. Boele-Woelki & S. Van Erp (eds), General Reports of the XVIIth Congres of the International Academy of Comparative Law, Brussels: Bruylant 2007, p. 1; see also J.W. Cairns, 'National, Transnational and European Legal Histories: Problems and Paradigms. A Scottish Perspective', *Clio@Themis* 5 (2012), p. 1-13.

87 Of course, sometimes it is the different jurisdictions that have remained, even though the country does not (not anymore; not yet) exist, as is the case in Scotland.

88 Patrick Glenn 2007, p. 6.

89 See on the Czech Republic e.g. R. Fawn & J. Hochman, *Historical dictionary of the Czech State*, Rowman & Littlefield 2010 and more generally Jankowski 2013.

As mentioned in the introduction, although it is possible to trace connections and family resemblances between the legal systems of different countries,[90] it is generally understood that legal traditions form a large part of legal culture. Legal culture being such a broad label, it can range from the symbolism of wearing wigs and specific robes, the procedure for appointing judges, the length of procedures, to the use of juries, and includes aspects of procedural and substantive law. There are common elements in these aspects, legal transplants happen and cross-fertilisation occurs,[91] but legal culture remains country-specific.[92] The judiciary is part of legal culture (and shapes it, in return). An example relating to the judiciary that shows differences between them can be found in the different reception of the European doctrines of direct effect and supremacy.[93] In the Netherlands, for example, these doctrines were accepted almost without question (reflected generally in law-courses and text-books). In France acceptance took decades. Thus, the role of constitutional courts in this reception is quite different from one legal tradition to another,[94] and the way the German *Bundesverfassungsgericht* is, in a very gentlemanly fashion, actively involved in a critical dialogue with the ECJ may be quite unthinkable in other member states.[95]

It is important to note here that the training of the judiciary is organised along national lines (notwithstanding the activities of European educational centres). This starts with schooling at universities (and even before),[96] where the curricula are co-shaped by national requirements dominating entry into the judiciary and Academia (though through the Erasmus programme knowledge of other European jurisdictions may be gained). It is reasonable to expect that most law graduates will have some education in European law, but this is embedded in national academic organisation. Following that becoming a judge means added professional training, both formal and informal. Not only further intricacies of

90 Patrick Glenn 2007.

91 On transplants see e.g. A. Watson, *Legal Transplants, An Approach to Comparative Literature*, Athens: University of Georgia Press 1993.

92 K. Plett & C.S. Meschievitz (eds), *Beyond Disputing: Exploring Legal Culture in Five European Countries*, Baden-Baden: Nomos Verlagsgesellschaft 1991.

93 W. Mattli & A.M. Slaughter, 'Revisiting the European court of justice', *International Organization* 52 (1998), p. 177-209.

94 See for a country comparison (for the then-member states): G. Bebr, 'How supreme is Community law in the national Courts?', *Common Market Law Review* 11 (1974), p. 3-37.

95 See for a different style of dialogue with the ECJ the judgment of the Czech Constitutional Court of 31 January 2012 on Slovak Pensions, available at: www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724 and for a discussion on this judgment: J. Komárek, 'The Czech Constitutional Court declares a Judgment of the Court of Justice of the EU Ultra Vires', *Eur. Con.st. L.Rev.*, 82012, p. 323.

96 For example, my half-Italian nieces, living in Italy, in school follow a mandatory subject 'European citizenship', which is not provided in the Netherlands.

the law are covered but professional attitudes and values are internalised, including ideas of what it means to be a judge. The collective identity of national judges rest on these foundations of culture, tradition, history and learning.

The judge as a European judge has, in comparison a relatively short history. She only came into being with the shaping of the EEC. That points towards a separation between identities and to relative weakness of the identity as a European judge. The shortness of the EU's history has also been pinpointed as the reason why in general a European identity has not formed.[97] There are, however, several elements that yet again obfuscate this straightforward picture. The first is that yes, the history of the EU is relatively short, but its *legal* tradition has been very strong since its inception in 1958. The EU Treaties are legal in nature (says the lawyer, of course): their rationale is the legal rationale.[98] This means that the legal nature of the EU may have a much stronger bearing on the legal reality and identity of national judges than on the general citizenry. Also, this legal tradition of the EU encompasses clear and very strong principles and doctrines. These have a genuine and compelling European feel: direct effect, supremacy, autonomy and in general the supranationality of the European legal sphere.[99] This would mean that, other than the general public, the European identity of the national judge might be stronger – but again also that it is quite separate from the national identity.

Then again, beyond their separateness and the differences in traditions and histories, much of European law does share common values and a common tradition which dates back a long time. The idea of a *ius commune* suggests this common history can be traced back to the Middle Ages and even further, to Roman law.[100] It is not necessarily true that it is EU law which is now the ius commune, one could equally hold that the shared characteristics of national laws is the ius commune, or that there are multiples of such common laws[101],

97 One of the theories on development of identity suspects that group identity is shaped throughout history by changing towards an ever bigger group or 'higher' allegiance: the tribe is displaced by the nation, the nation displaced by a greater community (see also e.g. F. Fukuyama, *The Origins of Political Order*, Farrar Straus and Giroux 2011.

98 See also J. Schwarze, 'Concepts and Perspectives of European Community Law', *EPL* 1999, p. 227-244, at p. 229; N. Fligstein & D. McAdam, *A theory of field*, Oxford: Oxford University Press 2012.

99 Part of the constitutionalization of the EU, see H. van Eijken, *The role of European citizenship in the constitutionalisation of the European Union* (diss. Utrecht), Groningen: Europa Law Publishing 2014 (forthcoming).

100 Some criticise the notion as mythical, see: D.J. Osler, 'The Myth of European Legal History', *Rechsthistorisches Journal*, 16 (1997), p. 393-410; see more nuanced also Cairns 2012.

101 Patrick Glenn 2007, at p. 2. Also see H. van Harten, 'National European Law Precedents', in: *REALaw Research Forum, Top-Down and Bottom-Up*, Groningen 2009 (available at: http://ssrn.com/abstract=1414829); E. Mak, 'Understanding Legal Evolution through Constitutional Theory: The Concept of Constitutional (In-)flexibility', *Erasmus Law Review* 4(4) 2001.

but a European judge can relate to this shared history and these shared traditions. The openness of legal regimes to influences from outside generally strengthens this shared past; it is a question of whether there are strong differences in this openness between the member states and whether all are moving towards a 'post-national' state of being.[102] That being said it is also important to note here that the old *ius commune* would usually respect the local law (*iura propria*), and would be secondary to that local law. This would point, on the one hand, towards a history that has shared elements between the identities, but on the other hand to the historical nestedness of the different legal spheres.

3.2.3 Values and Legal Principles

Different collective identities maintain close relationships to a *specific set of values*. In the legal realm these relate to legal values that may be enshrined in legal principles. It seems obvious that for a national judge these values will be contained in the national legal order; in many jurisdictions it is the constitution that fulfils this role. The national judge as a European judge will find the European system of (legal) values in the EU-treaty (article 2 and 3 of the TEU) and in the general principles of European law.[103] In the sections above the very specific European law principles of direct effect and supremacy, having to provide effective and uniform application of European law were introduced. The common denominator of these specific European principles is that they relate to reinforcing the *effectiveness* of EU law in the member states. These specific principles are not generally found in the national legal orders. It is precisely because the European legal order and the national legal order are separate, and EU-law being contingent on the national legal realm, that these principles are necessary.

However, as with a common core that is shared between the legal histories of the nation states of the EU and the EU itself there are shared values and principles. Many European principles, especially when not primarily relating to the effectiveness of EU law, are common to (most) member states. The ECJ has used these national principles as building blocks for the development of, separate and specific but recognisable, European principles.[104] Also of importance is the development of principles relating to the protection of fundamental rights, individual's rights and procedural fairness, such as the rights of defence and the

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[102] Quoting the Belgian Report: Patrick Glenn 2007, p. 13.

[103] See on principles: T. Tridimas, *The general principles of EU law*, Oxford: Oxford University Press 2006; X. Groussot, *General principles of Community law*, Groningen: Europa Law Publishing 2006.

[104] Schwarze 1999, at p. 231.

right to a fair trial. These have now been developed on the European level[105] but also in response to the judiciary dialogue between the ECJ and the constitutional courts of some member states[106] and partly in keeping with the general widening and deepening of European integration. As many national judges, some constitutional courts specifically, have been ingrained with a profoundly felt necessity of protecting the individual against the encroaching state,[107] this development on the European level might indicate that the sharpness of the dividing line between the European and the national identities might become more blurred.

3.2.4 Construct and Language

That a collective identity is a *constructed* identity ties in with the points raised above. The most important institution on which the constructed identity of judges rests is the law itself and the legal order that is tied to it. Strands of this have been discussed above. A further element is, of course, language. There is a strong connection between the law and language,[108] legal language clearly being different from day-to-day language.[109] There is also a relationship between justice and language; hence, the importance of being allowed to plead in your own language,[110] and the importance of having recourse to legal instruments and knowledge in your own language. There are, of course, differences between the legal languages of the member states and between them and the specific legal language of the EU. This is not only a realisation that French clearly differs from Finnish, but also that some legal concepts are untranslatable, unrecognisable, or have no clear functional equivalents elsewhere.[111] Language also ties to style, and judicial styles may vary considerably.[112] There are differences in legal reasoning: formal or pragmatic, deductive or in-

105 Burley & Mattli 1993, at p. 64.
106 See e.g. Schwarze 1999, p. 236-238.
107 See on Germany for example Bebr 1974, at p. 24.
108 See in general on the legal language: P.M. Tiersma, *Legal language*, University of Chicago Press 1999; S. Schane, *Language and the Law*, London: Continuum International Publishing Group 2006.
109 C. Williams, 'Legal English and plain language: an introduction,' *ESP Across Cultures* 1 (2004), p. 111-124.
110 For example the second official language of the Netherlands, Frisian, is allowed in courts in the province of Friesland, and this also has repercussions for being allowed to plead in Frisian in appeal before the Council of State, which is located outside its boundaries (see articles 2:7 to 2:12 of the Dutch General Administrative Law Act).
111 See Rt. Hon. The Lord Goff of Chieveley, 'Comparative Law: the Challenge to Judges', in: B. Markesinis (ed.), *Law Making, Law Finding, and Law Shaping, The Diverse Influences*, Oxford: Oxford University Press 1997.
112 E.g. comparing the German and the English style of judicial reasoning: B. Markesinis, Judicial Style and Judicial Reasoning in England and Germany, *Cambridge Law Journal*, 59 (2000), p. 294-309.

ductive, which are reflected in and through language. Euro-speak does not only exist in Brussels, it is formed in Luxembourg as well, because, as noted above, the very specifics of the European project means having a different, and separate, set of principles, expressed in law through language. This points towards the separateness of the national identity of national judges and their European identity.

But again, there are nuances here. If learning European law is the equivalent of learning a second language then an integrated learning-programme, national & European law entwined, means learning law is like learning languages simultaneously. There is no mother-tongue and second language, but bilingualism. That would bring a more balanced relationship between the national and the European legal regimes, in the sense that the language used to express elements of the legal regimes is equally known. Also, the common history of parts of European law in the *ius commune* brings some form of shared language. However, one reason why there is (usually) no true bilingualism is that this needs equal access to the legal knowledge and sources in the language of the countries:[113] European law materials need to be available in the same way in as national legal materials, in Dutch, in Estonian and in Croatian. Both the reality of having to learn 'Euro-legalese' as a second language and, for some Member States more clearly than for others, the lack of access to knowledge and sources leads to suggesting separation between European and national identities.[114]

3.2.5 Borders of the Collective

A collective identity cannot exist without a *border,* an *'other',* an in-group and an out-group. Without this 'other' being present (real or fictitious) feelings of solidarity among the group will not arise. It is, on the one hand, not very difficult to point to the 'we' in the different identities under scrutiny here. The in-group for a collective identity as a European judge would consists of the European judges collectively. The same holds true for the collective identity as a national judge, which will primarily be tied to the national legal order. A Croatian judge shares the European identity, but not the national

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113 This is supported by empirical data gathered in response to questions (posed to judges, prosecutors and supporting staff) in relation to knowledge of and training in aspects of EU law: European Parliament, *Study Judicial Training in the European Union Member States*, annex II PE 453.198 (2011) especially p. 111-120 (available at: www.europarl.europa.eu/committees/en/studies.html).

114 There is another interesting element here: where the language of Luxembourg is French, and this seems to influence the thought processes and the way judgments are drafted, the lingua franca between the national judiciaries seems, to the personal experience of the author (but admittedly: whose working knowledge of French is definitely not fluent) in the EU is English. Does that mean that even within 'Euro-legalese' there are different 'dialects'?

identity with a judge from Sweden, Spain or Latvia. But, on the other hand, it seems untrue to suggest that the 'otherness' of those outside the group of national judges, or even outside European judges, is an 'Other' in the extreme sense of that word.[115] I would suggest that there is no sense of an 'adversary' or, worse, an enemy.

3.3 Dual Identity as Reality: Nested and Cross-Cutting

The exploration of elements of a collective identity in relation to the legal reality of national judges leads to the conclusion that the national judge combines two identities: she is both a national judge in her national context and national system, and a European judge in the European context and system. The identity of a European judge is contingent on that national identity, and *nested* in the identity of the national judge, the collective of European judges being the larger group. The European identity is a derived identity, secondary to and dependent upon the identity as national judge, which is the basic identity. This theoretical finding is consistent with the (empirical) findings in general studies on European identity and also follows from the legal fact that it is by virtue of being a national judge that the judge is also a European judge. The nestedness might imply that the national identity is a 'stronger' identity than the European identity, which would tie in neatly with the notion that the historical and traditional component of the national identity seems so much stronger than the European component.

However, in general the concept of nested identities implies that there is no conflict between them, as they are activated in different circumstances. This does not rest completely at ease with the dual identity of the national judge. In one sense there are, indeed, different circumstances: yes, the judge chooses to apply European law (and is under obligation to do so), which is activated by the facts of the case before her, but that does not mean leaving the national context behind. The national context is necessary to fulfil the European obligations. There are, then, potential conflicts, a point of relevance to which I will return below.

4 Ramifications and Relevance

Finding that a national judge combines a dual identity, with the national identity grounding the European identity is interesting in itself but

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115 M. Buber, *Ich und Du* (1923), *I and Thou*, transl. by Ronald Gregor Smith, Edinburgh: T. and T. Clark 1937.

prompts further questions. The first question is whether this finding can be used to *explain* something else. So far in this article the concept has been used to describe the legal reality (a thing needing explanation), but the logical next question is whether the duality itself can be used to explain something else. As pointed out above, there seems to be a strong relationship between collective identity and collective action: identity as either shaping action, or resulting from action. For the purpose of this article the preliminary reference procedure is specifically interesting to link to collective identity and action. But as indicated above the dual identity may also, by mere existence, be an obstacle for the effectiveness and uniform application of European law and would then lead to a form of non-action (both in section 4.1). Finally, the finding that there is a dual identity may shed light on a normative question, that is, how to deal with differentiation in application of EU law (section 4.2).

4.1 Collective Identity, Action and Non-Action

The idea of collective identity can be connected to the study of collective action and social movements. Though it is hardly imaginable that the judiciary will collectively decide to strike or go protesting in the streets of Europe's capitals,[116] this is not to say that there is no action involved. One way in which national judges may act in relation to their European identity is by using the preliminary reference procedure. As indicated, this procedure enables (and sometimes obliges) national judges to refer a question of interpretation or validity of European law to the European Court of Justice. The formal hurdles are not so significant so as to put a judge off the idea a of asking a question, though the actual posing of a question may be cumbersome (as indicated above). The preliminary procedure has been a success. The ECJ has characterised this procedure as a *dialogue* between itself and national courts, with the national courts of equal importance as the ECJ in the EU legal order.[117] The dialogue is (this point has been raised before, of course) a very restricted dialogue as in any but the most narrow sense of the word the posing of a question and the receiving of an answer is meant by having a dialogue; a conversation it is certainly not. Also, it is an *individual* dialogue. In this sense, even if all judges were to refer

116 But in general not unthinkable for the judiciary: see for a 'sit-in' in Egypt www.dailynews-egypt.com/2013/05/29/judges-declare-sit-in-protesting-judiciary-law/ and for a mild (written) protest in the Netherlands: www.nrc.nl/nieuws/2012/12/20/meer-dan-500-rechters-ondertekenen-pamflet-we-hebben-het-te-druk/.

117 That qualification seems, however, to contradict with the ECJ being the primus in a primus inter pares relationship or seeing the ECJ as equivalent to a constitutional court sitting squarely at the pinnacle of the pyramid of European courts (though it might jostle for place on the pinnacle with the ECrtHR). That being said: the contradiction is only real if one feels that dialogue is not possible between levels within a hierarchy – which may be more easily felt by those lower in the hierarchy then those at the top, whose intentions of being equal may be sincere.

questions, there is no collective action and even the dialogue is limited. Having said that, the sum of individual actions does lead to a collective body of case-law and the fact that the judgments of the ECJ are generally published in the languages of the EU adds to this collectivity. Thus, the success of the preliminary procedure could in itself be an indication of its role in shaping the collective identity of national judges as European judges. This is supported by general identity-research: contact changes identity,[118] so participating in the preliminary procedure may strengthen the European identity. Though it has been stressed that the preliminary reference procedure has empowered private litigants,[119] and has taken power away from the Member States,[120] it is clear that it has also strengthened the legal position of national judges under European law. National courts, through the preliminary procedure, have been the ECJ's partner in furthering the legal integration in the EU.[121] In this sense even the mere *possibility* will have shaped the European collective identity.

It is interesting to note the differences between the member states' judiciaries, some being clearly more active in referring than others.[122] Also interesting is that though there are differences in accepting the doctrines of supremacy and direct effect between member states' judiciaries, those relate mostly to the reception by the highest courts (of the then member states), whereas preliminary references are made as much, and sometimes more, by the lower courts.[123] Though non-court factors influencing the number of preliminary procedures per member state have been pointed out,[124] the differences might also correlate

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118 Fligstein 2008.

119 K.J. Alter, 'The European Union's legal system and domestic policy: spillover or backlash?', *International Organization* 54 (2000), p. 489-518.

120 A 'closed exit' according to J.H.H. Weiler, 'The transformation of Europe', *Yale Law Journal* (1991), p. 2403-2483.

121 J.A. Usher, *European Community Law and National Law: The Irreversible Transfer?*, University Association for Contemporary European Studies 1981.

122 See also Carrubba & Murrah 2005, p. 402; some branches may be more active than others, see Alter 2000, pointing out that German tax courts account for 49 percent of German references.

123 Alter 2000, at p. 505-506. Lower courts might have been using the possibility of preliminary references in 'intercourt competition' (Alter 1996) quite apart from legal doctrine. See for a discussion also Slaughter & Mattli 1998, at p. 193-194. It has also been suggested that higher courts are more reluctant to refer to the ECJ because they might be threatened by the ECJ as the highest court or see European law as a 'source of disruption' in their own legal system in which they are at the top of the hierarchy: see R. Dehousse & W.E. Paterson, *The European Court of Justice: the politics of judicial integration*, St. Martin's Press 1998. See especially the 'dialogue' on the Maastricht judgment of the ECJ: K.M. Meessen, 'Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany', *Fordham Int'l LJ* 17 (1993), p. 489-527.

124 For example: transnational economic activity, the existence of judicial review, monism, public support for integration and politically informed publics are mentioned by Carrubba & Murrah 2005. They conclude that transnational economic activity is a driving factor, and negative public support is a restraining one, suggesting that public opinion may play a stronger role than expected.

(as a cause or as an effect) with the relative strength of the national collective identity versus the European collective identity of the national judges. Finally, that a strong European identity might lead to engaging in the dialogue with the ECJ more often or more easily, will have been fuelled by the European constitutionalisation process. This is reinforced by the ECJ itself who emphasises the collegial relationships with national courts.[125] In the 'narrative of empowerment'[126] the role of national judges together with the ECJ in shaping and guiding the integration process forward on the basis of the constitutionalised texts is emphasised.[127]

The second question relating to dual collective identity and collective action is whether the dual identity is itself a hindering factor for fulfilling the judges' obligations under European law. That is, if the national identity of the national judge is stronger and not in alignment with the European identity, would that bring a hesitance towards her EU obligations? This is a different perspective on the same general question. Where the action involved in the preliminary reference procedure may have helped shape the collective identity of national judges as European judges which in itself leads to action, the question now posed is, in a sense, non-action: the unrealisable uniformity and effectiveness of EU law. Though it is difficult to come to any firm conclusions some remarks seem to follow logically from the findings above. For example, the fact that the duality is grounded in the national identity will, almost inevitably, mean that the European identity is secondary. The European identity thus is the one that needs to be taken on with a conscious effort, whereas the national role is the one that is automatic. It is reasonable to suspect that European law is the 'stranger' law and therefore the more difficult law.[128] Furthermore, the difference in legal values and principles and the secondary-ness of the European identity means that the primary set of values is given by national law. This is especially true for EU principles that are not common to national law and relate to the effectiveness of EU law. The fact that many judges are primarily involved in conflict-resolution might also make a difference as this is a role that is supported and suggested by the national context. But her procedural role may also lead

125 See also H. Rasmussen, *On law and policy in the European Court of Justice: A comparative study in judicial policymaking*, Dordrecht: Martinus Nijhoff 1986, at p. 247 on the 'generous information campaign' of the ECJ; also Burley & Mattli 1993, at p. 62, mentioning the 'courting the national courts'.

126 Weiler 1991, at p. 2426.

127 This is mostly a 'legalist' telling of the integration story. There are other possibilities for example a retelling from a political sciences perspective: e.g. on realism see S.A. Scheingold, *The law in political integration: The evolution and integrative implications of regional legal processes in the European community*, Center for International Affairs: Harvard University 1971.

128 Note in this sense that in the EP report – referenced above – almost 75% of national judges reported that they find their role as 'common EU law judge' to be 'very difficult' or 'difficult'.

her to be very dependent on litigation for points of law to be raised, including points of EU law.[129] If the national judge sees herself as (also) being an EU law judge she might be more inclined to nudge parties on the EU-path of litigation.[130] The idea of the autonomy of judges is again relevant, the autonomous judge finds the law, interprets the law, applies the law and distinguishes relevant from irrelevant facts. There is, to a certain degree, less autonomy when applying European law (though in practice it may be larger than expected from the language of the ECJ).[131] The loss of autonomy, be it recognised explicitly or implicitly, or the reclaimed autonomy of the national judge under European law, might therefore hinder the uniform application of EU law.

Taking all this into account, I would suggest that it is (also) in these conflicts, not only in the legal sense but also in the conflict between the identities, that the impossibility of providing for full effectiveness and uniform application of EU law lies. This impossibility arises because, generally, where conflicts exist between identities, when they are *cross-cutting*, two main strategies present themselves: exclusion or inclusion. But exclusion is not a (legally) valid option as one cannot stop being either a French judge or a European judge and retain the other (though one can stop being a judge altogether, of course). And though inclusion, taking the two identities together and including the one in the other, might be a valid strategy for a national judge, she might come to see herself as 'French-European',[132] such an hyphenated identity seems at the very least not currently a true description, as explained above, for most national judges. The conclusion is, then, that although both concepts of collective identity fit,[133] – the duality being nested in that the one identity follows from the other, and cross-cutting in that there can be tension between the two identities – it is specifically the strength of the cross-cutting nature that is a stumbling block for uniformity and effectiveness, and one that currently is not easily resolved.

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129 See H.G. Schermers, 'The European Communities bound by fundamental human rights', *CMLR* 27 (1990), p. 249-258.

130 Higher courts may be less involved with conflict resolution and litigation will generally be more professional and less likely to overlook points of European law. Also, there is evidence that in general there is a relationship between the 'openness'of the national constitution and the extent to which the constitutional court relies on 'foreign law'(including EU law) (see E. Mak 2001).

131 See Van Harten 2011.

132 See on the hyphenated identity above: Fligstein 2008.

133 It must be noted that an important element aspect of collective identities cannot really be explored on the theoretical plane. Part of the concept of collective identity is that either the result of, or the reason for, its forming is a feeling of solidarity between the members of the group. From the exploration above no conclusions can be drawn as to this aspect. Of course, 'solidarity' may also seem a somewhat strange notion here; it is not unthinkable that there are feelings of connectedness, feelings of pride, or feelings of belonging to the professional group – be it on the national or on the European level – but solidarity seems to also connote 'helping out when in need', and that is not easily operationalised between national judges in the EU.

4.2 Differentiation as Normative Possibility

A normative question not yet explicitly posed above is whether differentiation in outcomes, which may be the result of the cross-cutting aspects of the dual identities, is very worrying. There are several possible answers. First, that, yes it is worrying and something to be suppressed because the judicial system in the EU forms a hierarchy, with the ECJ at the pinnacle. Non-uniformity is a threat to this hierarchy and the effectiveness of EU law. If EU law is applied in a different way in different member states, then this will also be a threat to a level playing field and the integrated market. Differentiation defies the notion that it is the ECJ who sets the boundaries. Taking this line of reasoning to a logical conclusion, it seems that if it is correct that this differentiation results from the duality of the collective identity of national judges, then these differences should be evened out and overcome. That would lead to further European (legislative) action, including e.g. harmonisation of procedural law, of training schemes and other elements relating to the national identities of the national judge.

The question of uniformity can also be answered differently, starting with acknowledging that *realistically* a uniform application is not attainable anyway. Theories, such as pluriform constitutionality, shared circles, or a multiple legal order may accommodate this more pragmatic notion,[134] and at the very least acknowledge that there several layers of legitimised legal orders. Taking the dual identity as explored in this article into account, it is easy to see the national judge as part of a shared system of judicial recourse (including the ECJ but clearly not limited to the European courts in Luxembourg). The collectives of national judges will share the different possible roles of the judiciary with the ECJ, also when it comes to applying EU law, and with each other.[135] Though not all legal roles, judicial protection, uniform application, development of the law and conflict resolution, are shared in equal parts, this *common legal space* is inhabited by both the national judges and their Luxembourgian colleagues. The common legal space does not just constitute the shared elements of both identities (where the identities overlap), but also the elements that point to a sharp dividing line or tension between them. The result is that also on a theoretical plane a bounded differentiation is accepted,[136] at least as far as it is not

134 See Walker 2002, Besselink 2007, Meij 2012.

135 Also Van Harten 2011.

136 See for a view on allowing bounded differentiation in competition law C. Townley, *Coordinated diversity: revolutionary suggestions for EU competition law (and for EU law too)*, Kings College Dickinson Poon School of Law 2013, available at: https://kcl.academia.edu/ChristopherTownley/Papers, who builds his argument both on network-governance and on the positive effects of regulatory differences.

the result of a lack of awareness or lack of resources.[137] Though a retort may be that this only emphasises the question of *where* the boundaries are and will not solve the riddle of *who* sets them, that question, in turn, can be answered through the legal theoretical perspective to which the dual identity of the national judge provides an additional frame. A possible way of looking at the boundaries of differentiation in relation to collective identities and the common legal space is in looking at the relative strength, or weight, of the identities in the duality. As indicated above, some elements may point towards a stronger national collective identity, whereas others might point towards a stronger European collective identity. But only where the national collective identity is either in blatant contrast with the European identity (or much stronger) does this duality lead to non-application or unacceptable differentiation of EU law. Though I indicated above that the *hyphenated* national judge is, as yet, not very apparent in legal reality, this might be the solution to some of most fiercely cross-cutting tendencies.[138] The hyphenated judge seeks a solution for the tension not in excluding the one from the other, but by inclusion so the judge is Hungarian-European, Slovenian-European, or Portuguese-European. There is here, perhaps, also a role for (the growing) networks of judges in strengthening this hyphenated identity, in strengthening the connection between the collective identities in shaping the common legal space.[139] In this sense the national judge, in part of both collectives, is a networking, interconnected, European judge. Not to the detriment of the national identity, but in respecting the nestedness of the European identity.

5 Final Remarks

A national judge is both a national judge, a judge in her judicial system, applying national law as law of the land, and a common EU judge, charged with applying EU law as law of the land as well. But there are differences between her national law obligations and her obligations under European law. There are also differences in legal history, values, language and traditions. The concept of a collective identity seems to fit this legal reality: the national judge

137 I would assume that one can easily agree that if non-application of EU law or differentiation in outcomes between national judges stem from lack of knowledge, lack of language-skills, or access to knowledge and expertise these outcomes are problematic. Knowledge, familiarity and language are elements of the duality of identity, but the resulting non-uniformity is based on ignorance, not on the duality of difference, and ignorance should be remedied.

138 Cf. in general Fligstein 2008.

139 See for an early example of how networks help to 'circulate ideas about law through education, travel, books, correspondence and so on' J.W. Cairns, Alexander Cunningham's Proposed Edition of the Digest: An Episode in the History of the Dutch Elegant School of Roman Law, *Tijdschrift voor Rechtsgeschiedenis*, 69 (2001) p. 87-117 and p. 307-359.

has a dual identity and is part of the collective of national judges in her jurisdiction and of the collective of European judges. This identity is both nested, the European identity is contingent upon the judge being a national judge, and has elements of a cross-cutting identity in that there may be conflicts between the different identities. I have explored the link between the preliminary procedure (as action) and collective identity and between differentiation (as non-action) and the collective identity and have indicated that the duality of identities might be a frame to add to a reevaluation of the puzzling question of where the boundaries of differentiation in the application of EU law on the national level should lie and in conceptualising the pragmatic reality that uniformity is unattainable. The hyphenated judge, inhabiting a *common legal space* that includes both the shared and differing elements, might provide a new framework for providing an answer that combines conceptualisation with pragmatism.