H.J. 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 vrijedienstenverkeer* (Den Haag: Boom Juridische uitgevers 2011), ISBN 978-90-8974-566-8, 277 p.

National courts are vital for the effectiveness of European law in the administration of justice in Member States of the European Union (EU). A considerable part of European case law originates from the national courts of the Member States. However, there is virtually no attention paid to national European case law in the Member States. In his dissertation, Van Harten fills this gap. His research explores the autonomy of national courts in European law. With this in mind, Van Harten analyses the Dutch European case law between 1975 and 2008 on the freedom of establishment and the free movement of services. The result is an eye-opener as it brings attention to the unnoticed but important role that national courts fulfil in the EU's judicial system.

The dissertation consists of six chapters. In the first chapter, Van Harten points out that he has chosen a profoundly restricted area to research instead of more superficial comparative law research. All national courts of the 27 Member States are part of one shared European legal order. Consequently, case law in one Member State can be in the interest of European law in its entirety.

The second chapter outlines the theoretical framework for the phenomenon of national judicial autonomy in European law. Van Harten discusses the role of national courts under European law. National courts are 'gatekeepers' for parties who seek to rely on European law. They are bound by European law as it stands at that particular time. According to the European Court of Justice (ECJ) in *Simmenthal*, national courts must apply Community law in its entirety.[1] The leeway of national courts is restricted by the principle of loyal cooperation (national courts may not issue judgments which, in essence, depart from decisions made by the ECJ in its case law) and the principle of equivalence (national courts are not permitted to discriminate between European and national law claims). Furthermore, Van Harten points out that in the view of the ECJ there is a clear separation between the functions of the ECJ and the national courts; the interpretation of European law belongs to the ECJ and national courts must apply European law. However, Van Harten argues that, apart from cases in which established case law or the *'acte clair'* doctrine is applicable, both the interpretation and the application of European law belong first of all to the national courts. There are very few cases where national courts must give judgement and the relevant European legal norms are immediately clear. Van Harten notes that when interpreting and applying European legal norms, national courts have *de facto* autonomy. Van Harten therefore, in contrast to others, advocates that the

1 Case 106/77 *Simmenthal II*, ground 21.

ECJ does not have a monopoly position with regard to the interpretation of European law. The best way to understand the relationship between the European legal order and the national legal orders is, in his view, as an integrated legal order with shared authority. As a consequence, national European case law has authority as well. In his opinion, not only the European institutions, but also the national courts play a role in order to guarantee the unity of the law and scope for differentiation. There is a substantial number of cases which contain an element of European law, but the ECJ is not involved. The lack of clarity concerning the level of authority that should be afforded to national case law on the interpretation of European law is therefore striking.

Following this theoretical framework, Van Harten presents his actual research. In the subsequent chapters, he explores various aspects of national judicial autonomy by analysing Dutch European case law.

Chapter three focuses on aspects of national judicial autonomy in the context of the substantive interpretation and application of the freedom of establishment and the free movement of services. This chapter follows the 'logical' system for review of these freedoms. Firstly, Van Harten concentrates on the substantive, personal and geographic scope. He argues that the national courts' autonomy with regard to these scopes has both substantial and procedural aspects. The substantial aspect becomes noticeable since the question of whether, for instance, there is movement of services is factual by nature. Because of this factual nature, national courts play a decisive role. Dutch European case law shows that the facts and evidence concerning the various scopes, and with them the national procedural law framework, play a considerable role in the potential successful appeal on the freedom of establishment and the freedom of services.Van Harten shows that substantive European rights fade into procedural questions in national European case law. The procedural autonomy enjoyed by national courts appears, for instance, in cases where there is a concurrence of freedoms. In those cases, national courts often do not make a choice between the applicable freedoms.

Secondly, Van Harten discusses the role of the prohibition of impediments of the freedoms. The question of direct or indirect discrimination or an impediment without distinction belongs to the autonomy of national courts. The researched case law shows that Dutch national courts rarely or do not at all scrutinise the character of the impediment, they only determine that the freedom has been restricted.Van Harten considers it desirable that national courts assess whether a case involves direct or indirect discrimination. Next, Van Harten discusses the effects of judicial harmonisation. Thanks to this judicial harmonisation, specific criteria must be fulfilled to answer the question whether there is an impediment. Van Harten indicates that the alienation of the 'logical' system for review concerns the domain of both the ECJ and the national courts, but he wonders whether the (European) legislator should take action.

Thirdly, Van Harten examines the possibilities for justification and the principle of proportionality.He draws attention to the fact that a review of proportionality, in theory, is pre-eminently the area in which national courts have autonomy. Consideration and decision making in this area are often left to the national courts by the ECJ. Furthermore, Van Harten makes clear that a government measure taken in the national public interest is almost assumed in many cases to be a valid justification for a possible impediment of the freedoms by Dutch national courts. The application of the principle of proportionality contains a specific judicial assessment of the facts and circumstances of a case. Therefore, the autonomy of national courts plays an essential role. Van Harten points out that, according to the ECJ, the national measure may not be applied if there is a violation of the freedoms. However, the case law reveals another option: national courts sometimes instruct the administration to solve the violation. In Van Harten's opinion, national courts can choose between these two approaches as they have the same result. The last option seems to be inherent to the Dutch national administrative law setting. In their final judgment, national courts give the administration an order to remedy the violation because the decision of the administration is, for example, not sufficiently substantiated. The result is however, less certainty concerning substantive law since national courts deal with the violation in a procedural way leaving it up to the administration to solve the matter.

Chapter four concentrates on the law on the preliminary reference procedure. Van Harten shows that the law on the preliminary reference procedure is much broader than only the preliminary reference itself. First of all, there is 'the world before referring'. European law gives national courts the autonomous competence to refer a case to the ECJ although courts in final instance are sometimes obliged to refer a case. Therefore, it is not very surprising that various elements of national judicial autonomy arise in this procedure.

A second aspect is the existential question 'to refer or not to refer'. Van Harten notes that not referring prevails in the researched case law and shows various reasons why national courts decide not to refer a case. For example, Dutch national courts often mention the *'acte clair'* exception. Van Harten points out that the reason to refer depends heavily on the case. The obligation to refer is, in practice, considered to be less strict. In his opinion, it would be better if especially the Dutch courts in final instance would give a justification why a preliminary reference was not necessary. Furthermore, national courts are responsible for the drafting of the question. This also contains an element of autonomy.

Thirdly, Van Harten discusses 'the world after referring' when the national court has to give its final ruling once the ECJ has given its preliminary ruling. In this stage too, there is some judicial autonomy. This is in my opinion perhaps the most interesting stage as it often seems that the dispute ends with the pre-

liminary ruling, but this is far from true. This neglects the fact that often a 'translation' is needed with all the problems that might arise.

Chapter five outlines the concept of 'national European law precedents'. This chapter shows a new and fascinating perspective. The concept of national European law precedents occur when interpretations of European law by a national court have precedential value for the same or another national court when determining new cases. According to Van Harten, this concept of European law precedents can be discerned in the context of European law.Precedents of European law norms have both a factual and legal influence on the development of the law and the unity of the law within the EU.

Van Harten distinguishes three functions of national European law precedents:clarification and refinement of the case law of the ECJand underpinning of the law to solve prospective cases.This leads to the question concerning the authority of national European case law. According to Van Harten, national courts are in principle free to give an independent judgment about the interpretation and application of European law on the freedoms, but they are also free to follow a precedent if it solves the legal question that arose.

In this chapter, Van Harten furthermore discusses the consequences of the existence and the meaning of national European law precedents. It is remarkable that Dutch national courts tend to follow Dutch case law on European law. Courts are often even more likely to follow Dutch case law on European law instead of the latest case law of the ECJ. It would be interesting to know if national European law precedents develop in other Member States in a similar way and, considering the unity of European law, if national European law precedents in other Member States differ from Dutch European law precedents in the interpretation of European law. The national European law precedents should not restrict the discretion of other national courts to decide, within the bounds of their autonomy, on elements of European law. The ECJ does not refer to national European case law as a source of European law or as a kind of factual guideline. Consequently, the status of national European case law remains considerably unclear. However, inherently linked to the idea of a shared legal order, national European case law has influence on the development of European law as well.

In his concluding chapter, Van Harten indicates various features of national judicial autonomy in European law in the researched case law. This results in several recommendations. One of the recommendations is to shift the focus and to further develop the preliminary ruling procedure. Van Harten suggests changing the preliminary ruling model into a discretionary procedure, which is subject to responsibilities instead of a duty subject to exceptions. He furthermore considers a further development of the concept of national European law precedents. This could unburden the preliminary ruling procedure. In that view, an interpretation of European law given in a judgment by a court of last

instance has the same effect as an '*acte éclairé*' when a similar question arises in a new dispute and the national European law precedent remains in line with the case law of the ECJ. However, an ECJ judgement would still have the highest authority and significance for the EU. As a potential corrective mechanism, Van Harten also suggests to extend the doctrine of interpreting national law consistently with European law to national European law precedents. With this doctrine, the *de facto* development of national European law precedents should be accepted. In addition, this would imply a duty for national courts to compare national European law precedents with case law developments of the ECJ. This is, in my opinion, quite an ambitious recommendation since it increases the workload of national courts. However, this corrective mechanism could be useful for reaching harmonious developments in the EU if the concept of national European law precedents develops further.

In this final chapter, Van Harten shows his true vision of the courts. Courts exist to settle disputes; their task under European law does not take precedence over that main task. Van Harten nevertheless also emphasises the powerful role national courts play for the effectiveness of European law. It is therefore still a struggle and the question of how European law must infiltrate in the national law if national courts omit to apply European law remains unanswered. It is likely that much will depend on parties taking recourse to European law.

All in all, this dissertation sheds light on the importance of national courts for the application and interpretation of European law in practice. Van Harten makes it a valuable contribution to the knowledge on the role of national courts in the judicial system of the EU. The book provides a good insight on the significance of the national European case law in the European legal order and the *de facto* autonomy which national courts have when applying and interpreting European law. After reading the dissertation, I wonder if the autonomy of national courts in other Member States manifests itself in the same way as the autonomy of Dutch national courts. It may perhaps be worth considering if the research could be expanded to other Member States or other fields of law.

*Stephanie ten Kate**

* LLM student, University of Groningen.