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National Supreme Courts and the EU Legal Order: Building a European Judicial Community through Networking

by

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Abstract

This article discusses the role of national supreme courts in the development of the European legal order, moving from a hierarchical to an interaction account of the relationship between legal systems. It first focuses on supreme courts' self-perception as European courts. For that purpose, it analyzes the loose understanding by national courts of the obligation to refer a question according to article 267 TFUE. This is done by looking not just at actual judicial practice, but more in general at the elaboration of a common understanding on the matter within transnational judicial networks. The article then contends that for national courts to assume responsibility in the development of the European legal order, extra-judicial interaction is necessary. It describes the contribution of judicial networks to the potential development of European judicial communities as a pre-condition for an integrated European legal order. It concludes by stressing the need for stronger empirical accounts in this field of research.

Key-words

European Union, Legal Integration, European judicial system, National Courts, CILFIT

1. Introduction: the role of national courts in the development of EU law

This article is grounded on the premise that still scarce attention is given to the effects of Europeanization on national courts of general jurisdiction (excluding, therefore, Constitutional Courts). In particular, it touches upon the following central issue: what is, and should be, the role of national courts with regard to the development of EU law? According to a widespread view, national courts are European courts when they apply EU law. However, this does not tell much about their relation with the European legal order. Roughly speaking, a traditional narrative understands this by referring to two aspects, both largely based on ECJ case law. First, national courts have to apply EU law and must not apply conflicting national law, as a consequence of the principles of supremacy and direct effect established at the beginning of the 1960s.[I] As former Director in the Directorate-General for Competition of the European Commission (and former member of the Legal Service of the European Commission), John Temple Lang put it as follows: «every national court, whatever its powers, is a Community court of general jurisdiction, with power to apply *all* rules of Community law. […] [It] must apply Community law even when (indeed, *especially* when) it is inconsistent with existing national law» (Temple Lang 1997, 1 and 4). Second, in carrying out this task, national courts cannot interpret EU law, because interpretation of EU law is the exclusive domain of the ECJ *via* the preliminary reference procedure (while interpretation of national law is up to national courts). These two aspects outline the basics of the mandate of national courts showing, at the same time, their very much theoretical character, based on the idea of the European and the national legal orders as two separate areas.

A couple of observations can be made on this traditional, theoretical narrative. On one hand, the "constitutional" principle of supremacy has been historically contested (think for example of its belated acceptance by the French *Conseil d'Etat*[II]), is still contested (above all by Constitutional Courts, but also by administrative and ordinary judges[III]) and, even where accepted, different interpretive choices can be and are actually made on the actual content of law. On the other hand, the preliminary reference has been largely used by lower courts as a strategic tool to overcome judicial hierarchies, allowing "judicial empowerment"

(Weiler 1999, 33); nonetheless, one can find much heterogeneity from one country to the other, while higher courts – with some exceptions – have been less prone to resort to this procedure. The traditional narrative of the national courts' mandate – along with a certain idea of the "good" European judge – shapes indeed an ideal-type of national courts as European courts. This ideal-type is based on "political" options regarding the European/national balance (Jaremba 2012, 64; Vauchez 2013b) and on abstraction from general principles that need to be reconciled with reality (Bobek 2013). The Treaty does not mention any kind of national courts' mandate, referring explicitly to national courts only with regard to the preliminary reference procedure. A "duty" for national courts is indirectly inferred from article 4 TEU (former article 5 EC Treaty) according to which «Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union» (Temple Lang 1997, 2; Tatham 2012, 580; Nowak 2011, 25).[IV]

Starting from these sketchy observations, in this article I contend not only the need to acknowledge the role of national courts in the development of EU law, but also that current trends show that such a role is already a reality, leaning on an expanding communicative web within the European judicial space (Claes and de Visser 2012). For that purpose, I consider the case of national supreme courts by looking at two facets of the same issue. On the one side, I discuss their self-perception as European courts involved in the development of the European legal order, through the prism of their understanding of the obligation to submit a preliminary reference to the ECJ according to article 267(3) of the Treaty on the Functioning of the European Union (TFUE). I first sketch the rationale behind the preliminary reference mechanism. I then focus on the related ECJ case law[V] and its understanding by supreme courts as it can be observed in the debate within the Network of the Presidents of the Supreme Judicial Courts (Network of the Presidents) and the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) (Benvenuti 2013). This gives me the opportunity to switch to the second argument, connected to the former, which relates to the ever-growing importance of horizontal and vertical interaction through networking as an alternative avenue of dialogue for the elaboration of shared views of what EU law is. Here, I first theoretically and conceptually frame the issue of judicial networks and then illustrate how

they contribute to the development of a coherent, although fragmented, European judicial field within the broader European legal field (Vauchez 2013a, 9).[VI]

Overall, the common sense understanding among last instance courts of the obligation to submit a preliminary reference to the ECJ reveals their self-perception as active European courts. At the same time, its elaboration is itself an example of how judicial networks, enacting informal cooperation (both horizontal and vertical), help to build a stronger judicial culture that might improve the cooperative dynamics ensured by the preliminary mechanism. In that sense, judicial networks – the prelude for a European judicial community in the making? – are the necessary infrastructure for a functioning multilevel legal order, standing for re-composition attempts of an inevitably fragmented transnational community. The choice of the topic is exemplary in that it touches upon a key-mechanism governing the relations between the European and the national legal systems, where the Court of Justice and national courts seem to have adopted different approaches.

In the concluding section of this article, I observe that acknowledging the role of national courts in the development of European law and enhancing a European judicial community – which implies a paradigm shift in the understanding of the relation between the European and national legal orders (to be framed in a federalist sense[VII]) – involves not only the strengthening of avenues for dialogue that are alternative to the preliminary reference procedure, but also the improvement of a set of tools relating to judicial training, knowledge management, and judicial organization in general. This opens new and interesting lines of research to be empirically investigated.

2. Preliminary reference between judicial protection of individuals and safeguard of the legal order: the understanding of the CILFIT criteria by supreme national courts

As is well known, the preliminary reference *ex* article 267 TFEU is a mechanism inspired by provisions regulating judicial review by Constitutional courts, namely the German *Bundesverfassungsgericht* (Article 100 *Grundgesetz*) and the Italian *Corte costituzionale* (Article 134 *Costituzione*). In Italy, the "ricorso incidentale" allows a national judge to halt proceedings and submit a constitutional issue to the constitutional court, which then

decides upon the constitutionality and the correct constitutional interpretation of a given legislative provision. The aim of such a procedure is to safeguard the constitutional conformity of national legislation and the internal constitutional coherence of a system based on a rigid constitution.

Jan Komárek observed that a prevailing understanding – supported by the European Commission and followed by the Court of Justice – sees the preliminary reference as a "mechanism for the judicial protection of individuals" rather than as a "tool for achieving coherence of EU law" (Komárek 2007, 469). Furthermore, such an understanding regards the need for unity and coherence as a need for absolute *uniformity* in *any legal domain* – an aim that is not only fictitious, but which is also not always achieved by the case law of the Court of Justice itself, serving rather the political goal of supremacy.[VIII] This approach – although odd from a legal perspective (think about the contradiction between the protection of individuals and the lack of typical procedural guarantees of the judicial process in the preliminary reference procedure) – is explained by reference to a specific historical period in which the Court of Justice was struggling to shape the EC legal order as an autonomous sphere with a nature distinct from the international legal order. A further explanation is that the Court of Justice builds its own legitimacy and authority "on its direct relationship to all EU citizens" (Komárek 2007, 484). From an opposite perspective, Komárek contends that preliminary ruling "must be seen as a deviation from normal organization of the judicial process". Its *raison d'être* lies indeed in providing guidance in the most relevant legal issues for the sake of systemic coherence. This explains its unique procedural characteristics, as Advocate General Jacobs rightly pointed out (Komárek 2007, 476 and 479).

Far from being an exception, the preliminary reference is nonetheless considered the avenue *par excellence* through which Member States' courts engage in a dialogue with the Court of Justice, thus acting as European courts inflecting legal reasoning in terms of "individual rights" (Kelemen 2011, 45ff; Lasser 2010, 159f). Consequently, the number of preliminary references by national courts is often referred to as one important indicator of their degree of Europeanization. Critical observations have been raised in this regard. Without considering that a preliminary reference does not always imply a true dialogue (Claes and de Visser 2012, 113), being in some cases an indicator of top-down Europeanization, at least theoretically the very lack of preliminary references may indicate

that courts *know* European law and do not need the ECJ's "assistance". Should we otherwise consider as non-sufficiently European the French *Cour de Cassation,* which submitted only 95 references between 1961 and 2011, having at the same time got involved in an intense transnational interaction and having developed working methods aimed at making decision-making aware of what is going on at the European level as well as in other Member States? (Canivet 2009, 147f) Should we consider as non-sufficiently European the German *Bundesverwaltungsgericht*, whose president stated that «courts of all the member states […] have the challenging mission to defend [the European legal framework], which supports the present state of cooperation and integration. […] Every national judge is – thus – a European judge as well. He – or she – is the judge entrusted with the care for the main pillar of the European Union»? (Hien 2008)

The equation between a high number of references and a high degree of Europeanization has therefore the same dignity as the opposite equation between a low number of references and a high degree of Europeanization. The problem, as usual, is conceptual confusion stemming from ambiguous terminology. The difference lies indeed in the kind of Europeanization we expect: passive vs. active Europeanization. In the latter case, national courts are willing to partake in the development of EU law. This involves a double paradigm shift. From a legal perspective, the EU legal order is not a separate legal order whose development is reserved to European institutions only (in our case, the Court of Justice); on the contrary national courts, and supreme courts in particular, partake in such a development, leaving to the Court of Justice merely the most controversial issues. From a socio-legal perspective, national and European judges are not worlds apart, but they are somehow interlinked. Over the next pages, I suggest that national supreme courts hold an active approach as shown by their understanding of the preliminary reference procedure.

These two opposite ways of understanding the preliminary reference procedure indeed affect the interpretation of the obligation of last instance courts to refer a question according to article 267(3) TFUE. According to this article, courts and tribunals of a Member State against whose decisions there is no judicial remedy under national law – which is most the often case with regard to supreme courts – "shall bring the matter before the Court". The ECJ has provided guidance on the matter. In Massam Dzodzi v. Belgian State, which however originated from a lower tribunal, it generally held that it is up to the

national court to determine the relevance of this question.[IX] The Court of Justice has also provided more precise guidance with regard to the obligation of last instance courts to refer to it, formulating the so-called CILFIT criteria. Such criteria are logically conceived as an exception to the obligation (Lenaerts 2006, 221), but are nonetheless considered to be quite strict.[X]

Following this famous jurisprudence, recalled in the *Information note* provided by the Court,[XI] according to article 267(3) TFEU national courts are not obliged to refer a case if the Court already gave an interpretation on an identical matter in a similar case, or even when the questions at issue are not strictly identical (*acte éclairé*); or if the correct application of Community law is obvious and raises no doubts (*acte claire*).[XII] In the latter case, it may be unclear whether the correct application is obvious or not. According to the Court, national jurisdictions «must be convinced that the matter is equally obvious» to the jurisdictions of other Member States and to the Court of Justice. In addition, their interpretation must be based on a comparison of the different linguistic versions of the uncertain provision and keep in mind differences in terminology.[XIII] A further interpretive criterion is that every Community provision must be interpreted in the light of the Community as a whole, including its objectives and «state of evolution».[XIV]

Most scholars consider such criteria to be too restrictive, believing that few national judges are able to abide to them (Chalmers, Davies and Monti 2010, 176 f). Seemingly, the ECJ's restrictive approach aimed at avoiding abuses by national supreme courts in circumventing the application of EU law – at that time notably the French *Conseil d'Etat,* from which the doctrine of *acte clair* is drawn (Groussot 2008, 6). Even though one can assert that the CILFIT jurisprudence can, paradoxically, be read in the opposite way – as encouraging «national courts to decide seemingly non-controversial or technical matters of EU law themselves» (Chalmers, Davies and Monti 2010, 177)[XV] –, nonetheless the later Köbler jurisprudence confirmed the duty of national courts to refer a case for preliminary ruling when the doctrines of *acte clair* or *acte éclairé* do not apply, holding that failing to comply with that duty results in a breach of EU law by a Court[XVI]. Interestingly enough, Austrian courts worriedly reacted to this further jurisprudence.

When it comes to judicial practice, as a general trend national supreme courts (not to talk about constitutional courts, which are not the object of this article) only coyly refer decisions to the Court of Justice. Comparing across countries is problematic due to the

major differences in the judicial organization of the Member States and would require a specific focus. However, one can observe that in the period between 1961 and 2011, in at least eleven Member States of the once 27 (i.e. excluding the newly acceded Croatia), referrals by supreme courts have been below 30% of total national references.[XVII] Sure enough, strong differences exist from one Member States to the other, in line with general trends that include lower courts (Mayoral 2012, 84). Even if one can argue that such a ratio is understandable, the number of references by supreme courts in the considered period (around 2300) remains very low compared to the total cases dealt with by Member States' courts. Indeed, that means that in 50 years, supreme courts from Member States submitted, on average, 46 references per year. If one adopts a strict approach to the obligation to submit a preliminary reference, the number of references should have been much higher, also considering those factors that make higher courts more willing to cooperate with the CJEU (Mayoral 2012, 87). The self-restraint of last instance courts in referring questions to the Court of Justice is however not surprising. From a theoretical point of view, high courts are more concerned than lower courts with the stability of the legal order and the bearing on it of European law (Alter 2003, 14). They are generally less prone to be guided by European jurisprudence, at least in those cases where their authority and the finality of their decisions are more clearly defied. As Komárek also put it, the main objective of supreme courts «is to solve the disputes brought to them by the parties rather than create a new legal order in sincere cooperation with the Court of Justice» (Komárek 2007, 476).

We can therefore find a clear contradiction between the ECJ's reading of the obligation to refer, further tightened by the Köbler jurisprudence, and what national supreme courts actually do. As shown by the mentioned reaction of the Austrian judges to Köbler – who stated that «in the future the Austrian Administrative Court will think very carefully before withdrawing a reference as it did in the circumstances that gave rise to the Köbler Action» – such a contradiction can have harsh consequences. It is therefore understandable that against the restrictive approach resulting from the Court of Justice's jurisprudence, judges from national supreme jurisdictions call for more flexibility. This position plainly emerges from reports of conferences and official stances of the two mentioned European associations of supreme courts, which I am going to present next.

Problems regarding the application of EU law have been under the careful consideration of ACA-Europe since the last decade. In particular, the 19th colloquium of

the Association aimed at contributing «to an improved method of working with the national judicial bodies and an improved interaction of the national judiciaries with the Court of Justice».[XVIII] Related topics were dealt with on the occasion of the 18th colloquium held in 2002,[XIX] the 21st colloquium held in 2008,[XX] and two further seminars held in 2008 and 2011.[XXI] At these events, a series of problems concerning the application of EU law have been highlighted, mainly through *questionnaires* submitted to the members of the Association, and final reports setting standards or just main common lines were eventually produced.[XXII] More specifically, the issue of the duty of last instance courts to refer a case to the Court of Justice has been discussed during the 18th colloquium of ACA-Europe held in Helsinki in 2002, and it has subsequently been the object of broad considerations by a working group on that matter joined by the Network of the Presidents (van Djiek 2008).

The conclusions of the Working Group on the preliminary reference procedure set up at the meeting held in Warsaw in May 2007[XXIII] stressed the need to interpret the CILFIT criteria «in a rational and reasonable way» and «with common sense» (van Djiek 2008, 11). According to the report of the Working Group, «Interpretation with common sense entails that the lesser the problem the more the national court can convince itself that it is capable, at first sight, to solve itself the question on the basis of its own knowledge and understanding of EU law, as the Court should not be bothered by minor problems or by problems the national court itself can solve in a satisfactory and acceptable way». The Working Group therefore added a criterion of "worthiness" that was not contemplated in the European jurisprudence, but which is along the line drawn by some critics of the CILFIT criteria, starting with the Ole Due Report in 2000.[XXIV] This view has been reiterated in other circumstances by supreme administrative judges. Suffice here to recall what the vice-president of the French *Conseil d'Etat* and current President of ACA-Europe, Jean-Marc Sauvé, said: «quant à l'obligation de renvoi pesant sur les juridictions statuant en dernier ressort, elle n'a rien de mécanique, compte tenu des critères posés par la Cour dans son fameux arrêt *Cilfit* du 6 octobre 1982, *que j'interprète comme un appel au bon sens des juges des Etats membres*» (Sauvé 2009, 5). This is justified primarily by the need not to overburden the procedure, limiting a more rigid understanding of the criteria only to questions of major relevance in the perspective of the unity, coherence and development of EU law. In particular, it is interesting to quote the cutting statement that «the original requirement to compare the text of all language versions is no longer realistic or feasible» (if it has ever

been), and the recommendation that the «the Court […] seizes a suiting opportunity to clarify its position on CILFIT in a judgment».[XXV] It should be noted that this sort of "good practice" reflects the actual practice of some supreme administrative courts in particular. In its 2008 annual report, the Court of Justice of the European Union for example lamented the low referring rates by the German, French, Italian and Spanish ones (Sarmiento 2009, 37).

The approach to the CILFIT jurisprudence, as it emerges from the discussion within and among judicial networks, has the nature of a bottom-up advocacy that contends the strict approach adopted by the Court of Justice and counters an excessive centralization of European courts. This is also in line with a more general approach on the role of national supreme courts, which emerged for example during the 19th Colloquium of ACA-Europe held in June 2004, one year after the Köbler ruling.[XXVI] It is the expression of the self-assertion of supreme national judges, «who see themselves as responsible for the administration of all law in their territories», against an undeserved and sneaky seizure by the European courts, "infantilizing" them (Chalmers, Davies and Monti 2010, 178). This fits with what Eyal Benvenisti and George W. Downs observe: «A national court that engages in serious application of international law sends a strong signal to international courts that the national court regards itself as an active participant in the transnational law-making process and will not accept just any decision rendered by an international tribunal» (Benvenisti and George W. Downs 2010, 166).[XXVII] To be fair, it should be added that we should not necessarily see an institutional conflict between the ECJ and national courts here. The conflict is rather conceptual, involving two different understandings of the respective roles of European and national courts in the development of the European legal order – one resulting from the "official" case law of the ECJ, the other from the actual behaviour of national supreme courts and judges.[XXVIII] In this regard, a member of the NPSCEU stressed that European judges themselves agree in their discussions with national judges that a broader understanding should be given to the CILFIT rules.[XXIX]

In any case, such a perspective points to a real Europeanization of national legal systems and to the assumption of responsibility by national courts to act as «co-actors in the development of European law-making» (Hirsch Ballin and Senden 2005),[XXX] as it has also been reiterated by the first President of the Italian *Corte di cassazione,* Vincenzo Carbone, during a Symposium organized in 2009 by the ECJ (Carbone 2009 4; Ravarani

2009 4). At the same time, this flexible approach – where a margin of discretion is left to national courts – does not annul, on the whole, the criteria set by the ECJ, whose former judge Christian Timmermans participated in the working group in the quality of observer. On the contrary, it stresses the need for an extended advertising of preliminary references made by other courts as well as of ECJ case law in order to more easily find out about those issues touched upon by ECJ case law.

To sum up, the formulation of a shared understanding by national supreme courts with regard to the CILFIT criteria not only shows the taking of an official stance on the issue as an indicator of the will to actively partake in the development of EU law. It also expounds that trans-judicial interaction in the European area in the form of "networking" and through other methods (Canivet 2010, 24) is a *sine qua non* for courts to act as «co-actors in the development of European law-making». Interaction takes different shapes and resorts to different tools: from transnational associations to more informal contacts, and from case-law dialogue to the exchange of legal materials, also through common databases, they all contribute to the building of a "European judicial field" within the broader European legal field. In the next section, I dwell on judicial networks (associations) as the most apparent form of interaction, highly relevant in the case we have just examined. I first clarify the notion of "judicial networks" and then highlight the theoretical importance of the horizontal and vertical dialogues it enacts as an alternative to the preliminary ruling procedure.

3. The EU's regulatory philosophy on disaster risks

When it comes to judicial networks, some preliminary clarifications are necessary. The spread of networks is indeed a substantive phenomenon happening in the EU. Since the creation of the European Judicial Network on 28 April 1997, the language of networks strikingly entered the European legal terminology. Since then, a number of entities have been created under this denomination within the fields covered by the former Third Pillar. In December 2001, the Laeken European Council called for «a European network to encourage the training of magistrates to be set up swiftly [in order to] develop trust between those involved in judicial cooperation». In September 2005, the Hague Programme mentioned those «networks of judicial organizations and institutions, such as

the network of the Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, [that] should be supported by the Union». In May 2010 the Stockholm Programme, in a section on "Developing Networks", stressed the need for increased judicial cooperation, promotion and circulation of best practices and training of the operators involved.[XXXI]

The rise of networks responds to a logic of horizontal cooperation that Armin von Bogdandy has conceptualized under the notion of *Verbund*, i.e. the European multilevel system that has developed since the second half of the 1990s and notably since the adoption of the Amsterdam Treaty (van Bogdandy 2000, 27). One major qualitative change occurred at that time, namely the extension "of the Union's grasp on the horizontal networking among the Member States' administrative and judicial systems". This essentially means the strengthening of mechanisms of cooperation among State authorities that were already foreseen, although at an embryonic level, in article K.1 of the Maastricht Treaty, which had explicitly enumerated a number of fields in the area of Justice and Home Affairs where Member States should cooperate as a matter of common interest.[XXXII]

The use of the term "network" by EU institutions is however often imprecise and actually encompasses different phenomena and institutions.[XXXIII] Scholars have unravelled the heterogeneity of this vague concept (Magrassi 2011; Claes and de Visser 2012; de Visser 2012; Dallara 2012; Dallara and Amato 2012). A first understanding refers to *institutional* networks whose main function is to *support* national jurisdictions to «enhance judicial cooperation in the relevant field, in order to improve the functioning of the European judicial system and to increase mutual trust» (Claes and de Visser 2012, 100 and 108). This concept of network as a form of judicial cooperation is also mentioned under the label "beyond networking towards coordination" (Magrassi 2011, 169). In this sense, institutional networks "oil" the gearwheels connecting different judicial systems within the EU in cross-border matters through «international legal assistance».[XXXIV] Therefore, they imply direct contacts between national judicial systems and operate as intermediates between them, by way either of contact points without a unitary strategy and more or less bureaucratized (EJN and EJNccm) or as examples of greater coordination, although labelled as "light coordination", including a unitary strategic approach (EUROJUST) (Dallara and Amato 2012, 10, 15 and 18).

Here, I focus more on the so-called networks of judicial institutions and professionals

established bottom-up by judges themselves, usually under national law. The two networks mentioned in the previous section, the Network of the Presidents and ACA-Europe, both belong to this category.[XXXV] Networks of judicial institutions and professionals are different from institutional networks established top-down through legislative acts of the European institutions that put into effect the policy of horizontal cooperation elaborated in the Stockholm program. Although they responds to the same horizontal logic and may have similar effects, these two forms of dialogue between judges should not be mixed up (as many EU policy documents do) with the different concept of judicial cooperation (Caponi 2011, 1). At the same time, institutionalized forms of judicial cooperation, understood as mutual assistance, should not overshadow other types of *de facto* judicial interaction happening outside the "institutional" framework of the EU and mostly based on voluntarism in which each individual actor is driven by his own motivations and interests. Indeed, the EU Commission itself strategically provides support – mainly financial support in a social-constructivist perspective (Risse 2009, 144)[XXXVI] – to such initiatives. The rationale for the establishment of judicial interaction lies in the existing gap within the *Verbund* between a legal environment tending towards increased harmonization and the lack of interconnection and uniformity between national and supranational structures (the only institutional links consist in the above-mentioned instruments of judicial cooperation and the preliminary reference).[XXXVII] Therefore, networks both integrate the vertical dialogue between European and national courts *ex* article 267 TFEU and improve the horizontal dialogue among national judges themselves, through which standards are set up and the interpretation of legal rules discussed. They are therefore indicative of a change in the understanding of legal integration from a top-down imposition of rules to «a process of negotiation between legal and political actors at the national and supranational level» (Alter 2003, 12). According to this view, national courts are not passive recipients but have a role to play (Accetto 2011, 20). National courts and judges participate in the elaboration of European legal knowledge and a common legal culture, and networks are (among) the *fora* where this happens.

As to their impact, although not always clearly discernible, it is possible to trace an "ascending" dimension where networks function as channels of dialogue with European institutions and the CJEU in particular, contributing to the (re-)elaboration of legal policies, and a "descending" dimension where networks act as Europeanization devices of national

judiciaries.[XXXVIII] In the first case, courts are involved in European governance and enact a strategy of self-assertion that can be fruitful only if a «united, coordinated judicial front exists» (Benvenisti and Downs 2010, 166). With regard to the case discussed in the previous paragraph, judicial networks thus engaged in a dialogue with the ECJ, expressing their common approach as a form of «collective empowerment» (Benvenisti and Downs 2010, 170). Former judge Christian Timmermans mentioned precisely this example as a case in which discussion about the relationship between domestic and Union law was possible (Timmermans 2012, 17ff). In the other, descending dimension, networks are *filters* between the EU legal system and its national judicial application; with regard to the case discussed above they almost legitimized a common sense approach to the CILFIT criteria against, for example, the worries expounded by Austrian judges.

From a socio-legal perspective, judicial networking therefore supplements the lack of institutional links by developing a transnational judicial community whose consistency then needs to be empirically assessed. At least in principle, a European judicial community allows the definition of more stable legal concepts in an unstable and uneven socio-legal environment (Paunio 2010, 8). Unlike national legal orders, the EU legal order is indeed shaped by a high number of considerably different legal actors, while in a national environment actors consist of a more limited group of specialists. Furthermore, for the same European principles and rules, portions of territory implementing such principles are presided over by different laws using different languages. As the Vice-President of the French *Conseil d'Etat* stated when advocating forms of cooperation among European judges, the aim is «to improve our proceedings and concepts in the light of other proceedings and concepts already familiar to other systems» (Burgues et al. 2010, 233). Finally, networks make up for the possible lack of the courts' self-restraint or "respect" towards other courts and legal systems[XXXIX], while the creation of a «transnational united front» for the purpose of coherence also aims at avoiding race to the bottom and forum shopping.

From the perspective of the legal system, networks indeed allow the resolution of aporias between partly overlapping systems (Ferrarese 2010, 56; Martinico 2011), acting as *de facto* "filters" decreasing the «overall systemic complexity» (Bobek 2013, 205) of the multilevel legal system by operating selective choices on the understanding of concepts, techniques, rules, and principles. Here, the activity of networks is directed at "creating" a

common substratum of establishing legal meanings for the use of national judiciaries, but also tools and expertise in general. Judicial networks thus amount to interpretive communities (Johnstone 2004, 189ff) establishing given understandings of legal and behavioral norms defining the judicial role. Such understandings have a persuasive role and work as a form of (very) soft law that has clearly no force of law but still some legal relevance.

The Network of the Presidents and ACA-Europe well portray this trend towards the building of a European judicial community (but also its weaknesses that should not be underestimated and which ought to form the object of another paper). In this article, I have sketched their role in shaping a common understanding of the obligation to refer for a preliminary ruling. The choice of the topic is exemplary in that it shows a different approach between the Court of Justice and national courts and touches upon a key mechanism governing the relations between the European and the national legal systems.

4. Concluding remarks: an agenda for future research

In this article, I have drawn attention to the role of national supreme courts in the development of the EU legal order: a topic that has become mainstream in the last years, but which has been put on the agenda already more than 15 years ago (Weiler 1991, Slaughter, Weiler, and Stone Sweet 1998). In particular, I have looked at national courts' self-perception as active European courts through the prism of the extra-judicial elaboration of a common understanding of the obligation to refer a decision for a preliminary ruling (article 267 TFEU and related ECJ case law). At the same time, the *locus* in which this extra-judicial elaboration happens (transnational networks of judges) is the other side of the coin of national judges' self-assertion regarding the obligation to refer a decision for a preliminary ruling. A "loose" or common sense approach to such an obligation – in any area of law – involves indeed the need to strengthen alternative and informal avenues of dialogue: to put it differently, the need for communicative infrastructures between European and national judges *and among national judges themselves*.

The building of such communicative infrastructures, suggesting a European judicial community in the making, lies at the core of the functioning relationship between legal orders in a multilevel system (Komárek 2007, 476).[XL] The acknowledgement of the role of

national courts involves indeed a change in the way one looks at the relation between the European and national legal orders. The ECJ's approach in the CILFIT decision is logically based on the idea of separate legal orders and on the pre-eminence of the European over the national legal orders. Against this, another way to handle the issue is to consider the two legal orders as interdependent and the European and national courts as "working partners" (Stone Sweet 2004, 20). Jan Komárek rightly observed that the «the attempt to attach fundamental status to every provision of EU law is contradicting the premise that EU law has become part of national law. If it has, then EU law can no longer be treated as "supranational" law having some special force in each instance, rather must the weight of its rules reflect their actual nature».[XLI]

This implies moving away from the traditional account of the relation between national and European courts, abandoning thereby the paradigm of the separation between the European and national legal orders where the Court of Justice (and EU bodies in general) is the only institution responsible for interpreting European law. I borrow once again Jan Komárek's sharp words: «We must look at the EU judicial system as a whole – not as a mere conglomerate of the central courts in Luxembourg and the national courts in Member States, each having a different *quality* – the former being "supranational" courts having tasks similar to all international courts, and the latter "wearing Community law hat" only when EU law enters their court-rooms […] finding solutions based on EU law is not only work for the Luxembourg oracle, but also for them» (Komárek 2007, 483 and 479). The case analysed in paragraph two shows that national supreme courts regard European law as their own law and are willing to assume responsibility with regard to its everyday development. According to Silvio Gambino, the activism of national courts in the re-elaboration of jurisprudence is a symptom of the shift in the «horizon de sens avec lequel a jusqu'ici été analysé le processus d'intégration communautaire». It shows the transition from the classic paradigm («l'unité dans la diversité») to a postmodern one («la diversité dans l'unité»), in which «le "nouveau visage de l'intégration" doit avoir une qualité différente : conditionné politiquement par les 'valeurs' nationales» (Gambino 2011).

Within this framework, the preliminary reference procedure is not to be seen as sufficient to achieve legal coherence. Statistics on the preliminary reference, on the contrary, indicate that the self-sufficiency of the mechanism is *de facto* already difficult to maintain. Other methods of judicial interaction are also essential. Here, I have stressed the

importance of just one tool: judicial networks, i.e. voluntary associations established by national courts and judges themselves outside the institutional framework of the EU, but nonetheless somehow supported by the latter.[XLII] The spread of networks of judicial institutions and professionals all along the last decade is indicative of a qualitative change in European legal integration, connected not only to the deepening of the European project and to its geographical enlargement, but more profoundly to the rise of a horizontal approach to legal integration.

The analysed case shows that associations of national supreme courts have elaborated a common position that explains and legitimizes a judicial practice countering a rigid understanding of the ECJ's case law. With reference to the obligation to refer a question for preliminary ruling, we have witnessed how interaction has helped cementing a European judicial community around the issue at stake. Far from being closed entities, networks may indeed give rise to a broader community of jurists due to intense collaborations. As van Haersolte metaphorically put it, each network does not operate in a void but moves like a wheel within a wheel (van Haersolte 2010, 138).

Sure enough, this article focuses on just one example, but the same phenomenon can be observed with regard to other areas of substantive law, namely those that are more directly affected by Europeanization: competition law, environmental law, asylum/migration law, taxation law, etc. Preliminary research seems to indicate that these forms of networking cannot be scornfully labelled "judicial tourism". On the contrary, in some cases they may even have a broader impact than professional training, also considering the scope of their activities, ranging from the organization of colloquia devoted to a specific subject to the realization of case-law databases such as Dec.Nat and JuriFast, and from the publication of bulletins on legal development of EU interest to the organization of judicial exchanges among courts.[XLIII] In this regard, Mayoral, Jaremba and Nowak (2014, 1131) also pointed out "the relevance of EU transnational/cross-border networks and personal contacts and discussion with foreign colleagues that seems to facilitate judges' learning process". A first line of future research should therefore cover the mapping of judicial networking phenomena happening in the European space as part of an expanding, although fragmented, "European legal field" (Vauchez 2008, 2013a) and analyse their impact. Empirical research is still lacking on this topic, namely with regard to the actual impact on both the development of European law (ascending dimension) (Muller

and Richards 2010, 18) and national judicial cultures (descending dimension).[XLIV] The expansion of judicial networks is just a trend, and factors of weakness of the phenomenon must not be underestimated, nor should their unintended consequences and side effects be ignored.[XLV]

Alongside this line of research, other directions should be followed. Judicial interaction happens at various levels; transnational associations are just one of them. Other tools, methods, and avenues allowing and/or indicating the formation of a European judicial community exist. An example are *informal* networks and socialization. This is the case of the activities promoted by the Center for Judicial Cooperation, recently established at the European University Institute on the initiative of Prof. R. Cafaggi, or the meetings promoted by the Hague Institute for the Internationalization of Law (HIIL) in 2006 and 2009 on the changing role of supreme courts.[XLVI] Other topics to be investigated more in-depth include the development of judicial techniques and the use of case law as tools of hidden dialogue (Martinico), frameworks of European judicial training (Benvenuti), and the introduction of knowledge management tools in national courts (Canivet 2009 30). In sum, there is still a broad and stimulating field of research to be inquired into in order to assess the actual functioning of national courts as European courts and to understand their role in the development of the European legal order.

Mitigation policies, in fact, foster the European integration through the harmonisation of legislation in areas of shared competence. The whole SES legislation on air traffic management is a clear example of the efforts to make air safety a cross-border issue that cannot be governed on a mere national basis any longer, but which needs a supranational approach within the EU – actually, based on the recognition of functional airspace blocks – in order to meet the near future challenges of increased traffic (both for movement of persons and goods) in the EU air transport sector. In this sector, safety and efficiency needs have actually boosted the integration process and competences are partially, but relentlessly lifted to the supranational level. This case also shows the actual functioning of the pre-emption mechanism which, according to art. 2(2) TFEU, governs the exercise of shared competences (Craig 2012: 379).

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I *Van Gend en Loos v Nederlandse Administratie der Belastingen*, Case 26/62, 1963 and *Flaminio Costa v ENEL*, Case 6/64, 1964.

II *Arrêt Nicolo*, 20 October 1989.

III In an interview, a lower Austrian judge clearly explained that in her eyes in the case of conflict between a European rule and an Austrian constitutional rule, with particular regard to fundamental rights, the precedence would be certainly given to the Austrian constitutional rule: in no way the European legal order has supremacy over the national one. She however added that interpretation techniques would allow her to overcome the problem by keeping the conflict hidden, for example by justifying the relevance of the Austrian rule through the reference by the Treaties to the constitutional traditions of the Member States. *De facto*, it is very rare that a conflict may not be resolved in this way.

IV This is a significant shift from a traditional international law logic to a domestic law logic, where single bodies or institutions of the State are subject to law.

V I use here the acronym ECJ (European Court of Justice), which indicates the highest judicial body of the European Union and is part of the Court of Justice of the European Union (CJEU), which includes also the General Court, formerly Court of first instance. In the article, I refer to the CJEU only where strictly necessary.

VI Following Antoine Vauchez, the notion of the European legal field indicates «a constellation of oft-distant-yet-interdependent legal actors and institutions competing for authoritative manipulation and interpretation of European law».

VII I refer here to a non-state notion of federalism (Van Bogdandy 2000, 28).

VIII Authors highlighted the shortcomings of an approach to legal coherence as predetermined uniformity (Muller and Richards 2010, 5).

IX Paragraph 34.

X On CILFIT, see the essays in Poiares Maduro, Miguel, and Loïc Azoulai. 2010. *The Past and Future of EU Law*. Oxford: Hart Publishing.

XI Information note on references by national courts for preliminary rulings, ECJ, 11 June 2005, point 1. This Information note has been replaced by a new one issued on 5 December 2009 (2009/C 297/01) (point 12).

XII Case 283/81, CILFIT v Ministry of Health [1982] ECR 341, par. 13, 14, and 16.

XIII Par. 18 and 19.

XIV Par. 20.

XV According to Edward (2010, 177), the Court precisely adopted a middle-way approach, excluding the «hard line approach» of the Advocate General but also the flexible one suggested by the Commission in favor of the recognition of national courts' discretion.

XVI Case C-244/01, Köbler v Austria [2003] ECR I-239. Rigidity of the courts' duty to the "right" interpretation of European law was also stressed in Case C-129/00, Commission v Italy [2003] ECR I-14637, where the Court held that although the provision concerned was not in breach of EC principles, it had nevertheless been applied by national courts in a way *de facto* contrasting European law. It is however to mention that ECJ adopted a more flexible stance as regards the CILFIT criteria in Case C-495/03, Intermodal [2005] ECR I-8551 (Groussot 2008, 7).

XVII Court of Justice of the European Union, 'Annual Report', 2012 119-121.

XVIII "The quality of European legislation and its implementation and application in the national legal order", The Hague, 15-16 June 2004.

XIX "Preliminary reference to the Court of Justice of the European Communities", Helsinki, 20-21 May 2002.

XX "Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States", Warsaw, 15-16 June 2008

XXI "Convergence of the supreme administrative courts of the European Union in the application of Community law", Santander, 8-10 September 2008; "European Case Law Identifier (ECLI) and meta-data: harmonization of case law identification in the European Union", Warsaw, 30 September 2011. On 22-23 March 2004 a meeting has also been organized in collaboration with ERA and TAIEX gathering the courts from the then 13 Candidates Countries for EU membership in order to familiarize them with Community law and, more specifically, with the system of referring questions to the ECJ for preliminary rulings. More than 60 judges from the supreme administrative courts of the future Member States attended this meeting.

XXII Among the issues considered, it is worth mentioning the problems of interpretations due to the fragmentary nature of EU legislation or to the variety of EU official languages; doubts arising as to the

hierarchical relations within the European legal order; judicial cooperation and the approaches to the preliminary reference procedure; and State liability for breach of EU law and its consequence on the relations between the European and the national courts systems (Senden 2004; Hirsch Ballin and Senden 2005; Puissochet and Timmermans 2004).

[xxiii] The conclusions reached by the working group were further taken in consideration by the Symposium "Reflections on the preliminary ruling procedure" organized by the ECJ on 30-31 March 2009, attended by the Presidents of the Constitutional Courts, the Supreme Judicial Courts and the Councils of State. However, the substance of the conclusions was already present in previous stances of the network during its activities (see for example the meeting organized on 22-23 March 2004, *supra* fn 20).

[xxiv] A standard of worthiness was also called for by Advocate General Jacobs, but then refused by the ECJ, in Case C-338/95, Wiener [1997] ECR I-6496 (Groussot 2008, 6ff; Lenaerts 2006, 219).

[xxv] This view has been reiterated on occasion of the Symposium of the Presidents of the Member States' Constitutional and Supreme Courts "Reflections on the Preliminary Ruling Procedure", Court of Justice of the European Communities, Luxembourg, 30-31 March 2009.

[xxvi] In its introduction to the Final Report of the colloquium, the General Rapporteur stated: «The most important quality requirement for European legislation is therefore not that it be complete, but that it be capable – where necessary – of coordinating and harmonizing a multiplicity of national systems that will continue to exist in all their diversity» (Hirsch Ballin, 'Preface', in Senden 2004, 3 and 6). The view is reaffirmed in the Report: «a differentiated interpretation and thus transposition of one and the same rule must in his view be accepted to a certain extent, as being a physiological characteristic of even a system such as the European one, in which the national courts must try to bring the different national rules back to a uniform interpretation of the European legal rule from which they ensue.»

[xxvii] It is almost worthless saying that the ECJ can be well considered as an international court here, and this does not withdraw the peculiarities of the Court and of European law compared to international law.

[xxviii] It would be also interesting to unveil how national judges come to the decision to refer a decision for preliminary ruling: among the criteria is not just relevance, but also the level of agreement between judges in the referring court. I give only two examples: In the Austrian Obergerichtshof, preliminary reference can be a way out when the members of a chamber do not come to a decision due to disagreements in the interpretation of European law; interview with the Former president of the Austrian Obergerichtshof, 24th April 2014. Something similar happens in the Hungarian Kúria, where disagreement among judges is one of the criteria for referring a decision for preliminary ruling; interview with a member of the Kúria, 18th April 2014.

[xxix] Interview with the Former president of the Austrian Obergerichtshof, 24th April 2014.

[xxx] This view oversteps the ambit of courts of last resort and applies to lower courts whose judgments can be appealed, and who are traditionally more willing to refer (van Djiek 2008 5).

[xxxi] «The European Council considers that contacts between senior officials of the Member States in areas covered by Justice and Home Affairs are valuable and should be promoted by the Union in so far as possible» 2010/C 115/01, § 3.2.2. The Stockholm Programme also mentions, among the networks of professionals, the European Network of Councils for the Judiciary and the Network of the Presidents of the Supreme Judicial Courts of the European Union.

[xxxii] Forms of administrative or judicial cooperation already existed, but as an exception rather than as part of a comprehensive integration strategy. See for example Council Directive 77/799/EEC on mutual assistance by the competent authorities of the Member States in the field of direct taxation, *ibidem*. Concerning the criminal field, these networks are the result of a double dynamic. On the one hand, they are the last step of a process started with the intergovernmental network named TREVI, created by the European Council in 1975 to tackle cross-border criminal issues. On the other hand, they found a decisive push at the beginning of the 1990s as a presumed logical derivation from the completion of the single market and the underlying freedom of movement. Thus, the deepening of cooperation in criminal matters with the creation of the 3rd pillar in 1993 (Justice and Home Affairs, then Police and Judicial cooperation 1997) brought about the establishment of instruments of enhanced cooperation in the criminal field, with the normative definition of legal policy principles as to the definition of a set of relevant crimes (drug trafficking, international fraud, etc.). On this matter, see more extensively Dallara and Amato 2012, 5.

[xxxiii] The term network itself has become a «fashionable catch word» in many scientific disciplines (Börzel 1997 1). Critics of the sheer concept of network governance note that the vagueness of the concept in EU documents goes hand in hand with the «governmental rhetoric», and that it shows the need for its

interpretation in terms of hegemony, power relations and hierarchy. This does not mean, however, negating the usefulness of the concept - quite the contrary (Davies, 2011, 10 and 13).

[XXXIV] The concept of "mutual assistance" was first introduced in European legal terminology by Council Regulation 515/97 EC (Dallara and Amato 2012).

[XXXV] Examples of networks of judicial professionals, where membership is individual or reserved to private judicial associations, are the European Association of Judges, the Association of European Administrative Judges, the Association of European Competition Law Judges, European Commercial Judges Forum, European Union Forum of Judges for the Environment, etc. Examples of networks of judicial institutions are the Conference of European Constitutional Courts, Network of the Presidents of the Supreme Courts of the EU, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, European Judicial Training Network, European Networks of Councils for the Judiciary. This latter category is still heterogeneous, including both networks composed of courts or their representatives and networks composed of judicial institutions that carry out only administrative functions, even though conditioning the exercise of the judicial function.

[XXXVI] It is worth recalling that the same social constructivist approach is taken by the European Commission that in 2011 set the objective of enabling 700.000 legal practitioners in Europe (which is approximately half of the total) to take part in European judicial training by 2020 (van Harten 2012, 14).

[XXXVII] The lack of uniformity explains the establishment of requirements of structural compatibility and standards of democracy and the rule of law set by the Treaties (van Bogdandy, 2000, 30)

[XXXVIII] The self-restraint approach also aimed at influencing the attitude of lower courts. Thus, in England the Court of Appeal and the House of Lords drafted narrow guidelines on referral by lower courts (Alter 2003, 19). This idea of the judicial network as a "filter" whose impact extends through a spillover effect to national judiciaries is stressed by members of the networks themselves. According to the president of the EU Forum of Judges for the Environment, activities should not be limited to the Forum; indeed, what is discussed should be "spread" at the national level among those judges who do not participate in the Forum. For example, in Belgium this is done through initial and advanced training, or by resorting to e-mail groups for judges dealing with environmental law, but it is acknowledged that there can be huge differences from one country to another and it is quite difficult to objectively assess such an impact. Interview of the author with Luc Lavrysen, Judge at the Belgian *Cour d'arbitrage*, 21st May 2013 (audio document). The call for raising awareness of colleagues not participating in the network was made during the annual conference of the Association of European Administrative Judges held in Utrecht on 24 May 2013.

[XXXIX] Christian Timmermans holds that the relations between the ECJ and domestic courts has been marked by such respectful behaviour, and that in spite of some frictions «no real conflict has occurred» (Timmermans 2012, 21). One can however question the tenability of this opinion, noting – as some authors did – the «aggressiveness of the CJEU towards domestic courts» (Martinico, 2011, 457).

[XL] With regard to Constitutional courts, see Martinico 2008.

[XLI] It is interesting to note that in *Köbler* (par. 32), the Court makes a reference to a principle of international law as an argument to characterize in absolute terms State liability for breach of EU law. One could on the contrary argue that such an absolute character does not fit a fully integrated system. Indeed, the principle of State liability is actually connected to the acknowledgement that "national loyalties" can be questioned and that the degree of unreliability is still high.

[XLII] However, the formation and effectiveness of the European judicial field must be empirically investigated, also in order to highlight weaknesses that certainly exist. For example, networks are financially dependent on the Commission (ranging from 70% up to 90%) and participate in initiatives that are funded and organized with the support of the Commission. However, the relationship is not one of dependence; networks are autonomous and reflect the strong identity of judges as a professional group.

[XLIII] The author conducted interviews during which it emerged that the Administrative court of Ljubljana was able, after accession, to get acquainted with the complex European legal system thanks to its involvement in the Association of European Administrative Judges and its pragmatic approach based on specialized working groups, where a limited number of judges discuss selected cases. Interview of the author with Jasna Šegan, President of the Administrative Court of Ljubljana, 3rd June 2013 (audio document). Other examples indicate the relevance of networking in fact-intensive and intricate legal cases, such as environmental and competition cases. With regard to the latter, it emerged for example that the case-law of the Italian *Corte di Cassazione* regarding the use of the National Competition Authority decision as evidence (decision 3640/2009) has been directly influenced by the discussions the drafting judge had with colleagues of the Association of European

Competition Law Judges; interview of the author with Marina Tavassi, Judge at the Tribunal of Milano, 22nd November 2013 (audio document).

[XLIV] Whether network are only relevant as a form of dialogue with the ECJ and other European institutions or also as a filter that impacts national judiciaries (i.e. national judges who are not members and do not participate in their activities) is an open issue that needs to be empirically investigated. Theoretically, two options are possible. The first one is that networks are not so relevant with regard to changes in national judicial cultures, lacking a working link between the members of the networks and the national judiciaries. On the other hand, networks can be considered as crucial devices allowing – together with professionalized training activities – the Europeanization of national judiciaries. The answer to which of the two options is true may not be a general one, due to differences across both countries and networks.

[XLV] Questions about the impact in terms of convergence and substantive choices on the content of law have been raised by Muller and Richards 2010, 17.

[XLVI] The Center is carrying out a wide array of initiatives bringing together judges and academics. Among them, the project "European Judicial Cooperation in the fundamental rights practice of national courts. The unexplored potential of judicial methodology", is supported by the European Commission DG Justice, aims at "promot[ing] and develop[ing] the dialogue existing between the European judges by exploring concrete dimensions of judicial cooperation in the area of selected EU fundamental rights, namely principle of non-discrimination, freedom of expression and fair trial".

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