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WORKSHOP 4B
DO EU INSTITUTIONS AND POLICIES “PRODUCE” EUROPEAN
IDENTITY?

Does the ECJ ‘produce’ identity?

Dr. H. VOOGSGEERD (University of Groningen)

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Table of contents

1. Introduction	p.1
2. European law as an essential element of European identity?	p. 3
3. The role of identity in the original doctrine of European law	p. 6
4. Four typical decisions of the ECJ concerning the internal market	p. 7
5. Factors and actors promoting the diffusion of the decisions of the ECJ	p. 10
6. How to study European law as identity?	p. 15

1. Introduction

There is an awkward relationship between European Community law and the concept of national or European identity. For a long time it was evident that this branch of law does not deal explicitly with the concept of identity. More recently, it has been deemed necessary to explicitly mention identity in treaty texts. Since 1993, the year in which the Treaty on European Union entered into force, it is explicitly stated in article 6, paragraph 3, that the European Union respects the national identity of her member states. This insertion in the EU Treaty of this paragraph is remarkable. After more than thirty-five years of experience with the EEC the member states decided that this paragraph should be added to the new Treaty. In article 22 of the Treaty of Nice it is stated that ‘the Union shall respect cultural, religious and linguistic diversity’. In the new text concerning a concept-treaty for the establishment of a Constitution for Europe, this paragraph has got a more central role in the first title of the first part of that concept-treaty.

In article I-5, paragraph 1 on the relation between the European Union and the member-states it is stated that the national identity of the member-states the Union must protect is related to the fundamental political and constitutional structures, the systems for regional and local self-governance and the essential functions of the member-states. The main functions concern the defense of the territorial identity, the maintenance of public order and the protection of internal security.

This new text is already more to the point. The concept of national identity is applied to the areas of local self-governance and public security. This specification does not imply that the concept cannot be applied to other areas as well. The European Court of Justice (ECJ) in its case law has over time deeply influenced the national identities of the member states and it continues to do so. The case law concerning the internal market and the competition regime has had an enormous impact on the member states and its citizens and also on the other institutions of the EU. It is another question, however, whether the ECJ 'produces' identity. According to Franz Mayer and Jan Palmowski the institutional and legal mechanisms of the EU have enabled Europe to overcome its historical divisions, and to invent a new identity based on popular notions of justice, and the 'legalization' of intra-European conflict (Mayer and Palmowski, 2004, p. 590 and 591). This argument gives the ECJ some credit for, indeed, producing this new identity. The authors also refer to the national identities of the member-states in that these have become 'permeable'. So it is not only national legal systems, which have become permeable because of the increasing influence of EC law. It is also the national identities, which have become permeable.

In my paper I will study somewhat deeper the relation between European law and identity. I will focus my paper on the influence of rules concerning the internal market on the national identities of the member-states. A limited number of decisions of the ECJ will be dealt with. The following questions will be answered:

- 1) Does the ECJ deliberately influence national identity or not?
- 2) When national identity is at stake before the ECJ is it then specifically dealing with it and respecting it, is it only applying the rules and standards in the EC Treaty or is the ECJ constructing and reconstructing identity at European level?
- 3) What are the methods with which the ECJ influences identity?
- 4) Who or what is responsible for the successful diffusion of principles and norms of the ECJ, the 'acquis communautaire'?

I will focus my paper on the ECJ, because it is one of the most authoritative institutions of the EU. The other institutions follow the findings of the ECJ. European regulations and directives are very often mere codifications of these findings. The decisions of the ECJ are, sometimes grudgingly, accepted by the member-states. In the new concept treaty for a Constitution for Europe the posi-

tion of the ECJ has, once again, been strengthened. A possibility is created to establish specialized tribunals under the aegis of the ECJ. The ECJ can adjudicate concerning a conflict between the European Commission and national parliaments about the concept of subsidiarity. The overall authority of the Court is, however, never openly questioned, although during the referenda about the concept-treaty for a European Constitution its position has been debated. This makes the ECJ an interesting topic for research. Political scientists have discovered that institution now as well since more than 15 years.

The conclusions of the mentioned contribution by Mayer and Palmowski will be a starting point for the analysis. Some decisions of the ECJ will be studied. The Court on its own can never produce identity. It needs other actors. In my analysis I will therefore focus on concepts like diffusion, persuasion, frames and epistemic communities. After discussing the cases and the methods with which the ECJ influences identity at the European and the national level with the help of these concepts, I will conclude with some remarks about how to study identity in relation to European law. Cederman uses a predominantly constructivist instead of an essentialist approach to identity (Cederman, 2001). Is this approach acceptable?

2. European Law as an essential element of European Identity?

In the subtitle of their article Mayer and Palmowski focus on 'the Ties that Bind the Peoples of Europe'. It is EU institutions and EU law through which European identities have come to be expressed in the view of these authors. This argument is essentially a negative argument: because there is no meaningful common European historical identification the mentioned institutions and laws are almost the only source for attention. The authors see a role for the EU institutions in the promotion of identifications with the EU. The main mechanisms for this promotion they see are a distinctive European citizenship and the strengthening of supranational institutions in Europe. In other words, more distinctive European citizenship and more supranational institutions would strengthen European identity. Patrick Glenn also focuses on European citizenship as a new European identity, alongside that of states (Patrick Glenn, 2000, p. 148).

In their contribution Mayer and Palmowski not only pay attention to European Law, the ECJ is also at the centre of their analysis. In general the authors claim that European law and therefore also the decisions of the ECJ express "what Europe is and what it aspires to be" (Mayer and Palmowski, 2004, p. 587). They even go further: in creating individual and fundamental laws the ECJ has become "pivotal in helping to articulate substantive aspects of a European identity" (Mayer and Palmowski, 2004, p. 589). The authors assume that these rights are primordial in bringing about a separate sense of European identity. The decisions of the ECJ, in individual and fundamental rights as well as in

other areas, have been accepted by the member states, although sometimes grudgingly. Famous is the negative remark by Chancellor Kohl concerning the *Paletta* case (45/90), in which an Italian migrant worker in Germany had a right to sickness allowance during a stay in Italy where he became ill. Dutch government ministers complained about the decisions of the ECJ concerning direct taxation, which have had huge financial consequences. Again, the decisions were simply accepted. Sometimes the governments warn the ECJ before a decision is taken that the judges should not deal with 'sovereign' elements. The British government did this when the ECJ was asked in a preliminary procedure to deal with the National Health Service.

Mayer and Palmowski put forward three reasons that might explain this broad acceptance of the decisions of the ECJ. In the first place the authors refer to majoritarian consensus: as long as the majority of the European population broadly supports the decisions of the ECJ, governments will not actively intervene as a result of a decision they might not like. Second, the ECJ has become less integrationist, it now guards the EU institutions in that these do not overstep their powers. Both arguments, the one concerning majoritarian consensus and the one concerning the evolving stance of the ECJ, resemble the arguments put forward by Maduro. In his book on the free movement of goods he uses the terms 'majoritarian activism', 'majoritarian approach' and 'majoritarian perspective' in order to explain the attitude of the ECJ to strike down national rules whenever the policy behind the rules was not shared by the majority of the member states and to uphold these rules whenever there were uncertainties in different member states legislation in a certain policy field (Maduro, 1998, p. 73). The same Maduro introduced the difference between 'market building' and 'market maintenance' (Maduro, 1998, p. 88). Market building requires more robust, integrationist, decisions of the ECJ, whereas market maintenance does not. Market maintenance requires more of a balancing attitude of the Court. In the words of former judge Koopmans the 'role of law in the next stage of European Integration' could be different (Koopmans, 1986). He means that the role of law in European integration will be characterized more by the essential 'peace making function of the law, than by the instrumental conception of the law. Landmark decisions such as *Van Gend & Loos* (26/62) and *Costa/ENEL* (6/64) in the beginning of the nineteen sixties were, indeed, instrumental in bringing about a coherent unitary common market. The decision whereby the Tobacco Publicity Directive was struck down (C-376/98) because of the wrongly chosen legal base at the end of the nineteen nineties can be considered a peace making decision.

The third argument of Mayer and Palmowski is that the ECJ has been seen, certainly by the member states, as more independent than the European Commission. The decisions of the ECJ have helped determining outcomes that are

to every member's benefit in the long run and avoiding situations of the prisoners' dilemma.

This argument that the EU institutions and especially the ECJ have contributed to articulate substantive aspects of a European identity is a direct and straightforward one. By strengthening their own prerogatives the EU institutions promote identification of the peoples with the EU. In general I agree with these statements. Law and identity are interrelated. Law has an important role to play in this respect. However, in my opinion there are other ways to strengthen identification with the EU as well. The other ways to strengthen identification are more bottom-upwards. The right of free movement, bolstered by the ECJ, leads by means of an increasing mobility throughout the EU to pressures on existing arrangements. Kurzer has shown that the Irish position on abortion, the Dutch position on soft-drugs and the Scandinavian position on alcohol have all changed, not only because of explicit decisions of the institutions of the EU, also because of increasing mobility by the people (Kurzer, 2001). European law has fulfilled an essential facilitating role here. Numerous decisions of the ECJ have, sometimes unexpectedly, come to the aid of citizens in their dealings with different and diverse authorities of the member states. In the next paragraph some examples will be shown.

The role of the ECJ in bringing about parts of a European identity is therefore certainly not only a top down process. There is another bottom up process that has to be mentioned in this context. Member states adapt their national laws and regulations not only because of a harmonization of laws decided in Brussels, or because of decisions of the ECJ. Benchmarking or best practices are of an increasing importance. This bottom up unification or, better, convergence process is in my opinion becoming more important recently than the old road by way of supranational legislation and decisions of the ECJ, which is sometimes too cumbersome. Decisions of the ECJ are at the basis of this process, this process is, however, not really caused by these decisions.

This process increasingly blurs the difference between Europeanization and Americanization, a topic discussed by author Daniel Kelemen and Sibbitt (Daniel Kelemen and Sibbitt, 2004). Daniel Kelemen considers the European internal market as another example of the American internal market. European integration with the help of legal integration increases the activities of cross-border adversarial groups, which operate world wide. This global convergence idea in the form of Americanization forces us to look more closely and accurately to the substance of possible 'European' identity/ties. Is there a specific European identity, or is there only a 'globalized' identity?

3. The role of identity in the original doctrine of European law

Is this approach to find European identity by looking to European law a correct one? In the early years of the common market it was not at all clear that there was a relation between European community law and a concept such as identity. One of the most influential authors in European law has been the German professor Hans-Peter Ipsen. It is said that in making the basic concepts of direct effect and supremacy of European Law the ECJ has been influenced by his thoughts. Ipsen sees the European Communities (EEC, ECSC and Euratom) as so-called 'special purpose associations' ('Zweckverbände'). An important characteristic of these associations is their technocratic nature. The tasks and competencies attributed to the EC level have to be handled in a technocratic-bureaucratic way. If member-states are not able any more to fulfill certain tasks, a European bureaucracy is needed. This technocratic way is also the most efficient (Ipsen, 1972, 1045). According to Ipsen there is no need for the European construction to deal with 'difficult' aspects like identity, national anthems, flags etc. (Ipsen, 1972, 198). The functions the Communities perform do not belong to the irrational field. Special purpose associations are not 'Gefühlsverbände' or 'special emotional associations'. "Wegen ihrer rationalen Versachlichung sind sie weder bestimmt noch geeignet, geistige, ideologische oder gar mythische Gehalte, die dem Staat verlorengehen oder schon gegangen sind, zu ersetzen" (Ipsen, 1972, 198).

The essential element is welfare, not stateness, the question is how to create as much welfare for all. Moreover, it is the member-states that 'carry' the 'spa's'. The member-states do not disappear or 'whither away' as some early functionalists opined. The member states are very essential because they have to carry the European construction. It is the member states that give legitimacy to the construction, the governments need to clarify to their peoples the benefits of the European project. The national identities remain unimpaired broadly speaking. Ipsen suggests that European law has to force member states to open themselves to each other. Essential in the special purpose associations is a process of disentanglement of the state, a progress in integration or 'doing things in common' and a change in the stateness of the member-states of the EC. These core concepts may bring about an EC that leaves unimpaired much of the identity of the individual member states. It is the view of Ipsen that the states opens up, the limit is where the identity of the state is threatened.

4. Four typical decisions of the ECJ concerning the internal market

If we watch some of the decisions of the ECJ we will be able to conclude that, indeed, there is no 'direct attack' at the national identity of the member states. The influence of these decisions on identity is less straightforward and more subtle. In decisions of the ECJ always a specific legal or technical language is used. National measures and policies are tested against concepts

such as non-discrimination and proportionality. The ECJ makes a trade-off between the promotion of free movement and fair competition within the EU on the one hand and protection of certain values on the other hand. Let us study some of the decisions, which had an influence on identity-related matters. I will use the example of four cases. The first one is about the topic of national languages, the second one is about boundaries, an interesting concept in relation with identity. The third example concerns a trade off between economic liberties and social protection and the last one is about old fashioned economic taxes that are simply abolished. These four specific decisions are selected because they show the ECJ's handling of decisions concerning the internal market in general.

The first decision is that concerning the Dutch female teacher Groener (379/87). Mrs. Groener worked as a part-time teacher in drawing lessons in Dublin (Republic of Ireland). In order to be eligible for a post of unlimited duration, she had to pass tests. Mrs. Groener passed all tests except one: the test concerning the Irish language (Gaelic). Because of this failure she was not nominated for the post of unlimited duration. Does this condition impede free movement of workers within the EU, now that speaking Gaelic was de facto not essential for fulfilling the post as drawing teacher? The French Advocate-General M. Darmon made a very strong defense for the protection of languages. Since the nineteen fifties the Irish government pursued a policy of actively stimulating to preserve and restore that language. Is it possible under EC law to take into account the wish of a member state to preserve a certain language? Without doubt the Advocate-General answered positively to this question. A 'normal' application of European law principles such as proportionality would intrude too much on the freedom of the member state. The ECJ did not spend so many emotional words to the protection of languages as the Advocate-General did. It made a strict application of the principle of proportionality. First national languages like Gaelic may be protected, but the impact on free movement of workers may not be disproportional. The ECJ did not make the suggestion that Mrs. Groener should receive additional language courses in Gaelic, before her application for a job of unlimited duration could be turned down. A good application of the principle of proportionality, however, could require this, now that Groener had already some experience in teaching drawing lessons in Ireland. I would consider this decision as a landmark case concerning the habitual trade-off between economic principles and other (cultural) values. As a principle free movement of workers is upheld, some exceptions are possible under severe limits.

The ECJ applies another kind of trade off in the decision concerning Mr. Wijsenbeek (C-378/97). Because since 31st of December 1992 the European Community ought to be an area without internal frontiers, the Dutch MEP Mr. Wijsenbeek refused to show his passport at a check at Schiphol Airport. He

protested that the fine he got was against the article in the Treaty that suggested this area without internal frontiers. The ECJ did not support him. Member states have a right to check the identity of persons who enter and leave their territory. The ECJ added, however, a remark concerning the external border of the EU. In the future external border controls might become so tight that controls at the internal frontiers would become superfluous. This addition is remarkable, in that it shows another trade-off between different kinds of boundaries.

Another important trade off in the decisions of the ECJ is the one between economic liberties and social protection. A strong case for free movement of services was made in *Rush Portuguesa* (C-113/89). A Portuguese construction firm provided services in France concerning the TGV Atlantique. The firm took its Portuguese workers also to France. Because of a lack of a permit to bring these workers French authorities imposed a fine. Protesting this fine brought the case to the ECJ in Luxembourg. The Belgian Advocate-General Van Gerven was aware of the sensitivity of this situation and proposed only that the Portuguese firm could bring essential and senior workers. The ECJ, however, decided in favor of the service provider. *Rush Portuguesa* could bring all the workers from Portugal he needed to provide the service in France. Another decision would have brought about a lot of administrative fuss and have made the freedom to provide services illusory. However, the Court added that "Community law does not preclude Member States from extending their legislation, or collective labor agreements entered into by both sides of industry, to any person who is employed, even temporarily, with their territory, no matter in which country the employer is established nor does Community law prohibit Member States from enforcing those rules by appropriate means". It is a bit of both, the internal market and the freedom to provide services is the principle which must be upheld, unfair competition, however, is not acceptable.

The last example of a decision by the ECJ is the one about old duties on imports of some French overseas territories. The decisions *Legros* (C-163/90) and *Lancry* (C-363, 407-411/93) were related to the so-called 'octroi de mer' levied in French islands overseas, such as La Réunion. These levies were held by the ECJ to be against the prohibition of customs duties and duties of equivalent effect in the EC Treaty. A typical example of economic rationality is the reaction of former Advocate-General Tesauro on these 'octrois de mer'. These levies had existed for quite a long time. Tesauro nevertheless called them 'obsolete' (Tesauro, 1995). In other words, old fashioned habits should disappear as quickly as possible, because these are obsolete in a modern economically efficient European Community. This way of thinking is not unlike that of the judges in the ECJ.

After studying these decisions by the ECJ it becomes clear that this court creates new boundaries. In its decisions the ECJ indicates who should be in-

cluded in a certain treatment and who should be excluded. Non-discrimination and the four economic freedoms play a predominant part in this new boundary creating process. The four freedoms, the internal market without internal borders and the obligation not to discriminate on the basis of nationality, have implications for the way member-states make their legislation and regulate their country, they do not prohibit all regulation. The member states are not going to end up like Gulliver with arms and legs tied up. There is, however, a profound influence of the ECJ. The ECJ reframes and reconstructs conflicts about national rules. It also deals with boundaries. In Cederman's bounded integration concept boundaries play an important part.

These cases also are proof of the fact that the ECJ is not directly dealing with identity. The decisions of the Court, however, in the long term have deep implications for national identity. What on short term looks like a technocratic and subtle reframing process, entails in the long term an important change of habits and cultures. Recently the Dutch national football coach, was complaining about consequences of the famous Bosman decision (C-415/93) of the ECJ. This decision led to the influx of many non-Dutch football-players in the Dutch competition. The coach was complaining about the increasing lack of a typical Dutch playing style.

The ECJ is dealing almost exclusively with individual rights and not with collective rights. This is related to the questions that are put to the ECJ. These questions generally concern individual cases before national courts entailing individual rights. These questions are never worded in language setting apart whole groups of people, e.g. French versus Dutch or British versus Irish. The decisions, however, have a deep influence on future rulemaking of member states. The ultimate influence of these decisions is, therefore, of a general nature.

Domestic rules that protect distinct cultural practices are sometimes declared by the ECJ to be against the EC Treaty. Craufurd Smith submits that the ECJ starts from the premise of advantages of exposure to other cultures. Insulation of domestic traditions will not be permitted. The consumers can choose themselves what sort of product or tradition they want to buy (Craufurd Smith, 2004, p. 29-31). The ECJ does not mandate cultural change, only openness to change. The common market promotes a culture of consumer choice. Therefore the influence of the ECJ on identity can be considered as deep but indirect. In the next paragraph I will study the processes by which the decisions of the ECJ have been diffused so successfully. What or who is responsible for the strong influence of the ECJ on European identity?

5. Factors and actors promoting the diffusion of the decisions of the ECJ

In order to study the growing contribution that European Community law might have on identity, it is important to study processes of diffusion and persuasion of EC law within Europe. Diffusion and persuasion are not only used by social constructivists, but also by institutionalists in order to account for institutional change by the spread of institutional principles or practices with little modification through a population of actors (Campbell, 2004, p. 77). Jeffrey Checkel has studied the conditions under which diffusion is probable. Persuasion and social interaction are paramount in his social-constructivist approach to European Identity change (Checkel, 2001). Information is essential in the formation of all social identities (Patrick Glenn, 2000, pages 38 and 39). How was the information produced by the Court distributed, why was the information accepted by relevant actors and why has this information been diffused so remarkably well the last 20 years? In order to answer these questions I will look to the hypotheses of Checkel. He gives five hypotheses under which agents are open to persuasion. He focused on compliance by states. His agents are therefore state agents. Persuasion can lead to European identity change. I will apply these hypotheses to the reception of the specific cases mentioned in the last paragraph. As agents or actors I will limit myself to state agents including national courts. Next, I will also develop one other hypothesis.

1). His first hypothesis suggests that argumentative persuasion is more likely to be effective “when the persuadee is in a novel and uncertain environment generated by the newness of the issue, a crisis, or a serious policy failure”. In that situation the agent is cognitively motivated to analyze new information. What about diffusion of the decisions of the ECJ concerning the four freedoms and the internal market?

In my remarks about the historical background of EC law in the preceding paragraph, I referred to the ‘special purpose associations’ of Ipsen and their object to serve member states. In this logic serious policy failures have been a cause for the creation of the Community. These failures were related to the economy, the experience of the years between the two world wars was still alive, destructive consequences of the tariff wars were enormous. In the fifties and sixties there were a lot of policy fields on which member states wanted to pool their sovereignty. Agriculture has been the most important but not the only one. European Community law creates a new framework within which these old goals can be realized. European law as it has been developed since 1958 clearly has had and still has unique characteristics. It could be seen at the time as a completely new issue. The EC system has always been qualified as a ‘sui generis’ system, mostly because of the unique system of Community law. It was a totally new way of framing economic issues. Over the time this way of framing issues has been very influential. Because of the enduring operation of the Community for now about almost fifty years the legal system is nowadays not

so new any more. An element of uncertainty in the environment is always there. The external environment of the EC has become more uncertain recently. The internal environment has also become more diffuse, because of the increasing number of states participating in the EU. A Union of twenty-five states is a different setting compared to the one present in 1958.

The elements in the first hypothesis concerning novelty and uncertainty remind me of the concept of epistemic communities developed by Haas and others (Haas, 1992). Under a situation of uncertainty networks of scientists are able to influence policy discourses. The question could be asked whether European law as a discipline would fit in the criteria of an epistemic community. I do not think that the discipline of European law as such can be qualified as an epistemic community. Haas' characteristics of an epistemic community are not all applicable. European law is certainly a network of academics who meet regularly. I doubt, however, that they share causal and normative ideas. It is not true that European law as a discipline promotes a neo-liberal paradigm. The discipline can however be linked to existing epistemic communities, consisting of experts, companies and NGO's. Formerly sensitive issues have been re-framed by the epistemic community. The integration of the coal and steel sectors in the early 1950s is an example.

2). The second hypothesis is related to the existence of prior, ingrained beliefs among the persuadees. Persuasion will be easier when few prior beliefs exist that are inconsistent with the persuader's message. It is not easy to name potential prior beliefs that might conflict with 'messages' of the Court. It is not national identity as such that is the prior belief. The technocratic special purpose associations of Ipsen have clarified this. Typical ways of behavior and national biases are subtly handled by the ECJ in its decisions. Therefore in the short term the decisions of the Court have been accepted. The popularity of supply side economics, the opening of borders within the EU, abolishing restrictions hindering the integration of the economies of the member states and clear timetables, set by the member states themselves, have probably helped the reception of the decisions of the ECJ in the member states. Research has shown that lower courts in the member states have used the possibility to ask preliminary questions to the Court in Luxembourg as a power grab against the supreme courts of the member states (Slaughter, 2004, p. 82).

Until recently the 'messages' of the European Court did not receive critical reactions from the legal discipline, the wider academic community as well as from politicians. In the legal discipline a critical study from H. Rasmussen with the title *On Law and Policy in the European Court of Justice* has remained a rare one, criticizing the judicial activism of the Luxembourg Court. Political scientists only discovered the Court in the late 1980s. Politicians rarely criticize the ECJ. They grudgingly accept those decisions, which have negative implications

for some member states, for example on the field of direct taxation. The general public, if it might be aware of the existence of the ECJ without confusing it with the Strasbourg Court on Human Rights, has reacted rather passively. The relevance of this second hypothesis therefore depends on the nature of the persuadee.

In the long term, the influence of these decisions concerning the internal market and competition could have some consequences for identity issues. The priority for the economy and the neo-liberal ideology inherent in some parts of the EC Treaty could bring about more tensions as the debate about the so-called Bolkestein directive in France has shown. People are going to discover that European Community law in different areas is not so neutral after all. The common or internal market favors a reallocation of economic factors throughout the whole enlarged EU. In many cases, this process will bring about losers.

3). The third of Checkel's hypotheses suggests that argumentative persuasion is more likely to be effective when the persuader is an authoritative member of the in-group to which the persuadee belongs or wants to belong. This hypothesis focuses on the wish to be member of a group. This wish has indeed been strong among the new member states, which all had to go through long and difficult accession processes. In these processes the 'acquis communautaire' played a very essential role (Fierke and Wiener, 2001, p. 132). The most important part of the 'acquis communautaire' are the decisions of the ECJ. The authoritativeness of the decisions of the ECJ is almost beyond doubt. This is because there is almost no alternative authority within Europe. One more easily accepts the authority of a Court in which one has an own national judge, instead of the authority of the three bigger states of the EU. Again, critical notes on the role of that Court are now not rare as they were forty years ago. Nevertheless, there is no one who really argues for the abolishment of the ECJ. For new member states the authoritativeness of the decisions of the ECJ has been even stronger. They wanted to belong to the in-group and had to confirm to the pre-accession conditions. Club-theory and the wish to become a member of the club, therefore, is an important explanation for the popularity of the decisions of the ECJ. In the club there is only one real independent broker, this is the ECJ.

4). Hypothesis number four is also related to the effectiveness of the persuasion. Persuasion is held to be more effective when the persuader acts out of certain principles and does not lecture or demand. This hypothesis fits very well on the Court of Justice. This Court has developed several principles and almost only argues on the basis of principles, norms and rules. Snyder has derived thirteen typical European constitutional principles. Examples are the principles of the single institutional framework; the separation of powers including institutional balance; implied powers; supremacy; direct effect; subsidiarity; non-

discrimination and the principle of respect for national identities (Snyder, 2003). Apart from these, in his words micro-sociological principles, he also mentions five macro-sociological constitutional principles. These are for example a divided power system, the member states as Masters of the Treaty and the rule of law. The difference between micro and macro-sociological principles is that the micro-sociological principles offer an internal perspective on European constitutional law. The Court often puts its decisions in language concerning broadly accepted principles. Some of these principles were written in the original EEC Treaty, others were developed by the Court. The important principles of direct effect and supremacy of Community law were developed by the ECJ. That this principle of supremacy is now mentioned explicitly in the concept-treaty for a European Constitution accentuates the authority the Court has had among politicians and the European elites. That the ECJ is attributed even more tasks, such as for example adjudicating conflicts between national parliaments and the European Commission about issues such as subsidiarity, is another proof of this tendency of increased legalization of the EU and increased delegation to the ECJ (Abbott a.o., 2000).

5). According to the last hypothesis argumentative persuasion is more likely to be effective when the interaction between persuader and persuadee is occurring in less politicized and more insulated, private settings. This hypothesis fits also remarkably well in the diffusion of European law. Most of the case law of the European Court are decisions as a result of a preliminary questions from a lower or higher national court. There are almost no cases putting one member state openly against the other. It is very often in private settings that the ECJ gives its views on the EC Treaty and secondary law.

To these five hypotheses I would like to add another one. In my opinion persuasion is more likely in non-hierarchical settings. The European Integration process has unleashed a strong tendency of benchmarking among member states. Bottom up tendencies of convergence and isomorphy have become stronger than top down harmonization strategies. European identity is promoted in this process as well. The role of the ECJ is less clear in this context. The Court could facilitate such developments. Most of the support for this process will come, however, from the other institutions such as the Commission. Soft law schemes could help this process of convergence and isomorphic change, in which member states learn from each others practices.

These six hypotheses explain to a certain extent the successful diffusion of the decisions concerning the internal market of the ECJ. The negative side of these processes is that the ECJ might become 'overstretched'. Its work load is now very big, an answer to so called preliminary questions by national courts from

the ECJ now takes about two years. In response to this successfully diffused case law of the ECJ more critical notes have been expressed recently. An interesting critical note is from Epiney (Epiney, 1995, p. 533 and 534). She pleads for a general principle of interpretation in European law of autonomous policy making by member states (“ein übergreifendes Prinzip der bestmöglichen autonomen Politikgestaltung durch die Mitgliedstaaten”). The ECJ should take into consideration the negative consequences of European law for autonomous policy making of the member states. These critical notes did not yet lead to a change in this process of persuasion and diffusion. Increasing popular discomfort with the European project, as the negative outcome of the referenda show, might bring about a change. The ECJ could make a start by taking seriously the concept of subsidiarity.

6. How to study European law as identity?

Did the ECJ produce identity? This has been the central question of this contribution. There are short and long term consequences of the decisions of the ECJ concerning the internal market. The short term consequences are not impressive. Only some decisions reach the international and main national newspapers. In the long term, however, the decisions have had an enormous impact. Diffusion and persuasion processes have been relatively successful. National actors, with the help of national courts, have increasingly accepted the decisions of the ECJ, although this happened sometimes grudgingly. Can the successfully diffused productions of the ECJ be seen as identity? What concept of identity should we use here?

Mayer and Palmowski emphasized the individual and fundamental rights of citizens and the existence of the European institutions as proof of a European identity. Essential in their concept is that the identity is a separate one from the identities of the member states. Indeed, such a separate identity exists now after almost fifty years of decisions of the ECJ. The identity the ECJ produced and produces is, however, still a very ‘thin’ identity. Only those citizens that move to another state are protected by the four economic freedoms and the provisions on European citizenship. The ECJ has contributed enormously to the protection of these individual rights. Nevertheless, the number of people making use of the so-called four economic freedoms is still very low. The total number of profiting citizens is, therefore, not so high. Only about 3 percent of the working population moves cross-border to work in another member state. Considering the concepts of ‘thick’ and ‘thin’ identity (Cederman, 2001, p. 5), the European identity is still very ‘thin’ and the national identity is still very ‘thick’. A ‘thin’ identity is limited to minimally necessary political communication within the public sphere. A ‘thick’ identity consists of a large number of cultural aspects of private life. Free movement and cross-border migration will not automatically lead

to a broadening of 'thick' identity. Migrants are accepted for economical purposes in the host member state. Inclusion of migrants in the host state for these reasons will lead to a 'thinner' identity. The large majority of people who do not migrate to another member state do not necessarily support this 'thinner' identity. They even might feel threatened by this identity, caused by economic reasons.

According to the original idea of 'special purpose association', discussed in paragraph 3, European and national identities should not be in opposition to each other. Both identities should reinforce each other. National identity is opened up by the decisions of the ECJ to become more inclusive for citizens from other member states. In principle the national identities are not destroyed, they are opened up. This implies that the 'thin' identity of the European common market the earlier existing 'thick' identities from the member states should also coexist peacefully. Cederman, however, suggests that an inclusive interaction between peoples from different member states will lead to a 'thinning' of identity (Cederman, 2001, p. 5). In that sense 'thin' and 'thick' identities become opposites.

Delanty has tried to clarify the relationship between national and European identity (Delanty, 1995, 23), according to this author these identities are not inseparable. In the same way as Mayer and Palmowski he tries to find some distinctive elements of a European identity. One important element in the search of Delanty is the contrast between particularism and universalism. National identity is particularistic and a European identity is universalistic (Delanty, 1995, 29). I agree with him that as long as a European identity does not require relinquishing national identity it has its uses. I do, however, not agree with him in that national identity is per definition particularistic. European identity has to be universalistic in order to accept different national identities.

European law and the decisions of the ECJ play an important role in this respect in that they open national laws and identities. These laws and identities become permeable. Openness in this context refers to the lack of a 'finalité' in the European integration concept. It also refers to the possibility of a gigantic learning process if more people will make use of the four freedoms and go to work and/or reside in another member state. This learning process is not created by the decisions of the ECJ. The people who make use of one the four freedoms are the potential objects of this learning process. The ECJ at the most facilitates this process.

There is a problem with the universalistic character of European identity in that there is no difference any more between 'European' and 'global'. For a meaningful European identity it is essential to forego the development in the direction of a global Anglo-American super-culture. National cultures and specificities will need to be protected. It is possible that these cultures open them-

selves up towards each other as a part of the learning process, but the cultures themselves must remain intact.

At the end of this contribution it is possible to conclude that the decisions of the ECJ concerning the internal market and the successful diffusion of these by national courts and other pressure groups have triggered several developments. Although these can only be seen at a long term, it is possible to see examples of changes in identities. According to Kurzer market integration in Europe has disturbed the integrity of cultural norms and collective identities in unanticipated ways. She shows us a modest trend toward cultural homogenization. The Dutch have changed their drug policy a little bit, the Swedish their alcohol policy and the Irish their abortion policy. Without the internal market these modest changes would not have happened (Kurzer, 2001, p. 56).

The ECJ has definitively contributed to these developments. In order to remain successful the ECJ must pay attention to and respect in a better way the national identities. It is clear that the member states must not disappear. The member states are the source of a possible collective European identity. It is dangerous to juxtapose European and national identities. The social experimentation and the learning process that is the consequence of good functioning 'special purpose associations' (the internal market and competition) bring about changes to these national identities. In my view these national identities must remain the focus of attention. What does the existence of 'the European level' do with the national identities? Some authors correctly talk about 'the Europeanization of national identities' (Kurzer, 2001, 29 and Marcussen and others, 2001, 118). Although Kurzer sees some convergence towards common European values in certain sensitive policy domains, Marcussen and others argue that there is no convergence among the various national state identities in Europe toward a common identity. But Marcussen and others stress anyhow that some nation state identities have thoroughly integrated "ideas about Europe and the European order". Each of the states have done that, however, in a different way.

In order to remain influential and to safeguard successful diffusion of its decisions in the near future the ECJ will have to pay more attention to subsidiarity and to cultural pluralism. The internal market must not become a pretext for converging habits and cultures around Europe. If that happens, Daniel Kelemen and Sibbitt will maybe be put in the right: Europeanization would in that case resemble Americanization. On the other hand, the internal market will have to be reconciled with specific national cultures and the pluralistic nature of Europe. In order to let this happen, the concepts of 'thin' and 'thick' identity will also have to be reconciled.

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