Tilburg University

Who has the last word? On judicial lawmaking in European Private Law

Loth, Marc

Published in:
Who has the last word?

Publication date:
2016

Document Version
Publisher's PDF, also known as Version of record

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):
Loth, M. (2016). Who has the last word? On judicial lawmaking in European Private Law. In *Who has the last word?*

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WHO HAS THE LAST WORD?

On judicial lawmaking in European Private Law

Marc Loth¹

1. Introduction

In this stage of his multilayered intellectual development Arthur Hartkamp is especially interested in the question what EU law means for private law (that is, for relationships between individuals). For answering this question we need more conceptual ‘grip’ than is offered in EU law doctrine, Arthur writes in Chapter 1 of his Case book, and the upshot of his project is to provide for this. For that purpose, he not only researches the doctrine of direct effect from the perspective of EU law, but also from that of its effects on national law. Having arrived at this point, I wondered whether the concept “judicial dialogue” could be of use in Arthur’s project, at least as far as judicial lawmaking in European private law is concerned. He does not mention it and at first sight it does not seem to fit in his concise conceptual framework, in which the distinctions between horizontal and vertical effects, direct and indirect effects, positive obligations and spillover effects, play a key role.² These distinctions presuppose a clear notion of valid law, which is exactly what is lacking in the discourse on judicial dialogues.³ Still, I hope to make the point that – although that discourse lacks clarity in this respect – it may still contribute to our understanding of the formation and development of European private law.

The concept of a constitutional dialogue (which lies at the root of that of a judicial dialogue) originated, as is well known, in the context of the national legal system, referring to the interaction between the legislator and the judiciary. It was meant to offer compensation for the supposedly undemocratic character of judicial review (the so-called “counter-majoritarian difficulty”), implying that in most cases when a piece of legislation is struck down by the court, it is in fact replaced by new legislation. The resulting constitutional dialogue is a continuous sequence of judicial review and legislative override, showing that the legislator and the

¹ Professor of private law at Tilburg University. This paper was presented at a conference on European private law in the honor of Arthur Hartkamp in Nijmegen at June 11, 2016. I am grateful to Carla Sieburgh and Rob van Gestel for their valuable comments on an earlier draft of this paper.

² Arthur Hartkamp, Casebook, Chapter 1, publication to be expected soon.

³ For an introductory overview compare Anne Meuwese and Marnix Snel, Constitutional dialogue: an overview, in: Utrecht Law Review 2013, p. 123 – 140.

judiciary are cooperating in the business of lawmaking. Whatever the merits of this picture in the national context⁴, within the EU things are different. In the constitutional relations in the EU the prospects for legislative override are poor⁵, while on the other hand the incentives for the ECJ to engage in a dialogue with other courts at the national level are particularly high.⁶ The constitutional dialogue thus turns into a dialogue between courts at different levels. The medium par excellence for the judicial dialogues between the ECJ and the domestic courts is of course the preliminary reference procedure (art. 267 TFEU).⁷ If anything can constitute a judicial dialogue, it is the interplay of questions and answers with regard to the validity and interpretation of EU law.

For analytical purposes it is useful to distinguish between a descriptive and a normative use of the concept of judicial dialogue.⁸ As a descriptive tool the concept of judicial dialogue is used to gain a better understanding of this interactive process of judicial lawmaking, the role of the participants, and their respective influence on the outcome. The analysis of the national context in which the concept originated, would be an example.⁹ As a normative tool the concept of judicial dialogue is used to express a preference for reciprocal lawmaking over the established alternatives, like the sovereignty of parliament (which gives the parliament the last word), a strong form of judicial review (which gives the judiciary the last word), or a judicial hierarchy (which gives one court authority over another). Whether used descriptively or normatively, the concept of judicial dialogue is connected with the last word in the process of lawmaking, and thus with the question who is in charge of the development of European private law.¹⁰

⁴ For criticism see Luc B. Tremblay, *The legitimacy of judicial review: the limits of dialogue between courts and legislatures*, I.CON, volume 3, Number 4, 2005, p. 617 – 648.

⁵ With one notorious exception, namely the Barber case (see Marcus Höreth, *The least dangerous branch of European governance? The European Court of Justice under the checks and balances doctrine*, in: *Judicial activism at the European Court of Justice*, Edited by Mark Dawson, Bruno de Witte and Elise Muir, Northampton (Mass.): Edward Elgar Publishing 2013, p. 42).

⁶ Höreth concludes: “As especially some critical landmark rulings of the German Federal Constitutional Court in the recent past indicate, the highest national courts indeed could become the last pockets of resistance against exaggerated judicial governance in the EU” (a.w., p. 55).

⁷ Mark Dawson, *The political face of judicial activism: Europe’s law – politics imbalance*, in: *Judicial activism at the European Court of Justice*, Edited by Mark Dawson, Bruno de Witte and Elise Muir, Northampton (Mass.): Edward Elgar Publishing 2013, p. 19.

⁸ Compare Lize R. Glas, *The theory, potential and practice of procedural dialogue in the European Convention on human rights system*, Antwerpen: Intersentia 2016, p. 71 – 75.

⁹ P. Hogg and A. Thornton, *The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights is not such a bad thing after all)*, in: 35 *Osgoode Hall Law Journal* 75 (1997).

¹⁰ With the qualification, of course, that strictly spoken there is no such thing as “the last word” in lawmaking. It is argued – by Jan Vranken, amongst others – that judicial lawmaking is a continuous discursive process, in which neither the legislator nor the judiciary ever has the last word (Asser-Vranken, Zwolle: W.E.J. Tjeenk Willink 1995, p. 69). The reason for raising the issue again, despite this well-known fact, is of course that in this pluralist context there are more courts involved that are not placed in a hierarchical relation.

From a descriptive point of view, one can observe that most of the time the national courts and the ECJ are engaged in a smooth and continuous process of cooperative judicial lawmaking, but that this process is sometimes disturbed because one of the participants takes a strategic stand and wants to have it his way. This raises three questions about judicial dialogues. The first is about their structure: are there recurring patterns of dialogue between the courts involved? My claim is that there is at least one recurring pattern, namely that the courts involved often claim the last word, however, without using it. In the first part of my paper I will substantiate this claim and look for an explanation (section 2). The second question is about their legitimacy: are there good reasons for conducting strategic dialogues between the domestic courts and the ECJ? My claim is that indeed there are, both with regard to the checks and balances within the EU, and with regard to the balancing of European and national interests and values. So, the strategic participation in judicial dialogues is a justified practice (section 3). The third and last question is about the effectiveness of the dialogues between the domestic courts and the ECJ: how should they be conducted, if they are to serve their purpose? My claim is that the quality of the dialogues is dependent on the reasoning of the participating courts (section 4). A last word will conclude my contribution to this ongoing dialogue (section 5).

2. *Why courts claim the last word..... and do not use it*

Some years ago a group of retired flyers of KLM/Air France started a lawsuit against their former employer, on the ground that their mandatory retirement at the age of 55 was a clear case of age discrimination and therefore a wrongful act that justifies compensation. After the court in first instance had rejected the claim and the appellate court had sustained that judgment, the claimants appealed in cassation. The Hoge Raad rejected their appeal.¹¹ That was not the end of the story, however. The claimants started another lawsuit, this time against the State of the Netherlands on the ground that the Hoge Raad, in rejecting their appeal, had wrongfully neglected to raise preliminary questions to the ECJ, and had thus violated article 6 ECHR.¹²

In the spring of 2015 the District Court of The Hague rejected their claim, on the ground that the ruling of the Hoge Raad did not violate EU law, since it had based its judgment on an extensive and defensible analysis of the case law of the ECJ on age discrimination. Besides, the claimants made their request for a preliminary reference only after the Advocate-General had

¹¹ HR 13 juli 2012, ECLI:NL:HR:2012:BW3367.

¹² With an appeal to ECtHR 8 april 2014, case 17120/09 (Dhahbi v Italy).

issued his conclusion without specifying the preliminary questions to be asked. Nor did the ruling of the Hoge Raad violate article 6 of the Convention (as in the case of *Dhahbi v Italy*), the Court ruled, because in this case (other than in *Dhahbi*) the claimants did not propose specified questions, and the Hoge Raad did go into depth into the case law of the ECJ.¹³ I do not know whether the claimants have filed for appeal, which would give them another opportunity for success.

This lawyer's paradise rests on the *Köbler*-ruling of the ECJ, of course, in which it has extended its *Frankovich*-case law to judicial rulings of the highest courts of the Member States in violation of EU law.¹⁴ As a result, Member States can be held liable under national private law to compensate the damage of citizens whose rights are violated by a judicial ruling in highest instance that constitutes a qualified violation of EU law. Claims like this place the District Court in a supervisory position, since it has to decide whether the Hoge Raad in the contested ruling has violated EU law. In the case of the *KLM/Air France* flyers the court rejected the claim, but one can imagine that the court would have asked preliminary questions to the ECJ. That would have placed the ECJ in a likewise supervisory position, with not only the power to have the last word in the issue at hand, but also the means to enforce it (by civil liability). This, of course, is a far cry from a judicial dialogue, in which the ECJ and the highest domestic courts keep on deliberating in a continuous discussion until the issues are solved.

Assuming that the *Köbler*-ruling is not such a brute usurpation of judicial power, we should provide a better interpretation.¹⁵ The most likely interpretation is that the ECJ considers liability of a Member State for a ruling of its highest court as a kind of emergency provision, meant to keep the national courts within the lines of the ECJ's case law, but hardly meant to be used. From a strategic point of view it makes sense to try to keep the domestic courts in pace with established case law of the ECJ and informing them about the consequences if they should trespass. This fits well with the function of the preliminary reference which is to serve the dialogue between the courts, and not to serve legal protection.¹⁶ The execution of the sanction however – in the form of a judgment that there is a sufficiently serious breach – would end that dialogue. Therefore it is a safe guess that the ECJ would be unwilling to execute that sanction too easily or swiftly. As a matter of fact, there is no extensive case law in the slipstream of the

¹³ District Court Den Haag 3 juni 2015, case C/09/459469/HA ZA 14 – 172.

¹⁴ ECJ 30 september 2003, case C-224/01, ECR I-10239 (*Köbler v Austria*).

¹⁵ Marc Loth, De hoogste nationale rechter en de Europese hoven, naar een systeem van checks en balances tussen gerechten, in: *Tijdschrift voor Civiele Rechtspleging* 2015, p. 124 – 128.

¹⁶ C.W.A. Timmermans, De Hoge Raad en het Hof van Justitie van de EU als partners in de prejudiciële procedure, in: *Tijdschrift voor Civiele Rechtspleging* 2015, p. 114 – 118.

Köbler-ruling. My conclusion therefore is that the ECJ claims the last word without wanting to use it, and that this is a rational strategy to follow.

This goes for its partners in the dialogue as well, as is shown in the case law of the BVerfG.¹⁷ Since the BVerfG is a master in this strategic interaction with the transnational courts, I have to elaborate on this, although the BVerfG is of course a constitutional court. Since the beginning of its dialogue with the ECJ it has maximized its influence by setting default-lines. In the seventies of the last century it ruled that it would not accept the doctrines of the supremacy and the direct effect of EU law “as long as” (“solange”) it would not offer at least the same human rights protection as the German Constitution (in the first “Solange”-ruling).¹⁸ Once the ECJ had introduced human rights protection in its case law, the BVerfG was happy to see its condition satisfied and gave full recognition to EU law (in the second “Solange”-ruling).¹⁹ In the nineties it moved on by tying the authority of the European institutions to the framer’s intentions (“die Herren der Verträge”), and claiming for itself a supervisory role in the form of an ultra vires review (in the Maastricht-ruling).²⁰ The BVerfG was so considerate, however, to announce that it would never judge a decision to be ultra vires without consulting the ECJ first by a preliminary reference (in the Honeywell-ruling).²¹ Finally, the BVerfG has interpreted article 4 section 2 TEU – the duty to respect the national identities of the Member States – as containing an absolute proviso not to trespass vital national interests²², which is at odds with the case law of the ECJ (which sees this provision as an interest to be balanced against other interests).²³

What we learn from this summary of the relevant case law of the BVerfG is that it has claimed the last word as well, long before the ECJ did so in the Köbler-case.²⁴ Up until now, however, it has never used this self-created right to the last word (it remains to be seen what it will decide in the pending case on the decision of the European Central Bank to issue a scheme for Outright

¹⁷ See Juliane Kokott, Report on Germany, in: Anne-Marie Slaughter, Alec Stone Sweet and J.H.H. Weiler (eds.), *The European Court and national courts, doctrine and jurisprudence, legal change in its social context*, Oxford: Hart Publishing 1998, p. 77 – 129, and Daniel Thym, *Attack or retreat? Evolving themes and strategies of the judicial dialogue between the German constitutional court and the European Court of Justice*, in: *Constitutional conversations in Europe, actors, topics and procedures*, Monica Claes e.a. (eds.), Cambridge: Intersentia Publishing 2012, p. 235 – 249.

¹⁸ BVerfG 29 may 1974, BVerfGE 37, 271 (Solange I).

¹⁹ BVerfG 22 october 1986, BVerfGE 73, 339 (Solange II).

²⁰ BVerfG 12 october 1993, BVerfGE 89, 155 (Maastricht).

²¹ BVerfG 6 july 2010, 2 2 BvR 2661/06 (Honeywell).

²² BVerfG 30 june 2009, 2 BvE 2/08 (Lisbon).

²³ See C.W.A. Timmermans, *Constitutioneel pluralisme: norm of feit?*, in: 175 jaar Hoge Raad der Nederlanden, bijdragen aan de samenleving, Den Haag: Bju 2014, p. 37.

²⁴ It developed the same strategy in its dialogue with the ECtHR, by the way, but that would take us too far from private law (Compare Marc Loth, *De hoogste nationale rechter en de Europese hoven, naar een systeem van checks en balances tussen gerechten*, in: *Tijdschrift voor Civiele Rechtspleging* 2015, p. 125).

Monetary Transactions, see below). There may be several reasons for this. The first is of course that the BVerfG indeed succeeded in exerting decisive influence on the case law of the ECJ most of the time; it turned out to be very effective in its dialogue with the ECJ, as the mentioned case law illustrates. The second reason might be that the actual use of the last word would in fact end the dialogue, which may have more serious consequences than not having it your way in this specific case.

This is illustrated by the Czech Constitutional court, which has adopted the *ultra vires*-doctrine of the BVerfG in its dialogue with the ECJ, but in fact did use its self-claimed right to the last word on one occasion. The case *Landtová* was about the right to a retirement pension under a regulation that was agreed upon after the separation of the Czech Republic and Slovakia. The Administrative High Court and the Constitutional Court of the Czech Republic disagreed about the application of this regulation, however, and the first made a preliminary reference. The ECJ applied the rules of free movement and thus ruled in favor of the referring court, leaving the Constitutional Court in frustration.²⁵ When the Constitutional Court had to judge a similar complaint in another case, it ruled that the decision of the ECJ was *ultra vires*, since the application of the rules of free movement to the situation after the separation was said to be “a denial of European history”.²⁶ So the ECJ decision was explicitly defied. For the first time in its history, the ECJ was resisted by a domestic court.²⁷ On the other hand, the Constitutional Court was outvoted by the ECJ and the Administrative High Court which caused a loss of authority.²⁸ So, while a threat of non-compliance may be an effective instrument of judicial dialogue – especially when issued by a powerful court like the BVerfG (compare the mentioned case law) – it may backlash at the domestic court (as the *Landtová*-case illustrates).

The cases mentioned show that the dialogues between the ECJ and the national courts sometimes display characteristics of a chicken game: who will be the first to blink with the eyes? An illustration is offered by the still pending case on the decision of the European Central Bank (ECB) to issue a scheme for Outright Monetary Transactions (OMT). The BVerfG made a preliminary reference, after having ruled that this scheme is not in conformity with EU law.²⁹ This was the first preliminary reference of the BVerfG to the ECJ. In the light of its *Honeywell*-

²⁵ ECJ 22 June 2011, Case C-399/09 (*Landtová*). The frustration was increased by the fact that the Constitutional Court had tried to intervene in the trial at the ECJ, but had been denied access.

²⁶ Constitutional Court 31 January 2012, Pl. ÚS 5/12 (Slovak Pensions).

²⁷ Of course, this was not necessary. According to the Constitutional Court’s own standards, it could and should have made a preliminary reference before deciding that the ruling was *ultra vires* (see the *Honeywell*-ruling).

²⁸ Moreover, the Czech Parliament passed a bill that prospectively abolished the special increment for all nationals, Czech or not, in line with the ECJ ruling (Act No. 428/2011 Coll. See Slovak Pensions XVII, part IX).

²⁹ BVerfG 14 January 2014, 2 BvR 2728/13 (*Gauweiler et alia*).

ruling, this bears a special meaning; the purpose of the reference is not to invite the ECJ to deliver its authoritative interpretation on EU law, but to invite the ECJ to join the BVerfG in *its* authoritative interpretation. Now that the ECJ has ruled differently than the BVerfG³⁰, the question is: will the BVerfG back off, or will it defy the ruling of the ECJ? Will it be the first to blink with the eyes?

The resemblance with the chicken game is a telling one, because game theory can indeed be useful to provide further insight. The starting-point of this perspective is the distinction between a communicative attitude of courts towards each other (which aims at cooperation) and a strategic attitude (which aims at influencing the case law of the other court). Some scholars have stressed the first³¹, others have acknowledged the last, while in fact most of the time they are both at play (see also section 5).³² Domestic courts can cooperate with transnational courts while at the same time negotiating the terms of the cooperation, which raises the question of their bargaining strategies. A helpful tool from game theory is the hawk dove-game, in which two players compete over a resource and have to decide whether to be assertive (the hawk) or to show restraint (the dove). When both play dove, they will have to share the resource. If one player chooses to play hawk while the other plays dove, he will win (the best possible outcome). If both play hawk they will have to share the resource, but at the expense of a conflict (the worst possible outcome). So, each of the players has an interest in convincing the other of its hawkish intentions, in order to influence the other to play dove.³³

Applied to the interaction between the ECJ and the domestic courts, the rivalrous good at stake is the jurisdiction of the respective courts. Both the domestic courts and the ECJ have institutional interests in jurisdictional disputes which resemble the structure of the hawk dove-game. Again, we can distinguish four possibilities.³⁴ If both the domestic court and the ECJ exert restraint (play dove), they share jurisdiction which entails that neither influences the case law of the other. But if one of the courts is assertive and the other one shows restraint, the assertive (hawkish) court will succeed in influencing the case law of the other. If the ECJ is the assertive court, EU law will prevail, and if the domestic court is the assertive court, national

³⁰ ECJ 16 June 2015, case C62-14, ECLI:EU:C:2015:400 (Peter Gauweiler et alia).

³¹ See Anne-Marie Slaughter, Judicial globalization, in: Virginia Journal of International Law 1999 – 2000, p. 1103 – 1124, and J.H.H. Weiler, The transformation of Europe, in: The Yale Law Journal 1991, p. 2403 – 2483.

³² Marc Loth, De Hoge Raad in dialoog, over rechtsvorming in een gelaagde rechtsorde, Tilburg University 2014, p. 13. See also Elina Paunio, Conflict, power and understanding – judicial dialogue between the ECJ and national courts, in: NoFo 2010, p. 5 – 23.

³³ See Arthur Dyevre, Domestic judicial defiance in the European Union: a systematic threat to the authority of EU law?, in: Yearbook of European Law (2016), p. 14 – 16.

³⁴ Dyevre, p. 16 – 18.

law will dominate the outcome. Finally, if both the ECJ and the domestic court are assertive (play hawk), this will result in a jurisdictional conflict. For a specific court, the best strategy is a mixed one, depending on the strategy of the other court. It may be worthwhile to be assertive in order to influence the other to show restraint. Whether that is the rational thing to do, depends on the balance of the jurisdictional values to be gained in the specific case and the risk and the costs of a jurisdictional conflict. An estimation of the relative power of the courts involved and the chances of success, is relevant as well. The result may be a situation of reciprocal deterrence comparable to the one that existed between the superpowers during the Cold War (“mutually assured destruction”).³⁵ For that reason, it may be a perfectly rational strategy to threaten without executing the threat, because the threat is likely to influence the other court, while its execution may cause a jurisdictional conflict. In other words, it makes perfectly sense to claim the last word without using it.³⁶ Summarized:

	ECJ Assertive	ECJ Restraint
Domestic court Restraint	I. EU law prevails	IV. Sharing jurisdiction
Domestic court Assertive	II. Jurisdictional conflict	III: National law prevails

I. EU law supremacy

In the Union as a whole, the doctrines of supremacy and direct effect of EU law are intended to guarantee that EU law prevails. Of course, the acceptance of these doctrines was not evident from the start.³⁷ As we saw, the BVerfG negotiated it for a better human right protection in the EU (the “Solange”-rulings), while in France the Conseil d’État was 15 years later with its

³⁵ Dyevre, p. 20 – 26.

³⁶ This is what Dyevre calls “signaling” (p. 26 – 36).

³⁷ See Kaarlo Tuori, *European constitutionalism*, Cambridge: Cambridge University Press 2015, p. 59 – 70.

acceptance of the supremacy of EU law than the Court de Cassation.³⁸ It was the assertive attitude of the ECJ in its landmark rulings *Van Gend en Loos* and *Costa/Enel* in combination with the gradual acceptance by the domestic courts, that explains the current supremacy of EU law.

II. Jurisdictional conflict

However, on occasions domestic courts revolted against the ECJ. An illustration is offered by the aftermath of the *Sturgeon* and *Böcker*-rulings of the ECJ.³⁹ In those rulings the ECJ decided that Regulation 261/2004, which provides a right to compensation for passengers in case of the annulment of a flight, applies to delayed flights as well. This decision caused an outright uproar. Airlines were reluctant to pay compensation to passengers and domestic courts were divided. Some accepted the decision of the ECJ, others made more preliminary references in order to suggest the ECJ to reconsider its decision⁴⁰, while again others defied.⁴¹ Here we have a jurisdictional conflict that lasted until it was solved by new rulings of the ECJ. After the ECJ persisted with a more extensive reasoning in the rulings *Nelson/Lufthansa* and *TUI/Civil Aviation Authority*, the courts complied with this new case of consumer-protection.⁴²

III. National law prevails

Sometimes the ECJ is remarkably sensitive to national interests.⁴³ A notorious problem for legal systems with a constitutional court can be the problem of parallel references, both to the domestic constitutional court and the ECJ. In those case the question rises which reference has priority. In France it was decided that the reference to the *Conseil Constitutionnel* had priority over a reference to the ECJ (the so-called “*Question Prioritaire de Constitutionnalité*” or “*QPC*”). The Court de Cassation disagreed and asked preliminary questions about the compatibility of

³⁸ *Conseil d'État* 3 february 1989, ECLI:FR:CEASS:1989:74052.19890203 (*Compagnie Alitalia*); *Conseil d'État* 20 october 1989, ECLI:FR:CEASS:1989:108243.19891020 (*Ncolo*). See J. Plötner, Report on France, in: A.M. Slaughter, A.S. Sweet & J.H.H. Weiler (eds.), *The European court and national courts – doctrine and jurisprudence, legal change in its social context*, Oxford: Hart Publishing 1998, p. 41 – 75.

³⁹ ECJ 19 november 2009, cases C-402/07 and C-432/07 (*Sturgeon/Condor* and *Böck and Lepuschitz/Aire France*).

⁴⁰ District Court Breda 20 october 2010, LJN BO1083, and 25 may 2011, LJN BQ5967.

⁴¹ District Court Den Bosch 19 january 2012, LJN BV1931.

⁴² ECJ 12 october 2012, cases C-581/10 and C-629/10 (*Nelson/TUI*).

⁴³ A classic example is of course the *Omega*-ruling of the ECJ, in which the court accepted the prohibition of commercialisation of a laser game for the simulation of killing of people in Germany on the ground of public policy, because the game was considered to be offensive of the ‘human dignity’ that is guaranteed by the German constitution. The ECJ referred to its case law that the protection of constitutional values may limit European fundamental freedoms. It ruled that the principle of human dignity is a common principle but that its content may vary along lines of time and place (ECJ, *Omega*, C-36-02).

the QPC with EU law.⁴⁴ The ECJ decided in the Melki-ruling that the QPC was in conformity with EU law if the road to the ECJ was not blocked and the rights of the parties under EU law were not infringed.⁴⁵ These conditions were exactly identical to those phrased by the Conseil Constitutionnel and the Conseil d'État in rulings that were issued 6 weeks before.⁴⁶ This clearly shows that the ECJ is willing to engage in dialogue with the national courts, in this case the Conseil Constitutionnel and the Conseil d'État (at the expense of the Court de Cassation⁴⁷). The domestic QPC has survived the ECJ scrutiny.

IV. Sharing jurisdiction

When both the ECJ and the domestic court exert restraint, the result is that jurisdiction is shared and no conflicts arise. As mentioned before (section 1), in the majority of the cases the interaction between the domestic courts and the ECJ operates smoothly, without competing claims over jurisdiction. All those cases illustrate a shared jurisdiction without conflict. This does not exclude, however, that the courts involved may influence each other's case law, for example when domestic courts follow the ECJ voluntarily (for example when interpreting national law in the spirit of Union law).⁴⁸

3. *Why domestic courts should engage in judicial dialogues with the ECJ*

So far, we have analyzed the structure of the dialogues of the ECJ and the domestic courts, and we have found a recurring pattern: courts often claim the last word, without using it. Another question is the justification of this pattern: are there good reasons for claiming the last word, without using it? From the perspective of game theory the affirmative answer is twofold. First, courts should claim the last word, since that is the most effective way to influence the other participants in the dialogue. As we have seen in the hawk dove-game, it is effective to convince

⁴⁴ Marc Bossuyt and Willem Verrijdt, The full effect of EU law and constitutional reform in Belgium and France after the Melki judgment, in: *European Constitutional Law Review* 2011, p. 355 – 391.

⁴⁵ ECJ 22 june 2010, Case C-188/10 and C-189/10 (Melki and Abdeli).

⁴⁶ Conseil constitutionnel 12 may 2010, decision no. 2010-605 DC, and Conseil d'État 14 may 2010, ECLI:FR:CESSR:2010:312305.20100514.

⁴⁷ Willem Verrijdt, Should the EU effectiveness principle be applied to judge national constitutional review procedures?, in: Liège, Strassbourg, Bruxelles: *parcours des droits de l'homme, Liber amicorum Michel Melchior*, Anthemis 2010, p. 545 et alia, in particular nos. 11 and 18.

⁴⁸ An example of such a spontaneous harmonization is the ruling of the Belgian Constitutional Court in the case Van Schaarbeek (Constitutional Court 30 june 2014, nr. 99/2014, B.W. 22 september 2014), in which it decided (in analogy with the Köbler-ruling of the ECJ) that the State is liable for a wrongful judgment of its highest court if that judgment rests on a qualified violation of the applicable rules (even if they do not have an EU origin) (see Rolf Ortlep, De aansprakelijkheid van de Staat voor fouten van de rechter, in: *Nederlands Juristenblad* 2016, p. 1491 – 1494).

the others of one's own assertiveness (in order to stimulate them to exert restraint). At the same time, however, the courts involved should refrain from using the claimed last word in case they prefer a continuous dialogue over a jurisdictional conflict. So, maximizing influence while avoiding conflict, may be very good reasons for this strategy. On a more abstract level, however, the question rises of the legitimacy of the strategic engagement in judicial dialogues. What good reasons are there, if any, for strategically engaging in dialogue over the only available alternative: installing one court with decisive authority over the other? There are two kinds of answers to this question, and they are both valid.

The first is the institutional line of reasoning, resulting in the conclusion that an institutional balance in the EU needs the ECJ to function within a system of checks and balances, rather than at the apex of the judicial pyramid. This is very much in line with the origins of the notion of a judicial dialogue in the national context, of course, in which it is meant to offer compensation for the counter-majoritarian difficulty (section 1). Besides, it has been observed by many that the possibilities of legislative override in the EU are practically non-existent, and that therefore there are little or no constraints on the ECJ. "Simply put", Marcus Höreth writes, "European checks and balances end where judicial governance begins."⁴⁹ If this is the case, then there is a role for domestic courts in the checks and balances of the ECJ: "As especially some critical landmark rulings of the German Federal Constitutional Court indicate, the highest national courts indeed could become the last pockets of resistance against exaggerated judicial governance in the EU."⁵⁰ This purpose is better served by a continuous dialogue between the domestic courts and the ECJ, of course, than by the ECJ having the last word. Since this is a topic for European constitutional law, I will not elaborate on this line of reasoning.

Instead, I will move on to a second, substantive line of reasoning, namely that a balanced development of EU law by the courts requires that both domestic interests and values and EU purposes and goals are taken into account. As a matter of fact, this is a principle of EU law, since article 4 section 2 TEU states that the Union shall respect the national identity of the Member States "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." As we have seen, this provision was already at the heart of the Lisbon-ruling of the BVerfG, which interpreted it as an absolute proviso against EU measures considered to be intrusive to the German constitutional identity (section 2). That is

⁴⁹ Marcus Höreth, The least dangerous branche of European governance? The European court of Justice under the checks and balances doctrine, in: Mark Dawson, Bruno de Witte and Elise Muir (eds.), *Judicial activism at the European Court of Justice*, Cheltenham/Northampton: Edward Elgar Publishing 2013, p. 54.

⁵⁰ Höreth, p. 55.

why this so-called identity clause promises to be a focal point for the dialogues between the domestic courts and the ECJ the coming years. Although thus far it has been studied mainly from a constitutional point of view, it seems to me to be relevant for the development of European private law as well. This contention, however, needs further explanation.

The identity clause was introduced in the Maastricht Treaty of 1992, which implied a major step forward to an ever closer European Union. This step towards integration was balanced by the introduction of principles safeguarding national autonomy, such as the identity clause. The Lisbon Treaty went further along this road, both in strengthening the EU, and in the codification of the identity clause in its final wording.⁵¹ What is meant by respect for “national identity” is still utterly vague, of course. What is more, it is an essentially contested concept, to be continuously discussed by domestic courts and the ECJ, amongst others. In the footsteps of the Lisbon-ruling of the BVerfG, several constitutional courts have sent signals to the Union that they will protect their “constitutional identity” from intrusion by EU law.⁵² Up until now the ECJ has ruled six times on article 4 section 2: once before 2010, and five times afterwards.⁵³ The Court however has never found an EU legislative act to be in violation of the clause, nor has it ever invalidated a Union measure for violation of the principle of subsidiarity.⁵⁴ Still, the Court not only enforces the identity clause, it is itself (as an institution of the EU) bound by it as well. As such, it may show more or less sensitivity for Member State’s identities.⁵⁵ In her study on “*National identity and EU law*” Elke Cloots concludes that “its jurisprudence does not seem to be informed by a principled and coherent vision of the relationship between European integration and respect for national identity.”⁵⁶ Moreover, she observes a certain reluctance and a lack of enthusiasm on the side of the ECJ with regard to the identity clause: “One can only guess why the court for such a long time has been far less eager to highlight the fact that the Union is bound to respect its Member States’ national identities than to draw attention to the fact that the Union creates and protects individual rights.”⁵⁷

⁵¹ Elke Cloots, *National identity in EU law*, Oxford: Oxford University Press 2015, p. 4 – 7, and Pietro Faraguna, *A living constitutional identity: the contribution of non-judicial actors*, Jean Monnet Working Paper Series 10/15, New York School of Law, p. 8.

⁵² Cloots, p. 3, 47 – 55.

⁵³ Cloots, p. 3.

⁵⁴ Cloots, p. 63. This does not imply that sometimes a decision of the ECJ seems inspired by the identity clause (Cloots, p. 64, footnotes 141 – 143).

⁵⁵ First, by accepting the national identity as a legitimate justification for an infringement of an EU provision such as the freedom of movement and, next, by limiting the scope of concepts and thus of EU law, with as result a legal sphere into which Union law cannot intrude and where national identity can strive (Cloots, p. 74 – 80).

⁵⁶ Cloots, p. 4.

⁵⁷ Cloots, p. 7.

If we want to gain a better understanding of the relation of the ECJ to the identity clause, we need to distinguish two questions. The first is the question what interests and values are involved in the concept of national identity? The second is who has the authority to decide on this?⁵⁸ With regard to the first question, it is of primary importance to distinguish between the concepts of national identity and constitutional identity, since they do not coincide. Of course, the text of article 4 section 2 TEU expresses that a Member State's identity is entrenched in its constitution. The drafters of the Treaty have circumscribed the notion of national identity in two ways. First, by designing the Member States as the only relevant national groups and, second, by restricting the features of a given Member State to those that find expression in the State's fundamental structures.⁵⁹ Besides, the identity review in the hands of Constitutional courts of Member States has turned national identity in constitutional identity.⁶⁰ The BVerfG, for example, has presented its jurisdictional claim to review Union action against the identity of the German Constitution as an essential means of enforcing the identity clause of art. 4 section 2 TEU.⁶¹

However, not every constitutional norm contributes to a Member State's constitutional identity and conversely, constitutional identity cannot account for non-constitutional structures that give expression to national identity. An inquiry into constitutional or national identity is an inquiry into different objects, namely a constitution and a national group respectively.⁶² A Member State's constitutional norms and doctrines which deal with fundamental rights, official language⁶³, status as a republic or not, relations between the branches of government, between the State and religion, are (amongst others) expressive of its constitutional identity. A comparison of the German and the Dutch constitutional identity shows the first to be rather "total", and the last to be more "modest".⁶⁴ In a constitution like the German, one should not be surprised that family law is part of its constitutional identity.⁶⁵ The notion of a national identity, on the other hand, refers to such characteristics as a distinctive shared history, territory, culture, language, a common society and institutions (like media, schools, economic life), and shared

⁵⁸ Faraguna mentions a "twofold invitation to struggle" (p. 11).

⁵⁹ Cloots, p. 134 – 136.

⁶⁰ "To cut a long story short, the interpretation of the notion of 'national identity' has gradually shifted towards a legal approach, moving away from a historical or sociological one" (Faraguna, p. 7).

⁶¹ Cloots, p. 55, Lisbon-ruling, para 240.

⁶² Cloots, p. 167.

⁶³ ECJ 12 may 2011, ECLI:NL:XX:BQ5453, nr. C-391/09 (Runevič-Vardyn).

⁶⁴ Gerhard van der Schyff, EU member state constitutional identity: a comparison of Germany and the Netherlands as polar opposites, *ZaöRV* 76(2016), p. 1 – 25.

⁶⁵ BVerfG, the Lisbon-ruling, para. 252.

traditions and values.⁶⁶ As these examples illustrate, the fundamental characteristics of a Member State's civil society can be part of its national identity too.⁶⁷ In this respect, there is no difference in principle between the relevance of a Member State's *political* organization and its *social* organization, as long as its most fundamental norms and characteristics are involved.

What about private law, then, viewed as the system and practice that helps to cement the bonds of civil society?⁶⁸ Is private law just a neutral tool for the regulation of markets, or is it in some way connected to the cultural identity of a society? It seems obvious that private law is part of a society's culture. It plays a central role in the process of defining and ordering social and economic relations. As such it shapes the form and content of legitimate claims, the protection of the weaker party, and more generally: the solidarity considered to be justified. Therefore it is closely connected to the notions of distributive justice upheld in that society.⁶⁹ Of course, these notions may diverge in different societies. Hans Micklitz, amongst others, has sketched the differences between the English, French and German models of social justice. He has characterized the English model as a liberal and pragmatic design fit for commercial use, the French model as a forward looking political design of a just society, and the German model as an authoritarian paternalistic-ideological though market-oriented design.⁷⁰ These differences - explained by variations in philosophical outlook, political viewpoints, and economic organization – are responsible for diverging rules, doctrines, and case law. Private law of EU origin, on the other hand, brings in its own social justice conception which need not necessarily coincide with those of the Member States. The European legal order is at least partly based on a more procedural notion of social justice that guarantees equal access to its citizens ("access justice"), which contains two elements: first, breaking down the barriers which limit participation and access and, second, strengthening the position of consumers and workers with a view to enforcing their rights. This may be at odds with domestic law, as the case law on age discrimination illustrates (section 2).

⁶⁶ Cloots, p. 165 – 170. In ECJ 22 september 2010, ECLI:NL:XX:2010:BP0385, nr. C-208/09 (Ilonka Sayn-Wittgenstein) the Court accepted under article 4 section 2 TEU the regulation of nobility titles as a means to serve the principle of equality.

⁶⁷ In the case-law of the ECJ the requirement of a certain nationality can be a precondition for the protection of national identity too, but has to be pass the proportionality-test (ECJ 2 july 1996, ECLI:NL:XX:1996:AB8057, nr. C-473/93 (Commission v Luxembourg), ECJ 24 may 2011, nr. C-51/08 (Commission v Luxembourg)).

⁶⁸ Hugh Collins, Why Europe needs a civil code?, in: European Review of Private Law 2013, p. 916.

⁶⁹ Hugh Collins, European private law and the cultural identity of States, in: European Review of Private Law 1995, p. 353 – 365.

⁷⁰ Hans-W. Micklitz, Social Justice and access justice in private law, EU working papers 2011/12.

My claim is not that private law is a national matter, of course, nor that it should be.⁷¹ My claim is simply that certain aspects of the Member State's private law systems are so fundamental for society that they may fall within the scope of the identity clause, which means that they deserve the respect of the institutions of the Union (the ECJ included) under article 4 section 2 TEU. What this means is not at all certain, but in any case it mandates a "nation-sensitive, differentiated construction of EU law".⁷² An example is recently offered by Advocate-General Kokott, responding to an intervention of the French government in a Belgian case on discrimination on the ground of religion (a female employee was refused to wear an Islamic headscarf in the workplace). France had claimed that Directive 2000/78 is limited to the competences of the Union and is therefore not to be applied in situations where the national identity of Member States is involved (in cases like these its constitutional principle of secularity or "laïcité" is at stake). The Advocate-General replied that the upshot of article 4 section 2 TEU is not that certain subject areas or areas of activity are entirely removed from the scope of Directive 2000/78, but that the application of the directive – that is: the interpretation of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment – must not adversely affect the national identities of Member States.⁷³

Another illustration is offered by the case of the KLM/Air France flyers, with which I started. A rigorous application of the prohibition of age-discrimination would certainly grant a continued participation of the flyers in the labor-process after the age of 55. However, this would be achieved at the expense of young flyers, just graduated with a heavy load of debts because of high study-costs, who find the entry to possible jobs blocked by their elderly colleagues. When the career-path of the flyers is taken into account – which is based on a salary that is adjusted to an early retirement – then it is not at all evident that the mentioned goal is served by proportionate means. What is more important, however, is that the way the balance is struck by the domestic court, deserves serious consideration of the ECJ (when asked). The proportionality test leaves room for domestic courts to strike the balance according to domestic notions of distributive justice. At the end of the day, the question is, how much room should be left to (or should be taken by) the domestic courts? In a more general phrasing: "How much leeway could be given to the Member States to determine what their own 'national identities

⁷¹ For this discussion I refer to Guido Comparato, *Nationalism and private law in Europe*, Oxford and Portland: Hart Publishing 2014, especially chapter 3.

⁷² Cloots, p. 190.

⁷³ Conclusion Advocate-General Kokott May, case Samira Achbita and Centrum voor gelijkheid van kansen en racismebestrijding v G4S Secure Solutions NV, 31 May 2016, C-157/15.

inherent in their fundamental structures' are, without paving the way for the Union's disintegration?"⁷⁴

This brings us to our second question: who decides? There are several options here. First, it is feasible that the ECJ should be in the lead, because of the primacy of EU law. After all, the ECJ is responsible for the interpretation of article 4 section 2 TEU. On the other hand, it must be admitted that domestic courts have better access than the ECJ to the facts constituting national identity, especially the beliefs and convictions of the population and the common history and values. On this ground it can be argued that the ECJ should in principle rely on the Member State's conception of its own national identity.⁷⁵ After all, it is their identity that is at stake.⁷⁶ Between Scylla and Charibdis, there is an in-between position in the claim that neither the ECJ nor domestic courts should have the last word in matters of national identity alone, but that they should engage in a dialogue. This fits very well with actual practice (section 2), but at the same time it constitutes a justification of that practice. Striking the balance between integration and accommodation is and should be the result of a joint cooperation in judicial lawmaking.⁷⁷

Still, this leaves several questions open. Most prominent is the question whether such a dialogue is reconcilable with the primacy of EU law. The answer is affirmative on two possible grounds. One may claim that that article 4 section 2 TEU should be read as permitting domestic courts to outweigh provisions of secondary EU law by fundamental norms and doctrines expressive of their own State's national identity. As we have seen, this is claimed by the BVerfG (amongst others), which has a tradition of restricting its acceptance of the primacy of EU law to those measures that are in harmony with Germany's most fundamental constitutional norms (section 2). For those who do not agree with such a qualification of the primacy of EU law, there is another way out and that is to distinguish between the existence of this principle and its enforcement.⁷⁸ Domestic courts may threaten to override measures of EU law which fail to respect their own State's national identity, as they may threaten to override measures of EU law which are at odds with fundamental rights or the principle of conferral of powers. According to

⁷⁴ Cloots, p. 13.

⁷⁵ Cloots, p. 149, 175.

⁷⁶ Monica Claes, Negotiating constitutional identity or whose identity is it anyway, in: Constitutional conversations in Europe, actors, topics and procedures, Monica Claes e.a. (eds.), Cambridge: Intersentia Publishing 2012, p. 212.

⁷⁷ This fits well with the claim that the development of European private law – that is: the effectuation of (public) European law in horizontal relations (private law) – should be the result of a two-way traffic: a top-down approach and a bottom-up approach (see Carla Sieburgh, A method to substantively guide the involvement of EU law in Private law matters, in: Journal of European Private Law 2013, p. 1165 – 1188).

⁷⁸ This leans on a conception of valid law in which validity is not the same as actual enforcement, of course.

Cloots, the execution of such a threat constitutes a breach of the primacy of EU law and should therefore be a remedy of last resort, to be executed only after first making a reference for a preliminary ruling to the ECJ: “Only if the ECJ fails to seize this opportunity to accommodate the State’s national identity, or at least to explain why integration must prevail over accommodation in the case at hand, the national court may consider actually carrying out its threat to set aside EU law.”⁷⁹ This comes down to claiming the last word on national identity, as we have phrased it, without necessarily using it.

So, it is judicial dialogue after all that should determine the final outcome in cases where a Member State’s national identity is at stake. However, a qualification may be in order here. Cloots suggests a rule-like approach instead of discretionary power of the courts involved in the dialogue, since none of them can be presupposed to strike the balance right. The ECJ might be expected to be more receptive to integration-based arguments, as the domestic courts might be expected to be more sensitive to identity-based arguments. For this reason she proposes a rule-based approach, limiting the discretionary power of both the ECJ and the domestic courts in the domains of potential conflict.⁸⁰ One can imagine that the proportionality test in the case of the KLM/Air France-flyers, for example, is replaced by some rule of thumb or guiding principle about the relative importance of the interests involved. Although one may sympathize with the attempt to improve the process of balancing integration and accommodation, I question the solution proposed, if only for the reason that these rules or principles are in need of interpretation on their turn (and so on, *ad infinitum*).⁸¹ In the end, it is the attitude of the (members of the) courts involved that is decisive for the way they strike the balance between integration and accommodation. A dialogue presupposes that the participants are ready to listen to the contribution of the other participants, which implies the intention to take competing interests and values into account and to compromise them in the case at hand.⁸²

One may consider this to be idealistic, referring to the practice of courts setting default-lines, making threats, having it their own way. In this line it is claimed by Faraguna, referring to the

⁷⁹ Cloots, p. 184.

⁸⁰ Cloots, p. 210 – 215.

⁸¹ Compare Wittgenstein’s paradox of rule-following.

⁸² A method for this process of weighing and balancing – although outside the specific context of national identity – is developed by Sieburgh, who distinguishes between three kinds of EU principles: (i) principles that do not have a private law nature, like the principles of primacy and direct effect (which have to be integrated in horizontal relations), (ii) principles that do not originate from private law but are recognized in private law, like the principles of equality or legal certainty (which again may involve a balancing act), and (iii) principles that originate from private law such as the principle of unjust enrichment (which may be shaped by the domestic courts as co-creators and co-developers) (Sieburgh 2013. p. 1176 – 1177).

OMT-case, that judicial dialogue in action is more like a “deaf ultimatum” when such vital interests of a Member State are at stake. Since the identity clause is a judicial “nuclear weapon” the risk of a “judicial cold war” between the ECJ and the BVerfG is substantial.⁸³ Instead of putting confidence in “the miraculous effect of the so-called judicial dialogue” we would do better to look for other solutions than the “myth of the so-called judicial dialogue”.⁸⁴ After questioning the judicial monopoly on the identity clause, Faraguna advocates legislative means to take national interests into account (like enhanced cooperation arrangements, opt-outs, exemptions, protocols, etcetera). As far as his criticism on judicial dialogues is concerned, it rests on a misconceived notion of judicial dialogue. As we have seen, a dialogue between courts is characterized (as any dialogue) by both strategic and communicative characteristics (section 2). Only a focus on the last can lead one to the conclusion that judicial dialogue in action is far less peaceful than in theory. In the dialogue on the OMT-case there were threats and caveats, for sure, but the dialogue isn’t over yet. As we have seen, courts often claim the last word, but they rarely use it. For the rest, Faraguna clearly has more confidence in the legislator than in the judiciary to flesh out the identity-clause, but that is outside the scope of this paper.⁸⁵

4. How domestic courts should engage in judicial dialogues with the ECJ

After questioning the structure and the legitimacy of judicial dialogues between the domestic courts and the ECJ, I finally turn to the issue of their effectiveness: how should these dialogues be conducted, if they are to serve the aforementioned purposes? If the domestic courts really want the ECJ to take into account national viewpoints, interests and values in the development of European private law, they will have to provide counterweight.⁸⁶ Claiming the last word is a form of counteraction, but that strategy is in fact only an option for the most powerful courts (like the BVerfG). Does that leave the less powerful courts helpless, without any possible strategy? No, less powerful courts can operate strategically too, for example by trying to find friends or allies for their viewpoints which may have roots in various national legal systems. An example would be the scope of the principle of “ne bis in idem” in EU law, which raises the question (amongst others) whether “idem” means “idem factum” (same fact) or “idem crimen”

⁸³ Faraguna, p. 28, 29.

⁸⁴ Faraguna, p. 71, 74.

⁸⁵ Although Faraguna contradicts himself, when he observes a remarkable resemblance between the constitutional identity patchwork in EU legislation and in case-law (p. 70).

⁸⁶ See also C.H. Sieburgh, *Legitimiteit van de confrontatie van Europees recht en burgerlijk recht van nationale origine*, preadvies NJV 2011, Deventer: Kluwer, p. 230.

(same offence)? The ECJ has recently chosen for an objective standard (same fact)⁸⁷, which has been rejected in Dutch law long time ago.⁸⁸ Is the choice of the ECJ a transgression to an outdated standard, or are there good reasons to diverge in the European context?⁸⁹ If the Hoge Raad wants to engage in a dialogue on this question, he would do well to look for friends or allies. The ECJ may resist the Dutch Hoge Raad, but may find it much harder to resist the Hoge Raad, the Bundesgerichtshof, and the Court de Cassation at the same time. Would the ECJ have persisted in its contested case law on compensation for delayed flights, for example, if the most important domestic courts would have succeeded in formulating common ground for their resistance? One can imagine that the ECJ would have backed off if a majority of domestic courts would have persisted in resistance. Of course, the relation between the ECJ and the domestic courts is a “relation of cooperation” (as it is phrased in the Maastricht-ruling of the BVerfG), but within that relation there is room for strategic decision-making, in an attempt to influence the case law of the partners in the dialogue.

There is more to this. In particular cases the domestic courts can attempt to seduce the ECJ to take the national context into account by providing it with more (detailed) information. In general, the expertise of the deciding panel of the ECJ is not always evident. As a rule, there is no judge from the referring legal system on the panel, as is the case in the ECtHR. Besides, there is little specialized knowledge of civil law in the ECJ. For these reasons it is important to provide the ECJ with (detailed) information on the legal and social context of the questions asked, on the values involved, as well as on the expected effects of different possible answers.⁹⁰ It may be helpful too, to inform the ECJ on which answer would best fit in the domestic needs and aspirations. In short, the dialogue is not to be conceived as just an exchange of questions and answers, but as an opportunity for a rich debate on all possible viewpoints from different angles. The ECJ then, is not to be considered as just a helpdesk for all the courts’ questions on EU law, it is to be treated as a true partner in dialogue, to be informed, helped, influenced, motivated, seduced, and even warned for the consequences of its decisions.⁹¹ If the ECJ is thus invited to engage in a dialogue – understood as a rich debate – it has to respond (on its turn) to

⁸⁷ ECJ 9 march 2006, C-436/04, NJ 2006/488.

⁸⁸ HR 27 june 1932, NJ 1932, p. 1659.

⁸⁹ See W.B. van Bockel, *The ne bis in idem principle in EU law*, Ph. D. dissertation Leiden 2009, and Juliette Lelieur, ‘Transnationalising Ne bis in idem: how the rule of legal certainty reveals the principle of personal legal certainty’, in: *Utrecht Law Review* volume 9, issue 4, september 2015, p. 198 – 210.

⁹⁰ Sieburgh 2011, p. 228 – 229, 233. A.W.H. Meij, *Europese rechtspraak in de Nederlandse rechtspleging: impressies uit Den Haag en Luxemburg*, preadvies NJV, Deventer: Kluwer 1999, p. 160, 162, 173, 204.

⁹¹ M.A. Loth, *De Hoge Raad in dialoog; over rechtsvorming in een gelaagde rechtsorde*, Tilburg: Prisma Press 2014, p. 28, 29.

the domestic courts' suggestions and viewpoints. This means that the ECJ's decisions have to improve on their reasoning too, if they are to be expected to contribute to a continuous and rich debate.

This point can be illustrated by the dialogue between the Dutch Hoge Raad and the ECJ in the case of *Diageo Brands v Simiramida*, which - by the way - touches on the balance of national and EU interests and values.⁹² The case was about the scope of the rules of recognition and enforcement laid down by Regulation No 44/2001, as based on the principle of mutual trust between the Member States. Article 34 section 1 allows for an exception if the recognition of a judgment is manifestly contrary to public policy in the Member State in which recognition is sought. In this case the Hoge Raad raised the question whether this public policy-clause applies to a case where the judgment for which recognition is sought is manifestly contrary to EU law, and that fact has even been recognized by that court. The case was about the judgment of a Bulgarian District Court on the claim of Diageo Brands that Simiramida had violated its trade mark on Johnny Walker whiskies. The claim was rejected on grounds of an interpretative decision of the Bulgarian Court of Cassation which was, according to the Hoge Raad, manifestly and intentionally contrary to EU law, thus suggesting an element of bad faith or even worse at the expense of Diageo Brands. Recognition of the Bulgarian judgment under these circumstances would put Union loyalty under severe pressure, so the Hoge Raad concludes, and thus seems hardly reconcilable with the legal system of the EU.⁹³ The questions of the Hoge Raad seem to signal a clear warning: you cannot really mean this....

The ECJ, however, does not back off. Although the Member States are free to determine the requirements of their public policy according to national convictions, the interpretation of this notion and its limitations is the authority of the ECJ. For an appeal to article 34 section 1 it is not enough to have a difference of opinion with the court whose judgment is to be recognized, or even for this judgment to rest on a mistake or downright wrong interpretation. What is required is that its judgment establishes a clear violation of a rule of law that is considered to be essential, or a right recognized as being fundamental, in the legal system of the Member State in which recognition is sought. The alleged infringement of article 5 of Directive 89/104 – intended to establish minimal harmonization with regard to the trade mark laws of the Member States – does not count as such. Neither are there any procedural safeguards violated, since Diageo Brands has not appealed against the Bulgarian judgment. And that was the end of

⁹² ECJ 16 July 2015, Case C-681/13, ECLI:EU:C:2015:471 (*Diageo Brands BV v Simiramida*).

⁹³ HR 20 December 2013, ECLI:NL:HR:2013:2062.

it for the ECJ. We need to take into account that things were made easy for the ECJ by its Advocate-General, who questioned the presupposition of the Hoge Raad that the Bulgarian judgment whose recognition was sought and the interpretative decision of the Bulgarian Court of Cassation on which it was based, were clear violations of EU law. As the Commission had pointed out during the hearings its investigations into the contested judgment of the Court of Cassation in the context of infringement proceedings had resulted in the conclusion that it is compatible with EU law. It is therefore not inconceivable, so the AG concludes, that the decision of the Bulgarian District Court applied the decision of the Bulgarian Court of Cassation incorrectly. So, we are left with the uneasy feeling that there is something rotten here, but we do not know exactly what it is (the decision of the Court of Cassation, or that of the District Court?). The main point here is, however, that the ECJ does not address the worries of the Hoge Raad. The obstacle for recognition is the concern for the integrity of the judicial process in Bulgaria, of course, and not for trademark law harmonization in the EU. The reasoning of the ECJ is therefore correct from a formal point of view, but not very communicative or helpful.

This example illustrates that there is room for improvement of the dialogues between the ECJ and the domestic courts. Improving on the quality of the dialogues between the ECJ and the domestic courts may well be another means of effective and legitimate judicial lawmaking in European private law, next to the ones already distinguished. Let me summarize the picture sketched thus far. I have claimed, first, that domestic courts operate strategically in their interaction with the ECJ. I have illustrated this claim with a recurring strategy of the BVerfG, namely claiming the last word without using it. We have learned from game theory that there are good reasons for this strategy, since it enhances the chances of influencing the case law of the ECJ. Next, I have claimed that this practice is justified both from the institutional perspective of checks and balances between within the EU, as well as from the substantive perspective of a balanced development of European private law in which both national and EU interests and values are taken into account. The principle of respect for national identity (article 4 section 2 TEU) turned out to be an important venue for striking the balance between the two types of interests and values involved. Neither the ECJ nor the domestic courts have the last word here, they both need the other in a dialogue to give flesh and bones to the concept of national identity in the context of private law. Finally, I have claimed that this dialogue is to be conceived not just as an interaction of questions and answers, but as a rich debate about how to integrate national law and Union law in a coherent pattern, that does justice to both. The quality

of the dialogues conducted may in the end well be responsible to a large extent for the balanced development of European private law.

These claims entail an agenda for both the ECJ and the domestic courts in their lawmaking cooperation. First, they both have to consider whether the notion of national identity could be an important vehicle for a balanced development of Union law that includes the development of private law as well. As we have seen, article 4 section 2 TEU has been discovered by the constitutional courts only, and has been neglected for the most part by the ECJ. Could private law interests fall within the scope of article 4 section 2 TEU as well? Can they be fitted in the conceptual scheme of the ECJ of rights and freedoms? The only way to find out for the respective courts is to engage in a dialogue on the interpretation of this provision. Since the interpretation of article 4 section 2 TEU is the authority of the ECJ, but the expertise on national identity is in the domestic courts, there is not last word here. Next, both the ECJ and the domestic courts have to improve on the quality of their dialogues, in the sense that these dialogues have to be richer in informational and discursive content. This requires more effort from both sides, both in providing background information on the domestic context (by the domestic court) and in reasoned judgments on the balance struck between integration and accommodation (by the ECJ). Again, this is only served by continuous dialogue, so there is no last word here either. Finally, both the domestic courts and the ECJ can influence one another's case law strategically by making moves, forecasting responses, and claiming the last word. This is not so much a matter of a peaceful dialogue or violent warfare, as is often claimed, but of strategic decision-making within a cooperative enterprise. There seems to be a last word here, but it exists only virtually. As we have seen, the last word appears to be nothing more or less than a strategic claim in a continuous dialogue.

5. *A last word*

Of course, there is no last word on this. There are at least two other perspectives on the notion of the last word, to be distinguished and reserved for different kinds of doctrinal research. First, the notion of the last word has constitutional meaning, since it refers to the question of ultimate authority in a pluralistic legal order like the EU. As we have seen, in such a legal order one may focus on conflict and rivalry, or on openness and dialogue (section 2). The first perspective is justified by the observation that domestic courts and the ECJ tend to defend their interpretative autonomy and that they have clashed on fundamental rights protection, ultra vires review, and national identity review. The second perspective is justified by the observation that, despite

these differences, domestic courts and the ECJ have influenced one another and have succeeded in establishing a pluralist equilibrium. As Kaarlo Tuori has rightfully claimed, article 4 section 2 TEU implies acknowledgement of constitutional diversity. At a deeper level of these dialogues a common constitutional culture is at play – a shared language and a common understanding – that prevents latent constitutional crises to break out.⁹⁴

The other perspective on the notion of the last word, is that of private law. For the doctrinal researcher in European private law there is work to do with regard to the mapping of specific judicial dialogues, thus contributing to our understanding of the formation and development of European private law. Only through the analysis of specific dialogues – with an eye to the mutual contribution and influence of domestic courts and the ECJ – can we bring to light how case law is developed on the foundations of the domestic private law systems and Union law regulation. This requires not only a deep understanding of both the case law of the highest domestic courts and of the ECJ, but also a conceptual grip on their interplay. Here the doctrinal work of Arthur Hartkamp in the field of European private law has paved the way, both with regard to the design of the conceptual framework needed and the analysis of the relevant case law. As such, it has provided a vast contribution to a doctrinal dialogue, in which the last word has not been spoken yet.

⁹⁴ Kaarlo Tuori, *European constitutionalism*, Cambridge: Cambridge University Press 2015, p. 102 – 107.