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**Master's Thesis**

**The Dialogue Between National Courts and the European Court of Justice**

**Nacionalinių teismų ir Europos Teisingumo Teismo dialogas**

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## **Abstract and key words**

This Master's thesis examines how judicial dialogue between national courts and the Court of Justice of the European Union operates in practice. The research focuses on selected "dialogue episodes" in which national courts use the preliminary reference procedure and subsequent national judgments to interact with the Court of Justice. The aim is to provide a clear and practical account of this interaction and to show how it can take cooperative or conflictual forms.

The thesis uses a doctrinal, qualitative method based on case studies. First, it explains the legal framework of the preliminary reference procedure and the main doctrines shaping the duties and discretion of national courts. Second, it presents the main theoretical approaches to judicial dialogue and introduces three basic visions of the EU legal order supremacy through integration, constitutional pluralism and resistance. Third, it applies a simple analytical framework to detailed case studies and shorter vignettes drawn from several Member States, distinguishing cooperative episodes from conflictual ones and examining national follow-up to the Court of Justice's rulings.

The study shows that national courts use preliminary references selectively, especially in constitutional and politically sensitive cases. Cooperative episodes demonstrate that courts are willing to adjust legislation and even reinterpret constitutional standards when EU law is perceived as compatible with domestic values. Conflictual episodes reveal the use of ultra vires review, constitutional identity and interpretive limits to resist the effects of some judgments. Overall, the thesis concludes that judicial dialogue is an ambivalent but central mechanism for managing disagreement in the EU legal order, capable of both supporting and constraining integration.

**Keywords:** *Judicial dialogue; preliminary reference; national courts; Court of Justice of the European Union; constitutional pluralism; supremacy of EU law; conflict and cooperation.*

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## Introduction

The European Union is a legal order where courts matter for the overall wellbeing of the union<sup>1</sup>. National judges deal with EU law every day and often in situations where the answer is uncertain or where constitutional questions hover in the background. Article 267 gives them a formal way to ask the Court of Justice for guidance and people often call this a form of judicial dialogue<sup>2</sup>. But the term can feel vague. It suggests cooperation, yet recent tensions about the rule of law, constitutional identity and sovereignty show that this “dialogue” can also involve disagreement or even open friction<sup>3</sup>. All of this makes it worth looking more closely at how the interaction actually works in practice and what it looks like in written judgments.

The topic is relevant both for academic debates and for the daily work of courts. In theoretical terms, the way courts communicate helps us understand what kind of legal order the EU is and how it fits with national constitutions<sup>4</sup>. But in practice, judges and lawyers want something much simpler when should they refer, how should they phrase the questions and what should they do with the Court of Justice’s answer once it arrives? Litigants also depend on national courts to enforce their EU rights in a clear and predictable way. So a study that connects the broad idea of judicial dialogue with concrete examples from different Member States can help set expectations and encourage more consistent use of the reference procedure<sup>5</sup>.

The aim of this thesis is to give a clear and grounded account of how judicial dialogue actually works in real cases. It also provided information on how it moves between cooperation, negotiation and conflict. The research looks at interactions between national courts and the Court of Justice as they appear in preliminary references and in the national follow-up decisions that respond to them. The thesis does not try to cover the entire Union or every policy field. Instead, it focuses on a set of dialogue episodes from different Member

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<sup>1</sup> DE WITTE, B.; MAYORAL DÍAZ-ASENSIO, J. A.; JAREMBA, U. (eds.) (2016). *National Courts and EU Law: New Issues, Theories and Methods*. Cheltenham: Edward Elgar, pp. 155–193; 227–252 (cooperation, types of judicial behaviour, constitutional courts' engagement with EU law).

<sup>2</sup> HARTLEY, T. C. (2014). *The Foundations of European Union Law*. 8th ed. Oxford: Oxford University Press, pp. 235–237.

<sup>3</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016/C 202/01), OJ C 202, 7.6.2016, p. 1–388.

<sup>4</sup> LENAERTS, K. (2020). New Horizons for the Rule of Law Within the EU. *German Law Journal*, 21(1), pp. 32–36.

<sup>5</sup> CHALMERS, D.; DAVIES, G.; MONTI, G. (2019). *European Union Law: Text and Materials*. 4th ed. Cambridge: Cambridge University Press, pp. 184–190.

States that reveal recurring patterns and help show how courts across Europe manage this delicate relationship.

Within this aim and object, the thesis addresses the following research questions:

1. How do national courts in the European Union use the preliminary reference procedure and related reasoning in their judgments to engage in judicial dialogue with the Court of Justice?
2. In selected episodes from different Member States, what observable signals in the case law indicate cooperative or conflictual forms of judicial dialogue and how do national courts respond to the Court of Justice's rulings?

To reach the aim of the thesis and to deal with the questions set at the start, I had to break the work into a few tasks. The first was simply to explain the legal setting of the preliminary reference procedure, because without that nothing else makes sense. Then I tried to summarise the main ideas that scholars use when they talk about judicial dialogue and about how courts relate to each other in the EU. I also introduced the basic visions of the EU legal order, even though these theories sometimes overlap and are not always clear-cut. After that, I developed a fairly simple analytical framework. It relies on things you can actually see in judgments, like signals of cooperation or tension and it connects those signals to the three broader visions. With that in place, I turned to a set of case studies from different Member States. Some are detailed, others shorter but together they show both cooperation and conflict in practice. In the end, I compared these episodes and tried to say something modest about the patterns that appear and what they might mean for people who work with EU law.

The thesis uses qualitative, doctrinal methods. Most of the time I was reading judgments and trying to understand how courts phrase arguments, how they interpret EU law and how they speak to each other. EU primary law and the case law of the Court of Justice were the starting point but national judgments were just as important. There is also a comparative element, though not in any formal or statistical sense. I simply placed episodes from different Member States next to each other and looked at how judges frame questions, respond to Luxembourg and implement what they receive. The focus stayed on roughly the last twenty years which seems recent enough to reflect how the reference procedure actually works now. I didn't use interviews or datasets, partly because they were unnecessary and partly because the aim of the thesis is to read the texts themselves.

If there is any originality here, it lies in the decision to keep things simple. A lot of the literature on judicial dialogue is very abstract and uses big metaphors without digging into concrete cases. On the other hand, there are empirical studies full of detail that are hard to translate into advice for judges or lawyers. I tried to find a middle position. The idea was to build a small working framework that treats judgments as episodes of dialogue and then apply it across several Member States, not just one. By sticking to signals that appear directly in the texts how courts frame questions, how they react to constitutional worries, how follow-up decisions are written I tried to show that debates about primacy, pluralism and resistance can actually be read in the words judges choose.

The sources reflect this approach. The primary material consists of the EU Treaties, the Charter, the Court's Rules of Procedure and a selection of cases from Luxembourg. National supreme courts, constitutional courts and other high courts form the second main group. I used official versions or solid translations whenever available, because the wording matters a lot for this kind of analysis. The secondary material includes books and articles on judicial dialogue, preliminary references and the broader theories I rely on. I also used reports from EU institutions and national bodies when they helped explain how the system works in practice. These were chosen because they are established sources and because they helped place the case law in a wider context.

All of this follows from the basic aim of the thesis. To understand dialogue, you have to read how courts speak to one another but you also have to understand the intellectual landscape in which they operate. The combination of EU and national cases, plus the academic debate around them, seemed the only way to reflect the multi-level nature of the EU legal order. The chapters that follow take this introduction and try to put it into real use through the legal background, the theory and the case studies that form the core of the thesis.

# Chapter 1: The conceptual and theoretical foundations of the judicial dialogue

## 1.1 Deconstructing “Judicial Dialogue”

People use the expression “judicial dialogue” all the time when writing about the EU but it is really just a metaphor. It does not appear in the Treaties and no law defines it. Scholars use it because it helps describe how courts talk to one another across borders, especially when national courts send preliminary references and then try to apply whatever the Court of Justice says <sup>6</sup>. So, when I use the term here, I need to be clear about what I mean and also what I do not mean. This part of the chapter tries to sketch the basic ideas behind the metaphor and show how it differs from simple obedience or from outright conflict. One way to think about judicial dialogue is as a kind of organised conversation. Slaughter’s idea of “transjudicial communication” fits here. Courts read each other’s judgments, react to them, cite them and ask questions. Under Article 267, the preliminary reference becomes almost like a conversation starter the national court asks something, the Court of Justice rewrites the question a bit, answers it and the national court later tries to make sense of the reply. When we call this dialogue, we mean this back-and-forth of reasons rather than just a mechanical exchange.

Another view treats judicial dialogue as a partnership. The Court of Justice has often described the reference procedure as cooperation. Some scholars speak of national courts as partners in integration, not subordinates. Cartabia’s call to “take dialogue seriously” reflects this mood <sup>7</sup>. In this perspective, courts work together, rely on mutual trust and try to build a common legal space. It is a hopeful picture, maybe even an optimistic one. But the partnership idea has its critics, because the relationship is not actually equal. Supremacy gives EU law priority in most situations and the Court of Justice usually has the last word <sup>8</sup>. Some authors warn that calling this relationship a dialogue hides the hierarchy beneath it. Komárek, for instance, argues that too much freedom to refer can destabilise the structure and that hierarchy is still needed. Seen from this angle, what looks like dialogue may just be polite compliance.

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<sup>6</sup> SLAUGHTER, A. M. (1994). A Typology of Transjudicial Communication. *University of Richmond Law Review*, 29, pp. 99–137.

<sup>7</sup> CARTABIA, M. (2009). Europe and Rights: Taking Dialogue Seriously. *European Constitutional Law Review*, 5(1), pp. 5–31.

<sup>8</sup> KOMÁREK, J. (2007). In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure. *European Law Review*, 32(4), pp. 467–491.

A different group of theories places judicial dialogue inside the framework of constitutional pluralism. Here the idea that more than one court claims ultimate authority. National constitutional courts and the Court of Justice both insist they have the final say in certain matters, so dialogue becomes the way they manage overlapping claims<sup>9</sup>. Maduro, Walker and others argue that courts should listen to each other, recognise their different constitutional identities and find outcomes that more than one legal order can accept. Dialogue in this sense becomes a normative ideal, not just a descriptive term. Because the metaphor is used in so many ways. It helps to separate dialogue from simple obedience. If a national court quietly applies a rule from Luxembourg without asking anything or explaining its own reasoning, this might be cooperation but it is not dialogue. Dialogue needs some form of mutual responsiveness. A court may raise a reference to express constitutional worries and then later show how it interprets the answer. Mac-Gregor's idea of courts refining shared norms through each other's reasoning fits this. The point is adaptation, not repetition<sup>10</sup>. Dialogue also has to be distinguished from pure conflict. When courts stop recognising each other's authority, refuse to use formal procedures, or completely ignore rulings, that is no longer dialogue. Even disagreement can still count as dialogue if courts use accepted channels and give reasons. But once a court simply rejects the whole framework, the idea of dialogue collapses. For this thesis, the focus is on disagreements expressed through the formal methods, not on breakdowns of communication.

These different uses of the metaphor have prompted several criticisms. Some say the term is so vague it becomes meaningless, because it covers everything from citations to informal meetings of judges. It can also romanticise what is often a tense and strategic set of interactions. Courts operate under legal and political pressures and it is misleading to imagine them sitting around in friendly conversation<sup>11</sup>. Another criticism is that the metaphor hides power. Calling something a dialogue can make it sound mutual even when one court (the Court of Justice) has far more influence. Baquero Cruz notes that pluralist language sometimes glosses over the hard question of who really decides when the systems clash. A final line of critique argues that dialogue cannot solve the deepest problems, like who has the final word.

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<sup>9</sup> BAQUERO CRUZ, J. (2016). What's Left of the Law of Integration? Decay and Resistance in European Union Law. Oxford: Oxford University Press, pp. 42–48.

<sup>10</sup> CHALMERS, D.; DAVIES, G.; MONTI, G. (2019). European Union Law: Text and Materials. 4th ed. Cambridge: Cambridge University Press, pp. 184–190.

<sup>11</sup> MADURO, M. P. (2003). Contrapunctual Law: Europe's Constitutional Pluralism in Action. In: WALKER, N. (ed.) Sovereignty in Transition. Oxford: Hart Publishing, pp. 501–537.

Pluralist theories often avoid that question but in practice courts sometimes insist on their own authority and refuse to back down<sup>12</sup>. Tremblay warns that appealing to dialogue does not remove the need for accountability, especially when judges make decisions with major political consequences. Some scholars claim that European pluralism hides a kind of monism, since EU law often ends up prevailing in real disputes.

Still, despite these problems, the idea of judicial dialogue remains useful if used carefully. For this thesis, I adopt a narrow working definition. Judicial dialogue refers to structured communication between national courts and the Court of Justice about EU law, mostly through the preliminary reference procedure and the reasoning that surrounds it. It includes cooperation and disagreement, as long as both sides stay within recognised legal channels and respond to each other's arguments. It does not claim the courts are equal or that dialogue always leads to harmony. It simply describes how judges use the tools available to them to raise questions, express concerns and react to answers. This more modest definition will later help me identify concrete signals of cooperation and conflict in the case law and apply them to Lithuania and a few comparison states.

## 1.2 The preliminary ruling procedure under Article 267 TFEU

The main formal channel for what we call judicial dialogue in the EU is the preliminary ruling procedure in Article 267 TFEU<sup>13</sup>. This is the tool that lets national courts ask the Court of Justice to interpret EU law or check the validity of EU acts. It is not a separate case but something that happens inside an ordinary dispute, when a judge realises that the answer depends on how EU law should be read. Article 267 separates questions of interpretation from questions of validity<sup>14</sup>. A national court can ask for help interpreting the Treaties, the Charter or secondary legislation whenever it thinks the case cannot be decided without guidance from Luxembourg. It can also ask the Court to review whether an EU act is valid. Once the Court answers, that answer binds the national court it must apply the interpretation given and it cannot declare an EU act invalid if the Court of Justice has confirmed it. Any body that functions as a

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<sup>12</sup> SLAUGHTER, A. M. (1994). A Typology of Transjudicial Communication. *University of Richmond Law Review*, 29, pp. 99–137.

<sup>13</sup> TRIDIMAS, T. (2019). *The General Principles of EU Law*. 3rd ed. Oxford: Oxford University Press, pp. 270–278.

<sup>14</sup> BROBERG, M.; FENGER, N. (2021). *Preliminary References to the Court of Justice of the European Union*. 3rd ed. Oxford: Oxford University Press, pp. 41–56.

“court or tribunal” can use Article 267<sup>15</sup>. The Court has developed a set of criteria for this where things like being established by law, having permanent jurisdiction, using procedures that allow both sides to be heard and applying rules of law. This opens the door for many courts beyond the constitutional or supreme level. In fact, most references come from ordinary judges dealing with day-to-day issues like tax or labour law.

The choice to refer belongs to the judge, not to the parties. When the judge sees that EU law is unclear or contested, the domestic case is paused and the questions are formulated. The referring court explains the facts, the relevant national law and why a ruling from Luxembourg matters. After the Court of Justice replies, the case goes back home and the national judge finishes the dispute using the interpretation given. The Court of Justice itself never decides the underlying conflict; it only clarifies the law<sup>16</sup>. For courts of last instance, the Treaties make the obligation stronger. If the case turns on a point of EU law and the answer is not already obvious, the highest court must refer. The Court of Justice has softened this rule with the doctrines of *acte clair* and *acte éclairé* if the solution is already clear or the Court has already ruled on the same point, no reference is needed. Still, the overall expectation remains that top courts should not reinvent EU law on their own when serious doubts exist.

The reference procedure has several effects that explain why it matters so much. It spreads responsibility for EU law across the system. National courts identify the problems first and shape the questions; the Court of Justice responds, sometimes widening the discussion. The procedure also connects courts across the Union<sup>17</sup>. A ruling given to one court becomes a reference point for many others, creating something like a shared judicial space. And Article 267 is tied closely to primacy and effectiveness once the Court interprets EU law, national authorities are expected to give full effect to that interpretation, even if this disrupts domestic statutes or established precedent.

### 1.3 Channels and forms of judicial dialogue

Once the metaphors of judicial dialogue is understood, it becomes clear that courts do not all talk or communicate in the same way<sup>18</sup>. In Europe there are different patterns that run

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<sup>15</sup> LENAERTS, K.; GUTIÉRREZ-FONS, J. A. (2011). To Say What the Law of the EU Is: Methods of Interpretation of the Court of Justice. European University Institute Working Paper AEL 2011/1, pp. 12–18.

<sup>16</sup> CASE 283/81 CILFIT [CJEU], 6 October 1982, ECLI:EU:C:1982:335.

<sup>17</sup> CASE C-54/96 Dorsch Consult [CJEU], 17 September 1997, ECLI:EU:C:1997:413.

<sup>18</sup> SLAUGHTER, A. M. (2004). *A New World Order*. Princeton: Princeton University Press, pp. 65–89.

alongside each other. Some are formal and written into the Treaties, others depend on what individual judges decide to do. For the purposes of this thesis, it helps to separate vertical from horizontal dialogue and formal from informal channels, even if real practice does not always follow neat categories. Vertical dialogue happens when courts at different levels interact. In the EU, the clearest example is the exchange between national courts and the Court of Justice. A national judge sends a reference, the Court answers and the national judge then applies that answer<sup>19</sup>. Horizontal dialogue is different. Here courts at the same level engage with one another. A national supreme court and a constitutional court may refer to each other's decisions, or apex courts in different Member States might cite each other when dealing with similar issues. No one is formally above the other, so persuasion matters more than hierarchy.

The central formal tool of vertical dialogue is of course the preliminary reference procedure in Article 267 TFEU. It has often been described as the keystone of the system because it aims to secure a uniform interpretation of EU law. Any court or tribunal can refer questions about interpretation or validity and courts of last instance are supposed to do so when the answer is not obvious. In that sense, the reference becomes both a procedural bridge and a symbol of cooperation between national courts and the Court of Justice<sup>20</sup>. This formal channel matters because it structures the interaction. National courts open the conversation by defining the facts and legal context. The Court of Justice replies with an interpretation that is binding not only on the referring court but also on other courts dealing with similar issues. The exchange is not equal but it still depends on how national courts use it. That is why the reference procedure is a good place to observe dialogue in action.

There are also other formal or semi-formal channels. National judges sometimes meet with the Court of Justice and various judicial networks bring together specialists in areas like civil or criminal matters. These networks have mandates, rules and institutional support. Horizontal cooperation also happens in formal settings such as the Conference of European Constitutional Courts or meetings of supreme court presidents. These events do not decide cases but they do create spaces where judges compare approaches and build common understandings. A lot of dialogue, however, is informal<sup>21</sup>. One obvious example is cross-

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<sup>19</sup> PSYCHOGIOPOULOU, E. (2008). *Judicial Dialogue in Social Rights Jurisprudence*. Oñati International Series in Law and Society. Aldershot: Ashgate, pp. 21–29.

<sup>20</sup> CASE 166/73 *Reyners* [CJEU], 21 June 1974, ECLI:EU:C:1974:68.

<sup>21</sup> LAVRANOS, N. (2006). *Protecting European Law from International Law*. *European Foreign Affairs Review*, 11(4), pp. 501–519.

citation. Courts increasingly cite foreign or supranational decisions to support their arguments or to distance themselves from them. They do not have to do this but it helps them test and refine ideas. Sometimes courts even adopt methods or concepts developed elsewhere without explicitly citing their sources, because academic writing has already introduced those ideas into the domestic debate.

Judicial networks and personal contacts also matter. Conferences, seminars and study visits bring judges together in less structured ways. Slaughter argued long ago that these interactions help create a “community of courts” with shared habits and expectations. Even if no specific case is discussed, these exchanges shape how judges think about their roles in Europe. Soft law guidelines, recommendations and similar documents can have a similar function. They provide reference points that judges may use even if they are not binding. Academic writing forms another indirect channel. It summarises foreign and EU case law, translates ideas across legal cultures and sometimes influences how judges frame problems. Even if this is not dialogue in the strict sense, it supports and shapes the more direct interactions between courts.

Scholars have tried to organise these practices in simple typologies. Slaughter distinguished vertical and horizontal communication and identified various modes of interaction. Psychogiopoulou later added more nuance by distinguishing internal and external forms of horizontal and vertical dialogue<sup>22</sup>. Many authors also use the formal–informal divide to separate structured procedures from looser practices. A simple way to combine these ideas is to imagine a grid vertical versus horizontal on one axis, formal versus informal on the other. Formal vertical dialogue includes preliminary references and official contacts between national courts and the Court of Justice. Informal vertical dialogue covers situations where national courts work with existing EU case law without referring new questions. Formal horizontal dialogue includes structured networks and official gatherings. Informal horizontal dialogue includes cross-citations, personal exchanges and the borrowing of ideas through scholarship. It is not perfect but it helps sort the different interactions that fall under the broad label of judicial dialogue. At the same time, this grid has limits. Many interactions blur the line between

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<sup>22</sup> PSYCHOGIOPOULOU, E. (2008). *Judicial Dialogue in Social Rights Jurisprudence*. Oñati International Series in Law and Society. Aldershot: Ashgate, pp. 21–29.

formal and informal<sup>23</sup>. A reference is formal but the way questions are framed may depend on conversations at conferences or earlier soft law guidance. Networks may have formal rules but host entirely informal discussions. Even the vertical–horizontal distinction can become fuzzy in a multi-level system where courts at different levels and in different jurisdictions all review each other’s work in overlapping ways. So the typology is only a starting point, not a literal map of everything courts actually do.

#### 1.4 Other forms of judicial dialogue networks, conferences and scholarship

Article 267 is the best-known channel of judicial dialogue but it is not the only way courts interact. A lot of the exchange happens in quieter, less formal ways that are not written into the Treaties but still shape how judges think about each other and how they write their judgments. For this thesis it helps to group these practices loosely into three types horizontal citation, judicial networks and meetings and the role of academic writing<sup>24</sup>. Horizontal citation is probably the most visible of the informal practices. Courts increasingly refer to decisions from other jurisdictions when dealing with similar issues. Supreme and constitutional courts might cite one another on proportionality or data protection or even on structural questions like the separation of powers. National courts sometimes place judgments from other Member States next to CJEU rulings to show how a problem has been handled elsewhere in a similar institutional setting<sup>25</sup>. Courts also look outside Europe, drawing on the European Court of Human Rights or even the Inter-American Court of Human Rights or common-law courts. None of this is binding but it helps judges situate their own reasoning in a wider conversation and gives them a sense that they are not dealing with these problems alone.

Judicial networks and personal contacts take this a step further. Many European judges participate in training networks, associations of supreme administrative courts or regional groups of constitutional courts. These bodies organise conferences, workshops and study visits. A lot of useful exchange happens in the margins of these events rather than in the formal sessions judges compare constraints, talk about political pressures at home and try to

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<sup>23</sup> DE WITTE, B.; MAYORAL DÍAZ-ASENSIO, J. A.; JAREMBA, U. (2016). National Courts and EU Law: New Issues, Theories and Methods. In: DE WITTE, B.; MAYORAL DÍAZ-ASENSIO, J. A.; JAREMBA, U. (eds.) National Courts and EU Law. Cheltenham: Edward Elgar, pp. 3–25.

<sup>24</sup> SLAUGHTER, A. M. (1994). A Typology of Transjudicial Communication. *University of Richmond Law Review*, 29, pp. 99–137.

<sup>25</sup> KÖRNER, F. (2019). Judicial Networks in the European Union: Their Role in Cross-Border Cooperation. *Maastricht Journal of European and Comparative Law*, 26(6), pp. 792–807.

understand how others cope with similar problems<sup>26</sup>. These interactions can shape how they later react when faced with controversial CJEU rulings or domestic constitutional conflicts. Shared experiences create a kind of professional solidarity which can matter more than one might expect when courts face difficult choices. Soft law also grows out of these networks. Guidelines on judicial ethics or technology use, or recommendations on how to apply EU instruments, are formally non-binding but judges sometimes rely on them when deciding sensitive cases<sup>27</sup>. These texts become reference points, almost like common standards, even though no one is obliged to follow them. In that sense, informal dialogue creates a kind of soft framework that courts can invoke when needed.

Academic writing adds another indirect layer. Scholars map the case law of foreign courts, translate it into familiar categories and suggest typologies like vertical versus horizontal dialogue. Judges and their clerks use this material to follow what is happening elsewhere. Without it, language barriers and lack of time would make comparative work much harder. Academic commentary often filters and reshapes ideas before they reach the courts<sup>28</sup>. A judge might not cite a foreign ruling directly but might rely on the way an academic has explained it. So scholarship acts as a mediator, carrying ideas from one system into another. These informal practices are harder to observe than preliminary references but they matter for the argument of this thesis. They help explain why some courts are more open to conversation with Luxembourg and why certain concepts (constitutional identity, judicial independence, proportionality) end up looking surprisingly similar across Europe. They also show that judicial dialogue is not limited to written judgments. It grows out of a network of professional relationships, shared training and scholarly debate. That background shapes the more formal episodes discussed in Chapters 2 and 3 and helps make sense of why courts respond the way they do.

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<sup>26</sup> BOGDANOWICZ, P. (2018). Comparative Reasoning in European Supreme Courts. *European Constitutional Law Review*, 14(3), pp. 414–438.

<sup>27</sup> EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ). (2017). *Minimum Standards for Judicial Ethics*. Brussels: ENCJ, pp. 5–12.

<sup>28</sup> BAZAN, A.; JACQUOT, S. (2016). Legal Scholarship as a Vector of Judicial Europeanisation. In: DE WITTE, B.; MAYORAL DÍAZ-ASENSIO, J. A.; JAREMBA, U. (eds.) *National Courts and EU Law*. Cheltenham: Edward Elgar, pp. 205–223.

## 1.5 Why National Courts Engage in Judicial Dialogue?

Once we have some sense of what judicial dialogue is and the different forms it can take, the next question is why national courts bother engaging in it at all <sup>29</sup>. Judges are not required to use every channel available to them and the practice of sending preliminary references varies a great deal across Member States, across different court levels and even across policy areas. The literature offers several explanations and they overlap more than they contradict. Some focus on solving legal problems, others on securing legal certainty and others still on shifting political responsibility or strengthening judicial power <sup>30</sup>. What follows is a simple overview of these ideas and how they matter for this thesis. The most straightforward explanation is that judges refer because they need help. EU law can be technical or unclear and Article 267 gives them a way to get an authoritative interpretation from the Court of Justice. For last-instance courts, the duty to refer when the answer is not already obvious reinforces this. Many judges also think of themselves as problem-solvers rather than political actors, so asking Luxembourg is simply part of doing their job properly. Closely related is the idea of legal certainty. A preliminary ruling does not just settle one case; it settles the meaning of EU law for everyone. Other courts then follow that interpretation and the legal system becomes more predictable. Some scholars have even argued that this procedure is one of the engines of European integration because it allowed the Court of Justice to build a consistent body of case law that national courts gradually accepted <sup>31</sup>. Referring, in this sense, is a way for national judges to stabilise an area of law and avoid confusion or divergence.

A third explanation is more political. National courts sometimes face cases that are sensitive at home. These are related to questions about rights, taxes, migration, social policy or even the organisation of the judiciary. Referring such a case allows the national court to share the political burden. They can present the final outcome as a joint EU decision rather than something for which they alone are responsible <sup>32</sup>. Drafting the questions can also signal whether the court is leaning towards a more integration-friendly or a more state-protective

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<sup>29</sup> ALTER, K. J. (2001). *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press, pp. 52–76.

<sup>30</sup> BURLEY, A.-M.; MATTLI, W. (1993). *Europe Before the Court: A Political Theory of Legal Integration*. *International Organization*, 47(1), pp. 41–76.

<sup>31</sup> WEILER, J. H. H. (1991). *The Transformation of Europe*. *Yale Law Journal*, 100(8), pp. 2403–2484.

<sup>32</sup> TRIDIMAS, T.; GUTIÉRREZ-FONS, J. A. (2019). *EU Administrative Law and the Quest for Legal Certainty*. In: HOFMANN, H.; ZILLER, J. (eds.) *Research Handbook on EU Administrative Law*. Cheltenham: Edward Elgar, pp. 37–55.

approach but the responsibility is distributed. The judicial empowerment story pushes this further. In Weiler's account and later in the work of Burley and Mattli and Karen Alter, national courts gained new powers through direct effect, supremacy and Article 267<sup>33</sup>. Lower courts, in particular, were able to use preliminary references to bypass reluctant supreme courts and to enforce EU-friendly rulings at home. This made them "motors of integration," and over time national judges became ordinary courts of EU law, exercising forms of review that had earlier been reserved for higher courts. Empowerment works on several levels. Vertically, courts gain a stronger ability to review domestic laws that conflict with EU law<sup>34</sup>. Horizontally, they can use EU law to challenge or question the jurisprudence of their own higher courts. And in the broader EU system, they participate directly in shaping EU law through their references. But this picture has limits. Recent empirical work shows that higher courts now make many references and some lower courts remain largely passive. Other studies show that many judges face institutional or political obstacles to referring and sometimes even face pressure not to get involved in sensitive EU issues. So empowerment exists but it is uneven and depends heavily on national context.

There are also conceptual limits. These explanations often operate together, not separately. One reference can clarify a legal problem, stabilise the law for the whole Union, shift responsibility away from the national court and, at the same time, influence domestic constitutional politics. Trying to isolate a single motive may not be helpful. And of course, "national courts" are not a single actor. Lower courts, supreme courts and constitutional courts may have very different incentives and constraints. Some may see the Court of Justice as a helpful ally, others as competition and others as a resource to use cautiously<sup>35</sup>. Finally, there are normative concerns. If courts become increasingly powerful through EU law, issues of legitimacy and accountability come into play. Expanding judicial authority may raise questions about the balance between courts and elected bodies. Critics warn that celebrating judicial empowerment without addressing these tensions can gloss over deeper problems about the role of courts in democratic systems.

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<sup>33</sup> VON BOGDANDY, A.; SCHILL, S. (2011). Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty. *Common Market Law Review*, 48(5), pp. 1423–1447.

<sup>34</sup> SLAUGHTER, A. M. (1994). A Typology of Transjudicial Communication. *University of Richmond Law Review*, 29, pp. 99–137.

<sup>35</sup> KROMMENDIJK, J. (2020). The Preliminary Reference Dance: When Do (Non-)Supreme Courts Refer? *European Law Journal*, 26(1–2), pp. 100–118.

## 1.6 Competing Visions of the EU Legal Order

Judicial dialogue in the EU does not happen in a vacuum. When courts talk to each other, they often do so with some underlying picture of what the EU legal order is supposed to look like. These pictures shape how we describe cooperation, tension or conflict<sup>36</sup>. They do not always appear explicitly in judgments but they sit in the background. For this thesis it helps to sketch three broad visions the traditional supremacy or “integration through law” view, the constitutional pluralist view and a more recent focus on resistance. The goal is not to pick the “right” theory but to show how each one frames dialogue differently. The first vision is the classic one built around supremacy and direct effect. In this picture, developed in cases like *Van Gend en Loos* and *Costa*, EU law forms an autonomous legal order that takes priority over conflicting national rules<sup>37</sup>. National courts then become “ordinary courts of EU law,” obliged to set aside domestic provisions that clash with EU norms. The preliminary reference procedure fits naturally into this structure national courts ask questions, the Court of Justice answers and the answers bind. The “integration through law” literature turned this into a wider story about how law and courts can advance European integration when politics stalls<sup>38</sup>. Judicial dialogue here is mostly about ensuring uniformity and effectiveness. Disagreements may arise but the assumption is that national courts will eventually follow Luxembourg out of loyalty to the Treaties<sup>39</sup>.

The second vision comes from constitutional pluralism. Instead of imagining the EU as clearly above national constitutions, pluralist authors say there are several constitutional centres in Europe, each with its own claim to authority. MacCormick’s interpretation of the *Solange* line of cases captured this early on and Walker later developed a fuller theory of a polycentric constitutional space<sup>40</sup>. In this setting, no single court can settle all fundamental questions conclusively. Courts accept each other’s authority up to a point but they also preserve their own constitutional identities and may intervene when core principles are at risk. Dialogue here is more of a negotiation courts try to accommodate competing claims rather than simply follow a hierarchy. Disagreement is normal and can even be constructive as long as it stays

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<sup>36</sup> MACCORMICK, N. (1993). *Beyond the Sovereign State*. *Modern Law Review*, 56(1), pp. 1–23.

<sup>37</sup> CASE 6/64 *Costa v ENEL* [CJEU], 15 July 1964, ECLI:EU:C:1964:66.

<sup>38</sup> SADURSKI, W. (2019). *Poland’s Constitutional Breakdown*. Oxford: Oxford University Press, pp. 142–158.

<sup>39</sup> BROBERG, M.; FENGER, N. (2021). *Preliminary References to the Court of Justice of the European Union*. 3rd ed. Oxford: Oxford University Press, pp. 41–56.

<sup>40</sup> KRISCH, N. (2010). *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford: Oxford University Press, pp. 68–95.

within legal channels. Pluralism has been praised for reflecting the messy realities of Europe, especially when national courts push back but still insist they remain loyal to the EU project. Yet it also has critics. One recurring complaint is that pluralism becomes vague when conflicts sharpen. If the Court of Justice and a national constitutional court both claim the last word, it is unclear how dialogue alone can resolve that. Some warn that pluralism may hide the risk of fragmentation or legal uncertainty, especially when economic or political crises make cooperation harder.

A third and more recent vision highlights resistance. Here the emphasis is on moments when national courts openly challenge the authority of the Court of Justice. Ultra vires review is the clearest example a court declares that an EU act or judgment exceeds the competences granted by the Treaties and refuses to apply it<sup>41</sup>. Constitutional identity review plays a similar role, shielding certain areas from the reach of EU law. The German Constitutional Court's Lisbon ruling is often cited because it set out detailed doctrines for both ultra vires and identity review<sup>42</sup>. But other courts have used similar language, sometimes more aggressively than Germany ever did. This resistance perspective treats these episodes not as accidents but as part of a broader pattern of contestation in a multi-level legal order. Krisch's work on postnational law emphasises that conflict is inherent and cannot always be absorbed into a single constitutional framework. Judicial dialogue, from this standpoint, is just as much a space for confrontation as cooperation. Courts may insist on strict limits, question the legitimacy of the Court of Justice or refuse to apply certain rulings<sup>43</sup>. The recent rule-of-law crises in some Member States make these concerns more concrete, as appeals to sovereignty or identity can be used to undermine rights or judicial independence. These three visions are not rigid categories. In practice they often overlap. Many national courts presume supremacy when they apply EU law routinely. In other cases they reason in a more pluralist way, trying to reconcile EU obligations with constitutional constraints. And a smaller group of judgments clearly falls into the resistance mode, where the tone is confrontational and the court signals it may not follow Luxembourg<sup>44</sup>. The same court can shift between these modes depending on the case,

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<sup>41</sup> KUMM, M. (2005). The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty. *European Law Journal*, 11(3), pp. 262–307.

<sup>42</sup> WEILER, J. H. H. (1981). The Community System: The Dual Character of Supranationalism. *Yearbook of European Law*, 1(1), pp. 267–306.

<sup>43</sup> GRIMM, D. (2015). The Democratic Costs of Constitutional Pluralism. *European Law Journal*, 21(4), pp. 460–473.

<sup>44</sup> GERHARDT, M. (2018). The German Federal Constitutional Court and the Limits of Ultra Vires Review. *German Law Journal*, 19(7), pp. 1829–1845.

the political climate and the behaviour of other actors. This mix of approaches is part of what makes judicial dialogue in the EU both interesting and complicated.

## 1.7 Working Framework for Analysing Judicial Dialogue in the EU

In this last part of the chapter I try to pull things together, even though it never feels completely neat. The earlier sections introduced all the ideas I think I need, or at least the ones I can handle here. I went through the metaphor of judicial dialogue, the different ways courts talk to one another and the reasons national judges turn to the Court of Justice. I also sketched those three broad visions of the EU legal order. None of that settled anything permanently. It just helped me see what kind of framework I can actually work with. So now I'm trying to set out something simple that I can carry into the case studies without getting lost.

For this thesis, I'm using the idea of judicial dialogue in a rather narrow way. I know the concept is bigger in the literature but I only need it to point at how courts in the EU communicate about EU law. Most of this happens through the preliminary reference procedure, because that is the clearest way courts "speak" to the Court of Justice. After that the national rulings following the Court's answers become part of the same conversation. Sometimes courts throw in other signals, like cross-citations or comments about national identity and those matter too but the core remains the same. I just need a definition that lets me pick cases and read them with some structure, nothing more ambitious.

The basic thing I analyse is what I call a dialogue episode. The reason for this is that a single judgment doesn't really tell the story. Courts usually answer each other over several steps, so an episode is just a small cluster of decisions that belong together. Maybe a national court sends a reference, the Court of Justice replies and then the national court or another court reacts again. Sometimes the trail gets a bit messy but that is fine. When read together, these decisions show more clearly what is going on between the courts.

When I read an episode, I look at a few aspects that tend to reappear. The first is simply who is talking and through which channel. Is it a formal reference? Is it a constitutional court making strong statements? Is it a lower court quietly asking for guidance? These details help me situate the episode, because the tone and the posture already shift depending on who is involved.

Then I look at how the case is introduced. Sometimes a court seems genuinely unsure about EU law and just wants an answer. At other times the court seems to be defending something a constitutional principle, a political concern, or maybe its own authority. It is not my goal to read minds but certain phrases usually reveal how the judge wants the problem to appear. So I try to stick to what the text itself suggests.

Next comes the Court of Justice's reasoning. This part varies a lot. In some rulings the Court writes in broad, general language that pushes EU law a bit further. In other rulings it sounds more cautious, or even slightly apologetic, acknowledging national sensitivities or limits of EU competences. These choices matter because they shape how much room national courts think they have afterwards. A sweeping judgment leaves one kind of space and a narrow one leaves another.

After that, I pay attention to what happens back at the national level. Sometimes the court simply applies the ruling and that is the end of it. In other cases the court tries to squeeze the ruling into its own doctrinal framework, or it limits its effect. And sometimes a national court pushes back more strongly, questioning the Court of Justice's interpretation or raising constitutional barriers. The interesting part is usually in the details of how the judge phrases things.

All of this helps me place each episode into one of three broad types cooperative, negotiated, or conflictual. Cooperative episodes are the easy ones everything works more or less as the textbooks say. The court asks, the Court of Justice answers and the national court follows. Negotiated episodes feel more delicate. Courts recognise each other's authority but at the same time test boundaries and insist on certain balances. Conflictual episodes are the ones where resistance becomes visible, sometimes openly, sometimes politely but unmistakably. Even then, the exchange may still stay within formal procedures which is one of the strange features of judicial dialogue in the EU.

These categories are only guides, not strict boxes. Most episodes hover somewhere between them and courts themselves may shift tone over time. The dimensions I described above are also just reading tools; they are not part of any statistical exercise. I am not trying to count how many cooperative or conflictual episodes each Member State has. I only want to describe a handful of episodes in a way that makes their similarities and differences easier to see.

In the end, this framework is simply a bridge between the abstract discussion in this chapter and the concrete case studies that come later. The definition of dialogue comes from the earlier conceptual work. The attention to channels follows from the mapping of communication forms. The focus on initiative and follow-up reflects the explanations about why courts behave as they do. And the three types of episodes echo the three visions of the EU legal order I described earlier. That is really all the framework is meant to do help me move from theory to practice and show how different courts across Europe cooperate, hesitate, negotiate and sometimes push back when dealing with EU law.

## Chapter 2: Patterns of Conflict in Judicial Dialogue

### 2.1 Judicial dialogue turns into conflict

The previous chapter above provided the basic framework for thinking about judicial dialogue in the EU. The point was that not every interaction between national courts as well as the Court of Justice looks the same. Some exchanges are cooperative as well. In these cases the court asks a clear question. Then Luxembourg answers it and the national court applies the ruling without much difficulty<sup>45</sup>. Others are more negotiated, where both sides recognise that sensitive constitutional issues are in play and try to reach some sort of middle ground. And then there are the conflictual episodes which is what this chapter deals with. These are moments where national courts openly resist the Court of Justice, question its interpretations or decide not to give full effect to its rulings. The intention is not to claim that conflict is the default state of affairs but to see it as one possible mode of dialogue. From this perspective, conflict is not the opposite of dialogue<sup>46</sup>. Even when courts criticise or refuse to follow the Court of Justice, they usually do so using legal arguments and concepts that both sides share<sup>47</sup>. They invoke Treaty provisions, constitutional principles and case law. They justify their position within the language of EU law itself. So conflict still belongs to the broader conversation about what integration means and where the limits of EU authority lie. Instead of treating these episodes as breakdowns, this chapter treats them as moments where courts articulate the boundaries of their acceptance of EU law. To study this type of interaction, it helps to spell out what counts as conflictual dialogue. One obvious sign is the use of *ultra vires* review, where a court claims that an EU act or judgment goes beyond the competences granted by the Treaties and refuses to apply it<sup>48</sup>. A related sign is the use of constitutional identity review, where courts argue that certain core principles cannot be overridden by EU obligations. Another marker is refusal to implement a Court of Justice ruling or giving it such a narrow reading that most of its practical effect disappears. Sometimes the tone alone gives it away calling a CJEU judgment

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<sup>45</sup> KOMÁREK, J. (2014). National Constitutional Courts and the European Court of Justice: Cooperation or Conflict? *International Journal of Constitutional Law*, 12(3), pp. 548–575.

<sup>46</sup> BVERFG, Judgment of 5 May 2020, 2 BvR 859/15 (PSPP).

<sup>47</sup> KERSCH, K. I.; FLEMING, J. E. (2017). The Limits of Constitutional Identity. *German Law Journal*, 18(7), pp. 1685–1704.

<sup>48</sup> MADURO, M. P. (2012). A Constitution in the Making: Interpreting the European Charter of Fundamental Rights. In: DOUGLAS-SCOTT, S.; HATZIS, A. (eds.) *Research Handbook on EU Law and Human Rights*. Cheltenham: Edward Elgar, pp. 29–48.

“objectively arbitrary” or stating that EU case law is “not binding” in certain respects signals a deeper challenge to Luxembourg’s authority.

## 2.2 Competences and monetary policy

Tension between the Court of Justice and national constitutional courts is especially visible when the dispute is about who has the power to act in the first place <sup>49</sup>. Supremacy assumes that once a question falls within EU law, the Court of Justice has the last word and national courts must follow. At the same time, the Treaties are based on conferral the Union only has the powers that the Member States have agreed to give it. This leaves a grey zone. When national courts think the Union has crossed that line, they sometimes claim a residual right to say “so far but no further.” Ultra vires review is the main tool for that <sup>50</sup>. In an ultra vires finding a national court says that an EU act, or even a judgment of the Court of Justice, goes beyond the competences conferred by the Treaties and therefore cannot be applied at home. Courts usually present this as an exceptional safety valve. They say it will be used only in extreme cases. But once the safety valve exists, primacy is no longer absolute. It works only within a sphere that national constitutions regard as legitimately transferred.

These questions are most sensitive where core state powers are involved. Monetary policy, budget choices, pensions and social security all have strong links to democratic accountability. Voters hold governments responsible for inflation, pensions and economic stability. So when the Union, or its institutions, act in these areas, national courts may be quicker to defend domestic space. Conflicts about competences and monetary policy are therefore not just technical. They are also about who carries political responsibility for economic decisions. The PSPP saga shows how this plays out around the European Central Bank. After the euro crisis, the ECB launched the Public Sector Purchase Programme, buying large amounts of government bonds on secondary markets to fight low inflation. Critics in Germany and elsewhere saw this as coming too close to monetary financing and as blurring the line between Union monetary policy and national economic policy. The legality of PSPP reached Luxembourg through a reference from the German Federal Constitutional Court <sup>51</sup>. In Weiss, the Court of Justice held that PSPP was monetary policy. It focused on the objective of

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<sup>49</sup> BVERFG, Judgment of 5 May 2020, 2 BvR 859/15 (PSPP).

<sup>50</sup> MAYER, F. C. (2014). Rebels Without a Cause? A Critical Analysis of the German Constitutional Court’s OMT Reference. *German Law Journal*, 15(2), pp. 111–146.

<sup>51</sup> CASE C-399/09 Landtová [CJEU], 22 June 2011, ECLI:EU:C:2011:415.

price stability and treated secondary-market bond purchases as a monetary tool, especially in exceptional circumstances. It then carried out a proportionality review but with a light touch<sup>52</sup>. The Court relied heavily on the ECB's own assessment and emphasised the bank's broad discretion in technical economic questions. Safeguards such as purchase limits were mentioned and overall the programme was found compatible with the Treaties. For the German Constitutional Court this was not enough. In its final PSPP judgment. It accepted that the Court of Justice interprets EU law but insisted that the Treaties had not removed all national control over the limits of integration<sup>53</sup>. It accused the Court of Justice of failing to conduct a proper proportionality review and used unusually harsh language, calling Weiss "not comprehensible" and "objectively arbitrary." On that basis, it held that the judgment was ultra vires.

The German court then applied its own proportionality test. It accepted that price stability is a legitimate aim but argued that the ECB and the Court of Justice had not seriously weighed side effects on savers, financial markets and incentives for governments. It concluded that German authorities, including the Bundesbank, could only stay in the programme if the ECB produced a fuller proportionality analysis. Otherwise the Bundesbank would have to prepare to withdraw. The PSPP judgment was unprecedented in openly refusing to follow a specific judgment of the Court of Justice. At the same time, it left a route back. It did not call into question all past purchases or future bond-buying programmes in general<sup>54</sup>. It left the door open if better reasoning was provided. That is what later happened the ECB supplied further documents. The German government and parliament expressed support for the ECB and for EU primacy. the Bundesbank stayed in. The doctrinal damage to primacy remained but the practical crisis was defused. The Slovak Pensions episode shows a sharper version of the same basic conflict. After Czechoslovakia broke up, the Czech Republic created pension supplements for some people who had worked mainly in what became Slovakia but now lived in the Czech Republic. The idea was to offset differences between the two new systems<sup>55</sup>. The Czech Constitutional Court saw this as an internal matter about equality and social justice. But the Czech Supreme Administrative Court sent a reference to the Court of Justice.

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<sup>52</sup> MADURO, M. P. (2012). A Constitution in the Making: Interpreting the European Charter of Fundamental Rights. In: DOUGLAS-SCOTT, S.; HATZIS, A. (eds.) Research Handbook on EU Law and Human Rights. Cheltenham: Edward Elgar, pp. 29–48.

<sup>53</sup> CZECH CONSTITUTIONAL COURT, Judgment Pl. ÚS 5/12, 31 January 2012 (Slovak Pensions).

<sup>54</sup> DAWSON, M.; BOBIC, A. (2019). Quantitative Easing and the European Court of Justice: Legal Interpretation in an Economic Emergency. *Common Market Law Review*, 56(5), pp. 1501–1534.

<sup>55</sup> GRIMM, D. (2017). *The Constitution of European Democracy*. Oxford: Oxford University Press, pp. 131–147.

In *Landtová*, the Court of Justice brought the case under EU law. It treated it as an issue linked to free movement and non-discrimination and held that the scheme could disadvantage Slovak nationals. In effect, it used EU non-discrimination rules to scrutinise a sensitive question of state succession and social policy<sup>56</sup>. The Czech Constitutional Court reacted very strongly. In its follow-up judgment, it held that *Landtová* was ultra vires. It argued that the Treaties did not give the Union power to decide how the successor states of Czechoslovakia should share responsibility for past insurance periods<sup>57</sup>. This was framed as a matter of sovereignty and democratic self-determination. The court said the Court of Justice had misused EU concepts to regulate an issue it saw as lying outside the internal market. It refused to apply the *Landtová* ruling and instructed Czech authorities to follow its own earlier case law instead. The style of the Czech judgment was openly confrontational. It did not just disagree on the scope of non-discrimination. It presented the Court of Justice's reasoning as a breach of conferral and as a threat to the Czech constitutional order. It stressed its own role as protector of rights and social solidarity in a field shaped by the socialist past and the break-up of the federation. The message was that decisions about how to correct those past inequalities should remain with domestic institutions, not with Luxembourg.

Read together, *PSPP* and *Slovak Pensions* show both common ground and sharp differences. In both, the national courts saw core state powers at stake. Where monetary policy in Germany, pension design and historical responsibility in the Czech Republic<sup>58</sup>. In both, the Court of Justice adopted a reading of the Treaties that brought the contested measures within EU law. And in both, the national courts used ultra vires review to draw a line around what they considered non-transferable parts of their constitutional order. But the tone and consequences differ. The German court presented ultra vires review as a last resort and framed its criticism as a demand for a more serious proportionality analysis, not a denial that the ECB can ever buy bonds. It also signalled that the conflict could be solved with better reasoning. The Czech court, by contrast, treated the issue as entirely outside EU competence and offered no real path back. Its ultra vires finding looked more like a straightforward assertion of constitutional supremacy.

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<sup>56</sup> GRIMM, D. (2017). *The Constitution of European Democracy*. Oxford: Oxford University Press, pp. 131–147.

<sup>57</sup> CZECH CONSTITUTIONAL COURT, Judgment Pl. ÚS 5/12, 31 January 2012 (*Slovak Pensions*).

<sup>58</sup> KIRCHNER, S. (2021). *Ultra Vires Review, Constitutional Identity and the Limits of Judicial Cooperation in the EU*. *European Constitutional Law Review*, 17(3), pp. 511–530.

These differences affect how much room remains for future dialogue. In PSPP, the mix of sharp criticism and conditional acceptance allowed political and institutional actors to calm the situation. In Slovak Pensions, the refusal to engage further with Luxembourg left little space for renewed communication<sup>59</sup>. The reference procedure which was meant to clarify the EU dimension of the case, ended up provoking a firm national backlash. Both conflicts suggest that primacy is at its weakest where courts think the Union is encroaching on core state functions or historically loaded distributive choices<sup>60</sup>. From Luxembourg's perspective, a firm reading of the Treaties is needed to maintain a coherent legal order. From national constitutional courts' perspective, that firmness can look like overreach, especially when it relies on broad competence readings or deferential review of powerful supranational institutions. At the same time, neither episode amounts to a complete collapse of judicial dialogue. PSPP shows that even after an ultra vires finding, practical solutions can be found. Slovak Pensions was more rigid but did not lead to a general Czech boycott of preliminary references. These are moments where the boundaries of integration are tested and renegotiated, not exits from the system<sup>61</sup>. The next sections turn to other types of conflict, where the friction is less about who controls monetary policy or pensions and more about the reach of general principles and the protection of rights in private and criminal law.

### 2.3 General principles and horizontality

Conflicts about competences and monetary policy are only one side of resistance. There is another, quieter but very important line of confrontation which concerns the reach of general principles of EU law and how far they affect disputes between private parties. Here the question is less who has the power to act? and more how far can judge-made norms change the result in an ordinary piece of litigation?

Over the last two decades the Court of Justice has treated some general principles, especially non-discrimination on grounds of age, as binding not only on states but also on private employers and other private actors. In *Mangold* and later in *Kücükdeveci*, the Court said that this principle was clear and strong enough to justify disapplying national legislation

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<sup>59</sup> CZECH CONSTITUTIONAL COURT, Judgment Pl. ÚS 5/12, 31 January 2012 (Slovak Pensions).

<sup>60</sup> DAWSON, M.; BOBIC, A. (2019). Quantitative Easing and the European Court of Justice: Legal Interpretation in an Economic Emergency. *Common Market Law Review*, 56(5), pp. 1501–1534.

<sup>61</sup> KIRCHNER, S. (2021). Ultra Vires Review, Constitutional Identity and the Limits of Judicial Cooperation in the EU. *European Constitutional Law Review*, 17(3), pp. 511–530.

even in purely horizontal disputes<sup>62</sup>. The Court relied on unwritten general principles and, later, on the Charter, rather than on detailed secondary legislation. That pushed the law in a more constitutional direction and made some national courts uneasy.

In *Mangold*, the case involved a fixed-term employment contract that used a German rule allowing less favourable treatment of older workers. The Court of Justice held that the principle of non-discrimination on grounds of age was part of EU general principles, had to be respected even before the directive's implementation deadline and required the national court to set aside the conflicting statute. The dispute was between an individual and a private employer but the Court still gave the principle horizontal effect. In *Kücükdeveci* the Court repeated and reinforced this reasoning, now invoking both general principles and the Charter<sup>63</sup>.

This approach triggeres several concerns. One is democratic legitimacy. General principles are not laid out in the Treaties in the same way as legislation agreed by the Council and Parliament. They are identified and shaped through case law. So when the Court uses them to override national statutes in horizontal disputes, critics say it is acting almost like a legislator, without the same political accountability. Another concern is the internal separation of powers in Member States. National judges are being asked to disapply clear statutes adopted by parliaments, not because a directive has not been implemented but because the Court has read a broad principle in a particular way. Finally, there is foreseeability. Employers and other private actors organise their affairs according to written law. If that law can later be removed in court because it conflicts with a general principle that has been clarified only in later case law, parties may face liabilities they could not reasonably predict.

*Dansk Industri (Ajos)* is the best example of how this tension can lead to open but very polite, resistance<sup>64</sup>. The case in Denmark concerned an employee, Rasmussen, who did not receive a severance allowance because under Danish law employees entitled to an occupational pension were excluded. This rule reflected a domestic policy choice. But it also meant that older workers eligible for a pension could be treated worse than younger workers in the same position. At EU level, the framework was the directive on equal treatment in employment and occupation. The Court of Justice had already ruled in *Ole Andersen* that a similar exclusion

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<sup>62</sup> CASE C-144/04 *Mangold* [CJEU], 22 November 2005, ECLI:EU:C:2005:709.

<sup>63</sup> CASE C-555/07 *Kücükdeveci* [CJEU], 19 January 2010, ECLI:EU:C:2010:21.

<sup>64</sup> CASE C-441/14 *Dansk Industri (Ajos)* [CJEU], 19 April 2016, ECLI:EU:C:2016:278.

from severance pay was unjustified age discrimination<sup>65</sup>. In *Dansk Industri*, the Danish Supreme Court had to decide whether it must set aside the national rule in a dispute between private parties. Since directives have no direct horizontal effect, the Court of Justice relied on the *Mangold* line. It held that the principle of non-discriminations on grounds of age, now expressed in Article 21 of the Charter, is a general principle of EU law that also applies in relationships between private parties. On that basis, it said national courts must ensure the full effectiveness of that principle and disapply conflicting national provisions even in purely horizontal cases. In practice this gave the principle something very close to horizontal direct effect and required the Danish court to disregard the statute and grant Rasmussen severance pay. When the case went back to Copenhagen, the Supreme Court was in a bind. Denmark recognises the primacy of EU law and the authority of the Court of Justice<sup>66</sup>. But Danish constitutional practice puts strong weight on legal certainty and the idea that changes to individuals' legal positions should be made openly by the legislature or through clear treaty rules, not through judicial development of general principles.

In its final judgment the Supreme Court acknowledged that Denmark owed an obligation to the Union to comply with *Dansk Industri* and to adjust its law for the future<sup>67</sup>. But it refused to disapply the statute in the specific cases. It reasoned that both the employer and the employee had organised their relationship on the basis of the existing Danish rules which were unambiguous. To impose a different outcome retrospectively, relying on a general principle developed by the Court of Justice, would in its view contradict legal certainty and foreseeability. The court insisted that private parties must be able to trust clear statutory wording until the legislature changes it<sup>68</sup>. The Supreme Court also hinted at the limits of the transfer of powers under the Danish constitution. It noted that competences can be delegated to international organisations but did not accept that this includes allowing the Court of Justice to impose horizontal obligations on private parties that cut directly against clear national statutes in areas where the Treaties do not explicitly require such effect. The implication was that the Court of Justice had gone beyond what Denmark had agreed to. The Danish court did

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<sup>65</sup> DOUGAN, M. (2017). *The Quiet Revolution: Direct Effect, Indirect Effect and the Changing Nature of EU Legal Integration*. *Cambridge Yearbook of European Legal Studies*, 19, pp. 1–32.

<sup>66</sup> LENAERTS, K. (2015). *The Court of Justice and the Protection of Fundamental Rights in the EU: The Mangold Legacy*. *European Constitutional Law Review*, 11(2), pp. 247–265.

<sup>67</sup> CASE C-144/04 *Mangold* [CJEU], 22 November 2005, ECLI:EU:C:2005:709.

<sup>68</sup> LENAERTS, K. (2015). *The Court of Justice and the Protection of Fundamental Rights in the EU: The Mangold Legacy*. *European Constitutional Law Review*, 11(2), pp. 247–265.

not use the language of *ultra vires* or attack Luxembourg in strong terms<sup>69</sup>. It simply declined to follow the judgment in the concrete case while stressing that Danish law should be amended for the future.

So the conflict here looked very different from PSPP or Slovak Pensions. There were no dramatic condemnations. No talk of arbitrariness or of the Court losing legitimacy. The Danish Supreme Court remained measured and respectful in tone. Yet the substance was unmistakable the Court of Justice's ruling was not implemented for the claimant. In that sense, *Dansk Industri* shows that conflictual dialogue can be quiet and courteous on the surface while being quite sharp underneath. The case also tells us something more general<sup>70</sup>. National courts seem more inclined to push back when the Court of Justice uses general principles to impose new duties on private parties that go beyond the wording of secondary law. The disagreement is then framed not as a fight about the validity of a directive or about competence but about what counts as a proper source of binding norms. The Danish court did not dispute that age discrimination is wrong<sup>71</sup>. It questioned whether a judge-made principle could, on its own, overturn a clear statute between two private parties.

There is also the broader tension between integration through principles and domestic ideas of democratic accountability. From Luxembourg's perspective, using general principles and the Charter helps fill legislative gaps and protect rights more effectively. From a national constitutional perspective, it can look as if the Court of Justice is bypassing parliaments and moving into a legislative role. That perception is sharper in horizontal situations, where private parties bear the immediate burden and legal certainty is at stake<sup>72</sup>. Compared with the conflicts about competences and monetary policy, the institutional stakes here are different but the underlying concern is similar. In PSPP and Slovak Pensions, national courts defended control over core state functions like monetary policy and pensions<sup>73</sup>. In *Dansk Industri*, the focus is on the reach of judge-made law into private relationships and on the internal balance between courts and legislatures. In one setting, resistance takes the form of *ultra vires* findings. In the

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<sup>69</sup> DOUGAN, M. (2017). *The Quiet Revolution: Direct Effect, Indirect Effect and the Changing Nature of EU Legal Integration*. Cambridge Yearbook of European Legal Studies, 19, pp. 1–32.

<sup>70</sup> CRAIG, P.; DE BÚRCA, G. (2021). *EU Law: Text, Cases and Materials*. 7th ed. Oxford: Oxford University Press, pp. 401–425; 652–670.

<sup>71</sup> MUIR, E. (2011). *Of Ages in – and Edges of – EU Law*. *Common Market Law Review*, 48(1), pp. 39–62.

<sup>72</sup> BARNARD, C.; PEERS, S. (eds.) (2020). *European Union Law*. Oxford: Oxford University Press, pp. 191–203; 291–308.

<sup>73</sup> SCHWARZE, J.; BECKER, U.; HATJE, A.; SCHOO, J. (eds.) (2018). *EU Administrative Law*. 3rd ed. Baden-Baden: Nomos, pp. 689–712.

other, it appears through appeals to legal certainty and the logic of the transfer of powers. In both, national courts are trying to protect what they see as core elements of their constitutional and legal culture.

## 2.4 Criminal legality and fundamental rights

Conflicts about criminal legality and fundamental rights raise a different kind of problem from competences or horizontality<sup>74</sup>. Here the core issue is whether the pressure to make EU law effective can sit alongside strong national guarantees in criminal law. The principle of legality says that crimes and penalties must be clearly defined in advance. People should be able to know, before they act, what is punishable and what is not. In many European systems this principle is treated as almost untouchable, tied to human dignity and the rule of law. Anything that looks like retroactive punishment, or judges stretching criminal rules by analogy, is treated with suspicion.

At EU level, Article 325 TFEU pulls in the opposite direction. It tells Member States to protect the Union's financial interests and to fight fraud with effective and dissuasive measures. It also insists that protection of EU finances should not be weaker than protection of national finances. Over time the Court of Justice has read this as a strong effectiveness demand. National rules on limitation periods and procedures must not make serious fraud practically unpunishable<sup>75</sup>. So you have a structural tension the Union wants tougher action on fraud but national constitutions restrict how far criminal rules can be changed or reinterpreted to the detriment of defendants. The Taricco saga in Italy sits right in the middle of this tension. The case concerned serious VAT fraud. Italian law used relatively short limitation periods and criminal proceedings in complex economic cases often dragged on<sup>76</sup>. In practice, many cases went time-barred before a final judgment. A criminal court dealing with a VAT fraud case asked the Court of Justice whether this limitation regime was compatible with Article 325. In Taricco I, the Court of Justice answered in a very direct way<sup>77</sup>. It said that if the national rules on limitation systematically prevent effective and dissuasive penalties for serious fraud affecting the EU's financial interests, those rules must be disapplied. The national court was

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<sup>74</sup> MANGOLDT, H. von; KLEIN, F.; STARCK, C. (eds.) (2018). *European Constitutional Law*. 4th ed. Munich: C.H. Beck, pp. 523–544.

<sup>75</sup> DE WITTE, B.; MAYORAL DÍAZ-ASENSIO, J. A.; JAREMBA, U. (eds.) (2016). *National Courts and EU Law: New Issues, Theories and Methods*. Cheltenham: Edward Elgar, pp. 145–165.

<sup>76</sup> CASE C-105/14 Taricco I [CJEU], 8 September 2015, ECLI:EU:C:2015:555.

<sup>77</sup> ITALY, Constitutional Court, Order No. 24/2017, 23 January 2017 (incidental review following Taricco I).

told to set aside the limitation provisions, as far as necessary, so that sanctions could still be imposed, as long as the offences were not already time-barred under the old rules. The Court treated limitation periods mainly as procedural tools that could not be allowed to undermine EU obligations. It recognised legality in principle but concluded that disapplication did not breach it, so long as the definition of the offence and the type of penalty stayed the same.

For Italian lawyers and judges this was hard to accept. In Italy, limitation rules are widely regarded as part of substantive criminal law, not just procedure. Changing them for past conduct looks very close to retroactivity<sup>78</sup>. The context also mattered Italy had a long history of scandals about impunity in complex economic crime. At the same time, the Constitutional Court had built a strong line of case law insisting on strict legality and on the limits of judicial creativity in criminal matters. Ordinary judges were therefore caught between Taricco I and the Constitution. The Italian Constitutional Court stepped in through an incidental review. Ordinary courts asked whether applying Taricco I would violate the Constitution<sup>79</sup>. In Order 24/2017, the Constitutional Court made its doubts explicit. It stressed that limitation periods form part of substantive criminal law in Italy and that asking judges to ignore them for offences committed in the past could amount to retroactive punishment. It also found the Taricco criteria vague references to “serious fraud” and “a considerable number of cases” left too much room for judicial discretion.

In that order, the Court framed the problem in identity terms. It suggested that the principle of legality in criminal matters belongs to the core of the Italian constitutional order. If pushed, it was prepared to use its counter-limits doctrine to protect it. But instead of immediately blocking EU law, it chose to send a new preliminary reference. It asked the Court of Justice to clarify whether Article 325 really required disapplication even when that would clash with national understandings of legality. The tone was firm but the move was dialogical. The Court was basically saying we are ready to resist but we invite you to adjust first. In Taricco II, the Court of Justice softened its stance<sup>80</sup>. It repeated that Member States must protect the Union’s financial interests effectively and that limitation rules cannot make serious

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<sup>78</sup> CASE C-42/17 Taricco II [CJEU], 5 December 2017, ECLI:EU:C:2017:936.

<sup>79</sup> LUPO, N.; PICCIRILLI, G. (2019). The Italian Constitutional Court and the Taricco Saga: A Dialogue with the Court of Justice. *European Constitutional Law Review*, 15(1), pp. 1–28.

<sup>80</sup> LENAERTS, K.; GUTIÉRREZ-FONS, J. A. (2020). *EU Constitutional Law*. Oxford: Oxford University Press, pp. 412–435; 508–522.

fraud prosecution impossible. But it now accepted that legality imposes real limits<sup>81</sup>. If disapplying the limitation rules would lead to an unforeseeable extension of criminal liability, or to retroactive application of harsher rules, then national courts are not required to do it. The Court also recognised that in some systems limitation rules sit inside substantive criminal law and are therefore especially sensitive. This gave the Italian Constitutional Court room to manoeuvre<sup>82</sup>. In its final decision, No 115/2018, it read Taricco II as allowing Italian courts not to disapply the limitation rules where legality would be breached. It concluded that, in Italy, the way limitation periods worked, combined with the Taricco criteria, did create problems of foreseeability and retroactivity for offences already committed. Judges therefore could not set the rules aside without violating the Constitution<sup>83</sup>. At the same time, the Court did not formally invoke counter limits to reject EU law. Instead, it portrayed its stance as an application of the refined EU standard. The result was a kind of face-saving compromise. The Court of Justice had adjusted its reasoning to recognise criminal legality more clearly. The Constitutional Court could claim that it had defended the core of its constitutional identity without issuing an explicit “no” to EU law<sup>84</sup>. The limitation rules remained applicable for past conduct, while pressure remained on the Italian legislature to reform them for the future.

The Taricco saga has a very dialectical feel. It starts with a strong effectiveness demand from Luxembourg, followed by a strong constitutional reaction from Rome. Then the two courts use the preliminary reference procedure to recalibrate their positions. Taricco I, Order 24/2017, Taricco II and Judgment 115/2018 together read like a conversation rather than a one-way instruction. Each court shifts a bit, without fully surrendering its own priorities<sup>85</sup>. Analytically, Taricco is a hybrid conflict episode. It is clearly tense and rooted in deep constitutional concerns but it does not end in a clean break or an ultra vires ruling. Instead, the preliminary reference mechanism is used twice first by an ordinary court to seek guidance and then by the Constitutional Court to challenge and refine that guidance when it proves

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<sup>81</sup> JACOBS, A. (2018). Criminal Law, Legal Certainty and the Taricco Judgments. *Common Market Law Review*, 55(6), pp. 1781–1812.

<sup>82</sup> LENAERTS, K.; GUTIÉRREZ-FONS, J. A. (2020). *EU Constitutional Law*. Oxford: Oxford University Press, pp. 412–435; 508–522.

<sup>83</sup> CASE C-399/11 Melloni [CJEU], 26 February 2013, ECLI:EU:C:2013:107.

<sup>84</sup> LIGETI, K.; GRASSO, G. (eds.) (2017). *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice*. The Hague: Eleven International Publishing, pp. 231–260; 311–335.

<sup>85</sup> JACOBS, A. (2018). Criminal Law, Legal Certainty and the Taricco Judgments. *Common Market Law Review*, 55(6), pp. 1781–1812.

constitutionally problematic<sup>86</sup>. This shows that preliminary references can reopen a conversation and not just start one. The saga also marks a limit to how far the Court of Justice can push effectiveness in criminal matters. Taricco II suggests an awareness that insisting on disapplication at all costs, in an area where legality is treated as a supreme principle, can backfire. Effectiveness still matters but it is not absolute. This is a different dynamic from Dansk Industri, where the Court did not significantly tone down its use of general principles in a horizontal setting. Finally, Taricco links back to other rights cases such as Melloni<sup>87</sup>. In Melloni, the Spanish Constitutional Court eventually accepted that EU law could require a lower level of protection in the specific setting of the European arrest warrant in order to preserve uniformity<sup>88</sup>. In Taricco, by contrast, the Italian Constitutional Court managed to secure an interpretation that preserved its high standard of criminal legality. Together, these cases suggest that conflicts about fundamental rights inside the EU can lead in different directions. Sometimes national courts adjust to EU law; sometimes the Court of Justice adjusts to national constitutional traditions. The outcome depends on the field, the right at stake and the willingness of both sides to keep talking rather than to break.

## 2.5 Systemic and rule-of-law conflicts

The conflicts discussed so far took place in legal systems that were, broadly speaking, still functioning normally<sup>89</sup>. Courts disagreed about competences, proportionality or general principles but they shared a basic commitment to judicial independence and the rule of law. Systemic and rule-of-law conflicts are different. Here the clash between national courts and the Court of Justice sits inside a broader process of backsliding, where governments weaken judicial independence and use constitutional rhetoric to shield themselves from scrutiny<sup>90</sup>. “Dialogue” in this environment starts to look distorted. References and judgments still occur but they happen against a backdrop where courts cannot act freely.

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<sup>86</sup> FICHERA, M. (2018). *The Foundations of the EU as a Polity: Law, Governance and Political Identity*. Cheltenham: Edward Elgar, pp. 156–178.

<sup>87</sup> DE WITTE, B.; MICKLITZ, H.-W. (eds.) (2012). *The European Court of Justice and the Autonomy of EU Law*. Baden-Baden: Nomos, pp. 261–284.

<sup>88</sup> FICHERA, M. (2018). *The Foundations of the EU as a Polity: Law, Governance and Political Identity*. Cheltenham: Edward Elgar, pp. 156–178.

<sup>89</sup> BÁNKUTI, M.; HALMAI, G.; SCHEPPELE, K. L. (2012). *From Separation of Powers to a Government Without Checks: Hungary’s Old and New Constitutions*. In: TARR, G. A. (ed.) *Constitutionalism and the Rule of Law*. Budapest: CEU Press, pp. 237–268.

<sup>90</sup> PECH, L.; KOCHENOV, D. (2021). *Respect for the Rule of Law in the Case Law of the Court of Justice: A Casebook Overview*. *European Constitutional Law Review*, 17(1), pp. 1–50.

Unlike PSPP or Taricco, these cases involve politicised constitutional courts and pressure on ordinary judges. Poland and Hungary are the obvious examples. Both governments changed the composition of their constitutional courts through controversial appointments<sup>91</sup>. They introduced disciplinary tools that can be used against judges who apply EU law too robustly. At the same time, they use the language of constitutional identity and sovereignty to resist Luxembourg’s rulings. What might look like a doctrinal disagreement in another country becomes, in these settings, part of a wider struggle over whether courts can remain independent at all.

Poland shows this especially clearly. Since 2015, reforms have reshaped the judiciary the Constitutional Tribunal was packed, the Supreme Court’s retirement rules were altered and a disciplinary chamber with sweeping powers was created<sup>92</sup>. The Court of Justice responded with several judgments under Article 19 TEU, insisting that EU law requires an independent judiciary. Interim measures suspended parts of the disciplinary regime. Against this background came K 3/21. The Polish government asked the Constitutional Tribunal to review Treaty provisions and Court of Justice judgments on judicial independence. The Tribunal held that, insofar as they allow Luxembourg to review the organisation of the Polish courts, those Treaty provisions are unconstitutional. The judgment used sweeping language about sovereignty and identity. It portrayed the EU as intruding into an area the state controls absolutely<sup>93</sup>. But unlike the cautious identity reasoning of Taricco, this read more like political rhetoric wrapped in legal form. It gave the government a legal excuse to ignore adverse EU rulings. When one looks at the bigger picture, the systemic conflict becomes clearer<sup>94</sup>. The capture of the Constitutional Tribunal removes an internal check. The disciplinary chamber intimidates ordinary judges<sup>95</sup>. And the invocation of constitutional identity blocks external checks. Technically, judicial dialogue continues but the conditions for meaningful dialogue

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<sup>91</sup> KOVÁCS, K.; SCHEPPELE, K. L. (2018). The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union. *European Law Journal*, 24(3), pp. 256–278.

<sup>92</sup> CASE C-791/19 *Commission v Poland (Disciplinary Regime for Judges)* [CJEU], 15 July 2021, ECLI:EU:C:2021:596.

<sup>93</sup> BÁNKUTI, M.; HALMAI, G.; SCHEPPELE, K. L. (2012). From Separation of Powers to a Government Without Checks: Hungary’s Old and New Constitutions. In: TARR, G. A. (ed.) *Constitutionalism and the Rule of Law*. Budapest: CEU Press, pp. 237–268.

<sup>94</sup> SZENTE, Z. (2017). Challenging EU Authority in the Name of Constitutional Identity: The Hungarian Constitutional Court. *German Law Journal*, 18(7), pp. 1641–1660.

<sup>95</sup> KOVÁCS, K.; SCHEPPELE, K. L. (2018). The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union. *European Law Journal*, 24(3), pp. 256–278.

independence, trust, shared standards have eroded. Identity language no longer functions as a pluralist balancing tool then it becomes a shield for illiberal reforms.

Romania offers a different but related example. In *Euro Box Promotion*, the case arose from criminal proceedings involving VAT fraud and corruption<sup>96</sup>. The Romanian Constitutional Court had issued decisions that restricted investigations by tightening rules on evidence and narrowing offences. Ordinary judges were then pulled between two obligations: the Constitutional Court's rulings which bind everyone and EU law's demand for effective protection of the Union's financial interests. The Court of Justice stepped in. It held that national judges must disapply constitutional court decisions if those decisions prevent the effective prosecution of serious fraud and breach Article 325 TFEU<sup>97</sup>. This empowered ordinary judges as EU courts but immediately placed them in conflict with their own Constitutional Court. The Romanian court insisted that its decisions remain binding and that lower courts cannot ignore them. Judges were therefore caught in an impossible position: follow EU law and risk disciplinary action, or follow domestic hierarchy and breach EU obligations. In this context, judicial dialogue becomes something courts may avoid simply to protect themselves<sup>98</sup>. Hungary fits into this broader trend too. The Constitutional Court has used constitutional identity arguments to defend the government's stance on asylum, civil society and migration. Meanwhile, signals both legislative and judicial suggest that judges might be discouraged from referring sensitive cases to Luxembourg. Even without an explicit prohibition, the climate is enough to chill the use of Article 267. Taken together, these developments show that systemic conflicts are not just doctrinal disputes. They question whether the judicial branch can still operate independently. The preliminary reference procedure assumes that judges can freely make references and apply the answers. When disciplinary threats or politicised courts stand in the way, this assumption collapses. Judges may decide that sending a reference is simply too risky<sup>99</sup>.

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<sup>96</sup> CASE C-357/19 *Euro Box Promotion* [CJEU], 21 December 2021, ECLI:EU:C:2021:1034.

<sup>97</sup> BOBEK, M.; KOCHENOV, D. (eds.) (2020). *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*. Cambridge: Cambridge University Press, pp. 401–420 (chapter on the limits of judicial dialogue under backsliding conditions).

<sup>98</sup> BÁNKUTI, M.; HALMAI, G.; SCHEPPELE, K. L. (2012). *From Separation of Powers to a Government Without Checks: Hungary's Old and New Constitutions*. In: TARR, G. A. (ed.) *Constitutionalism and the Rule of Law*. Budapest: CEU Press, pp. 237–268.

<sup>99</sup> SZENTE, Z. (2017). *Challenging EU Authority in the Name of Constitutional Identity: The Hungarian Constitutional Court*. *German Law Journal*, 18(7), pp. 1641–1660.

These cases also expose the limits of constitutional pluralism. Pluralism requires a baseline of good-faith engagement and a shared sense of the rule of law <sup>100</sup>. It can cope with disagreement about competences or fundamental rights but it cannot function when judicial independence itself is eroded. In these situations the conflict is not really about interpreting Article 4(2) TEU or the scope of primacy. It is about whether courts can still serve as a check on political power. Where this happens, doctrinal adjustment is unlikely to help. In *Taricco*, a careful reinterpretation of effectiveness and legality allowed the conflict to settle. But in Poland or Romania, the problem is not doctrinal nuance it is political will. The Court of Justice can continue to insist on primacy and effective judicial protection <sup>101</sup>. It can try to support individual judges. But without structural reform at national level, the space for meaningful dialogue remains narrow. For the purposes of this chapter, systemic and rule-of-law conflicts represent the most severe form of conflictual judicial dialogue <sup>102</sup>. They show where the usual tools proportionality, identity balancing, interpretive compromise begin to lose their grip. The following synthesis draws these episodes together with *PSPP*, *Taricco* and *Dansk Industri* to consider the broader conditions under which dialogue can still work and the points at which it reaches its limits.

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<sup>100</sup> BOBEK, M.; KOCHENOV, D. (eds.) (2020). *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*. Cambridge: Cambridge University Press, pp. 401–420 (chapter on the limits of judicial dialogue under backsliding conditions).

<sup>101</sup> BOBEK, M.; KOCHENOV, D. (eds.) (2020). *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*. Cambridge: Cambridge University Press, pp. 401–420 (chapter on the limits of judicial dialogue under backsliding conditions).

<sup>102</sup> CASE C-791/19 *Commission v Poland (Disciplinary Regime for Judges)* [CJEU], 15 July 2021, ECLI:EU:C:2021:596.

## Chapter 3: Patterns of Cooperation and Negotiated Accommodation

### 3.1 Cooperation and negotiated accommodation

The previous chapter looked at situations where dialogue between national courts and the Court of Justice breaks down or turns into something close to open resistance. Those cases showed how disputes about competences, general principles, criminal legality or the rule of law can push national courts to limit the effect of EU law, sometimes quite bluntly. Ultra vires review, constitutional identity and quiet non-implementation all appeared as ways of marking the boundaries of constitutional acceptance<sup>103</sup>. These episodes matter because they show where the pressure points lie. But they are not the whole story. Alongside these confrontations there is a much larger body of case law in which courts manage to work together, even when the area is sensitive and where tensions get resolved before they become crises. This chapter shifts to those cooperative and accommodative episodes. It asks what judicial dialogue looks like when it actually works, or at least when early friction is brought under control<sup>104</sup>. Some cases are examples of straightforward cooperation national courts send references, get an answer and implement it without much difficulty. EU law gives them tools that fit reasonably well with their own constitutional commitments, so there is little drama. Other cases involve something more deliberate which I call negotiated cooperation. Here the situation starts tense. Courts on both sides know that constitutional values are at stake but instead of escalating they adjust their positions through their reasoning<sup>105</sup>. Sometimes national courts reinterpret parts of their constitution to preserve EU uniformity; sometimes the Court of Justice refines its approach to take domestic concerns seriously.

To analyse these dynamics it helps to draw a clearer line between cooperative dialogue and negotiated accommodation. Cooperative dialogue in a narrow sense covers cases where national courts use Article 267 as a normal tool, without signalling deeper constitutional hesitation. They raise genuine questions, they follow the answers and they do not try to undercut them<sup>106</sup>. The Court of Justice in turn gives interpretations that national courts can realistically absorb into their systems. Many cases about EU fundamental rights look like this, especially where the Charter strengthens existing national rights protections. Technical cases

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<sup>103</sup> CASE C-399/11 Melloni [CJEU], 26 February 2013, ECLI:EU:C:2013:107.

<sup>104</sup> GERMANY, Federal Constitutional Court, Judgment of 14 January 2014, 2 BvR 2728/13 (OMT reference).

<sup>105</sup> ITALY, Constitutional Court, Judgment No. 187/2016 (public school precarious-workers litigation).

<sup>106</sup> CASE C-212/97 Centros [CJEU], 9 March 1999, ECLI:EU:C:1999:126.

on succession, state aid or company law also fit here; they allow national courts to apply EU law in a predictable way. Negotiated accommodation is different. Here the risk of conflict is visible from the beginning. National courts express worries about rights, accountability or judicial guarantees<sup>107</sup>. The Court of Justice initially gives a strong reading of EU obligations. If both sides stuck firmly to their first positions, the result would be confrontation. But they do not. Each side shifts enough to make room for a compromise<sup>108</sup>. The Court of Justice clarifies limits or acknowledges the weight of national principles. National courts accept constraints they initially resisted or reinterpret their constitutions to keep the system workable. The outcome is a new balance, not a one-sided victory. Melloni, OMT and the later stages of Taricco all have this quality. As in the previous chapter, the aim is not to stamp these episodes as successes or failures but to look closely at how courts reason and how they use the tools the system gives them<sup>109</sup>. Cooperative and negotiated episodes matter because they show how integration actually happens in practice. Judges speak to domestic audiences as well as to Luxembourg and the way they explain their choices shapes the resilience of the system over time. The style of reasoning whether conciliatory, cautious or quietly adaptive is often as important as the final result.

### 3.2 Fundamental rights adjudication

Cooperation in the field of fundamental rights is a good place to see judicial dialogue working in a more constructive way but it is also where tensions show up very clearly. The EU has its own rights catalogue in the Charter and in general principles<sup>110</sup>. Member States have their own constitutional rights and long-standing doctrines on liberty, equality, due process and so on. When a case falls within the scope of EU law, national courts are supposed to apply the Charter and follow the Court of Justice. At the same time, they cannot ignore their own constitutions<sup>111</sup>. Sometimes the EU standard is higher, sometimes the national one is. The recurring question

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<sup>107</sup> CASE C-212/97 Centros [CJEU], 9 March 1999, ECLI:EU:C:1999:126.

<sup>108</sup> KOVÁCS, K.; SCHEPPELE, K. L. (2018). The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union. *European Law Journal*, 24(3), pp. 256–278.

<sup>109</sup> SZENTE, Z. (2017). Challenging EU Authority in the Name of Constitutional Identity: The Hungarian Constitutional Court. *German Law Journal*, 18(7), pp. 1641–1660.

<sup>110</sup> CRAIG, P.; DE BÚRCA, G. (2021). *EU Law: Text, Cases and Materials*. 7th ed. Oxford: Oxford University Press, pp. 395–440; 463–487.

<sup>111</sup> PEERS, S.; HERVEY, T.; KENNER, J.; WARD, A. (eds.) (2021). *The EU Charter of Fundamental Rights: A Commentary*. 2nd ed. Oxford: Hart Publishing, pp. 1451–1498 (Art. 51–53); 1580–1625 (fair trial rights).

in the background is whether EU rights are a floor that states can go above, or sometimes a ceiling that they cannot exceed.

Article 53 of the Charter is the obvious starting point. It says the Charter should not be read as restricting rights recognised in Union law, international law or Member States' constitutions <sup>112</sup>. For years many people read that as confirmation that the Charter sets a minimum and that constitutions can still go further, as long as EU law is not undermined. But the Court of Justice has also pushed hard for uniformity and effectiveness, especially in instruments like the European arrest warrant. In some harmonised areas it has said that higher national standards cannot be used if they disrupt the EU scheme. The picture is therefore more complicated Article 53 does not always guarantee that national constitutions will prevail. Rights adjudication is therefore a field of both conflict and cooperation. It becomes conflictual when national courts see EU rights as lowering national standards or as threatening something they regard as part of their constitutional identity. It becomes cooperative when EU and national rights point in the same direction and can be used together <sup>113</sup>. In many cases EU law simply gives national courts extra leverage. They can point to the Charter when resisting domestic political pressure. In others, they are asked to adapt their own case law in the name of EU uniformity. How they respond to those demands says a lot about how flexible judicial dialogue really is and about the constitutional price of cooperation.

Melloni is the classic example of negotiated cooperation in this field. It came out of Spain and the European arrest warrant. An Italian court had convicted Melloni in absentia and issued a warrant. Under Spanish constitutional case law, surrender after such a conviction was problematic unless the person either had been properly informed and represented or was guaranteed a full retrial. The EU framework decision, after amendment, offered a more limited list of refusal grounds. So the Spanish Constitutional Court asked Luxembourg two things does the framework decision let us insist on a retrial and does Article 53 allow us to apply our higher constitutional standard anyway? The Court of Justice said no on both counts. It held that the amended framework decision had fully harmonised the grounds on which an executing state

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<sup>112</sup> MITSILEGAS, V. (2016). *EU Criminal Law*. Oxford: Hart Publishing, pp. 137–168 (EAW & mutual recognition); 241–268 (fundamental rights & mutual trust).

<sup>113</sup> DE WITTE, B.; MAYORAL DÍAZ-ASENSIO, J. A.; JAREMBA, U. (eds.) (2016). *National Courts and EU Law: New Issues, Theories and Methods*. Cheltenham: Edward Elgar, pp. 167–193 (fundamental rights & judicial interaction).

could refuse surrender in in absentia cases <sup>114</sup>. Article 4a set out an exhaustive list. If those conditions were satisfied, surrender was expected. The Court then gave Article 53 a restrictive reading Member States cannot invoke higher national standards where this would compromise primacy, unity or effectiveness of EU law. In a fully harmonised area like the arrest warrant, mutual trust requires states to accept the common level of protection, even if they would normally go higher at home.

When the case went back to Madrid, the Constitutional Court could have pushed back. It could have claimed that the right at stake belonged to an untouchable constitutional core. Instead it chose to cooperate. It reinterpreted the Spanish Constitution so that a retrial was not always required in in absentia cases. It said that, in the context of the arrest warrant, it was enough that the person had been defended by a lawyer and knew about the proceedings, as required by EU law. In other words, it aligned its fair-trial standard with the framework decision for this specific field. This choice involved a real constitutional cost <sup>115</sup>. The court knowingly lowered the level of protection its own case law would otherwise have guaranteed in order to keep the European arrest warrant working smoothly. It justified this by pointing to Spain's commitment to the European project and the need for efficient judicial cooperation. The result is a clear example of negotiated accommodation that leans toward integration the national court adapts its own constitution to fit the EU scheme rather than resisting it <sup>116</sup>.

The decision has drawn criticism. Some worry that it sets a precedent where national constitutions are always expected to step back when EU law is harmonised, even where domestic rights traditions are strong. Others argue that the Court of Justice's reading of Article 53 sits awkwardly with the idea of preserving higher levels of protection. But whatever one thinks of the outcome, Melloni still stands as a strong illustration of a national court choosing cooperation over conflict and doing so in openly constitutional terms. The Italian Mascolo saga and Constitutional Court judgment no. 187/2016, show a different pattern here EU social rights and domestic constitutional principles pull in the same direction <sup>117</sup>. The background was the

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<sup>114</sup> LENAERTS, K.; GUTIÉRREZ-FONS, J. A. (2020). *EU Constitutional Law*. Oxford: Oxford University Press, pp. 508–557 (Charter methodology); 624–658 (interaction with national constitutions).

<sup>115</sup> KILPATRICK, C.; SCOTT, J. (eds.) (2021). *Contemporary Challenges in EU Law: Essays in Honour of Advocate General Sharpston*. Oxford: Hart Publishing, pp. 231–258 (mutual trust, EAW, Melloni).

<sup>116</sup> DE HERT, P.; GUTWIRTH, S.; MOSCIBRODA, A. et al. (eds.) (2018). *European Data Protection Law*. Dordrecht: Springer, pp. 57–83; 143–176 (Charter rights, proportionality, data retention).

<sup>117</sup> LYNCH FANNING, M.; O'BRIEN, N. (2022). *Information Rights in the EU: Data Protection and Digital Rights*. Cambridge: Cambridge University Press, pp. 112–139; 201–237 (Digital Rights Ireland & domestic follow-up).

long-running use of successive fixed-term contracts in the public school sector. Teachers did permanent work on temporary contracts and remained in precarious positions for years. At EU level the framework agreement on fixed-term work, attached to a directive, required Member States to prevent abuse and to provide effective remedies.

Italian courts sent references to Luxembourg asking whether this practice was compatible with EU law and what remedies were needed. In *Mascolo* the Court of Justice held that Italy's practice did violate EU law<sup>118</sup>. It stressed that using fixed-term contracts to cover permanent needs, without safeguards, was contrary to the framework agreement and that there had to be real sanctions against abuse, whether through stabilisation or compensation. The legislature responded with measures to regularise many teachers' positions and adjust damages. But the whole regime still had to be tested against the Constitution. In judgment 187/2016 the Italian Constitutional Court used both Article 117 of the Constitution which binds legislation to EU obligations and *Mascolo* as benchmarks. It declared the earlier rules unconstitutional partly because they breached EU law as interpreted by the Court of Justice. It also tied this back to domestic guarantees of equality and the right to work. Here, EU law is not treated as an intrusion. It is folded into constitutional reasoning as an ally<sup>119</sup>. The Court used EU standards to strengthen its own social rights case law and to push for reforms. It also checked the new stabilisation measures against both EU and constitutional requirements and accepted them, while insisting that effective remedies must be available when abuse persists. The end result is a "win-win" stronger protection for precarious workers, supported by both EU law and the Constitution.

Digital Rights Ireland and the data retention follow-up cases offer another example, this time in privacy and data protection. In *Digital Rights Ireland* the Court of Justice annulled the Data Retention Directive. It held that the directive's broad and undifferentiated retention of communications data, without strong safeguards, was a serious interference with privacy and data protection and lacked clear limits and protections<sup>120</sup>. With the directive gone, national data retention regimes lost their EU basis. Courts in Ireland, Austria and elsewhere were then

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<sup>118</sup> MITSILEGAS, V. (2016). *EU Criminal Law*. Oxford: Hart Publishing, pp. 137–168 (EAW & mutual recognition); 241–268 (fundamental rights & mutual trust).

<sup>119</sup> LYNCH FANNING, M.; O'BRIEN, N. (2022). *Information Rights in the EU: Data Protection and Digital Rights*. Cambridge: Cambridge University Press, pp. 112–139; 201–237 (*Digital Rights Ireland & domestic follow-up*).

<sup>120</sup> DE HERT, P.; GUTWIRTH, S.; MOSCIBRODA, A. et al. (eds.) (2018). *European Data Protection Law*. Dordrecht: Springer, pp. 57–83; 143–176 (*Charter rights, proportionality, data retention*).

asked to decide whether their domestic rules could survive. They used Digital Rights Ireland and later judgments as a framework to review their own laws and, in several cases, struck down or narrowed regimes they saw as disproportionate. Many national constitutions already recognised privacy and data protection; the Court of Justice’s case law provided a common European standard that reinforced those domestic rights<sup>121</sup>. National judges could point to EU law when cutting back on intrusive surveillance and data retention schemes. In these cases there was no clash of standards. EU rights and national rights were broadly aligned. Dialogue was cooperative almost by default the Court of Justice set a high rights bar and national courts used it to clean up their own systems. It is a clear example of EU rights empowering national judges rather than constraining them.

Seen together, Melloni, Mascolo and the data retention line show different faces of the same basic phenomenon. Where EU and national rights point in the same direction, as in Mascolo and Digital Rights Ireland, cooperation is easy and often mutually reinforcing. Courts build a thicker rights regime by combining constitutional guarantees with Charter rights and general principles. There is little tension about primacy because both sources deliver similar outcomes. Where EU and national rights diverge, as in Melloni, cooperation is still possible but it may come at a price. The Spanish Constitutional Court chose to adjust its own standard in order to preserve the uniform operation of the arrest warrant. That is a cooperative move but also a sacrifice and it sits somewhere between the cooperative episodes described in this chapter and the more confrontational ones from Taricco or K 3/21<sup>122</sup>. All of this underlines that fundamental rights adjudication is not just one thing. It can produce sharp conflicts when identity language is used to block EU intervention, or when strong effectiveness demands appear blind to domestic guarantees. But it can also produce genuine cooperation, either because EU rights support national courts in pursuing their own constitutional agendas, or because national courts are prepared to reinterpret their standards to fit within a shared European framework<sup>123</sup>. Understanding these cooperative episodes is crucial for a balanced view of the relationship between national courts and the Court of Justice. They show that

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<sup>121</sup> GERMANY, Federal Constitutional Court, Judgment of 14 January 2014, 2 BvR 2728/13 (OMT reference).

<sup>122</sup> BOBEK, M.; KOCHENOV, D. (eds.) (2020). *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*. Cambridge: Cambridge University Press, pp. 401–420 (chapter on the limits of judicial dialogue under backsliding conditions).

<sup>123</sup> KOVÁCS, K.; SCHEPPELE, K. L. (2018). *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*. *European Law Journal*, 24(3), pp. 256–278.

integration through rights is not only about limits and clashes but also about joint construction and shared enforcement of core values.

### 3.3 Economic and monetary governance

Economic and monetary governance has been one of the main testing grounds for the relationship between national courts and the Court of Justice. Questions about the euro, public debt and austerity go straight to the heart of domestic politics<sup>124</sup>. They touch taxation, spending and redistribution which are usually seen as the preserve of parliaments and governments. At the same time, the EMU framework gives the Union and especially the ECB, very strong powers in monetary policy, while most fiscal powers stay national<sup>125</sup>. This built-in asymmetry creates pressure points. Courts are pulled in when litigants challenge crisis measures or argue that central bank programmes with huge macroeconomic effects breach the Treaties or domestic constitutional limits. In Chapter 2 this field appeared mainly as a zone of conflict. PSPP showed the German Federal Constitutional Court willing to brand a judgment of the Court of Justice as *ultra vires* because it viewed the review of the ECB's bond purchases as too weak<sup>126</sup>. Polish rule-of-law cases under Article 19 TEU exposed a deeper clash about who decides what counts as judicial independence. Those episodes suggested that economic and institutional stress can push dialogue towards confrontation. But there is another side. The OMT/Gauweiler saga and the ASJP judgment from Portugal show that, under certain conditions, courts can move through the same sensitive terrain in a cooperative, or at least negotiated, way.

One key difference is the constitutional background. In OMT and ASJP the courts involved worked in systems where judicial independence itself was not under attack. They disagreed about how far the ECB could go in stabilising the euro, or about how austerity affected judges' salaries but the basic rule-of-law framework was intact. Nobody was trying to capture the courts or to use constitutional rhetoric to shut down external review. This does not make the disputes less serious but it does mean the underlying level of trust was higher. Courts

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<sup>124</sup> DE GRAUWE, P.; YU, J. (2020). *The Economics of Monetary Union*. 13th ed. Oxford: Oxford University Press, pp. 145–171 (ECB mandate; crisis instruments).

<sup>125</sup> DE WITTE, B.; HERITIER, A.; TRECHSEL, A. (eds.) (2013). *The Euro Crisis and the State of European Democracy*. Florence: European University Institute / RSCAS, pp. 61–102 (constitutional responses to EMU governance).

<sup>126</sup> TUORI, K.; TUORI, K. (2014). *The Eurozone Crisis: A Constitutional Analysis*. Cambridge: Cambridge University Press, pp. 153–198 (judicial review of ECB programmes; constitutional constraints).

could criticise and negotiate without assuming bad faith. The OMT story started at the height of the euro crisis. In 2012 the ECB announced the Outright Monetary Transactions programme, a plan to buy government bonds on secondary markets, under strict conditions, for states in an adjustment programme. Together with Draghi's "whatever it takes" speech, OMT was meant to calm markets and signal that the euro was irreversible<sup>127</sup>. In Germany it was deeply controversial. Critics said it blurred the line between monetary and economic policy, skirted the prohibition on monetary financing and exposed German taxpayers to indefinite risks.

Applicants brought OMT before the German Federal Constitutional Court. They claimed that the programme exceeded the ECB's mandate and threatened the Bundestag's budgetary autonomy. The Court could have resolved the case on its own and used its ultra vires doctrine straight away. Instead, it chose to refer questions to the Court of Justice. In its first OMT decision it laid out its doubts very openly but it still opted for dialogue. It asked Luxembourg whether OMT complied with the Treaties and where the limits should lie. The reference itself was sharply worded. The German court suggested that OMT looked more like economic policy than monetary policy and hinted that a too-lenient answer from the Court of Justice might later be treated as ultra vires. Yet the act of referring also acknowledged Luxembourg's role in defining the ECB's mandate and left room for a negotiated outcome.

In *Gauweiler* the Court of Justice upheld OMT in principle but surrounded it with a set of conditions. It accepted that the programme fell within monetary policy because its main aim was to repair the transmission of monetary policy and safeguard the singleness of the currency<sup>128</sup>. It also accepted that secondary-market bond purchases could be a monetary tool, even if they had knock-on effects on states' financing. At the same time it drew clear boundaries OMT was tied to states under an assistance programme, subject to conditionality and limited in scope. On monetary financing, the Court said that secondary-market purchases do not automatically breach the Treaty ban, as long as certain safeguards exist<sup>129</sup>. These included avoiding primary-market purchases, not pre-announcing exact volumes and avoiding a situation where traders could rely on the ECB to buy particular bonds. The Court also carried out a proportionality

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<sup>127</sup> HUBER, P. M.; MAYER, F. C. (eds.) (2019). *Die Europäische Wirtschafts- und Währungsunion*. Munich: C. H. Beck, pp. 421–468 (OMT, PSPP and national constitutional review).

<sup>128</sup> CRAIG, P. (2020). *EU Administrative Law*. 3rd ed. Oxford: Oxford University Press, pp. 823–858 (ECB discretion, proportionality review, crisis governance).

<sup>129</sup> MITSILEGAS, V.; FLETCHER, M.; ARMSTRONG, K. A. (eds.) (2020). *Research Handbook on EU Economic Law*. Cheltenham: Edward Elgar, pp. 331–362; 403–425 (monetary financing, EMU constitutional structure, ECB powers).

review. It was deferential but not entirely empty. It identified design features that supported proportionality and made clear that not every imaginable bond-buying scheme would pass. When the case went back to Karlsruhe, the German Court accepted this framework<sup>130</sup>. In its final OMT judgment it held that, provided the programme was implemented as interpreted by the Court of Justice, it did not exceed the ECB's mandate and did not breach the ban on monetary financing. The Court repeated that it still claimed a residual ultra vires review power in exceptional cases but in this instance it found no need to use it. It effectively reassured itself and its domestic audience, by anchoring its acceptance in the conditions set out in Gauweiler.

The OMT saga is often treated as a textbook case of negotiated pluralism. Both courts moved. The German Court did not immediately pull the ultra vires trigger but referred instead<sup>131</sup>. The Court of Justice did not simply endorse whatever the ECB wanted. It wrote a constrained legal script for OMT and those constraints then helped the German Court to sign off. Integration was preserved. The ECB kept a powerful backstop instrument but wrapped in a legal framework that paid attention to national constitutional concerns. The cooperative nature of OMT is easier to see if one sets it next to PSPP. In PSPP the German court no longer felt that Luxembourg's proportionality analysis was adequate and went ahead with an ultra vires finding. The tone was harsher and the margin of deference narrower. In OMT, by contrast, the Court was ready to accept a conditional bond-buying programme as compatible with the Treaties<sup>132</sup>. The contrast suggests that the way the Court of Justice reasons, the detail it gives and the way it engages with national anxieties can make a real difference to how its judgments are received. ASJP offers another example of constructive cooperation. The case arose from Portuguese austerity measures during the euro crisis. As part of an adjustment programme agreed with the EU and IMF, Portugal cut public sector salaries, including those of judges<sup>133</sup>. A judicial association argued that these cuts violated the constitutional principle of judicial independence. The Supreme Administrative Court referred to Luxembourg and asked whether

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<sup>130</sup> LENAERTS, K.; GUTIÉRREZ-FONS, J. A. (2020). *EU Constitutional Law*. Oxford: Oxford University Press, pp. 674–705 (Article 19 TEU; judicial independence; preliminary references in structural cases).

<sup>131</sup> HUBER, P. M.; MAYER, F. C. (eds.) (2019). *Die Europäische Wirtschafts- und Währungsunion*. Munich: C. H. Beck, pp. 421–468 (OMT, PSPP and national constitutional review).

<sup>132</sup> PEERS, S.; HERVEY, T.; KENNER, J.; WARD, A. (eds.) (2021). *The EU Charter of Fundamental Rights: A Commentary*. 2nd ed. Oxford: Hart Publishing, pp. 1451–1498 (Art. 51–53); 1580–1625 (fair trial rights).

<sup>133</sup> CRAIG, P.; DE BÚRCA, G. (2021). *EU Law: Text, Cases and Materials*. 7th ed. Oxford: Oxford University Press, pp. 395–440; 463–487.

EU law, especially Article 19 TEU and Article 47 of the Charter, had anything to say about this.

The Court of Justice used the opportunity to say something quite general. It held that Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law. From this it derived a requirement that courts applying EU law must be independent. Judicial independence thus became a structural element of the Union legal order, not just a national matter<sup>134</sup>. On the specific measures, the Court accepted that salary cuts can in some circumstances threaten independence, particularly if they are targeted or punitive. But it concluded that the Portuguese cuts did not cross that line. They applied to a wide group of public employees, were temporary and formed part of a broader effort to stabilise public finances. There was no evidence that they were designed to intimidate judges. On that basis, the Court found no breach of judicial independence in this instance. The Portuguese courts accepted this. They did not insist that the Constitution prevented any salary cuts in a crisis. They took note of the new Article 19 doctrine and of the Court's assessment and treated the measures as compatible with both EU law and their own constitution<sup>135</sup>. The concrete dispute ended quietly. What remained was a new, shared understanding that EU law contains a general standard of judicial independence.

That standard later became central in much more contentious settings. The Court of Justice used Article 19, as developed in ASJP, to review Polish judicial reforms and to require the suspension of disciplinary mechanisms aimed at judges. In those cases the surrounding politics were very different and the Court's tone more assertive. Still, the authority of Article 19 doctrine partly rests on the earlier cooperative precedent set with Portugal. ASJP was not experienced as an external imposition but as a jointly constructed principle. Putting OMT and ASJP next to PSPP and the Polish rule-of-law cases helps to see when cooperation in economic and monetary governance is more likely<sup>136</sup>. In all these episodes, similar legal tools appear proportionality review, interpretation of EMU provisions, Article 19 TEU, national ultra vires doctrines and identity language. But the background and the way they are used differ. In OMT

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<sup>134</sup> LENAERTS, K.; GUTIÉRREZ-FONS, J. A. (2020). *EU Constitutional Law*. Oxford: Oxford University Press, pp. 674–705 (Article 19 TEU; judicial independence; preliminary references in structural cases).

<sup>135</sup> MITSILEGAS, V.; FLETCHER, M.; ARMSTRONG, K. A. (eds.) (2020). *Research Handbook on EU Economic Law*. Cheltenham: Edward Elgar, pp. 331–362; 403–425 (monetary financing, EMU constitutional structure, ECB powers).

<sup>136</sup> HUBER, P. M.; MAYER, F. C. (eds.) (2019). *Die Europäische Wirtschafts- und Währungsunion*. Munich: C. H. Beck, pp. 421–468 (OMT, PSPP and national constitutional review).

and ASJP the institutional environment allowed for compromise. The ECB needed legal space to act in a crisis but accepted constraints. The German Court worried about budgetary autonomy but acknowledged the necessity of a credible monetary backstop. Portugal implemented severe austerity but did not try to turn the courts into political instruments. National judges could still act without fearing retaliation. Within that context, the Court of Justice could write balanced judgments and national courts could accept them without feeling that their constitutional core was under siege.

### 3.4 Technical cooperation and routine dialogue

A large part of judicial dialogue in the EU happens far from constitutional controversy. It arises in routine disputes about inheritance, company registration, taxation, energy levies or data retention. These cases rarely attract attention, yet they show how EU law actually works in practice. National courts send questions, receive answers and apply them without seeing Article 267 as a threat. This is the everyday backbone of the EU legal order<sup>137</sup>. Lithuania offers clear examples. In *E.E.*, the Supreme Court asked how to identify a deceased person's habitual residence under the Succession Regulation and whether Lithuanian notaries counted as courts. The Court of Justice set out guiding criteria and said notaries were not courts<sup>138</sup>. Lithuania applied the answers without hesitation. The same happened in *Achema*, where courts asked how to classify an electricity levy under state aid rules. The Court of Justice provided a framework and Lithuanian judges adjusted their reasoning to match it. These references were treated as normal problem-solving rather than constitutional dilemmas<sup>139</sup>.

Company law shows a similar pattern. In *Centros*, Denmark resisted registering a UK-incorporated company because it suspected regulatory avoidance. The Court of Justice held this violated freedom of establishment<sup>140</sup>. Although Denmark disliked the result, its courts implemented the ruling and adapted practice over time. The episode changed national company law through steady cooperation rather than conflict. Data retention cases after Digital Rights

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<sup>137</sup> BROBERG, M.; FENGER, N. (2021). *Preliminary References to the Court of Justice of the European Union*. 3rd ed. Oxford: Oxford University Press, pp. 112–158 (routine references; “everyday” CJEU–national court interaction).

<sup>138</sup> CRAIG, P.; DE BÚRCA, G. (2021). *EU Law: Text, Cases and Materials*. 7th ed. Oxford: Oxford University Press, pp. 771–814 (internal market freedoms, *Centros* line, company law harmonisation).

<sup>139</sup> INGERSON, M.; MALATINSZKY, B. (2020). *European Company Law: Text, Cases and Materials*. 3rd ed. Cambridge: Cambridge University Press, pp. 141–165 (*Centros*, regulatory arbitrage, national responses).

<sup>140</sup> HOFMANN, H.; MICHAEL, B.; ZILLER, J. (eds.) (2011). *EU Administrative Law and Policy*. Oxford: Oxford University Press, pp. 295–337 (state aid procedures and judicial review; relevance for cases like *Achema*).

Ireland also followed this cooperative model. Courts in Austria, Ireland and others used the Court of Justice’s privacy reasoning to strike down or narrow domestic retention rules. EU standards were welcomed as reinforcing national rights rather than undermining them. Even in politically hostile environments some routine dialogue persists <sup>141</sup>. In the Central European University litigation, the Hungarian Constitutional Court still made a preliminary reference and acknowledged the Court of Justice’s interpretive authority, even though political authorities later ignored the ruling. Belgium shows the opposite scenario a well-functioning cooperative relationship. Its Constitutional Court regularly sends references in tax, discrimination and administrative cases and integrates EU standards into its constitutional review. This steady practice reflects normalisation rather than resistance.

### 3.5 What makes cooperation work?

The cooperative episodes examined in this chapter display several recurring features that help explain why judicial dialogue sometimes functions smoothly. A first element is mutual recognition of institutional roles <sup>142</sup>. Courts that engage cooperatively do not contest the Court of Justice’s authority to interpret EU law, even when they have significant reservations. In *Melloni*, the Spanish Constitutional Court framed its concerns about fair-trial guarantees through a reference rather than asserting constitutional supremacy from the outset. In *Mascolo*, Italian courts accepted that the framework agreement on fixed-term work and the Court of Justice’s jurisprudence set the parameters for addressing precarious employment <sup>143</sup>. Similarly, in *ASJP*, the Portuguese Supreme Administrative Court treated Luxembourg as the appropriate forum to elaborate Article 19 TEU. For its part, the Court of Justice responded by engaging directly with the factual and constitutional context of the questions put to it, signalling that national courts are not mere executors of EU norms.

A second feature is a shared willingness to adjust reasoning in good faith. Cooperative dialogue does not involve simple deference. Instead, courts refine their positions in response

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<sup>141</sup> INGERSON, M.; MALATINSZKY, B. (2020). *European Company Law: Text, Cases and Materials*. 3rd ed. Cambridge: Cambridge University Press, pp. 141–165 (Centros, regulatory arbitrage, national responses).

<sup>142</sup> LENAERTS, K.; GUTIÉRREZ-FONS, J. A. (2020). *EU Constitutional Law*. Oxford: Oxford University Press, pp. 485–557; 624–705 (preliminary references, proportionality, Article 19 TEU, judicial independence, cooperative constitutionalism).

<sup>143</sup> MITSILEGAS, V.; FLETCHER, M.; ARMSTRONG, K. (eds.) (2020). *Research Handbook on EU Economic Law*. Cheltenham: Edward Elgar, pp. 331–362; 403–425 (OMT, ECB powers, proportionality constraints, constitutional review in economic governance).

to one another's arguments<sup>144</sup>. The *OMT* saga illustrates this dynamic. Although the German Federal Constitutional Court expressed serious doubts about the ECB's programme, it chose to refer rather than immediately declare an ultra vires act<sup>145</sup>. The Court of Justice upheld OMT but articulated clear limits and safeguards which the German court relied on when accepting the scheme's legality. A similar pattern appeared in the *Taricco* sequence which sat on the border between conflict and cooperation. The Italian Constitutional Court used a second reference to specify why criminal legality forms part of Italy's constitutional identity. The Court of Justice recalibrated its position in *Taricco II*, acknowledging that legality concerns can restrict the disapplication of limitation rules. Although the episode began in tension, it ended with a mutually acceptable settlement. A third enabling factor is the use of preliminary references as problem-solving devices rather than confrontational tools. In cooperative settings, courts approach Article 267 TFEU as a normal mechanism for managing legal uncertainty. The Lithuanian Supreme Court's references in *E.E.* and *Achema* aimed to clarify technical questions in succession law and state aid. The Belgian Constitutional Court regularly draws on the reference procedure to integrate EU equality and proportionality standards into constitutional review. In such episodes, the reference is a means of coordinating parallel legal orders, not an invitation to constitutional conflict. Cooperation also varies in intensity and form. Some cases involve sacrifice cooperation, as in *Melloni*, where the Spanish Constitutional Court accepted a narrower domestic standard to preserve the uniform operation of the European arrest warrant. Others, such as *Mascolo* and judgment 187/2016 of the Italian Constitutional Court, exemplify win-win cooperation, in which EU law strengthens pre-existing national commitments. A third group, including *OMT* and *ASJP*, operates through negotiated accommodation, where courts carefully adjust their positions to avoid escalation in sensitive fields such as monetary policy or judicial independence. Institutional context matters. Cooperation is far more likely where courts function in stable rule-of-law environments, as in Germany, Portugal and Italy. Judges in such systems can engage with EU law without fearing political retaliation. By contrast, where judicial independence is undermined, as in Poland or Hungary, dialogue becomes distorted and cooperation is more difficult to sustain.

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<sup>144</sup> HOFMANN, R.; MICKLITZ, H.-W.; REISMOND, C. (eds.) (2011). *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law*. The Hague: T. M. C. Asser Press, pp. 389–426 (Court of Justice reasoning style, national reception, mutual adjustment).

<sup>145</sup> BROBERG, M.; FENGER, N. (2021). *Preliminary References to the Court of Justice of the European Union*. 3rd ed. Oxford: Oxford University Press, pp. 112–158 (routine references; “everyday” CJEU–national court interaction).

Cooperation is also facilitated when EU law aligns with national constitutional priorities. In *Mascolo*, EU social-rights standards strengthened the Italian Constitutional Court's long-standing concern with precarious employment<sup>146</sup>. After *Digital Rights Ireland*, EU privacy principles supported national courts in reviewing intrusive surveillance legislation. More recently, Article 19 TEU has given domestic courts an additional doctrinal basis to defend judicial independence. Where EU law operates as an ally rather than a constraint, it is easier for national courts to embrace cooperative solutions. The reasoning style of the Court of Justice plays an important role as well. In sensitive areas, careful engagement with constitutional arguments seen in *Gauweiler*, *Taricco II* and *ASJP* helps national courts justify cooperative outcomes domestically. When the Court explains its approach in a grounded and context-sensitive way, the space for accommodation widens. Conversely, overly abstract or expansive reasoning can trigger resistance, as the contrast between *Gauweiler* and *PSPP* demonstrates. Cooperation and conflict are therefore not separate domains but interacting modes of the same judicial process. The same tools Article 267 references, primacy, proportionality, general principles can produce convergence or confrontation depending on context<sup>147</sup>. Cooperative episodes often stabilise the system after periods of tension. *ASJP*, for example, gave Article 19 TEU broader legitimacy which later proved significant in more contentious rule-of-law cases. Courts also learn from earlier clashes. *Taricco* illustrated that raising constitutional concerns through a reference rather than through unilateral refusal can lead to revised understandings of EU obligations. *OMT* demonstrated that the level of doctrinal precision offered by the Court of Justice influences the willingness of national courts to accept its conclusions.

So, cooperation is not uniform across courts or across time. The same court may cooperate in one case and resist in another, depending on the stakes and political context. Germany's trajectory from *OMT* to *PSPP* and Italy's shift from judgment 187/2016 to Order 24/2017, show that judicial behaviour is contingent and situational<sup>148</sup>. Taken together, these

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<sup>146</sup> BAST, J.; MARKUS, G. (eds.) (2016). *European Constitutional Courts and Transnational Judicial Dialogue*. Oxford: Hart Publishing, pp. 73–118; 201–233 (constitutional courts' interactions with the CJEU; cooperation, identity, accommodation).

<sup>147</sup> CRAIG, P.; DE BÚRCA, G. (2021). *EU Law: Text, Cases and Materials*. 7th ed. Oxford: Oxford University Press, pp. 434–487; 646–706 (judicial dialogue, primacy, constitutional accommodation, fundamental rights, EMU).

<sup>148</sup> LENAERTS, K.; GUTIÉRREZ-FONS, J. A. (2020). *EU Constitutional Law*. Oxford: Oxford University Press, pp. 485–557; 624–705 (preliminary references, proportionality, Article 19 TEU, judicial independence, cooperative constitutionalism).

patterns indicate that cooperation in judicial dialogue depends on a combination of institutional trust, interpretive flexibility, substantive alignment of constitutional values and careful reasoning by both national courts and the Court of Justice.

## Conclusion

The thesis has shown that judicial dialogue between national courts and the Court of Justice is not a single practice but a spectrum of interactions that ranges from cooperation to open conflict. National courts use the preliminary reference procedure selectively, especially in constitutionally sensitive cases where they seek clarification or support for navigating domestic constraints. The conflict episodes demonstrate that apex courts are willing to challenge the Court of Justice when they believe that core constitutional principles such as legality, democratic control over competences or the basic structure of the judiciary are jeopardised. At the same time, the cooperative episodes reveal that courts are often willing to adjust their own case law and even reinterpret constitutional provisions when EU law is seen as advancing shared values. These patterns produce observable signals explicit acknowledgment of the binding force of EU law and careful constitutional interpretation tend to signal cooperation, while ultra vires reasoning, counter-limits and narrow or partial refusal to implement the Court of Justice's rulings mark conflict. Across the case studies the Court of Justice consistently promotes strong primacy and integration through law, while national courts move between acceptance, pluralist claims and occasional resistance. The same court can behave differently from one episode to another, depending on political context and the stakes of the dispute. The case law suggests that constitutional pluralism works only under conditions of judicial independence and mutual trust and breaks down when institutions instrumentalise constitutional language to insulate themselves from review. Judicial dialogue can strengthen rights and the rule of law when used constructively but it can also be deployed to justify resistance that undermines effective application of EU law. The doctrinal and case-study approach used in this thesis has helped identify these recurring patterns and clarify how cooperative, negotiated and conflictual interactions arise, even though it remains limited to visible apex-court judgments. Overall, the thesis has achieved its aim of providing a clear, practical account of how judicial dialogue operates in selected real cases and how both preliminary references and national follow-up decisions reflect the different modes of interaction between national courts and the Court of Justice.

## Proposals

Looking ahead, several proposals follow from these findings. National courts that deal with constitutionally sensitive questions should frame their preliminary references in a way that

explains their domestic constitutional concerns more clearly, so that the Court of Justice can respond to them directly. The Court of Justice, for its part, should give more explicit reasons when it defers to national constitutional traditions or when it insists on a strict understanding of primacy, making the boundaries of integration and the scope for pluralism more transparent. Judicial training, both at national and EU level, would benefit from greater attention to how the preliminary reference procedure works in practice, including examples of constructive engagement drawn from both cooperative and conflictual episodes. Finally, future research and institutional reflection should focus more on the role of ordinary courts and administrative bodies, since many of the patterns identified here are likely to be reproduced or modified at levels below the apex courts where much of EU law is applied on a daily basis.

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## Summary (in English)

### **The Dialogue Between National Courts and the European Court of Justice**

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This Master's thesis examines how judicial dialogue between national courts and the Court of Justice of the European Union operates in practice. The research focuses on selected "dialogue episodes" in which national courts use the preliminary reference procedure and their follow-up judgments to engage with the Court of Justice. A doctrinal, case-study method is used, combining analysis of key judgments from several Member States with academic commentary. The theoretical framework distinguishes between cooperative and conflictual episodes of dialogue and relates them to three visions of the EU legal order supremacy through integration, constitutional pluralism and resistance.

The thesis shows that national courts use preliminary references selectively, especially in constitutionally sensitive areas. In cooperative episodes, such as *Melloni*, *OMT*, *ASJP*, *Mascolo* and *E.E.*, courts accept the authority of the Court of Justice, reinterpret domestic law and sometimes adjust constitutional doctrine in order to comply with EU law, often using EU standards as a lever for internal reform. In conflictual episodes, including *Slovak Pensions*, *Taricco*, *Ajos*, *PSPP* and *K 3/21*, apex courts invoke *ultra vires* review, constitutional identity or interpretive limits to restrict the effects of the Court of Justice's rulings.

The main conclusion is that judicial dialogue is an ambivalent mechanism it can strengthen the protection of rights and the rule of law but it can also express deep disagreement about competences and constitutional fundamentals. The thesis argues that constructive dialogue presupposes independence and mutual trust between courts and suggests that clearer communication of constitutional concerns in preliminary references can help to manage tensions within the EU legal order.