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European Union:
A Political Economic Approach

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Domestic Judicial Non-Compliance in the European Union: A Political Economic Approach

Arthur Dyevre *

Abstract: In a multi-level, non-hierarchical court system, where courts at the upper echelon do not have the power to reverse the decisions of courts at the lower level, judicial cooperation appears crucial to the effectiveness of the higher-level law. For this reason, the recent judgment of the Czech Constitutional Court, which declared the decision of the Court of Justice in the *Landtová* case ultra vires, would seem to deal a terrible blow to the authority of European Union law. As doomsayers will be quick to point out, the Czech decision could set a dangerous precedent that may well one day bring down the entire edifice of EU law. However, borrowing insights from game theory and international relations, the present article argues that this judgment is more likely to remain an isolated episode than to be remembered as the tipping point when tensions between the CJEU and domestic courts escalated into the judicial equivalent of nuclear Armageddon. The author shows that many aspects of the jurisprudence of constitutional conflict can be represented as a simple Hawk-Dove game. A modified, slightly more sophisticated model then helps cast a wider light on the use of non-compliance threats by domestic high courts, notably the German Federal Constitutional Court.

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I. INTRODUCTION: JUDICIAL DIALOGUE OR JUDICIAL WAR?

On 31 January 2012,¹ the Czech Constitutional Court (CCC) declared the decision of the Court of Justice of the European Union (CJEU) in *Landtová*² an *ultra vires* act. In what might otherwise look like a mundane case about the pension rights of workers from the defunct Czechoslovakia, the Czech constitutional judges, sitting in full court, concluded that the CJEU had wrongly applied EU regulation 1408/71 on the coordination of social security schemes (Coordination Regulation)³ to facts devoid of any no cross-border dimension. The pension controversy arose from a time when Czechs and Slovaks were citizens of one and the same State. By disregarding that fact the CJEU had apparently made itself guilty of the worst kind of historical revisionism. In the CCC's words:

The failure to distinguish legal relationships arising from the dissolution of a state with a uniform social security system from legal situations resulting from the free movement of persons within the European Communities, or the European Union, as it applies to the social security systems of its Member States, is a failure to respect European history, it is comparing matters that are not comparable.⁴

Pointing to the doctrinal position it had articulated in its first ruling on the Treaty of Lisbon,⁵ the CCC went on to say that the Luxembourg Court had overstepped the boundaries of the powers transferred to the European Union by the Czech Republic:

¹ Judgment of 31 January 2012, announced 14 February 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*. The English translation is available at the CCC's website, <http://www.usoud.cz/view/6342>. This Article, however, relies on Jan Komárek's translation in Jan Komárek, *Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, C. M. L. REV. (forthcoming).

² Judgment of the CJEU (Fourth Chamber) of 22 June 2011 in Case C-399/09 *Landtová*, not yet officially reported.

³ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, English special edition of the OJ: Series I Chapter 1971(II) p. 416.

⁴ See *supra* note 1 at 13.

⁵ Judgment of 26 November 2008, Pl. ÚS 19/08, *Lisbon Treaty I*. English translation available on the CCC's website, <http://www.usoud.cz/view/pl-19-08> (accessed 25 May 2012). For an analysis of the judgment see the Case Comment by Petr Bříza, *The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 5 EUR. CON. L. REV. 143 (2009).

[W]e cannot do otherwise than state, regarding the effect of the European Court of Justice judgment of 22 June 2011, C-399/09 on similar matters, that in this case a European Union body acted in excess of the law, resulting in a situation where an act enacted by a European body overstepped the powers which the Czech Republic had transferred to the European Union by virtue of Article 10a of the Constitution; the act ignored the limits of the powers thereby delegated and was thus *ultra vires*.⁶

On the face of things, the CCC's judgment, by declaring an EU act, namely a ruling of the CJEU, *ultra vires*, constitutes a momentous and unprecedented display of judicial defiance. Surely, relations between the European Court and domestic supreme and constitutional courts have been fraught with tensions and conflict almost from the beginning. But, to my knowledge, no domestic court has ever taken this step before in a final judgment on the merits, at least not in so explicit a manner.⁷ In a non-hierarchical court system, where courts at the upper echelon do not have the power to strike down the decisions of courts at the lower level, judicial cooperation appears to be essential to the effectiveness of the higher-level law. So, by defying the authority of the Court of Justice in such blatant fashion, the CCC's judgment may be viewed as striking a terrible blow to the authority of EU law. As doomsayers will be prompt to assert, the Czech decision may be seen as setting an ominous precedent, which, were it to spread to other Member States, could ultimately bring down the whole edifice of EU law.

However, borrowing insights from game theory and international relations, this article argues that this judgment is more likely to remain an isolated episode than to be remembered as the tipping point when tensions between the CJEU and domestic courts escalated into the judicial equivalent of nuclear Armageddon. I submit that many aspects of the 'jurisprudence of constitutional conflict'⁸ can be represented as a simple Hawk-Dove game. I then attempt to show that a modified, slightly more sophisticated model helps cast a wider light on the use of non-compliance threats by domestic high courts, and notably by the German Federal Constitutional Court (GFCC). The game-theoretic analysis demonstrates, convincingly in my view, that a domestic court need not 'bite' in order for its 'barking' to be consequential. Far from an indication of strength, the decision to

⁶ See *supra* note 1 at 13.

⁷ Going back more than 30 years, the *Cohn-Bendit* ruling of the French *Conseil d'Etat* is probably the decision that comes closest to qualifying as a precedent. It challenged the Court of Justice's doctrine on the direct effect of directives but avoided a direct showdown with the judges in Luxembourg by setting aside the reference for a preliminary ruling ordered by the lower administrative court. See Decision No. 11604, 22 December 1978, *Dalloz* (1979) 155. Had the *Conseil d'Etat* allowed the reference and confronted the Court of Justice, it is doubtful, though, that it would have used the language of *Kompetenz-Kompetenz* and *ultra vires*, which had yet to become part of European legal discourse.

⁸ To borrow an expression coined by Matthias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, EUR. L. J. 173 (2006).

disapply EU law may in fact constitute evidence of a domestic court's institutional weakness, which suggests the CCC will sooner or later repudiate a decision that seems to be driven by anger rather than by reason. While *ultra vires* doctrines have proliferated in the wake of the GFCC's *Maastricht* ruling, I highlight key institutional limitations that national courts must reckon with when seeking to import the GFCC's jurisprudence into their own domestic context.

The Article is organised as follows. Section II reviews the literature on the role of national constitutional and supreme courts in European legal integration. In my view, both legal scholarship and the political science literature on European judicial politics have failed to produce a convincing narrative adequately capturing the nature of inter-judicial conflicts in the EU multi-level judicial system. I argue, in particular, that the concepts of 'judicial dialogue' and 'constitutional pluralism' are poor tools to analyse the kind of interactions at work between the Court of Justice and domestic high courts such as the CCC and the GFCC. While correctly capturing some of our intuitions about the operations of the European multi-level legal system, they go little distance to identifying the interests, ideas and constraints that drive the observed pattern of conflicts between domestic and supranational judges. Section III then presents my alternative game-theoretic approach together with the broader theory of judicial behaviour in which it is grounded.⁹ Drawing parallels with the Cold War and conflict situations in international relations, I model inter-court relations in a multi-level, non-hierarchical setting, where judges have antagonistic interests, as a simple Hawk-Dove game. I use this simple model to discuss two fundamental parameters shaping inter-judicial interactions in the European context: the cost of domestic defiance for national and supranational judges, and the power and institutional stature of domestic courts, which vary widely across Member States. Domestic high courts do not all have superpower status. Nor do their decisions pose the same systemic threat to the Luxembourg court's authority. Section IV sets out a more sophisticated model that seeks to address judicial signalling, i.e. the use of non-compliance threats by domestic courts. Incorporating incomplete information and communication, the iterated inter-court game helps elucidate numerous aspects of the jurisprudence of constitutional conflict hitherto unaccounted for. Not least among them is the GFCC's rich case law on integration. I suggest that GFCC-CJEU relations can be meaningfully analysed as a 'coexistence' or, from the GFCC's perspective, 'containment' equilibrium. While it often had little choice but to acquiesce to the CJEU's expansionary jurisprudence, the German court has nonetheless managed to exert considerable influence on the European court and on the development of EU law. Crucially though, it has achieved this without ever disapplying an EU act. Instead, it has used its obiter dicta as a signalling device to

⁹ See Arthur Dyevre, *Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour*, 2 EUR. POL. SC. REV. 297–327 (2010).

flag issue areas where it saw its interests as being more fundamentally at stake. Section V concludes with brief considerations on the direction of future research.

II. LEGAL INTEGRATION STUDIES AND THE JURISPRUDENCE OF CONSTITUTIONAL CONFLICT

Law scholars have underlined both the growing acceptance of supremacy and direct effect on the part of national judges since the 1960s and the points of disagreement that nonetheless persist between the CJEU and national courts.¹⁰ A careful perusal of this literature shows that some scholars have been willing to venture beyond pure doctrinal analysis to consider the institutional incentives of national judges.

In what remains one of the most influential essays ever written on legal integration,¹¹ Joseph Weiler, for one, developed the classic Judicial Empowerment Thesis. Thanks to EU law, courts that had previously been denied the power to control the legality of certain state acts, such as statutes, were able to acquire this prerogative. According to Weiler, by establishing what was in effect a system of decentralised judicial review, supremacy and direct effect combined with the *Simmenthal* doctrine¹² emerged as a promise of empowerment, which in turn explains why these courts were particularly keen to cooperate with the Court of Justice.

Other authors have focused on the more conflictual aspects of legal integration, seeking to elucidate why some higher courts have shown more resistance to the federalist implications of *Van Gend en Loos*¹³ and *Costa v. ENEL*¹⁴ – the decisions that have become the cornerstones of the ‘constitutionalisation’ of European law. Their analysis typically emphasise the role orientation of domestic courts. They contend, for example, that because constitutional courts view the

¹⁰ THE EUROPEAN COURT AND NATIONAL COURTS - DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter et al., 1998); MONICA CLAES, THE NATIONAL COURTS’ MANDATE IN THE EUROPEAN CONSTITUTION (2006); THE NATIONAL JUDICIAL TREATMENT OF THE ECHR AND EU LAWS: A COMPARATIVE CONSTITUTIONAL PERSPECTIVE (Giuseppe Martinico & Oreste Pollicino, 2010).

¹¹ Joseph Halevi Horowitz Weiler, *The Transformation of Europe*, YALE L.J. 2403–2483 (1991). See also Joseph Weiler, *A Quiet Revolution*, 26 COMP. POL. STUDIES 510–534 (1994).

¹² The *Simmenthal* doctrine states that each and every national court has the duty and, therefore, the authority to disapply domestic legislation when incompatible with EU law, see Judgment of 9 March 1978, Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263. On the *Simmenthal* doctrine see CLAES, *supra* note 10, at 69–118.

¹³ Judgment of 5 February 1963, Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie de Belastingen*, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

¹⁴ Judgment of 15 July 1964, Case C-6/64, *Costa v. ENEL*, [1964] E.C.R. 585.

protection of the national constitution as their paramount mission, they are more inclined to resist legal integration than other domestic courts.¹⁵

Nevertheless, two concepts have come to dominate the scholarly debate on inter-judicial relations. The first is the notion of ‘judicial dialogue’.¹⁶ As should be expected from a concept that was initially intended as a metaphor, what scholars mean by judicial dialogue is often unclear. The idea, though, seems roughly that the development of the integrated European legal order results from the constant interplay of domestic and supranational courts or, at least, that it should be so. ‘Constitutional pluralism’ is the catchphrase that is supposed to capture the other dominant paradigm of contemporary EU law scholarship.¹⁷ Like ‘judicial dialogue’, it has both descriptive and normative connotations and tends to be similarly ill-defined. In brief, despite integration and far-reaching judicial cooperation, national and supranational judges continue to operate on the basis of distinct constitutional foundations, in the knowledge that the non-hierarchical character of the system prevents any level from absorbing the other. What seems primarily a descriptive (and in itself hardly disputable) statement is then given a normative twist: So is the European legal system and so it ought to be. Scholars thus call on judges to respect pluralism and to show deference.¹⁸

Fashionable and popular as these ideas (theories?) are, they do not fare very well as positive account of what judges do. This Article is hardly original in noting that there is very little that resembles a dialogue in the tension-ridden relationship the Court of Justice has developed with the GFCC or the Polish Constitutional Court (PCC), at least if by ‘dialogue’ we mean something akin to a conversation among gentlemen seeking the truth through arguments based on reason.¹⁹ In any case, the dialogue metaphor falls short of adequately capturing the complex

¹⁵ Bruno de Witte, *Direct Effect, Supremacy and the Nature of the Legal Order*, THE EVOLUTION OF EU LAW 177–213 (Paul Craig & Grainne de Búrca, 1999); ANNELI ALBI, EU ENLARGEMENT AND THE CONSTITUTIONS OF CENTRAL AND EASTERN EUROPE (2005); CLAES, *supra* note 10.

¹⁶ See e.g. Anne-Marie Slaughter, *Typology of Transjudicial Communication*, A, 29 U. RICH. L. REV. 99, 100 (1994) (presenting judicial dialogue as a pervasive feature of legal integration in Europe). See also the contributions in SHAPING RULE OF LAW THROUGH DIALOGUE: INTERNATIONAL AND SUPRANATIONAL EXPERIENCES (Filippo Fontanelli et al., 2010).

¹⁷ See CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Matej Avbelj & Jan Komárek, 2012) (featuring a collection of essays both embracing and criticising constitutional pluralism).

¹⁸ See Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT’L J. CONST. L. 415 (2008); Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT’L J. CONST. L. 397 (2008); Miguel Poiaras Maduro, *Contrapunctual Law: Europe’s Constitutional Pluralism in Action*, SOVEREIGNTY IN TRANSITION 501–537 (Neil Walker, 2003).

¹⁹ KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 38 (2001) (criticising the use of the dialogue metaphor in EU scholarship); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004) (arguing that there is a growing pattern of interactions between international and domestic courts for which ‘dialogue’ constitutes an ill-suited analogy).

strategies, interests and calculations that seem to be at work in supranational-domestic judicial relations. The notion of constitutional pluralism proves equally inadequate when it comes to explaining the dynamic character of inter-judicial interactions. True, we are dealing with courts that do not share the same ultimate reference point. But what determines the conditions of coexistence of these plural legal orders? That the jurisprudence of constitutional conflict has remained something of a puzzle to the scholarly community thus comes as little surprise.

Even so, I see this deficiency as stemming from a more general failure to ground these legal narratives in a well-developed theory of judicial motivation as well as from problems inherent to the methodology (or, more exactly, the lack of it) of legal scholarship. In explaining the positions of judicial actors, legal scholars typically emphasise legal logic and the application of legal principles while glossing over political and strategic considerations.²⁰ Admittedly, most do acknowledge that judging is not impervious to political influences. But this recognition generally comes with a blanket qualification that it is only one factor among many others; that other social scientists are wrong to underestimate the role of doctrines in judicial decision-making and that, anyway, ideological determinants are inseparable from legal ones.²¹

Political scientists, for their part, have displayed more interest in the extra-legal determinants of judicial behaviour. However, they have focused their attention on the more harmonious aspects rather than the tensions in the operations of the EU multi-level legal system. Efforts have focused on explaining how and why national courts have been willing to help the CJEU further European integration through its activist jurisprudence.²²

Karen Alter's influential study on the establishment of EU law supremacy²³ stands out as one of the rare social science studies focusing on the more conflictual aspects of legal integration. Tracing the reception of the ECJ's case law by French and German judges from the early 1960s to the late 1990s, her research shows how domestic courts in two founding Member States have gradually altered their doctrines to accommodate supremacy and direct effect while seeking to keep the CJEU's activist tendencies in check. Her analysis rejects the dialogue metaphor, to which she prefers the term of 'negotiation'²⁴ and points to the

²⁰ I emphasise the word 'typically' here, as there are of course, and as acknowledged above, some notable exceptions, Weiler's work being not the least of them.

²¹ See e.g. CLAES, *supra* note 10, at 247 (claiming that legal variables play a more important role in judicial decision-making than commonly assumed by social scientists).

²² Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INTERNATIONAL ORGANIZATION 41–76 (1993); ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004); Geoffrey Garrett & Barry Weingast, *Ideas, Interests and Institutions: Constructing the EC's Internal Market* (1993); Clifford J. Carrubba et al., *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 435–452 (2008); Alec Stone Sweet & Thomas Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63–81 (1998).

²³ ALTER, *supra* note 19.

²⁴ *Id.* at 38.

importance of ‘access rules’ as constraint on the behaviour of judicial actors.²⁵ Her research is also commonly associated with the Court Competition Thesis. Taking Weiler’s Empowerment Thesis further, she claimed, in short, that EU law creates opportunities for lower courts to circumvent their judicial hierarchy through the twin doctrines of primacy and direct effect and the preliminary ruling mechanism.²⁶ Though undeniable, Alter’s contribution is nonetheless wanting in two respects. For one, her institutional theory of judicial motivation proves rather thin and underspecified when we try to deploy it beyond her two case studies. For another, she has little to say about the strategy judicial actors follow or are likely to follow when they engage in multi-level negotiations. While convincingly showing that legal doctrines are indeed the currency of inter-judicial negotiations, she does not quite succeed in determining when they will prove effective and when not.

While seeking to address the broader theoretical shortcoming identified in the legal and political science literatures by drawing on an ambitious attempt to develop a general theory of judicial behaviour,²⁷ the analysis that follows focuses on the strategic question. Which I try to clarify by bringing insights from game theory and international relations to bear on our understanding of inter-judicial relations in the EU.

III. OF HAWKS, DOVES AND CHICKEN: THE LOGIC OF INTER-JUDICIAL CONFLICTS IN THE EU LEGAL ORDER

The theoretical argument developed in this Section rests firmly on the view that judicial behaviour is driven by more than a simple concern for the correct application of legal rules – judicial rhetoric to the contrary notwithstanding. Assuredly, the game-theoretic approach adopted here presumes that a court’s behaviour may, at least in certain circumstances, depend on how other judicial actors position themselves on the issue at hand. But this is far from being the only extra-legal factor shaping judicial behaviour in the EU multi-level judiciary.

The factors shaping judicial decision-making can be grouped into micro-, meso- and macro-level determinants,²⁸ as in Table 1. Following this general theory of judicial behaviour, lower-level determinants are nested within higher-level ones, meaning that lower-level variables affect judicial outcomes only when higher-level variables take a certain value or remain below or above a specific threshold. For example, variations in the judges’ ideological outlook – a micro-level determinant

²⁵ *Id.* at 179.

²⁶ Karen Alter, *Explaining National Courts Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, THE EUROPEAN COURT AND NATIONAL COURTS - DOCTRINE AND JURISPRUDENCE 232 (Anne-Marie Slaughter et al., 1998).

²⁷ Dyevre, *supra* note 9.

²⁸ *Id.*

– will have little effect on judicial outcomes when and where political fragmentation and public support for the courts – both macro-level determinants – are low. Accordingly, if both the public and government parties are strongly pro-integration, whether domestic judges are Europhiles or Eurosceptics should have little impact on the courts’ position regarding integration, since courts in such situation will have scant latitude to depart from pro-integration policies anyway. As we shall see, the same logic underpins the assumptions of the game-theoretic model presented in this Section. Indeed, one of my basic assumptions is that the position of government parties on integration places an upper bound on the level of defiance domestic judges can realistically sustain.

Level of Analysis	Explanatory Variables
Macro-Level	Political fragmentation, public support
Meso-Level	Position in judicial hierarchy, power to review legislative acts, access rules, discretion over case selection, term renewability, term duration, separate opinions, opinion assignment rules, etc.
Micro-Level	Policy-preferences of individual judge

Table 1. Determinants of Judicial Behaviour

In addition to political fragmentation and public support, the influence of judicial ideology may be further limited by meso-level factors such as access rules, the court position in the judicial hierarchy, and so on. Admittedly, no inquiry into the attitude of domestic judges towards the European project can ignore the position these judges occupy in the domestic court hierarchy. For the purpose of the present essay, I focus on the highest rung of the Member State judicial systems. In line with the Court Competition and Empowerment Theories, I assume that domestic high courts have incentives and interests that potentially diverge from those of inferior courts. More specifically, I assume that a court that (a) already holds the power to disapply legislative enactments under domestic law and (b) has the authority to review or at least to exert significant influence on the decisions of lower courts will have both less to gain and more to lose from legal integration. I believe that, other things being equal, courts fitting this definition are likely to view the expansion of EU law with a less favourable eye.

Just as the hierarchical structure of the court system – however reconfigured by the integration process – constitutes a crucial element of the relationship of high court judges with their peers at the lower echelons of the domestic judicial pyramid, it is the absence of such a hierarchical component that characterises national courts/CJEU relations. Since the jurisprudence of constitutional conflict is in large part a consequence of the non-hierarchical makeup of the European

multi-level judicial system, it is hard to overstate the importance of this institutional characteristic. Assuredly, if the Treaties had granted the CJEU power to invalidate domestic judicial decisions or the CJEU had been able to arrogate such power for itself, courts like the GFCC or the French *Conseil d'Etat* might well not have contemplated the thought of defiance in the first place.²⁹ Nor, arguably, would EU scholars have spilled so much ink over the issue.

Other meso-level factors, such as the rules governing access to the judicial forum and the power to invoke core constitutional values against EU law, also play a crucial role in accounting for cross-national disparities in the influence wielded by domestic high courts on the operations of the multi-level legal system, as we will see below. For the time being, though, these elements should suffice to give us a sense of how the game-theoretic argument fits in a broader theoretical understanding of judicial behaviour.

THE HAWK-DOVE GAME

The use of game theory to model judicial behaviour is first motivated by the understanding that judging has a strategic dimension. Similar to other public decision-makers, judges are aware that their decisions can trigger adverse reactions. Legislators may respond to their rulings by passing override legislation or by stripping the court of its jurisdiction. A new case law may spur either over- or under-litigation. Moreover, judges who do not themselves sit at the top of the judicial heap may have to count with the appellate or supreme court, which may reverse their determinations.³⁰ Thus, in order to advance their interpretation of the law or any other policy goal, judges must anticipate the social response elicited by their own behaviour; just as other agents – be they litigants, politicians, or other judges – are likely to anticipate their rulings. Game theory proves a precious and powerful analytical tool precisely in those situations where, as with the CJEU and domestic high courts, human agents do not act upon purely parametric considerations but seek to guess each other's intentions and to anticipate each other's moves.

Having said this, a survey of the game-theoretic literature on judicial behaviour suggests it offers few insights that are directly applicable to the issue

²⁹ In the United States, the US Supreme Court had been explicitly vested with the power to reverse the state court decisions by Section 25 of the 1789 Judiciary Act. A prerogative the Marshall Court first put to use against Virginian courts, see *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813) (Story, J.) and *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (Story, J.). What arguably looked like a natural implication of federalism was nonetheless initially resisted by many state judges, see LESLIE F. GOLDSTEIN, *CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT* 14–42 (2001) (comparing patterns of resistance to federal authority across branches in the United States and the European Union).

³⁰ The seriousness of these threats and, therefore, the need to anticipate them will of course depend on the macro- and meso-determinants discussed above.

that forms the main concern of this article.³¹ The only game-theoretic model specifically addressing EU judicial politics³² treats the ECJ as a mere fire-alarm mechanism with no policy-making powers of its own. Worse still, it entirely leaves out domestic courts and the role they play in enforcing EU law. To be fair, some models do address inter-court interactions. Yet all without exception presume that the interacting courts stand in a hierarchical relationship to one another. Geared to the US context, they are intended to explain how lower courts may effectively escape the higher courts' oversight³³ and, conversely, how higher courts can maximise compliance in the face of limited resources to monitor the behaviour of lower courts.³⁴ Precisely because they assume a hierarchical relationship (the higher court has power to reverse lower court decisions), these models prove inadequate when it comes to analysing judicial behaviour in non-hierarchical configurations. An irremediable flaw in the EU context.

Interestingly enough, the way in which this Article proposes to conceptualise the interaction puzzle arising from the jurisprudence of constitutional conflict is more commonly found in the international relations literature, where the Hawk-Dove game is classically used to model conflict situations between states.³⁵

1. STRUCTURE OF THE HAWK-DOVE GAME

The Hawk-Dove game is a classic game form, also known as 'Chicken' and less commonly as 'Snowdrift' game. Many, presumably, know the game of Chicken as the game in which two drivers drive towards each other in a collision course, with the last to swerve counting as the winner.³⁶ The game typically serves to illustrate a situation where each player prefers not to yield while knowing the worst outcome will occur if both players refuse to do so.

In the Snowdrift variant of the game, the two drivers no longer face a car crash but, instead, find themselves trapped on opposite sides of a snowdrift. Each

³¹ For a literature review see Arthur Dyevre, *Game Theory and Judicial Behaviour*, STUDIES IN THE PHILOSOPHY OF LAW: GAME THEORY AND THE LAW 115 (Wojciech Zaluski & Jerzy Stelmach, 2011).

³² Clifford J. Carrubba, *Courts and Compliance in International Regulatory Regimes*, 67 J. OF POL. 669–689 (2005).

³³ See Charles Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, AM. POL. SCI. REV. 101–116 (2000).

³⁴ Jeffrey Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 J. THEOR. POLITICS 61–86 (2003).

³⁵ See Anne E. Sartori, *The Might of the Pen: A Reputational Theory of Communication in International Disputes*, 56 INT'L ORGANIZATION 121–149 (2002); Whereas discussion of the Prisoner's Dilemma in its various forms abound in American legal scholarship, mention of Hawk-Dove is rare. For an exception see Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2003).

³⁶ A famous example, which no good presentation of the game will fail to mention, is found in the drama film *Rebel Without a Cause*, where the character of Buzz Gunderson challenges Jim Stark to a 'Chickie Run'. (Note, though, that in the movie the cars hurtle towards a cliff instead of racing into each other.)

has the option of staying in her car or of picking a shovel to clear a path through the snow. Exactly as in the Chicken variant, each player is best off when she does not yield (i.e. stays in her car) and the other does (shovelling the snow from a path both will be able to use) while worst off when none of them yield (each player sits in her car until frozen to death).

		Player 2	
		Dove	Hawk
Player 1	Dove	$\frac{V}{2}$	V
	Hawk	0	$\frac{(V-C)}{2}$

Figure 1. Payoff Matrix of a Hawk-Dove Game. Notes: Payoff for Player 1 appears in the lower-left corner of each cell while payoff for Player 2 appears in the upper-right. V is the value of the contested resource and C the cost of an escalated conflict, incurred when both players play Hawk. It is assumed that $C > V > 0$.

Hawk-Dove has the exact same payoff structure as these two games, which means all three are strictly identical from a mathematical and game-theoretic point of view. The only difference lies in the example that traditionally serves to introduce them, which betrays their original fields of application. In the Hawk-Dove game, the two players compete over a resource and have to decide whether to fight (play hawk) or to acquiesce (play dove). From the payoff matrix given in Figure 1, we see that the players must share the value of resource V when both play dove, with each player accruing payoff $\frac{V}{2}$. If one player acts as a hawk while the other acts a dove, she receives the whole value of the resource V and the other player receives nothing. When both players play hawk, they have to share the resource V but also pay the cost C of an escalated fight, resulting in a payoff $\frac{V-C}{2}$. Thus, for each player, the best outcome is, of course, when she plays hawk and the other player acts a dove, while the worst outcome sees both players choosing to act as a hawk.

While used in biology to explore the logic of animal conflict,³⁷ this game form has become a staple of the international relations literature, where it is commonly employed to analyse crisis situations, such as nuclear brinkmanship during the Cuban Missile Crisis.³⁸ The typical study question being: What strategy should a country adopt, knowing that it will incur severe losses if it acquiesces to the demands of its neighbour but knowing at the same time that a war would be even more costly?

2. APPLYING THE HAWK-DOVE GAME TO JUDICIAL INTERACTIONS IN THE EU MULTI-LEVEL LEGAL SYSTEM

Two reasons motivate the choice of this specific game form to model judicial interactions in the EU legal system. The first follows from the nature of jurisdiction as a rivalrous good. Certainly, we can imagine situations where, in reconfiguring domestic politics, supranational integration expands the relative influence of the judicial branch to such an extent that the expansion ends up benefiting all courts. But in the scenario that interests us here, courts on opposite sides of a jurisdictional dispute typically have opposite institutional interests, just like the two players in a Hawk-Dove game.³⁹

The second analogy with the Hawk-Dove game pertains to the potential consequences of an escalated conflict. For the CJEU, a single case of overt non-compliance by an influential domestic court may, by setting a precedent, damage its authority and undermine the effectiveness of EU law. But putting a threat of non-compliance to execution may attract problems to domestic judges, too. A ruling that comes to be regarded as detrimental to the country's interests and membership in the EU may trigger adverse political reactions. Legislators may decide to punish the unruly court by rolling back its jurisdiction, changing its rules of procedure, appointing new judges, etc..

On that score, it is worth remembering that a group of respected German academic lawyers reacted to the GFCC's ruling on the Lisbon Treaty – which

³⁷ See JOHN MAYNARD SMITH, *EVOLUTION AND THE THEORY OF GAMES* (1982).

³⁸ See STEVEN J. BRAMS, *SUPERPOWER GAMES: APPLYING GAME THEORY TO SUPERPOWER CONFLICT* (1985).

³⁹ In other words, we assume (a) that courts want to expand – or at least preserve – their jurisdiction and (b) that whenever one court expands its jurisdiction, it normally does so at the other's expense. (a) is a common assumption in the judicial politics literature, see e.g. GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005); Michel Troper & Véronique Champeil-Desplats, *Jalons Pour Une Théorie Des Contraintes Juridiques*, *THEORIE DES CONTRAINTES JURIDIQUES*, BRUXELLES/PARIS: BRUYLANT/LGDJ 11–23 (Michel Troper et al., 2005). Note that assumption (b) suggests a parallel between constitutional courts and national parliaments in that both appear to be inevitable “victims” of the integration process, see Arthur Dyevre, *The French Parliament and European Integration*, 18 EUR. PUB. L. 527 (2012). Students of international law have documented a growing pattern of frictions between international and domestic courts in other contexts too, see Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011); Ahdieh, *supra* note 19.

stopped short of holding the Treaty unconstitutional but was nonetheless regarded as articulating a strongly Eurosceptic position⁴⁰ – by calling on legislators to amend the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*). The proposed amendment⁴¹ would have required that the GFCC send a reference for a preliminary ruling to the Court of Justice before entering any judgment on the *ultra vires* character of an EU act. Had it become law, the amendment would certainly have dealt a severe (albeit not quite fatal) blow to the GFCC’s institutional standing.

More generally, despite growing disenchantment with the EU among ordinary voters, government parties in the Member States, even the more Eurosceptic ones, usually agree about the fact of EU membership.⁴² This entails that domestic courts can ill-afford to make decisions that would imperil their country’s full membership in the supranational club. In our view, this fact places an upper limit on the level of defiance domestic judges can realistically afford. The doctrines of direct effect and supremacy are now part – though not necessarily in the form expounded by the CJEU in its jurisprudence – of the *acquis communautaire*. Thus, unless the government parties wish to leave the EU, a court that blatantly defies it will face a political backlash.

⁴⁰ See discussion in Section IV below.

⁴¹ The text is available at http://www.euractiv.de/fileadmin/images/Denkschrift_EuGH_BVerfG_2009_Aug.pdf (accessed 29 March 2012).

⁴² See *OPPOSING EUROPE? THE COMPARATIVE PARTY POLITICS OF EUROSCEPTICISM: VOLUME 1: CASE STUDIES AND COUNTRY SURVEYS* (Paul Taggart & Aleks Szczerbiak, 2008); *OPPOSING EUROPE? VOLUME 2: COMPARATIVE AND THEORETICAL PERSPECTIVES* (Aleks Szczerbiak & Paul A. Taggart, 2008).

BLUFF AND BRINKMANSHIP IN THE JUDICIAL COLD WAR**1. BEST STRATEGY AND EQUILIBRIUM CONCEPT**

Pictured in Figure 2 is the payoff matrix of the jurisdictional conflict modelled as a Hawk-Dove Game.

		National Court	
		Judicial Restraint	Judicial Defiance
Court of Justice	Judicial Restraint	$\frac{J}{2}$	J
	Judicial Defiance	$-J$	$\frac{J-C}{2}$

Figure 2. Jurisdictional Conflict Modelled as a Hawk-Dove Game. Notes: J is the value of the jurisdictional gain and C is the cost of a constitutional conflict, incurred when the two courts choose judicial defiance. I assume $\frac{J-C}{2} < -J$ (judges prefer jurisdictional loss to constitutional crisis).

What is the optimal behaviour to adopt in such a conflict situation? To form what game theorists call a ‘Nash equilibrium’, a strategy profile must be a player’s best response to the other player’s best response, such that no player may want to depart unilaterally from the resulting outcome. Restricting the analysis first to pure strategies, we find two strategy profiles that satisfy this definition. Given that a constitutional crisis is a worse outcome than a jurisdictional loss ($\frac{J-C}{2} < -J$), a domestic court’s best response to a hawkish Court of Justice is judicial restraint. Yet its best response to a dovish CJEU is hawkish judicial expansion or reassertion. Remarkably, when we “solve” the game in this way, using only pure strategies, equilibrium behaviour never results in a constitutional crisis.

Although it is easy to see to that each court would prefer the equilibrium where it is the hawk and the other court is the dove, strategic decision-making is rendered difficult by the fact that no court has a dominant strategy. That is, a strategy that remains the best whatever strategy the other court happens to choose. Under the assumption that the courts are acting simultaneously rather

than sequentially,⁴³ each court must somehow guess what the other is going to do. That entails playing dove in the anticipation the other court will play hawk, and, vice versa, playing hawk if it is expected to choose dove. The only answer to that problem within the game is to adopt a mixed strategy randomizing among pure strategies. A pair of mixed strategies constitutes a mixed strategy equilibrium if they are mutual best responses.⁴⁴ Applying this solution concept, a constitutional crisis would have some probability of actually occurring, depending on the magnitude of the cost attached to a constitutional crisis relative to the value of a jurisdictional gain.⁴⁵

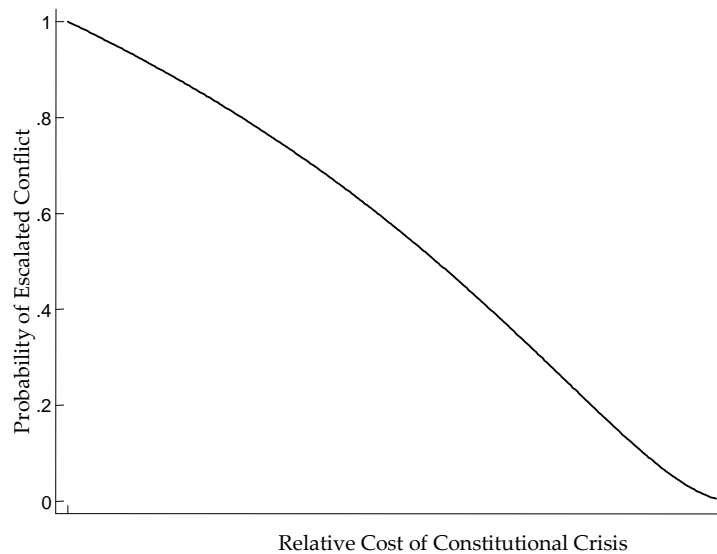


Figure 3. Relative Cost of Constitutional Conflict and Probability of Escalated Conflict. Notes: Relative cost of constitutional conflict is defined as

⁴³ When played sequentially, the game yields an obvious result: The court moving first chooses hawk, then, observing this, the other court is left with no choice but to play dove or else incur the cost of a constitutional crisis. When the game is repeated infinitely many times, though, playing the game sequentially does not necessarily entail this result, see *infra* IV.B.

⁴⁴ In short, players must play each strategy probabilistically, so as to make the other player indifferent between choosing one or the other (the expected payoff from one strategy must equal the expected payoff from the other). In our game, if p ($0 < p < 1$) and q ($0 < q < 1$) are respectively the probability with which the Court of Justice and the Domestic Court play dove, this condition is satisfied when p and $q = \frac{3J-C}{2J-C}$ ($p = q$ because payoffs are symmetrical.) To give a numerical example, assuming that $J = 10$ and $C = 50$, the two courts would play dove with probability $\frac{2}{3}$ and hawk with probability $\frac{1}{3}$.

⁴⁵ This is the joint probability of both courts acting as a hawk: $(1 - p) \cdot (1 - q) = \left(1 - \frac{3J-C}{2J-C}\right) \cdot \left(1 - \frac{3J-C}{2J-C}\right)$. In the numerical example above, this would happen with probability $\left(\frac{1}{3}\right) \cdot \left(\frac{1}{3}\right) = \frac{1}{9}$.

$C - 3J$ (in order for it to increase, cost C must increase relatively more than jurisdictional gain J).

Other things being equal, the probability of an escalated judicial war will go down as the relative cost of a constitutional crisis goes up, as depicted in Figure 3. For low values, the courts will want to play hawk more often, as the prospect of a jurisdictional gain (J whenever the other court acts as a dove) largely compensates for the risk of conflict ($\frac{J-C}{2}$ whenever the other court also happens to play hawk). On the other hand, for very high values, the probability of an escalated conflict will approach zero, thus demonstrating the effectiveness of the Cold War doctrine of Mutual Assured Destruction when applied to the European legal context: effective deterrence means courts will cooperate most of the time and judicial wars will be very rare.

2. DETERRENCE, SUPERPOWER STATUS AND THE NUCLEAR OPTION

Surely, I am not the first to invoke the Cold War analogy in the context of European legal integration. Some years ago, in commenting the GFCC's *Maastricht* decision, Joe Weiler and Ulrich Haltern observed:

According to this analogy [the Cold War analogy], the German decision is not an official declaration of war, but the commencement of a cold war with its paradoxical guarantee of mutual co-existence following the infamous MAD (Mutual Assured Destruction) logic. [...] For the German Court actually to declare a Community norm unconstitutional, rather than simply threaten to do so, would be an extremely hazardous move so as to make its usage unlikely. If other Member State courts followed the German lead, or if other Member State legislatures or governments were to suspend implementation of the norm on some reciprocity rationale, a real constitutional crisis would arise in the Community – the legal equivalent of the Empty Chair political stand-off in the 1960s. It would be hard for the German government to remedy the situation, especially if the German Court decision enjoyed general public popularity. Would the German Federal Constitutional Court be willing to face the responsibility of dealing such a blow to European integration, rather than just threatening to do so? Maybe not, but the logic of the Cold War is that each side has to assume the worst and to arm as if the other side would actually deal the first blow. The ECJ would then have to watch over its shoulder the whole time, trying to anticipate any potential move by the German Federal Constitutional Court.⁴⁶

⁴⁶ Joseph Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order-Through the Looking Glass*, 37 HARV. INT'L. L. J. 411, 445–446 (1996).

This fits rather well with our game-theoretic approach. But, more importantly, it points to two implications of the Hawk-Dove model presented here on which I would now like to dwell in more detail.

The first follows from the seemingly paradoxical finding that escalated judicial wars are more likely when the institutional cost associated with a constitutional crisis is perceived to be relatively low. Here too, the Cold War analogy applies in full. Indeed, while the existence of massive stockpiles of tactical and strategic nuclear weapons made war between the USA and the USSR virtually impossible, it did not prevent military escalations between them and lesser military powers (such as North Vietnam and Afghanistan). Similarly, I believe that an all-out war is less likely to occur with a judicial superpower like the GFCC than with a less powerful judicial institution like the CCC. Indubitably, domestic high courts differ widely in institutional stature, powers and international influence. At one end of the spectrum lies the GFCC as Europe's mightiest domestic court. With multiple ways to access the Court (abstract review, concrete review, individual complaint...), broad jurisdiction and doctrines that afford it a high level of discretion over case selection, the GFCC enjoys more control over its agenda than any other European judicial body. This in turn enables it to closely monitor jurisprudential developments at the supranational level while overseeing the application of EU law by domestic judicial actors. What is more, the GFCC's institutional prominence extends beyond German borders. Its jurisprudential edicts, especially on European integration, are closely followed in other Member States and enjoy broad international media coverage. To that extent and as Weiler and Haltern rightly notice, the GFCC potentially represents a systemic threat for the European Court and the effectiveness of European law in a way other domestic courts do not, or at least not to the same extent.

At the other extreme of the institutional spectrum, we find courts that are so severely constrained in their procedural and policy-making powers that they cannot really articulate credible non-compliance threats. Because the UK lacks a formal constitution, the UK Supreme Court, for example, cannot appeal to fundamental or immutable constitutional principles to place doctrinal limits on the supremacy of EU law in the same way the GFCC and other national courts have. This limitation, obviously, does not apply to the French Constitutional Council. Yet the French institution's agenda-setting power is subject to strict limitations. A recent constitutional revision has expanded the Council's review powers, by introducing a form of concrete review in a system that hitherto allowed constitutional challenges only against statutes awaiting promulgation.⁴⁷

⁴⁷ Arthur Dyevre, *The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)*, CONSTITUTIONAL CONVERSATIONS IN EUROPE (Catherine Van de Heyning & Maartje de Visser, 2012).

Nonetheless, the Council's operating radius remains severely constrained by the restrictive character of the existing review mechanisms and the fact that ordinary citizens lack standing to file constitutional cases. For this reason, French constitutional judges cannot be sure a case will be brought in timely fashion for them to take a stance on the EU issue of the day. When it comes to monitoring the pace and direction of legal integration, they thus appear to be in a much weaker position than their German counterparts. Even if they wanted to follow the example of the GFCC and confront the Court of Justice by issuing non-compliance threats, their credibility would be undermined by the Council's procedural limitations.

The CCC falls somewhere between these two extremes. The Czech Court is not held back by tight procedural constraints as is the French Constitutional Council. But it neither commands the same support at home, nor projects the same influence abroad as the GFCC. So, seen from the CJEU's standpoint, the cost of an escalated constitutional crisis with the CCC is not nearly as high. Furthermore, in handling the pension case, which led it to declare the CJEU *Landtová* ruling *ultra vires*, the CCC made the crucial mistake of choosing an issue on which there was no consensus at domestic level. The bone of contention was Article 20 of the C-S Agreement – the special agreement concluded by the two States that emerged from the break-up of Czechoslovakia to settle the pension issue. Article 20 stipulated that the applicable scheme and the authority competent to grant pensions would be determined by the State of residence of the employer at the time of the dissolution. This criterion entailed that someone who had never set foot in the Slovak part of the defunct federation, but whose employer resided in the Slovak part, would receive her pension check (or whatever proportion thereof) from Slovakia. Throughout the 1990s, the meagre Slovak pensions remained significantly below those paid in the Czech Republic. This led to a series of disputes, culminating in a CCC judgment that ruled Article 20 unconstitutional.⁴⁸ The CCC ordered the Czech authorities to pay a special increment to Czech citizens in order to compensate for their low Slovak pensions. The Supreme Administrative Court (SAC), however, never accepted the CCC's position. This triggered a domestic *guerre des juges* that has been dragging on for years. Indeed, before its 31 January 2012 ruling, the CCC had already delivered no less than 16 decisions on the matter! The CCC kept reasserting its jurisprudence. But the SAC persisted in refusing to back down.⁴⁹

Following the European Court's decision in *Landtová*, which found that the special increment enacted by the CCC contravened the Coordination Regulation on the ground that it discriminated on the basis of nationality, Czech politicians did not rally to the CCC, as its judges might have hoped. Instead, the Czech Parliament passed a bill that prospectively abolished the special increment for all

⁴⁸ Judgment of 3 June 2003, II. ÚS 405/02, *Slovak Pensions I*.

⁴⁹ See Komárek, *supra* note 1.

nationals, Czech or not, in line with the CJEU ruling.⁵⁰ Meanwhile, the SAC, which justifiably felt vindicated by the CJEU's preliminary ruling, still had to hand over its decision on the merits and decide whether Mrs Landtová would keep her special increment. The CJEU ruling did not preclude paying the increment to those who already enjoyed it.⁵¹ However, the SAC reasoned that, since the CCC had created the special increment in violation of EU law, its pension case law could not bind ordinary courts.⁵² The outcome, which also meant that Mrs Landtová would lose her special increment, infuriated the Czech constitutional judges. Nevertheless, when the pension issue came back before the CCC and on the day that saw it announce its *ultra vires* declaration, the Court found itself uncomfortably isolated. So much so that the odds of its *ultra vires* decision being actually enforced look very slim. In principle, the case is remanded to the SAC for further proceedings in accordance with the CCC's pronouncements. But it is hard to see any reason why the SAC would now acquiesce. Overall, it seems that the CCC's move will probably do more to harm its own institutional standing than to undermine the Court of Justice's authority. The nuclear bomb the Czech judges intended to drop on the Court of Justice apparently ended up exploding in their own hands.

Another implication of the foregoing game-theoretic analysis is especially relevant to domestic judicial superpowers like the GFCC. Again, this point has a Cold War parallel. Indeed, just as nuclear superpowers may realise that conventional weapons are more flexible and therefore easier to put to use, a mighty domestic court may want to lower the stakes of a showdown with the Court of Justice by choosing a low-profile issue or a less destructive form of defiance. By lowering the costs ensuing from an escalated constitutional crisis, a domestic court may make the usage of the non-compliance option more flexible and therefore more credible. If the expected gain from confrontation remains sufficiently high, the domestic court may even manage to escape, if only for a moment, the implacable logic of the Hawk-Dove game.⁵³ This line of reasoning apparently underpinned a piece Roman Herzog, both former federal President and former President of the Karlsruhe Court, published in the *Frankfurter Allgemeine Zeitung* in September of 2008.⁵⁴ Entitled 'Stop the ECJ', the article pointed the finger at what it viewed as the Court of Justice's increasing tendency to behave like a super-legislature grabbing ever greater competences. More to the point, though, Herzog urged the GFCC to rein in the Luxembourg Court's activism by pronouncing the latter's ruling in the *Mangold* case *ultra vires*. The *Mangold*

⁵⁰ Act No. 428/2011 Coll.. See *Slovak Pensions XVII*, part IX.

⁵¹ See *Landtová*, *supra* note 2, paragraph 53.

⁵² SAC, judgment of 25 August 2011, 3 Ads 130/2008 – 204.

⁵³ This would imply: $\frac{J-c}{2} > -J$. (The domestic court prefers constitutional crisis to acquiescence.)

⁵⁴ Roman Herzog, *Stoppt Den EuGh*, FRANKFURTER ALLGEMEINE ZEITUNG (2008).

judgment⁵⁵ pertained to the principle of non-discrimination on grounds of age and its application pending the transposition of Directive 2000/78/EC of 27 November 2000 (Antidiscrimination Directive). In 2002, the centre-left coalition then in power in Germany had lowered the age limit at which employees and employers could enter into temporary contracts from 58 to 52. Aimed at bolstering the employment opportunities of older workers, the new law gave employers a measure of flexibility in an otherwise rigid labour market. Accordingly, a 53-year old worker could have her fixed-term contract renewed an indefinite number of times without ever being offered a permanent position. This apparently contravened the Antidiscrimination Directive, which precluded discrimination among workers on account of age. Yet there were two reasons to think that the Antidiscrimination Directive and the German legislation were fully compatible. For one, Article 6(1) of the directive provided that „differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy“. For another, Member States had until December 2003 to transpose the directive and could claim an additional 3 years extension.⁵⁶ As Germany made use of the extension, the deadline for transposition was put off to 2 December 2006. So, when, in November 2005, the Court of Justice was about to announce preliminary its ruling in the case brought by the 56-year old Werner Mangold, it was expected that the Luxembourg Court would stop short of finding the German legislation in breach of EU law.

All the same, the European Court held that the German employment scheme constituted unacceptable age discrimination. Brushing aside the objection that a directive whose transposition period had not expired could not possibly bind a Member State, the Court of Justice took the view that the principle of non-discrimination on grounds of age enunciated by the Antidiscrimination Directive was a general principle of community law. The principle was supposed to have its source „in various international instruments and in constitutional traditions common to the Member States“. ⁵⁷ Not surprisingly, the ruling and the somewhat offhand justification offered by the European Court attracted considerable criticism in Germany.⁵⁸ But what really matters for the point I am trying to make here is that by the time Herzog’s article appeared in the *Frankfurter Allgemeine Zeitung* the policy issue raised by the *Mangold* case was, for all intents and purposes, moot. Because the Antidiscrimination Directive was now in force, the uniform application of EU law was not at risk, should the GFCC proceed to declare the *Mangold* ruling *ultra vires*. In other words, *Mangold* provided the GFCC with an opportunity to defy the Court of Justice at a much lower constitutional cost. This did not escape Herzog’s attention. He remarked that a *ultra vires* declaration by the

⁵⁵ Decision of 22 November 2005, Case C-144/04, *Werner Mangold v. Rüdiger Helm*.

⁵⁶ See Antidiscrimination Directive, Article 18.

⁵⁷ See *supra* note 52, Paragraph 74.

⁵⁸ See LÜDER GERKEN ET AL., “MANGOLD” ALS AUSBRECHENDER RECHTSAKT (2009).

GFCC would be ‘acceptable’ because the ‘Directive was now in force’ and, for this reason, the declaration ‘would not have any lasting impact on the unity of the EU legal system’.⁵⁹

IV. CREDIBLE AND NON-CREDIBLE THREATS OF NON-COMPLIANCE: THE ITERATED SIGNALLING GAME

This Section takes a closer look at judicial signalling – what legal scholars commonly discuss under the more capacious term of ‘judicial dialogue’⁶⁰ – and seeks to identify the conditions under which domestic non-compliance threats may really influence the behaviour of the Court of Justice even if they are not subsequently carried out. For this purpose, I present a slightly more complex model in which the Court of Justice interacts with a domestic court in iterated fashion. After laying out the model, I discuss one possible equilibrium of the game, which I call – yet again in allusion to Cold War international politics – “coexistence” or “containment” equilibrium. I contend that this equilibrium may constitute a good approximation of CJEU-GFCC relations. I also consider other equilibria and how they might explain the behaviour of less powerful courts. As before, I do my utmost to keep equations and formulas to a minimum.

A. THE MODEL

The Hawk-Dove model presented in the previous section certainly offers an eminently tractable and in many ways illuminating account of EU judicial politics. But it nonetheless remains a very stylised representation of the jurisprudence of constitutional conflict. So I introduce several modifications to arrive at a more accurate picture of reality.

The first follows from the observation that domestic and supranational judges, like countries on the world stage, do not interact in one-shot fashion but do so repeatedly. Judges have a history of past interactions and know they are likely to interact again in the future (interactions do not have a finite horizon). This matters because repetition fundamentally transforms the nature of

⁵⁹ Herzog, *supra* note 54. Another way for superpowers to lower the ante is to avoid direct confrontation and, instead, fight each other through proxy wars, as the US and the USSR did on several occasions during the Cold War. The speech of the GFCC’s President, Andreas Vosskuhle, before the legislature of Hessen on 1 March 2012, may quite plausibly be analysed as an attempt to apply this strategy in the context of European judicial politics. In discussing the GFCC’s role as guardian of Germany’s statehood, Vosskuhle praised the CCC’s decision as a ‘healthy’ development to rein in the CJEU’s ‘expansionary’ impulses, in an apparent attempt to exploit the Czech precedent in the GFCC’s own struggle with the European Court.

⁶⁰ See *supra* note 16 and accompanying text.

interaction. When a game is repeated an infinite number of times, outcomes that would not form a stable equilibrium in a one-shot interaction suddenly become possible. Repetition means a player can condition his behaviour on what the other player has done in previous rounds. This in turn makes it possible to punish or to reward the opponent for what she has done in the past. At the same time, and to the extent that the players care about future payoffs, the mere threat to punish may suffice to induce cooperation and prevent unilateral deviation from what would otherwise be an unstable outcome. The shadow of the future, as it were, thus becomes an effective means to enforce equilibria that would not be sustainable in a one-shot game.

A further consideration involves the assumption of incomplete information. The Hawk-Dove game I described above presumes complete information. Every outcome is associated with specific costs and benefits for the players and the exact value of the courts' payoffs is presumed to be public knowledge. In other words, each court knows exactly, and for every outcome, how much the other court will gain or lose. More realistically, though, courts do not always have complete information about the exact cost judges sitting on the opposite judicial body associate with a constitutional crisis or about the extent to which they value jurisdictional expansion. One way to model this is to assume that a court can be of two types: a dovish type, who associates a constitutional crisis with a very high cost and/or jurisdictional expansion with a lower gain, and a hawkish type, who associates a constitutional crisis with a relatively lower cost and/or jurisdictional expansion with a higher payoff. The hawkish type, as it has less to lose from a constitutional crisis and/or more to win from jurisdictional expansion, will be relatively more willing to risk an escalated confrontation. Knowing this, the other court, insofar as it is of a more dovish type, should have relatively more incentives to back down. Yet incomplete information implies that, though each court knows its own type, it does not know the other's type with certainty and must therefore act on the basis of what it believes most probable.

We really get to the crux of the matter – judicial signalling – when we introduce the possibility of communication. This can be conceptualised by allowing the players to signal their type before making a move. A player may do so honestly or dishonestly. Presumably, a hawkish type should want to signal its true type, either to avert a constitutional crisis or to force an equilibrium more favourable to her own interests on an opponent believed to be dovish. On the other hand, a dovish court may be tempted to lie about its true type and signal hawkishness. Communication can be modelled in two ways. Modelling communication as costly signal means that producing the signal directly affects the sender's payoffs. The other way to model it is as cost-free signal – “cheap talk” in game-theoretic jargon. This implies that producing the signal does not directly affect the sender's payoffs, although it may affect the players' choices and thus, indirectly, their payoffs.

In the international relations literature, formal models based on these ingredients have been used to identify the conditions under which signalling is

likely to be credible and when a state will have incentives to be honest or, on the contrary, to bluff.⁶¹ It has been demonstrated, in particular, that even when a signal is not itself costly (thus fitting the definition of cheap talk), it may nonetheless provide an effective deterrence tool when a State has built a reputation for honesty.⁶² Under certain circumstances, bluffing may also work. But a State that is caught bluffing – as China was over Taiwan in its confrontation with the United States in 1950⁶³ – may earn a reputation for bluff. As a result, its signal will lack credibility and will be ignored by other States. This means in turn that a State with a reputation for bluffing will be incapable of using signalling to avert a war, even when it is ready to fight, as exemplified by the Chinese failure to avoid military escalation in the Korean peninsula.⁶⁴

I believe the jurisprudence of constitutional conflict may be modelled along similar lines. The game tree depicted in Figure 4 represents a one-period interaction in the infinitely repeated game. It starts with the Court of Justice's attempting to enlarge its jurisdiction. The Domestic Court then responds to this move either by threatening to disapply some EU law or by remaining silent.⁶⁵ The Court of Justice must then decide whether to maintain or to abandon its activist jurisprudence. In case it chooses to press on with its expansionary jurisprudence, the last move rests with the Domestic Court to disapply some EU law or to acquiesce. Whenever the end of a branch of the game tree is reached, the stage game ends and a new period begins. The iterated game consists of an infinite number of repetitions of this base game.

⁶¹ See Sartori, *The Might of the Pen*, *supra* note 35; Anne E. Sartori, *Hawks, Doves, and Diplomats: Reputation and Communication in a Modified Hawk-Dove Game* (2001), available at <http://politics.as.nyu.edu/docs/IO/4760/Sartori4-13.pdf>; James D. Morrow, *Capabilities, Uncertainty, and Resolve: A Limited Information Model of Crisis Bargaining*, 33 AM. J. POL. SCI. 941–972 (1989).

⁶² Sartori, *The Might of the Pen*, *supra* note 35.

⁶³ *Id.* at 139.

⁶⁴ *Id.* at 137–140.

⁶⁵ For the sake of simplicity and because I am primarily interested in the use of signalling by domestic judicial actors, the model only considers communication by the Domestic Court.

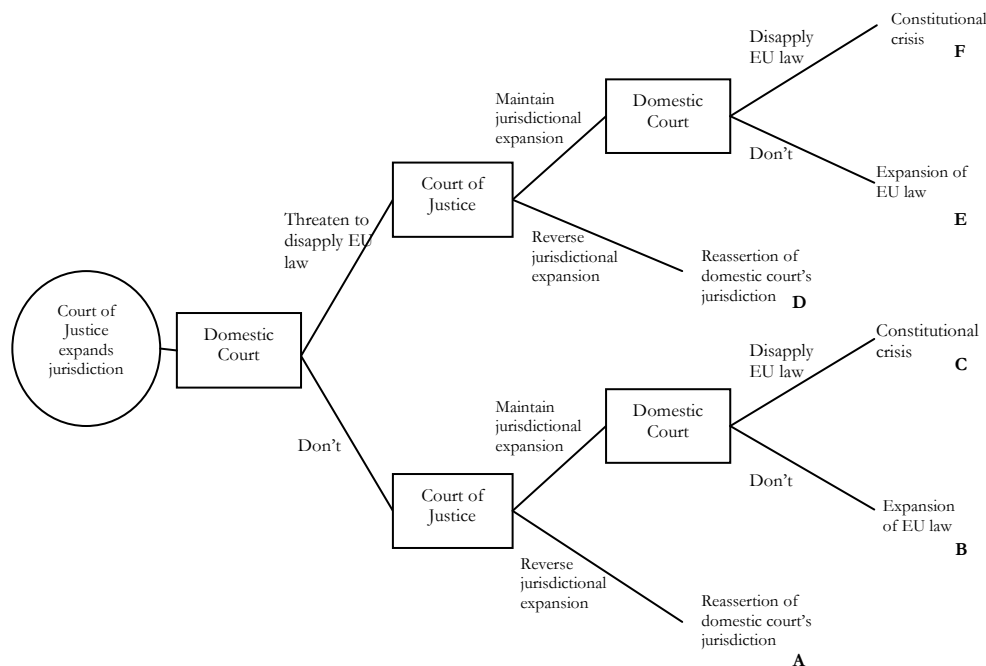


Figure 4. Signalling Domestic Judicial Defiance, Stage Game.

A court can be of two types. The more hawkish type associates jurisdictional expansion or reassertion with a high gain (noted J_h) but also jurisdictional retreat with a high loss ($-J_h$). The more dovish court, meanwhile, associates expansion with a low jurisdictional gain (J_l , with $J_l < J_h$) but also jurisdictional retreat with a smaller loss ($-J_l$, with $-J_l > J_h$). As before, when both courts refuse to acquiesce, each receives half the jurisdictional resource it was fighting for and incurs the cost of an escalated constitutional crisis ($\frac{J_h-c}{2}$ for the hawkish type and $\frac{J_l-c}{2}$ for the dovish type). The courts have no persistent type and a court's type may change in each period with probability $\frac{1}{2}$. This assumption is meant to reflect the view that judicial preferences may vary from issue to issue as well as over time following changes in judicial personnel. At the beginning of a period, a court knows only its own type. Once the period is over, though, the courts can observe each other's type.⁶⁶ The Domestic Court can thus observe which type the Court of Justice

⁶⁶ This assumption is arguably a simplification. In the course of real-world interactions, judges are likely to learn something about each other's preferences but not everything.

really was and the Court of Justice can verify whether the Domestic Court signalled its real type or bluffed. Here communication is modelled as cheap talk. Producing the signal “Threaten” does not per se affect the Domestic Court’s payoffs (nor does it affect the Court of Justice’s for that matter), although, under certain conditions, as we shall see, the signal may be credible enough for the Court of Justice to pay attention to it and revise its beliefs about the Domestic Court’s preferences accordingly.

B. THE ‘COEXISTENCE’ OR ‘CONTAINMENT’ EQUILIBRIUM

What is the optimal way to play this game? As with any infinite-horizon game, there are many possible equilibria in our inter-court game.⁶⁷ Yet not all are equally plausible empirically. Much depends on the players’ initial expectations.⁶⁸ Under certain conditions, the following strategy profiles constitute a plausible coexistence or containment equilibrium⁶⁹:

Court of Justice:

If type = dovish: If period $t = 1$, play ‘Maintain jurisdictional expansion’ if Domestic Court does not threaten, otherwise play ‘Reverse Jurisdictional Expansion’.
 If period $t > 1$ and no court has been caught deviating from equilibrium:
 Play ‘Reverse Jurisdictional Expansion’ if Domestic Court does not threaten and last time two courts were the same type you played ‘Maintain Jurisdictional Expansion’, or if Domestic Court says ‘Threaten’;
 Play ‘Maintain Jurisdictional Expansion’ if last time two courts were the same type you played ‘Reverse Jurisdictional Expansion’.
 If Domestic Court has been caught deviating from equilibrium, play ‘Maintain Jurisdictional Expansion’.
 If you have been caught deviating from equilibrium, play ‘Reverse Jurisdictional Expansion’.

If type = hawkish: If period $t = 1$, play ‘Maintain Jurisdictional Expansion’

⁶⁷ This follows from the so-called “Folk Theorem”, see DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 150 (1991).

⁶⁸ These expectations, arising from formal or informal norms, may identify one particular equilibrium as a ‘focal point’, a term coined by THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57 (1960).

⁶⁹ In the jargon of game theory, the solution concept applied here is called a ‘Perfect Bayesian Equilibrium’, for it implies that the players rationally update their beliefs according to Bayes’ rule.

whether or not Domestic Court threatens.

If period $t > 1$ and no court has been caught deviating from equilibrium:

Play 'Maintain Jurisdictional Expansion' if Domestic Court does not threaten or if last time two courts were the same type you played 'Reverse Jurisdictional Expansion';

Play 'Reverse Jurisdictional Expansion' if Domestic Court says 'Threaten' and last time the two courts were the same type you played 'Maintain Jurisdictional Expansion'.

If Domestic Court has been caught deviating from equilibrium, play 'Maintain Jurisdictional Expansion';

If you have been caught deviating from equilibrium, play 'Reverse Jurisdictional Expansion'.

Domestic Court:

If type = dovish:

If period $t = 1$, don't threaten and if Court of Justice plays 'Maintain Jurisdictional Expansion', play 'Don't Disapply EU Law'.

If period $t > 1$ and no court has been deviating from equilibrium:

Don't threaten;

Play 'Don't Disapply EU Law' if Court of Justice plays 'Maintain Jurisdictional Expansion'.

If Court of Justice has been caught deviating from equilibrium:

Say 'Threaten';

If Court of Justice plays 'Maintain Jurisdictional Expansion', play 'Disapply EU Law'.

If you have been caught deviating from equilibrium:

Say 'Threaten' with probability $\frac{1}{2}$, don't threaten with probability $\frac{1}{2}$;

If Court of Justice plays 'Maintain Jurisdictional Expansion', play 'Don't Disapply EU Law'.

If type = hawkish:

If period $t = 1$:

Say 'Threaten';

Play 'Don't Disapply EU Law' if Court of Justice plays 'Maintain Jurisdictional Expansion'.

If period $t > 1$ and no court has been caught deviating from equilibrium:

Play 'Don't Disapply EU Law' if Court of Justice plays

‘Maintain Jurisdictional Expansion’ and last time two courts were the same type the Court of Justice played ‘Reverse Jurisdictional Expansion’;

Play ‘Reverse Jurisdictional Expansion’ if Domestic Court says “Threaten” and last time the two courts were the same type you played “Maintain Jurisdictional Expansion’.

If Court of Justice has been caught deviating from equilibrium:

Say “Threaten”;

If Court of Justice plays ‘Maintain Jurisdictional Expansion’, play ‘Disapply EU Law’;

If you have been caught deviating from equilibrium:

Say “Threaten” with probability $\frac{1}{2}$, don’t threaten with probability $\frac{1}{2}$;

If Court of Justice plays ‘Maintain Jurisdictional Expansion’, play ‘Don’t Disapply EU Law’.

This equilibrium corresponds to a situation where the two courts accommodate each other’s existence by trading issues. The court that cares more about the issue (J_h) gets its way and the court that cares less (J_l) acquiesces. When the two courts are of the same type, each court alternatively gets its way, i.e. if the Court of Justice gets to play ‘Maintain’, it must play ‘Reverse’ the next time the courts are of the same type. In equilibrium, along the path of play, constitutional crises never occur and the only outcomes that are observed are A, B and D, E in Figure 4. As long as no court is caught deviating from the equilibrium path, the Domestic Court’s signal allows the courts to coordinate each other’s moves.⁷⁰ Because the Domestic Court expects to benefit from the trading of issues, it always tells the truth about its type. If it lied, saying “Threaten” when in truth its type is dovish, the Court of Justice would observe it at the end of the period. From then on, the Court of Justice would stop listening to the signal,⁷¹ would always maintain its expansionary judicial stance and no trading of issues would take place.

What conditions must hold to sustain this equilibrium? First, and most evidently, the courts must prefer a single-period jurisdictional loss to a single-

⁷⁰ At the beginning of each period, the Court of Justice believes that there is a 50 per cent chance that the Domestic Court is hawkish and a 50 per cent chance that it is dovish. When the Domestic Court announces “Threaten”, though, the Court of Justice updates its beliefs respectively to 0 and 100 per cent, while, conversely, the absence of signal prompts the Court of Justice to revise its beliefs to respectively 100 and 0 per cent.

⁷¹ As a result, the Domestic Court would be indifferent between signalling and not signalling hawkishness. It is why it threatens with probability $\frac{1}{2}$ and does not threaten with probability $\frac{1}{2}$.

period constitutional crisis ($\frac{J_l - c}{2} < \frac{J_h - c}{2} < -J_h < -J_l$). Second, the courts must care at least a middling amount about the future. This means that the expected payoff from complying now and in the future must be greater than the expected payoff from deviating now and enduring the consequences in the future.⁷² For the Domestic Court, the temptation to lie about its type when it is dovish seems the most obvious incentive compatibility constraint. Since the hawkish type gets its way more often,⁷³ the dovish type may want to say “Threaten” to obtain payoff (J_l) and avoid cost ($-J_l$).⁷⁴ This, however, must be balanced against the future loss resulting from a reputation for bluff. Therefore, a necessary condition for sustainability is that the expected dividend of a reputation for honesty outweighs the immediate reward from lying.⁷⁵ Third, the strategy profiles must also satisfy a credible punishment condition. This means that whenever a court is caught deviating the other court must be willing to enforce punishment. When the court caught deviating is the Domestic Court, this condition is easily satisfied: the Court of Justice always plays “Maintain Jurisdictional Expansion” and has no incentive to deviate from this course of action. It is when the court caught deviating is the Court of Justice that things get a little trickier. Indeed, for punishment to be credible the Domestic Court must be willing to play “Disapply EU law” in case the Court of Justice persists in playing “Maintain Jurisdictional Expansion”. That is, the Domestic Court must be willing to incur the cost of a full-blown constitutional crisis, even though, were it only for the current period, it would be better off acquiescing (remember: $\frac{J_l - c}{2} < \frac{J_h - c}{2} < -J_h < -J_l$). Thus the requirement is that the expected future payoffs from enforcing punishment

⁷² If δ ($\delta \in (0,1)$) denotes the judges’ discount factor, the rate at which they discount future payoffs, the Continuation Value of Compliance ($CV_{compliance}$) is captured by: $\frac{1}{1-\delta} \left(\frac{1}{4}J_h + \frac{1}{8}J_h + \frac{1}{8}J_l - \frac{1}{4}J_l - \frac{1}{8}J_l - \frac{1}{8}J_h \right)$. The Continuation Value of Non-Compliance ($CV_{noncompliance}$) for the court caught deviating is: $\frac{1}{1-\delta} \left(-\frac{1}{2}J_h - \frac{1}{2}J_l \right)$. (The court caught deviating always acquiesces).

⁷³ In period $t > 1$, the hawkish court gets its way whenever the other court’s type is dovish in addition to 50 per cent of the time when the other court is also hawkish. The dovish type, by contrast, get its way only half the time when the other court is also dovish. Note that in period $t = 1$ the dovish Domestic Court never gets its way.

⁷⁴ When, in period $t > 1$, no court has been caught deviating and the last time the two courts were of the same type the Court of Justice got its way, the dovish Domestic Court’s single-period net expected gain from lying over telling the truth is: $\frac{1}{2}J_l + \frac{1}{2}J_l - \frac{1}{2}J_l + \frac{1}{2}J_l = J_l$. If $t = 1$ or the last time the two courts were of the type the Domestic Court got its way, the net expected gain is: $\frac{1}{2}J_l - \frac{1}{2}J_l - \frac{1}{2}J_l - \frac{1}{2}J_l = -J_l$.

⁷⁵ More formally, in current period $t > 1$, if no court has been caught deviating and the last time the two courts were of the same type the Court of Justice got its way – the circumstances under which the temptation to lie is strongest – the following inequality must hold for the dovish Domestic Court: $\left(\frac{1}{2}J_l - \frac{1}{2}J_l + CV_{compliance} \right) > \left(\frac{1}{2}J_l + \frac{1}{2}J_l + CV_{noncompliance} \right)$.

overweigh the cost of a constitutional crisis in the current period so that the Domestic Court prefers punishing to acquiescence.⁷⁶

THE GERMAN CONSTITUTIONAL COURT AND THE EUROPEAN COURT: CONTAINING THE EXPANSION OF EU LAW

This coexistence equilibrium seems to provide a plausible characterisation of the relationship the CJEU has developed with the GFCC. In evolving its rich case law on European integration, which now spans more than four decades, the German Court has alternated conciliatory statements with tough talk. It has threatened to disapply EU acts on numerous occasions. Yet it has never put its threat to execution. To many legal scholars, this is proof that the GFCC is a dog that barks but never bites, and that its non-compliance threats cannot have any influence whatsoever on the CJEU.⁷⁷ The analysis presented here, however, suggests that this view is quite possibly wrong. Indeed, far from demonstrating that the GFCC's barking is mere "babble", our game-theoretic analysis implies that the absence of constitutional crises may in fact be an indication that the GFCC has enjoyed a good measure of success in containing the CJEU's expansionary impulses.

The first bouts of tension with the Court of Justice go back more than four decades. In its first *Solange* decision, the GFCC announced that as long as the European Economic Communities (EEC) lacked a proper bill of rights, it would review the measures enacted by EEC institutions to ensure they do not fall below the human rights standards of the German Constitution.⁷⁸ As is well known, no European act was found to violate these standards. But the Court of Justice soon began to work actively on the development of a human rights jurisprudence. In 1986, twelve years after its first *Solange* decision, the GFCC declared that it was satisfied with the progress made by EEC institutions on the human rights front and that it would not exercise its power to review European laws as long as the level of fundamental rights protection at supranational level remained equivalent to that guaranteed at the domestic level.⁷⁹ While demonstrating that a domestic judicial body could influence the development of European law, these decisions are also widely credited for spurring the Court of Justice to take fundamental

⁷⁶ The $CV_{noncompliance}$ for the punishing court corresponds to: $\frac{1}{1-\delta} \left(\frac{1}{2}J_h + \frac{1}{2}J_l \right)$. (The punishing court always gets it way, irrespective of its type.) Hence, the credible punishment condition for the punishing Domestic Court is captured by: $\frac{1}{1-\delta} \left(\frac{1}{2}J_h + \frac{1}{2}J_l \right) - \left| \frac{J_l - C}{2} \right| > -J_l$. (This is for the dovish Domestic Court. For the hawkish Domestic Court the condition is easier to satisfy, since acquiescence is more costly and constitutional crisis less so.)

⁷⁷ Christoph U. Schmid, *All Bark No Bite: Notes on the Federal Constitutional Court's "Banana Decision,"* 7 EUR. L. J. 95 (2001).

⁷⁸ Decision of 29 May 1974, 37 BVerfGE 271.

⁷⁹ Decision of 22 October. 1986, 73 BVerfGE 339.

rights more seriously.⁸⁰ Remarkably, the GFCC achieved this without pressing the big red button.

After a period of accelerated integration following the adoption of the Single European Act,⁸¹ tensions flared up again during the ratification of the Maastricht Treaty. A judge well-known for its Eurosceptic positions, Paul Kirchhoff, was designated as *rapporteur* for the case brought against the statute authorising ratification. Kirchhoff, soon to become the *bête noire* of pro-integration academics,⁸² wrote an opinion full of threats and warnings, some veiled others explicit, directed at the European legislative bodies and at the Court of Justice in particular. After cautioning Brussels and Luxemburg that ‘Treaty interpretation should not amount to Treaty revision’, it went on to spell out the GFCC’s now famous *ultra vires* doctrine,⁸³ which has since then served as inspiration for many other high courts throughout the EU. In any case, at a time when public attitudes towards the great European project were already souring, the ruling sent a shockwave through the EU legal order. So it is hardly surprising that the apparent self-restraint displayed by the Court of Justice in the 1990s has been linked to the GFCC’s *Maastricht* ruling.⁸⁴

The GFCC’s *Banana* decision⁸⁵ at the turn of the Millennium marked a return to détente. This interlude proved relatively short-lived, however. In the wake of the 2004 enlargement, the Court of Justice produced a series of judgments that sparked considerable controversy in Germany and elsewhere.⁸⁶ The pressure was again mounting between the two judicial superpowers. On the eve of the GFCC’s ruling on the Lisbon Treaty, tensions had reached unprecedented levels, inviting comparison with the Cuban Missile Crisis. Similar to judge Paul Kirchhoff in *Maastricht*, judge Udo di Fabio, who had also been *rapporteur* in the GFCC ruling on the European Arrest Warrant,⁸⁷ was there to lend extra credibility to the Court’s hawkish posturing. The language of the decision he penned, with its strong sovereigntist overtones, was clearly a signal of defiance addressed to the CJEU.⁸⁸ While stressing the structural limits placed by the German Constitution on the integration process, it flagged a handful of policy areas as core domestic competences that had to remain in the hands of German legislators.⁸⁹

⁸⁰ Weiler & Haltern, *supra* note 46, at 446; STONE SWEET, *supra* note 22, at 87–90; ULRICH R. HALTERN, *EUROPARECHT: DOGMATIK IM KONTEXT* 472 (2007).

⁸¹ See Weiler, *The Transformation of Europe*, *supra* note 11.

⁸² See Joseph Weiler, *The State “Über Alles”: Demos, Telos and the German Maastricht Decision*, *FESTSCHRIFT FÜR ULRICH EVERLING* 1651 (Ole Due, 1995).

⁸³ Decision of 12 October 1993, 89 BVerfGE 155.

⁸⁴ See RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* (1998).

⁸⁵ Decision of 7 June 2000, 102 BVerfGE 147.

⁸⁶ See Arthur Dyevre, *The German Federal Constitutional Court and European Judicial Politics*, 34 *W. EUR. POLITICS* 346–361 (2011).

⁸⁷ Decision of 18 July 2005, BVerfGE 113, 273.

⁸⁸ Decision of 30 June 2009, BVerfGE 123, 267.

⁸⁹ *Id.* para. 253–260

For want of a full-scale empirical investigation, it is hard to establish with the required certainty whether the GFCC's *Lisbon* ruling really forced the CJEU into retreat. In light of the reactions and criticism its ruling has attracted,⁹⁰ the GFCC would seem to have successfully emulated President Kennedy's cautious firmness in confronting the Soviet Union over the Cuban Crisis. On the other hand, *Küçükdeveci*, delivered less than a year after the German Court's landmark ruling, seemed to be an unequivocal confirmation of the doctrinal position articulated by the Luxembourg Court in *Mangold*.⁹¹ This would suggest the CJEU took the GFCC's signal to be bluff and decided to ignore it.

At any rate, just one year after its *Lisbon* ruling, the GFCC rendered its *Honeywell* decision.⁹² In an opinion whose appeasing tone stood in sharp contrast to *Lisbon*'s belligerence, the GFCC held that *Mangold* was not an *ultra vires* act. Under the assumption that the Court of Justice really believed the GFCC's signal in *Lisbon* and did not subsequently change its mind, *Honeywell* would simply be issue-trading going on – the judicial equivalent of President Kennedy's promise, as part of the resolution of the Cuban Crisis, not to invade Cuba and to withdraw US nuclear warheads from Turkey. The alternative interpretation would be that the GFCC was caught bluffing in *Lisbon*, as China was over Taiwan in 1950, and had little choice but to acquiesce. This would imply that the courts are now in the part of the coexistence equilibrium where the Court of Justice no longer listens to the Domestic Court and the Domestic Court is punished for deviating.⁹³

ALTERNATIVE EQUILIBRIUM, WEAK DOMESTIC COURTS AND KARLSRUHE'S NUCLEAR UMBRELLA

Leaving aside the (empirical) question as to whether *Lisbon* and *Honeywell* represented a failure or a triumph in the GFCC's containment jurisprudence, less powerful national courts may face structural difficulties in trying to emulate its *Maastricht ultra vires* doctrine.

To be sure, failing to communicate properly may not help the cause of domestic judges. Somewhat oddly, in the Czech story, when the SAC submitted a reference for a preliminary ruling in what was to become the *Landtová* judgment, the CCC sent a letter to the CJEU where it sought to explain its case law. Yet the Registry at the Court of Justice sent the letter back to the Czech constitutional

⁹⁰ See the special issue of the GERMAN LAW JOURNAL (2009) 10 (8).

⁹¹ Judgment of 19 January 2010, C-555/07.

⁹² Decision of 6 July 2010, BVerfG, 2 BvR 2661/06.

⁹³ In the above specification of the coexistence equilibrium, after a court is caught deviating, the other court punishes it forever and communication never works again. Admittedly, this is not a fully realistic assumption, as real-world actors, just as humans in experimental games, are more likely to "forgive" the deviant after a few rounds of punishment. Note, however, that the same equilibrium also exists, albeit for a smaller range of parameter values, when we assume that punishment only lasts for a finite number of periods.

judges in Brno stating that ‘according to what is established practice, the members of the CJEU do not exchange correspondence with third parties concerning the cases submitted to the CJEU’.⁹⁴ This the Czech judges apparently found insulting.⁹⁵ But for EU law practitioners the question would remain as to why they did not submit their own preliminary reference to the CJEU. The overall attitude of the Czech constitutional judges seemed to betray poor knowledge of the rules of procedure before the Court of Justice.⁹⁶

Even so, the relevance problem of the many domestic high courts that have been trying to mimic the GFCC’s containment jurisprudence probably runs deeper and it would be wrong to believe that better communication would suffice to resolve it. The problem with national courts such as the CCC is that their non-compliance decisions may not be able to inflict sufficient damage on the Court of Justice to force it to back down.⁹⁷ With respect to these courts, the supranational Court may simply prefer a constitutional crisis to a jurisdictional loss. The lack of superpower status thus presents the domestic judges with an asymmetric situation: they prefer acquiescence to war ($\frac{J_l - C}{2} < \frac{J_h - C}{2} < -J_h < -J_l$), while the European Court prefers war to acquiescence ($-J_h < -J_l < \frac{J_l - C}{2} < \frac{J_h - C}{2}$). Under these conditions no containment equilibrium can be sustained and non-compliance threats are unlikely to carry much weight.⁹⁸ In fact, knowing that non-compliance will achieve little and a constitutional crisis will be harmful for its own institutional standing than for the CJEU’s, a domestic court in such a situation is still better off acquiescing.

For weak domestic courts, as for non-nuclear states during the Cold War, the GFCC may well represent the only realistic hope of containing the CJEU and of protecting their interests as higher courts. The German Court, of course, pursues its own agenda and may not care much about Slovak and Czech pensions and whether they are measly or generous. But, to some extent, the Karlsruhe Court may provide less powerful courts with a nuclear umbrella: the guarantee that the Court of Justice will not go too far, lest it faces a clash with the GFCC. To speak of a “Karlsruhe Pact” would push the Cold War analogy too far. Yet it is telling

⁹⁴ Quoted from the judgment of the CCC, *Slovak Pensions XVII*, *supra* note 1 at 14.

⁹⁵ *Id.*

⁹⁶ See Komárek, *supra* note 1.

⁹⁷ Symptomatic of the difference of treatment between the GFCC and other domestic courts is the scant attention that has been given to the Polish Constitutional Tribunal decision, rendered as recently as November 2011, on the Brussels Regulation. Although the Polish Court did not rule the Regulation – a cornerstone of the EU civil jurisdiction cooperation system – unconstitutional, it nonetheless completed a thorough review on *ultra vires* grounds. See Judgment of 16 November 2011, No. SK 45/09, English translation at http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf (accessed 8 June 2012) and Council Regulation No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters, [2001] OJ L 12/1.

⁹⁸ For the Court of Justice always playing “Maintain jurisdictional expansion” is a dominant strategy, as it remains its best strategy regardless of the strategy played by the Domestic Court.

that the CCC, along with other constitutional courts, emphasised the similarities between its position and the position expounded by GFCC in its *Solange* and *Maastricht* decisions.⁹⁹

V. CONCLUSION

Those who fear a judicial Armageddon will take some comfort from experiments showing that the iterated Hawk-Dove game (here in its Snowdrift variant) leads to consistently higher levels of human cooperation than other iterated games such as the iterated Prisoner's Dilemma.¹⁰⁰ As with superpowers during the Cold War, the threat of mutually assured destruction provides a strong incentive to cooperate. The analysis developed in this Article demonstrates that the same may well apply for the GFCC and the CJEU. As for the CCC's *ultra vires* declaration, it warrants the conclusion that it is more likely to remain an isolated accident than to create a systemic threat for the EU legal system. With hindsight, the Czech constitutional judges may come to see their own decision as a slip of hand.

Having said this, I should specify that I do not deny that potential systemic threats to the EU legal system do exist. But my view is that such threats are unlikely to come from the courts acting alone. As the analysis developed in the present Article makes clear, national courts are embedded in domestic politics. Public opinion and government parties matter; and their attitude towards integration determines in large part how much leeway is afforded to the judiciary. Here lies probably the biggest danger of disintegration for the EU legal system, especially in light of the current Euro-zone crisis. Were partisan consensus on EU membership to collapse – either because public opposition to membership came to reach such levels that existing parties would no longer be in position to support integration or because widespread discontent fuelled the emergence of new, anti-EU government parties – Eurosceptic judges might feel safe enough to ignore the Court of Justice and with it the primacy of EU law.¹⁰¹ This is a real possibility, which would mark the end of legal integration and, arguably, of the European project as we know it today.

⁹⁹ See *Slovak Pensions XVII*, *supra* note 1 at 10, Polish decision *supra* note 97 at 24 (citing the GFCC's *Honeywell* ruling).

¹⁰⁰ See Rolf Kümmerli et al., *Human Cooperation in Social Dilemmas: Comparing the Snowdrift Game with the Prisoner's Dilemma*, 274 PROC. R. SOC. B. 2965–2970 (2007).

¹⁰¹ As hinted above, this may have been the scenario in which the CCC thought it found itself. Many constitutional judges owed their appointment to the arch-Eurosceptic Czech President, Vaclav Klaus, and may have expected that the Czech government and legislators would support them against the CJEU, see Komárek, *supra* note 1.