Concurrence in European Private Law

Graaff, R. de

7 General Conclusion

7.1 Concurrence all over the place

Private relationships are governed by many different rules, ranging from open-textured standards of general application to detailed rules aimed at specific situations. These rules originate from various sources of law. They are embedded in the national systems of private law, each with their own features and preferences.[1] But private relationships are also, and increasingly so, governed by the rules of the European Union. These rules are contained in binding agreements concluded by the Member States, such as the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights. Some rules have been developed by the Court of Justice of the European Union as part of the unwritten body of Union law. And many rules have their origins in directives and regulations governing areas as diverse as social policy, consumer protection, competition law, transport, public health, and the internal market more broadly.[2]

In this multi-level legal order, it is not unusual for a single set of facts to fall within the ambit of multiple Union rules nor is it uncommon that, on the face of it, national laws may provide protection as well. Such a concurrence of rules does not give rise to problems as long as their application produces the same outcome. We have seen, however, that the rules may vary in important ways, both in terms of their conditions and in terms of their consequences, which may lead to different outcomes. In such situations, the question that arises is whether the law permits the interested party to elect the rule of his choice. This question can only be answered by considering the relationship between the underlying rules. Does one legal rule affect the scope of application of another legal rule? Can the rules be applied cumulatively, or must one of them be excluded in favour of the other? Does the law permit a choice between the rules?

If we wish to find the appropriate answers to these questions, it is important to first specify which categories of rules we are focusing on. Indeed, this has been the first leg of our journey.[3] Carrying out this task required us to steer a middle course between the categories used within the national legal systems and the categories used within the Union legal

1 Section 1.2.
2 Section 4.2.
3 Sections 1.3 and 2.2-2.3.

order.[4] Given the ultimate objective of this book, which is to examine whether the scheme of analysis conceived and fostered in the context of the national systems of private law can be valued as a source of understanding of the laws of the European Union, we have not pressed the whole of the law into the moulds of one of the existing systems of private law. Although the book does examine Dutch, English, French and German law, we have not chosen one of these systems as our leading model. The aim to achieve an autonomous interpretation has not, however, led us to adopt uncritically the vocabulary used by the Union legislature and by the Court of Justice either. We have tried to avoid using indiscriminate 'rights and duties'-talk where possible and have instead sought to inform the reader, as accurately as appropriate in the context of this book, about the kinds of rights and duties we are focusing on.

To this end, we have taken advantage of the works of Wesley Newcomb Hohfeld (1879-1918). In line with his structure of correlatives, we have used the term *claim* to refer to rules which entitle a person to some performance from another person. Prominent examples include the claim for specific performance and the claim for compensation. We have used a different term – *power* – to refer to the capacity of a person to unilaterally create, modify or extinguish a legal position or relationship, and so to create, modify or extinguish claims and powers. The examples which have been discussed include the termination of a contract for breach and the rescission of a contract for pre-contractual misrepresentation. In line with Hohfeld's guiding thesis – legal problems can only be understood in terms of legal relations – we have also paid attention to the rules beneficial to the persons affected by the enforcement of a claim and the exercise of a power. They may be able to contest the proposition that a valid claim or power exists by relying, for instance, on grounds of justification and exemption. We have used the term *defence* to refer to these rules.[5]

This book has shown that current Union law contains a great number of claims, powers, and defences. Private conduct may, under certain circumstances, be assessed against the general prohibition of discrimination on grounds of nationality, against certain free movement provisions, and against competition rules. In fact, the Court of Justice has worked out several claims in great detail. The claim for compensation in respect of losses resulting from infringements of EU competition law is well-known. Recently, the Court has also developed two claims on the basis of the Charter of Fundamental Rights: the claim for an allowance in lieu of annual leave not taken upon termination of the employment relationship, and the claim for compensation for losses resulting from unequal treatment.[6]

4 Sections 1.2-1.3.
5 Sections 1.3 and 2.3.
6 Section 4.3.

As far as secondary Union law is concerned, this book has provided an overview of the directives and regulations which enable individuals to claim some form of performance from another individual, such as specific performance and monetary compensation. In addition, several directives and regulations enable individuals to create, modify or extinguish a legal position or relationship. The power of the consumer to withdraw from a contract is a case in point. Adopting the angle of view of the person affected, the book has also shown that Union law provides individuals with a range of defences, such as the *state-of-the-art* defence against a claim for compensation in respect of losses caused by a defective product and the *passing-on* defence against a claim for compensation in respect of losses resulting from an infringement of competition law.[7]

7.2 Fundamental assumptions challenged

The relationship between these claims, powers, and defences is often explained and understood on the basis of three fundamental assumptions: Union laws have precedence over national laws, harmonising measures replace national laws, and specific rules have priority over general rules.[8] What these assumptions have in common is that precedence is given to one of the rules on the basis of a formal criterion. This book has questioned this approach and has submitted that the substance of the rules should be taken into account, and not merely their formal relationship.

Consider the maxim *lex specialis derogat legi generali*, well-known in the systems of private law and Union law alike. Many lawyers contend that a specific rule should prevail over a general rule if both relate to the same subject matter. However, this book has warned that this maxim is not self-evident. To begin with, the maxim can only be relied upon when one rule is really general and another rule is truly specific. It is submitted that this is only the case when the specific rule contains all the elements of the general rule and at least one additional element. In other words, the general rule must embrace all the cases falling within the scope of the specific rule, but the specific rule may not embrace all the cases falling within the scope of the general rule. If the differences between the rules cur both ways, it is impossible to generally qualify one of them as the *lex specialis* and the other as the *lex generalis*.[9]

The latter point has been illustrated by examining the relationship between Article 18 TFEU and the provisions governing the free movement of persons and services in more detail. It is generally assumed that Article 18 TFEU is the *lex generalis* and that the free movement provisions must be

7 Section 4.4.
8 Section 1.1.
9 Sections 2.4, 5.2.4, 6.3, and 6.7.

considered *leges speciales*. And it is true that the Court of Justice has repeatedly held that the general prohibition of all discrimination on grounds of nationality has been given 'specific expression' by these free movement provisions, and has added that the violation of one of these free movement rights implies that Article 18 TFEU has been violated too.[10] However, this book has argued that Article 18 TFEU cannot be characterised as the all-embracing *lex generalis* anymore. The reason is that the Court of Justice has replaced the concept of discrimination with the broader concept of restriction in the context of the law of free movement,[11] but has so far refused to adopt the same approach in the context of Article 18 TFEU.[12] It is against this backdrop that we have argued that the free movement provisions can no longer be considered the *leges speciales* as compared with the general prohibition of all discrimination on grounds of nationality. Not every restriction of free movement is governed by Article 18 TFEU anymore.

But even if a general rule does embrace all the cases falling within the scope of a specific rule, there is really no compelling reason why the specific rule should automatically trump the application of the general rule. The overlap can be considered harmless if the specific rule merely complements the general rule. We have seen, for instance, that the directives regulating specific aspects of unfair commercial practices complement the general Unfair Commercial Practices Directive, so that both may be applicable to a single set of facts.[13] An exception must be made, however, when general and specific rules conflict. In such situations, one of the rules should be excluded in order to do justice to the objectives underlying the other rule. Whether that is the case, and whether the specific or the general rule should then prevail, is a question of interpretation which must be answered by considering the substantive importance of the rules at issue, in the light of the circumstances of each individual case.[14]

Likewise, we should avoid jumping to the conclusion that Union law sets aside otherwise applicable national laws. It must be stressed at once that this book has not questioned the capacity of Union law to produce this effect. In fact, we have paid much attention to the exclusionary effects of Union law. However, the book has also warned that Union rules do not automatically trump rules lower down the hierarchy. The principle of primacy is essentially a rule of conflict. It does tell us which law must have priority in the event of conflicts, but it does not tell us how we should determine whether a conflict actually exists. This is a question of interpretation which cannot be answered by merely referring to the formal relationship between the rules at issue.[15]

10 Section 5.2.2.
11 Section 5.2.3.
12 Section 5.2.4.
13 Section 6.7.
14 Sections 2.4, 5.2.5, 6.3, and 6.7.
15 Section 4.5.

Equally, we should proceed with caution when determining the relationship between the directives and regulations adopted by the Union legislature and otherwise applicable laws. It cannot be denied, of course, that these harmonising measures aim to introduce a uniform legal regime embracing all the Member States. But this does not mean that these measures necessarily replace or exclude otherwise applicable laws. This book has shown that the scope of application of directives and regulations is limited, because the competence of the Union is limited and because the Union legislature does not regulate all issues exhaustively. Sometimes, the very treaty provision upon which the competence of the Union legislature is based prescribes that any harmonising measure can only ever establish minimum requirements. In many other instances, the wording, meaning and purpose of the directive or regulation itself must be examined in order to determine the extent by which the Union legislature has actually exercised its competence to legislate.[16]

7.3 A shared scheme of analysis

How should we, then, establish whether the law permits the interested party to elect the rule of his choice? Inspired by the experiences gained from examining several national systems of private law, this book has offered a method of interpretation which can be used to answer this question. Indeed, one of our conclusions is that the systems of private law which have been considered – Dutch, English, French, and German law – share a scheme of analysis by which questions of concurrence can be debated and solved.[17]

In accordance with this scheme, the existence of one rule does not, in principle, affect the scope of application of another rule. The underlying reason is that the objectives of each rule should be realised to the greatest possible extent. It is assumed, therefore, that each rule ought to have its intended legal effect if the necessary elements have been established. It flows from this reasoning that concurrently applicable rules may be applied cumulatively as soon as the conditions of each rule have been established. We have seen that lawyers from different jurisdictions refer to this solution with the terms 'cumulation' and 'combination'. Indeed, they start from the premise that claims, powers, and defences can be accumulated if the party concerned so wishes.

However, rules cannot always coexist peacefully. This book has shown that an exception must be made when cumulative application would lead to inconsistent outcomes. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. One simply cannot blow hot and cold. It may be recalled, for instance, that it is impossible

16 Sections 4.5, 6.2-6.5.
17 Section 2.5.

to combine termination for breach and specific performance of the same contract. As termination means that the duty to perform the obligations under the contract ceases to exist, the exercise of this power implies that specific performance of these obligations cannot be claimed anymore. In such situations, an election between the alternatives is required. Lawyers from different jurisdictions refer to this situation with terms such as 'option', 'alternativity', and 'election'.

These examples indicate that another persistent theme runs through this scheme of analysis. In principle, it is up to the party concerned to rely upon the rule of his choice, be it a claim, a power, or a defence. Even if the rules cannot be applied concurrently, because this would lead to inconsistent outcomes, the law permits the party concerned to make an election. One reason why the law does not impose a choice may be that it is impossible to generally qualify one of the rules as more advantageous to the claimant or defendant, precisely because the conditions and consequences of each rule differ. But we can also think of another, more fundamental explanation. It is for reasons of party autonomy that the law does not, and should not, decide which rule must be applied. In principle, it is up to the person concerned to opt for the rule which appears to him to be the most advantageous.

We have seen that the benefit of this choice may nonetheless be affected, because the content of one rule might influence the content of another rule. Standards applicable in one context may be adopted in another context, and time limits restricting the enforcement of one right may also restrict the enforcement of another right. It may be recalled that this technique has been used by the supreme courts in all the jurisdictions under consideration. Rather than excluding one of the applicable rules altogether, the courts prefer to adjust their respective scopes of application. They permit the claimant to benefit from the application of the rule of his choice, but also take into account the arguments put forward by the defendant, even if the rules belong to a different legal regime. This does not mean that the rules are identical in all respects, nor that one of the rules is swallowed up by the other. The rules continue to exist side by side, in accordance with the principle that the objectives underlying each rule should be realised to the greatest possible extent.[18]

Sometimes, however, the law does dictate that one of the rules takes priority, so that no election can be made at all. If the legislature has intended a particular rule to govern a particular situation exhaustively, it should not be possible to avoid the application of this rule by relying upon another rule. Lawyers from different jurisdictions refer to this situation with terms such as 'exclusivity' and 'exclusion'. Their writings indicate that this solution is applied with great restraint. A total rejection of concurrence is considered to be an unnecessarily blunt instrument. The applicability of one rule is only affected by another rule to the extent that this is necessary in order

18 Section 2.5.

to do justice to the intentions of the legislature. Our analysis shows that the courts tend to reduce the restrictions imposed by the prioritised rule to a minimum and retain as much of the other rule as possible.

Of course, every case may spark a debate about whether the law permits a choice between the rules. The outcome may differ depending on the content of the rules and the structure of the legal system. This book has illustrated this point by discussing a classic example: the relationship between the laws of contract and tort.[19] How to explain that only French courts generally exclude the possibility to claim in tort if the damage is caused by or related to the performance, or non-performance, of a contractual obligation? It may be recalled that this choice has not only been made out of a genuine concern for the freedom of contract and the will of the legislature, but also to protect contracting parties against the general strict liability for things conceived and fostered by the courts themselves. Likewise, the German, Dutch and English courts have sought to offer contracting parties additional protection on the basis of the law of tort when the law of contract appeared to be too rigid.

The example shows that a legal problem which appears, on the face of it, to be the same may turn out to have a different nature and scope in different jurisdictions. It is submitted that this finding does not call into question our scheme of analysis as such. Rather, the example illustrates that questions of concurrence are questions of interpretation which may be answered differently, depending on the scope and structure of the relevant rules.

7.4 Understanding the laws of the European Union

Can this scheme of analysis, conceived and fostered within the systems of private law, be valued as a source of understanding of the laws of the European Union? This was the principal question which this book aimed to answer. To this end, the book has carefully examined the statements issued by the Union legislature and by the Court of Justice of the European Union about the availability of the claims, powers, and defences relevant to private parties. Can we see the same principles at work?

We have seen that the conduct of individuals which falls within the scope of Union law is, in principle, subject to all the requirements flowing from the treaty provisions pertaining to non-discrimination, free movement of persons and services, and competition law.[20] In fact, a host of judgments shows that the applicability of one treaty provision does not, in principle, affect the scope of application of another treaty provision. The Court has made clear, for instance, that Articles 101 and 102 TFEU are not mutually exclusive, but complementary.[21] Likewise, the Court has determined that

19 Chapter 3.
20 Sections 5.2.4 and 5.4.3.
21 Section 5.3.5.

the scope of application of the provisions governing the free movement of persons and services is not affected by the rules in the area of competition, and *vice versa*.[22] It is against this backdrop that we may conclude that the Court proceeds from the assumption that the rules of primary Union law may be applicable concurrently, provided, of course, that the necessary conditions have been fulfilled.

The same theme runs through the body of secondary Union law. We have seen that the Union legislature regularly confirms that the adoption of a directive or regulation shall not affect the scope of application of other harmonising measures. This book has shown that such explicit statements play an important role once a legal dispute must be resolved. They form a reason for the Court of Justice to assume that each rule must be assessed independently and that no rule should be excluded in advance.[23] In fact, the Court has made clear that the scope of application of one rule will only be affected by another rule if this is clearly provided by the Union legislature. In the absence of express indications on the part of the Union legislature, the conclusion must be that each rule ought to have its intended legal effect.[24] It flows from this reasoning that harmonised rules may, in principle, be applicable concurrently if their respective conditions have been established.

This book has submitted that this principle does not only apply when the relationship between rules originating from harmonising measures must be determined, but also when the relationship between these measures and otherwise applicable national laws must be determined. After all, the competence of the Union to legislate is restricted by the Treaties and the Union legislature does not regulate all issues exhaustively. In fact, we have seen that many directives and regulations are only aimed at so-called 'minimum' harmonisation, which means that Member States may adopt or retain a higher level of protection in their national legal systems. This book has shown that this regulatory technique leaves considerable room for the application of claims, powers, and defences based on the applicable national law.[25]

An examination of the substance of the rules involved should also be conducted if the directives and regulations aim at a 'complete' harmonisation of the laws of the Member States. These harmonising measures are also limited in scope. They might exhaustively regulate some issues, but they cannot be wholly autonomous and self-contained. The Product Liability Directive, for instance, fully harmonises the strict liability of producers and sellers, but still leaves considerable room for the application of national systems of contractual and non-contractual liability. Likewise, the Unfair Commercial Practices Directive, the Consumer Credit Directive, the Consumer Rights Directive, the revised Consumer Sales Directive, and the

22 Section 5.4.3.
23 Section 6.2.
24 Section 6.3.
25 Section 6.4.

newly introduced Directive concerning contracts for the supply of digital content and digital services generally prohibit Member States to depart from their respective provisions, but also leave important issues to the applicable national law, such as the rules on the validity, formation or effect of a contract.[26] Rather than assuming that measures aimed at 'complete' harmonisation exclude otherwise applicable national laws, we should, therefore, start from the premise that each rule, however founded, must be considered on its own terms.

This does not mean that concurrently applicable rules will always coexist peacefully. As is the case in the national systems of private law, an exception must be made when cumulative application would lead to inconsistent outcomes. On the basis of a host of examples derived from various harmonising measures, we may conclude that it is impossible, also as a matter of Union law, to combine termination for breach and specific performance of the same contract. In such situations, Union law requires an election between the available alternatives. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. It is submitted that this is generally not the case when a single set of facts falls within the scope of multiple liability rules. Of course, the claimant should not be able to recover double damages for the same loss. But there is no need to force the claimant to make an election, because most differences can be bridged at the stage of assessing the quantum of damages.[27]

It flows from the foregoing that the party concerned should, in principle, be free to elect the rule which appears to him to be the most advantageous. Consider, for instance, the case of anticompetitive contractual arrangements entered into by undertakings which together hold a dominant position on the relevant market. It will be remembered that Articles 101 and 102 TFEU are complementary, not mutually exclusive.[28] We may safely assume, therefore, that the aggrieved party may have a good claim for compensation against the dominant undertakings with respect to any of the infringements, provided that there is a causal relationship between the infringement in question and the harm suffered. It is readily arguable, then, that this party will have a choice to claim compensation for any of the infringements, subject only to a prohibition of double recovery of the same losses.[29]

As is the case in the national systems of private law, the content of one rule might affect the content of another rule. For instance, the nature and terms of an anti-competitive agreement may support the conclusion that a collective dominant position exists. We have also seen that the fact that certain conduct does not appreciably restrict competition under Article 101 (1) TFEU can be an indication that the same conduct does not infringe

26 Section 6.5.
27 Section 6.6.
28 Section 5.3.5.
29 Section 5.3.6.

Article 102 TFEU either.[30] Likewise, the existence of an unfair commercial practice within the meaning of the Unfair Commercial Practices Directive may be taken into account when assessing the unfairness of contractual terms within the meaning of the Unfair Terms Directive.[31] This does not, however, mean that one of the rules is excluded. Any solution must be found through an interpretation of the rule at issue and cannot, therefore, ignore the outer limits of that legal framework. Indeed, our analysis shows that the Court of Justice favours a convergent interpretation of concurrently applicable rules where possible, but is also careful not to conflate the legal texts.

Sometimes, Union law does dictate that one rule takes priority, so that no election can be made at all. If the drafters of the Treaties or the Union legislature have intended a particular rule to govern a particular situation exhaustively, it should not be possible to avoid the application of this rule by relying upon another rule. Within the body of primary Union law, the relationship between the general prohibition of discrimination on grounds of nationality and the free movement provisions governing persons and services provides a case in point. It may be recalled that we have argued that Article 18 TFEU cannot, in all situations, be considered the *lex generalis* and that the free movement provisions cannot, in all situations, be considered the *leges speciales*.[32] However, the book has also shown that if the facts do fall within the scope of application of one of the free movement provisions, the Court of Justice tends to assess the case only in the light of these provisions. To that extent, the scope of application of Article 18 TFEU is affected by the free movement provisions.[33]

The book has also demonstrated that it is not possible to avoid the application of a rule adopted by the Union legislature if this rule exhaustively regulates a certain situation of fact. It may be remembered, for instance, that the Product Liability Directive fully harmonises the strict liability of producers and sellers. In the view of the Court, it is not possible, therefore, to change the conditions under which these parties can be held strictly liable. Several other directives, such as the Unfair Commercial Practices Directive, the Consumer Credit Directive, the Consumer Rights Directive, and the revised Consumer Sales Directive, also prohibit Member States to depart from their respective provisions.[34]

Such statements should not, however, lead the reader to believe that the discretion granted to Member States by harmonising measures which aim at providing a 'minimum' level of protection is unlimited. Member States must, in any event, ensure the effectiveness of the directive or regulation at issue. And if they adopt or retain more protective rules, these rules will

30 Section 5.3.5.
31 Section 6.2.
32 Section 5.2.4.
33 Section 5.2.5.
34 Section 6.7.

have to comply with the rules belonging to the body of primary Union law. From the perspective of the individuals involved, this means that the rule upon which one of them relies may be set aside if it is contrary to the treaty provisions governing, for instance, the free movement of persons and services.[35]

In conclusion, our enquiry into the statements issued by the Union legislature and by the Court of Justice has revealed that the scheme of analysis, conceived and fostered within the systems of private law, can indeed be valued as a source of understanding of the laws of the European Union. In accordance with this scheme, we should start from the premise that each applicable rule, however founded, should be realised to the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. It flows from this reasoning that the party concerned should have a free choice as to which rule to rely upon. Two exceptions must be made, however. Union law requires an election between the available alternatives if cumulative application would lead to inconsistent outcomes which cannot exist concurrently. And sometimes Union law prescribes that one of the rules applies exclusively, so that no election can be made at all. The foregoing indicates that these exceptions are not self-evident, but can only be accepted after a careful enquiry into the wording, meaning and purpose of the provisions at issue.

7.5 Lessons learned and questions raised

This book started with the observation that scholars of private law and Union law tend to view the structure of the legal system from different angles. Many jurists specialised in private law, especially continental scholars, are thinking in terms of the institutional model inherited from Roman jurists. They seek to understand the world of persons and things, and the relations between them. By contrast, many scholars specialised in Union law are thinking in terms of the vertical structure of the legal order conceptualised by Hans Kelsen. For them, the core question is whether a rule, laid down by national law or Union law, can be validated, ultimately, by the constituent Treaties and by the Charter of Fundamental Rights of the European Union.[36]

We have tried to find a middle ground between these two ultimate positions. Inspired by the works of Hohfeld, we have focused on the legal relations between individuals and not on the institutional or hierarchical structure of the legal system as a whole. This book has demonstrated that Hohfeld's structure of correlatives can be used as a foundation for a more precise analysis of the rights and duties which individuals may derive from

35 Section 6.7.
36 Section 1.2.

the laws of the European Union. By providing a comprehensive overview of the claims, powers, and defences currently available as a matter of Union law, the book has shown that the impact of Union law on the legal relationships between individuals is profound. Our analysis confirms the trend, already observed in previous research, that the private enforcement of Union law is increasingly governed by Union law itself.[37]

If we wish to understand the relationship between these claims, powers, and defences, we should use a method of interpretation crafted with private relationships in mind. Inspired by the experiences gained from examining several national systems of private law, this book has offered a scheme of analysis which can be used to this end. Our inquiry into the statements issued by the Union legislature and by the Court of Justice has demonstrated that this scheme can be valued as a source of understanding of the laws of the European Union. The scheme accepts and accommodates the situations in which Union laws replace or exclude national laws, and the situations in which specific rules set aside rules more general in scope. Crucially, the scheme also absorbs the many situations in which rules do apply concurrently and provides a model by which the questions which may arise as a result of their overlap can be debated and solved. It is submitted that this scheme provides a complete and nuanced account of the impact of the laws of the European Union on private relationships, and of their interaction with the national systems of legal protection.

These findings are relevant to scholars and practitioners of private law and Union law alike. For them, it is important to understand how questions of concurrence are debated and solved. Practitioners, for instance, should be aware of the principle that the objectives underlying each rule should be realised to the greatest possible extent. It is against this backdrop that they should carefully examine all the legal possibilities before advising their clients, filing their court documents and drafting their decisions. For legislative lawyers, it is particularly important to be aware of the fact that a rule will generally only be excluded if an express derogation to that effect has been inserted in the legislative texts or if the overall meaning and purpose of the provisions at issue necessitate this conclusion. In the light of these findings, it is advised that the relationship with other legislative instruments is considered carefully when preparing legislative proposals.

Our findings may also be of interest for those participating in the ongoing debate about the nature of the Union legal order. It may be recalled that the Court of Justice has consistently held that the precedence of Union law is ultimately based on and limited by the founding Treaties of the Union. We have also noticed that this position has been challenged by a great number of supreme and constitutional courts. In their view, the precedence of Union law is ultimately based on and limited by the national

37 See e.g. Dougan 2011, p. 430 and 435-437; Wilman 2016, p. 890-896; Ackermann 2018, p. 758-763; De Graaff & Verheij 2019.

constitutions.[38] The Lisbon Treaty has contributed little to the resolution of this conflict, because the primacy of Union law was dealt with in a separate Declaration and not in the text of the Treaty itself.[39] And so the question as to who is to decide the ultimate boundaries of Union competences remains contentious, even though some authors try to calm the feelings by pointing out that, in practice, the Court of Justice and the national courts rarely deliver conflicting judgments.[40]

Not only has the precedence of Union rules over conflicting national rules been broadly accepted by the national courts, this book has shown that such conflicts are not as common as might be imagined. In practice, Union rules and national rules will often be applicable concurrently to a single set of facts without creating any conflicts whatsoever. In fact, we have found few examples of rules producing inconsistent outcomes. And even if the outcomes do differ, so that an election is required, we have seen that it will principally be up to the party concerned to rely upon the rule of his choice.[41] What is more, our findings confirm that the exclusive application of Union law can only be accepted on the basis of an inquiry into the wording, meaning and purpose of the provisions at issue. When viewed from the perspective of the individuals involved, therefore, the exclusion of one of the concurrently applicable rules appears to be the exception rather than the rule.[42]

Another point may be added. A large part of this book has been devoted to the legal reasoning of the Court of Justice of the European Union, a topic which has received considerable scholarly attention over the past decades. Several authors have submitted that the Court tends to expand rather than restrict the scope of application of Union law.[43] Beck, for instance, has argued that the Court suffers from a '*communautaire* predisposition', caused by the vague expressions and sweeping mission statements inserted into the Union legal texts.[44] In his view, it is 'more likely than not that the Court will adopt a *communautaire* solution to the question it has been asked'.[45] Our findings point in a different direction. We have seen that the Court leaves considerable room to the laws of the Member States, also when the Union legislature has not explicitly stated that the harmonising measure at issue is aimed at providing only a 'minimum' level of protection.[46] And even if the Union legislature has aimed at achieving a 'complete' harmonisation, national laws are only excluded by the Court if they clearly touch upon

38 Section 4.5.
39 Declaration No. 17 concerning primacy.
40 See e.g. De Búrca 2012, p. 454-455.
41 Section 6.6.
42 Section 6.7.
43 Bredimas 1978, p. 179; Rasmussen 1986, p. 561; Conway 2012, p. 21-50.
44 Beck 2012, p. 437.
45 Beck 2012, p. 330.
46 Section 6.5.

the topics which have been exhaustively regulated by the harmonisation scheme at issue.[47] When measured against the canon of interpretative techniques used by the supreme courts of the Member States, the approach adopted by the Court of Justice of the European Union does not seem to be overly activistic.

This book also raises a number of broader questions. We have examined the judgments delivered by the General Court and the Court of Justice of the European Union in order to discover how Union law answers the questions of concurrence raised.[48] National courts also play an important role within the Union judicial system. As organs of the Member States, they are under a duty to apply Union law in its entirety and to protect the rights which it confers on individuals.[49] From a practical perspective, moreover, most legal proceedings concerning the interpretation and application of Union law are ultimately resolved by the national courts.[50] It may be useful, therefore, to know whether they use the same scheme of analysis when they are asked to answer questions of concurrence in cases involving one or more Union rules. It is fair to assume that they will adopt the same approach. There are also some indications which point in this direction. The Supreme Court of the Netherlands has determined, for instance, that a contract which involves the purchase of a mobile phone in instalments may fall both within the scope of the rules governing instalment sale adopted by the Dutch legislature and the rules implementing the Consumer Credit Directive.[51] Indeed, the Supreme Court has confirmed that the consumer has a free choice as to which rule to rely upon.[52] Further research is needed, however, to establish whether the approach taken by national courts, acting as Union courts, is indeed in conformity with the approach outlined in this book.

Furthermore, this book raises the question of whether the same scheme of analysis may be used to debate and solve questions of concurrence arising in the context of vertical relationships, between an individual and an organ of a Member State or an institution of the Union. One could argue that the fundamental features of interpretation are universal and not bound to specific contexts.[53] It should not make a difference, then, whether the legal relationship involves a public authority or a private individual. However, it is also arguable that a public authority should not be granted the same freedom of choice as a private individual. In the Netherlands, for instance, public authorities may not escape the safeguards provided by public-law

47 Section 6.6.
48 See, on the scope and methodology of the present research, *supra* section 1.5.
49 Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECLI:EU:C:1978:49, at 14-16.
50 As observed e.g. by Rosas 2012, p. 105.
51 HR 13 June 2014, ECLI:NL:HR:2014:1385, *NJ* 2015/477, note J. Hijma (*Lindorff Purchase BV/Statia*), at 3.5.2.
52 See explicitly HR 12 February 2016, ECLI:NL:HR:2016:236, *NJ* 2017/282, note J. Hijma (*Lindorff BV/Nazier*), at 3.7.2. The same conclusion has been drawn by Van Boom 2014, p. 828.
53 See e.g. Conway 2012, p. 5.

arrangements by making use of their private-law powers.[54] The question of whether public authorities may rely upon the rule which appears to them to be the most advantageous may also be raised in jurisdictions which principally exclude such authorities from the scope of application of private law and subject them to the jurisdiction of the administrative courts. In both contexts, the question that arises is how, if at all, the general principles governing the administrative activities of such public authorities limit their freedom of choice.

Another factor may influence the resolution of a legal dispute. It has been observed that if a matter is taken to court, it is up to the claimant to allege the elements of the relevant rule of law in order to obtain the result sought and up to the defendant to put forward a reasoned defence. To some extent, the courts are bound to the facts and arguments submitted by these parties. However, the courts are also under a duty to assess and apply certain rules of their own motion. This duty may flow from the applicable law of civil procedure, but may also be imposed on the basis of the principle of effectiveness of Union law. Indeed, the Court of Justice has required national courts to apply Article 101 TFEU[55] and certain provisions contained in Union directives in the field of consumer law of their own motion.[56] These judgments do not call into question our findings, because they do not concern the relationship between the underlying rules as such. But they do suggest that the choice between the alternatives will not always be entirely up to the parties to the proceedings, but must sometimes be made by the court.[57] Further research is needed to establish the precise scope of the duty to examine Union law *ex officio* and the impact, if any, of the principle of effectiveness on the choices which can be made by the interested party in accordance with our scheme of analysis.[58] What if, for instance, one of the

54 HR 26 January 1990, ECLI:NL:HR:1990:AC0965, *NJ* 1991/393, note M. Scheltema (*Staat/Windmill*), at 3.2.

55 Case C-8/08, *T-Mobile Netherlands and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, at 49, with references to Case C-126/97, *Eco Swiss China Time v. Benetton International*, ECLI:EU:C:1999:269, at 36 and 39; Joined Cases C-295/04 to C-298/04, *Manfredi and Others*, ECLI:EU:C:2006:461, at 31 and 39.

56 Case C-377/14, *Ernst Georg Radlinger and Helena Radlingerová v. Finway*, ECLI:EU:C:2016:283, at 62. See also, with references to earlier case-law, Case C-488/11, *Asbeek Brusse v. Jahani*, ECLI:EU:C:2013:341, at 49-50; Case C-497/13, *Froukje Faber v. Autobedrijf Hazet Ochten*, ECLI:EU:C:2015:357, at 42.

57 See e.g. Case C-32/12, *Soledad Duarte Hueros v. Autociba and Automóviles Citroën España*, ECLI:EU:C:2013:637, at 43, where the Court held that a national court is obliged 'to grant of its own motion an appropriate reduction in the price of goods which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity of those goods is minor (…)'.

58 See Castermans & Krans 2019, p. 117-119, who discuss questions of concurrence from a civil procedural law perspective. See about the duty to apply Union law *ex officio* also Ancery & Krans 2019, p. 131-135.

rules appears to him to be the most advantageous, but the national court is required to apply another rule as a matter of public policy?

Even though this book has not explicitly addressed these questions, it is submitted that our scheme of analysis may contribute to finding the appropriate answers. In accordance with this scheme, we should start from the premise that the objectives underlying each rule, however founded, should be realised to the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. In the interest of legal certainty, one rule should only affect the scope of application of another rule if a careful consideration of the wording, meaning and overall purpose of the provisions at issue necessitates this conclusion. It flows from this reasoning that the person concerned should, in principle, be free to elect the rule which appears to him to be the most advantageous.