JUDICIAL ACTIVISM IN THE COURT OF JUSTICE OF THE EU

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I INTRODUCTION

The Court of Justice of the EU ('CJEU') is the most influential, the most powerful and the most widely studied regional court. Except for the Supreme Court of the United States, no other court has had a similarly profound effect on the development and political direction of its legal system — in the CJEU's case, the legal order of the European Union. This paper argues that the CJEU's extreme judicial activism is rooted in its ultra-flexible interpretative approach. The CJEU favours a purpose-based and gap-filling approach, which maximizes judicial discretion and, in cases of conflict, often prioritizes the purposes of EU integration over a more text-based interpretation, especially if the latter supports a less integrationist outcome. The CJEU's extreme judicial activism has been facilitated by an unusually permissive political environment.

The *Treaty on European Union* ('TEU') provides that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'.[1] In the name of preserving 'the rule of law' within the EU, the CJEU has used its powers to interpret the EU Treaties and EU legislation adopted under them to develop principles of a constitutional nature as part of the EU legal order. It has also established its own human rights jurisdiction and, as interpreter of the Treaties, has asserted the right to adjudicate on the limits of EU competences in opposition to the highest courts of the Member States. The CJEU's expansive interpretation of its own jurisdiction has, over time, resulted in a significant extension of the EU's powers at the expense of that of its Member States. The CJEU's expansive reading of its own jurisdiction has also stretched far beyond the ordinary meaning of many Treaty provisions. For this reason, the CJEU has often been accurately described as 'a motor of the integration process'.[2]

This article focuses on the methodology (or lack thereof) of the CJEU's legal argumentation across key areas of EU law. As will become clear, the CJEU's approach to judicial interpretation has been central to its transformation of EU law from treaty-based international law into a supra-national legal order which has made deep inroads into the legal systems and legal sovereignty of the EU Member States across many areas traditionally the sole domain of national law. The CJEU's integrationism has been favoured by a number of institutional and political features which have not been replicated in other treaty-based international legal orders and thus needs to be explained, at least in outline. This part of the discussion will be brief but revisited where relevant in the main body of the article.

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1 Art. 19.

2 See e.g. Patrick Neill, 'The European Court of Justice: a case study in judicial activism' (London: European Policy Forum), 1995; Trevor Hartley, 'The European Court, judicial objectivity, and the constitution of the European Union' (1996) 112 LQR 95.

A *The Near-Unassailable Status of CJEU judgments*

The EU Treaties empower the CJEU to issue authoritative decisions on all aspects involving the interpretation of EU law. Once the CJEU has interpreted an EU Treaty or legislative provision, its interpretation of the written law cannot be challenged; it effectively replaces the apparent meaning of the underlying written law, until the CJEU changes its mind in a future case. The only manner in which the treaty signatories — i.e. the EU Member States — can overrule the Court is by unanimous treaty amendment. Since its foundation, the EU Treaties have been subject to major revisions several times, but never with the intention or effect of overruling a CJEU judgment. Because of the unanimity requirement, Treaty changes are extremely difficult to agree, and practically impossible in the case of judgments which are opposed by some Member States but which typically also suit others. The CJEU, as a consequence, operates in a political environment which is extremely permissive and which vis-à-vis the Member States places the Court in a much more powerful position than that of national courts, including supreme courts in relation to national governments. Typically, national governments are able to overrule judicial interpretations by simple super parliamentary majorities or, over a longer time frame, by influencing the composition of supreme courts. To do anything at all equivalent in the EU, all 28 Member States must be of the same mind.

B *The asymmetrical right to review national law but not EU Law*

The CJEU is not an appeal court in the manner of national supreme courts. Access to CJEU is either by direct access or by reference from a national court. There lies no right to appeal against CJEU decisions, whether by direct action (Article 263 *Treaty on the Functioning of the European Union* (TFEU)) or the preliminary reference procedure (Article 267 TFEU). The CJEU has claimed sole jurisdiction to review the legality of EU legal acts. Direct access to the CJEU is largely confined to the EU institutions and EU Member States. Individuals generally have no direct standing before the CJEU.

However, in accordance with the doctrine of direct effect, individuals may start proceedings against a Member State for non-compliance with EU law. Under Article 267 TFEU national courts may, and the highest national courts must, refer a question of the interpretation or application of EU law to the CJEU unless there is CJEU case law on the point or the answer is patently obvious. The CJEU will issue a preliminary ruling on the point, to be applied to the facts of the case by the referring national court. In contrast, individuals cannot generally start a direct action with a view to annulling EU law except in certain narrowly defined circumstances, e.g. where the national court deems the review of the underlying EU legislation necessary to the review of national legislation or with reference to overriding requirements of national constitutional law. For this reason the validity of EU law can generally only be challenged by Member States which, in the majority of cases, agreed to it under the EU's legislative procedure in the first place. Where a Member State was outvoted in the relevant EU legislative chamber, the Council of Ministers, the situation is doubly unsatisfactory because the voters are subject to laws which not even their government or parliament agreed to. From the ordinary EU citizen's point of view EU law of general application cannot generally be judicially challenged. Nor does EU law necessarily mean what the written text says it means; it means what the CJEU resolves it should mean and citizens have no general right to challenge it.

At the same time, national courts regularly refer for review national law for its compliance with EU law. The CJEU's preliminary ruling is binding, and the national

court is obliged to set aside national law in cases of conflict. In contrast, the CJEU has laid down a very restrictive interpretation of the standing requirements of private parties which effectively denies them the right to review EU legislative acts. The CJEU has thus created an asymmetrical system of EU judicial review which encourages the review of national law on grounds of possible non-compliance of EU law as interpreted by the CJEU and discourages the judicial review of EU law.

C *The Establishment of a European Court System and the Doctrine of De Facto Precedent Based on the Supremacy of EU Law*

In common with civil law systems EU law does not formally accept the binding force of judicial precedents in accordance with the hierarchy of courts and the principle of *ratio decidendi*. Preliminary references by national courts and most direct actions – except competition and sanctions cases – go directly to the CJEU, against whose decisions there lies no right to appeal. Actions reserved for the CJEU include all quasi-constitutional cases and in particular all cases involving the allocation of powers between Member States and the EU. All CJEU judgments are binding on all national courts. This includes preliminary rulings in ongoing national litigations and, thereafter, in all future national legislation, as well as any CJEU ruling on the interpretation of EU law in any other type of action before it.

Although the CJEU's preliminary reference procedure depends on the cooperation of national courts which cannot be forced to refer a case and which cannot be directly sanctioned for not applying a CJEU preliminary ruling, voluntary co-operation amongst national courts has been high. The CJEU thus effectively created an EU-wide judicial system where national courts are both obliged to follow EU and national law and, in the case of conflict, favour EU over national law. National courts thereby became agents of the CJEU, ensuring that EU law as it is interpreted by the CJEU is applied in all Member States.

At no point and in no Member State has there been sustained judicial defiance or non-acceptance of CJEU rulings. On the contrary, national courts throughout the EU have generally accepted CJEU case law no matter how activist and incompatible with a literal interpretation of the EU Treaties or how contrary to settled public international law. The case law accepted by national courts includes the CJEU doctrines of the supremacy of EU law in all matters which the CJEU deems to be within the scope of EU law broadly conceived, and of the direct effect (i.e. enforceability in national courts) of EU law. Neither doctrine, however, has any clear basis in either the EU Treaties or the general principles of treaty interpretation. In this fashion national courts became collaborators in the CJEU's gradual establishment of a quasi-constitutional framework for the EU and in the enforcement not merely of EU law but of the quasi-constitutional supremacy of EU law.

D *The CJEU's Claim to Kompetenz-Kompetenz*

Overall, there has been a very high degree of acceptance by national authorities — political as well as judicial — of the binding force and unchallengeable status of CJEU case law and of the purely judge-made doctrines of the supremacy and direct effect of EU law. This is all the more remarkable since the CJEU's transformation of the EU law into a quasi-constitutional legal order runs counter both to general principles of international law and the generally accepted principles of treaty interpretation codified in Articles 31 and 32 Vienna Convention on the Laws of Treaties.

Even more remarkably, national governments generally accepted the CJEU's claim to *Kompetenz-Kompetenz*; that is, the power to define the limits of the EU's competences. General acquiescence in the CJEU's self-transformation from an international tribunal into a 'supreme court' competent to rule on the allocation of powers between the EU and its Member States is subject to one theoretical qualification. In some Member States, notably Germany, the national constitutional courts have challenged the CJEU's claim to *Kompetenz-Kompetenz* and reserved a jurisdiction of last resort over EU law. The national judicial challenge to the CJEU's claim to be the ultimate arbiter over the allocation of powers between the EU and its Member States has been developed most fully in the case law of the Bundesverfassungsgericht ('BVerfG') over a forty-year period from the *Solange I* decision[3] to its 2009 Lisbon Judgment.[4]

In the Lisbon Judgement the BVerfG affirmed that it would review EU acts on two grounds: (i) to ensure the EU did not exceed the powers conferred on it under the EU Treaties (*ultra vires review*), and (ii) to ensure that EU law did not encroach upon the core identity of the German Constitution which reserved the core powers in the areas of social, cultural and taxation policy for the national legislature (*identify review*). After a forty-year stand-off following the *Solange I* ruling, the BVerfG's resolve to disapply *ultra vires* or unconstitutional EU law was finally put to the test in the *Gauweiler* litigation. In 2014 the BVerfG published an initial opinion which stated that the European Central Bank had exceeded its mandate when the Bank announced an unlimited bond-buying programme to prevent the imminent collapse of the euro currency union.[5] In 2015 the CJEU dismissed the BVerfG's analysis and declared the programme lawful although it ran counter to the wording and purpose of valid EU law and clear economic evidence.[6] When the case returned to the BVerfG, the German judges lacked the 'courage to follow their own reason', revising their initial opinion and submitting like a lamb.[7]

The BVerfG did not formally abandon its claim to *Kompetenz-Kompetenz*. Nevertheless, the *Gauweiler* litigation in all but theory resolved the issue in favour of the CJEU. From its inception, the CJEU had attached little weight to periodic disquiet and doctrinal reservations by national judiciaries trying to assert national constitutional limits on the transfer of sovereign rights to the supra-national EU institutions. The BVerfG's *volte face* in the *Gauweiler* litigation validates the political acumen animating the CJEU's assertive approach and consolidated the CJEU's position as the final arbiter over the allocation of powers between the EU and its Member States.

II TREATY INTERPRETATION

The academic literature distinguishes between courts whose interpretative approach is primarily text based and those which more liberally draw on other criteria, especially teleological and policy criteria.[8] Courts of the former type seek to minimise

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3 *Solange I — Internationale Handelsgesellschaft von Einfuhr — und Vorratsstelle für Getreide und Futtermittel*, Decision of 29 May 1974, BVerfGE 37, 271.

4 Judgment of 30 June 2009, Bundesverfassungsgericht, BVerfG, 2 BvE 2/08.

5 BVerfG, Beschluss des Zweiten Senats vom 17. Dezember 2013 — 2 BvR 1390/12.

6 Case C-62/14.

7 BVerfG, Judgment of the Second Senate of 21 June 2016 — 2 BvR 2728/13.

8 See e.g. Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) *British Yearbook of International Law* 26, 48; George Letsas

judicial discretion and confine it to cases where the text itself is ambiguous. Courts of the latter type expand judicial discretion beyond the sphere of textual uncertainty and seek to interpret legal instruments with reference both to the text and its underlying objects and purposes, which may be construed narrowly or more widely, and not necessarily by giving primacy to the former. Courts of the latter type are therefore also referred to as 'activist'.

The general rules of treaty interpretation are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('VCLT').[9] The VCLT rules apply, in principle, to all international courts or tribunals, irrespective of their institutional set-up, subject matter, or geographical scope. Articles 31 and 32 offer two main principles of interpretation. The first general rule (Article 31) is that treaties must be interpreted in 'good faith', in accordance with the 'ordinary meaning' of the 'terms' or text of the treaty, in their 'context', and in light of the treaty's 'object and purpose'. The VCLT's second supplementary principle (Article 32) states that the 'preparatory work of the treaty and the circumstances of its conclusion' are only secondary sources of interpretation, and are to be used to confirm a meaning established under the first principle or in case the meaning of the treaty remains unclear or leads to an absurd result.

In the academic literature on the subject and in judicial practice, broadly three main schools of thought of treaty interpretation may be distinguished.[10] These are known as the '*intention of the parties*' (or the 'founding fathers' school);[11] the '*textual*' (or 'ordinary meaning of the words') school;[12] and the '*teleological*' (or 'aims and objectives') school.[13]

'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law*, 509–41; Patrick Neill, *The European Court of Justice: a case study in judicial activism* (European Policy Forum, 1995); Trevor Hartley, 'The European Court, judicial objectivity, and the constitution of the European Union' (1996) 112 *Law Quarterly Review* 95.

9 *Vienna Convention on the Law of Treaties* signed 23 May 1969, 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980.

10 For discussions of the various schools of treaty interpretation, see for instance, Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2nd ed, 2007); Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2nd ed, 2008); David J Bederman, Christopher J Borgen, and David A Martin, *International Law: A Handbook for Judges*, (American Society of International Law, 2003); A D McNair, *The Law of Treaties* (Clarendon Press, 2nd ed, 1961); Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2nd ed, 1984); R P Schaffer, 'Current Trends in Treaty Interpretation and the South African Approach' (1981) 7 *Australian Yearbook of International Law* 129, 130.

11 Few academic and judicial commentators would disagree that the judicial task is to give effect to the intention of the parties. However, there is no agreement as to the criteria for establishing intention: a tribunal's dominant hermeneutic can be text, party intent, or objective. In that sense the intention-based approach disguises rather than settles underlying disagreement about the correct approach to treaty interpretation.

12 The textualist approach maintains that the best and most objective expression of intent can be found in the treaty text itself. See for instance Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *British Yearbook of International Law* 1, 204-205; Alexander P Fachiri, 'Interpretation of Treaties' (1929) *American Journal of International Law* 23.4, 745–52; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008); Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) *European Journal of International Law* 14.3, 529–568.

13 The teleological approach focusses not so much on the raw text of the treaty, but on the underlying objectives these drafters were attempting to achieve. For examples see e.g. Hersch Lauterpacht,

In judicial practice, the elements in each of these schools are not necessarily exclusive of one another, and theories of treaty interpretation can be and are constructed and compounded from all three.[14] Neither the academic literature nor the text of the VCLT settle which approach is to prevail in which sets of circumstances.

It has been suggested that the VCLT envisages treaty interpretation 'as a holistic, non-hierarchical exercise', which involves the 'summing up of text, context, and purpose', 'albeit one that starts with the text of the treaty'.[15] This view seems questionable on the grounds that, although not expressly stating that the ordinary meaning of the terms of the text should always prevail over its purpose and object, Article 31 clearly states that treaties must be interpreted in 'good faith' and the treaty text must be given its 'ordinary meaning'. This implies that it is only when that meaning is ambiguous or 'manifestly absurd or unreasonable' (Article 32) that contextual or teleological criteria may prevail over the text. It is thus only for a good reason—i.e. textual ambiguity, vagueness or absurdity—that the ordinary meaning of a treaty provision may be displaced by an interpretation based on its context or underlying purpose. Article 32 further suggests that in determining the ordinary meaning of the text, courts may adopt an historical approach by looking at the preparatory works and circumstances leading to the conclusion of the treaty.

Apparent textual ambiguities and the lack of doctrinal guidance in the literature concerning the application of Articles 31 and 32 have resulted in considerable divergence between international tribunals in the practical application of the VCLT rules, and it is often an open question whether, on any particular interpretative question, a tribunal will rely primarily on: (a) the text of the treaty; (b) the intent of the parties to the treaty; or (c) the underlying objective that the treaty seeks to attain.[16]

'Teleological' courts tend to take an evolutionary approach to treaty interpretation in that they view legal instruments as 'living instruments' whose meaning is not tied to the original and historical understanding of textual terms at the time of their conclusion nor to the subjective intention of the parties as may be deduced from the preparatory works. By contrast, tribunals favouring the textual school are more likely to regard themselves as agents giving effect to the intention of the parties, in particular as revealed by the text or the historical documents surrounding its conclusion. Teleological courts, on the other hand, are activist and gap-filling beyond the rules provided in the treaty. They are more likely to regard themselves as 'self-confident agents' operating largely independently of the parties that made the treaty and established the tribunal.[17] International tribunals associated with the textual approach are the WTO's Appellate

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'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) *British Yearbook of International Law* 26, 48; George Letsas 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) *European Journal of International Law* 21.3, 509–41.

14 Gerald Fitzmaurice, 'The Law and Procedures of the International Court of Justice: Treaty Interpretation and Certain Other Points' (1951) 28 *British Yearbook of International Law* 1.

15 Georges Abi-Saab, 'The Appellate Body and Treaty Interpretation' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010), 99–109.

16 J H H Weiler, 'The Interpretation of Treaties — a Re-examination' (2010) *European Journal of International Law*, 21.3, 507; Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' (2010) *European Journal of International Law*, 21.3, 451-2.

17 Pauwelyn and Elsig, above n 16, 455.

Body[18] or the International Court of Justice (ICJ). Prime examples of 'activist' international tribunals are the European Court of Human Rights[19] and the CJEU.[20]

III THE COURT OF JUSTICE'S APPROACH

In *Merck v Hauptzollamt Hamburg-Jonas*,[21] the CJEU summarised its interpretative approach as follows:

> … in interpreting a provision of [Union] law it is necessary to consider not only its wording, but also the context in which it occurs and the objects of the rules of which it is part.

At first sight, this statement appears to echo the text of Article 31 VCLT.[22] The CJEU's approach to legal interpretation also resembles that of other national constitutional and international courts in that it appears to apply many of the same techniques and arguments.[23] In addition, the CJEU refers to specific provisions or text passages more frequently than any other interpretative consideration, except its own previous decisions.[24] And finally, the CJEU liberally cites its own previous decisions and does so at least as frequently as other higher courts.[25] However, there are important features of the CJEU's approach which are not apparent from its subtle reformulation of Article 31 VCLT. Eight features, in particular, bear special emphasis.

First, the EU is not a signatory to the VCLT although its Member States are. Since the VCLT applies to all treaties entered into by its signatory states, the CJEU should follow the VCLT's interpretative rules. However, the CJEU does not regard itself as bound by the VCLT and does not refer to the VCLT in its judgments despite the fact that it professes to follow the general principles of international law.

Second, although the CJEU frequently refers to the words used in the legal instrument it interprets, this in itself establishes little. The CJEU does so in a perfunctory manner and without extensive textual analysis. Crucially, the CJEU's respect for the wording of provisions is subject to a critical proviso. Compared to many other courts, it

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18 See e.g. Abi-Saab, above n 15, 106.

19 See e.g. V Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case-law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration' (2010) *Michigan Journal of International Law* 31, 621-690; Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed.), *The Oxford Handbook of IHRL* (Oxford University Press, 2013) 739.

20 See for instance Koen Lenaerts 'Interpretation and the Court of Justice: A Basis for Comparative Reflection' (2007) *The International Lawyer*, 41.4, 1011–32.

21 *Merck v Hauptzollamt Hamburg-Jonas* (Case C-292/82) [1983], [12].

22 As will be shown, some commentators have rightly concluded that the Court follows instead a 'meta-teleological' approach. See, for instance, V Moreno-Lax, 'Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law' in DJ Cantor and J-F Durieux (eds.), *Refuge from Inhumanity?* (Brill, 2014), 295-341.

23 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013), 287-233.

24 In 2011, the Court referred to particular provisions or their wording in nearly 97% of its decisions, compared to 74% where it cites purposive arguments. Ibid 286.

25 Ibid 234-277.

is relatively more willing to give priority to teleological criteria over linguistic criteria in cases where the former enables an integrationist outcome, or supports an otherwise politically convenient solution, and the literal reading does not.[26]

Third, the CJEU rarely, if ever, uses historical arguments.[27]

Fourth, the CJEU relies liberally on meta-teleological criteria and not merely, as it suggests in *Merck*, teleological considerations[28] which refer to the explicit 'objects of the rules of which [a legal provision] forms part'.[29] Meta-teleology as used here denotes the CJEU's tendency to rely on a small number of recurring abstract 'umbrella' purposes or principles which are judge-made rather than treaty-based, and generally favour further EU integration. The CJEU's approach is meta-teleological despite the fact that it rarely expressly refers to the 'ever closer union' objective and only somewhat more frequently to the 'spirit of the Treaties'.[30] In important cases, however, the idea of ever further integration is almost always implicit, as it is inseparable from the principles of the uniform application of Union law as well as the effectiveness of Union law.[31]

Fifth, any CJEU decision may effectively become a precedent.[32] Because many important cases were decided on meta-teleological considerations, understood to include those principles which favour an expansive interpretation of the scope of EU law and of the competences of the EU institutions, the body of precedents itself acquires a *communautaire* — or pro-Union — flavour. The importance of *de facto* precedents in the CJEU's argumentation is borne out by the fact that there is hardly any case in which it does not refer to at least one previous decision. In both 1999 and 2011 there were more cases in which it cited case law than any classical interpretative argument.[33] In referring back to its own case law, the CJEU thus implicitly also relies on meta-teleological considerations. In this way precedents solidify and reinforce the CJEU's *communautaire* leaning. Moreover, the appeal to previous decisions enhances judicial credibility in the sense it suggests judicial objectivity and creates the impression that the court did not exercise a choice but instead reached its decision subject to the constraints of legal consistency and certainty. The appeal to precedent lends later decisions only the *aura* of legal objectivity, simply because in analysing a case not every relevant previous case is excavated and subjected to legal analysis.[34] The previous decision is taken as authoritative when all too often it was a judicial choice based on a far from impartial interpretative approach skewed in favour of integrationist outcomes.

Sixth, as discussed earlier, the CJEU operates in an extremely permissive political and judicial environment. National courts, without much demur, have accepted the

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26 Ibid 280-317.

27 Ibid 217-219

28 For an elaboration on the 'meta-teleological' approach followed by the Court, with particular focus on asylum cases, see Moreno-Lax, above n 23, 295-341 (and references therein).

29 Case C-292/82 *Merck v Hauptzollamt Hamburg-Jonas*, [12]. See e.g. Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Routledge, 2016), 42.

30 Beck, above n 23, 319-322; Vaughne Miller, 'Ever Closer Union' (House of Commons Library, Briefing Paper 07230, 16 November 2015).

31 Beck, above n 23, 320-321.

32 Whether it does will depend on whether the CJEU treats it as such. The same, in principle, applies to all precedents anywhere. The CJEU, however, displays a much greater willingness than other courts simply to ignore and disregard inconvenient previous decisions.

33 Beck, above n 23, 290-91.

34 Ibid 245-249.

CJEU's reading of the EU Treaties and legislation as authoritative. The CJEU's decision-making, in turn, builds not on the treaty text itself but on meta-teleology and its own body of interpretative decisions.[35] The meaning of the Treaties, although not their wording, invariably reflects (and in this way also evolves with) ongoing views of the CJEU's judges. Over time the Treaties in this manner acquired a distinctly more integrationist flavour than their wording suggests. In circumstances where CJEU judgments can be overruled only by the CJEU itself or by unanimous treaty amendment by the Member States, general acceptance throughout the EU of the CJEU's activist approach to legal interpretations effectively means that the CJEU acquires a de facto power of amending and extending the EU's quasi-constitution, which (to further compound matters) is itself essentially a creation of the CJEU's daring early decisions on supremacy, direct effect and the relationship between EU and national law.

Seventh, in contrast to courts which apply the VCLT in good faith, the CJEU does not accept a hierarchy amongst the VLCT's literal, purposive and other criteria.[36] The CJEU does not attach a consistent weight to specific criteria. It presents its conclusion as the cumulative result of the variable application of all criteria. The CJEU's approach to legal reasoning may therefore be described as a cumulative, variable or ultra-flexible approach.[37]

Finally, the CJEU's variable or cumulative approach, combined with its meta-teleological dimension, gives its decision-making a distinctive pro-Union *communautaire* tendency: a predisposition, in other words, to resolve legal uncertainty in favour of further integration.

The CJEU's *communautaire* predisposition tends to be irrelevant in most run-of-the-mill cases, which concern the application of more or less clear, detailed and technical provisions. Examples of these are mostly agriculture, VAT, customs union, and tariff cases. These fields seldom involve issues central to the Union's interests, and as such it is rare for the CJEU to reach a conclusion based solely or primarily on teleological criteria at odds with a literal reading. However, its pro-Union default position becomes a crucial and often decisive factor in cases involving major issues of principle or the allocation of powers between the EU and Member States. In 'constitutional' cases its *communautaire* tendency inclines the CJEU to resolve legal uncertainty in favour of meta-teleological objectives, especially the 'ever closer union' objective which is implicit in many of its most influential decisions. The CJEU in such cases may disregard the *lex specialis* principle and override a more or less specific rule where that rule suggests a less integrationist outcome, in favour of a meta-teleological reading based not on the 'objects of the rules of which [the rule] forms part',[38] but the general aspirations

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35 Ibid 317-319.

36 Ibid 280-293, 316-317; K P E Lasok and Timothy Millett, *Judicial Control in the EU* (Richmond Law & Tax Ltd, 2004), 375-391.

37 There are different understandings of the term 'cumulative approach'. Here it means that the CJEU presents its decisions in terms of the cumulative weight of literal, systemic, teleological and, often, meta-teleological considerations, with no specific weight attached to each criterion across all or most cases. For this reason,the author also refers to this approach as 'variable' or 'ultra-flexible'. See further Beck, above n 23, 280-293; Cf. V Moreno-Lax, 'Systematising Systemic Integration: 'War Refugees', Regime Relations, and a Proposal for a Cumulative Approach to International Commitments' (2014) 12 *Journal of International Criminal Justice* 907-929, analysing the interpretative methodology of the CJEU in Case C-285/12 *Diakité* and related case law.

38 Case C-292/82 *Merck v Hauptzollamt Hamburg-Jonas*, [12].

of the Union Treaties.[39] The following are amongst the most important fields where the CJEU's pro-Union interpretative stance is operational and has had a profound pro-integrationist effect.

IV THE 'GREAT' TRANSFORMATIVE CASES

In its early quasi-constitutional cases from *van Gend*,[40] *Costa*,[41] the *Internationale Handelsgesellschaft*,[42] *Nold*,[43] and through to *Francovich*,[44] the CJEU was presented with issues to which the Treaty provided no explicit answer. In each of these cases, it reached an integrationist outcome without textual support, in defiance of established public international law, though not necessarily openly in opposition to the text.[45] In these cases, the CJEU filled the 'gaps' left by the signatory Member States with meta-teleology. 'Gap-filling' and the readiness to adopt a more teleological rather than textual approach are the key features of an activist court.

Crucially, since courts do not approach new cases *de novo* but in the light of their own previous decisions – teleological and gap-filling decisions – especially where they are relevant to the legal order as a whole, this fact tends to move the judicial decision-making process further down the same activist road. This phenomenon characterises the evolution of EU law. The principles established in the CJEU's early 'constitutional' cases quickly became part of the foundation of EU law and have been cited or simply applied in many subsequent key cases where they have had the effect of tilting the balance in favour of an integrationist outcome. With each subsequent *communautaire*

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39 At the same time, it should be added, the Court's *communautaire* predisposition is just that, a dominant tendency, not an inevitable conclusion. The Court of Justice is, in fact, a politically most astute court. Where Member States' political or budgetary sensitivities are engaged, the Court frequently adopts a compromise solution which may involve deferring to the Member States concerned, either on the facts or in law, or more commonly with reference to the flexible proportionality principle, which involves minimal constraints for future decisions and leaves the Court's future discretion largely untouched (Beck, above n 23, 404-409).

40 Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

41 Case C-6/64 *Flaminio Costa v ENEL*

42 Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel*.

43 Case C-4/73 *J Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft*.

44 Case C-6/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*. In *Costa v ENEL* the Court of Justice justified the supremacy of EU over national law in terms of a meta-teleological reading of the Treaty (the aspirational grand meta-objective of 'ever closer union') which, ultimately, can be used to justify any integrationist conclusion provided Member States will politically accept it. In the *Internationale Handelsgesellschaft* case the Court reiterated and extended its conclusion by additional reference to the principle of the uniform application of EU law, which it uses whenever the Treaties themselves provide inadequate textual support or are silent. And in *Francovich* the Court imposed liability in damages on Member States for breaches of Union law, esp. in implementation cases, again without textual basis and by reference to the principles of effectiveness and the uniform application of Union law.

45 The CJEU brushed aside such counter-arguments with the argument that the EU legal order is *sui generis* — which may be plausible but has no express treaty basis.

decision, the body of precedents became a degree more integrationist, and the goalposts were shifted.[46]

The CJEU's case law on the scope and content of EU citizenship rights provides a powerful example of the cumulative integrationist effect of a few cardinal initial judicial choices. The CJEU's initial choices were made possible by political acquiescence by national governments and reinforced by the judicial compliance of national courts. This politico-judicial cabal collaborated to transform EU law from international law into a quasi-sovereign constitutional supra-national legal order which increasingly set the parameters within which the relationship between national law and EU law was to evolve. This transformation illustrates the degree to which an activist international court indulged by national political and judicial acquiescence or silent approval can become a vitally important political agent able to take decisions which national governments would not dare to take because they violate national constitutions, the principles of public international law, and make a travesty of the natural meaning of the relevant treaties and/or undermine the principles of democratic self-government. In short, the CJEU is an ideal-type example of a disturbing trend in Western so-called democratic societies where governments delegate central functions to 'independent' institutions such as central banks, supervisory agencies and higher courts, which are then able to make political choices for which neither they nor anyone can be held electorally or otherwise accountable.

V EU CITIZENSHIP AND THIRD COUNTRY FAMILY REUNIFICATION

The legal concept of EU citizenship was introduced into the EU Treaties in 1993 with the Treaty of Maastricht. EU citizenship is complementary to, and does not replace, national citizenship. Apart from conferring certain political rights at EU level, its principal legal effect consists in the protection it offers any citizens of any EU Member State against arbitrary discrimination on the grounds of nationality when he or she moves to another EU Member State.[47] However, the right to equal treatment which the EU Treaties confer on any EU citizen in another EU member state only applies within the scope of EU law, not in areas where legislative powers remain with the Member States (e.g. social policy or taxation), and is further expressly 'subject to the limitations and conditions' provided for in the EU Treaties and EU legislation.

In practice, the CJEU has largely ignored the Treaty limitations on the scope of EU citizenship rights. In its early transformative cases the CJEU had adopted a 'gap filling' approach to establish a supra-national legal order in the absence of Treaty language to the contrary.[48] When the judicial power grab did not result in a Member State revolt, the CJEU was emboldened to go further. In the area of EU citizenship rights it incrementally expanded the right of EU citizens to equal treatment not merely in the absence of Treaty support, but in defiance of the principle of conferral and in opposition to both the

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[46] Another case where the Court clearly made law in the absence of any treaty basis for the protection of fundamental rights in the EC treaty is *Nold v Commission* (Case C-4/73). Despite the absence of any treaty reference to fundamental rights, the Court held that 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures'. The CJEU did not, and could not, appeal to any basis in the EC Treaty, it simply made law by deciding the general principles of Community law also extended to the protection of fundamental rights under national law — there was no basis for this assertion until the treaty revisions of the 1990s.

[47] TFEU, Art. 21 (in conjunction with Art. 18).

[48] Infra.

ordinary meaning of Treaty language and detailed provisions of the applicable implementing legislation.

The right of EU citizens to non-work related financial and other benefits is an area in which the CJEU's judicial activism has been particularly pronounced. According to the principle of conferral, the EU may only adopt policies and law in areas where Member States have authorised it to do so in the EU Treaties. Where the Treaties do not confer legislative competence, the Member States alone may legislate. The EU Treaties do not empower the EU to adopt legislation governing benefits entitlements to EU migrants who are not workers or ex-workers. This is in contrast to the status of economically active EU migrant citizens who have long enjoyed an equal right to in-work and contributions-based benefits on par with domestic workers.[49] Nor does Title X TFEU[50] include rules governing benefits entitlements for economically inactive EU citizens within the list of social policy fields where the Union has a supplementary competence to support national policies.[51] It follows that, in contrast to in-work benefits, benefits entitlements for economically inactive EU migrants fall outside the scope of the non-discrimination principle. Where EU citizens leave their home country for another EU Member State without employment or adequate financial resources, the EU Treaties, according to the ordinary meaning of the words used, do not confer a right to social assistance in the host state.

The adoption of Directive 2004/38 has not changed the pre-2004 distribution of competences, nor could it in the absence of a treaty change.[52] Instead, and in contra-distinction to the treaty rights of workers and ex-workers and their family members, Directive 2004/38 states that EU citizens who are not 'workers or self-employed persons in the host Member States' only have a right to residence in another EU Member State beyond three months if they 'have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence'.[53] Article 24(2) specifically provides that 'the host Member State shall not be obliged to confer entitlement to social assistance …, nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families'.

Notwithstanding these provisions, the CJEU in a series of seminal cases extended the right to social assistance to various groups of economically inactive Union citizens and EU citizens' rights to family unification. In *Grzelczyk*,[54] a pre-2004 case, the CJEU was asked to decide if a French student was entitled to a 'minimex' maintenance grant while studying in Belgium. National law laid down that only Belgian nationals were entitled to the minimex. However, the CJEU delphically opined that 'Union citizenship

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[49] See TFEU, Arts. 18, 21, 45(2). Art. 45(2) prohibits any discrimination on grounds of nationality between home and EU migrant workers in relation to remuneration and other work conditions.

[50] TFEU, Arts.151 to 161.

[51] TFEU, Art. 153.

[52] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158.

[53] Ibid, Art. 7. NB: The 'sufficient resources' requirement does not apply to EU migrants who have acquired the right to permanent residence, who entered as workers, or who after a minimum period of employment become unemployed. It is likewise qualified with regard to retired workers who wish to remain in the host Member State (Ibid Art. 17).

[54] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*.

is destined to become the fundamental status of nationals of the Member States enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.[55] Furthermore, it held that Union law 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'.[56] On those grounds, the CJEU concluded, the minimex could not be denied.

Articles 18 and 21 TFEU refer to the 'scope of application of EU law' and restrict the application of the equal treatment principles to those areas where the Union has legislative competence as provided for in Articles 3, 4 and 6 TFEU. This does not include non-work related social assistance and financial support for students which do not fall into this area. In *Grzelczyk*, the CJEU implicitly extended the competences of the Union legislator. The Court affirmed this position in *D'Hoop*[57] and in *Ioannidis*,[58] and extended the right to social assistance in *Bidar*,[59] where it held that, notwithstanding a lawful residence requirement under national law, a migrant student who does not meet that requirement might nevertheless qualify for a subsidised student loan in the host state. *Bidar* and *Ioannidis* were decided *after* adoption of Directive 2004/38, which limits the right to free movement of economically inactive EU citizens to workers and those with sufficient resources. The CJEU disregarded this restrictive provision and instead justified its conclusions by analogical reference to the underlying rationale established in its previous decisions, including *Grzelczyk* and *D'Hoop*.

The CJEU followed a similarly expansive approach to the application of the equal treatment principle in relation to differential tax treatment for national and non-national pensioners[60] and post-bankruptcy debt.[61] The CJEU's judicial integrationism has even encroached upon national rules governing the registration of surnames and nationality laws, paradigmatic areas of national autonomy.[62] The CJEU's decisions in these cases appear humane. However, the EU Treaties do not confer any competence on the EU in relation to rules governing the registration of surnames or the conferral or withdrawal of nationality.

Another area in which the CJEU has used the concept of EU citizenship to undermine national sovereignty is immigration law. Save for asylum and subsidiary protection law, rules regarding immigration, family reunification, and residency and naturalization of third country nationals (TCN) remain matters for national law. The TCN may, however, enjoy a derivative right to residence and non-discrimination if he is a family member of an EU citizen who has exercised the right to free movement within the EU. That TCN right is derivative in that it depends on the family link with an EU

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55 Ibid [31].
56 Ibid [24].
57 Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi*.
58 Case C-258/04 *Office national de l'emploi v Ioannis Ioannidis*.
59 Case C-209/03 *R(Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills*.
60 Case C-544/07 *Uwe Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*.
61 Case C-461/11.
62 See Case C-148/02 *Carlos Garcia Avello v Belgian State*; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul*. Cf. Case C–208/09 Sayn-Wittgenstein in which CJEU qualified but did not reverse its step-by-step erosion of the national prerogative over the law of surnames when it held that Member States retain that prerogative even in cross-border situations if the person affected changed her name to circumvent national constitutional rules abolishing titles of nobility.

citizen and, as the CJEU correctly held in *McCarthy*,[63] does not apply in wholly internal situations (i.e. where the EU citizen has only ever been resident in one Member State).

In *Zambrano*, however, the CJEU held that Article 20 TFEU precluded the expulsion of family members of an EU citizen who had never exercised his freedom of movement.[64] Accordingly, the CJEU decided that TCN parents of EU-citizen children born and resident in Belgium had a right under EU law to remain in Belgium although the children had never left Belgium. In these circumstances the correct view should have been that EU citizenship was not applicable because the situation was wholly internal. The CJEU has since affirmed its *Zambrano* decision in a series of cases in *S&G*,[65] *Iida*,[66] and *O&B*.[67]

The EU Treaties and EU legislation are clear: the determination of the rights of TCN family members to reside in an EU member state falls outside the scope of Union law and remains a matter for national law unless the TCN qualifies for temporary or permanent residence under asylum or subsidiary protection law or can claim a derivative right qua family member of a 'moving' EU citizen. The *Zambrano* decision, together with the CJEU's subsequent cases which affirm that decision, extend EU competence into areas of immigration law which the EU Treaties reserve to the member states. They are prime examples of judicial-led 'competence creep'.

A certain pattern emerges. The CJEU's competence creep typically starts with a 'hard case' brought by a morally attractive litigant. To achieve a 'just' result, the CJEU bends and expands relevant provisions of EU law, by exploiting vagueness and resolving norm pluralism in an integrationist direction where possible and by *contra legem* pro-Union interpretation where necessary. If the decision goes largely unnoticed, or if there is no widespread media and political reaction, both of which are rare, the CJEU, encouraged by favourable academic commentary and a lack of Member State opposition, will start citing and applying the initial activist principle in subsequent cases. In this fashion, the CJEU creates the impression of relying on uncontroversial, well-established precedents which require no further justification but which the Court may use to override or subtly tilt the meaning of restrictive provisions of EU law in a more integrationist direction.

VI THE EURO CRISIS DECISIONS

Nowhere is the CJEU's pro-Union bias more evident than in the euro crisis litigation where it takes the crucial step from law-making to law-breaking: it decides one way, when the Treaty clearly says otherwise. The term 'law-breaking' is, of course,

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63 C-434/09.

64 C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm*). The CJEU's effective ultra vires reading of the scope of the EU's non-discrimination powers has been qualified to some extent in the subsequent decision in Case C-256/11 *Dereci v Bundesministerium fur Inneres*. However it is that *Dereci* does not represent a general reversal of the CJEU's expansive reading of its fundamental rights jurisdiction. See for instance Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim*, *Secretary of State for the Home Department*; and Joined Cases C-356/11 and C-357/11 *O, S v Maahanmuuttovirasto*.

65 Case C-457/12.

66 Case C-40/11.

67 Case C-456/12.

rarely used in academic literature and least of all with regard to courts or judges. The more common term would be mis-application of the law by judges.[68]

The first patently integrationist and political decision is *Pringle*.[69] Before turning to the judgment, a few words must be said about the nature of the EU's monetary union. The European single currency, known as the euro, was established with the Treaty of Maastricht in 1993.[70] The Maastricht Treaty bases monetary union on the principle of individual national budgetary responsibility.[71] This means that although Member States agreed to a common monetary policy to be conducted by the European Central Bank ('ECB'), they would remain responsible for the management of their own public debt levels which, *inter alia*, are influenced by the interest rate and other policies of the ECB. To ensure responsible financial management by Member States, a no bail-out clause was inserted in the Treaties. This is Article 125 TFEU.[72]

Article 125 is as clear as legal provisions can be: there is to be no mutual financial assistance between eurozone governments, except for very specific limited projects. However, in the wake of the euro crisis, eurozone governments very quickly began to ignore the no-bail-out clause. In 2012, they established a permanent bail-out fund, the so-called European Stability Mechanism ('ESM'), with a total volume of EUR 500bn and, including other funds, of EUR 700bn.

In the *Pringle* case, the CJEU was asked to assess to the compatibility of the ESM with Article 125. It upheld the legality of the permanent rescue fund, essentially on two grounds. First, it resorted to a disingenuous literal argument: mutual financial assistance amongst several eurozone countries via the establishment of a rescue fund on the one hand, and the assumption of existing debts of one country by another on the other, are said to be two entirely different things. This is because 'assistance (via a rescue fund) amounts to the creation of a new debt, owed to the ESM by the recipient government, which remains responsible for its commitments to its creditors in respect of its existing debts'.[73] In other words, the 'no bail-out' clause does not forbid assistance given through an intermediary.

In essence, the CJEU confines Article 125 to cases where the existing debt of one country is assigned to another Member State, so that the donor 'steps into the shoes' of the original debtor and assumes legal liability for the pre-existing debt. On this reasoning, any mutual financial assistance involving a transfer of the default risk from

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68 The term law-breaking here is used to refer to situations where a court adopts an argumentation that imposes minimal methodological constraint and maximises judicial discretion, effectively allowing it to choose and rely on whatever interpretative criterion supports its own conclusions in preference to those which do not. It equally applies to situations where putative literal arguments do not reflect the ordinary meaning of the terms of the relevant provision, or when a court adopts a teleological interpretation at variance with the ordinary meaning of the treaty, which is supported by historical evidence about the intention of the parties and does not lead to absurd, but simply a politically or economically inconvenient result, or one that threatens important and influential business and financial interests.

69 Case C-370/12.

70 The Treaty on European Union ('TEU'), signed in Maastricht 7 February 1992, entered into force on 1 November 1993 (OJ C 191).

71 Art. 104b.

72 Art. 125 TFEU states that '[t]he Union … [and] *a Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State,* without prejudice to mutual financial guarantees for the joint execution of a specific project' (emphasis added).

73 *Thomas Pringle v Government of Ireland and Others* (Case C-370/12) [2012] ECLI [139].

the original debtor to the donor(s), but without a formal assignation of one and the same debt is outside the scope of the 'no-bail out' clause. If Article 125 was never intended to prevent the transfer of financial risk between eurozone governments, as the CJEU evidently concludes, then the so-called 'no-bail out' clause does little to restrict debt mutualisation.

The CJEU's supposedly literal interpretation even fails on its own terms. Article 125, on a literal interpretation, is not restricted to direct bail-outs between states. The words 'shall not be liable or assume' cover situations where the default of one country triggers a legally binding promise of support by another, though the resulting obligation may be legally distinct. Moreover, under the ESM Treaty[74], euro members guarantee loans and guarantees given by the ESM, according to a contribution formula equivalent to their shares in the capital of the ECB. However, if one eurozone member is unable to honour its commitments, then, according to Article 25 ESM Treaty, it falls to the remaining ESM members to assume the shortfall.[75] They thus assume the commitments of the failing Member State — precisely the 'assumption of liability' which, even on the CJEU's view, is prohibited by Article 125. The supposedly literal interpretation of Article 125 patently conflicts with an equally literal interpretation of the ESM Treaty.

Second, the CJEU then develops a classical meta-teleological argument, premised on the aim of Article 125 as being 'to ensure that the Member States follow a sound budgetary policy'.[76] The ESM, the Court notes, takes account of this objective in that it links the award of financial assistance to 'strict conditionality … [designed to] ensure that the Member States pursue a sound budgetary policy'.[77] The ESM, the Court concludes, complies with Article 125, as it 'ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'.[78] However, the ESM suspends precisely the operation of market processes which Article 125 tries to uphold.

It should be noted that Article 125 has one obvious aim — to prevent mutual financial assistance — and that aim is clearly set out. That aim admittedly, in turn, is designed to ensure a sound monetary policy, just as any immediate aim usually has another long-term objective. Yet, in invoking that further goal, the CJEU ignores that the EU Treaties make a very clear choice as to how 'sound budgetary policy' is to be achieved, which is obvious from the wording of Articles 119 and 125 TFEU, namely that budgetary discipline is to be achieved not through the debt mutualisation, but via individual national budgetary responsibility.

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74 *Treaty establishing the European Stability Mechanism* ('ESM'), OJ L 91, (entered into force 2 February 2012), 1.

75 Article 25(2) ESM Treaty.

76 *Thomas Pringle v Government of Ireland and Others* (Case C-370/12) [2012], [135].

77 Ibid [143].

78 Ibid [135]. The Court held that is that 'strict conditionality' ensures Member States remain subject to the market. That confidence seems surprising in view of the fact that a previous international agreement entered into by Member States, namely the Stability and Growth Pact, has been broken since its inception on a year-on-year basis by an average of two thirds of the eurozone Member States. That pact did nothing to ensure the observance of precisely that 'sound budgetary policy' which the Court now so confidently expects the ESM agreement to promote, in the absence, it should be noted, of any additional Treaty safeguards.

In *Pringle* the Court essentially upheld an agreed political deal. To give this convenient conclusion at least the semblance of legal credibility, the Court relies on two types of arguments it usually employs only extremely rarely. First, it expounds a putative literal argument, which is at variance with the ordinary meaning of Article 125 TFEU and Article 25 ESM Treaty, and thus is not a literal argument at all. Second, it refers to the preparatory works as support for its teleological reading — something the CJEU practically never does, as it commonly chooses to present the Treaties as evolving and not as historical documents to be interpreted with the subjective intention of the signatories.[79] That teleological argument distorts the message of the preparatory works which supports the view that Article 125 makes a clear textual choice that sound budgetary policy is to be achieved through budgetary self-reliance, not mutual assistance. It also runs counter to basic economic theory and empirical psychological evidence which suggests the mutualisation of debt reduces, rather than enhances, incentives for budgetary discipline (known as the 'moral hazard' argument in economic theory).

The simple and convincing construction of the rationale of Article 125 TFEU would have been an ordinary language reading, according to which 'the assumption of the commitments' of one Member State by another would have been taken to refer to, and strictly prohibit, any *de facto* transfer of the financial risk of public debt between Member States, save where expressly provided for in the Treaties.

In *Gauweiler*[80] the CJEU had to consider two issues. The first question was whether unlimited government bond buys are a lawful monetary policy instrument under the EU Treaties. The second question was whether the EU Treaties authorise the ECB to conduct monetary policy aimed at 'safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy'.[81] The CJEU held that bond buys were monetary policy and thus part of the ECB's mandate — and that, for those reasons, 'safeguarding an appropriate monetary policy transmission', the so-called 'singleness of monetary policy',[82] was a legitimate monetary policy objective. This aim has no basis in the Treaties. The measure is turned into monetary policy only because the ECB says so and it, in effect, secures the preservation of the euro. The CJEU not only effectively amended the Treaties, which confine the ECB to the pursuit of price stability,[83] but it also took the ECB's declared aims at their face value, when it held that the nature of a policy measure is to be assessed primarily by reference to its objectives and not its substance or effects. This not only ignores the Treaty text, but contradicts the CJEU's own previous decisions that the aim of EU Acts is to be determined objectively, not subjectively.[84]

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79 See for instance Beck, above n 23, 280-291; Hjalte Rasmussen, *The European Court of Justice* (GadJura, 1998); Oreste Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint' (2004) *German Law Journal* 5.3, 283-317, especially 284-285 and 317.

80 *Gauweiler and Others v Deutsche Bundestag* (Case C-62/14) [2015].

81 The slightly awkward wording of the supposed objective of the OMT programme is not the author's translation of some document originally drawn up in Italian, but the ECB's official words in its programme description.

82 European Central Bank, 'Technical features of Outright Monetary Transactions' (Press Release, 6 September 2012).

83 See the text of Art. 127 TFEU.

84 Infra.

On the first issue, the CJEU's conclusion, that bond buys may be a legitimate monetary policy measure, sits uneasily with its decision in *Pringle* that bond buys by the ESM 'to preserve the stability of the Euro' were economic, not monetary policy. In *Gauweiler*, it then decided that, when the ECB buys bonds for an allegedly different purpose, bond buys become monetary policy just because (and for no other reason than that) the ECB buys the bonds and states it is pursuing monetary policy.

The CJEU's conclusion further not merely ignores the fact that Article 123 TFEU prohibits direct bond buys from the issuing public bodies,[85] but also entirely glosses over the fact that recital (7) of Council Regulation 3603/93 extends the prohibition of monetary financing of government debt to 'purchases made on the secondary market',[86] which may have the effect 'to circumvent the objective of that Article'.[87] In *Gauweiler* the CJEU simply ignored Council Regulation 3603/93.

Gauweiler was decided nearly five months after the ECB had launched a quantitative easing bond-buying programme and nearly three years after the announcement of the Outright Monetary Transactions ('OMT').[88] At the time of the *Gauweiler* judgment, the economic effects of the ECB's bond-buying programme had become obvious. Both the announcement of the programmes and the commencement of the purchases had resulted in substantial declines in risk premiums and the interest on newly issued eurozone bonds. This is precisely the type of monetary financing of public debt which Article 123 TFEU and Regulation 3603/93 prohibit. The CJEU chose to ignore this unequivocal economic evidence, as readily as it ignored the prohibition of secondary market purchases by Council Regulation 3603/93.

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85 Article 123 TFEU:
'1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments'.

86 Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty, OJ L 332, 1-3.

87 Recital (8) of the Regulation lends additional support to a broad and very strict construction of the prohibition of monetary financing and states that neither the ECB nor the European System of Central Banks may engage in purchases 'of marketable debt instruments' issued by a euro Member State which may, in any way, 'help to shield the public sector from the discipline of market mechanisms'.

88 OMT is an ECB programme to purchase sovereign bonds. It was announced by ECB President Draghi in 2012. As part of the OMT programme, the ECB can purchase the sovereign bonds of specific euro area countries on secondary markets with no set ex ante quantitative limits. The prerequisite for purchasing sovereign bonds is that the state in question complies with conditions specified in the ESM programme. The OMT programme was never implemented but subsequently absorbed within a more broad-based money printing ECB programme known as the Quantitative Easing (QE) programme. In contrast to the 'conditionality' of the OMT programme, the QE programme launched by the ECB in January 2015 consists of unlimited and unconditional sovereign bonds purchases from all euro area governments. Officially the ECB justifies both programmes with reference to the alleged need to improve the transmission of the central bank's monetary policy and the 'maintenance of price stability' which the ECB has re-interpreted as a controlled inflation target of two per cent in the medium term. In reality, both the OMT and the QE programmes amount to monetary financing of both governments and private sector banks.

The CJEU's conclusion on the second main issue — i.e. whether improving the transmission mechanism for the ECB's monetary policy is a legitimate monetary policy — likewise plainly disregards the Treaty. The EU Treaties and the Statute of the ECB are clear on this point. The overriding objective of monetary policy in the eurozone is the maintenance of price stability,[89] whilst the tasks of the ECB also include the carrying out of foreign exchange operations, the management of foreign currency reserves, and the maintenance of the payment systems within the Eurozone. The ECB's declared aim — in both the OMT and its subsequent Quantitative Easing programme — of improving the transmission mechanism for its monetary policy has no treaty basis. Market economies are not planned economies. In market economies, the central bank sets base interest rates and minimum reserve requirements for commercial banks and carries out short-term open market foreign exchange and securities operations, but the transmission of these central bank monetary 'impulses' is deliberately left to market processes. Commercial banks then determine interest rates and lending volumes to the corporate sector and private households, and the interest rate and credit limits they set for loans to individuals incorporate a variable risk premium, which reflects the default risks of individual borrowers. The ECB's attempt to interfere with the transmission mechanism directly conflicts with the principle of an 'open market economy' enshrined in both Articles 119 and 120 TFEU. By distorting risk premiums on government bonds, the ECB, in truth, pursued, one objective only: to prevent a breakup of the euro. However, the survival of the euro is not a Treaty objective, no more than 'monetary policy transmission'.

In *Gauweiler*, the CJEU held that 'improving the transmission mechanism' of central bank policy fell within the ECB's mandate because the nature of a measure — i.e. whether it is to be regarded as monetary or economic policy — is to be assessed principally with reference to the ECB's putative aims, even if the measure 'may have indirect effects' which have nothing to do with monetary policy and these effects are very substantial.[90] Previously, it was settled case law that the objective of an EU act is to be determined objectively, not subjectively, and that in determining the nature of an EU measure, primary regard must be had to its objective effects, and not the declared objective.[91] In particular, the CJEU had always insisted that it 'must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature'.[92] In *Gauweiler*, the CJEU conveniently ignored its own settled case law.

Pringle and *Gauweiler* are two decisions which illustrate how far, in promoting the goal of further EU integration, the CJEU is prepared to defy conventions of legal argumentation and free itself from any methodological constraints on judicial decision-making. In *Pringle* the CJEU purported to rely on, but in reality glossed over, the natural meaning of Article 125 TFEU and its wider legislative context, notably Article 21 ESM Treaty as well as the teleo-systemic purpose of Article 125 provided by Articles 120 to 127. It opts instead for a reading based on a meta-teleological objective, i.e. the

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89 Art. 127(1) TFEU.

90 *Gauweiler and Others v Deutsche Bundestag* (Case C-62/14) [2015], [46]. See also [47]-[52].

91 *Germany v Parliament and Council* (Case C-376/98) [2000], [85]; see also *Spain v Council* (Case C-350/92) [1995], [25]-[41]; *Germany v Parliament and Council* (Case C-233/94) [2007], [10]-[21]; *Ezz v Council and Commission* (Case C-220/14) [2015], [42].

92 *Germany v Parliament and Council* (Case C-376/98) [2000], [85]. See further *Spain v Council* (Case C-350/92) [1995], [25]-[41]; *Germany v Parliament and Council* (Case C-233/94) [2007], [10]-[21]; *Ezz v Council and Commission* (Case C-220/14) [2015], [42]; *Parliament v Council* (Case C-130/10) [2012], [42]; C-453/03, C-11/04, C-12/04 and *ABNA and Others v Secretary of State for Health and Others* (C-194/04) [2005], [53].

preservation of the euro as an end in itself. It does so in preference to the express legislative choice made by Article 125, namely that a sound budgetary policy is to be achieved through national budgetary responsibility.

In *Gauweiler*, the CJEU goes further. The Court not merely turns the meaning of Treaty provisions on their head, but disregards relevant EU legislation *tout court*, notably Council Regulation 3603/03 which is relevant to the interpretation of both Articles 123 and 127 TFEU. In *Gauweiler*, the CJEU likewise ignored its own inconvenient settled case law when it took the view that the nature of a measure may be determined by the subjective purpose of the policy-maker and not objectively by reference to its effects. Previously the CJEU has always insisted on an objective, i.e. effects-based, test for determining the object of a measure. *Pringle* and *Gauweiler* illustrate the CJEU's approach to legal interpretation in its ideal-type form stripped of all justificatory niceties and conventions: The right answer to any question of interpretation of EU law is to be found not in the wording, nor the treaty-based objects of a measure, and nor for that matter the CJEU's own case law, but any consideration which best suits the meta-teleological objective of promoting EU integration.

VII CONCLUSION

In a rare frank moment, Jean-Claude Juncker, the current EU Commission President who has been at the centre of EU politics for forty years, once described the EU's 'system' of promoting EU integration by stealth. 'We decide on something, leave it lying around and wait and see what happens', he explained. 'If no one kicks up a fuss, because most people don't understand what has been decided, we continue step by step until there is no turning back'.[93] Juncker's candid remarks equally apply to the CJEU which, in its interpretation and application of the EU Treaties, has been as politically adept and ideologically committed to use the law to promote EU integration as the other EU institutions.

The foregoing discussion has shown that in cases involving the division of competences, EU citizenship rights and in the eurozone litigation, the CJEU adopts an ultra-flexible, often meta-teleological and strongly pro-Union interpretative approach which goes well beyond that suggested in *Merck v Hauptzollamt Hamburg-Jonas*.[94] The CJEU's pro-Union bias is equally evident in its interpretation of written EU law and in its approach to its own case law.

The CJEU regards itself as free to rely on literal, systemic, teleological and meta-teleological considerations, without any rule of priority or hierarchy between them and with no fixed weight to be given to each criterion. In many of the more technical run-of-the-mill cases which deal with specific issues in EU agriculture, fisheries, environmental or transport legislation, and which rarely raise fundamental issues for the Union or the division of powers between the EU and the Member States, the various interpretative criteria rarely point to very different conclusions. In these circumstances the CJEU usually follows the ordinary meaning of provisions and only exceptionally does violence to the language of the legislation.[95] The CJEU may also follow the literal approach in cases which raise significant issues for the EU legal order as a whole, where it supports an integrationist answer or suits the CJEU's interests for other reasons (e.g. those rare

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[93] 'Why Brussels isn't boring' *The Economist* (online) 12 September 2002 <www.economist.com/node/1325309>.

[94] *Merck v Hauptzollamt Hamburg-Jonas* (Case C-292/82) [1983].

[95] For a more detailed discussion, see Beck, above n 23, 344-45.

contexts where the Court considers it expedient to show judicial deference). Typically, however, where the outcome matters, the CJEU relies on whichever arguments favour a pro-Union solution to the legal question raised and an expansive reading of the competences of the EU institutions.

This ultra-flexible interpretative approach minimises methodological constraint and affords the CJEU almost complete freedom of interpretation. This methodological flexibility leaves the CJEU free to give the greatest weight to whatever arguments, usually teleological criteria, support its preferred conclusion. The purposes the CJEU may then invoke are not necessarily confined to those written into the Treaty nor to the most immediate objects evident from the legislative context. Rather, the purpose, in the CJEU's view, may be presumed as well as treaty-based, and it may refer to meta-teleological considerations just as readily as to either the immediate or indirect purposes, each of which may be either subjectively or objectively construed, depending on which most readily support its preferred solution. Moreover, by purpose the CJEU may also refer to effects, means, functional criteria, or general consequences. In general terms, whether explicitly or impliedly, when the Court invokes purposive interpretative criteria, it almost always falls back on what best suits EU integration, even where this contradicts specific Treaty provisions and conflicts with the *lex specialis* principle in international law.

The CJEU adopts a similarly flexible approach to its own previous decisions. It liberally relies on previous decisions when this lends an air of legal objectivity to justify an integrationist decision, whilst it will readily ignore a previous decision that runs counter to its pro-Union, integrationist objectives. In its citizenship judgments, to gloss over persistent departures from the wording of the Treaties and relevant EU legislation, the decisions of the CJEU abound with references to previous decisions, in preference to an analysis of the precise wording of the underlying legislative provisions. Over time, by reiterating certain judge-made principles, the Court creates an impression of continuity and consistency which disguises the judicial choices which distorted inconvenient written provisions that impose clear and precise limits on the EU's powers. However, the CJEU does not regard itself as bound by its previous decisions. For the sake of further EU integration the CJEU not only frequently departs from the text but will also just as readily ignore previous decisions. In *Gauweiler*, for instance, the CJEU disregarded both key aspects of its *Pringle* decision and settled case law according to which the aim of any EU measure has to be assessed objectively, not subjectively.

Paradoxically, the decision-making of the CJEU is not subject to unusually high legal uncertainty. The CJEU's decisions are probably more predictable than many higher national courts. They are predictable, however, not because the CJEU's approach is governed by a high degree of methodological rigour, but because its pro-Union prejudice is so settled. The CJEU may thus be regarded as a tribunal which combines a relatively high degree of legal certainty in its decisions with extreme methodological freedom in its judicial reasoning. With its methodological flexibility and its ready reliance on non-textual and meta-teleological considerations, the CJEU must be placed at the extreme 'activist' end of the judicial spectrum. If legal reasoning should be construed as imposing genuine methodological constraints on judicial decision-making, then the CJEU ultra-flexible approach affords the CJEU the interpretative freedom to operate 'lawlessly'. Law, for the CJEU, is essentially the continuation of politics by other means.