Chapter 13

The Quality of Decision-Making at the Court of Justice of the European Union

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Abstract

13.1 Introduction

The expression the 'quality of decision-making' has occasionally been raised in the literature on the Court of Justice of the European Union (ECJ or CJEU[2]) (Everling 1994; Bengoetxea 2007). Commentary has typically focused on particular aspects of the judgments of the Court, such as, for example, the degree of depth and detail of its judgments. The decisive role that the CJEU has played in the development of EU law through its distinctive meta-teleological approach to interpretation is now widely accepted. Obvious examples of key doctrines resulting from the caselaw of the Court include direct effect, supremacy, parallelism and pre-emption in external relations, and the incompatibility of non-discriminatory obstacles with the Treaty provisions on free movement. More recently, the Court of Justice has adopted wide and very flexible approach to the interpretation of Union competence relating to European Monetary Union.[3] It is now a largely uncontroversial characterisation of the Court has played the key role developing the Treaties as a 'constitutional charter' through an 'innovative'

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[2] The Court of Justice itself uses the acronym 'CJEU' rather than the previous universal practice of 'ECJ'.

[3] Case C-320/12, *Thomas Pringle v. Government of Ireland and the Attorney General*, judgment of 27th November 2012; Case C-62/14, *Gauweiler and Ors v. Deutscher Bundestag*, judgment of 16th June 2015.

approach to interpretation geared to the purpose of EU law overall.[4] Decision-making is, of course, not unique to law. Every human activity involves choices and thus decision-making. Given how endemic decision-making is to human experience, it is perhaps something that is under-studied: the psychological dimension of decision-making and decision-making in the context of applied ethics are often seen as academic specialities, rather than something that informs even public or governmental decision-making in general. This chapter analyses the quality of the legal reasoning of the Court of Justice from an internal legal perspective, from the point of view of the assumptions of a legal system and the coherence of the legal reasoning of the Court from what could be considered the broader values of the system.

13.2 The Concept of Quality of Decision-Making

As noted, the expression 'quality' has sometimes been used in the literature regarding the Court of Justice. Broadly understood, in a classic legal or constitutional context, it can be connected with the idea of legitimacy. Legitimacy can be understood as relating to the fundamental postulates of a system. First and most fundamentally, legitimacy involves the rule of law. In Europe, democracy and human rights can be understood also as accepted features of legitimacy. Applied to the decision-making of the Court of Justice, this suggests, thus, measuring the quality of the Court's reasoning by its coherence with the values of the rule of law, democracy and human rights. Bengoetxea describes such an approach in terms of a distinction between internal and external legitimacy. External justification is present "When coherence looks beyond the law, into political ideas, seeking legitimacy, we enter the domain of external justification" (Bengoetxea 1993:69). While democracy might be conceived of as a political idea, the rule of law is inherent in the very understanding of law itself, especially in its minimal formal content, and so is not political in the sense of extra-legal. 'Democracy' can properly be considered a political and extra-legal value in that a legal system can function perfectly well in a non-democratic system.

Legitimacy can be further unpacked in several different respects as a broadly framed concept that relates to the acceptability and adherence of standards of persuasiveness, accuracy, and fairness. On this approach, the concept of quality can be understood with reference to a range of factors or indicators as to how the

[4] Case 294/83, *Parti Écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339, para 23.

Court of Justice engages in its task: epistemic quality; argumentative, dialectical or deliberative quality; consistency or coherence; and moral or consequentialist. Further, the range of matters over which the Court of Justice can rule and the extent of its ability do so regarding standing requirements could be considered under the heading of 'jurisdictional quality'. A juridical tendency in recent times, and significantly as a result of developments at European level, has been to reduce the scope of matters considered non-justiciable. The final part of this chapter thus analyses recent caselaw concerning the jurisdiction of the ECJ.

By way of introduction to the issue of the Court's decision-making, it is necessary to briefly overview the Court of Justice's template method. This can be done briefly because as already noted there is now no serious dispute as to how to characterise the Court's method, as opposed to the possibility of debating how it should do so. One of the earliest English-language studies of the Court of Justice concluded that the Court's interpretation is, often, avowedly instrumental: ". . . the only consistent and overriding principle of interpretation, which can be traced throughout the case law, is interpretation promoting European integration" (Bredimas 1978:179). In terms of methods of interpretation, Lasser's important comparative work captured the distinctive feature of the Court's method as meta-teleological: the Court of Justice downplays the centrality of particular texts in favour purposive interpretation where purposive interpretation is with regard to purpose stated at a very broad (or 'meta-') level of the purpose of the EU legal system overall, which is 'ever-closer Union' or enhanced integration (Lasser 2004).

13.3 Normative or Institutional Legitimacy

The present author has adopted a normative perspective on how the Court exercises its role, proposing a model of legal reasoning developing from MacCormick's hierarchy of techniques of legal reasoning. MacCormick proposed that textual arguments should be supplemented by systemic arguments, i.e. arguments based on the surrounding body of laws to a particular law, first, and then by consequentialist arguments, i.e. arguments based on the consequence of a particular approach to legal reasoning (MacCormick 1978). For MacCormick, consequentialist arguments apply when the raw material of the law, structured through legal reasoning, fails to provide an answer to a legal problem. A more elaborate model of legal reasoning takes account of, first, the key role of *lex specialis*, meaning more specific laws should be applied above more general laws, in structuring systemic interpretation, and, second, the epistemic possibility and normative appeal of originalist of historical interpretation, i.e. recording the

original intention of the law-maker. This approach is based on substantive values, firstly, the rule of law, and secondly, democracy. Crucially, the substantive value of the rule of law in this context is not political in the sense of being extra-legal. The rule of law goes to the very concept and social fact of law itself. This has become a matter of consensus within academic commentary, with the best synthesis of thinking on it being found in Tamanaha's seminal work and his identification of a minimum core of formal legality as inherent in the rule of law (Tamanaha 2004, 2006). This perspective does not accept the Court's own standard of legal reasoning as a normative benchmark, instead it relates legal reasoning to a thesis of its universalizability. This can be contrasted with a *sui generis* conception of legal reasoning related to an understanding of the novelty of the EU as political and legal system, a perspective that has been dominant within 'orthodox' views of the EU since the beginning of academic commentary on it. The contrary argument supports a normative scheme of interpretation along the following lines:

- (i) The centrality and authority of the constitutional text and the normative priority of its ordinary meaning;
- (ii) The application of the *lex specialis* principle for structuring systemic or integrated interpretation
- (iii) Indeterminacy resulting from abstraction should be resolved through historical interpretation, primarily through reliance on Member State traditions
- (iv) A preference for dialectical reasoning and the explication of interpretive assumptions
- (v) The relevance of the argument from injustice only in exceptional cases
- (vi) Judicial creativity to fill gaps only where a matter was clearly intended to be regulated by the legislature and where no pre-existing rule can be applied (Conway 2012).

Articulating *lex specialis* helps to structure the first and second step of MacCormick's hierarchy by taking into account the level of generality problem in legal reasoning.

13.4 Epistemic Quality

Epistemic quality of the reasoning of the Court of Justice relates to the appropriateness of the information available to it in grounding its judgments. The Court of Justice is not generally a trier of facts. The nature of its jurisdiction means that there are few factual disputes before it. In the procedure for references

for a preliminary ruling under article 267 TFEU, the Court of Justice receives an abstract question from national courts, along with the national court's determination of the relevant facts to which the question referred relates. While the Court of Justice recites the factual background in its judgments on references under Article 267 TFEU, it does not engage in independent fact-finding in these cases. In disputes referred to it under Articles 258 or 259 TFEU, brought against a Member State by the Commission or another Member State respectively, questions of facts may arise as to a Member State's non-compliance, but usually such cases revolve around legal arguments rather than disputes of fact. Whether a Member State has complied with EU law or not is generally quite easy to establish. Similarly, as in national cases in administrative law, procedures under Articles 263 or 265 TFEU, are more about the interpretation of institutional competences than disagreements as to the underlying facts.[5]

Of more significance in terms of the quality of information before the Court of Justice is the deployment by the Court of arguments as effectiveness or *effet utile* to justify its interpretation of EU law. Such arguments, which are consequentialist in nature, are not unusual in the Court's judgments. Effectiveness in this context here is invariably linked with, or really as a synonym for, integration; the ECJ treats the two as largely interchangeable. Since effectiveness seems essentially an empirical concept that cannot be authoritatively disposed of in many cases in *a priori* terms, it can *only* be meaningful unless connected with some more specific values in the Court's case law, and that value tends to be integration.[6] For the Court to have adequate data available to it to determine empirical effectiveness, it would need to integrate a more comprehensive socio-economic fact-finding mechanism into its procedures, the key argument made by Rasmussen in his seminal 1986 critique of the Court's motivation by policy rather than legal considerations. However, even the integration of explicit policy data into rulings would not necessarily make evaluation of those facts neutral (Rasmussen 1986). The very contrast between law and policy itself points to the difference between politically contestable policy evaluations and the neutral inference expected of legal logic. Policy almost invariably brings with it trade-offs of costs and benefits in socio-economic policy,[7] and it may be questioned if the judiciary are well-

[5] The Court may hear evidence directly from witnesses and experts: see Articles 24-29 of the Statute of the Court of Justice and Articles 63-75 of the Court's Rules of Procedure dealing with measures of inquiry.

[6] See, e.g. Snyder (1993:52)

[7] On Case 43/75, *Defrenne v. SABENA* ('*Defrenne II*') [1976] ECR 455, Rasmussen notes that although the case is clearly open to the charge of judicial

placed to make such decisions in terms of institutional legitimacy and the separation of powers.

13.5 Argumentative, Dialectical or Deliberative Quality

In legal literature, Alexy has provided the best known account of the process of legal reasoning as a distinct type of reasoning shaped by the institutional processes of law. Alexy tends to say less about how this particular institutional character impacts the content of legal reasoning by determining the outcome through a particular method (Alexy 1989: 206-209; 287-288). Finnis offers a more general account of a philosophically sound understanding of how people should engage in decision-making, which he terms the requirements of practical reasonableness (Finnis 2011). These principles of practical reasonableness are not specific to law, they represent an ethical framework for decision-making in general. Relating this to Alexy, legal reasoning supervenes upon this scheme, although Alexy as noted is rather vague about what is specific to legal reasoning compared to ordinary practical reasoning. From legal practice, certain standard features of acceptable reasoning can be inferred:

- Justification with reference to the competing claims of the parties
- Discretion being rendered explicit and its exercise justified according to objective criteria where possible
- Proportionality and propriety of purpose as standards of review of exercise of public power (though not necessarily proportionality as a mechanism for weighing the importance of competing abstract values, where proportionality is more controversial due to it subjective character)
- Sensitivity to the institutional correctness of judicial decision-making, especially with regard to the separation of powers (which might be related to external justification)

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law-making, that it did have some empirical basis for the judgment and so should be praised in that respect Rasmussen (1986) 198 n. 162 and 438 et seq. Rasmussen's praise for the Court here related to its decision to make a prospective ruling, after having invited and considered submissions from relevant governments as to the financial effects of retroactively applying then Article 119 EEC Treaty on equal pay for men and women.

Justification is frequently seen as central to legal reasoning.[8] The way in which a court justifies its decisions is central to the character of those decisions as law, as opposed to an assertion of a decision based on power relations. Dialectical reasoning, i.e. the studied consideration of alternative possible interpretations, can help reduce the arbitrariness that is entailed in this potential subjectivity,[9] by explaining how one resolution is preferable over the other possibilities. Dialectical reasoning as a method of demonstrating truth or persuasiveness has a long history in philosophy. It is evident in Plato's *Dialogues* and in his *Republic*.[10] In the language of medieval philosophy, it is referred to as the *quaestio* format.[11] In scholastic teaching, *disputationes* was an important method (de Figueiredo Marcos 2015:10). Properly exercised, dialectal reasoning in this format requires that arguments for and against a proposition are set out and explicitly evaluated relative to each other and relative to any objections to the arguments (Conway 2012:161-163). The benefit of the method is that the persuasiveness or validity of a position is more comprehensively tested and justified.

A key feature of the Court of Justice from the point of view of its methodology has been a tendency to under-articulate its methods of reasoning. It routinely does not articulate its approach to interpretation. This is not very unusual for courts. However, in the case of the ECJ, it takes on a particular significance, because the ECJ has a marked tendency to meta-teleological interpretation (Lasser 2004:204-206): purposive interpretation at a very high level of generality related to the EU legal system overall, rather than to particular legislative provisions or pieces of legislation. This sets it apart from national and other international courts and gives it great scope for creativity, albeit that it only really does this in a minority of cases. Non-articulation of the Court's reasoning can be seen as undermining the deliberative character of the Court's reasoning: it helps conceal discretion and real choice, and it means justification is under-developed (Conway 2012:272). A recent example of where the Court did not articulate its choice of interpretation actually involves a narrow characterisation of purposes, rather than reliance on the meta-purpose of integration. In *X and X v. État Belge*, the Court defined the purpose of objective of Regulation (EC) No 810/2009 establishing a Community Code on Visas ('the Visa Code')[12] as "to establish the procedures and conditions

[8] See Alexy (1989) 221 et seq.; MacCormick (1978), op cit, 100-101; Bengoetxea (1993), 130 et seq 159-160.
[9] See, generally, e.g. Feteris (1994), see also Bertea (2005:388-389)
[10] Plato, *Republic*, Book VII 531d, 532a, 533c, 534b, e, 536d, 537c bis.
[11] It is the method of Aquinas' *Summa Theologica*.
[12] OJ L 243, 15.09.2009, p. 1.

for issuing visas for transit through or intended stays on the territory of the Member States not exceeding 90 days in any 180-day period."[13] On its general template of reasoning, the Court could quite easily have characterised the objective more broadly as being about the assurance of a humanitarian visa policy in accordance with the general concept of an area of freedom, security and justice. On the facts of *X and X*, the Court struck to a careful enumeration of the scope of the Visa Code as not requiring the Member States to accept applications for international protection to the representations of member States that are within the territory of a third country. The Court noted the limited exercise by the EU of competence to date under Article 79(2)(a) TFEU on long-term visas and residence permits to third-country nationals.[14] At a time of growing disenchantment with the integration project, the Court demonstrated a sensitivity to Member State competence in the asylum field. But the Court in no way bound itself to a similarly cautious approach in future because it did not characterise the underlying reasoning.

The ECJ does tend to refer to the arguments of both sides in its judgments, but in the operative part, often adopts a magisterial or declaratory style of judgment whereby the reasons for the conclusion are presented with little counter-argument. There can be a formulaic quality to its recitation of the parties' arguments, although it does generally make some effort to frame its reasoning in terms of an evaluation of the range of the arguments made, although this is very variable across judgments. A lack of substantive dialogical reasoning is apparent especially in the more innovative judgments of the Court. Here, at least at the level of what it explicitly articulates, the Court tends to ignores sensitivity to its own institutional role, or external justification: once a judgment coheres with the meta-teleological techniques, further justification is not needed in the Court's method.

Recent examples from the caselaw further help illustrate this aspect of the Court's reasoning. In both *Pringle*[15] and *Gauweiler*,[16] the Court of Justice had to determine matters of fundamental political and economic controversy and that also involved fundamental questions of the competences of the EU. The Court adopted contrasting rationales, yet both judgments supported an expansive interpretation of EU competences. *Pringle* concerned the use of the simplified revision procedure under Article 48 TEU for the purpose of the ratification of the European Stability

[13] judgment of 7th March 2017, para. 41.
[14] Ibid, para. 44.
[15] Case C370/12, *Pringle*.
[16] Case C-62/14, *Gauweiler*.

Mechanism (ESM) Treaty, and *Gauweiler* concerned the competence of the European Central Bank to use Open Monetary Transactions. The net issue in *Pringle* was whether the EU could adopt the ESM Treaty on the basis of Article 136 TFEU, which falls under Part II of the TFEU on the internal market, and therefore could it be adopted through the simplified revision procedure in Article 48(6) TFEU, or whether it fell under monetary policy in Part III TFEU and therefore could not be subject to Article 48(6) TEU and would require the normal process of treaty adoption at EU level (the exclusiveness of EU competence was also in issue given the intergovernmental process of adopting the ESM). The Court concluded that the ESM Treaty, which provides a fund for Eurozone Member States experiencing or threatened by severe financing problems, was concerned with financing and not price stability. Thus, the Court concluded it fell under the internal market competence and not under monetary policy.

This conclusion is not easy to sustain. Craig notes that the Court's reasoning was 'strained' but then goes on, somewhat paradoxically, to describe its approach as 'legal formalism'(Craig 2013:5). Legal formalism is normally associated with adherence to legal forms over policy substance, whereas in principle the Court deployed its template of teleological reasoning to enable policy to prevail over a narrower textual reading. The ESM Treaty was specifically designed for Eurozone Member States to avoid a contagion effect of bad debts in one member State undermining confidence in the Euro currency. While this certainly involves financing, it cannot be disconnected from price stability, and in this case price stability is an unduly narrow characterisation of monetary policy. Monetary policy is essentially concerned with the supply and stability of currency, not just of prices. In contrast, in *Gauweiler*, the Court of Justice held that Open Monetary Transactions, by which the European Central bank purchases government bonds on secondary markets (i.e. not directly from governments), did fall under monetary policy and could be adopted by the European Central Bank. This was notwithstanding the apparent prohibition in on the financing of government debt contained in Article 123 TFEU.

13.6 Consistency or Coherence (D'Andrea 2006:412)

At its most basic, coherence or consistency reflects the principle of non-contradiction, a principle that has been philosophically articulated since at least

Aristotle (D'Andrea 2006:417).[17] Aquinas considered it to be self-evident (D'Andrea 2006:413).[18] More generally, consistency means that judgments themselves should not contain contradictory tendencies either within themselves individually or across different judgments, unless there is explicit overruling in the latter case. As noted above, *Pringle* and *Gauweiler* do not seem consistent in the decision-making on their substantive content. The Court of Justice rarely explicitly overrules itself.[19] In *Gauweiler*, it sought, somewhat unconvincingly, to distinguish *Pringle*. *Commission v. Germany (Volkswagen)*[20] is quite a careful judgment that focuses in its reasoning on how to interpret *Court of Justice judgments* themselves. In this regard, the Court of Justice emphasised that the operative part of the judgment must be read in light of the conclusion and that the appeal by the Commission was based on a partial reading of the judgment that did not take account of the inherent links between the various passages of the judgment, nor of the grounds of the judgment as a whole and their coherence.[21] This is interesting, as the Court does not typically comment on how its own judgments are to be read. The passage points to the importance of justification in understanding a judgment, and this can be connected to the relationship between justification and legitimacy emphasised by MacCormick as characteristic of legal reasoning (MacCormick 1993; Bengoetxea 1993:op cit, 130 et seq 159-160). The Court of Justice also engaged in a careful textual analysis of its original judgment in *Commission v. Germany*, in which the use of the term restrictions in the plural or of the conjunction 'and' meant that paragraphs 2(1) and 4(3) of the Volkswagen law were to be read together in the context of the facts. The Court's close textual analysis is not always typical if its approach to legislative interpretation, where the Court may engage in extra-textual effectiveness-based reasoning.

[17] Citing Aristotle, *Metaphysics IV*, 1 005b12-25.

[18] Interpreting Aquinas to understand that the principle is embedded (implicit and presupposed) in human thought. See Aquinas, *Summa Theologica*, 1a2ac. 94, 2.

[19] One of the few examples is Joined Cases C-267 and 268/91, *Keck and Mithouard* [1993] ECR I-609, which partly overruled Case 8/74, *Procureur du Roi v.Dassonville* [1974] ECR 837 See also Case C-70/88, *European Parliament v. Council of the European Communities ('Chernobyl')* [1990] ECR I-2041and Case C-127/08, *Metock v. Minister for Justice, Equality & Law Reform* [2008] ECR I-6241. Generally on the Court and precedent, see Jacob (2014)

[20] Case C-95/12, *Commission v. Germany (Volkswagen)*, judgment of 22 October 2013.

[21] Case C-95/12, *Commission v. Germany (Volkswagen)*, para. 47.

13.7 Moral and Consequentialist Quality

In MacCormick's scheme of interpretation, consequentialism enters into legal reasoning when the first step in the process – interpretation of the relevant laws, if necessary in light of the surrounding law – fails to provide an answer. Dworkin seems to take a 'pragmatic' view of the justification of judicial review as being determinable by the quality of its outcomes (Dworkin 1996:34). The term 'pragmatic' here should perhaps be used with a note of caution. The term is often used as a cloak for a lack of systematic or principled thinking or a preference for intuitive or instinctive judgments. For Dworkin, consequentialism is something to be taken into the mix of legal principles weighted according to a test of 'best fit'. Where and how consequentialism fits into principles in the calculus of best is impossible to tell from Dworkin's writings, and his comments on outcomes can further add to the incommensurability problem that affects his theory overall (Conway 2012, chap. 3). Dworkin is not sufficiently explicit on the extent to which consequentialist reasoning can impact on a judgment applying the notion of best fit. In cases involving rights, rights are to prevail over policy considerations, as a rejection of utilitarianism, which suggests minimising consequentialist reasoning in that rights are to be respected without qualification on the basis of a more general concern with public policy consequences. On the other hand, Dworkin's notion of rights is conceptual, in the sense that he does not very clearly identify the content of rights in any systematic way (although he generally advocated a relatively libertarian position, while also highlighting equal respect). Consequentialist reasoning might find its way into the test of best fit, in the sense that the consequences to be considered are the consequences for the rights at stake. However, it seems clearer conceptually to understand consequentialism as related to policy rather than rights. Legal protection of rights involves what is necessary to vindicate the rights, without regard to a more open-ended consideration of consequences. If necessary, courts may have to prioritise competing rights, something that necessarily involves a moral evaluation of the relative importance of the competing rights, which very often legal and constitutional texts do not do, meaning this moral evaluation comes down to judicial interpretation (Fiss 1982).

In the context of the ECJ, arguments about moral desirability do not appear in the judgments, nor do arguments about individual rights to a great extent outside of arguments concerning direct effect, but consequentialist reasoning is common in arguments related to *effet utile* discussed above. In the sense also, Rasmusssen's critique of the Court as policy-driven was essentially correct. However, with the hard law status of the EU Charter of Fundamental Rights (Bobek 2014) since the

Treaty of Lisbon, arguments before and by the Court are increasingly framed in rights terms.[22]

13.8 Jurisdictional Quality

The procedures before the Court of Justice have remained fundamentally the same since the inception of the Communities (now Union) in the 1950s, but it has had its jurisdiction extended as the EU has extended its competence. Its compulsory character and relative comprehensiveness represented a radical innovation with regard to previous international law practice. The Court of Justice had and has four main procedures: preliminary references from the Courts of the Member States, enforcement actions by the Commission (or less commonly by a Member State) against a Member State, review of the legality of actions by the institutions before the Court of Justice, and the action for damages.[23] In addition, the Court of Justice has been given an important jurisdiction under the Fiscal Compact agreed in 2011 by 25 of the Member States (although only applicable to the Eurozone),[24] and which may prefigure future treaty development. The scope of the jurisdiction conferred on the Court of Justice reflects the tendency of the Member States to accept its role despite the strong criticisms that have sometimes directed at the Court for infringing on the competences of the Member States.

The rules governing the Court's jurisdiction are fundamental to its role: they determine what it can do. How the Court exercises its role is also fundamentally affected by its approach to interpreting its own jurisdiction, the problem of *kompetenz-kompetenz* thus presents itself (Beck 2011): is the Court of Justice always to be assumed as the legitimate interpreter of its own role? (Kumm 2005). Is there – and should there be (the two questions are not to be equated) – a feedback function by national courts to ensure the Court of Justice engages in legitimate hermeneutics and does not overstep its role, in other words to help

[22] OJ C 83, 30.03.2010, p. 389.

[23] Article 267 TFEU (preliminary references), Articles 258-260 TFEU (enforcement actions), Articles 263-265 TFEU (reviews of legality), and Articles 263 and 340 TFEU (actions for damages). Also of importance is the Court's jurisdiction under Article 218(11) TFEU to deliver a binding opinion on the compatibility with EU law of a draft international agreement intended to be concluded by the EU, a jurisdiction that the Court has historically exercised in a very assertive way.

[24] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Brussels, 2nd March 2011.

ensure the quality of the Court's reasoning? Feedback for the Court of Justice has come from national constitutional and supreme courts, but on substantive grounds, i.e. not at the level of questioning the Court's methods of interpretation, so there has been an explicit critique in the caselaw of the Court of Justice's meta-teleological method. The best known critique from national courts has come from the German Federal Constitutional Court, which has warned the Court of Justice on several occasions that it will not accept its rulings if they infringe fundamental rights as protected by the German Basic Law or amount to an acceptance of ultra vires action.[25] The reservation regarding *ultra vires* action seems ripe for a critique of the Court of Justice' methodology of interpreting competences. If a national constitutional court does decide to refuse to accept a Court of Justice judgment, it will be difficult to sustain that position without a critique of meta-teleology as a departure from the normal discipline of legal hermeneutics generally found at national level.

(i) Preliminary references:

Where a point of EU law has arisen in a national court in a dispute between an individual and the Member State in question, under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the national court may refer the point of law to the Court of Justice asking it to make a decision on a point of EU law so that the national court correctly applies EU law in finally giving judgment in the case.[26] The procedure for making a reference to the Court of Justice for a preliminary ruling has been of great importance in the development of EU law as a legal system.[27] It has harnessed national judicial systems into the enforcement structure of EU law and allowed the authority of national courts to be a proxy for the authority of EU law. It ensures a connection between national courts and the ECJ, allowing the ECJ to influence and usually determine the interpretation of EU law in national courts. One of the reasons given by the Court of Justice for developing the doctrine of direct effect, was that it was necessary for the preliminary reference system to function.[28] The preliminary reference system ensures that national interpretation of EU law is consistent throughout the Member States. Political scientists have analysed the impact of the preliminary reference system in terms of rivalry between judicial institutions. Alter located the

[25] See, e.g. *Europäischer Haftbefehl*, 113 BVerfGE 273 (2005), *available in English at* www.bverfg.de ; *reprinted in* 32 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT (EuGRZ) 387–408 (2005).
[26] See generally Broberg and Fenger (2014)
[27] The seminal work on this is Alter (2001) 28 and passim.
[28] Case 26/62, *Van Gend en Loos* [1963] ECR 1.

successful relationship between the ECJ and national courts within the context of inter-court rivalry and the self-interested motivation of courts as institutions – they are primarily concerned with enhancing their own status and jurisdiction.[29] Lower level national courts were motivated to circumvent the national judicial hierarchy, in that the preliminary reference system allowed for the authoritative determination of disputed legal issues independently of national supreme or constitutional courts. In systems without constitutional review, national courts were now able to assert a *de facto* power of constitutional review based on the supremacy of EC and now EU law to dis-apply contrary national legislation, a power that could not be exercised on the basis of national law (Alter 2001:52-53, 60). The Court of Justice's development of the *acte clair* doctrine tended to overlook the distinction in the text of (now) Article 267 TFEU on the duty of national courts or tribunals and final courts of appeal at national level (the text suggests only final courts of appeal are obliged to make a reference) in *CILFIT*, which suggested that all courts must make a reference whenever there was any reasonable doubt.[30]

The *CILFIT* doctrine could be seen as helping to ensure consistency, yet its departure from the text of the Treaty is problematic form the point of view of judicial legitimacy and raises the contrast between process-oriented justification (i.e. in this case, the text) and consequentalism. However, some more recent caselaw suggests national courts, at least final courts of appeal, might be more willing to decide a reference for a preliminary ruling was not necessary in that they need not wait for the outcome of a preliminary reference from a lower court on the same issue.[31] As with *CILFIT* itself, this judgment is not grounded in the text of Article 267 TFEU: the text of Article 267 TFEU suggests that final courts of appeal at national level should be less willing to refuse a preliminary reference, yet the Court of Justice in *X and Van Dijk* suggests the opposite, that the fact a preliminary reference procedure is pending before the Court of Justice should not prevent a national final court of appeal from deciding a similar question itself if it considered it could do so. In terms of the possible motivation of the Court of Justice for the apparent shift in emphasis in *X and Van Dijk* compared to *CILFIT*, it may indicate a greater willingness to trust national final courts to interpret EU law as the Court of Justice would wish, especially in the context of the increasing caseload of the Court of Justice. Any such motivation remains implicit, however.

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[29] See also Burley and Mattli (1993:43-44); Weiler (1993:442)

[30] Case 283/81, *CILFIT and Lanificio di Gavardo SPA v. Ministry of Health* [1982] ECR 3415,

[31] Joined Cases C-72 & 197/14, *X and Van Dijk*, judgment of 9th September 2015. See Kornezov (2016).

About two thirds of the docket of the Court taken is up with references for a preliminary ruling (Lasser 2004), which partly reflects the difficulty for individuals to establish standing reviews of EU institutions.

(ii) Enforcement actions:
An enforcement action is brought by either the European Commission (in almost all cases) or a Member State, for a breach of EU law by the accused State: Article 258 TFEU governs enforcement actions brought by the Commission, and Article 259 TFEU governs actions brought by Member States. The procedure remains unaffected by the Treaty of Lisbon. The Member States rarely sue each other under Article 259 TFEU. Caselaw has supplemented the enforcement procedure by creating the doctrine of State liability at national level: Member States must provide a remedy for their breaches of EU law, including damages.[32] Article 258 evidences a preference to avoid litigation in the sense that there is a preliminary or administrative stage in which there are negotiations and finally the transmission by the Commission to the Member States of a formal letter for a notice and then a reasoned opinion with a time limit for compliance. Writing in 2007, Borissova found that of the 10 new Member States that joined in 2004 (Cyprus, Latvia, Lithuania and Slovenia, few enforcement actions had been brought by 2007 (Borissova 2007).[33] It is to be expected that there will be variable patterns of caselaw from different Member States given different national legal systems and differing attitudes to compliance with EU law. The caselaw of the Court has established that the Commission has considerable discretion in the enforcement procedure: it cannot be compelled to bring an action under Article 258 TFEU.[34] It thus may decide to wait for an issue to be litigated at national level through the operation of direct effect. The Court's reasoning in *Star Fruit* is a good example of its tendency to magisterial or declaratory judgments, the Court simply stated:

> However, it is clear from the scheme of Article 169 of the Treaty that the Commission is not bound to commence the proceedings provided for in that provision but in this regard has

[32] Joined Cases C-6 & C-9/90, *Francovich & Ors* [1991] ECR I-5357.
[33] More recently, see Gormley (2016)
[34] Case 247/87, *Star Fruit v. Commission* [1989] ECR 291; Opinion of AG Tizzano in Joined cases C-466 and 476/98, *Commission v. UK et al.* [2002] ECR I- 9741, para. 30. However, the Commission is confined before the Court to arguments that it has also addressed to Member States at the administrative stage.

> a discretion which excludes the right for individuals to require that institution to adopt a specific position.[35]

There was no analysis of the text or an elaboration of the scheme of the Article.

Kochenov notes the current situation of virtual non-application of Article 259 TFEU (Kochenov 2015). Partly, this is inherent in the Article itself: it provides that a Member State must give the Commission the opportunity to refuse to bring a procedure under Article 258 before a Member State can proceed under Article 259. Partly, it reflects the diplomatic sensitivities of one Member State suing another. Kochenov notes that the Commission, for example, rarely uses the enforcement procedure for claimed violations of the EU Charter on Fundamental Rights, and that Article 259 could be used to counter-balance this through cases based on the values provision in Article 2 TEU. Kochenov proposes that the link between Articles 2 and 7 TEU points to the greater role of the Member States in questions of values than is so regarding the traditional *acquis* (Alexy 1989) and also notes the possibility of several Member States pursuing an action together. (Finnis 2011). The fact that there is no standing requirement under Article 259 indicates its potential for greater use, although the Commission will retain the important right to in effect take over a case if it wishes to by delivering a reasoned opinion and then pursuing its own action under Article 259 TFEU. Kochenov's suggestion for values-based review under Article 7 TEU is problematic because of the very abstract nature of the values referred to in Article 2 (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, and these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail), which could render review highly uncertain and unpredictable.

(iii) Review of the EU institutions:

The Lisbon Treaty did not take the opportunity to substantially revise the much criticised test of standing for non-privileged applicants to bring a judicial review under Article 263 TFEU. The test has been in place since the judgment in *Plaumann* and its requirement of an applicant to be uniquely affected,[36] despite

[35] Case 247/87, ibid, para. 11; Opinion of AG Tizzano in Joined cases C-466 and 476/98, *Commission v. UK et al.* [2002] ECR I- 9741, para. 3.
[36] Case 25/62, *Plaumann v. Commission* [1963] ECR 95.

some modification of its in practice to a somewhat more flexible approach.[37] However, the Court of Justice has refused to follow advice from Advocates General and from the General Court to move away from the requirement that a person be virtually uniquely affected by an act of an institution in order to have standing. The test in *Plaumann* is open to strong criticism: it, to a degree, insulates the institutions of the EU from the kind of legal accountability found in national systems and is indefensible and quite illogical from an access to justice point of view. The more people affected by an illegal act, the greater the need for legal standing to address it, yet EU law in *Plaumann* somewhat bizarrely takes the opposite position.

The Lisbon Treaty, however, did create an exception in Article 263 TFEU, amending the third paragraph, for 'regulatory acts' that 'do not entail implementing measures': only need to show direct concern: to have standing to challenge such regulatory acts, it is now only necessary to how direct concern and not individual concern. The meaning of 'regulatory acts' is undefined. The General Court has interpreted it somewhat restrictively to mean non-legislative in *Microban International and Microban Europe) v. Commission* concerning a Commission decision under Comitology procedure.[38] This raises the question of what 'not entailing implementing measures' adds to direct concern, or at least it seems to make the direct concern requirement somewhat redundant, since direct concern has meant in effect that there should be no implementing authority exercising discretion between the EU institutions and the person affected by an act of the EU institution. The General Court could have interpreted it 'regulatory acts' more broadly to include, for example, delegated legislation.

In *T & BL Sugars v. Commission*, the Court of Justice itself offered an explanation for the amendment at Lisbon concerning regulatory acts.[39] On the facts of the case, the Commission adopted certain measures/regulations to increase the supply of sugar on the EU sugar market. The General Court held that the contested Commission regulations were *not* 'regulatory acts not entailing implementing measures' because they did entail measures to be taken by national authorities that could be challenged in the national legal order. The ECJ agreed with the General

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[37] See, e.g. Joined Cases 789/79 and 790/79, *Calpak v. Commission* [1980] ECR 1949; Case C-309/89, *Codorniu* v. Council [1994] ECR I-1853.

[38] Case T-262/10, *Microban International and Microban Europe) v. Commission*, judgment of 25th October 2011.

[39] Case C-456/13 P, *T & BL Sugars v. Commission*, judgment of 28th April 2015.

Court and referred to the legislative history of the amendment to Article 263. It stated the purpose of Article 263 (4) TFEU was to ensure that individuals do not have to break the law in order to have access to a court, i.e. where a regulatory act directly affects the legal situation of a natural or legal person (i.e. direct concern), there is no need to wait for implementing measures and then to break them in order for the issue to become justiciable. Whereas natural or legal persons who are unable, because of the strict test of standing under Article 263 TFEU, to challenge an EU regulatory act directly before the EU judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails (i.e. at national level through direct effect). However, on this reasoning, a person may still need to directly break the regulatory act and the national implementing measures in order to challenge it. It is also unclear why a direct concern standing requirement does not address the same issue and why the qualification 'not entailing implementing measures' is really necessary, given that direct concern was interpreted in *Dreyfus*[40] to mean that any national implementation should be automatic and not involve discretion.

A clear pattern emerges from the Court's jurisdictional caselaw: EU institutions are protected from extensive judicial review, while the discretion of the same institutions tends to be enhanced by the Court's approach. This is another manifestation of the bias in favour of integration that has often been noted by commentators on the Court. This is problematic in light of the values of the rule of law and democracy that the Treaties themselves articulate.

13.9 Impact of the Lisbon Treaty and Fiscal Compact

Of the wide range of evolutionary institutional changes effected by the Treaty of Lisbon, the most significant measure affecting the ECJ was the extension of its compulsory jurisdiction to what were previously termed Third Pillar matters, i.e. criminal justice matters. In reality, this may not turn out to be of great significance, since Member States had been quite willing to exercise optional jurisdiction under the Third Pillar. The transitional provision that restricted the

[40] Case C-386/96 P, *Dreyfus* v. Commission [1998] ECR I-2309.

possibility of lower national courts to request preliminary rulings relating to the former Third Pillar measures lapsed in 2014.[41]

The Court of Justice has also acquired an important jurisdiction under the Fiscal Compact (FC). Under the Stability and Growth Pact applicable prior to Lisbon, the following restrictions applied: 3% budget deficit, a maximum debt of 60% of Gross Domestic Product (GDP), the excessive deficit procedure (EDP) under Article 126 TFEU, which encompassed the setting of Medium-term Budget Objectives (MTOs). This prefigured the Fiscal Compact, especially given the gradual strengthening in secondary legislation of sanctions relating to the SGP. Article 3 FC sets out a prohibition on budget deficits and a corrective mechanism to address a lack of compliance at national level. Article 5 FC outlines partnership programmes to be agreed between a Member State and the Commission on the correction of a budget deficit, while Article 8 gives the ECJ jurisdiction over Article 5 and possibly Article 3. Article 8 only refers to Article 3(2), but Article 3(2) refers to Article 3(1), which relates to the maximum budget deficit rule, which in turn the correction programme in Article 5 refers to: this suggests the ECJ may have jurisdiction over virtually all of the content of the FC. Article 3(2) FC sets out a preservation of competences of national parliaments in Article 3(2). It remains to be seen how intense will ECJ review be under the Article 5 partnership programme. This is a jurisdiction of potentially huge significance, with the possibility of the Court reviewing in detail the compliance of national budgetary decision-making with the FC and the merits of national budgetary decision-making. In the context of the quality of decision-making, the possibility – or risk – exists here that the Court's adjudication will be brought squarely into the policy realm. This judicialisation of budgetary matters risks further eroding the process legitimacy of the Court, though much will depend on how deferential the Court of Justice would be in its review toward the Member States. Indications from the caselaw to date in matters concerning Economic and Monetary Union (EMU) – *Pringle* and *Gauweiler* referred to above – do not lend much support for the view that the Court of Justice would be more sovereignty-sensitive in this sphere.

[41] See Protocol no. 36 to the Lisbon Treaty. e.g. Case C-40/12, *Gascogne*, judgment of 26th November 2013, paras. 86-89; discussed in Gutman (2016), op cit, sec 2.3.

13.10 Recent Scholarship on the Court

Recent scholarship does not dispute Hjälte Rasmussen's seminal 1986 *On Law and Policy of the European Court of Justice*(Rasmussen 1986), a critique of the Court of Justice has been sustained in the literature as engaging that the Court engages in a political enterprise of enhancing integration at the expense of the sovereignty and competence of the Member States. The analysis above lends further support to Rasmussen's thesis. Nonetheless, this has been a minority voice in the literature on the Court in terms of a critical attitude toward the Court. Recent contributions in English on the Court include publications by de Waele,[42] Beck, Jacob, Dawson, de Witte, Sankari, and the present author (Conway 2012). The steady stream of literature supportive of the Court's role continues, e.g. the edited collection in by de Witte, Dawson & Muir. One of the hallmarks of this literature has been a willingness by a substantial body of academic commentary to fundamentally accept the reasoning of the Court on the Court's own terms. Sankari, for example, identifies the distinct contribution of her work as its focus on the context that informs the Court's reasoning, including the Court's silence. This remains an internal point of view, one expressed especially by Bengoetxea's *The Legal Reasoning of the European Court of Justice* (Bengoetxea 1993), which applies 'institutional legal positivism' to an analysis of the Court of Justice: assessing the Court according to its own standards. Sankari notes the similarity of her approach to Bengoetxea's (Sankari 2013:22, 71-86) and describes her study as testing Bengoetxea's model.[43] Sankari applies her approach to case law under Articles 18, 20 and 21 TFEU, i.e. on the citizenship provisions of the Treaties. Sankari offers a detailed and sophisticated discussion of cases and their reasoning, but is confined to suggesting how the Court of Justice could have elaborated on what it already said, could have avoided a "silence".[44] De Waele's work more directly engages with the question of the allegations of activism against the Court and the debate about the legitimacy of the extent of its role. He distinguishes between extreme restraint, restraint, activism and extreme activism, thereby pointing to the importance of a differentiated analysis of the body of the Court's caselaw. He critically notes the relative un-importance of textual and historical interpretation in its approach and queries why this is so, but finds that the Court is only open to criticism for extreme activism. This contributes substantially to a theoretical underpinning of the criticism of a 'mechanical' conception of judicial

[42] But with an English-language summary at 411-419 and reviewed by Garben (2010).
[43] Ibid, 34-37, 84-85.
[44] See further the review by the present author (2015)

interpretation, while simultaneously contributing to an understanding opposed to the extreme view (although this extreme view is rather frequent in defences of the Court of Justice) that there are no objective yardsticks of activism versus restraint.

Beck's work is also consistent with a tendency to engage with the Court on its terms, but ultimately Beck concludes that the Court has stepped outside the norm of what courts legitimately do, given the deep encroachment on the competences of the Member States that has resulted from the Court's role (Beck 2012:446-451). His account of the ECJ is the most comprehensive of those focused on an internal perspective of how the ECJ behaves, as while he also acknowledges the key role of elements unarticulated by the Court itself. Beck argues that EU primary law displays an unusual degree of linguistic and normative uncertainty which results in judicial discretion. Beck assesses that the ECJ resolves that uncertainty with the accepted repertory of linguistic, systemic and teleological arguments familiar from national courts, subject, however, to "subtle but crucial differences" (Beck 2012:161-186, 2014). In comparison to higher national courts the ECJ is more willing to favour teleological over literal arguments; very rarely uses historical arguments;[45] commonly, often implicitly, employs meta-teleological arguments which go beyond the "objects of the rules of which [a provision] forms part."[46] Its meta-teleological dimension gives the Court's decision-making its distinctive *communautaire* predisposition, i.e. its tendency to favour an integrationist solution to legal problems (Beck 2012:318-331). Beck rightly notes that arguments from historical intent play no critical part for the ECJ and that their near-dismissal by the Court significantly increases its discretion. (Beck 2012:217-219). Beck explains the steadying factors operative on the Court's reasoning as follows:

> The Court generally, though not inevitably, favours integration. Which way the judicial axe will fall, depends not only on the clarity and precision of EU primary law, but crucially on the extra-legal steadying factors or heuristics which determine the weight the ECJ gives, and the relative order in which it places, the various interpretative arguments in specific cases. The steadying factors include the importance of a case for the integration process, the political fashionability of the issues, the degree of Member State opposition to or support for an

[45] For further discussion, see Conway (2012:chapters 6 & 7.)

[46] Beck (2012) op cit, 579, notes, e.g. Case C-292/82 *Merck v. Hauptzollamt Hamburg-Jonas*, **[Check]** para 12. Lasser introduced the expression 'meta-teleological' in the context of the ECJ, which has been widely taken up in the literature on the Court of Justice since.

> integrationist solution, the interests of the Union institutions, and arresting individual facts. Unless there is substantial national opposition the Court, when asked, typically favours further integration (Beck 2012:580).

This passage very accurately captures the political character of the Court's reasoning. Its meta-teleological method allows the Court to make far-reaching conclusions not based on the Treaty texts in any specific way, but the Court is sensitive to the reactions its audiences. So far, the Court has not provoked a backlash that represented a serious threat to its legitimacy, although sensitisation to the role of the Court of Justice was certainly significant in the Brexit vote of the United Kingdom to leave the EU.[47] Partly, this is because the structural and institutional situation of the Court places it in an "unusually permissive" (Sweet and McCowan 2013:84,88) environment, but much more so that ordinary constitutional courts in that to reverse Treaty interpretation by the Court, amendment of the Treaties is necessary. Treaty amendment is politically extremely difficult since it requires unanimous agreement of the Member States, including incorporation into national constitutional law.[48] As de Waele has put it, the Treaty amendment regime in the EU is of "unprecedented rigidity", and this ought to be understood as affecting the exercise by the Court in its constitutional role:

> This parameter awards a position of primacy for the Member States when it comes to changing the treaties, which entails that the ECJ ought to operate with the utmost circumspection and deference in its decision-making (de Waele 2009:415).

[47] In her speech at Lancaster House on 17th January 2017, UK Prime Minister Teresa May started that taking control of UK laws was a key concern in the Brexit process, and included in that "… So we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain." See the text of the speech at < http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/ > (accessed 16th January 2017).

[48] See Article 48 TEU. Article 48 also sets out a simplified revision procedure that applies to amendments to Part III TFEU.

13.11 The Broader Context of the Quality of Decision-Making by the Court of Justice

An overall assessment of the success of the Court sixty years after it came into existence tends to fold back into the question of how to measure success. At the practical level of whether the Court has had its authority accepted – how have its audiences reacted (to use an articulation found in the literature), the Court of Justice has undoubtedly had considerable success. The governments of the Member States, including national courts as the judicial branch of government, have generally accepted and complied with the Court of Justice's judgments and they have done so for decades. In that context, doubts or questions about the legitimacy and propriety of the Court's role and methods might seem academic. This, however, would represent an incomplete understanding of both *how* the Court of Justice has been successful and of the Court's possible future. Several factors suggest a possible disconnect between a normative assessment of the Court and its real-world, actual success in greatly enhancing integration and in having Member States broadly acquiesce in this. The Court of Justice has built up a *de facto* system of precedent. Firstly, As has been well observed by Stone Sweet, the Court of Justice has operated in an unusually permissive environment (Sweet 2004). Any constitutional court can establish precedent as an important source of law when it adjudicates in the context of an inflexible constitution, i.e. a constitution that is more difficult to change than ordinary law. It is difficult to for the other branches of government to reverse constitutional interpretation of an inflexible constitution: it may require a special, super-majority of the legislature, parallel processes at federal or sub-federal level, or a referendum. Judicial independence has been well established in most countries as a fundamentally accepted principle, so 'brute-force' threats to the tenure of judges where the executive and/or legislature get to appoint the judiciary are generally considered illegitimate (although systems with non-renewable, fixed-term tenure in their constitutional courts are more susceptible to this kind of political pressure being exerted).

Several factors or dynamics help explain how the Court of Justice has experienced compliance with its judgments, notwithstanding the serious questions that are increasingly raised about the legitimacy of meta-teleology as an approach to interpretation. The first dynamic that can be noted was well captured by Stein in his oft-quoted statement that "Tucked away in the fairy tale land of Luxembourg and subject to benign neglect of the powers that be, the Court of Justice fashioned a constitution for Europe …"(Stein 1981:1). In its early period, the Community seemed a largely technical project for experts in the fields of international law and

international trade. In this period, judgments that later came to be seen as having profound legal and political effects could pass largely unnoticed, because they did not have obviously far-reaching effects at the time. Only a small group of possibly self-selecting experts would have had much awareness of the judgments at the time. Research into the contemporary reaction at national level would likely yield little results. Walker aptly referred to the Court's "early cunning"(Walker 2005:586). Once the Court's judgments were accepted in the early stage of integration, their impact and legitimacy tended to be assumed later on by national political actors.

Secondly, the Court's success was achieved by of a strategy of conceptual differentiation of Community law from public international law generally by the same group of early Community law scholars. To a large extent, this strategy went unquestioned in the literature. Partly, this can be explained simply by the authority that comes with relative expertise: those less expert are less able to offer an intellectually convincing counter-position. By dominating the academic narrative, supporters of the Court of Justice deprived critics of a strong intellectual foundation, albeit that there have been important critical contributions from a minority of writers.

Thirdly, a particular pattern of socialisation has been a feature of European integration studies. The interpretive or epistemic community of integration experts and academics has tended to be dominated by a view of the inevitability and desirability of integration (Vauchez 2007). This strategy has had success at national level, rather than just within the transnational socialisation of integration experts. To a large extent, although with important and notable exceptions, national legal élites tended to accept the results of the Court of Justice jurisprudence.

Further, the Court of Justice has been opportunistic in its adherence to traditional legal hermeneutic discipline in adhering to 'normal' methods of legal reasoning and interpretation in much of its caselaw, while always reserving the possibility to engage in extra-textual, pro-integration teleology. The intellectual tension between these two tendencies is illustrated by the recent judgment in *Uniplex* (*UK*) *Ltd v. NHS Business Services Authority*.[49] The facts related to a procedural rule of UK public law that allows judicial review of actions against public bodies to be brought within a time limit of three months, but with an additional requirement that applications must be brought in any case 'promptly'. The issue in the case

[49] Case C-406/08, *Uniplex* (*UK*) *Ltd. v. NHS Business Services Authority* [2010] ECR I-817.

was whether this time limit was compatible with the requirement of Council Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedure to the award of public supply and public work contracts,[50] which requires that the decisions taken by national contracting authorities may be reviewed effectively and as rapidly as possible. The issue referred by the UK court was whether the UK procedural rules were to be interpreted in light of the Community/EU law requirements of effectiveness and equivalence of remedies and in light of Directive 89/665 so as to mean that the limitation period started from when the tenderer knew or ought to have known of the breach of form when the breach actually occurred. The Court of Justice answered that the limitation period ran from when the tenderer knew or ought to have known of the breach. Further, it ruled both that the 'promptly' requirement should not be applied in the context of EU law and that the UK courts should extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. As a matter of principle and legal policy, this conclusion is both logical and unobjectionable. That the limitation period runs only from when reasons are communicated is fair because it is only when this communication does occur that a tenderer has any basis for deciding to bring a judicial review. The Court noted early in its judgment that the objective of the Directive was to guarantee the existence of effective remedies for infringements of Community law in this area, but that the Directive did not specify time limits, which were thus to be established by the internal legal order of each Member State. This is to characterise the purpose in a relatively narrow, localised way. It is teleological, but not meta-teleological. The Court of Justice continued in this fashion. It engaged in systemic interpretation in referring to other secondary legislation on public supply contracts: this legislation provided that the reasons for the failure of a tender were to be communicated to a tenderer. From the perspective of legal reasoning, this systemic interpretation is a type of relatively localised teleology, in contrast to an approach that would relate Directive 89/665 to more general purposes of the legal system, up to the level of ever-increasing integration.

As a matter of legislative interpretation, the judgment is consistent with a careful, principled and restrained approach to interpreting legislation. This is reflected in the rationale the Court of Justice gave for excluding the discretion UK courts have

[50] OJ L 395, 30.12.1989, p. 33.

to refuse judicial review applications brought within 3 months but not brought promptly:

> The objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, the Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations. … As the Advocate General observed in point 69 of her Opinion, a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision for such a period does not ensure effective transposition of Directive 89/665.[51]

Here, the Court of Justice recites the widely accepted rule of law requirements of certainty and predictability. Yet it is impossible to attribute these same characteristics to the Court's meta-teleological approach in other cases. The Court of Justice itself has never addressed this tension. It engages in meta-teleology by assertion, rather than by justification through argumentation.

13.12 Conclusion

Characterising the quality of the Court depends upon the conception of quality employed. The discussion here broadly suggested a contrast between process-oriented and consequentialist justification in the institutional context of courts. Consequentialist is clearly less dependent upon legal sources and the discipline of legal method, it is less predictable and may be dependent upon an extra-legal evidential base, including complex socio-economic data. Consequentialism is more political and less 'legal'. It is clearly reflected in the tendency of the Court in important cases to rely on *effet utile*. The Court of Justice has the same fact-finding powers as courts generally, although most issues before the Court relate to arguments about the applicable law, rather than to disputes about the facts. The Court thus has the epistemic means on which to grounds its judgments as to issues of fact. Assessing the quality of the Court's reasoning must, however, have regard to the function of the Court as the judicial branch of EU governance: in other words, by a normative conception of its role. Notwithstanding the success the Court has enjoyed to date in getting its judgments accepted, questions remain as to

[51] Case C-406/08, para. 42.

the legitimacy of its meta-teleological method. In other words, its practical success in generally having its judgments accepted and applied by the Member States does not necessarily mean that the Court's methodology is hermeneutically or dogmatically legitimate. On this view, the quality of the Court's judgments cannot be praised for their integration-enhancing effects, rather the internal discipline of law as a social institution informs an evaluation based on process rather than outcome. 'Quality' in this sense is to be judged by the Court's adherence to and articulation of the conventional norms of legal reasoning focusing on the ordinary wording of the most specific texts, drafting history as evidence of the intention of the law-maker, and an attitude of deference to the constituent power of the formal process of Treaty amendment.[52] On that understanding, the Courts' role remains a matter of controversy in those important cases where the Court pursues a pro-integration policy instead of a more conventional hermeneutic discipline.

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[52] This argument is more fully developed in Conway (2012), and see also de Waele (2009)

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