A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the PSPP Ruling

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This article addresses the use of interpretative methods in the practice of the European Court of Justice. It first discusses the multifaceted context in which the Court operates, and then analyses each of the Court's traditional methods of interpretation separately. Drawing a distinction between the Court's judges and its Advocates General, it shows that there are important limits to how constraining interpretative methods can be. The article also illustrates the potential complications that can arise from the act of ascribing to the process of judicial interpretation a greater role than it can, in fact, assume. In this sense, the German Federal Constitutional Court's ruling regarding the powers of the European Central Bank (known as the PSPP decision) is analysed from the perspective of the methodological challenges it raises.

Keywords: methods of interpretation, legal reasoning, European Court of Justice, methodological vs. substantive reasoning, PSPP decision (of the German Federal Constitutional Court)

Table of Contents

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I. INTRODUCTION

The way lawyers deal with texts might be law's (only) *differentia specifica*. Law's 'essence' resides in its particular means, i.e. in specific vocabulary and reasoning techniques. While the judgments of courts can have an impact on politics,[1] lawyers insist that how decisions are made matters almost as much as the result itself. For instance, Jeffrey Goldsworthy seems to reprimand political scientists for failing to see law's *formal* importance:

> [p]olitical scientists often maintain that courts regularly change constitutions through interpretation, but they rarely examine legal arguments with sufficient care to distinguish between different kinds of change, or consider the extent to which courts have legal authority (as opposed to political power) to do so.[2]

This boundary work between law and politics has helped us better understand each field's specificity (alongside their commonalities).[3] More precisely, it has allowed us to view law as being first and foremost about a specific language: the language of interpretation and its persuasive strategies. In other words, there is a *linguistic* dimension to the activity of any court. But we can always add to this, at least in the case of powerful courts, an *institutional*

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1 Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press 2003); Alec Stone Sweet, *Governing with Judges* (Oxford University Press 2000); John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 Law and Contemporary Problems 41.

2 Jeffrey Goldsworthy, 'Introduction' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (Oxford University Press 2006) 3-4.

3 Bogdan Iancu, 'Law/Politics Distinctions: The Elusive Reference Points' in Bogdan Iancu (ed), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Eleven International Publishing 2009).

context. Regarding the European Court of Justice (ECJ),[4] this institutional setting is particularly important for understanding the structural constraints that influence the Court's interpretative postures and legal reasoning, especially in relation to other national and international judicial bodies.

The ECJ's tense relationship with national courts in the context of interpretative methodology became starkly visible in the recent judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter *BVerfG*) regarding the powers of the European Central Bank and the validity of some of its monetary interventions (known as the *PSPP* decision[5]). In this already (in)famous decision, the *BVerfG* decided to 'invalidate' a decision of the ECJ on grounds primarily related to the latter's misapplication of the canons of legal interpretation. This exceptional action prompts a series of questions related to the interpretation of (European) law. Notwithstanding the vast general literature on the aims and scope of interpretation in law,[6] in a context in which the belief in the existence of universal legal tools of interpretation is capable of creating tension within the European project, it is, we believe, all the more urgent for theoreticians to ask anew what can and cannot be said (in a court of law) in the name of interpretation. Can and should one expect methodological sameness, or at least similarity, in how judges reason? To what extent do the so-called traditional methods of interpretation constrain the argumentation of the official interpreter of the law? If the well-known strategies of interpretation impose few such constraints on the interpreter, what are we to make of judicial decisions that invalidate other decisions based on their alleged methodological deficiencies? In this article, we seek to provide an answer to these questions, focusing on the ECJ's interpretative practices.

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4 We use the 'European Court of Justice' or 'ECJ' to refer to both the Court of Justice of the European Communities, as well as the Court of Justice of the European Union, since we argue that from the perspective of its general interpretative approach, the Court has largely maintained a steady course, unaffected by the entry into force of the Treaty of Lisbon.

5 *BVerfG*, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 (*PSPP*).

6 There is important literature upholding the claim that judges worldwide use common tools, such as proportionality, in deciding cases. See, for instance, Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013) 153.

Structurally, the text proceeds by way of a literature review, a case-law analysis, and a case study, thus ensuring that theoretical insights and practical examples feed into each other throughout. The selection of case-law responds to our meta-theoretical concerns related to interpretation in the overall activity of the Court and was therefore not intended to account for potential chronological evolutions. Not being specifically focused on the timing or the precedential value of the decisions, we included both older and more recent ones, as well as landmark and less prominent judgments. At each stage, we have used an illustrative selection of cases where interpretative approaches are expressly addressed, allowing us to draw out insights into the Court's general stance.

Throughout the paper, we engage both with decisions of the Court, as well as with opinions of Advocates General (AGs). While not legally binding, the latter, as positions expressed by influential and respected members of the Court on the most significant legal matters brought before it, [7] offer valuable glimpses into the methodological workings of the ECJ. The Court's monolithic decisions, pronounced *per curiam*, are often written in terse and formal language and provide little insight as to the various arguments and reasoning paths explored by the judges before reaching what appears to be the only 'right' solution. AGs' opinions, on the other hand, function as 'critical internal mirrors' reflecting the various interpretative possibilities considered and the methodological obstacles encountered.[8] For this reason, at various stages in our paper we refer to AGs' opinions as either syntheses of the Court's approach in respect of (a) particular method(s) of interpretation or as illustrations of the wide range of interpretative choices available (and of the inherent limits of legal methods) when working with EU law.

Our text is organized as follows: drawing on relevant literature, part II addresses the importance of interpretation in the ECJ's discourse, taking account of the complicated institutional setting in which the Court operates. Part III explores, through an analysis of case-law, how the four traditional methods of interpretation are used in practice by drawing what we deem to

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7 See article 252 TFEU.

8 Michal Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' (2012) 14 Cambridge Yearbook of European Legal Studies 560.

be a necessary distinction between the Court's judges and its Advocates General. This part seeks to show that there are important limits to how constraining each interpretative method can be. Building on the conclusions reached in part III, part IV exemplifies, with reference to the *PSPP* decision, the potential complications arising from the act of ascribing a greater role to the process of interpretation than it can, in fact, assume.

II. The Institutional Context: Several Tales of the Same Court?

As the top judicial body of the European Union, the ECJ has undoubtedly played a pivotal role in shaping the EU's legal system. Alec Stone Sweet goes as far as deeming the Court to be 'the most effective supranational judicial body in the history of the world'.[9] However, without downplaying the role of the Court, some political scholars still argue that the key controlling factors in the evolution of the EU's legal system remain the Member States' will and readiness to embrace, even *post factum*, the direction of further integration.[10]

Against this backdrop, the status of the ECJ within (and outside) the EU legal order is relevant for understanding the interpretative stances that it adopts, as well as the ostensible variations of its approach. A first factor to bear in mind when analysing the Court's interpretative approaches is the constant negotiation of its role as a supranational court, in relation to the international and domestic legal systems. While the ECJ sits at the centre of a supranational legal order, its early institutional design was uncharacteristic of a court of an international organisation. As Dehousse notes, within the Community Treaties the initial tasks of the ECJ were framed using the model of an international jurisdiction, albeit one with atypical features (e.g. compulsory exclusive competence, infringement proceedings against Member States).[11] Gradually, its functions shifted towards those of a

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9 Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 1; see also Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 82-83.

10 See Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) International Organization 41.

11 Renaud Dehousse, *The European Court of Justice. The Politics of Judicial Integration* (Macmillan 1998) 18-19.

constitutional[12] and administrative[13] court, although such roles had also been envisaged in the Court's initial institutional design. At present, the ECJ appears to present itself primarily as a constitutional jurisdiction, given its own characterisation of the Treaties as having 'constitutional character', as well as its chief role in ensuring the uniform application of European law throughout the Union.[14] The Court could not completely 'break free' from its international jurisdictional status,[15] just as the legal order of the EU itself did not completely emancipate itself from its origins as an international organisation.[16] Nevertheless, the ECJ proclaimed itself the sole and final adjudicator on matters of European law, rejecting the option of yielding to decisions of external judicial bodies.[17] Any other alternative was deemed to endanger the very foundations of the Union.[18]

Placed in this triad of judicial paradigms – international, constitutional, administrative – the Court set about early on to create a space for itself, allowing it to weld together and reinforce its roles, while at the same time preserving the Union's connectedness to the separate international and national legal communities. The key concept of autonomy of EU law emerged from such internal negotiations of the Court's position vis-à-vis other systems.

We argue that this space- and power-preserving process is still ongoing, even though the Court has indisputably consolidated its influential position at the

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12 Ibid 21-25.

13 Ibid 26-33.

14 Ibid 35.

15 Jed Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) 3(3) Cambridge Journal of International and Comparative Law 717.

16 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) European Journal of International Law 516: 'The continuous assertion of the Community's *sui generis* character [...] does not by itself create "an own legal order". From a public international law perspective, the EC legal system remains a subsystem of international law'.

17 Opinion of 14 December 1991, *EEA Agreement I (Opinion 1/91)*, 1/91, EU:C:1991:490, para 71; Opinion of 18 December 2014, *Draft agreement on accession to the ECHR (Opinion 2/13),* 2/13, EU:C:2014:2454, paras 170-174.

18 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Bakaraat International Foundation* EU:C:2008:46, para 282; *Opinion 1/91*, paras 35, 71.

centre of the EU's legal order. In this context, the interpretative stances espoused by the ECJ are coloured and informed by the historical evolution of its tasks, as described above, accompanied by parallel shifts in its interpretative posture. Consequently, the ECJ's mixed status translates into a highly selective use of methods, standards and criteria – some specific to domestic systems, others pertaining to the international law sphere – characterised by some scholars as 'extreme methodological freedom'.[19]

A second, connected factor influencing the Court's methodology concerns the sources of its legitimacy within the EU system and especially in relation to other national and international courts.[20] Duncan Pickard, describing the choice of interpretative methods of the ECJ as a feature of supranational law, notes that judicial interpretation is inherently linked to sovereignty.[21] He posits that while national (constitutional) courts 'are free to make their own interpretive rules because they are constitutional decision makers in a co-equal branch of government', international courts, 'by contrast, operate on borrowed sovereignty' and states provide them with meta-rules of judicial interpretation since they 'want to be clear about the methods that they will be using in applying international law'.[22] Indeed, as Beck also observes, at national level interpretation is 'governed by broad criteria and traditions specific to each system',[23] with written constitutions very rarely including meta-rules of interpretation for courts to apply.[24] On the other hand, in international law, the 1969 Vienna Convention on the Law of Treaties

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19 Gunnar Beck, 'The Court of Justice of the EU and the Vienna Convention on the Law of Treaties' (2016) 35(1) Yearbook of European Law 512.

20 For an ampler analysis on this relation, see Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 88-97. See also the theoretical interrogation in Mark Tushnet, 'Can There Be Autochthonous Methods of Constitutional Interpretation?' in Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021).

21 Duncan Pickard, 'Judicial Interpretation at the European Court of Justice as a Feature of Supranational Law' (2017) Stanford-Vienna European Union Law Working Paper No. 20, 6 <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/pickard_eulawwp20.pdf> accessed 20 May 2021.

22 Ibid 4-6.

23 Beck (n 19) 484.

24 Pickard (n 21) 4.

(VCLT) contains the precise meta-rules provided by states for treaty interpretation, which are generally applicable to international adjudicators. In the constitutional legal order created by the EU Treaties and in the absence of a meta-rule of interpretation,[25] the supranational ECJ finds itself in a convolution of two legal worlds. This position serves to explain its approach to interpretation, as well as its different methodological choices regarding primary and secondary EU law, which reflect a mix of international and national law methods.[26]

Still related to the previous observations, a third factor influencing the interpretative posture of the ECJ concerns its dialogue with international and – especially – national courts. Through the preliminary ruling procedure, the ECJ has empowered national (and in particular, lower) courts,[27] incentivizing them to become its allies, at times even in 'tacit opposition' to their own supreme or constitutional courts and their governments.[28] Higher national courts 'realized that their power was being eroded and fought back',[29] at times even challenging the competences of the ECJ.[30] Nevertheless, paradoxically, they also felt increasingly compelled to engage in dialogue with the ECJ themselves.[31]

In this context, for the ECJ to maintain its internal influence, it must project uniformity and predictability of its decisions. At the same time, when dealing with matters external to the Union, the Court must speak a language familiar

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25 Jan Komárek, 'Legal Reasoning in EU Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 49.

26 See for instance Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) EUI Working Paper AEL 2013/9, 47 <https://cadmus.eui.eu/handle/1814/28339> accessed 20 May 2021.

27 R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79(1) Law and Contemporary Problems 133.

28 Stone Sweet (n 9) 82.

29 Ibid 83.

30 See, for instance, the emergence of the *controlimiti* doctrine in the Italian Constitutional Court's case-law in *Frontini*, as early as 1973: Sentenza n. 183/18.12.1973 della Corte Costituzionale, IT:COST:1973:183.

31 Karen Alter, 'Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (1998) 52(1) International Organization 145.

to international law. On a stylistic level, this translates into a strategic use of legal terminology, concepts and interpretative methods which the Court employs as tools to communicate with other systems. One could suggest that, just as it operates on borrowed sovereignty, the ECJ also operates on borrowed (legal) language. The Court has therefore designed a language consisting of terminology appealing to both its national and international interlocutors, and the traditional interpretative methods form part of it. However, in the spirit of protecting the autonomy of EU law, such terminologies sometimes prove to be 'false friends': instead of operating as the lowest common denominators of the national systems of the Member States, the Court assigns to them unique, 'European' meanings, departing from national ones, or even leaving them hollowed-out.

In the following sections we explore the interplay of these factors by referring to four traditional methods of interpretation (textual, systemic, historical and teleological) and their express use in the Court's case-law. We argue that, while formally invoked, the methods are not decisively constraining for the Court's reasoning and are employed with vast flexibility. Importantly, we show that this conclusion holds both for the Court's judgments and the opinions of its AGs, despite their different styles of reasoning.

III. Interpretation and Its Complements

'Every interpretation is complementary to the text it interprets'[32]

The European Court of Justice addressed the matter of interpretation on several occasions, prompted by the linguistic diversity,[33] but also by the complexity, of the European legal order, with its constant interplay between supranational and national law. The historic *CILFIT* decision might come closest to a general assertion by the ECJ of an interpretative methodology of EU law,[34] even if such pronouncements were made in the context of guidance given to national courts for their own interpretative work. In *CILFIT*, the

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[32] Pierre Legrand, 'Foreign Law: Understanding Understanding' (2011) 6 Journal of Comparative Law 67, 88.

[33] For a doctrinal contribution thoroughly exploring the implications of linguistic diversity for the concept of 'uniform law', see Simone Glanert, 'Speaking Language to Law: The Case of Europe' (2008) 28 Legal Studies 161.

[34] Komárek (n 25) 49. See Case C-77/83 *CILFIT* EU:C:1984:91 (*CILFIT*).

Court instituted a rule that places great emphasis on a systematic and purposive approach.[35] This interpretative scheme appears to follow the structure of Article 31 of the Vienna Convention on the Law of Treaties, signalling an approach coherent with the Court's mixed international-constitutional-administrative status.

On closer inspection of its case-law, however, it becomes clear that the ECJ struggles with the topic of interpretation as its principles of interpretation are far from uniform.[36] While generally, the Court tends to avoid establishing a direct hierarchy of methods, in some cases it has devised an order of preference which is not necessarily consistent with its statements on interpretation in other decisions. Thus, in case C-803/79 (*Gérard Roudolff*) the Court declared that where the text is ambiguous, it shall be examined in light of its purpose,[37] an observation that assigns to teleological interpretation only a subsidiary role, manifestly at odds with the position expressed in *CILFIT*, which implies that a teleological interpretation is *always* necessary.

Moreover, while the Court relies in its adjudicative practice on all of the four traditional techniques of interpretation, it seems to accept at the same time that beyond the desired uniformity and autonomy of EU law, there can be variations across legal systems even at the level of methodology and reasoning, as evidenced by the following statement of AG Geelhoed: '[i]t may be that under national law there are specific techniques of interpretation for that purpose'.[38]

Going through the Court's case-law, it becomes immediately clear what is already known to us from adjudicative practices in domestic contexts: courts employ interpretative tools selectively and rarely assess a provision through the lens of each of the methods available. At the ECJ, it is rather the Advocates General who tend to put a text to the test of *all* the traditional

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35 *CILFIT* (n 34) paras 18-20.

36 The overall number (142) of references to 'rules of interpretation' in both judgments and AG opinions is indicative of the fact that interpretation constitutes an important theoretical preoccupation on the part of the Court.

37 Case C-803/79 *Gérard Roudolff* EU:C:1980:166, para 7.

38 Case C-441/99 *Riksskatteverket v Soghra Gharehveran* EU:C:2001:193, Opinion of AG Geelhoed , para 47. See also Case C-299/17 *VG Media* EU:C:2019:716, para 33 where the Court speaks of 'national rules of interpretation'.

methods. This comes as no surprise, given the differences in style between their reasoning and that of the Court's judges. Indeed, as Mitchel Lasser has compellingly shown in his comprehensive comparative study, the decision-making activity of the Court can be characterized as dualist, consisting of, on the one hand, the impersonal, magisterial, one-sided tone of the Court's judges and the personal, argumentative, plurivocal tone of the Court's Advocates General on the other.[39] While the latter must ultimately embrace a position at the end of their analysis (indeed, they 'emerg[e] as [...] individual[s] who make no attempt to hide – and who can even be said to take pride in – [their] own subjectivity'),[40] their opinions typically explore vast arrays of interpretative possibilities in an 'overly hermeneutic' and dialogical enterprise: 'the Opinions necessarily demonstrate an awareness of interpretive choice, one that is symbolized by the publication of doctrinal controversy and personalized arguments'.[41] Whereas the Court speaks and acts as if there was only one correct answer, the Advocates General often like to 'make clear that the existing legal materials can be interpreted in different ways'.[42]

In what follows we contend that, paradoxically, both attitudes, the apodictic tone of the Court as well as the dialogic stance of the Advocates General, lead to the conclusion that the traditional methods of interpretation do not carry as important a weight as expected when reading the Court's meta-theoretical discourses about interpretation (or, for that matter, scholars' engagement with the topic). We will substantiate our claim by referring separately to each of the established methods.

1. Textual Interpretation: A Text Is a Text Is... Only a Text

That every act of judicial interpretation should begin at the source, that is, at the text of the rule, is generally considered a *datum*.[43] However, establishing

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39 Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations* (Oxford University Press 2004) 103-238.

40 Ibid 132.

41 Ibid.

42 Ibid 135.

43 Case C-190/10 *Génesis* EU:C:2012:157, paras 46–47; Case C-559/10 *Deli Ostrich* EU:C:2011:708, para 27. See also Neil MacCormick and Robert Summers,

what a rule *is* and especially what it *means* in a composite legal order with 24 equally authentic texts is an altogether different enterprise. The principles of multilingualism and linguistic equality, often highlighted as constitutional markers of an integrated democratic construction,[44] at the same time raise some of the most salient challenges to interpretation of EU law by the ECJ and by courts throughout the Union. This holds particularly true in respect of the method of literal interpretation and illustrates the Court's efforts to tackle the third factor of ambiguity identified in part II, related to its dialogue with national courts.

Under the traditional view, 'where the wording of an EU law provision is clear and precise, its contextual or teleological interpretation may not call into question the literal meaning of that provision [...]. [T]he ECJ will never ignore the clear and precise wording of an EU law provision'.[45] However, several questions remain. What does 'clear and precise' mean? Clear for whom? For the ECJ, for the national courts, or both? Such questions are frequently raised in the Court's case-law on the absence of horizontal direct effect of directives[46] and the *contra legem* limit of consistent interpretation.[47] These are, however, instances related not so much to interpretation *per se* – as a mechanism for revealing the *meaning* of norms – but rather to the basic precept that the black-and-white wording of a rule should not be replaced with a different wording which is simply not present.

If we generally view interpretation as a necessary search for meaning, it becomes apparent that for the ECJ, looking at the ordinary meaning of words

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'Interpretation and Justification' in Neil MacCormick and Robert Summers (eds), *Interpreting Statutes. A Comparative Study* (Routledge 1991) 516–517.

44 See Phoebus Athanassiou, 'The Application of Multilingualism in the European Union Context' (2006) 2 Legal Working Paper Series - European Central Bank 6-7; also, Dominik Hanf and Élise Muir, 'Le droit de l'Union européenne et le multilinguisme' in Dominik Hanf, Klaus Malacek and Élise Muir (eds), *Langue et construction européenne* (Peter Lang 2010) 23.

45 Lenaerts and Gutiérrez-Fons (n 26) 7.

46 Ibid 6.

47 For instance, Case C-268/06 *Impact* EU:C:2008:223, para 100; Case C-282/10 *Dominguez* EU:C:2012:33, para 25; Case C-176/12 *Association de médiation sociale* EU:C:2014:2, para 39.

is often insufficient in and of itself.[48] Rather, as noted in legal scholarship, '[m]ultilingual EU law does not contain "one" unequivocal meaning that the interpreter can "discover". Instead, the Court as interpreter adds meaning to EU legislation, using the formal elements of the text only as a springboard'.[49]

CILFIT reveals the steps the Court deems necessary in order to interpret the equally authentic versions of multilingual legislation of the EU: first, interpretation should involve a 'comparison of the different language versions'; second, 'even where the different language versions are entirely in accord with one another', regard should be had to EU-specific terminology and to the autonomous meaning that concepts have under EU law, which can be distinct from their meaning in the national legal systems; third, 'every provision of Community law' should also undergo a systematic and teleological analysis.[50] The Court bestows this complex interpretative task upon national courts, as a type of 'recipe' to ensure the uniform interpretation of EU law throughout the Union.

However, national courts are not adequately equipped to carry out such a significant comparative endeavour, given the magnitude of the task, as well as their familiarity with just one[51] or at best, two or three official languages of the EU.[52] The ECJ itself seldomly engages in this process and does not systematically resort to comparisons of the official language versions of the same rule. In fact, it does so only when expressly prompted by the parties,[53]

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48 Joined Cases C-267/95 and C-268/95 *Merck & Co*, Opinion of AG Fennelly, para 18.

49 Elina Paunio, *Legal Certainty in Multilingual EU Law* (Routledge 2013) 20.

50 *CILFIT* (n 34) paras 18-20.

51 Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20(3) Fordham International Law Journal 665.

52 For a discussion on the multiple levels of linguistic ambiguity and dynamics between the ECJ and national courts, as well as between judges of the ECJ themselves, see Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System' (2010) 12 Cambridge Yearbook of European Legal Studies 409, 416-418.

53 Joxerramon Bengoetxea, 'Multilingual and Multicultural Legal Reasoning: The European Court of Justice' in Anne Lise Kjær and Silvia Adamo (eds), *Linguistic Diversity and European Democracy* (Routledge 2011) 1.

immediately supplementing contextual and purposive arguments to the linguistic ones.[54] We can therefore conclude that textual interpretation carries little weight and almost always requires the employment of additional interpretative tools.

Consequently, not relying solely on textual interpretation, the outcome the Court reaches in each case is rather a cumulative effect of a series of heuristic and theoretical considerations that guide the decision-making process and inform its result, with the textual method used either as a mere point of departure in the Court's reasoning, or as one of several possible methodological justifications for a narrow reading of the norm in question.

2. Systemic Interpretation: A System Is a Legal Order, a Treaty or a Directive?

It is not an exaggeration to claim that at the ECJ, 'the most mundane cases turn into systemic affairs'.[55] Frequently, other methods of interpretation invite systemic consideration as well. For instance, as AG Maduro argues, 'it is not simply the *telos* of the rules to be interpreted that matters but also the telos of the legal context in which those rules exist'.[56] The need to resort so frequently to systemic arguments indicates that *in claris non fit interpretatio* remains more of a revered Latin adage than an actual possibility. In fact, the maxim appears in few documents of the Court, only to be denied application.[57] But does the recourse to systematic considerations amount to what Gunnar Beck has referred to as the 'steadying factors' – elements helping to keep the Court's discretion in check?[58]

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54 See, for example, Case C-376/11 *Pie Optiek* EU:C:2012:502, para 33; Case 6/74 *Moulijn* EU:C:1974:129, paras 10–11; Case 30/77 *Bouchereau* EU:C:1997:172, para 14; Case C-187/07 *Endendijk* EU:C:2008:197, paras 23-24; Case C-239/07 *Sabatauskas and Others* EU:C:2008:551, paras 38-40.

55 Lasser (n 39) 293.

56 Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) European Journal of Legal Studies 5.

57 See, for instance, case C-24/19, *A and Others* EU:C:2020:143, Opinion of AG Campos Sánchez-Bordona, para 60.

58 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012).

In fact, the reference to a systematic understanding of a given provision is not transparent, since the Court does not operate with a single connotation of the term 'system'. Thus, in many cases, the Court seems to have developed a specific, grand, meaning for the concept of 'system', namely that of a proper, self-standing, functioning legal order. Indeed, it has been noted that in the Court's case-law, 'the need to shape a proper European legal system routinely takes center stage'.[59] This is confirmed by the Court's penchant to view precedents as composing a system: 'the view that the solution resides "in the system" [...] rather than the cases as such continues to hold much sway at the Court, as evinced by the popularity of general precedent incantations [...] or its famous references to the "legal order" as a whole or to that which is "inherent in the system" of the treaties'.[60]

For instance, in *Foto-Frost* the Court considered that a different interpretation of the law under discussion 'would be liable to place in jeopardy the very unity of the Community legal order'.[61] Given this abstract conceptualization, it becomes clear that systemic considerations can barely limit discretion insofar as the judge will still have to assess the enormously complicated issue of knowing what a functioning legal order is.

However, in other cases, the Court preferred to ascribe a much more restrictive meaning to the idea of a 'system', referring essentially to the general framework of a given legislative act. The Court can sometimes cite specific recitals from a legislative act.[62] Yet, at other times, it confines itself to considering a particular act as a whole. For instance, in a preliminary ruling the Court held that 'the system established by that directive allows, *inter alia* [...]'.[63]

In many other cases, it is easily discernible in how formulaic a way the systematic method is quoted, since the Court does not go to great lengths either to elaborate on its understanding of the concept of 'system' or to

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59 Lasser (n 39) 296.

60 Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice* (Cambridge University Press 2014) 101.

61 Case 314/85 *Foto-Frost* EU:C:1987:452, para 15.

62 See, for instance, case C-487/07 *L'Oréal and Others* EU:C:2009:378, para 71 where the Court cites recitals 13 to 15 in the preamble to Directive 97/55.

63 Case C-25/19 *Corporis* EU:C:2020:126, para 33.

explain the link between its conclusion and whatever idea of system it applied in that specific case. Embracing its 'imperial confidence',[64] the Court often employs what we may call standard phrases such as 'under the system of the Treaty',[65] 'the coherence of the system requires',[66] 'the system of legal protection laid down by the Treaty',[67] or 'it follows from a systematic interpretation'.[68] Moreover, when the '*économie générale*' is invoked, the Court tends to ignore alternative interpretations[69] or to downplay other guidelines of interpretation such as *lex specialis*.[70] As one of the Court's judges argues,

> [t]his is not surprising, since the very concept of *l'économie générale* rests on idea that the chosen interpretation is based on a pre-existing and unalterable authority. [...] [T]here is no pressing need to refer to *jurisprudence constante* or any other authority. Both the rule and the general scheme speak for themselves through agency of the Court.[71]

For their part, Advocates General share some of the Court's understandings in respect of what systematic interpretation should be about.[72] For instance, in one opinion, AG Pikamäe refers to 'the general scheme of Directive 2008/115' while observing that 'more specific consideration will have to be given to the relationship between Articles 16 and 18 of the directive and to the use, in that act but also in other directives, of the concepts of "public

64 Lasser (n 39) 107.

65 See for instance Case C-39/17 *Lubrizol France SAS* ECLI:EU:C:2018:438, para 25.

66 Case 314/85 *Foto-Frost* EU:C:1987:452, para 15.

67 Case 90/77 *Hellmut Stimming KG* ECLI:EU:C:1978:91, 999.

68 Case C-487/07 *L'Oréal and Others* ECLI:EU:C:2009:378, para 74; Case C-25/19 *Corporis* EU:C:2020:126, para 29.

69 See Siniša Rodin, 'Interpretation in The Court of Justice of The European Union: Originalism, Purposivism, and *L'économie générale*' (2019) 34 American University International Law Review 601, 627.

70 Conway (n 20) 224.

71 Rodin (n 69) 627.

72 More surprisingly, AGs sometimes use the same self-assured language as the Court in relation to this mode of interpretation. See for instance C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* ECLI:EU:C:2013:49, Opinion of AG Cruz Villalón, para 68: 'a systematic interpretation immediately indicates [...]', 'a systematic interpretation clearly requires [...]'.

policy" and "public security"'.[73] As one can observe, the 'system' can be construed not only as one given normative act – in this case a directive – but as two acts – here two directives – in relation to each other. Moreover, Advocates General undoubtedly add layers of their own to the concept of 'system', for example when they refer back to opinions of other Advocates General and, importantly, to doctrinal writings that criticise the Court's rulings, thereby creating accountability. The very notion of 'system', then, is far from being transparent like a glasshouse through which one could clearly see the one and only possible meaning.

Rather, judges of the ECJ situate the systematic method in a network of self-assured, authoritative statements ('one can almost imagine the Court inserting Q.E.D. at the end of each brief recital'[74]), where it takes the form of an intellectual 'crutch' meant to bestow legitimacy and respectability on the decision to a community of legal professionals who speak the embedded language of canons of interpretation.

However, even a more argumentative, values-oriented reasoning, like that encountered in the opinions of the Advocates General, cannot turn interpretative strategies into fully-fledged means of constraint in adjudicative settings. The Advocates General dedicate more time to the scrutiny of the rationale for, and the implications of, their systematic readings (to take just one example, one opinion contains more than 50 lines of systematic analysis, while the Court's systematic considerations are frequently limited to a few lines).[75] Nonetheless, as they make visible their detailed reasoning, the Advocates place the systematic method in a plurivocal, eclectic, network of other plausible interpretations. This inevitably limits the persuasive force of any one method of interpretation.

Consequently, the systematic approach, as undertaken by the ECJ, requires the interpreter to find an interpretation that is consistent within either a micro-system (single legal acts), a meso-system (a number of related legal acts)

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73 Case C-18/19 *Stadt Frankfurt am Main* EU:C:2020:130, Opinion of AG Pikamäe, para 52.

74 Lasser (n 39) 112.

75 Compare the Opinion of AG Szpunar in Case C-20/17 *Proceedings brought by Vincent Pierre Oberle* EU:C:2018:89, para 78-93, to the judgment in Case C-249/19 *JE (Loi applicable au divorce)* EU:C:2020:570, para 27.

or a macro-system (the whole European legal order). Yet, while the judge certainly cannot put forward an interpretation that blatantly contradicts the materials before them, the fact remains that she still retains a great deal of discretion when designing the specific standard of reference, especially one as open-ended as the notion of a 'system'.

Such variations in the Court's use of the systematic method may also be read through the lens of the contextual factors discussed in part II. In effect, the numerous modulations of the concept of 'system' represent a flexible tool often employed by the ECJ to adjust its stance as a supranational court in relation to other legal orders and to preserve its legitimacy. The availability of options to position itself either assertively, at the centre of a macro-system (the entire EU order) or to withdraw into the micro-system of a single EU legislative act is invaluable to the ECJ, a court engaged in constant dialogue and negotiation with other national or international courts and institutions. We can clearly see this operation of scaling up or down in relation to other guidelines of interpretation, such as when the Court looks for general principles based on the common traditions of the Member States and inevitably comes up with a given selection of countries.

3. Teleological Interpretation: Telos and the (Too) Grand Scheme of Things

It may appear as if everything has already been said and written about teleological arguments in the ECJ's reasoning. The Court's penchant for grand-scale purposive interpretation is at once celebrated and criticised: bold, effective in advancing integration and ensuring uniformity of EU law across the Member States,[76] but at the same time politically activist, often impinging on the competences of the Member States[77] and sitting uneasily with the traditional methodologies of national judiciaries.[78]

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[76] Poiares Maduro (n 56) 4-6.

[77] On the relation between the ECJ's purposive interpretative approach and the EU's competence creep, see for instance, Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Brill Nijhof 1986); Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice' (EUobserver, 10 September 2008) <https://euobserver.com/opinion/26714> accessed 12 October 2021.

[78] On the challenges the ECJ's methods raise for national judiciaries, especially for some of the newer Member States, see Michal Bobek, 'A New Legal Order, or a

The teleological method is generally regarded as the ground-breaking instrument through which the ECJ has shaped the development of the European Union and achieved the constitutionalisation of its legal order.[79] This process has been guided first by a departure from the classic reading of public international law norms with *van Gend en Loos*[80] and subsequently, by the shift towards a 'Community based on the rule of law'[81] whose internal and external autonomy is to be preserved by the Court.[82] However, we argue that the ECJ's teleological approach is not always transparent and generates several layers of uncertainty, thus decreasing the overall force of this interpretative strategy.

As already discussed, the Court often proclaims that understanding an EU law provision requires a cumulative analysis of 'not only its wording, but also [of] the context in which it occurs and the objects of the rules of which it is part'.[83] Fennelly observes that 'linguistic conflict or ambiguity is not, in any sense, a pre-condition for the application of the teleological or schematic approach', because '[e]ven when it finds a clear meaning in the language used, the Court will often explain that the result so found conforms with the general scheme and object of the provision',[84] underscoring once again the limited weight of textual interpretation.[85] And yet, on occasion, the Court will resort to purposive interpretation *only* after declaring that the EU provision in question is ambiguous, usually due to linguistic differences.[86]

Non-existent One? Some (Early) Experiences in the Application of EU Law in Central Europe' (2006) 2 Croatian Yearbook of European Law and Policy 265; also, Urszula Jaremba, 'At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-level Legal Order' (2013) 3(4) Erasmus Law Review 191.

79 G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 Common Market Law Review 595.

80 Case 26/62 *van Gend en* Loos EU:C:1963:1, 12.

81 Case 294/83 *Les Verts v. Parliament* EU:C:1986:166, para 23.

82 For instance, Case C-284/16 *Achmea* EU:C:2018:158, para 33; Opinion 1/17 *CETA*, paras 106-108.

83 Case C-292/82 *Merck Hauptzollamt* EU:C:1983:335, para 12; Case 6/72 *Europemballage Corporation* EU:C:1975:50, para 22.

84 Fennelly (n 51), 665.

85 Case C-48/07 *Les Vergers du Vieux Tauves* EU:C:2008:758, paras 39-40.

86 Case 803/79 *Criminal proceedings against Gerard Roudolff* EU:C:1980:166, para 7.

This vacillating approach creates a first layer of uncertainty regarding the instances when the teleological method should be employed and in which configuration with other interpretative tools.

A second, more important ambiguity is connected to the contextual factors in which the ECJ operates[87] and concerns the ECJ's propensity to select, in an almost instinctive and discretionary fashion, a particular dimension of *telos* to use as an interpretative lens for the individual case before it. Such ambiguity is further compounded by the seldomly explicated choice of a particular objective to be attributed to the norm, from a pool of equally plausible (and often conflicting) policy objectives or general values of the Union.[88]

To analyse the Court's approach, scholars have created teleological taxonomies to navigate its use of purpose as an interpretative instrument. Drawing on Bengoetxea's extensive analysis,[89] Lenaerts and Gutiérrez-Fons identify three types of teleological interpretation in the practice of the ECJ: 'functional interpretation', 'teleological interpretation *stricto sensu*' and 'consequentialist interpretation'.[90] However, such doctrinal classifications contribute little to actually elucidating the reasoning behind the ECJ's selective use of this method, especially regarding the choice of *telos*. A more relevant categorisation would be that suggested by Lasser, who examines the various teleological routes available to the Court in some of its emblematic cases, in a type of zooming-out dynamic.[91] He differentiates between a 'micro-teleological' approach (focused on the *effet utile* and specific purpose of the provision in question), a larger-scale, 'substantively teleological policy stance' (guided by one or several of the express objectives of the European

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87 Part II above.

88 This is more rarely the case in those instances in which the Court relies on the specific objectives of a Treaty provision or of a legislative act in order to delineate between different areas of competence of the EU and the corresponding powers of the institutions – see for instance, Case C-91/05 *ECOWAS* EU:C:2008:288, paras 79-99.

89 Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford Clarendon Press 1993).

90 Lenaerts and Gutiérrez-Fons (n 26) 25.

91 See, for instance, Lasser's analysis of the ECJ's interpretative options in *van Gend en Loos* – Lasser (n 39) 288-289.

Treaties, such as, for instance, economic integration within the customs union) and a 'meta-teleological' approach (focused on framing the interpretative work 'in terms of systemic meta-policies', situated on the highest discursive plane).[92] Under this last category, the Court may interpret a given provision not in light of its specific purpose or of a precise Treaty objective, but rather by reference to 'the broader context provided by the EC (now EU) legal order and its "constitutional *telos*"'.[93]

This approach often proves problematic in light of the legitimacy factor discussed in part II of our paper, as it can place the Court on a collision course with the Member States and their apex courts for being perceived as (too) activist. This is due to the fact that the meta-teleological strategy (going well beyond the cumulative use of all interpretative methods) is frequently associated with an integrationist stance of the Court in highly sensitive areas of its relationship with the Member States (division of competences, EU citizenship, fundamental rights).[94]

As Lasser concludes, the ECJ displays a predilection for meta-teleological reasoning, often choosing to justify its decisions 'in stunningly grand and even threateningly systemic terms',[95] based on the objectives of the EU's legal order as a whole. A study regarding the opinions of the Advocates General reveals a similar preference. While the type of discourse adopted by the Advocates General is more personal and open-ended, the framing of the interpretative solutions is made in the same meta-teleological terms as those embraced by the ECJ itself.[96]

However, while the Court's predilection for *meta-telos* is transparent, its detailed reasons for choosing one purpose over (an)other, narrower one(s) often remain hidden, or at best, ambiguous. In reality, the Court oscillates between narrower and ampler objectives (equally fitting) as interpretative yardsticks, without offering clear criteria for its choice. In this light, purposive interpretation may be viewed more as a tool to justify the Court's choice of outcome, rather than a constraining legal reasoning tool on which

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92 Ibid 287-289.

93 Poiares Maduro (n 56) 5.

94 Beck (n 19) 510.

95 Lasser (n 39) 289.

96 Ibid 287.

the result is based. This view is consistent with our initial observations on the factors influencing the ECJ's interpretative postures, as its choice of *telos* may prove important for the wider process of shaping the EU's legal order and for maintaining the Court's influence within the system. At the same time, it can generate serious pushback from the Member States and their courts if perceived as discretionary or too activist.

4. Historical Interpretation: Rarely Looking Back?

Reservations have been expressed about the utility of historical interpretations in EU law:

> '[O]riginalism' [...] is [...] futile in the context of the EU [...]: in spite of occasional invocations of the 'founding fathers' of the EU or the 'original intent of the Treaties' by some authors, the moment of founding does not play such a strong symbolic role, that would translate into authority, as it does in the context of the USA.[97]

Nevertheless, there are other understandings of the historical method which remain applicable in the EU context. First, as noted by one Advocate General, '[h]istorical interpretation holds that a provision should be interpreted in the light of its history, taking account of the different stages which led to its adoption'.[98] Second, one could consider, after adoption, the evolution of the relevant field by placing a particular piece of legislation in the context of other – prior and subsequent – regulations.[99]

There are notable differences in reasoning between the Court's judges and its Advocates General when it comes to the use of the historical method. Firstly, the Advocates General are much more prone to resort to this method of interpretation.[100] Moreover, the text of the decisions themselves shows that the Court tends to use historical considerations in a very succinct and often

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97 Komárek (n 25) 42. For a contrary opinion, see Conway (n 20) 226.

98 Case C-249/19 *JE (Loi applicable au divorce)* EU:C:2020:231, Opinion of AG Tanchev, para 44.

99 Joined cases C-477/18 and C-478/18 *Exportslachterij J. Gosschalk* EU:C:2019:759 Opinion of AG Pikamäe, para 54.

100 Thus, of the 62 documents returned when we searched for 'historical interpretation', only 14 consist of judgments, the rest being opinions by the Advocates General.

formulaic manner. For instance, in the case T-374/04 (*Germany v Commission*), having briefly retraced – in no more than four lines – the legislative process that led to the adoption of a directive, the Court found that 'a historical interpretation does not supply additional factors capable of altering the conclusion'.[101] By contrast, Advocates General provide much more detailed historical analyses which, unlike in the case of a ruling, usually occupy a distinct section of their text. For instance, in one opinion, AG Pitruzella dedicated five paragraphs to a historical approach.[102]

Importantly, in another opinion, AG Saugmandsgaard went as far as placing the historical interpretation before the teleological one:

> [...] a dynamic or teleological interpretation is only possible where 'the text of the provision itself [is] open to different interpretations, presenting some degree of textual ambiguity and vagueness'. [...] However, that is not the case in this instance. As I explained above, literal and historic interpretations preclude any ambiguity as to the scope of the terms 'names and addresses' used in Article 8(2)(a) of Directive 2004/48.[103]

All in all, historical arguments do seem to count for Advocates General, in any case significantly more than for the Court's judges. And yet, as the Advocates General take history seriously, their transparent and even tentative discourse,[104] precisely because it is well-elaborated and rich in limpid arguments, inevitably exposes the fault lines and the limits of appealing to history. Indeed, some Advocates General seem to be aware and inform the public that identifying the legislature's original intent is risky, not only because it is difficult to do so, but also because it would freeze meaning in time. As remarked in the *Coman* opinion:

> It makes it impossible for the term 'spouse' to be definitively fixed and sealed off from developments in society. [...] This risk and the more general

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101 Case T-374/04 *Germany v Commission* EU:T:2007:332, para 99.

102 Case C-809/18 P *European Union Intellectual Property Office (EUIPO) v John Mills Ltd.* EU:C:2020:329 Opinion of AG Pitruzzella, paras 27-31.

103 Case C-264/19 *Constantin Film Verleih* EU:C:2020:261, Opinion of AG Saugmandsgaard Øe, paras 46-47, citing Case C-220/15 *Commission v. Germany* EU:C:2016:534, Opinion of AG Bobek, para 34.

104 In one opinion, the Advocate General did not hesitate to use these words: 'I tend to believe [...]'. See Case C-680/16 P *August Wolff and Remedia v. Commission* EU:C:2018:819, Opinion of AG Mengozzi, para 63.

> difficulty in determining the legislature's intention mean, moreover, that the historical interpretation is afforded a secondary role.[105]

Furthermore, certain Advocates General make no bones about the historical method being able to support divergent propositions. In *Coman and Others*, for example, Wathelet remarks that '[i]t therefore seems to me that no argument in AG favour of one theory rather than the other can be derived from the drafting history of the directive'.[106] Significantly, some Advocates General do not shy away from confronting the greatest difficulty of legal interpretation, namely the question of knowing how to decide when the various recognized methods lead the interpreter to contradictory results. The following paragraph is telling:

> If priority is given to a literal and historical interpretation of Article 2(a), second indent, it can be argued that only plans and programmes the adoption of which is compulsory by law require an environmental impact assessment. [...] However, if priority is given to a systematic and purposive interpretation of that provision, plans and programmes the adoption of which is voluntary but which are provided for in laws or regulations will also fall within the scope of the SEA Directive.[107]

One could read this text as an acknowledgment of the role played by the interpreter's choice. The fact that the Advocate General subsequently proceeded to cloak his choice in the language of necessity should not lead us to a different conclusion. Indeed, no further than three paragraphs following this inventory of methods, AG Campos Sánchez-Bordona appears self-assured and trenchantly settles the dilemma: '[s]ince the literal and historical interpretations are inconclusive, it is necessary to resort to a systematic and purposive interpretation'.[108] It is hard to see why two of the methods which previously seemed able to support a specific outcome and which, moreover, converged in their results, suddenly became 'inconclusive'.

To sum up, like with other interpretative methods of the ECJ, the historical approach also receives a paradoxical treatment. As an interpretative tool, it is

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105 Case C-673/16 *Coman and Others* EU:C:2018:2, Opinion of AG Wathelet, para 52.

106 Ibid.

107 Case C-24/19 *A and Others* EU:C:2020:143, Opinion of AG Campos Sánchez-Bordona, para 58.

108 Ibid, para 64.

not important (formally, in the Court's discourse), to the extent that the Court uses it rarely and when it does, it employs it rather hastily, in the form of a customary 'adornment'. Furthermore, it is not important (materially) insofar as, in the work of the Advocates General, the sophistication of the latter's discourse cannot conceal the fact that history constrains up to a certain point, beyond which it is the interpreter who gives meaning to, and assembles the various materials. Thus, perhaps against their will, the opinions of the Advocates General remind us once again that 'interpretation will inevitably (and indeterminably) emerge as conjectural on account of the unbridgeable distance between *interpretans* and *interpretandum*'.[109]

This section has shown the limited weight of interpretation techniques at the European Court of Justice. While always present, especially in the opinions of Advocates General, they do not constrain the official interpreters, be they the judges or the Advocates General, to such an extent as to eliminate discretion from the interpretative process. In brief, while relying on a different process, our analysis converges towards a theoretical conclusion along the lines of Gunnar Beck – that the Court's 'flexible interpretative approach frees it from almost any methodological constraints'.[110] One could thus hardly speak of one consistent interpretative methodology, but rather of a selective use of individual methodologies, often to the detriment of other equally possible methodological pathways.

IV. THE *PSPP* RULING AND ITS DISCONTENTS

> 'The local, the national, is fighting back, in law as in politics'[111]

One could say it was just a matter of time.[112] The *BVerfG* and other European constitutional courts had long been preparing their foreseeable – albeit partial and mostly hypothetical – contestation of the ECJ's hegemony by

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109 Legrand (n 32) 84.

110 Beck (n 19) 512.

111 Gareth Davies, 'Does the Court of Justice own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) 24 European Law Journal 359.

112 See Dieter Grimm, 'A Long Time Coming' (2020) 21 German Law Journal 944; Teresa Violante, 'Bring Back the Politics: The PSPP Ruling in Its Institutional Context' (2020) 21 German Law Journal 1045, 1048-1050.

rehearsing again and again their arguments on national and constitutional identity.[113] In particular, the *BVerfG* (an inspiration for other apex courts within the EU system) had proclaimed, as early as 1993, that it would reserve competence to review acts of EU institutions deemed *ultra vires*.[114] Its subsequent case-law reconfirmed this stance,[115] albeit with various degrees of forcefulness, but it had refrained from outright declaring an act of an EU institution *ultra vires*. This restraint ended with the *BVerfG*'s controversial decision of May 5, 2020 – the *PSPP* decision.[116]

Prior to *PSPP*, the Czech Constitutional Court[117] and the Danish Supreme Court[118] had declared two ECJ judgments *ultra vires*.[119] This, however, did little to mitigate the shock of the *BVerfG*'s decision in *PSPP*. Given the German court's position of an 'institutional leader among European constitutional courts',[120] the ruling raises 'questions of an existential nature

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113 For discussions on national identity and Article 4(2) TEU, see for instance, Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 167-168; Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 41(2) Brooklyn Journal of International Law 491.

114 *BVerfGE* 89, 155, October 12, 1993.

115 See the *Honeywell* decision*, BVerfGE*, 2 BvR 2661/06, 6 July 2010 and the *Lisbon* decision, *BVerfGE* 2BvE 2/08, 30 June 2009.

116 *BVerfG*, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 (*PSPP*).

117 Decision of the Czech Constitutional Court 012/01/31 - Pl. ÚS 5/12: *Slovak Pensions* (*CCC Landtovà*).

118 Supreme Court of Denmark, Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A* (*SCDK Ajos*).

119 For discussions on the context and impact of the *CCC Landtovà* and *SCDK Ajos* decisions, see Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS'(Verfassungsblog, 30 January 2021*)* <https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/> and respectively, Laurens Ankersmit, 'Primacy and the Czech Constitutional Court' (European Law Blog, 4 March 2012) <https://europeanlawblog.eu/2012/03/04/primacy-and-the-czech-constitutional-court/> accessed 20 July 2020.

120 Thomas Horsley, 'Karlsruhe Bites Back: The German Federal Constitutional Court's PSPP Judgment' (UK Constitutional Law Blog, 13 May 2020) <https://ukconstitutionallaw.org/2020/05/13/thomas-horsley-karlsruhe-bites-back-the-german-federal-constitutional-courts-pspp-judgment/> accessed 20 July 2020.

[...] concerning the balancing between the authority and primacy of EU law, and national competences and sovereignty beyond budget matters'.[121]

The crux of the *BVerfG*'s reasoning, leading it to declare with astounding virulence that the ECJ's decision in *Weiss*[122] was '*simply not comprehensible* so that, to this extent, the judgment was rendered *ultra vires*',[123] was its own understanding of the interpretative methodology that it alleged the ECJ should have applied.

The severe challenge raised by the *BVerfG* is all the more surprising since the ECJ's interpretative strategy in *Weiss* did not appear to be particularly problematic. Rather, the ECJ followed familiar paths, both in regard to the methods of interpretation discussed above,[124] as well as in its proportionality analysis.[125] For instance, as concerns the methods of interpretation, the ECJ performed a step-by-step teleological analysis in respect of the relevant EU provisions, discussing price stability and support for the general economic policies of the Union as some of the main objectives of the ECSB[126] and subsequently clarifying that the specific objectives of Decision 2015/774 contributed to these aims.[127] The ECJ then proceeded to perform a systemic

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121 Theodore Konstadinides, 'The German Constitutional Court's Decision on PSPP: Between Mental Gymnastics and Common Sense' (UK Constitutional Law Blog, 14 May 2020) <https://ukconstitutionallaw.org/2020/05/14/theodore-konstadinides-the-german-constitutional-courts-decision-on-pspp-between-mental-gymnastics-and-common-sense/> accessed 21 July 2020. See also, for instance, Justin Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment' (2020) 24 German Law Journal 1032.

122 Case C-493/17 *Weiss and Others* EU:C:2018:1000 (*Weiss*).

123 *PSPP* (n 5) para 116 (emphasis added).

124 *Weiss* (n 122) paras 50-60.

125 Ibid para 71ff. For a detailed analysis of the proportionality tests performed by the *BVerfG* and the ECJ, see Orlando Scarcello, 'Proportionality in the PSPP and Weiss Judgments: Comparing Two Conceptions of the Unity of Public Law' (2021) 13(1) European Journal of Legal Studies 45.

126 *Weiss* (n 122) para 51.

127 Ibid paras 54-57.

interpretation of the Treaty provisions in order to assess the correlation between economic and monetary policies.[128]

The *BVerfG*, in turn, after acknowledging that tensions inherent in the design of the Union 'must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual respect and understanding',[129] moved to a scathing analysis of the ECJ's methodology in *Weiss*, stating that

> the mandate conferred [to the ECJ] in Art. 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded.[130]

The *BVerfG* further linked the observance of what it deemed accepted canons of interpretation to democratic legitimation[131] and concluded that disregard of such canons represented an attack on Germany's constitutional identity, impinging on the principle of democracy.[132] The outcome is already notorious: a plethora of assertions displaying the breadth of the *BVerfG*'s disgruntlement with the ECJ's judgment – 'simply not comprehensible',[133] 'simply untenable',[134] 'objectively arbitrary',[135] 'not discernible'[136] – and leading it to conclude that 'if the EU crosses the limit set out above, its actions are no longer covered by the mandate conferred' and, 'at least in relation to Germany, [the ECJ's] decision then lacks the minimum of democratic legitimation necessary'.[137]

In light of our analysis of the ECJ's use of interpretative methods, what should one make of a judgment such as the *BVerfG*'s *PSPP* decision, which

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128 Ibid paras 60-66.
129 *PSPP* (n 5) para 111.
130 Ibid para 112.
131 Ibid para 113.
132 Ibid para 115.
133 Ibid paras 112, 116.
134 Ibid para 117.
135 Ibid para 113.
136 Ibid para 153.
137 Ibid para 113.

resorts to the language of 'methodological deficits' to describe the ECJ's approach?

In general, as Urška Šadl remarks, courts in the European Union had 'seemed to practice mutual recognition and respect of their court-like-ness',[138] which supposed that they would not interfere with each other's methodology, that is with their choices as regards the suitable interpretative techniques in a given case. Yet the *BVerfG*'s judgment did exactly that: it 'contest[ed] [the] "methodological autonomy" of the ECJ'.[139] If we are determined to read this 'methodological critique' as 'a mark for the profound dislike of the outcome of the balancing test', there is little else one could add.[140] However, assuming that the German Court's verdict is sincere, we can further ask if such a claim is sensible enough given the inherent limits of the various methods of interpretation in general and their operation in the ECJ's practice in particular.

The *BVerfG*'s decision to forego its previously restrained attitude and act in full defiance of the ECJ emphasizes the German court's demand for more rigour in the use of traditional methods of interpretation and gives voice to what had been hitherto a mostly silent discontent with the ECJ's style of judicial reasoning. At the end of her paper, Šadl hypothesizes that 'the judgment of the [Federal Constitutional Court] is a desperate cry for more methodological integrity' and contends that 'if it is, we should be willing to

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138 Urška Šadl, 'When is a Court a Court?' (Verfassungsblog, 20 May 2020) <https://verfassungsblog.de/when-is-a-court-a-court/> accessed 20 May 2020.

139 Davor Petric, '"Methodological Solange" or the spirit of PSPP' (European Law Blog, 18 June 2020) <https://europeanlawblog.eu/2020/06/18/methodological-solange-or-the-spirit-of-pspp/> accessed 19 June 2020, citing Francisco de Abreu Duarte and Miguel Mota Delgado, 'It's the Autonomy (Again, Again and Again), Stupid!' (Verfassungsblog, 6 June 2020) <https://verfassungsblog.de/its-the-autonomy-again-again-and-again-stupid/> accessed 30 November 2021.

140 Daniel Sarmiento, 'An Infringement Action against Germany after its Constitutional Court's ruling in Weiss? The Long Term and the Short Term' (EU Law Live, 12 May 2020) <https://eulawlive.com/op-ed-an-infringement-action-against-germany-after-its-constitutional-courts-ruling-in-weiss-the-long-term-and-the-short-term-by-daniel-sarmiento/> accessed 20 May 2020.

go along with the argument'.[141] We cannot help but wonder what 'more methodological integrity' would entail.

In fact, the *BVerfG*'s rebellion brings starkly to the foreground the debate regarding the significance of traditional interpretative methods as universally shared instruments that judges employ. As our analysis has sought to show, a reading of the ECJ's case-law through the lens of the classic methods of interpretation can only provide an incomplete picture of the Court's reasoning. While the decisions formally invoke them, none of the methods is, in and of itself, so constraining as to impose an inescapable outcome in each case. On the contrary, the ECJ's reasoning often appears to be informed by other determinant considerations that contribute to constructing its position within the EU order and its use of the interpretative techniques is quite lax. In this context, apart from endangering the foundational principle of primacy of EU law, the purported 'invalidation' of the ECJ's decision in *Weiss* is criticisable because it places too much weight on the formal interpretative methods, given that they carry in fact little force *in general*. As we have shown, formal interpretative methods play a fairly weak role for the ECJ and in fact, we argue this might hold true for other courts, as reaching complete methodological integrity and purity might prove an unattainable ideal. Therefore, to use methodological canons as the main standard of accountability would mean to pay heed, at a theoretical level, to an excessive formalism whose radical implication is that *any* decision is potentially reversible on methodological grounds. Indeed, who could stop the ECJ, in turn, to declare the *PSPP* judgement incomprehensible or methodologically flawed? On a more practical level, it would mean that the German court took the decision to depart from its previous stance according to which it will not, as a principle, challenge the interpretation of the ECJ when it does not agree with it.[142] By this distancing act, the Court would in fact unilaterally and

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141 Ibid.

142 See *PSPP* (n 5) para 112. For a related comment on the standards of review applied by the German Constitutional Court, see Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 979.

secretly negotiate a new programme of integration,[143] one in which, contrary to the text of the Treaties, methodology occupies centre stage.

This argument is not to be understood as meaning that courts should not or cannot be held accountable either *legally*, i.e. by other courts, or *politically*, i.e. by society at large. In fact, in a clear hierarchical system, legal accountability is essentially ensured through the existence of various jurisdictional levels in the system. Accountability derives from the inherent authority embedded in a functional, socially recognized, legal system. Courts hold other courts methodologically accountable every day, but this is only possible in a legal order with strict, undisputed, hierarchies of the kind the European Union does not currently possess.

Until such structures are designed at EU level (if ever), methodological challenges like the *BVerfG*'s are bound to weaken the ECJ's position at the core of the EU's legal order. While controversial, the *PSPP* decision might signal the end of the national constitutional courts' disenfranchised posture in relation to the interpretation of EU law. Already with the mounting constitutional identity case-law of national courts and with the defiant *CCC Landtovà* and *SCDK Ajos* judgments, this idea became gradually discernible.[144] With the *PSPP* decision, the message has been spelled out loud and clear: national constitutional courts are stepping right into the conversation, laying a claim to the meaning and methodology of EU law, with only a mere (irreverent) nod towards the ECJ's powers.

V. Conclusion

In his examination of the controversial Karlsruhe *PSPP* decision, Karsten Schneider asserts that 'the problem with methodologically reconstructing some judgement is not that there would be no "true methodology" at all, though some might raise this quarrel'.[145] Our paper was precisely meant to raise this quarrel. As such, it makes a different claim from those criticizing

143 Karsten Schneider, 'Gauging "Ultra-Vires": The Good Parts' (2020) 21 German Law Journal 978.

144 Decision of the Czech Constitutional Court 012/01/31 - Pl. ÚS 5/12: *Slovak Pensions* (*CCC Landtovà*); Supreme Court of Denmark, Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A* (*SCDK Ajos*).

145 Ibid.

the *BVerfG's* judgment on economic,[146] philosophical,[147] political,[148] legal-doctrinal,[149] or ideological[150] grounds.

While most courts certainly manage to keep intact, at least in the eyes of lay people, the appearances of neutrality and universality, our paper sought to show that upon closer scrutiny, judicial methodology at the ECJ (or perhaps at any court) conceals important nuances and a significant degree of discretion. Importantly, we arrived at this conclusion by way of examining the ECJ's bifurcated scheme of adjudication. Thus, both the opinions of Advocates General, through their complex, dialogical arguments, but also the Court's judgments, in their impersonal, often magisterial style, expose the limitations of the traditional interpretative methods. Our contribution revealed that in fact, for the ECJ the classic methods of interpretation are not as constraining as might appear at first glance. Rather, they represent inherited language which speaks and appeals to judges across countries, precisely by virtue of tradition, while their individual bearing on the outcome of the judicial process will vary greatly.

The ECJ has frequently been accused of opaque legal reasoning and many commentators have called for better judicial justifications.[151] However, we believe it is legitimate to ask what exactly is to be understood by this 'greater demand for justification'.[152] Against the background of our investigation, we claim that better justification cannot mean (only) better *methodological* justification simply because, as shown above, methods are too open-ended to

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146 Mathias Goldmann, 'The European Economic Constitution after the PSPP Judgment: Towards Integrative Liberalism?' (2020) 21 German Law Journal 1058.

147 Justin Lidenboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment' (2020) 21 German Law Journal 1032.

148 Violante (n 112); Grimm (n 112).

149 Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 German Law Journal 1090–1103.

150 Ibid.

151 For instance, Sharpston (n 52); Vlad Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 Virginia Journal of International Law 308; Davies (n 111).

152 Sarmiento (n 140).

allow for the establishment of an interpretative meta-standard to which all judges could reasonably be held. To pursue methodological perfection, and to do so at the expense of a political project impacting the concrete lives of hundreds of millions of people, means nothing more than to engage in a futile exercise in linguistic and conceptual impossibility.

We have confined our paper to an analysis of the constraints imposed by the ECJ's methods of interpretation and we have sought to contextualize a major judgement in light of these methods. As such, we did not intend to respond to those commentators who plead for a change in the Court's reasoning style, nor did we seek to devise a normative scheme for what the Court's reasoning should look like. If adjudicative improvement were nonetheless envisaged, and if there is some lesson to be drawn from our paper in this respect, it is that reform will probably not lie in methodology. It has been argued that adjudicative improvement might come with enhanced *substantive* justification – what Vlad Perju referred to as the 'discursive turn'.[153] While this is not the place to assess this normative claim, we can speculate that by espousing a 'justification model of authority', one that is more transparent and less formalistic than the judicial paradigm currently in place, the Court could manage to 'reposition itself with respect to the European public and engage it in a relationship that will enhance the citizenry's sense of shared political identity'.[154] However, the argument for 'more transparency' is not unproblematic either. For one thing, such demands for increased substantive justification risk opening the gate for the contestation of each and every decision in an already fragile context: 'every single policy of the EU is contested somewhere in the EU, and often from contradictory positions at the same time'.[155] On the other hand, the strand of literature dealing with constitutional pluralism would rebut such worries by claiming that contestation is actually a good thing.[156] Again, our purpose here was not to

153 Perju (n 151) 329.

154 Ibid.

155 Floris de Witte, *re:generation Europe* (Palgrave Macmillan 2019) 78.

156 See for instance Davies (n 111); Matej Avbelj, 'Constitutional Pluralism and Authoritarianism' (2020) 21 German Law Journal 1023; Niels Petersen, 'The Concept of Legal and Constitutional Pluralism' in Joachim Englisch (ed), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (IBFD 2016) 1-23; Niels Petersen, 'Karlsruhe's Lochner Moment? A Rational

take sides in this otherwise valuable debate, but to simply present how methodology operates in practice. On the basis of our investigation, we believe it is fair to suggest that when one engages in fictitious methodological quarrels, one speaks less about the law and its underlying social tensions than about the interpreter's power of imagination.

This is not to say that methodological talk should be banished either from the language of courts or from doctrinal work. But it can certainly be de-emphasized. Ultimately, that courts like the *BVerfG* should call upon other courts to equip themselves with more methodological scaffolding should certainly not prevent us scholars from denouncing this as a call to impossibility. That is because no court may offer an objectively 'true' methodology, but merely its own, *preferred* method, in a particular context in which its discretion remains largely unfettered.

Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU After the PSPP Decision' (2020) 21 German Law Journal 995.