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JUDICIAL ACTIVISM: A TOOL TO ENSURE THE EFFECTIVENESS OF EU LAW OR AN IMPROPER BEHAVIOR OF THE COURT OF JUSTICE OF THE EUROPEAN UNION?

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List of abbreviations:

EU	European Union
CJEU	Court of Justice of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European
AG	Advocate General
CFREU	Charter of Fundamental Rights of the European Union
ASJP	Associação Sindical de Juízes Portugueses
USA	United States of America
Bverfg	German Constitutional Court

CHAPTER 1

INTRODUCTION

1. Background

EU Law has been gradually constructed in a joint effort between the different European institutions. In this context, the CJEU has been vital in constructing and deepening the European project by developing new case law for more than 60 years.

Through its jurisprudence, the Court of Justice has over the years ensured the unity and coherence of the EU through the application of what Vauchez called the "magic triangle" of EU law¹: direct effect, the supremacy of EU law, and the preliminary ruling system outlined in Article 267 TFEU². This process was described by Weiler as "integration-through law"³, while Vauchez termed this phenomenon as "Europeanization-through-case-law".⁴

In this regard, the Court of Justice has played a major role in the development of the European Union since its landmark decisions *Van Gend en Loos* and *Costa v Enel* in the 1960s⁵, by creating the principles of Direct Effect and primacy of EU law.⁶ Sixty years after these rulings, the role of the CJEU within the European integration project covers all fields of EU law, having gradually extended to new "territories". For instance, the case law related to the internal market's functioning was essential for its development in the 1970s and 1980s⁷, and the *Le Verts* and *Chernobyl* rulings continued the process of constitutionalizing EU law that began in the 1960s.⁸ Another significant step was made in the 1990s with the recognition of a general principle of state liability for compliance with EU law.⁹ At the turn of the century, the CJEU developed the rights of non-economic

¹Antoine Vauchez, *Integration-through-Law: Contribution to a Socio-history of EU Political Commonsense* (Federal Reserve Bank of St Louis 2008) 8.

²Ibid.

³Mauro Cappelletti, Monica Seccombe and Joseph H. H. Weiler, 'Integration Through Law: Europe and the American Federal Experience. A General Introduction' in Cappelletti Mauro, Seccombe Monica and H. Weiler Joseph (eds), *Book 1 A Political, Legal and Economic Overview* (De Gruyter 1986) 8 <<https://doi.org/10.1515/9783110921540.3>> accessed 2023-01-14 ibid.

⁴Vauchez (n 1).

⁵Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1 and Case 6-64 *Costa v Enel* ECLI:EU:C:1964:66.

⁶Miguel Poiares Maduro and Loïc Azoulay, *The past and future of EU law : the classics of EU law revisited on the 50th anniversary of the Rome Treaty* (Hart 2010).

⁷Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* ECLI:EU:C:1974:82 ; Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. ECLI:EU:C:1979:42.

⁸Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* ECLI:EU:C:1986:166.

⁹Joined cases C-6/90 and C-9/90. *Andrea Francovich and Danila Bonifaci and others v Italian Republic*. ECLI:EU:C:1991:428.

actors, clarifying the rights and obligations within the framework of the free movement of persons,¹⁰ and promoted the defence of fundamental rights in the EU.¹¹ More recently, in the context of the rule of law crisis in Hungary and Poland, the CJEU has notably stimulated EU values by providing the necessary basis for an increasing number of preliminary references under Article 267 TFEU and infringement proceedings in accordance with Article 258 TFEU.¹²

Predictably this active stance has drawn criticism throughout the years, leading to accusations of judicial activism against the judges in Luxembourg¹³. While it is undeniable that claims of activism have been made since the 1960s, they became more serious and frequent in the 1980s and 1990s. These accusations were made from the beginning by politicians, namely Margaret Thatcher who stated that “some things at the Court are very much to our distaste”¹⁴, or, more recently by former German President Roman Herzog, who criticised the work of the CJEU.¹⁵ On the academic level, Hjalte Rasmussen's now eminent book *On Law and Policy in the European Court of Justice* marked the beginning of hostilities against the CJEU¹⁶, having been followed by many other books on the subject.¹⁷

In the realm of the national judiciary realm, Dieter Grimm, a former judge of the German Constitutional Court, stated that the characteristics of a covert “coup d'état” were present in the case law concerning direct effect and primacy.¹⁸

¹⁰Case C-85/96 *María Martínez Sala v Freistaat Bayern*. ECLI:EU:C:1998:217 ; Case C-184/99. *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*. ECLI:EU:C:2001:458 ; Case C-138/02. *Brian Francis Collins v Secretary of State for Work and Pensions*. ECLI:EU:C:2004:172 ; Case C-34/09. *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*. ECLI:EU:C:2011:124

¹¹Antonio Tizzano, ‘The Role of the ECJ in the Protection of Fundamental Rights’ in *Continuity and Change in EU Law : Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008)

¹²Rita Sineiro Andrade Aroso Duarte, ‘O papel do TJUE na salvaguarda do Estado de Direito no âmbito da União Europeia: o verdadeiro guardião dos valores da União?’ (2022)

¹³T Hartley, ‘The European Court, judicial objectivity and the constitution of the EU’ 112 *Law Quarterly Review*.

¹⁴46 *PARL. DEB., H.L. (5th ser.)* 560 (UK) (1993).

¹⁵Roman Herzog and Lüder Gerken, ‘Stop the European Court of Justice’ (Freiburg, Centrum für Europäische Politik, 2008).

¹⁶Hjalte Rasmussen, *On law and policy in the European Court of Justice : a comparative study in judicial policymaking* (Martinus Nijhoff/Dr W. Junk Publishers 1986).

¹⁷Joseph HH Weiler, ‘The Court of Justice on trial—A review of Hjalte Rasmussen: On law and policy in the European Court of Justice’ 24 *Common Market Law Review* Anthony Arnall, ‘The European Court and judicial objectivity: a reply to Professor Hartley’ 112 *Law Quarterly Review* 411 Mauro Cappelletti, ‘Is the European Court of Justice “running wild”?’ *European Law Review* 311.

¹⁸Carl Baudenbacher, *Judicial Independence : Memoirs of a European Judge* (Springer 2019).

In this regard, the Court has already been accused of almost everything, including allegedly supporting the more powerful Member States,¹⁹ promoting a neo-liberal agenda²⁰, and even implementing its own policy.²¹ In this sense, while critics such as Rasmussen contended that the Court ignored the Treaties' wording, disregarding the intentions of the "Founding Fathers"²², authors such as Hartley or Neill accused the CJEU of pursuing a federalist agenda.²³

These criticisms share the common view that judicial activism is an incorrect conduct of the judiciary that devaluates judicial power because of the alleged anti-democratic nature of activism. However, the CJEU's case law shows that this is not the case. The active posture of the Court of Justice over its 70 years of existence has been synonymous with the development of social protection in the EU, the development of human rights, and the protection of the rule of law. Therefore, throughout this thesis, I will try to define the concept of judicial activism and frame it in the context of CJEU.

2. Research Question

In view of the above, the primary research question in this thesis is:

To what extent can the Court of Justice of the European Union case law be considered judicially activist?

The research question will be answered pursuant to the following sub-questions:

1. What role does the CJEU play in the European integration project and how does it influence the perception of the CJEU's judicial activist nature?
2. To what extent does the CJEU's legal reasoning in its case-law motivate accusations of judicial activism?

¹⁹Pavel Belchev, *Is the Court of Justice of the European Union a mere instrument in the hands of member states* (2013).

²⁰Clemens Kaupa, 'Maybe not Activist enough? : on the Court's Alleged Neoliberal Bias in its Recent Labor Cases' Judicial activism at the European Court of Justice.

²¹Hartley (n 13).

²²Rasmussen (n 16).

²³Patrick Neill and Forum European Policy, *The European Court of Justice : a case study in judicial activism* (European Policy Forum 1995).

3. Can judicial activism be a form of protection of legality and how has CJEU's recent jurisprudence contributed to the defence of the rule of law in the EU?
4. What new developments have occurred because of the Portuguese Judges' case, and how these innovations can be interpreted as acts of judicial activism?

3. Methodology

Doctrinal legal research is the primary research methodology employed in the thesis. It is important to offer information on this controversial topic to determine if the criticism of the CJEU's judicial activism is justified.

To establish a legal foundation for the problem, the research will be carried out by collecting a wide variety of original literature related to the subject. The primary sources of law, which include pertinent EU Treaties, EU Secondary Legislation, and CJEU case law, will be analysed. Additionally, to support the assessment of the general thesis, secondary sources including doctrines, academic sources, and legal reviews will also be used.

Chapter 2 is based on theoretical research. The primary objective is to examine the philosophical and historical foundations of judicial activism to understand how each's particular view about the concept of law and the role of a court, in this case, the CJEU, affects how activism is perceived. This research illustrates why some critics perceive the role of the CJEU as being illegitimate and why its interpretation techniques can be seen as "activist".

The main type of research used in Chapter 3 is conceptual legal research. The goal is to first examine the difficulties in defining the concept of judicial activism before examining the various definitions of the term that are already in use. To illustrate this difficulty my main reference is articles published both in the USA and Europe as well as the case law of the CJEU.

Finally, in Chapter 4 I will make a case research methodology. I will analyse the Portuguese Judges Case of the CJEU to estimate its relevance in the ongoing rule of law crisis. In this chapter, I am going to review this case, using the lessons learned from the second and third chapters to scrutinise the legal reasoning of the Court of Justice.

4. Thesis Structure

In Chapter 2, I will analyse the philosophical and historical roots of judicial activism, focusing on the intersection of the formalist perspective of the law with the idea of activism, framing the legal reasoning of the CJEU in this discussion. After that I will identify the legal and institutional limits to the performance of the CJEU, perceiving the limits of judicial interpretation.

In Chapter 3 I will use the lessons learned in Chapter 2 to frame the different definitions of judicial activism in the context of the CJEU. For that, I will "travel" to the USA to assess whether the extensive conceptualization of the notion of judicial activism in the American context can be framed in the work of the CJEU.

Chapter 4's primary source is the Portuguese Judges case²⁴. In this way, I will show that the CJEU's interpretation is both original and well-supported by strong legal reasoning. I will evaluate the legal rationale used by the CJEU in this case and pinpoint the components that may be regarded as "activists" to show how a dynamic reading of the Treaties might protect the rule of law and legality in the EU legal system.

²⁴Case C-64/16. *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117

CHAPTER 2

The Origin of the Accusations of Judicial Activism in the CJEU

1. Introduction:

In this chapter, I will begin by analysing the philosophical and historical roots of judicial activism, focusing on the intersection of the formalist perspective of law with the idea of activism.

As a starting point, it should be noted that the majority of analysts and observers, both in the USA, where the phrase was first used, and in Europe, view judicial activism as inappropriate behaviour.²⁵ Anthony Arnall, for example, underlines that “judicial activism is, in principle, widely disapproved in the Member States”²⁶. He emphasizes that this disapproval is the result on the one hand of the inconsistency of judicial activism “with Montesquieu's famous description”²⁷, which influenced the countries of civil law, and on the other, a consequence of the conflict between the concept of judicial activism with the “idea of majoritarian democracy and the traditional reluctance of courts to interfere with the will of parliament”, in the Nordic Countries.²⁸

Nevertheless, and despite the undeniable popularity of the term the notion of judicial activism is still utterly vague. In this sense, as Arnall’ underlines, the term judicial activism is “far too indeterminate to provide a useful prism through which to view the Court's case law”.²⁹ This uncertainty stems from the fact that our perspective on the concept of judicial activism is influenced by the understanding of what is the law and the role of the judiciary. If we consider that the judiciary should be just the “mouthpiece of the law”, the definition of judicial activism is simple: any action taken by a judge beyond the letter of the law constitutes inadmissible activist behaviour. However, the meaning of judicial activism will be more difficult to explain if we believe that the judiciary should have a broader goal, one that goes beyond straightforward textual interpretation. For this reason, before defining the term judicial activism in Chapter 3, I will first analyse the evolution of the role of the judiciary and how the ideological struggle concerning the

²⁵Keenan D Kmiec, ‘The origin and current meanings of’ judicial activism” 92 California Law Review 1441.

²⁶Anthony Arnall, ‘Judicial activism and the European Court of Justice: how should academics respond?’ in *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing, 2013) 215.

²⁷Ibid.

²⁸Ibid.

²⁹Ibid, 230.

functions, powers, and limits of the judiciary power condition the discussion on judicial activism, especially in the case of CJEU. I will look at the origins of the accusations of judicial activism, the role of the Court of Justice, and how the relationship between the different approaches to judicial interpretation influences the notion of activism. The starting point in this regard will be the work of Montesquieu.

2. Montesquieu's fault?

As a first step, it is necessary to acknowledge that the notions of judicial activism and legal interpretation are poorly understood. As Orest Pollicino points out, there is a conviction in the academic discussion that there is a clear distinction “between legal interpretation and judicial activism”³⁰. Again, in the words of Pollicino, the “judicial function involves *per se* not only the interpretation of law but also its creation”³¹. For this reason, the difference between legal interpretation and judicial law-making can be in many cases tenuous.

In this regard, former Advocate General Poiares Maduro underlines that the debate concerning “legal interpretation often assumes a broader dimension linked to the proper role of courts in a democratic society”³². This idea emphasised by Poiares Maduro explains two fundamental notions: first, our perception of judicial activism is influenced by our understanding of what is law. Secondly, this assessment will also affect our perception of the role of the judge and the courts, influencing our opinion about activism. Therefore, it is not surprising that the function of judges is considered a “battleground for opposing ideologies concerning the functions, powers, and limits of the judiciary”.³³

The book *The Spirit of Law* by the French philosopher Montesquieu is perhaps the work that has had the largest impact on this "battlefield". The well-known phrase, "*Les judges ne sont que la bouche qui prononce les paroles de la loi*"³⁴, continues to be one of the most significant insights concerning the judiciary's function today. The legacy of

³⁰Oreste Pollicino, 'Legal reasoning of the court of justice in the context of the principle of equality between judicial activism and self-restraint' 5 German Law Journal 283, 285.

³¹Ibid.

³²Luis Miguel Poiares Pessoa Maduro, 'Interpreting European law: judicial adjudication in a context of constitutional pluralism' European Journal of Legal Studies, 2.

³³Pollicino (n 30) 283.

³⁴Charles de Secondat baron de Montesquieu, *Esprit des lois*, vol 1 (Firmin Didot frères, fils et cie 1872) 134.

Montesquieu continues to foster the notion of the judge as a "phonograph" that repeats "exactly what the law had definitely declared," as Richard Posner suggests.³⁵

Following this formalistic approach, a judge can categorise a case's outcome as "being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect"³⁶. In other words, the task of the judiciary is reduced to nothing more than the projection of the legal norm.

The constitutional power of the 19th century is a mirror of this thought, based on a clear division of powers between the three branches of the State, where the judge did not have the authority to make any material additions or modifications of any kind in the moment of the ruling. If the right answer to any case can be found in the law, the notion of activism makes no sense, given the inexistence of judicial discretion within this model. Otherwise, the judges would start to make law and no longer interpret it, violating the principle of separation of powers.³⁷

However, it is undeniable that this approach does not reflect the "open texture and indeterminacy" of law as we understand it today, as Maduro underscores.³⁸ In this sense, this formalistic vision lost force because of the social transformations in several countries seen in the first half of the 20th century, giving space to other elements of legal interpretation.³⁹

This reform was necessary as a result of a change in how the State was conceptualised, which gave governments a greater responsibility to defend the rights and interests of their citizens. This turn contributed to a paradigmatic transformation, creating fluctuations in the constitutional order and the judiciary, handing the judicial power the challenging task of concretizing that protection.⁴⁰ As a consequence, the rule of law expanded into

³⁵Richard A Posner, *The federal courts: Challenge and reform* (Harvard University Press 1999), 307.

³⁶Richard A Posner, 'Legal formalism, legal realism, and the interpretation of statutes and the constitution' 37 Case W Res L Rev 179, 181.

³⁷Andrei Koerner, 'Ativismo Judicial?: Jurisprudência constitucional e política no STF pós-88' Novos estudos CEBRAP 69.

³⁸Luis Miguel Poiars Pessoa Maduro, *We the court: The European Court of Justice and the European economic constitution* (Bloomsbury Publishing 1998) 16.

³⁹Pollicino (n 30).

⁴⁰Ibid.

traditionally unfamiliar domains, pushing for alterations in legal reasoning.⁴¹ This extension increased state regulation frequently focused on the application of unclear principles and conceptions.⁴² That is, the law became more indeterminate, and more open, demanding a different interpretative effort.⁴³

In this context, several different approaches appeared, notably the methodologies of Hans Kelsen and HLA Hart. The first author argues that judicial interpretation gives space for different understandings since Kelsen's legal interpretation theory rejects the purely cognitive exercise advocated by the formalist school.⁴⁴ HLA Hart stands in the middle of these two theories, accepting the idea of "judicial discretion" only in so-called areas of "penumbra"⁴⁵. Outside of these areas, the judge barely had room for manoeuvre.

Naturally, this is not the place to support or deny any of these theses. However, it is crucial to realise that even though the era of legal formalism has passed, this positivist perspective continues to have a significant impact on how we view the role of judges, as evidenced by the extreme reluctance to accept interpretations that go beyond the letter of the law. As Maduro explains the theories of interpretation that highlight the support for textualism are "theories that articulate a vision of judicial deference and a conception of courts as simple carriers of the legislative will"⁴⁶. Of course, in these courts, there is no room for judicial discretion or "any autonomous set of normative preferences or value choices".⁴⁷ Formalism and its obsession with textualism continue to influence hugely how we view the work of judges, which are frequently still seen as a "phonograph".⁴⁸ As Bengoetxea, states the debate in legal theory historically "was dominated by the contrast between natural law, legal realism, legal positivism, and issues of interpretation were secondary".⁴⁹

⁴¹Poiãres Pessoa Maduro (n 32).

⁴²Edward L Rubin, 'Law and legislation in the administrative state' 89 Colum L Rev 369.

⁴³Pollicino (n 30).

⁴⁴Hans Kelsen, *Pure theory of law* (Univ of California Press 1967)

⁴⁵Herbert Lionel Adolphus Hart, 'Positivism and the Separation of Law and Morals' in *Law and Morality* (Routledge 2017) 607.

⁴⁶Poiãres Pessoa Maduro (n 32) 5.

⁴⁷*Ibid.*

⁴⁸Posner, *The federal courts: Challenge and reform* (n 35).

⁴⁹Joxerramon Bengoetxea, 'Text and Telos in the European Court of Justice-Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012) 486 p., ISBN 9781849463232-Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 344 p., ISBN 9781107001398-Elina Paunio, *Legal Certainty in Multilingual EU Law* (Ashgate 2013) 234 p., ISBN 9781409438618-Suvi Sankari, *European Court of Justice Legal Reasoning in*

Because of this, there is still a tendency to think of courts as little more than enforcers of the written law. Therefore, it is essential to understand the CJEU's organizational structure and the process by which the Court of Justice interprets EU law, as well as the degree of judicial discretion that the judges in Luxembourg enjoy.

3. The Court of Justice: a dispute settler?

As Koen Lenaerts, the President of the CJEU, and José A. Gutiérrez-Fons explain, the discussion about judicial activism is useless without first discussing what the role of the CJEU should be.⁵⁰

In this regard, Fuad Zarbiyev identifies two models⁵¹: the first one, where the judges are seen only as “dispute settlers”⁵²; and the second one, where judges have “the ability and powers to give meaning to public values of the community within which they operate”.⁵³ Of course, the first model reflects the formalist view of the law, while the second is closer to the theories of Kelsen and Hart.

The CJEU resembles the second model significantly more than the first. The Court of Justice was created, as is well known, in the years immediately following World War II, a time when the judiciary in Europe underwent significant changes. As Koen Lenaerts and Gutiérrez-Fons note, the CJEU's limited role as “*bouche de la loi*” or as dispute settler is incompatible “with the mission with which the authors of the Treaties entrusted” the Court of Justice, specifically regarding the interpretation and application of the Treaties.⁵⁴ As the same authors claim, the Member States’ constitutional courts would not have accepted a “formalist interpretation” at the time of the creation of the Court of Justice⁵⁵.

Context (Europa Law Publishing 2013) 275 p., ISBN 9789089521170: Four Recent Takes on the Legal Reasoning of the ECJ’ 11 European Constitutional Law Review 184, 214., 11(1), 184-216.

⁵⁰Koen Lenaerts and José A Gutiérrez-Fons, ‘To say what the law of the EU is: methods of interpretation and the European Court of Justice’ 20 Colum J Eur L 3, 28.

⁵¹Fuad Zarbiyev, ‘Judicial activism in international law—a conceptual Framework for analysis’ 3 Journal of International Dispute Settlement 247.

⁵²Martin Shapiro, *Courts: a comparative and political analysis* (University of Chicago Press 2013)

⁵³Owen M Fiss, ‘Foreword: The forms of justice’ 93 Harv L Rev 1.

⁵⁴Lenaerts and Gutiérrez-Fons (n 50).

⁵⁵*Ibid.*

In this sense, Andreas Grimmel underlines that the CJEU “was never thought to be a panel of judges merely dependent on the goodwill of its contracting parties”⁵⁶. The CJEU stands out from other international courts due to its superior arsenal of “procedural weapons” and its broader range of powers. As an illustration, no international treaty has ever created a system of direct collaboration with national courts, as it did with the system of Article 267 TFEU (Preliminary Ruling) or granted private citizens the power to launch judicial actions.

As stated by Weatherill, the CJEU's role through its jurisprudence is to “breathe life into the Treaty”.⁵⁷ In this regard, using the expression devised by Owen Fiss, the ability of the CJEU “to give meaning to the public values of the community” where the Court of Justice operates is clear⁵⁸. For instance, the creation of the so-called mandatory requirements to complement Article 36 TFEU is a perfect example of this, where the CJEU by creating this judge-made concept reflected important policy concerns that were relevant or prominent when the Treaty of Rome was drafted, showing a concern to give meaning to the public values of the community by addressing local issues in different Member State, or by solidifying important public interests for the entire EU, such as environmental concerns or consumer interests.⁵⁹ This concern is evident in other areas. In *Nold v. Commission* stated that fundamental human rights are an essential component of the general principles of EU law and in the *Defrenne* ruling⁶⁰, regarding equal pay for men and women, the CJEU laid down the “foundations for the future development of EC sex equality law”.⁶¹

In this sense, the functions conferred by the Treaties on the CJEU far exceed the function of an ordinary “dispute settler”. The mandate to ensure the interpretation and application of EU law under Article 19 TEU extends from the preliminary reference system (Article

⁵⁶Andreas Grimmel, “This is not life as it is lived here’: the European Court of Justice and the myth of judicial activism in the foundational period of integration through law’ 7 European journal of legal studies 61, 15.

⁵⁷Stephen Weatherill, *Law and integration in the European Union* (Oxford University Press, USA 1995) 185.

⁵⁸Fiss (n 53).

⁵⁹Case 302/86. *Commission of the European Communities v Kingdom of Denmark*. ECLI:EU:C:1988:421; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* ECLI:EU:C:1995:224. For more information; Catherine Barnard, *The substantive law of the EU: the four freedoms* (Oxford university press 2022).

⁶⁰Case 43/75. *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*. ECLI:EU:C:1976:56.

⁶¹Nicole Busby, ‘Social Policy: Case 43/75 Defrenne v Societe Anonyme Belge de Navigation Aerienne (SABENA)’, 51.

267 TFEU) to the infringement actions (Articles 258 and 259 TFEU) to other functions performed by the Court. The dynamics of Article 267 TFEU which are based on cooperation and dialogue between courts prove that the work of the CJEU far transcends the dispute between the parties. In this sense, as Poiares Maduro mentions, Article 267 TFEU requires that the Court of Justice “must also state the law” providing a “thicker normative understanding of the law beyond the decision in the case of hand”.⁶² This need is explained by the expanded role of the CJEU under the preliminary ruling procedure where the Court of Justice provides national courts with guidance on how to interpret and implement EU law in a specific case, offering at the same time a wider legalistic lesson for future cases.⁶³

This development demonstrates that the CJEU is a court that responds to the demands imposed by the dynamics of European law and proves that it is more than just the law's mouthpiece. This is one of the reasons that a minimalist approach to the judicial role is difficult to fit with a legal order such as the EU.⁶⁴ The other reason is the particularities of European legislation, which force a legal interpretation more grounded in teleology than textualism. The section that follows will explain this.

4. How does the CJEU interpret EU law?

In contrast to what one might expect, there is a closer connection between judicial activism and judicial interpretation. As Oreste Pollicino states, while judicial interpretation is considered a “legitimate expression of judicial function”⁶⁵, judicial activism is seen as a degeneration of the judiciary involving:

“A judge's arbitrary intrusion into the political arena by giving priority to values other than legal ones, such as, in the case of the ECJ, supporting the process of European integration”.⁶⁶

The problem with this strict distinction between judicial activism and judicial interpretation is that the latter can either be less active (self-restraint) and rely on conventional interpretative elements, such as the literal element or the historical

⁶²Poiares Pessoa Maduro (n 32), 9.

⁶³Ibid.

⁶⁴Ibid.

⁶⁵Pollicino (n 30), 285.

⁶⁶Ibid, 286.

interpretation, or can depend on more dynamic interpretative components, such as teleological, systematic, and contextual elements.⁶⁷ In other words, by actively interpreting the law, the CJEU can be activist without disregarding the letter of the law. For this reason, as Poiares Maduro underlines, “some perceive teleological interpretation as a source of judicial activism”.⁶⁸ Teleological interpretation in EU law is not limited to alluding to an interpretation of the applicable legal rules in a specific case, as Poiares Maduro notes.⁶⁹ The former AG argues that the CJEU adopts a "meta-teleological" approach in this regard, which alludes to a particular systemic vision of the EU legal system that shapes how all of its legislation is interpreted.⁷⁰

Therefore, understanding how the CJEU interprets the Treaties, and the EU secondary legislation is essential.⁷¹ Article 19 TEU is clear: the Court of Justice “shall ensure that in the interpretation and application of the Treaties, the law is observed”.⁷² The Treaties are explicit concerning the CJEU’s mission. However, they do not specify how EU law shall be interpreted, and arguably therefore, given its responsibilities under Article 19 TEU, the Court of Justice was free to choose its interpretive approach⁷³. In this regard, the CJEU explained its interpretive methodology in *Merck v. Hauptzollamt Hamburg-Jonas* ruling:

“In interpreting a provision of [Union] law it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it is part”.⁷⁴

Through this transcript, it is possible to understand that the Courts of Justice’s legal analysis is guided by text, context, and telos as with many other courts⁷⁵. In other

⁶⁷Sabine Saurugger and Fabien Terpan, *Measuring Judicial Activism: Is the Court of Justice of the European Union an activist court* (2017).

⁶⁸Poiares Pessoa Maduro (n 32) 7.

⁶⁹*Ibid.*

⁷⁰*Ibid.*

⁷¹*Ibid.*

⁷²*Consolidated Version of the Treaty on European Union [2008] OJ C115/13*

⁷³Lenaerts and Gutiérrez-Fons (n 50).

⁷⁴Case 292/82. *Firma E. Merck v Hauptzollamt Hamburg-Jonas* ECLI:EU:C:1983:335, para 12.

⁷⁵Poiares Pessoa Maduro (n 32).

decisions, the Court reinforced this approach, stressing that the "legislative history of a provision of EU law may also reveal elements relevant to its interpretation".⁷⁶

However, it is undeniable that CJEU adopted a path based on a strong teleological component to fulfil its mandate of "interpretation and application of the Treaties".⁷⁷ Following Bengoetxea's typology, teleological interpretations can be further broken down into three categories⁷⁸ first, in the "consequentialist interpretation" the Court of Justice focuses on the effects of a decision.⁷⁹ Second, the "functional interpretation", where the CJEU aims to ensure the *effet utile* of EU law⁸⁰, and finally a "teleological interpretation *stricto sensu*", where the CJEU interprets an EU provision considered ambiguous or incomplete bearing in mind the objective of such provision.⁸¹

The CJEU has, in conclusion, "had limited recourse to the traditional methods of interpretation," as Albors-Llorens emphasises, despite using the teleological approach to interpretation more frequently than other courts".⁸² This increased frequency is viewed by some as an activist gesture, though. The reasons for this I will explain in the next section.

5. Is judicial interpretation a form of activism?

As Donna Starr-Deelen and Bart Deelen mention, the CJEU because of its creative teleological interpretation "has been accused of being inconsistent and undermining a European architecture based on the rule of law".⁸³ This approach was criticised by authors such as Rasmussen, Hartley, Neill, and Conway, who claimed that the Court's teleological interpretation removed all restrictions imposed by the letter of the law and gave judges unrestricted freedom to determine the correct interpretation of a given rule.⁸⁴ In this sense,

⁷⁶Case C-355/21. *Perfumesco.pl sp. z o.o., sp. k. v Procter & Gamble International Operations SA* ECLI:EU:C:2022:791, para 39.

⁷⁷Lenaerts and Gutiérrez-Fons (n 50).

⁷⁸Joxerramon Bengoetxea, *The legal reasoning of the European Court of Justice: towards a European jurisprudence* (Oxford University Press, USA 1993)

⁷⁹*Costa v Enel* (n 5).

⁸⁰Joined cases C-188/10 and C-189/10. *Aziz Melki and Sélim Abdeli* ECLI:EU:C:2010:363

⁸¹*Van Gend en Loos* (n 5).

⁸²Albertina Albors Llorens, 'The European Court of Justice, more than a teleological Court' 2 Cambridge Yearbook of European Legal Studies 373, 382.

⁸³Donna Starr-Deelen and Bart Deelen, 'The European Court of Justice as a federator' 26 *Publius: The Journal of Federalism* 81, 87.

⁸⁴Lenaerts and Gutiérrez-Fons (n 50).

Conway claims that the use of broad systemic considerations was used by the CJUE "to justify an interpretation that was contrary to both the text and to legal tradition".⁸⁵

In the same vein, Neill states the following idea.

“The ECJ has indulged in creative jurisprudence on many occasions. The Treaty texts and directives agreed between the Member States may at any time be given by the Court a meaning and impetus that may not have been contemplated by the negotiators”.⁸⁶

This quote from Neill’s article is crystal clear. The approach followed by the CJEU does not represent an act of judicial interpretation, but of judicial activism. In the same sense, Rasmussen points out that the lower the textual legitimacy of a given interpretation the more easily a teleological jurisprudence “will result in non-compliance and other forms of defiance”.⁸⁷ The same author further states that the CJEU "sought to deprive European political leaders of the opportunity of controlling the pace and rhythm of the movement toward the ultimate common goal".⁸⁸ From a slightly different angle, Neill and Hartley argued that the CJEU's interpretive approach is illegitimate because it deviates from the recognized canons of interpretation applied within the different legal systems in the EU,⁸⁹ “particularly within English law, as Horsley points out.”⁹⁰

Even though not unexpected, this critique cannot be accepted. In this regard, in addition to the fact that the CJEU was created at a time of change concerning the processes of judicial interpretation, it is important to call attention to the particularities of EU legislation that support the widespread use of a teleological interpretation.⁹¹ In this regard, it is pivotal to underline the open nature of the Treaties and the multilingualism of EU

⁸⁵Gerard Conway, *The limits of legal reasoning and the European Court of Justice* (Cambridge University Press 2012), 205.

⁸⁶Neill and European Policy (n 23) 2.

⁸⁷Rasmussen (n 16) 29.

⁸⁸Ibid 380.

⁸⁹Hartley (n 13).

⁹⁰Thomas Horsley, ‘Reflections on the role of the Court of Justice as the “motor” of European integration: Legal limits to judicial lawmaking’ 50 *Common Market Law Review*, 938 *ibid*.

⁹¹Lenaerts and Gutiérrez-Fons (n 50).

law⁹², as well as the absence of legislative action during the early years of integration, which compelled the Court to act.⁹³

In this regard, from the outset, it is pivotal to underline that there are numerous sources of "indeterminacy or uncertainty" in EU law⁹⁴, something which is stressed by Gunnar Beck, who contends that these factors set EU law apart from other legal realities.⁹⁵ In this regard, the Treaties are the outcome of diplomatic conversations providing only a fragmented picture of how the EU should operate, making European law much more imprecise and unclear. In the words of Koen Lenaerts and José A. Gutiérrez-Fons, this inaccuracy explains why a "purely textualist approach is not enough to interpret, completely and consistently, the provisions of the Treaties which are of open texture".⁹⁶ The same authors conclude that the CJEU has "no choice but to take into account the objectives pursued by the Treaties"⁹⁷, giving special importance to teleological interpretation.⁹⁸ On the opposite side, Rasmussen states that "the interpretative work of the Court may have been inspired by the spirit of integration".⁹⁹ The EU Treaties are distinguished by the incorporation of a wide range of overarching functional goals that are brought together to ensure an "ever-closer Union of the Peoples of Europe". Therefore, as Hartley mentions it is difficult to criticize this approach when it is the Treaties themselves to establish a clear integrationist path.¹⁰⁰

In this sense, as Poiares Maduro claims, reasoning through "telos will be an increased need in the context of a pluralistic legal order".¹⁰¹ The space for conflict between legal norms grows because of pluralism, which often makes legal provisions more ambiguous, requiring an interpretation far beyond the letter of the law.¹⁰² In short, textualism in EU law is limited by the characteristics of Treaties and because of the principle of linguistic equality, which gives the same legal force to all twenty-four EU languages, increasing the pluralism and uncertainty of European law.¹⁰³ As Gunnar Beck correctly underlines,

⁹²Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Bloomsbury Publishing 2013).

⁹³Grimmel (n 56).

⁹⁴Poiares Pessoa Maduro (n 38) 17.

⁹⁵Beck (n 92).

⁹⁶Lenaerts and Gutiérrez-Fons (n 50).

⁹⁷Ibid 25.

⁹⁸Ibid 27.

⁹⁹Rasmussen (n 16) 27.

¹⁰⁰Horsley (n 90).

¹⁰¹Poiares Pessoa Maduro (n 32) 8.

¹⁰²Ibid.

¹⁰³Lenaerts and Gutiérrez-Fons (n 50).

because ambiguity and uncertainty are common components of EU legislation “no less than the EU treaties,” this vagueness extends from the Treaties to EU legislation.¹⁰⁴ This imprecision is explained by the fact that decisions at the EU level are decided by either a qualified majority or unanimity in addition to the involvement of the European Parliament.¹⁰⁵

Additionally, these criticisms are a consequence of a bias against a teleological interpretation. In this regard, as Albertina Albors Llorens states “there has been considerable reluctance to accept this method of interpretation, mainly because it is viewed as dangerous and undemocratic” in the common law tradition, from which most critics come.¹⁰⁶ This inclination must be categorically rejected. As Poiares Maduro points out, teleological interpretation can be equally “faithful to the democratic outcomes since it prevents textual manipulation of the legal rules”¹⁰⁷, avoiding unfair situations not foreseen by the legislator.¹⁰⁸ The CJEU can fill up any gaps in such unfair situations by exerting a teleological extension, but they can also be fixed in the opposite direction by the so-called teleological reduction.¹⁰⁹ In this regard, Poiares Maduro underlines the following idea:

“An interpretation that pays attention to the goals of the rule, and not simply its wording, prevents opportunistic behaviours and minimises the risk of an interpretative manipulation of the legislation”¹¹⁰.

In these cases, manipulation would create effects that “neither wished for nor debated in the political process”¹¹¹, and therefore the intervention of the CJEU can be justified. The *Foto-Frost* decision is a prime illustration of this point.¹¹² In this case, the Court ruled that the Court of Justice exclusively has the right to declare an EU act unlawful and that national courts lacked this authority. Authors such as Neill and Hartley accused the Court

¹⁰⁴Beck (n 92) 185.

¹⁰⁵Susanne K Schmidt, *The European Court of Justice and the policy process: The shadow of case law* (Oxford University Press 2018)

¹⁰⁶Llorens (n 82) 381.

¹⁰⁷Poiares Pessoa Maduro (n 32) 10.

¹⁰⁸*Ibid.*

¹⁰⁹Case 283/81. *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*. ECLI:EU:C:1982:335

¹¹⁰Poiares Pessoa Maduro (n 32).

¹¹¹*Ibid.*

¹¹²Case 314/85. *Foto-Frost v Hauptzollamt Lübeck-Ost*. ECLI:EU:C:1987:452

of Justice of being overly activist because the CJEU considered the implications of national courts having the authority to void EU acts, supporting its findings in a consequentialist interpretation of Article 177 EC (now article 263 TFEU).¹¹³ Advocating a completely different perspective, AG Mancini claimed that a literal interpretation of the Treaties, in this case, would lead to "dangerous and anomalous results".¹¹⁴ Concerning the same case David T. Keeling stated the following idea:

*"[No] Principle of hermeneutics which says that clever textual arguments must triumph even though produce absurd results which are in the interest of none except mischief-makers bent on destroying the coherence of an entire legal order".*¹¹⁵

I agree. It would be contrary to the objectives of the Treaties, for national courts to be able to declare void EU acts. This is an extreme case in which the CJEU was forced to look beyond that specific legal norm, assessing the case in the broader context of the Treaties, and not only in the specific context of the provision.

Considering such a ruling, it is critical to enquire: Has the Court acted systematically against the Treaties during the past 60 years as several critics point out? The answer appears to be negative, as Arnall explains that "many of the decisions often criticised as activist were not reached contra legem, that is to say, by disregarding the express terms of the Treaties".¹¹⁶ Contrary to what the critics have argued¹¹⁷, the Court has also rarely entered reserved areas for Member States. As Arnall suggests the CJEU only "answer questions on which the Treaties were silent or ambiguous in a particular way"¹¹⁸. In this sense, the CJEU can be considered activist not because it goes against the letter of the Treaties¹¹⁹, but because it goes beyond it, either to extend its interpretation, as happened

¹¹³Hartley (n 13).

¹¹⁴Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:230, Opinion of Mr Advocate General Mancini, para 5.

¹¹⁵David Keeling, 'In praise of judicial activism. But what does it mean? And has the European Court of Justice ever practised it?' *But What Does it Mean*, 524.

¹¹⁶Arnall, 'Judicial activism and the European Court of Justice: how should academics respond?' (n 26) 224.

¹¹⁷Hartley (n 13).

¹¹⁸Arnall, 'Judicial activism and the European Court of Justice: how should academics respond?' (n 26)

¹¹⁹David Edward, 'Judicial Activism—Myth or Reality?' *Legal Reasoning and Judicial Interpretation of European Law* Gostport.

regularly in cases such as *Dassonville* or *Cassis De Dijon*,¹²⁰ or in the sense of reducing it as happened in the *CILFIT* judgement.¹²¹ As Rasmussen acknowledges a "mechanical or scientific" jurisprudence is neither feasible nor desirable, and even the Court may, and must, make choices between alternative legal constructs.¹²² However, this choice is not always obvious. In this sense, David T. Keeling emphasises that the notion of judicial activism wrongly assumes that every legal problem has a "straightforward answer that can be found by any well-trained lawyer"¹²³, while arguing that there is no such thing as a single correct answer for each legal problem, something undeniable in any legal reality.¹²⁴ The point is that the existence of these "straightforward answers" in the European law system is even more reduced by the unique characteristics of European law, forcing the CJEU to make a more ambitious interpretive effort, as I showed throughout this section.

6. The limits of judicial interpretation

Naturally, judicial interpretation cannot represent a *carte blanche* for the CJEU. As Thomas Bingham argues, "judicial activism taken to extremes can spell the death of the rule of law".¹²⁵ The problem, however, is that the Court's critics incorrectly equate creative or active judicial interpretation with blatant judicial activism, viewing this interpretive effort as an infringement on the Treaties as well as a threat to the sovereignty of the Member States, namely to democracy, resulting in Rasmussen's words in the "delegitimization" of the EU judiciary.¹²⁶

In this regard, the CJEU has repeated that every "provision must be interpreted, as far as possible, in such a way as not to detract from its validity".¹²⁷ Likewise, where a provision of EU law is open to several interpretations, preference must be given to that interpretation that ensures the effectiveness of the provision in question.¹²⁸ From the outset, there is a limit in this area. As Koen Lenaerts and José A. Gutiérrez-Fons

¹²⁰*Procureur du Roi v Benoît and Gustave Dassonville* and *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. (n 7).

¹²¹*Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*. (n 109).

¹²²Rasmussen (n 16).

¹²³Keeling (n 116) 508.

¹²⁴*Ibid.*

¹²⁵Tom Bingham, *The rule of law* (Penguin Uk 2011) 45.

¹²⁶Rasmussen (n 16) 42.

¹²⁷Case C-403/99. *Italian Republic v Commission of the European Communities*. ECLI:EU:C:2001:507

¹²⁸Lenaerts and Gutiérrez-Fons (n 50).

underlined, the Court “must not trespass on the limit of *contra legem*”.¹²⁹ Thus the CJEU “must give priority to that which guarantees compliance with primary EU law and ensures its effectiveness”.¹³⁰

To this end, the CJEU must maintain a dynamic equilibrium between “making sense of the political compromises embodied in the relevant legislation” and the fundamental principles of the agreements that comprise European law, as Anthony Arnall puts it.¹³¹ In other words, it is pivotal to ensure that there is mutual trust between all parties, that is, between the CJEU, the different institutions, and the Member States. How does the CJEU accomplish this, exactly? To achieve this end, Karen Alter underlines that the CJEU maintains “the appearance of judicial neutrality”¹³², which is for Alter the “basis for parties accepting the legitimacy of decisions”.¹³³

How can the CJEU make sure that this confidence holds up over time? Firstly, the Court must limit its interpretations to those permitted by the letter of the law and avoid *contra legem* interventions. A perfect example of this can be found in the cases of *Jégo-Quéré* and *Unión de Pequeños Agricultores v. Council* where the CJEU held that despite criticism of its approach¹³⁴, a more expansive interpretation of Article 173 EC (now Article 263 TFEU) would necessarily require a Treaty amendment, showing that it understands its limits.¹³⁵ Second, it must respect the principles of inter-institutional balance and mutual collaboration outlined in Article 13 (2) TFEU. Thirdly, the CJEU must pay due respect to the “common national legal traditions”¹³⁶, namely by respecting the main principles or constitutional identity of the national legal orders.¹³⁷

Therefore, I argue that contrary to what several critics of the CJEU pointed out, the Court of Justice generally respects these red lines. Three points demonstrate this precisely.

¹²⁹Ibid 16.

¹³⁰Ibid.

¹³¹Anthony Arnall, ‘Joined Cases C-39/05 P & C-52/05 P, Sweden and Turco v. Council, judgment of the Grand Chamber of 1 July 2008’ 46 *Common Market Law Review*.

¹³²Karen J Alter, ‘Who are the “masters of the treaty”? European governments and the European Court of Justice’ 52 *International organization* 121, 135.

¹³³Ibid.

¹³⁴Case C-50/00 P. *Unión de Pequeños Agricultores v Council of the European Union*. ECLI:EU:C:2002:462 and Case C-263/02 P. *Commission of the European Communities v Jégo-Quéré & Cie SA*. ECLI:EU:C:2004:210

¹³⁵Albertina Albors-Llorens, ‘Remedies against the EU institutions after Lisbon: An era of opportunity?’ 71 *The Cambridge Law Journal* 507.

¹³⁶Poiares Pessoa Maduro (n 32) 10.

¹³⁷Miguel Poiares Maduro, *Contrapunctual Law: Europe’s Constitutional Pluralism in Action* in N Walker (ed), *Sovereignty in Transition* (Oxford, Hart Publishing 2003).

First, as noted by Grimm, the Court "always demonstrated sensibility towards the legal opinions and reasoning of national high courts."¹³⁸ The relationship between the CJEU and the German Constitutional Court (Bverfg) serves as the best example of this, as the CJEU and the Bverfg engage in continuous constitutional dialogue about the concepts of supremacy and sovereignty.¹³⁹ In this context, recent research indicates that national judges trust the CJEU, indicating the existence of a relationship based on dialogue between national courts and the Court of Justice.¹⁴⁰ Secondly, not all cases brought to Luxembourg have been decided in favour of the expansion of EU law¹⁴¹. Third, the Court has been less ambitious recently than it was in its early years. This is exactly what the data from Fabien Terpan and Sabine Saurugger indicate, with just about 10% of activist judgements between 2010 and 2011, as opposed to at least 20% throughout the preceding periods.¹⁴² In the same vein, Franklin Dehousse emphasised the Court's increased caution by stating that "the era of sweeping declarations and judgments of principle is over".¹⁴³ In the same sense, Grimm points out that although during the foundational period, the Court based its reasoning on a teleological *stricto sensu* interpretation of the Treaties, in recent decades with the consolidation and embodiment of EU law, the CJEU case law denotes a predominance of arguments supported by the coherence of the common legal order, as well as, most notably, the "effet utile".¹⁴⁴

7. Conclusion:

I started by grasping the origins of accusations of judicial activism and how formalism continues to shape how the law is perceived, and as a result, how the actions of judges and courts are perceived.

¹³⁸Grimm (n 56) 19.

¹³⁹Valerie Dhooghe, Rosanne Franken and Tim Opgenhaffen, 'Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context' 20 *Tilburg Law Review* 122.

¹⁴⁰Juan A Mayoral, 'Impact Through Trust: The CJEU as a Trust-Enhancing Institution' Forthcoming "Impact through Trust: The CJEU as a trust-enhancing institution" in *International Courts and Domestic Politics* Marlene Wind and Andreas Follesdal (eds) Oxford: Oxford University Press, iCourts Working Paper Series.

¹⁴¹*Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*. (n 109).

¹⁴²Saurugger and Terpan (n 67).

¹⁴³Franklin Dehousse, 'The reform of the EU Courts (IV)-The need for a better focus on the European Court's of Justice core mission' *Egmont Papers* n° 96, 10.

¹⁴⁴Grimm (n 56).

Second, I described the CJEU as a court that is concerned with expressing communal values rather than just following the letter of the law. In this sense, the role of the CJEU as the “motor” of the European Integration project is undeniable, providing solutions to problems for which the Treaties had no answer. Therefore, I argue that the Court of Justice because of the characteristics of the “new legal order” could not be limited to a static interpretation of the law based mainly on the content of the letter of the Treaties. This approach which was described by Rasmussen as the “invention of a teleological inevitability”¹⁴⁵, allowed the Court to fulfil its obligation under the Treaties. The opposite scenario, i.e., the refusal to interpret a provision of EU law because it is unclear, silent, or insufficiently clear, as Mertens de Wilmars points out, would constitute a clear example of denial of justice, breaching therefore the principle of effective judicial protection protected by Article 19 TEU and Article 47 of the Charter.¹⁴⁶

The gap-filing of the Treaties by the CJEU sparked criticism of judicial activism, with authors such as Rasmussen arguing that the Court of Justice had seized control of the pace of European integration through the overuse of teleological interpretation.¹⁴⁷ In this sense, this chapter has also shown that there is a distrust of the use of interpretive elements other than textualism, particularly concerning teleological interpretation. In this sense, the Court's use of telos is framed in a context dominated by a legislative design characterised by its vagueness and uncertainty, which compels the Court of Justice to be active to provide solutions to the cases that reach the *Palais de la Cour de Justice*.

Nevertheless, this does not mean that the CJEU should not be scrutinised. In this regard, several aspects of the CJEU's performance should be criticised, including its legal reasoning, which is frequently flawed and with obvious logical leaps in its decisions. These problems also involve structural problems, such as the lack of dissenting opinions or the possibility of reappointing judges and advocates generals at the end of their terms of office.¹⁴⁸

¹⁴⁵Rasmussen (n 16) 380.

¹⁴⁶M DE WILMARS, ‘Reflexions sur les Méthodes d’Interprétation de la Cour de Justice des Communautés Européennes’ Cahiers de droit européen 5.

¹⁴⁷Rasmussen (n 16).

¹⁴⁸Joseph HH Weiler, ‘Epilogue: judging the judges—apology and critique’ Judging Europe’s judges: the legitimacy of the case law of the European court of justice 235.

Therefore, after identifying the role of the CJEU and the limits of the performance of judges based in Luxembourg, it is time to define judicial activism in the context of the CJEU.

CHAPTER 3

A journey between Europe and the US in a quest to define judicial activism in the context of the CJEU

1. Introduction

Judicial activism is frequently misunderstood, a problem that is not specific to the European Union. In the American context, Keenan D Kmiec has stressed that judicial activism has been defined over time "in several nonsense, even contradictory ways".¹⁴⁹ Undeniably, the main literature supports Kmiec's statement with an endless series of definitions and perspectives. In the same vein, Green argues that nonetheless of the popularity of the concept and its common use among commenters, politicians, or judges, the term judicial activism is "poorly understood"¹⁵⁰. I will examine the different attempts to define the term in this chapter, highlighting which ones can be framed in the context of the CJEU and outlining the challenges involved in doing so. In the end, I contend that rather than being labelled as activist, the CJEU case law should be described as dynamic or active because not all activist judgments are detrimental to the rule of law.

2. Judicial Activism: An empty and plastic term

The difficulty to define judicial activism is largely explained by two problems: Firstly, the emptiness of the term, and secondly the difficulty of the different notions of judicial activism to deal with textual vagueness and indeterminacy.

In this sense, Nuno Garoupa classifies the concept of judicial activism as an "empty" notion.¹⁵¹ In the same manner, Anthony Arnall argues that the term judicial activism "is far too indeterminate to provide a useful prism through which to view the Court's case law".¹⁵² Both authors are right. From my perspective, judicial activism is an umbrella concept used by politicians, journalists, and analysts to criticise the work of the courts. As Garoupa suggests, "general commentators have tended to use the term loosely as a

¹⁴⁹Kmiec (n 25) 1443.

¹⁵⁰Craig Green, 'An Intellectual History of Judicial activism Emory Law' 58 Journal, 1197.

¹⁵¹Nuno Garoupa, 'Comparing Judicial Activism-Can we Say that the US Supreme Court is more Activist than the German Constitutional Court?' *Revista portuguesa de filosofia* 1089, 1090.

¹⁵²Arnall, 'Judicial activism and the European Court of Justice: how should academics respond?' (n 26) 30.

form to criticise unpleasant court decisions”.¹⁵³ This void explains why the CJEU has been accused of being activist for numerous different reasons, including the standard assertion that the CJEU has a federalist agenda¹⁵⁴, the alleged implementation of a neoliberal perspective¹⁵⁵, or the Court of Justice claimed alignment with the biggest Member States.¹⁵⁶ As Catarina Botelho states, the term judicial activism is an “ether label adaptable to what we are interested in defending” characterised by its plasticity, being employed as an opportunistic comment “that frequently neglects a methodological critique”.¹⁵⁷

In a sense, there are allegations to “suit every taste”, which leads me to concur with Nuno Garoupa's assertion that “judicial activism is a form of critique when particular groups are displeased with the outcome of constitutional review”.¹⁵⁸ As Arnall states most accusations of judicial activism “can be refuted by choosing a different baseline from the accusers”.¹⁵⁹ In this regard, CJEU president Koen Lenaerts underlines that it is always necessary to make a key question: “who is making the fuss about such judgments”.¹⁶⁰ In other words, in countless situations, the criticism of activism has nothing to do with the substance of the judgement, nor with the rationale of the ruling. For instance, Fuad Zarbiyev argues that “those who are happy with the outcome of a case are unlikely to call the judge activist”.¹⁶¹ This idea, which Zarbiyev and Lenaerts emphasise, is obvious. In the end, the allegations of activism generally come down to the analysis of the winners and losers of such rulings. An illustration of this circumstance can be found in the contentious *Sturgeon* judgement, in which the CJEU determined that passengers who experienced lengthy delays in addition to those who were denied boarding and those whose flights were cancelled were eligible for compensation of up to 600 euros¹⁶². When faced with this situation, the airlines immediately heavily criticised the Court, which

¹⁵³Garoupa (n 151) 1091.

¹⁵⁴Neill and European Policy (n 23).

¹⁵⁵Kaupa (n 20).

¹⁵⁶Belchev (n 19).

¹⁵⁷Catarina Santos Botelho, ‘O lugar do Tribunal Constitucional no século XXI: os limites funcionais da justiça constitucional na relação com os demais tribunais e com o legislador’ *Jurgar* 111, 121.

¹⁵⁸Garoupa (n 151) 1090.

¹⁵⁹Arnall, ‘Judicial activism and the European Court of Justice: how should academics respond?’ (n 26).

¹⁶⁰Judge Koen Lenaerts highlighted this argument in the *High-Level Workshop ‘Judging the Judges in a transformed Europe’* (3–4 November 2011).

¹⁶¹Zarbiyev (n 51) 252.

¹⁶²Joined cases C-402/07 and C-432/07. *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France* SA ECLI:EU:C:2009:716

prompted them in the words of Sascha Garben to adopt a “strategy to boycott the judgment en masse”.¹⁶³ Of course, the users of these companies had the opposite reaction, praising the results of that judgement.

Two implications can be drawn from this: First, the notion of judicial activism is characterized by its emptiness. Secondly, the meaning of this term depends on the goals of the accusers. In the next section I will show how despite the multiplication of accusations of activism against the CJEU, this concept remains to be defined in European literature.

3. Judicial Activism in Europe: An “I know when I see it” approach

This challenge to define judicial activism is even more problematic in the European context since most European authors avoid the difficult task of defining this notion.¹⁶⁴ Even Hjalte Rasmussen, the author who is for many the precursor of accusations of judicial activism against the CJEU does not provide a sustained definition.¹⁶⁵ Rasmussen only made a distinction between three types of judicial interpretation from which it is possible to identify situations of activism.

In the first situation, the judicial interpretation operates “within the text of the disputed provisions”.¹⁶⁶ In this situation, the disputed provision must provide “with two or more rationally (almost) equally defensible decisional alternatives”.¹⁶⁷ As Rasmussen argues that the “overall behaviour of the Court in this area is also undeniably activist”, but asserts that in these circumstances, activism can be appropriate, using the *Dassonville* “acceptable” reading of Article 30 EC (now Article 34 TFEU) as an illustration.¹⁶⁸

In the second situation, the Court interprets the text to fill gaps, and an additional test is needed to understand whether this interpretation constitutes an example of illegitimate policy-making or judicial activism.¹⁶⁹ To understand whether the gap-filling of the Court

¹⁶³Sascha Garben, ‘Sky-high controversy and high-flying claims? The Sturgeon case law in light of judicial activism, euroscepticism and eurolegalism’ 50 Common Market Law Review, 40.

¹⁶⁴May Barth, ‘The Different Sides of Judicial Activism at the European Court of Justice’ Leiden University

¹⁶⁵Rasmussen (n 16).

¹⁶⁶Ibid, 26.

¹⁶⁷Ibid, 28.

¹⁶⁸Ibid, 27.

¹⁶⁹Ibid.

“constitute a transgression of judicial power”¹⁷⁰, it is necessary, in Weiler's words, to do an “additional test”.¹⁷¹ Rasmussen divides the test into “Level I” and “Level II”. Unfortunately, the Level I analysis of this test is based on a subjective examination that Rasmussen refers to as the “I know when I see it” attitude and the Level II analysis is based on the evaluation of the responses of various institutions to the Court’s judgments.¹⁷² As a result, this test does not provide us with a reliable test to identify situations of alleged activism because of the test’s subjective nature.

In the third and last situation, the Court engages in policy decision-making because the judicial interpretation is disrespectful of the text of the Treaties. For Rasmussen, his last situation is “blatant and unacceptable activism”¹⁷³. Following a similar logic, Hartley, another critic of the Court merely established a “framework for discussion” close to Rasmussen’s, based on rulings “within the text”, rulings “outside the text” and rulings “contrary to the text”.¹⁷⁴ These frameworks, although useful, do not define the term, particularly since, as I showed in the previous chapter, they all confuse in many cases, teleological interpretation with inappropriate use of judicial powers.

Another illustration of the difficulty to define this concept can be found in the book *Judicial Activism at the European Court of Justice*¹⁷⁵, where only two authors out of sixteen sought to define the term. One of them, Maartje de Visser, argues that judicial activism is intimately attached to how politicians, the media, and the public regularly “perceive the legitimacy of the Court and its judgments”.¹⁷⁶

The same author underlines that the debates over the performance of constitutional courts are usually conducted concerning “expressions as the proper role of the court, ‘judicial lawmaking and the court’s legitimacy and authority in the eyes of its main interlocutors’”¹⁷⁷, a topic I have covered in Chapter 2. Arnall also focuses on the role that

¹⁷⁰Ibid, 28.

¹⁷¹Weiler, ‘The Court of Justice on trial—A review of Hjalte Rasmussen: On law and policy in the European Court of Justice’ (n 17), 562.

¹⁷²Rasmussen (n 16), 53.

¹⁷³Ibid.

¹⁷⁴Hartley (n 31), 95.

¹⁷⁵Bruno de Witte, Elise Muir and Mark Dawson, *Judicial activism at the European Court of Justice* (Edward Elgar Publishing 2013)

¹⁷⁶Maartje De Visser, ‘A cautionary tale: some insights regarding judicial activism from the national experience’ in *Judicial activism at the European Court of Justice* (Edward Elgar Publishing 2013), 188.

¹⁷⁷Ibid, 189.

commentators and politicians have in creating these critics¹⁷⁸. For Arnall, an activist court “is a Court that has been improperly strayed beyond the limits of the judicial function, by misusing its powers”¹⁷⁹, an idea subscribed by Conway, which underlines that “at the core of criticism of judicial activism lies a concern that the judiciary is acting outside its proper role”.¹⁸⁰ Conway goes further and notes that activism in the context of legal reasoning refers to “creative or innovative interpretations”, a topic that I have already addressed in Chapter 2.¹⁸¹ Other authors claim that the activist judiciary is acting as the legislator.¹⁸²

Two conclusions emerged from this review: first, there is widespread agreement that judicial activism is linked to judicial dysfunction; and second, despite the abundance of material on the topic, there is a glaring lack of conceptualization by European authors, with the Rasmussen test “I know when I see it” serving as the best example. For these reasons, the next step to comprehend this notion is to visit the USA, the country where the term was first used in the 1940s.

4. Judicial activism in the USA: a useful comparison?

The creation of the term judicial activism dates back to Arthur Schlesinger’s *Fortune* magazine article in the 1940s¹⁸³. Despite the importance of Schlesinger’s work, this article did not define judicial activism in a precise way. Since then, many have tried to define the concept, although without great success. In this sense, I will start by examining the American definitions of the term to determine whether they make sense in the context of the CJEU.

In the US, a vast group of legal academics such as Greg Jones or Cass Sunstein, often portray judicial activism as “judicial invalidation of legislative enactment”¹⁸⁴. The CJEU has the power to examine the legality of EU acts to guarantee their lawfulness under Article 263 TFEU. Therefore, this definition must be disregarded instinctively. Indeed, most definitions defended over time by American authors run into the same problem. For

¹⁷⁸Arnall, ‘Judicial activism and the European Court of Justice: how should academics respond?’.

¹⁷⁹*Ibid.*, 215.

¹⁸⁰Conway (n 85), 182.

¹⁸¹*Ibid.*

¹⁸²Ernő Várnay, ‘Judicial Passivism at the European Court of Justice?’ 60 *Hungarian Journal of Legal Studies* 127.

¹⁸³Arthur SCHLESINGER JR, *The Supreme Court: 1947, Fortune*, n. 35 (jan 1947).

¹⁸⁴Kmiec (n 25), 1463.

example, Lino A. Graglia defends that judicial activism translates into practice by "judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit".¹⁸⁵ Others understand judicial activism "as any serious judicial error".¹⁸⁶ Further authors rely on understanding judicial activism as a deviation "from cultural norms of judicial role", or as "any controversial or undesirable result".¹⁸⁷

All these definitions have two things in common. First, they face the barrier highlighted by Garoupa: there is no "consensus on how courts should deal with textual vagueness and indeterminacy"¹⁸⁸, two legislative tools used abundantly in any Constitution and above all in EU law. As I have shown in Chapter 2, the textual ambiguity that can be found in the Treaties and EU secondary legislation provide serious interpretive challenges and significant levels of uncertainty, which call for an immediate rejection of these viewpoints. Otherwise, as Garoupa concludes, "activism simply becomes synonymous to judicial review".¹⁸⁹

Secondly, all these conceptions of judicial activism advocate a judiciary more tied to the letter of the law. In other words, they support a strategy of judicial restraint. In this sense, it is pivotal to underline that a strategy of judicial self-restraint may be more pernicious than an activist or dynamic attitude. According to Gonalo de Almeida Ribeiro, judicial restraint is a "survival tactic" of constitutional legalism that aims to circumvent the paradox that the judiciary has the authority to nullify rules coming from institutions with direct democratic legitimacy even though judges are not directly elected by citizens¹⁹⁰. It should be noted that, as I displayed in Chapter 2, an attitude of judicial restraint in the case of the CJEU would undermine the Court's constitutional duties, weakening the framework established by Article 267 TFEU, which ensures the coherence and uniformity of European law; consequently, these definitions must be rejected.

¹⁸⁵Lino A Graglia, 'It's Not Constitutionalism, It's Judicial Activism' 19 Harv JL & Pub Pol'y 293, 296.

¹⁸⁶Green (n 150) 1201.

¹⁸⁷Ibid, 1217.

¹⁸⁸Garoupa (n 151) 1093.

¹⁸⁹Ibid.

¹⁹⁰Gonalo Almeida Ribeiro, 'O Paradoxo Democrtico na Constituio Portuguesa de 1976 (The Democratic Paradox in the Portuguese Constitution of 1976)' Estudos em Homenagem ao Conselheiro Rui Moura Ramos, Coimbra: Almedina, 147.

Another attempt to define the concept was made by Keenan Kmiec by providing five distinct definitions of judicial activism. According to the first definition, the judges are activists when they strike “down arguably constitutional actions of the other branches”.¹⁹¹ In response to this definition, Anthony Arnall argues that this description does not fit in the Court of Justice actions as a result of the protection given by the CJEU to EU institutions “from challenges to the validity of legislative acts”.¹⁹² In fact, the Court has been criticised for doing exactly the opposite of that, i.e., for failing to limit the EU's sphere of competencies. An illustration of this is the CJEU's latitude in the broad use of Article 114 TFEU as a legal basis, giving the European legislative power in circumstances where its competence is questionable.¹⁹³ As Arnall states, “the case law of the ECJ in this context exemplifies not activism but restraint”.¹⁹⁴

The second definition offered by Kmiec can be interpreted as a failure to follow the precedent (“Ignoring Precedent”).¹⁹⁵ Again, this characterization does not suit completely the context of the CJEU. Contrary to what takes place in the US and UK the CJEU does not follow the principle of *stare decisis* despite normally following its own decisions. As Takis Tridimas underlines the CJEU “has in fact expressly overruled precedent only in very few cases”.¹⁹⁶ In this sense, “the value of precedent has been accepted by the political constituencies to such an extent that it can now be said to have a quasi-normative character”.¹⁹⁷ As Gunnar Beck explains, precedent in Union law functions as a “rebuttable presumption in favour of a particular construction of certain written provisions”.¹⁹⁸ In this sense, I consider that in the case of CJEU, a definition *a contrario* makes more sense. That is, in my perspective, the CJEU can be considered activist by creating precedents but not by breaking them as Kmiec considers. Taking an idea underlined by Alter, “the ECJ expanded its jurisdictional authority by establishing legal principles but not applying the principles to the cases at hand”.¹⁹⁹

¹⁹¹Kmiec (n 25), 1463.

¹⁹²Arnall, ‘Judicial activism and the European Court of Justice: how should academics respond?’ (n 26), 216.

¹⁹³Stephen Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a “Drafting Guide”’ 12 German Law Journal 827.

¹⁹⁴Arnall, ‘Judicial activism and the European Court of Justice: how should academics respond?’ (n 26).

¹⁹⁵Kmiec (n 25), 1466.

¹⁹⁶Takis Tridimas, ‘Precedent and the Court of Justice’ in *Philosophical foundations of European Union law* (Oxford University Press 2013) 316.

¹⁹⁷Ibid 329.

¹⁹⁸Beck (n 92) 180.

¹⁹⁹Alter (n 132), 131.

The third definition given by Kmiec consists of what he calls "judicial legislation"²⁰⁰. If we adopt this definition to the context of the CJEU, activist judges overstep their power by taking political decisions concerning the direction of the European integration project. To put it differently, according to this definition, activist judges create legislation from the benches of the court, violating the balance of power between the legislative and the judicial power. This criticism is quite common in the context of CJEU. To illustrate, Roman Herzog and Lüder Gerken criticised the CJEU ruling in *Mangold*, claiming that the CJEU acted as the legislator.²⁰¹ Another example is the above-mentioned *Sturgeon* judgment, where the CJEU has been criticised for engaging "in judicial legislation and, allegedly, unwarranted judicial activism".²⁰²

Another definition given by Kmiec corresponds to the departure from "accepted interpretation canons". This definition has two problems. First, it presupposes that this acceptance of the canons exists; secondly, it presupposes the existence of a hierarchy between elements of interpretation of the law, something that as I have shown in Chapter 2 does not exist in the EU law and so it must be rejected.

Finally, according to the last definition given by Kmiec, a decision is "activist" if two cumulative criteria are met: Firstly, the judge must have "an ulterior motive for making the ruling;" and, secondly, the decision must depart "from some baseline of correctness".²⁰³ In this sense, the level of activism is dependent on "how far it deviates from this baseline".²⁰⁴ Concerning this second point, accusations of judicial activism "can always be rebutted by choosing a different baseline from that of the accuser", as Arnall underlines.²⁰⁵ Regarding the first element, since every judge has interests and motivations, this definition has the unquestionable advantage of highlighting the inherent subjectivity of any judicial decision. In the case of the CJEU, former Judge Pescatore once stated that judges have "*une certaine idée de l'Europe*" which may support the validity of this statement.²⁰⁶ Nevertheless, despite it is conceivable that the CJEU may have had judges

²⁰⁰Kmiec (n 25) 1471.

²⁰¹Roman Herzog and Lüder Gerken, 'The Spirit of the Time: Revise the European Constitution to Protect National Parliamentary Democracy' 3 *European Constitutional Law Review* 209.

²⁰²Garben (n 164) 18.

²⁰³Kmiec (n 25) 1441.

²⁰⁴*Ibid.*

²⁰⁵Arnall, 'Judicial activism and the European Court of Justice: how should academics respond?' (n 26), 230.

²⁰⁶Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' *European Law Review* 135, 137.

who had a "further motive for making the ruling", this does not demonstrate that the Court was committed to these motivations, particularly over such a prolonged period of time, as is the case of CJEU. As Franklin Dehousse points out, while some judges are more active than others, this does not imply that the entire Court is activist.²⁰⁷ Therefore, for the following three reasons, such a definition is inappropriate for a court with the characteristics of the CJEU: First, since it lacks initiative power²⁰⁸, second, it must make decisions in accordance with the collegiality principle²⁰⁹, and third, because of the diversity of the body of judges. This notion of the CJEU as an agenda-setter is even more absurd given the volume of cases filed to the two courts annually and the stringent selection procedure established by Article 253 TFEU. As a result of this, it is practically impossible that such a massive body of judges, characterised by significant legal-cultural differences, could have imposed over the past 70 years an agenda of its own.

5. Conclusion:

It is clear from the literature that judicial activism is frequently linked to improper action on the part of the judiciary. As Bingham claims, "judicial activism taken to extremes can spell the death of the rule of law"²¹⁰. In the same vein, Hatzopoulos associates activism with a "misuse of powers" by judicial power.²¹¹ In this regard, I argue that not all activist behaviours are necessarily negative or essentially a "misuse of power" using Hatzopoulos's expression. In this sense, I have framed three definitions of activism to the case law of the CJEU. The first corresponds to the concept of judicial law-making; the second to the creation of precedents with a quasi-binding character and, finally, the definition given by Conway of creative interpretation.

None of these behaviours, in my opinion, qualify as *ultra-vires* actions. On the contrary, they fall within the margin of interpretation given to the CJEU. As Valerie Dhooghe, Rosanne Franken, and Tim Opgenhaffen explain, the Court of Justice's "judicial activism

²⁰⁷Dehousse (n 143).

²⁰⁸See: Šadl Urška, & Wallerman, A. (2019). 'the referring court asks, in essence': is reformulation of preliminary questions by the court of justice a decision writing fixture or a decision-making approach? *European Law Journal*, 25(4), 416–433.

²⁰⁹Dehousse (n 143).

²¹⁰Bingham (n 125).

²¹¹Vassilis Hatzopoulos, 'Actively talking to each other: the Court and the political institutions' in *Judicial activism at the European Court of Justice* (Edward Elgar Publishing 2013), 109.

is a natural feature in a dialogical context” between the CJEU, the national courts, and the European Union.²¹²

Due to the negativity surrounding the term judicial activism, I suggest this activist behaviour of the CJEU should be categorised using a different name. There are several choices to consider in this regard, ranging from Iyiola Solanke's claim that the CJEU and its judges should be described as "entrepreneurial"²¹³ to a description of the CJEU as an active or dynamic court.²¹⁴ Making this distinction, in my opinion, is more than just a formality. Creating this distinction will make it easier to differentiate between actions that naturally flow from the CJEU's role and those that are blatantly activist and detrimental to the rule of law, such as judicial treaty revision or judicial campaigns driven by ideological or politically biased interests.²¹⁵ In the next chapter, I will show how this active stance can lead to the strengthening of the rule of law and not to its death.

²¹²Valerie Dhooghe, Rosanne Franken and Tim Opgenhaffen, ‘Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context’ 20 *Tilburg Law Review* 122, 141. 141.

²¹³Iyiola Solanke, “‘Stop the ECJ’?: An Empirical Analysis of Activism at the Court’ 17 *European Law Journal* 764, 784.

²¹⁴In the last chapter, I will follow this last description.

²¹⁵A good example of this type of Judicial Activism can be found in Spain. See: Joaquín Urías Martínez, ‘Spain has a Problem with its Judiciary’.

CHAPTER 4

Judicial Dynamism to the rescue of the Rule of Law in the EU

1. Introduction

If in the 1960s the CJEU compensated for the political stagnation verified at that time with its constitutionalization case law²¹⁶, more than 50 years later in a scenario also overshadowed by a mix of inertia and ineffectiveness, the Court of Justice through its case law has taken important steps in the defence of the European values in the context of the so-called “rule of law crisis”.²¹⁷

In this last chapter, I will explain how the Court has been important in the defence of the rule of law in the EU by adopting an active interpretation stance. To this end, the focus of this chapter will be the *Portuguese Judges* case, where the Court established a “general obligation for Member States to guarantee and respect the Independence” of their national courts and tribunals²¹⁸. This innovative interpretation of Article 19 TEU has created new pro-integration precedents that widened the scope of EU law, empowering the CJEU to interfere with greater acuity in issues relating to the independence of the judiciary of the Member States.²¹⁹

I will begin by briefly examining the response of the different EU institutions to the crisis of the rule of law in Hungary and Poland, appreciating the consequences of this erosion for the Union. I will then summarise the Portuguese Judges Ruling, identifying the “active” or “activist” elements of the Court in this case. Finally, I will analyse how this ambitious stance defended judicial independence and the values set out in Article 2 TEU, protecting in this way the rule of law in the EU.

²¹⁶*Van Gend en Loos* and *Costa v Enel* (n 5).

²¹⁷Zoltán Fleck, Nóra Chronowski and Petra Bárd, ‘The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary’ 2022 MTA LAW WORKING PAPERS 1.

²¹⁸Laurent Pech and Sébastien Platon, ‘Judicial independence under threat: the Court of Justice to the rescue in the ASJP case’ 55 Common Market L Rev 1827, 1847.

²¹⁹Matteo Bonelli and Monica Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses’ 14 European Constitutional Law Review 622.

2. The Rule of Law Backsliding – A brief rewind

The problems created by the rule of law backsliding in Hungary and Poland over the past decade opened unprecedented challenges to the EU over the past decade.²²⁰

In this sense, due to the degree of interdependence among Member States, it is recognized that it is impossible to limit the effects of the rule of law deterioration just to the backsliding states²²¹. The threat posed by the judiciary capture by an undemocratic ruling party extends beyond the risk to the effective implementation of EU law in that specific Member State, having effects on the entire Union in several areas: Firstly, these threats call into question the principle of mutual trust, thereby jeopardizing the uniformity and effectiveness of EU law²²², namely by threatening the efficiency of the European Arrest Warrant's framework.²²³ Second, by hindering vertical cooperation between the Member States and the EU, the rule of Law backsliding also affects the proficiency of Article 267 TFEU, a mechanism based on cooperation between the national courts and the CJEU. Thirdly, the backsliding states challenge the effectiveness and credibility of the EU decision-making process, affecting in this way the confidence in the EU institutions both domestically, among its citizens, and externally, in the international community.²²⁴

In light of these circumstances and taking into account the increasing problems in Poland and Hungary, the European Commission has tried to present the rule of law as a well-defined principle whose core meaning “is the same in all Member States”.²²⁵ In this sense, until 2018, the year of the Portuguese Judges ruling, several initiatives were developed to supervise and dissuade the problematic Member States, namely the creation of the so-

²²⁰Pech Laurent and Kim Lane Scheppele, ‘Illiberalism within: rule of law backsliding in the EU’ 19 Cambridge Yearbook of European Legal Studies 3.

²²¹Laurent Pech, ‘The rule of law as a well-established and well-defined principle of EU law’ 14 Hague Journal on the Rule of Law 107.

²²²Ibid.

²²³Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*. ECLI:EU:C:2016:198.

²²⁴Petra Bárd, ‘In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law’ 27 European Law Journal 185.

²²⁵European Commission, *Commission Communication, Strengthening the rule of law within the Union. A blueprint for action* (2019), 1.

called Justice Scoreboard²²⁶, the development of the Rule of Law Tool Box²²⁷, or the Rule of Law Mechanism.²²⁸

Nevertheless, the Polish judicial reform and the Commission's Rule of Law Reports²²⁹, prove that the defence of the rule of law in both countries has not been effective. The limitations of Article 7 TEU, the alleged "nuclear option" constructed to protect the values mentioned in Article 2 TEU, were also clear during this period.²³⁰ The strict procedural requirements of Article 7(2) TEU, which stipulate that any sanction must be the result of a unanimous vote in the European Council (excluding the country involved in the proceedings), make the implementation of this mechanism impossible to achieve²³¹. As a result, this mechanism was blocked by Hungary and Poland in the Council, demonstrating the inability of Article 7 TEU to solve this crisis.

It was in this context dominated by political inertia and by the ineffectiveness of the European Institutions, that the Portuguese Judges case emerged. This decision undeniably marked a new era in defence of the rule of law in recent years, leading Laurent Pech and Dimitry Kochenov to consider that this "judgment can be viewed as belonging to the Pantheon of ECJ rulings, on par with Van Gend en Loos and Costa Enel".²³²

3. The Background to the Preliminary Ruling: An austerity case?

It is doubtful (perhaps impossible) to think that the judge on the Portuguese Supreme Administrative Court (STA) who referred the preliminary question to the CJEU knew how significant this case would be. After all, the scope of this case was limited. It resulted from Portugal's adoption of austerity measures in the context of the Memorandum of Understanding agreed in May 2011 with the European Commission. The Memorandum included the specific economic requirements for Portugal to receive financial assistance from the EU under the European Financial Stabilization Mechanism (EFSM). In this

²²⁶ Jakab, A., & Kirchmair, L. (2021). How to develop the EU justice scoreboard into a rule of law index: using an existing tool in the EU rule of law crisis in a more efficient way. *German Law Journal*, 22(6), 936-955.

²²⁷ Laurent Pech, 'The rule of law in the EU: The evolution of the Treaty framework and rule of law toolbox'.

²²⁸ Molly O'Neal, 'The European Commission's enhanced Rule of Law mechanism'.

²²⁹ Laurent Pech, '1095 days later: from bad to worse regarding the rule of law in Poland (Part I)' *Verfassungsblog*: On Matters Constitutional.

²³⁰ Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in *Defending Checks and Balances in EU Member States* (Springer, Berlin, Heidelberg 2021).

²³¹ Dimitry Kochenov, 'Busting the myths nuclear: A commentary on Article 7 TEU'.

²³² Laurent Pech and Dimitry Kochenov, 'Respect for the rule of law in the case law of the European Court of justice: A casebook overview of key judgments since the Portuguese judges case' 3 *SIEPS*, Stockholm, 12.

context, Portugal adopted Law 75/2014 which reduced the remuneration for persons working in the Portuguese public administration, including national judges.

Due to this reduction, the Associação Sindical de Juizes Portugueses (a Portuguese judges' union), acting on behalf of the members of the Tribunal de Contas (Court of Auditors), filed a special administrative action with the STA, alleging a violation of the "principle of judicial independence" codified both in the Portuguese Constitution and in the second subparagraph of Article 19(1) TEU.

4. The Ruling: The Portuguese Judges Case

The CJEU's decision and AG Saugmandsgaard's Opinion reach the same conclusion regarding the dispute's main contention, the salary reductions in the judiciary, and its relationship with the principle of independence of the judiciary. In this regard, the CJEU and the AG concur that general salary reductions in the public sector, such as those that took place after Law 75/2014 came into effect do not breach the independence of the judiciary (Article 19 TEU and Article 47 of the Charter). Nevertheless, the justifications for sustaining the decision could not be more different. The CJEU's rationale was solely based on Article 19 TEU, whilst the AG invoked Article 47 of the Charter. The AG asserted that the Charter was applicable because Law 75/2014 was an implementation of EU law and then continued to examine whether the wage reductions of the judiciary conformed with the Article 47 of the Charter, which establishes the fundamental right to a hearing before an independent tribunal.²³³

The Court's reasoning was different and opted for an interpretation based on Article 19 (1) TEU. The CJEU after restarting the principles outlined in Article 2 TEU²³⁴, emphasised that the EU is a "union based on the rule of law"²³⁵, and highlighted that Article 19 TEU "gives concrete expression to the value of the rule of law stated in Article 2 TFEU"²³⁶. In this sense, the CJEU continued by stressing that national courts and tribunals are also responsible for "ensuring judicial review in the EU legal order".²³⁷

²³³Case C-64/16. *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*. ECLI:EU:C:2018:117, Opinion of AG Saugmandsgaard Øe.

²³⁴*Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (n 24), para 29. (see, to that effect, Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454, para 168).

²³⁵*Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (n 24), para 31. See also Case C-583/11 *P. Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:C:2013:625.

²³⁶*Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, para 32.

²³⁷*Ibid.*

Using the third subparagraph of Article 19(2) TEU, the CJEU clarifies that the "guarantee of Independence (...) is required not only at the EU level as regards the Judges of the Union and the Advocates-General"²³⁸, but also additionally at the "level of the Member States as regards national Courts".²³⁹

The CJEU further clarified the meaning of the term "judicial independence," stating that this notion refers to the exercise of judicial powers "wholly autonomously, without being subject to any hierarchical constraint or subordinate to any other body".²⁴⁰ The CJEU goes further and adds that judicial independence presumes the protection "against external interventions" that can affect the judgments and independence of court members.²⁴¹

In this way, the Court of Justice established that all Member States must ensure that the bodies classified as "courts or tribunals" within the meaning of EU law meet the requirements of effective judicial protection. That is, the independence of the judiciary is *a condition of sine qua non* for effective judicial protection and for ensuring uniformity of the application of EU law.²⁴² This condition is based on the case law of the CJEU, with the Court stressing the intrinsic relationship between the independence of the judiciary and the need for a dialogue between national judges and the Court of Justice under Article 267 TFEU.²⁴³

In this regard, the CJEU establishes a link between the necessity to "ensure effective legal protection in the fields covered by Union law" and the requirement to sustain an independent judiciary by invoking Article 19 (1), second paragraph. In other words, considering this interpretation, it is not necessary for the Member State court to actually decide an issue of EU law in a specific case. The possibility of handling such issues is sufficient to apply Article 19(1) second paragraph.

Using these standards as a basis, the Court determined that "the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings".²⁴⁴

²³⁸Ibid, para 42.

²³⁹Ibid.

²⁴⁰Ibid, para 43.

²⁴¹Ibid, para 44.

²⁴²Ibid, para 43.

²⁴³Ibid, para 44.

²⁴⁴Ibid, para 53.

Nevertheless, this outcome is not particularly noteworthy. What is important is to look at the Court's reasoning and how the CJEU's interpretation can be viewed as ambitious or even activist.

5. An activist interpretation of Article 19 TEU?

In this case, the CJEU transformed the rule of law into a "legally enforceable standard to be used against national authorities to challenge targeted attacks on national judiciaries".²⁴⁵ This interpretation, as Laurent Pech and Sebastian Platon mention, is the result of a "combined reading of Article 2 TEU, Article 4(3) TEU (principle of sincere cooperation) and Article 19(1) TEU (principle of effective judicial protection)".²⁴⁶

From the outset, this interpretation stands out for its creativity because there is no express indication in the Treaty's text which supports this approach. In this sense, the CJEU through a teleological interpretation of Article 19 (1) TEU created a precedent extending the jurisdictional reach of the CJEU.

Without surprise, the Court was accused of displaying "an active, even political attitude" toward the rule of law crisis with this ruling.²⁴⁷ Claims of "over-constitutionalization" by the CJEU are frequently in decisions such as this, where the Court of Justice expands its jurisdiction using a teleological interpretation-based strategy.²⁴⁸ In this sense, Bonelli and Claes considered that "the Court used the Portuguese reference as an opportunity" to enter the EU Rule of Law crisis.²⁴⁹ In this regard, it is important to highlight that the Court has previously denied the admissibility of other austerity cases.²⁵⁰ Because of this, the same authors claim that the CJEU "entirely downplayed" the specific context of austerity measures by shifting the case's emphasis "from the economic crisis to the rule of law crisis".²⁵¹ In fact, neither the Member States nor the Commission had expressed any interest in the case, something that was illustrated by the fact that only Portugal and the Commission decided to intervene in this preliminary ruling. In this sense, Ovádek contends that it was the absence of "Member State opposition" that made the case's

²⁴⁵(n 218), 1836.

²⁴⁶Ibid, 1827.

²⁴⁷Bonelli and Claes (n 219), 641.

²⁴⁸Dieter Grimm, *The constitution of European democracy* (Oxford University Press 2017); and Pech and Platon (n 218), 1841.

²⁴⁹Bonelli and Claes (n 219).

²⁵⁰Case C-128/12, *Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios SA* ECLI:EU:C:2013:149;

²⁵¹Bonelli and Claes (n 219), 263.

resolution possible, questioning the Member States' willingness to accept the Court's activism rather than face the Polish and Hungarian governments.²⁵² In this regard, Bonelli and Claes contend that the CJEU's interpretation is "complex and not entirely convincing," with Article 19 TEU serving as both the basis for the CJEU's affirmation of its jurisdiction and as a "source for the principle of judicial independence".²⁵³

6. Response to this criticism: a creative but valid interpretation of Article 19 TEU

Regarding this criticism, I consider that although the creativity and dynamism of the CJEU in this decision are undeniable, the legal reasoning of the Court of Justice is well constructed. In this sense, after connecting Article 19 TEU with the "value of the rule of law stated in Article 2 TFEU"²⁵⁴, the Court of Justice expanded the scope of Article 19 (1) TEU by highlighting how the system established by Article 267 TFEU depends on the independence of the national court that submits a question to the CJEU²⁵⁵. In this way, the judges in the *Palais de la Cour de Justice* cleverly asserted that the independence of courts and tribunals is "essential to the proper working" of the European judicial cooperation system. This idea is reinforced by the invocation of the principle of sincere cooperation, stressing that the protection of judicial independence is essential to preserve the cooperation between national courts and the Court of Justice, because only independent judges can be tasked with the lawful application of EU law²⁵⁶. The CJEU amplified the scope of Article 19 (1) through a functional interpretation, taking advantage of the provision's ambiguity and vagueness, two features that, as I demonstrated in Chapter 2, encourage a teleological reading.

In this sense, this functional interpretation of Article 19(1) TEU has a clear aim of safeguarding the effectiveness of the EU system by setting a precedent with a quasi-binding character²⁵⁷, that enables the CJEU to monitor legislative reforms of the Member States that may infringe the values enshrined in Article 2 TEU.²⁵⁸ In this regard, it is

²⁵²Michal Ovádek, 'The making of landmark rulings in the European Union: the case of national judicial independence' *Journal of European Public Policy* 1, 20.

²⁵³Bonelli and Claes (n 219).

²⁵⁴*Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (n 24), para 32.

²⁵⁵Case C-54/96 *Dorsch Consult* ECLI:EU:C:1997:413, paras 34–36.

²⁵⁶*Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, (n 24), para 34.

²⁵⁷Aiste Mickonyte, 'Effects of the rule-of-law crisis in the EU: towards centralization of the EU system of judicial protection' 79 *ZaöRV* 815.

²⁵⁸Maciej Taborowski, 'CJEU Opens the Door for the Commission to Reconsider Charges against Poland' *Verfassungsblog: On Matters Constitutional*.

important to stress that no court decision is made in a vacuum. Therefore, it is impossible to separate this ruling from the institutional impasse caused by the inefficiency of Article 7 TEU and by the successive challenges created by the backsliding states to the European legal order.²⁵⁹ In this way, this interpretation of Article 19 TEU represents a "functional necessity" for the EU justified by the need to protect the EU legal order from the threats created by the rule of law backsliding. This need is felt in several areas²⁶⁰, namely in the decision-making process, where the affected Member States participate as members of the Council²⁶¹. This necessity is also explained by other reasons: firstly, by the need to ensure vertical cooperation between the Member States and the EU, particularly regarding the preliminary ruling procedure, and secondly, because of the importance of horizontal cooperation between the Member States.

In this sense, the Court's interpretation in this case, although ambitious, respects the limits that I addressed in Chapter 2. In this sense, it is important to highlight three points:

Firstly, as I have shown in Chapter 2, teleological interpretation can be more faithful to a democratic outcome than a less dynamic interpretation "since it prevents textual manipulation of the legal rules" which can produce effects that "were neither wished for nor debated in the political process".²⁶² Applying this reasoning to this case, it is clear that the CJEU intended to uphold these values and principles—the respect for the rule of law and the independence of the judiciary—that were expressed during the political process and later integrated into the Treaties. Secondly, although this interpretation falls under Conway's definition of a "creative interpretation"²⁶³, it is within the scope of interpretations allowed by the text of Article 19 (1) TEU and therefore does not constitute a counter-*legem* intervention on the part of the CJEU. In third place, this interpretation of CJEU respects the principles of inter-institutional balance and mutual collaboration outlined in Article 13 (2) TFEU. In this respect, this decision does not restructure national judicial systems because that power still rests solely with the Member States.²⁶⁴ Therefore, the CJEU is solely empowered to determine whether the courts of each Member State "comply with the concept of judicial independence" as potential enforcers

²⁵⁹Inês Pereira de Sousa, 'The Rule of Law Crisis in the European Union: From Portugal to Poland (and Beyond)' 114 *Teisė* 144.

²⁶⁰Pech and Platon (n 218).

²⁶¹*Ibid.*

²⁶²Poiões Pessoa Maduro (n 32).

²⁶³Conway (n 85).

²⁶⁴Koen Lenaerts, 'New Horizons for the Rule of Law within the EU' 21 *German Law Journal* 29

of EU Law²⁶⁵. Finally, as I explained in chapter 2, “the legitimacy of the EU legal order requires the CJEU to pay due respect to the common national legal traditions”²⁶⁶, and that is exactly what the Court of Justice did in this case by strengthening the rule of law and the principle of judicial independence, a principle that “stems from the constitutional traditions” of the Member States²⁶⁷, being one of the core elements of the definition of the rule of law.²⁶⁸

Therefore, the operationalization of Article 19 TEU should not be viewed as an example of improper behaviour on the part of the CJEU. This interpretation is a reaction of the Court of Justice to the identified threats to the EU legal system posed by the erosion of the Rule of Law in Poland and Hungary, having ensured a solidification of the rule of law by implementing the principle of legal independence.

7. The Consequences of the Portuguese Judges’ Ruling

In the last four years, several rulings have developed the obligation for Member States to ensure judicial independence under Article 19 (1) TEU established in the Portuguese Judges ruling. This development was directly achieved through infringement actions and indirectly under the Preliminary ruling system.

In this regard, the Commission's position regarding the launch of infringement actions under Article 258 TFEU changed by the clarification of the substance of the obligation set forth in Article 19 (1) TEU.²⁶⁹ In this regard, the Commission has been highly active in this area, launching several infringement actions during this period against the Polish State²⁷⁰. Most notably, in the case *Commission v. Poland (The Independence of Supreme Court)*, the Court of Justice ordered a complete restoration of the status quo before the reforms implemented by the Polish Government.²⁷¹

Regarding the application of Article 267 TFEU, the new interpretation established in the Portuguese Judges ruling permits any private party, including any national judge, to

²⁶⁵Ibid

²⁶⁶Poiares Pessoa Maduro (n 38).

²⁶⁷Lenaerts (n 264).

²⁶⁸European Commission, 2020 *Rule of Law Report. The rule of law situation in the European Union*, COM (2020) 580.

²⁶⁹Pech and Kochenov (n 232).

²⁷⁰Case C-192/18. *Commission v. Poland (Independence of Ordinary Courts)* ECLI:EU:C:2019:924 and Case C-619/18. *Commission v. Poland (Independence of the Supreme Court)* EU: C:2018:1021

Case C-791/19. *Commission v. Poland (Disciplinary regime for judges)* ECLI:EU:C:2021:596

²⁷¹*Commission v. Poland (Independence of the Supreme Court)* (n 271).

directly contest any national actions that pose a threat to the independence of any court or tribunal that applies or interprets EU law. This power has been used by the national judges, allowing a clarification of the conclusions of the Portuguese Judge's case. This is not the space for a thorough analysis of all decisions, but three cases should be highlighted. In *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*²⁷², the CJEU determined that national judges not only had the power to refuse jurisdiction to courts that did not uphold the requirements of judicial independence but also they have the authority to disapply national legislation that granted jurisdiction to such courts.²⁷³ A few months later, the Court of Justice in *Miasto Łowicz* reaffirmed the broad application of Article 19 TUE but restricted the procedural admissibility of preliminary decision requests, demonstrating the CJEU's caution in this matter.²⁷⁴ In the *Repubblica* case²⁷⁵, the CJEU strengthened the obligation on Member States to uphold the independence of the judiciary as a component of the rule of law value mentioned in Article 2 TEU by establishing the non-regression principle²⁷⁶. This principle prohibits any national legislation that undermines the "protection of the rule of law, in particular, the guarantees of judicial independence".²⁷⁷ Therefore, the principle of non-regression in this context could be understood as the obligation to not drop below the TEU's Article 49 benchmark after EU membership.²⁷⁸

In this sense, these rulings show that the precedent in the case of the Portuguese Judges served as the starting point for subsequent decisions that placed the CJEU at the centre of a "truly European system of checks and balances" strengthening in this way the rule of law and the judicial independence in the European Union.²⁷⁹

²⁷²Joined Cases C-585/18, C-624/18 and C-625/18. *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* EU: C:2019:982.

²⁷³Filipe Marques, 'Rule of law, national judges and the Court of Justice of the European Union: Let's keep it juridical' *European Law Journal*.

²⁷⁴Joined Cases C-558/18 and C-563/18. *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others*. ECLI:EU:C:2020:234

²⁷⁵Case C-896/19. *Repubblica v Il-Prim Ministru* EU:C: 2021:311.

²⁷⁶Pech and Kochenov (n 232).

²⁷⁷*Repubblica v Il-Prim Ministru*, para 65.

²⁷⁸Mathieu Leloup, Dimitry Kochenov and Aleksejs Dimitrovs, 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 *Repubblica v Il-Prim Ministru*'

²⁷⁹Marques (n 274) 237.

8. Conclusion:

In this chapter, I showed how, in the context of the crisis of the rule of law within the EU framework, the CJEU intervened to safeguard the legality and effectiveness of European law by adopting in the Portuguese Judges case a clever interpretation of Article 19 (1) TEU.

In this way, the Court of Justice by expanding the scope of EU law opened the door to preliminary rulings based on this new interpretation and encouraged the Commission to start infringement proceedings based on Article 19 (1) TEU.

Due to the creativity with which the CJEU connected several Treaty clauses, some General principles, and its case law, setting a precedent that resulted in the expansion of the Court of Justice's authority, this dynamism can be seen as an act of judicial activism on the part of the CJEU. Nevertheless, this interpretation cannot be considered an act of improper judicial behaviour by the Court of Justice.

It is evident that this activism—or, as I prefer to refer to it, dynamism— constituted a means to defend the legality of the EU order, assisting in the protection of the rule of law within the EU.

In conclusion, this interpretation demonstrates once more that the Court of Justice is much more than a dispute settler by providing through the preliminary ruling system a "thicker normative understanding of the law

CHAPTER 5:

Conclusion:

1. Final Remarks

Throughout this thesis, I have demonstrated that the notion of judicial activism is misunderstood. To this end, I started at the source of the problem, which is formalism's legacy and the strict adherence to textualism. In this sense, I have tried to demonstrate that the CJEU operates in a context dominated by pluralism, vagueness, and uncertainty,

In this way, decade after decade, the CJEU has helped the EU develop the European Integration project by cementing the concepts and principles expressed in the Treaties and secondary EU law through its jurisprudence, providing answers to the myriad of problems that the Union faces. In this sense, the CJEU has actively contributed to the interpretation of EU law, closing gaps in the law, and offering clarification to areas where EU legislation is silent. This approach, which is based on well-established components of legal interpretation with a preponderance of teleological elements, is the product of the characteristics of the EU's "new legal", where a static reading of the law would result in situations of denial of justice.

To ensure that EU law continues to be effective in attaining Union objectives, the CJEU has taken (and continues to play) a proactive role in interpreting EU law. An active CJEU that interprets EU legislation in accordance with the objectives and priorities of the Union is necessary for the EU as an institution that is constantly evolving and adapting to new circumstances.

The Portuguese Judges case is a prime illustration of this, in which the CJEU, by cleverly combining Article 2 TEU, Article 4(3) TEU, and Article 19(1) TEU, strengthened the notion of the rule of law in the EU, safeguarding the effectiveness and legality of EU law. Given the context created by the rule of law crisis, the CJEU showed an active stance, expanding the scope of Article 19 (1) TEU, giving new possibilities to the European Commission and to the national courts to tackle the severe degradation of the rule of law in Poland, but also in other Member States. This expansion of the scope of EU law based on a teleological interpretation of the above-mentioned provisions created a precedent,

which has been used successfully both in infringement actions under Article 258 TFEU and under Article 267 TFEU, showing the strength of this new interpretation of the CJEU.

To conclude, given its powers and the context in which it operates, it seems obvious that the CJEU could never serve as a simple dispute settler or a mouthpiece of the law. In this way, I consider that during its 70-year history, the CJEU has generally taken an activist stance and that this approach is appropriate in the context of the European Union.

Recalling the words of Thomas Bingham: "Judicial activism taken to extremes can spell the death of the rule of law". This is true. However, the extent that the CJEU has been an activist, or active as I prefer to define it, fits within the legal and institutional boundaries that delimit the CJEU's functions.

The Court of Justice's judicial activism did not reach "extremes," to borrow Bingham's words once again, that would have led to death or a weakening of the rule of law. Quite the contrary, the recent case law of the CJEU on the rule of law demonstrates that a dynamic/activist interpretation of EU law can be a successful tool to defend legality, the rule of law, and the effectiveness of EU law. This is what the CJEU accomplished in the Portuguese Judges case, illustrating how judicial activism may be a useful tool for preserving the rule of law and legality in the EU.

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