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**The Different Sides of Judicial Activism at the
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ABSTRACT

On regular bases, the Court of Justice of the European Union has been accused of being activist. However, the very nature of the European Union and the great complexity and diversity of the European Court of Justice's case law imply that judicial activism in itself may mean different things. First used and widespread in the United States, the term was rapidly taken for granted and applied to the Court of Justice of the European Union. Yet, the notion of judicial activism has been extensively used by scholars and judges but its meaning has become more and more ambiguous. As American Judge Frank H. Easterbrook already put in 2002 "Everyone scorns judicial "activism", that notoriously slippery term" (2002: 1402). In fact, too often employed to explain a number of different, even contradictory, concepts, it has become increasingly risky to use it. This thesis does neither aim to provide a single and specific definition of the notion of judicial activism nor to bring a completely new approach to the term. Its purpose is rather to collect a wide body of scholarship, to gather the most top-cited theories, to link them to case law and other literature. Then, the objective is to create a typology of judicial activism to make it easier for the reader to understand and for the scholars to convey their theories more adequately.

KEYWORDS

European Court of Justice; European Union; definition; judicial activism; judicial function: legal uncertainty; case law; judge-made law

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INTRODUCTION

Since 1965, the literature on the Court of Justice of the European Union's (CJEU) judicial activism is constantly expanding. However, in the dense and flourishing literature on judicial activism, very few writers have worked on its meaning. Indeed, providing a definition of the term is highly elusive, even from the earliest years of the literature on judicial activism. On the one hand, this is due to the topic in itself and on the other hand, this is due to the nature of the scholarship. The first use of the term "judicial activism" can be traced back to the late 1940s in *Fortune Magazine*. Arthur Schlesinger Jr. used the term to refer to the fatality of a judge to make a political choice: "A wise judge knows that political choice is inevitable; he makes no false pretence of objectivity and consciously exercises the judicial power with an eye to social results" (Schlesinger 1947). This genesis underlines three crucial issues that had important implications for all the successive literature. First, the term was proposed by a non-lawyer and addressed to the audience of a popular magazine. And, the very essence of the word "activism" suggests the existence of an ideological core. This leads to the second and third issues: it has not only been employed in reference to the United States (US) Supreme Court judges but also at a time when the European Court of Justice (ECJ) was not created yet. Indeed, the genesis of the label "judicial activism" highlights the geographical and temporal particularities involved. Since this very particular use of the term, applied to a specific situation and context, the notion has been increasingly used, first to denounce the behaviour of the nine judges of the US Supreme Court and then widespread on the other side of the Atlantic.

As early as the creation of the ECJ, D.G. Valentine (1965) wrote a book, which includes a substantial part on the political role of the ECJ (Hatzopoulos 2013: 103). Four years later, A.W. Green (1969) devoted a book to the issue of judicial activism at the European Court of Justice. In 1986, H. Rasmussen publicly accused the Court of being activist and he drew on no less than thirteen scholars and four judges who had already largely covered the issue (Hatzopoulos 2013: 103). His ideas were further developed by a number of scholars, including M. Cappelletti (1987), J.H.H. Weiler (1987), A. Arnall (1996) and, R. Dehousse (1998) (Hatzopoulos 2013: 103). Since then, the meaning of the term has too often been taken for granted and the scholarship on this subject is now rich, with a wide range of publications in distinguished journals and academic presses. Precisely because the term embodies much specificity and refers to different contexts, it has tended to serve as a function of those specificities and contexts instead of being handled as a topic on its own. Thus, the

topic is not only challenging, but the literature has also had difficulties to adapt to it. Indeed, even if many scholars have worked on judicial activism in specific periods of time and according to their field of study – whether legal, social or political – a little minority of them have tried to move beyond the mere debate of the (alleged) activist bias of the ECJ (Hatzopoulos 2013: 105) and to build models and typologies of the Court’s legal behaviour. And only few authors have analysed the topic in light of the characteristics of the EU system as a whole.

First, the European Union (EU) is often considered as a constant stimulus. Yet, “we need to see responses to the EU as changing responses to a changing stimulus” (Szczerbiak and Taggart 2018: 18). It is a construction for peace, prosperity and mobility but it is also a hybrid, multi-level system made of a complex set of institutions, policy-making and decision-making processes, laws and regulations covering a large range of areas (Flood and Soborski 2018: 36). Second, the so-called process of *judicisation* of politics has consistently made the contrast between the political and judicial even more difficult to identify in European politics. The unprecedented nature of the EU has made the Court the supreme judicial arbiter with regard to the application of EU law, thus making it automatically involved in European Union governance since it reaches decision that are collectively binding for the EU Member States (Kingston 2011: 133). And because the European Court of Justice operates through a so-called “magic triangle”: direct effect¹, supremacy² and preliminary ruling³, it often combines both legal and political interpretations (Barani 2007: 42). This complexity often leads to different interpretations and opinions. Thus, accusations of judicial activism arise because there is no commonly agreed meaning and because that meaning is divided into various and often conflicting objectives and values (Dawson 2013: 30). In the meantime, EU Treaty might treat these values equally, which make the possibility of reconciling them even more complex (Dawson 2013: 30; Beck 2012: 77). Thus, due to this legislative ambiguity, the Court is forced to make a choice or to operate a balancing test (Dawson 2013: 30). As a result, the ECJ constantly challenges the literature and brings it to review its academic archetypes in order to accommodate with contemporary European realities (Taggart and Szczerbiak 2002: 24).

¹ Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62

² Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, Case 6-64

³ See Article 267 TFEU

Thus, the author will attempt to answer the following question: can the sole notion of judicial activism be used to qualify the ECJ's legal reasoning in judgments deemed controversial⁴? This thesis aims to provide a three-fold contribution to the study of judicial activism in the EU. First, because the term has since acquired multiple facets, the literature is divided on what judicial activism means. As this contribution is limited in length, the author will present and organise the most widely accepted theories and ideas on judicial activism to provide an overview of the work that has already been done in this field. Second, this contribution will explain and analyse some concepts, mechanisms and procedures within the EU, which could have led to accusation of judicial activism. Thirdly, based on the literature review and explanations provided in the first two chapters, the author will build a typology of judicial activism in order to differentiate between all the theories for the sake of linguistic accuracy and better understanding. By building this model, she does not aim to take any side in the debate, to refute any approaches nor to develop a completely new theory but rather to combine all the applications of the term for more technical use.

I. Judicial Activism: the Emergence and Development of a Field of Study

A. Defining judicial activism

In the early years of the literature on judicial activism, Sir Patrick Neill (1995) published *The European Court of Justice: A Case Study in Judicial Activism*, in which he criticises the legal literature for not conducting sufficient "critical analysis" of the Court's case law. In other words, he argues that the early academic literature on Community law focused mainly on explaining the EU institutional structure and was not sufficiently critical of the Court. In his publication, he gathers a number of judgments where he accused the ECJ of being activist and pursuing a federalist agenda. In this sense, he perceived the Court of Justice as a potential threat to the institutional system of the United Kingdom. Thus, in his publication, the notion of judicial activism lies in Neill's national political orientation, which disagreed with the authority granted to the Court in the Treaty. Few years later, Keenan D. Kmiec (2004) provided an in-depth analysis of the different meanings of judicial activism. He collected five main definitions that have been used in the United States to describe the concept of judicial activism. According to the first definition, the Court is activist when it

⁴ By controversial, the author means all the decisions that have been contested at any given point of time

invalidates a piece of enacted legislation. In other words, when the Court voluntarily limits the work reserved to other government bodies. Secondly, the Court can be accused of activism when it disregards “horizontal precedent”, that is to say its previous decisions but also when it departs from a decision reached by a higher court, i.e. “vertical precedent” (Kmiec 2004: 1466-1469). However, according to Kmiec, it may not always be proper to follow a previous decision in cases where, for instance, a court deems a previous decision as not being faithful to the principles set down in the Constitution. When a court disregards precedents, it must be bore in mind that courts do not necessarily treat every kinds of law similarly (Kmiec 2004: 1469). Thus, when a court disregards common law precedents, this is because it deems the lower courts more able to change the law (Kmiec 2004: 1469). The third definition is one of the most used nowadays to describe the phenomenon: when a court intervenes in the legislative process by trying to create law, i.e. so-called “judge-made law”. However, here, the notion of judicial activism is used to criticise the Supreme Court’s behaviour in certain situations and thus may confuse the reader about the difference between a court behaving in an inappropriate manner and a court being “activist”. The fourth definition departs from the idea that, when a court interprets the Constitution following “established canons of interpretation” or when it relies on different tools to reach a decision, it may lead to judicial activism (Kmiec 2004: 1974). However, this definition is hard to follow since judges do not necessarily agree on the appropriate way to read the Constitution. Finally, the fifth definition is called “result-oriented judging” (Kmiec 2004: 1975). A court is said activist when the decision it reaches deviates from the objective of a case: when it “has an ulterior motive for making the ruling” (Kmiec 2004: 1476). However, Kmiec does not necessarily defend one definition over another and the term still remains confusing. In addition, his work has been conducted to clarify the notion of judicial activism as it is used in the United States’ long-standing judicial branches. But the EU Courts’ must be studied within the EU system as a whole which is itself complex and in constant evolution.

Nevertheless, contemporary literature on judicial activism has tended to rely on some of the abovementioned definitions without necessarily calling them into question. Indeed, over the years, the term as acquired a wide range of meanings, which make the term virtually unchallenged. For instance, the collectively written book *Judicial Activism at the European Court of Justice* comprises 12 chapters on the topic but only two authors provide some sort of definitions. The first author, Maartje de Visser (2013), argues that judicial activism has been used to refer to the ‘proper role’ of the Court, judge-made law and the legitimacy of the Court. According to de Visser, the notion is to a large extent employed by politicians, the

media and the public to express disagreement with a specific decision or interpretation of case law (2013: 188). However, given the great complexity and diversity of the European Court of Justice's case law, expressing disagreement can take various forms and be oriented around a specific issue according to the case at hand. Indeed, it is also highly subjective since it lies in the values and political orientation of the one who disagrees. Put differently, one may disagree with a specific decision the ECJ has reached whereas another individual can agree with the Court on a similar judgment because its reasoning is in line with his own beliefs and interests. Interestingly, the second author, Anthony Arnall (2013), suggests that accusing a court of judicial activism is more than just disagreeing with it on some specific decisions. According to him, an activist court is a court that goes beyond what is provided for in the Treaty and abuses its powers (Arnall 2013: 215). However, he stresses that a number of decisions taken by the EU Courts – which have been criticised as activist – were not reached *contra legem*, which means that the Treaty excludes EU action. Arnall recalls that the Treaties have been designed collectively and are the results of lengthy diplomatic compromises (2013: 225). In other words, some parts of the Treaties have been left ambiguous, thus often leading to disagreements. And it was made clear that the EU Courts should be in charge of solving these disagreements (Arnall 2013: 225). In this sense, Arnall argues that the decisions *in Van Gend en Loos*⁵ and *Costa v Enel*⁶ on direct effect and primacy of EU law cannot be considered as activist. Moreover, he argues that there is still no common agreement among the academics on the notion of judicial activism. And, given the great divergence of opinion among the literature, he believes that it would be useless to find universal agreement on the legal orientation the ECJ should take (Arnall 2013: 230-1). Accordingly, this is precisely why it is necessary to draw a typology of the term in order to avoid misunderstanding and overlap among the literature.

B. Judge-made law: an argument for judicial activism

Legal realism is one of the leading theories that provide an understanding of what judicial activism means. The theory lies in the US legal tradition and aims at studying the behaviour of judges and how they make decisions. And, it is often argued that justice is “what

⁵ Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62

⁶ See *Costa v E.N.E.L.*, above n 2

judges ate for breakfast”. In other words, the decisions reached by a judge depend on a variety of personal factors. In *What I Ate for Breakfast and Other Mysteries of Judicial Decision-Making*, Alex Kozinski (1993) clarifies the theory and argues that “legal rules don’t mean much anyway, (...) judges can reach any result they wish by invoking the right incantation, they should engraft their own political philosophy onto the decision-making process (...)” (1993: 993). He then suggests that American judges have a considerable room of manoeuvre, by directly interpreting the wording of the Constitution (1993: 994). This theory directly echoes the supreme character of the ECJ discussed in the introduction. Indeed, the Court of Justice of the EU also enjoys a large room of manoeuvre in the interpretation of EU law through its case law, thus making it the ultimate architect of the European edifice. David T. Keeling (1998) claims that many pieces of EU legislation have been left ambiguous, thus obliging the Court to interpret them. Moreover, as it will be explained in Chapter II, the Court must often deal with conflicting policy ideas. He argues that the Court had to make a hard choice when determining which policy orientations should predominate (Keeling 1998: 510). And this is precisely this responsibility that led to allegations of judge-made law. Similarly, Henri de Waele and Anna van der Vleuten (2011) conducted a study whereby they found that the ECJ has been activist in the field of EU competition law. They argue that the *Continental Can*⁷ judgment is an example of the absence of precise rules with regards to merger control in any EU sources, which paved the way to “judge-made” law in this field of EU law.

Henri de Waele (2010) gathered several arguments from different sides of the debate on judicial activism: those who strongly argue against the ECJ’s judicial activism and those who tend to believe that judicial activism is inevitable. By judicial activism, de Waele means that the ECJ interprets the law. The Court has indeed already proved to interpret the law, but because the legal wording in the Treaties has been left vague, thus forcing the Court to interpret it. As a result, it seems doubtful to accuse the Court of judicial activism while one of its duties is to give preliminary ruling on the interpretation of Union law or the validity of acts adopted by the institutions⁸. Moreover, De Waele’s use of judicial activism is confusing since he tends to apply this no consensus-based concept to the entire ECJ’s case law.

For several years, Ronald Dworkin has defended the idea that there can be “right answers to controversial legal questions” (Dworkin 1986: ix). By “right”, he does not mean

⁷ Judgment of the Court of 21 February 1973, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Case 6-72

⁸ Article 19 Treaty on the European Union (TEU)

that there is one single, universally agreed, answer to one question; it is rather a matter of morality. Similarly, the same year, Posner called into question the applicability of the notion of judicial activism. According to him, what matters is to determine when a judicial decision can be characterised as right. He argues that the theoretical concept of legal realism is useful but is not sufficient to interpret a judicial decision. Only time will determine whether judicial decisions are right (1986: 217). However, even if Posner's work calls into question the use of judicial activism, there is still a need to define what a "right decision" is. Indeed, when a Court is ruling there is always a decision that is to be made so, when a decision can be proved right in cases where the law is silent?

Finally, new legal realism aims to go beyond the old legal realism and to challenge hypotheses on the role of law and politics in judicial decisions. It is based on a quantitative approach, using a series of statistical analysis. According to Miles and Sunstein (2007), new legal realism has discovered that race, sex and other demographic data could have had an impact on judicial judgments (2007: 1). Similarly, Matthew Gabel (2003) has studied the selection process of the ECJ judges. Even if there is no available evidence of the ECJ's judges voting behaviour, he found that, once judges are appointed, they tend to legislate by trying to have an impact on public policy outcomes (Gabel 2003: 13). Therefore, he assumes that judges at the ECJ tend to share the same policy preferences as that of their national governments (Gabel 2003: 6). Drawing on this conclusion, the ECJ acts as a rational actor that adopts strategies going into that direction. However, his theory clearly undermines the principle of independence of the judges enshrined in Article 19 (2) TEU. In addition, it seems doubtful to use the theory to understand how the ECJ reaches decisions. On the one hand, the Court rules on a supranational level and therefore has to deal with 28 judges coming from 28 Member States with different judicial tradition and multiple political affiliations. On the other hand, ECJ judges voting behaviour are kept secret.

C. Interpreting judicial activism: two sides of the same coin?

Another branch of the literature on judicial activism has put forward two main arguments on several occasions and over time. Some authors have defended the idea that EU Member States influence the ECJ whereas others think that the ECJ follows a *communautaire* approach, i.e. the Court reaches decisions in accordance with the Union's interests.

On the one hand, scholars have argued that the ECJ is to a large extent influenced by national governments. For instance, in 2013, Pavel Belchev wrote that the European Court of Justice has been to a large extent more inclined to favor the “big” Member States when modifying the EU treaties and the institutional framework. By accusing the Court of Justice of the European Union (CJEU) of “judicial activism” in this sense, Belchev directly calls into question the principle of impartiality and independence of the Court set out in Article 19 of the Treaty on the European Union (EU), which provides that the Court shall ensure that the law of the Treaties is observed.

On the other hand, some scholars have suggested that the ECJ is largely shaping national laws to serve the integrationist interests of European law. Karen Alter ascertains that the ECJ has been “doctrinally activist” by avoiding any political interference (1998: 139). She argues that the Court has been able to reinforce its powers because politicians and judges follow a different timeframe (1998: 122). Thus, due to these “different time horizons”, the Court has been able to create legal doctrine without any political interference (Alter 1998: 120). More precisely, she explains that politicians tend to work on short-term solutions in order to satisfy their electorate and to stay in office (Alter 1998: 130). In doing so, they are more inclined to disregard ECJ’s decisions, which are more on the long-term (Alter 1998: 130). Similarly, governments tend to follow the Court’s rulings as long as they do not bear long-term costs. Thus, the Court has been “doctrinally activist” since it has been able to build precedent and incrementally expand its powers while successfully avoiding any political contestation (Alter 1998: 131). In *Integration-through-Law*, Antoine Vauchez (2008) studied how law should be implemented. He believes that European treaties cannot be effectively implemented if European law is not supreme over national law. Similarly, he claims that both direct effect and preliminary rulings principles are necessary to ensure a homogeneous application of European law across the European Union. By recognising the need for EU law supremacy, Vauchez’s argument seems to stand on the pro-integrationist and pro-supranationalist sides. In 2004, Rachel Cichowski showed that, with regards to women rights, the Court of Justice tends to act as a rational actor. According to him, the supranational character of the EU has expanded the scope of EU law and entitled individuals to enforce European law through the national courts system of a EU national government, thus not having to wait anymore for the Commission to bring a legal action against the Member State concerned for non-compliance with its international obligations. In 2010, Alec Stone Sweet also argued that the ECJ has been to a large extent pro-integrationist by privileging supranational norms over national laws. Similarly, Sabine Saurugger and Fabien Terpan

(2014) asked whether the Court, through its “activism” exert a major influence on the European Union. They analyse whether the Court modifies the state of the law, substantially on its own initiative, by an evolutionary interpretation (Saurugger and Terpan 2014: 60). They found that the CJEU does not exercise such a major influence if it does not substantially alter the state of the law or if it restricts itself to a strict interpretation of the treaties and secondary law (Saurugger and Terpan 2014: 60). The Court would have fashioned European governance through its jurisprudence, both at constitutional and legislative level. This phenomenon is generally referred to as “jurisprudential activism” (Saurugger and Terpan 2014: 62). According to them, the jurisprudence of the Court of Justice is usually explained by two main reasons: the independence of the Court and its federalist lecture of the European construction (Saurugger and Terpan 2014: 63). They also believe that, while the CJEU was largely glorified in the literature in the 1980s and 1990s, highlighting its influence and its jurisprudential activism, it has since been the subject of increasingly sceptical analyses with regards to its expansive role in contemporary European governance (Saurugger and Terpan 2014: 74). The authors thus ask whether, since the 2000s, the Court has entered a period of restraint putting an end to this activist tradition and would no longer be central to the integration process. In their article, they have shown that this observation must be highly nuanced. The Court remains a key player in the growing number of areas where European integration continues to progress on the basis of legislative acts and legal coercion (Saurugger and Terpan 2014: 74).

D. Applying the notion of judicial activism to a specific area of EU law

Another range of scholars went further in the debate by specifically concerning themselves with a specific area of EU law. For instance, a large part of the debate has been about the interaction between the market-oriented Court’s rulings and the fundamental rights. The Post-Chicago economic theories rejected the leading theory that actors act rationally and as a consequence have an impact on market regulation (Chalmers 2015: 949). More specifically, EU competition law was first influenced by the German idea of ordoliberalism, which promotes the freedom of other economic actors to intervene in the market. Thus, a large part of scholars have accused the ECJ of judicial activism because it often tends to favour economic freedoms over fundamental rights.

For instance, based on criticisms formulated against the judgments in *Laval*⁹ and *Viking*¹⁰, and hereafter the Monti II Regulation, Niklas Brunn (2012) argued that, by using the principle of proportionality, the ECJ's has, to some extent, confirmed the primacy accorded to economic freedoms. These judgments have not called into question the role of the proportionality test in the resolution of conflicts between the freedom to provide services and the right to bring a collective action. According to him, in the European Court of Justice case law, primary law generally tends to take precedence over secondary law. Correspondingly, since posted workers are subject to different rules and employer responsibilities, Mijke Houwerzijl has argued that this can lead to distort competition in the freedom of goods and lead to "regime shopping" (2014: 30). More precisely, he suggests that employers can choose which regimes to be applied for their company – freedom of services and freedom of workers – to lower labour costs and adjust contracts and thus pursue a "race to the bottom". Based on the principle of regime shopping of Houwerzijl, one may conclude that employers tend to play with EU legislation to their own benefits and therefore overturn fundamental social rights.

Similarly, in *Labour Mobility and Wage Dumping: The Case of Norway*, published in 2014, Kristin Alsos and Line Eldring argue that the enlargement to the countries of Central and Eastern Europe showed that the dangers for the labour market of the old Member States (EU15) are the result of the difference between wage costs, social conditions and industrial relations. This called into question the so-called "European social model" (Alsos and Eldring 2008). In 2014, Catherine Barnard argued that the future of the ECJ case law will tell if the EU will be able to "square the circle" – to provide both an effective protection of fundamental rights and an effective compliance with economic freedoms. In *Individualism: An Essay on the Authority of the European Union*, Alexander Somek wrote that horizontally the completion of the single market through the elimination of any barriers to competition has always been the "single basis of Union power" (2008).

Finally, Clemens Kaupa (2013) focuses on the academic debate over the internal market, especially the tensions between 'economic' and 'non-economic' goals. Kaupa goes

⁹ Judgment of the Court (Grand Chamber) of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, Case C-341/05

¹⁰ Judgment of the Court 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05

further the abovementioned scholars by arguing that this debate highlights the very division over both the nature and objectives of the ‘economic objectives’ as defined in the Treaty (2013: 64). Even if the Court has often followed a liberal tendency when interpreting those objectives, the author shows that economic theory provides several ways on how to achieve and define the Treaty’s economic objectives. For instance, in the *Viking* decision, he believes that the Court has been accused to follow a neoliberal line of conduct because it has interpreted the market freedoms in a neoclassical way, thus not taking into account other economic possibilities (Kaupa 2013: 67). In sum, Kaupa suggests that the Court has followed the ‘conventional wisdom’ put forward by the economic mainstream, which is considered as neutral (2013: 68). He argues that the decisions of the Court cannot thus be interpreted through judicial activism or the nature of the European Union but rather by the various economic positions that it chooses to follow (2013: 58).

Thus, overall this range of scholars tends to argue that economic arguments always take precedence over fundamental rights. Therefore, if judicial activism is defined as giving priority to economic freedoms over fundamental social rights, one could also argue conversely: could the promotion of social welfare, at the expense of the freedom of services, be characterised in light of judicial activism? One may thus conclude that the use of judicial activism lies in the eyes of the observer. Put differently, the author has found that the debate on judicial activism has gone in many directions and the notion of judicial activism has served as a function of their arguments instead of being handled as a topic on its own.

E. The ECJ and the EU policy-process

Finally, a large part of scholars have worked on the political role and function of the ECJ. Susanne K. Schmidt (2018) wrote a book about the *European Court of Justice and the Policy Process*. She distinguishes between activism (when the Court acts beyond its prerogatives) and self-restraint (when the Court decides not to act). However, rather than focusing on whether the Court acts in an activist way or not and because of the extraordinary nature of the European Union, she analyses the Court’s evolution in the EU system as a whole (2018: 239). As a constitutional system consisting of a Treaty including numerous policy goals, the ECJ plays a considerable role and this can explain why there is such a degree of constraints exercised by the Court’s case law on both EU and Member States’ policy decisions. She evaluates how the European case law has had deep policy implications.

According to the author, the policy implications of case law are greater when the Court is activist (2018: 239). However, the policy implications are also present even if the Court refrains from acting. Moreover, according to Schmidt, at the national level, constitutional courts are “embedded in the national political discussion” unlike the EU Courts (Schmidt 2018: 251). Indeed, national constitutions are more flexible than the Treaty, thus policy implications are much leaner for national constitutionalised case law: “if case law is not supported by politics, it will be overruled by secondary law in the national context” (2018: 251). Nevertheless, the EU system makes it impossible as a Treaty change is highly difficult to make. The work of Schmidt is a good starting point for this thesis but it crucially lacks accuracy in her definitions of “judicial activism” and “judicial restraint”.

Similarly, Sergio Carrera and Bilyana Petkova (2013) suggest that accusations of judicial activism directed at the EU Courts can be linked to the expanding role that courts have to play nowadays. They raise two very important questions in the context of judicial activism: “where does the law and policy begin? How to draw the line when it comes to written or de facto constitution?” (Carrera and Petkova, 2013: 238). When courts have to rule on certain issues, they have to reach decisions on questions of principle and conduct ‘balancing tests’ that often carry value or moral judgments (Carrera and Petkova, 2013: 237). However, such kinds of decisions based on moral values are considered as not appropriate for judges but rather fall within the competence of politicians (Carrera and Petkova, 2013: 237). In this perspective, they also introduce the notion of “judicial restraint” when the Court decides not to act. However, they both agree that the notion of “judicial activism” and “judicial restraint” are too vague and embody a wide range of meanings (Carrera and Petkova, 2013: 237).

Mark Dawson, Bruno De Witte and Elise Muir (2013) argue that two developments in EU law have led to accusations of judicial activism. On the one hand, there has been an increasing wave of Euroscepticism, especially with regards to the “general direction taken by the integration process” (Dawson, De Witte and Muir 2013: 2). On the other hand, EU law has expanded in scope over the years. The internal market has had some policy impact in non-economic fields, which led the Court to intervene even if the Member States retain competences in those fields, such as education or taxation (Dawson, De Witte and Muir 2013: 2). Karen Alter and Sophie Meunier (2010) took the example of the *Cassis de Dijon*¹¹

¹¹ Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case C-170/78

decision and assess how the judicial policy of mutual recognition could have been established without the approach of harmonisation adopted in the Single European Act (SEA). They believe that the *Cassis de Dijon* decision is an example of how “judicial politics” play a role in the policy-making process in the European Community by challenging policies at the national level, submitting ideas to policy-makers and triggering policy processes (Alter and Meunier 2010: 156). More specifically, the European legal system can operate in three main ways. First, it can be an intermediary channel through which individual or group interests are represented. The Court is thus a political actor evolving in a political environment but also independent from the influence of the Member States as well as of the Commission (Alter and Meunier 2010: 156). Second, the Court is encouraged to provide ideas and thus influence the policy-making process (Alter and Meunier 2010: 157). Third, after submitting policy ideas, the Court can also provoke policy responses, such as the harmonisation process in the *Cassis* case which led Member States to negotiate Article 100b of the Single European Act (Alter and Meunier 2010: 157).

Vassilis Hatzopoulos (2013) suggests that the EU Courts’ decisions are mostly welcomed throughout the EU. He called into question the theories of judicial activism by highlighting the ways through which the EU Courts act in response to political guidance. He also identifies some cases where the Court acted beyond or even against the political sphere. However, according to Hatzopoulos, acting in such a way is not always questionable. He recalls that the constitutional function of the Court is to remain independent from any external influence and its duty is to promote dialogue between political institutions (Hatzopoulos 2013: 111). Mark Dawson (2013) believes that a deep imbalance between the EU’s legal and political sphere is the result of judicial activism. While it is commonplace at the national level, there is a lack of ordinary dialogue between the legal and political sphere at the EU level due to the division of competences and the “constitutional” system set by the EU treaties. More specifically, he argues that because courts do not actually risk to be censured by any political entity, they do not look for political responsiveness (Dawson 2013: 13). Moreover, as a consequence of the division of competences and decision-making processes, the CJEU does not necessarily have the means, ability and incentives to engage in political debates (Dawson 2013: 5). According to the author, it is the use of constitutional conversations that can moderate and reduce the political effects of judicial decisions (Dawson 2013: 13).

F. Main findings

Among the wide and rich literature, some categories of arguments can be distinguished and categorised and within each categories can also be distinguished the proponents and detractors. This Chapter thus confirms that the notion of judicial activism has become used in an extensive way without being properly explained, thus making it increasingly complex for the reader. Indeed, the Court has been accused of judicial activism in many cases: either because it has ruled in favour of one fundamental freedom over the others, or because it has interpreted the law in a certain way over another, or because it has advantaged some actors over others, or because it is said to have a political role. The main problem with the notion of judicial activism is that it estimates that for each legal conflict coming before a court, it exists an unequivocal solution, which can be identified by any lawyer (Keeling 1998: 508). As a consequence, if a court delivers a decision that does not seem to be strictly text-based and unequivocal, it means that this decision is one possible answer among some others, which was reached to the detriment of others on policy grounds and the court will thus be accused of judicial activism by those who would have chosen another of the solutions (Keeling 1998: 508). However, the law enshrined in the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU) and the legislation adopted by the EU institutions, are much more complicated. Indeed, the main issue with the provisions enshrined in EU law, in particular in the founding Treaties, is that they are loosely written (Keeling 1998: 509). Moreover, it is crucial to remember that the EU institutional structure is unprecedented and unique, subject to international negotiations between 28 countries, which have sometimes not been able to reach an agreement, and most of the responsibility to resolve these disputes was left in the hands of the Court on a wide range of topics. This does not, in any case, call into question the quality and relevance of the arguments put forward by the scholars who have worked on judicial activism. But, it shows that this field of study crucially lacks semantic accuracy.

As a consequence, because this debate is confusing, it is necessary to look at the organisation of the European judicial architecture, the function of the judiciary and some of the particularities of the EU legal system, which could have led to accusations of judicial activism. By doing so, the objective is to shed light on what has been disregarded by most of the authors, i.e. the uniqueness of the EU legal system.

II. The European Court of Justice: an Unprecedented Judicial Architecture

How the uniqueness of the European Union system has led to accusation of judicial activism directed against the European Court of Justice?

First, while encompassing a wide range of provisions, the EU Treaties fail to provide an adequate answer to the question of the legitimate role of the European Court of Justice (Dawson 2014: 423). Because the Court has to apply and implement open-ended and sometimes even contradictory series of legal documents and interact with many different legal orders with diverse constitutional traditions and way of reasoning, finding a European consensus on the ECJ 'proper' role is complex to reach (Dawson 2014: 424). Second, judges can often interpret in a multiple way the text. Therefore, they have diverse possibilities to come to an interpretation, in the absence of clear and indisputable criteria of which approach to use and when (Dawson 2014: 426). Third, the ECJ lacks the opportunity to engage in a dialogue with EU political institutions and national legislatures (Dawson 2014: 423).

A. The judicial function of the ECJ

1. The duties of an extraordinary Court

As for any other courts, the ECJ is only entitled to solve legal disputes (Schmidt 2018: 232). It undertakes this responsibility within the EU legal order not only as a constitutional but also as an administrative court. In endorsing these two roles, in accordance with the integrity of the European institutional order as provided for in the Treaty and in quest for the protection of individuals' rights, the Court has to be entirely independent from any political interference¹² (Hatzopoulos 2013: 103). Indeed, since the Court is supposed to keep the political institutions under control, it cannot be responsible before them without taking the risk of jeopardising its role as 'custodian' of the other institutions (Hatzopoulos 2013: 108). The Court also enjoys an important institutional legitimacy within the EU legal order: it is composed of 28 national judges, one per Member States and of Advocates General who deliver neutral and solid legal analyses, which ensure the quality of its judgments (Hatzopoulos 2013: 103). While one may think that the selection criteria of the judges do give

¹² See Article 19(2) TEU

some margin of discretion at the national level¹³, Article 255 TFEU provides that a panel shall be set up to give an “opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court”.

According to Montesquieu (1748)¹⁴, “*les juges ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés, qui n’en peuvent modérer ni la force ni la rigueur*”. In other words, he considers that, in a democratic regime, the judge is an “inanimate being” who says and applies the principles that the law has already enacted without being able to modify their meaning or scope. Yet, in contemporary western democratic polities, constitutional courts have the duty of stabilising their political systems. And due to the ambiguity of some constitutional provisions, courts are often in charge of addressing the issue of ‘incomplete contracting’ (Höreth 2013: 32). Indeed, because the European legal order has not been “constitutional” at the outset, it requires completing contracts – the European treaties (Höreth 2013: 33). This is precisely this function of ‘dispute resolvers’ of constitutional disputes that makes them essential in modern democracies (Höreth 2013: 32). As a consequence, because the courts are in charge of resolving constitutional conflicts and filling legislative gaps, they are involved in the process of “judicialisation of politics” which sees an extension of the judicial power (Höreth 2013: 32). Thus, this can explain the increasing influence exerting by the EU Courts: while their duties have undoubtedly been extended more than what their founders had in mind, they also operate and fulfil their roles in line with what political systems require them to do (Höreth 2013: 32).

In addition, it is commonly known that the European integration process has transformed the domestic political landscape, especially with regards to power distribution, including an increased transfer of sovereignty and competences from Member States to the European Union. The development of the EU required a shift from a solely market-oriented project to a construction dealing with social, environmental and economic issues as illustrated in the Lisbon Treaty. For instance, Article 3 of the TFEU encompasses “combating social exclusion” and the promotion of international sustainable development as fully integrated into the Union’s objectives. Partly as a consequence, the ECJ has been accused of activism because it has handled questions about the limits of national sovereignty for example, which in itself should have been dealt at the political level and not at the judicial level (Dawson

¹³ See for instance Gabel, M. (2003), “The Politics of Decision-Making in the European Court of Justice: The System of Chambers and Distribution of Cases for Decision”, in *ECPR conference*, Marburg

¹⁴ “*De l’Esprit des Lois*”, Livre VI (1748)

2013: 12). This has led to many criticisms towards the ECJ, especially with regards to its alleged abuse of power over national legislature¹⁵. For example, in 2003, the European Parliament and Council passed the EU's Tobacco Advertising Directive¹⁶, which bans tobacco advertising in the print media. This directive has been widely criticised because health care was an area falling within the competence of the Member States and because the EU did not have enough legislative competence in this policy area (Herzog and Gerken 2008). Another example is the ECJ judgments in *Van Gend & Loos*¹⁷ and *Costa v Enel*¹⁸, where Federico Mancini characterises the ECJ's jurisprudence as taking "Community law out of the hands of politicians and bureaucrats and give it to people" (Mancini and Keeling 1994: 183). These two judgments created direct legal entitlements for individuals by enabling them to use rights under EU law to directly challenge national policies. Thus, those tasks the Court has to fulfil may partly explain why the ECJ has become among the most powerful European legal and legal institutions (Alter 2000: 227). In sum, the nature of the European legal order is so unprecedented that no other jurisdiction of a Supreme Court shape a legal order in such a way the jurisdiction of the ECJ shapes European law (Höreth 2013: 33).

2. A tailor-made agenda?

The theory that the European Court of Justice follows a federalist agenda has been widely supported¹⁹. However, it appears doubtful to think that all of the judges of the Court, who are designated by their respective Member States, would unanimously agree on a specific agenda (Keeling 1998: 531). Indeed, it is quite questionable to think that a collegiate body of judges can reach a coherent and commonly shared philosophy or a similar approach to their work (Keeling 1998: 531). As previously explained, Courts do not have any power of

¹⁵ See for instance Scharpf, F. (2008), "The only solution is to refuse to comply with ECJ rulings", interview in Hans Böckler Stiftung. Available at: https://www.boeckler.de/66359_36456.htm

¹⁶ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products

¹⁷ See *Van Gend en Loos*, above n 1

¹⁸ See *Costa v Enel*, above n 2

¹⁹ See for instance Neill, P. (1995), "The European Court of Justice: A Study in Judicial activism", *European policy forum*; Saurugger, S., Terpan, F. (2014), "La Cour de Justice au cœur de la Gouvernance Européenne", in *Pouvoirs*, n. 149, pp. 59-65

initiative (Keeling 1998: 531). And, the ECJ does not have the power to decide which cases should be brought before it or which legal issues should be addressed (Keeling 1998: 531). Nevertheless, it is interesting to ask whether the Court, despite those restraints, acts according to one principle, a guideline by which it makes legal choices.

One may argue that the founding Treaties do not specifically provide for the primacy of EU law over national law. However, in the absence of the doctrine of supremacy²⁰, the Treaty would have been meaningless and the Union would have fallen apart (Keeling 1998: 532). According to Keeling, “(...) the Court’s overriding conviction is that the European Community was meant to exist, to achieve something tangible and to be founded on the rule of law” (1998: 532). Indeed, one cannot expect to have a Union, which involves some pooling of legal sovereignty, if all the Member States are allowed to choose which European law is binding upon itself (Keeling 1998: 532). Thus, if the doctrine of primacy was not applicable, the EU would have reverted to a simple intergovernmental body and this was certainly not included in the project of the EU’s founding fathers (Keeling 1998: 533). This affirmation also holds for the Court’s case law on direct effect. The cases *Van Gend en Loos*²¹ and *Van Duyn*²² have both been said to fall “outside” the ambit of the Treaty (Keeling 1998: 533). However, if the doctrine of direct effect was not binding, EU law would be legally enforceable in some Member States, whilst it would be ignored in others. As a result of the absence of reciprocity, the EU would probably have fallen apart if several Member States were under the rules of the common market whereas other Member States were subject to a different regime (Keeling 1998: 533).

Therefore, applying the doctrine of direct effect and primacy of EU law in a uniform way was an indispensable requirement for EU law. In conclusion, the Court does not have any agenda and whatever decisions a judge reaches, critics will be addressed to him. On the one hand, if a judge formulates new law in order to do justice, there will be critics about how he broke the legal path and has called into question the long-standing principles (Edmund-Davies 1975: 13). Conversely, if a judge bases his legal reasoning only on long-standing legal principles, he will be accused of failing to adapt the law to new social needs (Edmund-Davies 1975: 13). Accordingly, as put by Edmund-Davies: “By its very nature, the law is a laggard. The reason is not far to seek. “Law,” someone has said, “does not search out as do science

²⁰ See for instance *Costa v Enel* (Case 6-64), *Simmenthal* (Case 106/77) and *Internationale Handelsgesellschaft* (Case 11/70)

²¹ See *Van Gend & Loos*, above n 1

²² Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*, Case 41/74

and medicine; it reacts to social needs and demands... The problem must arise before the law reacts to provide a solution. Here is where science and law differ” (1975: 2).

3. European governance and the ECJ

The ECJ is often considered as a political actor, playing a central role in European governance. Firstly, talking about governance with regard to the case law of the Court requires some precautions. As discussed above, the role of the Court, as of any jurisdiction is not only the “mouth of the law”. Although this runs counter to what Montesquieu envisaged, the Court, through its interpretations of the law, is close to play a political decision-making role but without substituting itself for political power (Saurugger and Terpan 2014: 65). The idea that the Court can deliver Praetorian interpretations is not incompatible with the fact that it is based on real legal reasoning. The one that led to the affirmation of the principles of primacy and direct effect may not be the only one possible, but it was a possible legal reasoning (Saurugger and Terpan 2014: 65).

Secondly, it seems highly doubtful to think that a small group of judges have been able to impose their conceptions of integration if this conception was not accepted by a majority of actors concerned. In addition, the Court, as such, has no means of sanction – no bailiff or police force that it can operate directly. Moreover, all lawyers, whether in court, in a national jurisdiction, in European political institutions or simply academics, do not share the same vision of the integration process and the role that the Court should have (Saurugger and Terpan 2014: 65). The example of the Constitutional Treaty, signed in 2004 but never ratified, with the reactions it provoked, is enough to demonstrate the lack of consensus (Saurugger and Terpan 2014: 65).

Thirdly, for the Court to emerge as a political actor, it had to be seized and it was necessary that other actors accept its strong power. Thus, the interests of the ECJ have met those of the national courts, giving rise to a jurisdictional system of which the CJEU is only the tip of the iceberg – the application of EU law largely falling within the jurisdiction of the national courts (Saurugger and Terpan 2014: 66). The national courts ‘activated’ the ECJ using the reference for a preliminary ruling to ask it to interpret or assess the validity of Community law (Saurugger and Terpan 2014: 66). And, this was done by the Dutch Tariffcommissie, which questioned the Court on the direct effect of the provision of the Treaty

of Rome on the prohibition of tariff barriers²³. Generally, the national courts have found in the reference for a preliminary ruling an opportunity to regain power *vis-à-vis* the higher courts. Of these, some have resisted by making use of the doctrine of the *acte clair*, according to which the reference is not mandatory if the application of the norm is obvious to the internal judge or if the interpretation has already been given by the Court (Saurugger and Terpan 2014: 66).

Thus, the European Union is a system of “dualism”, even of “constitutional pluralism”, which has two constitutional levels, that of the European treaties, which is the responsibility of the ECJ, and that of the Constitution under the responsibility of the national courts of the Member States (Saurugger and Terpan 2014: 67). Therefore, the Court also faces strong obstacles and fails to impose its conception of EU law when external conditions are not favourable (Saurugger and Terpan 2014: 67).

B. The uncertainty of EU legislation

1. The issue of incomplete contracts

In the EU legal system, the judicial process is determined by broad concepts and different legal traditions (Beck 2016: 484). Given that laws cannot be designed for all possible scenarios, the ECJ case law develops within a legal context where laws are inevitably incomplete contracts (Schmidt 2018: 55). Judges are in charge of interpreting these broad concepts and resolve the issue of incomplete contracts and this can lead to accusations of judicial activism. As put by Stone Sweet: “The idea of the incomplete contract is basic to a wide range of approaches to delegation and to courts. Generally, “contracts are said to be “incomplete” to the extent that there exists meaningful uncertainty as to the precise nature of the commitments made” (Stone Sweet 2004: 24). National legislatures have to cope with these incomplete contracts but which are sufficiently flexible to handle future eventualities. Thus, legal uncertainty arises as a result of these incomplete contracts but it can be seen as an indispensable requirement for integration (Schmidt 2018: 55). For Beck, legal uncertainty is “a universal feature of primary legal materials in all legal systems” (Beck 2016: 484).

In addition, legal uncertainty comes not only from the lack of clarity in the Treaty, which overlaps with domestic legal orders, but also from the fact that the ECJ relies on a

²³ See *Van Gend en Loos*, above n 1

balancing test in an effort to reconcile different legal orders (Schmidt 2018: 51). When mediating between the policy interest of the European Member States and the claims for integration, the Court applies a proportionality test, which means that the outcomes of its decisions are uncertain (Schmidt 2018: 51). Given the legal differences from one country to another, legal uncertainty also arises from a decision that has been reached in a specific context and for a specific country (Schmidt 2018: 51). Indeed, the implications of the decision reached might have uncertain applications for future cases. (Schmidt 2018: 51) In addition, the guidelines the Court provides during preliminary rulings do not result to strict policy regulation since, as previously mentioned, the Court is not entitled to do so (Schmidt 2018: 51). Furthermore, if the Court would deliver definite position on Treaty provisions, it would narrow its room of manoeuvre in future cases brought before it.

Finally, the European decision-making process also shows that legal uncertainty is a major issue at the supranational level (Schmidt 2018: 56). Indeed, the wide variety among the Member States' interests and voting procedures inhibit the decision-making process at the EU level. Decisions at the EU level are taken either by qualified majority or unanimity alongside the involvement of the European Parliament (Schmidt 2018: 56). Thus, because those political decisions require common agreement and due to the lack of clarity in legal texts, there is a necessity for legal interpretation by the ECJ. Put differently, the European Court and the Commission have to cope with legal uncertainty that arises from the partial compromise and incomplete contracts from the European Parliament and the Council of the European Union (Schmidt 2018: 56). Thus, as a consequence of the lack of legal clarity in the Treaty, the Court enjoys a certain room of manoeuvre in its interpretation of European law (Schmidt 2018: 56). Stone Sweet has called this practice "zone of discretion" (2010: 12). And the Court's discretion varies proportionally with the degree of legal uncertainty "in the norms relevant to the specific legal problems it is asked to resolve" (Beck in Schmidt 2018: 55). In other words, when legal uncertainty arises at the intergovernmental level, supranational actors may have the opportunity to extend their own powers.

2. The main characteristics of legal uncertainty

The EU legal system encompasses four different forms of legal uncertainty: "value pluralism" (Beck 2012), a lack of linguistic clarity, judicial precedent and, legal loopholes, which themselves are all intertwined.

a) Absence of linguistic clarity

The absence of linguistic clarity is twofold: on the one hand, the EU Treaties often contain vague or very limited explanations of the concepts at hand and on the other, unlike international or national legal orders, EU law is drafted in multiple languages. One striking example of the vagueness of EU Treaties provisions is the one related to the free movement of goods. Article 34 of the TFEU provides that “quantitative restrictions on imports, and all measures having equivalent effect, shall be prohibited between Member States”. This provision of measures having equivalent effect to quantitative restrictions is unclear (Keeling 1998: 510). For instance, a national rule which prohibits the sale of bread except in bakery shops will reduce sales and imports of bread and thus will have equivalent effect as a quantitative restriction on imports (Keeling 1998: 510). If a court interprets Article 34 as such, then it does not violate Article 34. However, if a court interprets Article 34 in the opposite way, it cannot be considered as violating Article 34 either as it was the case in *Commission v Greece*²⁴ with processed milk for infants. Thus, both a restricted and large interpretation of the scope of Article 34 does not conflict with the wording of the provision and a choice between both interpretations can only be a matter of policy considerations (Keeling 1998: 510). At that time, the Court of Justice of the EU demonstrated some difficulty in making a choice between those policy considerations, which led to a series of contradictory judgments, including *Keck and Mithouard*²⁵. Indeed, the Court should ensure a free access to the common market to all merchants based in the Community, free trade and fair competition in an undistorted market. On the other hand, the Court has to refrain from interfering unreasonably with socio-economic policy choices of the Member States (Keeling 1998: 511). Thus, any choice made by the Court would have been based, in any case, on policy considerations (Keeling 1998: 511). However, any judicial body asked to interpret vague and general provisions, such as Article 34, has no other choice than performing a law-making role. When a judge is confronting to several possible interpretations in a situation where no precedent can be found, he necessarily creates a new law (Keeling 1998: 511). As

²⁴ Judgment of the Court of 29 June 1995, *Commission of the European Communities v Hellenic Republic*, Case C-391/92

²⁵ Judgment of the Court of 24 November 1993, Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases C-297/91 and C-268/91

put by Lord Edmund-Davies: “the simple and certain fact is that judges inevitably act as legislators” (1975: 2). Similarly, Keeling said: “The expression of “creative jurisprudence” (...) that gives non-obvious answers to questions for which there is no obvious answer, is especially absurd in this context: for whatever the Court did with such scant material, its jurisprudence was bound to be creative” (Keeling 1998: 512).

In addition, EU legal uncertainty arises from the fact that EU law is drafted in all EU official languages, which are all uniformly reliable (Beck 2012: 174). The principle of “multilingualism” applies to EU legislation, EU Treaties and the Court of Justice’s case law. For instance, the Estonian wording of any legislative provision is equally authoritative as that of the same provision in Spanish. Thus, this implies that the terminology of any language version of whichever provision in a Court’s decision is reliable (Beck 2012: 174). However, concepts, linguistic symbols and vocabulary of one language cannot always be precisely translated into another language without risking to slightly change its meaning.

b) Value pluralism and the equality of norms before law

Value pluralism is well established in the EU legal order. It means that there are different values, which might be considered as equally elementary and crucial but which might also conflict with each other (Beck 2012: 77). Article 2 and 3 of the Treaty on the European Union include most of the EU legal values and objectives. Those latter do not only lack conceptual clarity but also often conflict with each other. Examples of value pluralism in the objectives of the TEU encompass the conflict between freedom and security or, more generally, between freedom and the principles of democracy and solidarity for example (Beck 2012: 176). The fact that these values are equally important implies that there does not exist any rational criteria to balance one value against another (Beck 2012: 177). Therefore, value pluralism and the equality of norms before law generates legal uncertainty since judges do not have any guidance on how to deal with legal values that are in conflict (Beck 2012: 77). In addition, since the Lisbon Treaty, fundamental rights are now enforceable as are the four freedoms, i.e. freedom of movement of goods, services, capitals and labour (Beck 2012: 177). Formally, the Court has made the protection of fundamental rights a genuine public policy objective, which “may justify proportionate interference with any of the four fundamental freedoms of movement” (Beck 2012: 178). For instance, in *Schmidberger*, the Court said that once a freedom poses a threat to the right in question, there is a need to protect it in order to

lessen the interference with the freedom of movement. Reciprocally, when a fundamental freedom has breached a fundamental right, it is complex to determine whether this breach was proportionate or not (Beck 2012: 178).

c) Judicial precedent

In this thesis, the notion of ‘precedent’ should be understood in a broad sense as any legal statements made by any higher court which are commonly accepted guidelines within a legal order, or considered as consistent for the interpretation of future cases (Beck 2012: 92). When there is a legal precedent, it gives the general orientation for interpreting the case on a specific topic (Beck 2012: 106). However, precedent only provides bases for interpretation, which can be inadequate for some reasons given the context and topic at hand and thus it must be balanced. Indeed, these statements are not absolute, cannot anticipate every situation and close every legal gap. Thus, courts will automatically have to close legal loopholes by creating precedents themselves (Beck 2012: 106). While, the judge is supposed to make reference to the law when solving legal disputes, the law, as a social construct, has to be adapted to any dispute or situation according to the context and facts (Stone Sweet 2004: 9-10). Judicial precedents, which provide guidelines as to the interpretation of written rules, are expected to somewhat avoid the uncertainty originating from the lack of linguistic clarity and value pluralism in EU legal instruments, but also to close legal loopholes also present in the EU legal order (Beck 2012: 92). Nevertheless, linguistic vagueness and value conflicts are also apparent in judge-made rules. As Beck put: “Precedents thus create their own legal uncertainty which is further reinforced by rule instability which is a specific feature and further source of uncertainty in judge-made norms” (2012: 92).

d) Legal loopholes

As previously discussed, some fields of EU law are incomplete and this creates legal uncertainty. Vassilis Hatzopoulos (2012) conducted a quantitative study on the case law on services between January 1958 and June 2009. His study corroborates the belief that some areas of EU legislation on services have been left idle. For instance, as of 2012, there have

been 92 CJEU cases on the interpretation of the Public Procurement Directive²⁶ without having recourse to the Treaty (Hatzopoulos 2012: 217). By leaving many provisions of the TFEU open to several interpretations, the founding fathers of the Treaties undoubtedly expected the Court to play a law-making role (Keeling 1998: 511-12). For instance, the provisions laid down in Articles 36 to 42 do not constitute a complete and specific set of rules supervising trade in goods between Member States (Keeling 1998: 511). The fathers of the Treaties drafted general guidelines and left “others” to fill the details. And this task was left to the European Court, which had to establish the scope of these articles. In this regard, concerning the Court’s legal reasoning, Lord Mackenzie Stuart put: “(...) if, from time to time, you are tempted to think that in its search for a solution the European Court has made too much or too little, please remember the spirit that has informed the attempt” (1977: 63).

C. The absence of an institutional dialogue between the EU judiciary and legislative branches

Under national constitutional frameworks, individuals are usually allowed to contest enacted laws on constitutional or other grounds. However, this right is normally accompanied by a degree of scrutiny by Courts with regards to legislators and, conversely, legislators are allowed to respond to Courts’ rulings when those latter invalidate national legislation (Dawson 2013: 12). At the EU level, the mechanisms of political response to judicial decisions are inhibited due to the very institutional structure of the EU (Dawson 2013: 12). The lack of dialogue between the legislative and judiciary branches of the EU institutional system, which is supposed to limit the political outcomes of judicial decisions, might also be partly a cause for accusation of judicial activism (Dawson 2013: 13). Since Courts are not reasonably threatened of censorship by political institutions, they do not have reasons to answer politically to ECJ’s judgments (Dawson 2013: 13). One of the consequences is that the ECJ’s decisions do not contain sufficiently developed arguments, which in turn inhibits the opportunities for a dialogue with the legislature. In addition, due to the division of competences and decision-making procedures set out in the Treaty, the legislative branch does not necessarily have the resources and capabilities to respond to Court’s decisions

²⁶ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts

(Dawson 2013: 13). And this often leads to vague responses formulated by the legislature and issues of interpretation for the ECJ.

A well-known example of a case where EU legislation responded to Court's rulings in an ambiguous or inconsistent way, which posed interpretative issue for the Court, is the set of decisions concerning posted workers, especially the ECJ's *Laval*²⁷ decision. Some countries were fearful that they could lose competitiveness if the "host country principle were to apply" (Cremers et al. 2006: 207). The main concern was that if wages and labour conditions were lowered, it could lead to a distortion of competition and thus to "social dumping". When the Posted Workers Directive²⁸ was adopted, it was concluded that the working conditions of posted workers must comply with the legislation of the country to which they are posted – the host country. However, the posting company continues to pay social security contributions in the country where it is usually employed. In order to reach a compromise between the countries pleading for higher standards of worker protection and more liberal states, the resulting text was left vague and contained possibly contradictory provisions. This led the Court of Justice, in *Viking*²⁹ and *Laval*, to rule on the relationship between fundamental freedoms (freedom to provide services and freedom of establishment) and fundamental social rights (in particular the right to strike and the right to collective bargaining) in the field of transnational litigation. In other words, the ECJ had to make a choice between two conflicting interpretations and this led to accusations of judicial activism³⁰.

This imbalance between EU law and politics can be partly due to the difference between the EU's judiciary and its legislative competence. The division of competences sets the limits between the EU Member States' power and those of the Union. It is also an effort towards the creation of a 'competence catalogue'³¹, which defines the areas where the Union can legitimately intervene (Dawson 2013: 14). This would explain why EU citizens express disappointment when EU Courts adjudicate in policy fields that are under national

²⁷ See *Laval*, above n 8

²⁸ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

²⁹ See *Viking*, above n 9

³⁰ See for instance, Barnard, C. (2014), "Free Movement and Labour Rights: Squaring the Circle?", in *Regulating Transnational Labour in Europe: The quandaries of multilevel governance*, 325-351; Bruun, N. (2012), "European Economic, Employment and Social Policy: Critical Assessment of the Proposed Monti II Regulation", in *ETUI Policy Brief* 4, 1-5

³¹ See Articles 3-6 of the TFEU

competence (Dawson 2013: 14). However, under the EU legal system, even if the policy field in question falls within the competence of Member States, the latter should always comply with EU law when they exercise this competence³² (Dawson 2013: 14). Thus, one of the consequences of this formulation is that it can make some of the national policies, in the field of health or education for instance, prejudicial to EU rules. According to Dawson, under EU law, this “discrepancy between competence and jurisdiction is not more than a logical counterpart to the supremacy principle” (2013: 14). Indeed, the coherence and efficiency of EU law would be undermined if every national measure in breach of EU market freedoms were taking precedence over EU law (Dawson 2013: 14). It should also be mentioned that this discrepancy between jurisdiction and competence is not only an attribute of the EU. Indeed, it can also be observed in other constitutional systems where constitutional courts are able to overrule rules adopted at regional or local levels of government in areas falling outside federal competence (Dawson 2013: 15). Thus, while this practice has rarely been constitutionally challenged in other multi-level jurisdictions, it seems questionable to do it at the EU level and then accused the Court of judicial activism (Dawson 2013: 15).

III. The State of the Art: a Typology of Judicial Activism

As previously mentioned, the academic literature on the topic contains a number of gaps that still need to be filled. Indeed, the notion of judicial activism remains excessively broad and encompasses many aspects of the ECJ’s case law. Judicial activism is nothing more than a word used to express disagreement or criticise the Court’s reasoning in a judgment. However, given the great complexity of the European legal system, it seems insufficient to use only one notion when analysing the legal reasoning of the ECJ. That is why a typology is necessary in order to draw clear boundaries between the different uses of judicial activism and to broaden the lexical field of the literature on this topic. In this contribution, judicial activism is defined less inclusively but yet more precisely than the definitions presented in Chapter I.

Thus, the author proposes below in Table 1 a typology of judicial activism to allow tighter specification of the types of ECJ’s legal reasoning. The author’s typology consists of five categories, based on the degree of the Court’s intervention in the policy process, across different sectors, or its abstention. Instead of creating a controversial typology made of neologisms, the author has chosen to use conventional terms that are mainstream in the

³² See for instance *Laval*, above n 8

popular and political discourse so that their use is easy. In addition, the labels embody a descriptive aspect so that their use are understandable and easily applicable. Finally, the labels are voluntarily value-neutral to refrain from importing ideological theories into interpretative reasoning based on the categories.

Table 1. A typology of ECJ judicial activism*

Types of Judicial Activism	Definitions	Case Law examples
Judicial Passivism	The Court decides not to act by declaring the case as falling outside the scope of EU law.	Ex: <i>EU-Turkey Statement</i> on the return of illegal migrant crossing from Turkey to the Greek islands.
Judicial Formalism	The Court decides to act but in a formalist way without taking into account the purpose of the case, the circumstances and the intentions of the Member States.	Ex: <i>A.S.</i> and <i>Jafari</i> cases on the non-respect of the Dublin first state-of-entry rule across the Western Balkans route.
Judicial Enthusiasm	The Court acts <i>preater legem</i> , i.e. the Court submits policy ideas to policy-makers when political institutions have left some gaps in legislation.	Ex: <i>Corbeau</i> , <i>Almelo</i> and <i>Glökner</i> cases on the role of Member States and the EU in defining and financing services of general interests.
Judicial Dynamism	The Court acts <i>substitutio legis</i> , i.e. the Court expands the scope of EU legal bases.	Ex: <i>Cassis de Dijon</i> case on the principle of mutual recognition.
Judicial Creativity	The Court acts <i>contra legem</i> , i.e. the Court goes beyond what is provided for in the Treaty: in areas reserved to the Member States.	Ex: <i>Vlassopoulou</i> and <i>Thieffry</i> cases on the freedom of movement of workers.

* The categories are not absolute and can be used either individually or in combination. For instance, the Court can both act beyond what is provided for in the Treaty (judicial discretion) and expand the scope of EU legal bases (judicial creativity) as it was the case in *Vlassopoulou*.

* Given that the ECJ's case law is subject to constant evolution for the reasons explained in Chapter II of this contribution, this typology is not frozen in time and can also be extended or reviewed.

* The categories are easy to use if one or more legal cases are sufficiently researched, taking into account that the ECJ's behaviour is complex.

A. Judicial Passivism

Judicial passivism appears when the Court chooses not to use its powers in cases where it is supposed. More specifically, the Court decides not to adjudicate by claiming that it lacks jurisdiction in a certain situation, i.e. the case falls outside the scope of EU law (Goldner Lang 2018: 76). A clear example of this is the judgments of the Court on the EU-Turkey Statement in 2017³³. The EU-Turkey Statement provides that any “new irregular migrants crossing from Turkey to the Greek islands as from 20 March 2016 will be returned to Turkey”³⁴. An Afghan national and two Pakistani nationals, who were worried that they could be returned from Greece to Turkey in the event of the rejection of their asylum application by the Greek authorities, asked the General Court to verify the legality of the EU-Turkey Statement (Goldner Lang 2018: 77). However, the Court refused to act and dismissed the cases by declaring that they were falling outside the scope of EU law. The General Court agreed in its judgments with the EU institutions, which argued that the Statement was not drafted by them but was prepared by the EU Member States and, as shown by the content of the communication of 16 March 2016³⁵, it is in fact an international agreement³⁶. Thus, the Court ordered that it lacks the jurisdiction to hear and determine the action and chose not to act whether it was a “legally binding agreement” or a “political arrangement reached by the Members of the European Council, [that is to say,] the Heads of State or Government of the Member States, the President of the European Council and the President of the Commission³⁷”. In other words, the Court concluded that it is not the European Council that adopted the EU-Turkey Statement but it is the EU Heads of State or Government and the Turkish Prime Minister who endorsed it. Hence it is clearly an example of *judicial passivism* since the Court declared that the EU-Turkey Statement was not a EU act in accordance with Article 263 TFEU (Goldner Lang 2018: 78). This decision means that related agreements with third countries could be concluded, “outside the scope of EU law and exempt from the judicial review of the CJEU” (Goldner Lang 2018: 79). However, it is uncertain whether the

³³ EU-Turkey statement, 18 march 2016. Available here:

<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>

³⁴ Ibid

³⁵ Ibid

³⁶ Order of the General Court (First Chamber, Extended Composition) of 28 February 2017, *NG v European Council*, Case T-193/16, para 40

³⁷ Ibid, para 30

Court of Justice will follow the same line of arguments and narrow its scope by excluding an entire body of cases from its jurisdiction (Goldner Lang 2018: 79).

B. Judicial Formalism

Judicial formalism happens when the Court uses its judicial power in a formalistic and strict way, thus straying from its usual teleological approach. More specifically, the Court does not take into account the global objective and pattern of the applicable norm, the motives of the Member States, the facts and details of the case (Goldner Lang 2018: 81). A clear example of this may be found in the Court's decision in *A.S.*³⁸ and *Jafari*³⁹. These cases deal with the non-application of the Dublin state-of-first entry rule across the Western Balkans route (Goldner Lang 2018: 81). A high number of people embarked upon this route between September 2015 and March 2016, which implied to depart from the Middle East passing by Turkey and Greece, Western Balkans countries and European Eastern and Central countries to arrive in Austria and Germany (Goldner Lang 2018: 81). The authorities of the Western Balkan countries and EU Western Member States allowed and eased the route. *A.S* and *Jafari* cases respectively involved a Syrian and two Afghan nationals who crossed the border between Croatia and Serbia while not having a valid visa. The Croatian authorities arranged them to be transported to the Croatian-Slovenian border and then help them to go to Austria and Slovenia in order to apply for international protection there⁴⁰. Nevertheless, both Austria and Slovenia refused to review their application on the ground that, since the applicants illegally entered Croatia, pursuant to the Dublin III Regulation⁴¹, it was the responsibility of the authorities of the country of first entry to examine their applications for international protection. By its judgments, the Court observed that the “crossing of a border in breach of

³⁸ Judgment of the Court (Grand Chamber) of 26 July 2017, *A.S. v Republika Slovenija*, Case C-490/16

³⁹ Judgment of the Court (Grand Chamber) of 26 July 2017, *Khadija Jafari and Zainab Jafari*, Case C-646/16

⁴⁰ Court of Justice of the European Union, “Judgment in Cases C-490/16 *A.S. v Slovenia Republic* and C-646/16 *Khadija Jafari and Zainab Jafari*”, Press Release No 86/17, 26 July 2017. Available here: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/cp170086en.pdf>

⁴¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Available at:

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>

the conditions imposed by the rules applicable in the Member State concerned must necessarily be considered ‘irregular’⁴² within the meaning of Article 13(1) of the Dublin III Regulation. The Court also considered that such an entry should be regarded as irregular, even if it occurs in the course of an unusual large inflow of third country nationals into the EU⁴³. However, the Court noted that, in accordance with Article 4 of the Charter of Fundamental Rights, transfers of third country nationals into the EU must be precluded if there is a genuine risk of inhuman or degrading treatment of the person concerned if transferred⁴⁴. The Court ruled that admission is “valid only in respect of the territory of the Member State concerned, not the territory of the other Member States⁴⁵”. Therefore, the Court held Croatia responsible for reviewing the asylum applications of A. S. and the Jafari sisters⁴⁶. By the same token, the Court also held Croatia responsible for reviewing applications for international protection of any third-country nationals who crossed its border during the 2015-2016 migration crisis⁴⁷.

These two judgments can be characterised as *judicial formalism* in the way the Court overlooked the global objective and scheme of the Dublin Regulation and EU asylum law but also the events happening in the Western Balkans route and the goals of the Member States, which provided support to facilitate the route (Goldner Lang 2018: 83). Thus, the Court strayed from its usual teleological and flexible approach by interpreting strictly the Dublin Regulation, which disregards Recital 5 of the Dublin Regulation providing for “objective, fair criteria both for the Member State and for the person concerned” for determining the Member State responsible for the examination of application for international protection (Goldner Lang 2018: 83). In addition, the Court refused to deny the state-of-first-entry rule on the ground of the unusual large number of individuals across the Western Balkans route.

C. Judicial Enthusiasm

Judicial enthusiasm happens when the Court acts *substitutio legis*, i.e. when the Court both underlines the necessity for fresh legislation and gives the adequate legal basis for it

⁴² Ibid

⁴³ See *Jafari*, above n 35, para 93

⁴⁴ See Court of Justice of the European Union, above n 36

⁴⁵ Ibid

⁴⁶ See *Jafari*, above n 35, para 60

⁴⁷ Ibid

(Hatzopoulos 2013: 118). When the Treaty is silent on some matter, the Court is not officially entitled to create new legislation. However, it can broaden the scope of existing legal bases, therefore pushing the legislature to act. An example of this is the Court's set of judgments regarding the posting of workers. Articles 56 and 57 TFEU do not provide sufficiently clear legal bases with regards to their content and delivery modes and the Court had to precise the content of the notion of services (Hatzopoulos 2013: 118). Thus, even if the Court was not confronted with the issue of posted workers before 1982, it already addressed the scope of application of the service rules of the Treaty (Hatzopoulos 2013: 118). In *Evi v Seco*⁴⁸, *Rush Portuguesa*⁴⁹ and *Vander Elst*⁵⁰, the Court decided that both the employer who sends a worker in another Member State and the worker himself could benefit from some social protection under the Treaty (Hatzopoulos 2013: 119). These judgments set up three important principles: it became much easier in terms of administrative requirements for service providers to move across EU Member States; they may still, however, have to abide by the legislation of the host Member State regarding working conditions such as minimum salaries; and they may not have to abide by every social security obligations for workers who are already covered in the service provider's Member State of origin, unless these obligations enhance the protection of the workers (Hatzopoulos 2013: 119). They also called on the legislature to act upon two main points. First, the legislature can now base his reasoning on the Services Chapter of the Treaty when regulating the posting of workers (Hatzopoulos 2013: 119). Second, these judgments called on the legislature to address the critical issue of posted workers' wage (Hatzopoulos 2013: 119).

When the Posted Workers Directive⁵¹ was drafted, it was deemed to guarantee that primary employment regulations of the host state should apply to all posted workers. However, the Court undermined the scope of application of the Directive in *Commission v Luxembourg*⁵² by preventing the host state from applying its national legislation to posted

⁴⁸ Judgment of the Court of 3 February 1982, *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité*, Joined cases 62 and 63/81

⁴⁹ Judgment of the Court (Sixth Chamber) of 27 March 1990, *Rush Portuguesa Lda v Office national d'immigration*, Case C-113/89

⁵⁰ Judgment of the Court of 9 August 1994, *Raymond Vander Elst v Office des Migrations Internationales*, Case C-43/93

⁵¹ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

⁵² Judgment of the Court (First Chamber) of 19 June 2008, *Commission of the European Communities v Grand Duchy of Luxembourg*, Case C-319/06

workers. The Court held that the existence of an additional obligation in the host Member States to which the posted worker is already subject in its own Member State is unnecessary and is likely to dissuade undertakings established in another Member State from exercising their freedom to provide services⁵³. In doing so, the Court has called into question the applicability of the Posted Workers Directive and underlined the need for new legislation regarding the posting of workers (Hatzopoulos 2013: 122). And it has led the Commission in March 2012 to propose a draft Directive⁵⁴ to complete the Posted Workers Directive (Hatzopoulos 2013: 122). Thus, the Court has highlighted that the Directive was loosely drafted and encouraged the legislature to act upon it (Hatzopoulos 2013: 122).

D. Judicial Dynamism

Judicial dynamism appears when, even if the Treaty provides a legal basis, the political institutions do not properly administer. In this case, the Court is said to act *preater legem*, i.e. the Court may be responsible to convict the political institutions for “failure to act” (Hatzopoulos 2013: 112). Nevertheless, the Court is able to do so only when a mandatory deadline is provided for in the Treaty and when one of the institutions decides to bring the case before the CJEU (Hatzopoulos 2013: 112). For instance, the Council was convicted when it failed to endorse the measures related to a common transport policy⁵⁵ (Hatzopoulos 2013: 112). In its judgment, the Court made it clear that “the first paragraph of Article 175 expressly gives a rights of action for failure to act against the Council and Commission *inter alia* to ‘the other institutions of the community’. It thus gives the same right of action to all the community institutions. It is not possible to restrict the exercise of that right by one of them without adversely affecting its status as an institution under the Treaty⁵⁶”. Thus, the Court is not acting in conflict with any legal statutes or written regulation. As previously explained in this contribution, because the Treaty contains some legal gaps and has been drafted at a given point of time, there is sometimes the need for fresh legislation according to

⁵³ Ibid para 41

⁵⁴ COM(2012) 131 final of 21.3.2012, Proposal for a Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

⁵⁵ Judgment of the Court of 22 May 1985, *European Parliament v Council of the European Communities*, Case 13/83

⁵⁶ Ibid, summary of the judgment, para 1

the evolution of the social context (Hatzopoulos 2013: 112). In these circumstances, the Court, through its jurisprudence, often highlights these legal gaps left by the political institutions and provokes the necessity for new legislation and this is called *judicial dynamism*. One way of doing so is to recognise the direct effect of the measure “left idle” (Hatzopoulos 2013: 112). The Court proceeded like this when it elaborated on the concept of “services of general economic interest”. In 1971, the provision was first brought before the Court but the latter denied the opportunity for individuals to invoke it⁵⁷. However, the Court changed its mind in 1991⁵⁸. As a consequence, the Court delivered three crucial judgments, *Glöckner*⁵⁹, *Almelo*⁶⁰ and *Corbeau*⁶¹, where it outlined the specific roles of the EU and of its Member States to define and organise services of general interests (Hatzopoulos 2013: 113).

E. Judicial Creativity

Judicial creativity happens when the Court acts *contra legem*, i.e. the Court goes beyond what is provided for in the Treaty. Indeed, the Court has sometimes pushed for the creation of EU law and developed a body of case law in areas, which fall within the competence of the EU Member States as provided for in the Treaty (Hatzopoulos 2013: 124). An example of this is education. Since the Maastricht Treaty, Article 165 TFEU provides that the “Union shall contribute to the development of quality education by encouraging cooperation between Member States” but in full respect of the responsibility of the Member States regarding the “content of teaching, the organisation of education systems and their cultural and linguistic diversity”. In 1977, the Court considered that refusing access to an employment to an individual solely on the ground that the latter is not in possession of the

⁵⁷ Judgment of the Court of 14 July 1971, *Ministère public luxembourgeois v Madeleine Muller, Veuve J.P. Hein and others*, Case 10-71

⁵⁸ Judgment of the Court of 18 June 1991, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Case C-260/89

⁵⁹ Judgment of the Court (Fifth Chamber) of 25 October 2001, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz*, Case C-475/99

⁶⁰ Judgment of the Court (Second Chamber) of 7 September 2006, *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo*, Case C-470/04

⁶¹ Judgment of the Court of 19 May 1993, Criminal proceedings against Paul Corbeau, Case C-320/91

“national diploma corresponding to the diploma which he holds” was against the law⁶². In addition, in *Vlassoupoulou*, the Court provided that if the foreign diploma corresponds only partially to those required by the national provisions, the host Member State can request the person concerned to provide a proof of knowledge and qualifications, which are lacking⁶³. These judgments constrained the Member States since they are now obliged to recognise foreign qualifications (Hatzopoulos 2013: 127). It should also be mentioned that in 1998/99, the Member States established the Bologna system outside the EU framework, which includes non-EU Member States and intend to harmonise the European Higher Education system (Hatzopoulos 2013: 128). Thus, the body of case law mentioned above reveals that the Court’s actions may have an impact both within and outside the EU framework as non-EU Member States also take part in the Bologna system. The Bologna case also shows that the Court can rely on soft law instruments and non-binding engagements to foster EU objectives, such as free movement of workers (Hatzopoulos 2013: 128).

CONCLUSION

From the early use of the notion of judicial activism in the late 1940s, the scope of judicial activism has constantly developed with the development of an ever more powerful European Court of Justice. It has even become fully integrated into the study of the European Union. Yet, this thesis confirmed that the notion of judicial activism is a loose term used by the media, in the popular discourse and politics to cover a wide a range of different attitudes of the European Court of Justice. And, many scholars did not called into question the notion and applied it to various cases when they deem that the Court deviates from its judicial powers as defined in the Treaties or when it fosters some values over the others. Although based on solid arguments, the authors defend the idea of an audacious Court but they are not always able to avoid the “normative” trap (Saurugger and Terpan 2014: 60). The temptation exists for some to highlight the beneficial influence of the Court on the integration process. Others criticise its role in the name of a certain conception of democracy, comparing the activism of the Court to a government of judges. In this contribution, this was not a matter of

⁶² Judgment of the Court of 28 April 1977, *Jean Thieffry v Conseil de l’ordre des avocats à la cour de Paris*, Case 71-76, para 4

⁶³ Judgment of the Court of 7 May 1991, *Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, Case C-340/89, para 19

defending the integrative role played by the Court, or of denouncing a new form of government of judges, but of examining the role of the Court, beyond the prejudices, which too often distorts the analysis. Thus, despite the wide and rich literature on judicial activism, the author discovered that the main problem was not whether the Court was activist or not, but it was the notion of “activism” in itself. Therefore, an analysis of the specificities of the EU legal system was needed in order to grasp the roots of the controversy.

The European Court of Justice presents similar characteristics with other legal systems but it has also some specific aspects that cannot be found at the national level. The ECJ provides national courts with general legal guidance regarding the interpretation of EU law in preliminary procedures but these are different from strict policy rules. Thus, the Court is not legitimate to formulate general policy rules (Schmidt 2018: 232). However, due to the nature of the EU legal order made of incomplete contracts, the Court has a heavy responsibility. Indeed, the fact that the Treaty contains a large number of material details means that judicial policy-making partially becomes a substitute to legislative policy-making since it necessarily has to be included in the reasoning of the latter (Schmidt 2018: 123). The ECJ, as the engine of integration, has to promote a legal system where national courts, unaccustomed with European law, must fully apply and respect it (Schmidt 2018: 51). Thus, unlike Montesquieu, this thesis argued that attempts to examine and study the CJEU and its legal reasoning in a strict and rigid way would disregard issues of legal uncertainty, i.e. linguistic clarity, legal loopholes, judicial precedent and value pluralism, which characterise EU legislation. Indeed, as demonstrated in Chapter II, the Court had to decide on many of the orientations and level of integration and harmonisation in areas where the Member States were unable or unwilling to decide in the Treaties, often due to a lack of political will and agreement on some matters. Because the final agreement is the result of lengthy diplomatic dialogues and political compromises, the language emanating from such legal texts is often highly ‘codified’, leaving the Court responsible for its interpretation. The Court has endorsed this role by following a *communautaire* approach and working to reconcile norm pluralism and legal uncertainty, taking into consideration both political sensitivity and the limits of an integrationist judicial orientation (Beck 2012: 242).

Therefore, the sole notion of “judicial activism” cannot refer to every case where the Court has delivered judgments deemed controversial. The typology then obtained offers a set of five categories to differentiate between the various types of judicial activism. Judicial Passivism will be useful to characterise situations where the Court restraints itself from acting because it deems the case as falling outside its competence. Judicial Formalism can be used in

situations where the Court strays away from its teleological approach and adopts a strict interpretation of the law. If the Court submits policy ideas to policy-makers in areas where the law is silent, then it falls within the category of judicial enthusiasm. However, if the Court expands the scope of EU legal bases, then one would talk about judicial dynamism. Finally, judicial creativity happens when the Court acts beyond what is provided for in the Treaty. This typology is voluntarily value-neutral and has the advantage of being easy to use. It also carries implications for further academic debate regarding explanations of judicial activism. Indeed, due to the legal uncertainty of the Court's case law, this typology is non-exhaustive and the categories can be extended or subject to adjustment across time.

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