



# Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context

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## Abstract

This article analyses two aspects of judicial activism at the European Court of Justice.\* First, four German landmark cases concerning European law demonstrate the dialogical relationship between the European Union and their member states with regard to judicial activism. Here, the question of whether the interaction between the ECJ and the German Constitutional Court (*das Bundesverfassungsgericht*) has consequences for the amount of judicial activism arises. Second, on the basis of rulings on discrimination law and the internal market law, it is substantiated that activism is not a negative, but a normal feature of the ECJ and that rather judicial restraint constitutes an interesting deviation. Consequently, we conclude that judicial activism at the ECJ is a natural feature in a dialogical context.

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## Keywords

European Court of Justice – judicial activism – judicial restraint – *Bundesverfassungsgericht* – judicial minimalism – constitutional dialogue – discrimination law – internal market law

### 1 Introduction

The European Court of Justice (hereinafter: ECJ) is often accused of being an activist Court,<sup>1</sup> involved in political law-making.<sup>2</sup> This paper tests this stipulation on two domains. First, on the basis of four German landmark cases concerning European law, the influence of the relation between the European Union and its member states concerning judicial activism will be analysed. The question arises of whether the interaction between the ECJ and the German Constitutional Court (*das Bundesverfassungsgericht*, hereinafter: *BverfG*) has consequences for the amount of judicial activism and for the dialogue between the courts. Second, on the basis of 15 rulings on discrimination law and internal market law, it is substantiated that activism is not a negative, but a normal feature of the ECJ and that it is judicial restraint we should wonder about.

### 2 Part I. Judicial Activism as a Dialogue

The tension between supremacy and sovereignty becomes clear through four landmark cases of the *BverfG*. Just as the ECJ, the *BverfG* can be considered an activist Court: not only towards German legislation, but also towards European legislation.<sup>3</sup> In the four cases under study, stipulations were put on the scope and degree of influence of European law. The following analysis is based on

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1 Henri De Waele, *Rechterlijk Activisme en het Europees Hof van Justitie* (Boom Juridische Uitgevers 2009) 399.

2 Allard Knook, *Europe's Constitutional Court: The Role of the European Court of Justice in the Intertwined Separation of Powers and Division of Powers in the European Union* (CUP 2009) 253.

3 Regarding constitutional review, Germany is a typical example of a constitutional model. Powers are granted to courts in order to evaluate statutes or acts of parliament for compliance with the Constitution. The *BverfG* has a strong form of judicial review: its rulings are conclusive unless they are overturned by a later constitutional amendment. See: Tim Koopmans, *Courts and Political Institutions: A Comparative View* (CUP 2003) 39–40; Mark

these cases since the stipulations may have affected the relation between the ECJ and the national courts. The decisions of the *BverfG* may also call for a response of the ECJ and other national courts. The question is not only whether this response could be placed within the framework of judicial activism, but also where this activism occurs: on the national or the international level, or perhaps on both levels?

### 2.1 *Solange I & II*

Based on its constitutional position and related powers, the *BverfG* acts as a 'guardian of the Constitution'. The ECJ on the other hand is an important representative of judicial activism, particularly because of its predisposition towards the definition and discussion of the main themes of social life, the construction of instruments and interpretations and the shift from subjective principles to objective principles.<sup>4</sup> Here, judicial activism becomes evident in disallowing policy choices by other governmental officials or institutions<sup>5</sup> and refers to the role of the court as protector of the state's core values.<sup>6</sup>

In *Solange I*, Community legislation was challenged due to an alleged violation of fundamental rights, guaranteed in the German Constitution. While the ECJ stated there was no violation, the *BverfG* ruled it was entitled to test the compliance of the secondary Community Law with the fundamental rights of the German Constitution, as long as ("*solange*") Community Law contained no catalogue of rights, adopted by parliament and equivalent to the rights of the German Constitution.<sup>7</sup> Therefore, it was established that Community Law could prevail over national law, but not automatically over the German Constitution. The *BverfG* did not demand identical fundamental rights on national and Community level, but aimed at an equivalent level of protection.<sup>8</sup>

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Tushnet, 'Judicial review of legislation' in Peter Cane and Mark Tushnet (eds), *Oxford Handbook of Legal Studies* (OUP 2005) 164–182.

4 Juliano Benvindo, *On the Limits of Constitutional Adjudication* (Springer 2010) 31–39.

5 Lino Graglia, 'It's not Constitutionalism, it's Judicial Activism' (1996) 19 Harv JL and Pub Pol'y 293.

6 Mordechai Cohn and Margit Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 Can JL and Jur 333.

7 *Solange I* [1974] *BVerfG*, 37, BvR 271. The European Court of Justice developed its own doctrine concerning the fundamental rights issue, mainly out of concern for the uniformity of Community Law. Since the primary Community Law lacked such a catalogue, the Court created an alternative. This had already appeared before the first *Solange* decision. See: Case 29/69 *Erich Stauder versus City of Ulm Sozialamt* [1969] ECR 419; Case 44/79 *Liselotte Hauer versus Land Rheinland-Pfalz* [1979] ECR 3727.

8 Dieter Grimm, 'European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision' (1997) 3 Colum J Eur L 229, 231.

In 1986, the *BverfG* reconsidered its position.<sup>9</sup> The central issue was the continuing validity of Community regulation after June 1976. In a preliminary ruling, the ECJ stated that, although the concerned regulations had a temporary character, the Commission had a wide discretion to set conditions beyond those of the concerned article of the regulation.<sup>10</sup> Ultimately, the *BverfG* reviewed the Community institutions with regard to the protection of fundamental rights.<sup>11</sup> Although these institutions were not fully developed at that time, the *BverfG* ruled that the circumstances had changed to such an extent that earlier reservations could be abandoned.<sup>12</sup> The ECJ was regarded as the lawful adjudicator where Community secondary law allegedly conflicts with fundamental rights under the German Constitution.<sup>13</sup>

## 2.2 *The Maastricht & Lisbon Cases*

### 2.2.1 The Maastricht Case

The Treaty of Maastricht established a new economic and political union, comprising the twelve member states of the former European Economic Community.<sup>14</sup> To ratify the Treaty, the German Constitution needed to be amended, as previously, article 24 of the German Constitution granted the constitutional authority to transfer sovereign state power to intergovernmental institutions.<sup>15</sup> However, there was a growing awareness that the former

9 Elton Lanier, 'Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge' (1998) 11 BC Int'l and Comp L 1.

10 Case 126/81 *Wünsche Handelsgesellschaft v Federal Republic of Germany* [1982] ECR 144.

11 *Solange II* [1986] *BVerfG* 73, BvR 339.

12 Dieter Grimm, 'European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision' (1997) 3 Colum J Eur L 292, 231.

13 *Solange II* [1986] *BVerfG* 73, BvR 339.

14 The member states agreed to work towards further European unification and the Treaty provided the basis to establish a political union within Europe. An important aspect was the expansion of Community-level involvement regarding foreign policy, security policy, justice, and domestic affairs policy. Those areas became the subject of a new form of inter-governmental cooperation. Additionally, the Treaty of Maastricht included several institutional changes that strengthened the EU position and promoted political integration. See: Treaty of Maastricht [1992] OJ C 191. See also: Thomas König and Simon Hug, 'Ratifying Maastricht: Parliamentary Votes on International Treaties and Theoretical Solution Concepts' (2000) 1 EUP 93; Finn Laursen and Sophie Vanhoonacker, *The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications* (European Institute of Public Administration 1994).

15 *German Constitution*, <[www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg\\_02.html](http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg_02.html)> accessed 15 April 2015.

European Economic Community and particularly the new European Union had become supranational institutions outside the scope of article 24.<sup>16</sup> The German parliament therefore amended the Constitution by adding article 23.

The above decision of the parliament was challenged in court. The *BVerfG* affirmed that the law approving the Treaty of Maastricht possibly violated the right to elect members of the *Bundestag* as representatives of the whole people.<sup>17</sup> The *BVerfG* construed the electoral rights stated in article 38 paragraph 1 of the Constitution<sup>18</sup> not only as a right to vote, but also as a right to elect a Parliament having the power to decide on all questions of state interest. This interpretation cleared the way for judicial review of the Maastricht Treaty.<sup>19</sup>

According to the *BVerfG*, the Constitution guarantees effective protection of the complainant's fundamental rights in cooperation with the ECJ. The ECJ enforces fundamental rights in every single case, whereas the *BVerfG* safeguards the general standard of basic rights in the Union, as stated in the former *Solange II* decision.<sup>20</sup> Furthermore, the *BVerfG* defined that the democratic principle does not prevent Germany to enter a supranational community of states. However, the assurance of democratic legitimacy within that community is a pre-condition for membership. As a result, functions and powers of substantial importance must remain with the German *Bundestag*.<sup>21</sup>

The *BVerfG* also ruled that the *Bundestag* retained sufficient control to satisfy the democratic principle and strongly rejected the conception of the European Union as a state-like entity. The court stated that the European Union is not an autonomous legal order, because it is not a state, but a *Staatenverbund*.<sup>22</sup> According to the *BVerfG*, the people form the foundation of

16 Kevin Makowski, 'Solange III: The German Federal Constitutional Court's Decision on Accession to the Maastricht Treaty on European Union' (1995) 16 U Pa J Bus L 155.

17 Treaty on European Union (Maastricht Treaty) [signed on 7 February 1992, entered into force on 1 November 1993] Article 38, para 1.

18 *Ibid.*

19 Yet, the Court restricted the scope of this right to questions concerning article 23 of the Constitution, thus questions referring to the European Union. Otherwise, every citizen might initiate judicial review of acts of German public authorities concerning their democratic legitimation. Joachim Wieland, 'Germany in the European Union: The Maastricht Decision of the Bundesverfassungsgericht' (1994) 5 Eur J Int'l L 259.

20 *Solange II* [1986] *BVerfG* 73, BvR 339.

21 *Maastricht* [1993] *BVerfG* 89, BvR 155.

22 This concept refers to a community that is more than a normal entity between states, but at the same time, could not be determined as an independent state. See: Roel de Lange, 'Het Bundesverfassungsgericht over het Verdrag van Lissabon' (2010) 59 AA 26.

a democratic legal order. If there are no European 'people', therefore not a European political entity, there is no European autonomous legal order.<sup>23</sup>

Following the above, the European Union cannot be exalted to the level of a state. All European authority stems from the member states, the so-called 'masters of the Treaties'. This means that all European institutions may only exercise powers that were transferred to them from the member states. The *Bundesverfassungsgericht* will ultimately make related decisions. The *BVerfG* stated that the Maastricht Treaty does not confer unlimited powers (*kompetenz-kompetenz*) to the Union, but only expresses political intentions.<sup>24</sup>

To conclude, the *BVerfG* did not withhold Germany from ratifying the Treaty of Maastricht. Although the Treaty led to a new level of unification, it coincided with enhancing democratic and efficient functioning of the institutions. At the same time, the European Union respects the national identities of the member states and protects and builds upon those principles of democracy, which already exist in the member states. Yet, the *BVerfG* shows an anti-Community point of view as it considers itself authorized to monitor the jurisdiction of the European Community.

### 2.2.2 The Lisbon Case

The ratification of the Lisbon Treaty in 2009 again led to a case brought before the *BVerfG*. Again, the complainants stated the German Constitution was violated due to the transfer of powers from Germany to the European Union.<sup>25</sup> As in the foregoing *Maastricht case*, the Treaty was declared compatible with the German Constitution by the *BVerfG*. However, stipulations were put on the involvement of the German legislature and the European integration, in particular concerning the way European legislative acts were to be passed.<sup>26</sup> The so-called 'ordinary legislative' procedure became the standard procedure in passing legislation, which implies a larger role for the European Parliament.<sup>27</sup>

Just as in the *Maastricht decision*, the *BVerfG* connects European integration to a strong notion of national sovereignty and identity. With respect to the

23 Tim Koopmans, 'Rechter, D-Mark en democratie: het *Bundesverfassungsgericht* en de Europese Unie' (1994) 69 *Nederlands Juristen Blad* 245.

24 Joachim Wieland, 'Germany in the European Union: The Maastricht Decision of the *Bundesverfassungsgericht*' (1994) 5 *Eur J Int'l L* 259.

25 Christian Wohlfart, 'The Lisbon Case: A Critical Summary' (2009) 10 *Ger Law J* 1277.

26 Amy Verdun, 'Decision-Making before and after Lisbon: The Impact of Changes in Decision-Making Rules' (2013) 6 *West Eur Polit* 1128; *Lisbon* [2009] *BVerfG*, BvR 2/08.

27 Rik de Ruiter, 'Under the radar? National parliaments and the ordinary legislative procedure in the European Union' (2013) 20 *J Eur Public Policy* 1196.

democratic legitimacy of the European Union, three key points emerge.<sup>28</sup> First, the *BverfG* emphasizes sovereignty and its relation to democracy. It creates a link between sovereignty and *staatlichkeit*, a feature that relates to Germany, but not to the European Union.<sup>29</sup> The Union's inability to determine autonomously the form and substance of its own political existence distinguishes it from a state.<sup>30</sup> Consequently, it is impossible to transfer powers to the European Union if this results in the acquisition of *kompetenz-kompetenz* or in the deterioration of Germany's constitutional identity.<sup>31</sup>

Second, the concept of *Europarechtsfreundlichkeit* emerges. Several articles of the German Constitution offer a margin for the transfer of powers from the national to the international level, leading to European integration.<sup>32</sup> However, the boundaries set by the German constitutional identity cannot be crossed. The *BverfG* considers itself the guardian of the Constitution, and therefore the best institution to assess to what extent the European integration meets their set conditions. Subsequently, the assumption that European law has automatic validity in the member states as claimed by the ECJ, is not confirmed by the *BverfG*. European legislation cannot touch certain German societal areas, or at least these areas should remain subject to a German level of decisive formal and material control.<sup>33</sup> Third, as a result of the boundaries described above a doctrine with respect to the constitutional relation between Germany and Europe – or '*Staatsaufgabenlehre*' – has been developed. On the one hand, the *BverfG* favors European integration, and on the other hand, it imposes stipulations on European integration.

28 Wouter Hulstijn and Jan Willem Van Rossem, 'Het Lissabon-Urteil: pluralisme op Duitse voorwaarden' in Jaap van Rijn van Alkemade and Jerfi Uzman (eds), *Soevereiniteit of pluralisme? Nederland en Europa na het Lissabon-Urteil (preadviezen voor de Jonge Staatsrechtstag 2010)* (WLP 2010) 21.

29 *Lisbon* [2009] *BVerfG*, BvR 2/08.

30 Dieter Grimm, 'European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision' (1997) 3 *Colum J Eur L* 229, 231. This already appeared in the Maastricht decision when the Court stated that the European Union is not a state due to lack of sovereign entity of people. See: *Maastricht* [1993] *BVerfG* 89, BvR 155.

31 Dieter Grimm, "Defending Sovereign Statehood Against Transforming the Union Into a State" (2009) 5 *Eu Const* 353.

32 *The German Constitution*, <[www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg\\_02.html](http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg_02.html)> accessed on 28 May 2014.

33 Philipp Kiiver, 'Reflections on the Lisbon Judgment: How the Judges at Karlsruhe Trust Neither the European Parliament Nor Their National Parliament' (2010) 3 *Maastricht Journal of European and Comparative Law* 263.

### 2.3 *Analysis*

So far, two distinct conceptual lines have been developed, namely judicial activism on the one hand and the reasoning of the *BverfG* on the other. In what way can both be connected and how does this relate to judicial activism of the ECJ? With respect to the four landmark cases, the *BverfG* has made it clear that no significant political developments can take place without its ratification. Especially in the *Maastricht case*, the German Court extensively discussed all issues of the prevailing debate on the supremacy of European Union law. Although legal viewpoints play a greater role than in previous rulings, the *BverfG* goes extremely far in its interpretation and explanation of political and economic concepts.<sup>34</sup> This is confirmed in the *Lisbon decision*.<sup>35</sup> Consequently, the *BverfG* is subject to judicial activism, both on national and international level.

To find out whether judicial activism may have influenced the dialogue between the ECJ and the member states, other member states might be looked at, since various domestic courts have reviewed the supremacy of European law. For example in Denmark, several Danish citizens claimed that the implementation of the Maastricht Treaty was unconstitutional. The Danish Supreme Court rejected their claims by declaring that in principle Danish courts must abide by the supremacy of Community Law and the jurisdiction of the ECJ.<sup>36</sup> However, national courts cannot be deprived of their right to examine whether a particular act of Community law exceeds the limits for transferring sovereignty. Additionally, the same goes for rules of Community Law and legal principles developed in the practice of the ECJ. Although the tone of its judgment is softer than that of the *BverfG* in the *Maastricht decision* the Danish Supreme Court adopts the same conceptual matrix and normative solutions.<sup>37</sup>

In 2008, the Czech Constitutional Court expressed its position on the supremacy and direct applicability of Community Law in the Czech Republic. Although these principles were accepted to a large extent, the Czech Constitutional Court reserved its authority to have a say in cases where Community norms could conflict with the foundations of the Czech democratic state.<sup>38</sup> Other important judgments where the same issue broadly emerged, were rendered by the

34 Tim Koopmans, 'Rechter, D-Mark en democratie: het Bundesverfassungsgericht en de Europese Unie' (1994) 69 *Nederlands Juristen Blad* 245.

35 *Lisbon* [2009] *BVerfG*, BvR 2/08, paras 210–219; 247–252; 268–272.

36 Case 1/361 *Carlsen and others vs. Rasmussen* [1998], Danish Supreme Court. See also: Jesper Svenningsen, 'Danish Supreme Court puts the Maastricht Treaty on Trial' (1997) 4 *Maastricht J of EU L* 101.

37 Hjalte Rasmussen, 'Denmark's Maastricht ratification case: Some serious questions about constitutionality' (1998) 1 *Journal of European Integration* 1–35.

38 Case 50/04 *Sugar Quotas III* [2008] Czech Constitutional Court.



Constitutional Courts of Hungary<sup>39</sup> and Poland.<sup>40</sup> The relation between European Union law and national law has also been explored in France, Spain and Belgium.<sup>41</sup> Given the scope of this article, it is impossible to discuss all these cases, but in general two tentative conclusions can be drawn. First, the *Maastricht decision* of the *BverfG* does not stand alone and could have been an incentive for other member states to review European legislation. Second, constitutional courts of several member states have undoubtedly questioned the principle of supremacy of European law over national law. These Courts thus acted as guardians of national standards of human rights protection and democratic principles.

How does this affect the relation between the national courts and the ECJ and what does this mean for the extent of judicial activism on European level? The question remains as to whether the European Union is a supranational organization or whether the process of constitutionalisation transforms it into something more closely resembling a state.<sup>42</sup> As already described, in the view of the *BverfG*, the European Union remains a supranational organization, equipped with sovereign powers, but far from constituting a European state.<sup>43</sup> If we assume that the European Union is indeed not a state, it seems fair to say that the member states are the masters of the Treaties. They purposively delegate a number of their competences to European level. Therefore, European law depends on national law and sovereignty, because the member states both create and apply European Law. On the other hand, the ECJ monitors this application, causing a constant constitutional dialogue between the concepts of supremacy and sovereignty. Such a dialogue is influenced by changing perceptions regarding the relation between national law and European law.<sup>44</sup> The supremacy of European law does not come naturally and is therefore subjected to reciprocity, even though these concepts seem contradictory in principle. The European dialogue is no longer a matter of hierarchical supra-nationalism, but a matter of cooperation and interaction between the Union and its member states. This requires a more equal

39 Case 17/04 *Speculations in Agricultural Products* [2005] Constitutional Court of the Republic of Hungary.

40 Case 18/04 *Polish Membership of the European Union* [2005] Polish Constitutional Court.

41 Julio Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 4 ELJ 389. See also: Wojciech Sadurski, 'Solange, chapter 3: Constitutional Courts in Central Europe' (2008) 14 ELJ 1.

42 Michael Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 MLR 191.

43 Steve Boom, 'The European Union After the Maastricht Decision: Will Germany Be the Virginia of Europe?' (1995) 43 Am J Comp L 202.

44 For an extensive analysis of the concept of constitutional dialogue, see: Anne Meuwese and Marnix Snel, 'Constitutional Dialogue: An Overview' (2013) 9 Utrecht L Rev 123.

relation between them, based on mutual trust, acceptance and tolerance concerning each state's constitutional identity.<sup>45</sup>

### 3 Part II. Judicial Activism as a Feature

In the first part we demonstrated that the ECJ's judicial activism is a matter of cooperation and interaction between the European Union and its member states. In this part we will add a layer by proving that judicial activism also constitutes a feature of the ECJ. Judicial activism is often normatively used to depict the Court at hand as a political actor overstepping its boundaries.<sup>46</sup> Often, this normative position goes together with an undefined<sup>47</sup> or narrowly defined concept of judicial activism.<sup>48</sup> By applying a more descriptive and multileveled concept, this part will demonstrate that activism is an inherent feature of the ECJ due to its position in the European legal order. Although activism comes in degrees, the absence of activism, namely judicial restraint, draws the most attention. Two types of restraint are distinguished: restraint as the counterpart of activism, and restraint as a feature within activist judgements.

#### 3.1 *Judicial Activism at the ECJ, a Typology*

##### 3.1.1 Criteria for Activism

Throughout the literature, different criteria for judicial activism have been developed.<sup>49</sup> One of the most complete and multileveled lists is offered by

45 See for instance Monica Claes, 'National identity: Trump Card or up for Negotiation?' in Alejandro Arnaiz and Carina Llivinia (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) 109. Also: Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) 13 *Cambridge Yearbook* 195; Leonard Besselink, 'National and constitutional identity before and after Lisbon' (2010) 6 *Utrecht L Rev* 36.

46 Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 *Can JL & Jur* 333, 337; Bradley Canon, 'Defining the Dimensions of Judicial Activism' (1983) 66 *Judicature* 236, 237-238.

47 See for instance: Juliano Benvindo, *On the limits of constitutional adjudication: deconstructing balancing and judicial activism* (Springer 2010) 421; Henri de Waele and Anna van der Vleuten, 'Judicial Activism in the European Court of Justice – The Case of LGBT Rights' (2011) 19 *Mich J Int'l L* 639.

48 Richard Posner, *The Federal Courts: Challenge and Reform* (HUP 1996) 314 & 318; Lino Graglia, 'It's Not Constitutionalism, It's Judicial Activism' (1996) 19 *Harv JL & Pub Pol'y* 293, 296; Aharaon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 16 *Harv L Rev* 19, 127.

49 Among others: Bradley Canon, 'Defining the Dimensions of Judicial Activism', (1983) 66 *Judicature* 236, 239.

Cohn and Kremnitzer.<sup>50</sup> In the working paper written in preparation of this article, six of the criteria that were testable for the ECJ were selected on the basis of their relevance. Consequently, the ECJ is considered an activist court if the court:

- [1] revises its prior decisions and opts for a radical outcome compared to prior case law (Judicial stability);
- [2] prefers purposive interpretation over text and its original meaning (Interpretation);
- [3] interferes in policy making (Majoritarianism and authority);
- [4] expands or redefines its jurisdiction (Judicial remit);
- [5] decides in a broadly applicable manner (Extent of the decision); and
- [6] instigates a legislative, administrative, judicial and/or public reaction (Reaction).

### 3.1.2 Scope of the Research

In the working paper these selected criteria have been applied meticulously to a series of ECJ key cases in three domains. In the first domain of gender discrimination law,<sup>51</sup> the outcome was the following.

	Judicial Stability	Interpretation	Majoritarianism and autonomy	Judicial remit	Extent of the decision	Reaction
<b>Defrenne I</b>	Activist	Activist	Self-restraint	Activist	Bit of both	Gradual compliance
<b>Defrenne II</b>	Self-restraint	Self-restraint	Self-restraint	Self-restraint	Self-restraint	Self-restraint
<b>Barber</b>	Self-restraint	Bit of both	Activist	Self-restraint	Activist	Activist
<b>P v.S</b>	Activist	Activist	Bit of both	Activist	Activism	Gradual compliance
<b>Grant</b>	Activist	Self-restraint	Self-restraint	Self-restraint	Self-restraint	Self-restraint
<b>Test-Achats</b>	Activist	Activist	Activist	Self-restraint	Self-restraint	Gradual compliance

50 Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 Can JL & Jur 333, 333.

51 Case 43/75 *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455; Case 149/77 *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena* [1978] ECR 1365; Case 262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR 4527; Case-C 13/94 *P. v. S. and Cornwall County Council*, [1996] ECR I-2143; Case-C 249/96 *Grant v. South-West Trains Ltd* [1998] ECR I-621; Case-C 236/09 *Association belge des Consommateurs Test-Achats ASBL v. Conseil des ministres* [2011] ECR I-773.

The second domain was measures having an effect equivalent to quantitative restrictions in the domain of free movement of goods.<sup>52</sup> Here, the application of the criteria led to the following schematic outcome:

	Judicial Stability	Interpretation	Majoritarianism and autonomy	Judicial remit	Extent of the decision	Reaction
Dassonville	Activism/ Restraint	Neutral	Activism	Activism	Activism	Activism
Cassis	Activism/ Restraint	Neutral	Activism	Activism	Activism	Activism
Torfaen	Activism	Restraint	Restraint	Restraint	Neutral	Activism
Keck	Activism	Restraint	Restraint	Restraint	Activism	Activism
C. v. Italy	Restraint	Neutral	Activism	Neutral	Activism	Activism

The third series of tested cases were on citizenship with regard to third country nationals,<sup>53</sup> leading to the next scheme:

	Judicial Stability	Interpretation	Majoritarianism and autonomy	Judicial remit	Extent of the decision	Reaction
Zhu	Activism/ Restraint	Activism/ Restraint	Activism	Activism	Restraint	Activism/ Restraint
Zambrano	Activism/ Restraint	Neutral/ Restraint	Activism	Activism	Restraint	Activism/ Restraint
McCarthy	Restraint	Neutral/ Restraint	Activism/ Restraint	Restraint	Restraint	Restraint
O&B	Restraint	Neutral/ Restraint	Activism/ Restraint	Restraint	Restraint	Restraint

52 Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 838; Case 120/78 *REWE v Bundesmonopolverwaltung für Branntwein* [1979] ECR 650; Case 145/88 *Torfaen Borough Council v B & Q PLC* [1989] ECR 3852; Cases-C 267/91 & 268/91 *Keck and Mithouard* [1993] 6099; Case-C 110/05 *Commission of the European Communities v. Italian Republic* [2009] ECR 66.

53 Case-C 200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR 9951; Case-C 34/09 *Ruiz Zambrano v Office national d' employ* [2011] ECR 1232; Case-C 434/09 *McCarthy v Secretary of State for the Home Department* [2011] ECR 3393; Case-C 456/12 *O v Minister voor Immigratie, Integratie en Asiel & Minister voor Immigratie, Integratie en Asiel v B* [2014] ECR 135.

### 3.1.3 Analysis of the Extent of Judicial Activism in the ECJ

The schematic case per case outcome of activism and restraint in the key-cases under 3.1.2 was subsequently used to form general conclusions on each of the six criteria.

- [1] First, the ECJ mostly takes into account prior decisions, leading to a stone by stone construction.<sup>54</sup> The shape of a new stone hardly ever surprises. For example the *Zambrano* case and the opinion of AG Sharpston are saturated with references to prior case law,<sup>55</sup> demonstrating the logical application of EU citizenship to wholly internal situations, since otherwise “lottery rather than logic would seem to be governing the exercise of EU citizenship rights”.<sup>56</sup> Surprisingly, on the one hand, many ECJ cases which are often construed as activist are restrictive from a stability point of view. For example, the outcome of *Cassis de Dijon* should not surprise those who read *Dassonville*.<sup>57</sup> On the other hand, cases depicted as restrictive are often activist from a stability point of view. For example, in *Torfaen* the Court attempted to undo the old principles, by creating a new precedent without reference to the prior *Dassonville-Cassis de Dijon* case law.<sup>58</sup> The ECJ often combines this restrictive stone by stone construction with an activist choice for the most far-reaching option. Every building block thus leads to a higher floor. For example in *Defrenne I* the Court bestowed horizontal and direct effect on the principle of equal pay and in *Test-Achats*

54 Koen Lenaerts, ‘How the ECJ thinks: a Study on Judicial Legitimacy’ (2013) 36 *Fordham Int’l L J* 1351.

55 AG Sharpston for example refers to the broadness of the *Dassonville* formula and the fact that also in *Garcia Avello* and *Zhu and Chen* physical movement was no requirement; Case-c 34/09 *Ruiz Zambrano v. Office national d’ employ* [2011] ECR I-1179, Opinion of AG Sharpston, paras 69–70; 78.

56 See e.g. Case-c 34/09 *Ruiz Zambrano v. Office national d’ employ* [2011] ECR I-1179, Opinion of AG Sharpston, paras 40–42 and 86–88; Or stated differently: “If one insists on the premises that physical movement to a Member State other than the Member State of nationality is required before residence can be invoked, the results risks being both strange and illogical. Suppose a friendly neighbor had taken Diego and Jessica on a visit or two to Parc Astérix in Paris or to the seaside in Brittany”.

57 Donald Regan, ‘An Outsider’s View of *Dassonville* and *Cassis de Dijon*: On Interpretation and Policy’ in Miguel Maduro and Loic Azoulay (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty* (Hart 2010) 465, 466; *Dassonville* [1974] ECR 838, para 9; *Cassis de Dijon* [1978] ECR 650, paras 8–15.

58 *Torfaen* [1989] ECR 3852. This judgement makes no reference to *Cassis de Dijon* [1978], ECR 650 or *Dassonville* 1974] ECR 838. The *Torfaen* case seems to stand on its own and does not refer to the two prior cases.

it went against widespread practice of sex-dependant insurance premiums and benefits, creating in both cases new law. However, the Court at the same time limited the potential danger of judicial uncertainty by restricting the temporal effect of its verdicts,<sup>59</sup> even giving the member states a transition period of over a year in *Test-Achats*. Consequently, although the outcome is often far-reaching and thus activist, the court remains within the scope of its construction plan.

- [2] Second, most interpretations are based on text, context and *telos*. Regarding Treaty interpretation *telos* prevails, but text is also present.<sup>60</sup> With regard to Directive interpretation, text prevails, but *telos* is taken into account.<sup>61</sup> According to Cohn and Kremnitzer teleology hints at activism.<sup>62</sup> Nevertheless, if the law is vague – which is the case for most TFEU provisions – the legislator forces the Court towards activism to ensure the effectiveness of the Treaty articles. When in 1974 the Court was asked whether the Belgian requirement of an origin-certificate for Scotch whiskey constituted a measure with an effect equivalent to a quantitative restriction to free movement of goods, it was confronted with the open treaty-article 30 EEC (now 34 TFEU).<sup>63</sup> As the Treaty itself did not provide guidance on how to interpret the concept of measures having an equivalent effect, every possible way in which the *Dassonville* case could have been decided would have been activist.<sup>64</sup>

With regard to the interpretation of the Directives, the Citizen Directive is relevant. Here, as the textual basis is broader, the Court seems to be more open about its interpretation methods, which are primarily textual,

59 *Defrenne I* [1976] ECR 455 480–481 (as opposed to the opinion of its Advocate General Mr Trabucchi in Case 43/75 *Defrenne v Société Anonyme belge de navigation Aérienne Sabena* [1976] ECR 492, opinion of AG Trabucchi; and *Test-Achats* 2011, 816, para. 33.

60 E.g. *Dassonville* [1974] ECR 838, para 6; *Torfaen* [1989] ECR 3852, para 15; Donald Regan, 'An Outsider's View of Dassonville and Cassis de Dijon: On Interpretation and Policy', in Miguel Maduro & Loic Azoulay (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty* (Hart 2010) 465, 465.

61 E.g. *Zhu and Chen* [2004] ECR 9951, para 31; *Zambrano* [2011] ECR 1232; *Mc Carthy* [2011] ECR 3393, paras 31–35; *O&B* [2014] ECR 135, paras 37–43.

62 Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 Can JL & Jur 333, 337.

63 *Dassonville* [1974] ECR 838; Penelope Kent, *Law of the European Union* (Pearson 2008) 127–129.

64 Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986) 27.

but are complemented by context and *telos*.<sup>65</sup> As for gender discrimination law cases, the dynamic and evolving nature of the European Union and the growing attention for social policy and human rights necessitates a more purposive interpretation,<sup>66</sup> since the original drafters of the Treaty could not have foreseen such evolution in the text itself. The more recent Directives 86/378/EEC and 2004/113/EC acknowledge this explicitly by referring to the goals of the European Union, the principle of equality and the purpose of the Directive itself.<sup>67</sup> The method of interpretation is therefore not a true either-or choice but rather a combination, emphasising in turn the interpretation method that backs up the decision.

- [3] Third, the Court does not work in a vacuum. If there is a law that has to be taken into account, it will do so and even when no law has yet been made, it acknowledges the importance of democratic instruments. For instance in *Grant*, the Court decided that “it is for the legislature alone to adopt, if appropriate, measures which may affect that position”, referring to the lack of any Community rule on equality regarding sexual orientation.<sup>68</sup> Often however, the lack of a clear legal basis forces the Court to clarify the law. All cases on measures which have an equivalent effect are for instance based on ten words (“Quantitative restrictions on imports and all measures having equivalent effect”), which give little guidance. It would be difficult for the Court to fulfil its duties as a court and not get involved in policy making.<sup>69</sup>
- [4] Fourth, although every key case introduces a new storey, the Court respects the maximum height in construction regulations. This means

65 E.g. *Zhu and Chen* [2004] ECR 9951, para 31; *Zambrano* [2011] ECR 1232; *Mc Carthy* [2011] ECR 3393, paras 31–35; *O&B* [2014] ECR, 135, paras 37–43.

66 See for instance *Defrenne I* [1976] ECR 455, para 7 (“in light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the treaty”); *P v S* [1996] ECR I-2143, para 20 (“in view of its purpose and the nature of the rights it seeks to safeguard”); *Test-Achats* [2011] ECR I-773, paras 21 and 29 (“it must contribute, in a coherent manner, to the achievement of the intended objective” and “in light of the subject matter and purpose of the EU measure”).

67 Preamble and article 1 of Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes and Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

68 *Grant* [1998] ECR I-621, para 36.

69 *Dassonville* [1974] ECR 838; Karen Alter, *The European Court's Political Power: Selected Essays* (OUP 2009) para 18; 153.

that while expanding its judicial remit by adding a new ground for review or a new area of intervention, the Court nevertheless rarely oversteps its powers. In the gender case of *Defrenne 1* the ECJ for instance extended the judicial remit of article 119 by giving it direct effect, but this already formed part of the ground plan since the transposition period for this article had long since expired. In *P v S*, the Court added the floor of transsexualism, which actively extended the Court's judicial remit, however again within the existing construction of discrimination law. The Court confirmed after all that transsexuals do not constitute a third sex and were therefore already included in existing discrimination regulations.<sup>70</sup>

- [5] Fifth, the Court often introduces broad and general rules, applicable to more situations than the case at hand. Again, measures having an equivalent effect are a clear example. *Dassonville*, a very specific case on the import of Whiskey, has led to the broad formula of "all trading rules enacted by member states which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade".<sup>71</sup> This rule was so broad that it led to a floodgate.<sup>72</sup> Again, however, this is a feature of the role of the ECJ. As it may not judge on the national rule but only on the interpretation of EU Law, broadness is a natural consequence. A non-broad — and thus restrictive — judgment should therefore draw more attention.
- [6] Sixth, the ECJ is well aware of the reaction of other actors. Although this reaction rarely leads to a change of case law, it regularly entails an extended motivation, aimed at mutual understanding, or a slight change in approach. Due to its immense financial impact the decision in *Barber* for instance raised so much debate that the Member States overruled the decision by adding a protocol to the Maastricht Treaty limiting the retrospective application of the *Barber* principles.<sup>73</sup> The Court acknowledged

70 *P v S* [1996] ECR 2165, para 21: "Such discrimination is based essentially if not exclusively on the sex of the person concerned".

71 *Dassonville* [1974] ECR 838, para 5; Penelope Kent, *Law of the European Union* (Pearson 2008) 127–129.

72 *Torfaen* [1988] ECR 3852, para 14; Catherine Barnard, 'Sunday Trading: A Drama in Five Acts' (1994) *Mod L Rev* 449, at 454; Michael Holoubek and Dragana Damjanovic, 'Structure and Methods', in Michael Holoubek, Dragana Damjanovic, and Matthias Traimer, *Regulating Content. The European Regulatory Framework for the Media and Related Creative Sectors* (Kluwer 2008) 23, 28–29; René Joliet, 'The Free Circulation of Goods. The Keck and Mithouard Decision and New Directions in Case Law' (1994–1995) *Colum J Eur L* 436, at 436.

73 Protocol no. 2 on Article 119 of the Treaty on the European Union, which states the following: "for the purposes of Article 119 of this Treaty, benefits under occupational social security



this reaction by confirming the planned Treaty amendment in the case of *Ten Oever* in 1993.<sup>74</sup> The decision remained the same, but the temporal effect was slightly adjusted. In *Test-Achats* it was due to the Guidelines of the Commission that the temporal effect was limited to new contracts to avoid a sudden readjustment of the entire insurance market.<sup>75</sup>

The main conclusion drawn from the 15 key cases in three different domains is that in general the ECJ is an activist court, though not in an illegitimate way. The Court's activism naturally flows from vague Treaty articles, the hierarchy of norms, and the restriction to the interpretation of EU law without impeding on national rule and the Court's essential role as sole interpreter of EU law.

### 3.2 *Restraint as the Noteworthy Exception*

The short overview above demonstrates that we should refrain from using activism as a normative term. Rather, activism constitutes a feature of the ECJ, embedded in articles 19 TEU and 267 TFEU, since the structure of the European legal order leads to broad and generalised law-making judgments based on purposive interpretation. Consequently, restrictive cases — as the exception — are the most noteworthy ones. Two types of restrictive cases can be distinguished. First, cases of which the outcome is restrictive and second, cases with a restrictive scope of application. As a consequence of this bipolar concept of restraint, a case can at the same time be activist for what is decided and restrictive for whom it is applicable to.

#### 3.2.1 Restrictive Outcome of the Decision

The first type of restraint is formed by cases in which the decision is restrictive. Here, the question arises as to why the Court deviates from its natural feature and interprets EU Law narrowly. In gender equality law, the two reticent cases—*Defrenne II* and *Grant*—were based on the limited competence of the European Community in view of the powers conferred to the legislative body.

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schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law”.

74 Case-C 109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers – en Schoonmaakbedrijf* [1993] ECR I-04879.

75 Guidelines of the European Commission of 22 December 2011 on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*), C (2011) 9497 final, [http://ec.europa.eu/justice/gender-equality/files/com\\_2011\\_9497\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/com_2011_9497_en.pdf) accessed 18 June 2015.

At the time of *Defrenne II* the equal pay provision did not yet confer a right to equal working conditions, while in *Grant* the Court was confronted with legislative propositions in the pipeline to prohibit discrimination on the basis of sexual orientation. In the domain of measures having an equivalent effect the two reticent cases—*Torfaen* and *Keck*—were the result of the workload of the Court due to the broad *Dassonville* formula and the critique of the member states.<sup>76</sup> In citizenship the reason for the two reticent cases—*McCarthy* and *O&B*—is less clear.

### 3.2.2 Restrictive Scope of Application

A second type of restraint limits the scope of application of the decision. In gender equality cases the ECJ has shown such restraint especially towards the last decade, namely *Grant* and *Test-Achats*. In *Test-Achats* this reticent extent was combined with overall activism. The cases of *Zambrano* and *Zhu and Chen*—two citizenship judgements—also combine an activist content with a limited scope of application. In *Zhu and Chen* the Court deviates from the literal interpretation of Directive 90/364—which is clearly activist—but is in the same time so overwhelmed by the specificity of the facts, that it refuses to define the outcome of the case broadly.<sup>77</sup> In measures having an equivalent effect the opposite takes place: *Torfaen* and *Keck* are restrictive in substance, but activist in their scope of application.

### 3.2.3 Rules, Evolution and Restraint

Two things are noteworthy about this second type of restraint. First, almost all judgments issued after 1998 included in our overview (*Grant*, *Test-Achats*, *Zhu and Chen*, *Zambrano*, *McCarthy*, *O&B*) have a restrictive scope of application, even though many of them are activist in content. Consequently, there seems to be a tendency towards a less far-reaching outcome. This observation seems to confirm the recent article of Sarmiento, stating that the ECJ is becoming a more judicially minimalist court.<sup>78</sup>

76 *Torfaen* [1988] ECR 3852, para 14; Catherine Barnard, 'Sunday Trading: A Drama in Five Acts' (1994) *Mod L Rev* 449, 454; Michael Holoubek and Dragana Damjanovic, 'Structure and Methods' in Michael Holoubek, Dragana Damjanovic and Matthias Tramer, *Regulating Content. The European Regulatory Framework for the Media and Related Creative Sectors* (Kluwer 2008) 23, 28–29; René Joliet, 'The Free Circulation of Goods. The Keck and Mithouard Decision and New Directions in Case Law' (1994–1995) *Colum J Eur L* 436, 436.

77 *Zhu and Chen* [2004] ECR 9951, para 44.

78 Daniel Sarmiento, 'Half a Case at a Time. Dealing with Judicial Minimalism at the European Court of Justice' in Monica Claes, Maartje De Visser, Patricia Popelier, and Catherine Van De Heyning, *Constitutional Conversations* (CUP 2012) 13, 13.

Second, in these cases with a restrictive scope of application – or Sarmiento’s minimalist cases – the reasoning applied differs dramatically from cases with a broader scope of application. While the former judgements apply an inductive principle-based reasoning, the latter judgments are based on a rule and are judged more deductively.

The difference between rule and principle is clear in the distinction between cases on measures having an equivalent effect and cases on citizenship. In the former cases the ECJ did not base its judgements directly upon the principle of free movement, but on a rule derived from it, the *Dassonville Formula*. From the development of that formula onwards the ECJ kept developing its rule, giving it a broad scope of application open for deductive reasoning. Even the most recent case on measures having an equivalent effect, the 2005 *Commission v. Italy* case, further develops this rule. In citizenship cases there is no such rule. All cases studied were based directly upon the principle of citizenship itself and apply an inductive reasoning.

The difference between the rule – and principle—based approaches also applies in the domain of gender equality, although here the distinction has been an ongoing process. In the beginning the ECJ had to rely on a single article, namely the equal pay provision in article 119 EEC, which constituted a rule rather than a principle. The ECJ deduced from this rule a rather active scope in the cases of *Defrenne I* and *Barber*.<sup>79</sup> Regarding the *P v. S* case, however, the Court referred in its reasoning to the general principle of equality itself. This general principle enabled the Court to deviate from the text of the European instruments, but also to fit it into the purpose of the Treaty by way of induction. The first decision made on the basis of the principle of equality, *P v. S*, continued to have a rather broad scope of application,<sup>80</sup> but the latter cases of *Grant* and *Test-Achats* were narrower and based on a case by case application.

Consequently, in recent cases, the Court has focused on the *raison d'être* of the principle and the constellation of facts, leading to a more inductive reasoning and a narrow scope of application. Our analysis led to two variables. The first is time: the younger the case, the more reticent the scope of application.

79 See *Defrenne I* [1976] ECR 455, para 40 (“Article 119 may be relied upon before the national courts [...] in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public”) and *Barber* [1990] ECR 4527, para 20 (application on all pension schemes “whether they are paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis” since they all fall under article 119).

80 See *P v S* [1996] ECR 2165 (“precludes dismissal of a transsexual for a reason related to a gender reassignment”).

The second is rules-principles: the more inductive and principles-based the reasoning, the more reticent the scope of application. It is still unclear, however, if and how both variables correlate. To draw a broader conclusion, further research is needed, specifically to check whether the conclusion in gender discrimination cases, free movement of goods and citizenship is transposable to other domains and non-key cases as well. At present, the overlap between recent judgments, narrowly extended judgments and judgments based on principles remains a working hypothesis and a provisional answer.

#### 4 Overall Conclusion

This article developed a two-stranded evaluation of the ECJ's so-called judicial activism, whereby the main conclusion is that judicial activism at the ECJ is a natural feature in a dialogical context. First, concerning the dialogical context of judicial activism, the fact that the *Bundesverfassungsgericht* is an important representative of the current worldwide judicial activism has had implications for the European legal order. If national courts are active in reviewing EU Law, this influences the dialogue between them and the ECJ. Member states are the legitimate basis for the supremacy of European law, which creates a reciprocal relationship between the states and the Union. The increase of judicial activism on the national level will probably lead to action from the other side of the dialogue formed by the Union. However, it is also possible that the ECJ prefers to maintain a low profile and leaves the discussion in the hands of other European organs, for example the European Parliament or the European Commission. After all, these organs have a political base and function, an aspect that the ECJ essentially lacks.<sup>81</sup> This leads us back to the debate about the desirability of judicial activism and judicial restraint.

Second, by applying criteria to three series of ECJ cases we have demonstrated that at the ECJ judicial activism is a natural feature, and that restraint should be investigated. Restraint towards the outcome of the decision is noteworthy, as it both confirms the recent tendency towards judicial minimalism and launches a new hypothesis on how the Court judges minimalist cases. Finally, it is argued that the younger the case and/or the more inductive and principles-based the reasoning, the more reticent the scope of application of the decision will be.

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81 See Neil MacCormick, 'Judicial Pluralism and the Risk of Constitutional Conflict' in Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999), 97–122.