

ECJ legal rulings designed to help the Eurozone are threatening the accountability of European governance

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One of the most controversial issues during the Eurozone crisis has been the extent to which policies aimed at resolving the crisis, such as the decision by the European Central Bank to adopt 'Outright Monetary Transactions' (OMT), comply with EU law. Gunnar Beck writes that the European Court of Justice has adopted outwardly 'political' rulings which allow for courses of action to take place which are incompatible with the EU's treaty framework. He argues that this approach has undermined the accountability of European governance and has ensured EU law has become merely the continuation of politics by other means.



In his speech on EU immigration on 28 November 2014, the British Prime Minister called for radical changes in the availability of UK state benefits to immigrants from elsewhere in the EU. Only a couple of weeks before, however, Chancellor Merkel, in an interview with the Sunday Times, made clear she would oppose David Cameron's plans to renegotiate the EU's free movement rules possibly by curbing the powers of the European Court of Justice. Because any amendment of the Court's powers requires unanimity, this means that even if David Cameron were to succeed in placing further limits on so-called 'benefits tourism', the scope of any such limited safeguards would remain subject to the jurisdiction of the Court of Justice.

How justified is the UK Government's apparent faith in the ability of the Court of Justice to be an impartial arbiter between national interests and ever greater integration? The Court's approach to the Eurozone crisis suggests this perspective may be rather naïve.

The rule of (EU) law

In 2011 the then French finance minister Christine Lagarde famously remarked that 'the EU leaders had to break the law to save the euro.' Three years on, law-breaking has become the order of the day. To date the UK Government has taken a remarkably short-sighted and at times hypocritical stance towards habitual law-breaking in the Eurozone. Such complacency raises doubts about the seriousness of Britain's commitment to repatriating powers from Brussels.

Since the outbreak of the Eurozone crisis in 2010, the EU has been in an 'emergency situation', where the management of the crisis has been delegated to the 'independent' European Central Bank (ECB) whose euro rescue policy openly conflicts with the EU Treaties. The delegation of far-reaching political and economic decisions to *soi-disant* 'independent' institutions is part of a wider break-down of good governance in the EU.

The rule of law, besides democratic accountability, is the great safeguard against the abuse of executive power: where governments or parliaments ignore clear constitutional principles and treaty rules or delegate powers to unaccountable institutions, they must be restrained judicially. In the EU it is the task of the European Court of Justice (ECJ) to uphold the law and enforce the EU Treaties against national governments and the centralising ambitions of the EU institutions alike.

But the EU Treaties are fraught with vague concepts and conflicting principles. These often express political compromises between member states with competing interests and different visions of European integration. In these circumstances the ECJ typically seeks to resolve legal uncertainty with reference to the combined perspective of the wording, the legislative context and the express and implied purposes of a provision including the 'ever closer union' reference in the Treaty preambles. This flexible approach allows the Court to override the literal meaning of treaty rules and at will infuses a markedly integrationist bias into its rulings on important interpretative issues.

The Court's integrationist tendency has little bearing on the outcome in run-of-the-mill cases in areas such as tariffs and competition law. But it does become significant in cases which engage the fundamental interests of the EU institutions or go to the heart of the integration process. The greater the stakes for the Union, the more 'purposive' where possible and 'creative' where necessary the Court's cumulative approach tends to become. The danger comes when a supreme court takes the rule of law seriously only when the sailing is smooth and treats law as the 'continuation of politics by other means' when the waters get rough, as in the Eurozone crisis. The rule of law then becomes a fair-weather affair.

In the landmark 2012 *Pringle v Ireland* case the ECJ was asked to examine whether the establishment of the permanent euro rescue fund (known as the ESM, or 'European Stability Mechanism') was compatible with the EU Treaties. Predictably, the Court found that the ESM did not violate the so-called 'no bail-out' clause (Article 125 TFEU) of the EU Treaties. Yet the Court's interpretation is impossible to square with the literal meaning of Article 125 which states that neither the Union nor a member state should 'be liable for or assume . . . the commitments . . . of another Member State.' Remarkably, the ECJ ruled that this prohibition was not intended to stop loans or financial guarantees to member states in trouble, on the grounds that this would be technically distinct from 'assuming' their debts. Financial assistance and the assumption of debt were, the Court decided, two entirely different things.

How could the ECJ uphold the euro bail-out fund in the face of a no bail-out clause? The answer lies in the Court's variable interpretative approach which avoids clear rules: the specific importance the Court attaches to the wording, context and purposes of the provision under consideration is not fixed but may vary according to the issue considered and from one case to another. Its variable approach allows the Court to depart from the literal meaning of legal rules if it decides that a literal interpretation conflicts with their purposes. The added weight given to purposes then generally favours a more rather than less integrationist judicial response to most interpretative questions, as the Court regards the reference to 'ever closer union' in the treaty preambles as the central *Leitmotiv* of the Treaties.

The case of *Pringle* is a prime example of this inbuilt integrationist bias in the Court's reasoning. In the early 1990s, the German government had insisted on the 'no-bail out' clause as a key safeguard against future fiscal transfers between euro members. But in *Pringle* the EU institutions, 11 euro governments plus the UK all maintained that 'no' meant 'yes' to the assumption of financial commitments. In the face of a done political deal, there was never any question as to which way the judicial axe would fall: the ordinary meaning of legal rules, the conventions of legal argumentation and the 'no bail-out' principle all gave way to the overriding political commitment to 'break the law to save the euro.' Britain officially opposes 'competence creep' by judicial law-making. Yet, in *Pringle* the UK government intervened to countenance a manifest treaty breach.

In February 2014 the ECJ handed down another key decision in the case of *Thesing and Bloomberg v ECB*. In 2010 the Bloomberg journalist Gabi Thesing challenged a decision by the ECB to refuse access to two documents concerning transactions between 2001 and 2007 by which Greece, with the assistance of the investment bank Goldman Sachs, temporarily removed part of its public debt from the government's books with 'off-market currency swaps'. Astonishingly, the ECJ confirmed that the ECB was fully entitled not only to draft and approve its own 'transparency' rules but also to interpret what transparency means in each case.



Mario Draghi, Credit: © European Union PE-EP/Pietro Naj-Oleari (CC-BY-SA-ND-NC-3.0)

The judges held that the ECB was right to withhold the documentation if, in its opinion alone, disclosure could lead to market instability or undermine public confidence in the economic policy of the Union or one of its member states – here the Hellenic Republic – even where there is an overwhelming public interest in favour of disclosure. Central bank documents might be market-sensitive – who could deny it? However, is this a valid reason for judicial approval in February 2014 of the ECB's 2010 refusal to disclose documents concerning transactions which date back to 2001-2007? Surely, there must be another reason.

The current ECB president Mario Draghi became vice-chairman of Goldman Sachs in January 2002 with special responsibilities to develop 'business with governments' especially European governments, shortly after the firm's first Greek swap transaction. Draghi previously headed the Italian Treasury which has used similar currency swaps. In the 1990s Italy adopted 'the Draghi law', which facilitated Draghi's undervalued sell-off of state companies to international investors including Goldman Sachs.

In 2011 when Germany's financial daily *Handelsblatt* started investigating Draghi's links with investment banks, his multiple conflicts of interests, and persistent rumours about his role in the Greek off-market swaps and earlier Italian transactions, the investigation suddenly stopped after the paper received a decidedly unfriendly telephone call. The *Thesing* case suggests the judiciary will 'do whatever it takes' to protect Draghi from public scrutiny. The UK could have intervened to support Bloomberg's case for journalistic freedom and transparency at the EU level, but chose not to.

The ECJ has handed down many well-reasoned technical judgments in politically less contentious or technical areas of the law. It has rightly upheld the fundamental rights of individuals and non-EU companies subjected to ill thought-out EU sanctions or other restrictive measures. But where governments circumvent the need for democratic accountability, ignore treaty rules and delegate powers to unaccountable institutions, the ECJ ought to uphold the rule of law which functions as a constraint on what everyone, including governments and central banks, may do.

To this end, the judges should observe interpretative rules and conventions which ensure at least minimum respect for the wording and specific objectives enshrined in written law. By contrast, if they disregard and suspend the constraints of legal reasoning whenever it suits the aim of 'ever closer union', law ceases to function even as a flexible constraint on permissible executive action.

Since its inception the ECJ has gradually expanded the scope of the Union's powers through the principles of supremacy and of the uniform application of Union law. These principles were not part of the founding treaties but are judge-made. The Court's variable interpretative approach leaves it free to promote integrationist outcomes, even where these openly conflict with the express wording and specific objectives of the Treaties.

In *Pringle*, the Court turned the natural meaning of Article 125 on its head and simply ignored specific treaty provisions. In *Thesing* the Court disregarded pervasive general principles of law and EU transparency legislation to free the ECB from effective judicial oversight. The Court's response to the Eurozone crisis suggests that where the Court is called upon to uphold treaty provisions which restrict – rather than expand – EU powers, such as the subsidiarity principle, the deliberately narrowly defined mandate of the ECB, or the broadly defined national policy exceptions to the free movement rules, the Court is not an impartial judge between competing national and Union interests. EU law therefore is not necessarily what it seems or what the Treaties say; it is what the judges say it is.

The UK's Chancellor of the Exchequer has declared that "proper legal protection for the rights of non-euro members is absolutely necessary – to preserve the single market and make it possible for Britain to remain in the EU". But the reality is that in contrast to their official position British governments have often been complicit in the ECJ's judicial competence creep. *Pringle* is a case in point. If the British Government is serious in its intention to repatriate powers from Brussels, it cannot simultaneously ask the ECJ to break the law to prevent a euro break-up and then expect the same court to respect safeguards protecting Britain's national interest. Such double standards compromise Britain's negotiating position as they suggest weakness, bluffing or that the promised referendum is largely a PR exercise.

In theory the EU derives its powers by conferral from the member states under the Treaties, which should impose limits on what its institutions may do. In reality, treaty safeguards are not enough. Europe's judges, like Shakespeare's Elbow, may 'lean heavily upon justice' – not in most cases but when the integration process is at stake. The time has come for Britain to adopt a principled, rather than hypocritical, stance toward judicial activism which undermines the rule of law.

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Note: This article gives the views of the author, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.

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About the author

Gunnar Beck – SOAS, University of London

Dr Gunnar Beck is Reader in EU Law and Legal Philosophy at SOAS, University of London, a practising barrister at 1 Essex Court (Chambers of The Rt Hon Sir Tony Baldry MP), and the author of the study *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2013).

