

DOES THE EUROPEAN COURT OF JUSTICE NEED A NEW JUDICIAL APPROACH FOR THE 21ST CENTURY?

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1. The Court of Justice has always provoked controversy.² Critics accuse it of pure judicial invention, of providing a blank cheque for ever-expanding EU competence,³ and of result or policy driven decision-making.⁴
2. Proponents argue that the Court has provided the legal glue which has made a reality of the single market, and of EU policies on, for example, competition, state aids, the environment and equality.
3. What makes the debate interesting is that both sides of it are largely right. This is because they place their emphasis on different elements of the Court's jurisprudence. But that does not mean that the Court of Justice always strikes the right balance. I do not think it does. I would argue that the the Court needs a new judicial approach for the 21st century.

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² Early criticism came from Hjalte Rasmussen in his book "On Law and Policy in the European Court of Justice" Martinus Nijhoff, 1986. Rasmussen commented in Oxford some years later that his criticisms involved perhaps 2% of the Court's judgments. For more recent critical analysis, see Adams et al. (editors) "Judging Europe's Judges - The Legitimacy of the Case Law of the European Court of Justice", Hart Publishing, 2013.

³ I have myself commented: "The Court of Justice has not been enthusiastic to enforce the limits of law-making competences, except in cases of clear breach of general principles... including fundamental rights. The Court of Justice has also contributed to the expansion of EU competence by an expansive reading of Treaty provisions, such as those which establish the internal market, and that expansive reading has in turn had an expansive effect on lawmaking competence", Wyatt, *Is the European Union an Organisation of Limited Powers?*, in Arnall et al (editors) "A Constitutional Order of States: Essays in Honour of Alan Dashwood", Hart Publishing, 2011, page 3.

⁴ Hartley refers to "judicial legislation" by the Court, and to the Court applying a judicial policy of promoting federalism, citing Judge Mancini who (writing extra-judicially) relied upon the "primary objective" of the Treaty to create "an ever closer union among the peoples of Europe", Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union". 112 LQR (1996) 95-109, at 95.

4. The concerns which I shall express about the Court's current approach are not those of a lone eccentric. They echo concerns expressed by academics and judges in a number of Member States, including the UK. The presentation of Marie Demetriou QC has referred to concerns expressed by UK judges both judicially and extra-judicially.

5. The new approach which I advocate would allow more leeway to the EU lawmaker, even when the EU lawmaker has decided to compromise, and reach an outcome which conflicts with what the Court conceives to be the overall aim of the legislation in question.⁵

6. The new approach would accept that concepts referred to in the Treaties, such as EU citizenship, and equality, should be *principally* defined by EU secondary legislation, rather than by judicial decision, and that the EU lawmaking institutions should be accorded a large margin of appreciation in defining the scope of such concepts.⁶

7. My proposed new approach would mean that the Court of Justice would re-appraise its approach to subsidiarity,⁷ and to the requirement that EU law respects the national identities of its Member States.⁸ The Court would

⁵ Contrary, for example, to the interpretation of the Court of Justice of Article 1(4) of the EIA Directive (Directive 2011/92/EU) (exemption from assessment for projects adopted by a specific act of national legislation), in Case C-43/10 *Nomarchiaki* para. 78 (and case-law cited). The Court interprets this provision, against the text, to apply only where the specific act of national legislation ensures that the aims of the Directive are achieved. There is criticism of this case-law in the *HS2* judgment [2014] UKSC 3, at paras. 81 and 196. As regards criticism of the Court's interpretative approach more generally, see the *HS2* judgment at paras. 163-174 (Lords Neuberger and Mance, with the other members of the Court being in agreement); and Lord Reed in his Thomas More Lecture 2014, at pages 10, 11.

⁶ For example: to assess inequality it is necessary to identify comparable situations, and a determination of comparability often involves a value judgement/policy decision. Thus, in the *Lebon* case (Case 316/85), the Court held that a claim by a migrant to a job-seeker's benefit was not comparable to such a claim by a national worker; yet in the *Collins* case (C-138/02), the Court held that because of the introduction of the status of Union Citizenship such situations were now to be regarded as comparable. This ruling binds EU authorities as well as national authorities, and a judicial value judgment is thus likely to foreclose a different value judgment on the part of the EU legislator. It is submitted that the EU legislator should in principle be free to make its own decision as regards comparability in such cases. In Case C-236/09 *Test-Achats* the Court of Justice should, in my view, have accepted that the Council was entitled to make the exception which it did in Article 5(2) of Council Directive 2004/113/EC in respect of sex as a determining factor for calculating risk for insurance purposes. I agree with Lord Mance's comments on this case in his lecture in honour of Sir Jeremy Lever QC in February 2013, pages 28, 29.

⁷ Article 5(3) TEU provides: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." The text must be interpreted in light of its aim, which is "to ensure that decisions are taken as closely as possible to the citizens of the Union", see the first recital to the preamble of Protocol No 2 on Subsidiarity and Proportionality.

⁸ Article 4(2) TEU provides: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining

promote these de-centralising values of the EU legal order as strongly as it promotes centralising values, such as the direct effect and supremacy of EU law, and the concept of Citizenship of the Union.⁹

8. That new approach would also place greater weight on a literal interpretation of EU rules, especially provisions of secondary legislation. In the great majority of cases, a literal interpretation will give effect to the intention of the draftsman, and be more likely to produce a predictable outcome.¹⁰ By a literal interpretation I mean an interpretation which is consistent with the relevant words used in the text. There may be more than one literal interpretation of the text.

9. I accept that a literal interpretation is not always the correct interpretation. The Court of Justice adopted a literal interpretation of the concept of a “data controller” in the *Google Spain* case.¹¹ Yet the judgment in what has come to be called the “right to be forgotten” case has been controversial.¹² Vattel wrote in the 18th century that a literal interpretation of a text, even a text lacking in ambiguity or obscurity, must be rejected, if it leads to an absurd result.¹³ That still seems the right approach. There should be a strong presumption in favour of a literal interpretation, but that presumption will be rebutted if the result is so unreasonable that it cannot have been intended. That is the approach I would commend to the Court of Justice.

law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

⁹ By “values” I mean rules, principles, and concepts. By “centralising values” I mean those values which promote decision-making at EU level rather than national level, and which constrain EU secondary legislation by reference to norms of EU primary law. The principle of conferral is described in the TEU as governing “the limits of Union competences” and the wording of Article 5(1) and (2) imply that the principle has a de-centralising function, though in practice this is little in evidence.

¹⁰ In this respect, see *HS2* judgment at paras.163-174

¹¹ Case C-131/12 *Google Spain*.

¹² Advocate General Jääskinen considered that an internet search engine provider (such as Google) *could not* be considered a data controller, though he considered that the contrary conclusion “might easily be defended as a logical conclusion of a literal and perhaps even teleological interpretation of the Directive..” (Opinion, para. 77). But he described a literal interpretation as a “*blind* literal interpretation of the Directive in the context of the internet” (my emphasis). He added that “The Court should not accept an interpretation which makes a controller of processing of personal data published on the internet virtually everybody owning a smartphone or a tablet or a laptop computer” (Opinion at para. 81).

¹³ “*Every interpretation that leads to an absurdity*, ought to be rejected, or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity...”

“The application of this is more easy, when the expressions of the law, or the treaty, are susceptible of two different meanings. In this case we adopt without hesitation that meaning for which no absurdity arises....”

“The rule we have just mentioned is absolutely necessary, and ought to be followed, even when the text of the law or treaty does not, considered in itself, present either obscurity or ambiguity in the language.” See §282 of the 1797 English edition of Vattel’s “The Law of Nations or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns,” The 1797 edition is based on Charles W.F. Dumas’ 1774 edition of Vattel’s original 1758 edition. I record my thanks to John Dunbabin, Emeritus Fellow of St Edmund Hall, Oxford, for providing the pretext for my acquaintance with this work.

10. Any critical analysis of judicial reasoning must take account of the role of the court which is the subject of the analysis. A judgment of the English Court of Appeal might be criticised on grounds which would not justify criticism of the UK Supreme Court. My brief critical analysis today is of the interpretative approach of the Court of Justice. I take full account of the role of that Court, which is a constitutional role in the EU legal order.¹⁴ But I would maintain that nevertheless the Court ought to accord due deference to EU lawmaking institutions, and to the competence which is retained by national parliaments and courts, and which is recognised as being so retained in the fundamental law of the EU.

11. Potential judges of the Court of Justice are the subject of a report by a panel established under Article 255 TFEU. In a recent article, the learned authors criticised the panel for failing to take due account of the difference between the role of the EU General Court and the Court of Justice. They write:

“...the Panel has done little to rectify the often non-existent distinction made in the Member States between the criteria required for judges at the Court of Justice and the General Court. While it is expected of general courts, especially district and appellate courts, to strictly observe the law and provide expert interpretation of highly specific legal provisions, it is the task of constitutional courts to correct failures in the law – by focusing more on the principles and values on which a legal system rests.”¹⁵

12. I am not sure I fully agree with this analysis, so I offer this comment upon it. I consider that it is the job of the Court of Justice, no less than of the General Court, to strictly observe the law, and to provide expert interpretation of highly specific legal provisions. Its appellate function requires no less. Any task of the Court of Justice to correct failures in the law must be principally a responsibility to correct what in retrospect it takes to be errors in its own case law. That task should not extend to correcting policy decisions made by those who drafted the Treaties, nor should it extend to correcting policy decisions made by the EU lawmaking institutions. Nor should the desire of the Court of Justice to focus on the principles and values upon which a legal system rests release it from the obligation to justify fully its judgments by clear consistent and compelling judicial reasoning.

13. Calling for a new judicial approach implies criticism of the old judicial approach. What, precisely, am I criticising? I have already said that over readiness to depart from the text is part of the criticism. A related criticism is of

¹⁴ Thus I defended the Court’s ruling that the Treaty principle requiring equal pay should have direct effect only *prospectively* in Case 43/75 *Defrenne*, on the ground that “it is firmly founded in principles affirmed consistently by the Court in its previous jurisprudence, unexceptionable in themselves, and essential to a Court exercising a quasi-constitutional function in the legal order established by the founding Treaties”, Wyatt and Dashwood, *The Substantive Law of the EEC*, Sweet and Maxwell, London, 1980, page 32.

¹⁵ Dumbrovsky, Petlova, and van der Sluis, “Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in Member States,” 51 *CML Rev.* (2014), 455-482, at 482.

judgments driven by judicial policy, rather than reached by a convincing process of legal analysis and reasoning. I shall call this the result-driven approach.

14. Such an approach has led to a relentless increase in EU competence. And such an approach undermines the political and democratic processes provided for or recognised in the Treaties. It substitutes, without sufficient justification, the Court of Justice's preferences for the preferences of other actors on the EU's institutional stage, and it allows the Court to choose the EU constitutional values which it promotes, and those which it does not.

15. It would be wrong and misleading for me to speak only of what I would urge upon the Court as reform. I must refer to and pay tribute to what the Court has done well, and in some respects done supremely well.

16. The Court of Justice must take much credit for developing the rules of the internal market. It has contributed in a major way to the "highly competitive social market economy" envisaged by the Treaty on European Union.¹⁶ The Court's case law has provided the framework for ground-breaking EU legislation, such as the Services Directive.¹⁷ The Court has provided much of the legal glue needed to make the internal market work, and to enforce the environmental and social rights and obligations of individuals and companies. The Court has created a system in which the rule of law can be enforced and more often than not is enforced. There is much else that the Court has done which I would praise, but not today.

17. What I have found troubling for a number of years, is that some judgments of the Court which I have praised from a policy point of view, I have found difficult to justify in terms of legal reasoning. I give as an example the highly significant *Centros* decision, confirmed in *Inspire Art*.¹⁸ These judgments have contributed to making the internal market more competitive, and have encouraged Member States to adopt less burdensome rules for the formation of private companies.¹⁹

18. The *Centros* judgment holds that a commercial operator doing business in one Member State (Denmark) may set up a company in another Member State (the UK), while carrying on all the business of that company through a branch in the original Member State (Denmark). The Danish business thus set up a company with a capital of £100 in the UK rather than being subject to the £20,000 requirement had it incorporated in Denmark. The effect of the judgment is to allow businesses to choose the most business friendly environment in which to incorporate, and it allows them to avoid

¹⁶ Article 3(3) TEU.

¹⁷ Directive 2006/123/EC on services in the internal market. For an account of the Directive, see see "Wyatt and Dashwood's European Union Law", by Dashwood, Dougan, Roger, Spaventa, and Wyatt, Hart Publishing, 2011, chapter 18.

¹⁸ Case C-212/97 *Centros*, Case C-167/01 *Inspire Art*.

¹⁹ For a discussion of this case law, and its impact on regulatory competition between Member States, and its inspiration for a Commission proposal for a Statute for a European Private Company, see "Wyatt and Dashwood's European Union Law", by Dashwood, Dougan, Roger, Spaventa, and Wyatt, Hart Publishing, 2011, pages 649-658.

relatively higher capital requirements in their home state. The policy virtues of that are of course open to debate. I take the free market side of that debate. So did the Court of Justice.²⁰ But in order to reach its conclusion the Court side-stepped the Treaty requirement that an individual or company, wishing to exercise the right of secondary establishment in a Member State, by setting up an agency, branch or subsidiary in that State, must already be *established* in a Member State.²¹

19. The Court's case law holds that in order to be established in a Member State an individual or company must actually pursue an economic activity through a fixed establishment in that State.²² The reason why the Danish authorities had refused to permit a branch of the English *Centros* company to carry on business in Denmark was the fact that the English company was carrying on no business in England. The Court nevertheless proceeded on the basis²³ that simple incorporation of a company in a Member State amounted to establishment in that State. It might be possible to justify this conclusion, but the Court does not even attempt to do so. I include this case in the discussion because I wish to dispel any suspicion that I am confining my criticism of the Court's reasoning and analysis to cases in which I disapprove of the outcome. But in fairness I should point out that the conclusion reached by the Court was the conclusion urged upon it by the UK, which submitted observations in the proceedings. Member States are not always strict constructionists when it comes to pursuit of national policies. I have myself said that the *Centros* judgment was a "bold initiative" and that "it is not inconceivable that *Centros* might have been decided differently," pointing out that the reference in the Treaty to the right to set up secondary establishments being reserved to nationals of Member States²⁴ already *established* in a Member State might have required more in the case of corporate entities than mere incorporation. But I also concluded that the policy outcome was a good one, and that a contrary conclusion by the Court would have been

²⁰ Empirical research by Brecht, Mayer and Wagner indicates that the judgments in *Centros* and later cases in similar vein were directly associated with a trend towards the incorporation of private companies in the United Kingdom by business located in other Member States. Between 2003 and 2006 over 67,000 new private limited companies were established in the United Kingdom from other EU Member States, see See M Becht, C Mayer, H Wagner, 'Where Do Firms Incorporate? Deregulation and the Cost of Entry' European Corporate Governance Institute (ECGI), Law Working Paper No 70/2006 (2008) 14 *Journal of Corporate Finance*. Free download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=906066

²¹ Article 49 TFEU states that "Such prohibition [on restrictions on the freedom of establishment] shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State *established* in the territory of any Member State" (emphasis added).

²² For a recent statement of this principle in the corporate context see Case C-378/10 *VALE Építési kft.*, at paragraph 34: "...the Court notes that the concept of establishment within the meaning of the Treaty provisions on the freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there (Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 54 and the case-law cited)."

²³ As it had previously done in Case 79/85 *Segers*; Case Case C-212/97 *Centros*, para. 16.

²⁴ Article 54 TFEU provides that the reference to "nationals of Member States" shall be applied by analogy to inter alia companies registered in a Member State.

unfortunate.²⁵ The line between a healthy regard for the merits, and so-called judicial activism, may be a fine one, and lie in the eye of the beholder.

20. Nevertheless, there are a number of judgments in the field of free movement which are open to serious criticism, both in terms of reasoning, and outcome.

21. An example of a result-driven judgment is that in the *Carpenter* case in 2002.²⁶ The case concerned the deportation of a third country national who was the wife of a UK citizen, resident in the UK. The husband sold advertising space in the UK to advertisers in other EU Member States. Because his customers were based in other Member States, Mr Carpenter's business activities fell within the scope of the Treaty provisions on freedom to provide services. The Court held that the deportation of Mrs Carpenter interfered with Mr Carpenter's freedom to provide services and could not be justified because it infringed his right to family life. The link with EU law was clearly too tenuous to justify any of this.²⁷ The Court invented a test which it had never used before and has never mentioned since.²⁸ The Immigration Appeal Tribunal in the UK which made the reference to the Court of Justice was entitled to apply the Human Rights Act to the case before it.²⁹ The Court of Justice usurped that jurisdiction by making the human rights of Mrs Carpenter part of the freedom of Mr Carpenter to sell advertising space to his customers.

22. There are other cases which stretch the Treaty provisions on cross border service provision beyond breaking point. It will be recalled that the Treaty provisions on services cover services "normally provided for remuneration." These provisions are clearly designed to prohibit restrictions on the provision of cross-border commercial services. In a number of cases,³⁰ the Court of Justice has found that medical services (including hospital care) fall within the internal market provisions on free provision of services.

23. The Court of Justice has interpreted these provisions as applying to hospitals which provide treatment under national social security schemes, and

²⁵ "Wyatt and Dashwood's European Union Law", by Dashwood, Dougan, Roger, Spaventa, and Wyatt, Hart Publishing, 2011, page 657.

²⁶ Case C-60/00 *Mary Carpenter*.

²⁷ Advocate General Stix-Hackl reached a contrary conclusion to that of the Court. The European Commission did not see how the situation of Mrs Carpenter could be regarded as a situation subject to EU law, see the Advocate General's Opinion, at para. 28.

²⁸ "It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom", at para 23. So, it seems that the deportation of Mrs Carpenter fell within the scope of EU law because it was detrimental to the conditions under which Mr Carpenter sold advertising space to customers outside the UK.

²⁹ The original deportation decision regarding Mrs Carpenter was taken prior to the coming into force of the Human Rights Act 1998. That decision had been re-taken after the coming into force of the Act to ensure that Mrs Carpenter could exercise her rights under the Act, as the UK explained to the Court at the hearing.

³⁰ See in particular Case C-157/99 *B.S.M. Geaets-Smits v. Stichting Ziekenfonds VGZ; HTM Peerbooms v. Stichting CZ Groep Zorgverzekeringen* [2001] ECR I – 5473, and Case C-385/99 *V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA* [2003] ECR I – 4509.

to patients of such hospitals in other Member States. Thus an NHS patient awaiting treatment in an NHS hospital is treated as a potential recipient of a service provided by e.g., a French hospital to patients covered by the French health care system. The UK patient may opt for treatment in another Member State, and the NHS is required to pay the bill. The insistence by the NHS that it was designed to treat its own patients and that it was not an insurance fund was regarded by the Court of Justice as a restriction on the freedom of NHS patients to receive hospital treatment in other Member States. The NHS was required to turn itself into an insurance fund to pay for treatment of its patients in other Member States, despite the fact that that was not the way that the NHS works.³¹ This is not a fair reading of the provisions on cross border provision of services. It is pure judicial policy-making.

24. One effect of case law which extends excessively the scope of internal market freedoms is that it also extends the lawmaking competence of the EU, and reduces the lawmaking competence of the member States. That is precisely the effect of the case-law to which I have just referred. It brought national health care schemes within the scope of internal market regulation by the lawmaking institutions of the European Union.³² There followed an internal market directive on cross-border health care which covered patients of national health care schemes.³³

25. I turn next to the example of collective action by trade unions. In the *Viking* case³⁴ the Court held that a commercial operator could rely on Article 49 TFEU to impose obligations on trade unions. The unions had taken collective action which restricted the right of establishment of the commercial operator concerned. The collective action in question in *Viking* was designed to prevent a ferry operator from re-flagging its vessels to take advantage of less protective national labour rules. This ruling by the Court of Justice effectively circumvented the Treaty's exclusion of EU competence in the field of the right of association and the right to strike. The social policy provisions of the Treaty give lawmaking powers to the EU institutions covering aspects of workers' rights. The Treaty excludes from these lawmaking powers, inter alia, the right of association and the right to strike (Article 153(5) TFEU). By holding that trade union collective action could amount to a restriction on cross border establishment, the Court of Justice implied that the EU lawmaking institutions could regulate strike action under the chapter on establishment. That flatly contradicted the exclusion in Article 153(5).

26. The Commission later initiated a proposal, the so-called *Monti II* proposal, to balance strike action with cross border economic activity, based on Article 352 TFEU. The proposal was widely condemned as an attempt to circumvent the Treaty exclusion of the right to strike from EU competence, and prompted a "yellow card" from national parliaments under the subsidiarity

³¹ Case C-372/04 *Yvonne Watts v Bedford Primary Care Trust*.

³² E.g., Article 114 TFEU.

³³ Directive 2011/24/EU.

³⁴ Case C-438/05 *Viking*. See Wyatt, *Is the European Union an Organisation of Limited Powers*, in Arnall et al (editors) "A Constitutional Order of States: Essays in Honour of Alan Dashwood", Hart Publishing, 2011, page 3, at pages 16,17.

protocol. The Commission abandoned the proposal. But the circumvention for which the Monti II proposal was blamed must be attributed to the Court of Justice in *Viking*. Denmark argued to the Court that the exclusion from EU competence of collective action implied exclusion from the scope of the provisions on establishment and services. The Court rejected this argument on the basis that the fact that such matters remained in principle within national competence did not release Member States from the obligation to exercise that competence consistently with Community law.³⁵ That does not meet the point in issue. If a Treaty provision excludes a particular subject matter from EU regulatory competence, that subject matter cannot amount to a restriction on free movement, because regulating restrictions on freedom of movement is precisely what EU legislative competence is designed to do. *Viking* is yet another step too far. The legal arithmetic does not add up.

27. National parliaments rebelled against the Monti II proposal under the banner of subsidiarity,³⁶ though many of their arguments were in reality issues of competence. Subsidiarity (simply put) is the principle that lawmaking decisions in the EU should be taken as closely as possible to the citizen and only at EU level where EU action is justified. The principle was introduced by the Maastricht Treaty to establish a brake on excessive EU lawmaking. The principle of subsidiarity imposes two pre-conditions for the adoption of EU secondary legislation. The first is that the objectives of the proposed action cannot be sufficiently achieved at national level. The second is that these objectives can be better achieved at EU level. These tests are less straightforward than they seem. It might be said that if they are applied literally they lead to the absurd result (for the purposes of Vattel's principle of interpretation referred to above) that all proposals for EU legislation which are within EU competence are also compliant with subsidiarity. The EU institutions do interpret these tests in this way.

28. The EU political institutions have been uninhibited by subsidiarity. They have interpreted it in a way which guarantees that any proposal for EU action which the EU is competent to adopt is also compliant with subsidiarity. If a proposed measure is an internal market measure, the institutions say that only EU wide action can remove obstacles to trade between Member States. If a proposed measure is not an internal market measure, the institutions say that the aim of adopting EU wide standards can only be achieved by adopting EU wide rules. It follows that all proposals for EU action can be presented as being compliant with the principle of subsidiarity.³⁷ This defeats the aim of the principle to ensure that decisions are taken as closely as possible to the citizen, and deprives subsidiarity of all effect, useful or otherwise.

³⁵ *Viking* para 40. The argument was advanced by Denmark in *Viking*.

³⁶ In 2012 a dozen national parliaments showed the first "yellow card" under Protocol No 2 on Subsidiarity and Proportionality. The second "yellow card" in 2013 was prompted by the Commission's proposal for a European Public Prosecutor's Office, which was opposed by 14 national parliaments.

³⁷ For detailed substantiation of this analysis, see Wyatt, Evidence to the Balance of Competences Review on Subsidiarity and Proportionality, pp. 3-8, file (entitled *Professor Derrick Wyatt QC*) accessible at <https://www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences>

29. The Court of Justice has been unenthusiastic about the principle of subsidiarity. It could have breathed constitutional life into subsidiarity had it so chosen. It has not required the institutions to address subsidiarity expressly in the reasoning of legislative acts, nor in any greater detail than is required in any event,³⁸ despite an early plea from Advocate General Léger for the obligation to state reasons to be enforced with particular rigour in the context of subsidiarity.³⁹ Successive declarations and protocols have indicated criteria for compliance with subsidiarity, such as the issue under consideration having transnational aspects which cannot be satisfactorily regulated by action by Member States, and the requirement that the reasons for concluding that a Union objective can be better achieved at Union level be substantiated by qualitative, and, wherever possible, quantitative indicators.⁴⁰ The Court could have required the institutions to address such matters in detail in the course of the legislative process and treated failure to do so as a ground for annulment.⁴¹ Arguments to this effect have been rejected by the Court, or simply ignored.⁴² In the case of internal market measures, while accepting that subsidiarity applies to the measures in question, the Court has in effect held that if there is competence to adopt the measure, then that in itself resolves the question of compliance with subsidiarity.⁴³ Outside the internal market context, the Court has implied that a decision that the exercise of EU lawmaking competence is necessary presupposes EU wide action, leaving no room for application of the principle of subsidiarity.⁴⁴

30. The Court recently stated, in *Estonia v Parliament and Council*, that the EU lawmaking institutions are bound to consider “detailed evidence” in reaching a conclusion on subsidiarity, and that they must not fall into an error of assessment, and the Court pronounced those conditions satisfied in the case in point.⁴⁵ But the only “detailed evidence” considered by the Court was the text of the measure in issue, and Court did not address the objection of Estonia that the material attached to the draft Directive lacked “the statement on compliance with the principle of subsidiarity provided for in Protocol 2”.⁴⁶

³⁸ Case C-233/94 *Germany v European Parliament and Council*, para. 28; Case C-508/13 *Republic of Estonia v European Parliament and Council* paras. 58-63.

³⁹ Opinion in Case C-233/94, para. 87.

⁴⁰ Amsterdam Protocol, paras, 4 and 5. The current (Lisbon) Protocol, which provides for subsidiarity monitoring by national parliaments, does not repeat the criteria set out in the Amsterdam Protocol, apart from the requirement that the need for Union action be substantiated by qualitative, and wherever possible, quantitative indicators.

⁴¹ See Case 191/82 *FEDIOL*, para. 30, scrutiny to determine whether an institution has omitted to take into consideration any essential matters part of the normal powers of review of the Court of Justice.

⁴² Case C-84/94 *United Kingdom v Council*, paras. 46, 47. A similar argument was advanced in Case C-491/01 *BAT*, but the point was not even referred to by the Court. In Case C-508/13 *Estonia v European Parliament and Council* the Court ignores Estonia’s arguments that the draft directive in issue had not been accompanied by the statement of compliance with subsidiarity required by Protocol No 2.

⁴³ Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council*; Case C-491/01 *BAT*; Joined Cases C-154/04 and 155/04 *Alliance for Natural Health*.

⁴⁴ Case C-84/94, above, para. 47.

⁴⁵ Case C-508/13 *Estonia v European Parliament and Council* para. 54

⁴⁶ *Ibid.*, para. 41.

31. The Court also maintains that even if one of the objectives of the directive could be better achieved at national level (limiting information requirements on small undertakings), what it describes as “the first objective of the directive” can be better achieved at EU level than at national level, since that objective is “to establish minimum equivalent legal requirements as regards the accounts of undertakings *that are in competition with one another*” (emphasis added).⁴⁷ On the face of it, this objective does not seem sufficient to establish even *competence* to adopt the measure in question, let alone justify the provision in terms of subsidiarity, since there is no indication that such minimum requirements are necessary to rectify *appreciable distortions of competition*, which would be required if potential distortion of competition was the legal basis for competence.⁴⁸ Where the EU lawmaker seeks to rectify appreciable distortions of competition it is quite capable of saying so.⁴⁹ In fact, the directive in issue is based on Article 50(1) TFEU which authorises legislation to attain freedom of establishment, and the directive aims to reduce administrative burdens on small and medium sized companies imposed by prior EU legislation on accounting requirements. Its compatibility with subsidiarity should be considered in this context.

32. My point is not that the directive in issue in the *Estonia* case cannot be justified in terms of subsidiarity, simply that the Court’s approach is undemanding and uncritical. The Court also holds that the institutions need not justify individual provisions of draft legislative acts by reference to subsidiarity, but need only concern themselves with the act as a whole.⁵⁰ This is surely wrong, since it endorses the current brief and perfunctory justification provided for draft acts in subsidiarity terms. In the event of challenge, the institutions must justify each and every provision of a binding measure *ex post*, and it is irrationally asymmetrical to limit *ex ante* scrutiny to consideration of a measure as a whole.⁵¹ The one concession the Court has made is that EU measures are to be *interpreted* in accordance with the

⁴⁷ *Ibid.*, para. 47.

⁴⁸ The Court has held that an internal market measure aiming to rectify distortions of competition can only be justified if those distortions are “*appreciable*” The Court noted that “In the absence of such a requirement, the powers of the Community legislature would be practically unlimited.” See C-376/98 *Germany v Parliament and Council*, at para. 106. In the case of the Directive in issue in the *Estonia* case, the objective in question had clearly been copied and pasted from an earlier directive repealed by the directive in issue (Directive 78/660/EEC, 7th recital) and pre-dating the Court’s ruling in Case C-376/98.

⁴⁹ See for example, Directive 2005/29/EC, the “Unfair Commercial Practices Directive”, recital (3); Directive 2005/29/EC, the “Timeshare Directive”, recital (2).

⁵⁰ *Ibid.*, para. 51.

⁵¹ Article 5 of Protocol No 2 provides that “Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.” The validity of individual provisions, or sub-provisions, of EU acts can be challenged on the basis of lack of competence, or infringement of, for example, the principle of proportionality. In Case C-508/13 *Republic of Estonia v European Parliament and Council* the Court appears to accept that in principle individual provisions of an act can be challenged for infringement of the principle of subsidiarity, but denies that the institutions are bound to consider whether such individual provisions are compliant with the principle during the legislative process.

principle of subsidiarity.⁵² This rule of interpretation applies to *individual provisions* of EU measures, pointing up once again the anomaly of the institutions being free of any duty to justify individual provisions of draft measures for compliance with the principle of subsidiarity in the course of the legislative process. But in any event, the Court's statement that EU measures are to be interpreted in accordance with subsidiarity has as yet had no visible impact on the Court's general approach to the interpretation of EU law. This general approach continues to be result-orientated, and to favour centralising principles over de-centralising principles.

33. My conclusion is that subsidiarity has to date been a judicial dead letter. The current subsidiarity protocol gives the Court jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act.⁵³ There is thus a clear intent in EU primary law that subsidiarity be enforced by the Court of Justice. As we have seen, the Court of Justice acknowledges this in principle, yet it difficult to imagine the Court ever over-ruling the EU institutions on this issue, unless it changes its approach.

34. It is of course the case that there is a large policy, indeed political element involved in assessing compliance with subsidiarity. That is why the best opportunity for subsidiarity monitoring is at the pre-legislative stage, by the EU lawmaking institutions, and by the national parliaments under Protocol No 2 on Subsidiarity and Proportionality. But it does not follow from this that once EU secondary legislation is adopted, its compliance with the principle of subsidiarity can be taken for granted, nor that judicial application of the principle of subsidiarity is foreclosed.

35. The elements of the Court's interpretative approach under discussion today also have implications for application of the principle of subsidiarity. In the *HS2* judgment Lords Neuberger and Mance referred to the problems caused to the EU legislative process by the unpredictability of the interpretative approach of the Court of Justice (difficulties in drafting, and in reaching agreement on a draft text).⁵⁴ There is a further problem. The Court's approach also undermines subsidiarity monitoring by the EU political institutions, and by national parliaments under Protocol No 2 on Subsidiarity and Proportionality. Provisions of EU secondary legislation which as drafted appear to conform to the principle of subsidiarity may then be interpreted by the Court of Justice in a way which contravenes that principle. The Court's insistence that the institutions need not justify individual provisions of draft legislative acts by reference to subsidiarity, but need only concern themselves with the act as a whole, only compounds this problem.

⁵² C-114/01 *Avesta Polarit Chrome Oy*, paras. 55-57. The Court held that a reference to "other legislation" was not confined to EU legislation but covered national legislation provided that that national legislation had the same objectives as the Waste Framework Directive and resulted "in a level of protection of the environment which is at least equivalent to that resulting from the measures taken in application of the directive, even if the detailed terms of that national legislation diverge from those of the directive" (para.59).

⁵³ Article 8.

⁵⁴ Para. 174.

36. In contrast with the Court's lack of enthusiasm for subsidiarity, it has worked hard to expand and develop the concept of EU Citizenship. It has branded EU Citizenship as a status "destined to be the fundamental status of nationals of member States" (first expressed in *Grzelczyk*). This is based on judicial policy rather than any relevant text. It is supported by no reasoning. It makes an implicit contrast with national citizenship - if EU Citizenship is destined to be the fundamental status of the nationals of the Member States, then national citizenship is destined to be something less. This implication is confirmed by later case law.

37. The Court of Justice has deduced from this fundamental status the proposition that the acquisition and loss of *national* citizenship is subject to review in light of EU law.⁵⁵ There is no textual basis in the Treaties for this and it subjects the very existence of national citizenship to EU law.

38. The Court's conclusion is in my view inconsistent with Treaty requirements that EU Citizenship shall not replace national citizenship.⁵⁶ If the EU law concept of Citizenship over-rides conditions on the acquisition and loss of national citizenship imposed by national law, then to that extent EU Citizenship replaces national citizenship. The Court's conclusion in *Rottman* is also in my view inconsistent with the treaty requirement that the Union to respect the national identities of the Member States,⁵⁷ and respect their essential state functions.⁵⁸ There is no more essential a state function than determining the conditions for acquisition and loss of national citizenship.⁵⁹

39. A distinguished academic commentator has observed that:

"Too extensive an interpretation of the national identity clause has the potential to block or even reverse the course of European integration. On the other hand, too narrow an interpretation would render [it] devoid of its useful effect."⁶⁰

40. In general, I agree with Professor Rodin's proposition. The national identity clause cannot be used to excuse a failure to apply EU law. But it can and should inhibit the Court of Justice from *expanding* EU obligations in ways which are bound to erode essential state functions. That is my objection, in this respect, to the proposition that EU law can determine the grant or withdrawal of national citizenship.

⁵⁵ C-135/08 *Rottman* paragraph 48.

⁵⁶ Article 9 TEU, Article 20(1) TFEU.

⁵⁷ In force in this form at the time of the judgment in *Rottman*.

⁵⁸ Lisbon version.

⁵⁹ It follows that I agree with Laws LJ in *R (GI) v Secretary of State for the Home Department* [2012] EWCA Civ. 867, at para. 43, to the effect: "The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants." Laws L.J. questioned whether any purported EU law conditions on the conferral or revocation of UK citizenship laid down by the Court of Justice could be applied in the UK, *ibid*.

⁶⁰ S. Rodin, *National Identities and Market Freedoms after the Treaty of Lisbon* 7 Croatian Yearbook of European Law and Policy [2011] p. 41

41. I would also add a few observations about European integration. The integration envisaged by the EU Treaties does not require a constant expansion of EU competences. The de-centralising aim of the principle of conferral can only be undermined by such an expansion. European *integration* should never be measured by the extent of European *regulation*. Subsidiarity, respect for national identities, and respect for essential state functions, are core constitutional values of the Union which militate against any theory of an ever expanding European legal universe. The procedure for enhanced cooperation provides for a multi-speed Europe, and yet is described, and rightly described, as reinforcing European integration.⁶¹ The European integration which the Court should protect, is an integration which maintains constitutional as well as cultural diversity, and guards against, rather than promoting, the creation of EU competences which have not been clearly and expressly conferred.

42. To the extent that the Court's case law expands EU competence, it contradicts the principle that decisions should be taken as closely as possible to the citizen. I have already referred to examples of how the Court's case on the scope of restrictions on state action have served to increase the scope of EU lawmaking competences, and in one case to circumvent express Treaty restrictions on that competence. *Rottman* is a judgement which reduces the competence of national lawmakers to define national citizenship. What it also does is to transfer to the EU lawmaker competence to lay down rules in respect of national citizenship. This is the inevitable consequence of *Rottman*, just as it was the inevitable consequences of the case law on national health care provision in cases such as *Watts*, and the case law on strike action in cases such as *Viking*.

43. The rights of EU citizens are in part defined by EU primary law and are in part by EU secondary legislation. But the Court of Justice has construed that legislation generously in favour of EU citizens, and has chipped away at the conditions imposed by the EU lawmaker for the enjoyment of rights of residence.

44. One example is the *Grzelczyk* case.⁶² Grzelczyk was a student. His residence in other Member States was conditional on a declaration of sufficient financial resources to avoid becoming a burden on social assistance system of the host Member State. But the *preamble* of the then applicable Directive referred to a student not becoming an *unreasonable* burden on the social assistance system of the host Member State. The Court latched onto that word *unreasonable* in the preamble and upheld the right of a student at the beginning of his final year of study whose money had run out to claim a social assistance benefit in the host State. The Court also upheld the right of Member States to terminate the residence of those who no longer complied with the requirements of that residence. Such termination must not however be automatic. This use of the preamble to modify the text rather than resolve an ambiguity in it is questionable to say the least. And the judgment of the

⁶¹ Article 20(1) TEU.

⁶² C-184/99 *Grzelczyk*.

Court leaves real uncertainty as to when a student is entitled to claim social security, and when claiming social security will lead to termination of his right to residence.

45. EU Citizens who are not economically active are entitled to residence in the Member States if they are economically self-sufficient and have comprehensive medical insurance. In *Baumbast*⁶³, the Court said it was disproportionate of a Member State to object to a person's residence on the ground that his medical insurance was not comprehensive in that it did not cover emergency medical treatment. This ruling is against the text of the Directive and is not conducive to legal certainty. Comprehensive medical insurance means, it seems, *fairly* comprehensive medical insurance.

46. No doubt the Court felt sympathy for the individuals concerned in *Baumbast* and *Grzelczyk*. In the former case the individual had almost certainly qualified for residence, so why not place the matter beyond doubt? In the latter case the student was in his final year of study, so why not let him claim social assistance after all? Why not? Because in each case the Court gives a ruling that is against the text and leads to uncertainty in future cases, and in each case the Court undermines the solution reached by the lawmaking institutions in formulating the directives concerned. It is no answer to say that the lawmaking institutions could change the outcome. A qualified majority in the Council had endorsed the text to which the Court then gave an expansive interpretation. If the Council had been minded to restore its original understanding of the text, it would have had to muster a qualified majority to amend the original text. The Court's interpretation in these cases, in my view, amounts to an unjustified intrusion into the EU lawmaking process.

47. It is possible to identify numerous other examples of judgments which are against the text, which are based on inadequate reasoning, and unnecessarily and inappropriately undermine both the EU and national lawmaking processes. I offer the *Mangold* judgment as an example. The judgment invented a new general principle of EU law, that of non-discrimination on grounds of age. The consequence in the case itself was to set aside the period of grace allowed to implement an EU directive on the same subject matter, to allow the newly established general principle to displace the effects of provisions of German labour law, and to impose obligations directly upon a German employer. The judgment was almost universally criticised. It was a result driven judgment, it was unsupported by convincing or indeed any legal reasoning, and its effects were not and could not have been foreseen by lawmakers at EU or national level. In reaching decisions like this, the Court is acting as if it were above the law, rather than the servant of the law.

48. I return to the question of the contrast between the Court's handling of subsidiarity cases, and its handling of EU citizenship cases. It is striking. It is also striking that the Court does not see aspects of its EU citizenship case law

⁶³ Case C-413/99, paras. 80-94 (interpreting Directive 90/364, now Article 7 (b) of Directive 2004/38).

as impacting upon the national identities of the Member States, which the Union institutions are bound to respect. I conclude that the Court is choosing, on grounds of policy, the constitutional values which it upholds, and those which it does not, and that it always opts for centralising values rather than for de-centralising values. These might have been the right choices for the 20th century, in particular during a period when de-centralising values had yet to be articulated as part of EU primary law.⁶⁴ But in my view, it is now time for the Court to reflect upon the choices it has made in the past, and consider whether they are the right choices for the future.

⁶⁴ Both the principle of subsidiarity and the principle that the Union respect the national identities of its Member States were introduced by the Treaty on European Union, which was signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993.