Abstract[1]

Current state of affairs

A great deal of emphasis has been placed on the influence of EU law on the Czech law and its application. It is beyond doubt that this influence is indeed strong. Its normative basis can be seen in the Founding Treaties and especially in their interpretation by the Court of Justice of the EU. What is also stressed is the special nature of European Union law in its juxtaposition with national laws, which do not enjoy any special position in this context and are thus merely "*normal laws*".

In our opinion, a specific feature of European Union law lies in its autonomous position as a third system existing in the European space, along with international and national laws. However, this concept can hardly be considered clear-cut. There are some doubts among the professional public as to the nature of EU law and this is further augmented in certain cases of international law practice. Indeed, instead of forming a third, autonomous system, EU law could be considered a particular branch of public international law. Nonetheless, the stance a majority of experts as well as the attitude taken by the Member States speak unambiguously for the first option. This question, however, is not crucial in terms of the topics of this paper and is therefore not dealt with herein. Indeed, any special features of interpretation – if they actually exist – can be inherent to both concepts of EU law indicated above.

Individual sources of EU law can exhibit certain specificities. The professional public has confirmed the special position enjoyed by the European Union's directives, while also emphasising certain specific properties of EU regulations. The unique nature of European Union law is also often highlighted by reference to the

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[1] This abstract follows the structure as required by Article 6 Sec. 1of the Masaryk University directive No 7/2017 on Habilitation Procedure Initiation Proposal (*směrnice Masarykovy univerzity č.7/2017 Habilitační řízení a řízení ke jmenování profesorem).* According to the Article 6 Sec. 4 of this directive, the compulsory language for abstract is English.

principles of its application. Save for directives and a broad range of their effects, however, some of these principles, which may appear surprising from the perspective of international law, can be fully explained from the viewpoint of national law. Indeed, the direct effect and primacy of EU law tend to reflect, rather than the context of international law, the aspects of the functioning of federations, where federal law and the laws of the individual states form a single "internal body of law", and where federal law has primacy over the laws of the individual states.

Before the accession of this country to the Union, the citizens viewed EU law with interest and fear, as something strange. Shortly before the accession and after the accession, emphasis was placed on the distinct features of this law – it became a mystery and also the origin of problems. In practice, a number of experts welcomed the opportunity to argue with reference to European Union with a view to pursuing their own interests. Similarly, European Union law was used as an argument in the legislative process and the phases preceding it.

Hypothesis

It is a fact that everything depends on the observer's perspective. One can focus on what European Union law has in common with national law or on its differences. It appears that the latter approach has prevailed in this country. European Union law has gradually been labelled as something external, different and foreign. Case-law of the Court of Justice of the EU undoubtedly contributed to this perception, at least in two ways. Firstly, it was the position of the institution. It stands outside the scope of our judicature but nonetheless affects our application of law. Secondly, it was the approach of the Court of Justice of the EU to law, especially as regards its interpretation. The arguments used by the Court of Justice of the EU in its rulings can often appear extraneous to our legal environment.

But what is reality? Does European Union law, or more specifically its interpretation, really differ from the way we construe our national laws? Does this mean that a Czech judge is faced with the uneasy task of applying a different

methodology in dealing with every-day disputes, depending on whether he is working with national or EU law?

I consider that this is not the case and that all the differences are excessively emphasised. Naturally, one can expect EU law to have certain particularities. But I am of the opinion, and this is also the hypothesis that this paper will strive to verify, that such particularities of interpreting EU law do not go beyond what we are familiar with in our national legal environment or in international law.

Individual issues

However, should the hypothesis prove to be untrue, I will strive to determine the causes of the differences in interpretation of European Union law and how they are manifested. The individual issues forming the subject of my research are thus as follows:

- Firstly, are the particularities of interpretation of European Union law caused by institutional factors, i.e. by the systemic (or structural) setting of the judicature in the European Union?
- Secondly, are these particularities caused by European Union law as such, and especially its wording?
- Thirdly, what are the consequences of the particularities for the Member States?

Methodology

With a view to verifying the hypothesis and resolving the issues dealt with in my research, I will need to establish an appropriate methodology for my work. While the descriptive method of work is often disrespected as inferior, I shall nonetheless use it as a basis for each of the chapters of this paper, where it will serve especially to grasp the current state of affairs. In the first chapter, it will therefore be used to define the current position of the Court of Justice of the EU; in the second chapter, to describe the manifestations of national law in EU law; in the third and fourth

chapters, to demonstrate the methods of interpretation with reference to the Court's case-law; and in the fifth chapter, especially to describe the doctrinal approaches regarding the evolution theory and its expression in law. Nonetheless, I shall strive to restrict the use of the descriptive method to the necessary minimum. This paper will therefore not provide, unlike a majority of publications focusing on European Union law, any extensive description of the facts underlying the rulings made by the Court of Justice of the European Union and its conclusions. I consider that while such an approach does lead to bulky papers, thus giving them a sense of credibility, it is, in fact, useless. At the same time, I shall prefer the normative approach to the individual issues to a mere description of the case-law.

This brings me to the second method I shall apply – a critical analysis of the rulings of the Court of Justice of EU and the professional literature. The comparative method will also be employed to a limited extent. This will be limited because I do not want to pay the same attention in this paper to national law and international law as to EU law and the methods of its interpretation by the Court of Justice of the EU. That would serve no purpose. The mirror will thus be one-sided. The comparative method will play a greater role in the third chapter, examining the effects of national and international law on the decision-making of the Court of Justice of the EU. The comparison, however, will be restricted to evaluation of the arguments used to determine why a different decision was made and whether this relates to the nature of European Union law and the rules of its interpretation.

Explanation will then be provided for all the findings so as to make the picture of the methods of interpreting European Union law and the role played by the Court of Justice of the EU complete. The findings thus obtained will then be employed, using a synthesis, to verify the hypothesis and resolve the individual issues under scrutiny. The methods of explanation and synthesis also predetermine the structure of this paper. It is a fact that much has been written on European Union law and its interpretation. Some papers focus on the Court of Justice of the EU, others on the individual methods of interpretation and still others on the response of the national

environment, etc. However, it is not my goal to explain what the Court of Justice of the EU is and how it functions, what literal interpretation is and how it is manifested in the Court's case-law, what purposive interpretation *per analogiam* means, etc. I intend to focus on what is material and what defines the relevant area. In other words, instead of a vertical (or sectoral) approach, which in its substance can reflect the context only to a limited degree, I intend to employ a horizontal approach. I would like to complement that approach by a review of the consequences of the Court's interpretation for the Member States.

Structure

This publication will therefore form an organic whole – in the second part (by the first part, I mean the introductory chapter), I shall examine the entity which undertakes the interpretation exercise in terms of its systemic (structural) position. That, indeed, predetermines everything else. Since emphasis is generally placed, in respect of the Court of Justice of the EU, on its autonomous position and independence, which makes it more a political than a judicial body, the third part will concentrate on the effects caused by the Court of Justice of the EU, in terms of both national law and international law, including interactions with other courts. Indeed, the so often proclaimed autonomy of EU law and of the Court of Justice of the EU need not be so marked in its consequence.

The fourth part follows from the conviction that however independent a judicial institution may be, it nonetheless does not find itself in a legal vacuum, but is rather limited by the legislation and its wording. In view of its multilingual wording, law of the European Union somewhat differs from national laws. It is therefore questionable – and this will be examined in the fourth part – whether the use of the literal method of interpretation differs fundamentally from how it is employed in national or international law.

The way law is expressed in the text of the legislation can never be complete in terms of casuistic and exhaustive coverage of all conceivable situations. If one

concentrates exclusively on linguistic interpretation, a full picture can never be obtained. This is where the other methods of interpretation come into play. I consider that, from among the main methods, there is no sense in concentrating on systematic interpretation. This relates to what I declared in the second paragraph of this introduction. Regardless of how one perceives the nature of EU law, and its inner structure and hierarchy, its whole overall concept in no way differs from national law. It is vertical both among the individual sources of law and within them. And the consequences that ensue from the above must be the same as for other systems of law. The Court of Justice of the EU is nonetheless believed to emphasise, or even strictly insist on, teleological interpretation of law. Within that method of interpretation, there are clear efforts on the part of the Court of Justice of the EU to arrive by interpretation at the contemplated aim of the legislation. This field will therefore be examined in the following, fifth chapter. However, since the concept will be broader and will also extend to what has traditionally been considered historical interpretation within national law, while at the same time paying attention to the *effet utile*, that chapter will be titled and conceived in wider terms, in the sense of functional interpretation.

The final chapter will then focus on the consequences ensuing from the systemic settings of the Court of Justice of the EU and the wording of European Union law for the Member States. In this respect, I shall concentrate exclusively on the consequences following from the method of interpretation as such, i.e. those that would not arise in use of any other manner of interpretation. Attention will be paid especially to "*reverse discrimination*" and primarily the evolutionary (selective) pressures to which the national laws are subject in the European Union. At the same time, European Union law works as a mediating factor, and it has and plays this role only because the systemic position and manner in which the Court of Justice of the EU construes EU law were allowed through its own case-law. However, the generally known consequences, or those that have already been sufficiently

examined in other professional literature (indirect effect, primacy, direct effect, etc.), will be intentionally omitted.

Results

As regards the results of the present paper, it can be noted that the position of the Court of Justice of the EU within the institutional system of the European Union and also vis-à-vis the Member States is extremely firm and strong. It thus enabled the Court to adopt decisions that have no equivalent in any other body authorised to settle disputes within traditional international organisations. These decisions were moreover legitimised by the subsequent inactivity of the Member States. Partial opposition formed by certain national courts, which have been accepting the activist case-law of the Court of Justice of the EU with reservations, cannot change anything in this respect as the courts lack the necessary powers.

Nonetheless, I ultimately do not find this dominant and autonomous position of the Court of Justice specific in any way in terms of interpretation of European Union law. Indeed, it deals only with the question of "*who*" will interpret European Union law, but has no direct relation to "*how*" such interpretation will be undertaken. In other words, under the current setting of the entire system, and thus being in the same position, the Court of Justice of the EU could make entirely different decisions, i.e. not activist, but rather conservative.

Professional literature has offered many various suggestions as to how the current activist case-law of the Court of Justice of the EU should be dealt with in view of its systemic position. In principle, they oscillate between the two extremes. On the one hand, there are solutions that are pro-integration and federalist (and quite optimistic, in the current political situation), which welcome the current state of affairs and acknowledge it. According to these suggestions, it would be desirable to extend the activities of the Court of Justice of the EU and its agenda by means of its "*expansion*" into the Member States in the form of its direct institutional representation.

On the other hand, there are disintegrative solutions that prefer limiting the role of the Court of Justice of the EU and its position, possibly by restricting its agenda, e.g. by rendering its preliminary rulings non-binding – indeed, the Court of Justice of the EU would then have to strive to obtain legitimacy and authority through every decision it makes, thus limiting the scope for its activist decision-making. Another solution might lie, for example, in creating another (political) body composed of representatives of the Member States that would serve as the final instance in selected key questions of interpretation of EU law, as regards, e.g., the scope of powers of the European Union.

However, I consider that no such radical change is necessary, and indeed desirable. This is so for both legal and political reasons. The choice of the solution will ultimately depend on the personal preferences of individuals and their attitude towards European integration. Pro-integration solutions can further strengthen the European Union in relation to its Member States, but may also further increase the opposition of the Member States' citizens towards the Union. On the other hand, the second approach could gradually result in limitation of uniform interpretation of EU law in the Member States and prevailing influence of political aspects in judicial decision-making, at the expense of its independence.

I consider it material in this respect that the Court of Justice of the EU has been doing exactly what it is expected to do as a judicial institution, i.e. deciding as a court – independently and impartially, within the options available to it. The possible solution should also be legal, reflecting its position as a court. In my opinion, such a solution could only lie in modifying European Union law, especially the primary law, but also the secondary law. This might take the form of a forward-going approach, which would leave space for activist interpretation, or of subsequent correction, responding to earlier decisions. At the same time, I am aware of the political context and complications related to changing the founding treaties; in spite of that, I consider this approach the only one correct.

When interpreting European Union law, the Court of Justice of the EU often deals with the same problems which are being discussed and decided by other courts which are independent of the Court of Justice of the EU in institutional terms. There are three main reasons why I consider it useful to examine the approach of the Court of Justice of the EU and compare its decision-making with the way similar or identical things were decided by other courts. Firstly, this comparison can provide information on the specifics of interpretation of EU law by the Court of Justice of the EU, and secondly, it can prove whether the systemic position of the Court of Justice of the EU as described in the previous chapter is indeed absolute in nature, as could often appear at first sight. Thirdly, such examination currently has sense because it can reveal whether the Court of Justice of the EU has to take other authoritative sources into consideration when interpreting EU law, and adopt their previous conclusions.

As regards the first question, I do not think I have been able to identify any fundamental differences in the activities of the Court of Justice of the EU, on the one hand, and of other courts, on the other hand, in terms of construction of law that would attest to the existence of any unique and specific features of EU law. Different conclusions reached in similar or identical cases are, in our opinion, explicable and understandable. As a matter of fact, courts which form a part of a single judicial system often make different decisions in the same disputes.

As to the second question, it appears that the Court of Justice of the EU is willing to "*listen*" to and reflect the activities of other courts and also perceive the reality of international law, as well as of national laws. It is admittedly for political reasons only that the influence of national courts is not explicitly acknowledged. However, this does not mean that there is none. The Court of Justice of the EU shows no such restraints in relation to international law. It appears to me that both external and internal influences on the activities of the Court of Justice of the EU often have a fundamental impact on its decision-making. Naturally, this does not negate the conclusions made in the previous chapter. The Court of Justice undoubtedly has an

exclusive position in interpretation of EU law, but it is not "*blind and deaf*" – to the contrary, it listens to other courts and is willing to discuss matters with them. Therefore, there can be no talk of an absolute position of the Court of Justice of the EU.

As regards the third question, it holds that the possibilities offered by comparative interpretation remain unutilised. The options of the Court of Justice of the EU are limited in relation to international courts. Indeed, in view of the cases that the former hears and decides, it comes closer to national courts (constitutional, administrative and civil courts); in contrast, there are relatively few aspects that it has in common with international courts, or there is rather practically no overlapping, which is true, for example, of the International Court of Justice. In those cases where co-operation is possible and has sense, such co-operation is, in fact, only limited.

As an example of the closest link, one could mention interactions with the European Court of Human Rights and with the EFTA Court. The tasks performed by the two courts diametrically differ. Different is also their relation to the Court of Justice of the EU and its normative basis.

In the former case, one could consider that there exists certain hidden competition between courts of constitutional nature. Such competition would be "*hidden*" because, save for negligible exceptions, the European Court of Human Rights and the Court of Justice of the European Union respect each other, both in systemic terms (the competence of one of the courts is not questioned by the other) and in terms of interpretation (the decisions serve as mutual sources of inspiration).

In the latter case, the relationship is different. The Court of Justice of the EU and the EFTA Court are parallel courts which are mutually independent. Nonetheless, the Court of Justice of the EU clearly prevails as its position in interpretation has been established in institutional terms so as to be independent of the EFTA Court. In contrast, the EFTA Court bears full weight of the principle of homogeneity.

While the rulings of the Court of Justice of the EU are not binding on the EFTA Court as precedents, the latter court is nonetheless bound by them in interpretation (as regards case-law preceding the signature of the Agreement) or must take them into consideration (in respect of newer case-law). At the same time, it follows from the decision-making practice that the Court of Justice of the EU considers the case-law of the EFTA Court a valuable source of ideas as well as an instrument of legitimacy in terms of support for its own conclusions by reference to analogous conclusions of the EFTA Court.

There is also one other considerable difference between the influence of the European Court of Human Rights and of the EFTA Court. Indeed, from the viewpoint of a Member State, the EFTA Court interprets one and the same law as the Court of Justice of the EU. Ultimately, interpretation of EU law by the national courts can thus never become fragmented in the sense that, in some cases, the national courts would have to reflect the conclusions of the Court of Justice of the EU and, in others, they would be bound by conclusions made by the EFTA Court. In this case, the interpretation provided by the Court of Justice will always prevail.

In the case of the Convention for the Protection of Human Rights and Fundamental Freedoms, the situation is different and such fragmentation can actually arise. Potential interpretation provided by the Court of Justice of the EU which differs from the concept adopted by the European Court of Human Rights must be followed by the Member States in the field of human rights protection, not only in interpretation and application of EU law, but also in matters of national law if they fall within the competence of the European Union. This influence naturally does not exist outside the sphere of EU law. Therefore, unlike in the case of law of the European Economic Area, there exists a certain potential for differing interpretation.

What remains unutilised to the full extent is the potential of national courts. Quite understandably, the Court of Justice of the EU does not work with judgements of national courts and does not refer to them. Such an approach would be

irreconcilable with the carefully protected aura of supremacy ensuing from the supranational concept of this institution. Moreover, this would be problematic from the viewpoint of the Member States themselves. The concept of European Union as an association of democratically equal countries is not compatible with an official and open preference for a selected national law. In spite of that, national laws have found their way into EU law, precisely within its interpretation by the Court of Justice of the EU. This is just not openly admitted.

The Court of Justice of the EU thus actively works with the comparative approach, but does so questionably from the methodological viewpoint or – maybe more precisely – only to a limited degree. Indeed, comparison is superficial and is restricted to references to national law and rulings of other courts. In the decisions of the Court of Justice, the comparative approach therefore seeks arguments to support the Court's own conclusions, rather than interpreting the law. This, however, does not mean that this is not done in chambers, within the Court's discussions.

The wording of EU law forms the basis for linguistic interpretation and, at the same time, delimits the scope for the Court of Justice of the EU and limits its creativity. The relative significance of linguistic interpretation of European Union law is rather diminished compared to national law. This is true of the concept of linguistic interpretation as a general interpretation approach. Nonetheless, this approach serves the same basic function analogously as in national and international law. It forms the basic and also initial source for learning the contents of legislation.

The role of linguistic interpretation grows when used as a specific method of comparing the individual wordings. A majority of issues encountered in interpretation of EU law tend to be of factual nature. The multilingual character of this law is a burden for all bodies engaged in its interpretation as well as for individuals. While the requirements of the Court of Justice of the EU pertaining to the egalitarian comparison of the individual versions are formally correct, they are unfeasible in practice.

Ultimately, the multilingual nature of EU law is not interesting in terms of the specific aspects of linguistic interpretation, but rather in view of its political consequences. The Court of Justice of the European Union is affected only to a minimum degree by the multiplicity of language versions, as regards interpretation of the legislation. Indeed, it makes its decisions with emphasis on teleological (or functional) interpretation, which it did even before the multiplicity of languages ever became a problem. Retrospectively, it can therefore be viewed only as partial justification of the generally utilitarian approach taken by the Court of Justice to interpretation of law. In the view of the national courts, this tends to be a technical complication, which is likely to be overlooked in practice, unless there is a clear and known error in the text or unless this is requested by one of the parties.

A more fundamental problem compared to the phenomenon of multiplicity of languages lies in a purpose-driven failure to respect the text as a basis for interpretation of European Union law. A textualist approach to EU law is pragmatically suppressed by the Court of Justice of the EU for the benefit of other approaches. The principles of primacy, direct effect, liability of the State for damage and others are generally not considered bad, quite the contrary. However, they should be adopted by the legislature, not by the courts.

It seems in general that a similarly looser link with the wording of law and preference for other interpretation approaches can be expected from courts that show similar characteristics as the Court of Justice of the EU. This is probably a consequence of their systemic position, rather than a property or specificity of law. In the conditions of the Czech Republic, such a court is the Constitutional Court, although the latter has mostly shown conservative attitudes. Nonetheless, certain common characteristics can indeed be found, such as in the case of Melčák,[2] decisions on

[2] Decision of the Czech Constitutional Court No Pl.ÚS 27/09. 10. 9. 2009. ECLI:CZ:US:2009:Pl.US.27.09.1.

Lisbon Treaty[3] or the recent decision in cases of recognition of parental rights of same-sex couples.[4]

However, even the properties of law are not without significance and cannot therefore be neglected. This again can be demonstrated on the example of the Czech Constitutional Court and its activity related to those provisions of the Czech Constitution that are "*imperfect in their design*". In this connection, Professor Filip recalls the ruling regarding an "*amendment to the Conflict of Interests Act (the 'electoral law' under Article 40 of the Constitution)*" and the decision in the case of the European Arrest Warrant, where he mentions a need for "*imagination*" on the part of the Constitutional Court in order for the latter to resolve the two cases.[5] A similarity with the methods employed by the Court of Justice of the EU in a number of its decisions is obvious.

What is entirely clear is the willingness of the Czech Constitutional Court to part ways with the wording of the legislation with a view to attaining the required purpose – this can be demonstrated precisely on its decision regarding the European Arrest Warrant, which is in contrast with the approach taken by the Polish peers in a similar case. By embracing straightforward and broad linguistic interpretation of the Constitution, the Polish Constitutional Court reached the conclusion that it was not possible to infer a deviation from the wording of the Polish Constitution in a manner that would ensure conformity with EU law in that case. Indeed, if the Polish Constitution prohibits extradition, construction of this notion cannot be entirely subsumed to the laws and the way this notion is defined therein, but rather the provision in question needs to be construed in a way that also comprises analogous

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[3] Decision of the Czech Constitutional Court No Pl. ÚS 19/08, 26. 11. 2008. 446/2008 Sb. ECLI:CZ:US:2008:Pl.US.19.08.1.

[4] Decision of the Czech Constitutional Court No I.ÚS 3226/16. 29. 6. ECLI:CZ:US:2017:1.US.3226.16.2.

[5] FILIP, J. Evropský zatýkací rozkaz před ústavními soudy. *Časopis pro právní vědu a praxi.* 2005, roč. 13, č. 2, str. 162.

concepts, including the concept of surrender. In contrast, the Czech Constitutional Court used the linguistic approach only as a starting point and interpreted the relevant provision of the Charter of Fundamental Rights and Freedoms narrowly, and while using other methods of interpretation with preference for an option conforming to EU law, it reached a conclusion opposite to the one made by its Polish counterpart and one that is indicated *prima facie* by the wording of the Charter.

However, there is also a factual difference between the Court of Justice of the EU and, for example, the Czech Constitutional Court, which is based primarily on the fact that the agenda of the Constitutional Court is quite limited compared to the one of the Court of Justice of the EU, because the latter's competence also includes interpretation of "*simple laws*" (*einfaches Recht, jednoduché právo*) in the fields of internal market and sectoral policies. All these areas have provided and continue to provide space for creative interpretation with a loose connection to the wording of the legislation.

In systemic terms, with its – at times – even „*frivolous approach*" to the wording of primary law, the Court of Justice and sectoral policies tacitly follows the continental legal tradition, while often *de facto* deciding in a manner analogous to courts of common law. Indeed, in view of the those courts' rule-making powers, their precedents supplement the work of legislative bodies where the latter have so far failed to act. These courts thus ultimately provide a competition for the parliament. This can explain the lesser willingness to work creatively with the wording of rules that have already been adopted by legislative bodies, as adopting one's own rule (precedent) appears to be more straightforward from this viewpoint.

While linguistic interpretation has a relatively lower significance in the case of EU law, it serves the basic function analogously as in national and international law. It forms the basic and also initial source for learning the contents of legislation. The functional approach should be employed within the limits set by the wording of the

legislation. An unquestionable advantage of the functional approach lies in the fact that, unlike numerous language versions, there is only one function.[6]

As regards the inner classification of the functional approach, it appears that there is a difference between primary and secondary laws, which is not that surprising given their different origin and nature. I would consider it correct if the objective purpose of the legislation was determined on the basis of the text and within its limits. In my opinion, the subjective purpose can only be taken into consideration on a subsidiary basis, where the objective purpose does not lead to an unambiguous conclusion.

Consequently, if the linguistic approach and the approach based on the objective purpose result in several variants of interpretation, I would consider it appropriate to use, in view of the subjective purpose followed by the Member States in founding the European Union, the variant that better corresponds to the goals of European integration, as expressed in the preambles and recitals of the founding treaties.

On the other hand, interpretation based on subjective purpose can be fully employed in respect of secondary law as the relevant information thereon is expressed in the recitals of the EU legislation.

I consider the principle of *effet utile*, in its narrow sense, a natural component of interpretation of EU law. It should be used to eliminate, from among the variant solutions one arrives at using the aforesaid procedure, those variants that cannot reasonably and effectively ensure implementation of the legal rule being interpreted.

I believe that, up to this point, EU law shows no specificities that would distinguish it, in terms of concept and principles, from interpretation of national law, at least as regards continental and Czech laws. The perspective of common law would differ insofar as it places much lesser emphasis on the purpose of law.

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[6] This is meant in general. A single act may of course serve several purposes.

If I return to the principle of *effet utile*, this principle is problematic in its broader sense as it leads to results that have no direct support in the text. We believe that, by applying the above principle, the Court of Justice of the EU exceeds the limits set by the Founding Treaties.[7] It does so simply because it can (as explained in Chapter II.); its decisions are not questioned, and are rather often accepted.

This brings me to the factual aspects of the matter. I consider that the Court of Justice of the EU does not apply a textualist, but rather a functional approach. Emphasis is placed on the objective purpose; in substance, the Court of Justice uses an approach based on intention only where this suits it. Indeed, the clear intention pursued by the Member States is often entirely neglected. The *effet utile* is then used as an instrument aimed to provide acceptable justification for such a procedure.

Papers dealing with interpretation of European Union law also usually do not examine its consequences for national laws and the Member States. However, its specific autonomous position enabled the Court of Justice of the EU to provide more extensive and pro-liberal interpretation of the founding treaties than has ever been the case in any form of economic co-operation of the States. For example, the regime established on the basis of GATT, which is restricted to the requirement for national and most favoured nation treatment, or analogously, GATS, which inclines towards liberalisation, is incomparable in this respect. Their effect on national law by far does not attain the influence of founding treaties. At the same time, this difference is not caused by the actual wording of the treaties, but rather by the approach adopted by the Court of Justice of EU.

Along with the duty of Euro-conforming interpretation of national law, a practical consequence lies, especially in the case of directives that have not been implemented properly and in due time, in the possibility of "reverse discrimination", which EU

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[7] According to Article 19 of the Treaty on the European Union „[The Court of Justice] shall ensure that in the interpretation and application of the Treaties the law is observed." Not the making of law.

law may cause, but in no way resolves. Reverse discrimination causes no problem in legal terms. It is a natural consequence of limited powers of the European Union. However, it arises artificially and often has no basis in reality, while negatively affecting the individual. This – politically hardly acceptable issue – thus needs to be dealt with in national law. In my opinion, the solution should not be excessively accommodating, but there nonetheless may be a reason to change the approach to its interpretation. This will be so in respect of new cases, in a situation where a national court decides in an earlier case under the influence of EU law in that it takes foreign legislation into consideration. In that case, it can be considered justified to adapt national interpretation and thus also case-law to the new approach influenced by foreign law, but only and solely provided that such different interpretation is at all possible under the national law. Indeed, a judge cannot be expected or required to go beyond its role of a body interpreting and applying law, but not making it.

Another consequence of specific and extensive interpretation of EU law by the Court of Justice of the EU is the creation of direct competition among national laws. The similarity with evolutionary mechanisms is more than clear in this case. The Court of Justice of the EU has mediated mutual interaction of the Member States' legal systems in some areas of the single market in a way that is unique in the world of international organisations. Paradoxically, the Court of Justice of the EU has also put itself and the whole of EU under more scrutiny. It appears that its approach to the interpretation of certain provisions establishing EU legislative powers could be different. The interpretation may be traditional, conservative, but it can similarly take into account the implications the case law of the Court of Justice of the EU has had in national law.

This demonstrates that the harmonising and unifying tendencies are not as necessary as they may currently appear since the necessary development can also take place through natural evolutionary processes in law. Still, the EU can effectively contribute to this evolution since it is its main motivator. Finally, the European Union is the one who has the necessary prerequisites. The Union can assist with

translation of national regulations, national commentaries to laws and selected collections of court decisions; this would provide a strong impetus for a transfer of ideas across the many legal systems of EU Member States. The fact that delegation occurs even in the case of the Court of Justice of the EU itself was clearly illustrated in the third chapter. In my opinion, it would be more than desirable to contribute to similar processes that take place on the national level.