Course: GV251
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Week 5: The European Court of Justice

PART I) Basic concepts

During your own time, please place the terms at the word bank below in the appropriate categories, and provide a short definition for each term.

(a) Sources of EU law

1)

2)

3)

(b) Types of EU secondary legal acts

1)

2)

3)

4)

5)

(c) Types of cases that the ECJ can hear

1)

2)

3)

Word bank: Directives; regulations; infringement cases; general principles of law; primary acts (treaties); recommendations; preliminary reference cases; secondary legal acts; judicial review cases; opinions; decisions

PART II) The EU's constitutional order and the role of the ECJ within this order

a) *Discuss*: Please define the following doctrines and principles of EU law, and recall the judgements in which they were established. Why are these principles important for the development of the EU's constitutional order?

1. ***Direct effect*** = _____
_____
_____

Case: _____

Significance:

2. ***Supremacy of EU law*** = _____
_____
_____

Case: _____

Significance:

3. ***Mutual recognition*** = _____
_____
_____

Case: _____

Significance:

b) *Discuss*: Is the ECJ a runaway judiciary? To what extent does the ECJ tend to go against the intentions and interests of the member-states in its rulings?

In thinking about an answer to this question, you can draw inspiration from the following sub-questions:

- *What is the primary motivation of ECJ judges when they are deciding on a case?*
- *Why did the member-states create the ECJ in the first place? Is it fulfilling the role that the member-states wanted it to fulfill when they created it?*
- *Can the member-states use threats of override to influence ECJ rulings?*
- *Can the member-states use threats of non-compliance to influence ECJ rulings?*
- *Can the member-states use the appointment process of ECJ judges as a tool to constrain the ECJ's discretion?*
- *Can you think of some particular examples of rulings in which the ECJ went against the preferences of the member-states? What about examples of rulings where the preferences of member-states seem to have influenced the ECJ's decisions?*
- *What light does the empirical evidence that Larsson et al. present in their 2017 article shed on the question?*

The table below can help you organise your answers to those sub-questions.

	Is the ECJ a runaway judiciary?		
	YES (supranational politics approach)	**NO** (intergovernmentalism)	**NEITHER YES NOR NO** (Legal-formalist view)
Motivation of the judges			
Reasons for creating the ECJ			
Threat of override			
Threat of non-compliance			
Appointment of the judges			
Examples of case law that support this view			
Empirical evidence in Larsson et al. 2017			

PART III) Examples of court rulings on some controversial issues in EU law

a) *Please consider the information below about the 2015 Gauweiler case and discuss*: Was the ECJ's ruling compatible with the preferences of member-states in the *Gauweiler* case? Was the ECJ's approval of the OMT programme another case of 'integration through law'?

Setting: The Gauweiler case began with a request to the ECJ by the German federal constitutional court for a preliminary ruling on a domestic court case in which several plaintiffs questioned the legality of the Outright Monetary Transactions (OMT) programme of the European Central Bank (ECB). Through the OMT programme, which was launched in 2012, the ECB started buying member-state government bonds in the secondary bond market, thereby providing support against speculation to Eurozone countries in financial trouble. Member-states could only benefit from the OMT programme if they adhered to strict fiscal conditions, including the implementation of austerity measures and structural reforms.

Significance of the case: (1) The OMT programme marked a major departure from the ECB's previous policy. Supporters welcomed the programme as a long-awaited step that was necessary to save the Euro. Opponents argued that the OMT programme was in violation of the ECB's mandate, which is specified in the EU treaties. (2) This was the first time in history that the German federal constitutional court asked the ECJ for a preliminary ruling. Through the wording of its request, the German court made it clear that it considered that the OMT programme did in fact exceed the ECB's mandate. The German court threatened that should it not like the ECJ's ruling, it would ignore it.

One of the German court's questions: "Is the ECB's decision on the OMT programme compatible with Article 123 TFEU[1], pertaining to the prohibition of monetary financing?"

Article 123 (1): "Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be **prohibited**, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments."

ECJ ruling (excerpt): "It is clear from its wording that Article 123(1) TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments.

It follows that that provision prohibits all financial assistance from the ESCB to a Member State, but **does not preclude**, generally, the possibility of the ESCB purchasing **from the creditors of such a State**, bonds previously issued by that State. (…)

[1] Treaty on the Functioning of the European Union, i.e. part of the Lisbon Treaty

It is apparent from the preparatory work relating to the Treaty of Maastricht that the **aim** of Article 123 TFEU is to encourage the Member States to follow a **sound budgetary policy**, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits. (…)

Thus, purchases made on the secondary market **may not be used to circumvent the objective** of Article 123 TFEU. It follows that, when the ECB purchases government bonds on secondary markets, **sufficient safeguards** must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU."

In short: The ECJ upheld the legality of the OMT programme, but imposed a number of strict conditions for similar programmes in future to be deemed constitutional.

b) *Please read the excerpts below and consider*: Are there any legal limits to the principle of the supremacy of EU law?

*Costa V. Enel (**1964**), ruling of the ECJ*

In Costa v. Enel, the ECJ established the principle of the supremacy of EU law. In its judgement, the Court stated that:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. **By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.** The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. (…)
>
> It follows from all these observations that the law stemming from the Treaty, an independent source of law, **could not, because of its special and original nature, be overridden by domestic legal provisions**, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

*Solange I (**1970**), ruling of the German Constitutional Court*

Solange I is an EU law case in which the German Constitutional Court ruled on matters involving a conflict between national laws and EU laws. The case raised the question of whether EU law should take precedence over Constitutional law in matters pertaining to the protection of fundamental human rights. The German Constitutional Court held that it reserved the right to uphold German fundamental rights in case of conflict with the ECJ because it considered that the EU did not have an equivalent system of protection:

> The Community still lacks a democratically legitimated Parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level. It still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution…
>
> Provisionally, therefore, **in the hypothetical case of a conflict between Community law and... the guarantees of fundamental rights in the Constitution... the guarantee of fundamental rights in the Constitution prevails** as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.

*Solange II (**1986**), ruling of the German Constitutional Court*

In Solange II, the German Constitutional Court changed its original stance and decided that it would no longer examine the compatibility of Community legislation with German fundamental rights as long as ("solange") the ECJ continues to protect fundamental rights adequately. It considered this to be likely because since its original judgement, the ECJ and the EU had developed a regime for the protection of human rights that was equivalent to the one granted by the German constitution. The German Constitutional Court held that:

> In view of these developments, it must be held that, **so long as the European Communities… and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights** as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, **the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation** cited as the legal basis for any acts of German civil courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and **it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution**.

*Landtová (**2012**), ruling of the Czech Constitutional Court*

In 2012, the Czech Constitutional Court challenged the ECJ's 2009 ruling in the Landtová case, arguing that the ECJ had no competence to pronounce a judgement in this area (i.e. that the ECJ had acted *ultra vires*). According to the Czech court, Czech national law should therefore apply in this area instead. Such overt conflict between a national constitutional court and the ECJ regarding the applicability of EU law in a particular case was unprecedented. In its press release, the Czech Constitutional Court summarised its ruling as follows:

> In the introduction, the Czech Constitutional Court summarized its previous case-law concerning the relationship between national and European law and above all **emphasised the thesis** (which follows also from the doctrine of the Federal Constitutional Court of Germany) **under which constitutional courts maintain their role of supreme guardians of constitutionality even in the realms of the EU and even against potential excesses on the side of EU bodies**. In this respect, the Constitutional Court believes that a European regulation which governs co-ordination of pension system among the member states may not be applied to an entirely specific situation of a dissolution of the Czechoslovak federation and to consequences stemming thereof. […] **In the view of the Constitutional Court, the Court of Justice of the EU accidentally overlooked these facts which otherwise must lead to the conclusion of inapplicability of European law in the instant situation. As a result of this, an excess of the European body and a conduct *ultra vires* occurred**. The Constitutional Court expressed the conviction that the false conclusions of the Court of Justice of the EU had resulted also from the insufficient, wrong and in this respect unprecedented statement of the government of the Czech Republic which itself had stated in the proceedings before the Court of Justice of the EU that the case-law of the Constitutional Court violates European law.