The meaning of the "ever closer union" in the CJEU case law

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Introduction

The nearly 70-years old clause of "ever closer union" has been recently brought to the popular attention by the negotiations about the special status of the United Kingdom in the European Union. With an attempt to convince British voters to stay in the EU, Prime Minister David Cameron decided to start a bargaining with European leaders about certain exceptions in the EU Treaties that might be helpful for overcoming the popular idea that membership in the Union undermines the sovereignty of the United Kingdom[1].

This seemingly unimportant phrase – and, as many claim, not legally binding – has become the real bone of contention between the supporters of a more federalist approach to the idea of European integration (Belgian politicians, for instance) and its opponents, according to whom setting limits to further federalisation is desperately needed (mostly the British government)[2].

Its presence in the legislation of the European Union and its precedessors can be traced back to 1957 and the *Treaty Establishing the European Community* (abbreviated as TEC, commonly known as the Treaty of Rome)[3]. As the beginning of its Preamble reads, the

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1 *David Cameron: the EU is not working and we will change it,* The Telegraph, 15 March 2014, available online: http://www.telegraph.co.uk/news/newstopics/eureferendum/10700644/David-Cameron-the-EU-is-not-working-and-we-will-change-it.html [07-05-2016].

2 *Ever closer union: the surrealist Brexit summit,* EurActiv.com, 19 February 2016, available online: http://www.euractiv.com/section/future-eu/news/ever-closer-union-the-surrealist-brexit-summit/ [07-05-2016].

3 *Treaty establishing the European Economic Community,* 25 March 2957, English translation available online on Wikisource: https://en.wikisource.org/wiki/Treaty_establishing_the_European_Economic_Community [07-05-2016]. Original version of the Treaty available online on Eur-Lex: http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT&from=EN [07-05-2015].

signatories are “determined to establish the foundations of an ever closer union among the European peoples”. The phrase itself is not repeated in the operative part of the Treaty, although Art. 2 TEC is sometimes interpreted as promoting the spirit of “ever closer union”[4]. This is, however, an untimely assumption, given the wording of Art. 2:

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

“To promote... closer relations” between EU Member States seems to be a common objective of diplomatic cooperation between countries and similar goals are laid as principles of several international organisations, including the United Nations. Art 1(2) lists “develop[ing] friendly relations among nations”[5] as one of the objectives of the UN, whereas in the Preamble of the Organisation of African Unity Charter we read about “a common determination to promote understanding among our peoples and cooperation among our states”[6]. If the “ever closer union” clause is to be interpreted as something more than just a mere declaration of the willingness to maintain friendly cooperation between the countries, the provisions of Art. 2 cannot be perceived as its operative extension.

It is worth mention that the Treaty of Rome refers to an “ever closer union among the European peoples”, which can be interpreted in various ways. Two basic ways of understanding the words “European peoples” are intuitive. It either refers to the citizens of the countries which were parties of the Treaty, or to all nations living in Europe in

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4 V. Miller, *"Ever Closer Union" in the EU Treaties and Court of Justice case law,* 16 November 2015, Commons Briefing papers CBP-7230, p. 4. Available online: http://researchbriefings.files.parliament.uk/documents/CBP-7230/CBP-7230.pdf [07-05-2016].

5 *Charter of the United Nations*, 25 June 1945, available online: https://treaties.un.org/doc/Publication/CTC/uncharter.pdf [07-05-2016].

6 *OAU Charter,* 25 May 1964, available online: http://www.au.int/en/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf [07-05-2016].

general, including the ones not present in the original six countries whose representatives signed the Treaty. It is, however, important to notice that there are other possible interpretations[7], including nations inhabiting a historical territory rather than a separate recognised state (e.g. Basque, Welsh, Wallon) or nationalities with historical presence throughout Europe (e.g. Jews, Roma). It can even be argued that this expression includes pan-national identities (e.g. Germanophones, Scandinavians), but we perceive this interpretation to be too extensive.

Next Treaties and other documents are less consistent in their perception of the European Union as a union of peoples (nations) rather than Member States (political entities). The Solemn Declaration on European Union – a non-binding document signed in Stuttgart in 1983 by heads of 10 European states – openly refers to the idea of an "ever closer union" not only among the peoples, but also the Member States:

> *The Heads of State or Government, on the basis of an awareness of a common destiny and the wish to affirm the European identity, confirm their commitment to progress towards an ever closer union among the peoples and Member States of the European Community*[8].

The Treaty on European Union (abbreviated as TEU, commonly known as the Treaty of Mastricht) was signed in 1992 and created the European Union, incorporating three European Communities into the first of three pillars of the EU. The way in which the "ever closer union" clause is worded in the Treaty of Maastricht strongly suggests that the emphasis is put once again on the peoples of Europe and not the Member States. The parties of the Treaty are, according to the Preamble,

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7 M. C. Scott, *What is an 'ever-closer union'?,* 26 April 2016, LSE BrexitVote, available online: http://blogs.lse.ac.uk/brexitvote/2016/04/26/what-is-an-ever-closer-union/ [07-05-2016].

8 *Solemn Declaration on European Union, 19 June 1983. Bulletin of the European Communities, No. 6/1983. pp. 24-29.* Archived online by the Archive of European Integration, University of Pittsburgh: http://aei.pitt.edu/1788/1/stuttgart_declaration_1983.pdf [07-05-2016].

> *resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity*[9].

This was repeated in the operative part of the Treaty, namely in Article A of Title I of the original Treaty of Maastricht:

> *This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen.*

Merging the "ever closer union" clause with the principle of subsidiarity in the same sectioning levels in both the Preamble and the operative part suggests that the union to be created and further strengthened is not only a union of "peoples", but also a union of "people" - individuals and communities who should make decisions for themselves. The principle of subsidiarity is in contradiction with the alleged domination of EU supranational powers over national and subnational governance that is deemed to stem from the "ever closer union" clause.

Article A of the Treaty of Maastricht was amended by the Treaty of Amsterdam of 1997 (full name: *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*) by adding that decisions are taken not only "as closely as possible to the citizen", but also "as openly as possible"[10]. It could be safe to assume that this does not add anything to the meaning of "ever closer union" clause, if it was not for the fact that a significant part of all CJEU cases containing the "ever closer union" phrase concerns the access to public information. This issue is referred to further in the article.

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9 *Treaty on European Union*, 7 February 1992, available online: http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf [07-05-2016].

10 *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, 2 October 1997, available online: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11997D/TXT [07-05-2016].

Primary legislation of the European Union was significantly amended by the Treaty of Lisbon of 2009 (full name: *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*). Since Lisbon, the primary legislation is based on two Treaties – the Treaty on European Union and the Treaty on Functioning of the European Union, in both of which the "ever closer union" phrase is present. The Treaties now includes three occurrences of the clause:

- Preamble of TEU – as in the Preamble of the Treaty of Maastricht,
- Article 1 TEU – as in Art. A of the Treaty of Maastricht with the Treaty of Amsterdam amendment,
- Preamble of TFEU - "determined to lay the foundations of an ever closer union among the peoples of Europe"[11].

It is clear that any reference to Member States was removed from the passages in which "ever closer union" is mentioned, which may or may not be significant for the interpretation of the Treaties. The principle of subsidiarity, as well as the openness of decision-making process, have been confirmed to be linked to the idea of "ever closer union among peoples of Europe".

"Ever closer union" and "more perfect Union" – comparison with the USA

The Treaty of Rome was not the first document which in the beginning of its preamble stated that the purpose of creating a new body is to *lay the foundations* of a union which in *longue durée* will become more tight. In other words, the "ever closer union" clause strongly resembles an American clause of "more perfect Union" from the U.S. constitution. In this chapter we would like to compare these preambles and consider whether they have a normative meaning. To conduct these intentions, we will start with presenting both preambles (European preamble presented in its current wording from TFEU):

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11 *Treaty on the Functioning of the European Union*, consolidated version, available online: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT [07-05-2016].

European:

> *determined to lay the foundations of an ever closer union among the peoples of Europe, resolved to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,*
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> *affirming as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,*
>
> *(...)*
>
> *resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts, determined to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,*
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> *(...)*
>
> *who, having exchanged their full powers, found in good and due form, have agreed as follows.*[12]

American:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[13]

At first sight both preambles look quite different due to their forms. Nevertheless, the structures are similar. They both start with the clause and then state what the purpose of

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12 □ *Ibidem.*

13 *The Constitution of the United States*, 17 September 1787, available online: http://www.archives.gov/exhibits/charters/constitution_transcript.html [18-05-2016].

the document is. In texts as symbolic as preambles, the order of sentences or even words is significant, thus the clauses should be treated seriously. The comparison of whole preambles exceeds the purpose of this paper thus we will focus only on the parts directly connected with the clauses.

First of all, the American union is "more perfect" when the European one is "ever closer". The second one emphasises that a new political body which is created by the treaty is only an initial form which in future will be transformed into another, closer one. On the other hand, the American clause agrees on an existence of a union which has to be made *more perfect*, yet its general framework has already been stated. If we look at the contemporary United States and the European Union, we can easily notice that both of them somehow fulfilled their own clauses – the USA has not changed its constitution, only added amendments to it, when the EU after 2007 is a much closer union than the European Communities used to form. Interestingly, the President of the European Central Bank Mario Draghi referred to both ideas in his lecture at Harvard Kennedy School in 2013:

> *So it is important to understand that the agenda facing Europe today is not adequately captured by the phrase "ever closer union". In my view, it is better encapsulated by wording borrowed from the Constitution of the United States: the establishment of a "more perfect union"*[14]

In his opinion, Europe should perfect something that has already begun. In other words, he acknowledges a framework within which he wants to develop the union by an evolution but not by a revolution. What is more, Draghi also stated that "ever closer union" manifests an inexorable movement towards a federation, which – in his opinion – is not a well-considered idea when many Europeans feel very strongly bounded to their national identities and thus want to preserve *status quo* in case of the nation-states. This speech is also a proof of differences between "more perfect Union" and "ever closer union" on the field of their importance and significance. The American one is very well-

14 M. Draghi, *Europe's pursuit of 'a more perfect union'* , 9 October 2013, available online: https://www.ecb.europa.eu/press/key/date/2013/html/sp131009_1.en.html [18-05-2016].

known, incontrovertible. It is worth to mention that on 18th of March 2008 future President Barack Obama gave his famous speech, a title of which was "A More Perfect Union".[15] It will not be an abuse to call the U.S. clause a symbol of the political meaning of the constitution. The same thing cannot be said about "ever closer union" in the context of European constitutionalism. The citizens are not aware of it, the politicians publicly say that this wording is not the most adequate.

Nevertheless, there is also a second significant difference in these clauses. In the European case the document is created in order to *lay the foundations of an ever closer union* ***among the peoples of Europe***, when in the US constitution ***We, the People of the United States*** establish this document in order to form a *more perfect Union*. This quantitative difference has an impactful meaning as in the case *Bush v. Orleans Parish School Board* (E.D. La. 1960) the court stated that

In essence, the doctrine denies the constitutional obligation of the states to respect those decisions of the Supreme Court with which they do not agree. The doctrine may have had some validity under the Articles of Confederation. On their failure, however, "in Order to form a more perfect Union," the people, not the states, of this country ordained and established the Constitution.[16]

The group which stated the US constitution is homogenous and, as a sovereign who created the union between the states, ensures a superiority of federal acts over the states' as the first ones represent *The People* as a whole and not only inhabitants of a one state. In the European case the superiority is not so simple. The union was created *among the peoples of Europe*. In other words, it is an agreement between equal partners who do not create a new sovereign. As a result, even if one perceives "ever closer union" clause as a way to create a European federation, it is obvious that a position of separate peoples will be very strong and there will never exist such a clear hierarchy as in the US.

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15 B. Obama, *A More Perfect Union.* Video available online: https://www.youtube.com/watch?v=zrp-v2tHaDo [18-05-2016].

16 *Bush v. Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960).

Another interesting point is the normative meaning of both clauses. In the case of "ever closer union", the next two parts of our paper will consider direct and indirect impact in the judgements of CJEU. The US clause is not commonly used in judgements, yet it occurred in a few historical cases which are fundamental for this country. E.g. in a case *Texas v. White* from 1869 the Supreme Court asked: *What can be indissoluble if a perpetual Union, made more perfect, is not?*[17] To conclude, the normative meaning of "more perfect Union" exists, yet the political, historical and social ones are much more crucial.

Direct use of "ever closer Union" clause in the CJEU judgement

In order to determine the role played by the "ever closer Union" clause in the judgement of the Court of Justice of the European Union, a quantitative and qualitative research must be conducted. Further in this chapter we will analyse the occurrence of the phrase in the CJEU judgements and the opinions of Advocates General, as well as the context in which it was used by either the Court or the AGs. Moreover, we will take a deeper dive into patterns of this occurrence, including chronological aspects and the relation between the occurrence of the clause in cases depending on their subject area. As the final, most qualitative step of our research, we decided to determine whether any of the cases analysed can be labelled as "landmark cases", having at least some potential impact on later judgements and opinions.

All qualitative data provided in this chapter are based on *Curia* – the official database of the Court of Justice, as well as of the General Court and the Civil Service Tribunal – all of which are encompassed by the Court of Justice of the European Union[18]. If not mentioned otherwise, the data provided refer to the Court of Justice only, and so does the abbreviation "CJEU".

"Ever closer union" judgements and opinions in numbers

17 *Texas v. White*, 74 U.S. (7 Wall.) 700

18 Available online: http://curia.europa.eu.

The Court of Justice, previously known as the Court of Justice of the European Coal and Steel Communities and the Court of Justice of the European Communities, was established in 1952 and since then it has examined (or is currently examining) 20682 cases. The phrase "ever closer Union", even though repeatedly mentioned in the Treaties, has been used in just 31 cases in either the judgement or the AG's opinion, or both[19]. It is roughly 0.15% of all cases, which already raises doubts about the popular claim that the phrase has a significant impact on the European judiciary.

This claims become more understandable, if we take into account the chronological pattern of the use of "ever closer Union" in the CJEU judgements. It was 2003 when the phrase was used for the first time in case law, even though its first legislative occurrence can be traced back to the Treaty of Rome of 1957. However, it is hard to find a specific pattern since then - maybe with the exception of 2010 peak of 7 cases, which can be justified by the adoption of the Treaty of Lisbon, in which the phrase is reinvoked. From the perspective of the entire history of the CJEU it is clear that the "ever closer Union" clause has gained more attention in the past dozen of years than it had experienced ever before.

Of the 31 cases examined, 13 concerned the access to documents of public institutions and to public information in general (including information about the environment), while 7 of them fall within the category of "justice and home affairs", including references to judicial and police cooperation, and procedural justice. 6 of them include references to the idea of "ever closer Union" with regard to fundamental freedoms stemming from EU Treaties, such as free movement of goods and services and freedom of establishment.

The clause has been used 10 times in the judgements of the Court (and in one opinion of the Court), but as many as 22 times in the opinions of the Advocates General. It means that the arguments that can stem from the idea of "ever closer Union" are more than twice

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☐One of the cases – Avis 2/13 – is an opinion of the Court under the Art. 218(11) TFEU. In this case, the term "judgement" and the AG's opinion do not apply.

more likely to be used by the Advocates General than by members of the Court themselves.

Looking for an "ever closer union" - a qualitative approach

A general understanding of "ever closer union" clause in CJEU judgements and opinions of the AGs changes changes considerably if not simply the occurrence of the phrase, but the actual context is taken into account. Although cases concerning access to information and public institutions constitute the biggest groups of search results, their relevance for understanding the importance of "ever closer union" is limited. As mentioned in the introduction to this article, the phrase is now linked in the treaties with the principle of subsidiarity and the openness of decision-making process. The last aspect is the most important one if the passage is quoted in judgements and opinions concerning the right to access to documents of public institutions. Compliance with the principle of open decision-making process is crucial for creating a union that is ever closer to its citizens, but this interpretation seems to be too extensive.

In one judgement and one opinion of the AG, the phrase was used in reference to the preamble to the Convention Implementing the Schengen Agreement. It is interesting to note that the judgement in joined cases *Hüseyin Gözütok* (C-187/01) and *Klaus Brügge* (C-385/01) was the first CJEU judgement in which the clause was invoked. Just as in a subsequent case - *Giuseppe Francesco Gasparini and Others* (C-467/04) to which AG Sharpston delivered her opinion – it was used as a legal background for a case arising from criminal proceedings. The main issue at stake was the scope of *ne bis in idem* or *res iudicata* rule in the judicial cooperation stemming from the Schengen Agreement.

Two other cases find a link between the "ever closer union" phrase and the idea of primacy of EU law. In his opinion in *Commission v. Council* (C-440/05) Advocate General Mazák the wording of the Art. 1 of the Treaty of Maastricht is not a coincidence. Creating the European Union is "a new stage in the process of creating an ever closer union among the peoples of Europe", as the new entity was founded on the previously existing European Communities, but with new aspects of cooperation added by the

TEU[20]. The same article of TEU is invoked by the Court in its opinion about the accession by the European Union to the European Convention on Human Rights (Avis 2/13) in which it connects the clause with the special characteristics of EU legal order, namely its foundation on the Treaties, the supremacy of EU law and the rule of direct effect[21].

Without a doubt, the most important case including "ever closer union" clause is *Pupino* (C-105/03), which is further referred to in the opinion of the Advocate General Mengozzi to *Gestoras Pro Amnistía* (C-355/04) and in the opinion of the Advocate General Ruiz-Jarabo Colomer to *Advocaten voor de Wereld VZW* (C-303/05).

Maria Pupino was an Italian kindergarten teacher accused of maltreatment of her pupils. At the preparatory part of the procedure, the prosecutor requested for the children to be heard in special arrangements, outside of a courtroom. According to the European law, namely the *Framework Decision on the standing of victims in criminal proceedings* (2001/220/JHA), it was allowed in cases of "vulnerable victims", but the transposition of the Framework Directive to the Italian law only applied to victims of sexual violence. As the actions for which the prosecution was held were non-sexual in nature, Maria Pupino opposed to the special arrangements. The Italian court decided to refer the case to CJEU, asking about the interpretation of the Framework Directive.

In its judgement CJEU concluded that national courts are obliged to interpret all the national legislation, as much as possible, in the light of the Framework Directive. The goal of building an "ever closer union" is used as justification for extending the previously existing principle of conforming interpretation to Framework Directives adopted in the context of Title VI of the Treaty on European Union. As stated in the justification provided by the Court

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20 ☐C-440/05, Opinion of the Advocate General, pp. 53-54.

21 ☐Avis 2/13, pp. 166-167.

> *The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union (...) shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples. (...) In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union (...)*[22].

The new area of police and judicial cooperation was perceived by the governments of several Member States (that submitted their opinions to the Court) as more "inter-governmental" than "communitarian", as compared with the previous areas of cooperation, stemming from the European Communities. The Court strongly rejected this opinion:

> *It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters (...)*[23].

Indirect use of "ever closer union" clause in the CJEU judgement

Unfortunately, there is no simple way or a method to verify whether "ever closer union" clause has an indirect impact on the Court of Justice of the European Union's work and its judgement. In this situation we will focus mainly on doctrine and try to examine if the CJEU resorts to judicial activism and how the idea of "ever closer union" is present in its judgements. Nevertheless, it is worth to firstly present a way in which the aforementioned clause can be indirectly expressed.

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22 ☐C-105/03, pp. 41, 43.

23 ☐C-105/03, p. 42.

The main method of indirect use of the "ever closer union" clause is by a vocation on "the spirit of the Treaty". It was used in a famous case *Costa v. ENEL* which established the supremacy of European Union law over the laws of its Member States:

> *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.*[24]

It is also used in more recent cases. E.g. *Kakavetsos-Fragkopoulos* (C-161/09):

> *it would be contrary to the spirit of the Treaty provisions on the free movement of goods for Member States to set up insuperable internal borders within their territory in order to protect the purported superior quality of certain products (...)*[25]

As it arises from two examples above, "the spirit of the Treaty" is a way to prove CJEU judgment on any issue. It is unquestionable that the "ever closer union" clause plays an enormous role as it in a way opens the Treaty. What is more, as it was mentioned in the part on difference between the American and European clause, even main EU politics are not sure about the meaning of "ever closer union". As a result, "the spirit of the Treaty" which is a *clausula generalis* based on an another *clausula generalis* is a perfect way for the judges who do not want to be very bounded to a literal interpretation. Joxerramon Bengoetxea proved this argument in his article in which he wrote that the CJEU if often reprimanded for focusing on creative interpretation and paying too much attention to *telos* and at the same time, not enough to the text itself.[26]

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24 C-6/64

25 C-161/09

26 J. Bengoetxea, *Text and telos in the European Court of Justice - four recent takes on the legal reasoning of the ECJ*, "European Constitutional Law Review" 1 (2005), p. 184.

Nevertheless, it is not easy to show a precise border between "activism" and "restraint" which, as Gerard Conway said, are two basic terms used in defining a judicial approach to interpretation.[27] In the same fragment he cites judge Edward that "what is described by one as an activism is seen by another as a just and necessary safeguard".

In other words, it is very difficult to unambiguously rate CJEU judgments on whether they display too much activism or not. Especially in Europe, where – as Elina Paunio states – "multilingualism is a central and inevitable aspect of European integration".[28] The official languages of Member States are acclaimed as equal thus the EU legislation has to be translated into all of them. As a result, the Court of Justice of the European Union has to remove all the linguistic differences in order not to favour any language. Teleological method happens to be the optimal way to interpret the European law. One may say that it is against the certainty of a legal system but the same problem occurs (even in a greater scale) when judges have to use literal interpretation while dealing with twenty-eight languages at once. These circumstances put CJEU in a very complex situation in which it cannot choose a method of judging in a classical way. Nevertheless, the judicial activism has its limits and it is worth examining how far does the Court of Justice of the European Union uses this method in judgements.

Undoubtedly, the development of Community law was extraordinarily influenced by the Court of Justice of the European Union. This quasi-legislative role is regarded with scepticism. The same situation occurs in any country where supreme or constitutional courts act against the will of legislative power. Nevertheless, the criticism against the CJEU on the field of judicial activism is usually based on a selective analysis. The cases which are used as evidence in favour of the activist theory are strictly selected. At the same time one can find many other cases which are examples of being restraint. As Tridimas said: *for each case that is labelled active, there is another one that can be*

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27 G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge 2012, p. 17.

28 E. Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice*, London-New York 2013, p. 1.

labelled reactive, conservative, passive, an example of self-restraint and consolidation.[29]

However, there are also arguments of opponents of the CJEU judicial activism who use arguments which concern higher legal aspects than cases. In their point of view, the literal meaning of the Treaty is marginalised by the usage of the "ever closer union" clause. In this point we once again need to invoke Elina Paunio and her arguments based on multilingualism of the European Union. Secondly, the Court of Justice of the European Union cannot be treated as an institution whose aim is to develop the European federalisation. The aforesaid author has also stated that the approach of the CJEU to the competence conflicts between Member States and the EU is more pragmatic than characterised by a principle. He also underlines that there was no case in which the CJEU judged against a Member State when it *pleaded ground of public security to justify a derogation from Community law.*[30]

When the Court of Justice of the European Union is not able to fully rely on on the language of the Treaty then it must use a teleological interpretation. It is crucial to perceive the CJEU not as a typical court, but as a constitutional one. This type of courts in Member States often find a way to exceed the acts and use judicial activism. In Hungary it is called "an invisible constitution", in Poland it is "acquis constitutionnel". The CJEU — which fulfils competences of a constitutional court and which is a European institution, i.e. its roots are the same as in the case of Member States' courts of this type — is also permitted to use such methods in order to execute its functions.

If we accept the argument provided by Gunnar Beck that “spirit of the treaties” is a synonym for “ever closer union”, it has been used widely in the CJEU judgements[31]. As a result, the CJEU is criticised for its judicial activism which in a way stems from this

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29 □ T. Tridimas, *The Court of Justice and judicial activism*, "European Law Review" 3 (1996), p. 199.

30 □ *Ibidem.*

31 G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Oxford 2012, p. 321.

clause. Nevertheless, the multilingualism forces the CJEU to use the teleological interpretation and the "ever closer union" significantly facilitate this task.

Conclusions

The aim of creating an “ever closer union” is nearly as old as the postwar communities of European countries, created to facilitate establishment of a common market, to promote cooperation and prevent future generations from the atrocities of military conflicts. No matter whether the intentions of the founding fathers of the later European Union can be described as less or more federalist, an idea that they intended to include a normative obligation for the prospective institutions is unfounded.

Taking aside the possibility that the United Kingdom will soon leave the European Union, the objective of creating a European community of nations, starting with a close cooperation between France and Germany and then extending all across the Europe, seemed to give the initial hope not only for the creation of the European Community of Coal and Steel, but also for the earlier Council of Europe. As expressed by Winston Churchill in his famous speech of 1946:

> *We must build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living. (...) The structure of the United States of Europe, if well and truly built, will be such as to make the material strength of a single state less important. (...) But I must give you a warning. Time may be short. At present there is a breathing-space. The cannons have ceased firing. The fighting has stopped; but the dangers have not stopped. If we are to form the United States of Europe, or whatever name it may take, we must begin now. (...) Our constant aim must be to build and fortify the strength of the United Nations Organization. Under and within that world concept we must re-create the European Family in a regional structure called, it may be, the United States of Europe. And the first practical step would be to form a Council of Europe*[32].

32 *The Speech of Sir Winston Churchill*, 19 September 1946, available online:

In the light of the excerpt above, it seems clear that understanding of the concept of "ever closer union" is strictly connected with the idea of creating a European entity similar to the United States of America. A "more perfect union" was not an easy idea to be included in the later treaties, not so long after "the cannons have ceased firing". The more practical goal of creating an "ever closer union" - understood as a loyal and faithful cooperation, was a better choice.

The importance of the clause for the CJEU judgements is impossible to measure. A simple statistical analysis of the occurrence of the words in the existing case law can provide us with some hints – pointing out the areas in which the "communitarian" approach and the cooperation were more important than in others – but it cannot show the whole picture of how the phrase shapes the minds of the European lawyers – if it somehow does. The importance of *Pupino* is probably the only example of a landmark case in which the concept of "ever closer union" is invoked by the Court as a rationale for a rather "communitarian" and not "inter-governmental" approach, but the mere presence of the phrase in the judgement is by no means a supporting argument for a claim that without this clause there would be no *Pupino*.

There are also no available tools for measuring the indirect impact of the clause for the CJEU judgements or the opinions of Advocates General. This indirect meaning of the phrase has been often cited recently as an argument that CJEU supports federalisation and undermines national sovereignty through its judgements. Even if the "spirit of the treaties" is a synonym for "ever closer union", it is safe to say that the inclusion of the latter clause in the Preamble to the Treaty of Rome was not the reason for which *Costa v. ENEL* happened. In other words, the roots of the primacy of EU law, the direct effect, and the principle of loyal cooperation can be found elsewhere.

To sum up, the historical importance of "ever closer union" is undeniable, yet its normative meaning is far overrated. As the institutional framework of the European Union has been growing, so have its "communitarian" tendencies and the real scope of

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competence. If there is a way back to a looser community of sovereign states, the “ever closer union” clause is not a major obstacle for the proponents of this way.