Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

2014

Pringle and the Nature of Legal Reasoning

Paul Craig

Indiana University Maurer School of Law, pcraig@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>

Part of the [European Law Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Craig, Paul, "Pringle and the Nature of Legal Reasoning" (2014). *Articles by Maurer Faculty*. 2456.
<https://www.repository.law.indiana.edu/facpub/2456>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.

LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

ARTICLE REVIEW

PRINGLE AND THE NATURE OF LEGAL REASONING

PAUL CRAIG*

§1. INTRODUCTION

In a recent issue of this journal Gunnar Beck¹ responded to my earlier article² on the CJEU's judgment in *Pringle*³ concerning the legality of the European Stability Mechanism.

He is very critical of the CJEU, castigating it for reasoning that is said to be absurd, and accusing it of crossing the line between legal reasoning and political judgment.⁴ Gunnar Beck acknowledges that courts regularly deploy an admixture of textual and purposive argumentation when reaching their conclusions, but nonetheless regards *Pringle* as an illegitimate judgment in which the CJEU used whatever type of justificatory argument that it could in order to uphold the ESM, doing grave injustice to the text in the process. The difficulties with Beck's analysis of the judgment will be considered below. Suffice it to say for the present that they reside, paradoxically, in Beck paying insufficient regard to the background purpose of the Treaty provisions that were in issue in *Pringle*.

He is also critical of much academic analysis of the case,⁵ including my own. Beck's article gives the impression that I 'appear' to favour some open-ended fusion of text and teleology, the effect of which is that whenever text fails to get you where you want to go, one can have recourse to some open-ended purposive argument. He contends

* Professor of English Law, St John's College and the University of Oxford.

¹ 'The Legal Reasoning of the Court of Justice and the Euro Crisis – the Flexibility of the Cumulative Approach and the *Pringle* Case', 20 *MJ* 4 (2013), p. 635.

² P. Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology', 20 *MJ* 1 (2013).

³ Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, Judgment of 27 November 2012, not yet reported.

⁴ The same kind of critique appears in the Epilogue to G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013).

⁵ P. Koutrakos, 'Political choices and Europe's judges', 38 *European Law Review* 3 (2013), p. 291–292; B. de Witte and T. Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism: *Pringle*', 50 *Common Market Law Review* (2013), p. 805–848; A. Hinarejos, 'The Court of Justice of the EU and the legality of the European Stability Mechanism', 72 *Cambridge Law Journal* 2 (2013), p. 237–240.

that I ‘suggest’ that the *Pringle* judgement fuses ‘literal and purposive considerations in a way that is both logical and universalizable’,⁶ such that it can be a general model of legal reasoning. I said nothing of the kind. What I actually said was that it is common for textual argumentation as to the scope of a particular Treaty article to be shaped by background teleological assumptions or objectives. These may be apparent on the face of the judgment. They may be implicit in the Court’s reasoning. I also made clear that the text will perforce shape and constrain the role played by recourse to background purpose. The degree of work done by teleological argumentation will depend in part on how far the Court believes that it can go toward its desired conclusion through purely textual analysis, and how far it is willing to give voice to the *telos* underlying a particular scheme of Treaty provisions. Thus, if one wished to save the ESM, greater recourse to teleological input might be required, and I sketched, within the limits of allowable space, the nature of such arguments. It is of course contestable how far such reasoning can be taken, an issue that will be considered in more detail below.

This academic exchange raises interesting issues concerning the nature of legal reasoning, which will be explored in this article. It will begin with some introductory remarks concerning the Maastricht settlement for economic and monetary union. This will be followed by discussion of the relationship between text and teleology in legal reasoning. The focus will then turn to *Pringle*, and the way in which a properly informed understanding of the nature of that relationship can shed light on the Court’s legal reasoning and Beck’s critique thereof.

§2. THE MAASTRICHT SETTLEMENT

The Maastricht Treaty was notable for introduction of the Pillar system and for detailed rules on economic and monetary union (EMU). The latter were complex and difficult to comprehend for the uninitiated. The ‘architecture’ of the EMU provisions was nonetheless readily apparent for those who had the inclination and patience to read the relevant provisions. The EMU schema was predicated on a dichotomy between monetary and economic union, and this remained largely unchanged in the Lisbon Treaty. It is indeed arguable that the dichotomy was reinforced by the Lisbon Treaty. The Maastricht bargain was reflected in the primary Treaty articles and in the Stability and Growth Pact,⁷ which fleshed out the details of the schema and contains the multilateral surveillance procedure and the excessive deficit procedure.

⁶ G. Beck, 20 *MJ* 4 (2013), p. 638.

⁷ Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, [1997] OJ L209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, [1997] OJ L209/6.

A. MONETARY POLICY

Monetary union was all about the single currency and the Treaty articles were powerfully influenced by German *ordo-liberal* economic thought, which demanded independence of the European Central Bank (ECB), governance by experts and the primacy of price stability. These foundational precepts were embodied in the primary Treaty articles. The independence of the ECB was enshrined in Article 130 TFEU, which stipulates that the ECB shall not take any instruction from EU institutions, Member States, or any other body, and this is further affirmed by Article 282(3) TFEU. Governance by experts was stipulated in relation to the decision-making structure of the ECB. The Executive Board is composed of a President, Vice-President, and four other members, who must be recognized experts in monetary or banking matters.⁸ The importance of expertise was further emphasized by the European System of Central Banks, ESCB, which is composed of the ECB and the national central banks, although it is the ECB and the national central banks whose currency is the Euro that conduct the EU's monetary policy.⁹ Price stability was accorded pride of place in the objectives of EU monetary policy from the outset, now found in Article 127 TFEU.

It was integral to the Maastricht settlement that monetary policy structured in the preceding manner was Europeanized. This was reinforced by mandatory Treaty provisions precluding instructions or interference from any outside party, whether that was a nation state or another EU institution. The importance of this principle is reflected in the symmetry of Article 130 TFEU. It imposes an obligation on the ECB, national central banks and those involved with their decision-making not to take or seek instructions from any other institution, including EU institutions, bodies, offices or agencies, any government of a Member State or any other body. It also imposes a duty on EU institutions and Member State governments to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.

The very fact that monetary policy lay truly within the domain of the EU was further reinforced by the Lisbon Treaty provisions on competence. Article 3 TFEU stated clearly that monetary policy for those countries that subscribed to the Euro was within the exclusive competence of the EU, with the consequence that only the EU could legislate and adopt legally binding acts, subject to the caveat that the Member States could do so if empowered by the EU or for the implementation of Union acts.¹⁰

⁸ Article 283(2) TFEU.

⁹ Article 282(1) TFEU.

¹⁰ Article 2(1) TFEU.

B. ECONOMIC POLICY

The Maastricht settlement in relation to economic policy was markedly different. It was built on two related assumptions, preservation of national authority and preservation of national liability.

The former was reflected in the fact that Member States retained fiscal authority for national budgets, subject to oversight and coordination from the EU designed to persuade Member States, with the ultimate possibility of sanctions, to balance their budgets and not run excessive deficits.

The latter, preservation of national liability, was the *quid pro quo* for the former. It finds its most powerful expression in the no bail-out provision, Article 125(1) TFEU. This provides in essence that the EU should not be liable for, or assume the commitments of, central governments, regional, local or other public authorities, or other public bodies, and nor should a Member State be liable for, or assume the commitments of such bodies within another Member State. This injunction was qualified to a limited extent by Article 122(2) TFEU, which allows the Council, on a proposal from the Commission, to grant financial assistance to a Member State that is in difficulty, or is seriously threatened with severe difficulty, caused by natural disasters or exceptional occurrences beyond its control. The message was nonetheless that national governments retained authority over national economic policy, subject to the Treaty rules designed to persuade them to balance their budgets, the corollary being that if they did not do so then the consequential liabilities in terms of debt and economic hardship would remain at the door of the nation state.

This was the 'deal' struck in Maastricht and the principal features were unaltered in the Lisbon Treaty, although the degree of oversight was actually weakened in the intervening years. The Member States recognized the proximate connection between economic and monetary policy. They understood that the economic health of individual Member State economies could have a marked impact on the valuation of the Euro, hence the need for some oversight and coordination of national economic policy. They were however mindful of the policy decisions made in and through national budgets, including those of a redistributive nature, and were unwilling to accord the EU too much control over such determinations, whether at the individual or aggregative level.

C. THE FINANCIAL CRISIS

The euro crisis generated two responses from the EU, assistance and heightened supervision over national economic policy. The ESM was the successor to earlier measures to provide assistance to Member States and entered into force on 8 October 2012. Article 136 TFEU had been amended by the simplified revision procedure, the result being a new paragraph 3, which stated that 'the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard

the stability of the euro area as a whole',¹¹ the assistance being subject to conditionality. However this amendment was not in force in October 2012 and the ESM thus took effect as an intergovernmental organization based on an international treaty between the euro area Member States.

The ESM was devised as a permanent rather than temporary mechanism for giving financial assistance to those in the euro area. Its purpose is set out in Article 3. It has a total subscribed capital of € 700 billion. The ESM may provide stability support by: giving loans to countries in financial difficulties; providing precautionary financial assistance in the form of a credit line; financing recapitalizations of financial institutions through loans to governments including in non-programme countries; and purchasing bonds of an ESM Member State in primary and secondary debt markets.¹²

The claimant in *Pringle* made a number of arguments against the legality of the ESM. It was argued that the ESM was concerned with monetary policy, which fell within the exclusive competence of the EU, with the consequence that the Member States had no competence to enact legally binding measures in this area. The other principal contention was that the ESM was legally inconsistent with the no bailout clause contained in Article 125 TFEU. We shall return to these arguments later, but before doing so I wish to say something about the nature of legal reasoning and more specifically the techniques of such reasoning open to courts when deciding difficult cases such as *Pringle*. This will, it is hoped, shed light on options available to the CJEU when it decided *Pringle*.

§3. TEXT AND TELEOLOGY IN LEGAL REASONING

We commonly distinguish between legal reasoning that focuses on the text of the relevant statute, treaty or constitutional provision and teleological reasoning where the principal focus is on the object sought to be achieved by the provision. The appellation teleological judicial reasoning can be used disparagingly, to capture courts that play fast and loose with text in their zeal to attain the end in question, whatsoever that might be. Critics of the CJEU use the term both descriptively to connote a judicial institution that routinely employs teleological reasoning, and normatively to criticize it for doing so. For some, such as Gunnar Beck, teleological reasoning can be legitimate, but can also be akin to a political judgment, whence the Court uses pursuit of objectives as a method of legitimating a decision that cannot be justified by the text of the provision being interpreted. On this view, the text imposes limits on outcome and those limits are transgressed or circumvented by playing a trump card that should not be part of the pack.

¹¹ European Council Decision 2011/199 of 25 March 2011 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, [2011] OJ L91/1.

¹² Articles 14–20 ESM.

It is of course undeniably true that the text imposes limits on legitimate outcome. No sensible lawyer would deny this. It is nonetheless the case that our understanding of teleological reasoning and its relation with text is imperfectly understood. The reality is the converse of the generally perceived position: in most instances teleological reasoning is central to a proper understanding of the text, and is essential if the text is to be correctly applied to the issue before the court. This can be more readily understood if we distinguish three different types of case in which the conjunction of text and purpose can occur.

A. TEXT, PURPOSE AND STATUTORY INTERPRETATION

The simplest and most prevalent instance is that which we confront every day, whether as academics, practitioners or judges, viz discerning the correct ambit of a statutory provision. Take the example much used by academics to torment the student aspiring to read law at University. The statute states that 'all vehicles are prohibited in the park', but provides no definition of the term vehicle. There will be many instances where there is no need for any considered reflection on the purpose of the provision. If an ordinary car drives through the park it will be subject to whatever penalty the statute so provides. Matters rapidly become more complex where the judge is asked to determine whether any or all of the following fall within the prohibition: a rider on a horse, a child on a small scooter, a teenager on a skateboard, and cyclists from the local cycling club. All such modes of transport could without difficulty be regarded as 'vehicles'.

Whether any of them should be so regarded cannot be determined by semantic analysis alone. If such a criterion is used the result will either be semantically arbitrary, in the sense that the judge will try to say why the child's scooter is not a vehicle whereas an adult's bicycle is, or the result will be absurd, in the sense that the judge will use a uniform semantic criterion that bans the four year old toddler from riding his bike in the park. Happily the majority of judges most of the time do not succumb to such errors. They will rather make the determination as to which if any of the preceding list should fall within the prohibition by adverting to the purpose or object underlying the statute. The primary object may be to prevent danger to users of the park, which could well lead to differential results for the modes of transport listed above. Secondary objects may be noise prevention, or prevention of damage to the park. What evidence the judge uses to determine such matters is a second order issue for the particular legal system, which can involve contestable questions concerning, for example, the extent to which legislative history can be drawn on to elucidate the meaning of the statutory provision. The point remains that consideration of object or purpose is central to determination of the correct meaning of the text. Teleology and textualism properly understood work together, not in opposition.

B. TEXT, PURPOSE AND THE AMBIT OF A BODY OF LAW

This is true also when we move to the next level, which involves consideration of the scope of a category or body of law, rather than just a particular section of a statute. Consider for example the EU jurisprudence on gender discrimination. There will, as with the interpretation of a particular statutory provision, be straightforward instances where we do not need any soul-searching concerning the purpose of this body of the law, since the challenged action falls four-square within its remit, as exemplified by the case of direct and unequivocal discrimination between men and women in terms of pay for the same job. There will, however, be many other instances where the court has to consider the object or purpose of this body of law in order to decide on its ambit in a particular case. Thus EU courts have, for example, held that there are economic and social objectives underlying gender discrimination and that when they conflict the CJEU has given priority to the latter over the former.¹³

Consider also the reasoning that underpins the Court's jurisprudence on free movement, and more particularly the extent to which it should be applicable to market access as well as discrimination. There will be simple instances of infringement that do not entail any recourse to deeper issues of purpose or object. Direct discrimination on grounds of nationality against foreign goods or workers is the obvious example. The very decision to push the boundaries in these areas beyond discrimination, direct and indirect, is however predicated on considered, albeit contestable assumptions, about the object or purpose to be served by this body of law.

Thus discrimination-based free movement law embodies the assumption that the underlying purpose in this area is the prohibition of differential treatment where it is felt that there is no defensible normative ground for the difference. Free movement law that in addition embraces market access embodies the normative assumption that hindrance to markets constitutes a valid reason for legal intervention, even where there is no differentiation between those affected based on nationality. The choice between these alternative conceptualizations of free movement underlies much of the case law, as the courts seek to work through the legal implications of their choice for the resolution of particular cases, and for the outer reaches of this body of the law. The pros and cons of this choice is, moreover, the dominant theme in much of the considerable body of free movement scholarship.

C. TEXT, PURPOSE AND OVERALL TREATY OBJECTIVE

The third level where we see a conjunction of text and teleology is the most general, and often the most controversial. This concerns the underlying purpose or object of the

¹³ See, e.g., Case 43/75 *Defrenne v. Sabena* [1975] ECR 455; Case C-50/96 *Deutsche Telekom v. Schröder* [2000] ECR I-743.

constitution or treaty itself. This is the macro level, which most commonly provokes adverse comment. We need to tread carefully when assessing the interplay between text and teleology at this level in order to avoid error.

The starting point is that there is nothing illegitimate in courts advertent to a general background purpose or object when interpreting a constitution or treaty, nor is there anything illegitimate in their construing particular constitutional or treaty provisions so as to attain that purpose. These documents are made to achieve certain objectives or purposes. They are not the result of some haphazard drafting, where the result is simply the fortuitous conjunction of random provisions. It might well be that the identification of object or purpose is contestable. There may also be controversy concerning the extent to which judicial interpretation of particular constitutional or treaty provisions is warranted in the light of the judicially identified objects underlying the treaty as a whole. This does not alter the preceding point, which is that the very identification of the objectives that underpin the constitution or treaty is a legitimate part of the judicial function. It is properly part of legal discourse and the fact that it may have political implications broadly conceived does not alter this.

Consider in this respect the EU. There is no doubt that the EU courts regard integration as a central objective of the constituent treaties, and have always done so. This recourse to background teleology is legitimate, given the values expressed in the Treaties and the rationale underpinning many of the substantive provisions, including the four freedoms. The fact that some legal consequences drawn from this teleology, such as, for example, the role accorded to effectiveness in legal reasoning are contestable does not undermine the legitimacy of recourse to the background *telos*. It reveals that we should bring a properly critical eye to such judicial reasoning. It means that we should not accept bland judicial justification derived from a background purpose that is cast at a high level of generality, or insufficiently reasoned. It means also that we should be properly mindful of limits to the integrationist *telos* cast in terms of, for example, subsidiarity and national identity.

D. BECK'S CRITIQUE

While Beck acknowledges that all courts consider object or purpose when interpreting legal texts he is nonetheless critical of such teleological reasoning in the *Pringle* decision. His specific criticism of the case will be considered below, but two more general strands to his argument can be discerned.

He takes the CJEU to task for oscillating 'seemingly unsystematically between literal and teleological arguments in relation to the specific interpretative issues in the case, favouring whichever argument supports the desired conclusion'.¹⁴ The mere fact that a court uses an admixture of textual and teleological argumentation is however surely unsurprising. All courts do, more especially so in 'big' cases where important issues

¹⁴ G. Beck, 20 *MJ* 4 (2013), p. 638.

of principle and practicality are at stake. It is not clear that the CJEU is any different in this respect from many if not all top national courts. I am equally unsure what the concept of 'unsystematic' connotes in this context. It might mean that courts sometimes use one and sometimes the other, but that can, as seen from the preceding analysis, be for valid reasons, the most common being that the facts fit pretty much four square within the core of the relevant rule, thereby obviating the need for searching inquiry as to its background purpose. The concept of 'unsystematic' might alternatively connote the idea that the CJEU does not set out chapter and verse to explain its deployment of text and purpose with sufficient clarity to satisfy Beck. This seems to be what Beck has in mind when criticizing the CJEU in *Pringle* for not using 'an identifiable meta-interpretative approach, nor any logical or consistent application of certain interpretative arguments in certain pre-defined or pre-definable circumstances'.¹⁵ Courts are not, however, writing doctoral theses or learned monographs. They are resolving cases. It is difficult to think of a real world example of judicial reasoning by any court that would satisfy Beck's requirement of being systematic, insofar as this demands some identifiable meta-interpretative approach, which is applied in a logical manner, such that certain types of interpretative argument can be said to apply in pre-defined circumstances.

The second strand of Beck's general critique is that the Court 'does not confine its teleological argumentation to purposes and objectives expressly stated in the Treaties and instead justifies its preferred solution by inferred purposive considerations nowhere to be found in the Treaties'.¹⁶ This leads, says Beck, to the Court taking account of a 'multiplicity of purposes and consequentialist considerations which can be brought to bear on legal provisions or judge-made rules and which can be stated at varying levels of generality and abstraction and a variety of time horizons',¹⁷ thereby increasing 'judicial freedom in the consideration of teleological considerations to extremes'.¹⁸

This critique, however, begs far more questions than it answers, first and foremost of which is what precisely it means to say that the purpose must be stated expressly in the Treaties.

Does it suffice in this respect if the objective or purpose is expressly stated in some shape, manner or form at some general level in Articles 1–3 TEU? If this is the test then virtually any purpose ever adverted to by the CJEU could be said to be legitimate, even where there is no ready answer as to how it should be applied in the context of a particular Treaty article.

Does Beck's criterion demand that there must be some more particular express reference to background purpose in relation to a particular Treaty article? If so does this mean that the Court was acting illegitimately in inferring the twin objectives, social and economic, underlying gender equality, given that there is nothing express about this

¹⁵ Ibid., p. 639.

¹⁶ Ibid., p. 638.

¹⁷ Ibid., p. 638.

¹⁸ Ibid.

in the relevant Treaty article, and given that nothing explicitly indicates what should happen when the two values clash? Does it mean that the Court was acting illegitimately in conceptualizing free movement so as to cover market access as well as discrimination, given that there is no express guidance as between the two background objects in the wording of the Treaties? Does it mean that the Court was acting improperly in deciding on the balance between protection of consumers and protection of competition when interpreting the competition Treaty provisions, given that there is no express textual guide on this? This same point could be repeated in relation to almost any area of the Treaty. There is in addition the small problem that the *travaux préparatoires* for the Rome Treaty were not available for over 30 years.

The difficulties are equally profound when one considers EU legislation. There is to be sure a greater wealth of background material, but this does not obviate the problems of demanding that recourse to background objective is only legitimate when there is express reference to it in the accompanying documentation. It still leaves open how express the express reference has to be, and provides no answer to what is the common reality, viz, that the legislation will embody numerous objectives that are stated with varying degrees of clarity, which can often clash inter se.

The reality is that Beck's insistence that resort to background purpose is only legitimate when there is express reference in the Treaties falls between a rock and a hard place. If the criterion is satisfied by some broad, general reference to such purposes in Articles 1–3 TEU it can legitimate pretty much all judicial use of such purposes, notwithstanding the fact that the meaning/application might be contestable in relation to a particular Treaty article in a manner that the Treaty clearly does not expressly resolve. This would denude the idea of express reference of virtually all meaning, and would moreover cause Beck's critique of *Pringle* to collapse, since if the idea of express purpose is interpreted thus broadly it is difficult to see why such purpose could not be 'expressly' found in *Pringle*, given that survival of the Euro was integral to economic and monetary union. If by way of contrast the demand for express reference to purpose demands something more specific in relation to the particular Treaty article, which is what Beck seems to require, then it is a test that will not be met in relation to the interpretation of most Treaty articles, notwithstanding the fact that the EU courts have to choose between such background objectives when determining the reach and application of the relevant provision, since the text per se does not provide the answer.

The reality is that conjunction of text and teleology is a legitimate part of legal discourse at all three levels adumbrated above. The text may, as shown above, resolve the particular dispute before the court without further thought being given to background objectives or purposes. There will be instances where it does not do so, where some recourse to background teleology is a necessary step in the resolution of the particular case, although the text will necessarily constrain the interpretation and application of such objectives. There is no way of avoiding this. Those who contend that the answer can be divined from text alone simply hide reality. They conceal arguable assumptions

about purpose or object in the meaning they accord to the relevant text. This pretence of textual autonomy thereby hides the substantive choices that inform the textual outcome.

§4. PRINGLE AND JUDICIAL REASON

In *Pringle* the CJEU sought to save the ESM primarily by reliance on textual analysis. The reasoning was strained and unconvincing. Recourse to more considered thought about the object of the relevant Treaty provisions was justified, and would have improved the quality of the reasoning. It will also enable us to see the weakness of Beck's critique of the CJEU's reasoning.

A. MONETARY AND ECONOMIC POLICY

The claimant argued that the ESM was in substance designed to ensure price stability and save the Euro; this was monetary policy, which fell within the EU's exclusive competence;¹⁹ and the Member States therefore had no competence to adopt legally binding acts in the form of an international Treaty, the ESM.²⁰ There was force in the contention that the ESM was in reality directed towards monetary policy given the wording of Articles 3 and 12 ESM, which predicate assistance on the fact that it is indispensable to the financial stability of the euro area as a whole. The CJEU, in common with the Member States, held that the ESM was concerned with economic policy, and therefore that competence was shared with the Member States.

The reasoning was textual and strained. The CJEU held that the primary objective of monetary policy was price stability,²¹ but that this was distinct from the stability of the euro area as a whole, which was the objective of Article 136(3) TFEU and the ESM. The CJEU justified this conclusion on the ground that even

though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.²²

This textual reasoning is unconvincing, which is why it has been criticized by commentators. The economic rationale for the legal critique is not hard to divine: stability of the euro area as a whole is a condition precedent to price stability within that area, and hence the latter cannot exist if the former is beset by serious instability. Gunnar

¹⁹ Article 3(1)(c) TFEU.

²⁰ Article 2(1) TFEU.

²¹ Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 54, 94.

²² *Ibid.*, para. 56, 96.

Beck's critique in this respect simply reiterates that advanced by others, including the present author.

Closer consideration as to the object and consequences of the divide between monetary and economic policy could, however, have provided the basis for a more convincing conclusion. It would have facilitated a principled conclusion as to whether the divide between monetary and economic policy was violated by the ESM. This is not merely legitimate legal reasoning. It is a necessary precondition for reaching a rational legal decision. Where the law creates a divide from which important consequences follow, then if there is doubt as to the correct assignment of a case as between the categories we must inquire as to the object or purpose of the respective categories in order to reach a defensible conclusion. A conclusion reached in the absence of such consideration is, by way of contrast, thin and prone to error. The key issue is therefore both simple and fundamental, viz, why the concept of monetary policy falls within the EU's exclusive competence and whether the ESM offends the rationale for such exclusivity.

The reason for treating monetary policy as within the EU's exclusive competence is surely as follows. It is the ECB and ESCB that manage the Euro and operate EU monetary policy, including in this respect interest rates and exchange rates with other currencies, with the primary aim of attaining price stability.²³ This is regarded as falling within the EU's exclusive competence since it would be contrary to this policy if Member States could legislate and adopt legally binding acts on such matters, which could well undermine the monetary policy pursued by the ECB. There cannot be a chorus of 8, 9 or 17 legally binding acts giving voice to issues relating to EU monetary policy that affect interest rates, exchange rates and the like. There could not be an 'EU monetary policy' unless the EU's competence was exclusive in relation to matters such as interest rates, exchange rates and the like.

Viewed from this perspective, the CJEU's conclusion is more defensible. The ESM does not seek to set an alternative monetary or exchange rate policy for the EU.²⁴ It does not entail any challenge to the ECB/ESCB's substantive monopoly in this regard. To the contrary it is providing support for ailing Member States to prevent the spread of further economic contagion, and possible collapse of the Euro. Now there may well be issues as to whether that assistance is contrary to Article 125 TFEU, an issue that will be addressed below. This does not however alter the fact that it is difficult to see why the ESM should be regarded as infringing the exclusive competence of the EU over monetary policy, once we unpack the object or purpose for treating that competence as exclusive.

The preceding argument might be reinforced by adverting to the consequences of the divide. Thus, it might be argued that the divide between monetary and economic policy should not readily be interpreted so as to prevent Member States from taking action that

²³ Articles 119, 127, 128 TFEU.

²⁴ The CJEU does note this in Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 96.

was vital for their own economic well-being, where the EU itself lacked competence to take the requisite action. The weak control over economic policy meant that fiscal deficits in some euro area Member States could have negative consequences for the value of the Euro and a direct impact on the economic health of other such states. The euro crisis was the extreme manifestation of this, with potentially very severe economic consequences for all states that subscribed to the currency. This is readily acknowledged as part of the background ‘facts’ concerning *Pringle*, but then rapidly forgotten when we come to the legal analysis of the case. It would have been legitimate for the CJEU to take this into account directly when drawing the divide between monetary and economic policy.

The argument was glimpsed by the CJEU, but not developed. It informed the Court’s response to the argument that even if Article 136(3) TFEU was regarded as falling within economic policy, Member State competence to act was nonetheless pre-empted because the EU had occupied the relevant area. The CJEU rejected this contention.²⁵ It held that since Articles 2(3) and 5(1) TFEU restricted the EU’s role in economic policy to the adoption of coordinating measures, the TEU and TFEU did not therefore confer any specific power on the EU to establish a stability mechanism of the kind envisaged by Decision 2011/199 that brought about the amendment in Article 136(3) TFEU.²⁶

It followed, said the CJEU, from Article 4(1) and Article 5(2) TEU that competence in this regard remained with the Member States, who could therefore lawfully conclude the ESM.²⁷ It also followed that Article 136(3) was regarded as merely ‘confirming’²⁸ Member State power to establish a stability mechanism, and created no new Union competence.²⁹ The argument was also adverted to by Advocate General Kokott, albeit in relation to an interpretation of Article 125 TFEU, where she contended that the Court should not readily interpret Treaty provisions so as to preclude Member States from taking action to prevent serious economic harm to their own economies as a result of the economic troubles of other Member States.³⁰

B. BAIL OUTS

There is no doubt that the claimant’s principal argument in *Pringle* concerned bailouts and the compatibility of the ESM with Article 125 TFEU. Gunnar Beck reserves his harshest criticism for the CJEU’s treatment of the bailout, characterizing it as narrow to the point of absurdity.³¹

²⁵ Ibid., para. 102–107.

²⁶ Ibid., para. 64.

²⁷ Ibid., para. 68, 109.

²⁸ Ibid., para. 72.

²⁹ Ibid., para. 73.

³⁰ Opinion of Advocate General Kokott in Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 139–140.

³¹ G. Beck, 20 *MJ* 4 (2013), p. 644.

He regards the CJEU's identification of the purpose of Article 125 TFEU, that it was designed to ensure that Member State adherence to sound budgetary policy was not diminished, as the importation of a teleological consideration that was nowhere spelled out in the Treaties.³² He contends, moreover, that the meaning of Article 125 could have been divined from its ordinary language, such that the assumption of the commitments of a Member State by other Member States would have covered any *de facto* transfer of the financial risk of public debt between Member States save where expressly provided for in the Treaties.³³ I disagree with both strands of this argument.

It was entirely legitimate for the CJEU to advert to the purpose underlying Article 125 TFEU in order to determine its scope, nor was this the importation of a teleological consideration outside the confines of the Treaties. The CJEU concluded that Article 125 TFEU must be held to 'prohibit the EU and Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished.'³⁴ This reasoning is surely correct. The purpose of Article 125 was to engender sound national budgetary policy. It was to ensure that states remained subject to the logic of the market when they became indebted, and hence any assistance that would, in the words of the Court, 'diminish' the incentive of the Member State to conduct sound budgetary policy should fall within the prohibition of Article 125 TFEU. This was not importation of a teleological consideration outside the confines of the Treaty. It was the very foundation on which the Maastricht settlement for economic and monetary union was built. The *quid pro quo* for continued Member State fiscal autonomy was fiscal responsibility: the EU would only exercise limited control over national budgets, the corollary being that if a Member State got into economic trouble it could not go cap in hand to other Member States in search of financial relief.

Beck's contention that the meaning of Article 125 could have been divined from its ordinary language forcefully exemplifies the point made earlier that such assertions commonly entail reading the text so as to attain a purpose that is implicit or unarticulated. This comment is especially apposite here, given that Beck's textual conclusion implicitly imports the very purpose that he regards as illegitimately read into the Treaty by the CJEU. This is readily apparent if one asks why, in accord with Beck's reading, Article 125 should be interpreted to cover any *de facto* transfer of the risk of public debt. The answer is of course because the purpose of Article 125 is to prevent a diminution of national fiscal responsibility, the very purpose openly articulated by the CJEU, and the very purpose that Beck claims was illegitimately imported into the Treaty by the CJEU. It is far more preferable that courts openly articulate the background purpose that informs their interpretation of Treaty provisions than conceal this in what purports to be a purely semantic analysis.

³² Ibid., p. 644.

³³ Ibid., p. 645.

³⁴ Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 136.

In truth the difficulty with the CJEU's judgment was that the conclusions drawn from the purpose underlying Article 125 were highly problematic. The Court held that provided that the state remains ultimately responsible to its creditors, and provided that conditions are attached to assistance designed to foster sound budgetary policy, then it is not prohibited by Article 125 TFEU.³⁵ The ESM was therefore compatible with Article 125 TFEU because the participating Member States were not 'liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU'.³⁶ ESM assistance did not render Member States the guarantor of debts of the recipient state, nor did they assume the debts of that state.³⁷ I analysed the difficulties with this reasoning in previous writing.³⁸ There is a real tension between the purpose underlying Article 125 and its interpretive realization by the Court: the assistance is provided on terms that would not be provided by the ordinary markets; the preceding argument is not met merely because the assistance is given subject to strict conditionality; and the recipient state may not pay back the debt, a fact recognized in the ESM provisions.³⁹

We are therefore faced with a choice. Textual analysis, informed by background object, cannot by itself reconcile the ESM with the no-bailout clause. So we either find the ESM to be invalid with all the dramatic consequences that this would have had for all euro-zone countries, or we consider whether there is some other legally defensible way to reach the desired conclusion.

Thus it might be contended that Article 125 was designed with individual cases in mind, preventing bailouts of particular states when national fiscal policy or irresponsibility led to problems confined to that state. Article 125, and the more general schema in Articles 122–126 TFEU, was not on this view structured so as to cope with the circumstance where the very future of the Euro was at stake, with the consequence that assistance had to be provided by the Member States, considerations of moral hazard had to be compromised and could only be given expression through strict conditions attached to funding assistance.

This sentiment was captured by the Court when it stated that 'the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole'.⁴⁰ The same sentiment was captured more explicitly by Kaarlo Tuori, through his invocation of the idea of a double *telos*. There was the *telos* embodied in Article 125 itself, expressive of the view that fiscal liability remained with the particular Member State. This should nonetheless be read subject to a 'second-order

³⁵ Ibid., para. 137, 143, 146.

³⁶ Ibid., para. 146.

³⁷ Ibid., para. 138–139.

³⁸ P. Craig, 20 *MJ* 1 (2013), p. 7–9.

³⁹ Article 25 ESM.

⁴⁰ Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 136.

telos’, where the very survival of the Euro was at stake, which underpinned the general regulatory schema of which Article 125 was part, which could legitimate the legality of the assistance provided through the ESM.⁴¹

It is of course contestable whether recourse to this kind of purposive reasoning is defensible in legal terms in this particular case. The nature of this contestation should nonetheless be made clear. The ESM could be saved through textual interpretation of the kind undertaken by the CJEU, or through more explicit recourse to teleological reasoning. The former is safer, which is why it was used primarily by the CJEU, but it does not work by itself for the reasons set out above. The latter is legally bolder, but does work, in the sense that in determining the legal scope of a Treaty provision the distinction between retention of fiscal responsibility of a particular Member State, and survival of the euro area as a whole is a meaningful one.

§5. CONCLUSION

Pringle was a difficult case in all senses of the word. It tested the boundaries of legal interpretation and how this should be rationalized. It might be argued, as Beck does, that the CJEU crossed the line between legal argumentation and political decision. I do not accept this, even if one chooses to defend the result on the more overtly teleological ground. That approach remains defensibly legal for the reasons set out above, and this is so even though it is contestable.

It might also be argued that courts should exclude consequentialist considerations when considering the legal ambit of Treaty provisions. I do not accept this either. The text will perforce shape and constrain the extent to which courts can take account of such considerations, in the same way that it shapes and constrains recourse to background purpose. Subject to this it is normatively legitimate for courts to be cognizant of the consequences of their interpretation, whether of statute, treaty or common law rule, and to take this into account when deciding on what that legal interpretation should be. Lawyers do not and should not have a lofty disdain for the consequences of legal rulings, more especially so when those consequences can be profound.

⁴¹ K. Tuori, ‘The European Financial Crisis – Constitutional Aspects and Implications’, *EUI Law Working Papers* 28 (2012), p. 24.