

## ‘Precedents’ in EU Law – The Problem of Overruling

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### I Introduction

Legal precedent is a term strongly linked to Anglo-Saxon legal systems. The system of precedent ‘means that the judges make law in the course of resolving disputes between litigants’<sup>1</sup> and is a system where ‘the role of judicial decisions has not only been to apply but also define the legal rules.’<sup>2</sup> When the court has to decide a case, the judge ‘must always look back to see how previous judges have dealt with previous cases.’<sup>3</sup>

A fundamental element of the precedent system of English law is the doctrine of *stare decisis*, that is, the courts are bound by the decisions of the higher courts. In England, until 1966, even the House of Lords was bound by its own decisions.<sup>4</sup> What is binding from a decision is the *ratio decidendi*. The *ratio decidendi* must be distinguished from the *obiter dicta*. However, it is questionable what constitutes the *ratio decidendi*. It is described as the ‘necessary basis to the decision’<sup>5</sup> or the ‘reason for the decision’ which ‘constitutes the binding precedent.’<sup>6</sup> The *obiter* is the rest of the decision, the part of the decision which the judge stated without any obligation.<sup>7</sup> It may happen that a higher court does not accept the legal solution adopted by a lower court and overrules the principle established by the lower court.<sup>8</sup>

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<sup>1</sup> PS Atiyah, Robert S. Summers, *Form and Substance in Anglo-American Law* (Clarendon 1987, Oxford) 115.

<sup>2</sup> René David, John E. C. Brierley, *Major legal systems in the World Today* (3rd edn, Stevens 1985, London) 376.

<sup>3</sup> Penny Darbyshire, *Eddey on the English Legal System* (5th edn, Sweet & Maxwell 1992, London) 159.

<sup>4</sup> *London Tramways v London County Council* [1898] AC 375. Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. David Pugsley, ‘London Tramways (1898)’ in David Pugsley (ed), *Lawyers and Precedents* (Faculty of Law, University Exeter 2014, 38–50) 38ff; Darbyshire (n 3) 159–160; Eric Tjong Tjin Tai, Karlijn Teuben, ‘European Precedent Law’ (2008) 16 *European Review of Private Law* 827–841, 828ff.

<sup>5</sup> David, Brierley (n 2) 379.

<sup>6</sup> Darbyshire (n 3) 163.

<sup>7</sup> David, Brierley (n 2) 379.

<sup>8</sup> Darbyshire (n 3) 162.

These features of the common law system of precedent serve legal certainty. Legal certainty requires that court decisions must be predictable. Similar situations must be treated alike, unless a difference in the treatment is objectively justified. The uniformity of the application of law is thus a crucial element of legal certainty. Precedent reduces the courts' discretion<sup>9</sup> and 'is the guarantor of certainty and equality of treatment.'<sup>10</sup>

Though any overruling is seemingly against the demand for legal certainty, it may be necessary under certain circumstances. The social or economic circumstances or the legal environment may change, new demands arise or it may simply happen that the court gave a wrong judgment. Evolution of law or correction of erroneous judgments must be allowed. As Jaeger says, a legal system has to support a certain degree of uncertainty that is required for its development.<sup>11</sup>

Both the principle of legal certainty and equal treatment are recognised in European Union (the EU) law and is reflected in the practice of the Court of Justice of the European Union (the Court). In the vast majority of cases, the Court follows its own judgments and considers them applicable to future cases if the factual situation is similar or identical.

The development and the necessary adaptation of the case law of the Court are sometimes in conflict with the demand for legal certainty. The Court has therefore to strike a balance between legal certainty and changes frequently made necessary by the aims of integration.<sup>12</sup>

The aim of this paper is to analyse the nature of the case law of the Court and to examine the main reasons for eventual deviations from the previous decisions.

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<sup>9</sup> Alec Stone Sweet, Margaret McCown, 'Discretion and Precedent' in Ola Wiklund (ed), *Judicial Discretion in European Perspective* (Norstedts Juridik/Kluwer 2003, The Hague, 84–115) 85.

<sup>10</sup> Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 *Journal of International Dispute Settlement* 5–23, 6.

<sup>11</sup> Marc Jaeger, 'Notion et politique du revirement. Propos introductifs' in Eric Carpano (ed), *Le revirement de jurisprudence en droit européen* (Bruylant 2012, Brussels, 25–46) 25.

<sup>12</sup> Rostane Mehdi, 'Le revirement jurisprudentiel en droit communautaire' in *L'intégration européenne au XXI<sup>e</sup> siècle. En hommage à Jacques Bourrinet* (La documentation française 2004, Paris, 113–136) 114; Sweet, McCown (n 9) 85.

## II Characteristics of the Case Law of the Court

Terminologically, we find certain signs that the Court's adjudication could be a system of precedent. The Advocate Generals and even sometimes the Court (at least in the English version of the decisions) use the term 'precedent',<sup>13</sup> 'stare decisis',<sup>14</sup> 'ratio decidendi'<sup>15</sup> and 'obiter'<sup>16</sup>. Although

<sup>13</sup> The use of the term 'precedent' in Advocate Generals' opinions and views: Case C-334/12 RX-II *Oscar Orlando Arango Jaramillo and Others v European Investment Bank (EIB)* (ECLI:EU:C:2012:733) View of AG Mengozzi, para 72; Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* (ECLI:EU:C:2012:663), Opinion of AG Cruz Villalón, paras 27 and 33; Case C-242/10 *Enel Produzione SpA v Autorità per l'energia elettrica e il gas* [2011] ECR I-13665, Opinion of AG Cruz Villalón, para 2; Case C-89/09 *European Commission v French Republic* [2010] ECR I-12941, Opinion of AG Mengozzi, paras 75–81; Case C-515/03 *Eichsfelder Schlachtbetrieb GmbH v Hauptzollamt Hamburg-Jonas* [2005] ECR I-7355, Opinion of AG Ruiz-Jarabo Colomer, para 2; Joined Cases C-80/99, C-81/99 and C-82/99 *Ernst-Otto Flemmer (C-80/99) and Renate Christoffel (C-81/99) v Council of the European Union and Commission of the European Communities, represented by: Bundesanstalt für Landwirtschaft und Ernährung and Marike Leitensdorfer (C-82/99) v Bundesanstalt für Landwirtschaft und Ernährung* [2001] ECR I-7211, Opinion of AG Tizzano, para 34; Case C-107/76 *Hoffmann-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] ECR 957, Opinion of AG Capotorti, para 4.

Judgments of the Court and the General Court (CFI): Case C-334/12 RX-II *Oscar Orlando Arango Jaramillo and Others v European Investment Bank (EIB)* (ECLI:EU:C:2013:134), para 50; C-197/09 RX-II *M v European Medicines Agency (EMA)* [2009] ECR I-12033, para 62; Case T-336/07 *Telefónica, SA and Telefónica de España, SA v European Commission* ECR, (ECLI:EU:T:2012:172), paras 361, 364, 432.

<sup>14</sup> Case 112/76 *Renato Manzoni v Fonds national de retraite des ouvriers mineurs* [1977] ECR 1647, Opinion of AG Warner, p. 1662; Joined cases C-267/95 and C-268/95 *Merck & Co. Inc., Merck Sharp & Dohme Ltd and Merck Sharp & Dohme International Services BV v Primecrown Ltd, Ketan Himatlal Mehta, Bharat Himatlal Mehta and Necessity Supplies Ltd and Beecham Group plc v Europharm of Worthing Ltd* [1996] I-6285, Opinion of AG Fennelly, para 139; Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, Opinion of AG La Pergola, para 36.

<sup>15</sup> Case 112/76 *Renato Manzoni v Fonds national de retraite des ouvriers mineurs* [1977] ECR 1647, Opinion of AG Warner, p. 1662; Case 130/79 *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* [1980] ECR 1887, Opinion of AG Capotorti, para 2; Case C-254/95 P *European Parliament v Angelo Innamorati* [1996] ECR I-3423, Opinion of AG Fennelly, para 33; Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, Opinion of AG La Pergola, para 36; Case C-443/11 *F. P. Jeltens and Others v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* (ECLI:EU:C:2013:6), Opinion of AG Mengozzi, the title of point IV. A I. is 'Miethe and its ratio decidendi'.

In the case law of the Court: Case C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) SA (C-442/03 P) and Diputación Foral de Vizcaya (C-471/03 P) v Commission of the European Communities* [2006] I-4845, para 44.

In the case law of the CFI: Case T-404/06 P *European Training Foundation (ETF) v Pia Landgren* [2009] ECR II-2841, para 216.

<sup>16</sup> Case C-107/76 *Hoffmann-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] ECR 957, Opinion of AG Capotorti, para 4; Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, Opinion of AG La Pergola, para 36; Case C-170/11 *Maurice Robert Josse Marie Ghislain Lippens and Others v Hendrikus Cornelis Kortekaas and Others* (ECLI:EU:C:2012:311), Opinion of AG Jääskinen, para 36; Joined cases C-628/10 P and C-14/11 P *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others* (ECLI:EU:C:2012:11), Opinion of AG Kokott, para 184; Case C-235/09 *DHL Express France SAS v Chronopost SA* [2011] I-2801, Opinion of AG Cruz Villalón, para 57; Case C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I-5949, Opinion of AG Kokott, para 135.

In the case law of the Court: Case C-352/09 P *ThyssenKrupp Nirosta GmbH v European Commission* [2011] ECR I-2359, para 132.

we can find terms used in Anglo-Saxon laws in the texts of the Court's decisions, this is only the semblance. The use of the common law terminology does not turn the Court's case law into a system of precedent as exists in Anglo-Saxon laws.<sup>17</sup>

The Court does not really deal with the nature and characteristics of its case law. This task tends to be left to scholars and the Advocates General of the Court. The eventual presence of the *stare decisis* doctrine in the Court's case law and the binding force of the Court's decisions have been discussed by several Advocates General. AG Fennelly's opinion in the *Merck v Primecrown* case analyses in detail whether and when the Court may deviate from a previous ruling. He held that 'as a matter of principle, the Court is of course not bound by its own previous judgments', since the doctrine of precedent or *stare decisis* is not followed as in the UK or in Ireland.<sup>18</sup> He added that 'it is none the less obvious that the Court should, as a matter of practice, follow its previous case-law except where there are strong reasons for not so doing.'<sup>19</sup> The Court may reconsider an earlier decision if there is 'strong evidence that this was wholly or partially incorrectly decided.'<sup>20</sup> As AG Lagrange put, 'the Court of Justice should [...] remain free when giving its future judgment... no one will expect that, having given a leading judgment [...] the Court will depart from it in another action without strong reasons, but it should retain the legal right to do so.'<sup>21</sup> It is the Court's responsibility 'to confront the realities of the situation with the legal rule in each action, which can lead it in appropriate cases to recognize its errors in the light of new facts, of new arguments or even of a spontaneous rethinking...'<sup>22</sup> According to AG Trstenjak, 'the binding authority of precedent is not an inherent feature of the Union's judicial system. Although, in the interest of legal certainty and the uniform interpretation of Community law, the Community Courts endeavour in principle to give a coherent interpretation to the law, the general structure of both the Community legal order and the judicial system means that the Community Courts are not bound by their previous decisions.'<sup>23</sup>

In the view of AG Maduro:

The Court has always shown itself to be circumspect with regard to reversing an interpretation of the law given in earlier judgments. Without determining whether those judgments constituted legal precedents the Court has always shown deference to a line of well-established case-law. The force awarded by the Court to judgments it has delivered in the past may be considered to derive from the need to secure the values of cohesion, uniformity and legal certainty inherent in any system of law... Even

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In the practice of the CFI: Case T-224/00 *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities* [2003] ECR II-2597, para 200.

<sup>17</sup> Jan Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 *American Journal of Comparative Law* 149–171, 162.

<sup>18</sup> *Merck v Primecrown*, Opinion of AG Fennelly, para 139.

<sup>19</sup> *Merck v Primecrown*, Opinion of AG Fennelly, para 142.

<sup>20</sup> *Merck v Primecrown*, Opinion of AG Fennelly, para 143.

<sup>21</sup> Joined cases 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* English special edition ECR 31, Opinion of AG Lagrange, point II. p. 42.

<sup>22</sup> *Da Costa*, Opinion of AG Lagrange, p. 42.

<sup>23</sup> Case C-331/05 P *Internationaler Hilfsfonds eV v Commission of the European Communities* [2007] ECR I-5475, Opinion of AG Trstenjak, para 85.

though the Court is not formally bound by its own judgments, by the deference it shows them it recognises the importance of the stability of its case-law for its interpretative authority and helps to protect uniformity, cohesion and legal certainty within the Community legal system.<sup>24</sup>

AG La Pergola stated that 'the rule *stare decisis* has not been incorporated in the Community judicial system' and added that '...the Court is not technically bound by its earlier judgments, and may therefore [...] give a different answer to a preliminary question dealt with in an earlier decision, if such a result is justified by new matters brought to its attention in the later proceedings.'<sup>25</sup>

In its decisions, the Court refers back to its previous rulings, but the reference to and the application of former cases in the Court's adjudication is not supported by any reasoning or theory established in the Court's decisions.<sup>26</sup> The Treaties do not mention that the Court should follow its earlier decisions and this neither follows from the Statute of the Court of Justice of the European Union (the Statute) or the Rules of Procedure of the Court of Justice (the Rules of Procedure). Consequently, the Court's case law does not constitute a precedent system in the sense applied in Anglo-Saxon laws. Still, in its judgments, the Court often refers to the 'well established case law': in most of the cases, the decisions of the Court refer back explicitly to those earlier decisions that support the conclusion of the given case or from which the case must be distinguished.<sup>27</sup> It must be noted that the reference to previous decisions is selective. In a field, where there is a large number of decisions, the Court usually refers back only to some of its rulings and on other occasions it also happens that the Court makes reference to those cases that support its conclusion, leaving aside the contrary decisions.<sup>28</sup> Furthermore, the Court encourages counsels to include relevant references to the case law of the Court in their pleadings.<sup>29</sup> Similarly, in their opinions, the Advocates General seek for previous

<sup>24</sup> Joined cases C-94/04 and C-202/04 C-94/04 *Federico Cipolla v Rosaria Fazari, née Portolese* (C-94/04) and *Stefano Macrino and Claudia Capoparte v Roberto Meloni* (C-202/04) [2006] ECR I-11421, Opinion of AG Poirares Maduro, para 28.

<sup>25</sup> *Sürül*, Opinion of AG La Pergola, para 36.

<sup>26</sup> Virág Kovács, 'Precedensjog az Európai Bíróság gyakorlatában' [Legal precedent in the practice of the European Court of Justice] (2000) 4 *Jogelméleti Szemle*, point 1 (A precedens a közösségi jogrendszerben) <<http://jesz.ajk.elte.hu/kovacs4.html>> accessed 1 August 2015.

<sup>27</sup> Katja Langenbucher, 'Argument by Analogy in European Law' (1998) 57 *Cambridge Law Journal* 481–521, 507; László Kecskés, *EU-jog és jogharmonizáció* [EU-law and legal harmonisation] (HVG-ORAC 2005, Budapest) 443; Sándor Vida, "'Precedensek" az EU Bírósága gyakorlatában' [Precedents in the practice of the Court of Justice of the EU] (2013) 68 *Jogtudományi Közlöny* 53–58, 53.

<sup>28</sup> Henry G Schermers, Denis Waelbroeck, *Judicial Protection in the European Communities* (5th edn, Kluwer 1992, Deventer, Boston) 97; Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, Oxford University Press 2006, Oxford) 628.

<sup>29</sup> Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities (February 2009), 19 <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9\\_2008-09-25\\_17-37-52\\_275.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf)> accessed 1 August 2015; Kovács (n 26) point 1 (A precedens a közösségi jogrendszerben).

decisions of the Court applicable to the case and, in the absence of such a decision, they state that ‘there is no precedent for the present case’<sup>30</sup> or ‘the questions referred for a preliminary ruling are without precedent.’<sup>31</sup>

However, the Court is not bound by its previous decisions.<sup>32</sup> The Court may reconsider a previous decision if it finds it subsequently erroneous or otherwise not appropriate.

Nevertheless, legal certainty requires a consistent and clear case law. Although the case law of the Court does not constitute a precedent system in a formal sense, deviations from the ‘well established case law’ are rare.

### III The Relation between the Court, the General Court and the Civil Service Tribunal in Terms of Legal Precedents

The Court’s decisions may not only be examined horizontally in terms of their binding force in a subsequent case, but also in the vertical relationship with the other forums having a subordinated role within the EU court system, namely the General Court and the Civil Service Tribunal.<sup>33</sup>

<sup>30</sup> Case C-547/10 P *Confédération suisse v European Commission* (ECLI:EU:C:2012:565), Opinion of AG Jääskinen, para 37.

<sup>31</sup> Case C-522/10 *Doris Reichel-Albert v Deutsche Rentenversicherung Nordbayern* (ECLI:EU:C:2012:114), Opinion of AG Jääskinen, para 3. Similarly: Case C-488/10 *Celaya Emparanza y Galdos Internacional SA v Proyectos Integrales de Balizamientos SL* (ECLI:EU:C:2011:714), Opinion of AG Mengozzi, para 18; Case C-274/10 *European Commission v Republic of Hungary* [2011] ECR I-7289, Opinion of AG Bot, para 59; Joined cases C-89/10 and C-96/10 *Q-Beef NV (C-89/10) v Belgische Staat and Frans Bosschaert (C-96/10) v Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens NV* [2011] ECR I-7819, Opinion of AG Jääskinen, para 3; Case C-362/09 P *Athinäiki Techniki AE v European Commission* [2010] I-13275, Opinion of AG Bot, para 75.

<sup>32</sup> John J. Barceló, ‘Precedent in European Community Law’ in D. Neil MacCormick, Robert S. Summers (eds), *Interpreting Precedents – A comparative study* (Aldershot 1997, Ashgate/Dartmouth, 407–436) 420; Anthony Arnall, ‘Interpretation and Precedent in European Community Law’ in Mads Andenas, Francis Jacobs, *European Community Law in the English Courts* (Clarendon Press 1998, Oxford, 115–136) 125; Ami Barav, ‘The European Court of Justice and the Use of Judicial Discretion’ in Ola Wiklund (ed), *Judicial Discretion in European Perspective* (Norstedts Juridik/Kluwer 2003, The Hague, 116–149) 142; Langenbucher (n 27) 507; Keckés (n 27) 442; Arnall, *The European Union and its Court of Justice* (n 28) 627; Vida (n 27) 53; Tjong Tjin Tai, Teuben (n 4) 8.

<sup>33</sup> Kieran Bradley, ‘Vertical Precedent at the Court of Justice of the European Union: When Push Comes to Shove’ in Kieran Bradley, Noel Travers, Anthony Whelan (eds), *Liber Amicorum in Honour of Nial Fenelly* (Hart 2014, Oxford, 47–65) 48.

## 1 The Court and the General Court

The General Court (formerly the Court of First Instance, CFI) is bound neither by its own decisions nor by the judgments of the Court,<sup>34</sup> therefore the *stare decisis* principle does not even apply at this level. The decisions of the hierarchically higher superior Court do not bind the General Court.<sup>35</sup> Still, the General Court regularly refers to and follows the decisions of the Court.<sup>36</sup> As AG Trstenjak explained, ‘the Court of First Instance cannot be barred from distancing itself from an earlier decision. This is self-evident, since otherwise, if it were bound strictly by an earlier judgment, an appeal to the Court of Justice would be redundant... On those grounds a plea in law cannot be based on a departure by the Court of First Instance from an earlier judgment alone.’<sup>37</sup> In another opinion, AG Trstenjak remarked that it is not an error of law that may be challenged before the Court if the CFI does not make reference to a legal precedent.<sup>38</sup>

However, the decisions of the General Court may be challenged by appeal before the Court on points of law.<sup>39</sup> According to the first paragraph of Article 61 of the Statute, ‘if the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.’

Since the General Court usually does not wish to risk its decision being set aside, the General Court rarely deviates from the decisions of the Court.<sup>40</sup> Pursuant to the second paragraph of Article 61 of the Statute, if on appeal the Court quashes the decision of the General Court and refers back the case to it, the General Court is bound by the decision of the Court on points of law. Another instance where the General Court is bound by a decision of the Court is if the Court finds that an action falls within the jurisdiction of the General Court: it shall refer that action to the General Court, whereupon the General Court may not decline jurisdiction.<sup>41</sup> Moreover, if in a review procedure the Court finds that the decision of the General Court affects the unity or consistency of Union law, it shall refer the case back to the General Court which shall be bound by the points of law decided by the Court.<sup>42</sup>

Nevertheless, the General Court is free to deviate from an earlier decision of the Court and induce the Court to change its previous approach on appeal confirming the position of the General Court.<sup>43</sup>

<sup>34</sup> Neville L. Brown, Tom Kennedy, *The Court of Justice of the European Communities* (4th edn, Sweet & Maxwell 1994, London) 350; Barceló (n 32) 421.

<sup>35</sup> Arnall, Interpretation and Precedent in European Community Law (n 32) 130.

<sup>36</sup> Arnall, Interpretation and Precedent in European Community Law (n 32) 130.

<sup>37</sup> *Internationaler Hilfsfonds*, Opinion of AG Trstenjak, paras 86 and 87.

<sup>38</sup> Case C-414/08 P *Sviluppo Italia Basilicata SpA v European Commission* [2010] I-2559, Opinion of AG Trstenjak, para 127.

<sup>39</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 256(1); Statute of the Court of Justice of the European Union (Statute) art 56.

<sup>40</sup> Kovács (n 26) point 4. (Egyszerű illusztrációként felhívott precedensek).

<sup>41</sup> Statute art 54(2).

<sup>42</sup> Statute art 62b.

<sup>43</sup> Langenbucher (n 27) 508.

Article 256 of the Treaty on the Functioning of the European Union (the TFEU) and Article 62 of the Statute are also worthy of mention in terms of the relation between the Court and the General Court.

Pursuant to the first paragraph of Article 62 of the Statute:

In the cases provided for in Article 256(2) and (3) of the Treaty on the Functioning of the European Union, where the First Advocate-General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court.

The second paragraph of Article 256 TFEU refers to cases where the General Court hears actions brought against decisions of the specialised courts (now only the Civil Service Tribunal), while the third paragraph of Article 256 TFEU bases the jurisdiction of the General Court to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the Statute.

In *NMB II*, the CFI itself held that it 'is only bound by the judgments of the Court of Justice, first, in the circumstances laid down in the second paragraph of Article 54 of the Statute of the Court of Justice of the European Community,<sup>44</sup> and, secondly, pursuant to the principle of *res judicata*.'<sup>45</sup>

The complex relationship between the Court and General Court in terms of legal precedents may be illustrated by the *Jégo-Quééré* case,<sup>46</sup> where the interpretation and reconsideration of the Plaumann test was at stake. In the *Plaumann* case, the Court interpreted the conditions of the standing of private persons in relation to annulment actions.<sup>47</sup> Within the meaning of Article 173 of the Treaty establishing European Economic Community (EEC Treaty), 'any natural or legal persons may [...] institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.' The question was how to interpret the 'direct and individual concern' condition. In the *Plaumann* case, the Court held that 'persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'<sup>48</sup> In *Plaumann*, a clementine importer company claimed for the annulment of a decision of the Commission rejecting the request of Germany to apply a lower customs tariff for fresh clementines imported from third countries. The Court rejected the importer's claim and

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<sup>44</sup> See now Statute art 61(2) discussed above.

<sup>45</sup> Case T-162/94 *NMB France SARL, NMB-Minebea-GmbH, NMB UK Ltd and NMB Italia Srl v Commission of the European Communities* [1996] ECR II-427, para 36. Arnulf, *The European Union and its Court of Justice* (n 28) 635–637.

<sup>46</sup> Case T-177/01 *Jégo-Quééré & Cie SA v Commission of the European Communities* [2002] ECR II-2365.

<sup>47</sup> Case 25/62 *Plaumann & Co. v Commission of the European Economic Community* English special edition ECR 95.

<sup>48</sup> *Plaumann*, p. 107.



concluded that the clementine importer company was affected by reason of its commercial activity, which may be practised by anyone, and this is not sufficient to distinguish it as it would if it were the addressee of a decision. In *Jégo-Quéré*, the CFI reviewed the Plaumann test as to the meaning of 'individual concern'.<sup>49</sup> *Jégo-Quéré*, a fishing company, challenged Commission Regulation (EC) No 1162/2001 establishing measures for the recovery of the stock of hake adopted for the conservation of threatened fish stocks.<sup>50</sup> The Regulation aimed at controlling the fishing activity and techniques applied in certain areas. According to the CFI's interpretation, 'a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.'<sup>51</sup> Rejecting the CFI's definition, the Court accepted the Commission's appeal against the CFI's decision and confirmed the interpretation of the condition of 'individual concern' as set out in the *Plaumann* case.

This case shows that the General Court (earlier the CFI) is sometimes inclined to change the Court's practice. Notwithstanding this, in the *Kadi II* case, the General Court held that it 'considers that in principle it falls not to it but to the Court of Justice to reverse precedent in that way, if it were to consider this to be justified...'<sup>52</sup> Thus, although the General Court is only exceptionally bound by the decisions of the Court, it follows the Court's practice in principle. Nevertheless, by a decision adopting a solution other than those applied previously by the Court, the General Court has the possibility to call the Court for the reconsideration of its earlier case law.

## 2 The Civil Service Tribunal

Almost the same may be said about the Civil Service Tribunal. The Civil Service Tribunal is not formally bound by the decisions of the Court or the General Court (except regarding the reference back on appeal), but the possibility of appeal to the General Court makes deviations rare. An appeal may be brought before the General Court against final decisions of the Civil Service Tribunal and decisions of that Tribunal disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility.<sup>53</sup> Article 13 of Annex I of the Statute provides that 'if the appeal is well founded, the General Court shall quash the decision of the Civil Service Tribunal and itself give judgment in the matter. It shall refer the case back to the Civil Service Tribunal for judgment where the state of the proceedings does not permit a decision by the Court. Where a case is referred back to the Civil Service Tribunal, the Tribunal shall be bound by the decision of the General Court on points of law.'

<sup>49</sup> See Eric Carpano, 'Autopsie d'un revirement avorté: retour sur la saga *Jégo-Quéré* / Unión de Pequeños Agricultores' in Eric Carpano (ed), *Le revirement de jurisprudence en droit européen* (Bruylant 2012, Brussels, 181–208) 181ff.

<sup>50</sup> Commission Regulation (EC) 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII *a, b, d, e* and associated conditions for the control of activities of fishing vessels [2001] OJ L159/4.

<sup>51</sup> *Jégo-Quéré*, para 51.

<sup>52</sup> Case T-85/09 *Yassin Abdullah Kadi v European Commission* [2010] ECR II-5177, para 123.

<sup>53</sup> Statute – Annex I. – The European Union Civil Service Tribunal art 9; see also TFEU art 257.

## IV A Multi-Layered Precedent System

### 1 The Court and National Courts

In terms of the relationship between the Court and the courts of the Member States, two aspects are to be examined: the effect of the Court's rulings on the courts of the Member States and the effects of the decisions of the courts of the Member States on the other courts of the same or another Member State in matters relevant from the perspective of EU law.

Where the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union seems necessary before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling thereon under 267 TFEU.<sup>54</sup> Where any such question is raised in a case pending before a court or tribunal of last instance against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter before the Court.<sup>55</sup>

The Court's decision given in a preliminary reference procedure binds the referring court, but the decision has a wider effect: it has an impact on the courts of the same or other Member States facing an identical or similar factual situation and legal problem. According to AG Warner, the doctrine of *stare decisis* 'means that all Courts throughout the Community, with the exception of this Court itself, are bound by the *ratio decidendi* of' the Court's judgment.<sup>56</sup>

National courts (even of last instance) are not obliged to refer all cases to the Court. In *Da Costa*, the Court stated that 'the authority of an interpretation under Article 177 [now Article 267 TFEU – *added by the author*] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'<sup>57</sup> In the *CILFIT* judgment, the Court went further and extended this to situations 'where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.' The approach of the *CILFIT* judgment is underlined by the 'expectation that the Court will seek consistency in its judgments.'<sup>58</sup> Finally, in an *acte clair* situation, where the interpretation of EU law is obvious, the national court can decide not to refer the case and may decide itself based on the previous rulings of the Court.<sup>59</sup> These statements entail that the Court's decisions will also govern future situations arising before national courts, where the factual situation is identical or similar. Unless the Court finds its previous decision wrong, it will follow its ruling in later cases that are identical or similar.<sup>60</sup> The

<sup>54</sup> TFEU art 267(1).

<sup>55</sup> TFEU art 267(2).

<sup>56</sup> *Manzoni*, Opinion of AG Warner, p. 1662.

<sup>57</sup> *Da Costa*, p. 38.

<sup>58</sup> *Merck v Primecrown*, Opinion of AG Fennelly, para 142.

<sup>59</sup> Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 16.

<sup>60</sup> *Brown, Kennedy* (n 34) 345.

Rules of Procedure provide that where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case law or where the answer to the question referred for a preliminary ruling admits no reasonable doubt, the Court may decide to rule by reasoned order.<sup>61</sup>

Nevertheless, in all these cases, a court may still decide to turn to the Court with a preliminary reference if it finds this necessary.<sup>62</sup> This may be a vehicle for the courts of the Member States to call the attention of the Court to possible conflicts or uncertainties in the case law and suggest the reversal of the Court's practice.<sup>63</sup> From another perspective, a preliminary ruling may oblige national courts to change their previous practice if the national rules or their interpretation were not in accordance with EU law.<sup>64</sup>

Many times, national courts do not refer a case to the Court, since they are not courts of last instance or they consider the case obvious or already settled by the Court and thus they decide the case themselves. It may also happen that a court considers the case purely national. The reticence of national courts to request preliminary ruling gives rise to a particular layer of EU law. If a national court decides a case concerning EU law, it is possible that other courts in the same Member State will follow that decision without a preliminary reference procedure. This constitutes national EU-law material. The question may be posed whether the decisions of the courts of the Member States on EU law have binding force on the other courts of the same Member State. If a higher court decides a case on EU law, a court of lower instance is not bound by this decision and may still request a preliminary ruling to the Court.<sup>65</sup> As far as the effect of decisions of the courts of other Member States on EU law are concerned, although the impact of such rulings is limited primarily by linguistic and cultural reasons, these decisions do not even have a legally binding force in another Member State; instead they may have at most a persuasive force.<sup>66</sup> The loyalty clause of the Treaty on European Union (the TEU) may be interpreted so that if a national court realises that in the same matter different line of adjudication developed in the same or in different countries, the court is obliged to request a preliminary ruling from the Court.<sup>67</sup>

<sup>61</sup> Rules of Procedure art 99. Arnall, Interpretation and Precedent in European Community Law (n 32) 127.

<sup>62</sup> *Da Costa*, p. 38; *CILFIT*, para 15.

<sup>63</sup> Kecskés (n 27) 442; John Temple Lang, 'Precedents and Judicial Dialogue in European Union Law, Present and Future' in Carl Baudenbacher, Simon Plauzer (eds), *International Dispute Resolution. Volume 3. – The Role of Precedent* (German Law Publishers 2011, Stuttgart, 141–174) 163.

<sup>64</sup> Pascale Deumier, 'Le revirement de jurisprudence en questions' in Eric Carpano (ed), *Le revirement de jurisprudence en droit européen* (Bruylant 2012, Brussels, 49–68) 55.

<sup>65</sup> Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33. Brown, Kennedy (n 34) 354; Arnall, Interpretation and Precedent in European Community Law (n 32) 135–136.

<sup>66</sup> Brown, Kennedy (n 34) 355–356.

<sup>67</sup> TEU art 4(3); Temple Lang (n 63) 163. It must be noted that in practice the financial, human and linguistic resources of national courts are limited, so they are unable to take into account the practice of other Member States appropriately.

## 2 The Court and the European Court of Human Rights

The European Court of Human Rights created its own case law under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).<sup>68</sup> The Court had regard to the developments of the case law of the European Court of Human Rights and often cited in its decisions. In its practice, the Court's decisions have been in line with the decisions of the European Court of Human Rights.<sup>69</sup> From the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights (the Charter) became binding.

According to Article 52 (3) of the Charter:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53 of the Charter provides that:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

These provisions also entail that the Court cannot interpret rules on the protection of human rights more restrictively than according to the decisions of the European Court of Human Rights. When interpreting the Charter, it may happen more frequently in the future that the Court has to adapt its own case law to the developments of the adjudication of the European Court of Human Rights.<sup>70</sup>

By the Court's former case law and now by the binding provisions of the Charter, the precedent law of the European Court of Human Rights is in essence built into the practice of the Court.

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<sup>68</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed 4 September 1950, 213 UNTS 222 (entered into force 3 September 1953). Yonatan Lupu, Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413–439, 413ff; Alastair Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-law' (2009) 9 *Human Rights Law Review* 179–201, 179ff.

<sup>69</sup> For an exception, see Joined cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 2859, paras 17–18 and *Niemietz v. Germany*, no. 13710/88, 16 December 1992, §§ 27–33, Series A251-B.

<sup>70</sup> Temple Lang (n 63) 156 and 159.

### 3 The Court and the EFTA Court

The Court also takes into account the case law of the EFTA Court. In some cases, it made references to the decisions of the EFTA Court.<sup>71</sup> In *Bellio Flli*, the Court held that 'both the Court and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly.'<sup>72</sup>

### V Overruling in the Case Law of the Court

The notion of overruling will be construed here as to refer to cases where the Court changes its view and give a different answer to a materially identical or very similar situation. It is not intended to address cases where the Court distinguishes a given case on the grounds of the factual circumstances (and accordingly give a different answer) or where the Court reaffirms a previous ruling and it simply changes the reasoning or supplements its arguments. Jaeger distinguishes between overruling (*revirement*) and innovation, where the first necessarily involves a break with earlier decisions, a change to a former solution, while the latter means only the addition of new reasons, more precision or a variation of the earlier solution.<sup>73</sup> Although this distinction is in substance right, it cannot be denied that an overruling may involve innovation.

The overruling of previous judgments may be necessary as an answer to errors committed in adjudication or to social and economic changes. AG Poiares Maduro stated that:

It is true that stability is not and should not be an absolute value. The Court has also recognised the importance of adapting its case-law in order to take account of changes that have taken place in other areas of the legal system or in the social context in which the rules apply. It has also accepted that the appearance of new factors may justify adaptation or even review of its case-law.<sup>74</sup>

As AG Trstenjak set out 'the Court of Justice had to be put in a position to depart from its previous case-law if necessary and to steer developing Community law in a different direction.'<sup>75</sup> AG Jacobs went further in the *HAG II* case, stating that:

The Court has consistently recognized its power to depart from previous decisions, as for example by making it clear that national courts may refer again questions on which the Court has already ruled. [...] That the Court should in appropriate case expressly overrule an earlier decision is I think an inescapable duty...<sup>76</sup>

<sup>71</sup> See for example Case C-192/01 *Commission of the European Communities v Kingdom of Denmark* [2003] ECR I-9693, paras 47, 49–53.

<sup>72</sup> C-286/02 *Bellio Flli Srl v Prefettura di Treviso* [2004] ECR I-3465, para 34 cited by Temple Lang (n 63) 159 (fn. 43).

<sup>73</sup> Jaeger (n 11) 28.

<sup>74</sup> *Cipolla*, Opinion of AG Maduro, para 29.

<sup>75</sup> *Internationaler Hilfsfonds*, Opinion of AG Trstenjak, para 85.

<sup>76</sup> Case C-10/89 *SA CNL-SUCAL NV v HAG GFAG* [1990] ECR I-3711 (HAG II), Opinion of AG Jacobs, para 67.

In practice, the Court deviates from its previous decisions with relative restraint: the number of overrulings is not too high in its history of sixty years.

## 1 Form of Overruling

The identification of those decisions where the Court reverses its previous case law, is difficult, because the Court does not necessarily call the attention of the readers of its decisions to the deviation. If the Court deviates from its earlier case law, it rarely does it explicitly. In his opinion related to the *HAG II* decision delivered in 1990, AG Jacobs noted that ‘the Court should in an appropriate case expressly overrule an earlier decision [...], even if the Court has never before expressly done so.’<sup>77</sup> [*italics added*]. He stressed that ‘the Court should [...] make it clear, in the interests of legal certainty, that it is abandoning the doctrine of common origin laid down in *HAG I*.’<sup>78</sup>

The problem also arises that sometimes the Court does not make it clear which earlier decisions have been overruled and which have not, as the effect of a new decision of the Court. For instance, the *Keck* judgment was criticised by several authors because it did not expressly list the cases overruled by the Court.<sup>79</sup> In other cases, the Court explicitly identifies the case to be overruled. Thus, in *Brown*, the Court overruled the interpretation of Directive 76/207/EEC given in the *Larsson* case,<sup>80</sup> to which it expressly referred in its judgment, in order to grant protection against dismissal for pregnant women who are unable to work at any time during the pregnancy because of illness resulting from the pregnancy.<sup>81</sup>

## 2 Reasons for Overruling in the Court’s Case Law

It is difficult to classify the cases where the Court reversed its earlier line of case law. The reasons for overruling may be manifold. It may happen that the Court finds its earlier decisions inappropriate under the new circumstances or it wishes to restrict an unintended or unforeseen interpretation of the case law. The policy of overruling is not predefined.<sup>82</sup> Changes may be progressive or regressive.<sup>83</sup> In a progressive change, as Mehdi put it, the creative force of the Court is demonstrated.<sup>84</sup> However, this is not always the case. Sometimes a more restrictive approach, which leads to the alteration of an earlier line of decisions, seems more acceptable for the Court.

<sup>77</sup> *HAG II*, Opinion of AG Jacobs, para 67.

<sup>78</sup> *HAG II*, Opinion of AG Jacobs, para 67.

<sup>79</sup> Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] I-6097. Arnall, *Interpretation and Precedent in European Community Law* (n 32) 129; Arnall, *The European Union and its Court of Justice* (n 28) 630.

<sup>80</sup> Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S* [1997] ECR I-2757.

<sup>81</sup> Case C-394/96 *Mary Brown v Rentokil Ltd* [1998] ECR I-4185 para 27. Arnall, *The European Union and its Court of Justice* (n 28) 630.

<sup>82</sup> Jaeger (n 11) 27.

<sup>83</sup> Jaeger (n 11) 33

<sup>84</sup> Mehdi (n 12) 115.

### a) *Narrowing the interpretation of the previous case law*

In the famous *Keck* case, the question was whether the French provision prohibiting resale at a loss is in conformity with the free movement of goods. Two French supermarket managers, who were prosecuted for selling certain products below their purchase price, argued that the French prohibition is a measure having equivalent effect in accordance with the previous *Dassonville* judgment.<sup>85</sup> In *Dassonville*, the Court stated that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.'<sup>86</sup> The Court expressly noted that 'in view of the increasing tendency of traders to invoke Article 30 of the Treaty [now Article 34 TFEU – *added by the author*] as a means of challenging any rules whose effect is to limit their commercial freedom [...], the Court considers it necessary to re-examine and clarify its case-law on this matter.'<sup>87</sup>

Here, the reason for the deviation from the earlier case law has been that, in practice, parties interpreted the *Dassonville* judgment too broadly. Hence, the Court distinguished between rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling and packaging) and national provisions restricting or prohibiting certain selling arrangements. The former constitute measures of equivalent effect falling under the scope of application of the current Article 34, while the latter do not.<sup>88</sup> The Court itself indicated the deviation by the 'contrary to what has previously been decided' wording concluding that selling arrangements do not fall under Article 30 EEC Treaty.<sup>89</sup>

It is interesting that, in his opinion on one of the Sunday trading cases, AG van Gerven advocated a more cautious application of Article 30 EEC Treaty and a possible deviation from *Dassonville*.<sup>90</sup> In that case, the Court upheld the consequent application of the *Dassonville* decision. In *Keck*, AG van Gerven in turn did not wish to deviate from *Dassonville* and took it as a point of departure. In his opinion, he called attention to the need for the Court to adhere to its previous judgment:

I will thus assume from now on that the broad *Dassonville* formula still remains the cornerstone of the Court's case-law concerning the sphere of application of Article 30 of the EEC Treaty. In order to avoid any confusion, I think that the Court owes a duty to the national courts to make this quite clear.<sup>91</sup>

<sup>85</sup> Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

<sup>86</sup> *Dassonville*, para 5.

<sup>87</sup> *Keck*, para 14.

<sup>88</sup> *Keck*, paras 15–16.

<sup>89</sup> *Keck*, para 16.

<sup>90</sup> Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851, Opinion of Advocate General Van Gerven.

<sup>91</sup> *Keck*, Opinion of AG van Gerven, para 8.

The reason of its reconsideration might have also been that in *Dassonville* the Court gave a too general definition of measures having an equivalent effect.<sup>92</sup> In *Keck*, the Court limited this too broad definition. In relation to the *Keck* judgment, AG Maduro remarked that ‘the Court took into consideration the consequences of its earlier case-law in the social context of the relevant rules and the legal systems responsible for applying them’ and this led to the reversal of the previous case law.<sup>93</sup>

The Court touched several times upon the issue of whether the free movement of goods provisions bind private persons. In *Dansk Supermarked v Imerco*, the issue was that Imerco ordered china services from a UK company subject to the condition that the latter company may not sell them in the Scandinavian countries.<sup>94</sup> Dansk Supermarked, a Danish company, still obtained such products through a Danish reseller and put them on market. The Court held that individuals cannot derogate from the mandatory provisions on the free movement of goods and that a prohibition on the importation into a Member State of products lawfully marketed in another Member State under a private agreement may not qualify the importation of those products as improper or unfair commercial practice.<sup>95</sup> This implies that the Court assessed on the merits an agreement between private parties under the provisions on the free movement of goods. Subsequently, in *Vlaamse*, the Court declared that Article 30 EEC Treaty ‘concern only public measures and not the conduct of undertakings.’<sup>96</sup> Here, the Court did not make any reference to the fact that it intended to reverse its earlier case law.

### b) Giving a broader interpretation

In the aforementioned *Plaumann* case, Germany asked for authorisation from the Commission to suspend collection of the customs duty laid down in the Common Customs Tariff for fresh clementines and to apply a reduced tariff instead. The Commission refused this request by a decision. The issue was whether *Plaumann*, a German clementine importer company, may bring an action against the Commission for payment of compensation equivalent to the customs duties and the turnover tax paid because of the refusal of the request. The Court dismissed the compensation claim.<sup>97</sup> The Court required that the decision must first be annulled before bringing an action for compensation, since this could have proven that the act of the institution was wrongful. As the decision in question had not been annulled, *Plaumann* could not successfully claim damages. The Court changed its attitude on the precondition of annulment action in *Lütticke* and stated that an action for damages is an independent form of action.<sup>98</sup>

In the famous *van Gend en Loos* judgment, the Court found that one of the conditions of the direct effect of any article of the EEC Treaty is that it must contain a prohibition, a negative

<sup>92</sup> See *Vida* (n 27) 58 referring to Timmermans.

<sup>93</sup> *Cipolla*, Opinion of AG Pöiares Maduro, fn 17 to para 29.

<sup>94</sup> Case 58/80 *Dansk Supermarked A/S v A/S Imerco* [1981] ECR 181.

<sup>95</sup> *Dansk Supermarked*, paras 17–18.

<sup>96</sup> Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, para 30.

<sup>97</sup> *Plaumann*, p. 108.

<sup>98</sup> Case 4/69 *Alfons Lütticke GmbH v Commission of the European Communities* [1971] ECR 325 para 6.



obligation.<sup>99</sup> Based on this, the Court attributed direct effect to Article 12 of the EEC Treaty, that provided that Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other. The Court abandoned the precondition of the existence of a negative obligation in *Lütticke v Hauptzollamt Saarlouis* in relation to the interpretation of the third paragraph of Article 95 EEC Treaty.<sup>100</sup> The first two paragraphs of Article 95 (now Article 110 TFEU) prohibit protectionist or discriminatory internal taxes. The third paragraph of Article 95 EEC Treaty (already not in force), imposed an obligation on the Member States to ‘repeal’ or ‘amend’ any provisions which conflict with the rules set out in the preceding paragraphs until the beginning of the second stage of the transitional period, that is until 1 January 1962. The Court considered that, upon the expiry of that period, the general rule emerges unconditionally into full force. After having acknowledged that the first paragraph of Article 95 had direct effect, the Court in essence stated that the third paragraph had the same effect, although it contained a positive obligation of amending or eliminating the national provisions violating the first two paragraphs of Article 95. The Court did not refer to the earlier approach taken in *van Gend en Loos*, requiring a negative obligation for the direct effect of a Treaty provision.

In the *van Duyn* judgment, the Court held that a Member State can deny the entry of a citizen of another Member State for reasons of public policy if that person would like to work for the Church of Scientology, an organisation, the activity of which was considered harmful by the host state. This holds even if the operation of that organisation is not legally prohibited by that Member State and the nationals of the host Member States are not restricted from taking part in the activity of the organisation. In the later *Adoui* and *Cornuaille* joined cases, the question was posed to the Court whether Belgian authorities could lawfully refuse a permit of residence from two French nationals who intended to work in Belgium in a bar, the activity of which was suspected to be linked to prostitution.<sup>101</sup> Two of the questions referred to the Court explicitly addressed the *van Duyn* case.<sup>102</sup> Nevertheless, reaching its conclusion, the judgment did not even refer back to *van Duyn*. The Court held that a ‘conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct.’<sup>103</sup> Here, the Court construed public policy more narrowly, whereas it granted a wider protection for free movement rights.

<sup>99</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* English special edition ECR I, II.-B.

<sup>100</sup> Case 57/65 *Alfons Lütticke GmbH v Hauptzollamt Sarrelouis*, English special edition ECR 205.

<sup>101</sup> Joined cases 115 and 116/81 *Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State* [1982] ECR 1665.

<sup>102</sup> Questions (3) and (4) see *Adoui and Cornuaille*, para 6.

<sup>103</sup> *Adoui and Cornuaille*, para 8.

### c) *Defending the institutional balance*

In the 302/87 *Parliament v Council* case, also known as the *Comitology* case, the Court stated that the European Parliament is not entitled to bring an annulment action against a Council decision of general application.<sup>104</sup> This reflected the wording of the EEC Treaty and Treaty establishing the European Atomic Energy Community (the Euratom Treaty), which did not mention the Parliament among the institutions entitled to bring annulment proceedings. The Court argued that various legal remedies were available to guarantee the Parliament's prerogatives. Shortly after, the question of the Parliament's right to bring annulment proceedings arose again. In the C-70/88 *Parliament v Council* (also known as *Chernobyl*) case, the problem was that the Parliament did not accept the legal basis for Council Regulation 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedstuffs following a nuclear accident or any other case of a radiological emergency and brought an action against the Council.<sup>105</sup> AG van Gerven suggested that the Court reconsider its earlier standpoint in order to provide adequate legal protection to the Parliament.<sup>106</sup> The Court started seemingly with a distinction and found that in the given case the available legal remedies (an action for failure to act or a reference for a preliminary ruling) were proved ineffective or uncertain. It reached, however, a more general conclusion, stating that the Court is obliged to maintain the institutional balance and defend the prerogatives of the Parliament. The lack of reference to the Parliament in the wording of the EEC Treaty and the Euratom Treaty was considered as a mere procedural gap and the Court found that 'an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement.'<sup>107</sup> Here, apart from the abovementioned 'distinction,' the Court did not bother much that it gave another direction to its previous case law. It must be noted that the change in the case law was followed by the amendment of the EEC Treaty so as to include the Parliament among the institutions entitled to initiate annulment proceedings.<sup>108</sup>

<sup>104</sup> Case 302/87 *European Parliament v Council of the European Communities* [1988] ECR 5615.

<sup>105</sup> Case C-70/88 *European Parliament v Council of the European Communities* [1990] ECR I-2041. Analysed by: Margaret McCown, 'The Use of Judge-Made Law in European Judicial Integration: Precedent-Based Arguments in EU Inter-Institutional Disputes,' 17–19 <[http://aei.pitt.edu/2141/1/002191\\_1.PDF](http://aei.pitt.edu/2141/1/002191_1.PDF)> accessed 1 August 2015. The legislation concerned: Council Regulation (Euratom) 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency [1987] OJ L371/11.

<sup>106</sup> Case C-70/88 *Parliament v Council*, Opinion of AG van Gerven, paras 9, 12, 14 and 15.

<sup>107</sup> C-/88 *European Parliament v Council of the European Communities*, para 27.

<sup>108</sup> Temple Lang (n 63) 152. See the current TFEU art 263.

#### d) *Providing a human rights conform interpretation*

In *Akrich*<sup>109</sup> and in *Metock*,<sup>110</sup> the question was whether prior lawful residence may be required from the non-EU citizen spouses of Union citizens who wished to acquire a residence card in another Member State. In *Akrich*, the Court answered the question affirmatively, permitting national legislation to refuse to grant, under Regulation No 1612/68/EEC,<sup>111</sup> a right of residence in the Member State of origin to which a Union citizen had returned to establish herself with her spouse who was a national of a non-member country, since the third country national spouse had not previously been lawfully resident in a Member State. The judgment noted that the national court assessing the circumstances must have regard to the right to respect for family life under Article 8 of the ECHR. In the *Metock* judgment, the Court reversed its earlier ruling, stating that the conclusion of the *Akrich* case 'must be reconsidered.'<sup>112</sup> In *Metock*, the Court referred to the fact that the application of Directive 2004/38/EC does not depend on the prior lawful residence of third country family members.<sup>113</sup> The Court also found that the prior lawful residence requirement has a deterrent effect on the exercise of the freedom of movement of Union citizens: if a Union citizen cannot lead a normal family life together with his spouse, he will be discouraged from moving to another Member State. In addition, requiring prior lawful residence unilaterally by some Member States but not by others leads to the partitioning of the Internal Market in terms of the free movement of Union citizens. Finally, the Court underpinned its decision by referring here again to Article 8 of the ECHR that guarantees the right to respect for private and family life. Here, the broader internal market-friendly and the human rights conform interpretation have been intertwined.

#### e) *Amendment of the treaties, changes in legislation and developments of the case law*

In the *Hag* cases, the Court altered its case law due to the development of its adjudication on the relation between intellectual property rights and the free movement of goods. The common origin doctrine was in the background of the *Hag* cases. The German Hag AG, a coffee production and distribution company, was the holder of trademark 'Hag'. Subsequently, Hag AG set up a subsidiary in Belgium, Hag/Belgium and Hag AG's Belgian and Luxembourg trademarks were assigned to this subsidiary. At the end of the Second World War, the shares of the Hag Belgium were sequestered as enemy property, and in 1971 Hag/Belgium assigned further its Benelux Hag trademarks to VZF. The problem in the *Hag I* case was that when Hag AG started

<sup>109</sup> Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607.

<sup>110</sup> Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

<sup>111</sup> Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2, 19.10.1968.

<sup>112</sup> *Metock*, para 58.

<sup>113</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

to sell its coffees to Luxembourg retailers under its German trade mark, VZF brought a trademark infringement procedure against Hag AG. The question was whether free movement of goods provisions may prevent the holder of the trade mark from opposing the importation of products that bear the same trademark in another Member State, because the two trademarks previously belonged to the same holder. The Court answered the question so that, under the free movement of goods provisions, the marketing of products bearing an identical trademark cannot be prohibited by the holder of trade mark in another Member State in spite of the common origin of the trademarks. The same issue arose again in the *Hag II* case, when SA CNL-SUCAL NV (a company established through the purchase and transformation of VZF) commenced to sell decaffeinated coffee under the Hag trade mark in Germany and as a reaction Hag AG instituted proceedings against SA CNL-SUCAL in order to prevent the importation.<sup>114</sup> In his opinion, AG Jacobs called for the reversal of the *Hag I* judgment and he dealt with the possibility of overruling in detail. He found that the common origin doctrine developed in the *Hag I* decision did not have a legitimate basis on the grounds of the provisions of the EC Treaty and it was difficult to reconcile with later developments of the case law of the Court.

To answer the question, the Court referring to the *Hag I* case expressly declared that:

[...] it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in that judgment in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods.<sup>115</sup>

Thus, the Court made clear the grounds for reconsidering its earlier judgment: the later development of the case law on industrial property rights and the free movement of goods.<sup>116</sup> Finally, the Court held that independently of their common origin each trademark holder can oppose the importation of the goods bearing an identical trademark in the Member State where the trademark belongs to him if the products are similar and they may be confused by the consumers.<sup>117</sup> However, the reversal of *Hag I* may be considered as ‘a step backwards’ by sacrificing or at least restricting the free movement of goods to guarantee stronger trademark protection.<sup>118</sup>

In *Bidar*, the amendment of the EC Treaty led to a change in the Court’s practice. In this case, the Court had to decide whether a university student is entitled to a student loan even if he is not considered as settled in the host state under the law of the latter.<sup>119</sup> In the *Lair* and

<sup>114</sup> Case C-10/89 *SA CNL-SUCAL NV v HAG GF AG* [1990] ECR I-3711.

<sup>115</sup> *Hag II*, para 10.

<sup>116</sup> *Vida* (n 27) 57. In the judgment, the Court referred to the following cases: Case 78/70 *Deutsche Grammophon Metro* [1971] ECR 487; Case 16/74 *Centrafarm v Winthrop* [1974] ECR 1183; Case 19/84 *Pharmon v Hoechst* [1985] ECR 2281; Case 102/77 *Hoffmann-La Roche v Centrafarm* [1978] ECR 1139; Case 3/78 *Centrafarm v American Home Products Corporation* [1978] ECR 1823.

<sup>117</sup> *Hag II*, paras 18–19.

<sup>118</sup> ‘The Court of Justice changes its mind again’ (1991) 16 *European Law Review* 365–366.

<sup>119</sup> Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

*Brown* cases, the Court answered the question so that assistance given to students for their maintenance and training, such as a student loan, falls outside the scope of Article 7 EEC Treaty (Article 12 EC Treaty, now Article 18 TFEU).<sup>120</sup> However, in *Bidar* the Court reconsidered these judgments taking into account the legal developments that occurred since *Brown* and *Lair*. At that time, education policy was outside the competences of the Community, and social policy fell within the competence of the Member States only in so far as it was not covered by specific provisions of the EEC Treaty.<sup>121</sup> However, since then the citizenship of the Union has been introduced and a new chapter on education policy has been inserted into the EC Treaty. In light of these developments, the Court concluded that the possibility of obtaining a student loan by a student resident in another Member State falls under the scope of Article 12 EC Treaty.

## VI Conclusions

Previous decisions play an important role in the reasoning of the Court. However, the Court does not reveal much how it conceives its own case law. The Advocates General, the parties to the legal proceedings and academics are much more interested in understanding the particularities of the Court's adjudication.

Sometimes, the Court uses (at least in the English versions of the decisions) the terminology of the common law system of legal precedent. Some of the Advocates General and the parties to the procedure do the same. However, the Court's practice does not formally constitute a precedent system. Following Komárek's definition, the Court's decisions constitute precedents taken in a broader sense, according to which precedent means 'a prior judicial decision which has normative implications beyond the context of the particular case in which it was delivered.'<sup>122</sup>

The case law of the Court shows up certain specific features. The Court is not bound by its earlier decisions. Notwithstanding this, the Court only seldom deviates from its previous rulings. The General Court and the Civil Service Tribunal are not bound by the Court's decisions, nor do they have to follow their own decisions. The Court's case law is intertwined with the practice of the European Court of Human Rights, the EFTA Court and finally the courts of the Member States. This interlocking produces a multi-layered precedent law. The actors of this multi-layered system have regard to the case law of the other judicial organs.

The Court may overrule a former decision if it finds this appropriate. As AG Fennelly put it, 'while the judgments [...] are too few to admit of extensive generalizations, it appears that the Court will reexamine and, if need be, decline to follow earlier judgments which may have

<sup>120</sup> Case 39/86 *Sylvie Lair v Universität Hannover* [1988] ECR 3161; Case 197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 3205.

<sup>121</sup> *Bidar*, para 38.

<sup>122</sup> Jan Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts' LSE Law, Society and Economy Working Papers 4/2011, 3. <[http://www.lse.ac.uk/collections/law/wps/WPS2011-04\\_Komarek.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2011-04_Komarek.pdf)> accessed 1 August 2015.

been based on an erroneous application of a fundamental principle of Community law...<sup>123</sup> This rarely happens and the Court does it not always explicitly. Often, a clear justification of the alteration is also absent. With this background, it is difficult to classify those cases where the Court reconsiders its practice. The reasons for altering a certain line of adjudication range from the protection of human rights (*Metock*) to the safeguarding prerogatives of the EU institutions (*Chernobyl*). In some of the cases an integrationist approach prevailed over a narrower interpretation (*Adoui*), in other cases the Court adopted rather a restrictive approach for reducing the number of complaints (*Keck*). Sometimes, the development of the Court case law in a related field led the Court to change its attitude (*Hag II, Bidar*).

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<sup>123</sup> *Merck v Primecrown*, Opinion of AG Fennelly, para 146.