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# Detecting the Footprints of the Legal Reasoning of the Court of Justice: Inquiry into the Citation Methods

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ABSTRACT: In its rulings, the Court of Justice of the EU (CJEU) largely rely on its precedents. Sometimes these references do not seem particularly important, as they might be chosen without a precise method, or are simply aimed at showing that the argument made is rooted in the previous case-law. In other cases, scholars may use citations to trace a point of law back to its precedents and discover non-immediately evident elements. Citations may not attract attention, but learning to use some techniques, apt to disclose the approach of the Luxembourg Court behind the use of references to previous case law, greatly helps, on many occasions, to grasp the way the CJEU looks at its precedents and to catch how it manages the relationships with the different lines of its previous case law. As part of the textual analysis, the aim of the inquiry into citations is, in particular, to discover possible shifts in meaning of certain expressions throughout the *chain* of citations covering sometimes large time spans, or to highlight undermotivated passages in the legal reasoning contained in CJEU's judgments, maybe in the context of explicit or implicit overturns. Anyway, citations analysis investigates, at least sometimes, almost casual choices, therefore it should be used carefully and without overestimating its results. It should be combined with other tools to confirm and corroborate the elements emerged, on the basis of an equilibrate approach based on systematic interpretation and a solid theory of precedents, and with a view to avoiding the risks of exasperate originalism applied to case law. Moreover, all elements should be read under the light of historical changes involving sectoral lines of interpretation or even some basic paradigms of Union Law, that can provoke apparent inconsistencies, but that often also show the vitality of the EU legal order.

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## 1. Simple as it is?

'When did the Court of Justice state this for the first time?': this is a question EU Law scholars often ask themselves. They sometimes also follow the citations[1] the Court of Justice itself often provides as a comfortable means to trace a point of law, contained in a judgment, back to its origin. The reference provided is normally to the latest ruling where the point has been restated and, very often, to 'the case law cited': going to that ruling and following again the reference to the other previous precedents makes it possible, after another or some other passages, to reconstruct the complete strain of case-law. *Remonter le fil* thus becomes a relatively easy exercise and EU Law scholars, well acquainted with the search engine of the CURIA website,[2]

[1] See, amongst the most recent studies on the matter, E Paunio, 'Reasoning with past cases at the CJEU: linguistic, institutional and systemic constraints', in A Frese and J Schumann (eds), *Precedents as Rules and Practice – New Approaches and Methodologies in Studies of Legal Precedents* (Nomos 2021) 129. Other published studies often regard specific areas, as inferring general trends from single strains of case-law, or even from sectors, is not easy: see for instance J Fejø, 'How does the ECJ cite its previous judgments in competition law cases?', in M Johansson, N Wahl and U Bernits (eds), *Liber Amicorum in Honour of Sven Norberg – A European for All Seasons* (Bruylant 2006) 195. Whilst trying to detect general trends, I will also focus on two case-studies: see sections 3 and 4, selected however for their significance also on the systematic plane. With reference to the connected habit of reporting the exact wording of precedents (again with a focus on a specific field), see FX Millet, 'In the Name of Analogy: Judicial Copy-pasting and Competence Creep in the Connection Data Case.law' (2024) 61 *Common Market Law Review*, 1289; see also A Napieralski, 'Between Procedural Autonomy and Sincere Cooperation. Understanding the Self-Citation Practice of the Court of Justice of the EU' (Working Papers of the Centre for Antitrust and Regulatory Studies Faculty of Management, University of Warsaw, No. 3-2025) papers.ssrn.com.

In this paper, I will use the word 'citation' to indicate the act of the Court of Justice of referring to one or more of its precedents. Sometimes the reference is of a rather broad type, but the habit of the Court of Justice is to reproduce statements, therefore, references are often also literal quotations. It is nevertheless true, as it will be recalled in the main text, that the wording may sometimes be not exactly the same: I will specify in the course of the analysis that where references are non-literal, attention should be paid to the possible nuances in the meaning respectively of the original and of the referred formulations. Unless specified differently, I will refer, on the whole, to 'citations', while, in more general terms, or when the wording changes are relevant for the purposes of the analysis, I will prefer to use the word 'references' or similar terms. It should be noted that quotation marks are normally not used by the Court of Justice (with a rather recent exception: see Section 1.1.), however, as said, wording is often reported literally; I will use the word 'quotation' where the fact that a citation is literal is especially relevant. On the distinctions between the different citation techniques, please see the following pages in the main text and Section 1.1.

[2] www.curia.europa.eu. A new search page was proposed early 2026. However, after many requests, the old search engine, which proved to be more reliable and user-friendly, has been made available again alongside the new one for the time being. Citation analysis benefits of a search engine which offers a wide array of search keys and of possible combinations thereof; at the same time, taking into account the type of research normally used would be useful for the framing of the tools of the CJEU website. In the present paper, I rely on the use of the classical curia search engine: the described kind

should finally be able to discover the ruling where the point of law in question has been made for the first time.

The situations of the different cases in question can hardly be the same and they might come from very different historical, factual and legal backgrounds. This may complicate things a little bit, as the point of law to be taken from previous judgments may have been formulated in a too different context or it might be …a different point of law.

As recent literature has shown, with the use of enquiries applying network analysis to the case-law of the Court of Justice, citations in CJEU's rulings may openly report an entire strain, but the substantial reference should sometimes be intended to a more limited point of law.[3] On the one side, this requires a critical assessment by the researcher, to identify the effective point of law which constitutes the relevant piece of argumentation used by the Court of Justice. On the other side, the citations may carry also the non-directly relevant points with the effectively useful point, thus making the entire reported sentence as a fixed expression, acquiring normative character as a whole.

Hence, the citations exercise drives scholars through a quite intricated itinerary, and often the Court of Justice may call readers to see a previous decision 'by analogy' or 'to that effect'.[4] Thus, in the course of a reconstruction, there may be a shift in the argumentation – or maybe more than one – that makes unclear whether the Court of Justice is really referring to the *last* point of law, i.e. to the point made in the *last case* cited, or at least in the *latest case-law* cited.[5] Even if the arguments rest

of research can be carried out also with new foreseeable tools, maybe potentiated by artificial intelligence, but they have not been used for the preparation of this paper.

[3] See Napieraski (n 1), 6 and literature cited therein.

[4] Whether the Court, when saying 'by analogy' is strictly following an analogical process, or if it does it when using the formula 'to that effect', is a question I do not address at this stage of the analysis – where the interest is merely to present a problem – and that will be treated incidentally in the following sections. Indeed, the methods used may vary a lot and one may get the feeling that a specific formula does not necessarily entail the use of one and only precise logical process. As it will be stated in the main text in this section, the aim of this research is to detect how the Court of Justice has used citations in two specific case-studies to show how useful this kind of research can be in clarifying some passages of the real legal reasoning followed. Such passages will be the object of attention to understand how specific legal issues have been handled and to detect whether the argumentation explicitly given is in line with the results of the '*citations analysis*'. As a further step, EU Law scholars would probably try to assess critically what kind of logical process has been effectively followed.

[5] An example may help to explain the possible developments of the case-law of the Court of Justice. In a period when the case-law was still not too abundant, especially as regards some sectoral developments in the context of the internal market, the Court of justice used to cite almost all the relevant precedents. Nonetheless, shifts in argumentation like those to which I hinted at in the main text, could already arise. For instance, the Court of Justice started to express the principle whereby, when exercising national competences, the States had to respect Union (then Community) law already many years ago: as regards healthcare, it is often reported that such principle has been firstly expressed in Case C-158/96 *Raymond Kohll v Union des caisses de maladie* EU:C:1998:171, para 19. In the passage in question, the Court refers to Opinion of AG Tesauro Cases C-158/96 *Raymond Kohll v Union des caisses de maladie* and C-120/95 *Nicolas Decker v Caisse de maladie des employés privés* EU:C:1997:399: by analyzing the Opinion, one discovers that the principle in question comes out of Case 110/79 *Coonan* EU:C:1980:112, para 12, which,

the same and where the literal formulation is unchanged, the way the Court of Justice intends such arguments can vary over time. This adds another layer of complexity: even when the Court is making reference to the *first* case where a certain statement has been made – as it occurs when the Luxembourg Judges are ostensibly willing to stress the importance of the *founding* building block of a certain strain of case-law – such reference has to be intended not just in its original context, but in the *new context* and in the way it has been intended and re-construed also by the subsequent case-

in its turn, recalls Case 266/79, *Brunori*, para 6. In these last cases, the Court of Justice was interpreting Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (see now Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems) – relevant also in the *Decker* and *Kohll* cases – and affirmed that national security systems had to be fully managed at national level and that Member States had to set the conditions for having access to each service or social measure. This strain of case law regarded social security ('*sécurité sociale*' in the French version), more than healthcare (see also Case C-349/8 *Paraschi* EU:C:1991:372, para 15, Joined Cases C-4/95 and C-5/95, *Stöber* (C-4/95) and *José Manuel Piosa Pereira* (C-5/95), EU:C:1997:44, para 36). The Regulation in question in fact mainly regarded social security systems (but some provisions touched upon healthcare, as well). It is true that in some Member States healthcare and social security share some important features (and some systems are mixed), but actually they pertain to different areas and are often subject, in many respects, to separate legal disciplines. Therefore, when recalling these judgments, there was an implicit recognition that both areas pertain to national law and the same logic should apply to the effect that, when exercising the relative competences, Member States had to respect European law. Nevertheless, there was no explicit statement that there had been recourse to analogy, or another logical/interpretative process (from social security to healthcare, assuming or not that the former may be a broader area including also the latter).

In the *Coonan* case, the issue regarded healthcare treatment for elders (with a combination of social security and healthcare), then the affirmation that Member States had to respect European law when exercising their competences passed on to Case 238/82 *Duphar* EU:C:1984:45, para 16, where no precedent is cited, but, as the Court of Justice would have done for a long time, the expression 'social security' is used with reference to healthcare. Then, in case Case C-70/95 *Sodemare* EU:C:1997:301, para 27, where healthcare aspects, although combined with social security, seemed dominant, the Court restated that the powers to 'organize their social security systems' rested in the hands of Member States, by making reference to the mentioned Case *Duphar*, regarding the healthcare sphere, and to Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v AGF and Cancava*, para 6, where, even with the presence of elements regarding sickness insurance, the legal issue regarded the broader area of social security. The story could go on even longer… however, the passages reconstructed above seem enough to understand that, in the cases mentioned, different elements came into play: the developments induced by the evolution of Community/Union competences (and the way the Institutions, States and private parties intend them), the differences in the qualification under the national systems of each Member States of healthcare and social security, possible difficulties in translation of specific national legal expressions, but – what matters more here – the fact that, in juggling with these difficulties, the Court of Justice found it useful and, one may say, comfortable to extend the same logic exposed in some initial cases to the entire sector of 'social security', including healthcare: in this complex strain, looking at citations helps to understand the itineraries implicitly and explicitly followed by the case-law. A little trace of this itinerary can be found also in the Italian translation of some judgments following *Decker* and *Kohll*, dealing with trans-national healthcare, where the expression 'previdenziale' (which pertain basically to social security principally in the area of pensions) is used, in a quite unusual way, with reference to the healthcare system of States: see Case C-372/04 *Watts* EU:C:2006:325, para 103.

law …that is maybe not cited (or not directly or not completely).[6] Take primacy: some aspects will be the object of attention in the next pages – where specific references will be provided –, however it can be anticipated that the scope of primacy has clearly broadened over time. Therefore, a reference, for instance, to the seminal judgment in *Costa v. Enel*[7] is very often not just limited nowadays to the *nude* idea of the duty to set aside a national provision in contrast with a European one, but also to a series of other aspects, added by the subsequent case-law and/or given by the new meanings the Court is willing to derive from the reasoning in the case at hand.[8]

It can be accepted that an order, a judgment, or an opinion of the Court of Justice enters into the *corpus* of its jurisprudence and is thus the object of interpretation by the Court itself on new successive occasions. To our limited ends, it should be borne in mind that especially old, fundative, rulings are to be intended in their original

[6] This often happens in cases where the Court is willing to show that a new line of reasoning is carved out of a traditional argument (see, by way of example, Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117 (*ASJP*), paras 30-35, where reference is however not made to founding building blocks of the case-law, but to rather recent cases, which are however seen under a new light, given the need to provide new arguments), or in solemn rulings where a broad reconstruction is provided (see, for instance, Opinion 1/09 *Draft agreement on the Creation of a unified patent litigation system* EU:C:2011:123, paras 65, 68 and 70, or Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454, paras 157, 161, 166, 169, 170, 175 and 176).

[7] Case 6/64 *Flaminio Costa v E.N.E.L.* EU:C:1964:66.

[8] A second preliminary example, after that provided in n 5, on the broadening of the idea of primacy, will further clarify the usefulness of citations analysis. One may take the duty of national judges to interpret national law in conformity with EU law. The reconstruction whereby such duty stems from primacy can be found in clear terms in Case C-573/17, *Popławski* (*Popławski II*), EU:C:2019:530, paras 53-56. As to citations in the recalled passages, the Court of Justice in para 53 moves from *Costa* (n 7), expressing primacy in a few words as a generic idea of 'pre-eminence' (with a little inaccuracy, reference is made to pages 1159 and 1160 of the official record – as paragraphs were not used in Costa –, which, however, do not exist in the English version, which has a different page numbering: the reference in the English version of *Popławski II* is thus to the French version of the *Costa* judgment). Then, in para 54 the Court formulates the idea that national authorities must 'give full effect to the various EU provisions' and that national laws cannot undermine such effectiveness, making reference 'to that effect' to Case C-399/11, *Melloni*, EU:C:2013:107, para 59 and to Case C-378/17, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, EU:C:2018:979, para 39, both, from what concerns here, falling squarely within the strain of primacy (as testified also by the reference that can be found in *Melloni*, while the recalled paragraph in *Commissioner of An Garda Síochána* has no references, but the preceding paragraphs were construed on primacy, as well). In para 55, the Court of Justice carves out of the referred obligation of national authorities the specific duty to interpret national law in conformity with EU Law and it considers such duty as 'inherent in the system of the treaties'. However, in Case 14/83 *Sabine von Colson and Elisabeth Kamann* v Land Nordrhein-Westfalen EU:C:1984:153, para 26, a fundative decision as regards the obligation incumbent on national judges to interpret national law consistently with EU law, such obligation was derived from the duty of loyal cooperation and not from primacy (which was not mentioned at all). Although also primacy may be referred to the duty of sincere cooperation, it is clear that in the more recent case-law primacy has incorporated the obligation to interpret national law consistently with EU law and, moreover, the latter has become a step the national judge should try to take before resorting to setting aside national law contrasting with EU law where the last one has direct effect (primacy in its strict sense); in *von Colson and Kamann*, not only primacy was not openly mentioned, but the interpretative solution was used precisely because primacy *per se* (in its strict sense) was not applicable and could not be of help.

meaning, *and* as enriched by the subsequent case-law. When following the strains of citations, this dynamic has to be borne in mind.

In the light of the elements sketched above, the relevance of an inquiry into citation methods is twofold: on the one side, concrete aspects related to drafting can offer important perceptions of single judgments and lines of case-law; on the other side, citations analysis can offer insights for interpretative and systematic understandings of the jurisprudence of the Court of Justice and of the legal reasoning used. These two ends are pursued in two branches of the analysis (although not hermetically separated), that I will briefly present in the following two sub-sections (1.1 and 1.2): in both of them the interpreter is called upon to make some methodological choices, that will guide him/her in the understanding of the results of the analysis. It has to be stressed that the methodology outlined here relies only on the text of the decisions of the CJEU, with a view to proposing research tools available to all EU scholars. Internal working methods, or the technology used at the CJEU, are not object of the present enquiry, although observation on some well-known general exigencies, related to the management of the ever-increasing workload or to the linguistic regime, will be occasionally made. I will afterwards concisely provide a basic overview of the use of precedents, in general, by the Luxembourg Court, which is especially useful for the aforementioned second branch of the analysis (Section 2). Then, I will present two case-studies (Sections 3 and 4), to test the type of analysis proposed and finally I will offer some tentative conclusions (Sections 4).

### 1.1. Analysis of drafting elements

Elements related to drafting *per se*, of various natures, can be illustrative of important aspects of the logical process followed by the Court of Justice. On top of the simple methods to which I have hinted at the beginning of Section 1, four main sub-categories can be evaluated: elements of a *statistical* nature; features regarding the *quality* of the citations; references to other judges' jurisprudence; the relevance of *omissions*. The four sub-categories in question should be intended as follows.

*a)* A *statistical research* on the number and maybe increase or decrease of citations of a certain decision over time can sometimes be useful. However, results must be interpreted in the light of the methods used by the Luxembourg Court: a sudden decrease in citations may well be due to the mere fact that, from a certain point in time, reference has been made to a subsequent judgment. As a matter of fact, a judgment can be cited just because it is the last ruling restating one, or maybe two or more specific points of law[9]. Mere numbers, including those regarding citations of precedents, are not normally a big preoccupation for law scholars; however, it should be borne in mind that an effort is needed in understanding whether the citations detected are useful or not, while their real or apparent numerousness should be interpreted correctly.

[9] J Fejø (n 1) 216–217 suggests that the, at least apparent, erratic reference to the first or the last judgment in a certain strain may well be due to the specific preference or knowledge of the drafters.

*b)* Leaving aside numbers, the *quality* of a certain citation is illustrative: apart from the formulas possibly used by the Court (the already mentioned 'by analogy' and 'to that effect'), it should be for the interpreter to understand whether a certain expression, fixed or almost fixed, is used just as a judicial refrain of a point important for the Luxembourg Judges for some reasons – but that could be reconstrued also on the basis of other arguments – or if it constitutes a unreplaceable piece of the legal reasoning. More in general, the way citations are made, their order and combination can explain how the Court of Justice is building up its legal reasoning.

Moreover, when speaking about citations, one could also draw a distinction between cases in which there is a reference to a previous judgment, with the use of exactly the same words of the passage to which reference is made, so that here we should talk about (self-)quotations by the Court of Justice, and cases where the wording is changed more or less profoundly (and with or without the use of formulas about analogy or pseudo-analogy)[10].

In other cases, the Court itself reinforces citations, by stressing that a certain point of law comes from the previous 'case-law of the Court'. More strongly, in the *IS* case – rested unique in this respect, to my knowledge –, the Court has reported a sentence from *Van Gend en Loos*, with the exact original wording and in quotation marks: the Court does not use quotation marks when reporting its own words, but the use of this technique here clearly shows the stress put on the stableness of certain orientations (please see following Section) and a kind of pedagogical intent towards the referring judge (and/or other national authorities) [11].

[10] See for example Case 29/84 *Commission v Germany* EU:C:1985:229, paras 23 and 31, where it is stated that, with reference to the duty to implement directives, a State could abstain from introducing new implementing acts where the national legislation is already in line with the directive in question and there is a sufficient degree of clarity, in particular as regards the rights of which individual could avail themselves. The Court has made reference to this passage in many successive rulings and (see for instance Case C-217/97 *Commission v Germany* EU:C:1999:395, para 31), but with a different formulation and without the use of formulas like 'by analogy' or 'see, to that effect': the change in formulation is not, moreover, totally neutral, as in the new statements it is asserted the non-necessity of a literal reproduction of the provisions of a directive in the implementing pieces of national legislation – which is something different from the hypothesis of national legislation already in line with a directive – and that safe implementation could arise also of a 'general legal context' at the national level – this last point may be closer to the indicated first precedent of *Commission v Germany*. The absolute non-necessity of a legislative intervention had become a quite rare case; however, considering the common use of fixed formulas, it is quite clear that there is a shift both in formulas (something that may happen in particular in the past) and in meaning, and without the justification, at least explicitly, of the use of analogy or other logical processes.

[11] See Case C-564/19 *Criminal proceedings against IS* EU:C:2021:949, para 76, which reads as follows:

> 'It should be recalled, in that regard, that, as regards the preliminary ruling procedure, 'the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [258 and 259 TFEU] to the diligence of the Commission and the Member States' (judgment of 5 February 1963, van Gend & Loos, 26/62, EU:C:1963:1, p. 13). Limitations on the exercise by national courts of the jurisdiction conferred

*c)* Furthermore, although the CJEU is seen as quite reluctant to establish links with the jurisprudence of other judges, this is done in a certain number of cases. This may be due to the formal competence in a certain field and/or the authoritative character of the rulings of such judges. Interrelations of lines of reasoning can take many different forms. For instance, when responding to the arguments of the parties, the CJEU may give its own interpretation of other judges' precedents.[12]

*d)* Finally, inquiry into citations can be more complicated if one wants to look at omissions, that could be as meaningful as citations. Demonstrating that an omission does not come out of simple inaccuracy, but is the result of a choice is an uneasy task: however, scholars can consider the choice not to cite a certain previous judgment at least as a working hypothesis, which, with other concurring elements, may offer possible interpretative paths.

Each time drafting elements of the types referred are identified, they should be correctly understood, as they clearly come out of techniques accurately used and checked internally in Luxembourg (the common use of citing the last judgment, or the fixed expressions referred above hinting at analogical or pseudo-analogical processes are just the most evident signs of the existence of *house rules* at the Kirchberg Court). Besides, the mere fact that the Court departs from the usual techniques in a given situation may be a sign that the Judges are willing to say something different in such a case. At the same time, such elements should not be overestimated, where their use appears accidental, especially where one wants to cover a wide span of time in a jurisprudential research – as house rules and habits have changed over time –, and due to the fact that various hands touch the texts at different stages, i.e. law clerks (*référendaires*, in the French jargon of the Court), Judges and readers of judgments

on them by Article 267 TFEU would have the effect of restricting the effective judicial protection of the rights which individuals derive from EU law'.

[12] Take the references to the International Court of Justice in a quite relevant number of cases and, quite recently, in Case C-181/23 *Commission v. Malta (Citoyenneté par investissement)* EU:C:2025:283, para 71, or to the European Court of Human Rights in a series of rulings. Like in the case of the case-law of the Court of Justice itself (see in the main text), omissions – of judgments and/or of arguments – may be relevant here, too.

A different solution has been adopted in Case C-453/99 *Courage v Crehan* EU:C:2001:465, para 13: in that judgment, the CJEU admitted that the weaker (from an economic point of view) party to an anti-competitive agreement could ask for the compensation of the harm suffered: the CJEU reported the citation by the Court of Appeal (England and Wales) (Civil Division), referring court in the case, of the Supreme Court of the United States of America ruling *Perma Life Mufflers Inc. v International Parts Corp.* 392 U.S. 134 (1968). In such ruling of the Supreme Court, the prospected possibility of weaker parties to an anticompetitive agreement to bring a damages action had been upheld. It is clearly not a 'citation' by the Court of Justice, however – in times where the hearing report was not published (anymore, contrary to the past), access to other working documents and to the order of the referring court was probably less easy than today, and information on the arguments put forward by the referring court were limited to what was reported in the judgment – such citation seems nonetheless significant. In fact, the Court of Justice is not clearly under any obligation of reporting any reference to other judges' case-law (even of non-EU jurisdictions) contained in the order of reference in preliminary rulings. Therefore, the fact it has been reported testify at least that the Luxembourg Court itself considered that reference important.

(*lecteurs d'arrêt*, whose job is very important, as they should ensure consistency in the language used and in drafting techniques, as well).

The existence of the referred type of elements could also be the starting point for the functioning of artificial intelligence (AI) tools. I will not deal with this issue; however, the use of the referred techniques, habits and interpretative understandings should take into account the foreseeable use of AI tools by practitioners and researchers (for instance with a view to providing the most useful results and/or to offer interpretative hypotheses concerning the use of citations and/or specific arguments in a certain judgment, or in a line of case-law). Giving the right input and offering the final interpretation should nevertheless remain in the human hands of scholars or practitioners.

### 1.2. Interpretative and systematic understanding

Each time a segment of a legal reasoning is borrowed from a previous judgment, the Court of justice is giving a clear message as to its reliance on the *corpus*, or, as one may say, heritage, of its previous jurisprudence and on the *auctoritas* – i.e. authoritativeness – that should be recognized to its precedents. As already pointed out and extremizing here, for the sake of clarity, two opposite situations that often occur, there might be a clear departure from the *original* meaning, due to a *physiological* evolution of its understanding, or a disguised recourse to a new interpretation or to a new method. In the first case, it will be interesting to catch how the Court sees the evolution of its own judicial *acquis*, while, in the second, scholars could concentrate on the implicit line of arguments and speculate on the possible reasons for not having exposed it openly.

In both cases, and especially in the second one, the fact that the Court *relies on itself* is very telling: all in all, the Court wants to reassure the readers that its jurisprudence *tends* to be stable. Short of a formal *stare decisis* rule in EU Law, the Luxembourg Judges are clearly willing to provide orientations that should be always followed at all levels, especially within national legal orders, while, at the same time, keeping a not too little room for manoeuvre in the field of interpretation. Each time this latitude may vary depending on many different features of the concrete situation, however, a clear message emerges on the existence of a stable judicial nucleus constituting the fabric on which the Luxembourg judicial machinery builds its case-law. There are theoretical and practical outcomes of this attitude of the Court of Justice, on which I shall come back briefly in the concluding remarks. However, such attitude must be regarded also in the light of two other aspects, that should be recalled already at this stage.

First, explicit overturns of previous judicial orientations are very rare[13]: contradicting openly what the Court itself said in the past is disliked at the Kirchberg. This attitude stems as a corollary of the idea that the past orientations should rest as stable as

[13] A well-known one is contained in Joined cases C-267/91 and C-268/91 *Keck and Mithouard* EU:C:1993:905, paras 14–16, as regards national legislations on selling arrangements, in the context of the interpretation of what is currently Article 34 TFEU (prohibition of measures having equivalent

possible. Therefore, the eyes of EU law scholars should stay wide open on hidden overturns: while it should not be the job of the Court of Justice to conduct *covert affairs*, it is true that sometimes adjustments, if not radical changes, have been made without announcements. As a consequence, precedents might have been invoked, but sometimes without clearly explaining the reasons why they have been partially or wholly discarded, so that the changes in question have rested undermotivated. Open overturns can all the more be problematic, especially when the arguments used by the Court are not enough articulated and well-founded to lead to change orientation[14].

Second, the well-known interpretation provided by the Court of Justice on the duty incumbent on jurisdictions of last resort to refer a preliminary ruling according to Article 267 TFEU is clearly founded on the premise that an existent judicial orientation should be always considered good law until the Court of Justice itself – possibly solicited by a national court willing to provoke an overturn and to provide good arguments to do so – revises it. In fact, as widely known, a national jurisdiction of last resort can avoid referring a preliminary question, where the response comes out of precedents of the Court of justice addressing an identical question, or an analogous one[15].

effect to quantitative restrictions). For long the Court of Justice applied to selling arrangements the same orientations formulated for technical rules and finally in *Keck* it announced it was time to change.

[14] This has happened in a quite recent and delicate situation, where assessing whether the principle of proportionality – of sanctions – could be invoked directly was at stake. In the *Link logistic* judgment Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya*, EU:C:2018:810, paras 52–56, the CJEU paid homage to the discretion to be left to Member States, that should be called upon to intervene to re-adjust the sanction to be issued, where the proportionality principle had to be breached. Less than four years after, the Court of Justice changed its mind completely in Case C-205/20, *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld* (*NE*), ECLI:EU:C:2022:168, paras 25–29. While in the first case the Court, wisely enough, observed that proportionality as such cannot offer an applicable criterion for a judge, in the second one it resorted to more ambitious, albeit vague considerations. First, it relied on the binding nature of Article 288 TFEU to assert that a Directive could be invoked, which is an argument openly rejected, on a general plane, in a well-established case-law; second, although recognizing that Member States must be given enough room to exercise their implementing powers, the Court affirmed they have nonetheless a precise canon, which is not to impose disproportionate measures. In this example, the problem is not constituted by the overturn of a precedent *per se*, but in the overturn of argumentations, that has been carried out by simply following a different (and less convincing) line of reasoning. Limiting the space of Member States in that way would have required a more robust reasoning and, what is more, practical consequences (what is the appropriate, i.e. proportionate level of sanctions?) are left undetermined in a potentially high number of cases. On this overturn see F Viganò, 'La proporzionalità della pena tra diritto costituzionale italiano e diritto dell'Unione europea: sull'effetto diretto dell'art. 49, paragrafo 3, della Carta alla luce di una recentissima sentenza della Corte di giustizia' (Sistema Penale, 26 April 2022), at www.sistemapenale.it, D Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) 1 *European Law Open* 576.

[15] See joined cases 28-30/62 *Da Costa* EU:C:1963:6 and case 283/81 *CILFIT* EU:C:1982:335, paras 10 ff.; see now also case C-561/19 *Consorzio Italian Management* EU:C:2021:799, paras 27 ff. See, on this case-law, M Broberg and N Fenger, 'If You Love Somebody Set Them Free: On the Court of Justice's Revision of the *Acte Clair* Doctrine' (2021) 60 *Common Market Law Review* 711; F Munari, 'Il "dubbio ragionevole" nel rinvio pregiudiziale', (2022) 18 *Federalismi* 162. Another case in which a

Formally speaking, the Court of Justice cannot be considered a jurisdictional organ acting under a common law system. Nevertheless, from time to time the question arises in the literature as to if and to what extent the Court of Justice adjudication scheme imitate that of a 'common law' court.[16] I will not discuss the theme here – while a few observations will be made in the following and last Sections –, however I would like to stress that the Court of Justice shows great care of its own precedents and it builds almost always upon the idea that each decision can be used as a block for future ones. This is probably done to produce stableness and certainty, with a view to ensuring clarity and predictability and, therefore, going back to the precedents is useful to reconstruct the full meaning of the arguments used each time by the CJEU.

Nonetheless, a too large reliance on the judicial *acquis* of the Court, presents also risks on the substantial plane, which have essentially two sides. First, when the legal reasoning remains shrunk in a series of references too deferent to previous cases, the rulings may sometimes suffer of a not sufficiently clear motivation. Second, when the *story* of the blocks used is not completely coherent, the understanding of the final motivation rests, again, difficult.

## 2. A concise framework to understand the use of precedents by the Luxembourg Court

In his study on 'Precedents and Case-based Reasoning' by the Luxembourg Court, the reference book for these matters to date, Marc Jacob affirms that 'the use of precedents by the ECJ is far-reaching but rarely, if ever, explicated in detail as an intricate legal technique in its own right'[17]. Consequently, and as already stated, it is quite complicated to understand how precedents are really used at the *Kirchberg* and if a comprehensive – although maybe not always coherent and constant over time – precedent doctrine is adopted. By contrast, a formal *stare decisis* rule does not operate in the EU legal order. While this study is dedicated to the illustration of a reconstruction technique, as part of the textual analysis, the ultimate aim is clearly to help EU scholars to reconstruct the use of precedents, therefore a few words will be devoted to recall a general framework on that issue.

national Court of last resort can avoid referring – which is nonetheless not relevant for us – occurs when it has to interpret an *acte clair*, where no real doubts arise as to its interpretation.

[16] For a classical study, see K Lenaerts and K Gutman, '"Federal Common Law" in the European Union: A Comparative perspective from the United States' (2006) 54 *American Journal of Comparative Law* 1.

[17] See M Jacob, *Precedents and Case-based Reasoning in the European Court of Justice – Unfinished Business* (Cambridge University Press 2014), 3. See also, among general enquiries into the topic, J. Komarek, 'Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Court de Cassation' (2009) 11 *The Cambridge Yearbook of European Legal Studies* 399.

In general terms, using precedents implies different phases[18], that can be sketched as follows. First, a previous case has to be identified and its meaning, i.e. the meaning of its legal reasoning, should be determined. This process implies the consideration of the particular circumstances of the case, including its factual context. Second, once the significance of its legal reasoning has been assessed, a point of law should emerge. Third, the point of law in question will exercise some kind of constraining effect on the case at hand, or, under certain conditions, the precedent should be considered not relevant or overruled.

Enabling a general rule – or a principle – to produce effects also in cases subsequent to that in which a judicial decision has originally expressed/recognized it, by acknowledging its validity and significance *beyond the boundaries* of that original case is the essence of precedent-based reasoning. Both the identification of the links of the decision to the specificities of the case and the logical process that enables to infer a general rule or principle from a concrete case are influenced by pertinent principles existent in the legal order and by the methods used by the competent courts. Also the kind and extent of the constraining effect on subsequent cases, as well as the identification of the conditions under which precedents would be not relevant or overruled will depend on the general framework established under the considered legal order.

A rule or principle going *beyond the boundaries* of the decision in which it was expressed is not necessarily a rule or principle interpreted in an *extensive* way. Further application means application of that rule or principle to another and new similar case, by virtue of analogy or other logical process, that could either expand or restrict the scope or extent of the norm in question. It should be borne in mind that common law systems, where precedent-based reasoning is acquired as a basic judicial rule, rely more on trust than civil law system. As Michal Bobek puts it,

> '[t]he common law tradition (…) is arguably based more on trust and coordination through precedents than on extensive hierarchical review. Each tradition thus creates a different type of authority and officialdom: coordinated on the one hand and hierarchical on the other'[19].

The Author continues by holding that, in this form of 'coordination' there will be less need for hierarchical and rigid control over judicial decisions, as, one may argue, the solidity of judicial-making should be rooted in the faithful application of the precedent-based argumentation, that would lead to adjudicating a case. The complex flow of judicial decisions identifies paths of evolution: traditional justifications for the use of precedents include the need to ensure certainty, equality, judicial efficiency, impartial justice instead of arbitrary decision making and, ultimately,

[18] See, for a general presentation, MA Eisenberg, *Legal Reasoning* (Cambridge University Press 2022), 5 *et seq*.

[19] M Bobek, 'Epilogue: Of Judges and Trust', in S Iglesias Sánchez and M González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021), 433, at 435, fn 12.

> '(…) the concept of stare decisis reflects very basic notions about the proper function of judges in the lawmaking process'[20].

On top of trust, tradition has a great importance for instance in the American system, intended as a kind of interpretation of the Supreme Court that

> '(…) signals presumptive influence of political and cultural practices of substantial duration for informing constitutional meaning'[21].

This appears different from precedent-based reasoning, but it seems not used in Luxembourg, in particular in explicit terms. The Court of Justice prefers its written precedents, while tradition may be referred to the way it interprets them or specific points of law, but the CJEU seems reluctant to openly resort to tradition.

Let us now look at the attitude of the Court of Justice more broadly. It should be accepted that the primary concern of the Court of Justice is reinforcing its legitimacy by referring to precedents, relying, in a way, to the story of its long standing authoritativeness and to the final acceptance of it by the Member States[22]: also when its authority is openly contested, a fortunate story is still very telling (and hopefully persuasive) and worth relying on. In this connection, one may argue that the Court of justice is firstly saying its precedents – read in the way it is using them at present, i.e. in particular when speaking to national authorities and namely judges – are binding more on national courts, especially Supreme and Constitutional courts, than on itself. Referring to precedents is thus a way to recall that the old story of EU law has already made its own way and must be still accepted to keep the whole edifice stay in place[23]. This is especially true for the references to the big classics of EU law[24].

While the CJEU's use of precedents is very linked to the case specificities, it emerges the strong will of the Court of justice to show that the building blocks of its legal reasoning can fit into cases sometimes also very different from those where

[20] E Maltz, 'The Nature of Precedent' (1988) 66 *North Carolina Law Review* 367, 372. See in a similar sense also MNS Sellers, 'The Doctrine of Precedent in the United States of America' (2006) 54 *American Journal of Comparative Law*, 67 et seq.

[21] See MO De Girolami, 'The Traditions of American Constitutional Law' (2020) 95 *Notre Dame Law Review*, 1123, at 1125. Other Authors propose to integrate in some way societal influences in the conception of precedents: see Maltz (n 20) 372 et seq.

[22] See again Jacob (n 17) 7.

[23] See see FX Millet (n 1), 1296, that affirms that 'Copy-pasting-based analogy (…) grants a moral and legal high ground to the outcome by establishing an authoritative filiation between the treatment of a pending case and the venerable "established case law"'. On his turn, he cites Posner, 'Judges' writing styles (and do they matter?)', *University of Chicago Law Review* (1995), 62, 1420, at 33, who advocates an 'impure' style in drafting judicial decision, that, although less solemn, sounds more authentic and try to persuade with fresh arguments, without relying too much on long citations of precedents.

[24] In the rich line of case-law on values, broad reconstructions are often carried out and the Court of Justice is keen to rely on its most significant ancient and recent precedents: see, as a recent example, Case C-448/23, *Commission v Poland*, ECLI:EU:C:2025:975.

they had been used for the first time[25]. The underlying and implicit assumption is that there is an inherent consistency in the law of the EU, that enables to use such building blocks in different situations and that *tout se tient*, with connections between basic concepts re-discovered many times, especially when dealing with the very foundations of EU law[26] …and with a little effort to be done to show that each citation really suits well …sometimes just needing to say: 'see, to that effect'. I believe this tendency is the outcome of the strong will to show that legal reconstructions and principles, methods of interpretations and, ultimately, the *identity* of the legal order rest the same in many different aspects. While this may feed also the scientific identity of EU law, a too large use of the same line of argumentation in sparse and diverse strains of case-law could also water down the efficacy of the citation methods in the long run[27], or hide shifts in argumentation related to certain principles or rules of EU law[28], and, what is more worrying, could weaken the persuasiveness of the specific legal reasoning used on each occasion. The possible emergence of this risk adds another good reason to take into account citations when analyzing the case-law of the Court of Justice.

Furthermore, the repetitive use of statements that tend to become fixed with a sometimes confused reference to a strain of case-law (where only one case is cited, maybe chosen in a casual way) not only reveals insistence on stableness of jurisprudential orientations, but hides the analysis of the specificity of each case, which is, as seen, essential in the logical process of applying precedents. This makes also less clear if the Luxembourg Court is relying also on other elements, that stem from cultural or political options, or from tradition (whatever conception or tradition one may adopt). In this vein, citations analysis could open interpretative avenues that, with the help also of other methods, may shed some light on the arguments effectively followed at the Kirchberg.

## 3. Case study 1: a turning point in the case-law on the independence of judges

Different lines of case law, openly considered by the Court of Justice or not, may at some point overlap or influence each other, and at the end, one of the two may fully or partially absorb the other. Something like this envisaged situation, coupled with

[25] See L Azoulai, 'La fabrication de la jurisprudence communautaire' in P Mbongo and A Vauchez (eds), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Bruylant 2009) 153, at 163 et seq.

[26] See e.g. *Commission v Poland* (n 14), paras 173–181.

[27] This is why, probably, Marc Jacob has recommended the Court to 'cut back on general precedent mentions': Jacob (n 17) 277.

[28] See Napieraski (n 1), 3 et seq affirming that procedural autonomy is not a 'safe harbour' for Member States: following the line of citations, the Author shows that the CJEU has put a strong accent to the duty of sincere cooperation over time, thus bringing procedural autonomy to the realm of duties of Member States to ensure full effectiveness of EU law.

one of the rare explicit overturns, seemed to occur in a particular turning point of the case law on the independence of judges, that is the object of the first case study.

The issue of independence of judges, as framed under the judgment in a line of case law inaugurated by *Vaassen-Goebbels*[29], followed by other judgments, like *Pretore di Salò*[30], *Danfoss*[31], *Almelo*[32], *Job Centre*[33], *Dorsh Consult*[34] and others, regarded the functioning of the Article 267 TFEU mechanism. In this case-law, it is required that, to refer preliminary questions to the Court of Justice, a national organ has to fulfil some conditions under which an organ can be qualified as a jurisdictional one in EU Law: it must be established by the law (and not by the parties to the disputes), be permanent, settle disputes with decisions binding upon parties, by applying normative rules, and in an adversarial procedure: according to a common expression, used also in the English version of the relevant judgments, it is said that the procedure should be *inter partes*, even if this last requirement is not considered *per se* 'absolute'. Moreover, such organs must be independent, hence independence, in this context, has been treated for long as a question simply regarding the possibility to refer a preliminary question to the CJEU and thus it constituted an admissibility criterion.

A first interesting point regards the fact that independence is a requirement added by the case law at a second stage, as it results from the statement in *Almelo* whereby '[t]he Court has extended those criteria, pointing out in particular the need for the court or tribunal in question to be independent'[35]. In this passage, reference is made to *Pretore di Salò*, where the relevant affirmation sounds like this: the Luxembourg Court can reply if the reference comes from 'a court or tribunal which has acted in the general framework of its task of judging, *independently* and in accordance with the law' (emphasis added). The adverb 'independently' thus turned out to be a *heavy* one. The reference in question is also extended to *Fratelli Pardini*[36], where the sentence just quoted is reported literally, and to *Corbiau*[37], where the formulation is completely different and the word 'independence' (or others with the same root) is

[29] Case 61/65, *Vaassen-Goebbels v Beambtenfonds voor het Mijnbedrijf* EU:C:1966:39, I. See A Rosanò, 'Si fa presto a dire "arbitrato"! Il rapporto tra organi arbitrali e rinvio pregiudiziale a partire dalla sentenza *Vaassen-Goebbels*', in A Arena, ME Bartoloni and M Riberi (eds), *L'integrazione europea attraverso la giurisprudenza comunitaria (1954-1974): i processi, gli attori, le narrative* (Editoriale Scientifica 2025), 353.

[30] Case 14/86 *Pretore di Salò v Persons unkown* EU:C:1987:275, para 7.

[31] Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* EU:C:1989:383, paras 7–8.

[32] Case C-393/92 *Gemeente Almelo and Others v Energiebedrijf Ijsselmij* EU:C:1994:171, para 21.

[33] Case C-111/94 *Job Centre Coop. ARL.* EU:C:1995:340, paras 8–11.

[34] Case C-54/96, *Dorsh Consult Ingenieursgesellschaft v Bundesbaugesellschaft Berlin* EU:C:1997:413, paras 23 and 35–38. The line of case law in question has been reconstructed thanks to the citations in *Dorsch Consult*, para 23.

[35] See *Almelo* (n 32), para 21.

[36] Case 338/85 *Fratelli Pardini SpA v Ministero del commercio con l'estero e Banca Toscana (filiale di Lucca)* EU:C:1988:194, para 9.

[37] See Case C-24/92 *Pierre Corbiau v Administration des contributions* EU:C:1993:118, paras 15–16.

not used; it is, however, stated that a court or tribunal must be a 'third party': an organ, which is fully integrated in the structure of a public administration, and that, in case its decision had to be challenged, would be a counterparty of the plaintiff before the competent judge, cannot be considered as a 'third party'[38].

Let us now come to the story of our turning point.

In *Gabalfrisa*,[39] a judgment delivered in 2000, the *Tribunal Económico-Administrativo*, existing under a Spanish law, was considered a jurisdiction within the meaning of Article 267 TFEU. The Court of Justice started by citing *Dorsch Consult* 'and the case-law cited therein',[40] then examined at some length the features of the *Tribunal* in question, as laid down in Spanish law: it ascertained its permanent nature,[41] the compulsory character of its jurisdiction[42] and the binding force of its decisions.[43] As to the *inter partes* character, the Court recalled that in *Dorsch Consult* it considered such requirement not absolute, observing, nonetheless, that the procedure before the Spanish *Tribunal Económico-Administrativo* met such requirement.[44] Then, the Court went on recognizing the Tribunal was invested with the task of applying 'rules of law'.[45] Finally, as regards independence, it is worth reporting the relevant passage:

> 'Finally, it is important to note that Article 90 of Law No 230/1963 ensures a separation of functions between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery and, on the other hand, the Tribunales Económico-Administrativos which rule on complaints lodged against the decisions of those departments without receiving any instruction from the tax authority.
> Such safeguards give the Tribunales Económico-Administrativos, unlike the Directeur des Contributions Directes et des Accises (head of the Direct Taxes and Excise Duties Directorate) in question in Case C-24/92 *Corbiau* v *Administration des Contributions* [1993] ECR I-1277, paragraphs 15 and 16, the character of a third party in relation to the departments which adopted the decision forming the subject-matter of the complaint and the independence necessary for them to be regarded as courts or tribunals for the purposes of Article 177 of the Treaty.'[46]

[38] In the Opinion of AG Darmon in Case C-24/92 *Pierre Corbiau v Administration des contributions* EU:C:1993:59, there is a large use of the concept of independence and, after a wide analysis of the characteristics of the organ in question, it was proposed to the Court of Justice to declare itself as non-competent, as the Luxembourg Judges finally did.

[39] Cases C-110/98 to C-147/98, *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT)* EU:C:2000:145, paras 33–41.

[40] Ibid para 33.

[41] Ibid para 34.

[42] Ibid para 35.

[43] Ibid para 36.

[44] Ibid para 37.

[45] Ibid para 38.

[46] Ibid paras 39-40.

Thus, by marking a difference between the Spanish organs in question and those considered in *Corbiau*, the CJEU acknowledged the separation of functions between the *Tribunal Económico-Administrativo* and the structure whose decisions can be challenged before it.

The story could be considered quite conventional up until this point, leaving aside any physiological critical attitude towards decisions of the Court of Justice that, like those of any other judicial organ, can be analyzed and criticized. What it matters here is that the Court of Justice, twenty years later, changed its mind and, in the *Banco de Santander* ruling,[47] made an explicit overruling exactly on the point of the qualification of the *Tribunal Económico-Administrativo*.

It could not be said that the old case law on independence within the meaning of Article 267 TFEU was abandoned, but it seems that decisive arguments were taken from a more recent line of case-law which was starting to construe the idea of independence of the judiciary as a building block of the rule of law, one of the values of the EU under Article 2 TEU.

Let us follow the citations.

First, the classical case law centred on Article 267 TFEU, with the well-known requirements for an organ to qualify as a national jurisdiction capable to refer preliminary questions, was recalled and it is significant that the Court of Justice mentioned *Vaassen-Goebbels*, *Syfait*[48], a judgment of 2005, *Margarit Panicello*, delivered in 2017,[49] 'and the case law cited'.[50] The reference is a quite conventional one, as regards the recalling of the case-law cited, but it is not limited to the last judgment; it is interesting that three judgments come from three different periods of time and this has not been done by chance and the Court significantly started with the first, that initiated the strand in question. As a hypothesis, it can be argued that the drafters wanted to stress the reference to the entire developing line, starting with its roots, with a view to underlining a certain sense of faithfulness to a well-established orientation. This seems tantamount to a clarification that the overruling would regard just the solution regarding the Spanish organ in the case at hand, not the complex of the ordinary criteria, which still stay in place.

When the CJEU went on in its reasoning, it was immediately stated that all the criteria set out in the case-law in question were fulfilled, with the exception of independence, which then became the focus of the subsequent line of reasoning: after having recalled *Gabalfrisa*, the ruling about to be overruled, the Court invoked three

[47] Case C-274/14, *Proceedings brought by Banco de Santander SA* EU:C:2020:17.
[48] Case C-53/03 *Syfait and Others* EU:C:2005:333, para 29.
[49] Case C-503/15 *Margarit Panicello* EU:C:2017:126, para 27.
[50] *Banco de Santander* (n 47), para 51.

times *Associação Sindical dos Juízes Portugueses* (*ASJP*)[51]. The first time, which appears the most meaningful, regarded the idea that independence is a strict requisite for being entitled to refer a preliminary question and it must be said that the classical case law was also recalled again (with reference to the previous passage) [52] …but *ASJP* was not a case in which there were doubts on admissibility![53] In that judgment, independence was strictly seen under the light of the idea that, even on a foreseeable occasion, it must be a distinguishing feature of an organ which enters in dialogue with the Court of Justice. It must be paid attention to this point: the issue – it should be restated – did not regard admissibility, as there was not a concrete question with reference to which the exercise of effective jurisdictional activity could be evaluated.[54] Therefore, this kind of *operational* independence could be verified only where the organ in question had to refer a preliminary question to the CJEU. By contrast, *ASJP* read independence as a necessary characteristic of a jurisdictional organ that may be called upon to apply EU law and, where deemed opportune, to refer to the CJEU. The problem was thus treated as a systemic one, in connection with the general duty of Member States, laid down in Article 19 TEU, to provide judicial remedies for the protection of rights originating in EU law.

Under the *Vaassen-Goebbels* line of case-law, the Court of Justice evaluation is limited to the question whether *that particular organ*, in the performance of *the specific powers involved in the case at hand*, can be qualified as a jurisdictional organ. If the answer is in the negative, there are normally no dramatic implications, but the declaration of inadmissibility of the preliminary reference. This would normally imply that, at a later stage, the issue can pass through a proper judicial avenue before a jurisdictional organ within the meaning of Article 267 TFEU, which may, at that point, decide to make a new preliminary reference to the CJEU.[55]

By invoking a different line of case law, the Court of Justice was taking into account (also) the acquisitions of its own jurisprudence on the evaluation of the very existence, at some point, of a proper judicial organ, before which appropriate judicial

[51] *ASJP* (n 6). See M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 *European Constitutional Law Review* 622. [too large an attitude for a long time at 637]

[52] *Banco de Santander* (n 47), para 56.

[53] Indeed, the question on independence regarded the *Tribunal de Contas*, i.e. the organ in which the judges complaining about a salary cut where serving (the idea was that independence could be undermined in case the cut had to be too deep and the Court of Justice agreed in principle on that point). However, the referring judge was different (*Supremo Tribunal Administrativo*, which was the one competent for the action brought by the Judges of the *Tribunal de Contas*).

[54] The same organ can be considered as qualified to refer a preliminary question or not depending on the type of powers it is concretely exercising. Therefore, it is difficult to assess independence within the meaning of the *Vaassen-Goebbels* line of case-law without a concrete question.

[55] Arbitral tribunals are not considered court or tribunals within the meaning of Article 267 TFEU, therefore, at this later stage the scrutiny the jurisdictional organ can exercise over the arbitral award would be limited and this would pose some problems.

remedies can be activated with the guarantees required by Article 47 of the Charter of fundamental rights.

The Court of Justice then turned to analyze whether the Spanish *Tribunal* was independent under the two dimensions identified by the European case law: the external one, requiring that the organ in question be autonomous and immune from hierarchical coercion or influence of any other body, and the internal one, pertaining to the equality of the parties before the organ in question and its impartiality, its sole interest being the application of the law. It is interesting that judgments from the classical Article 267 TFEU requirements case law were cited with reference to both dimensions,[56] but, as regards the first, they were merged with cases taken from the new strain concerning the rule of law. In the context of the external aspect of independence, and as regards in particular irremovability of judges, the CJEU recalled the already mentioned *ASJP*[57] and *Commission v Poland* (*Independence of the Supreme Court*), a landmark ruling in the ambit of the line of jurisprudence on the rule of law.[58]

It is worth recalling that the passage of *Commission v Poland* to which the Court made reference in *Banco de Santander* was an original one, i.e., there were no other judgments to which the CJEU again readdresses the reader. However, by enlarging the reference to the preceding and subsequent paragraphs to the one cited in *Commission v Poland*, there are citations of *Minister for Justice and Equality* (*Deficiencies in the system of justice*) (*LM*),[59] which is a case on the European arrest warrant, defining when systemic deficiencies in the judiciary of the issuing Member State provide grounds to refuse surrender. The problem emerged with the Polish Judiciary also in *LM* and it was one of the cases where the forced retirement of some judges was at stake, thus irremovability turned out to be a crucial requisite in that case. If one looks at the judgments to which *LM*, on its turn, refers back, one may, not surprisingly, find *ASJP* and *Wilson*, a case of the classical line of case law, cited also in *Banco de Santander*.

Independence and namely irremovability has been driven through a journey to classical situations, where the problem was not particularly sensible, and to others in which it assumed a much more delicate role, its lacking implying systemic deficiencies in the Judiciary of a Member State, that could lead to the virtual (…or effective) exclusion of or more of its organs from the circuit of the dialogue with the Court of Justice and/or with the Judiciaries of other Member States.

[56] See *Banco de Santander* (n 47), paras 61–63, where the judgments *Margarit Panicello* (n 49), para 38, *Corbiau* (n 38), para 15 and Case C-222/13 *TDC A/S v Erhvervsstyrelsen* EU:C:2014:2265, para 32 are cited.

[57] See *Banco de Santander* (n 47), para 58, making reference to ASJP (n 6) para 45.

[58] See *Banco de Santander* (n 47), para 59, making reference to Case C-619/18 *Commission v Poland* (*Independence of the Supreme Court*) EU:C:2019:531 para 76.

[59] Case C-216/18 PPU, *Minister for Justice and Equality* (*Deficiencies in the system of justice*) (*LM*) EU:C:2018:586, paras 64 and 67. The first reference is ‘to that effect’, with the addition of the ‘case law cited’.

Turning back to *Banco de Santander*, in a completely different situation, the Spanish *Tribunal* was deemed to be too much exposed to external influence, namely of the national executive power, and irremovability of its Members and of its President was considered as not sufficiently guaranteed.[60] After having carried out an analysis of the pertinent national legislation, the Court of Justice marks the difference between the situation of the Spanish organ at hand with that of two other cases, where irremovability was the object of attention, but it was ascertained that the guarantees where sufficient: *Consorci Sanitari del Maresme*,[61] where irremovability was ensured to members of the body in question up to the end of the term of office, with limited exceptions for grounds provided by the law, and *MT Højgaard and Züblin*,[62] where, in a body composed of experts and other holding the status of magistrates, only the latter enjoyed constitutional protection, who constituted in any the case the majority. Interesting as they may be for the reconstruction of the requisite of irremovability – because they clarify that such requirement should evidently not to be intended as absolute – these references are quite meaningful, from the perspective adopted in these pages, for another reason. *Consorci Sanitari del Maresme* and *MT Højgaard and Züblin* have been delivered respectively in 2015 and 2016 – so quite a lot of years after *Gabalfrisa* – and they are both cases in which the question of independence was raised in the sole and only context of admissibility, like in the traditional vein of case law on Article 267 TFEU. It cannot be denied that these examples have been useful for the Court of justice to find a foundation for the concrete assessment of the requisite of irremovability in the new analysis of the *Tribunal Económico-Administrativo* carried out in *Banco de Santander*. However, the references of the Court of Justice were up to date to the last developments in the line regarding admissibility, while, and probably most significantly, such line was merged with the acquisitions coming from the rule of law jurisprudence[63].

In this connection, it should be noted that, when starting in *Banco de Santander* the reasoning justifying the overruling of *Gabalfrisa*, the CJEU stated that 'as the Commission also submitted in its written observations, [the] considerations [exposed in *Gabalfrisa*] must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence which any national

[60] *Banco de Santander* (n 47), paras 64–71.

[61] See ibid. para 70, making reference to Case C-203/14 *Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva* EU:C:2015:664, paras 11–20.

[62] See *Banco de Santander* (n 47), para 71, with reference to Case C-396/14 *MT Højgaard A/S and Züblin A/S v Banedanmark* EU:C:2016:347, paras 29–31.

[63] This reconstruction is confirmed, for instance, by P Bogdanovicz and M Taborowski, 'The Independence Criterion for National Courts in the Preliminary reference Procedure after *Banco de Santander*: Still the Joker in the Deck?' (2023) 60 *Common Market Law Review* 763, 764 et seq. The Authors note that before *Banco de Santander* the Court of Justice had 'relaxed' a lot the requisites; after the judgment in question, they advocate for an even stronger position regarding cases where a rule of law problem arises and express concern towards the successive evolutions of the case law.

body must meet in order to be categorised as a 'court or tribunal' for the purposes of Article 267 TFEU.'[64] However, this statement is immediately followed by the first quotation of *ASJP*, therefore, and in the light of the foregoing analysis, the 'categorisation as court or tribunal' is not read under the sole light of questions of admissibility.

The overruling of *Gabalfrisa* was not accurately motivated: it was just said that in that judgment the separation between the Tribunal and the administrative structures to which it was in some way connected had been judged sufficient (and this is the only occasion on which reference is made to that previous ruling), however, upon request of the Commission, such conclusion had to be re-examined, as just reported.[65] What follows is a new assessment under the new requisites, without clarifying where and to what extent the old requisites – or the old way to intend the classical requisites – had to be deemed not good law anymore. By comparing the two legal reasonings, it emerges that the regime of removal of members of the Tribunal, which could come out of a decision of the Minister for Economic Affairs and Finance, was just mentioned but not assessed in the light of independence of the organ in *Gabalfrisa*.[66]

The crossing of references of the two lines of case-law, reported here in some detail to show how the citation analysis can be of help in understanding some passages, can lead at least to a conclusion, that can be summarized as follows. The case law on requisites of independence for the categorization of an organ as 'court or tribunal' within the meaning of article 267 TFEU has evolved over time and, at the time of *Banco de Santander*, there were already some interesting precedents, regarding for instance, as seen, irremovability. Moreover, in that judgment, that stream of case law overlapped with another, coming from a different origin, although dealing also with independence of national organs that should be able (and free) to refer preliminary questions to the Court of Justice. Thus, the idea of independence was enriched with the acquisitions coming from the line of case law regarding the respect of the rule of law and the need (not just the possibility with reference to a specific organ) that national organs able to come in touch with the CJEU are in place and, therefore, legal actions for the protection of rights stemming from the EU legal order can be brought before them.[67]

From *Banco de Santander* onwards, the dividing line between the two streams of case law on independence has become increasingly blurred, with issues of admissibility of preliminary questions often becoming also more substantial and highly sensitive.

This merger has been the object of criticism on many occasions, as it has been submitted that keeping the assessment of independence separate for the two purposes

[64] *Banco de Santander* (n 47), para 55.

[65] Ibid. paras 54–55.

[66] *Gabalfrisa* (n 39), para 23.

[67] For a reconstruction of the reasons and the effect of the combination of these two lines of case law, see M Broberg and N Fenger, 'The European Court of Justice's Transformation of its Approach towards Preliminary References from Member State Administrative Bodies' (2022) 24 *Cambridge Yearbook of European Legal Studies* 169, 191.

– admissibility on one side, and assessment on the context of the respect of the rule of law (with systemic implications) on the other – would have ensured more clarity and a more appropriate adjudication in the different contexts.

## 4. Case-study 2: episodes regarding primacy of EU law

As a second case-study, I will analyze two judgments where the CJEU refers, also in the operative part of judgments, directly to primacy *per se*, alone or in combination with specific provisions of EU law. Primacy, as widely known, is a complex and, recently, increasingly controversial legal concept. Different conceptions of primacy have been proposed, that will not be discussed here. However citations will help to highlight some useful elements to understand how the CJEU's conception of primacy has changed over time.

The two cases in question are *Euro Box*[68] and *RS*. The issue of a clash of the national provisions in question with primacy *per se* was raised already in the proceedings before national judges.[69] In the second one, the problem of the freedom of national judges to adjudicate on matters of EU law, already decided by their Constitutional court was at stake: common judges had in fact to follow the decisions of the Constitutional court as regards compatibility of national norms with EU law, even where they had to be in contrast with orientations expressed by the CJEU. Moreover, referring a preliminary question to Luxembourg, in this kind of situations, constituted a disciplinary offence for the judges who had to decide so.

After an ample reconstruction of the essential features of the EU legal order, the Court of Justice stated the following:

> '50 Following the entry into force of the Treaty of Lisbon, the Court has consistently confirmed the earlier case-law on the principle of the primacy of EU law, a principle which requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 250 and the case-law cited).
>
> 51 It follows from that case-law that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law, including constitutional provisions, being able to prevent that (judgments of 17 December 1970, Internationale Handelsgesellschaft, 11/70, EU:C:1970:114, paragraph 3, and of 21

[68] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* EU:C:2021:1034.

[69] Case C-430/21 *Proceedings brought by RS* EU:C:2022:99.

December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 251).

52 Thus, given that it has exclusive jurisdiction to give the definitive interpretation of EU law (see, to that effect, judgment of 2 September 2021, Republic of Moldova, C-741/19, EU:C:2021:655, paragraph 45), it is for the Court, in the exercise of that jurisdiction, to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law, with the result that that scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with that of the Court (see, to that effect, judgment of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 254).

53 In that regard, it must, inter alia, be recalled that, in accordance with the principle of the primacy of EU law, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, where it is unable to interpret national law in compliance with the requirements of EU law, to give full effect to the requirements of EU law in the dispute brought before it, by disapplying, as required, of its own motion, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means (see, to that effect, judgments of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, paragraph 24; of 24 June 2019, Popławski, C-573/17, EU:C:2019:530, paragraphs 61 and 62; and of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 252).'[70]

Four elements regarding primacy can be extracted from each of the reported paragraphs. First, in paragraph 50, primacy is defined as 'a principle which requires all Member State bodies to give full effect to the various EU provisions' and, consequently, national norms shall not constitute an obstacle to the full effectiveness of EU law. Under this light, primacy is particularly linked to the duty of sincere cooperation (see especially Article 4(2) TEU), while the judicial source we discover through citation is *Euro Box*, where an identical statement is used, 'and the case-law cited'.[71] By way of the *chain of citations*, with which the reader will now be well acquainted, the reference goes ultimately and, unsurprisingly, to *Costa v ENEL*.[72]

In the case at hand, the formulations at hand are highly standardized and repeated identically in many judgments. What may be interesting is that, following the *chain*,

[70] *RS* (n 69), paras 50–53.

[71] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others* EU:C:2021:393, para 244; Case C-487/19 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* EU:C:2021:798, para 156; *IS* (n 11), para 78. On the first case, see O Kadlec and D Kosař, 'Romanian Version of the Rule of Law Crisis Comes to the ECJ: the AFJR Case is not just about the Cooperation and Verification Mechanism' (2023) 59 *Common Market Law Review* 1823, 1834 for interesting reflections on the legal bases used for assessing independence of jurisdictional organs.

[72] *Costa v ENEL* (n 6).

one may find judgments in which cases which were recent at the time and that were considered significant because they added something new, or re-stated something the Court of Justice considered important, are cited many times in the same ruling with reference to similar issues.[73]

Second, in paragraph 51 it is specified, in essence, that even national constitutional provisions shall not constitute an obstacle to the full effectiveness of EU law. As to citations, after recalling again *Euro Box*, the Court refers back to *Internationale Handelsgesellschaft*, but with a formulation different from the original, which, albeit clear, was slightly less direct and *confrontational*: the new one seems to have been appeared for the first time in *Winner Wetten*.[74]

Third, para 52 clarifies that, as it stems from the interpretation monopoly of EU law held by the CJEU, it is for the same Court to interpret ultimately the principle of primacy of EU law. Two separate citations call respectively into question *Republic of Moldova*, with a focus on autonomy,[75] and again, with overlaps in the respective strains, *Euro Box*, stressing the binding nature of the interpretation by the Court. It is interesting that, in this second vein, the CJEU reminds its role in setting orientations that should guide also national courts of last instance, within the limits lastly restated in *Consorzio Italian Management*, which has been already recalled also in these pages.[76]

[73] As regards the formulations in question, if one looks Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, paras 157–161, finds Case C-573/17 *Popławski II* (n 8) (a case in which the relationship between direct effect and primacy had been recently clarified, amongst other things) cited five times (the two cases were delivered in the same year, with *A.K.* published nearly five months after *Popławski*).

[74] Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para 3 where we find the original formulation used in that judgment (which, as said in the main text, is not the same as the one used in *RS* and widely repeated in the most recent case law): '(…) the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.' As to the new formulation, close to that used in *RS*, see Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* EU:C:2010:503, para 61, where reference is made 'to that effect' to *Internationale Handelsgesellschaft*. In *Winner Wetten*, the CJEU found that the maintaining in force of measures adopting restrictions to EU freedom of establishment and to provide services for a transitional period, granted by the German Federal Constitutional Tribunal, was in contrast with primacy of EU law.

By contrast to what seem to emerge here, it has been noted that, when a conflict emerges with referring courts, the Court of Justice seems to adopt a softer language: see AW Ghavanini, 'Power Talk: Effects of Inter-Court Disagreement on Legal Reasoning in the Preliminary Reference Procedure' (2020) 5 *European Papers* 887.

[75] See in particular Case C-741/19 *Republic of Moldova v Komstroy* LLC EU:C:2021:655, para 45 and then Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158, paras 35–36 and *Opinion 2/13 Accession of the European Union to the ECHR* EU:C:2014:2454, para 174 (as cited in *Achmea*, but a more complete reference should have included also paras 175–176). See D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) 8 *European Papers* 1403.

[76] *Consorzio Italian Management* (n 15), para 27. To the same effect, also *Achmea* (n 75), para 37 is cited in the passage in question of *Euro Box* (n 68, para 254).

Fourth, the classical dimension of primacy regulating contrasts between EU and national rules – a conflict rule – is reconstructed in paragraph 53. The duty to set aside national norms in contrast with EU provisions is put under the umbrella, unsurprisingly, of *Simmenthal* and of *Popławski*, a relatively recent case, where, finally, the duty in question was explicitly limited to EU norms with direct effect.[77] *Euro Box*, as the most recent and important case related to very similar issues, was recalled again.

Let us turn briefly to the latter now. Here the Court of Justice was faced with a particularly difficult issue, as national proceedings before specialized judges in fiscal fraud affairs, aimed, as such, to protect also EU financial interests, were suspected to be not fully in line with the right to effective judicial protection enshrined in Article 47 CFREU.

Looking at the passage of *RS* reported above, one can note that the reconstruction follows a peculiar order[78]. Primacy as a conflict rule is in fact the final point made by the Luxembourg Court, while the starting argument is construed on the duties of Member States to cooperate to ensure full effectiveness to EU law. Primacy is then restated also in the face of contrasting rules even of a constitutional nature and then connected with autonomy of EU law. Finally, with a restatement of the duty to ensure full effect of EU law, is then specified that, when the European provision at issue has direct effects, then national judges shall set aside, without waiting any internal procedure even of a constitutional nature, the internal contrasting rule.

The passage in which the Court of Justice seems to rely especially on the principle of primacy as such – without calling into question a specific provision – is the one dedicated to the discard of internal rules even of a constitutional nature[79]. Primacy was born as a principle, not embedded in an explicit provision of the Community or Union Treaties, therefore such reference seems coessential to its very nature. Nonetheless, the passages where the Court of Justice seems more in need to invoke primacy as such are those where the need to keep national common judges immune from any negative influence on their freedom to act as Union judges, i.e. to ensure that EU norms with direct effect prevail over national norms, with the freedom to refer, where deemed opportune, preliminary questions to the Court of Justice. Where

[77] Case 106/77 *Simmenthal* EU:C:1978:49, para 24, *Popławski II* (n 8) pars 61–62. On the difficulties to apply this rule in Romania, see D Călin, 'Constitutional Courts Cannot Build Brick Walls between the CJEU and National Judges Concerning the Rule of Law Values in Article 2 TEU: *RS*' (2023) 60 *Common Market Law Review*, 819, 834.

[78] For a systematization of the arguments put forward by the Court of Justice in *Costa v ENEL*, see I Pernice, '*Costa v ENEL* and *Simmenthal*: Primacy of European Law', in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 47, 48.

[79] Another case in which the Court of Justice made reference to primacy as such also in the operative part of the judgment is *Winner Wetten* (n 74), where the need to depart from a national constitutional court was affirmed, too.

the obstacles come from national constitutional rules, namely from rulings of constitutional courts, the CJEU has resorted to primacy in its essence.

Two remarks must be made, that help to understand this point. First, one must keep in mind that, as already pointed out, primacy as such was called into question by the referring judges in *Euro Box* (the reference in *RS* seems incidental and the question of interpretation are referred to identified provisions). Second, in *Euro Box*, which is, of the two considered, the one published slightly before, there is a point of the operative part where the Court of Justice offers its interpretation directly of the principle of primacy as such, precisely with reference to the problem that common judges cannot be precluded by a decision of their constitutional court of disapplying the orientation of such court, if they are in contrast with those of the Court of Justice.

The citations analysis of *Euro Box* and *RS* has been useful to highlight and confirm the following essential points:

- The story of primacy is reconstructed by the Court of Justice, especially in delicate judgments where difficult institutional issues are at stake; in this cases, traditional foundations of primacy are connected with relatively recent acquisitions of the case law, like those in the field of autonomy of the EU legal order;
- The Court of Justice has adjusted its approach on primacy over time, reinforcing in the last period some elements that sound rather intrusive in national legal orders (take the setting aside of constitutional courts' rulings in contrast with orientations of the Court itself), namely in respect of the rule of law backsliding;
- The language used for expressing primacy of EU law has also evolved over time and it has become more direct, namely as regards, again, the problem of constitutional courts' decisions in contrast with EU law and especially with the case law of the Court of Justice: in such situations the Court is inclined to resort to primacy as such.

The case-law dealing with general or specific aspects of primacy is very vast and citations analysis may be of help in many other situations. Without entering in a whole analysis of citations and just by way of example, one may also think to *Melki and Abdeli*. According to a widespread opinion, in that judgment the Court of Justice softened (if not overruled) the *Simmenthal* jurisprudence, as regards the obligation of common judges to set aside national norms in contrast with EU law provisions without waiting for a national procedure to formally annul or declare the former unconstitutional, by stating that

> 'In so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Article 267 TFEU nevertheless

> requires that that court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law'.[80]

The passage reported, which is the one where the most innovative part of the judgment is formulated, does not contain citations. By contrast, *Simmenthal* is cited before, where its content is formally restated, while just after the reported passage other cases, regarding the exclusive power of the Court of Justice to declare an EU law act void, is cited. [81] That an innovative paragraph does not contain citations cannot be considered problematic. What is, on the contrary, not easy to explain is the fact that the *Simmenthal* rule has been formally restated and that no argument has been submitted to justify the softening (or re-reading, or overruling) of that jurisprudence. In doing so, the citation of *Simmenthal* has not been avoided, but it has been kept *at distance* from the formulation of (what many intend as) the new rule.

## 5. Concluding remarks

Limited attention has been devoted to citations by the legal doctrine, thus far[82]. Nonetheless it has been noted, for instance, that in *Francovich*,[83], when dealing with State liability for violation of EU law, the solemn citation of the 'fantastic four' – *van Gend en Loos*[84], *Costa v ENEL*[85], *Simmenthal*[86] and *Factortame*[87] – marked the tie of the judgment with those illustrious precedents, and thus, *Francovich* was posed in the long vein of primacy. It was also stressed that the 'collective appearance' of the four landmark rulings in question is 'otherwise very rare'.[88] With the dock of the

[80] Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* EU:C:2010:363, para 53.

[81] *Melki and Abdeli* (n 80), paras 43–44 and 54.

[82] There are interesting exceptions, like the studies already cited. For a further example of an observation reported in the context of a case analysis, see KL Scheppele, 'The Law Requires Translation: The Hungarian Preliminary Reference on Preliminary References: *IS*' (2022) 59 *Common Market Law Review* 1107, 1116. Commenting on *IS* (n 11), in the context of the reconstruction of citations in a certain part of the judgment, a passage on the duty or discretion to refer a preliminary question at any stage of the procedure has been interestingly interpreted as an implicit citation, with a different formulation, of a previous judgment: Case C-689/13 *Puligienica Facility Esco SpA (PFE) v Airgest SpA* EU:C:2016:199, para 34. The explicit reporting in quotation marks of *van Gend en Loos*, noted here (n 11), in the same passage has not been highlighted.

[83] Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428, paras 31–32.

[84] Case 26/62 *van Gend & Loos* EU:C:1963:1.

[85] *Costa v ENEL* (n 7).

[86] *Simmenthal* (n 77).

[87] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1990:257.

[88] See A Biondi 'In Praise of *Francovich*' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 413, 414.

Court of Justice increasingly overcrowded and institutional tensions involving the basics of EU law – starting with primacy – raising to pitches that were unexpected a decade ago or so, there is no need to rely on verified statistics to understand that today the citation of great classics has become recurrent (even if, probably, the 'fantastic four' collective appearance is possibly still confined to cases where the invocation of all of them appears justified).

When studying EU law and, inevitably, large or small numbers of CJEU's judgments, one cannot escape from noting that the citation of precedents is widely used. Making a so complex *little universe of case law* grow and keep its coherence, to the standard deemed desired and achievable, is not an easy task and one should enter in touch with the way they do it in Luxembourg.

Examination of citations should be thus considered as a part of the textual analysis of the decisions of the Court of Justice and the foregoing presentation demonstrates it can be useful to highlight aspects that might sometimes rest hidden, or to confirm and corroborate hypotheses and results obtained thanks to other techniques (related to other aspects of the text of the judgments, or emerging from interpretative reconstructions, or from other documents or sources). Its use presents advantages, but also some risks that must be borne in mind. To conclude the present pages, I indicate two attitudes that can be combined for a fruitful use of the technique presented here, each of which, however, should be used carefully, as they may otherwise lead to some exaggerated or paradoxical results.

First, *originalism* is an attitude that can be fuelled by citations analysis, in particular, by an excessive reliance on it. If originalism as an interpretation approach to normative texts stresses the need to be faithful to their original meaning, a kind of similar attitude could exist towards the case law of the Court of Justice. Under this perspective, the interpreter may tend to privilege a specific meaning of a precedent considered 'real' and 'original', with reference, for instance, to the context in which the ruling in question has been adopted. In other words, if the Court cites *that* ruling, it must be because it wants to use *that* specific and original meaning. This attitude runs counter the impression – recurring on many occasions – that the Court of Justice often refers to a present interpretation of precedents, especially if they are old ones. It has already been said, for instance, that big classics are used with reference to the specific context of the rule of law backsliding, meaning, of course, that their proper significance cannot be turned upside down, however a too strict originalism could prevent the interpreter to catch the actual idea the Luxembourg Judges want to carve out from that ruling. Moreover, when citations are used with some erraticism, with the reference not being to the real case where the CJEU made the point of law in question, originalism can be disguising again (or should be, at least, referred to the real original precedent to which the point of law in question has to be referred back).

Second, another idea strictly related to the recourse to citations analysis has to do with *systematic interpretation*. It has been stated, with reference to EU normative sources, that '[s]ystematic interpretation is based on the premise that the legislator is a *rational actor*. This means that the authors of the Treaties are assumed to have established a legal order that is consistent and complete' (emphasis original).[89] Paraphrasing this statement, it could be said that systematic interpretation of the case law is based on the premise that the Court of Justice is a '*rational actor*' and that is assumed that it produces a jurisprudence that is consistent and tends to be complete. This assumption normally lies at the roots of the approach of commentators, who work to understand the judgments, discover possible inconsistencies inside the legal reasoning of each one of them and, more broadly, within the *corpus* of the case law. Moreover, they tend to prefer understandings that ensure that each ruling and each line of case law plays a clear role in the context of the whole jurisprudence and that some basic principles are identified, inspiring the reconstruction of the whole system. Carrying out citations analysis can serve the objective of this approach. However, it could, at the same time, exacerbate little problems, that may be due to *light* inconsistencies, and/or are related to not particularly significant drafting inaccuracies.

To counterbalance the risks of both originalism and overestimation of apparently anti-systematic elements, citations analysis should not rest a technique significant *per se*, but the results it offers are always to be read under the light of the developments of the EU legal order and of the case-law of the Court of Justice. In other words, changes in the understanding of precedents, or of entire lines of case law, can be signs of vitality of the legal order and of the evolution of its features and of its historical mission. The art of the interpreter should include the ability to distinguish basically three different cases in this respect. The first one regards inaccurate citations, when their impact can be light, thus their systematic significance is low. Careful consideration should be given to the second case, where inconsistencies or unjustified ruptures occur, and the Court of Justice should be called upon take its responsibility, in particular to better state reasons for the solutions adopted. In the third case, incoherencies in citations may disclose the unfolding of possible developments of the case law, that deserve attentive consideration.

In conclusion, the aspiration for a more case-specific argumentation, that would be more sober and better elaborated at the same time[90], collides with systematic choices of the Court of Justice that are in place at least since the beginning of the eighties, that tend to privilege the idea that the jurisprudence of the Court is speaking altogether each time, recalling consolidated arguments, that could not lead but to the result finally adopted by the Court itself[91]. Nowadays it cannot be denied that the heavy use of literal repetitions (accompanied in the majority of cases by the citation of at least the last judgment containing the same expression) helps also in speeding

[89] K Lenaerts and JA Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (EUI Working Paper AEL 2013/9) cadmus.eui.eu 14.

[90] See references to Authors calling for 'impure' argumentation *supra*, at 22.

[91] See M Bobek, '*The Court of Justice of the EU*' (College of Europe Research Papers in Law) 2/2014, at 16, who talks about 'cluster citations' and of a 'sensation of 'inevitability' as to the results reached by the ECJ'.

up the drafting exercise and makes research engines and machine learning work easily. The turnover of this trend seems improbable, thus EU law scholars should become more and more attentive to citations and to the hidden logical processes conducted – consciously or not – underneath their surface …still without abandoning the somewhat romantic desire of a different way to state reasons in judgments.