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Giulio Itzcovich

***The European Court of Justice as a Constitutional Court.
Legal Reasoning in a Comparative Perspective***

Sant'Anna School of Advanced Studies
Department of Law

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Abstract

After having briefly presented some institutional aspects of the Court of Justice of the European Union, the present report analyses forty of its leading cases in order to assess the general characteristics of the legal reasoning developed by the Court in interpreting the Treaties. The report underlines the importance of teleological interpretation and arguments from precedents, the frequency and cogency of the arguments based on the principle of the rule of law, the difficulty for the Court in referring to the political nature of the Union and the tendency to eschew constitutional rhetoric. Above all, the report underlines the high degree of impersonality that the Court is able to achieve in its judgments and concludes that it depends on a variety of factors such as the collegiate nature of the judgments, their subject matter, the declining but persisting influence of the French model, the need for translation and informatisation, the extensive use of precedents and literal self-quotations, and the contradictory and unsettled status of the Court of Justice as *sensu lato* constitutional court of the European legal space.

Key-words

European Court of Justice, Legal Reasoning, Constitutional Reasoning, Constitutional Adjudication, Legal Argumentation

*The European Court of Justice as a Constitutional Court. Legal
Reasoning in a Comparative Perspective*

Giulio Itzcovich*

A. Institutional Design 1. Premise. A constitutional court?; 2. The jurisdiction of the Court; 3. Access to the Court and workload, procedure and evidence; 4. Composition of the Court. The judges; 5. The advocates general; B. Arguments in Constitutional Reasoning 1. “Constitutional Reasoning” at the ECJ; 2. The structure of constitutional arguments; 3. Analogies; 4. Establishing/Debating the text of the Treaties; 5. Applicability of the Treaties; 6. Ordinary meaning of the words; 7. Domestic harmonising arguments; 8. Harmonising with international law; 9. Precedents; 10. Implicit concepts and principles; 11. Linguistic-logical formulae based on silence; 12. Teleological arguments referring to the purpose of the text; 13. Teleological arguments referring to the purpose of the Constitution-maker; 14. Non-legal arguments; 15. References to scholarly works; 16. References to foreign law; C. Key Concepts 1. Form of state, form of government, federalism, democracy; 2. Sovereignty and Nation; 3. Substantive legal principles and fundamental rights, equality and basic procedural rights; 4. Rule of Law; D. The Context of Constitutional Reasoning 1. Academic context: legal scholarship as context for constitutional reasoning; 2. Legal and political culture as context for constitutional reasoning E. General characteristics of the constitutional discourse. The style of the Court’s legal reasoning 1. The collegiate nature of the judgment; 2. The subject matter of the Court’s judgments and their non-constitutional tone; 3. The cultural background(s) of the Court; 4. Impersonality: translation, informatisation and the use of precedents; 4. Framing the constitutional issues as non-constitutional issues. Appendix: The Sample

* Researcher in Philosophy of Law, University of Brescia. Comments are welcomed: giulio.itzcovich@unibs.it. This paper constitutes a preliminary and extended version of a study that is due to be published within the framework of “Conreason: Constitutional Reasoning in a Comparative Perspective” (<http://www.conreasonproject.com/>) directed by András Jakab. I am grateful to Jakab and to the other project participants for their remarks and commentaries to an earlier version of this paper. I am also indebted to Giuseppe Martinico, Leonardo Pierdominici, Damiano Canale, Giovanni Tuzet and to the research communities at Stals – Sant’Anna Legal Studies, and Bocconi University – Sraffa Department, for their interest in discussing the outcomes of my research. Note that the decisions of the ECJ that are part of the sample of 40 influential judgments analysed by the paper (“the Sample”) will be quoted in shortened form – for the complete references, see the Appendix – and the decisions that are not included in the Sample will be quoted in the usual complete form.

A. Institutional Design

1. Premise. A constitutional court?

Unlike the other courts analysed in the research, determining whether the ECJ (European Court of Justice) is a constitutional court or not is not a straightforward matter of course¹. To qualify it in such a way requires some introductory terminological and conceptual considerations for at least two separate reasons.

The first is as much obvious as contingent. It lies in the fact that a consequence of the constitutional debate launched at Laeken in 2001, culminating with the failed Constitutional Treaty and then with the approval of the Lisbon Treaty in 2007, is a definite political stake or political bias influencing the response to questions such as, “Does the EU (European Union) have a constitution?” and, “Does it need one?”. These questions have been addressed to the European peoples and for the time being they have received a negative answer. Following the results of the French and Dutch referenda, the European Council expressly decided that the new European Treaties “will not have a constitutional character. The terminology used throughout the Treaties will reflect this change: the term ‘Constitution’ will not be used”².

The question of the constitutional nature of the EU institutions and treaties has become the object of such harsh political controversy throughout Europe. Thus, even if one were willing to admit that the question of the “constitutional nature” of something might have a purely theoretical meaning, that supposition would lose part of its credibility in the case of the EU. This is the first reason why, if we want to approach the ECJ as a constitutional court and avoid misunderstandings, we are forced in practice to provide some preliminary clarifications as to what it means to be a constitutional court in the context of our analysis.

The second reason is perhaps more interesting from a theoretical view point because it does not relate to the contingent political vicissitudes of the EU, but to one of its most salient features – what the legal doctrine constantly refers to as the *sui generis* nature of the Community. The *sui generis* nature is the result and the synthetic formulation of several institutional novelties that have characterised the ECs (European Communities) since the beginning: directly applicable regulations, majority voting in the Council, independency of the Commission, and – last but not least – the jurisdiction of the ECJ. Since the establishment of the ECSC (European Coal and

¹ The issue has already been discussed many times: already in 1954 Maurice Lagrange argued that the ECJ was a constitutional court in embryo (M. Lagrange, “La Cour de justice de la Communauté européenne du charbon et de l’acier”, *Revue du droit public et de la science politique en France et à l’étranger*, 70, 1954, pp. 417–435). See e.g. F.G. Jacobs, “Is the Court of Justice of the European Communities a Constitutional Court?”, in D.M. Curtin and D. O’Keeffe (eds.), *Constitutional Adjudication in European Community and National Law*, Dublin, Butterworth, 1992, pp. 25–32; A. Arnall, “A Constitutional Court for Europe?”, *Cambridge Yearbook of European Legal Studies*, 6, 2003-2004, pp. 1–34; B. Vesterdorf, “A Constitutional Court for the EU?”, *International Journal of Constitutional Law*, 2006, pp. 607–617; L. Azoulai, “Le rôle constitutionnel de la Cour de Justice des Communautés européennes tel qu’il se dégage de sa jurisprudence”, *Revue trimestrielle de droit européen*, 44/1, 2008, pp. 29–46; T. Tridimas, “Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction”, *International Journal of Constitutional Law*, 9/3-4, 2011, pp. 737–756; E. Sharpston, G. De Baere, *The Court of Justice as a Constitutional Adjudicator*, in A. Arnall et al. (eds.), *A Constitutional Order of States?*, Oxford-Portland, Hart, 2011, pp. 123–150, with further references.

² Council of the EU, *IGC 2007 Mandate*, document 11218/07, 26 June 2007, p. 3.

Steel Community) in 1951, the legal scholarship has always qualified the EC institutions as *sui generis* entities in order to express the fact (and to endorse the project) that they lie (and should lie) somewhere in between international law and constitutional law, and between interstate organisation and federal construction³.

True enough, the *sui generis* nature has never been, so to say, a brute fact – a state of things capable of being simply observed and described in a detached and objective manner. It is a complex institutional fact or, to put it differently, a narrative with notable consequences for several legal issues of European integration. In any case, the institutional self-understanding and the political project expressed by the formula “*sui generis* nature” have deeply affected the semantics of European law. As a consequence of the *sui generis* nature of the Community, several fundamental concepts of public law, once they are applied to the European institutions, have undergone significant transformation and adaptation⁴. And the concepts of “constitution” and “constitutional” are no exceptions in this regard.

If we apply the words “constitution” and “constitutional” to the ECJ and try to clarify in what sense the ECJ is a constitutional court, we run into a characteristic paradox. In order to expound the paradox, we must first of all discharge the non-technical meaning of “constitution” as emphatic and generic synonym for “very important law”. This is a concept that was central to the recent political debate on the opportunity of adopting a fully-fledged constitutional charter for the EU and is also, one may argue, crucial in most of the current legal literature on the constitutional nature of the EU and its Court of Justice. We must also dismiss any politically oriented, substantive concept of constitution. If, following Carl Schmitt, the constitution is intended as “the complete decision over the type and form of the political unity”⁵ – arguably a too demanding concept of constitution – then the Member States’ governments and the European peoples would have taken a fundamental “non-decision” on the type and form of the political unity: today’s EU would be marked either by the absence of unity (the EU as a polycentric, pluralistic post-national constellation)⁶ or by the absence of politics (the EU as a non-political, strictly technical regulatory State)⁷. Both these reconstructions of the current non-constitutional or post-constitutional nature of the EU might be viable and attractive, but they do not seem to have any direct and interesting bearing on the way in which we could conceive of the ECJ and describe its legal reasoning⁸.

³ Paradigmatic in this regard is R. Schuman, “Préface”, in P. Reuter (ed.), *La Communauté Européenne de Charbon et de l’Acier*, Paris, LGDJ, 1953, p. 7.

⁴ On the “problems of translation” of the core normative concepts of constitutionalism from the state to the EU, see N. Walker, “Postnational Constitutionalism and the Problem of Translation”, in J.H.H. Weiler, M. Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge, CUP, 2003, pp. 27–54.

⁵ “Die Verfassung als Gesamtentscheidung über Art und Form der politischen Einheit”. See C. Schmitt, *Constitutional Theory* (1928), trans. by J. Seitzer, Durham, DUP, 2008, p. 75.

⁶ See, among many, N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford, OUP, 1999; I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, *Common Market Law Review*, 36, 1999, pp. 703–750; N. Walker, “The Idea of Constitutional Pluralism”, *Modern Law Review*, 65, 2002, pp. 317–359; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, OUP, 2010.

⁷ A. La Spina, G. Majone, *Lo Stato regolatore*, Bologna, Il Mulino, 2000.

⁸ It is obviously possible to adopt other, non-Schmittian substantive concepts of constitution and assume, for instance, that a legal document is a constitution if it performs certain functions (e.g.

Instead, if we want to observe and possibly explain the inherent paradox of the *sui generis* constitutional nature of the ECJ, we must refer to the Kelsen-inspired concept of constitution proposed by András Jakab and stipulate that a constitution is “a norm or a group of norms which are of the highest rank in a legal order in the sense that the validity of all other norms is measured on them”⁹.

If we adopt this concept of constitution, the ECJ would wear its constitutional hat mainly in annulment proceedings brought under Article 263 TFEU (ex Article 230 TEC), in which it is competent to review the legality of EU acts such as legislative acts and other acts adopted by the European institutions which are intended to have legal effects. Moreover, the ECJ would serve as constitutional court in the preliminary proceedings on the validity of EU law: under Article 267(b) TFEU (ex Article 234 TEC), where a question on the validity of acts of the EU institutions is raised before a national court, that court may (or must, if it is a court of last instance) request the Court to give a ruling thereon.

However, according to a widespread and well-grounded opinion, it is not in annulment proceedings that the Court has exercised, or has acquired, its constitutional status, nor is it in preliminary ruling proceedings on the validity of Community law. The ECJ has become a constitutional court mainly thanks to the powers it exercises in preliminary ruling proceedings on the interpretation of Community law. Under Article 267(a) TFEU, when a national court has any doubt about the meaning of EU law, it may (or must, if it is a court of last instance) initiate a preliminary ruling proceeding referring the question of interpretation to the ECJ. Thanks to this kind of proceedings, the ECJ has been able to develop a constructive and mutual relationship (a “dialogue”, as it has become customary to say) with the national courts, which means that the European and the national courts have collaborated in shaping the content of Community law “in action” without establishing a formal hierarchical relationship between themselves; the ECJ has initiated a process of “constitutionalisation” of the European Treaties making it acceptable to the national courts¹⁰. Thanks to the

allocates the power between different governing bodies and provides for the protection of certain principles and individual rights) or has certain features (it is constitutive, stable, superior, justiciable, written, entrenched, for J. Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in L. Alexander (ed.), *Constitutionalism. Philosophical Foundations*, Cambridge, CUP, 1998, p. 153). On the basis of the definition one chooses to adopt, it is easy to conclude that the EU Treaties are, or are not, a constitution: see e.g. B. Vesterdorf, “A Constitutional Court for the EU?”, cit. (“there can be no doubt that the ECJ already carries out constitutional tasks”); D. Grimm, “Does Europe Need a Constitution?”, *European Law Journal*, 1995, p. 287 (the EU does not and should not have a constitution because the constitution is “the higher-rank group of norms deriving from the people and directed at the State power”).

⁹ A. Jakab, “Constitutional Reasoning in Constitutional Courts – A European Perspective”, in this volume.

¹⁰ Standard reference works on the EC constitutionalisation process are E. Stein, “Lawyers, Judges, and the Making of a Transnational Constitution”, *American Journal of International Law*, 75/1, 1981, pp. 1–27; G.F. Mancini, “The Making of a Constitution for Europe”, *Common Market Law Review*, 1989, 26, pp. 595–614; A.-M. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), *The European Court and National Courts. Doctrine and Jurisprudence*, Oxford-Portland, Hart, 1998; J.H.H. Weiler, *The Constitution of Europe*, Cambridge, CUP, 1999; A. Stone Sweet, *The Judicial Construction of Europe*, Oxford, OUP, 2004; K.J. Alter, *Establishing the Supremacy of European Law*, Oxford, OUP, 2001. See also G. Itzcovich, *Teorie e ideologie del diritto comunitario*, Torino, Giappichelli, 2006, pp. 85 ff.; A. Vauchez, “The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity”, *European Law Journal*, 16/1, 2010, pp. 1–28.

preliminary ruling proceedings the ECJ has gradually laid the basis and eventually established its most authentic and significant “constitutional status”.

Note that when we speak here of the constitutional status of the ECJ in the preliminary interpretative rulings, the words “constitution” and “constitutional” are not merely employed in their non-technical sense – the ECJ as “very important” judge – but in their technical meaning. However, the legal order whose norms are evaluated against the constitution is no longer limited to the legal order of the EU strictly conceived, as it happens in annulment proceedings and in preliminary proceedings on the validity of EU law; the legal order to which the ECJ belongs as constitutional court is now meant to be comprehensive of the legal order of the Member States. In fact, once that the national courts have in principle accepted the doctrines of the direct effect and supremacy of Community law, the ECJ is *de facto* empowered to assess, by means of the preliminary ruling proceedings, not only the validity of Community law, but also the conformity to Community law of Member States’ legislation and practices¹¹.

True enough, in preliminary ruling proceedings the ECJ is not competent to assess the validity of national legislation. However, by interpreting EU law the ECJ can indirectly but unequivocally rule on Member States’ compliance. The national courts have accepted that EU law can be directly applicable and in principle enjoys supremacy. Therefore, as a consequence of the ECJ’s decision national law can be rendered inapplicable in the case at hand and, indirectly, *erga omnes*¹². This effect can be achieved thanks to the enduring cooperation of the national courts: the majority of references from national courts are designed to make a finding on the compatibility of national legislation with EU law¹³, and the ECJ can exercise its *sensu lato* constitutional role only insofar as it can rely on the general acceptance of the supremacy of EU law by national judges¹⁴.

Thus, we can say that the ECJ is *sensu stricto* a constitutional court – the constitutional court of the EU legal order – with regard to annulment proceedings and preliminary proceedings on the validity of EU law. Here the ECJ is by all means the highest court of the legal order which has the task of adjudication on the validity of norms by reference to the Treaties, and its jurisdiction is exclusive as no other court

¹¹ “Direct effect” is the obligation of a court or another authority to apply the relevant provision of EU law, either as a norm which governs the case or as a standard for legal review, and “supremacy” is the capacity of EU law rule to take precedence over inconsistent norms of national law: S. Prechal, “Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union”, in C. Barnard (ed.), *The Fundamental of EU Law Revisited*, Oxford, OUP, 2007, pp. 35–69, pp. 37 f.

¹² H.G. Schermers, D.F. Waelbroeck, *Judicial Protection in the European Union*, 6th ed., The Hague, Kluwer Law International, 2001, p. 305; G. Martinico, *L’integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo*, Jovene, Napoli, 2008, pp. 91 ff.

¹³ M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, Oxford, OUP, 2010, pp. 156 f.; K. Lenaerts, “Form and Substance of the Preliminary Ruling Procedure”, in D. Curtin, T. Heukels (eds.), *Institutional Dynamics of European Integration*, Dordrecht, Martinus Nijhoff, 1994, pp. 355–380.

¹⁴ On the relationship of collaboration and conflict, “dialogue” and negotiation, between the national courts and the ECJ there is an extensive literature. See Slaughter, Stone Sweet and Weiler (eds.), *The European Court and National Courts*, cit.; M. Kumm, “Who is the Final Arbiter of Constitutionality in Europe?”, *Common Market Law Review*, 36, 1999, pp. 351–386; A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe*, Oxford, OUP, 2000.

(except the General Court, which however is an internal articulation of the Court of Justice of the European Union) has the competence to annul EU legislation¹⁵.

In addition, and most importantly, the ECJ is *sensu lato* a constitutional court – a constitutional court *sui generis* – when it evaluates the “European validity”, so to speak, of national legislation and practices. Here the ECJ is not only the constitutional court of the EU, but is the constitutional court – or, to say it better, *a* constitutional court: one among many – of the European “legal space”: a legal space that is comprehensive both of the EU legal order and of the legal orders of the Member States. Its *sensu lato* constitutional jurisdiction is not exclusive, because the competence to annul national legislation belongs primarily to national courts, which are also generally competent, if not to annul EU legislation, at least to suspend its applicability when it is deemed to be incompatible with fundamental domestic constitutional provisions and/or with the national legislators’ explicit decision of withdrawing from their European obligations. Thus, in its capacity as *sensu lato* constitutional court of the European legal space, the ECJ is not alone but shares its responsibility with other courts – with the constitutional courts of the Member States and, indirectly, with the ECtHR (European Court of Human Rights); it is not the highest court of the legal order, but it is one of several high courts of justice of the European constitutional space.

Thus, if we want to speak of the ECJ as a constitutional court when it indirectly evaluates the conformity to EU law of Member States’ legislation and practices under Article 267(a) TFEU (preliminary interpretative rulings), then we must put quotation marks around the adjective “highest” in our definition of constitution (“a norm or a group of norms which are of the highest rank in a legal order”). If we do not look at the legal order of the EU as strictly conceived and instead look at the European legal space broadly conceived, we must ask ourselves – and here lies the paradox of the *sui generis* constitutional nature of the ECJ – whether a constitution that is not the highest law, a constitution that is *sui generis*, is still a constitution, and whether a court that is not supreme, a court that is just one authoritative voice in the judicial dialogue on the constitutionalisation of Europe, is still a constitutional court.

In the end, it might well be just a matter of words. But if we want to speak of the ECJ as a constitutional court, as it seems perfectly reasonable to do, then we must be aware that the word “constitution” has undergone a significant change in the experience of European integration. This change can be disguised by denying the constitutional nature of the EU or by constructing ad hoc stipulative definitions of “constitution” in order to accommodate the Community construction. Alternatively, this change can be acknowledged and highlighted by making recourse to traditional substantive or formal concepts of constitution. In the latter case, we will develop and work with paradoxical definitions, such as the European constitution as “fundamental indecision” on the type and form of the political unity, and the European constitution as “less than highest” law.

¹⁵ *Foto-Frost* (1985), par. 15: national courts “do not have the power to declare acts of the Community institutions invalid ... Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty”.

2. The jurisdiction of the Court

The jurisdiction of this atypical constitutional court is atypical in several other respects. First of all, the Court of Justice of the EU is at present composed of three judicial organs: the Court of Justice properly called, whose legal reasoning is the subject of our inquiry; the GC (General Court), formerly Court of First Instance; and the specialised courts, of which at the moment there is only one, the CST (Civil Service Tribunal). Secondly, and most importantly, the matters upon which the Court is competent to adjudicate are so diverse and the grounds of its jurisdiction are so miscellaneous that the Court has no analogue in the national or international level. In fact, it might be said that the ECJ is not only the *sensu stricto* constitutional court of the EU legal order and one among the several *sensu lato* constitutional courts of the European legal space (see above), but is also an international tribunal, an administrative court, an appeal court, and so on. To put it in the usual irreplaceable way, it is a *sui generis* court.

A detailed account of the precise contours of the ECJ's jurisdiction would be out of place here. Suffice to say with regard to its functions as an international court that the ECJ has an exclusive and mandatory jurisdiction on the controversies arising between the contracting parties of the Treaties, the Member States of the EU. Any Member State which considers that other Member States have failed to fulfil their obligations under EU law can bring the matter before the ECJ, and only before the ECJ; the other Member States are automatically subject to the jurisdiction of the Court and cannot invoke any immunity – no express declaration of acceptance is required, no reservation is permitted.

However, Member States' power to bring a case against other Member States has been very rarely used¹⁶. In practice, infringement proceedings are almost always initiated by the Commission which acts *motu proprio* or at the solicitation of individuals, businesses and associations, and which enjoys a full discretionary power to assess whether the action is appropriate and suitable from a political as well as legal point of view. The convicted Member States are under the obligation to comply with the ECJ's rulings, although the judgments of the court are declaratory in nature, not self-executing, and therefore do not give rise to any immediate legal consequence in Member States.

In order to give the Member States an incentive to abide by the judgments of the Court, the Treaty of Maastricht gave the Court the power to impose financial sanctions on the Member State concerned. Moreover, the ECJ has held in the *Francovich* (1995) case that the Member States are liable to compensate individuals and companies for damage caused by breaches of EU law. So, if the ECJ can be considered as an international court, then we must conclude that it is an extraordinarily effective, *sui generis* one.

Actions for annulment deserve to be mentioned because the ECJ's jurisdiction over them constitutes what can be called *sensu stricto* constitutional review – a review of EU legislation made in accordance with the standards established by the highest law, the Treaties. The first legal doctrine dealing with the ECJ was used to consider this competence essentially identical to that of an administrative jurisdiction, rather than

¹⁶ One rare recent example is Case C-364/10, *Hungary v Slovakia* [2012] not yet published, on the ban of Hungarian President László Sólyom from Slovakia in August 2009 (case dismissed).

constitutional in nature¹⁷, and in fact the jurisdiction of the ECJ on the actions for annulment was originally designed by strictly following the model of the French *Conseil d'État*¹⁸. The action can be brought by certain preferential plaintiffs – the Member States, the Council, the Commission and the Parliament – on grounds of lack of competence, infringement of essential procedural requirements, infringement of law and misuse of powers.

The action for annulment can also be brought by certain specialised bodies of the EU – the Court of Auditors, the European Central Bank, and the Committee of the Regions – for the purpose of protecting their prerogatives, thereby emphasising the constitutional role of the ECJ as guarantor of the proper functioning of the inter-institutional balance of the EU. Following the Treaty of Lisbon, the Court has a limited jurisdiction to decide on the legality of acts adopted by the European Council or by the Council in relation to a serious and persistent breach of the Union's fundamental values by a Member State. Last but not least, the action for annulment can be brought directly by any natural or legal persons – private parties such as individuals, companies, associations, but also legal persons governed by public law, such as regional authorities of a Member State – against decisions addressed to them, against decisions and regulatory acts that are not addressed to them but which directly and individually concern them and, after the Treaty of Lisbon, also against regulatory acts which are of direct concern to them and do not entail implementing measures. Usually this kind of action is decided in first instance by the GC and the ECJ is the appellate court against such decisions.

Other forms of jurisdiction of the ECJ that can be associated with the action for annulment – and thus with the *sensu stricto* constitutional competences of the Court – are the actions for failure to act and the advisory jurisdiction to give opinions on the lawfulness of the international agreements concluded by the EU. Although the failure to act is a typical ground for complaint before the administrative jurisdiction, this kind of action can be associated with the action for annulment because both consist of forms of judicial review on the (in)activity of EU institutions made in accordance with the standards established by the highest law, the Treaties. The same applies to the advisory jurisdiction of the ECJ as the opinion of the Court is binding upon the institutions of the EU and, where it is adverse, the agreement envisaged cannot enter into force unless the Treaty is amended. Thus, the powers of the Court in this respect are identical to those of a preventive and abstract constitutional review.

The ECJ is an appellate court against the decisions of the GC. Decisions given by the GC may be subject to a right of appeal to the ECJ on point of law only: where the First Advocate-General considers that there is a serious risk of the unity or consistency of EU law being affected, he may propose that the Court of Justice review the decision of the GC. For its part, the GC has jurisdiction, amongst other matters of minor importance, over actions for annulment and failure to act brought by natural or

¹⁷ See e.g. M. Lagrange, “La Cour de Justice”, *Revue du droit public et de la science politique en France et al étranger*, 1954, pp. 417 ff.; L. Delvaux, *La Cour de justice de la Communauté européenne du charbon et de l'acier. Exposé sommaire des principes*, Paris, LGDJ, 1956, pp. 19 ff.

¹⁸ J. Bast, “Legal Instrument and Judicial Protection”, in A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law*, 2nd ed., Oxford-München, Hart-Beck, 2009, pp. 345–397, p. 348; L. Neville Brown, T. Kennedy, *The Court of Justice of the European Communities*, 5th ed., London, Sweet & Maxwell, 2000, p. 157; T. Koopmans, “The Birth of European Law at the Cross-Roads of Legal Traditions”, *American Journal of Comparative Law*, 39/3, 1991, pp. 493–507, p. 500.

legal persons, over actions brought by the Member States against the Commission and in certain cases against the Council, over disputes concerning the non-contractual liability of the EU, and over appeals, limited to points of law, against the decisions of the CST.

There is no doubt, however, that the most important competence of the ECJ is the power to give a preliminary ruling on the validity and interpretation of EU law when requested by a national court. The preliminary ruling procedure is the central instrument for judicial control of the EU as it amounts to a sort of indirect but effective check on the “European lawfulness” of Member States’ laws and practices. As much of the responsibility for applying EU law belongs to the domestic courts of the Member States, the viability of this procedural channel between the ECJ and the national judges is vital in order to achieve the uniform application of EU law over all of Europe. Moreover, as the preliminary ruling procedure is an effective means of protecting rights claimed under EU law, the viability of this procedure transforms all citizens into potential guardians of compliance with EU law, therefore contributing enormously not only to the uniformity but also to the effectiveness of EU law enforcement.

Most of the landmark judgments of the Court have been given under this head of the ECJ’s jurisdiction, and it is revealing in this regard that in the sample of the 40 influential judgments analysed by this research (hereby “the Sample”), 32 are preliminary rulings on the interpretation of Community law, 2 are preliminary rulings on its validity, 1 is a preliminary ruling both on the interpretation and the validity of EC law, 3 are decisions on annulment proceedings, 1 is an opinion and 1 is an appellate decision. No judgment gathered in the Sample was rendered in an infringement proceeding.

3. Access to the Court and workload, procedure and evidence

The ECJ does not have the discretionary power to refuse to review a case and must rule on all the cases lodged with its registry¹⁹. Obviously, as with every other court, the ECJ can assess whether it has jurisdiction over certain kinds of cases brought to its attention. The Court has the authority to question, of its own motion, the admissibility of the action and, in so doing, it can establish precedents that gradually constitute a more or less consistent case law on the criteria according to which the Court can be called to adjudicate on certain matters. Nonetheless, the ECJ does not enjoy discretion in the strong sense that it can refuse to review a case without providing any argument, on a groundless basis or for reasons of opportunity and/or political necessity. In contrast to the US Supreme Court, whether the ECJ can review on a writ of certiorari is “a matter of right”, not of “judicial discretion”²⁰.

¹⁹ Note, however, that the ECJ reviews the decisions of the GC only when the First AG considers that there is “a serious risk of the unity or consistency of Union law being affected” (Article 62 ECJ Statute).

²⁰ On the advantages of establishing, if not a “European certiorari”, at least a limitation of preliminary references to the courts of last instance, see J. Komárek, “In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure”, *European Law Review*, 32/4. pp. 467–490, pp. 486 ff.

An important consequence of the absence of such discretionary power is the limited capability of the Court to autonomously determine its own workload²¹. The caseload of the Court depends primarily on factors that are external to the Court, such as the increasing size of the EU after the enlargements, the gradual but constant extension of EU competences into new policies areas, the increased salience of EU action, the growing constellation of economic, political and social interests involved in the enforcement of EU law, the more or less collaborative attitude of the national courts, the Commission's willingness to pursue infringement proceedings against Member States, the general phenomenon of “judicialisation” (the tendency to a greater presence of judicial institutions in political and social life), and so on. Internal factors, such as whether the Court takes a liberal or strict attitude to the admissibility of the action, are not the most important elements affecting the caseload.

Following the constant expansion of EU competences and the successive enlargements of the EU, the judicial activity of the Court has steadily increased over time. In the 1950s the Court had less than 50 new cases each year; in the 1960s there were approximately 30–50 new cases each year and usually less than 100; and in the 1970s the Court usually had between 100 and 200 new cases each year (with an unsurpassed record of 1324 new cases in 1979). In the 1980s the workload increased to between 200 and 400 new cases each year; in the 1990s there were between 300 and 500 cases; since 2001 there have been between 400 and 600 new cases each year (688 in 2011)²². This increase has had an adverse effect on the ECJ's ability to deliver its judgments within a short timeframe. In 1975 it took the ECJ an average of six months to deal with preliminary references; in 1983 it took 12 months; in 1988, 17 months; and in 2003 the average period reached a peak of 25.5 months and then it started to decrease to 16.8 months in 2008 and 16.4 months in 2011²³. Preliminary references represent by far the greatest source of the caseload of the Court: in the five years 2007–2011, more than a half of the proceedings before the ECJ were references for a preliminary ruling.

In order to respond to the increasing workload, the Court has benefited from the autonomy it enjoys in devising its own rule of procedure and in organising and managing the cases. In the last years the Statute of the ECJ and its Rules of Procedure have been amended several times in order to secure greater organisational autonomy, flexibility and efficiency. Without going into much detail, it is worth mentioning that the use of Chambers has evolved considerably and has been gradually extended to the current situation in which cases are assigned to the full Court or to the Grand Chamber only exceptionally – originally the Chambers were used in lieu of the full Court only for hearing cases related to staff matters. At present, the ECJ is divided into eight Chambers consisting of either three or five judges, and the general rule is that cases are assigned to Chambers “so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber” (Article 44(3) ECJ Rules of Procedure).

²¹ P. Craig, “The Jurisdiction of the Community Courts Reconsidered”, in G. de Búrca, J.H.H. Weiler (eds.), *The European Court of Justice*, Oxford, OUP, 2001, pp. 177–214, pp. 185 ff., examines the mechanisms possessed by the ECJ for controlling the number of cases brought before it.

²² Detailed statistics concerning the judicial activity of the ECJ are available on the web site of the Court. See the CJEU, *Annual Report 2011*, Luxembourg, 2012, at http://curia.europa.eu/jcms/jcms/Jo2_7000/.

²³ CJEU, *Annual Report 2011*, cit.

Moreover, the procedure followed by the Court is essentially written, inquisitorial, and from the viewpoint of a jurist accustomed to the proceedings before the national courts it is marked by great flexibility and informality²⁴. Informality and flexibility result from, amongst other things, the provision by which the ECJ may require the parties to produce all documents and to supply all information which the Court considers desirable, and may also require the Member States governments as well as EU institutions to supply every kind of information the Court considers necessary; the Court can at any time entrust any individual or organisation it chooses with the task of giving an expert opinion and can order that any measure of inquiry be undertaken or that a previous inquiry be repeated or expanded. The judge-rapporteur can chair informal preparatory meetings with the parties and the Court can decide to dispense with the oral part of the procedure. In practice the oral proceedings are reduced to addresses by the opposing lawyers within strict time limits, normally thirty minutes, questions put from the bench, and very brief replies²⁵.

The language of the case is chosen by the applicant among the official languages of the EU, except where the defendant is a Member State, in which case the language of the case is the official language of that State. In preliminary ruling proceedings, the language of the case is the language of the referring court. The internal working language of the Court, however, is French: it is the language in which the judges deliberate and the language in which preliminary reports and judgments are drafted.

Summaries of judgments of the Court of Justice are published in the “Official Journal of the European Union” (C Series) and all judgments are published in full together with opinions of the Advocates-General in the “European Court Reports”, except some minor decisions (e.g., judgments delivered, other than in preliminary ruling proceedings, by Chambers of three Judges) which are nonetheless accessible on the Court’s internet site.

4. Composition of the Court. The judges

Another response to the growing workload of the ECJ was the establishment in 1989 of the Court of First Instance (now GC), intended to relieve the pressure on the Court by creating “a specialised fact-finding tribunal with particular expertise in cases concerning the economic effects of complex factual situations”²⁶, the establishment in 2005 of the CST, a specialised court called upon to adjudicate in disputes between the EU and its civil service, and, most importantly, the increase in the number of the members of the ECJ. Following several incremental enlargements, today’s Court of Justice of the EU is composed of ECJ’s twenty-seven judges, of the GC’s twenty-seven judges and of the CST’s seven judges, all appointed by the common accord of the governments of the Member States for a renewable term of six years.

With regard to appointments of the members judges, the basic rule – originally a political convention stemming from the practice of the national governments, later a

²⁴ See e.g. P. Biavati, *Diritto processuale dell’Unione europea*, 4th ed., Milano, Giuffrè, 2009, pp. 38 ff.; F. Capotorti, “Le sentenze della Corte di Giustizia delle Comunità europee”, in Università degli Studi di Ferrara (ed.), *Le sentenze in Europa. Metodo tecnica e stile*, Padova, Cedam, 1988, pp. 230–247, p. 235, on informality.

²⁵ Neville Brown, Kennedy, *op. cit.*, pp. 281 f.

²⁶ A. Arnall, *The European Union and Its Court of Justice*, 2nd ed., Oxford, OUP, 2006, p. 25.

rule of the Treaty formally established by the Treaty of Nice – is “one State, one judge”; that is, the ECJ consists of one judge from each Member State. Each judge is proposed by their country of origin, and in practice the choice made by the national government is never disputed by other national governments. To a limited extent, therefore, the ECJ is a representative jurisdiction, and this raises the question: can the demand for a representative court be compatible with its independence? The members of the ECJ have always been appointed by common accord of the Member States without any formal assessment of their appropriateness being made at European level. “It is in the muffled atmosphere of ministerial cabinets and diplomatic meetings, sheltered from the public gaze, that the members of the ECJ are appointed”²⁷. As the mandate of the judges is renewable, the system of appointment gives national authorities a means of applying pressure on the Court and this raises concerns for the independence of the ECJ.

In order to meet these concerns, the Lisbon Treaty modified the appointment procedure and required the Member States to consult a panel before appointing judges and AGs of the Court of Justice or the General Court so as to obtain a non-binding opinion on candidates’ suitability for office (Article 255 TFEU)²⁸. However, there is no doubt that the strongest ‘normative’ guarantee of the ECJ’s independence lies in the fact that decisions are taken collegiately and that judges’ deliberations remain secret. Judgments contain no indications of the votes taken nor do they contain any dissenting opinion. Obviously, if the judges’ votes and opinions were published, the governments would be able to check and control their nominees. In addition, it seems that a non-normative but factual or institutional guarantee is provided by the strong group identity and institutional culture that the ECJ has been able to develop and consolidate over the course of time²⁹, which hinders – although cannot fully prevent – the risk of a judge acting as a docile instrument of his or her government of origin.

Little information exists, however, about how Member States select their members for the ECJ; no thorough study has ever been conducted on who the judges of the ECJ are, their social backgrounds, and their political preferences³⁰. We know that the judges of the ECJ are chiefly professors, often of community, comparative, or international law; most of them have had previous judicial experience in their Member State of origin, often as judges of the supreme courts or constitutional courts; not infrequently they have professional backgrounds as higher civil servants,

²⁷ R. Dehousse, *The European Court of Justice*, London, Macmillan, 1998, p. 14.

²⁸ On the effects of the establishment of the advisory panel, see T. Dumbrovský, B. Petkova, M. Van Der Sluis, ‘Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States’, *Common Market Law Review*, 51 (2014), 455–482.

²⁹ D. Chalmers, “Judicial Preferences and the Community Legal Order”, *Columbia Journal of European Law*, 5, 1999, pp. 101–134, p. 168; D. Edwards, “How the Court of Justice Works”, *European Law Review*, 1995, 20, pp. 539–558, pp. 556 ff.; J. Bell, “European Perspectives on a Judicial Appointments Commission”, *Cambridge Yearbook of European Legal Studies*, 6, 2003–2004, pp. 35–48, discussing the judicial independence of the ECJ.

³⁰ Noteworthy exceptions are S.J. Kenney, “The Members of the Court of Justice of the European Communities”, *Columbia Journal of European Law*, 5, 1999, pp. 101–134; H. Rasmussen, *On Law and Policy in the European Court of Justice*, Dordrecht, Martinus Nijhoff, 1986. Recent legal history has started to investigate the first ECJ and its legal community: see e.g. C. Pennera, “The Beginnings of the Court of Justice and Its Role as a Driving Force in European Integration”, *Journal of European Integration History*, 1/1, 1995, pp. 111–128; A. Cohen, “Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)”, *Law & Social Inquiry*, 32/1, 2007, pp. 109–135; N.P. Ludlow (ed.), *Journal of European Integration History*, 14/2, 2008.

politicians and lawyers. We know that while the very first ECJ included members that were lacking any prior judicial experience (e.g., a trade unionist and an economist) and low-profile and soon-to-retired jurists, today the technical expertise, legal knowledge and professional prestige of the members of the Court is generally high, with a predominance of the academic component. But about the judges of the ECJ we do not know much more. Notwithstanding the “contextual” and political-science inspired approach of many of today’s legal studies on the EU, and their tendency to abandon a purely legal-dogmatic approach to their subject, the mainstream legal doctrine has been largely unresponsive to Martin Shapiro’s call for “exposing ... the human flesh of its [the ECJ’s] judges”³¹.

5. The advocates general

The ECJ is assisted by eight AGs (Advocates General). Their presence is an original feature of the ECJ inspired by the *Commissionaires du gouvernement* who appear before the French *Conseil d’Etat*. They do not directly take part in the Court’s deliberations, but are subject to the same conditions of recruitment and are appointed by means of the same process as the judges, are subject to the same duties of impartiality and independence, receive the same salary and, according to the ECJ, “have the same status as the Judges, particularly so far as concerns immunity and the grounds on which they may be deprived of their office”³². Their task is to deliver a written opinion after the hearing and before the judgment in order to help the Court reach its decision. In the opinion, the AG reviews the facts of the case, evaluates the arguments and pleadings of the parties and of the other participants to the proceeding, analyses the existing law and the previous case law, and finally expresses a view on how the Court should decide the case. Thus, the AG acts as a kind of institutionalised *amicus curiae* – an *amicus curiae*, however, which is internal to the Court.

According to Burrows and Greaves, the AGs assist the Court basically in four different ways: by arguing for innovation based on a teleological approach, by arguing for consolidation based on existing case law or legislation, by arguing against past case law, and by arguing for a strict interpretation³³. The majority of the opinion is usually devoted to analyse the case law of the ECJ in a careful, very detailed and “almost academic” way, thereby demonstrating the “full extent of the respect granted to the Court’s *jurisprudence* [that] apparently qualifies as a ‘source of law’ and therefore possesses independent legal force”³⁴. The legal reasoning of the AG is much more open and candid than the legal reasoning of the Court and often takes into account factors such as budgetary and economic considerations, pragmatic concerns, policy issues, arguments based on equity, foreign judgments and doctrinal articles that might exercise a persuasive force upon the ECJ’s deliberations without being explicitly endorsed in the final judgment.

³¹ M. Shapiro, “Comparative Law and Comparative Politics”, *Southern California Law Review*, 53, 1980, 537–542, p. 540.

³² Case C-17/98, *Emesa Sugar* [2000] ECR I-665, par. 11. See also Article 6 ECJ Rules of Procedure: “Judges and Advocates General shall rank equally in precedence according to their seniority in office”.

³³ N. Burrows, R. Greaves, *The Advocate General and EC Law*, Oxford, OUP, 2007, pp. 293 ff.

³⁴ M. de S.-O.-L’E. Lasser, *Judicial Deliberations*, Oxford, OUP, 2004, p. 116.

Although it is difficult to assess the overall influence of the AGs' opinions on the deliberations of the Court³⁵, their importance for the legal reasoning of the ECJ is beyond question. As shown by the analysis of the Sample, the arguments of the AGs are often upheld and reiterated by the ECJ using formulas such as "as the Advocate General correctly observed/noted/pointed out at paragraph ... of her/his opinion"³⁶. Most importantly, the opinions are indispensable for understanding what arguments might have influenced the Court without being explicitly endorsed in the final judgment and what arguments have been implicitly rejected. The judgments of the ECJ should be a self-sufficient text, but in reality if we want to fully grasp their meaning we must make reference to the opinions of the AGs. As convincingly argued by Mitchel Lasser, we cannot appreciate the specific features of the ECJ's legal reasoning without taking into consideration its "bifurcated structure":

"[T]he ECJ produces two argumentative modes. In the sphere of the ECJ's official judicial decision operates the discourse of the magisterial and deductive application of EU law ... In the sphere of the AG Opinions ... operates the discourse of the personal and subjective construction of purposive judicial solutions"³⁷.

B. Arguments in Constitutional Reasoning

1. "Constitutional Reasoning" at the ECJ

For the reasons outlined above (sub A1), there are two possible ways in which the expression "constitutional reasoning" can be understood.

First, the ECJ engages in *sensu stricto* constitutional reasoning when it interprets the Treaties in order to rule on the validity of EU secondary legislation. In annulment proceedings and in preliminary proceedings on the validity of EU law, the ECJ is by all means a constitutional court, at least according to the definition of "constitution" that we adopted, and the Treaties are, as the same ECJ solemnly declared, the "basic constitutional charter of a Community based on the rule of law"³⁸. In that context, the expression "constitutional reasoning" could refer exclusively to the reasoning that is based on the text of the Treaties or that is intended to expound and develop their meaning.

Secondly, the ECJ engages in *sensu lato* constitutional reasoning when it evaluates the "European validity" of national legislation and practises in preliminary ruling proceedings on the interpretation of EU law. Here the object of interpretation is not limited to the Treaties but comprises the whole body of EU law. As already

³⁵ For an assessment of that influence, see T. Tridimas, "The Role of the Advocate General in the Development of Community Law: Some Reflections", *Common Market Law Review*, 34, 1997, pp. 1349–1387; C. Ritter, "A New Look at the Role and Impact of Advocates-General – Collectively and Individually", *Columbia Journal of European Law*, 12/3, 2006, pp. 751–773.

³⁶ 13 references in eight judgments: *Antonissen* [1991], par. 20; *Brasserie du Pêcheur* [1996], par. 34; *Bosman* [1995], par. 53, 99 and 110; *Köbler* [2003], par. 48; *Pupino* [2005], par. 42 and 48; *Traghetti del Mediterraneo* [2006], par. 36 and 41; *Mangold* [2005], par. 53 and 73; *Laval* [2007], par. 48.

³⁷ Lasser, *Judicial Deliberations*, cit., p. 141.

³⁸ *Les Verts* [1986], par. 23. In the Sample, on the Treaty as "constitutional charter" see also Opinion 1/91 [1991], par. 21; *Kadi* [2008], par. 281.

mentioned, this kind of constitutional jurisdiction of the Court is not exclusive (the competence to annul national legislation belongs primarily to national courts), is not supreme (national courts do not regard the ECJ as endowed with ultimate and supreme authority) and is not direct (the intervention of national courts is necessary for removing the conflict between national law and EU law).

The indirect nature of the *sensu lato* constitutional jurisdiction of the ECJ has one significant consequence for our research. In almost every preliminary ruling proceeding decided by the Court, it can be dubious whether the Court is exercising its *sensu lato* constitutional jurisdiction by indirectly controlling the compliance of Member States with EU law, or is simply doing what it says it is doing, that is, it is interpreting EU law in order to answer the questions referred by the national court. For the purposes of this study the *sensu lato* concept of constitutional reasoning is definitely too broad, as for every case analysed by the research the difficult question would be open: is this really constitutional reasoning or is this just ordinary interpretation of EU legislation?, and the answers to that question cannot but be speculative and controversial.

Therefore, we analysed only the arguments adopted by the ECJ for interpreting the Treaties: what can be called *sensu stricto* constitutional reasoning, although it is a kind of reasoning that can be employed not only in case of action for annulment and preliminary questions on the validity of EU law but also in every other kind of judicial proceeding before the Court. We did not take into consideration the arguments adopted by the ECJ for interpreting EU secondary legislation.

For that reason, it is not surprising that we found judgments such as *Stauder* (1969) in which no argument at all is given in support of the interpretative conclusion reached by the Court. Here the Court provided several arguments of non-constitutional interpretation directed to showing that “interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights” – arguments that cannot be considered for the purposes of our research; with regard to constitutional interpretation, the Court limited itself to stating that “fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court” without providing any argument³⁹.

2. The structure of constitutional arguments

We found that the majority of the judgments (16) has a “legs of a chair” structure, a robust minority (14) has a “chain” structure and 10 judgments have a “dialogical” structure to support the interpretation of the Treaties. It is worth noting, however, that often in the chain-kind judgments the chain is actually made of only one ring: with regard to the interpretation of the Treaty the ECJ may provide one sole argument, or even no argument at all, and limit itself to straightforwardly stating the interpretative conclusion of its (implicit) reasoning. Note that there can be more independent arguments in a chain-kind judgment because the ECJ may decide more than one question and/or interpret more than one Treaty provision. A judgment that exhibits a well-articulated and complex legs of a chair structure or even a dialogical structure with regard to the interpretation of secondary legislation and/or to the qualification of

³⁹ *Stauder* [1969] par. 7.

the facts of the case may nonetheless be qualified as having a chain “legs of a chair” structure when it contains just one argument, or no argument at all but a mere interpretative conclusion, regarding the interpretation of the Treaties.

The distinction between “legs of a chair” and “dialogical” structures may be difficult when, as it almost invariably happens, the judgment does not make clear if the arguments that it employs are *per se* sufficient to sustain the conclusion of the reasoning. The distinction can be traced only by answering to the highly speculative counterfactual question “What would have the Court decided if the other arguments it employed would have not been available?”. Therefore, the analysis has qualified as “dialogical” only those judgments in which there is some textual basis for answering that question, such as when the Court states that a conclusion “is confirmed” by another argument (which presumably would not have been self-sufficient), an interpretation is “reinforced” by a certain consideration, and so on⁴⁰, and those judgments in which the content and nature of the arguments put forward by the Court makes it clear that some of them are not self-sufficient but merely reinforce the main arguments of the judgment.

Note that a judgment that is “dialogical” according to the definition of the term adopted by the research may not be dialogical in the common sense of adopting a discursive style of reasoning. By all means the style of the ECJ is not discursive; at times, however, the Court considers it appropriate to reinforce its line of reasoning by adding some further considerations in support of the conclusion. Paradoxical as it may seem, even a decision such as *Van Gend en Loos* (1963) that is renowned not only for its importance in the development of Community law but also for the laconic and magisterial tone of the Court’s argumentation can be considered as being “dialogical”. In fact, in order to answer the question on the direct effect of a provision of the EEC Community, the Court took into consideration the objectives of the Treaty and then added

“[t]his view is confirmed by the Preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this community through the intermediary of the European Parliament and the Economic and Social Committee”⁴¹.

It is reasonable to assume that none of these considerations is in itself sufficient to ground the ruling of the Court and thus *Van Gend en Loos* must be considered for the purposes of this research as a “dialogical” judgment.

⁴⁰ E.g., *CILFIT* [1982], par. 21 (“In the light of all those considerations, the answer to the question ... must be that...”); *Foto-Frost* [1987], par. 18 (“It must also be emphasized that...”); *Factortame* [1990], par. 22 (“That interpretation is reinforced by the system established by Article 177”); *Francovich* [1991], par. 36 (“A further basis for the obligation ... is to be found in...”); Opinion 1/91 [1991], par. 35 (“This exclusive jurisdiction of the Court of Justice is confirmed by...”); *Köbler* [2003], par. 49 (“It may also be noted that, in the same connection...”); *Pupino* [2005], par. 43 (“In the light of all the above considerations, the Court concludes that...”); *Advocaten voor de Wereld* [2007], par. 39 (“The interpretation ... is corroborated by...”).

⁴¹ *Van Gend en Loos* (1963).

3. Analogies

We found 8 judgments in which the Court had recourse to analogical reasoning.

In *Bosman* (1995) the Court took into consideration the argument by analogy simply in order to dismiss it as irrelevant for the case. In *Bosman* the Court held that “[t]he argument based on points of alleged similarity between sport and culture [could not] be accepted” because the issue of the case related “on the scope of the freedom of movement of workers ... which is a fundamental freedom in the Community system”⁴².

In the broad majority of cases of recourse to analogy, the Court is simply making reference to a precedent in its own case law that can be applied to the issue of case at hand “by way of analogy”, as the Court explicitly acknowledges: there is no identity between the prior decision and the current question but still there are some similarities that suggest that the prior decision can be extended to cover the new case. Reasoning through precedents and reasoning by analogy are different kinds⁴³. Therefore, we considered as analogy only those cases in which the Court does not simply apply a precedent but declares explicitly that it is resorting to an analogical reasoning based on precedents⁴⁴.

One interesting case of analogical reasoning not based on precedents is *Brasserie du Pêcheur* (1996)⁴⁵. Here actually we have two different analogies. First, the Court held that a rule of international law on state liability applies “*a fortiori* in the Community legal order” (*argumentum a fortiori* can be considered as a case of analogical argumentation). Secondly, it maintained that “the conditions under which the State may incur liability ... cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances”⁴⁶.

Another example is the “ERTA case” (1971) in which the analogy could at first sight appear as an *argumentum a contrario*⁴⁷. The Court remarked that the only matters explicitly excluded from the scope of the action for annulment are recommendations or opinions, and that recommendations or opinions are declared by the Treaty to have no binding effect. Having regard to the *ratio legis* of the provision on the scope of action of annulment, it follows that the action should be in principle admitted for all legal acts that produce binding effects, such as the proceedings of the Council relating to the negotiation and conclusion of an international agreement (the European Rail Transport Agreement – ERTA) provided that they are intended to have legal force.

⁴² *Bosman* [1995], par. 78.

⁴³ See G. Lamond, “Precedent and Analogy in Legal Reasoning”, *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/legal-reas-prec/>>; F. Schauer, “Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy”, *Perspectives on Psychological Science*, 3/6, 2008, pp. 454-460; Id., *Thinking Like a Lawyer*, Cambridge, Mass., HUP, 2009, pp. 85 ff.

⁴⁴ *Franovich* [1991], parr. 21 and 43; *Advocaten voor de Wereld* [2007], par. 59; *Laval* [2007], par. 87; *Viking* [2007], par. 34 and 40; *Kadi* [2008], par. 224.

⁴⁵ *Brasserie du Pêcheur* [1996]. K. Langenbacher, “Argument by Analogy in European Law”, *Cambridge Law Journal*, 57/3, 1998, pp. 481–521, pp. 516 ff., discusses at length *Brasserie du Pêcheur* in order to provide an example of analogical reasoning of the ECJ but highlights passages of the judgment that cannot be considered as analogies for the purposes of this research.

⁴⁶ *Brasserie du Pêcheur* [1996], parr. 34 and 42.

⁴⁷ Case C-22/70 [1971], par. 39.

4. Establishing/Debating the text of the Treaties

We have not found any argument which dealt with doubts about how to establish the text of the Treaties.

5. Applicability of the Treaties

It is not surprising that we found no less than 1/4 of the judgments of the Sample (11 judgments precisely) that discuss on the applicability of the Treaties to the case at hand, or that rule on the matter without providing any explicit argument. The competences of the EU are governed by the principle of conferral: “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States” (Article 5(2) TEU). The EU legal order is a sectional legal order that does not claim to be complete in the sense of providing a solution for every possible controversy: certain matters fall outside the scope of EU law. Therefore, the issue of the applicability of the Treaties is quite common in EU law litigation. On the one side, the so called “vertical” distribution of competences between the EU and the Member States is object of frequent controversies upon which the Court may be called to adjudicate; on the other side, in almost every legal proceeding before the ECJ the referring court, the private parties or the intervening Member States may find it appropriate to raise the question whether the matter falls within the province of EU law and challenge the jurisdiction of the ECJ or the competence of the EU.

In all cases except one the ECJ ruled that the issue of the case did not fall outside the scope of EU law and that a certain Treaty provision should have been applied to the case. The exception is *Grogan*: the Court ruled that the Irish prohibition on the distribution of information relating to the clinics where abortion is carried out constitutes a limitation to freedom of expression and cannot be regarded as a restriction on the freedom to provide services⁴⁸.

The arguments that support the conclusion on the applicability of the Treaties do not share any structural feature and can be very diverse among themselves – teleological considerations, harmonisation arguments, implicit principles, and so on. However, in the case law of the ECJ we find one peculiar way of supporting the decision favourable to the applicability of the Treaties – a traditional argument that has been named “retained powers formula” and that is virtually capable of eliminating or overcoming every positive limit to the applicability of EU law⁴⁹. While the classical formulation of this doctrine can be found in the *Schumacker* (1995) case and in the “British fishing vessels” case of 1991 (“the powers retained by the Member States must nevertheless be exercised consistently with Community law”)⁵⁰ and its origins

⁴⁸ *Grogan* [1991], par. 27.

⁴⁹ L. Azoulai, “The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?”, *European Journal of Legal Studies*, 4/2, 2011, op. 192-219.

⁵⁰ Case C-279/93, *Schumacker* [1995] ECR I-225, par. 21; Case C-246/89, *Commission v United Kingdom* [1991], ECR I-04585, par. 12.

can be traced back to the *Steenkolenmijnen* (1961) and *Casagrande* (1974) cases⁵¹ (decisions not included in the Sample), in our study we found the same point expressed with slightly different words in *Viking* (2007) and *Laval* (2007): “even if, in the areas which fall outside the scope of the Community’s competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law”⁵².

6. Ordinary meaning of the words

The forty judgments analysed by the research were identified as landmark decisions because of their impact on the legal and political culture of the Member States (e.g., *Lütticke*, *Simmenthal*, *Factortame*), because of their contribution to the completion of the common market (e.g., *Dassonville* and “Cassis de Dijon”), or because of their influence on the development of EC law and on the so called “constitutionalisation” of the Treaties. It is therefore of no surprise that literal arguments are almost absent from the sample.

We found six cases in which reference to the wording of the Treaty was made in order to provide an argument in favour or against a certain interpretation of the Treaty. In three cases the literal argument was actually taken into consideration and ultimately rejected by the Court on the basis of prevailing teleological and harmonising considerations⁵³. In *Van Gend en Loos* and in *Costa* the reference to the wording of the Treaty is quite puzzling because it is not clear what contribution these wordings bear to the argument put forward by the Court⁵⁴. We found the best examples of literal argument in *Kadi*⁵⁵.

⁵¹ Case C-30/59, *Steenkolenmijnen* [1961] ECR 3, 24; Case 9/74, *Casagrande* [1974] ECR 773, par. 12. See also Joined Cases C-6 and 11/69 *Commission v. France* [1969] ECR 523, par. 17 (“The exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty”).

⁵² *Viking* [2007], par. 40; *Laval* [2007], par. 87 (with slightly different wording).

⁵³ *Defrenne II* [1976], par. 27 (“the terms of article 119 cannot be relied on to invalidate this conclusion”); *Antonissen* [1991], par. 9 ff, rejecting the interpretation based on “the strict wording of Article 48”; Opinion 1/91 [1991], par. 14. While not concerned with Treaty interpretation, the following statement from *Grad* [1970], para. 12-14, is nonetheless revealing of the general approach of the Court: ‘It is true that a literal interpretation ... of the decision might lead to the view that ... However, such an interpretation would not correspond to the aim of the directives in question ... Moreover, the objective of the decision of 13 may 1965 can only be achieved at the Community level ...’.

⁵⁴ *Van Gend en Loos* [1963], 13 (“The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. ... The very nature of this prohibition makes it ideally [sic] adapted to produce direct effects”). An analogous argument in *Costa* [1964], 597. It is not clear, however, why the negative instead of positive nature of the obligation imposed by the Treaty should have any consequence on the issue of direct effect, and in fact that criterion was already abandoned in *Lütticke* [1966].

⁵⁵ *Kadi* [2008], par. 166 ff. (the restrictive measures decided on the basis of Articles 60 EC and 301 EC must be taken against third countries, as expressly established in these provisions, and cannot be directed at persons or entities present in a third country, as proposed by the Commission) and 199 ff. (the measures adopted under Article 308 EC must relate to the “operation of the common market” which, having regard to the “clear and precise wording” of the provision, cannot be regarded as including the objectives of the Common Foreign and Security Policy).

Given the nature of the sample analysed by the research, the significance of this finding cannot be emphasised. However, it is worth mentioning that according to many scholars and critics of the ECJ, the relative unimportance of text-based arguments is a distinctive feature of the legal reasoning of the ECJ⁵⁶. This feature affects first and foremost the interpretation of the Treaty but concerns also, although to a lesser degree, the interpretation of secondary legislation. While it is particularly evident in the landmark decisions of the ECJ, as it is obvious, it can also be found in less influential judgments of the Court.

Moreover, the relative unimportance of literal arguments is reflected by several statements of the Courts that suggest the existence of a kind of hierarchy between the legal arguments. Among the judgments of the sample, the Opinion 1/91 is revealing in this regard: “The fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically”, because the interpreter must take into consideration the “objectives” (teleological arguments) and the “context” (harmonising arguments) of the international agreement and of the EEC Treaty (par. 14).

In other judgments of Court not included in the Sample we can find contradictory statements regarding the cogency and hierarchical status of the literal argument. On some occasions, the Court has stated that it “is not entitled to assume the role of the Community legislature and interpret a provision in a manner contrary to its express wording”⁵⁷ and that the principle of legal certainty precludes the Court from departing from the ordinary meaning of the provision⁵⁸; on other occasions, the Court has stated that the literal meaning must be discarded if it conflicts with the purpose of the provision⁵⁹.

7. Domestic harmonising arguments

This argument is fairly common in the judgments of the sample, as we found 21 judgments which contained it. Actually this category comprises more than one argument as it signifies a family of arguments that share the same structural feature of supporting a certain interpretation by referring to other norms or groups of norms.

⁵⁶ Among the critics of the ECJ, standard references are Rasmussen, *On Law and Policy*, cit.; Sir Patrick Neill, *The European Court of Justice. A Case Study in Judicial Activism*, London, European Policy Forum 1995; T.C. Hartley, *The Foundations of European Community Law*, 4th ed., Oxford-New York, OUP, 1998, p. 78; Id., “The European Court, Judicial Objectivity and the Constitution of the European Union”, *Law Quarterly Review*, 112, 1996, pp. 95-109. See more recently R. Herzog, L. Gerken, “Stoppt den Europäischen Gerichtshof”, in *Frankfurter Allgemeine Zeitung*, 8 September 2008, English translation at <http://euobserver.com/opinion/26714>: the ECJ “deliberately and systematically ignores fundamental principles of the Western interpretation of law ... its decisions are based on sloppy argumentation”.

⁵⁷ Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, par. 32.

⁵⁸ Case C-361/06, *Feinchemie Schwebda* [2008] ECR I- 3865, par. 50: “Given that the wording ... is clear and unambiguous, the interpretation ... is the only interpretation that is compatible with the principle of legal certainty, in accordance with which Community legislation must enable those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them”. See also Case C-161/06, *Skoma-Lux* [2007] ECR I-10841, par. 36 and 38.

⁵⁹ E.g., *Grad* [1970], para. 12-14.

Thus, under the heading “harmonising arguments” we grouped, first of all, the cases in which the Court makes some generic reference to the “spirit of the Treaty”, “the whole scheme of the Treaty”, the “system” established by the Treaty or by a Treaty provision or group of provisions, the “general system of the Treaty and its fundamental principles”, and so on, without specifying what are the provisions that articulate or embody that “spirit” and “system”. The case law of the ECJ is not short of generic references of this kind⁶⁰.

Secondly, we found numerous cases in which the Court clarifies the relationships between different provisions of the Treaty and construct the rule of the case by reading a plurality of provisions “in conjunction” one with the other. In these cases, the Court does not limit itself to evoke the scheme of the Treaty but concretely constructs it by reading together of a group of Treaty provisions⁶¹.

Thirdly, under the heading “harmonising arguments” we grouped cases in which the Court states that a certain interpretation of the Treaty is “confirmed” or “supported” by other provisions of the Treaty, or in which it declares to be following considerations dictated by “the necessary coherence” of the provision to be interpreted with other provisions of the Treaty, or in which it reads one provision in the light of some “fundamental principle” of Community law in order to avoid internal conflicts and inconsistencies⁶².

Fourthly, we considered to be instances of harmonisation argument those cases in which the Court adopts a certain interpretation in order not to “render meaningless” other principles of Community law by depriving them of their “essential effectiveness” or by compromising the achievement of the objectives set out in the Treaties. These cases differ from the former ones in that they assess the practical effects of the proposed interpretation and have reference to the objectives, goals, purposes, etc., set out by the Treaty. Thus, this kind of harmonising argument is mixed in nature and can be regarded also as instance of teleological argumentation: it is a teleological argument in which the Court declares that it intends to prevent a conflict with the objectives pursued by the Treaty as a whole or by certain Treaty provisions⁶³.

Finally, we considered as instances of harmonising arguments those argument that refer to the “sedes materie”, that is, arguments based on the internal systematic structure of the Treaties, as designed by the legislator⁶⁴.

⁶⁰ E.g., *Costa* [1964]; Case C-22/70, *ERTA* [1971], par. 15; *Defrenne II* [1976], par. 7.

⁶¹ E.g., Case C-22/70, *ERTA* [1971], par. 22; *Defrenne II* [1976], par. 63; *CILFIT* [1982], par. 10.

⁶² E.g., *Costa* [1964]; *Foto-Frost* [1987], par. 16 and 17; Opinion 1/91 [1991], par. 71; *Kadi* [2008], par. 309.

⁶³ E.g. *Traghetti del Mediterraneo* [2006], par. 36; *Advocaten voor de Wereld* [2007], par. 42; *Laval* [2007], par. 98.

⁶⁴ E.g., Case C-22/70, *ERTA* [1971], par. 14 (“this provision, placed at the head of part six of the Treaty, devoted to ‘general and final provisions’, means that...”); *Defrenne II* [1976], par. 15 (“since article 119 appears in the context of the harmonization of working conditions...”); *van Gend en Loos* [1963] ECR I (“This provision is found at the beginning of the part of the Treaty...”); *Costa* [1964] (“This article, placed in the chapter devoted to the ‘approximation of laws’, is designed to...”).

8. Harmonising with international law

We found 14 cases in which the Court referred to international law sources in order to support the interpretation of the Treaty. The vast majority of references consists in a literal or almost literal quote from the *Nold* formula: “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law”⁶⁵. In six cases the ECJ made reference to the European Convention of Human Rights⁶⁶ and in four cases we find references to the case law of the ECtHR⁶⁷. Moreover, the Court made reference to International Labour Organization conventions⁶⁸ and to general principles of international law and customary international law⁶⁹. Particularly in the cases in which the Court mentions the *Nold* formula, however, it is far from obvious whether the reference to human rights has any direct bearing on the outcome of the case or is merely rhetorical and declamatory in nature.

9. Precedents

The Court has made reference to its previous case-law since the very beginning of its activity: the first example can be found already in a case of 1955⁷⁰ and in 1956 the Court quoted a precedent as authority for the proposition that certain provisions of the ECSC Treaty were of a “fundamental character”⁷¹. References to its case-law became increasingly frequent in the 1970s and especially in the 1980s, possibly as consequence of the accession of the United Kingdom and Ireland in 1973⁷². Today the practice of relying on precedents is firmly established and almost every decision of the Court contains extensive references to the case-law and copy-and-paste quotations from earlier judgments.

Such evolution is reflected in the analysis of the 40 influential judgments that we have undertaken. The first argument based on precedents that we found is a generic and unnamed reference to the previous case law in *Defrenne* (1976)⁷³; the first explicit reference is in *Ratti* (1979)⁷⁴. From *Ratti* onwards, we found only two judgments in

⁶⁵ Case C-4/73, *Nold* [1974] ECR 491, par. 13. See, e.g., *Hauer* [1979], par. 15; *Wachauf* [1989], par. 17; Case C-260/89, *ERT* [1991], par. 41; *Viking* [2007], par. 43; *Laval* [2007], par. 90; *Kadi* [2008], par. 283.

⁶⁶ *Hauer* [1979], par. 17; *ERT* [1991], par. 41; *Bosman* [1995], par. 79; *Pupino* [2005], par. 58; *Advocaten voor de Wereld* [2007], par. 45 and 49; *Viking* [2007], par. 43.

⁶⁷ *Köbler* [2003], par. 49; *Pupino* [2005], par. 60; *Advocaten voor de Wereld* [2007], par. 50; *Kadi* [2008], par. 256 and 311.

⁶⁸ *Defrenne II* [1976], par. 20; *Viking* [2007], par. 43; *Laval* [2007], par. 90.

⁶⁹ *van Duyn* [1974], par. 22; *Brasserie du Pêcheur* [1996], par. 34; *Köbler* [2003], par. 32.

⁷⁰ Case C-4/54, *Industrie Siderurgiche Associate* [1955] ECR 91.

⁷¹ *Joined Cases C-7 and 9/54, Groupement des industries* [1956] ECR 175.

⁷² Schermers, Waelbroeck, *Judicial Protection*, cit., p. 135; U. Everling, “The Court of Justice as a Decisionmaking Authority”, in Michigan Law Review Association (ed.), *The Art of Governance. Festschrift zu Ehren von Eric Stein*, Baden-Baden, Nomos, 1987, pp. 156–172, p. 163. *Contra* T. Koopmans, “‘Stare Decisis’ in European Law”, in D. O’Keefe, H.G. Schermers (eds.), *Essays in European Law and Integration*, Deventer, Kluwer, 1982, pp. 11–28, p. 18.

⁷³ *Defrenne II* [1976], par. 31 (“...as the court has already found in other contexts...”).

⁷⁴ *Ratti* [1979], par. 19 (“in this regard the settled case-law of the court, last reaffirmed by the judgment of 1 February 1977 in case 51/76...”).

which the Court did not have explicit reference to its case-law⁷⁵ while all other cases contained extensive and detailed references to previous rulings of the Court. In one case analysed by the research the Court (almost) explicitly overruled a previous decision⁷⁶. Overall we found 27 judgments in which the argument from precedents has been used by the ECJ.

10. Implicit concepts and principles

We found 20 judgments invoking concepts and principles not mentioned in the text of the Treaties as operative arguments supporting a certain constitutional interpretation. Such concepts and principles are the outcome of doctrinal construction on the part of the Court: they are not the product of the interpretation of the Treaty (they are not expressed in any given provision) but result from an heterogeneous set of (often implicit) non-interpretative reasonings. Some of such concepts and principles constitute the “living constitutional law” of the EU and the reason why the EU is often thought of as being international in origins but constitutional in nature. Thus, the ECJ famously established that “[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system”⁷⁷ and that “fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court”⁷⁸. The Court invented the principles of “uniformity and efficacy of Community law”, it hold that “the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law”⁷⁹ and that “the right to reparation is the necessary corollary of the direct effect”⁸⁰. The Court laid down the keystone of the common market – the principle of mutual recognition⁸¹ – and theorised the existence of an “institutional balance” among the different Community institutions – a balance that the Court must be able to maintain by reviewing the observance of the various institutions’ prerogatives when called upon to do so by one of them⁸². Finally, the Court has created the rule according to which in case of a legal gap in the Treaties “it is for the Court ... to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States”⁸³.

Moreover, since the beginning of its activity the Court has created a value-lade (“axiological”) hierarchy between some of the provisions of the Treaty, qualifying as “fundamental” the corresponding right or principle (e.g., the principle of equal pay for men and women, free movement of workers, free movement of goods, and so on); then, on the basis of the fundamental nature of certain provisions of the Treaties, the ECJ has established certain interpretative presumptions. For instance, in *Defrenne II*

⁷⁵ *Foglia* [1980]; *Antonissen* [1991].

⁷⁶ Case C-70/88, “Chernobyl” [1990], par. 16.

⁷⁷ *Costa* [1964].

⁷⁸ *Stauder* [1969] par. 7. See also *Internationale Handelsgesellschaft* [1970] par. 4.

⁷⁹ *Internationale Handelsgesellschaft* [1970] par. 3; see also *Simmmenthal* [1978], par. 17 (“principle of the precedence of Community law”).

⁸⁰ *Brasserie du Pêcheur* [1996], par. 22.

⁸¹ “Cassis de Dijon” [1979], par. 14.

⁸² Case C-70/88, “Chernobyl” [1990], par. 21.

⁸³ *Brasserie du Pêcheur* [1996], par. 27.

(1976) the Court stated that “this double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community [...] therefore, in interpreting this provision, it is impossible to base any argument on the dilatoriness and resistance which have delayed the actual implementation of this basic principle in certain Member States”⁸⁴; in *Antonissen* (1991) the Court stated that “freedom of movement for workers forms one of the foundations of the Community and, consequently, the provisions laying down that freedom must be given a broad interpretation”⁸⁵. Analogously, in *Van Duyn* (1974) the Court emphasized that the concept of public policy must be interpreted strictly when it is used as “a justification for derogating from the fundamental principle of freedom of movement for workers”⁸⁶.

This way of reasoning can be considered, alternatively or cumulatively, as recourse to an implicit principle (while the principle that the Court places at the foundations of the Community is explicit, its foundational or fundamental nature depends on an implicit hierarchy – a hierarchy that is not established by the Treaty but is created by the Court), as non-legal argument (the hierarchy is value-laden, axiological, as it depends on a choice by the interpreter), or harmonisation argument (as the construction of axiological hierarchies is a common tool of systematic interpretation). For the purposes of this research, we have adopted the first option.

11. Linguistic-logical formulae based on silence

As is well known⁸⁷, the ECJ is very reluctant in adopting *a contrario* reasoning and in some of its earliest decisions it even theorised explicitly this attitude: “an argument in reverse is only admissible when no other interpretation appears appropriate and compatible with the provision and its context and with the purpose of the same”⁸⁸.

In the Sample we found five judgments employing the *argumentum a contrario*, and in four of them the argument was explicitly rejected. The Court held, for instance, that in the system of the Treaties the existence of the infringement procedure does not exclude that individuals can plead the violation of EC law before the national courts when the State has not fulfilled an obligation that has direct effect⁸⁹, and that it does not follow from the fact that according to Article 189 EEC regulations are directly applicable that “other categories of legal measures mentioned in that article can never produce similar effects”⁹⁰.

⁸⁴ *Defrenne II* [1976], par. 12-14.

⁸⁵ *Antonissen* [1991], par. 11. This interpretative presumption had already been established in Case C-139/85, *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, par. 13. On free movement of goods as fundamental principle see *Schmidberger* [2003], para. 51, 60 and 78.

⁸⁶ *Van Duyn* [1974], par. 18. See also *Omega* [2004], para. 30: “the concept of ‘public policy’ in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly”.

⁸⁷ E.g., Schermers, Waelbroeck, *Judicial Protection*, cit., p. 12.

⁸⁸ Case C-9/56, *Meroni* [1958], ECR 133, 140; Case C-8/55, *Fédération Charbonnière de Belgique* [1956], ECR 293, 300: “Such an argument is, in fact, acceptable only in the last resort when no other interpretation appears to be adequate or compatible with the text, the context and their objectives”.

⁸⁹ *Van Gend en Loos* [1963].

⁹⁰ *Grad* [1970], par. 5; *Van Duyn* [1974], par. 12; *Ratti* [1979], par. 19.

The only case analysed by the research in which the argument was actually but adopted by the Court is *Faccini Dori* (1994), in which the Court held that directives cannot have direct effect because the Community can enact obligations for individuals with immediate effect “only where it is empowered to adopt regulations”⁹¹.

Note that when the Court held that in the absence of common rules relating to a certain matter it is for the Member States regulate it, the argument of the Court cannot be considered as an instance of *arguetum a contrario* because the Court is not interpreting a Treaty provision (it is not resorting to “constitutional interpretation”) but it is merely applying the principle of conferral to the case at hand⁹².

12. Teleological arguments referring to the purpose of the text

In the 40 judgments analysed by the research the teleological argument was used in no less than 27 cases, thus emerging as the most frequently employed argument in the Sample.

This finding is hardly surprising. Although in EU law there is no commonly accepted doctrine on the relative weight of arguments, teleological interpretation enjoys a distinguished record and a particularly strong standing before the Court of Justice. It is indicative in this regard that the ‘spirit’, that is, teleological argumentation, comes first in the list of interpretative methods formulated in *Van Gend en Loos* (‘...it is necessary to consider the spirit, the general scheme and the wording of those provisions’⁹³). The Court of Justice is well-known for having adopted the teleological method and the hallmark of the Court is to interpret the Treaties in the way that best fits their overall objectives. While it may be true that in the everyday adjudication activity of the Court recourse to teleological interpretation is far less common than we are accustomed to think, nonetheless it cannot be denied that teleological interpretation is fairly important in those judgments that ‘have “famous status” and are continuously referred to in the literature’.⁹⁴ Several judges of the Court have explained and justified that method in numerous writings and journal articles, in which they claim that the most appropriate way of fulfilling their office is to contribute to the achievement of the goals of the Community by bearing them in mind when interpreting the open-ended Treaties provisions and when filling the gaps of the Treaties⁹⁵.

⁹¹ *Faccini Dori* [1994], par. 24.

⁹² “Cassis de Dijon” [1979], par. 8.

⁹³ *Van Gend en Loos* [1963], 12.

⁹⁴ U. Neergaard, R. Nielsen, ‘Where Did the Spirit and Its Friends Go? On the European Legal Method(s) and the Interpretational Style of the Court of Justice of the European Union’, in U. Neergaard et al. (eds.), *European Legal Method. Paradoxes and Revitalisation* (Copenhagen: DJØF, 2011), 95–184, at 122.

⁹⁵ P. Pescatore, ‘Les objectifs de la Communauté européenne comme principes d’interprétation dans la jurisprudence de la Cour de Justice’, in *Miscellanea W. J. Ganshof van der Meersch*, Vol. II (Bruxelles-Paris: Bruylant- LGDJ, 1972), 325–363; H. Kutscher, ‘Alcune tesi sui metodi d’interpretazione del diritto comunitario dal punto di vista d’un giudice’, *Rivista di diritto europeo* (1976), 283–314 and (1977), 3–24; R. Lecourt, *L’Europe des juges* (Bruxelles: Bruylant, 1976), 235 f.; G.F. Mancini, D.T. Keeling, ‘Democracy and the European Court of Justice’, *Modern Law Review*, 57 (1994), 175–190, at 186; M.P. Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context

Particularly in the case of the EU Treaties, it is often impossible to sharply distinguish between teleological argumentation and systematic interpretation ('domestic harmonising arguments'). The EU Treaties are imbued with teleology from top to bottom, as they are functional to a project of transformation of the legal orders of the Member States ('an ever closer union among the peoples of Europe', as is stated in the Preamble of the Treaty on European Union); they are 'designed along functional lines' and are 'structured with a view to the Community's achievement of the various objectives' they establish.⁹⁶ Systematic interpretation is meant to achieve coherence and consistency between the rules of the system; if these rules set forth goals and policy objectives, then systematic interpretation implies and includes teleological argumentation.

The distinction between teleological argumentation and systematic interpretation is therefore blurred in those cases in which the Court assumes that a provision of the Treaty must be interpreted in a way which is coherent with the goals and purposes established by the Treaty. For instance the Court held that 'the objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the Contracting States',⁹⁷ and held that '[s]ince the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy'.⁹⁸ Here teleological interpretation and systematic construction are indistinguishable.

The distinction is more clear when the Court takes into consideration the practical consequences of the interpretive decision, which in turn it assesses in light of the objectives of the Community and of the principles of effectiveness and uniform application of EC law. This is a special kind of teleological interpretation: the guiding goal is the effectiveness of the provision the Court is about to interpret, or of other provisions of the Treaty, and therefore the Court examines the foreseeable extra-systematic consequences of the legal decision. For instance the Court held that '[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty'.⁹⁹ It held that '[p]articularly in cases where ... the Community authorities by means of a decision have imposed an obligation ... to act in a certain way, the effectiveness ("l'effet utile") of such a measure would be weakened if the nationals of that state could not invoke it in the courts and the national courts could not take it into consideration as part of Community law'.¹⁰⁰ The Court held that "the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the

of Constitutional Pluralism', *European Journal of Legal Studies* (2007), <http://www.ejls.eu/2/25UK.pdf>

⁹⁶ K. Lenaerts, "Interpretation and the Court of Justice: A Basis for Comparative Reflection", *The International Lawyer*, 41, 2007, 1011–1032. See e.g. Pescatore, "Les objectifs de la Communauté", cit., and for extensive references to the first EC legal scholarship, G. Itzcovich, *Teorie e ideologie*, cit., 93 ff. and 97 ff.

⁹⁷ *Van Gend en Loos* [1963], 12.

⁹⁸ *Viking* [2007], para. 79; *Laval* [2007], para. 105.

⁹⁹ *Costa* [1964], 594.

¹⁰⁰ *Grad* [1970], para. 5; *Simmmenthal* [1978], para. 18: "...would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally".

conditions under which Mr Carpenter exercises a fundamental freedom [freedom to provide services]”.¹⁰¹

With regard to the goals that the teleological argument may take into account, they can vary from being more or less determinate objectives set out in given Treaty provisions or groups of provisions (e.g. free movement of workers, the principle of equal pay, the goal of establishing a common market) to more abstract and indeterminate general principles such as the “social purpose of the Community”, the effectiveness of EC law, its uniform application, the goal of securing effective judicial protection, and so on. Sometimes, the goal that guides the teleological reasoning of the Court is totally indeterminate and unnamed (e.g. “the spirit of the Treaty”, “the objectives of the Treaty”, “the obligations undertaken under the Treaty”, “the framework of the structure and objectives of the Community”).

13. Teleological arguments referring to the purpose of the Constitution-maker

References to the preamble of the Treaties (“which refers not only to governments but to peoples”¹⁰²) can in no way be considered as instances of subjective teleological reasoning because they are essentially devoted to reinforce objective teleological argumentation by providing the Court with energetic goals and bright perspectives on the future developments and deep *raison d’être* of the Community – the Court is not at all interested in what the framers had in mind. Therefore, we found only one case in which perhaps it is possible to sustain that the Court has made reference to the subjective intentions of the framers of the Treaty, although the point is uncertain and open to different qualifications¹⁰³.

In fact, the ECJ has always denied any binding or even persuasive force to the original intentions of the (representatives of) the Contracting Parties¹⁰⁴. The reason publicly given is that the Court cannot rely on documents which have not been published and which are not, therefore, accessible to the general public¹⁰⁵. It is likely, however, that the guiding consideration is that the Court does not want to tie the future developments of EU law to the past intentions of the representatives of the Contracting Parties. Besides, international treaties are not usually interpreted in this

¹⁰¹ *Carpenter* [2002], para. 39.

¹⁰² Case C-26/62, *Van Gend en Loos* [1963] ECR I.

¹⁰³ *Pupino* [2005], par. 36. The argument could also be qualified as harmonising interpretation and/or objective teleological reasoning: “Irrespective of the degree of integration envisaged by the Treaty of Amsterdam ..., it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments [framework decisions] with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union’s objectives”.

¹⁰⁴ E.g., in Case C-6/60, *Humblet* [1960] 559, 575: “The opinions of the governments put forward during the parliamentary debates on the ECSC Treaty do not touch on this question”.

¹⁰⁵ This rationale can be inferred from cases that dealt with EC secondary legislation: Case C-15/60, *Simon* 1961 ECR 225: “In the absence of working documents clearly expressing the intention of the draftsmen of a provision, the Court can base itself only on the scope of the wording as it is and give it a meaning based on a literal and logical interpretation”; *Antonissen* [1991], par. 18: “such a declaration [a declaration recorded in the Council minutes at the time of the adoption of a provision of secondary legislation] cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance”. See also Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit* 1996 ECR I-5063.

way, by having recourse to the original intentions of the States' representatives. The Vienna Convention on the Law of Treaties establishes a different criterion of subjective interpretation (Article 31.3), which the Court of Justice, however, does not follow: the Court does not refer to the subsequent agreements between the parties nor to their subsequent practice in the application of the treaty.

Thus, subjective criteria of treaty interpretation are almost entirely absent from the legal reasoning of the Court. Because of the increasingly frequent Treaties revisions in recent years, things are likely to change in the near future¹⁰⁶ – after all, starting from the Single European Act of 1987, the *travaux préparatoires* of the European treaties have been regularly and extensively made available to the public. However, the Court is still reluctant to use preparatory materials: for the time being, we can conclude that the Treaties are interpreted like a constitution with no framers, or like an international treaty with no parties.

14. Non-legal arguments

We did not find any non-legal (moral, sociological, economic) argument in the Sample. We found, however, some cases in which the Court dismissed a non-legal argument not because of its being unfounded and substantially wrong – which would count as a (negative) instantiation of non-legal argumentation and as such would have been recorded by the research – but because of its being non-pertinent to the case and/or *per se* irrelevant. In *Grogan*, for instance, the Court held that “Whatever the merits of those arguments [against abortion] on the moral plane, they cannot influence the answer to the national court’s first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally”¹⁰⁷.

Moreover, on several occasions the ECJ made explicit profession of legal positivism and referred to a doctrine that might be called *dura lex sed lex*. In *Defrenne*, in *Bosman* and in several other cases not included in the Sample, the Court held that “[a]lthough the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision”¹⁰⁸. In other cases the same point was expressed even more clearly: “although, ... [the issue of the case] is a very sensitive social issue in many Member

¹⁰⁶ P. Dann, ‘Thoughts on a Methodology’, cit., 1463, notes that ‘the widespread opinion that historical interpretation is impermissible in Union law owing to the lack of publication of the *travaux préparatoires* has become invalid since they began to be published’. See e.g. Case C-370/12, *Pringle* [2012], not yet published, para. 135: ‘It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy.’

¹⁰⁷ *Grogan* [1991], par. 20.

¹⁰⁸ *Defrenne II* [1976], par. 71; *Bosman* [1995], par. 77; Case C-437/97, *Evangelischer Krankenhausverein Wien and Wein & Co* [2000] ECR I-1157, par. 57. Further references include Case C-69/80, *Worringham and Humphreys v Lloyds* [1981], ECR 767, par. 31; Case 24/86, *Blaizot v University of Liège and Others* [1988] ECR 379, par. 30; Case C-163/90, *Administration des Douanes et Droits Indirects v Legros and Others* [1992] ECR I-4625, par. 30; Joined cases C-177 and 181/99, *Ampafrance and Sanofi* [2000], ECR I-7013, par. 66; Case C-228/05, *Stradasfalti* [2006], ECR I-8391, par. 72.

States, marked by their multiple traditions and value systems, the Court is not called upon, ... to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions”¹⁰⁹. In a case on GMOs, the ECJ stated that social morality is irrelevant for the purpose of justifying the breach of EC law, as “a Member State cannot rely in that manner on the views of a section of public opinion in order unilaterally to challenge a harmonising measure adopted by the Community institutions”¹¹⁰.

It is interesting to note, however, that the Court insists on the *dura lex sed lex* principle in two kind cases: when it wants to reject arguments based on equity considerations, economic and/or pragmatic considerations; when it wants to accept such non-legal arguments by introducing an exception to the *dura lex sed lex* principle, such as the limitation of the temporal effect of its judgment. So, in *Defrenne*, in *Bosman* as well as in *Barber* and in other cases not included in the Sample, the Court stated that it “may, by way of exception, taking account of the serious difficulties which its judgment may create as regards events in the past, be moved to restrict the possibility for all persons concerned of relying on the interpretation which the Court, in proceedings on a reference to it for a preliminary ruling, gives to a provision”¹¹¹.

In this latter kind of cases, when the Court limits the temporal effects of its decisions on account of the practical consequences that they would involve, it can be argued that it is having recourse to explicit moral (that is, non-legal) reasoning¹¹². However, it is worth noting that the Court always mentions the principle of legal certainty – which is by all means a legal principle – as the determining ground of that limitation: “important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past”¹¹³. Thus, it is debatable whether at present the legal reasoning practised by the Court leaves any room for arguments that are explicitly non-legal in nature.

It can be particularly difficult to distinguish non-legal arguments from arguments based on implicit principles, that is, principles not mentioned in the text of the Treaty but constructed by the legal doctrine and the case law. For instance, in *Faccini Dori* the Court held that “it would be unacceptable if a State, when required by the Community legislature to adopt certain rules ..., were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those

¹⁰⁹ Case C-506/06, *Mayr* [2008], ECR I-1017, par. 38; Case C-34/10, *Brüstle v Greenpeace* [2011], ECR I-9821, par. 30. See also Case C-1/96, *Compassion in World Farming* [1998] ECR I-1251, para. 67. See also Case C-1/96, *Compassion in World Farming* [1998] ECR I-1251, para. 67; Case C-92/71, *Interfood GmbH v Hauptzollamt Hamburg Ericus* [1972] ECR 231, para. 5: “No matter how unsatisfactory it is in practice ... it is not for the Court to remedy this situation, by modifying, by way of interpretation, the content of the provisions applicable to one or other case”.

¹¹⁰ *Ibid.*, par. 56. Cfr. Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251, par 67: “In any event, a Member State cannot rely on the views or the behaviour of a section of national public opinion ... in order unilaterally to challenge a harmonising measure adopted by the Community institutions”.

¹¹¹ Case C-262/88, *Barber* [1990] ECR I-1889, par. 41. Analogous expressions in *Defrenne II* [1976], par. 72; *Bosman* [1995], par. 142.

¹¹² E.g., according to T.C. Hartley, *Constitutional Problems of the European Union*, Oxford and Portland, Hart, 1999, p. 41-42, in *Defrenne II* the ECJ was implicitly but clearly recognizing the “legislative character” of a judgment that was essentially motivated by “the serious economic consequences which would otherwise have ensued”.

¹¹³ *Defrenne II* [1976], par. 74. See analogously *Barber* [1990] ECR I-1889, par. 44, and *Bosman* [1995], par. 144 (“overriding considerations of legal certainty”).

rights”¹¹⁴. If that sentence were interpreted as stating that it is “morally” unacceptable that a State relies on its own breach of Community law in order to deprive individuals of their rights, than the sentence would be a case of a non-legal argument; if it were interpreted as stating that it is “legally” unacceptable, then the Court would be relying upon an implicit principle of Community law – a sort of implicit doctrine of “estoppel” that would prevent the Member States from benefiting of their own breach of Community law. Both interpretations are plausible, and the distinction between non-legal arguments and implicit principles seems thus to rely not on certain distinctive structural features of the reasons provided for by the Court but on the interpretation of the legal materials that we are ready to accept: the distinction between what is implicit in the law and what is external to the law is a matter of (normative) interpretation and thus cannot simply be observed as if it were a matter of fact.

15. References to scholarly works

The ECJ does not make reference to scholarly works. However, if we define “scholarly works” very broadly as comprising every non-authoritative interpretation and legal opinion explicitly taken into account by the Court, then the reference to the interpretation provided by the Community legislature in *Antonissen* should be considered as a case of such sort. The Court intended to argue that Article 48 EEC (freedom of movement) does not comprise exclusively the right to accept offers of employment actually made and to move within the territory of Member States for that purpose, as the wording of the provision would suggest, but includes also the right to move and to stay in order to seek employment. To that end, the Court held that “that interpretation of the Treaty corresponds to that of the Community legislature, as appears from the provisions adopted in order to implement the principle of free movement”¹¹⁵.

16. References to foreign law

In the context of the legal reasoning of the ECJ, “foreign law” is mainly the law of the Member States. However, since *Internationale Handelsgesellschaft* [1970] “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice”, and “the protection of such rights [is] inspired by the constitutional traditions common to the Member States”¹¹⁶. Thus, on closer inspection it might be argued that the law of the Member States is not foreign at all: it is a constitutive part of Community law. Community law lives in an osmotic relationship with the constitutional traditions of the Member States and the Court of Justice is the “guardian” of that osmosis.

In any case, we found 13 references to the law of the Member States, and the vast majority of them were mechanical quotes from the *Internationale Handelsgesellschaft* formula. Thanks to the bridge provided by the “common constitutional traditions”, the

¹¹⁴ *Faccini Dori* [1994], par. 23.

¹¹⁵ *Antonissen* [1991], par 14.

¹¹⁶ *Internationale Handelsgesellschaft* [1970], par. 4.

ECJ has accepted as general principles of Community law the social function of the right to property¹¹⁷, freedom of expression¹¹⁸, the principle of the non-contractual liability of the Community and of the Member States for loss and damage caused to individuals¹¹⁹, the right to a fair trial¹²⁰, the principle of non-discrimination on grounds of age¹²¹, the principle *nullum crimen, nulla poena sine lege*¹²², the right to take collective action¹²³, and the right to be heard and right to effective judicial review¹²⁴.

However, the only case in which the Court does not limit itself to declare that a certain rule results from the legal traditions of the Member States but engages in an explicit comparison is *Hauer*. Here, in order to demonstrate that the rules and practices followed in all the nine Member States of the EEC permit the legislature to control the use of private property in accordance with the general interest, the ECJ makes reference to the *German Grundgesetz*, to the Italian and Irish constitutions, and to the “numerous legislative measures” that in all Member States “have given concrete expression to that social function of the right to property”¹²⁵. A part from *Hauer* and maybe *Köbler*¹²⁶, no judgment analysed in the sample of the 40 influential rulings of the ECJ has ever employed arguments based on comparative law.

C. Key Concepts

1. Form of state, form of government, federalism, democracy

Obviously in the 40 judgments analysed by the research we did not find any reference to the “form of state” (monarchy or republic) nor to the “form of government” (parliamentary or presidential). These concepts can hardly be applied to the EC/EU and probably there is no significant reference to them in the whole case law of the ECJ. However, we did not find any reference even to analogous concepts that in political theory and in legal scholarship are intended to express some distinctive features of the EU or some normative expectations relating to the EU – notions that are current in the theoretical debate such as “multilevel governance”, “mixed constitution”, “European Commonwealth”, “association of states”, or even the evergreen and much abused notion of the “*sui generis*” nature of the Community.

We considered nonetheless that “federalism” was mentioned in one judgment in which the Court rejected an argument by the German Government based on the

¹¹⁷ *Hauer* [1979], par. 20. With regard to the right to property, see also *Wachauf* [1989], parr. 17-18.

¹¹⁸ *ERT* [1991], par. 41.

¹¹⁹ *Brasserie du Pêcheur* [1996], parr. 27-32; *Köbler* [2003], par. 48 (application of the principle of State liability to judicial decisions).

¹²⁰ *Pupino* [2005], parr. 58-59.

¹²¹ *Mangold* [2005], parr. 74-75.

¹²² *Advocaten voor de Wereld* [2007], par. 49.

¹²³ *Laval* [2007], par. 90; *Viking* [2007], par. 43 (having regard to “various international instruments which the Member States have signed or cooperated in”).

¹²⁴ *Kadi* [2008], par. 283.

¹²⁵ *Hauer* [1979], par. 20.

¹²⁶ In *Köbler* [2003], para. 48 (“application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States, as the Advocate General pointed out at paragraphs 77 to 82 of his Opinion”).

principle of subsidiarity¹²⁷. We did not consider as mentioning “federalism” those judgments in which the Court made reference to the principle of loyal cooperation based on Article 4(3) TEU (former Article 5 TEC), although it is interesting to note that the label “loyal cooperation”, which is obviously a calque from the German concept of *Bundestreue*, appears for the first time in 1991¹²⁸ and, among the judgments analysed in the research, is employed in *Pupino* (2005)¹²⁹. Prior to that judgment, the Court had used the expression “principle of cooperation”¹³⁰ or the “obligation to cooperate”¹³¹, or had simply quoted the text of Article 5 TEC (“Member States shall take all appropriate measure ... to ensure fulfilment of the obligations...), without adding any “federalist flavour” to that formula¹³².

The ECJ tends to refrain from having recourse to concepts that refer to the EC/EU as a political authority. Generally speaking, we did not find any reference to concepts that refer to the EC/EU as a political community in its own right – while we are not short of references to concepts that relate to the Community as autonomous legal order. It is revealing, in this regard, that in the sample of the 40 influential judgments analysed by the research there is just one case in which the Court mentioned the democratic principle and it did so only in passing, in a *obiter dictum* that was totally irrelevant for the decision of the case¹³³.

It is true that, starting from the “Isoglucose judgments” of 1980¹³⁴, the Court has often upheld the prerogatives of the Parliament on the basis of what it calls “the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly”¹³⁵. The participation of the Parliament in the legislative process constitutes, according to the ECJ, “an essential formality disregard of which means that the measure concerned is void”¹³⁶. Recently, the Court has even made reference to the “importance of the Parliament’s role in the Community legislative process”¹³⁷.

However, appeals to the democratic principle run the risk of being intrinsically divisive in the EU context and cannot easily be employed to strengthen the European Parliament’s constitutional role. In the EU it is far from clear where the locus of democracy lies – whether in the representative institution of the European Parliament, in the intergovernmental institutions of the Council of the EU and the European Council, or in the indirect control exercised by the national parliaments and by other national authorities, or whether the legitimacy of the EU is essentially an “output legitimacy” provided by technical bodies such as the European Commission, the ECJ

¹²⁷ *Bosman* [1995], par. 81.

¹²⁸ Case C-374/89, *Commission v Belgium* [1991] ECR I-367, par. 15. Starting with Case C-275/00, *First and Franex* [2002] ECR I-10943, par. 34, the Court began to use the expression “loyal cooperation” with great frequency.

¹²⁹ *Pupino* [2005], par. 42.

¹³⁰ The expression was used for the first time in Case C-33/76, *Rewe-Zentralfinanz* [1976] ECR 1989, par. 5. See also *Factortame* [1990], par. 19.

¹³¹ See, e.g., *Brasserie du Pêcheur* [1996], par. 39.

¹³² See, e.g., *Francovich* [1991], par. 36.

¹³³ *Kadi* [2008], par. 303.

¹³⁴ Case C-138/79, *Roquette Frères v Council* [1980] ECR 3333, par. 33 and Case C-139/79, *Maizena v Council* [1980] ECR 3393, par. 34.

¹³⁵ See, e.g. Case C-300/89, *Commission v Council* [1991] ECR I-2867, par. 20; Case C-130/10, *Parliament v Council* [2012], not yet published, par. 81.

¹³⁶ Case C-139/79, *Maizena v Council* [1980] ECR 3393, par. 34.

¹³⁷ Case C-155/07, *Parliament v Council* [2008] ECR I-8103.

and the European Central Bank. At EU level, no institution can claim a monopoly on democratic legitimacy, and therefore in the case law of the ECJ references to democratic legitimacy provide little more than a rhetorical flourish.

2. Sovereignty and Nation

What we have just said about the difficulty of the ECJ in employing concepts that imply or refer to the political nature of the EC/EU and that therefore are liable of having a divisive effect in the context of the Community applies also to the concept of (political) sovereignty and to the concepts of nation and supranational.

With regard to sovereignty, it can be safely said that the ECJ is very conscious of the political environment in which it operates and often takes into consideration the political dimension of the sovereignty of Member States – the salience of national interests and identities involved in the controversies before the Court and the autonomy of the national political authorities. Occasionally such deference to national sovereignty has made its way into the explicit legal reasoning of the Court by means of a (rather rudimentary, in comparison with the ECtHR's case law) margin of appreciation doctrine¹³⁸. The Court has acknowledged that “depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State”¹³⁹, and it has employed the concept of *marge d'appréciation* when it intended to show respect for the political sovereignty of the Member States in areas such as the concept public policy¹⁴⁰, the requirements of public morality¹⁴¹, the level of protection for public health¹⁴², and the content of fundamental rights¹⁴³. In *Van Duyn* (1974), for instance, the Court held that “the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty”¹⁴⁴.

However, the concept of sovereignty as such does not play a decisive role in the legal reasoning of the ECJ, as demonstrated by the fact that we were able to find only three

¹³⁸ On the margin of appreciation doctrine in the case law of the ECJ, see Y. Shany, “Toward a General Margin of Appreciation Doctrine in International Law?”, *European Journal of International Law*, 16/5, 2006, pp. 907–940, pp. 927 ff.; J.A. Sweeney, “A ‘Margin of Appreciation’ in the Internal Market: Lessons from the European Court of Human Rights”, *Legal Issues of Economic Integration*, 34/1, 2007, pp. 27-52; J. Gerards, “Pluralism, Deference and the Margin of Appreciation Doctrine”, *European Law Journal*, 17/1, 2011, pp. 80-120, pp. 89 ff., analysing the factors determining the intensity of the ECJ's review of national measures and advocating for the adoption of an explicit and consistent margin of appreciation doctrine by the ECJ.

¹³⁹ Case C-83/94, *Leifer and Others* [1995] ECR I-3231, par 35; Case C-273/97, *Sirdar v The Army Board & Secretary of State for Defence* [1999] ECR 7403, par. 27; Case C-285/98, *Tanja Kreil v Germany*, [2000] ECR I-69, par. 24.

¹⁴⁰ *Van Duyn*, par. 18; Case C-30/77, *Regina v Pierre Bouchereau* [1977] ECR 1999, par. 34; Case C-36/02, *Omega* [2004] ECR I-9609, par. 31.

¹⁴¹ Case C-34/79, *R v Henn & Darby* [1979] ECR 3795, par. 15.

¹⁴² Case C-141/07 *Commission v Germany* [2008] ECR I-6935, par. 51; Case C-84/11, *Susisalo and Others* [2012], not yet published, par. 28. For this line of reasoning, see already Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, par. 103.

¹⁴³ See e.g. Case C-112/00, *Schmidberger* [2003] ECR I-5659, par. 82.

¹⁴⁴ *Van Duyn* [1974], par. 18.

references to this concept in the Sample. This probably depends on the intrinsically polemical nature of the concept of sovereignty: the question “who is (still) sovereign in the EU?” has produced a growing body of scholarship, but it is not the kind of question that can be easily addressed and solved *ex cathedra* within the confines of the legal process. For the ECJ to declare the sovereign nature of the Community would be as pointless and counterproductive as declaring the definitive abandonment of Member States’ sovereignty. Declarations of this sort would stir up harsh controversy and in any case could not contribute to the persuasive force of the judgment.

Thus, the rhetoric of the limitation of Member States’ sovereignty appears in a few foundational judgements of the 1960s and early 1970s¹⁴⁵, and soon tends to disappear from the case law of the ECJ. In the Sample, we found it solely in *Van Gend en Loos* (1963), in *Costa* (1964) and in Opinion 1/91 on the incompatibility with EC law of the EEA: “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights”¹⁴⁶. Even in these judgments, it is clear that the ECJ is using the word “sovereignty” in quite a broad and generic sense, as synonymous with a bundle of competences and powers that the States are free to limit and transfer to the Community.

When the Court intended to establish the principle that EC law does not derive its binding force from the law of the Member States and is not subordinate to their constitutions and statutes – which can be called the legal concept of sovereignty, as opposed to the political concept – the Court reasoned in terms of *primauté* (primacy, supremacy) of EC law and “autonomy” of the EC legal order, and carefully avoided the lexicon of sovereignty. Therefore, we have considered these concepts as being corollaries of the concept of rule of law (see below) rather than being instances of the concept of sovereignty: maintaining that *Kadi* revolves around the sovereignty of the EU would have been overly emphatic, bizarre and confusing, while it is fair to say that the issue at stake under the label of “autonomy of Community law” was the respect for the rule of law.

Similar considerations apply to the concept of nation and to the characteristically European neologism of “supranational”. Given their potentially divisive nature, these concepts are not frequently used in the legal reasoning of the ECJ¹⁴⁷. They were never mentioned in the judgments analysed in the research with the only exception of *Bosman* (1995). Here we found one negative instantiation of the concept of nation

¹⁴⁵ *Van Gend en Loos* [1963], 12; *Costa* [1964], 593. See also Case C-17/67, *Neumann* [1967] ECR 441, 453; Case C-28/67, *Molkerei* [1968] ECR 143, 152; Case C-48/71, *Commission v Italy* [1972], ECR 529, par. 9.

¹⁴⁶ *Van Gend en Loos* [1963], 12; *Costa* [1964], 593: “a Community ... having ... real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community”, “the Member States have limited their sovereign rights, albeit within limited fields”. See also Opinion 1/91 [1991], par. 21, and Opinion 1/09 [2011] ECR I-0000, par. 65, both quoting *Van Gend en Loos* and the second adding “possessing its own institutions” to the formula “a new legal order ... for the benefit of which the States have limited their sovereign rights”. The concept is occasionally employed by the GC.

¹⁴⁷ For a case – not included in the Sample – that deals with the concept of national identity ex Article 4(2) TEU, see Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, para. 83. See also Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, para. 35; Case C-51/08, *Commission v Luxembourg* [2011] ECR I-4231, para. 124; Case C-202/11, *Las* [2013] not yet published, para. 26-27 (preservation of national identity as a legitimate aim of national policy).

made by the Court in order to dismiss the argument that the “nationality clauses” (rules restricting the extent to which foreign players can be fielded in a match) were justified on non-economic grounds: according to the Court there is nothing qualitatively distinct about the kind of belongingness and bond conveyed by the concept of nationality, as “a football club’s links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than its links with its locality, town, region”¹⁴⁸.

It can be argued that the kind of reasons expressed by the concept of nation are at least partially already conveyed by the above-mentioned notion of margin of appreciation and by other tools that allow the Court to show deference for national values and identities. Sometimes the Court accepts that principles of national constitutional law provide a sufficient ground for the restriction of fundamental freedoms under EU law but it usually avoids making reference to the concept of national identity as justification. The Court has acknowledged that “the preservation of the Member States’ national identities is a legitimate aim respected by the Community legal order”¹⁴⁹, but it has made reference to that concept only in a few occasions and always in passing¹⁵⁰.

The concept of supranational is even less relevant, if possible. The word “supranational” was eliminated from the text of the ECSC Treaty by the Merger Treaty of 1965, and it is used by the Court very rarely and never in an emphatic way. The concept is mainly borrowed by the Court from the applicants or from the referring courts when the Court summarises their arguments. In this respect, there is a notable discrepancy between the linguistic uses of the ECJ and those of the legal community surrounding the Court, as the latter often uses the concept of supranationality, or even post-nationality, to refer to the kind of new political community instantiated by the EU.

3. Substantive legal principles, fundamental rights, equality and basic procedural rights

We found no reference to the concepts of secularism and privacy in the Sample and we found two in passing references to the concept of human dignity which were both immaterial for the case¹⁵¹. Moreover, we found four references to freedom of expression, two of which were mere *obiter dicta*¹⁵², one was substantive and relevant for the case¹⁵³, and the last one was relevant because it allowed the Court to discharge

¹⁴⁸ *Bosman* [1995], par. 131.

¹⁴⁹ Case C-473/93, *Commission v Luxembourg* [1996] ECR I-3207, par. 35. See also Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, par. 80, for a reference to the need of balancing the legitimate goal of preserving Austrian constitutional identity, on the one side, and the freedom of movement of persons, on the other.

¹⁵⁰ See A. von Bogdandy, S. Schill, “Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty”, *Common Market Law Review*, 48, 2011, pp. 1417-1454, pp. 1422 ff.

¹⁵¹ *Pupino* [2005] par. 52; *Laval* [2007] par. 94. It is worth mentioning that the notion of human dignity, although not explicitly mentioned, is at the core of *Stauder* [1969].

¹⁵² *Laval* [2007], par. 94; *Viking* [2007], par. 46.

¹⁵³ *ERT* [1991], par. 44.

the case by holding that it was outside the scope of the Treaty and related exclusively to principles of domestic constitutional law¹⁵⁴.

References to the principle of equality and to basic procedural rights such as the right to judicial review, the right to a fair trial, the rights of the defence and the principle of the legality of criminal offences and penalties were much more common in the Sample (11 and 7 respectively). In some cases these were the main substantive principles, or one of the main substantive principles, that the ruling of the Court took into consideration: they had immediate operative force on the judgment and were employed, or at least could have been employed, in order to guarantee some fundamental individual liberty¹⁵⁵. In many other cases, however, the principle of non-discrimination and the basic procedural rights (in particular, the need to guarantee effective judicial protection) were used by the Court first and foremost for affirming not individual rights but certain structural principles of EC law such as direct effect and supremacy¹⁵⁶.

Thus, to make just a few examples, the ECJ held that the force of Community law cannot vary from one State to another in deference to subsequent domestic laws without giving rise to the discrimination prohibited by the Treaty¹⁵⁷, and that the scope of certain Treaty provisions cannot be confined to acts of public authorities (so called “vertical” direct effect) without risking of creating inequality in their application¹⁵⁸. The Court held that a restriction of the guarantees against a violation of EC law by Member States to the infringement procedures “would remove all direct legal protection of the individual rights of their nationals”¹⁵⁹, and that the need to guarantee effective judicial protection implies that individuals should be able to obtain reparation when their rights are affected by an infringement of Community law attributable to a court of a Member State¹⁶⁰.

Finally, with regard to the substantive legal principles and fundamental rights referred to by the ECJ in the Sample, it is worth noting the relatively high number of cases that dealt with or mentioned correlative notions such as proportionality (9 judgments¹⁶¹) and the “very substance” (*Wesengehalt*) of fundamental rights (3 judgments¹⁶²). As Mattias Kumm noted, the ECJ’s fundamental rights case law exhibits in a paradigmatic way certain features of an idea of fundamental rights that is remarkably new and distinct from the traditional conception¹⁶³: the emergence of proportionality

¹⁵⁴ *Grogan* [1991], par. 26.

¹⁵⁵ See *Defrenne II* [1976]; *Barber* [1990]; *Martínez Sala* [1998]; *Köbler* [2003]; *Pupino* [2005]; *Mangold* [2005]; *Kadi* [2008]. See also *Advocaten voor de Wereld* [2007].

¹⁵⁶ *Costa* [1964]; *Dassonville* [1974]; *Bosman* [1995]; *Viking* [2007]; *Laval* [2007].

¹⁵⁷ *Costa* [1964].

¹⁵⁸ *Bosman* [1995], par. 84; *Viking* [2007], par. 34.

¹⁵⁹ *Van Gend en Loos* [1963] ECR I.

¹⁶⁰ *Köbler* [2003], par. 33; *Traghetti del Mediterraneo* [2006], par. 33.

¹⁶¹ *Internationale Handelsgesellschaft* [1970] par. 12 and 16; “*Cassis de Dijon*” [1979], par. 8; *Hauer* [1979], par. 23; *Wachauf* [1989], par. 18; *Bosman* [1995], par. 104; *Mangold* [2005], par. 65; *Viking* [2007], par. 46 and 75; *Laval* [2007], par. 101; *Kadi* [2008], par. 355.

¹⁶² *Hauer* [1979], par. 23; *Wachauf* [1989], par. 18; *Kadi* [2008], par. 335. For a reference to the “essential part” of the Community competences, see Opinion 1/91 [1991], par. 41.

¹⁶³ M. Kumm, “*Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm*”, in M.P. 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*, Oxford and Portland, Hart, 2010, pp. 106-118.

as a “global constitutional standard”¹⁶⁴ implies that fundamental rights stop being thought of as infeasible rules that work as “trumps” against any illegitimate exercise of public authority and come to resemble generic and defeasible reasons that the ECJ, in the same way as every other authority, ought to take into consideration when adjudicating on public policy issues.

4. Rule of Law

It comes to no surprise that among the key concepts taken into consideration by the analysis of the forty influential judgments of the ECJ, the rule of law occupies the dominant position. No less than 14 judgments invoked the concept either explicitly or implicitly by having recourse to notions that are identical to or implied by the principle of the rule of law, such as legal certainty, legality, non-retroactivity and – particularly important in the context of the Community – uniform application of EC law and autonomy of the Community legal order.

In fact, as Armin von Bogdandy notes, most of the ECJ’s great judgments which led to a constitutionalization of the Treaties were not meant to implement substantive legal principles such as fundamental rights, but focused instead on “furthering integration through ensuring that the results of the political process, i.e. primary or secondary law, are enforced”¹⁶⁵. Instead of human dignity and fundamental rights at the centre of the case law of the ECJ we find the principles of the rule of law, direct effect and supremacy, legal certainty and legitimate expectation, uniform application and effective judicial protection. “There seems to be a mismatch between the range and depth of the EU activities and the tiny number of human rights cases involving EU intrusion brought – or the even smaller number which are successful”¹⁶⁶.

This can be shown by comparing the scarce and somewhat subdued references to fundamental rights with the references to the notion of the rule of law and *communauté de droit* (*Rechtsgemeinschaft*, “Community based on the rule of law”). From the beginning, the European Communities were conceived as communities based on the rule of law in order to express the idea that, as they were lacking the means of physical coercion, voluntary compliance with EC law was the only basis upon which their objectives could be achieved. The rule of law was the first classical constitutional principle to be claimed for EC law, and today it is commonly regarded as one of the foundational principles legitimating the EU constitutional order¹⁶⁷. It plays a crucial role in strengthening the authority of the EU institutions vis-a-vis the member states.

¹⁶⁴ A. Stone Sweet and J. Mathews, “Proportionality Balancing and Global Constitutionalism”, *Columbia Journal of Transnational Law*, 47, 2008, 73-165.

¹⁶⁵ A. von Bogdandy, “The European Union as a Human Right Organization?”, *Common Market Law Review*, 37, 2000, pp. 1307–1338, p. 1325.

¹⁶⁶ Ibid, p. 1321. B. de Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, in P. Alston (ed.), *The EU and Human Rights*, Oxford, OUP, 1999, pp. 859–897.

¹⁶⁷ A. von Bogdandy, “Founding Principles”, in Bogdandy, Bast (eds.), *Principles of European Constitutional Law*, cit., pp. 11–54, p. 28; L. Pech, “A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law”, *European Constitutional Law Review*, 6, 2010, pp. 359–396., p. 362.

In this respect, the principle of the rule of law seems to undergo a significant transformation once it is applied to the European institutions: while, in the national setting, the rule of law is generally conceived as a principle that limits the pre-existing coercive powers of the state, at the European level it appears to be a principle that constitutes and justifies the authority of the Community institutions.

Thus, according to the ECJ, respect for the principle of the rule of law implies, first of all, that Community law cannot be overridden by domestic legal provisions¹⁶⁸, and “imposes upon all persons subject to Community law the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court”¹⁶⁹. The validity of Community law can only be judged in the light of the Treaties and cannot be affected by its alleged incompatibility with domestic constitutional rights¹⁷⁰ or with domestic rules as to the division of powers between constitutional authorities¹⁷¹. The national courts do not have the power to declare acts of the Community institutions invalid¹⁷²: only the ECJ can do so and, when needed, it can also limit the temporal effects of its judgments taking into account “overriding considerations of legal certainty”¹⁷³.

To sum up: respect the rule of law implies the principle of legal certainty and one of its important corollaries, the need for uniform application of EC law, which in turn grounds the primacy of EU law over national law, as the Member States cannot unilaterally walk away from their Community obligations without jeopardising legal certainty and violating the EC rule of law; it implies the notion of European constitutional legality – every piece of EU legislation is based on the Treaties and must be in conformity with the Treaties; and finally it includes access to justice, the need for effective judicial protection, the possibility of judicial review and the exclusive jurisdiction of the ECJ to interpret EC law and decide on its validity. All these contents of the rule of law principle seem to be summed up in an oft-quoted passage of the judgment in *Les Verts*:

“the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular ... the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions”¹⁷⁴.

¹⁶⁸ *Costa* [1964].

¹⁶⁹ Case C-101/78, *Granaria BV v Hoofdprodukschap voor Akkerbouwprodukten* [1979] ECR 623, par. 5.

¹⁷⁰ *Internationale Handelsgesellschaft* [1970], par. 3

¹⁷¹ *Brasserie du Pêcheur* [1996], par. 33.

¹⁷² *Foto-Frost* [1987], par. 15.

¹⁷³ *Barber* [1990], par. 44; *Bosman* [1995], par. 144. See also *Defrenne II* [1976], par. 74.

¹⁷⁴ Case C-294/83, *Partie Ecologiste ‘Les Verts’* [1986], par. 23. See also *Foto-Frost* [1987], par. 16; *Kadi* [2008], par. 281.

D. The Context of Constitutional Reasoning

1. Academic context: legal scholarship as context of constitutional reasoning

The attitude of legal scholarship towards the Court of Justice changed over the course of time. As Joseph Weiler noted, until the publication in 1986 of Hjalte Rasmussen's *On Law and Policy in the European Court of Justice*, in virtually all books on the Court of Justice 'the underlying ethos [was] one of praise and admiration' and criticism of the Court was 'muted and on most occasions confined to specific cases or areas of jurisprudence and not the overall posture of the court'.¹⁷⁵ The legal doctrine surrounding the Court was highly supportive of its constitutionalising efforts. All the landmark decisions of the Court in the 1960s and 1970s were welcomed by the enthusiastic support of a 'comprehensive transnational network of European minded jurists'¹⁷⁶: a relatively small group of scholars, often professionally involved in the EC institutions, who were very active in terms of publications as well as very homogeneous in terms of professional ethos and value choices. Dissenting voices were usually confined to the few writings of the traditional academic jurists, who were more prestigious in terms of cultural legitimacy but ultimately un-influential on the developments of the case law.¹⁷⁷

Following the Maastricht Treaty (1992), the attitude of the legal doctrine started to change fast. As the political relevance of the European institutions significantly increased, the academic interest and the quantitative dimension of the EU legal scholarship grew enormously. The composition of the EU legal scholarship changed and became more internally differentiated both with regard to the methodological perspectives (traditional expository jurisprudence and legal dogmatics were now joined by the new 'law in context' tendencies of a legal scholarship informed by political science, by the new constitutionalist and 'principled' approaches characteristic of a normatively oriented jurisprudence, and by cultural and critical legal studies) and with regard to normative assessments of the Court of Justice's role and case law.¹⁷⁸ Today's legal doctrine is far less deferential towards the Court than it used to be. Indeed, it seems fair to say that almost every piece of legal doctrine dealing with the Court must now contain, in order to be appealing and publishable, a normative (better, critical) assessment of certain aspects of its case law.

¹⁷⁵ J.H.H. Weiler, 'The Court of Justice on Trial', *Common Market Law Review*, 24, 1987, 555-589, 555-556.

¹⁷⁶ M. Rasmussen, 'From *Costa v ENEL* to the Treaties of Rome: A Brief History of a Legal Revolution', in Maduro, Azoulai (eds.), *The Past and Future of EU Law*, cit., 69-85, 78; H. Schepel, R. Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', *European Law Journal*, 1997, 165-188; Itzcovich, *Teorie e ideologie*, cit., 276-307.

¹⁷⁷ Itzcovich, *Teorie e ideologie*, cit., 307-314 and 324-382.

¹⁷⁸ F. Snyder, 'New Directions in European Community Law', *Journal of Law and Society*, 14/1, 1987, 167-182; A. von Bogdandy, 'A Bird's Eye View on the Science of European Law', *European Law Journal*, 2000, 208-238; J. Shaw, 'The European Union: Discipline Building Meets Polity Building', in P. Cane, M. Tushnet (eds.) *Oxford Handbook of Legal Studies*, Oxford, OUP, 2003, 325-352; N. Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay', *Oxford Journal of Legal Studies*, 25, 2005, 581-601; Dann, 'Thoughts on a Methodology', cit.

2. The political context of constitutional reasoning

In the 1990s, political science and international relations theory engaged in a debate on the degree of responsiveness of the Court of Justice to perceived national interests and to other environmental factors. Theorists inspired by realism (or intergovernmentalism) opposed a neo-functionalist interpretation of the Court's role in European integration according to which the driving forces of the constitutionalisation process successfully initiated by the Court in the 1960s and 1970s were to be traced not in the national interests but in the inputs coming from private litigants (mainly private companies and professional associations) and from lower-ranked national courts.¹⁷⁹ While the debate did not reach any firm conclusions, it is undeniable that the Court exercised its most active and creative role after the 'Empty Chair Crisis' (1965-1966), which provoked the end of any ambition of political protagonism by the Commission (until the Delors presidency in 1985-1994), a long-lasting legislative gridlock at European level and the so-called 'Eurosclerosis' – the perceived stagnation of the Community project. According to a famous interpretation by Joseph Weiler, the end of the 'institutional supranationalism' determined by the Empty Chair Crisis triggered the Court to strengthen 'normative supranationalism' by pursuing the politics of the judicial constitutionalisation of the EC Treaties.¹⁸⁰ In turn, following the Maastricht Treaty and the beginning of the 'semi-permanent Treaty revision process',¹⁸¹ the approach of the Court changed significantly: it became more cautious and sometimes committed to self-restraint.¹⁸² The closer scrutiny on the Court exercised by an enlarged and not always friendly legal community is likely to have had an influence on the changing attitude of the Court.

E. General characteristics of the constitutional discourse. The style of the Court's legal reasoning

The general style of the Court's legal reasoning¹⁸³ depends primarily on four factors which will be briefly presented here: the procedure followed by the Court, the subject

¹⁷⁹ Cfr. A.-M. Burley, W. Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization*, 47, 1993, 41–76; G. Garrett, 'The Politics of Legal Integration in the European Union', *International Organization*, 49, 1995, 171–181.

¹⁸⁰ J.H.H. Weiler, 'The Community System: the Dual Character of Supranationalism', *Yearbook of European Law*, 1, 1981, 267–306.

¹⁸¹ B. De Witte Bruno, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process', in P. Beaumont et al. (eds.), *Convergence and Divergence in European Public Law*, Oxford, Hart Pub, 2002, 39–57.

¹⁸² On the reasons for this change of attitude, see N. Mancini, 'Attivismo e autocontrollo nella giurisprudenza della Corte di Giustizia', *Rivista di diritto europeo*, 1990, pp. 229–240, pp. 236–240.

¹⁸³ On the legal reasoning of the ECJ, see G. Itzcovich, "The Interpretation of Community Law by the European Court of Justice", *German Law Journal*, 10/5, 2009, <http://www.germanlawjournal.com/article.php?id=1106>, with broad references to the existing literature. See moreover E. Paunio, S. Lindroos-Hovinheimo, "Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law", *European Law Journal*, 16/4, 2010, pp. 395–416; U. Neergaard and R. Nielsen, "Where Did the Spirit and Its Friends Go? On the European Legal Method(s) and the Interpretational Style of the Court of Justice of the European Union", in U. Neergaard, R. Nielsen and L. Roseberry (eds.), *European Legal Method. Paradoxes and Revitalisation*, Copenhagen, DJØF, 2011, pp. 95–184; G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge, CUP, 2012; G. Beck, *The Legal Reasoning of the Court of*

matter of its decisions, the influence of the French model, the influence of other legal traditions, and the need for translation and informatisation.

1. The collegiate nature of the judgment

The first factor consists in the committee decision-making procedure adopted by the Court, which is typical of European civil law jurisdictions. The collegiate nature of the judgment implies that dissenting opinions are not allowed and the decision is the outcome of the collective work of the whole collegium. Moreover, within the Court the attempt is usually made to achieve the broadest possible consensus. This has consequences for the quality of the legal reasoning developed by the Court: in the words of one judge of the ECJ, Pierre Pescatore, “the system of collegiate deliberation adopted by the Statute of the Court has the consequence of ‘laminating’ the grounds of the judgment up to the point that they lose every relief. We are far away from the colour of the judgments of the English judges”¹⁸⁴.

Especially to common law eyes, the Court seems to confirm the old saying that a camel is a horse designed by a committee: “some judgments of the Court of Justice are camels”¹⁸⁵. When there are two lines of reasoning leading to the same conclusion and there is disagreement within the Court as to what are the best arguments for the case, the Court often adopts a middle-ground solution that, however, might be unsatisfactory for both sides¹⁸⁶. Another judge of the ECJ has written in this regard that “the case law produced in Luxembourg is rightly criticized for its often stunted reasoning and its frequently oracular tone; but such shortcomings must be attributed ... to the need to render judgments that are acceptable to all the signatories”¹⁸⁷.

2. The subject matter of the Court’s judgments and their non-constitutional tone

The second element affecting the general style of the judgments of the ECJ depends on their subject matter. Most of EU law deals with economic regulation: the administration of the common agricultural policy, state aids, taxation, environmental and consumer protection, industrial and intellectual property, competition, and so on. As the ECJ does not have the discretionary power to refuse to review a case on the ground that it is trivial, it follows that the judgments of the Court that present a constitutional tone or indulge in constitutional rhetoric are quite rare.

The majority of the ECJ’s judgments deal with the daily management of the internal market and thus with detailed and highly technical regulations. It is not unusual to find judgments of the Court that are concerned with interpretative questions such as “whether the words *emballés séparément* [packaged separately] refer to *morceaux désossés* [boned or boneless cuts] or whether they refer on the contrary to the

Justice of the EU, Oxford and Portland, Hart, 2012; S. Sankari, *European Court of Justice Legal Reasoning in Context*, Groningen, Europa Law Publishing, 2013.

¹⁸⁴ P. Pescatore, *Vade-mecum. Recueil de formules et de conseils pratiques à l’usage des rédacteurs d’arrêts* (3rd ed. 1985), Bruxelles, Bruylant, 2007, p. 292.

¹⁸⁵ Edwards, “How the Court of Justice Works”, cit., pp. 557.

¹⁸⁶ Hartley, *The Foundations*, cit., p. 75.

¹⁸⁷ G.F. Mancini, D.T. Keeling, “Language, Culture and Politics in the Life of the European Court of Justice”, *Columbia Journal of European Law*, 1, 1994-1995, pp. 397–413, p. 398.

exception made for *les joues, les abats, le flanchet et le jarret* [the chaps, the offals, the thin flanks and the shin]¹⁸⁸. The Court has ruled on the distinctive features of slide fasteners, holding that they actually are “two flexible tapes to which scoops or other interlocking elements are attached in parallel staggered formation [so that they] can be opened or closed by means of the action of a slider”¹⁸⁹. The Court has carefully reconstructed the manufacturing process of xanthan gum, in order to conclude that “Xanthan gum is thus no longer a vegetable extract but a new substance manufactured by means of an industrial process of fundamental chemical conversion”¹⁹⁰. On more than one occasion, the Court has been called to expound the concept of pyjamas – according to the pragmatic approach adopted by the Court, “the objective characteristic of pyjamas ... can be sought only in the use for which pyjamas are intended, that is to say to be worn in bed as night wear”¹⁹¹.

True enough, the case law of the ECJ is not short of decisions of the greatest importance and the Sample analysed by the research includes cases of the utmost constitutional significance. However, generally speaking, the grounds that the Court employs in order to decide the “constitutional issues” upon which it is sometimes called to adjudicate are characterised by a certain understatement. The Court might well be one of the many constitutional courts of the European legal space, but it tends to conceal its status as far as possible. Occasionally in the judgments of the ECJ it is possible to find declamatory political statements by the Court, such as the often-cited *dictum* in *Grzelczyk* (“Union citizenship is *destined* to be the fundamental status of nationals of the Member States...”¹⁹²), but in principle the Court sticks to a legalistic and unpretentious understanding of the way in which its reasoning ought to be framed.

The traditional understatement of the Court might well be due to pragmatic reasons. As the authority of the Court depends upon the continuing collaboration of the national courts, it is understandable that, in order to avoid offending their constitutional (national) sensibilities, the Court might be willing to keep a low profile, highlight the strictly technical grounding of its rulings and eschewing constitutional rhetoric. However, the approach of the Court may also have its drawback in terms of legitimacy, as it can easily be interpreted as lack of constitutional awareness or sensibility. In its characteristic role of promoter and guardian of the internal market, the Court may well appear to disregard the constitutional traditions of the Member States and, more generally, any non-market based legal principles.

Moreover, “the cryptic, Cartesian style which still characterizes many of its decisions” and “its pretence of logical legal reasoning and inevitability of results” may not be, according to the critics of the Court, “conductive to a good conversation with national courts”¹⁹³. According to this criticism, by eschewing constitutional

¹⁸⁸ Case C-803/79, *Roudolff* [1980], ECR 2015, par.7.

¹⁸⁹ Case C-34/78, *Yoshida* [1979] ECR 115, par. 10.

¹⁹⁰ Case C-160/80, *Smuling-de Leeuw* [1981] ECR 1767, par. 10.

¹⁹¹ Case C-395/93, *Neckermann Versand* [1994] ECR I-4027, par. 7. See also Case C-338/95, *Wiener* [1997] ECR I-6495 (on the concept of “nightdress”) and the Opinion of AG Jacobs: “The present case is a perfect example of a case where it may be questioned whether it is appropriate for this Court to be involved”.

¹⁹² Case C-184/99 *Grzelczyk* [2001] ECR I-6193, par. 31. See lastly Case C-503/09, *Stewart* [2011], ECR I-6497, par. 80.

¹⁹³ J.H.H. Weiler, “Epilogue: The Judicial Après Nice”, in G. de Búrca, J.H.H. Weiler (eds.), *The European Court of Justice*, Oxford, OUP, 2001, p. 225 and p. 219 (“the style of judicial decisions is

rhetoric the Court fails short to its role of *sensu lato* constitutional court of the European legal space. In contrast, in order to broaden and deepen the constitutional “dialogue” with the national courts, the Court should attempt as much as possible to identify and develop the general principles of a common European legal culture.

3. The cultural background(s) of the Court

The traditional understatement of the Court and its tendency to avoid constitutional rhetoric and bold political statements are certainly linked also to the third factor affecting the general style of its legal reasoning: the diminishing but still present influence of the French model.

At the beginning of its activity the ECJ adopted a style of legal reasoning based on that of the French courts: “formal, terse, and abstract”¹⁹⁴; “a terse and opaque summary of the outcome and the reasons for it”, expressed in a “strictly deductive form”¹⁹⁵. The working language of the Court is French and at first the French version of the judgments was written according to the typical French and syllogistic model of the “*attendus que*”. The ECJ’s *jugement à phrase unique* consisted in one long sentence, each paragraph beginning with the words “whereas that” or simply “that” and ending with a semicolon; the conclusion (“*dispositif*”) was introduced with the words “*par ces motifs ... la Cour ... déclare et arrête/dit pour droit*” (on those grounds ... the Court ... hereby rules). As a result, the Court reached “a stern, authoritarian style, expressed in a single-sentenced statement in which shines a single subject (the Court)”¹⁹⁶; its judgments were expressed in a “dense and austere” sentence that “commands respect for its powerful brevity”¹⁹⁷. According to a former judge of the ECJ, Antonio Trabucchi, in *Van Gend en Loos* the Court first adopted the formula “*dit pour droit*”, instead of the usual “*déclare et arrête*”, in order to highlight the *erga omnes* effect of its decisions, their “law-declaring” (or law-making) nature¹⁹⁸.

In France the syllogistic structure and the magisterial tone proved to be means for hiding the adjudicator’s discretion by portraying the decision as the mechanical and strictly logical application of a general rule (a *loi*) to the concrete case at hand. That style of legal reasoning, however, was distinctively French: it was too parochial and particularistic in nature and also too constrictive on the legal reasoning of the Court. Soon it was perceived as inadequate for a court, such as the ECJ, engaged in the process of building up a supranational legal order. Therefore in 1979 the Court abandoned the model of the *attendus* in order to favour a more discursive style of argumentation.

outmoded, does not reflect the dialogical nature of European Constitutionalism”); Arnall, *The European Union and its Court of Justice*, cit., p. 12.

¹⁹⁴ Hartley, *The Foundations*, cit., p. 74.

¹⁹⁵ M. Wells, “French and American Judicial Opinions”, *Yale Journal of International Law*, 19, 1994, pp. 85–103, pp. 92 and 94; U. Everling, “Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities”, in J. Rosenløv et al. (eds.), *Festschrift til Ole Due*, Gad, Kbh, 1994, pp. 55–74, p. 59: “strict, disciplined form and apodictic brevity”.

¹⁹⁶ G. Gorla, *Lo stile delle sentenze. Ricerca storico-comparativa e Testi commentati*, 2 voll., Roma, Soc. ed. Foro Italiano, 1968, I, p. 16.

¹⁹⁷ P. Mimin, *Le style des jugements*, 4th ed., Paris, Librairies techniques, 1962, reported by Gorla, *Lo stile delle sentenze*, cit., II, pp. 21, 25–26.

¹⁹⁸ A. Trabucchi, “Un nuovo diritto”, *Rivista di diritto civile*, 1963, 259–272, 269.

Its judgments nonetheless remained strongly structured and somewhat rigid. Arguments are introduced with standard phrases such as “it must be observed that”, “it must be pointed out that”, “it is clear that” and “it follows from the foregoing that”. According to their critics, the decisions of the Court still tend to be “short, terse, and magisterial decisions that demonstrate tremendous interpretative confidence and suggest a certain logical compulsion”¹⁹⁹.

However, the importance of this factor affecting the general style of the ECJ’s legal reasoning should not be overemphasised. The influence of the French model has gradually declined and the judgments of the Court have started to deal with possible counter-arguments raised by the parties to the proceedings as a matter of course²⁰⁰. The change has been rightly described as a “stylistic earthquake” that occurred when the Court, in order to communicate more effectively with the national judges through the vehicle of the preliminary ruling procedure, embraced a more dialogical style of legal argumentation, “testing its reasons with a more thoughtful motivation and exposing itself to the controversial debate of scholarship”²⁰¹. It is indicative in this regard that the average length of the Court’s decisions has increased in the course of time: from the laconic brevity of its first judgments it reached the 380 paragraphs and 29,000 words of the *Kadi* judgment of 2008²⁰².

Moreover, the influence of the French model has been combined with different legal traditions and cultural backgrounds that have converged creating a distinct form of transnational legal reasoning²⁰³. In the rulings of the Court we can find reference to concepts that were originally typical of the German legal culture, such as the duty of sincere (or genuine, or loyal) cooperation, the principle of proportionality, the protection of legitimate expectations, and to other indeterminate legal concepts (general clauses, *Generalklauseln*) – “the ethical lungs of positive law”²⁰⁴ – that are rooted in the antipositivist turn that affected German legal thinking after the Second World War. The very concept of fundamental rights as general principles of EC law was absent from the text of the Treaties and was developed by the ECJ in strict dialogue with the German courts²⁰⁵.

¹⁹⁹ Lasser, *op. cit.*, p. 112

²⁰⁰ According to some authors, however, the tendency towards better argumentation has recently turned into an opposite trend. E.g. Komárek, “In the Court(s) We Trust?”, *cit.*, p. 482; M. Bobek, “Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice”, *Common Market Law Review*, 45, 2008, pp. 1611–1643, p. 1639 f.

²⁰¹ G. Martinico, “Reading the Others: American Legal Scholars and the Unfolding European Integration”, *European Journal of Law Reform*, XI/ 1, 2009, pp 35–49, p. 37; G. Davies, “Abstractness and Concreteness in the Preliminary Reference Procedure”, in N. Nic Shuibhne (ed.), *Regulating the Internal Market*, Cheltenham, UK, Edward Elgar, 2006, 210–244, p. 213.

²⁰² *Kadi* [2008]. This is partially due to the importance of the case, but is not at all unprecedented: see e.g. the 632 paragraphs of Joined Cases C-40/73 et al., *Suiker Unie v Commission* [1975] ECR 1663 (partial annulment of a Commission decision concerning concerted practices in the sugar market).

²⁰³ J. Usher, “The Influence of National Concepts on Decisions of the European Court”, *European Law Review*, 1, 1976, pp. 359; Koopmans, “The Birth of European Law”, *cit.*; Everling, “The Court of Justice as a Decisionmaking Authority”, *cit.*

²⁰⁴ Mancini and Keeling, “Language, Culture and Politics”, *cit.*, p. 400. On the influence of German legal culture, see G. Nolte, “General Principles of German and European Administrative Law: A Comparison in Historical Perspective”, *Modern Law Review*, 57, 1994, 191-212.

²⁰⁵ *Stauder* [1969] ECR 419 (reference for a preliminary ruling from the *Verwaltungsgericht* Stuttgart); *International Handelsgesellschaft* [1970] ECR 1125 (reference for a preliminary ruling from the *Verwaltungsgericht* Frankfurt am Main); Case C-4/73, *Nold* [1974] ECR 491 (application for annulment made by a limited partnership based in Darmstadt).

One of the key concepts of the ECJ's constitutionalising case law – the concept of autonomous Community legal order – is strongly connected to the Italian dogmatic legal scholarship. As Pierre Pescatore once wrote, that expression “acquires its full meaning in the working language [of the case *Costa v ENEL*], that is Italian”, as it is “a quasi-philosophical expression which suggests the completeness and consistency of what is called a legal system”²⁰⁶.

After the accession of the United Kingdom and Ireland in 1973, the common law tradition affected the style of the hearings before the ECJ, which began to witness an almost informal exchange of opinions between the bar and the bench. Albeit in a less evident way, the common law tradition also impinged on the conceptual patrimony of the Court, on its form and style of legal reasoning. According to Mancini and Keeling, for instance, the common law doctrine of estoppel was employed by the Court in *Ratti* in order to argue that, under certain circumstances, the provisions of directives not yet implemented may be relied upon by private individuals²⁰⁷:

“a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails”²⁰⁸.

Last but not least, the influence of the common law tradition can be seen in the strong precedent-consciousness of the Court. After the accession of the United Kingdom and Ireland the techniques used by the ECJ to deal with precedents have become increasingly sophisticated. According to a judge of the ECJ, Thijmen Koopmans, “[a]lthough the Court’s way of formulating principles, or general propositions of law, is closely akin to methods used by the French *Conseil d’Etat*, its techniques of relying on previous cases, or invoking the authority of its own case-law and of determining the *ratio decidendi* of earlier judgments are not dissimilar to those used by the English common law courts”²⁰⁹. In fact, it is fair to say that today “much of what is most important in Community law is judge-made” and that EU law has developed “an internal coherence that is organized, in a self-referential manner, through precedent”²¹⁰. EU law tend to be a system in which cases are decided by reference to earlier judgments and by a process of slowly extending or reducing earlier rulings²¹¹.

This has consequences for the level of completeness and generality of the Court’s arguments. Occasionally the Court may be guided by considerations such as “saying as little as it possibly can – sometimes at the price of coherence, clarity and legal

²⁰⁶ P. Pescatore, “Diritto comunitario e diritto nazionale secondo la giurisprudenza della Corte di giustizia delle Comunità europee”, *Foro italiano*, 1970, V, 39. On this concept in historical-theoretical perspective, see G. Itzcovich, “Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts”, *European Law Journal*, 18/3, 2012.

²⁰⁷ Mancini and Keeling, “Language, Culture and Politics”, cit., p. 401; A. Dashwood, “From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?”, *Cambridge Yearbook of European Legal Studies*, 9, 2006-2007, pp. 81-109, p. 86.

²⁰⁸ *Ratti* [1979], par. 22. See also Case C-8/81, *Becker* [1982] ECR 53, par. 24; *Faccini Dori* [1994], par. 23.

²⁰⁹ Koopmans, “‘Stare Decisis’ in European Law”, cit., p. 27. See also Id., “The Birth of European Law”, cit., p. 504; Everling, “Reflections on the Reasoning”, cit., p. 65.

²¹⁰ A. Stone Sweet, M. McCowan, “Discretion and Precedent in European Law”, in O. Wiklund (ed.), *Judicial Discretion in European Perspective*, The Hague-Stockholm, Kluwer-Norstedts Juridik, 2003, pp. 84–115, p. 113.

²¹¹ Koopmans, “The Birth of European Law”, cit., p. 504. See also Mancini and Keeling, “Language, Culture and Politics”, cit., p. 402.

certainty – in order not to be constrained by precedent in the future”²¹². As witnessed by another judge of the ECJ, Ulrich Everling, the Court became “increasingly cautious about laying down general principles” following the arrival of judges from the common law tradition, “schooled in case law and inclined to a pragmatic approach”²¹³. At least in part, the magisterial tone of the first Court of Justice was abandoned in favour of the daily and gradual development of the case law.

4. Impersonality: translation, informatisation and the use of precedents

Written in French, the judgments of the ECJ are designed to be translated into every official language of the EU²¹⁴, and this has significant consequences for the kind of prose that the Court is able to employ: “Write simple and uncluttered sentences, use the simplest possible vocabulary, avoid abstract and learned terms”²¹⁵, recommends the *Vademecum* that Pierre Pescatore wrote for his colleagues at the ECJ. His suggestion has been generally followed by the practice. The ECJ tends to avoid rhetorically shaped, ornate language, elegant and brilliant prose, as well as abstract conceptualism and academic thoughtfulness. It prefers plain terms, simple and compact style and, above all, impersonality²¹⁶.

Even if it were true that “over the years, the ECJ has developed not just its own style, but undoubtedly a unique way of looking at and interpreting Union law”²¹⁷, the style of the Court would be unique but certainly not characteristic. Even from the viewpoint of a civil law lawyer, let alone from the viewpoint of a common law lawyer, one of its striking aspects is the high degree of impersonality that it strives for and is able to achieve in its judgments.

Impersonality is a consequence of the need for translation as much as of the need for informatisation. The *rationes decidendi* of the ECJ’s rulings tend to be standardised in order to be stored and retrieved using database queries so as to be easily quoted by subsequent judgments. Already in the 1980s the ECJ began to show ICT awareness, recognised the need for informatisation and begun to draft its judgments accordingly, taking into consideration the requirement for information retrieval: according to Pescatore’s *Vademecum*, “legal reasoning, even when it is complicated, should eventually be reduced ... to simple options that are compatible with the work of the

²¹² Ritter, “A New Look at the Role and Impact of Advocates-General”, cit., p. 762.

²¹³ Everling, “The Court of Justice as a Decisionmaking Authority”, cit., p. 163.

²¹⁴ On the consequences of multilingualism in EU law, see J. Bengoetxea, “Multilingual and Multicultural Legal Reasoning”, in A.L. Kjær, S. Adamo (eds.), *Linguistic Diversity and European Union*, Farnham, Ashgate, 2011, pp. 97-122 (maintaining that so far the preference for French has hindered the development of a genuinely multilingual form of legal reasoning).

²¹⁵ Pescatore, *Vade-mecum*, cit., p. 46

²¹⁶ One of the few exceptions to the rule of impersonality is due to a translation inaccuracy: in Joined Cases C-202/08 P and C-208/08 P, *American Clothing Associates NV* [2009], par. 47, the impersonal French phrase “il convient tout d’abord de relever que” becomes a highly unusual “let me start by observing that”.

²¹⁷ M. Horspool, “Over the Rainbow: Languages and Law in the European Union”, in Arnall et al. (eds.), *A Constitutional Order of States*, cit., pp. 99–120, p. 113 (according to Horspool, the ECJ borrows from different legal methods, “but mostly prefers its own approach”, based on balancing and weighting the principles/interests of the Member States and the Union).

machine”²¹⁸. In order to allow for informatization, the Court should have used “explicit, univocal and homogeneous concepts”²¹⁹.

The Court wants to avoid originality and its judgments are characterised by the extensive use of copy-and-paste quotations. The reason for this is not economic in nature – it is not a matter of preventing waste of time or the hard intellectual labour of thinking anew about the best arguments for the case. Copy-and-paste quotations facilitate information retrieval in database systems and, most importantly, create (an appearance of) consistency in the case law or – to put it in a more precise way – they create redundancy²²⁰: they show that the decision of the case is deeply embedded in a long line of decisions repeating the same legal principle and, by doing so, they provide legitimacy for the judgment and the Court. Thus, the extensive use of precedents, literal self-quotations and typical formulas by the ECJ does not depend only nor primarily on the influence of the common law tradition, but has much more to do with the need for standardisation and self-legitimation of a court that operates in a pluralistic legal space and that is actively engaged in a constitutionalisation process. Redundant self-quotations create the perception of stable reference points in a highly uncertain legal and political environment.

In any case, copy-and-paste quotations tend to eliminate any personal or idiosyncratic elements in the justification of the judgment. As noted by Loïc Azoulai, it is as if the judgments of the Court were “the result of a complex kind of ‘collage’ of judicial formulas”, i.e. of doctrines and *rationes decidendi* formulated in the landmark decisions of the ECJ: “This collage effect is typical for Community case law – to such an extent that in some cases it may seem as if it is the formulas which are speaking, instead of the Court and the preferences of its members”²²¹.

5. Framing the constitutional issues as non-constitutional issues

Of the 40 cases included in the Sample, 14 dealt with fundamental rights issues, 4 with issues relating to the organisation of the EC/EU and in particular to the “horizontal” division of competences between the institutions of the Community, and 24 dealt with other issues such as the system of sources and the legal effects of EC legal acts, the interpretative duties incumbent upon national judges, the civil liability for the violation of EU law and the governing principles of the common market. Two cases (*Defrenne*, 1976, and *Mangoldt*, 2005) can be regarded as involving both fundamental rights issues (non-discrimination on the grounds of sex and age) and issues relating to the effects of the rules of EC law.

The relatively high number of influential judgments of the ECJ that deal with or mention fundamental rights can easily be misunderstood. EC legal scholarship tends to consider as more significant and thus influential precisely those judgments that exhibit and refine some sort of doctrine of fundamental rights and principles. The frequency of influential judgments on fundamental rights issues should be regarded as much more revealing of the prevailing constitutionalist tendencies of EC legal

²¹⁸ Pescatore, *Vade-mecum*, cit., p. 28.

²¹⁹ Ibid.

²²⁰ M. Shapiro, “Toward a Theory of ‘Stare Decisis’”, *Journal of Legal Studies*, 1/1, 1972, pp. 125–134

²²¹ L. Azoulai, “The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization”, *Common Market Law Review*, 45, 2008, pp. 1335–1356, p. 1339.

scholarship then it is of the features of the legal reasoning usually adopted by the Court. In fact, from the 1960s onwards, there has been an increasing doctrinal and institutional pressure on the Court for it to embrace what might be called – no irony is meant – “constitutional rhetoric”: a narrative style of reasoning and argumentative form that resembles that of other constitutional courts and rights-based jurisdictions such as the US Supreme Court, the German Constitutional Court and the ECtHR.

The institutional pressure on the Court results from a series of initiatives that can be traced back to the “Declaration on the European Identity” of 1973, which created the notion of the “special rights” of European citizens, and which became increasingly important in the European constitutional debate following the Maastricht Treaty. The Maastricht Treaty and the subsequent amendments to the Treaties adopted at Nice, Amsterdam and Lisbon solemnly entrenched certain constitutional principles as founding principles of the EU, and eventually led to the adoption of the Charter of Fundamental Rights of the European Union. In the long run, the adoption of the Charter and of the language of rights is likely to have an increasing effect on the way in which the ECJ constructs the cases upon which it is called to decide²²².

The legal culture and the political environment surrounding the Court generally endorsed these tendencies by urging the Court to adopt a different and more principled style of legal argumentation. As the Community has evolved from a market organisation into a more comprehensive form of constitutional entity, so the reasoning goes, the ECJ should stop being the promoter of an integration process entirely based on market freedoms and start to “take (other) rights seriously”²²³.

The criticism of the rather uninspiring style of legal argumentation adopted by the ECJ is often based on the theory of deliberative democracy – democracy as form of government that allows for an open, public and principled argument leading to rational consensus – and/or on the adoption of an ideal of constitutional patriotism, according to which constitutional discourse can be crucial for forstering a sense of collective civic identity²²⁴. Those who require legal culture to contribute to the forging of the “We, the Europeans” expect the ECJ to expound and develop, if not the ethical foundations of the Union as the common constitutional “home” of the Europeans, at least the substantive reasons for its decisions. The adoption of the language of rights is seen as a necessary step towards the construction either of a feeling of shared identity or of a common “constitutional conversation” with the other courts of Europe²²⁵. It is uncertain whether the style of legal reasoning has any connection whatsoever with the content of the decision – a point against which legal realists would be willing to argue – but the promoters of the adoption of the language of fundamental rights and principles mainly recommended it for its alleged ability to

²²² This is the opinion of the majority of the AGs interviewed by S. Morano-Foadi, S. Andreadakis, “Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights”, *European Law Journal*, 17/5, 2011, pp. 595–610, p. 599: “the language of the common market is being more and more replaced by the new language of the human rights standards”.

²²³ See, e.g., M. Cartabia, “Europe and Rights: Taking Dialogue Seriously”, *European Constitutional Law Review*, 5, 2009, pp. 5–31, p.31: “the European Court, especially when acting as a constitutional court or a court of fundamental rights, should seriously consider moving away from the old-style telegraphic judgements”.

²²⁴ J. Habermas, *The Postnational Constellation: Political Essays*, Boston, MIT Press, 2001.

²²⁵ Weiler, “Epilogue: The Judicial Après Nice”, cit., pp. 219 and 225; recently D. Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review*, Princeton, PUP, 2010, p. 345.

foster the legitimacy of the legal system (and of the Court)²²⁶. The strong idea underlying these proposals is that the content of the ECJ's decisions may sometimes be less important than the communication that precede and follow those decisions: the legal reasoning and the public discourses that they foster.

Especially when litigation revolves around national measures impinging on the principles of free movement, the ECJ has generally resisted such tendencies. Although it is true that the ECJ has accepted that the protection of fundamental rights may occasionally take priority over the market freedoms²²⁷, its case law on human rights is at least cautious – according to the critics of the Court, it is symbolic, insufficient or merely instrumental²²⁸. In terms of number of cases decided by the ECJ, its role in the field of fundamental rights protection is by far more limited than that of a national constitutional court²²⁹. Generally speaking, the ECJ still strives to eschew constitutional rhetoric and resists the call to become another fully fledged human rights jurisdiction alongside the constitutional courts of the Member States and the ECtHR.

In this regard, it is worth noting that sometimes the Court reformulates claims that are based on the classical civil liberties in terms of claims that deserve to be fulfilled inasmuch as they are a precondition for the exercise of market freedoms. In so doing the Court achieves the intended substantive result – the protection of an individual right – at the price, however, of a characteristic distortion of its commonly accepted meaning and scope: the instrumentalisation and functionalisation of the right in question towards the pursuit of goals of the common market.

Two well known examples can be found in the judgments *Konstantinidis* (1993)²³⁰ and *Carpenter* (2002)²³¹. Among the judgments analysed in the Sample, the *Grogan* case (1991) provides a last example of the Court's tendency to eschew the language of fundamental rights and principles in order to maintain an approach based on market

²²⁶ E.g. S. Douglass-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*", *Common Market Law Review*, 43/3, 2006, p. 661: "The ECJ is therefore finding its feet as a human rights court ... its status as a Constitutional Court is being improved by its developing human rights jurisprudence".

²²⁷ E.g., Case C-112/00, *Schmidberger* [2003] ECR I-5659; Case C-36/02, *Omega* [2004] ECR I-9609.

²²⁸ See e.g. J. Coppel and A. O'Neill, "The European Court of Justice: Taking Rights Seriously?", *Common Market Law Review*, 29/4, 1992, pp. 669–692.

²²⁹ B. de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in P. Alston (ed), *The EU and Human Rights*, Oxford, OUP, 1999, pp. 859–897, p. 869. Rightly B.-O. Bryde, "The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism", in Maduro and Azoulai (eds.), *The Past and Future of EU Law*, cit., pp. 119–129, p. 125, notes that this depends upon the fact that the ECJ is not a specialised constitutional court, but a court of general jurisdiction in European law and that EU law remains limited to mainly socio-economic functions.

²³⁰ Case C-168/91, *Konstantinidis* [1993] ECR I-1191 (the right not to be obliged to use a transcription of one's own name that distorts its pronunciation was not based on human dignity and the right of personal identity; the Court had exclusive recourse to the alleged interference with the right of establishment due to the rather remote risk that the applicant's clients might confuse him with other people).

²³¹ Case C-60/00, *Carpenter* [2002] ECR I-6279 (the ability to provide services of Mr Carpenter would have been impaired if his Philippine wife was deported, due to the fact that she was responsible for the children when the husband was away on business; the Court highlighted "the importance of ensuring the protection of the family life of nationals of the Member States" on the basis of the assumption that such protection is necessary "in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty").

freedoms and concepts that are characteristic of EU law. Here the ECJ held that the Irish prohibition on the distribution of information relating to the clinics where abortion is carried out constituted a limitation to freedom of expression and not a restriction on the freedom to provide services: the decision to qualify the highly controversial substantive issue of the case as a “true” constitutional issue involving a limitation of fundamental civil rights (freedom of expression) was the means for avoiding to rule on the matter.

This modest and, so to say, “unconstitutional” approach or style of the ECJ might change, of course, and in many respects has already changed²³². The *Kadi* case (2008) provides a major example of the new tendency, and also *Les Verts* (1986) and the Opinion 1/91 can be mentioned as cases of sound constitutional language in the area of institutional organisation. The terse and laconic style of the first judgement of the ECJ has largely been abandoned and since the 1980s the judgments have become considerably longer. Today, nobody would argue that they stick strictly to the French model of administrative jurisdiction. The adoption of the Charter of Fundamental Rights and the move of the EU into policy areas like police and judicial co-operation in criminal matters are likely to strongly affect the legal reasoning of the ECJ. The Court will have to address fundamental rights issues more openly.

Until now, however, the Court has continued to avoid, as far as possible, the language of fundamental rights and constitutional principles: it speaks “strict legalese” and stays away from political rhetoric and vibrant moral calls. Its judgments seem to strive for “a simple and direct style”²³³, not for brightness and depth, and they run the risk of being dry and boring, not the risk of being emphatic and pompous.

Appendix: The Sample

1. Case C-26/62, Van Gend en Loos [1963] ECR 1
2. Case C-6/64, Costa v ENEL [1964] ECR 585
3. Case C-29/69, Stauder [1969] ECR 419
4. Case C-9/70, Franz Grad [1970] ECR-825
5. Case C-11/70, Internationale Handelsgesellschaft [1970] ECR 1125
6. Case C-22/70, Commission v. Council (ERTA) [1971] ECR 263
7. Case C-8/74, Dassonville [1974] ECR 837
8. Case C-41/74, Van Duyn [1974] ECR 1337
9. Case C-43/75, Defrenne II [1976] ECR 455
10. Case C-106/77, Simmenthal [1978] ECR 629
11. Case C-120/78, Rewe-Zentrale (Cassis de Dijon) [1979] ECR 649
12. Case C-148/78, Ratti [1979] ECR 1629
13. Case C-44/79, Hauer [1979] ECR 3727
14. Case C-104/79, Foglia v. Novello [1980] ECR 745
15. Case C-283/81, CILFIT [1982] ECR 3415

²³² See U. Haltern, *On Finality*, in Bogdandy, Bast (eds.), *Principles of European Constitutional Law*, cit., pp. 222 ff., analyses the case law on European citizenship in order to show how the Court entered “into what might be called ‘political rhetoric’”.

²³³ Pescatore, *Vade-mecum*, p. 24.

16. Case C-294/83, Les Verts [1986] ECR 1339
17. Case C-314/85, Foto-Frost [1987] ECR 4199
18. Case C-5/88, Wachauf [1989] ECR 2609
19. Case C-70/88, Parliament v Council [1990] ECR I-2041 (“Chernobyl”)
20. Case C-262/88, Barber [1990] ECR I-1889
21. Case-C-106/89, Marleasing [1990] ECR I-4135
22. Case C-213/89, Factortame [1990] ECR I-2433
23. Case C-260/89, Elliniki Radiophonia Tiléorassi AE (ERT) [1991] ECR I-2925
24. Case C-292/89, Antonissen [1991] ECR I-745
25. Joined Cases C-6/90 and 9/90, Francovich [1991] ECR I-05357
26. Case C-159/90, Grogan [1991] ECR I-4685
27. Opinion 1/91 [1991] ECR I-6079 (Incompatibility with EC law of the EEA)
28. Case C-91/92, Faccini Dori [1994] ECR I-3325
29. Case C-415/93, Bosman [1995] ECR I-4921
30. Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA and Factortame [1996] ECR I-1029
31. Case C-85/96, Martinez Sala [1998] ECR I-2691
32. Case C-60/00, Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-06279
33. Case C-224/01, Köbler [2003] ECR I-10239
34. Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-05659
35. Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-09609
36. Case C-105/03, Pupino [2005] ECR I-5285
37. Case C-144/04, Mangold [2005] ECR I-9981
38. Case C-303/05, Advocaten voor de Wereld [2007] ECR I-3633
39. Case C-438/05 Viking [2007] ECR I-10779
40. Joined Cases C-402/05 P and C-415/05 P, Kadi [2008] ECR I-6351