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How the ECJ Thinks: A Study on Judicial Legitimacy

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HOW THE ECJ THINKS: A STUDY ON JUDICIAL LEGITIMACY

*Koen Lenaerts**

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INTRODUCTION

Writing extrajudicially,¹ Sir Konrad Schiemann—former Lord Justice of Appeal and Judge at the European Court of Justice (the “ECJ”—highlighted the differences in the style of judgment between English courts and the ECJ. First, he noted that the ECJ operates at a level of abstraction which is strange for English courts. Unlike the latter, the ECJ interprets both primary and secondary EU law in a way which is not necessarily limited to the facts of the case at hand, but “can be used whenever and in whatever circumstances the relevant provision is part of the body of law relevant to that case.”² Second, unlike English judges (including Appeal Court judges who are entitled to deliver concurring and, as the case may be, dissenting opinions), the ECJ operates under a strict version of the principle of collegiality. This means that it only renders “committee judgments” where “[c]ompromise is the name of the game.”³ Third, regarding the use of precedence, he observed that, whilst both English courts and the ECJ have very often recourse to previous case-law with a view to reinforcing their determinations, only the latter relies on “the precise wording of a particular phrase in past judgments.”⁴ Finally, as to the way in which the oral hearings are held, Schiemann observed that they play a more important role in England than they do in Luxembourg, where parties focus on their written observations. In summary, he opined that both systems have

1. Sir Konrad Schiemann, *From Common Law Judge to European Judge*, 13 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 741 (2005) [hereinafter Schiemann, *Common Law Judge*].

2. *Id.* at 742.

3. Sir Konrad Schiemann, *Should We come Together?: Reflections on Different Styles of Judicial Reasoning*, 9 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 1, 7 (2006) [hereinafter Schiemann, *Reflections*].

4. Schiemann, *Common Law Judge*, *supra* note 1, at 745.

advantages and disadvantages. For example, the English system allows everyone to see how each of the judges sitting in the Appeal Court thinks. However, it is difficult to find “what the law is” where judges have agreed as to the outcome of the case but do not follow the same strand of reasoning. As to the ECJ, he criticized the fact that there is a time lapse, sometimes an important one, between the oral hearing and the date on which judicial deliberations are to take place. Such a time lapse is, however, unavoidable where the Advocate General is asked to deliver an Opinion. Overall, he enjoyed the English judicial process more because it allows a style of judgment which is more “flowery” and, as such, better tailored “to catch the attention of the casual reader and to reveal that [the judge has] had doubts as to the best solution and why [he or she has] eventually come down on one side of the fence.”⁵ However, as a concluding remark, he observed that “there is no denying that the style which the ECJ has evolved is a better one for the particular tasks which the ECJ has.”⁶ In this regard, he stated that, “I have the feeling that there is a genuine attempt to arrive at the best common solution that the brains of the [ECJ] can reach.”⁷

The purpose of my contribution is thus to honour Sir Konrad Schiemann, former colleague and friend, by demonstrating that his “feeling” regarding the way in which the ECJ thinks is well-founded. To this end, I attempt to explore the two dimensions of judicial legitimacy as applied to the ECJ. Stated differently, this contribution seeks to explore the external and internal legitimacy of the ECJ when the latter interacts with the EU legislature, the Member States, and national courts. Based on the study of recent case-law, this contribution supports the contention that, as a constitutional umpire, the ECJ takes its role seriously, i.e. it is constantly seeking to strike the balance imposed by the rule of law among the different interests at stake in a multilayered system of governance. This type of analysis does not aim to shield every ECJ judgment from criticism as to its outcome and/or reasoning but serves to highlight that the ECJ strives to achieve overall consistency in judicial decision-making as a basis of its legitimacy.

5. *Id.*, at 748.

6. *Id.*

7. *Id.*, at 747.

I. EXTERNAL AND INTERNAL JUDICIAL LEGITIMACY

Judicial legitimacy may be examined from two different, albeit complementary, perspectives. Externally, the legitimacy of the judiciary and its role in democratic societies are deeply intertwined, as it is only by defining what courts should do (and what they should refrain from doing) that one may determine whether they enjoy legitimacy. To that effect, one must first define “what the law is,” and only then appraise whether courts are limiting themselves to “interpreting and applying the law.” If courts go beyond their duty of saying “what the law is,” they lack legitimacy as they intrude into the political process. By drawing the borderline between law and politics, courts are in fact drawing the contours of their own legitimacy. The imperative need for courts to stand behind that line is, by no means, a novel question, but it has accompanied them ever since constitutionalism was born. As Chief Justice Marshall famously articulated more than two hundred years ago, in *Marbury v Madison*,⁸ whilst “[i]t is emphatically the province and duty of the judicial department to say what the law is,” acts of a political nature “can never be examinable by the courts.”⁹ Drawing the line between law and politics may be seen as a manifestation of the principle of separation of powers which seeks to prevent courts from undermining the prerogatives of the political branches of government and thus, to preserve the “check and balances” set out by the Founding Fathers.

Internally, legitimacy looks at the quality of the judicial process. In systems such as the EU where the judicial function is shared between the EU and the national judiciaries—i.e. where that function is vertically integrated—legitimacy requires judicial power to be allocated in accordance with the Treaties. This means that judicial legitimacy is conditioned upon those two types of courts acting with mutual respect and deference. An EU court will be deprived of its legitimacy, not only if it intrudes into the political sphere, at either EU or national level, but also if it encroaches upon the prerogatives of national courts. The same applies for the latter in relation to the prerogatives of EU

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

9. *Id.* at 166.

courts.¹⁰ In a broader sense, given that no legal order operates in isolation but interacts with other legal orders in a bilateral or multilateral context, courts may not impinge upon the competences that have been transferred to supranational or international tribunals. Hence, in multilayered systems of governance, the notion of “comity”¹¹—understood as a means of guaranteeing a constructive judicial dialogue among different courts—becomes of paramount importance to determine whether a given court enjoys legitimacy.¹²

In addition, internal legitimacy looks at courts as rational actors, by focusing on the soundness of their legal reasoning.¹³ The question whether courts enjoy legitimacy thus amounts to examining whether their rationale is sufficiently transparent and easy to understand or whether it is cryptic; whether the grounds of judgment are strong enough to be convincing and adequately meet the arguments put forward by the parties; whether the court’s rulings are coherent with the existing case-law and based on impartial criteria known in advance or whether they are simply unpredictable and arbitrary.

External and internal judicial legitimacy complement each other: the line between law and politics must be drawn in accordance with the institutional capacities of the judicial department, i.e. the lack of judicially manageable standards implies that some decisions are not fit for judicial deliberations but better left in the hands of the political process.

The ECJ strives to enjoy both external and internal legitimacy. As a result of the constitutionalization of the Treaties which transformed the European Union from an international organization into a composite legal order, the ECJ has continuously been called upon to uphold the rule of law as

10. See Opinion 1/09 [2011] E.C.R. I-1137, ¶ 85 (holding that “the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties”).

11. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 39 (5th ed. 2007) (defining “comity” as “the deference federal courts owe to state courts as those of another sovereign”).

12. See, e.g., Francis G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 *TEX. INT’L L.J.* 547 (2003).

13. See generally JOXERRAMON BENOETXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE* (1993).

provided for by Article 19 TEU. As I mentioned twenty years ago, one may distinguish three historical strands in the ECJ's jurisprudence.¹⁴

First, at the beginning of European integration, the ECJ was confronted with the following problem: although the original version of the EC Treaty commanded the ECJ to “ensure that in the interpretation and application of [the Treaties] the law is observed”, it did not provide a definition of “the law.”¹⁵ In order to honor that constitutional mandate in a self-referential and, in that sense, autonomous legal order, the ECJ could not limit itself to a formalistic understanding of the rule of law. Accordingly, it had no choice but to complete the constitutional lacunae left by the authors of the Treaties. In so doing, the ECJ was well aware of the fact that in order not to put at risk the legitimacy of an incipient Union, EU law could not break away from the constitutional traditions of the Member States. Thus, it took a leading role in setting the founding principles of the EU legal order by having recourse to the general principles of law which provide a material constitutional content to the “law” of the EU.¹⁶ The paradigmatic example of the gap-filling function of the ECJ is the incorporation of fundamental rights into the EU legal order as general principles of EU law. Furthermore, by virtue of the principles of primacy and direct effect, individuals are entitled to have the rights which EU law bestows upon them enforced by national courts and, where appropriate, have conflicting provisions of national law set aside by them. For those rights to become more than empty promises, their enforcement had to become a reality. To that end, the ECJ first developed the principles of equivalence and effectiveness which require national law on remedies not to discriminate against the enforcement of EU rights and not to make the exercise of those rights virtually impossible or excessively difficult.¹⁷ However,

14. Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, U. CHI. LEGAL F. 93 (1992).

15. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 164, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

16. Koen Lenaerts & José A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 COMMON MKT. L. REV. 1629, 1632 (2010).

17. *See* Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, Case 33/76, [1976] E.C.R. 1989, ¶¶ 5–6; Comet BV v. Produktschap voor Siergewassen, Case 45/76, [1976] E.C.R. 2043, ¶ 13; *see also* Koen Lenaerts,

these two principles only seek to neutralize the effect of national rules of procedure which hamper the proper enforcement of EU law, but they are incapable of guaranteeing an effective protection of EU rights where national law does not provide sufficient injunctive or monetary relief. Hence, in a further development of its case-law, the ECJ decided to enhance the effective protection of EU rights by creating new remedies, this time grounded in EU law itself.¹⁸

Second, the ECJ aimed to safeguard the core of European integration set out in the Treaty by providing solutions to problems that were expected to be tackled by the EU political institutions but were not in practice as the latter could not reach the then necessary consensus. It thus allowed interest-driven litigation to overcome the political deadlock that prevented the completion of the internal market, as free movers sought to tear down barriers to trade that could have been eliminated by EU harmonization. The principle of mutual recognition defined in *Cassis de Dijon* best encapsulates this line of jurisprudence.¹⁹ It set in turn the stage for the Commission's action plan adopting a "new approach" to remove obstacles to interstate trade,²⁰ which, with the adoption of the Single European Act (the "SEA"), was no longer governed by intergovernmental dynamics given that Member States gave up their right to veto.²¹ Member States thus accepted that EU internal market legislation could be passed against their will and yet be binding upon them. As a consequence, the establishment and functioning of the internal market became an objective to be attained by both positive and negative integration techniques, i.e. on the one hand, legislative measures adopted by the Union political process and on the

National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness, 46 *IR. JURIST* 13 (2011).

18. In relation to interim relief, see *The Queen v. Sec'y of State for Transport, ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. I-2433. In relation to state liability in damages, see *Francovich v. Italy*, Joined Cases C-6/90 & C-9/90, [1991] E.C.R. I-5357; *Brasserie du Pêcheur SA v. Germany*, Joined Cases C-46/93 & C-48/93, [1996] E.C.R. I-1029.

19. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case 120/78, [1979] E.C.R. 649.

20. See Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (85) 310 Final, ¶¶ 67–73 (June 1985).

21. See EEC art.100a (now TFEU art. 114), *supra* note 15.

other hand, enforcement by the ECJ of the prohibitions laid down in the Treaties themselves to erect barriers to interstate trade. The EU legislator and the ECJ are not in a competing relationship when pursuing that objective. They are rather to be seen as joining efforts.

Last, but not least, once the constitutional foundations of the EU legal order were put in place and the establishment and functioning of the internal market secured, the ECJ moved onto a new paradigm. As the constitutional court of a more mature legal order, it now tends to be less assertive as to the substantive development of EU law. It sees its role primarily as one of upholding the “check and balances” built into the EU constitutional legal order of States and peoples, including the protection of fundamental rights.²² This does not, however, prevent the ECJ from taking a more proactive stand in some areas of EU law, yet overall it displays greater deference to the preferences of the EU legislator or, as the case may be, to those of the Member States.²³ The ECJ thus favors both continuity of its role as a constitutional umpire and change in the substantive EU law achieved by the traditional interaction between the political and judicial processes.

One could look at those three strands through the prism of the “activism v self-restraint” divide.²⁴ A quick glance at them might suggest that the first two are characterized by an activist ECJ, whereas the third reveals an ECJ more committed to judicial self-restraint. However, a critical observer may also argue that in none of those three strands did the ECJ really engage in

22. See Lenaerts, *supra* note 14, at 95.

23. In the context of the law on remedies, Takis Tridimas refers to that approach as “selective deference.” See TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 418–22 (2d ed. 2006).

24. See, e.g., Patrick Neill, *The European Court of Justice: A Case Study in Judicial Activism*, evidence submitted to the House of Lords Select Committee on the European Communities, Subcommittee on the 1996 Inter-Governmental Conference, Minutes of Evidence, House of Lords, 18th Report, 218 et seq., (Session 1994–95) and the reply given by David Edward, *Judicial Activism—Myth or Reality?*, in *LEGAL REASONING AND JUDICIAL INTERPRETATION OF EUROPEAN LAW: ESSAYS IN HONOUR OF LORD MACKENZIE-STUART* 29–67 (Campbell et al. eds., 1996); see also Trevor C. Hartley, *The European Court, Judicial Objectivity and the Constitution of the European Union*, 112 L.Q. REV. 95 (1996) and the reply given by Anthony Arnall, *The European Court and Judicial Objectivity: A Reply to Professor Hartley*, 112 L.Q. REV. 411 (1996). More recently, see generally John Temple Lang, *Has the European Court of Justice been involved in “Judicial Legislation”?* 96 SVENSK JURISTTIDNING 299 (2011).

judicial activism as it limited itself to doing what the Treaties required it to do, i.e. to uphold the rule of law.²⁵ In my view, this shows that the “activism v self-restraint” discourse is misconceived and does not lead to a productive discussion, unless one first solves the following question: what should the role of the ECJ be? In other words, how can the ECJ enjoy external and internal legitimacy? It is to providing an answer to those two questions that I now turn.

II. *EXTERNAL LEGITIMACY*

Part II of this contribution is devoted to examining how the ECJ draws the line that divides the judicial process from the realm of politics. Whilst Section A looks at the interactions between the ECJ and the EU legislator, Section B explores how the ECJ strives to accommodate, as far as possible, national interests. That is so not only in the absence of EU harmonization, but also where the EU legislator has adopted secondary EU legislation.

A. *The ECJ and the EU legislator*

When the ECJ interprets EU legislation, it must ensure that the latter complies with primary EU law. However, in so doing, it may not replace the choices made by the legislature by its own. The ECJ is called upon to uphold simultaneously the principles of hierarchy of norms and of separation of powers. If it is not possible to interpret an act of secondary EU law in a way that accommodates those two principles, then the ECJ will have no choice but to annul that act or declare it invalid.

1. Reconciliatory Interpretation: An Example

If an act adopted by the EU legislator conflicts with the Treaties, the ECJ will have no choice but to annul that act or declare it invalid. However, in order to safeguard the legitimate objectives pursued by the EU legislator, the ECJ will first do everything within its jurisdiction to interpret secondary EU law

25. See, e.g., Christiaan Timmermans, *Judicial Activism and Judicial Restraint*, in *THE ROLE OF INTERNATIONAL COURTS* 245 (Carl Baudenbacher et al. eds., 2008).

in accordance with primary EU law.²⁶ It follows that, in so far as the ECJ does not interpret secondary EU law in a *contra legem* fashion,²⁷ the annulment or declaration of invalidity of an act adopted by the EU legislator operates as the *ultima ratio* in order to uphold the rule of law. The judgment of the ECJ in *Vatsouras* illustrates this point.²⁸

Originally, the ECJ ruled in *Lebon*²⁹—decided in 1987—that job-seekers’ allowances did not fall within the scope of (then) Community law. However, in *Collins*—decided seventeen years later—the ECJ reconsidered its approach. By relying on the Treaty provisions on EU citizenship, it ruled that the principle of non-discrimination on grounds of nationality applies to such allowances.³⁰ However, access to such allowances is not unconditional, as it is legitimate for the host Member State to subject the grant of job-seekers’ allowances to job-seekers having established a “real link” with the labor market of that State.³¹ The ECJ acknowledged that a residence requirement is, in principle, appropriate for the purposes of ensuring a “real link.” Nevertheless, such a requirement must comply with the principle of proportionality, i.e. it must not go beyond what is necessary to establish a “real link”: the period of residence must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State; it must also be based on clear criteria

26. Karsten Engsig Sorensen, *Reconciling Secondary Legislation and the Treaty Rights of Free Movement*, 36 EUR. L. REV. 339, 345 (2011) (who considers that reconciliatory interpretation is “less likely to lead to an inter-institutional conflict and more elegant in resolving the issues without making it necessary to adopt new legislation”).

27. *Cf.*, *Adencler & Others v. Ellinikos Organismos Galaktos* [ELOG], Case C-212/04, [2006] E.C.R. I-6057, ¶¶ 110–11.

28. *See Vatsouras & Koupatantze v. Arbeitsgemeinschaft (ARGE)*, Joined Cases C-22-2308, [2009] E.C.R. I-4585.

29. *Centre Public de l’Aide Sociale, Courcelles v. Lebon*, Case 316/85, [1987] E.C.R. I-2811, ¶ 26. *See Commission v. Belgium*, Case C-278/94, [1996] E.C.R. I-4307, ¶¶ 39–40.

30. *Collins v. Sec’y of State for Work & Pensions*, Case C-138/02, [2004] E.C.R. I-2703, ¶ 63; *Office Nat’l de l’Emploi ’v. Ioannidis*, Case C-258/04, [2005] E.C.R. I-827, ¶ 22.

31. *D’Hoop v. Office Nat’l de l’Emploi’*, Case C-224/98’ [2002] E.C.R. I-6191, ¶ 38; *Collins*, [2004] E.C.R. I-2703, ¶ 69; *Ioannidis*, [2005] E.C.R. I-827, ¶ 30.

known in advance; and provision must be made for access to a means of redress of a judicial nature.³²

On April 29, 2004, the EU legislator adopted the Citizen's Rights Directive (the "CRD"),³³ whose Article 24(2) reads as follows: "[b]y way of derogation from [the principle of equal treatment], the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4) (b)."³⁴ Arguably, an interpretation of this provision based solely on its wording could suggest that the concept of "social assistance" laid down therein includes "benefit[s] of a financial nature intended to facilitate access to employment in the labour market of [the host] Member State."³⁵ Such a reading would, however, imply—contrary to *Collins*—that, regardless of the existence of a "real link" between job-seekers and the labor market of the host Member State, the former would not be entitled to job-seekers' allowances in spite of the fact that they "can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged" but have not become permanent residents. Bearing in mind that the findings of the ECJ in *Collins* are grounded in primary EU law, such a reading of Article 24(2) of the CRD would be incompatible with that law. That is why in *Vatsouras*,³⁶ the referring court called into question the compatibility of Article 24(2) of the CRD with Article 18 TFEU, read in conjunction with Article 45 TFEU, asking whether it was possible to reconcile the "real link" approach put forward in *Collins* with Article 24(2) of the CRD. The ECJ replied in the affirmative. At the outset, it confirmed its previous findings in *Collins*, according to which "nationals of the Member States

32. *Collins*, [2004] E.C.R. I-2703, ¶ 72.

33. Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. L 158/77 [hereinafter Parliament and Council Directive on Citizens' Free Movement and Residence Rights].

34. See Parliament and Council Directive on Citizens' Free Movement and Residence Rights, *supra* note 33, art.14(4)(b), at 104, (referring to the period during which "the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged").

35. *Collins*, [2004] E.C.R. I-2703, ¶ 63.

36. *Vatsouras & Koupatantze*, [2009] E.C.R. I-4585.

seeking employment in another Member State who have established real links with the labour market of that State can rely on Article [45(2) TFEU] in order to receive a benefit of a financial nature intended to facilitate access to the labour market.”³⁷ The ECJ then proceeded to interpret Article 24(2) of the CRD in light of Article 45(2) TFEU, since it considered that a literal interpretation of Article 24(2) of the CRD was overinclusive and consequently, the concept of “social assistance,” understood in its natural and ordinary meaning, needed to be narrowed down. Hence, benefits of a financial nature intended to facilitate access to employment in the labor market of the host Member State fall outside the scope of that provision.³⁸ This includes not only job-seekers’ allowances, but also any financial benefit whose purpose is “to promote integration into the labour market.”³⁹ Thus, in relation to job-seekers’ allowances, Article 24(2) of the CRD does not apply. It is for the national court to determine, in light of *Collins*, whether a job-seeker has established sufficient connections with the society of the host Member State.

2. Primary EU Law and the Objectives Pursued by the EU Legislator

Moreover, the ECJ strives to provide a solution which accommodates both the objectives pursued by the EU legislator and primary EU law. For example, if the challenged provision of secondary EU law not only conflicts with primary EU law but is also inconsistent with the objectives pursued by the EU legislator, then the ECJ will have fewer difficulties in annulling or invalidating such provision. On the contrary, if by interpreting secondary EU law in light of primary EU law, the ECJ manages to enhance the objectives pursued by the EU legislator, then it will tend to follow such reconciliatory interpretation rather than to annul or invalidate the challenged act of secondary EU law. These two different outcomes are

37. *Id.* ¶ 40.

38. *Id.* ¶ 45.

39. See Opinion of Advocate General Ruiz-Jarabo Colomer, *Vatsouras*, [2009] E.C.R. I-4585, ¶ 57.

highlighted by comparing the ruling of the ECJ in *Test-Achats*⁴⁰ with that in *Sturgeon & Others*.⁴¹

In *Test-Achats*, the referring court asked the ECJ whether Article 5(2) of Directive 2004/113⁴² was valid in light of the principle of equal treatment between men and women.⁴³ Article 5(1) of Directive 2004/113 implements that principle in relation to actuarial factors. It provides that the differences in premiums and benefits arising from the use of sex as a factor in the calculation thereof must be abolished by December 21, 2007 at the latest.⁴⁴ By way of derogation, the second paragraph of Article 5 of Directive 2004/113 stated that it was permitted for Member States to introduce proportionate differences in individuals' premiums and benefits where the use of sex was a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.⁴⁵ If a Member State made use of that option before December 21, 2007, its decision had to be reviewed five years after that date, account being taken of a Commission report.

At the outset, the ECJ stressed that Directive 2004/113 expressly refers to Articles 21 and 23 of the Charter. Accordingly, the validity of Article 5(2) of Directive 2004/113 had to be determined in light of those two provisions. Next, the ECJ looked at the Treaty provisions which define the principle of equal treatment between men and women as a social objective to be attained by the European Union, namely the second subparagraph of Article 3(3) TEU and Articles 8, 19(1) and 157(1) TFEU. In this regard, it pointed out that “[i]n the progressive achievement of that equality, it is the EU legislature

40. *Assoc. Belge des Consommateurs Test-Achats ASBL & Others v. Conseil des Ministres*, Case C-236/09, [2011] E.C.R. I-773.

41. *Sturgeon & Others v. Air France SA*, Joined Cases C-402/07 & 432/07, [2009] E.C.R. I-10, 923.

42. Council Directive 2004/113/EC Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, 2004 O.J. L 373/37 [hereinafter *Access to Goods and Services Directive*].

43. *Assoc. Belge des Consommateurs Test-Achats ASBL & Others*, [2011] E.C.R. I-773, ¶ 14.

44. See *Access to Goods and Services Directive*, *supra* note 42, art. 5, at 41.

45. *Id.* art. 5, at 41. This meant, for example, that national law could allow car insurance companies to impose higher premiums on men than on women given that, in accordance with statistical data, men have a higher risk of causing a car accident than women.

which [. . .] determines when it will take action, having regard to the development of economic and social conditions within the European Union.”⁴⁶ This meant, for example, that, since the use of actuarial factors related to sex was a widespread practice in the Member States, it was permissible for the EU legislator to provide for the appropriate transitional period. This was actually the rationale underpinning Article 5(1) of Directive 2004/113 which sets 21 December 2007 as the deadline for the implementation of the principle of equal treatment between men and women in relation to actuarial factors. By contrast, Article 5(2) contained a derogation from that principle which was subject to no temporal limitation. “[G]iven that Directive 2004/113 is silent as to the length of time during which those differences may continue to be applied”, the ECJ observed, “Member States which have made use of the option are permitted to allow insurers to apply the unequal treatment without any temporal limitation.”⁴⁷

The Council supported the validity of Article 5(2) of Directive 2004/113, arguing that, in the context of certain branches of private insurance, the respective situations of male and female policyholders may not be regarded as comparable, given that, in light of statistical data, the levels of insured risk may be different for men and for women. However, the ECJ took a different view. According to Recitals 18 and 19 of Directive 2004/113, the latter favored the application of rules of unisex premiums and benefits. Accordingly, “Directive 2004/113 is based on the premise that [...] the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.”⁴⁸

For the ECJ, Article 5(2) of Directive 2004/113:

which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the

46. *Assoc. Belge des Consommateurs Test-Achats ASBL & Others*, [2011] E.C.R. I-773, ¶ 20.

47. *Id.* ¶ 26.

48. *Id.* ¶ 30. Of course, one could call into question whether that premise was well founded. See Philippa Watson, *Equality, Fundamental Rights and the Limits of Legislative Discretion: Comment on Test-Achats*, 36 EUR. L. REV. 896 (2011). Be that as it may, this was not the question that the ECJ was asked to examine in *Test-Achats and Others*.

achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.⁴⁹

Consequently, that provision was held to be invalid upon the expiry of an appropriate transitional period, i.e. December 21, 2012.⁵⁰

In *Sturgeon & Others*, the ECJ was asked whether Regulation No. 261/2004⁵¹ confers a right to compensation upon airline passengers in the event of delay.⁵² The wording of Regulation No. 261/2004 does not expressly create a right to compensation for those passengers whose flight is delayed, as opposed to passengers whose flight is cancelled, on whom such a right is explicitly conferred.⁵³ Can this legislative silence be read as denying compensation to this category of passengers? The ECJ replied in the negative. It began by observing that, in the light of its objectives, Regulation No. 261/2004 does not exclude awarding compensation to passengers whose flight is merely delayed. Nor does Regulation No. 261/2004 rule out the possibility that, for the purposes of recognition of the right to compensation, both categories of passengers can be treated alike.⁵⁴ Next, the ECJ noted that, in accordance with a general principle of interpretation, “a [Union] act must be interpreted in such a way as not to affect its validity.”⁵⁵ This means that a Union act must be interpreted in compliance with superior rules

49. *Assoc. Belge des Consommateurs Test-Achats ASBL & Others*, [2011] E.C.R. I-773, ¶ 32. See C. Tobler, Case Note on Case C-236/09, *Association belge des Consommateurs Test-Achats and Others*, 48 *COMMON MKT. L. REV.* 2041, 2060 (2011) (observing that “[t]he [ECJ]’s finding in *Test-Achats* in essence implies a criticism of the legislative decisions made by the Council in adopting Directive 2004/113”).

50. See *Access to Goods and Services Directive*, *supra* note 42, ¶ 19, at 39. 21 December 2012 is the date on which the decision to derogate from the principle of equal treatment between men and women laid down in Article 5(2) of Directive 2004/113 was to be reviewed by the Member State concerned.

51. Council Regulation No. 261/2004 of the European Parliament and of the Council Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No 295/91, 2004 O.J. L 46/1 [hereinafter Regulation No. 261/2004].

52. *Sturgeon & Others*, [2009] E.C.R. I-10923, ¶ 25.

53. See Regulation No. 261/2004, art. 5 (1)(c), at 4.

54. *Sturgeon & Others*, [2009] E.C.R. I-10923, ¶ 46.

55. *Id.* ¶ 47.

of EU law, including the principle of equal treatment. Hence, where passengers whose flight is cancelled and passengers whose flight is delayed are in a comparable situation, Regulation No. 261/2004 must be interpreted in such a way as to treat both categories of passengers equally. To this effect, the ECJ noted that both categories of passengers suffer similar damage, consisting in a loss of time. In particular, the situation of passengers whose flight is delayed is comparable to that of passengers who are informed upon arrival at the airport that their flight is cancelled and subsequently re-routed in accordance with Article 5 of Regulation No. 261/2004. Since Article 5 (1) (c) (iii) of Regulation No. 261/2004 only provides for a right to compensation where the cancellation of a flight and its subsequent re-routing entail a loss of time equal to or in excess of three hours, the same should apply in the event of delay.⁵⁶ Therefore, the ECJ ruled that in order for Regulation No. 261/2004 to comply with the principle of equal treatment, it had to be interpreted so as to grant a right to compensation to passengers whose flight is delayed and who reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Finally, the ECJ recalled that air carriers are not obliged to pay compensation where they manage to prove that cancellations and delays are caused by extraordinary circumstances.⁵⁷

The approach followed by AG Sharpston was somewhat different. She concurred with the ECJ in acknowledging that if compensation to passengers whose flight is delayed were excluded, then it would be impossible to reconcile Regulation No. 261/2004 with the principle of equal treatment. Yet, in contrast to the ECJ, the Advocate General did not provide a particular time-limit after which passengers whose flight is delayed enjoy a right to compensation. In her view, “the actual selection of a magic figure is a legislative prerogative.”⁵⁸ However, the ECJ deployed another argument in order to counter this separation-of-powers objection. It invoked Recital

56. *Id.* ¶ 57.

57. *Id.* ¶ 67 (noting that extraordinary circumstances are defined as those which “are beyond the air carrier’s actual control”).

58. See Opinion of Advocate General Sharpston, *Sturgeon & Others v. Air France SA*, Joined Cases C-402/07 & 432/07, [2009] E.C.R. I-10923, ¶¶ 93–94.

15 in the preamble of Regulation No. 261/2004, whereby “the legislature [. . .] linked the notion of ‘long delay’ to the right to compensation.” Thus, the ECJ did not encroach upon the prerogatives of the EU legislator but simply limited itself to clarifying a legislative choice already contained in Regulation No. 261/2004, namely the distinction between “delay” (inferior to three hours) and “long delay” (equal to or in excess of three hours). Whilst the latter gives rise to compensation, the former does not.⁵⁹

More recently, in *Nelson & Others*, several airlines, the International Air Transport Association (“IATA”) and the UK called into question the validity of Articles 5 and 7 of Regulation No. 261/2004, as interpreted by the ECJ in *Sturgeon & Others*, on the ground that that judgment was at odds with the principles of legal certainty and proportionality.⁶⁰ They urged the ECJ (Grand Chamber) to depart from its findings in *Sturgeon & Others* (a ruling given by a Chamber of five judges).⁶¹

As to the principle of legal certainty, they posited that the method of interpretation followed by the ECJ in *Sturgeon & Others* was incompatible with paragraph 76 of the *IATA and ELFAA* judgment. In the latter case, the ECJ conceded that Recitals 14 and 15 of the Preamble of Regulation No. 261/2004 gave “the impression that, generally, operating air carriers should be released from all their obligations in the event of extraordinary circumstances, and it accordingly gives rise to a certain ambiguity between the intention thus expressed by the [EU] legislature and the actual content of Articles 5 and 6 of Regulation No. 261/2004 which do not make this defence to liability so general in character.” “However”, the ECJ added, “such an ambiguity does not extend so far as to render incoherent the system set up by those two articles, which are themselves entirely unambiguous.”⁶² For the applicants, this meant that, in *Sturgeon & Others*, the ECJ should not have relied upon Recital 15 of Regulation No. 261/2004 with a view to

59. See *Sturgeon & Others*, [2009] E.C.R. I-10923, ¶ 62.

60. See *Nelson & Others*, Joined Cases C-581/10 & 629/10, [2012] E.C.R. I____ (delivered Oct. 23, 2012) (not yet reported).

61. *Id.* ¶¶ 62, 73.

62. See *Int'l Air Transp. Assoc. & European Low Fares Airlines Assoc. v. Dep't of Transp.*, Case C-344/04, [2006] E.C.R. I-403, ¶ 76.

modifying the meaning of the relevant provisions of that Regulation. The ECJ took, nonetheless, a different view: “as regards [...] the relationship between the judgments in *IATA and ELFAA* and *Sturgeon & Others*, it is apparent [...] that there is no tension between those two judgments, the second judgment applying the principles laid down by the first.”⁶³ As explained by AG Bot, a distinction should be drawn between the question of interpretation raised in *IATA and ELFAA* and that raised in *Sturgeon & Others*. In the former case, the ECJ explained that the ambiguity which may arise on reading Recitals 14 and 15 of the Preamble of Regulation No. 261/2004 could not call into question the fact that the body of that Regulation made clear that the defence of extraordinary circumstances is not a general rule but applies only to the obligation to pay compensation. Conversely, in *Sturgeon & Others*, the question whether long delays may give rise to compensation could not be answered by looking at the relevant provisions of Regulation No. 261/2004. Thus, the ECJ was right to examine Recital 15 of the Preamble thereof.

In relation to the principle of proportionality, the applicants argued that, as interpreted by the ECJ in *Sturgeon & Others*, Regulation No. 261/2004 would impose an excessive

63. *Nelson & Others*, [2012] E.C.R. I____ (delivered Oct. 23, 2012). In paragraph 45 of *IATA and ELFAA*, the ECJ found that the authors of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC, 2001 O.J. L 194/38, [hereinafter Montreal Convention] did not intend “to shield those [air] carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts.” See also *Nelson & Others*, [2012] E.C.R. I____ (delivered Oct. 23, 2012). Stated differently, the Montreal Convention does not prevent public authorities from redressing, in a standardized and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes. In *IATA and ELFAA*, the ECJ ruled that “the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such standardized and immediate compensatory measures.” See *IATA and ELFAA*, [2006] E.C.R. I-403, ¶ 46. In the same way, in *Sturgeon*, the compensation envisaged by Article 7 of Regulation No. 261/2004 in the event of a long delay to a flight also constitutes such a standardised and immediate compensatory measure, which the Montreal Convention does not oppose. See *Nelson & Others*, [2012] E.C.R. I____ (delivered Oct. 23, 2012).

burden on air carriers as they would have to provide compensation to passengers suffering a loss of time equal to or in excess of three hours. They also pointed out that the financial cost brought about by that compensation would be passed on to passengers by means of an increase in fares or a reduction in the number of flights from local airports and services to outlying destinations.⁶⁴ Whilst acknowledging that that compensation may entail certain financial consequences to air carriers, the ECJ found that “those consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for air passengers.”⁶⁵ First, not all delays may give rise to compensation, but only long delays.⁶⁶ Second, provided that the conditions laid down in Article 7(2)(c) of Regulation No. 261/2004 are met, the amount of compensation may be reduced by fifty percent.⁶⁷ Third, compensation is excluded where the delay in question is caused by “extraordinary circumstances” as defined by the case-law of the ECJ.⁶⁸ Fourth, air carriers having paid compensation to passengers suffering long delays may seek to recover that amount from any person who caused the delay.⁶⁹ Fifth, statistics show that “the proportion of flights for which delay confers entitlement to the compensation provided for under Regulation No 261/2004 is less than 0.15%.”⁷⁰ Sixth, applicants failed to provide evidence showing that “the payment of compensation in the event of long delays to flights would give rise to an increase in fares or a reduction in the number of flights from local airports and services to outlying destinations.”⁷¹ Most importantly, recalling its previous ruling in *Vodafone & Others*,⁷² the ECJ held that “the importance of the objective of consumer protection, which includes the protection

64. *Nelson & Others*, [2012] E.C.R. I____ (delivered Oct. 23, 2012).

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* Sturgeon & Others, Joined Cases C-402/07 and C-432/07, [2009] E.C.R. I-10923 ¶ 67; *see also* McDonagh, Case C-12/11, [2013] E.C.R. I____ (delivered January, 31 2013) (not yet reported).

69. *Nelson & Others*, [2012] E.C.R. I____ (delivered 23 October 2012).

70. *Id.*

71. *Id.*

72. *Vodafone and Others*, Case C-58/08, [2010] E.C.R. I-4999, ¶¶ 53, 69.

of air passengers, may justify even substantial negative economic consequences for certain economic operators.”⁷³

As a result, the ECJ held that “ consideration [of the questions referred for a preliminary ruling] has disclosed no factor of such a kind as to affect the validity of Articles 5 to 7 of Regulation No 261/2004.”⁷⁴

The problems with which the ECJ was confronted in *Test-Achats* and *Sturgeon & Others* are, to some extent, similar. First, in both cases, the ECJ had to review the compatibility of an act of secondary EU law with the principle of equal treatment. Second, in both cases, the alleged incompatibility of the challenged EU act resulted from a lacuna contained therein. In *Test-Achats*, Directive 2004/113 was silent as to whether the derogation laid down in Article 5(2) was subject to a temporal limitation. In the same way, in *Sturgeon*, the wording of Regulation No. 261/2004 does not expressly create a right to compensation for those passengers whose flight is delayed. However, in *Test-Achats* the ECJ declared Article 5(2) of the Directive 2004/113 invalid, whereas in *Sturgeon* it decided to construe Regulation No. 261/2004 so as to award a right to compensation to passengers whose flight is delayed for more than three hours. How can these two different outcomes be explained? Did the ECJ engage in judicial activism in these cases?⁷⁵ In my view, the approach followed by the ECJ in both

73. *Nelson & Others*, [2012] E.C.R. I____ (delivered 23 October 2012).

74. *Id.*

75. See, e.g., John Balfour, *Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004*, 35 AIR & SPACE LAW 71, at 75 (2010) (arguing that “[t]he disregard of clear provisions of EU regulations and rewriting of them by the [ECJ] raises serious concerns about the rule of law in the EU that [go] far beyond the interests of just airlines and passengers. It would be regrettable if this deeply unsatisfactory judgment was allowed to stand unchallenged”). But see Temple Lang, *supra* note 24, at 309 (positing that “[i]t is understandable that neither the [ECJ] nor the Advocate General wished to declare the Regulation invalid because it was discriminatory, because that would have deprived many airline passengers of a right to compensation”); Cees van Dam, *Air Passenger Rights After Sturgeon*, 36 AIR & SPACE LAW 260, 265 (2011) (positing that “[t]he airlines may be right to point out that, also in *Sturgeon*, the principle of legal certainty was at stake. However, even though the [ECJ] did not explicitly refer to this principle, it will probably have concluded that, in the context of the questions referred by the national courts, it had to give way to the principle of equal treatment. Legal principles do not have an absolute value and often conflict with each other. It is one of the [ECJ]’s tasks to reconcile them or to give way to one to the detriment of the other”); Sacha Garben, *Sky-high Controversy and High-*

Sturgeon and *Test-Achats* is not only consistent, but more importantly, it is deferential to the policy choices of the EU legislator. Indeed, a close reading of *Sturgeon* and *Test-Achats* reveals that the ECJ limited itself to applying the principle of equal treatment so as to enhance the objectives pursued by the EU legislator.

It is worth noting that, in *Sturgeon & Others*, Regulation No. 261/2004 seeks primarily to ensure a high level of protection for all passengers who suffer from similar serious trouble and inconvenience connected with air transport.⁷⁶ As an act of judicial deference to the EU legislator, the ECJ sought not to call into question that level of protection, whilst at the same time ensuring compliance with the principle of equal treatment. This meant, in essence, that Regulation No. 261/2004 had to be construed so as to expand the categories of passengers benefiting from those rights, rather than inviting the EU legislator to revisit the entire scheme set out in this Regulation. A joint reading of the principle of equal treatment and the objectives pursued by Regulation No. 261/2004 favored pushing the bounds of interpretation to the utmost (though not beyond the limits of *contra legem*) in order not to adversely affect the high level of protection already put in place by the EU legislator. By contrast, in *Test-Achats*, the challenged provision of Directive 2004/113 was a derogation from the objectives pursued by that Directive, namely the application of rules of unisex premiums and benefits. Article 5(2) was thus inconsistent with the objectives pursued by Directive 2004/113. Just as it does in

Flying Claims? The Sturgeon Case Law in Light of Judicial Activism, Euro-scepticism and Eurolegalism, 50 *COMMON MKT. L. REV.* 15, 45 (2013) (arguing that “[w]e have seen that although there are good reasons to be critical of the ruling, especially with regard to the poor quality of legal reasoning, the outcome of the case can be defended. The [ECJ] has rightly taken a forceful approach in the protection of European consumers, providing a necessary counterbalance to the EU-induced privatization of the air travel sector”).

76. See, e.g., *Sturgeon & Others*, Joined Cases C-402/07 and C-432/07, [2009] E.C.R. I-10923, ¶¶ 44–45 (holding that “it is apparent from Recitals 1 to 4 in the preamble, in particular from Recital 2, that the regulation seeks to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport”). Hence, the ECJ ruled that “the provisions conferring rights on air passengers, including those conferring a right to compensation, must be interpreted broadly”).

testing the compatibility of national measures with EU law,⁷⁷ the ECJ required in *Test-Achats* that there should be no internal inconsistencies in secondary EU law, when it verifies the validity of that law in light of primary EU law.

3. Judicial Deference to Legislative Choices

When the ECJ is called upon to interpret secondary EU law, it must respect the framework laid down by the EU legislator. Hence, contrary to primary EU law, which must be interpreted as a “living constitution” capable of coping with societal changes, the ECJ must refrain from rewriting secondary EU law, even if the latter is outdated or no longer fulfills the objectives it pursues. The role of the ECJ is indeed neither to anticipate nor to pre-empt policy choices that fall within the purview of the EU legislator. The ruling of the ECJ in *Commission v. Spain* illustrates this point.⁷⁸

One should briefly recall that an EU citizen has the right to receive cross-border healthcare services under two co-existing regimes. On the one hand, there is Regulation No. 883/2004⁷⁹ which entered into force on 1 May 2010, replacing Regulation No. 1408/71.⁸⁰ Regulation No. 883/2004 lays down a system of prior authorization. On the other hand, there are the Treaty provisions on the freedom to provide (or receive) services as interpreted by the ECJ. It is worth noting that the case-law of the ECJ under these Treaty provisions has been largely codified by the recently adopted Directive 24/2011 (the Patient’s Rights Directive, the “PRD”).⁸¹ In relation to cases of “scheduled treatment”, it may happen that the coverage of a treatment is lower in the Member State of stay than in the Member State of affiliation. For such a situation, the ECJ held in *Vanbraekel* that “Article [56 TFEU] is to be interpreted as meaning that, if the

77. For further discussion, see *infra* Part II, Section B.I.ii.

78. *Commission v. Spain*, Case C-211/08, [2010] E.C.R. I-5267.

79. Regulation of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, No. 883/2004, 2004 O.J. L 166/1.

80. Council Regulation of 14 June 1971 on the Application of Social Security Schemes to Employed Persons and Their Families Moving Within the Community, No. 1408/71, 1986 O.J. L 266/39.

81. Directive of the European Parliament and of the Council of 9 March 2011 on the Application of Patients’ Rights in Cross-border Healthcare, No. 2011/24, 2011 O.J. L 88/45. The deadline for transposing that Directive is 23 October 2013.

reimbursement of costs incurred on hospital services provided in a Member State of stay, calculated under the rules in force in that State, is less than the amount which application of the legislation in force in the Member State of registration would afford to a person receiving hospital treatment in that State, additional reimbursement covering that difference must be granted to the insured person by the competent institution.”⁸² This is known as the “Vanbraekel reimbursement.”

In *Commission v Spain*, the ECJ held that the “Vanbraekel reimbursement” does not apply to people who travel to other Member States for purposes other than receiving medical care, i.e. persons who claim the reimbursement of the healthcare incurred in the Member State of stay under Article 22 (1) (a) Regulation 1408/71 (now Article 19 of Regulation No. 883/2004).⁸³ First, it stressed that, unlike scheduled treatment, national legislation denying the “Vanbraekel reimbursement” in cases of unscheduled treatment “cannot be regarded as having any restrictive effect on the provision of hospital treatment services by providers established in another Member State,”⁸⁴ given that the unexpected character of that type of treatment does not induce the insured person to cancel his or her trip. Second, the ECJ found that the contested legislation could not, in general terms, be regarded as restricting the freedom to provide hospital treatment services, tourist services or educational services, since it appears too uncertain and indirect to consider that the person insured in the Member State of affiliation would be induced not to leave that Member State or to return there early in order to receive medical treatment.⁸⁵ Finally, the ECJ ruled that its interpretation of Article 56 TFEU was consistent with “the principle of overall compensation of risks” laid down in Articles 22 (1) (a) and 36 of Regulation No. 1408/71 (now Articles 19 and 35 of Regulation No. 883/2004). In accordance with that principle, cases in which the hospital treatment provided for in the Member State of stay is of a higher financial cost than that offered in the Member State of affiliation are offset by cases in which the hospital treatment

82. *Vanbraekel & Others*, Case C-368/98, [2001] E.C.R. I-5363, ¶ 53.

83. *Commission v. Spain*, [2010] E.C.R. I-5267, ¶¶ 63–65.

84. *Id.* ¶ 65.

85. *Id.* ¶ 72.

provided for in the Member State of stay is of a lower cost.⁸⁶ Otherwise, the ECJ reasoned, the Member State of affiliation would be systematically exposed to the highest financial burden.

According to Van der Mei,⁸⁷ the ruling of the ECJ in *Commission v Spain* has been superseded by Article 7(4) of the PRD, since the latter does not distinguish between scheduled and unscheduled treatment. Indeed, that provision states that:

“[t]he costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received.”

Van der Mei relies on this occurrence with a view to criticising the ruling of the ECJ in *Commission v Spain*. After looking at the legislative process that led to the enactment of the PRD, he observes that, in relation to Article 7(4) thereof, “no objections were raised, and no amendments were proposed.”⁸⁸ Indeed, ever since it was included in the original 2008 Commission proposal, Article 7(4) of the PRD remained unchanged. Hence, the EU legislator (including the Member States) appeared not to be opposed to the application of the “Vanbraekel reimbursement” to unscheduled hospital treatment. In his view, *Commission v Spain* gave rise to a “unique and reverse situation, in which the Member States prove to be more ‘patient-friendly’ than the overly conservative [ECJ].”⁸⁹

Even if one were to assume that Article 7(4) of the PRD applies to unscheduled treatments, which is far from being clear,⁹⁰ I cannot agree with such criticism. By qualifying the ECJ as a “patient-friendly” or as an “overly conservative” court, one

86. *Id.* ¶¶ 78–79.

87. See generally Anne Pieter Van der Mei, *Cross-border Access to Healthcare and Entitlement to Complementary “Vanbraekel Reimbursement”*, 36 EUR. L. REV. 431, 431–32 (2011).

88. *Id.* at 439.

89. *Id.*

90. See 28th recital of the PRD, which states that “[the PRD] should not affect an insured person’s rights in respect of the assumption of costs of healthcare which becomes necessary on medical grounds during a temporary stay in another Member State according to Regulation (EC) No 883/2004.” Directive 2011/24/EU of the European Parliament and of the Council on The Application of Patients’ Rights in Cross-border Healthcare, 2004 O.J. L 88/45, art. 28 at L 88/248.

embarks onto the wrong debate. Those two adjectives refer to policy considerations and should therefore be reserved to the appraisal of the work done by the political process. In *Commission v Spain*, the ECJ limited itself to examining the compatibility of Spanish legislation with Article 56 TFEU; it found that Article 56 TFEU does not require Member States to award the “Vanbraekel reimbursement” to unscheduled hospital treatment. In so doing, it effectively held that the award of such reimbursement in the event of unscheduled hospital treatment was a matter for the EU legislator alone to determine as it involved policy choices concerning financial trade-offs in the healthcare budgets of the Member States, as the money spent on moving patients is not being spent on other patients’ needs. Thus, it is wrong to say that the ECJ was not “patient-friendly” or “overly conservative.” One can only infer from *Commission v Spain* that the ECJ is seriously committed to leaving policy choices in the hands of the EU legislator, where they actually belong if the EU is to be seen as a system based on representative democracy.⁹¹

B. *The ECJ and the Member States*

The ECJ strives to strike the balance imposed by the rule of law between national and EU interests. In the absence of EU harmonizing measures, the ECJ strikes that balance where a Member State relies on national identity or on public health considerations with a view to derogating from the Treaty

91. See *Commission v. Germany*, Case-205/84, [1986] E.C.R. 3755, ¶ 55; *Commission v. France*, Case-220/83, [1986] E.C.R. 3663, ¶ 20; *Commission v. Denmark*, Case-252/83, [1986] E.C.R. 3713, ¶ 20; *Commission v. Ireland*, Case-206/84, [1986] E.C.R. 3817, ¶ 20. In those cases, the ECJ held that the fundamental freedoms did not preclude the Member State in which insurance services are provided from imposing on insurance companies established in another Member State the obligation to obtain a separate authorisation. However, in order to ensure compliance with EU (then Community) law, the granting of such an authorization had to be subject to certain conditions. It follows from those judgments that the establishment of a system of a single authorization would thus require the EU (then Community) legislator to adopt harmonising measures in the insurance sector. See also *Kerckhaert and Morres v. Belgische Staat*, Case C-513/04, [2006] E.C.R. I-10,967, ¶¶ 22–24 (holding that the fundamental freedoms do not require the elimination of double taxation resulting from the parallel exercise by the Member States concerned of their respective powers of taxation. This required a political solution to be adopted by the EU legislator or through double tax conventions concluded by the Member States).

provisions on free movement and EU citizenship. By contrast, when EU harmonizing measures have been adopted, the ECJ weighs national interests against the objectives pursued by the EU legislator.

1. In the Absence of EU Harmonization

i. The Importance of Constitutional Principles Embedded in National Law

In the absence of EU harmonization, and in so far as there are no national measures producing a protectionist effect (or having a protectionist intent), Member States enjoy a broad leeway to safeguard national interests which are deemed fundamental to their identity. Beyond a core nucleus of shared values where the ECJ must ensure uniformity, EU law cannot disregard the cultural, historical, and social heritage that is part and parcel of national constitutional traditions. In other words, beyond that core nucleus, the ECJ welcomes “value diversity.”⁹² The rulings of the ECJ in *Omega* and *Sayn-Wittgenstein* illustrate this approach.⁹³

In *Omega*, the Bonn police authority prohibited Omega from offering games involving the simulated killing of human beings on the ground that they infringed human dignity. Given that Omega had entered into a franchise contract with a British company, it argued that the ban was contrary to the freedom to provide services embodied in ex Article 49 EC (now Article 56 TFEU). Thus, the ECJ was called upon to strike a balance between ex Article 49 EC and human dignity, as understood by a national authority. After noting that the ban constituted a restriction on the freedom to provide services which, nevertheless, pursued a legitimate objective—the protection of human dignity—the ECJ ruled that, for the purposes of applying the principle of proportionality, “[i]t is not indispensable [. . .] for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which

92. See Lenaerts & Gutiérrez-Fons, *supra* note 15, at 1663–64.

93. *Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn (Omega)*, Case C-36/02, [2004] E.C.R. I-9609 and *Sayn-Wittgenstein v. von Wien*, Case C-208/09, [2010] E.C.R. I-13693.

the fundamental right or legitimate interest in question is to be protected.”⁹⁴ Thus, the fact that a Member State other than Germany had chosen a system of protection of human dignity less restrictive of the freedom to provide services did not imply that the German measure was contrary to the EC Treaty. Given that the ban satisfied the level of protection required by the German constitution and did not go beyond what was necessary to that effect, the ECJ considered that it was a justified restriction on the freedom to provide services. Thus, *Omega* demonstrates that the ECJ did not seek to impose a common conception of human dignity. Nor did it embrace the national conception prevailing outside Germany which was more protective of free movement. Instead, it endorsed a model based on “value diversity”, where national constitutional traditions are not in competition with the economic objectives of the Union, but form an integral part of them.⁹⁵

The ECJ followed the same approach in *Sayn-Wittgenstein*. The facts of the case were as follows. In 2003, the Austrian Constitutional Court delivered a judgment in which it interpreted the Law on the abolition of the nobility, which enjoys a constitutional status as it implements the principle of equal treatment in this field. It held that the Law on the abolition of the nobility prohibits Austrian citizens from bearing titles of nobility, including those of foreign origin. This meant for Ilonka Fürstin von Sayn-Wittgenstein—an Austrian national residing in Germany who took the name of her German stepfather—that all official documents delivered by Austrian authorities could no longer contain the noble elements “Fürstin von”, i.e. her surname could only be registered as “Sayn-Wittgenstein.” The latter, who had been using the prefix “Fürstin von” both personally and professionally in Germany for more than fifteen years, argued that the Law on the abolition of nobility hampered her rights to free movement. By contrast, the Austrian Government stressed the importance of the Law on the abolition of nobility which, as a matter of public policy, “went hand in hand with the creation of the Republic of Austria.”⁹⁶ Hence, the referring court asked, in essence, whether Article 21

94. *Omega*, [2004] E.C.R. I-9609, ¶ 37.

95. TRIDIMAS, *supra* note 23, at 341.

96. *Sayn-Wittgenstein*, [2010] E.C.R. I-13693, ¶ 32.

TFEU may authorize a Member State to rely on reasons of a constitutional nature in order not to recognize all the elements of a name obtained by one of its nationals in another Member State. The ECJ began by finding that the refusal by Austrian authorities to recognize the noble elements of Ms Sayn-Wittgenstein's surname constituted a restriction on her rights to free movement. Such refusal may cause Ms Sayn-Wittgenstein "‘serious inconvenience’ within the meaning of *Grunkin and Paul*⁹⁷ result[ing] from having to alter all the traces of a formal nature of the name ‘Fürstin von Sayn-Wittgenstein’ left in both the public and the private spheres, given that her official identity documents currently refer to her by a different name."⁹⁸ Indeed, the discrepancy in names may dispel doubts as to Ms Sayn-Wittgenstein's identity and the authenticity of the documents she submits, or the veracity of their content.⁹⁹ As to the justification, the ECJ held that, as a matter of public policy, a Member State may restrict the right to free movement in order to protect an element of its national identity.¹⁰⁰ Although public policy had to be interpreted strictly, the ECJ noted that, since "the concept of public policy may vary from one Member State to another and from one era to another [,] [t]he competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."¹⁰¹ Next, the ECJ recognized as legitimate the objective pursued by the Law on the abolition of the nobility, which "seeks to ensure the observance of the principle of equal treatment as a general principle of law",¹⁰² enshrined in Article 20 of the Charter. As to the principle of proportionality, the ECJ recalled its findings in *Omega*:

[I]t is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the

97. *Grunkin-Paul v. Standesamt Niebüll*, Case C-353/06, [2008] E.C.R. I-7639.

98. *Sayn-Wittgenstein*, [2010] E.C.R. I-13693, ¶ 67.

99. *Id.* ¶ 69.

100. *Id.* ¶¶ 83–84.

101. *Id.* ¶ 87.

102. *Id.* ¶ 89.

contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State.¹⁰³

Hence, the ECJ ruled that the refusal by Austrian authorities to recognize the noble elements of the surname of a national of that State was compatible with Article 21 TFEU.

Moreover, in order to strengthen its approach, the ECJ referred for the first time, though in passing, to Article 4(2) TEU, according to which “the [EU] is to respect the national identities of its Member States, which include the status of the State as a Republic.”¹⁰⁴ This is an important development which suggests that Article 4(2) TEU is to be interpreted as protecting “national identity” understood as the fundamental constitutional principles of the Member States. However, the fact that the ECJ mentioned Article 4(2) TEU in the context of the principle of proportionality implies that “national identity” is not absolute, but must be weighted against the fundamental values of the EU.¹⁰⁵ This means that where fundamental constitutional values of the Member States are at stake but no core value of the Union is in danger, then “value diversity” will prevail over uniform application of EU law. Conversely, where the national measure at issue threatens values of essential importance to the very existence of the Union (such as the prohibition of discrimination on grounds of nationality), the Member State concerned will not be able to rely on Article 4(2) TEU. The approach followed by the ECJ in *Omega* and *Sayn-Wittgenstein* is fully consistent with this reading of Article 4(2) TEU. Where the contested national measure has nothing to do with protectionism,¹⁰⁶ i.e. where no core value of the Union is at

103. *Id.* ¶ 91.

104. *Id.* ¶ 92.

105. See Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1420 (2011) (arguing that “[n]ational identity [. . .] does not enjoy absolute protection under EU law, but has to be balanced, against the principle of uniform application of EU law; implementing this duty is a task for both the ECJ and national constitutional courts as parts of a system of composite constitutional adjudication”).

106. Cf. *Int'l Transp. Workers' Fed'n v. Viking Line ABP (Viking)*, Case C-438/05, [2007] E.C.R. I-10779. In relation to that case, I have argued that trade unions sought protectionist measures by struggling to keep jobs at home. While it is in

stake, by applying a proportionality test which leaves to the Member States the level at which constitutional principles of fundamental importance are to be protected, the ECJ seeks to respect “value diversity.”

ii. The Importance of Consistency

The way in which the ECJ applied the principle of proportionality in *Omega* and *Sayn-Wittgenstein* is not limited to national measures protecting fundamental constitutional principles. The ECJ has equally favored “value diversity” where a national measure pursues a legitimate objective in relation to which EU law does not require Member States to adopt the same level of protection. For instance, this is the case where, in the absence of EU harmonization, non-discriminatory national measures constituting obstacles to free movement aim to protect public health or public morality. Needless to say, this approach does not apply where the core values of the Union are put at risk.

However, the fact that the ECJ recognizes considerable leeway to the Member States when they establish the level at which national interests are protected, does not exclude that it will examine the consistency of the national legislation as a whole aiming to protect that interest. As the ECJ held in *Placanica*:¹⁰⁷

[W]ith regard to the [objective of reducing gambling opportunities], it is clear from the case-law that although restrictions on the number of operators are in principle capable of being justified, those restrictions must in any event reflect a concern to bring about a genuine diminution

principle legitimate for trade unions to seek to protect workers from social dumping, it is equally true that trade unions are not entitled to shield local labor markets from competition coming from Member States with low average wages. For this reason, the ECJ may have felt that granting a margin of appreciation to trade unions in such a broad way, as if they were Member State authorities, was inappropriate. Otherwise, the ECJ might have tilted the balance in favor of a “social Europe” that arguably excludes a large part of its new citizens. Trade unions could easily engage in social protectionism, leading to retaliatory measures and eventually to the fragmentation of social groups across Europe. See Lenaerts & Gutiérrez-Fons, *supra* note 16, at 1666.

107. Criminal Proceedings Against Massimiliano Placanica, Christian Palazzese & Angelo Sorricchio, Joined Cases C-338/04, C-359-60/04, [2007] E.C.R. I-1891.

of gambling opportunities and to limit activities in that sector in a consistent and systematic manner.¹⁰⁸

After *Placanica*, the ECJ has continuously stressed the importance of consistency of the national rules on gambling in order to secure their compatibility with the Treaty provisions on free movement. Though Member States enjoy a wide margin of discretion in deciding the level of protection at which they wish to ban behavior of dubious morality such as gambling,¹⁰⁹ the ECJ is committed to verifying that those national rules are free from internal and external contradictions.¹¹⁰ The contested national rules often set up a public monopoly or restrict market access for private operators so as to fight crime and/or prevent individuals from becoming addicted to gambling. However, the ECJ engages in a joint reading of the national rules at issue and the national legislation as a whole. If that reading shows inconsistencies revealing that the objective of combating crime and/or game addiction is illusory, whilst the national legislation's true purpose appears to be to increase public revenue, the contested national rule will not be justified.¹¹¹

The ECJ went on testing the consistency of the justifications put forward by the Member States in other areas of the law, such as the provision of healthcare services.¹¹² For example, in *Hartlauer*,¹¹³ the ECJ examined the compatibility of the Austrian system of prior authorization for the setting up and operation of outpatient dental clinics with EU law. In order to better

108. *Id.* ¶ 53.

109. See *Liga Portuguesa de Futebol v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, Case C-42/07, [2009] E.C.R. I-7633, ¶ 57 (holding that “the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of [EU] harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected”).

110. See Stefaan Van den Bogaert & Armin Cuyvers, “*Money for Nothing*”: *The Case Law of the EU Court of Justice on the Regulation of Gambling*, 48 *COMMON MKT. L. REV.* 1175, 1193 (2011).

111. See, e.g., *Joined Cases C-316/07, C-358-60/07, C-409-10/07*, [2010] E.C.R. I-8069, ¶ 106; see also *Carmen Media Group Ltd. v. Land Schleswig-Holstein*, Case C-46/08, [2010] E.C.R. I-8149, ¶ 68.

112. See, e.g., *Corporación Dermoestética SA v. To Me Group Advertising Media Srl*, Case C-500/06, [2008] E.C.R. I-5785.

113. *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung*, Case C-169/07, [2009] E.C.R. I-1721, ¶ 55.

understand the case, it is worth pointing out that the Austrian social security system is mixed. On the one hand, it is based on a system of benefits in kind when healthcare services are provided by establishments belonging to the social security institutions or by establishments or independent practitioners contracted to sickness funds (“contractual practitioners”).¹¹⁴ On the other hand, if an insured patient wishes to hire the services of a non-contractual practitioner, he or she has a right to reimbursement by the social security system up to a ceiling of eighty percent of the sum that would have been charged by a contractual practitioner.¹¹⁵ Austrian legislation conditioned the setting up and operation of non-contractual outpatient dental clinics upon obtaining a prior authorization which could not be granted if demand for dental services within a given province was already satisfied by the existing dental service providers. Hartlauer, a German company, which had unsuccessfully applied for a license to open an outpatient dental clinic in Vienna, challenged that negative decision before the Austrian courts. It alleged that the Austrian legislation was contrary to the freedom of establishment. However, in recalling the case-law of the ECJ regarding patient mobility and hospital care,¹¹⁶ Austria argued that, even if there was a restriction of the freedom of establishment, it could be justified on the ground that there was a general interest in planning the number of outpatient dental clinics so as to avoid wastage of financial, technical and human resources, whilst ensuring a sufficient and permanent access to a high-quality dental treatment. Accordingly, in order to preserve healthcare planning, the system of prior authorization was necessary. In addition, an open access to non-contractual practitioners would drive contractual practitioners to disappear from the market, since the former would focus on the profitable part of the market, rendering sickness funds incapable of covering their costs (“cream-skimming”).

114. *Id.* ¶ 16. See also Opinion of Advocate General Bot, *Hartlauer*, [2009] E.C.R. I-1721, ¶¶ 30-32.

115 *Hartlauer*, [2009] E.C.R. I-1721, ¶ 17.

116. See, e.g., *Watts v. Bedford Primary Care Trust*, Case C-372/04, [2006] E.C.R. I-4325; *V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, Case C-385/99, [2003] E.C.R. I-4509.

Although the ECJ recognized the objective pursued by Austria as legitimate,¹¹⁷ it noted that no authorization was required for “group practices” which, unlike outpatient dental clinics, take the legal form of a for-profit partnership comprising partners with an independent entitlement to practice and who are personally liable.¹¹⁸ But given that “the premises and equipment of group practices and those of outpatient dental clinics may have comparable features and that in many cases the patient will not notice any difference between them” and that “group practices generally offer the same medical services as outpatient dental clinics and are subject to the same market conditions”,¹¹⁹ the ECJ found that the contested Austrian legislation contained a clear inconsistency: group practices could also upset the organization and planning of the provision of care in an area.¹²⁰

More recently, the ruling of the ECJ in *Blanco Pérez*¹²¹ provides a good example which shows how the ECJ combines a soft application of the proportionality test with the requirement of consistency. In that case, the ECJ examined the compatibility of Asturian legislation (Spain) which conditioned the opening of new pharmacies upon obtaining a prior authorization, the award of which had to comply with geographical and demographical limits.¹²² Those limits were as follows:

– [I]n each pharmaceutical area, a single pharmacy may be opened, as a general rule, per unit of 2 800 inhabitants [(the ‘2800 inhabitants’ rule)];

117. *Hartlauer*, [2009] E.C.R. I-1721, ¶ 52.

118. *Id.* ¶ 59.

119. *Id.* ¶¶ 57–58.

120. *Id.* ¶ 60.

121. *Blanco Pérez & Chao Gómez v. Consejería de Salud y Servicios Sanitarios*, Joined Cases C-570-71/07, [2010] E.C.R. I-4629.

122. In addition, the ECJ also examined the selection criteria for licensees for new pharmacies which, in essence, gave preference to pharmacists with professional experience obtained within the Autonomous Community of Asturias. The ECJ found those criteria to be discriminatory and that they could not be justified by the need to maintain a level of quality in the pharmaceutical service, given that pharmacists falling within the scope of Council Directive 85/432/EEC Concerning the Mutual Recognition of Diplomas, Certificates, and Other Evidence of Formal Qualifications in Pharmacy, 1985 O.J. L 353/34—and Directive 2005/36/EC of the European Parliament and of the Council on the Recognition of Professional Qualifications, 2005 O.J. L 255/22—were deemed to be sufficiently qualified to provide services of a high quality. *Blanco Pérez*, [2010] E.C.R. I-4629, ¶ 115.

- a supplementary pharmacy may not be opened until that threshold has been exceeded, that pharmacy being established for the fraction above 2 000 inhabitants; and
- each pharmacy must be a minimum distance away from existing pharmacies, that distance being, as a general rule, 250 metres' [(the “250 metres” rule)].¹²³

Hence, the contested national measure limited the number of pharmaceutical service providers according to economic and social needs. Although the contested national measure was applicable without discrimination on grounds of nationality,¹²⁴ the ECJ found that it was liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment, since a system of prior authorization caused undertakings to bear additional administrative and financial costs, and prevented the undertakings not satisfying the predetermined requirements from carrying out a self-employed pharmaceutical activity.¹²⁵

Next, the ECJ held that the contested measure could be justified on grounds of public health, given that it sought to distribute the number of pharmacies within a given geographical area evenly, so as to ensure adequate access to pharmaceutical services as well as to improve the reliability and the quality of the provision of medical products to the public.¹²⁶

As to the principle of proportionality, the ECJ first recalled that “it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed [a margin] of discretion.”¹²⁷ Accordingly, as the ECJ held in *Omega* and *Sayn-Wittgenstein*, “the fact that one Member State imposes more stringent rules than another in relation to the protection of public health does not mean that those rules are incompatible with the Treaty provisions on the fundamental freedoms.”¹²⁸ Second, the ECJ examined whether the contested

123. *Blanco Pérez*, [2010] E.C.R. I-4629, ¶ 52.

124. *Id.* ¶ 62.

125. *Id.* ¶ 54.

126. *Id.* ¶ 78.

127. *Id.* ¶ 44.

128. *Id.* ¶ 68.

legislation was appropriate to the aim pursued. It noted that the “2800 inhabitants” rule was capable of preventing both a surplus of pharmacies in densely populated areas which might be perceived as very profitable, and a deficit of pharmacies in geographically isolated or disadvantaged areas.¹²⁹ The ECJ further observed that the “2800 inhabitants” rule may not be sufficient to ensure adequate access to pharmaceutical services. Indeed, such demographical limit does not prevent the establishment of a high concentration of pharmacies within one and the same pharmaceutical area, generating a duplication of structures in some parts of that area, whilst other parts of the same area might suffer from a lack of pharmacies. That is why the ECJ also upheld the “250 metres” rule. In addition, in referring to its previous ruling in *Hartlauer*,¹³⁰ it ruled that:

[I]t is also essential that the way in which that legislation pursues that objective is not inconsistent. According to the case-law of the [ECJ], the various rules – and the national legislation as a whole – are appropriate for ensuring attainment of the objective relied upon only if they genuinely reflect a concern to attain that objective in a consistent and systematic manner.¹³¹

For the case at hand, this meant that the “2800 inhabitants” rule and the “250 meters” rule contained in the contested legislation had to be readjusted so as to take into account areas with special geographical and demographical features. For example, for rural, mountainous or tourist areas, the limit of 2800 inhabitants per pharmacy could be inappropriate to ensure adequate access to pharmaceutical services. Likewise, in densely populated areas, a minimum distance of 250 meters per pharmacy could bring about a shortage in the supply of pharmaceutical services.¹³² Accordingly, the ECJ held that it was for the referring court to ascertain whether those two basic rules could be adapted in accordance with the special features of certain pharmaceutical areas. Finally, after stressing again that the Member States enjoy a broad margin of discretion in

129. *Id.* ¶ 72.

130. *See* *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung*, Case C-169/07, [2009] E.C.R. I-1721.

131. *Blanco Pérez*, [2010] E.C.R. I-4629, ¶ 94.

132. *Blanco Pérez*, [2010] E.C.R. I-4629, ¶¶ 99–102.

relation to the protection of public health, the ECJ rejected that the contested measure went beyond what was necessary to attain the aim pursued.¹³³

Cases like *Placanica*, *Hartlauer* and *Blanco Pérez* show that the ECJ endeavors to find the true purpose underpinning the national measure in question. In so doing, it focuses on the contextual aspects of the proportionality principle. In other words, the principle of proportionality is not applied in an abstract fashion, “but as a part of the legal and factual context in which the [contested] measure operates.”¹³⁴ In order to ensure that there is no protectionist objective behind the contested national measure, judicial deference in relation to the “necessity” prong of the principle of proportionality is compensated by incorporating the “consistency” test into the “suitability” prong of the same principle. In so doing, the ECJ enhances the legitimacy of its legal reasoning: verifying the absence of contradictions in the justifications put forward by the Member States is a strong way for the ECJ to dismiss arbitrary criteria when assessing the compatibility of national measures with EU law.

133. In so doing, it found that the Member State concerned was entitled to consider that a “minimum number” system was less effective than the scheme set out by the contested legislation. According to that alternative system, a “no licence for setting up a new pharmacy would be issued [...] in areas where there was already an adequate number of pharmacies, until each of the specific geographical zones had the minimum number of pharmacies required. However, as soon as each of those areas had the minimum number of pharmacies, the opening of new pharmacies would be possible.” *Id.* ¶ 105. Indeed, given that Spain had decided to transfer to the Autonomous Communities the organization of the distribution of pharmacies and that it was a national objective to channel pharmacists towards areas where there were no pharmacies, in whatever region, the ECJ observed that the “minimum number” system could actually hinder that objective: “it is possible[, the ECJ reasoned,] that the pharmacists concerned would tend to swell the numbers of pharmacists in regions where the minimum number has already been reached – and where, as a consequence, there are no restrictions on the opening of pharmacies – instead of setting up in areas where there are no pharmacies, in the regions where the minimum number has not been reached.” *Id.* ¶ 111.

134. Gjermund Mathisen, *Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement*, 47 COMMON MKT. L. REV. 1021, 1040 (2010).

2. In the Presence of EU harmonization

In the presence of EU harmonizing measures, it is not sufficient for national law to comply with primary EU law. Additionally, Member States must comply with the way in which the EU legislator has struck the balance between the substantive law of the Union and national interests. The normative yardstick determining the compatibility of national law with EU law is then also constituted by secondary EU law. It follows that the margin of manoeuvre enjoyed by national authorities, if any, is limited by the legislative framework put in place by the EU legislator. This does not mean, however, that, within that framework, the ECJ will never be in a position to accommodate national interests. The recent ruling of the ECJ in *Mesopotamia Broadcast* illustrates this point.¹³⁵

Before explaining the facts of the case, an overview must be given of the way in which the EU legislator has sought to remove obstacles to the freedom to provide broadcasting services within the EU. Directive 89/552¹³⁶ (as amended by Directive 97/36¹³⁷) encapsulates “the principle of the originating Member State” whereby “it is necessary and sufficient that all broadcasts comply with the law of the Member State from which they emanate.”¹³⁸ It is for the authorities of that Member State to check whether television broadcasts emanating therein comply with the rules on broadcasting thereof. In accordance with Article 2a of Directive 89/552, only exceptionally and provisionally may the receiving Member State suspend the retransmission of a televised broadcast emanating from other Member States, in so far as such a broadcast is in breach of Articles 22(1) or (2) and/or Article 22a of that Directive. The latter provision states

135. *Mesopotamia Broadcasting and Roj TV A/S v. Bundesrepublik Deutschland*, Joined Cases C-244-45/10, [2011] E.C.R. I___ (delivered September 22, 2011) (not yet reported).

136. Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. L 298/23.

137. Directive 97/36/EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 1997 O.J. L 202/60.

138. Opinion of Advocate General Bot in *Mesopotamia Broadcasting*, [2011] E.C.R. I-___ (delivered Sept. 22, 2011) (not yet reported).

that “Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.” Moreover, Article 2a of Directive 89/552 lays down additional requirements for suspension.¹³⁹ It follows that, in areas coordinated by Directive 89/552, the receiving Member State may only suspend a broadcast in compliance with Article 2a.

Mesopotamia Broadcast is a holding company incorporated under Danish law which owns several Danish broadcasting licenses and operates, inter alia, the broadcaster Roj TV. Roj TV’s programmes are produced mainly in Kurdish and broadcasted via satellite throughout Europe and the Middle East. In 2006 and 2007, convinced that Roj TV supported the objectives of the PKK, which the EU has classified as a “terrorist” organization, Turkey lodged a complaint with the Danish Television Committee. However, those complaints were dismissed on the ground that Roj TV had violated neither Article 22 nor Article 22a of Directive 89/552. In 2008, the German Federal Ministry of Interior took a different view, prohibiting Mesopotamia Broadcast from carrying out, through the agency of Roj TV, any activities falling within the scope of the German law governing associations (the “Vereinsgesetz”). It also precluded Roj TV from undertaking its activities in Germany. Its decision was based on the fact that Roj TV supported the use of violence to achieve the political aims of the

139. See Directive 89/552, *supra* note 136, Article 2a, which provides: “[. . .] 2. Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled: (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22(1) or (2) and/or Article 22a; (b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in (a) on at least two prior occasions; (c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again; (d) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in (c), and the alleged infringement persists.

The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.

3. Paragraph 2 shall be without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.”

PKK and in relations between Turks and Kurds, thus infringing the constitutional “principles of international understanding” for the purposes of the Vereinsgesetz. Mesopotamia Broadcast and Roj TV challenged that decision before the competent German court. They argued that the decision of the German authorities was in breach of Directive 89/522 as it was for Danish authorities alone to exercise control over their broadcasting activities. Moreover, they posited that the German decision was in breach of Article 2a of that Directive. Conversely, the German Federal Government argued that Directive 89/552 did not prevent Member States from applying their general rules on criminal or police matters or the Vereinsgesetz, even if those rules were capable of adversely affecting television broadcasting activities.

At the outset, the ECJ stressed that Directive 89/552 has a non-exhaustive character, and accordingly, “with regard to areas relating to public order, public morality or public security [. . .] a Member State is free to apply to the activities carried out by broadcasters on its territory generally applicable rules concerning those fields, in so far as those rules do not hinder retransmission.”¹⁴⁰ Next, it examined whether the activities carried out by Roj TV fell within the meaning of “any incitement to hatred” as provided for by Article 22a of Directive 89/552. The ECJ replied in the affirmative. In light of the literal, systematic and teleological interpretation of Article 22a, it defined “incitement to hatred” as a concept “designed to forestall any ideology which fails to respect human values, in particular initiatives which attempt to justify violence by terrorist acts against a particular group of persons.”¹⁴¹ Hence, since the activities of Roj TV stirred up the violence between Turks and Kurds in Turkey and intensified the tensions between those two groups in Germany, that behaviour was covered by the concept of “incitement to hatred.” This meant that German authorities were precluded from hindering Roj TV’s retransmissions, unless they did so in accordance with Article 2a of Directive 89/552. The fact that the risk of confrontation between those two groups

140. *Mesopotamia Broadcasting*, [2011] E.C.R. I____ (delivered Sept. 22, 2011), ¶ 37.

141. *Id.* ¶ 42.

was more likely in Germany than in Denmark was of no relevance.¹⁴²

However, referring to its previous ruling in *De Agostini*,¹⁴³ the ECJ recalled that a distinction had to be drawn between, on the one hand, national measures which constitute an obstacle to retransmission per se and, on the other hand, national measures with the general aim of protecting public policy. Whilst the former type of measure must comply with Article 2a of Directive 89/552, the latter type falls outside the scope of coordination of that Directive and must only comply with primary EU law. This meant for the case at hand that Directive 89/552 did not prohibit Germany from adopting a measure which “pursue[d] a public policy objective without however preventing retransmission per se, on its territory, of television broadcasts from another Member State.”¹⁴⁴ Hence, Germany could, for example, prohibit Roj TV from producing broadcasts and organizing public events within its territory. The ECJ deferred to the national court the determination of the type of activities which were contrary to the principles of international understanding as provided for by the Vereinsgesetz but did not prevent the retransmission per se in Germany of Roj TV’s broadcasts.

Mesopotamia Broadcast is a positive development which confirms that, in interpreting EU harmonizing measures, the ECJ takes national interests seriously. Thus, the fact that the EU legislator has harmonized an area of law does not automatically rule out that national interests may be taken into account. On the contrary, *Mesopotamia Broadcast* shows that the ECJ seeks to strike the balance intended by EU law taken as a whole, between the objectives pursued by the EU legislator and the interests of the Member States. On the one hand, the ECJ ruled that Germany was precluded from exercising a double control on the broadcasting activities of Roj TV. The exercise of such control would run counter to the principle of the originating Member

142. *Id.* ¶ 45.

143. *Konsumentenombudsmannen v. De Agostini (Svenska) Förlag AB and TV-shop i Sverige AB*, Joined Cases C-34-36/95, [1997] E.C.R. I-3843 (noting in that case that the national measures at issue sought to protect consumers from misleading advertising).

144. *Mesopotamia Broadcasting*, [2011] E.C.R. I____ (delivered Sept. 22, 2011) ¶ 50.

State. This meant that German authorities had either to trust the decision adopted by their Danish counterparts or to follow the procedure laid down in Directive 89/552 in order to oppose that decision. On the other hand, the ECJ stressed that Directive 89/552 could not be interpreted so as to deprive the receiving Member State, namely Germany, of its police powers. Germany could control the activities of Roj TV which took place within its territory. For example, a public event organized by Roj TV could be banned, even if that implied that such event could no longer be broadcasted.

III. *INTERNAL LEGITIMACY*

So far, the present contribution has primarily focused on examining whether the ECJ is committed to standing behind the line that divides “law” from “politics”, i.e. it has focused on the external aspects of judicial legitimacy. By contrast, Part III of this contribution aims to determine whether the judicial function in the EU legal order is exercised in a way that guarantees a high-quality judicial process. To this end, Section A examines whether the ECJ is committed to respecting the allocation of judicial powers provided for by Article 267 TFEU. Section B then looks into the question whether the ECJ operates as a “rational actor” ensuring that the outcome it reaches is based on convincing grounds. It thus assesses the persuasiveness of the ECJ’s legal reasoning.

A. *The ECJ and National Courts*

One of the key elements explaining the success of European integration lies in that, from the very beginning, the ECJ brought national courts on board. The relationship between the ECJ and national courts has been portrayed as a “dialogue.”¹⁴⁵ This means that, though there are some hierarchical elements in that relationship,¹⁴⁶ mutual cooperation and empowerment is at its centre. The principles of direct effect

145. See Opinion of the ECJ, 1/09, [2011] E.C.R. I-1137, ¶ 84.

146. See, e.g., Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Jan Komáreck, *Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order*, 42 COMMON MKT. L. REV. 9 (2005).

and primacy in conjunction with the preliminary reference procedure gave to national courts a leading role in the legal construction of Europe.¹⁴⁷ Those two constitutional principles and Article 267 TFEU somehow shifted powers from the national legislature and executive to the national judiciary as well as from higher courts to lower courts.¹⁴⁸ The lowest court of the national judicial pyramid may indeed have to set aside national law breaching EU law, even if that implies departing from the case-law of the supreme or constitutional court.¹⁴⁹

Additionally, the relationship between the ECJ and national courts may be assessed in terms of allocation of powers. Unlike other federal systems, the EU rests on an integrated judiciary,¹⁵⁰ in which judicial power as to the enforcement of EU law is shared between EU and national courts.¹⁵¹ First, regarding judicial review of EU measures, EU courts enjoy the monopoly to declare secondary EU law invalid.¹⁵² Accordingly, in order to ensure compliance with the rule of law, access to these courts must be guaranteed. Where private applicants do not enjoy direct access to EU courts, the ECJ has held, and now the Treaty itself suggests,¹⁵³ that national rules of procedure must provide indirect means of challenging those measures.¹⁵⁴ Second, under

147. See *Opinion of the ECJ, 1/09*, [2011] E.C.R. I-1137, ¶ 66 (holding that “[a]s is evident from Article 19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the [ECJ] and the courts and tribunals of the Member States”).

148. See Takis Tridimas, *The European Court of Justice and the Draft Constitution: A Supreme Court of the Union?*, in *EUROPEAN LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER* 114 (Tridimas et al. eds., 2004).

149. See, e.g., *Krzysztof Filipiak v. Director Izby Skarbowej w Poznaniu*, Case C-314/08, [2009] E.C.R. I-11049, ¶ 84; see also *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, Case C-409/06, [2010] E.C.R. I-8015, ¶ 60.

150. See Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 142 (Whittington et al. eds., 2008).

151. See *Opinion of the ECJ, 1/09*, [2011] E.C.R. I-1137, ¶ 69.

152. See, e.g., *Foto-Frost v. Hauptzollamt Lübeck-Ost*, Case 314/85, [1987] E.C.R. 4199; *Gaston Schul Douane-expéditeur BV v. van Landbouw*, Case C-461/03, [2005] E.C.R. I-10,513.

153. See Consolidated Version of the Treaty on European Union art. [19], 2012 O.J. C 326/1, at 27 (“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”); see also Koen Lenaerts, *Le traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union*, *CAHIERS DE DROIT EUROPÉEN* 711 (2009).

154. See generally Koen Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, 44 *COMMON MKT. L. REV.* 1625 (2007).

the preliminary reference procedure, the ECJ has only jurisdiction to interpret EU law, not national law,¹⁵⁵ so that it may not declare a national measure to be incompatible with EU law.¹⁵⁶ The interpretation of EU law is indeed a task for the ECJ to undertake, whereas its application to the case at hand is for the national courts alone to carry out.¹⁵⁷

Just as happens with national law, it is often difficult, if not impossible, to draw the dividing line between interpretation and application of EU law. Sometimes the ECJ will provide a ruling of general application,¹⁵⁸ whilst in others the answer will be adapted to the specific circumstance “at issue in the case in the main proceedings.”¹⁵⁹ This flexibility is of paramount importance for the proper functioning of the preliminary reference procedure. It allows the ECJ to accommodate its answers to different factors. First, the degree of precision with which the referring court sets out the facts of the case and interprets the relevant parts of national law, determines the generality or specificity of the answer provided by the ECJ. When the order for reference is very precisely drafted there is a

155. See, e.g., *Demag v. Finanzamt Duisburg-Süd*, Case 27/74, [1974] E.C.R. 1037, ¶ 8; see also *Freistaat Bayern v. Eurim-Pharm GmbH*, Case C-347/89, [1991] E.C.R. I-1747, ¶ 16; *Turn- und Sportunion Waldburg v. Finanzlandesdirektion für Oberösterreich*, Case C-246/04, [2006] E.C.R. I-589, ¶ 20; *dos Santos Palhota & Others*, Case C-515/08, [2010] E.C.R. I-9133, ¶ 18 (holding that “Article 267 TFEU is based on a clear separation of functions between national courts and tribunals and the . . . [ECJ], and the latter is empowered to rule only on the interpretation or the validity of the acts of the European Union referred to in that article. In that context, it is not for the . . . [ECJ] to rule on the interpretation of national laws or regulations or to decide whether the referring court’s interpretation of them is correct”).

156. This is different under Articles 258 to 260 of the Lisbon Treaty on the Functioning of the European Union.

157. See, e.g., *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn NV (Feryn)*, Case C-54/07, [2008] E.C.R. I-5187, ¶ 19 (holding that Article 267 TFEU “does not empower the . . . [ECJ] to apply rules of . . . [EU] law to a particular case, but only to rule on the interpretation of the EC Treat[ies] and of acts adopted by . . . [EU] institutions”).

158. See, e.g., *Audiolux & Others v. Groupe Bruxelles Lambert SA (GBL) & Others*, Case C-101/08 [2009], E.C.R. I-9823, ¶ 64 (holding that “EU “law does not include any general principle of law under which minority shareholders are protected by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy their shares under the same conditions as those agreed when a shareholding conferring or strengthening the control of the dominant shareholder was acquired”).

159. *Fixtures Marketing Ltd v. Organismos prognostikon agonon podofairou AE (OPAP)*, Case C-444/02, [2004] E.C.R. I-10,549, ¶ 36.

bigger chance of the ECJ giving a tailor-made answer as to the EU law implications of the case. Second, where the ECJ has already rendered several rulings in a given area of EU law so that the questions referred to it are neither of great complexity nor raise novel issues, it may limit itself to recalling previous case-law. This should be seen as a sign of maturity of the EU legal order whereby the ECJ trusts national courts as to the daily application of EU law. Third, in matters which raise national sensitivities, the ECJ will opt for answering the questions referred to it in such a way as to take into account the concerns put forward by the Member States.¹⁶⁰ Last, but not least, in some cases, the ECJ simply provides the EU law framework within which the referring court must take its decision. This is done in cases involving questions of fact or national law that still have to be determined by the referring court. The ECJ then clarifies the several possible ways under EU law to go about the case, leaving it to the national court to select the correct one after assessing the facts and aspects of national law. The ruling of the ECJ in *Bressol* and its implementation by the Belgian Constitutional Court provide an excellent illustration in this regard.

In *Bressol*,¹⁶¹ the ECJ was asked by the Belgian Constitutional Court to examine the compatibility of the decree of the French Community (“the 2006 decree”)—which regulated the number of students in certain programmes in the first two years of undergraduate studies in higher education—with the Treaty provisions on EU citizenship. The system of higher education of the French Community is based on free access to education, i.e. there are no entry exams. However, in recent years, French students, who had failed to pass the entry exams in France, have gone to study at the Universities of the French Community. The number of students having become too large, in particular in medical and paramedical courses, the authorities of the French Community thought that, having regard to the budgetary, human and material resources available to the teaching institutions concerned, such an influx of students was jeopardizing the quality of teaching—and, because of the nature

160. See, e.g., *Gueye & Others*, Joined Cases C-483/09 & C-1/10, [2011] E.C.R. I ___ (delivered Sept. 15, 2011) (not yet reported).

161. *Bressol & Others v. Gouvernement de la Communauté Française*, Case C-73/08, [2010] E.C.R. I-2735, ¶ 2.

of the programmes at issue, public health. Accordingly, in relation to nine medical or paramedical programmes,¹⁶² the French Community adopted the 2006 decree which provided a numerus clausus for enrollment by non-resident students who were selected by the drawing of lots, whilst resident students continued to enjoy free access to the courses referred thereto. In order to qualify as a resident student, a double condition had to be fulfilled. “Essentially, ‘residents’ [were] persons who both [had] their principal residence in Belgium and [had] a right of permanent residence in Belgium.”¹⁶³ Moreover, the number of non-resident students in those courses could not exceed a thirty percent threshold. Mr. Bressol and other students, most of them French nationals, brought an action before the Belgian Constitutional Court contesting the constitutionality of the 2006 decree. They posited that that decree violated the principle of equality by treating resident and non-resident students differently, for no valid reason.

At the outset, the ECJ stressed that EU law does not detract from the Member States the power to organize their education systems and vocational training. A Member State is free to opt for a system based on free access or for a system which lays down a numerus clausus of students. However, in so doing, it must comply with EU law, in particular with the Treaty provisions on EU citizenship.¹⁶⁴ Next, the ECJ found that the 2006 decree put non-resident students at a disadvantage vis-à-vis resident students, since only the latter continued to enjoy free access to any of the nine medical or paramedical courses referred to. Since the condition of residence was more easily met by Belgians than by students of other nationalities, the 2006 decree created a difference in treatment indirectly based on nationality that needed to be justified.¹⁶⁵

162. Those nine programmes were: Bachelor in physiotherapy and rehabilitation; Bachelor in veterinary medicine; Bachelor of midwifery; Bachelor of occupational therapy; Bachelor of speech therapy; Bachelor of podiatry-chiropractic; Bachelor of physiotherapy; Bachelor of audiology; Educator specialized in psycho-educational counseling.

163. Opinion of Advocate General Sharpston in *Bressol & Others*, [2010] E.C.R. I-2735, ¶ 25.

164. *Bressol & Others*, [2010] E.C.R. I-2735, ¶¶ 28–29.

165. *Id.* ¶ 46–47.

As to the justification of the 2006 decree, the Belgian Government argued that it sought to counter the excessive burdens on the financing of higher education brought about by non-resident students. However, observing that the financing of higher education did not depend on the total number of students but was based on a system of a “closed envelope”, the ECJ dismissed that justification.¹⁶⁶

In addition, the Belgian Government posited that the 2006 decree aimed to ensure the quality and continuing provision of medical and paramedical care within the French Community. It argued that the large numbers of non-resident students were likely ultimately to reduce the quality of teaching in medical and paramedical courses which require a significant amount of hours of practical training. In the same way, those large numbers may also bring about a shortage of qualified medical personnel throughout the territory which would undermine the system of public health within the French Community, given that after completing their studies, non-resident graduates tend to return to their country of origin to exercise their profession there, whilst the number of resident graduates remains too low in some specialties.¹⁶⁷ The ECJ recognized as legitimate the public health concerns raised by the Belgian Government. However, it provided a detailed framework of analysis that the referring court had to follow in order to determine whether there were genuine risks to the protection of public health and thus, whether the 2006 decree complied with EU law.

First, in assessing those risks, the referring court had to take into consideration “the fact that the link between the training of future health professionals and the objective of maintaining a balanced high-quality medical service open to all is only indirect and the causal relationship less well established than in the case of the link between the objective of public health and the activity of health professionals who are already present on the market.”¹⁶⁸ Second, the ECJ pointed out that, whilst the Member State concerned does not have to wait for the risks to the protection of public health to materialize, it must, however, show that those risks actually exist. Third, the ECJ held that, for

166. *Id.* ¶ 50.

167. *Id.* ¶ 59.

168. *Id.* ¶ 69.

each of the nine courses covered by the 2006 decree, the analysis undertaken by the referring court had to determine the maximum number of students who can be trained at a level which complies with the desired training quality standards, as well as the number of graduates which is necessary to ensure adequate public health services. In determining those numbers, the analysis may not focus on one or the other group of students but it must take into account the number of non-resident students who decide to practice in Belgium, the number of resident students who decide to work in a Member State other than Belgium, and the number of healthcare service providers who may come to work in Belgium.

As to the proportionality of the contested measure, the ECJ held that the referring court had to verify whether a system of numerus clausus for non-resident students can really bring about an increase in the number of graduates ready to ensure the future availability of public health services within the French Community. As to the necessity of the measure, the ECJ ruled that it was for the referring court to ascertain whether there were less restrictive means of encouraging students who study in the French Community to establish themselves there. Finally, the ECJ compelled the referring court to verify whether the system of selection for non-resident students (based on chance rather than on merits) was necessary to attain the objectives pursued.

Three months after the ECJ delivered its ruling, the Belgian Constitutional Court addressed six questions to the Government of the French Community.¹⁶⁹ The purpose of those questions was to obtain the relevant information with a view to implementing the framework of analysis laid down in *Bressol*. After obtaining a reply, the Belgian Constitutional Court examined thoroughly each of the nine programmes referred to in the 2006 decree,¹⁷⁰ and found that only three of them satisfied the requirements laid down by the ECJ, namely Bachelor in physiotherapy and rehabilitation, Bachelor of physiotherapy, and Bachelor in veterinary medicine. In relation

169. Cour Constitutionnelle [CC] [Constitutional Court] decision no 89/21011, May 31, 2011, <http://www.const-court.be> (providing the judgment of the case in French, Dutch, and German), ¶ B.6.

170. *Id.* ¶ B.7.

to the first two, it found that there was a real risk to the protection of public health, as physiotherapy services currently suffer from a significant shortage in the French Community, which might even worsen with the increase in demand for those services and with the incoming retirement of the baby-boomers. Data were also provided showing that the number of new graduates necessary to ensure a high quality of physiotherapy services was of 323 per year.¹⁷¹ As to the suitability of the 2006 decree, the Belgian Constitutional Court found that, in light of statistical data submitted, a reduction in the number of non-resident students had helped to increase the number of resident students.¹⁷² It also observed that between 61 and 70% of nationals of a Member State other than Belgium who have studied physiotherapy in the French Community do not establish themselves in the latter Member State.¹⁷³ As to the necessity of the 2006 decree, the Belgian Constitutional Court examined whether the French Community could have adopted a less restrictive measure, such as giving incentives to non-resident students to stay in Belgium, or encouraging physiotherapists having studied abroad to come to that Member State whilst limiting the number of physiotherapy students. As to the first alternative measure, the Belgian Constitutional Court found that it was not financially viable, since Belgium would suffer from a double burden, namely paying for the studies of non-resident students and for their initial stay in Belgium. As to the second alternative, it ruled that such a radical solution might run the risk of diminishing the quality of healthcare services in the French Community.¹⁷⁴ Finally, owing to the fact that the organization of entry exams for non-residents would impose administrative and financial burdens on the Universities of the

171. *Id.* ¶ B.8.3.

172. *Id.* ¶ B.8.4.2. For example, prior to the adoption of the 2006 decree, there were 880 non-resident students, whilst the number of resident students was 334. By contrast, in the academic year 2008-2009, the situation was reversed: the number of non-resident students was 366, whilst that of resident students was 734. The Belgian Constitutional Court also noted that the number of applications lodged by non-resident students had not stopped increasing: in the academic year 2006-2007, the number of non-resident applicants was 457, whilst in the academic year 2010-2011 it was 611.

173. Cour Constitutionnelle [CC] [Constitutional Court] decision no 89/21011, May 31, 2011, ¶ B.8.5.

174. *Id.* ¶ B.8.8.2.

French Community, the Belgian Constitutional Court considered that the system of selection for non-resident students by the drawing of lots was the less controversial. It also guaranteed social equality between the applicants.¹⁷⁵ As to the programme on veterinary medicine, the Belgian Constitutional Court reached the same conclusion. The only difference was that the risk to the protection of public health did not come from a possible shortage in veterinary services but from the influx of non-resident students which could jeopardize the quality of the education veterinary students receive.¹⁷⁶ In relation to the other six, the French Community had failed to provide sufficient evidence in support of the 2006 decree. Hence, in relation to the latter courses, the 2006 decree was annulled.¹⁷⁷

B. *The Persuasiveness of the ECJ's Legal Reasoning*

It is often argued that the legal reasoning of the ECJ is not elaborated enough; that it is closer to a mathematical formula than to a clear and well articulated statement of reasons; and that, more often than not, some parts of its argumentative discourse are missing, have been skipped or jumped through. For example, Weiler has urged the ECJ to abandon its “Cartesian discourse”, in favor of a more Anglo-Saxon-oriented deliberation.¹⁷⁸ He posits that, “especially in its [c]onstitutional jurisprudence, it is crucial that the [ECJ] demonstrate[s] [...] that national sensibilities were fully taken into account. And it must amply explain and reason its decisions if they are to be not only authoritarian but also authoritative.”¹⁷⁹ Most importantly, Weiler stresses that “the Cartesian style, with its pretence of logical legal reasoning and inevitability of results, is not conducive to a good conversation with national courts.”¹⁸⁰

There is undeniably great merit in those observations, but they fail to grasp the fact that the ECJ operates under the

175 *Id.* ¶ B.8.8.4.

176 *Id.* ¶ B.9.2.1.

177 *Id.* ¶¶ B.11.2-3.

178. Joseph H.H. Weiler, *Epilogue: The Judicial Après Nice*, in *THE EUROPEAN COURT OF JUSTICE* 215, 225 (Gràinne de Búrca et al. eds., 2001).

179. *Id.*

180. *Id.*

principle of collegiality. In light of the latter principle, reaching an outcome based on consensus is of paramount importance for the daily inner-workings of the ECJ. Writing extrajudicially, Schiemann stated that “[c]ompromise is the name of the game.”¹⁸¹ Accordingly, for the sake of consensus, in hard cases the discourse of the ECJ cannot be as profuse as it would be if dissenting opinions were allowed. As Schiemann observes, “the best committee judgments tend by their very nature to be less crisp and coherent than the best individual judgments.”¹⁸² As consensus-building requires to bring on board as many opinions as possible, the argumentative discourse of the ECJ is limited to the very essential. In order to preserve consensus, the ECJ does not take “long jumps” when expounding the rationale underpinning the solution given to novel questions of constitutional importance. On the contrary, the persuasiveness of its argumentative discourse is built up progressively, i.e. “stone-by-stone.” This means that, in order to fully apprehend the approach of the ECJ in an area of EU law, a critical observer should not limit him- or herself to studying the “groundbreaking” case, but he or she should also read the relevant case-law predating as well as postdating that case. This idea is illustrated by the recent developments in the case-law relating to the Treaty provisions on EU citizenship.

Ruiz Zambrano is a landmark case in the law on EU citizenship.¹⁸³ In that case, the ECJ ruled that, even in the absence of a cross-border element, “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”¹⁸⁴ In so doing, the ECJ was sending a clear message: the Treaty provisions on EU citizenship are not limited to being a

181. Schiemann, *Reflections*, *supra* note 3, at 7.

182. *Id.* at 8.

183. *Ruiz Zambrano v. Office National de l'Emploi (ONEm)*, Case C-34/09, [2011] E.C.R. I-1177. See Koen Lenaerts, ‘*Civis Europaeus Sum*’: *From the Cross-border Link to the Status of Citizen of the Union*, in CONSTITUTIONALISING THE EU JUDICIAL SYSTEM ESSAYS IN HONOUR OF PERNILLA LINDH 201 (Pascal Cardonnel et al. eds., 2012); see also Koen Lenaerts, *The Concept of EU Citizenship in the Case Law of the European Court of Justice*, 14 ERA FORUM (2013), available at <http://link.springer.com/article/10.1007/s12027-013-0279-y>.

184. *Ruiz Zambrano*, [2011] E.C.R. I-1177, ¶ 42.

“fifth freedom” which operates under the dynamics of free movement law. The rights attaching to the status of citizen of the Union may be relied upon, even in the absence of a cross-border element, against any national measure causing the deprivation of those rights.

For the case at hand, this meant that Mr. Ruiz Zambrano—a Colombian national staying illegally in Belgium—had, as the father of two Belgian minors, a derivative right to reside and to work in Belgium, in spite of the fact that his children had never left that Member State. The ECJ reasoned that if Mr. Ruiz Zambrano were to leave the territory of the Union because of his irregular immigration status (or because a work permit was not issued to him), his children would be obliged to do the same. As a result, “those citizens of the Union would [. . .] be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.”¹⁸⁵ Interestingly, in contrast to the extensive Opinion of AG Sharpston,¹⁸⁶ the ECJ’s legal reasoning is contained in ten paragraphs,¹⁸⁷ out of which only six concerned Article 20 TFEU.¹⁸⁸ Explaining such an important development in only six paragraphs may, for some, show that the argumentative discourse of the ECJ is laconic, cryptic, and even minimalist. However, the ruling of the ECJ in *Ruiz Zambrano* did not come “out of the blue”, but it draws on the previous ruling of the ECJ in *Rottmann*. As a matter of fact, in the key passage of *Ruiz Zambrano*, i.e. paragraph 42, the ECJ itself refers to *Rottmann*.

185. *Id.* ¶ 44.

186. Opinion of Advocate General Sharpston, *Ruiz Zambrano*, [2011] E.C.R. I-1177. For example, it is worth noting that, unlike the Opinion of AG Sharpston, the ECJ did not address the issue of reverse discrimination. Perhaps, once it held that the situation of Mr. Ruiz Zambrano was not purely internal, the ECJ reasoned that it was no longer necessary to determine the role played by reverse discrimination in the context of EU citizenship.

187. *Ruiz Zambrano*, [2011] E.C.R. I-1177, ¶¶ 36–45.

188. The other four concern the reformulation of the questions referred by the Belgian court, the observations of the parties, and an explanation as to why the CRD does not apply to the situation of Mr. Ruiz Zambrano. *Ruiz Zambrano*, [2011] E.C.R. I-1177, ¶¶ 36–39; Parliament and Council Directive on Citizens’ Free Movement and Residence Rights, *supra* note 33.

1. The Founding Stone

Rottmann thus set the founding stone that paved the way towards the emancipation of EU citizenship from the limits inherent in its free movement origins. The facts of the case are as follows. Whilst being the subject of judicial investigations in Austria, Dr. Rottmann, an Austrian national, moved to Germany in 1995. Two years later, Austria issued an arrest warrant against him. In February 1999, he acquired by naturalization the German nationality, which meant losing simultaneously his Austrian nationality. However, in August 1999, Austria informed Germany of the arrest warrant issued against Dr. Rottmann. Taking the view that by withholding that information Dr. Rottmann had obtained the German nationality by deception, Germany revoked that nationality and, since the original nationality did not revive, Dr. Rottmann became stateless. Dr. Rottmann challenged that decision before the German courts. In essence, the referring court asked the ECJ whether, in a situation such as that of Dr. Rottmann, it was contrary to Article 20 TFEU for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalization and obtained by deception inasmuch as that withdrawal deprived the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless, acquisition of that nationality having caused that person to lose the nationality of his Member State of origin. In the key passage of the judgment, the ECJ held that:

[i]t is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of [EU] law.¹⁸⁹

In reaching that conclusion, the ECJ stressed once again that “citizenship of the Union is intended to be the fundamental

189. *Rottmann v. Bayern*, Case C-135/08, [2010] E.C.R. I-1449, ¶ 42.

status of nationals of the Member States.”¹⁹⁰ With a view to transforming this postulate into a living truth, the ECJ places weight on the status of citizen of the Union *as such* rather than on free movement. In light of *Rottmann*, even in the absence of any physical movement between Member States, national measures which deprive an individual of his or her status of citizen of the Union and thereby of the rights attaching to that status, fall within the scope of application of the Treaty provisions on EU citizenship.

Accordingly, reading *Ruiz Zambrano* in the light of *Rottmann*, one may conclude that the former is actually endorsing and developing the approach followed in the latter: even in the absence of a cross-border element, Article 20 TFEU opposes a national measure which does not formally deprive an individual of the rights attaching to his or her status as an EU citizen but, in practical terms, produces the same effect.

2. The Three Unsolved Questions After *Ruiz Zambrano*

After *Ruiz Zambrano*, three important questions were left open. First, the ECJ did not clarify how in the absence of a cross-border element Articles 20 and 21 TFEU interact. Second, neither did it specify under which circumstances a national measure may “have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”,¹⁹¹ or when does a national measure produce a “deprivation effect”? It was thus left to future cases to decide whether the ECJ would opt for a restrictive or a broad interpretation. On the one hand, in accordance with a restrictive interpretation, a national measure would only produce a “deprivation effect” when it brings about *de jure* or *de facto* the loss of the rights attaching to the status of citizen of the Union. In order to produce such an effect, the

190. *Id.* ¶ 43. In so doing, the ECJ sought to stress the fact that EU citizenship is more than a fifth freedom which protects the rights of free movement of economically inactive citizens. This can be seen by contrasting the Opinion of AG Poiares Maduro in this case with the ruling of the ECJ. Unlike the Advocate General, the ECJ ‘disregard[ed] Dr Rottmann’s] earlier move and look[ed] exclusively to the future effects that withdrawal of German citizenship would have by rendering [Dr] Rottmann stateless.’ See Opinion of Advocate General Sharpston, *Ruiz Zambrano*, [2011] E.C.R. I-1177, ¶ 42.

191. *Ruiz Zambrano*, [2011] E.C.R. I-1177, ¶ 42.

national measure at issue would have to cause more than a mere hindrance on—namely a serious inconvenience to—the rights attaching to the status of citizen of the Union. On the other hand, according to a broad interpretation, a measure producing a “deprivation effect” would be tantamount to a measure which is “liable to hinder or make less attractive the exercise of [rights attaching to the status of citizen of the Union] guaranteed by the Treaty.”¹⁹² Last, but not least, the ECJ had also to clarify whether fundamental rights, specially the right to respect for a person’s private and family life, had to be taken into account for the purposes of determining the existence of a deprivation effect.

Since those three questions were not addressed right away but their resolution was postponed for future cases, did *Ruiz Zambrano* adversely affect the internal legitimacy of the ECJ? In my view, it did not. First, providing an answer to those three questions was not necessary to solve the case at hand. The ruling of the ECJ in *Ruiz Zambrano* gave sufficient guidance to the referring court. It made crystal clear that Mr. Ruiz Zambrano had a derivative right to reside with his children and to have access to the employment market in Belgium. Second, under the preliminary reference procedure laid down in Article 267 TFEU, the ECJ operates as the court of both first and last resort. This means that the ECJ cannot benefit from the “percolation” effect known in relation to the U.S. federal judiciary. There are no EU Circuit Courts of Appeals that could adopt diverging approaches on an important question of EU law, after which the ECJ would settle the matter by undertaking a comparative study of the advantages and disadvantages of each approach. The preliminary reference procedure does not operate in such a way, as there are no EU lower courts that can be used as “laboratories” until the discussion among these courts is mature enough for the ECJ to decide. Hence, in cases such as *Ruiz Zambrano* where the ECJ is drawing the external contours of the Treaty provisions on EU citizenship, it must be sure of the steps taken, of the direction in which it goes, and of the consequences of its decisions. In the procedural setting of preliminary

192. That expression is commonly used by the ECJ in the context of the Treaty provisions on free movement. *See, e.g.*, *Kraus v. Land Baden-Württemberg*, Case C-19/92, [1993] E.C.R. I-1663, ¶ 32.

references, judicial prudence counsels in favor of limiting the argumentative discourse of the ECJ to the questions which are really to be answered in order to solve the case at hand. A concise ruling is then preferable to one that rests on assumptions of an excessively general and abstract nature which are likely to be subsequently reconsidered in view of concrete questions raised by new cases. It would undoubtedly be more damaging to the internal legitimacy of the ECJ to send “mixed signals” than to design an argumentative discourse that, though not as extensive as some would like it to be, appears to be sound and likely to gain momentum and strength as the case-law develops.

3. The “Stone-by-Stone” Approach

As mentioned above, the fact that the argumentative discourse in *Ruiz Zambrano* left important questions unanswered is no less no more than a sign of judicial prudence. It is not that the ECJ decided to avoid answering difficult, complex and politically sensitive questions. On the contrary, it is simply that those questions would only be addressed when the cases at hand required it. This is actually what the ECJ did in *McCarthy* and subsequently in *Dereci*.¹⁹³

i. *McCarthy*: Drawing the Distinction Between the “Impeding Effect” and the “Deprivation Effect”

Mrs. McCarthy, a dual Irish and UK national, was born and had always lived in the UK, i.e. she had never exercised her right of free movement. Mrs. McCarthy married a Jamaican national who lacked leave to remain in the UK in accordance with that Member State’s immigration laws. In order to prevent his deportation, Mrs. McCarthy and her husband applied to the Secretary of State for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. However, their application was rejected on the ground that Mrs. McCarthy was

193. See *McCarthy v. Secretary of State for the Home Dpt.*, Case C-434/09, [2011] E.C.R. I___ (delivered May 5, 2011) (not yet reported), and *Dereci v. Bundesministerium für Inneres*, Case C-256/11, [2011] E.C.R. I___ (delivered Nov. 15, 2011) (not yet reported).

neither economically active nor self-sufficient, as she was a recipient of State benefits. The referring court asked, in essence, whether Article 21 TFEU applied to a situation such as that of Mrs. McCarthy. To this effect, the ECJ held that:

no element of the situation of Mrs. McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of *depriving* her of the genuine enjoyment of the substance of the rights [attaching to] her status as a Union citizen, or of *impeding* the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.¹⁹⁴

Indeed, the failure by UK authorities to take into account Mrs. McCarthy's Irish nationality had in no way affected her right to move and reside freely within the EU.

Next, the ECJ went on to distinguish the facts of the case at hand from those in *Ruiz Zambrano* and *Garcia Avello*. In contrast to *Ruiz Zambrano*, the ECJ observed that the national measure at issue in the main proceedings did not have the effect of obliging Mrs. McCarthy to leave the territory of the Union.¹⁹⁵ As to *Garcia Avello*, the ECJ explained that what mattered in that case was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued.¹⁹⁶ The ECJ thereby in effect ruled that dual nationality is not in itself a sufficient connecting factor with EU law.¹⁹⁷

Accordingly, the ECJ decided that the situation of a person such as Mrs. McCarthy had no factor linking it with any of the situations governed by EU law and was thus confined in all relevant respects within a single Member State.¹⁹⁸

194. *McCarthy*, E.C.R. I ___ (delivered May 5, 2011) (emphasis added).

195. *Id.*

196. *Id.* (referring to *Grunkin & Paul v. Standesamt Niebull*, Case C-353/06, [2008] ECR I-7639, ¶¶ 23–24, 29).

197. *Id.*

198. *Id.* ¶¶ 55–56.

After *McCarthy*, one may argue that a combined reading of Articles 20 and 21 TFEU suggests that in order for a national measure to fall within the scope of EU law, the latter must produce either a “deprivation effect” or an “impeding effect.” The “impeding effect” refers to the traditional line of case-law according to which the application of the Treaty provisions on EU citizenship requires the existence of a cross-border link, not however that the national measure in question causes the loss, in practice, of the rights attaching to the status of citizen of the Union. As *Garcia Avello* shows, it suffices that the national measure at issue is liable to cause “serious inconveniences” to a right attaching to the status of citizen of the Union. By contrast, as *Ruiz Zambrano* made clear, the “deprivation effect” does not depend on the existence of such a link, but focuses on the rights attaching to the status of EU citizen. Or in other words, the “deprivation effect” does not require a cross-border link but requires the national measure to cause more than “serious inconveniences.” That effect requires a *de facto* loss of one of the rights attaching to the status of citizen of the Union.

It follows from the foregoing that the “impeding” and “deprivation” effect are subject to different requirements which are not, however, mutually exclusive: it is still possible for a national measure which applies in a cross-border context to cause the loss of the rights attaching to the status of EU citizen, thus producing both types of effect. Hence, the ECJ opted for a restrictive interpretation when defining a national measure capable of producing a “deprivation effect.”

Furthermore, it is worth noting that the ECJ did not expressly refer to *Zhu and Chen*. However, that silence should not be interpreted as a sign of inconsistency. On the contrary, a close reading of *Zhu and Chen* reveals that the latter judgment is entirely consistent with *McCarthy*. The application of the national measure in question in *Zhu and Chen* would have caused a “deprivation effect”: just like the children of Mr. Ruiz Zambrano, the deportation of Mrs. Chen would have forced her infant child, Catherine Zhu, to leave the territory of the Union. The deportation of her mother would indeed have had “the effect of depriving her of the genuine enjoyment of the substance of the rights attaching to her status as a Union citizen.” Hence, her Irish nationality provided a sufficient

connecting factor with EU law, not because she was an Irish national living in the UK, but owing to the fact that her Irish nationality allowed her to benefit from the rights attaching to her status as an EU citizen. Accordingly, since the national measure at issue caused the *de facto* loss of a right attaching to her status as an EU citizen, namely her right to move, that measure fell within the scope of Article 21 TFEU.¹⁹⁹

Moreover, it is true that in *Ruiz Zambrano*, instead of having recourse to Article 21 TFEU, the ECJ grounded the “deprivation effect” in Article 20 TFEU. However, given that Article 21 TFEU limits itself to giving expression to a right already laid down in Article 20(2)(a) TFEU, one may argue that Article 21 TFEU also opposes a national measure which has “the effect of depriving a Union citizen of the genuine enjoyment of the substance of [the right to move].”²⁰⁰

ii. *Dereci*: the Scope of Application of Fundamental Rights

In *Ruiz Zambrano*, the referring court asked, as a third question, whether fundamental rights, in particular Articles 21, 24 and 34 of the Charter, had to be taken into account for the purposes of determining the compatibility of the national measure in question with the Treaty provisions on EU citizenship. However, since Article 20 TFEU by itself opposed that national measure, there was no need for the ECJ to answer the delicate question concerning fundamental rights. In *McCarthy*, the ECJ implicitly did not take fundamental rights into account for the purposes of determining the existence or absence of a “deprivation effect”, as the deportation of Mr. McCarthy would adversely affect the private and family life of his wife. But this was not conclusive, since the ECJ clearly found that “no element of the situation of Mrs. McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has [either a deprivation or an

199. Parliament and Council Directive on Citizens’ Free Movement and Residence Rights, *supra* note 33, art. 3(1), at 38 (finding that today, an EU citizen in the same situation as that of Catherine Zhu would fall within the scope of Article 3(1) of Directive 2004/38, as that person, unlike Ms. McCarthy, would only have the Irish nationality. Hence, he or she would be an Irish national challenging an administrative decision adopted by UK authorities).

200. *Ruiz Zambrano*, [2011] E.C.R. I-1177, ¶ 42.

impeding effect].”²⁰¹ By contrast, in *Dereci*, the ECJ considered that the time was right to address that question directly.

The facts of that case are as follows. Just as Mr. Ruiz Zambrano, Mr. Dereci is a third-country national (of Turkish nationality) residing illegally in a Member State of which his children are nationals, namely Austria.²⁰² Just as the children of Mr. Ruiz Zambrano, those of Mr. Dereci are still minors and have never exercised their right to free movement.²⁰³ After recalling its main findings in *Ruiz Zambrano*, the ECJ clarified what is to be understood by a national measure producing a “deprivation effect.” Such effect may only take place where “the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.”²⁰⁴ Consequently, the impact that the deportation of family members of an EU citizen who do not have the nationality of a Member State may have on the family life or on the economic well-being of that EU citizen “is not sufficient in itself to support the view that [the EU] citizen [concerned] will be forced to leave [the] territory [of the EU] if such a right is not granted.”²⁰⁵ Put simply, fundamental rights are not taken into account for the purposes of determining the existence or absence of a “deprivation effect”, i.e. they are not relevant for the purposes of determining the scope of application of the Treaty provisions on EU citizenship in situations such as those of Mr. Ruiz Zambrano, Ms. McCarthy, or Mr. Dereci. Otherwise, the ECJ would be relying on fundamental rights in order to expand the substantive scope of application of EU law beyond the competences conferred on the EU, contrary to Articles 6(1) TEU and 51(2) of the Charter. Only after having established that the national measure in question produces, in the factual circumstances of the case, a “deprivation effect” may the restriction brought about by that measure be examined in light of the Charter, in particular Article 7 thereof. Conversely, if the national measure in question does not produce such an effect, then that measure does not fall

201. *McCarthy*, [2011] E.C.R. I____ (delivered May 5, 2011).

202. *Dereci*, [2011] E.C.R. I____ (delivered Nov. 15, 2011), ¶ 24.

203. *Id.*

204. *Id.* ¶ 66.

205. *Id.* ¶ 68.

within the substantive scope of application of EU law. This does not mean, however, that the fundamental rights of the persons concerned are deprived of any protection. As the ECJ clearly stated, in such cases, it is for the national courts and, as the case may be, for the ECtHR to judicially enforce Article 8 of the ECHR.²⁰⁶

iii. *Iida*: Purely Hypothetical Impediments to Free Movement

In the aftermath of *McCarthy* and *Dereci*, some scholars criticized the fact that the ECJ failed to take into account “the impediments to prospective movements.”²⁰⁷ They posited that the ECJ itself appears to acknowledge in paragraph 49 of the *McCarthy* judgment that the traditional line of case-law applied to the situation of Mrs. McCarthy. Contrary to the views of the ECJ, the deportation of Mr. McCarthy was liable to “deter” or “dissuade” Mrs. McCarthy from exercising her right of free movement. They argued, in light of *Carpenter*,²⁰⁸ that as the mother of three children and the primary carer of her disabled son, Mrs. McCarthy would have no prospects of exercising her right to move if her husband were deported.²⁰⁹ However, those criticisms appear to be grounded in a set of facts which differ from those described by the referring court.²¹⁰ The factual

206. *Id.*

207. See, e.g., Niamh Nic Shuibhne, *Case Note on McCarthy and Dereci*, 49 COMMON MKT. L. REV. 349, 366, 377 (2012) (holding that the ECJ failed to examine “prospective movement rights”).

208. See *Carpenter v. Sec’y of State for the Home Dep’t*, Case C-60/00, [2002] E.C.R. I-6279; see also *Jia v. Migrationsverket*, Case C-1/05, [2007] E.C.R. I-1.

209. Shuibhne, *supra* note 207, at 370.

210. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Oct. 26, 2012, 2012 O.J. C 326 [hereinafter TFEU] (ascribing that it is for the referring court to describe the factual scenario of the case at hand. In that regard, the ECJ has consistently held that Article 267 TFEU “is based on a clear separation of functions between the national courts and the [ECJ], the latter is empowered only to give rulings on the interpretation or the validity of [an EU] provision on the basis of the facts which the national court puts before it.”); see *Ochschläger v. Hauptzollamt Emmerich*, Case 104/77, [1978] E.C.R. 791, ¶ 4; see *World Wildlife Fund (WWF) v. Autonome Provinz Bozen*, Case C-435/97, [1999] E.C.R. I-5613, ¶ 31 (depicting how logically, this means that factual lacunas are not for the ECJ to fill. Moreover, at the hearing, parties may, if they deem it necessary, complete the factual scenario described by the referring court); see also Dimitry Kochenov & Sir Richard Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 37 EUR. L. REV. 369, 389–90 (2012) (stating the argument that the ECJ “closed its eyes to the essential elements of the McCarthy

scenario of the case, as described by the ECJ and the Advocate General, does not suggest that Mrs. McCarthy sought to exercise her right to move. Thus, in my view, *Carpenter* is not the appropriate comparator. Of course, had the referring court stated that Mrs. McCarthy envisaged to work in (or to move to) a different Member State and that Mr. McCarthy would be in charge of taking care of the children in her absence, then the ECJ would have undoubtedly followed the same rationale as that endorsed in *Carpenter*. However, as mentioned above, the prospects of Mrs. McCarthy exercising her right to move were not mentioned at all by the referring court. Thus, in *McCarthy*, there were no “prospective impediments to the right to move.” Those impediments were, if anything, purely hypothetical and as such, fell outside the scope of the Treaty provisions on EU citizenship.²¹¹ This was made clear by the ECJ in *Iida*.²¹²

In that case, Mr. Iida, a third-country national residing legally in Germany, sought to obtain a residence permit as the spouse and father of two EU citizens. The purpose behind such a request was to improve his immigration status as his residence permit was to expire on 2 November 2012, subsequent extension being discretionary. However, German authorities rejected his application on the ground that his spouse and daughter, two German nationals, no longer lived with him in Germany but had moved to Austria. Before determining whether the Treaty provisions on EU citizenship applied to a situation such as that of Mr. Iida, the ECJ examined whether Directive 2003/109²¹³ and the CRD were applicable to the case at hand.

family situation which were able to shed some light on what was actually going on. Three children, one of them severely disabled and in need of constant care, went unreported,” are not accounting for a proper functioning of the preliminary reference procedure. In addition, even assuming that in the factual setting of the case at hand, a real issue of protecting the fundamental right to family life of the persons concerned arises, this does not automatically turn that issue into a matter of EU law. This will only be so if a substantive nexus to the latter law is present, such as the “impeding effect” or the “deprivation effect” of the national measure in question).

211. See Stanislas Adam & Peter Van Elslande, *Citizenship Rights and the Federal Balance Between the European Union and its Member States: Comment on Dereci*, 37 *EUR. L. REV.* 176, 183 (2012).

212. *Iida*, Case C-40/11, [2012] E.C.R. I ____ (delivered 8 November 2012) (not yet reported).

213. Council Directive 2003/109/EC, Concerning the Status of Third-country Nationals Who Are Long-term Residents, 2004 O.J. L 16/44 [hereinafter Long Term Residents Directive].

At the outset, the ECJ noted that Mr. Iida was, in principle, entitled to a residence permit as provided for by Directive 2003/109.²¹⁴ However, since Mr. Iida had voluntarily withdrawn his application, a residence permit could not be granted on the basis of that Directive.²¹⁵ As to the CRD, its provisions apply to “beneficiaries” who are defined as “all [EU] citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2(2) who accompany or join them.”²¹⁶ In this regard, the ECJ examined whether Mr. Iida could be regarded as a “family member” for the purposes of Article 2(2) thereof. Regarding direct relatives in the ascending line, the CRD limits the concept of “family members” to those who are dependent on the EU citizen concerned. For Mr. Iida, this meant that he could not be considered to be a family member of his daughter within the meaning of that provision, as he did not depend on her.²¹⁷ In addition, whilst qualifying as a “family member” of his spouse, Mr. Iida could not be regarded as a “beneficiary” for the purposes of the CRD owing to the fact that “Article 3(1) [thereof] requires that the family member of the [EU] citizen moving to or residing in a Member State other than that of which [she] is a national should accompany or join [her].”²¹⁸ Stated simply, in order to benefit from the provisions of the CRD, Mr. Iida should have moved with his wife to Austria. Thus, neither Directive 2003/109 nor the CRD was applicable to the case at hand.

Regarding the Treaty provisions on EU citizenship, the ECJ went on to examine whether the refusal to grant Mr. Iida a residence permit could be liable to deny his spouse and daughter “the genuine enjoyment of the substance of the rights

214. *Id.* (explaining how, first, the ECJ found that none of the cases mentioned in Article 3(2) of Directive 2003/109 was applicable to the case at hand. Second, Mr. Iida was a third-country national who had resided legally and continuously in Germany for five years prior to the submission of the relevant application. Third, because of his employment, he was able to provide for himself and had sickness insurance in respect of all risks normally covered in Germany. Lastly, he was not a threat to public policy or public security); *see also Iida*, [2012] E.C.R. I____ (delivered 8 Nov. 2012).

215. *Iida*, [2012] E.C.R. I____ (delivered 8 Nov. 2012).

216. *Id.*

217. *Id.*

218. *Id.*

associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States.”²¹⁹ The ECJ replied in the negative. First, it observed that, unlike the situation of Mr. Ruiz Zambrano, Mr. Iida did not seek to obtain a residence permit in the Member State where his spouse and daughter lived. Second, the refusal of German authorities to grant a right of residence under EU law to Mr. Iida had not discouraged his spouse or daughter from exercising their right of free movement, as the fact that they had moved from Germany to Austria demonstrates. Finally, the ECJ found that Mr. Iida enjoyed a right of residence in Germany which was, *prima facie*, renewable and, in any event, he was entitled to a residence permit as a long-term resident within the meaning of Directive 2003/109. Most importantly, the ECJ recalled that purely hypothetical prospects of exercising the right of free movement do not fall within the scope of the Treaty provisions on EU citizenship. Accordingly, “[t]he same applies to purely hypothetical prospects of that right being obstructed.”²²⁰

Furthermore, *Iida* confirmed the approach developed by the ECJ in *Dereci*. The compatibility of the national legislation at issue with fundamental rights could not be examined as a matter of EU law, given that, as applied to Mr. Iida, such legislation was not intended to implement a provision of EU law. Indeed, as mentioned above, neither the Treaty provisions on EU citizenship nor Directive 2003/109 nor the CRD were applicable to the case at hand.

iv. *O & S*: Exploring the Notion of Dependency

O & S concerned two joined cases with a similar factual background. The facts of the first case are as follows. In 2008, Mr. O, a national of Côte d’Ivoire, married Ms S, a national of Ghana, who held a residence permit and was the mother of an EU citizen of minor age from a previous marriage. In 2009, Mr. O and Ms. S had a child of Ghanaian nationality in respect of whom they enjoyed joint custody. Mr. O applied for a residence permit in Finland on the basis of marriage. However,

219. *Id.* (referring to *McCarthy*, [2011] E.C.R. I____ (delivered May 5, 2011).

220. *Iida*, [2012] E.C.R. I____ (delivered Nov. 8, 2012), ¶ 77.

his application was denied by Finnish authorities on the ground that he did not have sufficient means to provide for himself. Mr. O and Ms. S challenged that decision before the Finnish courts.

As to the second case, Mr. M and Ms. L, two Algerian nationals, got married in 2006. Just like Ms. S, Ms. L held a residence permit and was the mother of an EU citizen of minor age from a previous marriage. In 2007, Mr. M and Ms. L had a child of Algerian nationality in respect of whom they enjoyed joint custody. Mr. M applied for asylum, but his application was unsuccessful. As a result, he was returned to his country of origin in 2006. Ms. L then applied for her spouse to be granted a residence permit in Finland on the basis of marriage. However, Finnish authorities rejected her application on the ground that Mr. M did not have sufficient means to provide for himself. She then challenged that decision before the Finnish courts.

Accordingly, the referring court asked the ECJ “whether the [Treaty] provisions [. . .] on citizenship [. . .] must be interpreted as precluding a Member State from refusing to grant a third-country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third-country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third-country national.”²²¹ It follows from the foregoing that the factual scenario in *O & S* differs significantly from that in *Ruiz Zambrano*. Unlike Mr. Ruiz Zambrano, neither Mr. O nor Mr. M was respectively the biological father of the EU citizen concerned. Nor did they have the custody of the child.

At the outset, the ECJ observed that the CRD was not applicable to the case at hand, since the EU citizens concerned, both of whom were minors, had never made use of their right of free movement and had always resided in the Member State of which they were nationals, namely Finland.²²² Next, the ECJ

221. *O & Maahanmuuttovirasto v. L*, Joined Cases C-356-57/11, [2012] E.C.R. I___ (delivered Dec. 6, 2012) (not yet reported).

222. *Id.*

went on to examine whether the Treaty provisions on EU citizenship were applicable to the case at hand, i.e. whether the national measure in question produced a “deprivation effect.” In this regard, after recalling its main findings in *Ruiz Zambrano* and *Dereci*, the ECJ provided new guidance relating to the concept of “dependency”, which was implicitly taken into account in those two judgments for the purposes of determining the existence (or absence) of a “deprivation effect.” To begin with, the ECJ stated that the question whether a national measure may produce such an effect must be examined by reference to both the law and the facts of the case at hand. Given that both Ms. S and Ms. L held permanent residence permits in Finland, the ECJ noted that, “in law, there [was] no obligation either for them or for the [EU] citizens dependent on them to leave the territory of that Member State or of the European Union as a whole.”²²³ Regarding the facts of the case, “it is the relationship of dependency between the [EU] citizen who is a minor and the third-country national who is refused a right of residence”, the ECJ wrote, “that is liable to jeopardize the effectiveness of [EU] citizenship, since it is that dependency that would lead to the [EU] citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal.”²²⁴ That dependency can be of a legal, financial or emotional nature.²²⁵ In addition, the ECJ rejected that the new approach set out in *Ruiz Zambrano* was limited to situations in which there is a blood relationship between the third-country national who seeks to obtain a residence permit and the EU citizen concerned.²²⁶ As to the situation of Mr. O and Mr. M, the ECJ held, in light of the information available to it and subject to verification by the referring court, that there was no such dependency.²²⁷ Accordingly, the Treaty provisions on EU citizenship did not preclude Finland from refusing them a residence permit.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

However, the ECJ noted that Directive 2003/86 was, in principle, applicable to the case at hand.²²⁸ As Ms. S and Ms. L were two third-country nationals who held residence permits in Finland, they could be recognized as “sponsors” within the meaning of Article 2(c) of Directive 2003/86 and apply for family reunification. In this regard, the ECJ held that, subject to compliance with the conditions laid down in Chapter IV of Directive 2003/86—notably, Article 7(1) (c) thereof which states that the sponsor is required to have stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to social assistance—, Finland had the “positive obligation” to authorize Mr. O and Mr. M to join their spouses.²²⁹ Whilst in implementing Article 7 (1) (c) of Directive 2003/86 Member States enjoy a “margin of appreciation”, such a margin “must [. . .] not be used by them in a manner which would undermine the objective and the effectiveness of that [D]irective.”²³⁰ Nor may it be exercised “in such a manner that its application would disregard the fundamental rights set out in [the] provisions of the Charter,”²³¹ notably Articles 7 and 24 (2) and (3) thereof. This meant, in essence, that the Member States are required to strike a balance between the interests of the children concerned and the promotion of family life, and the margin of appreciation enjoyed by national authorities.²³²

O & S is an interesting development in the case-law of the ECJ which has two direct implications for the law on EU citizenship. First, it provides further guidance as to what is to be understood by a national measure producing a “deprivation effect.” Such a national measure must, *either in law or in fact*, force the EU citizen concerned to leave the territory of the EU as a whole. Second, unlike the national measure at issue in *Iida*, in *O & S* the refusal to grant a residence permit to Mr. S and Mr. M was covered by secondary EU legislation, namely by Directive 2003/86. This meant that the compatibility of those

228. Council Directive 2003/86/EC on the Right to Family Reunification, 2003 O.J. L 251/12.

229. *O*, [2012] E.C.R. I ____.

230. *Id.*

231. *Id.*

232. *Id.*

measures with fundamental rights could be examined in light of the Charter. Stated differently, a national measure which neither falls within the scope of the CRD nor produces a “deprivation effect” but implements other EU measures must pass muster under the Charter.

4. Concluding Remarks

A joint reading of *Rottmann*, *Ruiz Zambrano*, *McCarthy*, *Dereci*, *Iida* and *O & S* show that the legal reasoning of the ECJ is far from being laconic or cryptic. The sequence of those cases demonstrates that the new approach set out in *Ruiz Zambrano* has been built up progressively, i.e. on a “stone-by-stone” basis. Indeed, in light of *Dereci*, the new approach only operates under exceptional circumstances, namely in so far as the contested national measure forces EU citizens to leave the territory of the Union, depriving them of “the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”²³³

If *Ruiz Zambrano* is examined in a vacuum, the discourse of the ECJ in that case was arguably, as Weiler suggests, too Cartesian. However, if those six cases are examined together, the same does not hold true. On the contrary, the way in which the ECJ built up its legal reasoning is rather similar to the way a U.S. common-law court operates. As Schiemann notes, “[t]he ECJ started by following the French tradition but has moved a certain way in the English direction.”²³⁴ Indeed, *Rottmann*, *Ruiz Zambrano*, *McCarthy*, *Dereci*, *Iida* and *O & S* show that “the life of the law [on EU citizenship] has not been logic: it has been experience.”²³⁵ At the outset, the ECJ decided not to answer all the important questions to which the new approach set out in *Ruiz Zambrano* would give rise. Instead, it preferred, for the sake of consensus and as a token of judicial prudence, to answer those questions as and when new cases arrived. The experience gained through the deliberations in *Rottmann* shed light on how to address the issues raised in *Ruiz Zambrano*, in the same way as

233. *Ruiz Zambrano*, [2011] E.C.R. I-1177, ¶ 42.

234. Schiemann, *Reflections*, *supra* note 3, at 4.

235. OLIVER W. HOLMES, JR., *COMMON LAW* 3 (2009).

the latter case did to address the issues raised in *McCarthy*, and then in *Dereci*, *Iida* and *O&S* and in cases to come.²³⁶

Moreover, the “stone-by-stone” approach followed by the ECJ is not only the right way of building a solid edifice to the rights attaching to the status of citizen of the Union, but it is also entirely consistent with the dynamics of Article 267 TFEU. As mentioned in the previous section, the internal legitimacy of the ECJ requires the latter to honor the role played by national courts during the preliminary reference procedure. The inter-judicial dialogue that takes place under Article 267 TFEU is deeply intertwined with the way in which the ECJ builds up its argumentative discourse. Accordingly, if the ECJ were to follow a model based on “expository justice” where it would provide exhaustive, albeit abstract, answers based on logic to the points of law raised by the questions referred, it would actually prevent national courts from engaging in a constructive dialogue. When putting forward its legal discourse, the ECJ must strike the appropriate balance between different levels of specificity and generality in its reasoning. It must not be laconic and cryptic, or too abstract, since this would deter national courts from making a reference. In essence, the preliminary reference procedure laid down in Article 267 TFEU being a mechanism of dialogue between courts, the quality of the order for reference will largely determine the drafting style of the answer given in the ECJ’s ruling. The latter must indeed constitute, first and foremost, a real contribution to the solution of the case pending before the referring court. Also for this reason, it is best for the ECJ in hard cases of constitutional importance to follow an incremental approach.

CONCLUSION

It is widely accepted that “hard cases make bad law”, and yet, in my view, cases which put courts at distress, such as those examined in the present contribution, provide good evidence from which one may determine whether the judiciary enjoys

236. See, e.g., *Alopka & Others v. Ministre du Travail, de l’Emploi et de l’Immigration*, Case C-86/12 (pending case) and *Ymeraga & Others v. Minister for Labour, Employment and Immigration*, Case C-87/12 (pending case).

legitimacy. Indeed, it is in complex cases that courts often prove what they are (and are not) capable of.

First, cases such as *Vatsouras* and *Sturgeon* demonstrate that, when the validity of secondary EU law is called into question, the ECJ strives to uphold the principle of separation of powers. However, this task is not an easy one as that principle is subject to internal tensions. On the one hand, the ECJ is prevented from rewriting the contested act of secondary EU law. On the other hand, the ECJ must try to avoid inter-institutional conflicts which could arise if the contested act is annulled. Hence, as a means of reconciling those two tensions, the ECJ has recourse to “reconciliatory interpretation”, according to which secondary EU legislation must be interpreted in light of primary EU law in so far as the limit of “*contra legem*” is not overstepped. However, reconciliatory interpretation, as *Test-Achats* reveals, does not take place where the challenged provision of an act of secondary EU law is inconsistent with the objectives pursued by that act. In such a case, in order to enhance the objectives pursued by the EU legislator, the principle of separation of powers would actually advise in favor of eliminating such inconsistencies.

Second, cases such as *Omega* and *Sayn-Wittgenstein* show that, where the core values of the Union are not in danger, the ECJ favors “value diversity.” If, in order to protect a constitutional principle or a legitimate interest (such as public health), a Member State lays down an obstacle to free movement which establishes a higher level of protection than that of other Member States, such a Member State is not acting contrary to the principle of proportionality. However, in order to determine that the Member State is truly pursuing that objective, the ECJ will check whether the contested national measure and the national legislation as a whole are free from contradictions. In addition, as *Mesopotamia Broadcast* illustrates, when interpreting EU harmonizing measures, the ECJ does take into consideration national interests. It will strive to interpret EU harmonizing measures in a way that accommodates the interests pursued at both national and EU level.

Third, cases such as *Bressol* show that the ECJ is committed to respecting the jurisdiction of national courts, in the same way as the former expects the latter to respect its own. Since in *Bressol*, the compatibility of the contested legislation depended

on data that could only be provided at national level, the ECJ decided to limit itself to laying down a framework of analysis which the Belgian Constitutional Court had to apply. This allocation of judicial functions demonstrates that the preliminary reference procedure operates at its best when it follows “comity”: on the one hand, the Belgian Constitutional Court decided to engage in a dialogue with the ECJ to discuss a sensitive national matter, namely the means the French Community had at its disposal to counter the adverse impact that the exercise of free movement rights by students had on its system of higher education. On the other hand, the reply given by the ECJ must be interpreted as a sign of trust in the referring court: it was ultimately for the latter, in applying the guidelines laid down by the ECJ, to examine the compatibility of the contested legislation with EU law.

Last, but not least, in hard cases of constitutional importance, the legal reasoning of the ECJ follows a “stone-by-stone” approach. This means that, in order to guarantee consensus and as a token of judicial prudence, the argumentative discourse of the ECJ is limited to answering the legal questions that are necessary to solve the case at hand. As a joint reading of *Rottmann*, *Ruiz Zambrano*, *McCarthy*, *Dereci*, *Ida* and *O&S* demonstrate, the incremental approach followed by the ECJ guarantees a solid and sound evolution of the case-law that allows room for the national courts to engage in a constructive dialogue.

The role of the ECJ is that of a constitutional umpire operating in a multilayered system of governance. “Saying what the law is” often amounts to a risky venture, but one that cannot be avoided if the ECJ is to secure its external and internal legitimacy in pursuing the task conferred on it in Article 19 TEU.