Vertical Precedent at the Court of Justice of the European Union: When Push Comes to Shove

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INTRODUCTION

Much has been written about the practice of the Court of Justice of the European Union as regards the precedential value of its own decisions. Indeed, the volume of commentary on the subject appears to stand in inverse proportion to the number and pertinence of the indications which may be garnered from the Treaty or the judgments of the Court of Justice. Happily, while an Advocate General, Nial Fennelly made a significant contribution to that commentary in his Opinion in Merck v Primecrown, where he was proposing...
that the Court radically modify its long-established interpretation of the impact of patents on the free movement of goods. He noted that the supreme courts of the two common law jurisdictions of the Union,4 though wedded to the notion of legally binding precedent or ‘stare decisis’, as ‘the normal, indeed almost universal, procedure’, were prepared to depart from an earlier ruling

where it appears to be clearly wrong ... However desirable certainty, stability and predictability of law may be, they cannot ... justify a court of ultimate resort in giving a judgment which they are convinced, for compelling reasons, is erroneous [or where] too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. 5

It was obvious, he opined, that, though not bound as a matter of principle, ‘the Court should, as a matter of practice, follow its previous case-law except where there are strong reasons for not doing.’ He based this conclusion on the grounds that many important aspects of Union law were ‘judge-made’ and that the preliminary ruling procedure sought to ensure the uniform application of Union law. After reviewing a handful of judgments where the Court of Justice had openly overruled, or at least materially qualified, the scope of its previous rulings, the Advocate General suggested that the Court would depart from earlier judgments ‘which may have been based on an erroneous application of a fundamental principle of [Union] law, which interpret a Treaty provision as applicable to situations which are properly outside its scope, or which result in an imbalance between differing principles, such as the free movement of goods and the protection of intellectual and commercial property’.6

The question which Advocate General Fennelly so succinctly examined may be dubbed ‘horizontal precedent’, that is, the extent to which a court is obliged, as a matter of law, to follow its own previous judgments. On the other hand, the matter of ‘vertical precedent’ in Union law, that is, the extent to which the lower courts of the Union judicature, the General Court and Civil Service Tribunal, are obliged to follow judgments of their respective higher court(s) has been largely ignored; a recent, and otherwise helpful, study consigned the subject to a single footnote providing references to two of the three relevant provisions of the Court’s Statute.7 Yet such an obligation, if it existed, would have even more impact on the outcome of the decisions of these courts than would a doctrine of binding precedent for the Court of Justice. As a court of final resort, the ECJ can, in effect, decide in a given case whether or not to follow its own previous

Stephar to the Unitary Patent Regulation and Court: Reflections on the incremental development of an EU patent law and legal system’.  

4 For convenience, the term ‘Union’ and ‘General Court’ are used throughout in preference to ‘Community’ and ‘Court of First Instance’ in defiance of chronology, except where confusion would otherwise arise.
5 Merck v Primecrown (n 3), paras 138–146, pp 6343–6347.
6 His analysis has in turn been taken up by at least one well-advised academic commentator: A Arnull, The European Union and its Court of Justice 2nd ed (Oxford, OUP, 2006), 630–1.
7 Tridimas (n 2), 307, fn 4. The CJEU Statute, which applies to all three courts, is set out at Protocol No 3 to the TEU and TFEU; an up-to-date version is available on the Court’s website, http://curia.europa.eu.
judgments; in theory, it could even decide, like the House of Lords did in the century up to 1966, that it would be bound strictly to follow its own case law, however erroneous it considered that case law to be.8

The possible application of a doctrine of vertical binding precedent in the Union legal order is one of fundamental, not to say existential, importance for the courts concerned. It affects the court’s conception of its own role. Where bound by a doctrine of stare decisis, a major part of the court’s role in deciding a case is to determine whether or not there is a binding precedent and, if so, whether there is any reason which would justify not following it. A court not so bound must, on the other hand, determine the law, and, though it may draw inspiration from past judgments, may nonetheless not simply base its own decision entirely on the authority of such judgments. The application of some form of strict stare decisis would also have an impact on the expectations of the parties which appear before the court; obviously, where there already exists an established precedent, the chances of success of a potential litigant depend, in large part, on whether or not that court is obliged to follow such a precedent.

The question arises for consideration in the first place because of the general ethos of almost unquestioning respect for the decisions of the higher courts of the Union, which in turn reflects the clearly hierarchical structure of the Union judicature, with an appeal on a point of law lying to the Court of Justice from a decision of the General Court, and to the General Court in respect of decisions of the Civil Service Tribunal. In some jurisdictions at least the adoption of a doctrine of vertical precedent appears to have come about largely because of the establishment of different layers of jurisdiction in a judicial pyramid.9 The fact that the judgments of the Court of Justice have a certain precedential value for the courts of the Member States could give support to the idea of an equivalent binding effect on the lower courts of the Union. In a major comparative study of the subject of precedent, one author suggests that the ECJ ‘appears to be developing, at least in a de facto sense, a doctrine of stare decisis, although employing a continental methodology and style that focuses on the rules and principles articulated in the cases, rather than on the cases themselves in their factual settings’.10 When authorising the Union legislature to set up specialised courts, the Treaty of Nice also introduced an express obligation on the Courts of the Union to respect the ‘unity [and] consistency of Union law’ and a special procedure to review compliance with this obligation. The question of the binding character of the case law of the higher Union courts arises in this context too, particularly as the Court of Justice itself regularly refers to the notion of a judicial ‘precedent’.

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8 See Beamish v Beamish (1859–61) 9 HLC 274, and London Street Tramways v London County Council [1898] AC 375; the 1966 Practice Statement reversing this position was itself unprecedented ([1966] 3 All ER 77).


10 JJ Barceló (n 2) 433; see also Cristina, text to n 64 below.
WHAT WERE THE TREATY AUTHORS THINKING OF?

The ‘Original Understanding’: Approaches to Precedent in (some of) the Founding Member States

Unlike the Statute of the International Court of Justice (ICJ), the Union Treaties (and the Community Treaties before them) do not provide any indication of the sources of law which the Court of Justice should apply. In particular, the Treaty authors did not feel obliged to stipulate that ‘[t]he decision of the Court has no binding force except between the parties and in respect of that particular case’, nor that, subject to this proviso, ‘judicial decisions’ could constitute a ‘subsidiary means for the determination of rules of law’. Clearly the Statute had to cater for the participation in the work of the ICJ of judges and lawyers from States Parties from the common law tradition, for whom stare decisis is an article of faith, as well as those from other jurisdictions who reject so binding a form of precedent.

Given the civil law traditions of the original six Member States, such a clarification in the Union Treaties would in any case have been supererogatory. The flavour of French thinking on case law (‘jurisprudence’), generally considered to have exercised a preponderant influence in the design of the first European Court of Justice, may be gleaned from Robespierre’s rallying cry: ‘[t]he word “jurisprudence” must be expurgated from the French language; in a country which has a Constitution and legislation, jurisprudence is nothing more than law-making.’ This view was reflected in more moderate terms in the Code Civil, Article 5 of which prohibits judges – the prohibition is directed at the judges individually, not just the courts – from providing general or abstract rulings in deciding the cases before them. As a result, ‘judicial decisions are not a source of law in France. Strictly speaking, they never create legal rules … It is never enough … simply to refer to a prior judicial decision’. This mistrust of precedent applied as much to judgments of the highest courts for civil, criminal and administrative matters, the Cour de cassation and the Conseil d’Etat, as to the lower courts amongst themselves. The lower courts are thus free not to follow judgments of the higher courts, though of course there is always a risk of their decisions being overturned on appeal:

Because higher court precedents do not bind, lower courts can offer ‘legitimate resistance’ to them. The refusal of lower courts to follow a ruling of the Cour de cassation has sometimes led the latter to reconsider its views and to come up with a different solution.

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11 Respectively Articles 59 and 38(1)(d) ICJ Statute.
12 The European Convention on Human Rights, which also preceded the first European Community Treaty, restricts the jurisdiction of the Court it established to ‘matters concerning the interpretation and application of the Convention and the Protocols thereto’ (Art 32).
13 Speech to the Assemblée constituante, 18 November 1790 (author’s translation).
Similarly in Germany, ‘[j]udicial decisions are authoritative as interpretations of the law, but not authorities in their own right. Judges are free to depart from precedents when circumstances change or [when] they think it right to do so’. One lower court famously refused on 160 occasions to follow an interpretation of asylum law given by a superior administrative court, though, in Germany as elsewhere, ‘precedents carry substantial weight’. Similarly ‘[i]n Italy, there are no generally recognized rationales for treating precedents as formally binding, since the precedent is not ascribed any formal binding force’.

While it is difficult to draw very reliable conclusions from what the Treaties do not say, it is clear that the imposition of a system of binding precedent on the Union judicature would be a significant departure both from the practice followed in the Member States in their own legal orders, and from international practice. At the very least, the Treaty authors might have been expected to provide some indication that this was indeed their intention.

**Treaty Indications: The Shared Duty to Ensure ‘the Law is Observed’**

The principal indication in the Union Treaties, which has remained essentially unchanged since Article 31 ECSC, is currently set out in the second sentence of the first sub-paragraph of Article 19(1) TEU. This provides that the Court ‘shall ensure that in the interpretation and application of the Treaties the law is observed.’ It would be difficult to overstate the importance of this provision for the development of the Union’s legal order over the years. It is, in effect, the Treaty foundation for the bold jurisprudence of the Court of Justice which defines the relationship between the Union and the national legal orders, on which the Treaty was, if not actually silent, at least far from forthcoming. Under the powers vested in it by this provision, the Court has interpreted ‘the law’ as embracing inarticulate structural imperatives, such as the direct effect of Treaty provisions, the liability in damages of Member States for their failure properly to apply Union law and, most importantly, the primacy of Union law. In turn, this admonition against judicial passivity led the Court to develop the material law of the common market at a time when the legislature was unwilling or unable to carry out its policy-making duties under the Treaty. On a few rare occasions, the Court relied on this statement of its general duty in order to escape the limits on the wording of the jurisdictional clauses of the Treaty, in pursuit of a higher legal ideal such as the rule of law or the intended balance in decisional powers between the Union institutions. The use of the term ‘the law’ also gave the Court the springboard to develop a case law in favour of legal protection of fundamental rights which the Treaty had not foreseen in terms.

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16 Ibid 140.
17 Bell (n 15) 141.
18 M Taruffo, ‘Precedent in Italy’ in DN MacCormick and R Summers (n 2) 141, 165.
19 Later Art 164 EEC and latterly Art 220, first para, EC.
20 The literature on the role of the Court in the development of the Union’s legal order is vast, and it would be invidious to select one or a few references; these may be found in any case in the standard textbooks on EU law.
For present purposes, it is important to note that under Article 19(1) TEU the duty and power to ensure that ‘the law is observed’ is conferred equally and indivisibly on all three levels of Union court. Indeed, in this regard the old Article 220 EC was somewhat more specific, in conferring the duty and power on the ECJ and the Court of First Instance ‘each within its jurisdiction’. In other words, Article 19(1) TEU did not, as conceivably it might have, confer this duty on the sole Court of Justice, and confer a lesser duty and power on the lower courts; in particular it did not impose on them a specific obligation to comply with rulings of the higher court(s). Moreover, according to the 1988 Council decision establishing the then Court of First Instance, the new court was charged with exercising ‘the jurisdiction conferred on the Court of Justice by the ‘Treaties’, implying that it was to operate within its areas of competence under the same conditions as regards precedent as the Court of Justice.

Structural Considerations

As noted above, the Union judicature now comprises three levels of jurisdiction, in line with the judicatures of many Member States: the Court of Justice, the General Court and specialised courts which are ‘attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas’. To date, only one such specialised court, the Civil Service Tribunal, has been established. An appeal is available from ‘decisions’ – including orders bringing a case to an end – of the General Court to the Court of Justice, and from the Civil Service Tribunal to the General Court, in each case ‘on points of law only’. The grounds on which such an appeal may succeed are defined as a ‘lack of competence … a breach of procedure before [the Court] which adversely affects the interests of the applicant as well as the infringement of Union law’ by the lower court.

The CJEU Statute expressly requires the lower court to comply with a decision of the higher court in three situations. Firstly, where the Court of Justice finds that an action which has been lodged with its Registrar falls within the jurisdiction of the General Court and refers the action to that court, the General Court ‘may not decline jurisdiction’. Similarly when the Court of Justice quashes a judgment of the General Court and refers the case back to that court, the General Court is then ‘bound by the decision of the Court of Justice

21 Under Art 19(1) TEU, ‘[t]he Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts’.
23 See also in this volume V Skouris, ‘The Evolution of the Judicial Architecture of the European Union and its Procedural Implications’.
24 Respectively Arts 256, second para, and 257, third para, TFEU. No appeal lies from a decision of the General Court on appeal from the Civil Service Tribunal (but see the Review procedure, below).
26 For convenience, reference will be made here to the General Court only; similar provisions apply to the Civil Service Tribunal.
on points of law’. Finally, the General Court is also so bound when the Court of Justice, in a review procedure, remits an appeal judgment to it.27

While the existence of hierarchical judicial structures means that the decisions of the higher courts are almost always followed in practice, this does not necessarily imply that the lower court is bound by a doctrine of strict precedent. Again the practice of the Member States shows that such structures can operate perfectly well without the need for vertical stare decisis.

Under a system of stare decisis, a lower court may issue a so-called ‘critical concurrence’, that is, a judgment which follows, but criticises, a previous ruling with which it is obliged by law to comply.28 A court of the Union judicature has no such luxury and, save where the Treaty vests a decision of another court with binding authority, must in all circumstances decide in accordance with its own conception of ‘the law’.

ON THE PRECEDENTIAL EFFECT OF PRELIMINARY RULINGS

The Locus Classicus: Da Costa

Article 267 TFEU,29 which governs the powers and duties of the national courts with regard to preliminary rulings, does not expressly indicate the extent to which the rulings of the Court are binding on national courts. In Da Costa, the Court was in effect invited to rule on the precedential value of its judgment in Van Gend en Loos, which had been handed down just two weeks before the hearing in Da Costa.30 On the grounds that the substantive questions put by the national court in Da Costa were identical to those in the earlier case, the Commission had argued at the oral hearing that there was no need to answer the Da Costa reference which, it contended, should be ‘dismissed for lack of substance’. It is unclear from the case report precisely why the Commission had taken such a position, which prima facie contradicted the terms of the Treaty; then as now, national courts of final instance are obliged to request a preliminary ruling from the Court where ‘a decision on the question is necessary to enable [the national court] to give judgment’. It may be, if one might be allowed to speculate, that the Commission felt that the judgment in Van Gend en Loos, adopted by the slimmest margin imaginable,31 was ‘as good as it gets’, and that the Commission was concerned that the Court might be tempted not to treat Van Gend en Loos as a precedent and hence reconsider its strikingly bold decision in the earlier case.

27 Respectively Art 54, second para, Art 61, second para, and Art 62b, first para, CJEU Statute.
29 Formerly Art 177 EEC and latterly Art 234 EC.
31 It is well known that three of the seven judges supported the position proposed by the Advocate General in Van Gend en Loos denying Art 12 EEC direct effect.
If that were the case, the Opinion of Advocate General Lagrange would have brought the Commission cold comfort at best. He suggested that the Van Gend en Loos judgment had no binding effect on later disputes: ‘[however] important the [Court’s prior] judgment ... the golden rule of res judicata must be preserved: it is from the moral authority of its decisions, and not from the legal authority of res judicata that a jurisdiction like ours should derive its force’.32 In the result, however, he did not even examine the substantive questions put in Da Costa, but proposed that the Court provide exactly the same answers as it had in Van Gend en Loos.

The Court took a different approach again as regards the binding effect of Van Gend en Loos. While the referring court was a court of final instance and hence, according to the terms of what is now Article 267 TFEU, obliged in principle to request a preliminary ruling, the Court held that

[T]he authority of an interpretation ... already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.33

The Court hinted that the authority of a preliminary ruling could extend to courts in other Member States; the purpose of this procedure was to ensure ‘unity of interpretation of [Union] law within the ... Member States’. That said, the Court also underlined the fact that a national court was always entitled to request a second preliminary ruling if it so wished, and concluded that it (the Court) was therefore obliged to answer the second batch of requests from the national court. It did so by reproducing the answers it had provided in Van Gend en Loos and holding that the questions posed in the instance case were identical and that ‘no new factor [had] been presented to the Court’.

Extending the Authority of Preliminary Rulings: CILFIT and Foto-Frost

In confirming and refining the scope of the obligation of national courts of final instance to refer questions for a preliminary ruling in CILFIT,34 the Court extended the potential authority of its judgments. Thus a previous Court ruling, whatever the procedural setting in which this was delivered, on the point of law at issue before the national court was sufficient to obviate the need for that court to refer the matter to the ECJ.35 Whereas Da Costa allowed the application of an identical ruling provided in essentially identical circumstances, CILFIT allowed the extrapolation of a legal solution adopted in one set of procedural circumstances to a different, but legally pertinent, set of circumstances. In so

32 Opinion in Da Costa (n 20) (emphasis in original), 42.
33 Judgment in Da Costa (n 20), 38.
35 The same dispensation from the obligation to refer was recognised where ‘the correct application of [Union] law [was] so obvious as to leave no scope for any reasonable doubt’, under the so-called ‘CILFIT criteria’.
doing, the Court necessarily based its reasoning the idea that a judgment could have authority beyond the four corners of the dispute which had generated it.

The Court has also interpreted Article 267 TFEU to mean that it has a monopoly of the authority to annul acts of the Union institutions; a national court which has serious doubts regarding the validity of such an act may not annul it, but must refer the question to the ECJ. This is so even for courts which are not courts of final instance and are hence not otherwise obliged to refer questions of Union law to the Court of Justice.36

What is significant is that the Court did not base its reasoning in these cases on some notion that its judgments are inherently blessed with binding precedential value, but relied instead on an interpretation of the relevant Treaty provisions. The precedential value of a preliminary ruling is not such as to deprive the national court of the possibility of re-submitting to the Court a question it has already answered, which is indeed the reason the Court has been able to revise its position in certain of the judgments mentioned by Advocate General Fennelly in Merck v Primecrown. The reasoning of the Court of Justice in this regard is solidly based on Treaty provisions; it would make little sense to oblige national courts of last instance to refer questions of Union law to the Court if the ruling were not binding, particularly as lower national courts are not even obliged to refer such questions. The Treaty authors clearly intended that preliminary rulings provided to national courts of last instance would benefit from the natural authority of such courts in the legal orders of the Member States, even where they did not operate a system of binding precedent. The qualified stare decisis of preliminary rulings also explains why the Member States are given the possibility of submitting observations on requests for preliminary rulings from courts in other Member States.

UNITY, CONSISTENCY AND THE REVIEW PROCEDURE: SOMETHING NEW UNDER THE SUN?

The Review Procedure

The review procedure which was established, along with the possibility of setting up specialised courts, by the Treaty of Nice is truly an extraordinary judicial proceeding in the European Union constellation; the Treaty enjoins the Court to use it only ‘exceptionally’.37 It allows the Court of Justice to review two categories of General Court decision: decisions on appeal from specialised courts, and preliminary rulings. As no jurisdiction has (as yet) been conferred on the General Court to provide such rulings, the procedure has only ever been applied to judgments on appeals from the Civil Service Tribunal. The review procedure is not an appeal, and it may not therefore be initiated by the parties;

37 See now Art 256(2) and (3) TFEU and Arts 62–62b CJEU Statute for the review procedure, and Art 257 TFEU for the ‘specialised courts’, formerly ‘judicial panels’.
in theory it falls outside the scope of effective judicial protection per se, and may be considered a proceeding in the interests of the law. That said, where it is applied, the parties, along with the Member States and the Commission and, according to the circumstances, other institutions or Union bodies, may present legal argument, both in writing and, if the Court so decides, orally. More importantly, the review may lead to the appeal judgment’s being set aside and the case being either remitted to the General Court (and thence possibly to the Civil Service Tribunal) or decided by the Court of Justice itself; the effect on the interests of the parties is therefore equivalent to that of an appeal.

The review procedure is initiated by the Court of Justice operating under a double filter: the Court may only act on the basis of a proposal to this effect by the First Advocate General, and only if it agrees with the latter’s assessment that the appeal judgment poses a ‘serious risk [that] the unity or consistency of Union law [is] affected’. The procedure thus operates rather like certiorari in the United States Supreme Court, though the Court of Justice decides whether or not to review by a majority of the judges in the chamber responsible, rather than by minority decision as in its American counterpart. The review procedure is initiated by the Court of Justice operating under a double filter: the Court may only act on the basis of a proposal to this effect by the First Advocate General, and only if it agrees with the latter’s assessment that the appeal judgment poses a ‘serious risk [that] the unity or consistency of Union law [is] affected’. The procedure thus operates rather like certiorari in the United States Supreme Court, though the Court of Justice decides whether or not to review by a majority of the judges in the chamber responsible, rather than by minority decision as in its American counterpart. In practice, the Court of Justice adopts a first decision on the basis of the case file forwarded by the General Court that it is necessary to review the appeal judgment and setting out the matters to be reviewed and, after hearing the parties, a second judgment reviewing the appeal judgment on the merits.

While it certainly provides a useful backstop in relation to direct actions, where appeal judgments of the General Court in highly specific areas of Union law may occasionally raise questions with wider implications, the review procedure would arguably come into its own in respect of preliminary rulings of the General Court; not only is there is no possibility of an appeal from such rulings, but all the courts (and indeed other public authorities) of the Member States would be expected to comply with the General Court’s ruling. Indeed, it could be argued that it is precisely because the General Court is not formally obliged to follow the rulings of the Court of Justice that such a procedure is particularly appropriate, given that it is intended to safeguard the same values as a system of binding precedent, the ‘unity’ and the ‘consistency’ of Union law.

‘Unity’ and ‘Consistency’ of Union Law

It is not clear what precisely is intended by the terms ‘unity’ and ‘consistency’ in this context; though they are used elsewhere in the Treaty, they could hardly be

38 In fact, the number of review procedures to date (3) as a percentage (1.5%) of the total number of appeal judgments handed down by the General Court (2007–2013: 197) is slightly higher than that of cases in which certiorari is accepted by the Supreme Court in a normal year, about 1%.

39 For this reason, the ruling would only take effect after the expiry of the deadlines for initiating the review procedure: Art 62b, CJEU Statute.

40 The Council and High Representative for foreign policy are to ‘ensure the unity, the consistency and effectiveness’ of the Union’s action in this area (Art 26(2), second subpara, TEU).
described as terms of art. One dictionary definition of ‘unity’ is ‘[t]he quality or fact of being one body or whole ... [d]ue interconnection and coherence of the parts’, while ‘consistency’ is defined as ‘the agreement of parts or elements with each other’; semantically in any case, the terms are not far apart.

It is also unclear why the English text of the relevant Treaty provisions does not refer to ‘coherence’, rather than ‘consistency’, as do some of the other language versions of the relevant phrase. The two terms are arguably not identical in meaning: an interpretation of a legal provision could be coherent with other, previous, interpretations, in that they can be reconciled in the framework of a larger whole, without necessarily being consistent, in the sense that the two interpretations are in agreement with each other. In other words, ‘coherence’ and ‘consistency’ appear to posit different tests of the degree to which a later interpretation need accord with an earlier one.

Be that as it may, the notion of coherence/consistency has also been introduced into the proportionality test with which Member States must comply in certain circumstances, for example in order to justify a restriction on a Treaty freedom. Such a restriction may only be considered ‘appropriate for securing attainment of the [national] objective relied upon only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner’. The test seeks to reconcile judicial review with the margin of appreciation enjoyed by the Member States: ‘coherence is designed to object to rules which are found to be self-contradictory or, at least, manifestly inappropriate without questioning the legitimate scope left to Member States by Union law’.

Review Judgments and ‘Precedents’ under Union Law

The Court of Justice showed a distinct reluctance, in its first two judgments under the review procedure, to define the notion of ‘unity [and] consistency of Union law’. At first instance in M v EMEA, the Civil Service Tribunal had rejected an application for annulment as manifestly inadmissible, without examining the merits of the case. On appeal, the General Court had not merely set aside the judgment, but had itself ruled on the merits, as it is entitled to do under the CJEU Statute ‘where the state of the proceedings ... permits’; in particular, it awarded the applicant compensation for non-material damage. The review procedure was here limited to the compensation award by the General Court. The Court of Justice first established a number of errors of law in the appeal judgment under review, and identified four factors which it

42 eg ‘cohérence’ ‘coerenza’, ‘Kohärenz’ and ‘coherencia’ in French, Italian, German and Spanish, respectively.
43 Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes and Ors v Saarland and Ors [2009] ECR I-4171, para 42.
considered were relevant to the question of whether the General Court had put unity or consistency at risk:

– the appeal judgment was the first occasion on which the General Court had ruled on the merits of a case which the Civil Service Tribunal had dismissed as inadmissible without examining the merits and it ‘could therefore constitute a precedent for future cases’;
– the General Court had ‘departed from the established case-law’ of the Court of Justice;
– the procedural rules which the General Court misinterpreted were applicable generally, rather than being confined to the area of staff regulations law, and
– the rules in question were set out in provisions of primary law, \textit{in casu} the CJEU Statute, and hence ‘occupy an important position in the [Union] legal order’.

On the basis of these four points, ‘considered as a whole’, the Court held that the appeal judgment affected ‘the unity and the consistency of [Union] law’, without distinguishing between these two notions. The case was remitted back to the General Court as regards the damages claim, which in turn remitted it to the Civil Service Tribunal.

Of the Court’s four indicators of a risk to unity or consistency, the first two are particularly noteworthy in the present context. As the ‘precedent’ in the first point concerned a decision of the General Court in appeal proceedings, the Court seems to be using the term as meaning an example which the General Court itself might follow in the future, rather than in the sense of a precedent which would bind the Civil Service Tribunal. Moreover, the reference to the General Court’s departing from the case law could be seen as shorthand for its failure properly to interpret the rule laying down the conditions under which it may decide the merits of an appeal case whenever the first instance judgment has been set aside, which the Court of Justice had established in some detail earlier in the judgment.

The Court relied on the same four risk indicators in the second review judgment, which concerned the notion of a ‘reasonable deadline’ for initiating court proceedings where the relevant statutory provisions had not determined any rule in this regard.\textsuperscript{46} On this occasion, the Court was much exercised by the fact that the General Court had not followed previous case law of both the Court and the General Court itself, and had thereby contravened the principle of effective judicial protection under Article 47 of the Charter and Article 6 of the ECHR. Noting that ‘the members of staff concerned ... were entitled to expect that the General Court would simply apply that case-law’, the Court concluded that the appeal judgment affected the consistency of Union law. Once again, however, the strictures of the review court should not be read as indicating that the General Court is in some way bound by a rigorous doctrine of precedent; the notion of a ‘reasonable deadline’ applies in such circumstances where there

\textsuperscript{46} Case C-334/12 RX-II Review Arango Jaramillo, judgment of 28 February 2013.
is no rule of positive law, and is hence defined exclusively in the case law of the Union Courts.

In Strack, however, the Court abandoned the ‘four factors’ test.\footnote{47} It held that, by failing to take account of the European Union Charter of Fundamental Rights (‘the Charter’) in interpreting the relevant provisions of the EU Staff Regulations, the appeal judgment adversely affected the unity of European Union law. By not applying the Charter in these circumstances, the appeal judgment undermined, in effect, the recognition of its Treaty status. More generally, as suggested by Advocate General Kokott, ‘the unity of Union law is adversely affected, in particular, where the General Court has misconstrued rules or principles of EU law which have particular importance’.\footnote{48} The appeal judgment at issue was also held to affect the consistency of Union law; by ruling that measures governing working conditions did not cover the organisation of working time, and in particular the rules on paid leave, the General Court had ignored the contrary ruling of the Court of Justice in the ‘Working Time’ case.\footnote{49} It thus appears that ‘the consistency of European Union law is adversely affected where the General Court has misconstrued existing case-law of the European Union courts.’\footnote{50}

The Court of Justice has indicated extra-judicially that the review procedure is ‘not … an appropriate tool for ensuring consistency of case-law other than in relation to important issues of principle.’\footnote{51} It follows that ‘[one] or more errors, even glaring errors, do not necessarily affect the unity or consistency of European Union law’.\footnote{52} Indeed, the Court has held that ‘it is now solely for the Civil Service Tribunal and the General Court of the European Union to develop the case-law in matters relating to the civil service’.\footnote{53} While, as Advocate General Kokott crisply noted, ‘this does not mean [these courts] have been given “carte blanche” … to develop the case-law [on staff matters] … without concern for the compatibility of that case-law with other areas of EU law’,\footnote{54} the Court has in effect acknowledged the absence of a strict obligation to comply with its case law in this particular area.

NON-BINDING PRECEDENT IN ACTION: FOUR JUDGMENTS AND A TREATY AMENDMENT

That the system of non-binding precedent works well in practice may be illustrated by a number of examples from the case law of the General Court and the Civil Service Tribunal.

\begin{itemize}
\item Case C-579/12 RX II, Review Commission v Strack, judgment of 19 September 2013.
\item Case C-84/94 United Kingdom v Council [1996] ECR I-5755.
\item AG Kokott, View in Strack, n 48 above.
\item Explanatory note to the draft amendments to the CJEU Statute submitted by the Court to the European Parliament and the Council, Luxembourg, 28 March 2011, 9.
\item AG Mengozzi, Review Arango Jaramillo, para 69 (emphasis in original).
\item Case C-17/11 RX, Petrilli Review Proposal [2011] ECR I-229, para 4; the Court decided not to review an appeal judgment which allegedly contravened previous General Court case law on liability for damages in staff law.
\end{itemize}
Intention to Harass? Q v Commission

In 2004, the EU Staff Regulations were amended to include an express prohibition on ‘psychological harassment’ in the workplace, also known as ‘mobbing’ or, in more familiar terms, bullying. The definition of the prohibited conduct requires, inter alia, ‘acts that are intentional and that may undermine the personality, dignity or physical integrity of any person’. In its case law prior to the 2004 reforms, the General Court had ruled that the alleged victim had to ‘prov[e] he was subjected to conduct aimed, objectively, at discrediting him or at deliberately impairing his working conditions’; it adopted the same position in 2007 in Lo Giudice v Commission, when it first interpreted the new provision.55 When the question of the statutory definition of psychological harassment came before the Civil Service Tribunal (Tribunal), the precedent was clear, and under a system of stare decisis would have been more or less unarguable.

The Tribunal took a different view.56 On the basis of the wording of the relevant provision, it deduced that there was no requirement that the conduct complained of be committed with the intention of undermining the personality, dignity or integrity of the victim, but that ‘[i]t is sufficient that such reprehensible conduct, provided it was committed intentionally, led objectively to such consequences’. For the Tribunal, a contrary interpretation – that is, the interpretation espoused repeatedly by the General Court in the past – would ‘depriv[e] the provision of any useful effect, on account of the difficulty of proving the malicious intent of the perpetrator of an act of psychological harassment’ in all but the rarest cases, as ‘the alleged harasser is careful to avoid any conduct which could indicate his intention to discredit his victim or to impair the latter’s working conditions’. The Tribunal was also able to rely on the definition of ‘harassment’ provided in the general law of the Union,57 which it interpreted as being intended to ensure ‘adequate judicial protection’, an objective which could not be attained if the victim had to show intention to harass, rather than conduct which was objectively capable of having that effect. Moreover, it was ‘hardly … likely’ that the legislature would adopt a different, and markedly less protective, standard for harassment in the case of Union officials than that which applied generally.

The previous case law was dispatched briefly; some of the judgments relied on were pre-2004 and hence not directly germane to the new provision, while the Tribunal considered that it was ‘not apparent from [Lo Giudice] that the [General] Court [ ] expressly intended to interpret Article 12a(3) of the Staff Regulations as making the malicious intent of the alleged harasser a condition for the existence of psychological harassment’. Though the Commission appealed against the judgment, to its credit it did not seek to challenge the Tribunal’s interpretation of the conditions under which an official could establish bullying at the workplace.58

55 Case T-154/05 [2007] ECR-SC I-A-2-00203 and II-A-2-01309; the case had been commenced before the Civil Service Tribunal was operational, and had not been transferred to the Tribunal.
Obligation to Give Reasons for Resiling a Temporary Contract: *Landgren*

The cards were more heavily stacked against any temptation to innovate in *Landgren*, where the Tribunal had to contend with a judgment of the Court of Justice which was almost thirty years old, interpreting a statutory provision which had not been amended since. The question was whether an institution which wished to terminate a contract of indefinite duration which it had concluded with a member of the temporary staff was obliged to state the reasons for its decision. The answer provided by the Court in 1977 was abundantly clear; the justification for the termination was to be found in the temporary nature of the employment relationship itself, which was fundamentally different from that between the institution and an official, and the employer was therefore under no obligation to provide reasons for the termination of the contract.

Though acknowledging the fundamental difference between the legal position of permanent officials and that of other agents, the Tribunal nonetheless relied on the development of the law concerning the protection of workers against dismissal and the abusive recourse to successive fixed-term employment contracts or relationships and of the [Union] case-law itself as to the requirement of a formal statement of the reasons on which [a contested] act ... is based.

In regard to the first, the Tribunal was able to call in aid a variety of measures of social protection adopted both within and outside the Union legal order, including the 1999 Council Directive on fixed-term work, international standards protecting workers from unfair dismissal, and the 2000 Charter of Fundamental Rights of the European Union. The Tribunal concluded that ‘there is no overriding reason to exclude members of the temporary staff ... from protection against unjustified dismissal’ and that such protection implied a concomitant obligation on the employing institution to notify the agent of the reasons for his dismissal. Moreover, the Tribunal continued, ‘the recognition of [such] an obligation ... does not prevent the [employer] enjoying broad discretion in regard to dismissal, and review by the [Union] Courts is therefore confined to ensuring there has been no manifest error or misuse of powers’.

This time the defendant institution did challenge on appeal the Tribunal’s novel finding on the requirement to provide reasons, though not specifically on the grounds that the Tribunal had offended against any duty to comply with existing precedent. Once again, the General Court upheld the judgment of the Tribunal, albeit for reasons which were slightly different, though no less convincing. The appeal court stressed the ‘general and essential principle

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60 In fact, the defendant was an agency rather than an institution per se, but the legal question is the same.

61 Case 25/68 *Schertzer v European Parliament* [1977] ECR 1729; the proceedings had been suspended for several years pending the outcome of different proceedings before the national courts.

that the administration must give reasons for its decision’, to which a broad exception such as the appellant was relying on ‘could only be the result of the express and unequivocal will of the [Union] legislature which is not evident in’ the relevant statutory provisions. It therefore ‘interpreted’ the existing case law as not requiring that the employee be provided with a formal statement in the dismissal decision, but holding that the decision must be based on valid grounds to which the employee must have access.63

When Precedents Clash: Cristina

That it is not always simple for a lower court to benefit from the wisdom of prior decisions of the higher courts, even where it wishes to do so, is illustrated by Cristina.64 The applicant was a candidate in an open competition to join the EU civil service, who had been refused admission to the tests on the ground that she did not have the necessary qualifications. On 11 July 2011, she lodged a complaint under the Staff Regulations to challenge the selection board’s decision excluding her from the competition; the following day, for reasons which do not appear from the case report, she brought legal proceedings against the Commission before the Civil Service Tribunal. The Commission objected that the action was inadmissible, as the complaint procedure had not been completed.

Under long-established case law, an unhappy competition candidate is not required to follow the administrative complaint procedure before initiating legal proceedings, as other litigants are obliged to do; the thinking is that the institution may not in any case amend the decision of a selection board, which is wholly independent, and that in these circumstances following the complaint procedure would be pointless. The question in the present case was whether the candidate who nonetheless chooses to launch such a procedure is then obliged to await the outcome, or whether he may also initiate legal proceedings in parallel. The applicant was able to point to judgments of the Court of Justice and the General Court from 1978 and 1990 respectively, admitting an annulment action in essentially identical circumstances to the instant case, while the Commission relied on a much more recent judgment of the General Court holding expressly that an action commenced before the administrative complaint had been completed was inadmissible.

Borrowing a leaf from the book of common law, the Tribunal distinguished the more recent judgment of the General Court rather than confront the appeal court head-on on this point. On a close analysis, the Tribunal found that the General Court had held in its judgment that the complaint and the annulment

63 It has been argued that the Court should have reviewed the Landgren appeal judgment, but was unable to do so because the First Advocate General made no such proposal: P Iannuccelli in A Tizzano and P Iannuccelli, ‘Premières application de la procédure de “réexamen” devant la Cour de justice de l’Union européenne’, in N Parisi et al (eds), Scritti in onore di Ugo Draetta, (Naples, Editoriale Scientifica, 2011) 733, 746–748.

64 Case F-66/11 Cristina v Commission, judgment of 20 June 2012.
action there at issue concerned different Commission decisions and had different purposes; as a result, the legal proceedings had not been preceded by an administrative complaint. If this was the ratio decidendi, ‘there was no need for the General Court to declare premature an action for annulment brought before the pre-litigation administrative procedure … was concluded’, and the General Court’s finding in this regard was therefore in effect obiter; as the recent judgment ‘relates to factual and legal situations which are significantly different from those in the present case, it cannot be regarded as relevant in this instance’.

Individual Concern and Effective Judicial Protection: Jégo-Quéré

The Cristina litigation only arose in effect because the General Court had not followed a prior judgment of the Court of Justice. A more dramatic and telling example of its independence of spirit is provided by the Jégo-Quéré saga, where the application of the consistent, not to say immutable, case law of the Court of Justice on the locus standi of individuals over a forty-year period would, in the view of the General Court, have left the applicants with no means of legal redress.

The applicants in Jégo-Quéré sought to challenge the validity of a Union measure of general scope, in casu, a Commission regulation setting a minimum mesh size for fishing nets being used in waters south of Ireland; to do so, they needed to show the Regulation affected them individually, that is ‘by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed’, under the so-called Plaumann test. Unable to do so, the applicants contended they had no means of effective judicial protection, and that the Union was thereby failing to respect a fundamental right guaranteed under Union law and the European Convention of Human Rights.

The General Court first considered, and rejected, two other possible means of indirectly challenging the validity of the regulation, that is, a request for a preliminary ruling by a national court and an action in damages: the first because it would require the applicants to break the law in order to get to court, and the second because it would not allow the Court full review of the validity of the measure, which would in any case remain in place even if the action were successful. The General Court came what it described as ‘the inevitable conclusion’ that the Treaty no longer guaranteed the right to an effective judicial remedy. It therefore proposed a revised definition of the notion of ‘individual concern’, which would be established if the applicant could show that the measure of general scope affected his legal position ‘in a manner which is both definite and immediate.’

The Court of Justice was quick to respond; in giving judgment in an unrelated case just under three months later, which happened to pose a similar question

67 Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677; judgment was pronounced on 25 July, some weeks into the judicial vacation.
of the effectiveness of judicial protection under the Treaty, it re-stated the Plaumann test for individual concern, and held that where ‘that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation.’ Though not unsympathetic to the concerns raised by the General Court, the Court of Justice considered that it could not ignore the requirement of individual concern and that ‘it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection’. In particular, the admissibility of an annulment action before the Courts of the Union could not depend on the vagaries of the respective procedural laws of the Member States, some of which would have allowed persons in the same position as the applicants a remedy. The Court subsequently quashed the judgment in Jégo-Quéré, though making no reference to the fact that the General Court had not followed the test laid down in Plaumann.

The saga has a kind of happy ending, however, in terms of the development of Union law and the effectiveness of the judicial protection provided by the Union Courts; indeed, it may be that this is exactly what the Court of Justice had intended by putting the ball in the Member States’ court, given that by the summer of 2002 a convention charged with drawing up a Constitution for Europe was in full swing. By not following a clear, and clearly relevant, precedent, the General Court had drawn attention to what it considered to be a lacuna in ‘the complete system of judicial protection’ which the Court of Justice had first declared in the landmark Les Vôts judgment, and which both Courts relied upon in their respective judgments in this case. As a result, the Constitution, and subsequently the Lisbon Treaty, extended the scope of annulment proceedings to include those by persons whose legal position is directly affected by a regulatory act which does not entail implementing measures. At the same time, though merely the consecration of an existing principle, the Member States were enjoined to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.

CONCLUSIONS

If the Treaty provides little by way of explicit instruction regarding vertical precedent in the Union’s legal order, the reasons for following judgments of a higher court are obviously myriad and solid, notably equal treatment of equal situations, efficiency of the judicial process, stability and predictability in legal

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68 In Jégo-Quéré, the General Court had relied on the Opinion AG Jacobs had presented in Unión de Pequeños Agricultores.
69 Case C-263/02 P [2004] ECR I-3425; in the relevant part of its judgment, the Court refers exclusively to Unión de Pequeños Agricultores, which had been handed down after the first instance judgment in Jégo-Quéré, rather than to Plaumann.
71 Respectively Art III-365(4), Constitution for Europe, and Art 263, fourth para, TFEU.
72 Respectively Art I-29(1), second subpara, Constitution for Europe, and Art 19(1), second subpara, TFEU.
relations, respect for judicial authority, and most important of all, because the lower court will usually have no doubt that the earlier judgment is correct. As a matter of practice then, lower courts follow rulings of the higher courts; in the EU judicature, as elsewhere, ‘[t]he doctrine of [vertical] precedent is so deeply ingrained in judicial practice and consciousness that its dominance has rarely been questioned’.

The issue remains however, of what to do when push comes to shove, that is, when the lower court is profoundly convinced that, on an issue within its own specific field of law, the judgment of the higher court does not provide a just solution in the instant case.

In this regard, there is much wisdom in the approach of the General Court, which is particularly well placed to have a balanced view on the matter, being both a court of first instance and an appeal court. In its judgment in Kadi III, it had to deal with arguments criticising the ruling of the Court of Justice in Kadi II concerning the intensity and extent of judicial review of asset-freezing decisions, criticisms which the General Court viewed as ‘not entirely without foundation,’ and which were very similar to those the General Court had itself previously taken on the matter. On the one hand, it noted that ‘in the context of the present proceedings, the General Court is not bound under Article 61 of the Statute of the Court of Justice by the points of law decided by the Court of Justice in its judgment in Kadi’.

On the other hand, the General Court took into account the particular circumstances of the case – the fact that in its earlier judgment the Court of Justice had annulled a judgment of the General Court – as well as structural considerations, and in particular ‘the appellate principle itself and the hierarchical judicial structure which is its corollary’. The General Court concluded that ‘in principle it falls not to it but to the Court of Justice to reverse precedent in that way’. Whether or not it formally binds the lower courts of the Union, Kadi III provides invaluable guidance on the question of vertical precedent at the CJEU, complementing that of Advocate General Fennelly on horizontal precedent in Merck v Primecrown.

73 Caminker (n 28), 817.
74 It is hardly to be expected that a lower court, particularly a specialist tribunal, would challenge a ruling of the higher court(s) on a matter of general application, such as rules of judicial procedure; within the EU judicature, the Review procedure would provide the necessary corrective.
75 See also in this volume D Edward ‘Due Process, Judicial Protection and the Kadi saga’ and NJ Forwood, ‘Closed Evidence in Restrictive Measures Cases: A Comparative Perspective’.
76 This provides that, when a matter is referred back to it after its judgment has been quashed, the General Court is bound by the points of law on which the Court of Justice has ruled.
77 Case T-85/09 Yassin Abdullah Kadi v European Commission [2010] ECR II-5177, paras 112, 121 and 123; the judgment was upheld as to the result on appeal, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, European Commission and Ors v Kadi, judgment of 18 July 2013.