THE COURT’S OUTER AND INNER SELVES
EXPLORING THE EXTERNAL AND INTERNAL LEGITIMACY OF THE EUROPEAN COURT OF JUSTICE

by

Koen Lenaerts*

(published in Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice edited by Maurice Adams and Henri de Wael)

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,1 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’.2 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

* Judge and President of Chamber at the European Court of Justice, and Professor of European Union Law K.U. Leuven. All opinions expressed herein are strictly personal to the author.
1 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
2 Ibid.
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 courts.  

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’—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.

In addition, internal legitimacy looks at courts as ‘rational actors’, by focusing on the soundness of their legal reasoning. 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; and whether such rulings will be complied with by the political branches of government or superseded by legislative statute or even constitutional reform, or else simply not enforced.

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.

---

3 See Opinion 1/09, of 8 March 2011, not yet reported, para. 85 (holding that ‘the tasks attributed to the national courts and to the [ECJ] respectively are indispensable to the preservation of the very nature of the law established by the Treaties’).


The European Court of Justice (the ‘ECJ’) strives to enjoy both external and internal legitimacy. As a result of the ‘constitutionalisation of the Treaties’ which transformed the European Union from an international organisation into ‘a composite legal order’, the ECJ has continuously been called upon to uphold the ‘rule of law’ as provided for by Article 19 TEU. As I mentioned almost twenty years ago, one may distinguish three historical strands in the ECJ’s jurisprudence.

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’. In order to honour 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. 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. However, these two principles only seek to neutralise 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.\textsuperscript{10}

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 harmonisation. The principle of mutual recognition defined in \textit{Cassis de Dijon} best encapsulates this line of jurisprudence.\textsuperscript{11} It set in turn the stage for the Commission’s action plan adopting a ‘new approach’ to remove obstacles to interstate trade,\textsuperscript{12} 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 (ex Article 100a EEC, now Article 114 TFEU). 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 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.


\textsuperscript{11} Case 120/78 \textit{Rewe-Zentral} [1979] ECR 649.

and peoples, including the protection of fundamental rights. 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. The ECJ thus favours 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. A quick glance at them might suggest that the first two are characterised 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 judicial activism as it limited itself to doing what the Treaties required it to do, i.e. to uphold ‘the rule of law’. 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?

The purpose of the present contribution is therefore to explore the external and internal legitimacy of the ECJ when the latter interacts with the EU legislature, the Member States, and national courts. By selecting a series of recent examples raising complex legal issues, 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.

13 K. Lenaerts, above n 7, 95.
16 See e.g. C.W.A. Timmermans, ‘Judicial activism and judicial restraint’ in C. Baudenbacher and E. Busek (eds), The Role of International Courts (Stuttgart, German Law Publishers, 2008) 243, at 245 et seq.
I External Legitimacy

Part I 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 harmonisation, 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.

i. 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 in accordance with primary EU law.17 It follows that, in so far as the ECJ does not interpret secondary EU law in a contra legem fashion,18 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.19

17 K. Engsig Sorensen, ‘Reconciling secondary legislation with the Treaty rights of free movement’ (2011) 36 European Law Review 339, at 345 (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’).
Originally, the ECJ ruled in Lebon\(^{20}\) – decided in 1987 – that job-seekers’ allowances did not fall within the scope of (then) Community law. However, in Collins – decided 17 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.\(^{21}\) 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 labour market of that State.\(^{22}\) 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 known in advance; and provision must be made for access to a means of redress of a judicial nature.\(^{23}\)

On 29 April 2004, the EU legislator adopted the Citizen’s Rights Directive (the ‘CRD’),\(^{24}\) 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)’.\(^{25}\) 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’.\(^{26}\) Such a reading would, however, imply – contrary to Collins – that, regardless of the existence of a ‘real link’ between job-seekers and the labour 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


\(^{22}\) Case C-224/98 D’Hoop [2002] ECR I-6191, para. 38, Collins, above n. 21, para. 69, and Ioannidis, above n. 21, para. 30.

\(^{23}\) Collins, above n. 21, para. 72.


\(^{25}\) Article 14(4)(b) of the CRD refers 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’.

\(^{26}\) Collins, above n. 21, para. 63.
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*, 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 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’. 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 labour market of the host Member State fall outside the scope of that provision. This includes not only job-seekers’ allowances, but also any financial benefit whose purpose is ‘to promote integration into the labour market’. 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.

ii. 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

---

27 *Vatsouras*, above n 19.
30 Opinion of AG Ruiz-Jarabo Colomer in *Vatsouras*, above n. 19, para. 57.
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 highlighted by comparing the ruling of the ECJ in Test-Achats\textsuperscript{31} with that in Sturgeon.\textsuperscript{32}

In Test-Achats, the referring court asked the ECJ whether Article 5(2) of Directive 2004/113\textsuperscript{33} was valid in light of the principle of equal treatment between men and women. 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 21 December 2007 at the latest. 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.\textsuperscript{34} If a Member State made use of that option before 21 December 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 which […] determines when it will take action, having regard to the development of economic and social conditions within the European Union’.\textsuperscript{35} 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

\textsuperscript{31} Case C-236/09 Association belge des Consommateurs Test-Achats and Others, judgment of 1 March 2011, not yet reported.
\textsuperscript{32} Joined Cases C-402/07 and C-432/07 Sturgeon and Others [2009] ECR I-10923.
\textsuperscript{34} 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.
\textsuperscript{35} Association belge des Consommateurs Test-Achats and Others, above n 31, para. 20.
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’.  

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 favoured 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’. 

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 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’. Consequently, that provision was held to be invalid upon the expiry of an appropriate transitional period, i.e. 21 December 2012. 

In Sturgeon, the ECJ was asked whether Regulation No. 261/2004 confers a right to compensation upon airline passengers in the event of delay. 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. Can this legislative silence be read as denying compensation to this

36 Ibid., para. 26.
37 Ibid., para. 30.
38 Ibid., para. 32.
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.
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. 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’. This means that a Union act must be interpreted in compliance with superior rules
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.
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.

41 Sturgeon, above n 32, para. 46.
42 Ibid., para. 47.
43 Ibid., para. 57.
44 The approach followed by AG Sharpston is 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’. See
Opinion of AG Sharpston in Sturgeon, above n 32, paras 93-94. However, the ECJ deployed another argument in
order to counter this ‘separation of powers’ objection. It invoked Recital 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. See Sturgeon, above n 32, para. 62.
45 Sturgeon, above n 32, para. 67 (extraordinary circumstances are defined as those which ‘are beyond the air
carrier’s actual control’).
The problems with which the ECJ was confronted in Test-Achats and Sturgeon 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? In my view, the approach followed by the ECJ in both 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, 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. 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

---

46 See e.g. J. Balfour, ‘Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004’ (2010) 35 Air and Space Law 71, at 75 (who argues 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, above n 15, at 309 (who posits 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”).

47 See e.g. Sturgeon, above n 32, paras 44-45 (where the ECJ held 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’).
objectives pursued by Regulation No. 261/2004 favoured 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 testing the compatibility of national measures with EU law,\(^{48}\) 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.

iii. 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 fulfils 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.\(^ {49}\)

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. 883/2004\(^ {50}\) which entered into force on 1 May 2010, replacing Regulation No. 1408/71.\(^ {51}\) Regulation No. 883/2004 lays down a system of prior authorisation. 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

\(^{48}\) For further discussion, see Section B, subsection i, heading b of the present contribution.
\(^{49}\) Case C-211/08 *Commission v Spain*, judgment of 15 June 2010, not yet reported.
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 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’.

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). 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’, 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. 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 must be granted to the insured person by the competent institution.

54 Commission v Spain, above n 49, para. 65.
55 Ibid., para. 72.
State of affiliation are offset by cases in which the hospital treatment provided for in the Member State of stay is of a lower cost.\textsuperscript{56} Otherwise, the ECJ reasoned, the Member State of affiliation would be systematically exposed to the highest financial burden.

According to Van der Mei,\textsuperscript{57} the ruling of the ECJ in \textit{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 \textit{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’. 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, \textit{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].’\textsuperscript{58}

Even if one were to assume that Article 7(4) of the PRD applies to unscheduled treatments, which is far from being clear,\textsuperscript{59} I cannot agree with such criticism. By qualifying the ECJ as a ‘patient-friendly’ or as an ‘overly conservative’ court, one 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 \textit{Commission v Spain}, the ECJ limited itself to examining the compatibility of Spanish legislation with Article 56

\textsuperscript{56} \textit{Ibid.}, paras 78 and 79.
\textsuperscript{57} A.P. Van der Mei, ‘Cross-border access to healthcare and entitlement to complementary "Vanbraekel reimbursement"’ (2011) \textit{36 European Law Review} 431.
\textsuperscript{58} \textit{Ibid.}, at 439.
\textsuperscript{59} See 28\textsuperscript{th} 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’.
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.60

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

i. In the absence of EU harmonisation

a The importance of constitutional principles embedded in national law

In the absence of EU harmonisation, 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

60 See Case 220/83 Commission v France [1986] ECR 3663; Case 205/84 Commission v Germany [1986] ECR 3755; Case 252/83 Commission v Denmark [1986] ECR 3713; Case 206/84 Commission v Ireland [1986] ECR 3817. See also Case C-513/04 Kerckhaert and Morres [2006] ECR I-10967, paras 22 to 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).
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’.\textsuperscript{61} The rulings of the ECJ in \textit{Omega} and \textit{Sayn-Wittgenstein} illustrate this approach.\textsuperscript{62}

In \textit{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 the fundamental right or legitimate interest in question is to be protected’\textsuperscript{63}. 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, \textit{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.\textsuperscript{64}

The ECJ followed the same approach in \textit{Sayn-Wittgenstein}. The facts of the case were as follows. In 2003, the Austrian Constitutional Court delivered a judgment in which it

\begin{itemize}
  \item K. Lenaerts and J.A. Gutiérrez-Fons, above n 8, at 1663.
  \item Case C-36/02 \textit{Omega} [2004] ECR I-9609 and Case C-208/09 \textit{Sayn-Wittgenstein}, judgment of 22 December 2010, not yet reported.
  \item \textit{Omega}, above n 62, paragraph 37.
  \item T. Tridimas, \textit{The General Principles of EU Law}, 2\textsuperscript{nd} edn (Oxford, OUP, 2006), at 341.
\end{itemize}
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’. Hence, the referring court asked, in essence, whether Article 21 TFEU may authorise a Member State to rely on reasons of a constitutional nature in order not to recognise 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 recognise 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[66] resulting 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’. 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. 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. 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 [...] the competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty’. Next, the ECJ recognised as legitimate the objective pursued by the Law on the abolition of the nobility, which ‘seeks to ensure the

---

65 Sayn-Wittgenstein, above n 62, para. 32.
68 Ibid., para. 69.
69 Ibid., paras 83 and 84.
70 Ibid., para. 87.
observance of the principle of equal treatment as a general principle of law’, \(^{71}\) enshrined in Article 21 of the Charter. As to the principle of proportionality, the ECJ recalled its findings in *Omega*:

‘it 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 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’. \(^{72}\)

Hence, the ECJ ruled that the refusal by Austrian authorities to recognise 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’. \(^{73}\) 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. \(^{74}\) 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,

---

\(^{71}\) Ibid., para. 89.

\(^{72}\) Ibid., para. 91.

\(^{73}\) Ibid., para. 92.

\(^{74}\) See A. von Bogdandy and S. Schill, ‘Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 1417, at 1420 (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 of both the ECJ and national constitutional courts as parts of a system of composite constitutional adjudication’).
i.e. where no core value of the Union is at 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’.

b 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 favoured ‘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 harmonisation, 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 recognises 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*76,

‘With 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 of gambling opportunities and to limit activities in that sector in a consistent and systematic manner’77

---

75 Cf. Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union* [2007] ECR 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 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 labour 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 favour 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 K. Lenaerts and J.A. Gutiérrez-Fons, above n 8, at 1666.

76 Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891.

77 Ibid., para. 53.
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 behaviour of dubious morality such as gambling, the ECJ is committed to verifying that those national rules are free from internal and external contradictions. 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.

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. For example, in Hartlauer, the ECJ examined the compatibility of the Austrian system of prior authorisation for the setting up and operation of outpatient dental clinics with EU law. In order to better 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’). 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 80% of the sum that would have been charged by a contractual practitioner.

Austrian legislation conditioned the setting up and operation of non-contractual outpatient

---

78 See Case C-42/07 Liga Portuguesa de Futebol [2009] ECR I-7633, para. 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’).
80 See e.g. Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 Stoß, judgment of 8 September 2010, not yet reported, para. 106; and Case C-46/08 Carmen Media Group, judgment of 8 September 2010, not yet reported, para. 68.
81 See e.g. Case C-500/06 Corporación Dermoestética [2008]ECR I-5785.
83 See Opinion of AG Bot in Hartlauer, above n. 82, paras 30-32.
dental clinics upon obtaining a prior authorisation 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 licence 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, 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
authorisation 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’).

Although the ECJ recognised the objective pursued by Austria as legitimate, it noted
that no authorisation 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. 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’, the ECJ found that the contested Austrian
legislation contained a clear inconsistency: group practices could also upset the organisation
and planning of the provision of care in an area.

85 Hartlauer, above n 82, para 52.
86 Ibid., para. 59.
87 Ibid., paras 57 and 58.
88 Ibid., para. 60
More recently, the ruling of the ECJ in *Blanco Pérez*\(^{89}\) 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 authorisation, the award of which had to comply with geographical and demographical limits.\(^{90}\) Those limits were as follows:

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

– 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 metre’ rule)].\(^{91}\)

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,\(^{92}\) 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 authorisation 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.\(^{93}\)

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.\(^{94}\)

\(^{89}\) Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez*, judgment of 1 June 2010, not yet reported.

\(^{90}\) 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 Directives 85/432 – [1985] OJ L 353/34 – and 2005/36 – [2005] OJ L255/22 – were deemed to be sufficiently qualified to provide services of a high quality. *Blanco Pérez*, above n 89, para. 115 et seq.

\(^{91}\) *Ibid.*, para. 52.


\(^{93}\) *Ibid.*, para. 54.

\(^{94}\) *Ibid.*, para. 78.
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’. 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’. Second, the ECJ examined whether the contested 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. 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, it ruled that ‘it 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’.

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

95 Ibid., para. 44.
96 Ibid., para. 68.
97 Ibid., para 72.
pharmaceutical services. 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 relation to the protection of public health, the ECJ rejected that the contested measure went beyond what was necessary to attain the aim pursued.

Cases like *Placanica*, *Hartlauer* and *Blanco Pérez* show that the ECJ endeavours 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’. 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.

ii. In the presence of EU harmonisation

In the presence of EU harmonising 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

99 *Blanco Pérez*, above n 89, paras 99 to 102.
100 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 ‘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’. *Ibid.*, para. 105. Indeed, given that Spain had decided to transfer to the Autonomous Communities the organisation 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’. *Ibid.*, para. 111.
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.102

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 89/552103 (as amended by Directive 97/36104) 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’.105 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 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.106 It follows that, in areas

102 Joined Cases C-244/10 and C-245/10 Mesopotamia Broadcasting, judgment of 22 September 2011, not yet reported.
105 Opinion of AG Bot in Mesopotamia Broadcast, above n 102, para. 9.
106 Article 2a of Directive 89/552 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.
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 licences 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’ organisation, 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 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’.107 Next, it examined whether the activities carried out by Roj TV fell

---

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.’

107 Mesopotamia Broadcast, above n 102, para. 37.
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’. 108 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 was more likely in Germany than in Denmark was of no relevance. 109

However, referring to its previous ruling in De Agostini, 110 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’. 111 Hence, Germany could, for example, prohibit Roj TV from producing broadcasts and organising 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 harmonising measures, the ECJ takes national interests seriously. Thus, the fact that the EU legislator has harmonised 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

108 Ibid., para. 42.
109 Ibid., para. 45.
110 Joined Cases C-34/95 to C-36/95 De Agostini and TV-Shop [1997] ECR I-3843 (in that case, the national measures at issue sought to protect consumers from misleading advertising).
111 Mesopotamia Broadcast, above n 102, para. 50.
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 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 organised by Roj TV could be banned, even if that implied that such event could no longer be broadcasted.

II 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 II 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’. This means that, though there are some hierarchical elements in that relationship, mutual cooperation and empowerment is at its centre. The principles of direct effect and primacy in conjunction with the preliminary reference procedure gave to national courts a leading role in the legal construction of Europe. 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. 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.

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, in which judicial power as to the enforcement of EU law is shared between EU and national courts. First, regarding judicial review of EU measures, EU courts enjoy the monopoly to declare secondary EU law invalid. 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, that national rules of procedure must provide indirect means of challenging those measures. Second, under the preliminary reference procedure, the ECJ has only jurisdiction to interpret

---

112 See Opinion 1/09, above n 3, para. 84.
114 See Opinion 1/09, above n 3, para. 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’).
116 See e.g. Case C-314/08 Filippiak [2009] ECR I-11049, para. 84; C-409/06 Winner Wetten, judgment of 8 September 2010, not yet reported, para. 60.
118 See Opinion 1/09, above n 3, para 69.
120 See Article 19 (1) TEU which states: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. See also K. Lenaerts, ‘Le traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l’Union’ (2009) Cahiers de droit européen 711.
EU law, not national law, \(^{122}\) so that it may not declare a national measure to be incompatible with EU law. \(^{123}\) 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. \(^{124}\)

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, \(^{125}\) whilst in others the answer will be adapted to ‘the specific circumstances of the […] case’ at hand. \(^{126}\) 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 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. \(^{127}\) 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

\(^{122}\) See e.g. Case 27/74 Demag [1974] ECR 1037, para. 8; Case C-347/89 Eurim-Pharm [1991] ECR I-1747, para. 16; and Case C-246/04 Turn- und Sportunion Waldburg [2006] ECR I-589, para. 20. More recently, see Case C-515/08, dos Santos Palhoita and Others, judgment of 7 October 2010, not yet reported, para. 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’).

\(^{123}\) This is different under Articles 258 to 260 TFEU.

\(^{124}\) See e.g. Case C-54/07 Feryn [2008] ECR I-5187, para. 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 Treat[ies] and of acts adopted by [EU] institutions’).

\(^{125}\) See e.g. Case C-101/08 Audiolux and Others [2009] ECR I-9823, para. 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).”

\(^{126}\) Case C-145/09 Tsakouridis, judgment of 8 June 2010, not yet reported.

\(^{127}\) See e.g. Joined Cases C-483/09 and C-1/10 Gueye and others, judgment of 15 September 2011, not yet reported.
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*, 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 jeopardising the quality of teaching – and, because of the nature of the programmes at issue, public health. Accordingly, in relation to nine medical or paramedical programmes, the French Community adopted the 2006 decree which provided a numerus clausus for enrolment 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’. Moreover, the number of non-resident students in those courses could not exceed a 30% 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.

---

128 Case C-73/08 *Bressol and Others*, judgment of 13 April 2010, not yet reported.
129 Those 9 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-chiroprapy; Bachelor of physiotherapy; Bachelor of audiology; Educator specialised in psycho-educational counselling.
130 Opinion of AG Sharpston in *Bressol*, above n 128, para. 25.
At the outset, the ECJ stressed that EU law does not detract from the Member States the power to organise 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. 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.

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.

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 specialities. The ECJ recognised 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.

131 Bressol, above n 128, paras 28 and 29.
132 Ibid., para. 46.
133 Ibid., para. 50.
134 Ibid., para. 58.
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’.135 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 materialise, it must, however, show that those risks actually exist. Third, the ECJ held that, for 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. 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

135 Ibid., para. 69.
examined thoroughly each of the nine programmes referred to in the 2006 decree, 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 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. 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. 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. 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. Finally, owing to the fact that the organisation of entry exams for non-residents would impose administrative and financial burdens on the Universities of the 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. 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-


137 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.
resident students which could jeopardise the quality of the education veterinary students receive. 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.

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 favour of a more ‘Anglo-Saxon-oriented’ deliberation. 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’. 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’.

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

139 Ibid., at 225.
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.\(^{140}\) 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’.\(^{141}\) In so doing, the ECJ was sending a clear message: the Treaty provisions on EU citizenship are not limited to being a ‘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’.\(^{142}\) Interestingly, in contrast to the extensive Opinion of AG Sharpston,\(^{143}\) the ECJ’s legal reasoning is contained in ten paragraphs,\(^{144}\) out of which only six concerned Article 20 TFEU.\(^{145}\) 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

---

\(^{140}\) Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011, not yet reported.  
\(^{141}\) Ibid., para. 42.  
\(^{142}\) Ibid., para. 44.  
\(^{143}\) Opinion of AG Sharpston in *Ruiz Zambrano*, above n 140, which contains 178 paragraphs. 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.  
\(^{144}\) Ibid., paras 39 to 45.  
\(^{145}\) The other four concern the reformulation of the questions referred by the Belgian court (*Ibid.*, para. 36), the observations of the parties (*Ibid.*, paras 37 and 38), and an explanation as to why Directive 2004/38, [2004] OJ L 158/77, does not apply to the situation of Mr Ruiz Zambrano (*Ibid.*, para. 39).
‘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.

C 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 naturalisation 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 naturalisation 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.146

In reaching that conclusion, the ECJ stressed once again that ‘citizenship of the Union is intended to be the fundamental status of nationals of the Member States’147 With a view to

146 Case C-135/08 Rottmann, judgment of 2 March 2010, not yet reported, para. 42.
147 Ibid., para. 43.
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.

i. 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’, 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 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’.

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.

---

148 Ruiz Zambrano, above n 140, para. 42.

149 That expression is commonly used by the ECJ in the context of the Treaty provisions on free movement. See e.g. Case C-19/92 Kraus [1993] ECR I-1663, para. 32.
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 references, judicial prudence counsels in favour 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.

ii. 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*.

...a *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 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’.

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. 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

---

150 See Case C-434/09 *McCarthy*, judgment of 5 May 2011, not yet reported, and Case C-256/11 *Dereci*, judgment of 15 November 2011, not yet reported.
151 *McCarthy*, above n 150, para. 49 (emphasis added).
freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued.\textsuperscript{153} The ECJ thereby in effect ruled that dual nationality is not in itself a sufficient connecting factor with EU law.\textsuperscript{154}

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.

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 \textit{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 \textit{Zhu and Chen}. However, that silence should not be interpreted as a sign of inconsistency. On the contrary, a

\textsuperscript{153} Ibid., para. 52 (referring to Case C-353/06 \textit{Grunkin and Paul} [2008] ECR I-7639, paras 23, 24 and 29).
\textsuperscript{154} Ibid., para. 54.
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.\(^{155}\)

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]’.\(^{156}\)

b) 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.

---

\(^{155}\) 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.

\(^{156}\) *Ruiz Zambrano*, above n. 140, para. 42.
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 impeding effect]’.\(^\text{157}\) 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. Just as the children of Mr Ruiz Zambrano, those of Mr Dereci are still minors and have never exercised their right to free movement. 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’.\(^\text{158}\) 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’.\(^\text{159}\) 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 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

\(^{157}\) *McCarthy*, above n 150, para. 49.

\(^{158}\) *Dereci*, above n 150, para. 66.

\(^{159}\) *Ibid.*, para. 68.
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.  

iii. Concluding remarks

A joint reading of Rottmann, Ruiz Zambrano, McCarthy and Dereci show that the legal reasoning of the ECJ is far from being laconic or cryptic. The sequence of these 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’.  

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 four 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 common-law court operates. Indeed, Rottmann, Ruiz Zambrano, McCarthy and Dereci show that ‘the life of the law [on EU citizenship] has not been logic: it has been experience’. 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 the latter case did to address the issues raised in McCarthy, and then in Dereci, and in cases to come.

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 honour the role

160 Ibid., paras 72 and 73.
161 Ruiz Zambrano, above n. 140, para. 42.
162 O. W. Holmes, Jr., Common Law (Massachusetts, John Harvard Library, 2009), at 3.
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.

III General 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 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 favour 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 favours ‘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 harmonising measures, the ECJ does take into consideration national interests. It will strive to interpret EU harmonising 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 and Dereci 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.