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The Court of Justice of the E.U.: a Contextualist Court

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ABSTRACT

The Court of Justice of the European Union (E.U.) is sometimes labelled "a teleological court". In this paper I will show why it is a misleading label. Then I will propose a more appropriate label for it – "a contextualist court" – and describe what such a label reveals about the interpretation of E.U. law by the Court of Justice. In particular, I will show that the contextual/systemic arguments are the most defining feature of the Court's legal reasoning and that those arguments are essential for the Court's use of other categories of interpretive arguments: textual/linguistic, purposive/teleological, and historical/intentional. I will also discuss what are the values promoted by such an approach to the interpretation of E.U. law. In the end, I will demonstrate, using a recent case study, that the Court's interpretive approach leads to integrationist outcomes less often than is usually thought. This challenges accounts built on the alleged integrationist bias of the Court of Justice, which is often used interchangeably with the label "teleological".

KEYWORDS

Interpretation of E.U. Law; Court of Justice; Legal Reasoning; Teleology; Contextualism

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INTRODUCTION

The Court of Justice of the E.U. receives incredible attention from legal scholars. It always has. They dissect its case law in every possible area of E.U. law. They analyse its legal reasoning. They discuss its institutional setup. They sketch its relationship with other institutional actors, especially the E.U. legislature and national courts. They question or defend its legitimacy and authority. They look deeper into its judgments to find a particular ideology, biases, or policy preferences. They describe, explain, criticise and justify what the Court *is* or *does*, as well as urge, advocate, require, and propose what the Court *should be doing*.

E.U. legal scholars also label. They take certain features or characteristics of the Court's setup, case law, reasoning, etc., and come up with labels that best capture them. These labels are then used descriptively to give as accurate and detailed an account of judicial practice in the E.U. as possible, as well as, normatively, defending or criticising such practice.[1]

One such label is "teleological". It is meant to describe the typical approach of the Court of Justice to the interpretation of E.U. law. Namely, in its legal reasoning the Court is supposedly giving great(er) weight to the teleological arguments – including objectives, purposes, and effectiveness of E.U. law – often at the expense of the textual argument or the intention of the E.U. legislator.[2] Its interpretive philosophy can thus be characterised as purposivism,[3] which is usually associated with judicial activism and a lack of judicial restraint and deference to the legislator.[4] The omnipresence of the Court's teleology and purposivism are sometimes taken axiomatically - such that the focus shifts to the purported justifications of such interpretations.[5]

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[1] *Cf.* Paul Craig, *Pringle and the Nature of Legal Reasoning*, 21 Maastricht J. Eur. & Comp. L. 205, 209 (2014) (U.K.).

[2] *Cf.* Gunnar Beck, *The Structural Impact of General International Law on EU Law. The Court of Justice of the EU and the Vienna Convention on the Law of Treaties*, 35 Y. B. Eur. L. 484 (2016) (U.K.) [hereinafter Beck, *The Structural Impact*]; *see also* Gunnar Beck, *The Legal Reasoning of the Court of Justice and the Euro Crisis – the Flexibility of the Cumulative Approach and the Pringle Case*, 20 Maastricht J. Eur. & Comp. L. 635 (2013) (U.K.); Timothy Millett, *Rules of Interpretation of EEC Legislation*, 10 Statute L. Rev. 163 (1989) (U.K.).

[3] *Cf.* Giulio Itzcovich, The Interpretation of Community Law by the European Court of Justice, 10 German L. J. 537, 557–59 (2009) (Ger.); *see also* Mitchel de S.-O.-L'E. Lasser, Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy 229 (Oxford University Press, 2009) (U.K.) (who rather terms it "meta-purposive" or "meta-teleological"); Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 Fordham Int'l L. J. 656 (1996). For sector-specific studies, see generally Oreste Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint*, 5 German L. J. 283 (2004) (Ger.); Kenneth M. Lord, *Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European Court of Justice*, 29 Cornell Int'l L. J. 571 (1996); David Mazzarella, *The Integration of Aviation Law in the E.C.: Teleological Jurisprudence and the European Court of Justice*, 20 Transp. L. J. 353 (1992).

[4] *Cf.* Hjalte Rasmussen, On Law and Policy in The European Court of Justice: A Comparative Study in Judicial Policymaking (Brill Nijhoff ed., 1986) (Neth.); *see also* Trevor C. Hartley, *The European Court, Judicial Objectivity, and the Constitution of the European Union*, 112 Law Q. Rev. 95 (1996) (U.K.).

[5] *Cf.* Stephen Brittain, *Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal*, 55 Irish Jurist 134 (2016) (Ir.).

Some authors have rejected this label as inadequate, selective, and superficial.[6] I will briefly revisit their objections and explain why we should break off with the label "teleological" for good. At the same time, I will propose a more accurate label for the Court of Justice – a "contextualist" court. I will argue that, as a descriptive matter, the contextual/systemic arguments are the most defining feature of the Court's legal reasoning and its judicial philosophy. I will also show that the Court's use of other general categories of interpretive arguments – textual/linguistic, purposive/teleological, and historical/intentional[7] – is marked by their *contextualisation*. Following that, as a normative matter, I will ask what value or good is promoted by such an approach to legal reasoning. Lastly, I will reflect on the relationship between a "contextualist" reasoning and outcomes of adjudication. The main concern is that contextualism, just like teleology, will in most cases lead to integrationist outcomes that reflect E.U. interests. Based on a sample of recent cases of the Court of Justice, I will illustrate why that is not necessarily so. The final section concludes with looking into the factors that call for a contextualist court in the current state of the E.U. legal system.

1. GREAT CASES MAKE BAD LAW

The label "teleological" given to the Court of Justice has two major limitations. First, it is based on a limited number of cases.[8] And second, those cases are what we usually call "landmark" cases. They make up for only a tiny fraction of all cases the Court of Justice deals with – a dozen a year at most, compared to almost a thousand a year which the Court is currently deciding.[9] They feature exceptional controversies that raise salient legal and political issues of a constitutional nature, which cannot merely be solved by

[6] *See* Albertina Albors Llorens, *The European Court of Justice, More than a Teleological Court*, 2 Cambridge Y. B. Eur. Legal Stud. 373 (1999–2000) (U.K.); *see also* David Edward, *Judicial Activism – Myth or Reality?*, *in* Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie Stuart 29 (Angus I. L. Campbell & Meropi Voyatzi eds., 1996).

[7] For discussion of these main interpretive arguments that appear in judicial reasoning in many contemporary jurisdictions and legal traditions, and in general of the interpretation of law as argumentative practice, see generally Neil MacCormick, *Argumentation and Interpretation in Law*, 9 Argumentation 467 (1995) (Neth.); *see also* Neil MacCormick & Robert Summers, Interpreting Statutes: A Comparative Study, Routledge (Neil MacCormick & Robert Summers eds., 1991) (U.K.).

[8] One of the major critical works readily admits this limitation when it notes that it takes into account "only a tiny proportion" of the Court's case law – less than 0.3% of judgments in a thirty years period; *see* Sir Patrick Neill, The European Court of Justice: A Case Study in Judicial Activism (European Policy Forum ed., 1995) (Neth.).

[9] In 2021, the Court received 838 new cases, completed 772 cases, and had 1113 cases pending. 2019 was the peak year, before the Covid-19 pandemic hit. In that year the Court received 966 new cases, completed 865 cases, and had 1102 cases pending; *see* Court of Justice of the E.U., *Ann. Rep. 2021 – Judicial activity* (Mar. 2022).

only looking into the text of legal provisions and their relevant context. On the contrary, in those cases the Court is often presented with a range of arguments that point to rivalling yet equally plausible conclusions. So, once the immediate rules run out, the Court has to use what Advocate General Michal Bobek termed "constitutional interpretive tiebreakers".[10] These are, for instance, certain moral or political values and principles like dignity, equality, liberty, peace, solidarity, cultural diversity, free movement, market liberalisation, etc. They are characteristic of a liberal democracy being a political order and liberal constitutionalism as a legal order in general. More importantly, they are recognised as such in the E.U. constitutional order, be it in Article 2 of the Treaty on European Union (T.E.U.) or other provisions of the founding Treaties. Hence, they represent the intentionally made "fundamental constitutional choice" of the E.U. Treaty-makers.[11] By extension, they inform the legal reasoning of the Court of Justice in the interpretation of E.U. law and not only in these landmark cases - albeit that in them this becomes the most apparent. Of course, although we may all subscribe to nominally the same values and principles, reasonable disagreements about their conceptions, their meaning, and their requirements in particular circumstances still exist.[12] The controversies in these landmark cases usually concern disagreements about moral and political issues. So, whichever side the Court takes – and one side it must always take – there will surely be those who will loudly protest the outcome. For that reason, landmark cases typically receive the greatest scholarly and public attention.

[10] Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., Opinion of Advocate General Bobek, ECLI:EU:C:2020:375, ¶¶ 104–117 (May 14, 2020).

[11] *See* Siniša Rodin, *Liberal Constitutionalism, Rule of Law and Revolution by Other Means*, Il Diritto dell'Unione Europea 203, 226–27, 230–31 (2021) (It.).

[12] *Cf.* Martijn van den Brink, *Justice, Legitimacy and the Authority of Legislation within the European Union*, 82 Mod. L. Rev. 293, 300 (2019) (U.K.).

In an often-quoted passage from his dissenting opinion, U.S. Supreme Court Justice Oliver Wendell Holmes famously reminded us that "[g]reat cases, like hard cases, make bad law".[13] The same holds true in the E.U. context: a fixation on "great" cases can give false impressions and expectations about the actual practices of the Court of Justice and lead to a distorted picture of its legal reasoning.[14] For the same reason, labels assigned on the basis of great cases are bad. The one about "teleological" courts is too simplistic and selective. It was never verified by a larger and comprehensive case law analysis that describes the reasoning of the Court in a meaningfully selected sample of cases that cover certain areas of law or periods of time.[15] At the same time, it leaves out a vast majority of the Court's judgments. In them, the Court routinely deals with ordinary cases that involve somewhat simpler questions of interpretation of E.U. (often secondary) law. These questions are about politically or morally non-salient controversies; and therefore, receive scant attention.

One may push back against this and say that what actually matters is what the Court of Justice does in hard, exceptional cases. They set the tone for the Court's practice

[13] Northern Securities Co. v. United States, 193 U. S. 197, 400 (1904) (Holmes, J., dissenting).

[14] What is acknowledged by many authors, including those that are the most critical of the Court's alleged purposivism: see, e.g., Giulio Itzcovich, *The European Court of Justice*, *in* Comparative Constitutional Reasoning 277, 294 (András Jakab, Arthur Dyevre & Giulio Itzcovich eds., 2017):

> [T]he fact that literal arguments are almost absent [. . .] [from the Court's leading cases that are notable for] their impact on the legal culture of the Member States, their contribution to the completion of the common market, and their influence on the development of European law [. . .] cannot be regarded as indicative of a general feature of the Court's legal reasoning;

Beck, *The Structural Impact*, *supra* note 2, at 496:

> [I]n most run-of-the-mill cases, which concern the application of more or less clear, detailed, and technical provisions [. . .] the Court generally pays close regard to the wording of the applicable provisions, and it is exceptional for the Court to reach a conclusion based on teleological criteria, which are opposed to a literal reading. However, the Court's pro-Union default position becomes crucial and often the decisive factor in cases involving major issues of principle, such as constitutional issues or the division of competences between the [E.U.] and Member States;

Gerard Conway, *The Quality of Decision-Making at the Court of Justice of the European Union*, *in* How to Measure the Quality of Judicial Reasoning 225, 231 (Mátyás Bencze & Gar Yein Ng eds., 2018):

> [T]he [European Court of Justice] has a marked tendency to meta-teleological interpretation [. . .] purposive interpretation at a very high level of generality related to the [E.U.] legal system overall, rather than to particular legislative provisions or pieces of legislation. This sets it apart from national and other international courts and gives it great scope for creativity, albeit that it only really does this in a minority of cases.

[15] On the contrary, it was challenged in certain studies; see, e.g., Albors Llorens, *supra* note 6, at 398, who notes that:

> [W]hichever view one takes of the Court's work, it is too facile to generalise on the basis of a few decisions randomly selected from more than forty [now seventy] years of case law. A more rigorous approach, based on a systematic analysis of the Court's case law in different areas, would do it more justice. The comparatively few judgments where it has reached a seemingly dramatic result must not obscure the careful and painstaking interpretative task carried out by the Court in the majority of its decisions.

overall and are thus the most important for the E.U. legal system and community. Hence, they deserve all the attention, and it is most important to know how the Court will go about deciding those cases. But in reality, the reason why a certain case is considered important is often unclear. They rarely lead to major twists and turns in the jurisprudence of the Court, nor fierce reactions from national courts and governments, or dramatic changes in everyday life of ordinary citizens. Sometimes it is legal scholars who overstate the importance of certain judgments - for better or worse.

Alternatively, cases that are considered routine and simple may often be equally important. They may affect the legal position of many individuals or impose significant financial burdens on those that end up on the losing side. They are very important, at least, for many legal practitioners and national judges who will have to apply E.U. law to solve real-life disputes. So, what the Court of Justice does in these cases is not less important from what happens in cases that stir great controversy. The fact that the former cases exceed the latter by far in numbers makes them only more important. Our knowledge about the Court's reasoning in those cases is much more useful for everyone outside academia - especially if we measure the usefulness of that knowledge by how successful it is in predicting the outcomes of judicial rulings.[16] It can also provide a more solid basis for describing and characterising the Court's legal reasoning, including labelling its approach to the interpretation of E.U. law.

[16] Echoing Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897): "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law".

To overcome the obstacles of selectiveness and representation, my observations in this paper build upon a study of a recent set of cases, which does not (only or mostly) consist of landmark cases. It is composed of 102 preliminary references received by the Court of Justice between mid-2018 and 2020,[17] which contain 135 questions of interpretation of E.U. law posed by national courts. These questions are about the interpretation of different substantive areas of E.U. law, from customs and taxes; to consumer protection and the free movement of workers; to environment and asylum; as well as different sources of E.U. law: both primary and secondary. Questions were referred by courts from twenty-one Member States of different jurisdiction and rank: from ordinary, administrative, financial, and constitutional courts to first instance, appellate, and apex courts.[18]

Moreover, among these references, there is a small number of those that could perhaps be characterised as hard cases, if we assume that those cases are reserved for the Grand Chamber - of which there are seven in total (containing ten questions of interpretation).[19] There are also only a few cases that the Court decided with a reasoned order, which can be considered as "easy" cases and there are three in total (containing four questions).[20] Other cases fall on the spectrum between these two ends where fifty-one cases (containing sixty-one questions) dealt with three-judge chambers and without the opinion of the Advocate General (except in one case);[21] eight cases (containing eleven questions) dealt with five-judge chambers without the opinion of the Advocate General; and thirty-three cases (containing forty-nine questions) dealt with five-judge chambers with the opinion of the Advocate General.

[17] Which is around one-seventh of all preliminary references (720 in total) received by the Court during this period.

[18] This set of cases was compiled of preliminary references in which national courts proposed answers to the questions of interpretation of E.U. law sent to the Court of Justice. In an earlier study, I have compared those references to the responses of the Court of Justice; see Davor Petrić, Interpreting E.U. Law: Legal Reasoning of National Courts in the Preliminary Ruling Procedure (2022) (Ph.D. dissertation, University of Zagreb), in which I aimed to assess the interpretive practice of national courts. Since the analyzed cases covered a significant number of diverse legal questions, which were not restricted to specific area(s) or source(s) of law, national background or type(s) of the referring courts, they provided a solid sample for describing general features of the legal reasoning of the Court of Justice.

[19] *Cf.* Rules of Procedure of the Court of Justice of the E.U., art. 60(1), 2012 O.J. (L 265) 1. ("Assignment of cases to formations of the Court"): "The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber [. . .]".

[20] *Cf. Id.* at art. 99. ("Reply by reasoned order"):

> Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

[21] *Cf.* 3. Protocol on the Statute of the Court of Justice of the E.U, art. 20(5), 2004 O.J. (C 310) 210 : "Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General".

Such a diverse sample of cases – most importantly, in terms of their perceived legal difficulty and subject areas – arguably comes closer to representing the bulk of the everyday interpretive practice of the Court of Justice. Therefore, it enables a more accurate description of the Court's general approach to the interpretation of E.U. law.

2. THE INTERPRETIVE APPROACH OF A CONTEXTUALIST COURT

Against this background, in this Section I take up the most important categories of interpretive arguments the Court of Justice uses when interpreting E.U. law. Those are textual/linguistic, contextual/systemic, purposive/teleological, and historical/intentional arguments. For each of these arguments, I will show what are the main characteristics of their use and what place *context* and *contextualisation* have in that process.

2.1. TEXTUAL OR LINGUISTIC ARGUMENTS

Legal provisions are typically expressed in writing. Written text is, therefore, the starting point of legal interpretation. The same holds true in E.U. law.[22] Indeed, the Court of Justice often cites textual or linguistic features of E.U. legal provisions as a first step in their interpretation.[23] The Court refers to these features in different ways. Some examples are the "[strict/actual] wording",[24] "expression",[25] "usual meaning [in everyday language]",[26] "everyday meaning",[27] "terms",[28] etc. The Court, however, rarely adds anything to these brief references. Rather, it merely asserts that the meaning or scope of a legal provision is "clear" or "apparent" based on its text; or that from its wording or terms or ordinary use a specific meaning or scope inevitably "follows". The

[22] *Cf.* Case C-482/09, Budějovický Budvar, Opinion of Advocate General Trstenjak, 2011 E.C.R. I-08701: "According to traditional principles of construction, the starting-point of any interpretation, and also its boundary, is always the wording of a provision".

[23] In my study, it did so in more than half of situations (57.1%) or in 76 of 135 questions of interpretation.

[24] Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶ 39 (July 16, 2020); Case C-292/89, Antonissen, ¶ 9, 1991 E.C.R. I-00745.

[25] Case C-112/19, Marvin M., ECLI:EU:C:2020:864, ¶ 37 (Oct. 28, 2020); Case C-363/19, Konsumentombudsmannen v. Mezina, ECLI:EU:C:2020:693, ¶¶ 46–47 (Sept. 10, 2020).

[26] Case C-264/19, Constantin Film Verleih, ECLI:EU:C:2020:542, ¶¶ 29–30 (July 9, 2020). Occasionally, the Court makes a distinction between "the usual meaning" of a term or sentence "in scientific language and in everyday language"; *see* Case C-346/08, Comm'n v. United Kingdom, 2010 E.C.R. I-03491, ¶ 37.

[27] Case C-437/19, État luxembourgeois v. L., ECLI:EU:C:2021:953, ¶ 51 (Nov. 25, 2021).

[28] Case C-513/20, Termas Sulfurosas de Alcafache, ECLI:EU:C:2022:18, ¶ 29 (Feb. 13, 2022).

only exception is that the Court may support this assertion with a remark that other parties in the proceedings share the same understanding.[29]

For their part, (some) Advocates General are usually more elaborate with these assertions. When they make them, they may cite dictionaries,[30] technical manuals and scientific writings,[31] legal scholarship and legal vocabulary, etc.[32] These legally non-binding materials support the conclusion that the meaning of provisions follows from their text or ordinary use. They may indirectly appear in the Court's judgments. For instance, when judgments refer to specific points in the opinions ("as the Advocate General observed/stated/noted in her Opinion, [. . .]") or "soft law" instruments published by E.U. institutions, which the Court recognises as admissible aids to interpretation.[33]

In some situations, the Court of Justice may implicitly rely on the linguistic rules on grammar and syntax. For example, it may point to the form or function of the words or their position in a sentence. Typical examples are the use of the word "shall" which implies obligation;[34] or the word "only" which implies exhaustiveness;[35] or the conjunction "or" which implies alternatives;[36] or the indefinite article "a" which implies a general scope or status.[37]

However, these linguistic subtleties and inferences are not what lead the Court of Justice to conclude that the meaning of a provision is clear and unambiguous. What leads it there more often is *contextualisation* of the text. As Neil MacCormick noted, "[n]o linguistic communication is fully comprehensible save in a whole presupposed context of utterance".[38] To illustrate how this works, consider the following example.

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[29] *See* Case C-167/95, Linthorst, 1997 E.C.R. I-04383, ¶ 13:

> The term "valuations", as it is understood in common parlance, signifies – as the German Government and the Commission have pertinently observed – examination of the physical condition or investigation of the authenticity of a good with a view to estimating its value or quantifying work to be carried out or the extent of damage sustained.

[30] *See* Case C-264/19, Constantin Film Verleih, Opinion of Advocate General Øe, ECLI:EU:C:2020:261, ¶ 30 (Apr. 2, 2020); Case C-535/19, A. v. Latvian Ministry of Health, Opinion of Advocate General Øe, ECLI:EU:C:2021:114, ¶ 88 (Feb. 11, 2021).

[31] *See* Case C-88/19, T. M. and Others, Opinion of Advocate General Kokott, ECLI:EU:C:2020:93, ¶¶ 34, 39 (Feb. 13, 2020).

[32] *See* Case C-532/18, G. N. v. Z. U., Opinion of Advocate General Øe, ECLI:EU:C:2019:788, ¶ 45 (Sept. 26, 2019).

[33] *Cf.* Case C-189/19, Spenner v. Germany, ECLI:EU:C:2020:381, ¶¶ 48-49 (May 14, 2020).

[34] *See* Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304, ¶ 39 (Apr. 23, 2020); Case C-112/19, Marvin M., ECLI:EU:C:2020:864, ¶ 37 (Oct. 28, 2020).

[35] *See* Case C-564/18, L. H., ECLI:EU:C:2020:218, ¶¶ 29–30 (Mar. 19, 2020); *see also* Case C-321/19, B. Y. and C. Z., ECLI:EU:C:2020:866, ¶¶ 31–32 (Oct. 28, 2020).

[36] *See* Case C-540/19, W. V. v. Landkreis Harburg, ECLI:EU:C:2020:732, ¶ 29 (Sept. 17, 2020).

[37] *See* Joined Cases C-322/19 and C-385/19, K. S. and Others, ECLI:EU:C:2021:11, ¶ 63 (Jan. 14, 2021).

[38] MacCormick, *supra* note 7, at 475.

In *Presidenza del Consiglio dei Ministri v. B. V.*, the Court was asked to interpret Article 12(2) of Directive 2004/80/EC relating to compensation to crime victims. That provision mandates Member States to "ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims". The Court noted that from its "wording" it follows that "that provision sets out, in general terms, the obligation for Member States to provide for the existence of a scheme on compensation to "victims of violent intentional crimes committed in their respective territories" and not only to victims that are in a cross-border situation".[39] But that conclusion follows only after juxtaposing the wording of Article 12(2) to the wording of other provisions of the same Directive, which expressly refer to the existence of cross-border elements as a precondition of their application.[40] So, the meaning that the Court brings to the "wording" of this provision is not usual or everyday meaning that it could be ascribed to the text in question. Rather, it is a contextualised meaning that becomes apparent only in a relevant context, i.e., in an immediate setting of a provision in question or a wider setting of the legislative act.

In many other situations encountered in my study,[41] the Court of Justice was using the textual/linguistic arguments in the same way. It pointed to textual or linguistic features of E.U. legal texts not in isolation but rather in their immediate or wider surrounding.

Of course, there may be certain words, phrases or sentences whose meaning may be ascertained only by observation of the natural language in which they are expressed, without inquiring about their context. It may be argued that every text does have the "core" meaning – after all: "[a] cigarette is not an elephant".[42] In many situations in everyday life, we can understand the meaning of legal texts without much effort or background information. But these are not situations that generate controversy or end

[39] Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶ 39 (July 16, 2020).

[40] *See* Council Directive 2004/80/EC of 29 April 2004 relating to Compensation to Crime Victims, 2004 O.J. (L 261) 15, 1.

[41] *See generally*, Case C-502/18, C. S. and Others, ECLI:EU:C:2019:604, ¶ 20 (July 11, 2019); *see also* Case C-524/18, Willmar Schwabe, ECLI:EU:C:2020:60, ¶ 52 (Jan. 30, 2020); *see* Case C-578/18, Energiavirasto, ECLI:EU:C:2020:35, ¶¶ 38–40 (Feb. 23, 2020); *see* Case C-610/18, AFMB and Others, ECLI:EU:C:2020:565, ¶¶ 52-53 (July 16, 2020); *see* Case C-722/18, KROL v. Porr, ECLI:EU:C:2019:1028, ¶¶ 30–32 (Nov. 28, 2019); *see* Case C-791/18, Stichting Schoonzicht, ECLI:EU:C:2020:731, ¶¶ 30–31 (Sept. 17, 2020); *see* Case C-796/18, Informatikgesellschaft für Software-Entwicklung, ECLI:EU:C:2020:395, ¶¶ 29–30 (May 28, 2020); *see* Case C-299/19, Techbau, ECLI:EU:C:2020:937, ¶¶ 39–46 (Nov. 18, 2020); *see* Case C-365/19, F. D., ECLI:EU:C:2021:189, ¶¶ 28–30 (Mar. 10, 2021); *see* Case C-530/19, N. M. v. O. N., ECLI:EU:C:2020:635, ¶¶ 24–25 (Sept. 3, 2020); *see* Case C-619/19, Land Baden-Württemberg v. D. R., ECLI:EU:C:2021:35, ¶¶ 37–40 (Jan. 20, 2021); Case C-189/19, Spenner v. Germany, ECLI:EU:C:2020:381, ¶¶ 37-40, 45 (May 14, 2020); Landkreis Harburg, ECLI:EU:C:2020:732 ¶¶ 29-31.

[42] Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 Cardozo L. Rev. 767, 767 (1992).

up being litigated before courts. Those that do usually concern the "penumbral" meaning of the text, which cannot be ascertained only by following the rules of ordinary language.[43] These situations represent the tip of the iceberg of all legal questions requiring judicial resolution.[44]

Cases that are brought before the Court of Justice are of the same kind. Therefore, in the interpretation of E.U. law, it is indeed "context and not text that provides answers to legal questions".[45] For that reason, most situations in which the Court refers to the textual/linguistic arguments are characterised by the contextualisation of linguistic expressions, in the way just described. What provides relevant context are typically other provisions found within the same legal act. These provisions, together with provisions of different but related legal acts or of higher sources of law, are part of what is usually considered as making the content of the following category of interpretive arguments.

2.2. CONTEXTUAL OR SYSTEMIC ARGUMENTS

These arguments are used to ensure that the meaning of a legal provision "fits" into its context horizontally and vertically. As the Court famously noted in *CILFIT*, "every provision of [E.U.] law must be placed in its context and interpreted in the light of the provisions of [Union] law as a whole".[46] What makes the relevant context is expressed through different types of contextual/systemic arguments - the most important being contextual harmonisation, precedent, analogy, and general principles. These will be discussed in the following lines.

In the case law of the Court of Justice, contextual harmonisation and precedent are by far the most frequently used arguments.[47] It can rightfully be said that it is impossible to find a judgement of the Court that does not cite at least one of these two arguments.

The first of them is contextual harmonisation. It is important since no legal provision is enacted in isolation from other provisions. Rather, every provision is a part of a certain section or chapter of some legislative act, which is, together with related legislative acts, part of a certain area of law, which is, in turn, a part of the entire legal

[43] *See* Riccardo Guastini, *Legal Interpretation. The Realistic View*, *in* Encyclopedia of the Philosophy of Law and Social Philosophy (Mortimer Sellers & Stephan Kirste eds., 2020).
[44] *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. Chi. L. Rev. 1215, 1226–31 (2009).
[45] Siniša Rodin, *In the Classroom and the Courtroom*, 20 Maastricht J. Eur. & Comp. L. 475, 477 (2013) (U.K.).
[46] Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 03415, ¶ 20.
[47] In my study, the Court used the argument from contextual harmonization in 83.4% questions of interpretation or 111 in total, and the argument from precedent in 84.2% of questions of interpretation or 112 in total. As for the other two contextual/systemic arguments, general principles were cited in 29.3% of questions of interpretation or 39 in total, and analogy in 28.6% of questions of interpretation or 38 in total.

system. This, then, finds its place next to other legal systems in the transnational legal arena, and so on. In line with this, the Court of Justice uses the argument from contextual harmonisation to interpret provisions of E.U. law consistently with other relevant provisions, on different levels and in different dimensions. Most notably:

- to determine the meaning of a term consistently with the meaning of other terms found in the same provision (also known as *ejusdem generis* [of the same kind] argument);[48]

- to determine the meaning of a provision consistently with the meaning of provisions immediately surrounding it,[49] or with provisions with which it forms a specific Unit or Chapter of a source of law,[50] or with provisions from Annexes to that source of law;[51]

- to determine the meaning of a provision consistently with the title of a Section or Chapter of the legal act in which it is found;[52]

- to determine the meaning of a provision consistently with analogous provisions from other legal acts,[53] and other areas of law,[54] or with provisions from different legislative acts regulating the same area of law (also known as *in pari materia* argument);[55]

[48] *See* Case C-272/19, V. Q. v. Land Hessen, ECLI:EU:C:2020:535, ¶¶ 69–71 (July 9, 2020); *see also* Case C-73/16, Peter Puškár v. Finančné ECLI:EU:C:2017:725, ¶¶ 39–40 (Sept. 27, 2017); *see* Case C-101/01, Bodil Lindqvist, 2003 E.C.R. I-12971, ¶¶ 44–45.

[49] *See* Case C-546/19, B. Z. v. Westerwaldkreis, ECLI:EU:C:2021:432, ¶¶ 43–46 (June 3, 2021); *see also* Case C-543/19, Jebsen & Jessen v. Hauptzollamt Hamburg, ECLI:EU:C:2020:830, ¶¶ 56–57 (July 1, 2019); *see* Case C-686/2019, SIA "Soho Group" v. Patērētāju, ECLI:EU:C:2020:582 ¶¶ 38–42 (July 6, 2020); *see* Case C-616/19, M. S. and Others v. Minister for Justice and Equality, ECLI:EU:C:2020:1010, ¶¶ 32–36 (Dec. 10, 2020); Case C-791/18, Stichting Schoonzicht, ECLI:EU:C:2020:731, ¶ 26 (Sept. 17, 2020); Case C-437/19, État luxembourgeois v. L., ECLI:EU:C:2021:953 ¶¶ 43-48 (Nov. 25, 2021).

[50] *See* Case C-786/18, ratiopharm GmbH v. Novartis Consumer Health GmbH, ECLI:EU:C:2020:459, ¶ 34 (Oct. 31, 2018); Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304, ¶¶ 25-35 (Apr. 23, 2020).

[51] *See* Case C-881/19, Tesco Stores ČR a.s. v. Ministerstvo zemědělství, ECLI:EU:C:2022:15, ¶¶ 34–39 (Jan. 13, 2022).

[52] *See* Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶ 40 (July 16, 2020); Case C-500/18, AU v Reliantco Investments, ECLI:EU:C:2020:264, ¶ 60 (Apr. 2, 2020).

[53] *See* Case C-706/18, X. v. Belgische Staat, ECLI:EU:C:2019:993, ¶¶ 34–37 (Nov. 20, 2019).

[54] *See* Case C-306/06, 01051 Telecom GmbH v. Deutsche Telekom A.G., 2008 E.C.R. I-01923, ¶ 27 (Apr. 3, 2008); see also Case C-360/00, Commission v. Italian Republic, 2003 E.C.R. I-05767, ¶ 38 (Jun. 12, 2003) (concerning payments in commercial transactions and payments to the E.U. budget).

[55] *See* Case C-815/18, Federatie Nederlandse Vakbeweging v. Van den Bosch Transporten BV, ECLI:EU:C:2020:976, ¶ 35 (Dec. 1, 2020); *see* Case C-346/19, Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶¶ 40–42 (Dec. 17, 2020); *see* Case C-619/19, Land Baden-Württemberg v. D. R., ECLI:EU:C:2021:35, ¶¶ 55-56 (Jan. 20, 2021); *see* Case C-264/19, Constantin Film Verleih, ECLI:EU:C:2020:542, ¶ 33 (July 9, 2020); *see also* Joined Cases C-322/19 and C-385/19, K. S. and Others, ECLI:EU:C:2021:11 ¶ 66.

- to determine the meaning of a provision consistently with provisions of hierarchically higher sources of law:[56] secondary law consistently with primary law,[57] which includes: the Charter,[58] and general principles,[59] as well as with international law;[60] or implementing legislation consistently with primary legislative act;[61]

- to determine the meaning of a provision in light of a generic requirement of completeness and coherence of the E.U. legal system.[62]

Second important argument in this category is precedent. Its appearance in the jurisprudence of the Court of Justice has been discussed many times.[63] As we saw, the Court makes references to its earlier case law in almost every judgement. Case law thus makes an important element of the context in which legal provisions are placed. In its jurisprudence, the Court of Justice constantly interprets provisions from different

[56] See Joined Cases C-392/16, C-77/17 and C-78/17, M. and Others v. Commissaire général aux réfugiés et aux apatrides, ECLI:EU:C:2019:403, ¶ 77 (May 14, 2019):

> [I]n accordance with a general principle of interpretation, an [E.U.] measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter [. . .] Thus, if the wording of secondary [E.U.] law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with that law.

[57] *See* Case C-199/19, R.L. sp. z o.o. v., ECLI:EU:C:2020:548, ¶ 30 (July 19, 2020).

[58] *See* Case C-949/19, M.A. v. Konsul Rzeczypospolitej Polskiej w N., ECLI:EU:C:2021:186, ¶ 44 (Mar. 10, 2021).

[59] *See* Case C-356/19, Delfly sp. z o.o. v. Smartwings Poland sp. z o. o., formerly Travel Service Polska sp. z o.o, ECLI:EU:C:2020:633, ¶ 29 (Sept. 3, 2020); Case C-826/19, W.Z. v. Austrian Airlines AG, ECLI:EU:C:2021:318, ¶ 41 (Apr. 22, 2021).

[60] *See* Case C-515/19, Eutelsat SA v. Autorité de régulation des communications électroniques et des postes (ARCEP) e Inmarsat Ventures SE, ECLI:EU:C:2021:273, ¶ 63 (Apr. 15, 2021); *see also* Case C-790/19, Parchetul v. L.G. and M.H., E.C.R., ¶¶ 55–58 (Sept. 2, 2021); *see* Case C-795/19, X.X. v. Tartu Vangla, ECLI:EU:C:2021:606, ¶ 49 (July 15, 2021). Note also that the limit to consistent interpretation of E.U. law with international law is reached if the outcome of interpretation would prejudice the fundamental principles of the E.U. constitutional order or undermine its autonomy: see Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA), Opinion 1/17 of the Court, ECLI:EU:C:2019:341, ¶ 107 (Apr. 30, 2019); *see also* Joined Cases C-302/05 and C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-06351, ¶¶ 284–285.

[61] *See* Case C-815/19, Natumi GmbH v. Land Nordrhein-Westfalen, ECLI:EU:C:2021:336, ¶ 52 (Apr. 29, 2021); Case C-361/06, Feinchemie Schwebda GmbH and Bayer CropScience AG v. College voor de toelating van bestrijdingsmiddelen, 2008 E.C.R. I - 3865, ¶ 49.

[62] *See* Case C-482/08, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union, 2010 E.C.R. I-10413, ¶ 48. For classic expressions of this requirement, see Case 294/83, Parti écologiste "Les Verts" v. European Parliament, 1986 E.C.R. 01339, ¶ 23; Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. 04199, ¶ 16.

[63] *See generally* Itzcovich, *supra* note 14, at 296–97; Gunnar Beck, the Legal Reasoning of the Court of Justice of The EU 290–91 (Bloomsbury Publishing, 2013) (U.K.); see also Mitchel de S.-O.-l'E. Lasser, *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court* 51 (N.Y.U. L. Sch., Jean Monnet Working Paper No. 1/03, 2003), who noted that "the Court's "case-law", identified explicitly as such, constitutes probably the single most important focal point in [the Court's] argumentation".

sources of E.U. law. These earlier interpretations then become relevant for later interpretations of the same, similar, or related provisions. Some of the reasons for holding earlier judicial interpretations as authoritative and relevant – and not only in E.U. law – include stability and predictability of the legal system; institutional knowledge and wisdom accumulated during periods of development; and consolidation of precedents; and the value of equality which requires treating the same or similar cases in a same or similar manner.

Precedent is closely related to other types of contextual/systemic arguments mentioned earlier like analogy and general principles. Regarding analogy, when the Court encounters situations that have the same or similar factual or legal background as situations that have already been resolved in an earlier judgement, it can extend its holding from an earlier case and apply it by analogy to a later case.[64]

As for general principles of E.U. law, which are unwritten sources of law, they are developed in the case law. Hence, they can always be traced back to the original judgement that established them. In these rulings, the Court of Justice drew general principles from some of the existing, written sources of law in order to fill in the gaps left by the Treaties. In this exercise, wider legal context becomes essential. When establishing the general principles, the Court of Justice refers to the Treaties and their "general/whole" "system/scheme",[65] constitutional traditions common to the Member States,[66] comparative law in general,[67] and international law.[68] Of course, this doctrinal exercise cannot be reduced to arithmetic, but requires evaluative choices.[69] In other words, the Court does not seek "a lowest common denominator" among these written sources of law, but rather a principle that would "fit" best within the scheme of the Treaties, ultimate objectives and fundamental values of E.U. integration.[70] This is where

[64] *See* Case C-535/18, I. L. and Others, ECLI:EU:C:2020:391, ¶¶ 94–98 (May 28, 2020); *see also* Joined Cases C-762/18 and C-37/19, Q. H., C. V. v. Iccrea Banca, ECLI:EU:C:2020:504 ¶¶ 65–70; *see* Case C-29/19, Z. P. v. Bundesagentur für Arbeit, ECLI:EU:C:2020:36, ¶ 40 (Jan. 23, 2020); Case C-87/19, TV Play Baltic v. v Lietuvos radijo ir televizijos komisija, ECLI:EU:C:2019:1063, ¶¶ 22, 28–29 (Dec. 11, 2019). *see* Case C-329/19, Condominio di Milano v. Eurothermo SpA, ECLI:EU:C:2020:263, ¶ 37 (Apr. 2, 2020); *see* Case C-673/19, M. and Others, ECLI:EU:C:2021:127, ¶¶ 36, 44 (Feb. 24, 2021); Council Directive 2004/80/EC, *supra* note 40, art. 1 ¶¶ 38–40; Case C-363/19, Konsumentombudsmannen v. Mezina, ECLI:EU:C:2020:693, ¶¶ 60–61 (Sept. 10, 2020); Case C-949/19, M.A. v. Konsul Rzeczypospolitej Polskiej w N., ECLI:EU:C:2021:186, ¶ 46 (Mar. 10, 2021).

[65] Case 22/70, Commission v. Council (ERTA), ECLI:EU:C:1971:32, ¶¶ 12, 15 (Mar. 31, 1971).

[66] *See* Case 11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114, ¶ 4 (Dec. 17, 1970).

[67] *See generally* Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur/Factortame,1996 I-01029, ¶¶ 27–30.

[68] *See* Case 4/73, Nold, 1974 00491, ¶ 13; Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, 1979 E.C.R. 03727, ¶ 15.

[69] *See* Koen Lenaerts & José A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 Common Mkt. L. Rev. 1629, 1635-54 (2010).

[70] *See* Case 13/61, Kledingverkoopbedrijf v. Bosch GmbH, 1962 E.C.R. 00045, ¶¶ 283–284; Constantinos N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 Pace Int'l L. Rev. 267, 273-275 (1994).

general principles overlap with the category of purposive/teleological arguments,[71] which is discussed below.

But, it should be noted that cases in which the Court of Justice establishes general principles are very exceptional. They have mostly been laid out in early case law, during the formative period of the E.U.'s legal order. In most situations afterwards, general principles were used as arguments in the interpretation of different provisions of E.U. law.[72] Or, absent specific provisions, they are applied to situations that share relevant factual or legal properties, which is where general principles interact with analogy. Furthermore, at certain points many unwritten principles developed in the case law were codified, be it in a human rights catalogue or secondary law instruments. For instance, the general principle of equal treatment is expressed in several provisions in Title III ("Equality") of the E.U. Charter of Fundamental Rights and directives regulating, e.g., access to employment and working conditions. From there, the Court of Justice can invoke that principle by reference to respective provisions of the Charter or directives in question. This is where the argument from general principles becomes intertwined with the argument from contextual harmonisation.

In the majority of situations in which they nowadays appear in the Court's case law, general principles are indeed used alongside other arguments from this category: contextual harmonisation, precedent, and analogy. For instance, the principle of equal treatment is paired with provisions of primary or secondary law which give a more concrete expression to it;[73] or recalled from the case law in which it was previously applied;[74] or applied by analogy to legally or factually similar situations.[75] As can be seen, the principle of equal treatment or non-discrimination – together with the principle of fiscal neutrality as its iteration in the area of tax law – seems to be the most versatile and frequently used across different areas of law.

These combinations of interpretive arguments reveal another important feature of the legal reasoning of the Court of Justice. It concerns the use of the argument from precedent. Typically, the Court provides a literal "copy–paste" quotation of its earlier

[71] *Cf.* Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 Eur. J. Legal Stud. 137, 141 (2007): "Comparative law becomes, in this way, one more instrument of what is the prevailing technique of interpretation at the Court: teleological interpretation".

[72] *Cf.* Case C-759/18, O. F. v. P. G., ECLI:EU:C:2019:816, ¶¶ 32, 34 (Oct. 3, 2019) (interpretation in conformity with the principles of legal certainty and mutual trust); Case C-45/19, Compañía de Tranvías de La Coruña, ECLI:EU:C:2020:224, ¶ 21 (Mar. 19, 2020) (interpretation in conformity with the principle of legal certainty); Case C-854/19, Vodafone GmbH v. Bundesrepublik Deutschland, ECLI:EU:C:2021:675, ¶ 24 (Sept. 2, 2021). (interpretation in conformity with the principle of equal treatment).

[73] *Cf.* Case C-830/18, P. F. and Others, ECLI:EU:C:2020:275, ¶ 69 (Apr. 2, 2020); Council Directive 2004/80/EC, *supra* note 40, art. 1.

[74] *Cf.* Case C-346/19, Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶¶ 43–51 (Dec. 17, 2020).

[75] *Cf.* Case C-707/19, K. S. v. A. B., ECLI:EU:C:2021:405, ¶¶ 31–32 (May 20, 2021).

rulings, without additional discussion or explanations. At times, one has to go back to these referenced judgements to see how exactly (if at all) they are relevant for the situation at hand. In these judgements, the Court may be pointing to two things. One is a previously determined rule or outcome, as in: "The Court held in *A. v. B.* that the meaning of Article *X* of Directive *Y* is *Z*." The other is specific interpretive arguments that were employed in the earlier judgement, as in "The Court held in *A. v. B.* that the purpose of Article *X* of Directive *Y* is *Z*." By the latter form of the argument from precedent, we can see that this argument in the Court's reasoning becomes "transcategorical".[76] In other words, although the Court is formally citing precedent, it is actually referring to some other argument, like contextual harmonisation, textual argument, purpose, or the intention of the legislator.[77]

To sum up: so far, we have seen how the Court of Justice cites the contextual/systemic arguments the most, in particular contextual harmonisation and precedent to justify its rulings; how contextual harmonisation is used for putting textual and linguistic features of E.U. legal provisions in a proper context; how precedent serves as a "bridge" to other types and categories of interpretive arguments; and how these arguments in general are essential for avoiding legal antinomies, i. e., ensuring that different provisions do not conflict with each other, which manifests in two dimensions. One, horizontally, for the E.U. legal system to be coherent, internally consistent and gapless. And vertically, to preserve validity and constitutionality of provisions in sources of law that are lower in rank.

In what follows, we will see how the contextual/systemic arguments interact with the remaining two general categories of interpretive arguments.

2.3. PURPOSIVE OR TELEOLOGICAL ARGUMENTS

These arguments are used to ensure that the meaning of a legal provision corresponds to the purpose, end, or goal ("*telos*") of that provision or of the legal act in which that provision is situated. The idea of interpreting law in conformity with its purpose is not new. It goes back to Roman law, where it was expressed in the maxim: "*[S]cire leges non*

[76] For an explanation of this term, MacCormick, *supra* note 7, at 472.

[77] For examples of the argument from precedent leading to the argument from contextual harmonisation, *see* Case C-488/18, Golfclub Schloss Igling, ECLI:EU:C:2020:1013, ¶¶ 34–38 (Dec. 10, 2020); *see also* Case C-373/19, Dubrovin & Tröger – Aquatics, ECLI:EU:C:2021:873, ¶ 20 (Oct. 21, 2021); *see* Joined Cases C-503/19 and C-592/19, U. Q. and S. I., ECLI:EU:C:2020:629, ¶¶ 41–42 (Sept. 3, 2020).

hoc est verba earum tenere, sed vim ac potestatem" [knowing the laws does not mean knowing their words, but their intent and purpose].[78] The same is well established in the E.U. law.[79]

There are different ways of framing these arguments. The interpreters can thus rely on the purpose of a specific legal provision; the purpose of a legal act or entire legal system, including values that are recognized in them; or the consequences that are assumed to follow for an identified purpose from adopting a certain interpretation. These different types of the purposive arguments are discussed below.

The relevant purposes, values, and consequences referred to can be expressly found in the text of some legal sources. Or they can be imputed by the interpreters, as implicit in those sources. In the former case, purposes, values, and consequences are drawn by the interpreters from written sources. So, in a wider sense they can be understood as a part of the context that is relevant for the interpretation of specific provisions, alongside other related provisions, legal acts, judicial decisions, and legal principles. This overlap between contextual and purposive arguments is often acknowledged in E.U. law.[80] Hence, in the entire system of the Treaties or the legislative acts the Court can find relevant purposes of their provisions.[81]

2.3.1. PURPOSES

When using the argument from purpose, the Court of Justice, almost as a rule, refers to actual purposes written down in different sources of E.U. law rather than imputing the purposes to those sources. These purposes – also referred to as "goals", "aims", or "objectives" of the E.U. or of specific policy areas – concern different areas of political and social life: from the internal market and consumer protection to economic growth and price stability, to environmental protection and protection of health, and to free movement of persons and elimination of inequalities. These can be found in the operative part of the Treaties or legislative acts,[82] in which case they are legally binding;

[78] András Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L. J. 1215, 1241 (2013) (Ger.).

[79] *See* Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 03415, ¶ 20.

[80] What Bengoetxea terms "teleo-systemic criteria" of interpretation; *see, e.g.*, Joxerramon Bengoetxea, The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence 250–51 (Cambridge University Press, 1993).

[81] *Cf.* Koen Lenaerts & José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 20 COLUM. J. EUR. L. 3, 32 (2014).

[82] For a classic example, see Case 43/75, Defrenne, 1976 E.C.R. 00455, ¶¶ 8–12, in which the Court interpreted what is nowadays art. 157 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.], a provision that codifies the principle of equal pay for equal work for men and women. The Court famously noted that this provision "pursues a double aim [. . .] which is at once economic and social": on the one hand, fair competition, and on the other, elimination of inequalities between men and women and prohibition of discrimination based on sex, which are expressed in the operative part of the Treaties.

or in the Preambles to the Treaties or legislative acts in which case they are not legally binding although they are authoritative.[83]

Many Treaty provisions have indeed been drafted in goal-oriented terms. That is why the Treaties have sometimes been referred to as "*traité-cadre*" or "framework treaties".[84] The Preamble to the Treaties also contains a number of overarching purposes of E.U. integration, such as the creation of "ever closer Union among the peoples of Europe".[85] Similarly, recitals of the Preambles to the acts of secondary law typically contain numerous statements of purpose. This is a peculiarity of E.U. law, unlike in other legal systems, where the E.U. legislator and Treaty-makers specifically reflect on the ratio and purpose of adopting certain regulatory arrangements, which makes it easier for the interpreters to identify those purposes. And given that Member States regularly agree on these purposes – unanimously in the case of the Treaties' amendments, unanimously or by qualified majority when adopting secondary law (alongside the Parliament) – it is inevitable that the Court will frequently take recourse to them when interpreting E.U. law.

E.U. law may at times pursue several, equally important yet not fully compatible, purposes. In certain situations, those purposes could pull the interpreters into different directions.[86] To solve the problem, it is not sufficient to point to one of those purposes and insist on it. The reason is obvious: "[t]he game of "choose the recital you like" leads wherever one wishes it to: it is just necessary to pick the fitting recital".[87] Rather, judges need to weigh and balance the contradictory purposes. The Court of Justice does so by lifting its reasoning to a higher level: it uses values as "constitutional interpretive tiebreakers" that are in the background of those purposes and takes them through the proportionality test.

[83] *Cf.* Joined Cases C-402/07 and C-432/07, Sturgeon and Others, 2009 E.C.R. I-10923, ¶ 42 : "[T]he operative part of an act is indissociably linked to the statement of reasons for it [provided in the Preamble], so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption"; Case C-162/97, Nilsson and Others, 1998 E.C.R. I-07477, ¶ 54: "[T]he [P]reamble to a [Union] act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question". Although some cases seem to indicate that recitals have legal status greater than "a mere interpretative guidance"; *see* Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., Opinion of Advocate General Bobek, ECLI:EU:C:2020:375, ¶ 120 (May 14, 2020).

[84] Itzcovich, *supra* note 3, at 558.

[85] As declared by the Court of Justice, "the objective of all the [E.U.] [T]reaties is to contribute together to making concrete progress towards European unity"; and "to contribute [. . .] to the implementation of the process of integration that is the raison d'être of the [E.U.] itself"; *see* Opinion 1/91, Draft agreement on the European Economic Area, 1991 E.C.R. I-06079, ¶ 17; Opinion 2/13, Draft agreement on the accession of the EU to the European Convention on Human Rights, ECLI:EU:C:2014:2454, ¶ 172 (Dec. 18, 2014).

[86] *Cf.* Presidenza del Consiglio dei Ministri, ECLI:EU:C:2020:375 ¶¶ 46-51 (Opinion of Advocate General Bobek); Case C-16/18, Dobersberger, Opinion of Advocate General Szpunar, ECLI:EU:C:2019:638, ¶¶ 23–24 (July 29, 2019); Case C-442/16, Gusa, Opinion of Advocate General Wathelet, ECLI:EU:C:2017:607, ¶ 52 (July 26, 2017); Case C-140/12, Brey, ECLI:EU:C:2013:565, ¶ 71 (Sept. 19, 2019).

[87] Presidenza del Consiglio dei Ministri, ECLI:EU:C:2020:375 ¶ 101 (Opinion of Advocate General Bobek).

But this happens very exceptionally. In most situations, the Court straightforwardly identifies a single relevant purpose of a provision that informs its interpretation. It did so in about two out of every three questions included in my study.[88] The argument from purpose is thus explicitly invoked more often than textual arguments, but not as often as contextual harmonisation and precedent. Moreover, the purpose is usually found in the text of the legislative act, be it in an operative part or the Preamble.[89] At times, the Court will refer to its earlier judgement in which the purpose of a provision was identified,[90] which as discussed above reveals the "transcategorical" nature of the argument from precedent. There were rarely any references to the broader purposes of E.U. law found in the sources of primary law or the system of the Treaties, like purposes of specific areas of law as defined in the Treaties,[91] or meta-purposes like the classic "ever closer union".[92] This may be explained by the fact that nowadays most of the cases before the Court of Justice arguably concern the interpretation of E.U. secondary law, or are framed as

[88] That is, in 66.1% of questions of interpretation or eighty-eight in total.

[89] *Cf.* Case C-527/18, Gesamtverband Autoteile-Handel eV v. KIA Motors Corporation, ECLI:EU:C:2019:762 ¶ 35 (Sept. 19, 2019); Case C-671/18, CJIB, ECLI:EU:C:2019:1054 ¶ 29 (Dec. 5 2019); Case C-20/19, kunsthaus muerz v. Zürich Versicherungs AG, ECLI:EU:C:2020:273 ¶ 34 (Apr. 2, 2020); Case C-88/19, Asociaţia "Alianţa pentru combaterea abuzurilor" v. T. M. and Others, ECLI:EU:C:2020:458 ¶¶ 21, 46 (June 11 2020); Case C-191/19, O. I. v. Air Nostrum Líneas Aéreas del Mediterráneo SA, ECLI:EU:C:2020:339 ¶ 32 (Apr. 30, 2020); Case C-267/19 and C-323/19, PARKING d.o.o. and Interplastics s.r.o. v SAWAL d.o.o. and Letifico d.o.o., ECLI:EU:C:2020:351 ¶ 48 (May 7, 2020); Case C-330/19, Staatssecretaris van Financiën v. Exter, ECLI:EU:C:2020:809 ¶¶ 25, 27 (Oct. 8, 2020); Case C-477/19, I. E. v. Magistrat der Stadt Wien, ECLI:EU:C:2020:517 ¶ 18 (Jan. 2, 2020); Case C-636/19, Y. v. Centraal Administratie Kantoor, ECLI:EU:C:2021:885 ¶ 51 (Oct. 28, 2021); Case C-524/18, Willmar Schwabe, ECLI:EU:C:2020:60, ¶¶ 35, 55 (Jan. 30, 2020); Case C-722/1 KROL v. Porr, ECLI:EU:C:2019:1028, ¶ 35 (Nov. 28, 2019); Techbau,ECLI:EU:C:2020:937, ¶¶ 53–54 (Nov. 18, 2020); Case C-329/19, Condominio di Milano v. Eurothermo SpA, ECLI:EU:C:2020:263, ¶ 23 (Apr. 2, 2020); Land Baden-Württemberg v. D. R., ECLI:EU:C:2021:35, ¶¶ 30, 44, 46 (Jan. 20, 2021); SIA "Soho Group" v. Patērētāju, ECLI:EU:C:2020:582 ¶¶ 27, 48–50 (July 6, 2020) ; Spenner v. Germany, ECLI:EU:C:2020:381, ¶ 63 (May 14, 2020); Jebsen & Jessen v. Hauptzollamt Hamburg, ECLI:EU:C:2020:830, ¶¶ 58, 76 (July 1, 2019); L. G. Case C-790/19, Parchetul v. L.G. and M.H., E.C.R., ¶ 68 (Sept. 2, 2021); K. S. and Others, ECLI:EU:C:2021:11 ¶¶ 69–70; Case C-437/19, État luxembourgeois v. L., ECLI:EU:C:2021:953, ¶¶ 42–43, 54, 56–57 (Nov. 25, 2021); Case C-881/19, Tesco Stores ČR a.s. v. Ministerstvo zemědělství, ECLI:EU:C:2022:15, ¶¶ 34, 43–46 (Jan. 13, 2022).

[90] *Cf.* Case C-583/18, Verbraucherzentrale Berlin eV v. DB Vertrieb GmbH, ECLI:EU:C:2020:199 ¶ 31 (Mar. 13, 2020); Case C-48/19, X. v. Finanzamt Z., ECLI:EU:C:2020:169 ¶ 24 (Mar. 12, 2020); Case C-97/19, Pfeifer & Langen GmbH & Co. KG v. Hauptzollamt Köln, ECLI:EU:C:2020:574 ¶¶ 32, 44 (July 16, 2020); Case C-331/19, Staatssecretaris van Financiën v. X., ECLI:EU:C:2020:786 ¶¶ 33–34, 38 (Oct. 1, 2020); Case C-509/19, BMW Bayerische Motorenwerke AG v. Hauptzollamt München, ECLI:EU:C:2020:694 ¶ 13 (Sept. 10, 2020); Case C-799/19, N. I. and Others v. Sociálna poisťovňa, ECLI:EU:C:2020:960 ¶ 64 (Nov.25, 2020); Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶ 45 (Dec. 17, 2020); L. H., Case C-564/18, L. H., ECLI:EU:C:2020:218, ¶¶ 30, 76 (Mar. 19, 2020); Case C-488/18, Golfclub Schloss Igling, ECLI:EU:C:2020:1013, ¶ 46 (Dec. 10, 2020); Case C-707/19, K. S. v. A. B., ECLI:EU:C:2021:405, ¶ 27 (May 20, 2021); Case C-373/19, Dubrovin & Tröger – Aquatics, ECLI:EU:C:2021:873, ¶ 21 (Oct. 21, 2021); W. V. v. Landkreis Harburg, ECLI:EU:C:2020:732, ¶¶ 33, 37 (Sept. 17, 2020).

[91] Sole exception is C-629/19, Sappi Austria Produktions-GmbH & Co KG and Wasserverband "Region Gratkorn-Gratwein" v. Landeshauptmann von Steiermark, ECLI:EU:C:2020:824 ¶ 43 (Oct. 14, 2020).

[92] Only two Opinions reflected on this kind of purposes; *see* C-616/19, M. S. and Others v. Minister for Justice and Equality, Opinion of A. G. Øe, ECLI:EU:C:2020:648 ¶ 71 (Sep. 3, 2020); *see* Case C-243/19, A. v. Veselības ministrija, Opinion of A. G. Øe, ECLI:EU:C:2020:325 (Apr. 30, 2020).

such.[93] They do not raise questions of interpretation of E.U. primary law or questions of (non-)conformity of secondary law with primary law.

As can be seen, the Court of Justice in most situations refers to the purposes of E.U. law in the same way as when using the contextual arguments: either by pointing to the specific purposes expressed in the operative part or in Preamble of a written source of E.U. law, which makes a wider context of a provision that is being interpreted,[94] which basically corresponds to how the argument from contextual harmonisation is used; or by invoking its case law in which the relevant purpose has already been confirmed, which corresponds to the argument from precedent. In both ways, the purposive arguments resemble the contextual arguments.

How about other iterations of the purposive arguments which are grounded in values and consequences associated with established purposes?

2.3.2. VALUES

Judicial interpretations of law are expected to conform with values that are of fundamental importance to a legal system. These values capture moral norms or political and policy ideas, and may include e.g., liberty, equality, equity, dignity, justice, fairness, tolerance, solidarity, democracy, federalism, etc. They are not necessarily found in or derived from a formal source of law, like constitutions or treaties, but may fall in the domains of politics and morality. Moreover, these values may be expressed in various purposes or consequences that are assumed to follow from specific interpretations. Consider the following: "The purpose of this provision is to achieve *equality* between men and women", or "[s]ince the proposed interpretation of this provision would lead to a restriction of the *liberty* of individuals, it cannot be accepted".

When interpreting E.U. law, the Court of Justice very rarely invokes these values (moral, political, social, economic, etc.) as self-standing reason justifying its decision, even in its landmark rulings. Rather, it usually traces them back to some legal source and presents them in the form of a distinctly legal argument.[95] For instance, the Court can link values of human dignity or equality to respective provisions of the Charter.[96] Other values can be accommodated in general principles of law: for instance, in *Defrenne* the

[93] *Cf.* Bruno de Witte, *The Freedom to Provide Services: The Controversial Freedom?*, *in* THE INTERNAL MARKET 2.0 137, 144-45 (Sacha Garben & Inge Govaere eds., 2021) (concerning free movement of services).

[94] *Cf.* Vienna Convention on the Law of Treaties art. 31, May 23, 1969 ("General rule of interpretation"): "The context for the purpose of the interpretation of a treaty shall comprise [. . .] the text, including its [P]reamble and [A]nnexes [. . .]".

[95] *See* Itzcovich, *supra* note 14, at 302–03.

[96] *See* Charter of Fundamental Rights of the European Union, Art. 1-5 and Art. 20-23, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter CFR].

Court seemed willing to accept economic interests as a reason to limit the temporal effects of its decision, but nevertheless the argument it put forward was the principle of legal certainty.[97] In these situations, values appear in the form of the contextual arguments. And although parties before the Court at times explicitly refer to values as an independent argument, the Court would dismiss it by saying that it is not "called upon to broach" non-legal value questions, but instead "must restrict itself to a legal interpretation".[98]

It is therefore unsurprising that, in my study,[99] I found only one situation in which the Court of Justice was referring to a certain value on its own.[100] In *K. S. and Others*, the Court was asked whether asylum seekers have the right to access the labour market under the Reception Conditions Directive 2013/33/EU, where a transfer decision has been taken in their regard under the Dublin III Regulation (Regulation (EU) No. 604/2013). Answering in the positive, the Court mentioned, among many other things, the value of work that contributes to a life of dignity, and avoidance of financial costs that Member States would have to bear for paying social benefits to individuals who without a job cannot sustain themselves and their families.[101]

In most situations that it handles, therefore, the Court of Justice is not faced with questions of interpretation that require moral or political values to be answered. On the contrary, in these cases the Court justifies its answers with the support of other available arguments which are grounded in written sources of law. And where certain values are indirectly referred to, they come through other types of arguments like contextual harmonisation or general principles.

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[97] *See* Case 43/75, Defrenne, 1976 E.C.R. 00455, ¶¶ 69–70, 74.

[98] Case C-34/10, Oliver Brüstle v. Greenpeace eV., 2011 E.C.R. I-09821, ¶ 30 and Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and Others, ECLI:EU:C:1991:378 ¶¶ 19–20 (Oct. 4, 1991).

[99] Which is 0.75% of all analysed questions of interpretation.

[100] See Opinions of Advocates General referred to independent values somewhat more. *See also* Joined Cases C-322/19 and C-385/19, K. S. and Others, Opinion of Advocate General de la Tour, ECLI:EU:C:2020:642 ¶¶ 85–87 (Sept. 3, 2020) (referring to the value of work for preservation of one's dignity; increased vulnerability, precariousness, isolation, and social exclusion of non-working asylum seekers; and social and financial burdens for supporting non-working asylum seekers that host Member States bear); Case C-581/18, R. B. v. TÜV Rheinland LGA Products GmbH and Allianz IARD SA, Opinion of Advocate General Bobek, ECLI:EU:C:2020:77 ¶ 107 (Feb. 6, 2020) (referring to the value of "equal dignity"); Case C-481/19, D. B. v. Consob, Opinion of Advocate General Pikamäe, ECLI:EU:C:2020:861 ¶ 99 (referring to autonomy, freedom of determination and formation of one's will without coercion, and human dignity); Case C-580/19, R. J. v. Stadt Offenbach am Main, Opinion of Advocate General Pitruzzella, ECLI:EU:C:2020:797 ¶ 44 (Oct. 6, 2020) (referring to the need to protect the worker as a weaker party in the employment relationship); *see* Joined Cases C-762/18 and C-37/19, Q. H., C. V. v. Iccrea Banca, Opinion of Advocate General Hogan, ECLI:EU:C:2020:49 ¶ 48 (referring to the notion of justice in the relationship between worker and their employer); Case C-535/19, A. v. Latvian Ministry of Health, Opinion of Advocate General Øe, ECLI:EU:C:2021:114, ¶¶ 151, 153 (Feb. 11, 2021) (referring to the value of solidarity).

[101] *See* K. S. and Others, ECLI:EU:C:2020:642, ¶¶ 69–73 (Opinion of Advocate General de la Tour).

2.3.3. CONSEQUENCES

Another one of the purposive arguments is the argument of consequences. When invoking it, the Court of Justice is considering consequences that are likely to affect some purpose or value in case a certain interpretation is adopted.[102] The Court is often expressing this argument in negative terms, i.e., referring to the undesirable consequences that ought to be avoided in the interpretation of E.U. law. Furthermore, these consequences may be of two kinds: socio-economic consequences, typically related to the functioning of the internal market, and legal consequences.

The example of the former may be found in the free movement cases. When interpreting relevant Treaty provisions on free movement of workers, establishment, or services, and deciding that they are applicable to relationships between private parties, the Court emphasised that the abolition of obstacles to free movement between Member States – the purpose of those provisions – *would be compromised* if actors governed by private law are allowed to keep certain barriers in place.[103]

These kinds of consequences appear regularly in the Court's judgments: in my study, they occurred in nearly every third question the Court was answering.[104] Specific consequences are usually invoked side by side with related purposes,[105] which are, as we

[102] Cf. Defrenne, E.C.R. 00455 ¶ 71, where the Court acknowledged that "the practical consequences of any judicial decision must be carefully taken into account", before adding that "it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result [. . .]".

[103] *See* Case 36/74, B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, ECLI:EU:C:1974:140 ¶¶ 17–18 (Dec. 12, 1974); *see also* Case C-281/98, Roman Angonese v. Cassa di Risparmio di Bolzano SpA, 2000 E.C.R. I-04139, ¶ 32; *see* Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti., 2007 E.C.R. I-10779 ¶ 57.

[104] That is, in 30.3% of questions of interpretation or forty-one in total.

[105] *Cf.* Case C-828/18, Trendsetteuse SARL v. DCA SARL, ECLI:EU:C:2020:438 ¶¶ 37–38 (June 4, 2020); Case C-96/19, V. O. v. Bezirkshauptmannschaft Tulln, ECLI:EU:C:2020:353 ¶ 38 (May 7, 2020); Case C-290/19, R. N. v. Home Credit Slovakia a.s., ECLI:EU:C:2019:1130 ¶ 31 (Dec. 19, 2019); Case C-742/19, B. K. v. Republika Slovenija, ECLI:EU:C:2021:597 ¶¶ 43, 79 (July 15, 2021); Case C-879/19, FORMAT Urządzenia i Montaże Przemysłowe v. Zakład Ubezpieczeń Społecznych I Oddział w Warszawie, ECLI:EU:C:2021:409 ¶¶ 29–32 (May 20, 2021); Case C-868/19, M-GmbH v. Finanzamt für Körperschaften Berlin, ECLI:EU:C:2021:285, ¶¶ 44, 51 (Apr. 15, 2021); Case C-895/19, A. v. Dyrektor Krajowej Informacji Skarbowej, ECLI:EU:C:2021:216, ¶ 46 (Mar. 18, 2021). Case C-610/18, AFMB and Others, ECLI:EU:C:2020:565, ¶¶ 66–69 (July 16, 2020); Case C-45/19, Compañía de Tranvías de La Coruña, ECLI:EU:C:2020:224, ¶¶ 20–22, 26 (Mar. 19, 2020); Case C-299/19, Techbau, ECLI:EU:C:2020:937, ¶¶ 54–55 (Nov. 18, 2020); W. V. v. Landkreis Harburg, ECLI:EU:C:2020:732, ¶¶ 34–38 (Sept. 17, 2020); Case C-199/19, R.L. sp. z o.o. v., ECLI:EU:C:2020:548 ¶¶ 35–36 (July 19, 2020); Case C-437/19, État luxembourgeois v. L., ECLI:EU:C:2021:953, ¶¶ 58–59 (Nov. 25, 2021); Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304, ¶ 46 (Apr. 23, 2020); Case C-112/19, Marvin M., ECLI:EU:C:2020:864, ¶ 41 (Oct. 28, 2020); Case C-29/19, Z. P. v. Bundesagentur für Arbeit, ECLI:EU:C:2020:36, ¶¶ 37, 42 (Jan. 23, 2020); Case C-502/18, C. S. and Others, ECLI:EU:C:2019:604, ¶ 30 (July 11, 2019); Case C-786/18, ratiopharm GmbH v. Novartis Consumer Health GmbH, ECLI:EU:C:2020:459, ¶ 44 (Oct. 31, 2018); Case C-330/19, Staatssecretaris van Financiën v. Exter, ECLI:EU:C:2020:809, ¶ 29 (Oct. 8, 2020); Case C-616/19, M. S. and Others v. Minister for Justice and Equality, ECLI:EU:C:2020:1010, ¶ 52 (Dec. 10, 2020).

saw, found in the entire context of E.U. legal acts. In that sense, references to consequences are not less "legal" and more "political", if the latter would mean that relevant consequences are found in a non-legal realm.[106] Rather, they are related to what the law already expressly proclaimed are its goals and objectives.

2.3.4. EFFECTIVENESS

As for the legal consequences, they may concern either effectiveness or redundancy of provisions that are interpreted. The assumption is that the purpose of a legal provision can only be achieved if that provision produces all its intended useful effects and is not rendered meaningless or superfluous. This version of the purposive argument is, therefore, used to justify interpretations that ensure the effectiveness of a provision and to discard interpretations that would diminish its effectiveness or lead to its redundancy.

These two notions – effectiveness and redundancy – are of the same kind, with the only difference being that they vary in degree. A redundant provision would be fully stripped of its effectiveness. Yet a provision of limited or decreased effectiveness would not necessarily be redundant. The same appears to be the understanding of the Court of Justice.[107] Its approach seems to be: to interpret E.U. law in order not to make any provision redundant, and to make every provision as effective as possible. The latter indicates that the effectiveness is conceived in maximalist terms to ensure the greatest possible effects of a provision in question.[108] However, the same could be conceived in a minimalist sense, i. e., to ensure *some* useful effects of a provision; hence, not to make it completely useless or redundant, but to allow certain limitations to its effects for the sake of other arguments or interests.[109]

Another rationale behind this argument is that a rational (E.U.) legislator intends the provisions it enacts to be as effective as possible and does not enact provisions that are ineffective.[110] In that sense, it can overlap with the argument of the legislator's intention discussed below. It often also overlaps with contextual arguments.

[106] Contrary to what was argued by Conway, *supra* note 14, §13.12 "Conclusions": "Consequentialist is clearly less dependent upon legal sources and the discipline of legal method, it is less predictable and may be dependent upon an extra-legal evidential base, including complex socio-economic data. Consequentialism is more political and less "legal"".

[107] *See* Case C-173/03, Traghetti del Mediterraneo SpA v. Repubblica italiana, 2006 E.C.R. I-05177 ¶¶ 36, 40.

[108] A classic example of effectiveness as seeking to ensure not some effect but maximum effect of E.U. law is Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, ECLI:EU:C:1963:1, 13 (Feb. 5, 1963).

[109] An example of using effectiveness in a non-maximalist sense would be the case law on horizontal direct effect of directives; *see* Tamara Ćapeta, *Ideology and Legal Reasoning at the European Court of Justice*, *in* The Transformation or Reconstitution of Europe 89, 111–13 (Tamara Perišin & Siniša Rodin eds., 2018).

[110] *Cf.* Lenaerts & Gutiérrez-Fons, *supra* note 81, at 17.

For instance, a provision is made redundant if its interpretation is identical to another provision's interpretation. Similarly, meaning given to one provision can impact the effectiveness of another provision. Therefore, when using this argument, the Court of Justice does not always constrain itself to looking at a single provision of E.U. law but operates in a wider system of primary and secondary law.

Effectiveness of E.U. law (*effet utile*) featured in many important judgments of the Court of Justice. A settled case law of the Court is that "where a provision of E.U. law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness".[111] The Court was invoking this argument not only to ensure the effectiveness of a single provision of E.U. law,[112] but also the effectiveness: of provisions of E.U. law as a whole;[113] of a class of E.U. legal acts;[114] of procedures established by the Treaties;[115] of the Treaty itself;[116] and of general principles of E.U. law established by the Court.[117]

Unsurprisingly, then, effectiveness is often considered as being the key argument in the repertoire of a teleological Court, which appears frequently and carries significant weight. As Michal Bobek wrote in his early work:

> In its [Union] guise, the problem with the use of purposive reasoning is not so much the unpredictability of the value choice of the judge; on the contrary, it is the fact that recourse to teleological reasoning by the Court of Justice almost always leads us on a journey to a well-known destination called "effet utile". The problem with the case law of the Court of Justice [. . .] might well be the fact that purposive reasoning is often reduced to one and only one purpose: the full effectiveness of [E.U.] law, which is turned into the crucial principle not allowing for any balancing or opposition.[118]

[111] Case C-576/20, C. C. v. Pensionsversicherungsanstalt, ECLI:EU:C:2022:525 ¶ 54 (July 7, 2022).
[112] *See* Case 43/75, Defrenne, 1976 E.C.R. 00455, ¶ 33.
[113] *See* Joined Cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v. Italian Republic, 1991 E.C.R. I-05357 ¶ 33.
[114] *See* Case 9/70, Franz Grad v. Finanzamt Traunstein, ECLI:EU:C:1970:78 ¶ 5 (Oct. 6, 1970) (concerning direct effect of decisions); Case 41/74, Yvonne van Duyn v. Home Offic., 1974 E.C.R. 01337 ¶ 12 (concerning direct effect of directives).
[115] *See* Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 00629 ¶ 20 (concerning the preliminary ruling procedure under art. 267 T.F.E.U.).
[116] *Id.* ¶ 18.
[117] *See* Case C-173/03, Traghetti del Mediterraneo SpA v. Repubblica italiana, 2006 E.C.R. I-05177 ¶ 40 (concerning the principle of state liability for damages due to violations of E.U. law committed by national courts as confirmed in Case C-224/01, Gerhard Köbler v. Republik Österreich, 2003 E.C.R. I-10239).
[118] *See* Michal Bobek, *On the Application of European Law in (Not Only) the Courts of the New Member States: "Don't Do as I Say"?*, 10 Cambridge Y. B. Eur. Legal Stud. 1, 21 (2008) (U.K.).

In reality, however, this happens rarely. In my study, the argument of effectiveness/redundancy appeared in around one in every six cases.[119] It was cited alongside specific purposes and not isolated from them.[120] The reason why the issue of effectiveness is raised in a relatively small number of cases may be that the Court of Justice is able to interpret provisions of E.U. law with support of other arguments, especially contextual arguments, in a way that does not impact their effectiveness. Moreover, in certain cases the argument of effectiveness gave way to other arguments and considerations. This shows the effectiveness of E.U. law as not just being a one-way street. Consider the following example.

Constantin Film Verleih concerned the interpretation of the term "addresses" from Article 8(2)(a) of the Intellectual Property Rights Directive 2004/48/EC, which enlisted information that must be provided in cases of infringement of intellectual property rights. One of the questions was whether that term covers "email addresses" and "I.P. addresses" of users through which files that infringe intellectual property rights were uploaded. The referring court, the German *Bundesgerichtshof* [Federal Court of Justice], proposed an answer in the affirmative. It offered several purposive arguments in support of that answer: that email and I.P. addresses, in the same way as postal addresses, *facilitate* identification of copyright infringers, and are thus necessary for safeguarding the right to intellectual property under Article 17(2) of the Charter; the *purpose* of the Directive, according to its Recital 3, is "protective" – it concerns *effective* enforcement of intellectual property rights in the E.U. internal market; *broad* interpretation of the term "addresses" would contribute to the *effectiveness* of the regime for protection of intellectual property rights under the Directive given that many platform operators do not collect or verify personal names and postal addresses of its users; the term "addresses" should be given "*dynamic*" interpretation, to take account of the technological developments, since the *objectives* of the Directive could not be ensured "as long as the traditional understanding of the terms" in question would be maintained.[121]

[119] That is, in 16.3% of questions of interpretation or twenty-two in total. *See* Case C-540/19, W. V. v. Landkreis Harburg, ECLI:EU:C:2020:732, ¶¶ 34–35 (Sept. 17, 2020); *see also* Case C-346/19, Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶¶ 50, 53 (Dec. 17, 2020); Case C-828/18, Trendsetteuse SARL v. DCA SARL, ECLI:EU:C:2020:438, ¶ 37 (June 4, 2020); *see* État luxembourgeois v. L., ECLI:EU:C:2021:953, ¶¶ 54, 58 (Nov. 25, 2021); *see* Case C-706/18, X. v. Belgische Staat, ECLI:EU:C:2019:993, ¶¶ 26, 37 (Nov. 20, 2019); *see* Case C-215/19, Veronsaajien oikeudenvalvontayksikkö, ECLI:EU:C:2020:518 ¶ 39 (concerning effectiveness as a limit to the requirement of narrow interpretation of exemptions to general rule).

[120] *Cf.* Case C-580/19, R. J. v. Stadt Offenbach am Main, ECLI:EU:C:2021:183 ¶ 32 (Mar. 9, 2021); Case C-686/2019, SIA "Soho Group" v. Patērētāju, ECLI:EU:C:2020:582, ¶ 51 (July 6, 2020); C-629/19, Sappi Austria Produktions-GmbH & Co KG and Wasserverband "Region Gratkorn-Gratwein" v. Landeshauptmann von Steiermark, ECLI:EU:C:2020:824, ¶ 45 (Oct. 14, 2020); Case C-535/18, I. L. and Others, ECLI:EU:C:2020:391, ¶ 100 (May 28, 2020).

[121] *See* Case C-264/19, Constantin Film Verleih, order for reference, ECLI:EU:C:2020:542, ¶¶ 12-15 (July 9, 2020).

The Court of Justice nonetheless disagreed. The Court did implicitly acknowledge the referring court's argument – that adopting its proposed answer would "ensure the effective exercise of the fundamental right to property, which includes the intellectual property right [. . .] by enabling the holder of an intellectual property right to identify the person who is infringing that right and take the necessary steps in order to protect it".[122] However, the Court offered a number of arguments supporting the opposite outcome, i.e., that Article 8(2)(a) should not be interpreted as covering emails and I.P. addresses. Most importantly, the Court looked into "the usual meaning of the term "address" in everyday language"[123] and how the same term is used in a wider "scheme" of E.U. secondary law,[124] as well as having analysed the *travaux préparatoires*.[125] From all of this, it became apparent that the E.U. legislators attempted to strike a balance between the competing rights and interests: the protection of intellectual property rights on the one hand and the freedom of expression or the protection of private life and personal data safeguarded by Articles 7 and 8 of the Charter on the other. Furthermore, the Court added that in the Directive "the E.U. legislature chose to provide for minimum harmonisation concerning the enforcement of intellectual property rights in general".[126] So, concerning the provision in question, "that harmonisation is limited [. . .] to narrowly defined information".[127] To support that claim, the Court pointed to Article 8(3)(a) of the Directive, in which the E.U. legislator expressly provided an option to the Member State "to grant holders of intellectual property rights the right to receive fuller information".[128] So, under Article 8(2)(a) there would be no obligation to provide the right holders with information about emails and I.P. addresses of infringers of intellectual property rights. Nonetheless, from the context of the Directive it was apparent that the Member States were left to choose whether to provide for this additional information.

In *Constantin Film Verleih*, we can see that the Court of Justice was willing to accept that, in circumstances such as those in the main action, the provision of the E.U. law in question would not produce the maximum effect that it could possibly have. Rather, from the context of that provision and the Directive in general, the Court concluded that the legislator's intention was to achieve minimum harmonisation with the Intellectual Property Rights Directive and thus establish a narrower scope of Article

[122] Case C-264/19, Constantin Film Verleih, Judgment, ECLI:EU:C:2020:542, ¶¶ 12-15 (July 9, 2020).
[123] *Id.* ¶ 30.
[124] *Id.* ¶¶ 32–33.
[125] *Id.* ¶ 31.
[126] *Id.* ¶ 36.
[127] *Id.*
[128] *Id.* ¶ 39.

8(2)(a). In essence, the Court was deferring to the E.U. legislator instead of taking *effet utile* as a knockout argument that wins in every interpretive dilemma.[129] From this it also transpires how the Court uses contextual arguments to substantiate the argument from the intention of the legislator, which will be discussed in the following Section.

In my case study, there were several other examples that showed the same trend.[130] The referring courts tend to adopt purposive and consequential reasoning at the expense of textualism. Based on that approach, they propose "dynamic" interpretations of E.U. law in the light of technological and social development; hence, appearing "activist". Meanwhile, the Court of Justice tends to adopt a balanced reasoning based on the observations of context and systemic coherence, demonstrating thereby judicial restraint and deference to the E.U. legislator. That is hardly an approach of a *teleological* Court. It also raises a question about the influence of the referring courts: whether they at times push the Court of Justice into adopting ambitious interpretations of E.U. law.[131] Furthermore, this takes the whole interpretive burden off the Court's shoulders and indicates that the interpretation of E.U. law is a collaborative exercise in which multiple actors interact; introduce different arguments; and push for different solutions.[132]

2.4. HISTORICAL OR INTENTIONAL ARGUMENTS

Historical or intentional arguments support the interpretation of a legal provision that corresponds with the intention of the legislator which enacted that provision. Since the courts are bound by *the authority of the legislator, democratic will expressed by it when passing laws,* and *the separation of powers*, it is unsurprising that they will often refer to the intention of the legislator when interpreting the law. These arguments are also called "historical",

[129] Advocate General Henrik Saugmandsgaard Øe explicitly referred to the principle of separation of powers which promotes the value of legislative primacy; *see* Case C-264/19, Constantin Film Verleih, Opinion of Advocate General Øe, ECLI:EU:C:2020:261, ¶¶ 43, 58–59 (Apr. 2, 2020).

[130] *Cf.* Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union DHU Arzneimittel GmbH & Co. KG v. Bundesrepublik Deutschland, ECLI:EU:C:2020:304 (Apr. 23, 2020) REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany) order for reference (Nov. 6, 2018) and the Court's reply in Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304 (Apr. 23, 2020); Case C-535/19, A. v. Latvian Ministry of Health, Augstākā tiesa (Senāts) ECLI:EU:C:2021:595 (July 15, 2021) REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākā tiesa (Senāts) (Supreme Court, Latvia) order for reference (July 9, 2019) and the Court's reply in Case C-535/19, A. v. Latvian Ministry of Health, ECLI:EU:C:2021:595; and cases discussed *infra* Section 2.4.

[131] *Cf.* Maduro, *supra* note 71, at 148; and Edward, *supra* note 6, at 44, 54.

[132] *Cf.* Antoine Vauchez, *Close-Ups to Long Shot: In Search of the "Political Role"of the Court of Justice of the European Union, in* New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context 45 (Claire Kilpatrick & Joanne Scott eds., 2020) (U.K.).

since they look at what the legislator wanted to achieve when enacting that legislation in a particular moment in history; as well as "psychological", since they impute the specific intent – basically a state of mind – to the legislator as a collective entity.[133] The use of these arguments is regularly acknowledged in E.U. law too.[134] In my study, they appeared in around one in every three questions the Court of Justice was answering.[135]

Like in other legal systems, the argument from the intention of the legislator is "transcategorical". It is typically expressed through one of the previously discussed types of interpretive arguments, which means that it also depends on proper contextualization. In the case law of the Court of Justice, several different ways of conceptualising the intention can be distinguished.

First, the intention can be found in the wording of a provision.[136] The wording or text of enacted provisions is obviously legally binding and authoritative.[137] If that wording or text is clear and unambiguous, it is taken as the evidence of what the E.U. legislator intended with that provision.[138] The assumption would be that the E.U. legislators used or intended to use the words and the text in their ordinary meaning when enacting that provision. In this respect, the argument from intention moves back to textual arguments as discussed above.

Second, the intention can be established by observing the relevant context of a provision. For instance, by observing the provisions in their immediate or wider

[133] *Cf.* Fabrizio Macagno & Douglas Walton, *Arguments of Statutory Interpretation and Argumentation Schemes*, 2 Int'l J. Legal. Discourse 47, 51 (2017) (Ger.)

[134] *Cf.* Case C-583/11, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, ECLI:EU:C:2013:625 ¶ 50 (Oct. 3, 2013): "The origins of a provision of European Union law may also provide information relevant to its interpretation"; Fennelly, *supra* note 3, at 657: "The object of all interpretation lies in the true intention of the lawmakers, whether they be framers of a constitution or a treaty, legislators, or drafters of secondary legislation".

[135] That is, in 29.6% of questions of interpretation or forty in total.

[136] *See* Case C-671/18, CJIB, ECLI:EU:C:2019:1054, ¶ 35 (Dec. 5 2019); Case C-828/18, Trendsetteuse SARL v. DCA SARL, ECLI:EU:C:2020:438, ¶ 24 (June 4, 2020); *see* Case C-530/19, N. M. v. O. N., ECLI:EU:C:2020:635, ¶ 24 (Sept. 3, 2020); *see* Case C-686/2019, SIA "Soho Group" v. Patērētāju, ECLI:EU:C:2020:582, ¶ 31 (July 6, 2020); *see* Case C-346/19, Bundeszentralamt für Steuern v. Y-GmbH, ECLI:EU:C:2020:1050, ¶ 39 (Dec. 17, 2020); C-629/19, Sappi Austria Produktions-GmbH Co KG and Wasserverband "Region Gratkorn-Gratwein" v. Landeshauptmann von Steiermark, ECLI:EU:C:2020:824, ¶¶ 33–34 (Oct. 14, 2020); *see also* Joined Cases C-322/19 and C-385/19, K. S. and Others, ECLI:EU:C:2021:11, ¶ 63 (Jan. 14, 2021); Case C-547/14, Philip Morris Brands SARL e.a. v. Secretary of State for Health, ECLI:EU:C:2016:325 ¶ 63 (May 4, 2016).

[137] *See* Case C-815/18, Federatie Nederlandse Vakbeweging v. Van den Bosch Transporten BV and Others, Opinion of Advocate General Bobek, ECLI:EU:C:2020:319 ¶ 62 (Apr. 30, 2020): "[. . .] Hopes, ideas, or wishes are not legally binding. The adopted text is".

[138] *See* Case C-482/09, Budějovický Budvar, Opinion of Advocate General Trstenjak, 2011 E.C.R. I-08701, ¶ 69: "[A] semantic examination of the various terms used gives a sufficiently clear indication of what the legislature actually intended"; *see also* Case 28/76, Milac GmbH Groß-und Außenhandel v. Hauptzollamt Freiburg, Opinion of Advocate General Warner, ECLI:EU:C:1976:144, (Oct. 28, 1976): "[A]t the end of the day, I think that the solution of the problem must lie in seeking to ascertain, from the wording of the relevant legislation of the Council what, objectively, the intention of its authors was [...]".

context;[139] or comparing the differences in the wording between the surrounding provisions or chapters;[140] or making inferences from the "silence" of the wording i.e., from what is not explicitly mentioned in the text of a provision or its context;[141] or using what is expressly provided as exceptions to a general rule to infer what cannot be implied as an additional exception to that rule (the so called *expressio unius* argument, which is a variation of the *a contrario* argument),[142] etc. Here, the E.U. legislators are assumed to act and legislate rationally, e.g. to enact internally coherent and valid legislation, which does not overlap with provisions in its horizontal context nor infringe provisions in its vertical context. In this respect, the argument from intention falls back to contextual arguments - discussed above.

Third, the intention can be established by looking into the statement of reasons made by the E.U. legislator in the Recitals of the Preamble to a legal act.[143] Preambles are not legally binding and cannot derogate from the clear and unambiguous wording of operative provisions.[144] Nevertheless, they can be taken as authoritative when they disclose the intent of the E.U. legislator in a clear and convincing manner.[145] At times, the statements of intent in the Preambles are indistinguishable from the statements of

[139] *See* Case C-715/18, Segler-Vereinigung Cuxhaven, ECLI:EU:C:2019:1138 ¶ 32; *see also* Case C-796/18, Informatikgesellschaft für Software-Entwicklung, ECLI:EU:C:2020:395, ¶¶ 34, 66–70 (May 28, 2020); *see* Case C-868/19, M-GmbH v. Finanzamt für Körperschaften Berlin, ECLI:EU:C:2021:285, ¶¶ 34–35 (Apr. 15, 2021); Case C-373/19, Dubrovin & Tröger – Aquatics, ECLI:EU:C:2021:873, ¶¶ 26–27 (Oct. 21, 2021); *see* Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 ¶ 60 (Dec. 11, 2018).

[140] *See* Case C-616/19, M. S. and Others v. Minister for Justice and Equality, ECLI:EU:C:2020:1010, ¶ 35 (Dec. 10, 2020); Case C-477/19, I. E. v. Magistrat der Stadt Wien, ECLI:EU:C:2020:517, ¶ 27 (Jan. 2, 2020); Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶¶ 40–42 (July 16, 2020); Case C-370/12, Thomas Pringle v. Government of Ireland and Others, ECLI:EU:C:2012:756 ¶¶ 130–132 (Nov. 27, 2012); *see also* Joined Cases C-439/05 P and C-454/05 P, Land Oberösterreich and Republic of Austria v. Commission of the European Communities, 2007 E.C.R. I-07141, ¶¶ 37–41.

[141] *See* Case C-219/19, Parsec Fondazione v. ANAC, ECLI:EU:C:2020:470, ¶ 27 (Jun. 11, 2020); Case C-365/19, F. D., ECLI:EU:C:2021:189, ¶¶ 38–39 (Mar. 10, 2021); *see also* Joined Cases C-297/88 and C-197/89, Massam Dzodzi v. Belgian State, ECLI:EU:C:1990:360, ¶ 36 (Oct. 18, 1990).

[142] *See* Case C-815/18, Federatie Nederlandse Vakbeweging v. Van den Bosch Transporten BV, ECLI:EU:C:2020:976, ¶¶ 32–33 (Dec. 1, 2020); Federatie Nederlandse Vakbeweging, ECLI:EU:C:2020:319, ¶ 56 (Opinion of Advocate General Bobek): "[I]f something is be to excluded from the scope of an otherwise generally worded act, it can and should be stated clearly".

[143] *See* Case C-774/19, Personal Exchange International, ECLI:EU:C:2020:1015, ¶ 35 (Dec. 10, 2020); *see also* Case C-941/19, Samohýl group v. Generální ředitelství cel., ECLI:EU:C:2021:192, ¶ 42 (Mar. 10, 2021); Case C-786/18, Ratiopharm GmbH v. Novartis Consumer Health GmbH, ECLI:EU:C:2020:459, ¶ 49 (Oct. 31, 2018); Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., ECLI:EU:C:2020:566, ¶¶ 46, 51; Case C-707/19, K. S. v. A. B., ECLI:EU:C:2021:405, ¶ 27 (May 20, 2021); Case C-790/19, Parchetul v. L.G. and M.H., E.C.R., ¶ 60 (Sept. 2, 2021). For a classic example, see Case 29/69, Stauder v. City of Ulm, ECLI:EU:C:1969:57, ¶ 5 (Nov. 12, 1969): "The last recital of the preamble to this decision shows that the Commission intended to adopt the proposed amendment".

[144] See *supra* text accompanying notes 82–83; *see also* Tadas Klimas & Jūratė Vaičiukaitė, *The Law of Recitals in European Community Legislation*, 15 ILSA J. Int'l & Compar. L. 61 (2008).

[145] For a remark that the Court of Justice occasionally treats Preambles as something more than "a mere interpretative guidance" see Case C-129/19, Presidenza del Consiglio dei Ministri v. B. V., Opinion of Advocate General Bobek, ECLI:EU:C:2020:375, ¶ 120 (May 14, 2020).

purpose.[146] This is understandable, since the two are intertwined: after all, "the legislature's intent is to write a law that [fulfils] the legislative purpose".[147] So, the claim would be that when enacting legislation the E.U. legislators intended to achieve specific purposes, to reach some desirable outcomes or avoid undesirable (absurd, unjust) outcomes, etc. In this respect, the argument from intention falls back to purposive arguments - discussed above.

Fourth, the intention can be established by investigating materials that are, unlike operative provisions and Preambles, outside the legislative act that is being interpreted. These are different documents related to the drafting history of the legislation, also known as the *travaux préparatoires*. The requirement of their use in the interpretation of E.U. law is that they are made publicly available. This was the reason why, until recently, the Court of Justice has been using the *travaux* only for the interpretation of secondary law.[148] Nowadays, the Court uses them when interpreting the Treaties,[149] and the Charter,[150] as well as secondary law.[151] Still, being external to the legislative act, the *travaux* are not legally binding. But they can be used as an ancillary argument to support the finding of the intent of the E.U. legislator based on other arguments. In that sense, they are especially persuasive as the indicator of the legislators' intent when they confirm the clear and unambiguous wording of the operative parts of the legislative act.[152] So, the *travaux* are most useful when providing context and clarification to the wording or objectives expressed in the text of the legislation.

The argument from intention seems to have the greatest weight when it is linked to either textual or contextual arguments. In several examples from my study, the Court

[146] Cf. C-29/69. Stauder v. Stadt Ulm, ECLI:EU:C:1969:57, ¶ 3, where the Court referred to "the real intention of [the] author and the aim he seeks to achieve". *See also* Case C-331/19, Staatssecretaris van Financiën v. X., ECLI:EU:C:2020:786, ¶ 33 (Oct. 1, 2020); *see* Case C-267/19 and C-323/19, PARKING d.o.o. and Interplastics s.r.o. v. SAWAL d.o.o. and Letifico d.o.o., ECLI:EU:C:2020:351 ¶ 48 (May. 7, 2020); *see* Joined Cases C-322/19 and C-385/19, K. S. and Others, ECLI:EU:C:2021:11, ¶ 88 (Jan. 14, 2021).

[147] *See* Lawrence M. Solan, The Language of Statutes: Laws and Their Interpretation 142 (2010).

[148] For a discussion, *see* Samuli Miettinen & Merita Kettunen, *Travaux to the EU Treaties: Preparatory Work as a Source of EU Law*, 17 Cambridge Y. B. Eur. Legal Stud. 145 (2015); Case C-583/11 P, Inuit, Opinion of Advocate General Kokott, ECLI:EU:C:2013:21, ¶ 32 (Jan. 17, 2013).

[149] Case C-370/12, Thomas Pringle v. Government of Ireland and Others, ECLI:EU:C:2012:756, ¶ 135 (Nov. 27, 2012).

[150] *See* Case C-279/09, DEB v. Germany, ECLI:EU:C:2010:811, ¶¶ 32–39 (Dec. 22, 2010), (using Explanations relating to the Charter of Fundamental Rights, published by the Convention that drafted the Charter); *see also* TEU art. 6(1) and CFR art. 52(7). For further discussion, see Lenaerts & Gutiérrez-Fons, *supra* note 81, at 52–59.

[151] *See* Case C-264/19, Constantin Film Verleih, ECLI:EU:C:2020:542, ¶ 31 (July 9, 2020); Case C-321/19, B. Y. and C. Z., ECLI:EU:C:2020:866, ¶ 28 (Oct. 28, 2020); Case C-299/19, Techbau, ECLI:EU:C:2020:937, ¶ 56 (Nov. 18, 2020); Case C-796/18, Informatikgesellschaft für Software-Entwicklung, ECLI:EU:C:2020:395, ¶ 33 (May 28, 2020); Case C-619/19, Land Baden-Württemberg v. D. R., ECLI:EU:C:2021:35, ¶ 44 (Jan. 20, 2021).

[152] *See* Case C-306/06, 01051 Telecom GmbH v. Deutsche Telekom A.G., 2008E.C.R. I-01923, ¶¶ 23–25 (Apr. 3, 2008); Case C-488/18, Golfclub Schloss Igling, ECLI:EU:C:2020:1013, ¶ 39 (Dec. 10, 2020).

employed it to outweigh the purposive arguments. The following one is particularly indicative.

Criminal proceedings against F. O. concerned the interpretation of two Regulations on road transport.[153] The dispute arose from a roadside check in France, which showed that a bus driver of the German transport company had driven through Germany without inserting his card in the vehicle's tachograph. The question was whether one Regulation allows French authorities to sanction that driver or his transport company for infringement of the other Regulation committed on the German territory but detected on French territory. The referring court, the French *Cour de cassation* [Court of cassation], seemed to have thought that it did. The reasons were that, first, such a broad interpretation would be in line with the *purposes* of these Regulations, which include improvement of the working conditions of employees in the road transport sector and, in general, improvement of road safety; and second, it would ensure the *effective enforcement* of the two Regulations.[154]

The Court of Justice nevertheless disagreed. It pointed out that the unambiguous wording of the provision in question,[155] and its immediate context,[156] confirmed beyond doubt that the E.U. legislator envisaged the system under which national authorities cannot issue criminal sanctions based on one Regulation for the infringements of the other Regulation.[157] Even if such an interpretation may lead to undesirable consequences for the drivers' working conditions and road safety, the Court added that it was up to the E.U. legislators to make appropriate amendments to the text of the Regulations.[158]

In this example, we can again see the Court of Justice adopting a reasoning based on the consideration of the text and relevant context. From there, it infers the E.U. legislator's intent and defers to it; hence, prioritising the legislative primacy over purported purpose and effectiveness of E.U. legislation - contrary to what the referring court, intervening government, and the Commission had suggested.[159] The intention of the E.U. legislator, when convincingly established, clearly becomes imposed as a limit on

[153] See Regulation (EC) No. 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonization of certain social legislation relating to road transport, 2006 O. J. (L 102) 1, and Council Regulation (EEC) No. 3821/85 of 20 December 1985 on recording equipment in road transport, 1985 0. J. (L 370) 8.

[154] Case C-906/19, Criminal proceedings against F. O., Judgment, ECLI:EU:C:2021:715, ¶¶ 31–33 (Sep. 9, 2021).

[155] *Id.* at ¶ 41.

[156] *Id.* at ¶¶ 42-44.

[157] Case C-906/19, Criminal proceedings against F. O., ECLIEU:C:2021:178, ¶¶ 45–57, especially ¶¶ 54, 57 (Mar. 4, 2021) (separate opinion by Bobek, M.).

[158] Case C-906/19, Criminal proceedings against F. O., Judgment, at ¶ 45.

[159] Case C-906/19, Criminal proceedings against F. O., separate opinion by Bobek, M., at ¶¶ 47-48.

the Court's purposivism. Again, hardly something one would expect from a *teleological* Court.

3. THE VALUE OF HAVING A CONTEXTUALIST COURT

The examples discussed in the previous Sections illustrate that in a significant number of cases, the Court of Justice favours systemic coherence over the effectiveness of individual provisions of E.U. law, or their particular purposes, or avoiding bad consequences that follow from certain interpretations. In those situations, the Court favours *general*, *structural* or *macro* over *particular* or *micro* values and interests. As Mitchel Lasser rightly noted, "[t]he [Court of Justice's] interpretive technique is therefore oriented primarily towards developing a proper legal order, namely, one that would be sufficiently certain, uniform and effective".[160] The question that can be raised at this point is what good is promoted by such an interpretive approach?

First of all, the Court's contextualist approach to the interpretation of E.U. law, which places a premium on the coherence of the E.U. legal system, can be linked to the idea of the E.U. legislator being a rational actor. That the E.U. legislator intends to create a coherent and consistent legal system, to adopt a sensible legislation that does not conflict or overlap with already enacted legislation or higher sources of law, and not to depart from the previous case law of the Court unless expressly provided so, etc., is indeed a "benign"[161] assumption that guides the interpretation of E.U. law.[162] It can even be argued that such a legislative behaviour is mandated by the E.U. Treaties. Article 7 of the T.F.E.U. can thus be read as one of the expressions of that mandate: it prescribes that "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account [. . .]".

Moreover, the contextualist approach means that the interpretive arguments the Court uses will always be grounded in formal sources of law "posited" by the E.U. legislator. So, a "contextualist" court could, at the same time, be understood as a

[160] Lasser, *supra* note 63, at 54. *Cf.* Edward, *supra* note 6, at 66–67: "In any system based on case-law the judge must proceed from one case to another seeking, as points come up for decision, to make the legal system consistent, coherent, workable and effective".

[161] Cf. Green v. Bock Laundry Machine Co., 490 U. S. 504, 528 (1989) (Scalia, J., concurring), who argued that the meaning of a legal provision ought to be determined by considering which meaning is, among other things, "most compatible with the surrounding body of law into which the provision must be integrated – a compatibility which, by a benign fiction, we assume Congress always has in mind".

[162] *Cf.* Lenaerts & Gutiérrez-Fons, *supra* note 81, at 17: "[T]he authors of the Treaties are assumed to have established a legal order that is consistent and complete".

"positivist" court. By linking the arguments in its reasoning to legal sources posited by the E.U. legislator, the Court defers to the choices made by the democratically legitimated legislator. It understands itself to be "a faithful agent"[163] of the E.U. legislator who is tasked with "making sense rather than nonsense"[164] out of the body of law enacted and developed by the historical and contemporary legislature. Such an approach to the interpretation of E.U. law promotes the values of democracy and separation of powers (in the E.U. context, known as institutional balance).

The contextualist approach is also essential for one of the key functions of the Court of Justice – making E.U. law intelligible – alongside other important functions such as reviewing acts of the E.U. legislator and protecting individual rights. By ensuring the intelligibility of E.U. law, the Court enables private and public actors to adjust their behaviour to directives that stem from sources of E.U. law, while enabling E.U. law to fulfil its normative function of guiding the behaviour of its subjects. This is what arguably all courts strive to achieve in practice and most of the contemporary legal systems work reasonably well most of the time.[165] The value thereby promoted is legal certainty, which is less of a concern in the teleological interpretation that typically gives way to momentary, short-term interests which cannot always be predicted beforehand.

Making law intelligible might be even more important in a complex institutional system such as the E.U. For the E.U. legal system to function optimally, the Court of Justice needs the cooperation of other actors, supranational and national: from the Council, the Parliament, the Commission, and the E.U. agencies and offices, to Member State legislatures, national courts, and executives. National actors are especially important since they are mainly responsible for the everyday application of E.U. law. If E.U. law that they ought to give effect to is made consistent and coherent by the Court of Justice, they will likely have little to no difficulties in enforcing it. E.U. law will then produce equal effects in all Member States and will apply to all E.U. citizens in the same manner, thereby ensuring their equal treatment. So, making sense of the body of E.U. law eventually ensures its efficiency and uniformity, which are important structural values, and ultimately the equality of Member States and their citizens, another

[163] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J. L. & Pub. Pol'y 61, 63 (1994).

[164] See Justice Scalia's majority opinion in West Virginia University Hospitals v. Casey, 499 U. S. 83, 100–01 (1991): Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law [...] because it is our role to make sense, rather than nonsense, out of the *corpus juris.*

[165] *See* D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification, in* Interpreting Statutes 511, 535 (Neil MacCormick & Robert Summers eds., 1991).

fundamental value of the E.U. legal system. In such a decentralised institutional environment, contextualism seems to be the most appropriate interpretive approach.

It should also be added that the Court's interpretive approach that aims at ensuring coherence, completeness, and consistency of E.U. law corresponds to the ideal of a constitutional court as envisaged by Hans Kelsen. For Kelsen, a constitutional court is responsible for ordering the legal system so as to achieve unity of law, which would be free of any contradiction.[166] That system is necessarily hierarchical and monist, since no one can be above the constitutional court that is tasked with making the system coherent and whole.[167] That the Court of Justice indeed understands itself to be such a Kelsenian court transpires from the clash with the German Federal Constitutional Court following the ruling in *Weiss*.[168] In a number of reactions – institutional,[169] judicial,[170] and extra judicial[171] – it was strongly asserted that there can be only one final authority in the interpretation of E.U. law, thus rejecting the notion of interpretive pluralism in the E.U. legal system,[172] which would in theory be just the opposite from the ideal of coherence and consistency of law.

4. "CONTEXTUALIST" OR "TELEOLOGICAL" - DOES IT MATTER IF BOTH REACH THE SAME OUTCOME?

An important objection against the label "contextualist" and a description of the legal reasoning of the Court of Justice proposed so far, as well as the values it promotes, could be to question whether it matters at all? In other words, do different interpretive approaches

[166] *See* Stanley L. Paulson, *Formalism, "Free Law", and the "Cognition" Quandary: Hans Kelsen's Approaches to Legal Interpretation*, 27 U. Queensland L. J. 7, 29 (2008).

[167] *See* Daniel Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance* 28–32, 39–43 (Univ. Mich. L. Sch. Pub. L. Working Paper Series, Working Paper No. 229, 2011).

[168] *See* Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018); *see also* Bundesverfassungsgericht [BVerfG] (Federal Constitutional Court), May. 15, 2020, 2 BvR 859/15, Judgment of the Second Senate regarding Public Sector Purchase Program, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915 (Ger.).

[169] See Court of Justice of the EU, Press Release No. 58/20 following the judgment of the German Constitutional Court of 5 May 2020 (May 8, 2020).

[170] *See* Case C-824/18, A. B., C. D., E. F., G. H., I. J. v. Polish National Council of the Judiciary, Opinion of Advocate General Tanchev, ECLI:EU:C:2020:1053 ¶¶ 80–84 (Dec. 17, 2020).

[171] *See* Koen Lenaerts, *No Member State is More Equal than Others: The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties*, Verfassungsblog (Oct. 8, 2020), https://verfassungsblog.de/no-member-state-is-more-equal-than-others/ (Ger.).

[172] *See* Gareth Davies, *Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation*, 24 Eur. L. J. 358 (2018) (U.K.).

lead to different interpretive outcomes, if we assume that the outcomes of adjudication are what in the end matters the most?

Those who insist on the label "teleological" and accuse the Court of Justice of judicial activism may not actually be concerned with the reasoning of the Court that is offered to justify particular outcomes, but with those outcomes themselves. So, the problem would be that the Court's teleological interpretive approach has a built-in "communautaire tendency" that inevitably results in "pro-integration" outcomes.[173] In other words, whenever a doubt about the outcome of interpretation exists – i.e., about the resolution of a case – the Court will always opt for the "federal" or "centralising" solution that favours the Union, enhances European integration, and promotes its interests.[174] Many studies, both critical and sympathetic, hence, argued that the Court of Justice consistently and in all strands of the case law arrives at these integrationist outcomes,[175] irrespective of the reasoning it adopts that purportedly lead there.

For many advocates of the Court of Justice, this cannot be seen as surprising. Teleological interpretation is driven by the goals of E.U. law and those goals are distinctly integrationist and "pro-E.U.". As David Edward wrote, if anything like "integrationist agenda" or "communautaire tendency" exists, it is in the Treaties. The Member States have set it, and the Court cannot ignore it when interpreting E.U. law.[176] The following remark with a similar tenor is often quoted:

> The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted to it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an "ever closer union among the peoples of Europe".[177]

But this "genetic code" may not only be in the objectives and purposes of E.U. law. It may permeate the entire E.U. legal system - down to every single provision in every source of law. That is why some insiders to the Court like Advocate General Miguel Poiares Maduro spoke about "meta-teleology", about the "constitutional telos" of the legal context in

[173] *Cf.* Beck, *supra* note 63, at 318–31.

[174] *See* Hartley, *supra* note 4, at 95; Rasmussen, *supra* note 4, at 3; *see also* Derrick Wyatt, Does the European Court of Justice Need a New Judicial Approach For the 21st Century?, Lecture at the Bingham Centre (Nov. 2, 2015).

[175] *Cf.* Anna Bredimas, Methods of Interpretation and Community Law 179 (1978); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 Am. J. Int'l L. 1, 24–27 (1981) Trevor C. Hartley, The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community 78 (4th ed., 1998).

[176] *See* David Edward, *The European Court of Justice - Friend or Foe?*, Eur. Atlantic J. 60, 67-68 (1996) (U.K.).

[177] Giuseppe Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice,* 57 Mod. L. Rev. 175, 186 (1994) (U.K.).

which provisions of E.U. law exist,[178] where the systemic/contextual and purposive/teleological interpretation become one. So, not only *télos* (end) but also *óntos* (essence) of E.U. law is integrationist.[179] For that reason, a contextualist court will act just like a teleological court would. If the Court of Justice is contextualist, and the context is implicitly but surely integrationist, the Court will in the end come to the integrationist outcomes. If the result is the same, the labels given to the interpreter are irrelevant.

However, there are several issues with making it all about the integrationist outcomes. Namely, what makes an outcome an integrationist one is rather elusive. "Integration as a term does not mean anything in itself",[180] Advocate General Tamara Ćapeta wrote. It is hard not to agree with this remark. European integration has so many diverse objectives, some of which may be contradictory in certain circumstances. When the Court of Justice gives preference to one objective at the expense of another, has the outcome thus reached integrationist or not? So, looking at the E.U. 's values, interests, and policies at the macro level, we cannot know what exactly would qualify them as integrationist. Is it right or left, socially liberal or conservative, economically interventionist or *laissez-faire*? Does integration imply preference for market and competition or social justice and equity? In the Court's case law, one can find outcomes that further all these causes. And they would all qualify as integrationist.[181] But if all of these different causes are integrationist, then that term loses a lot of its explanatory power. For integration to be more useful conceptually in this context, it would require a master plan. However, there is no such thing, there never was, and cannot be in such a diverse and dynamic political community like the E.U. As Robert Schuman said in his address when launching the idea of the European Coal and Steel Community, "Europe will not be made all at once, or according to a master plan".

Some authors did, however, offer a more specific and analytically useful measure of integration. For instance, Trevor Hartley considered an outcome integrationist if it promoted European integration in the way that it strengthened the Union and its federal elements, increased the scope and effectiveness of E.U. law, or enlarged powers of the E.U. institutions.[182] However, when put to test, these criteria likewise fail for the following reasons.

[178] *See* Maduro, *supra* note 71, at 140. *See also* Lasser, *supra* note 3, at 203–38; and for a similar concept of *économie générale* that informs the Court's interpretation of E.U. law, see Siniša Rodin, *Interpretation in the Court of Justice of the European Union: Originalism, Purposivism and L'Économie Générale*, 34 Am. Univ. Int'l L. Rev. 601 (2019).

[179] *See* Siniša Rodin, *A Metacritique of the Court of Justice of the European Union*, 2 Il Diritto dell'Unione Europea Law of the European Union 193 (2016) (It.).

[180] Ćapeta, *supra* note 109, at 105.

[181] *Id.* at 104–07.

[182] *See* Hartley, *supra* note 175, at 78.

Not every case before the Court of Justice raises these issues. Perhaps some or most of the landmark cases do in one way or another. But these represent only a smaller portion of cases dealt with by the Court of Justice. They are not representative of what the Court does in most of the situations.[183] In the same way that great cases make bad law and provide bad labels for judicial reasoning, they give a bad impression of judicial preferences for integrationist outcomes.

The same thing can be noticed in the case study I performed for the purposes of this paper. In 135 questions of interpretation of E.U. law, I analysed, and I counted how many outcomes reached by the Court of Justice could be classified as integrationist, non-integrationist, and neutral. Echoing Hartley's suggestion, I looked into whether the outcome: (i) broadens or restricts the scope of E.U. law; (ii) widens or narrows the exception from application of a general rule of E.U. law; (iii) leads to a more or less effective and efficient enforcement of E.U. law; (iv) precludes or allows application of national law that restricts application of an E.U. rule and consequently narrows or widens discretion of national authorities; (v) was supported or opposed by the Commission in the proceedings before the Court.

The outcomes for which none of these criteria could be established were considered as neutral. They concern, for instance, certain technical questions which seemingly do not involve political or value considerations, or have no impact on structural features of the E.U. legal order. Examples would be classification of a copper rod or a medicinal product under one or the other customs' heading of the combined nomenclature of the E.U. common customs tariff;[184] or allowing or prohibiting a package leaflet of homoeopathic medicinal products to contain information about dosage schedules; etc.[185] It is difficult to consider these outcomes as being integrationist or not absent certain indications based on the aforementioned (or other similar) criteria. In any event, in 135 questions of interpretation of E.U. law covered in my study, the Court of Justice had 54 neutral outcomes - which is 40% of the total number.

As for the other two types of outcomes, the situation is as follows: the Court of Justice reached 64 integrationist outcomes, which is 47.4% of the total number, and 17 non-integrationist outcomes, which is 12.6% of the total number. So, in less than half of all cases the Court's integrationist bias surfaces. But in one in every eight cases, the Court reaches outcomes that cannot be considered as promoting the E.U. integration, no

[183] *Cf.* Conway, *supra* note 14, § 13.12 "Conclusions", where he notes that "the Court's role remains a matter of controversy in those important cases where the Court pursues a pro-integration policy instead of a more conventional hermeneutic discipline".

[184] *See* Case C-340/19, Valsts ieņēmumu dienests v. Hydro Energo, ECLI:EU:C:2020:488, (Jun. 18, 2020); *see also* Case C-941/19, Samohýl group v. Generální ředitelství cel, ECLI:EU:C:2021:192 ¶ 42 (Mar. 10, 2021).

[185] *See* Joined Cases C-101/19 and C-102/19, Deutsche Homöopathie-Union, ECLI:EU:C:2020:304 (Apr. 23, 2020).

matter how contradictory that may sound. Moreover, two in every five cases will not even raise these concerns. So, the full picture is less black-and-white and much more nuanced than authors who criticise the Court of Justice's alleged integrationist bias are willing to admit.[186] Which should not come as a surprise, given how unlikely it would be to have a full agreement over anything between twenty-seven judges sitting in the Luxembourg benches.[187]

From this, we can see that the Court of Justice, in the many situations in which it interprets E.U. law, does not reach integrationist outcomes. By extension, the entire E.U. legal context cannot be fully integrationist. Rather, a significant number of cases will deal with integration-neutral issues in which a contextualist court has to make sense of a complex web of technical legislative solutions. What is more, in some parts of the E.U. legal context Member States may have envisaged a limited scope of E.U. law or firm exceptions from application of E.U. law; or have granted wide discretion to national authorities; or left the matter completely to be dealt with at the national level. In those situations, a contextualist court that seeks to make the E.U. legal system intelligible, coherent, and consistent will take into account those decentralising pieces of the puzzle instead of blindly and forcefully trying to fit centralising solutions in that frame.

CONCLUSION

The Court of Justice is a contextualist court. In my view,[188] that is the most appropriate label for its approach to the interpretation of E.U. law, and the fairest characterisation of its legal reasoning. It may sound like an apology, but it is difficult not to come to that conclusion after reading a bigger sample of the Court's judgments. My claim is easily verifiable. Anyone can take a look at a randomly or carefully selected sample of cases, related or not to a specific area of E.U. law or legislative act, in a limited period of time, and read a hundred or more judgments of the Court of Justice - not only those that draw some controversy but also those rather uninteresting ones to which scholars rarely pay

[186] Cf. Rodin, *supra* note 179, § III "Ontological metacritique: how the CJEU should be deciding cases?", where he noted that "[w]hile it is true that the Court has generated solid jurisprudence that can be characteri[s]ed as Europeanizing, there are also abundant examples of [the Court promoting] de-centrali[s]ing values".

[187] *Cf.* Michael Malecki, *Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers*, 19 J. Eur. Pub. Pol'y 59 (2012) (U.K.) (showing that the Court's judges do not have uniform preferences when it comes to pursuing pro-integration agenda, but rather they fall on a spectrum between "Europhilia" and "Euroscepticism").

[188] Here I should reiterate that my observations were based on a study of the Court's recent case law, that is a sample of judgments delivered between 2019 and 2021, so these conclusions should be read with that caveat in mind. For the explanation of the design of my research, see *supra* Section 1.

attention. When reading, they should take note of the following: the nature of legal questions – whether they have an integrationist "flavour"; how the Court uses specific interpretive arguments; what are the most frequently used arguments; and what kind of outcomes the Court usually reaches. After they are done with reading and taking notes, I am convinced that the pattern they will identify with all those points will reveal "the careful and painstaking interpretative task carried out by the Court in the majority of its decisions",[189] and not some carefree activist approach unrestricted with the letter of E.U. law that pursues a grand plan of delivering a European superstate or something along those lines.

The label "contextualist", moreover, could make the most sense in the current state of development of the E.U. legal order. You may even think that it is logical that the Court will have such an approach to the interpretation of E.U. law some seventy years after the creation of the first European communities, compared to what it championed in the formative years of the E.U. or during periods of political turmoil, which could perhaps be labelled "teleological". So, first, the E.U. legal system was built from scratch by a teleological court. On that basis, it grew and consolidated. And now, it is being systematised and perfected by a contextualist court.

There are several factors that may have contributed to such an evolution of the interpretive approach of the Court of Justice. The first is the number of cases it handles. From a few dozen a year in the first decades to almost a thousand a year in recent years. Perhaps over time the Court will keep delivering a similar absolute number of bold, purposive rulings. Before they stood out and could be thought of as being representative of the Court's legal reasoning. But lately those become drowned in hundreds of rulings in which the Court routinely solves the issue by a careful consideration of the text and relevant context.

The second factor concerns the personnel. From seven judges sitting at the early court to twenty-seven being there at the moment. A greater number of judges overall means more diversity in opinion, which makes it more difficult to have everyone in favour of ambitious reasoning and far-reaching outcomes. Moreover, the original seven were initially handling all cases together and could indeed adopt a distinct judicial philosophy and follow it consistently. Since they had to make the system operative and secure its institutional authority along the way, they could have been more eager to rely on purposivism. Now, cases are being handled mostly in chambers of three and five judges. This may serve as a steadying factor that pushes everyone to come up with a solution that will be the most acceptable to the rest of the judges. And since more cases

[189] Albors Llorens, *supra* note 6, at 398.

handled by different formations of the Court will produce more material to work with, it becomes important to consolidate the case law and make it coherent and consistent.

The third factor concerns the nature of the cases the Court is dealing with. Initially, the Court was mostly asked to interpret Treaty provisions which are broadly drafted and goal-driven. They are often concerned with issues related to free movement, which were essential for the establishment and functioning of the internal market. And in certain periods, the Union legislator was in a deadlock and could not enact legislation that would make those provisions operative. Furthermore, there was less case law in which the subsequent rulings had to be situated. At the same time, the Court was less known and politically exposed, "blessed with benign neglect by the powers that be and the mass media",[190] so some ambitious rulings could fly under the radar. And some of them dealt with rather mundane facts such as import of chemicals, unpaid electricity bills, or subsidies for slaughtering cows. Such an environment, indeed, may be more conducive to purposivism. But today, that environment has markedly changed. The internal market is more or less completed and solidly in place. The Court is dealing not so much with the Treaty provisions but rather with the intricate, extensive, technical, and ever-growing body of the E.U. secondary law,[191] which shows that the legislative output is there. That law regulates sensitive matters like social security or human rights, which are politically more problematic for Member States since they may encroach on the areas of their reserved competence. And the Court's rulings and legal reasoning are scrutinised more closely than ever, not only by scholars but also by the media, interest groups, politicians, and national judiciaries. Such an environment calls for a contextualist court, and the Court of Justice seems to be responding.

[190] Stein, *supra* note 175, at 1.

[191] *Cf.* Michal Bobek, *What Are Grand Chambers For?*, 23 Cambridge Y. B. Eur. Legal Stud. 1 (2021) (U.K.):

> [I]in contrast to the cases which came, for example, in the 1980s or even in the 1990s, the main role of the Court today is perhaps not so much focused on proactively opening up new areas of law, often based on broadly stated constitutional or primary law principles or Treaty provisions. The cases put before the Court today require ever more navigating through a rather complex web of detailed secondary law instruments, seeking to establish at least some sort of internal order and consistency.