THE 'OVERRULING TECHNIQUE' AT THE COURT OF JUSTICE OF THE EUROPEAN UNION

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The 'overruling technique' has been used in the past by the Court of Justice of the European Union. Whilst the cases of explicit overrulings are very scarce, a broader range of indirect or tacit overrulings exist in the case-law. All these developments have taken place always in the context of preliminary ruling procedures, which confirm the importance of Article 267 TFEU, as well as the flexibility that this means of dialogue with national courts provides to the Court of Justice. The trend of overrulings shows that the search for consistency within a legal order is not a simple task, and courts attempt to minimize the derogation or departure from precedent, even by camouflaging such changes as natural or spontaneous developments in the case-law. In this contribution a theoretical framework will be provided to explain the practice of the Court of Justice when derogating precedent. A distinction will be proposed between trends that amount to overrulings: evolution, clarification and reconsideration. It will be argued that further transparency is needed when the Court undertakes an overruling, and several proposals will be made in this regard.

Keywords: Court of Justice of the European Union, Article 267 TFEU, Precedent, Stare Decisis, Overruling, Litigation, Legal Certainty

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I. INTRODUCTION

The Court of Justice of the European Union (hereinafter the 'Court' or the 'Court of Justice'), like any other constitutional or supreme court, has its own track-record of overrulings. Although the doctrine of *stare decisis* is not explicitly recognized in EU law nor in the Court's case-law, seventy years of practice confirm that the EU legal order is closely attached to the notion of binding precedent.[1]

[1] On the binding effects of the judgments of the Court of Justice and, in particular, of preliminary ruling judgments, see, in this issue, Giuseppe Martinico, 'Retracing Old

This feature turns the act of a judicial overruling into a rather expectational event, scarcely found in the seven-decade long history of the Court and reserved for well-justified occasions only. However, although it is true that the Court has been highly selective in overruling prior decisions, it is equally correct to say that the case-law hosts what could be termed as *covert* or *camouflaged* overrulings, judicial decisions which depart from prior case-law or rectify it as a result of legal developments, acting as if no derogation of judicial precedent had taken place.

In this contribution the 'overruling technique' at the Court of Justice will be analysed in a critical light. In practice, the overrulings in the case-law have always taken place in the context of the preliminary reference procedure. It will be argued that an overruling is a complex phenomenon that cannot be reduced to cases of explicit derogation of precedent. The practice of the Court of Justice confirms that an oversimplified approach towards judicial overrulings can create confusion when analysing the development of the case-law. As a result, a typology of overrulings will be developed, in which a distinction will be introduced between an *evolution*, a *clarification* and a *reconsideration* in the case-law. Several examples of the three types of overrulings will be provided, to argue that a certain degree of theoretical and terminological clarity from the Court of Justice would be welcome. This clarity is not only a demand for the sake of dogmatic thoroughness, but mostly for a guarantee of legal certainty. Several proposals will be made for future cases in which the Court might be tempted to overrule precedent, with the aim of providing a more transparent and manageable toolbox that improves the current *status quo*.

(Scholarly) Path. The *Erga Omnes* Effects of the Interpretative Preliminary Rulings'. Moreover, the binding character of the Court's rulings has also a temporal dimension that has been analysed in this issue by Lorenzo Cecchetti, 'The scope *ratione temporis* of the interpretative rulings of the ECJ: Should the temporal limitation still be a strict derogation from retroactive effects?'.

II. WHAT IS AN OVERRULING?

The reversal of precedent raises complex and delicate issues of legal certainty, coherence and *res iudicata*. One of the virtues of the law is to provide stability in legal relations, so that individuals can make decisions in an environment that provides foreseeable outcomes.[2] When judicial decisions overturn precedent, the change in the case-law produces a shift of expectations that can eventually frustrate foreseen outcomes planned in advance. A legal system that facilitates the reversal of precedent promotes instability in the law. On the opposite end, fixation to a static conception of the case-law, a strict conception of *stare decisis*, provokes an unnecessary rigidity within the legal order, to the point of frustrating any attempts to adapt the case-law to social reality or evolution in the legal system altogether. Too much rigidity in the case-law can lead to the overturning of precedents through constitutional or legislative amendment, thus undermining the authority of courts. In sum, neither a flexible nor a rigid vision of *stare decisis* seems to provide ideal results, leaving the most appropriate outcome somewhere in the middle ground.

This contribution will focus on the most standard scenario of an overruling: a judicial derogation enacted by the same jurisdiction that issued the repealed precedent. In the case of the Court of Justice, overrulings have always taken place in the context of preliminary reference procedures. But nothing precludes a broader conception of the overruling technique, particularly one in which the derogation is undertaken by a non-judicial body.[3] That may be the case of a precedent interpreting a piece of legislation that is superseded by the legislature itself, in disconformity with the interpretation that the courts made of the legislative provision. A similar situation can result in the

[2] On the role of legal certainty in the EU legal order, see Araceli Turmo, *Res Judicata in European Union Law. A Multi-Faceted Principle in A Multilevel Judicial System* (EU Law Live Press 2023) 28 ff.

[3] Alvaro Núñez Vaquero, *Precedentes: Una Aproximación Analítica* (Marcial Pons 2022) 329 ff.

case of constitutional amendments that derogate judicial precedent, as it has been the case on five occasions in the history of the Supreme Court of the United States ('SCOTUS').[4] From here on forward, the notion of "overruling" on which this contribution will operate is a concept based on judicial derogations undertaken by the same jurisdiction, and more specifically by the Court of Justice, acting as the highest court in the EU legal order.

The tensions inherent to the derogation of precedent have led courts to find a balanced approach that safeguards legal certainty with flexibility.

This is seen in the reluctance of courts, and specifically of higher courts, to assume neither of the two extremes, and opting for a balanced methodology in which very specific and exceptional departures coexist with a general trend of stability and subtle evolution. This balanced approach is best represented by the SCOTUS's approach towards *stare decisis* and its revocations, carefully confined to very specific circumstances in which a set of criteria are applied.[5] The SCOTUS will depart from precedent only in situations in which a variety of factors are taken into account: (1) the quality

[4] The precedents superseded by constitutional amendment are Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970), superseded by constitutional amendment, U.S. CONST. amend. XXVI; Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895), superseded by constitutional amendment, U.S. CONST. amend. XVI; Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874), superseded by constitutional amendment, U.S. CONST. amend. XIX; Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452-54 (1856), superseded by constitutional amendment, U.S. CONST. amends. XIII and XIV; Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 452 (1793), superseded by constitutional amendment, U.S. CONST. amend. XI. For a comparison between the US Supreme Court and the Court of Justice of the EU, see Fernanda G. Nicola, Cristina Fasone, and Daniele Gallo, 'Comparing the Effects of US Unconstitutionality and EU's Preliminary Interpretative Rulings: Disapplication, Resistance and Coordination Procedures', in this special issue.

[5] Brandon J. Murrill, 'The Supreme Court's Overruling of Constitutional Precedent' (*Congressional Research Service*, 24 September 2018) < https://sgp.fas.org/crs/misc/R45319.pdf > accessed 15 June 2023.

of the precedent's reasoning; (2) the workability of the precedent's rule or standard; (3) the precedent's consistency with other related decisions; (4) factual developments since the case was decided; and (5) reliance by private parties, government officials, courts, or society on the prior decision.[6] This cautious approach has led the SCOTUS to overturn a limited number of precedents in the course of time, but in a way that it provides the court with sufficient leeway to advance or regress the directions of the case-law and avoid excessive rigidity.[7]

The stability of precedent will also depend on the overall features of each legal system. The common law tradition, in which the structural role of precedent plays a more distinctive part than in continental systems, has additional incentives to pursue a strict doctrine of *stare decisis*, leaving situations of derogations of case-law to exceptional situations only. In continental systems in which the view of the judiciary is attached to the role of the judge as 'the mouth that pronounces the words of the law', legislative inroads into the task of the judiciary can facilitate the departure from precedent, fueling the legislator's agenda to prevail over the stability in the case-law. Notwithstanding such differences, the reality and practice show that both legal traditions have navigated towards a middle ground in which precedent is respected, whilst allowing for specific and exceptional situations of departure and change. It is the ways in which such departures and changes take place that are better explained by the context and culture surrounding each legal tradition. It is no surprise that in common law countries the courts tend to construe a methodology for the derogation of precedent, whilst in

[6] See Janus v. American Federation of State, County, and Municipal Employees, 585 U.S, No. 16-1466, slip op. at 34-35 (2018). For a recent example of an overruling of constitutional precedent, see Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization, et al., 597 US, at pgs. 43 et seq. (2022)

[7] Murrill (n 5).

continental legal systems a tendency exists to refrain from theorizing on the matter.

Another feature playing an important role in the derogation of precedent, particularly in the case of departures from constitutional principle, is the degree of flexibility in the amendment of the Constitution or other higher norms. In cases of rigid Constitutions subject to strict amendment procedures, the role of high courts becomes crucial, as their task will frequently assume the debates that the rigidity of the political procedures will drive away from the political arena into the judicial fore. In the opposite end, a Constitution subject to flexible amendments and frequently reviewed through political debate and decision-making procedures, will contribute to a judiciary more prone to adhere to precedent, in the understanding that the political process can always review and amend the constitutional text. In the case of the EU, the rigidity is associated to the Treaties and to their review procedures, which are subject to a particularly high threshold of review, dependent on ratification procedures in all Member States, thus introducing a broad array of veto players, including domestic veto players (national courts, a regional parliament, a parliamentary commission, etc…). The Court of Justice's flexibility in its approach towards precedent can be explained in the backdrop of such a constitutional framework.

Another factor that will condition the approach towards precedent is the procedural context in which high courts decide on *stare decisis*. In unitary systems composed of a single law-making democratic body, the passage of time can contribute to provide stability, to which the legislative institutions can adjust and evolve in the course of time. In composite systems of federal or quasi-federal nature, in which a plurality of law-making institutions coexists, the role of precedent is a precious tool of certainty and stability for the federation and its unitary components.

Complexity and fragmentation in the legislative sphere require courts to be particularly more conscious of their unifying role as guarantors of precedent and legal certainty. In the case of a quasi-federal supranational organization

like the EU, the role of the Court of Justice is particularly relevant to guarantee the consistency of the federal rulebook, but also its effectiveness in all twenty-seven composite members of the European project.[8]

In sum, the stability of precedent is a complex feature that relies on several variables. Despite the fact that most western high courts make use of a balanced approach toward the departure from precedent, the way in which such practice has evolved depends on the variables mentioned above. In the case of the EU, its legal system is a hybrid between the common law and the continental tradition, but subject to a rigid 'Constitution' with pseudo-federal features, in which the preliminary reference and cooperation with national courts plays a relevant role. It is for these reasons that the Court of Justice's approach towards *stare decisis* does not have a direct parallelism with the approach of national courts.[9] As it will now be explained, *stare decisis* prevails in the EU case-law, but with cases that amount to derogations that also coexist with situations that are close, but not exactly within the confines of a formal departure from precedent. For this reason, an autonomous concept of the 'overruling' will be now introduced, with the aim of reflecting the specificities of the Court of Justice's approach towards the departure from precedent.

III. THE 'OVERRULING' TECHNIQUE: AN AUTONOMOUS APPROACH FROM EU LAW

There is no scarcity of analysis in the legal literature as to the different ways through which courts can depart from precedent. This richness reflects the complexity that the *stare decisis* doctrine can entail, at times complicated

[8] Marc Jacobs, *Precedents and Case-based Reasoning in the European Court of Justice* (Cambridge University Press 2014) 98 ff.

[9] Alec Stone Sweet, 'The European Court of Justice', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999); Mattias Derlen and Johan Lindholm, 'Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions' (2019) 18 *German Law Journal* 687.

further by the context of the legal system and its peculiar features. The typology of overrulings can be different in a common law system, where the doctrine of *stare decisis* holds a very specific legal position, in contrast to continental legal systems, in which the role of legislation can supersede the status of the case-law. In the case of the EU's legal order, heavily conditioned by its quasi-federal structure and its two-tiered system between EU and national courts loosely held together through the preliminary reference procedure, the way in which overrulings are theorised require specific attention to the features of the EU's legal system. Furthermore, due to the fact that all overrulings have taken place in the context of preliminary reference procedures, this feature highlights the importance of judicial dialogue among court, including in the process of undertaking a judicial overruling of precedent.

In 2012, Takis Tridimas[10] proposed a typology of the overruling technique as applied to the EU legal order, according to which situations of (1) distinguishing precedent, (2) express overrulings and (3) implicit overrulings should be treated differently. In this authors' view, the distinguishing technique allows the Court to reject undertaking a formal departure from precedent by separating the facts of past cases with those of a case under consideration. The law becomes reliant on facts, thus allowing for different solutions which might depart on a point of law on the grounds of differences in fact. The express overruling is the unequivocal and explicit departure from precedent undertaken by the same court, whilst implicit overrulings reflect a change in the case-law without explicit recognition, although the *communis opinio* around the new development agrees on the fact that the case-law has moved on.

The distinction put forward by Takis Tridimas reflects in a clear way the basic toolbox of the Court of Justice's overruling technique. However, the

[10] Takis Tridimas, 'Precedent and the Court of Justice. A Jurisprudence of Doubt?', in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 307 ff.

distinction between express and implicit overrulings is based on the will of the Court, and its decision to articulate an overruling in explicit terms or not, whilst the overruling as such is the same. Therefore, two variables must be introduced to portray in more detail the overruling toolbox: one that focuses on the intentions of the Court, and another pointing at the effects of the Court's decision.

By focusing on the *intentions* of the Court, a classification can distinguish between explicit, implicit and accidental overrulings, the first two in line with Tridimas' and Núñez Vaquero's[11] characterization of express and implicit overrulings. A new category is introduced to reflect the situation of accidental turns in the case-law, unintended by the Court, but confirming over the course a new approach in the case-law. No accidental overrulings have been located in the case-law of the Court of Justice, but nothing stops it from incurring in a practice of the kind in the future.

A second variable takes into consideration the *effects* of a specific line of reasoning of the Court. Seen in that light, overrulings can be revocatory or explanatory, the former intended to replace prior precedent by a new doctrine, whilst the latter is introduced to clarify past case-law, but with such scope and impact that the overall effect is to operate an overruling within the legal order. Revocatory overrulings reflect an orthodox approach towards the review of past precedent, whilst explanatory overrulings shed light on previous case-law, with the risk of introducing further complexity depending on the scope of the changes put forward, which at times can be more ambitious than originally intended.

The two variables (intention and effects) provide us with a typology of overrulings which will be used in this article. The combination of both variables produces a typology based on the *trend* perceived in the Court's case-law. Because in some cases the Court will not be undertaking an overruling in formal terms, the typology will reflect the trends that appear

[11] Núñez Vaquero (n 3) 356 ff.

in the case-law amounting to an overruling. The typology distinguishes between (1) evolution, (2) clarification and (3) reconsideration. These three trends can be analysed from the perspective of the two variables, resulting in the following scenarios:

Evolution

	Explicit	Implicit
Revocatory	Explicit Revocatory Evolution	Implicit Revocatory Evolution
Explanatory	Explicit Explanatory Evolution	Implicit Explanatory Evolution

Clarification

	Explicit	Implicit
Revocatory	Explicit Revocatory Clarification	Implicit Revocatory Clarification
Explanatory	Explicit Explanatory Clarification	Implicit Explanatory Clarification

Reconsideration

	Explicit	Implicit
Revocatory	Explicit Revocatory Reconsideration	Implicit Revocatory Reconsideration
Explanatory	Explicit Explanatory Reconsideration	Implicit Explanatory Reconsideration

In the following section this typology will be explored by focusing on cases in which the Court of Justice has made use of the different manifestations of overrulings. It will be argued that *evolution* and *clarification* are the standard approaches in the case-law of the Court of Justice, while *reconsideration* is an exceptional tool scarcely employed, but still in force and significant impact on precedent. This portrayal of the Court of Justice's overruling technique shows that there are no substantial differences with the approach used by other continental courts, not even with common law courts with well-established doctrines of *stare decisis*. The main difference is in the way in which evolution and clarification is used in the EU legal system, which is closely attached to the development of the EU's policies and the objectives-centered means of interpretation developed by the Court of Justice.[12]

IV. EVOLUTION

The case-law evolves in the course of time, as a result of constitutional change or social developments. Case-law is not a static and set body of rulings, but a continuous and organic set of rulings that reflect an

[12] Koen Lenaerts, José A. Gutiérrez-Fons, Les méthodes d'interprétation de la Cour de justice de l'Union européenne (Bruylant 2020).

understanding of the law and society. This evolution can drive the case-law into certain directions, resulting in trends that may eventually contradict precedent. When these developments take place, usually within a medium or long term, a feature that can eventually ensue is a gradual departure from precedent. By the time this development takes place, the abandonment of prior rulings can be considered as a natural or logical result, fully justified in terms of advancing the case-law. This way of building gradually in time towards an overruling is what will be categorized as *evolution*.

The case-law of the Court of Justice provides several examples of how an evolution can bring about changes of precedent. Such a result will generally derive from another evolution taking place in the law (legislation, Treaty reform, international treaties, etc…) or in society. Three examples will be provided, reflecting the interplay of the two variables mentioned above, in which intention and effects contribute to categorize the kind of overruling that the Court of Justice undertook in each case.

In its judgment in *Bidar*,[13] delivered in 2005, the Court of Justice was confronted with the issue of discriminatory treatment in the access of students to grants and subsidized loans, reserved only for students with legal residence in the host Member State. The previous position of the Court was well-defined, and it was characterized by its restrictive turn since the judgments in *Lair*[14] and *Brown*,[15] delivered in the late 1980's, in which the Court refused to recognize a right to non-discrimination on the grounds of nationality, with the argument that education policy fell within the remit of the Member States. According to the Court:

> 'it must be stated that at the present stage of development of Community law assistance given to students for maintenance and for training falls in

[13] Case C-209/03 Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills EU:C:2005:169.

[14] Case 39/86 Sylvie Lair v Universität Hannover EU:C:2988:322.

[15] Case 197/86 Steven Malcolm Brown v The Secretary of State for Scotland EU:C:1988:323.

> principle outside the scope of the EEC Treaty for the purposes of Article 7. It is, on the one hand, a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions and, on the other, a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the EEC Treaty'.[16]

Between the rulings in *Lair* and *Brown*, a significant development had taken place: the entry into force of the Maastricht Treaty, introducing the status of European citizenship and a new field of EU policy area in education and vocational training. When the issue of discrimination in access to allowances in University education reached the Court in a post-Maastricht context, it didn't take the Luxembourg judges much effort to depart from their prior judgments in *Lair* and *Brown*, arguing that the Maastricht Treaty had shifted the constitutional parameter significantly. The Court took also comfort in the fact that the seminal Directive 2004/38 had been recently enacted, which included a new provision in Article 24, whereby a general prohibition on the grounds of nationality explicitly referred to students. In sum, and in order to justify the departure from *Lair* and *Brown*, the Court stated:

> 'In view of those developments since the judgments in Lair and Brown, it must be considered that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article [18 TFEU] for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs'.[17]

The judgment in *Bidar* is an example of an explicit revocatory evolution, whereby the Court of Justice openly departs from prior precedent, justified on the grounds of an evolution in the Treaties that provokes an evolution in the case-law. The revocatory effect is obvious, inasmuch *Lair* and *Brown* are no longer good law, and their role within the body of case-law has been

[16] Lair (n 14) para 15.

[17] *Bidar* (n 13) para 42.

neutralized to the point of irrelevance, superseded by a new binding precedent in the shape of the *Bidar* judgment. It is paradoxical that some years later the judgment in *Bidar* would itself become partly superseded by an implicit revocatory evolution in the case of *Förster*, where the Court restricted the scope of *Bidar* and provided support to a broad interpretation of Article 24(2) of Directive 2004/38, thus confirming that evolution in the case-law can take place by taking two steps forward and one step back.[18]

Another evolution in the case-law took place in a ruling that started in the case of *Trojani*,[19] followed by *Dano*[20] and, finally, *Communities of Northern Ireland*.[21] The three judgments are good proof of how an evolution with revocatory and explanatory overrulings can take place, some of them implicit and others explicit. In 2004, in the case of *Trojani*, the issue of access to social benefits in a host Member State was discussed, in a case concerning a French national holding no legal residence in the host Member State (Belgium) under the residence Directive, but authorized to remain in the country by the Belgian authorities. In those circumstances, the Court of Justice ruled that the decision of the host Member State to authorize the presence of the French national triggered the application of the non-discrimination provisions in the Treaty, thus precluding the Belgian authorities from denying access to social benefits on the grounds of nationality. Nine years later, in the case of *Dano*, the Court changed course, stating that equal treatment is conditioned to situations in which an individual is a legal resident pursuant to the conditions set in Directive 2004/38. The contrast between the two rulings shows how the overruling

[18] Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630.

[19] Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* EU:C:2004:488.

[20] Case C- 333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358.

[21] Case C-709/20 *CG v The Department for Communities in Northern Ireland* EU:C:2021:602.

takes place, with no reference whatsoever to the prior decision (*Trojani*) or to the fact that an evolution in the case-law was taking place:

In *Trojani*, the Court clearly stated that, when it comes to access to a social benefit by a national of another Member State,

> 'a citizen of the Union who is not economically active may rely on Article [18 TFEU] where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit'.[22]

In 2013, the statement in *Dano* points in exactly the opposite direction, by ruling as follows:

> 'It follows that, so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38'.[23]

The judgment in *Dano* is an example of an implicit revocatory evolution, in which no reference whatsoever is made to the ruling in the case of *Trojani*, but a clear departure from the said judgment is taking place in a move that is driving the case-law into a specific direction. This direction is coherent with other rulings of the Court taking a more restrictive approach towards immigration in the EU. However, eight years later another step in the evolution took place, this time in an *explanatory* function, as shown in the case of *Communities of Norther Ireland*. In this case, the Court of Justice restricted the effects of *Dano* by introducing the possibility of invoking the Charter of Fundamental Rights of the EU in situations in which there is no legal residence under Directive 2004/38, thus reducing the impact of *Dano* when risks of violations of fundamental rights emerge, particularly in the

[22] *Trojani* (n 19) para 43.

[23] *Dano* (n 20) para 69.

case of destitute individuals with minor children.[24] Once again, the clarification is implicit and there is no reference whatsoever to the fact that the judgment is severely curtailing the impact of *Dano*, but the progression shows how an evolution and clarification can, in the course of time, perform important changes in the case-law.

Another example of an evolution that carries together an overruling of past precedent can be found in *Banco Santander*,[25] a judgment in which the Court of Justice provided for the first time a holistic approach towards the definition of an "independent jurisdiction" pursuant to Article 267 TFEU. The case concerned the status of specialised tax tribunals in Spain, whose compliance with the requirements pursuant to Article 267 TFEU were questioned. In a prior ruling in the case of *Gabalfrisa*,[26] delivered in 2000, the Court of Justice confirmed that these tribunals complied with all the requirements to act as jurisdictions with the power to make preliminary references pursuant to Article 267 TFEU. The reason why the Court had to reconsider the situation was the result of development in the case-law in another field: the protection of the rule of law and judicial independence, in the context of Article 19 TEU. As a result of case-law in this area, mostly resulting from the worrying developments emerging in Poland and

[24] At paragraph 84 of the judgment in Communities of Northern Ireland, the Court of Justice, immediately after referring to *Dano*, introduces a caveat by adding the following paragraph: 'That said, as pointed out in paragraph 57 of the present judgment, a Union citizen who, like CG, has moved to another Member State, has made use of his or her fundamental freedom to move and to reside within the territory of the Member States, conferred by Article 21(1) TFEU, with the result that his or her situation falls within the scope of EU law, including where his or her right of residence derives from national law'. From that point onward, the judgment highlights the importance of fundamental rights and the specific situation of a destitute family with minor infants, with a reference to Article 1 of the Charter (dignity), to conclude that in those circumstances a refusal to provide social assistance would amount to a breach of Union law.

[25] Case C-274/14 *Banco Santander* EU:C:2020:17.

[26] Case C-110/98 *Gabalfrisa and others* EU:C:2000:145.

Hungary, the Court introduced high standards of judicial independence, higher than those required under Article 267 TFEU in the context of the definition of a 'jurisdiction' for the purpose of referring cases to the Luxembourg court. As a result, in the case of Banco Santander the Court departed from *Gabalfrisa* with the aim of providing coherence to the case-law as a whole, thus aligning the notion of 'independence' provided in Article 267 TFEU with the standards of independence required by Article 19 TEU in relation with Article 47 of the Charter.

The terms by which the Court departs from *Gabalfrisa* shows the effort to accommodate the case-law in the context of an evolution taking place, to which Article 267 TFEU must be aligned to:

> 'those considerations [in Gabalfrisa] must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence which any national body must meet in order to be categorised as a 'court or tribunal' for the purposes of Article 267 TFEU'.[27]

V. CLARIFICATION

In the process of developing its case-law, a high court can refine previous rulings and produce additional criteria that eventually lead to derogations to specific points or elements that make part of a precedent. There is no overruling in a strict sense, because the precedent remains in place. However, the new contribution provides a new insight that can amount to a derogation. In some cases, the derogation can be broad, to the extent that it may significantly neutralize the existing precedents. In some situations, the exception can be so broad that it can be perceived to be the rule itself, and in such cases the clarification can be considered to be an overruling.

[27] *Banco Santander* (n 25), para 55.

In the case of *Taricco*,[28] the Court of Justice was confronted with an Italian provision that reduced the period applicable to a statutory limitation in criminal proceedings. As a result of this rule, a good number of criminal proceedings on VAT fraud were closed in Italy, since they had been brought at a time that exceeded the new statutory limitations. The constitutional principle imposing the application of the most favorable rule to the accused resulted in the termination of criminal proceedings which left alleged criminal offences unresolved, including VAT fraud offenses. The Court of Justice ruled that such a situation breached Article 325 of the TFEU, a provision that imposes a legal duty on Member States to take all the necessary measures to combat fraud against the financial interests of the Union.

The Italian rule did not contribute to such aim and was consequently declared by the Court of Justice to breach Union law. This ruling caused a major upheaval in the Italian criminal system. Thousands of closed criminal proceedings, with extinguishing effects on the criminal liability of the accused under Italian law, were reopened to comply with the Court of Justice's ruling. Eventually the matter reached the Italian Constitutional Court and the case was referred again to the Luxembourg court. This time around, the stakes were considerably higher: in its order for reference, the Constitutional Court reminded the Court of Justice that, in the Italian legal order, the rules on statutory limitations in criminal proceedings were not provisions of procedure, but substantive rules that determine criminal liability and therefore subject to the principle of legality and the prohibition of retroactive criminal charges, principles protected by the Italian Constitution. The Court of Justice took good note of the challenges raised by the case and in the decision of *M.A.S and M.B,*[29] decided to take a step back from its prior ruling in *Taricco*.[30] In a very subsided tone and with an

[28] Case C-105/14 *Taricco and others* EU:C:2015:555.

[29] Case C-42/17 *M.A.S. and M.B.* EU:C:2017:936.

[30] In this vein, see Daniele Gallo, 'The Taricco Saga: When Direct Effect and the Duty to Disapply Meet the Principle of Legality in Criminal Matters', in Paul Craig and Robert Schütze (eds), *Landmark Cases in EU Law* (Hart, Forthcoming).

effort to clarify its previous case-law, the Court stated that the principle of legality, as provided in the laws of the Member States, is also a rule subject to protection under Union law. Therefore, when a Member State provides such provision, Union law reinforces it and confirms its priority vis-à-vis the protection of the Union's own resources. In the Court's words:

> 'It follows […] that it is for the national court to ascertain whether the finding, required by paragraph 58 of the Taricco judgment, that the provisions of the Criminal Code at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union leads to a situation of uncertainty in the Italian legal system as regards the determination of the applicable limitation rules, which would be in breach of the principle that the applicable law must be precise. If that is indeed the case, the national court is not obliged to disapply the provisions of the Criminal Code at issue'.[31]

Clarifications can be the result of a lack of prior information. In preliminary reference procedures the Court of Justice relies on the information provided by national courts, including the national law applicable in the main proceedings. As a result, the interpretation provided by the Court of Justice can become highly conditioned by the contents of the order for reference drafted by the national court, which may not always be complete, or fully transparent as to the intentions of the referring court. In some cases, the information provided might be inaccurate, including the information on the national law. Defective orders for reference can ensue in an erroneous decision of the Court of Justice which might have to be rectified at a later point. When the correction arrives, the Court will not consider its decision to be an overruling, but the result of a prior misunderstanding as to the law or facts as provided by the referring court. However, the case-law has to incorporate two contradicting rulings, one superseding the other, as a means

[31] *M.A.S. and M.B.* (n 29), para 59.

of clarifying past case-law delivered on the basis of wrong assumptions, thus resulting in a development equivalent to an overruling.

This means of clarification can be found in the case of *Grupo Norte*,[32] a Grand Chamber judgment in which the Court was invited to clarify a previous judgment, delivered only several months earlier, in the case of *De Diego Porras*.[33] The crux of the matter boiled down to the Spanish rules on employer compensation for termination of fixed-term contracts. Under Spanish law, the contracts for fixed-term temporary workers would terminate with no compensation. Permanent workers enjoyed a more beneficial regime of compensation following the termination of their contracts. In *De Diego Porras* the Court of Justice, ruling in a chamber of three judges without an Advocate General's Opinion, stated that both categories of workers were in a comparable situation and such difference of treatment was not objectively justified, thus breaching the fixed-term contracts Directive. This decision relied on a variety of details provided by the national court that turned out to be incomplete and at times erroneous, leading the Court of Justice, the first time around, to come too quickly to certain conclusions that turned out to produce unexpected consequences. Spain's fixed-term contractual framework provided equal social protection for permanent and fixed-term workers. The only difference was the terms of compensation for termination, which in the case of fixed-term workers replacing permanent workers was not envisaged due to the very nature of the contract itself, while in the case of permanent workers it was subject to certain conditions depending on whether the employer complied with certain conditions. The Court of Justice did not focus on this last feature and came too fast to the conclusion that the situations were comparable, putting the Spanish system of fixed-term employment upside down, with huge

[32] Case C-574/16 *Grupo Norte Facility SA v Angel Manuel Moreira Gómez* EU:C:2018:390.

[33] Case C-596/14 *Ana de Diego Porras contra Ministerio de Defensa* EU:C:2016:683.

financial implications and causing considerable financial tensions within the social security regime.

Shortly after the ruling in *De Diego Porras* was delivered, a regional high court, immediately followed by the Spanish Supreme Court as well, referred the matter once again to the Court of Justice. The government of the Kingdom of Spain requested the case to be addressed by the Grand Chamber. The discomfort within the Spanish community of employment lawyers was clear, and the Court of Justice was invited to review its prior ruling in *De Diego Porras*.

In *De Diego Porras*, the Court found the situation between permanent and fixed-term workers fully comparable in the following terms:

> 'The very fact that that applicant held for seven consecutive years the same position of an employee who was on full-time exemption from professional duties in order to carry out a trade union mandate, leads to the conclusion not only that the interested party fulfilled the training requirements to take up the post in question, but also that she carried out the same work as the person she was called upon to replace on a permanent basis during this prolonged period of time, while being subject to the same working conditions."
>
> It must therefore be held that the fixed-term employment situation of the applicant in the main proceedings was comparable to that of a permanent worker'.[34]

Shortly after, and referring to the same categories of workers, now having been presented with the full picture of the Spanish framework and with a better understanding of the benefits involved in both contracts and the differences between the two, the Court of Justice came to exactly the opposite solution, without making a single reference to its prior judgment:

> 'In that respect, it should be noted that the payment of compensation such as that payable by Grupo Norte on termination of [the] employment contract — which was expected to occur, from the moment that contract

[34] *Ibid*., paras 43 and 44.

> was concluded, when the worker he replaced took full retirement — takes place in a significantly different context, from a factual and legal point of view, to that in which the employment contract of a permanent worker is terminated on one of the grounds set out in Article 52 of the Workers' Statute'.[35]

Grupo Norte is an example of an implicit revocatory clarification. The judgment reviews the case once again in light of new information, thus reaching a more detailed analysis that leads the Court of Justice to clarify its previous reasoning in *De Diego Porras*. However, the scope of the clarification is so profound that it is ensues in a revocation of prior precedent. This outcome was clearly voiced by Advocate General Kokott in her Opinion in *Grupo Norte*, where she points to the fact that an overruling or a clarification might have been needed in this case:

> 'The present case gives the Court an opportunity to expand specifically on this aspect, which, in my view, was somewhat neglected in de Diego Porras, and to reconsider its case-law on this point'.[36]

The 'reconsideration' at the invitation of the Advocate General led to an implicit revocatory clarification from the Court of Justice, providing a welcome clarification following a ruling hastily resolved based on incomplete information. While the judgment in *Grupo Norte*, when read without the knowledge of the existence of *De Diego Porras*, does not give any hints as to whether an overruling is taking place, the reality is that the Court is undertaking a clarification that derogates precedent.

Another clarification was provided in the case of *Cassa di Risparmio*,[37] in the context of the controversial case-law of the Court of Justice delivered in *TWD Textilwerke Deggendorf*.[38] This case-law precludes private applicants

[35] *Grupo Norte* (n 27) para 56.

[36] Case C-574/16 *Grupo Norte Facility SA v Angel Manuel Moreira Gómez* EU:C:2017:1022, Opinion of AG Kokott, para 53.

[37] Case C-222/04 *Cassa di Risparmio di Firenze and others* EU:C:2006:8.

[38] Case C-188/92 *TWD Textilwerke Deggendorf* EU:C:1994:90.

with standing to bring a direct action against an EU act, to request preliminary references of validity from national courts when they have previously not made us of the action of annulment. The rationale of this case law is straight-forward: if the Treaty provides a remedy and a time-limit to bring a direct action before Union courts, this remedy cannot be circumvented by way of the preliminary reference of validity. It is true that the Court has limited the *TWD* case-law to cases in which the applicant has a clear case of standing, but it is nevertheless a restriction in the right of access to justice of private applicants that has no explicit foundation in the Treaties. In *Cassa di Risparmio* the Court of Justice was confronted with the same situation, but in a case in which the preliminary reference of validity was not made upon a request of any of the parties, but ex officio by the referring court. In that situation, does the *TWD* apply or not?

The Advocate General approached the matter by using the 'distinguishing' technique, highlighting that the case at hand concerned a general act of the Commission addressed to a Member State, a circumstance that was different from the facts in the *TWD Textilwerke Deggendorf* case. However, the Court of Justice approached the matter differently, ignoring the features of the challenged act and focusing on the fact that the question had been raised by a national court of its own motion. Instead of distinguishing the facts from one case to another, the Court used a syllogistic reasoning by virtue of which an exception was introduced to the general precedent set by the *TWD Textilwere Deggendorf* ruling. The clarification was introduced as follows:

> 'The question was referred by the national court of its own motion. Consequently, it cannot be declared inadmissible by virtue of the case-law resulting from TWD Textilwerke Deggendorf'.[39]

Cassa di Risparmio is an example of an explanatory and explicit clarification, in which the Court of Justice introduces a derogation to a general and principled line of prior case-law, but with sufficient scope to consider it as a

[39] *Cassa di Risparmio* (n 37), paras 73 and 74.

partial overruling. As a result of this clarification, the *TWD Textilwere Deggendorf* can be eluded by having a national court raising a point of validity of its own motion, a feature that waters down considerably the restrictions imposed by the preexisting precedent.

VI. RECONSIDERATION

The third and most expressive form of overruling takes place when the Court of Justice derogates precedent in categorical terms resulting from a reflective process that can be termed as a *reconsideration*. Unlike evolution, situations of reconsideration are outright departures that reflect a change of criterion and a straight-forward rupture with past precedent following a reflective process within the Court. In the entire history of the Court of Justice there are only four occasions in which such departures have taken place.

The first case of a reconsideration can be found in the *HAG I* [40] and *HAG II* [41] cases, in which the Court struggled with the doctrine of common origin. At first, the Court stated that the holder of a trademark could not prohibit the marketing in its own Member State of goods lawfully produced by the proprietor of an identical trademark in another Member State if the two trademarks had a common origin. Seventeen years later, the Court reconsidered its previous position, in light of the evolution in the internal market and the development of trademark laws in that time. In fact, the Advocate General openly invited the Court to depart from *HAG I* and to do it explicitly, which the Court did. In an unusual reference to the discussions taking place before the institution, the Court announced the overruling of *HAG I* in the following terms:

> '*Bearing in mind the points outlined in the order for reference and in the discussions before the Court concerning the relevance of the Court' s judgment in Case 192/73 Van Zuylen v HAG [1974] ECR 731 to the reply to the question asked by the*

[40] Case 192/73 *Van Zuylen/Hag AG* EU:C:1974:72.

[41] Case C-10/89 *CNL-SUCAL/HAG* EU:C:1990:359.

> *national court, it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in that judgment in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods*'.[42]

Immediately after, the Court reversed its prior ruling in *HAG I* and rejected the doctrine of common origin in support of a criterion of consent. The judgment is carefully reasoned, as was the Opinion of Advocate General Jacobs. In addition, paragraph 10 of the judgment refers to the development of the case-law itself, but also to 'the general rules of the Treaty', in an implicit reference to the need to update the interpretation of primary law in light of current developments in the internal market, almost two decades since the inception of the judgment in *HAG I*.

This was the first occasion in which the Court departed explicitly from prior precedent as a result of a reconsideration within the institution. It did not undertake such a task lightly. The reference to the 'discussions before the Court' and the Opinion of Advocate General Jacobs are good proof of the intensity and force of the arguments in support of an explicit overruling. The Advocate General argued convincingly in support of an explicit departure to avoid any risks of legal uncertainty:

> 'That the Court should in an appropriate case expressly overrule an earlier decision is I think an inescapable duty, even if the Court has never before expressly done so. In the present case the arguments for expressly abandoning the doctrine of common origin are exceptionally strong; moreover, the validity of that doctrine is already, as I have suggested, in doubt as a result of the intervening case-law. To answer Question 1 in the affirmative without abandoning the doctrine, or to seek to rationalize such an answer on some other ground, would be a recipe for confusion'.[43]

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[42] *Ibid*., para 10.

[43] Case C-10/89 *CNL-SUCAL/HAG* EU:C:1990:112, Opinion of AG Jacobs, para 67.

Shortly after the overruling in *HAG II,* the Court of Justice was confronted with yet another reconsideration. In the case of *Keck & Mithouard*,[44] the Court was called to deal with the backlash resulting from its case-law on free movement of goods developed during the 1970's and 1980's, which had expanded the definition of 'measures having an equivalent effect ('MEE') to a quantitative restriction'. This evolution led into the development of the *Dassonville* test and mutual recognition, putting the entirety of national regulatory measures under scrutiny in light of free movement provisions. This development created considerable levels of legal uncertainty which were not being remedied at the time by Union legislation. As a result, the Court decided to limit the scope of what constitutes an MEE and excluded from its scope the selling arrangements under national law, in particular when they are of an indistinctly applicable scope. This was not a mere clarification, but a conscious and well reflected decision ensuing from an internal deliberation on the outcome of its case-law. In the Court's own words:

> 'In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.
>
> […]
>
> By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment […], so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'.[45]

[44] Case C-267/91 *Keck & Mithouard* EU:C:1993:905.

[45] *Ibid*., paras 14 and 16.

It is interesting to observe that the Court starts its analysis by pointing at a possible clarification of prior case-law, but what it undertakes is a rather different endeavor. In paragraph 16, it openly admits that the upcoming ruling is no clarification, but a fully-fledged rectification of prior precedent ('by contrast, contrary to what has previously been decided…'). As a result of *Keck & Mithouard*, the scope of *Dassonville* was mutilated and restricted, leaving the task of developing standards for selling arrangements to the Union legislature and not to the courts.

In *Metock*,[46] the Court of Justice rebuked a prior decision taken in the case of *Akrich*,[47] overturning it explicitly. The facts of *Akrich* concerned the situation of third country nationals, holding derivative free movement rights, having entered the territory of the Member States illegally. In such situations, the Court of Justice ruled in *Akrich* that a third country national enjoyed no free movement rights under the Treaties. Five years after the judgment in *Akrich*, the Court of Justice reversed course and overturned its prior decision:

> 'It is true that the Court held in paragraphs 50 and 51 of Akrich that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State'.[48]

The most recent example of a reconsideration took place in 2022 in the case of *NE*,[49] a case in which the Court overturned its prior ruling in Link

[46] Case C-127/08 *Metock and others* EU:C:2008:449.

[47] Case C-109/01 *Akrich* EU:C:2003:491.

[48] *Metock* (n 41) para 58.

[49] Case C-205/20 *NE and Bezirkshauptmannschaft Hartberg-Fürstenfeld* EU:C:2022:168.

Logistic,[50] on the question of whether the principle of proportionality, as enshrined in the text of a directive, has direct effect in national courts.[51] In *Link Logistic*, ignoring the powerful Opinion of Advocate General Bobek in the case, the Court of Justice provided a negative reply:

> 'It follows that, in circumstances such as those of the main proceedings, the requirement of proportionality of penalties in Article 9a of Directive 1999/62 cannot be interpreted as requiring the national court to take the place of the national legislature.
>
> Consequently, Article 9a of Directive 1999/62 does not have direct effect and does not give individuals the right to rely on it before the national authorities in a situation such as that at issue in the main proceedings'.[52]

However, this approach proved to be wrong in the eyes of the Court itself, sitting in Grand Chamber this time around, and it explicitly quashed its prior decision pointing in exactly the opposite direction:

> 'It is apparent from those considerations that, contrary to what was held in paragraph 56 of the judgment of 4 October 2018, Link Logistik N&N […], the requirement of proportionality of penalties laid down in Article 20 of that same directive is unconditional and sufficiently precise to be capable of being invoked by an individual and applied by the national administrative authorities and courts.
>
> In particular, where a Member State exceeds its discretion by adopting national legislation providing for disproportionate penalties in the event of infringements of the national provisions adopted pursuant to Directive 2014/67, the person concerned must be able to invoke directly the requirement of proportionality of penalties laid down in Article 20 of that directive against such legislation.

[50] Case C-384/17 *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya* EU:C:2018:810.

[51] On this matter, see Daniele Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) 1 European Law Open 576, 590-593.

[52] *Ibid*., paras 55 and 56.

> […]
>
> In the light of all the foregoing considerations, the answer to the first question is that Article 20 of Directive 2014/67, in so far as it requires the penalties provided for therein to be proportionate, has direct effect and may thus be relied on by individuals before national courts against a Member State which has transposed it incorrectly'.[53]

VII. AN 'OVERRULING TOOLBOX' FOR THE COURT OF JUSTICE

Throughout its seventy years of case-law, the Court of Justice has proved to be a jurisdiction well attached to a non-written doctrine of *stare decisis*, limiting the derogation of precedent to very selected cases. The description portrayed above is not inconsistent with the practice of other high courts at state or international level, whereby attachment to precedent is a source of legal certainty and foreseeability, limiting the scenario of derogations to specific instances subject to robust justification. If the question is framed in terms of how consistent is the Court of Justice vis-à-vis its own case-law, the answer should be in the positive, and the rate of consistency can be considered to be high.

A different matter lies when it comes to the transparency and the reasons underlying departures from precedent. The cases described in this paper show a significant degree of pragmatism in the Court's approach when having to deal with an overruling. There is no predetermined framework in the case-law distinguishing between cases of evolution, clarification or reconsideration, nor does the Court have a consistent approach in dealing with the distinguishing of cases as an alternative technique to an overruling. The development of the case-law is a pragmatic succession of decisions whereby the Court of Justice moves its stance forward, backward or it openly derogates prior rulings, with no clarity as to why it decides in one sense or the other. The underlying rationale for one of those options can be

[53] *NE* (n 49) paras 30 and 32.

implicitly deduced by reading between the lines of the judgment, or through the looking glass of the Opinion of the Advocate General, or through the extra-judicial publications of the members or legal secretaries of the Court. Overall, consistency does not appear to be a problem for the EU legal order, but transparency is certainly a matter with room for improvement.

The Court of Justice is not a Common Law jurisdiction, nor a continental court. Its hybrid origin, inspired in the French Conseil d'État but fleshed in the course of time by the contributions of legal traditions from all its Member States, impedes a clear-cut categorization of the Court under traditional parameters. It is precisely because of its *sui generis* status among the different families of European legal traditions that its approach towards certain matters resists to fall under standard categories. This is also the case of precedent, the *stare decisis* doctrine and overrulings.

As it was mentioned in Section II, the Common Law tradition tends to develop frameworks of justification to undertake an overruling. The example of the SCOTUS is very telling, introducing a sophisticated number of steps to undertake what in this contribution has been termed as a *reconsideration*.[54] The need to develop predetermined conditions is closely linked to the US legal tradition's attachment to the doctrine of *stare decisis*. This approach contrasts with continental Europe's approach towards the derogation of precedent, traditionally categorized as the result of judicial discretion, legislative fiat or of an automatic outcome linked to the development in the law, whether through the enactment of new legislation or new constitutional rules. Between the formalization of predetermined standards and an approach based on strict discretion, there is a possible middle ground for the Court of Justice. A tentative proposal is outlined below.

The distinction between evolution, clarification and reconsideration is a useful tool to distinguish between the different justifications that underlie an

[54] See Section II of this contribution and the references in footnote 7.

overruling. In all three cases there is a powerful reason to depart from precedent, but such reasons show significant differences that require different justifications. Cases of *evolution* reflect a development in the law, a natural flow in the advancement of legislation, international law or of an overall policy approach, that eventually require adjustments in the case-law. The price to pay for not evolving the case-law is its petrification, a lack of adjustment to reality and, eventually, potential legislative or constitutional derogations of precedent. In cases of *clarification* the need for an overruling is mostly based on the necessity of stream-lining the case-law, or adjusting it in light of the effects that precedent has caused, which might require further specification by the same court. There is no evolution in the law, but a need to fine-tune the building blocks of a prior line of case-law in order to ensure its proper implementation. When it comes to *reconsideration*, the reasons and approach are widely different, inasmuch the Court is not evolving or clarifying, but directly repealing a prior ruling in order to discard it once and for all from its body of case-law. There is a willing intention to *purify* the legal order and put an end to a decision that does not belong any longer to the legal order.

From a practical perspective, it is important for the legal community to understand clearly whether an overruling is delivered based on any of the three grounds mentioned above. In the case of evolution, the legal community can understand that the overruling is a way to ensure consistency of the case-law with the broader evolution of the law. The overruling in such a context also sends a message as the willingness of the Court of Justice to adapt or not to the general developments taking place in the legal system. The fact that in judgments like *Martinez Sala* or *Bidar* the Court explicitly referred to the Maastricht Treaty and to the overall change that this legal text introduced in the broader understanding of the role of the individual in the EU legal order, helped to anticipate the following decisions in the field of Union citizenship. By correcting a prior mistake in *De Diego Porras*, the Court signaled its willingness to rectify case-law, pointing at the circumstances in which such a change can come about. In sum, there is a

high value in having transparency in the circumstances that surround situations of evolution, clarification and reconsideration, providing legal certainty and a better understanding of the case-law to the legal community. In sum, transparency at the time of undertaking an overruling is an asset in terms of *consistency* for the EU legal order. In a system closely attached to the doctrine of *stare decisis*, to introduce change in the case-law while simultaneously guaranteeing robust levels of consistency, is an important asset that should deserve careful attention.

The proposal of this contribution invites the Court of Justice to introduce specific language when dealing with cases of evolution, clarification and reconsideration. It will also be submitted that certain procedural guarantees should be introduced when derogating derogate precedent, particularly when it comes to the role of the Advocate General and the attribution of cases to the Grand Chamber. Also, it is argued that implicit overrulings should be avoided for the sake of clarity. The very notion of an overruling sits uncomfortably with implicit decisions which deprive the auditorium from properly understanding the state in which prior case-law has been left. To this end, transparency can be provided by employing a consistent approach in terms of terminology, in order to signal and inform the legal community of the steps that the Court is taking at the moment of an overruling. In fact, the case-law already anticipates this proposal: in *HAG II* and *Metock*, the Court was consistent in explicitly referring to the term 'reconsider' in order to undertake an overruling of precedent.

The use of standard formulaic expressions in the case-law is frequent in the practice of the Court of Justice. For example, the limits to the scope of a ruling in a preliminary reference are defined by the reference in the judgment to the powers of the national referring court. By stating, in the standard formulation, that a specific matter is 'for the national court to asses, in the light of all the facts of the dispute in the main proceedings', the Court is defining the perimeter of its jurisdiction in the case at hand. In similar terms, when referring to 'the specific circumstances of the case', the Court is

introducing a distinguishing technique, pointing to the fact that its solution applies to that specific factual situation, but not necessarily to a different arrangement if it was ever to be raised in the future. In sum, the role of standard formulaic expressions in the practice of the Court of Justice is a valuable tool that provides transparency and helps in better understanding the true meaning of a judgment. When the ruling is undertaking a derogation of precedent, a highly relevant development for the overall body of case-law, such transparency should be demanded from the Court.

It is submitted that the use of standard formulaic expressions to reflecting an *evolution*, a *clarification* or a *reconsideration* of precedent, should be expressed in the following terms, using the same variables already introduced in Section III:

Evolution

	Explicit
Revocatory	'In view of the developments since the judgment/s in [*x*], it must be considered that the said judgment/s does no longer reflect the case-law of the Court, and [*new precedent*].'
Explanatory	'In view of the developments since the judgment/s in [*x*], the said judgment/s must be interpreted in the sense that [*new precedent*]'

Clarification

	Explicit
Revocatory	'In view of the arguments put forward before the Court, the judgment/s in [*x*] must be clarified in the sense that [*new precedent*]'
Explanatory	'In view of the arguments put forward before the Court, the judgment/s in [*x*] must be interpreted in the sense that [*new precedent*]'

Reconsideration

	Explicit
Revocatory	'In view of the arguments put forward before the Court concerning the relevance of the judgment/s in [*x*], the Court considers that the said judgment/s must be reconsidered. In light of [*reasons justifying the reconsideration*], it follows that [*new precedent*].'
Explanatory	'In view of the arguments put forward before the Court concerning the relevance of the judgment/s in [*x*], the Court considers that the said judgment/s must be reconsidered. In light of [*the reasons justifying the reconsideration*], it follows that judgment [*x*] must be interpreted in the sense that...'

A final remark should be made to the procedural guarantees that reinforce transparency while undertaking an overruling of precedent. A specific attention will be addressed to the role played by the Advocate General and the formations in the Court of Justice.

Considering the importance that derogations from precedent have for any legal order, it should be assumed that, in proceedings in the Court of Justice, such a development should demand the participation of the Advocate General hearing the case. To enrich the decision-making process and provide full legitimacy to the Court's decision, it will be argued that all overrulings, in any of their manifestations referred above, should count with the participation of the Advocate General, as a means of introducing an additional guarantee of stability to the legal order. However, this proposal should not be taken too far to the point of requiring a positive stance of the Advocate General in support of an overruling. Granting a veto power to the Advocate General would undermine the very nature of his/her role, whose function is to support the task of the Court, but not to condition it. In fact, the experience of past overrulings in the Court of Justice show that in most cases the Advocate General has supported a departure or a readjustment of the case-law, in line with the Court's final decision in the case. On some occasions the Advocate General has been the main and active promoter of such a turn in the case-law. It is unquestionable that an overruling will have a reinforced legitimacy if it has been decided upon a proposal of the Advocate General, but nothing should preclude the Court from departing from precedent even if the Advocate General is opposed to such a move. However, the Advocate General should be heard at all times, so it is imperative that any overruling takes place with an Opinion of an Advocate General, something that has always happened to date and should continue to be the standard trend.

In addition, another procedural guarantee should be provided by the role of the Grand Chamber, the Court's leading formation on matters of principle. Unless the overruling is departing from a precedent delivered by the plenary of the Court, all derogations must be undertaken by the Grand Chamber, a fifteen-judge formation that includes the participation of the President, Vice-President and the five Presidents of chambers of five judges. It should be said that, as in the case of the Advocate General's participation, all the overrulings delivered thus far by the Court of Justice have been issued from

the Grand Chamber or an equivalent formation prior to the introduction of the Grand Chamber. This practice should continue and at no point should the Court be tempted to overrule a three-judge chamber judgment in a chamber of five-judges, for the sake of ensuring the legitimacy and consistency in the case-law, as well as to restrict the practice of overrulings to the minimum.

VIII. CONCLUSION

Standard formulaic expressions provide consistency and legal certainty, particularly in a jurisdiction operating with twenty-four official languages. The use of such an approach to derogations of precedent will be an important asset, allowing the legal community to better discern the development of the case-law and the intentions of the Court. Half a decade later, legal scholars are still discussing whether the judgment in *M.A.S.* overruled the decision in *Taricco*. From the perspective of the requisite standards of consistency in any legal order, such outcome is not optimal and it should be avoided.[55]

[55] Transparency in the reasoning, consistency in the language used by the CJEU and legal certainly are also important for allowing the preliminary reference procedure to work efficiently and smoothly. This seems to be particularly important at a time in which one of the most important reforms of the preliminary reference procedure is under discussion. See the Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the TFEU, with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union. On this request, see Sara Iglesias Sánchez, 'Preliminary rulings before the General Court: Crossing the last frontier of the reform of the EU judicial system? (2022) EU Law Live, Weekend Edition No. 125, available online (15 June 2023); Antonio Tizzano, 'Il trasferimento di alcune questioni pregiudiziali al Tribunale UE' (2023) BlogDUE, available online (15 June 2023); Chiara Amalfitano, 'The future of the preliminary rulings in the EU Judicial System' (2023) EU Law Live, Weekend Edition No. 133, available onlin (15 June 2023).

In this contribution it has been argued that the *intention* and the *effects* of a judgment overruling previous precedent are useful variables to create a functional typology that describes the overruling technique of the Court of Justice. These variables can be employed to develop a typology of the *trends* in the case-law: *evolution*, *clarification* and *reconsideration*. The typology, together with the variables, provide a complete portrayal of the diverse configurations of the overruling technique in the Court of Justice. Precisely because the variety of configurations is broad, it is crucial that the Court introduces clarity in the way it proceeds when it decides to depart from precedent. The use of standard formulaic expressions is a modest but effective tool to ensure consistency, clarity and legal certainty at the solemn time of derogating a precedent, an event that should be reserved to very limited occasions.

This analysis should not be taken as a critique to the fact that the Court of Justice has made use of the overruling technique in the past. In fact, it has been argued that the derogation of precedent is a healthy and necessary feature of any legal system that all high courts must have at their disposal. It is the complex balance between consistency and change that must be kept with care, for which some tools are also available. This contribution intends to provide some of those tools, as a means of facilitating the task of making the case-law move forward, while simultaneously providing clarity, legal certainty and trust in the EU legal order.