

The ECJ as the EU Court of Appeal: some evidence from the appeal case-law on the non-contractual liability of the EU

Giulia Gentile*

Visiting Lecturer and PhD Candidate at the Dickson Poon School of Law, King's College London

Abstract

Legal scholarship has devoted limited attention to the appeal procedure before the Court of Justice of the European Union. However, appeal judgments have assumed renewed importance following the recent EU judicial reform in 2015. Firstly, the centralisation of the appeal procedure in the hands of the General Court (GC) and the Court of Justice (ECJ) has further strengthened the ECJ's role as a court of appeal of the EU legal order. Secondly, the number of appeal judgments delivered by the ECJ has drastically increased.

The scope of this article is twofold: it presents findings on how the ECJ exercises its role as court of appeal; it also seeks to initiate an academic debate on how the appeal procedure shapes the judicial dialogue between the GC and the ECJ in the interpretation of EU law. For this purpose, the article firstly investigates how the ECJ interprets the notion of 'pleas of law' and 'complex factual assessment'. Since appeals may cover only questions of law, these notions are pivotal in determining the limits of the ECJ jurisdiction when reviewing the decisions of the GC. Secondly, it analyses the interpretative methods used by the ECJ on appeal, and the divergent judicial interpretations of EU law followed by the GC at first instance. Thirdly, it analyses the balancing of individual rights and general interest in the context of this procedure, and the instances in which the ECJ has reviewed the balance struck by the GC. Far from being merely doctrinal research, this analysis offers evidence of how the ECJ interprets EU law on appeal, and provides guidance to practitioners and academics as to procedural and substantive aspects of this procedure. As a case study, the paper focuses on the EU case-law issued on appeals concerning the non-contractual liability of EU institutions.

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I. Introduction

In the 1970s,¹ the litigation before the European Court of Justice (ECJ) began to increase in its amount and complexity. Competition cases, for instance, often required assessment of complex facts, entailing delays in the delivery of final judgments.² Therefore, criticisms on the effectiveness of the ECJ's judicial activity started arising, and reforms seemed unavoidable. In 1989, the Court of First Instance (CFI) was established.³ This new first instance court was entrusted with the duty to decide on direct actions where the assessment of complex economic and legal circumstances was pivotal.⁴ By attributing this competence to the CFI, the ECJ was effectively discharged from the task of assessing the facts of the litigation, in order to focus on its activities as the constitutional court of the EEC system.⁵ In parallel with the transfer of litigation to the CFI, unsuccessful parties at first instance obtained the right to challenge⁶ the CFI's decisions before the ECJ through the appeal procedure.⁷ This course of action was subsequently extended to challenge decisions issued by the Civil Service Tribunal (CST) before the CFI.⁸ Since the establishment of the CFI, appeal decisions issued by the ECJ have significantly risen,⁹ reaching a peak of 245 appeals pending in 2015. Moreover, with the abolishment of the CST pursuant to Regulation No. 2015/2422,¹⁰ the appeal procedure was centralised in the hands of the GC and the ECJ. To avoid a potential litigation flood, in 2019 EU Regulation no. 2019/629 introduced an admissibility filter for appeals in selected areas of EU law, such as intellectual property.¹¹

¹ T Millet, *The Court of First Instance of the European Communities* (1990) (Millet).

² G de Búrca and JHH Weiler, *The European Court of Justice* (2001) (de Búrca and Weiler).

³ Millet (n 1).

⁴ *ibid*; de Búrca and Weiler (n 2).

⁵ Millet (n 1); J Dine and I Persaud, *Procedure and the European Court* (1991).

⁶ M Jaeger, 'Is it time for reform?' (*CURIA*, 25 September 2009) <<https://curia.europa.eu/jcms/jcms/P52392/>> accessed 4 November 2019.

⁷ It was first regulated by Article 49 and following of the ECJ's Statute. This procedure is currently regulated by Article 56 and following of the Statute of the Court of Justice, [2015] OJ L 265, 29.9.2012, 1 (ECJ Statute). Following the latest reform of the EU judicial system, this procedure will be applied only to challenge GC's decisions.

⁸ In 2009, the Lisbon Treaty renamed the CFI as General Court (GC) and expanded the competence of this court. It also renamed the ECJ as CJEU, which refers both to the GC as well as the ECJ. According to Article 256 TFEU, this court is currently competent for all direct actions at first instance and, potentially, for the preliminary ruling procedure.

⁹ Court of Justice of the European Union, 'Annual Report 2016. Judicial Activity' (*CURIA*, 1 January 2017) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/rajur2016enweb.pdf>> accessed 4 November 2019.

¹⁰ Regulation EU 2015/2422 amending Protocol No 3 on the Statute of the Court of Justice of the European Union [2015] OJ L341/14.

¹¹ Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union [2019] OJ L111/1.

Irrespective of its importance in the EU judicial system, the appeal procedure before the ECJ is underexplored. Nevertheless, appeal decisions have been becoming increasingly influent on the interpretation of EU law and thus in shaping the EU legal order. As argued by Shapiro, appeal procedures may be used to reach different objectives: protecting the loser against an arbitrary or mistaken decision by a trial judge; ensuring uniformity among subordinate courts; announcing or making law; strengthening the central power; distributing justice between the general interest and individuals; favouring political integration.¹² The study of the impact of the appeal procedure before the ECJ should, in particular, consider the dialogic nature of this action, whereby the ECJ may review the GC's challenged judgments and establish with it an indirect dialogue when interpreting EU law. Albeit only a limited number of GC judgments are re-examined,¹³ the appeal procedure offers the pivotal opportunity for the ECJ to correct errors committed by the GC in the application of EU law, and thus to state 'what [EU] law is'.¹⁴ Ultimately, the GC and the ECJ can influence their respective interpretation of EU law – the former court dealing with the majority of direct actions while allowing the latter court have the 'last word' on what EU law means. Interestingly, the status quo of the cooperation between the GC and the ECJ in identifying the correct interpretation of EU law has not been subject to any comprehensive studies,¹⁵ and remains unmapped to date.

In order to fill this gap in the literature, this paper has a twofold objective: it gathers findings on how the ECJ exercises its role of court of appeal of the EU; it also provides a preliminary assessment of how the appeal procedure

¹² M Shapiro, 'Appeal' (1979) 14 *Law & Society Review* 629.

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¹⁴ cf with the title of the article by K Lenaerts and J Gutiérrez-Fons 'To say what the law of the EU is: methods of interpretation and the European Court of Justice' (2013) 20 Columbia Journal of European Law 3 (Lenaerts and Gutiérrez-Fons).

15 Studies on appeals before the ECJ include PD Camesasca and others, 'Cartel Appeals to the Court of Justice: The Song of the Sirens?' (2013) 4 Journal of European Competition Law & Practice 215; T Tridimas and G Gari, 'Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)' (2010) 35 European Law Review 131 and J Boulois, 'Jurisprudence de la Cour de Justice et du Tribunal de première instance des Communautés européennes' (1994) 40 Annuaire français de droit international 484. In addition, Caroline Naômé has described the rules governing the appeal procedure: See C Naômé, *Le pourvoi devant la Cour de justice de l'Union européenne* (2016).

shapes the judicial dialogue between the GC and the ECJ in the interpretation of EU law. In so doing, it endeavours to situate the discussion on the EU appeal procedure within the broader discourse on the role of procedures in judicial systems. For these purposes, the paper firstly examines how the ECJ interprets the limits of its jurisdiction vis-à-vis the GC under the concept of ‘plea of law’ and ‘complex factual assessment’. Since appeals may cover only questions of law,¹⁶ these notions become pivotal in determining the limits of the ECJ jurisdiction when reviewing the decisions of the GC. Furthermore, these concepts play a fundamental role in the submissions presented by aspiring appellants to successfully lodge their claims. Secondly, the paper analyses the interpretative methods used by the ECJ in appeal and how these differ from those employed by the GC at first instance. This analysis highlights what normative objective, if any, the ECJ pursues through appeal judgments. Thirdly, a discussion of the balancing of the EU action with the protection of individual rights on appeal is provided. Far from being merely doctrinal research, this study offers evidence of how the ECJ interprets EU law on appeal, and provides guidance to practitioners and academics as to the procedural and substantive aspects of this procedure.

As a case study, the paper focuses on the appeal case-law concerning the non-contractual liability of the EU institutions.¹⁷ This jurisprudence, which has been extensively studied by scholars for its complexity,¹⁸ offers a prime example of judicial dialogue between the GC and the ECJ. Set out in Article 340 of the Treaty on the Functioning of the European Union (TFEU), this cause of action is mainly regulated by principles developed by the EU judicature: as a consequence, the GC and the ECJ share the interpretative monopoly of this action. Appeal judgments in this field, therefore, provide a useful illustration of the interaction between the two EU courts in the interpretation of EU law.

The paper is structured as follows. First, it provides an overview of the rules governing the appeal procedure. Second, it describes the framework governing

¹⁶ *ibid.*

¹⁷ The case-law considered for the purpose of this study includes all appeals lodged in the context of actions for the non-contractual liability of the EU, for a total of 62 appeals. It considers the judgments retrieved through the Curia database: See the ‘Search Results’ at <http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrc=fr&jge=&td=%3BALL&jur=C&page=1&dates=&pcs=OandB-19.05%2BB-19.10&lgr=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&langage=fr&avg=&cid=3211331> accessed 28 January 2020.

¹⁸ K Gutman, ‘The evolution of the action for damages against the European Union and its place in the system of judicial protection’ (2011) 48(3) *Common Market Law Review* 695 (Gutman); A Biondi and M Farley, *The right to damages in European law* (2009); T Tridimas, ‘Liability for Breach of Community Law: Growing Up and Mellowing Down?’ (2001) 38(2) *Common Market Law Review* 301; M Wathélet and J Wildemeersch, ‘La Responsabilité Extracontractuelle De L’union Européenne’ in David Renders (ed), *La responsabilité des pouvoirs publics* (2016).

the actions for damages against the EU. Third, it discusses the appeal case-law issued in the field of non-contractual liability claims against the EU. Notably, it focuses on the notions of 'pleas of law' and 'complex factual assessment', the interpretative methods used by the ECJ in appeal proceedings and the GC at first instance, and the balancing of individual rights against the EU general interest on appeal. Finally, it provides concluding remarks on the ECJ's activity as a court of appeal of the EU and how the appeal procedure contributes to the judicial dialogue between EU courts.

2. An Overview of the Rules governing the Appeal procedure

As established by Article 256(2) TFEU, '[d]ecisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute'. An appeal may seek to set aside a final decision¹⁹ in whole or in part, and grants the same relief as that sought at first instance before the GC. According to Article 58 of the Statute of the Court of Justice (ECJ Statute), an appeal can lie on the grounds of (i) lack of GC's competence,²⁰ (ii) a breach of procedure before it which adversely affects the interests of the appellants, or (iii) a Union law infringement by the GC.²¹ The subject-matter of the proceedings may not change on appeal, and the appellants²² must clearly indicate the challenged points of law of the first instance judgment.²³ A plea will be manifestly unfounded where it is inconsistent with previous ECJ case-law or is based on an erroneous or selective reading of the judgment of the first

¹⁹ 'Final decision' indicates a decision which put an end to a case before the GC or the CST, concerning both procedural and substantial matters.

²⁰ Following the expansion of the GC's competences with the Lisbon Treaty, the ground of appeal alleging a breach of GC's competence is rarely used successfully by appellants before the ECJ. Consequently, in the considered period the ECJ has reversed GC judgments on the basis of such a ground only in very few instances. Out of 542 appeals judgments delivered by the ECJ in the considered period, grounds on competence have been upheld only in 2 cases.

²¹ K Lenaerts and others, *EU Procedural Law* (2014) (Lenaerts and others).

²² Consolidated version of the Rules of Procedure of the Court of Justice [2012] OJ L265/1 (ECJ Rules of Procedure), art 170.

²³ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/49 (TFEU), art 256; Consolidated version of the Treaty on the Functioning of the European Union PROTOCOL (No 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION [2016] OJ C202/210 [ECJ Statute], art 58 and ECJ Rules of Procedure, art 112(1)(c). See, inter alia, C-352/98 P *Bergaderm and Goupil v Commission* [2000] EU:C:2000:361, para 34; C-41/00 P *Interporc v Commission* [2003] EU:C:2003:125 (*Interporc v Commission*), para 15; C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] EU:C:2006:541 (*Reynolds Tobacco and Others v Commission*), para 49.

instance.²⁴ Where an appeal merely repeats or reproduces verbatim the pleas in law previously submitted to the GC, it fails to satisfy the requirements to state reasons.²⁵ Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the GC, which the ECJ does not have jurisdiction to undertake.

Having competence only to assess points of law, the ECJ has no jurisdiction to consider the submitted evidence and to identify the factual circumstances and inferences deriving from them.²⁶ The ECJ has indeed interpreted²⁷ Article 256(1) TFEU and the first paragraph of Article 58 of the ECJ Statute as providing exclusive jurisdiction to the GC, firstly to find the facts – except where the substantive inaccuracy of its findings is apparent from the documents submitted to it – and, secondly, to assess those facts.²⁸ The ECJ is entitled to raise some pleas on its own motion, such as pleas based on admissibility or compliance with the time-limit to appeal.²⁹ The appeal procedure shall not have any suspensory effects,³⁰ but the parties can apply for suspension of the first instance judgment in the course of the appeal procedure.

If an appeal is well-founded, the ECJ quashes the decision of the GC. However, not every defect in a decision of the GC entails annulment. The ECJ has held that if the grounds of the GC's judgment disclose a breach of EU law but the operative part appears well-founded for other reasons of law, the appeal must be dismissed.³¹ The ECJ may decide to provide its judgment or to refer the case back to the GC³² when an assessment of the facts is necessary to resolve the case – an activity for which the GC is solely competent. The judgments delivered on appeal cannot be reviewed and bind the GC in its final decision.³³

In light of the overview provided, and despite its name, the rules governing the appeal procedure before the ECJ resemble a cassation, rather than an appellate, procedure. The origins of the cassation procedure may be traced back to the aftermath of the *Ancien Régime*, when the *Cour de Cassation* was established with a 'cathartic' role. The creation of this court, aimed at ensuring the uniformity of the law, was a reaction to the judicially active *parlements*, the French

²⁴ P Lasok and T Millet, *Judicial Control in the EU* (2004).

²⁵ See, inter alia, *Interporc v Commission* (n 23) para 16. See also *Reynolds Tobacco and Others v Commission* (n 23) para 50.

²⁶ See, for instance, C-442/99 *Cordis Obst* [2001] EU:C:2001:493, para 17.

²⁷ C-346/17 P *Klein v Commission* [2018] EU:C:2018:679 (*Klein v Commission*).

²⁸ C-551/03 *General Motors v Commission* [2006] EU:C:2006:229, para 51 and C-431/14 *Greece v Commission* [2016] EU:C:2016:145 (*Greece v Commission*), para 30.

²⁹ See *Lenaerts and others* (n 21).

³⁰ ECJ Statute (n 7) art 60.

³¹ *Lenaerts and others* (n 21).

³² ECJ Statute (n 7) art 61.

³³ However, see ECJ Statute (n 7) art 62, which provides a review procedure for ECJ judgements.

appellate courts during the *Ancien Regime*.³⁴ One of the main features of cassation procedures is that the court hearing the case is not entitled to consider *ex novo* the case, but it may hear points of law.³⁵ Points of law mixed with facts are considered as new pleas based on the interpretation of previous instances judgments, and are thus inadmissible before the court of cassation.³⁶

As in the cassation procedure, the ECJ is competent to review first instance judgments only on points of law based on specific grounds, while the assessment of facts and evidence is excluded from its competence. The ECJ can of its own volition raise some procedural pleas; it can also confirm or quash the GC's decision and, if further assessment of the facts is required, send the case back to the GC. Moreover, ECJ judgments delivered on appeal cannot be reviewed and have the effect of influencing the case-law of the GC, thus exercising a *nomophylactic* role (i.e. aimed at ensuring the correct and uniform application of the law). The *nomophylactic* function of cassation-like courts is one of the forms in which their judicial decision-making powers find expression. By enouncing what the law is, they may in fact shape the interpretation of the law, taking into account also societal changes and evolutive approaches to legislation.³⁷ The division of judicial competences between the GC and the ECJ conclusively reflects the syllogistic structure of the application of the law to the facts. The assessment of the facts, which constitutes the minor premise in legal syllogisms, is left exclusively in the hands of a first instance court, the GC. The major premise and the conclusion of the syllogism, relating instead to the interpretation of the law and its application, pertain to the ECJ – a higher court that may oversee mistakes committed by GC.³⁸

³⁴ I Hualde Lopez, 'A Few Considerations regarding the French Court of Cassation and the Civil Appeal in Cassation' (2017) 9 Cuadernos Derecho Transnacional 161.

³⁵ *ibid*; M Ghyselen and B Peeters, 'The Court of Cassation as the Supreme Body of the Judiciary in Belgium' (2016) 70 Bulletin for International Taxation 12 and French Court of Cassation, 'The Role of The Court of Cassation' (*Cour de Cassation*) <www.courdecassation.fr/about-the-court9256.html> accessed 4 November 2019.

³⁶ See, for instance, Cass. soc., R., 17 avril 1986, *pourvoi c. Cons. prud'h. Orléans* 5 novembre 1984.

³⁷ See, for an overview of the role of the cassation procedure in France, A Bancaud, 'Considérations sur une "pieuse hypocrisie": la forme des arrêts de la Cour de cassation' (1987) 7 *Droit et société* 373.

³⁸ A similar approach is used under French law in relation to the Cassation Court: See French Court of Cassation, 'Le rôle normatif de la Cour de cassation' (*Cour de Cassation*, 2018) <www.courdecassation.fr/publications26/tudeannuelle8869/rnormatif9039/> accessed 20 January 2020.

3. The action for damages against the EU

The action for damages under EU law has been in place since the inception of the European Coal and Steel Community. Article 34 of the Treaty of Paris allowed undertakings to bring an action for damages, for direct and particular injury, in the event of the annulment of a Community act. The same Treaty also included a general clause of non-contractual liability under Article 40 thereof: individuals could bring claims for damages against the Community in cases where faults resulted from the execution of an act of the Community implementing the Treaty. Article 340 TFEU currently lays down the action for damages. In the case of non-contractual liability, Article 340 TFEU provides that 'the EU shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. The EU is thus liable for both wrongful acts attributable to its institutions and unlawful conduct on the part of its employees.³⁹ The EU courts have classified this action as the norm of 'closure' of the EU system of remedies. Whenever alternative remedies to sanction unlawful acts of EU institutions are unavailable, the action for damages is the last resort redress.⁴⁰ The non-contractual liability claim is thus an autonomous remedy, filling the 'loopholes' of the EU remedial system.⁴¹

Article 340 TFEU does not list the criteria to be employed to determine actual liability. This gap has been gradually filled by the case-law of CJEU, which has clarified that liability can only be ascertained if the following elements are present: a sufficiently serious breach of a rule of EU law granting rights to individuals (i.e. an unlawful act); the presence of actual damage; a causal link between the damage caused and the conduct of the institution.⁴² These criteria have been borrowed from the EU jurisprudence on the liability of the Member States under EU law established with the *Francovich*⁴³ case. The significant influence of EU case-law in the shaping of the action for damages is further strengthened by the explicit reference to 'general principles common to the laws of the Member States' under Article 340 TFEU. EU courts have thus been entrusted with shaping the procedural aspects of this cause of action under the aegis of the general principle of law.⁴⁴ However, in an attempt to create parallelism between the rules applicable to the Member States and those applicable

³⁹ A Biondi and M Farley, 'Damages in EU law' in R Schütze & T Tridimas (eds), *Oxford Principles of European Union Law. Volume 1* (2018) (Biondi and Farley) 1040-1063; Gutman (n 18).

⁴⁰ Gutman (n 18).

⁴¹ See, to that effect, C-234/02 P *Ombudsman v Lamberts* [2004] EU:C:2004:174 (*Lamberts*), para 59.

⁴² Biondi and Farley (n 39).

⁴³ C-6/90 *Francovich* [1991] ECLI:EU:C:1991:428.

⁴⁴ Gutman (n 18).

to the EU institutions, the EU judiciary has created a complex set of rules and high standards of proofs for individuals to determine the liability of the EU. The burden of proof to establish the unlawfulness of the EU institution action lies with the third parties bringing the claim. One significant difference from the action of damages against the EU institutions is that whether a Member State may be imposed the payment of damages following a breach of EU law is a matter for national courts to determine under the principle of procedural autonomy.⁴⁵

Overall, the key role of the EU judiciary concerning this action should not come as a surprise. Compensation for damages caused by EU institutions follows the assessment of the behaviour of EU institutions under the highest laws of the EU, for which only the EU courts are the competent judge.

In light of this account, the question arises as to how the ECJ exerts its oversight on appeal over the decisions of the GC in the context of actions for damages. Remarkably, actions for damages have a robust factual component. For the purposes of these claims, courts attribute legal qualifications to facts. The challenge under these appeals is for the ECJ to refrain from carrying a re-assessment of facts, for which the GC is exclusively competent, whilst ensuring that the correct interpretation of EU law is respected. In this regard, the notions of ‘points of law’ and of ‘complex factual assessment’ become crucial: they determine how the ECJ sets the jurisdictional boundaries with the GC and indicate how challenges to GC decisions should be framed in order to be admissible on appeal.

⁴⁵ See, for an overview on the principle of procedural autonomy, A Biondi and G Gentile, ‘National Procedural Autonomy’ (March 2019) *Max Planck Encyclopaedia of International Procedural Law* <<https://opil.ouplaw.com/view/10.1093/law-mpeipro/e1878.013.1878/law-mpeipro-e1878?rs-key=hJTm15&result=1&prd=MPIL>> accessed 7 February 2020; M Bobek, ‘Why There is no Principle of “Procedural Autonomy” of the Member States’ in B de Witte and HW Micklitz (eds), *The European Court of Justice and Autonomy Of The Member States* (2011) 305-322.

4. The Notions of Points of Law, Complex Factual Assessment and the Limits of the ECJ Jurisdiction on Appeal

The distinction between law and fact has ancient origins⁴⁶ and remains controversial in many legal orders.⁴⁷ Before EU courts, this classification impacts the role of the parties and the jurisdiction of the ECJ on appeal. First, parties can only plead points of law: were appellants to bring forward pleas of fact instead of law, their appeals might not be admissible. However, by allowing a too narrow notion of ‘point of law’, the ECJ might risk denying justice in situations where the GC has made an incorrect legal assessment of facts. Second, if the ECJ provided a too encompassing notion of ‘point of law’, it would alter the division of competences with the GC, which has exclusive jurisdiction to carry factual assessments. In this context, attention should also be paid to the notion of ‘complex factual assessment’. In case the ECJ quashes the decision of the GC, it might give its final ruling only were no complex factual assessment is required. Where complex factual analysis is involved, the ECJ should refer the case to the GC for further assessment. Distinguishing pleas of law from pleas of fact and simple from complex factual assessments thus bears procedural consequences for claimants, determines jurisdictional limitations on the ECJ, and affects the efficiency of the appeal mechanism.

As to the distinction between pleas of law and fact, the ECJ case-law does not provide clear guidance. An explicit difference between pleas of fact and law would offer the advantage of setting the boundaries between the jurisdiction of the ECJ and that of the GC. It would also provide guidance to aspiring appellants before the ECJ on admissibility questions. Nevertheless, a definite conceptual and analytical classification might not be achievable: an error in the interpretation of a norm (an error of law) may be directly linked to the assessment of the facts.

An example may be useful to illustrate these points. The conduct of the EU may be qualified as unlawful under a variety of judicial tests and EU law norms. The EU courts could classify it as a ‘serious breach of EU law’ under Article 340 TFEU, or as contrary to the principle of institutional balance, or as not proportionate. The latter two are instances of different legal qualifications under

⁴⁶ Aristotle used to discuss the difference between facts and norms: D Louis-Caporal, ‘La Distinction Du Fait Et Du Droit En Droit Judiciaire Privé’ (PhD thesis, Université de Montpellier 2014).

⁴⁷ cf with J Batrouney, ‘The Distinction Between Questions of Fact and Questions of Law in Section 44 Appeals to the Federal Court’ (Federal Court of Australia, 20 May 2014) <www.fedcourt.gov.au/digital-law-library/seminars/tax-bar-association/jennifer-batrouney> accessed 20 January 2020.

which a fact – such as the conduct of an EU institution – may be classified. Legal qualifications of factual evidence are especially relevant in appeals on damages claims,⁴⁸ whose cause of action requires proof of a cumulative⁴⁹ set of elements. Was the conduct of the EU institution a ‘sufficiently serious breach of a rule of law giving rights’? Did the action of the EU institution cause a damage to third parties? The answer to these questions depends on the interpretation of the facts. It is clear that an incorrect reading or gathering of the factual background by the GC might lead to a classification of the facts under the wrong legal qualifications, and consequently an error in the application of EU law.

The issue arises as to how these instances should be treated under the divide between ‘pleas of facts’ and ‘pleas of law’. They could qualify as (a) pleas of facts, thus excluded from the ECJ jurisdiction; (b) pleas mixed of law and facts, only partially falling within the ECJ’s competence; (c) pleas of law, subject to the full review of the ECJ on appeal. Still, the first two approaches may fail to maintaining the uniform and correct interpretation of EU law. By excluding, even partially, these pleas from scrutiny on appeal, the risk of consolidating an incorrect interpretation of EU law might arise. As a consequence, the appeal procedure would risk missing its objective, this being to ensure the correction by the ECJ of errors in the application and interpretation of EU law committed by the GC.

These are most probably the reasons behind the ECJ’s case law establishing that questions concerning incorrect legal qualifications of facts are matters of law. As such, they fall within the jurisdiction of the ECJ on appeal. Moreover, if the appellants demonstrate that the meaning of the evidence was distorted by the GC, the ECJ’s appeal jurisdiction may be triggered.⁵⁰ The ECJ embraces a conception of plea of law similar to that of the Courts of Appeal in Canada, where questions pertaining to legal qualifications of facts and the distortion of the evidence are treated as of law.

⁴⁸ This is confirmed by Gutman (n 18).

⁴⁹ First, an EU institution must have acted unlawfully by committing a sufficiently serious breach of a rule of law intended to confer rights on individuals. Second, the harm alleged must actually exist. Third, there must be a causal link between the EU’s conduct and the damage. This test requires EU courts to consider the evidence submitted by the parties, including the factual background of the case, to achieve their legal assessment.

⁵⁰ See C-397/03 *P Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2006] EU:C:2006:328, para 85 and *Greece v Commission* (n 28) para 31. It is worth pointing out that these pleas, although based on an indirect assessment of the evidence or the facts of the litigation, are considered by the ECJ as concerning ultimately a point of law, being related to the application of EU law by the GC. However, as specified by Koen Lenaerts, this distinction might seem artificial. See, for further discussion: Lenaerts and others (n 21); HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* (6th edn, 2001).

Notably, in relation to pleas alleging a distortion of the evidence by the GC, the appellant must indicate⁵¹ precisely the evidence alleged to have been distorted by the GC and show the errors of appraisal which led to such distortion. The ECJ has consistently held that that distortions must be evident from the documents in the Court's file,⁵² without there being any need to carry out a new assessment of the facts and the evidence.⁵³ Thus, the ECJ is somewhat deferential to the GC, as it applies a strict standard of review concerning the evidence: only the manifestly wrong assessments of the evidence or a grave violation of the rules used to gather evidence⁵⁴ may be revisited on appeal as pleas of law.⁵⁵ The encompassing notion of 'points of law' offers to individuals ample access to the appeal review of the ECJ. It also overcomes the hurdle of excluding as inadmissible pleas of law mixed with fact where an incorrect application of EU law may become precedent.

A manifest error of assessment of the evidence by the GC occurs whenever this court reaches a legal conclusion without conducting the factual verifications required by the established case-law. In *European Union Intellectual Property Office (EUIPO) v European Dynamics Luxembourg SA*⁵⁶, the ECJ corrected a manifest misapplication of the EU case-law. The manifest error arose since the GC had not verified, as requested by the settled case-law, whether the conditions for a contracting authority to lawfully determine weighting factors for sub-criteria (after the expiry of the time-limit for submitting tenders) were fulfilled.⁵⁷

⁵¹ See TFEU (n 23) art 256; ECJ Statute (n 7) art 58(1) and ECJ Rules of Procedure (n 23) art 168(1)(d).

⁵² See, for instance, C-104/00 *DKV Deutsche Krenkenversicherung AG v OHIM* [2002] EU:C:2002:506.

⁵³ C-413/08 *Lafarge v Commission* [2010] EU:C:2010:346, para 16 and *Greece v Commission* (n 28) para 32.

⁵⁴ C-7/95 P *John Deere Ltd v Commission of the European Communities* [1998] EU:C:1998:256, para 22.

⁵⁵ The same approach has been followed in Canada: See F Bachand, 'Le Traitement En Appel Des Questions de Fait, Questions de Droit et Questions Mixtes' (2007) 86(1) *The Canadian Bar Review* 97. However, the French Court of Cassation would consider mixed questions of law and fact as excluded from its scrutiny: See D Louis-Caporal, 'La Distinction Du Fait Et Du Droit En Droit Judiciaire Privé' (PhD thesis, Université de Montpellier 2014) 159ff and French Court of Cassation, 3e Chambre civile 28 juin 2018, pourvoi: 17-20409.

⁵⁶ T Millet, *The Court of First Instance of the European Communities* (1990) (Millet).

⁵⁷ According to the settled case-law, the GC should have verified that those weighting factors do not (i) alter the criteria for the award of the contract set out in the contract documents or contract notice (ii) contain elements which could have affected the preparation of the tenderers, and (iii) discriminate against one of the tenderers. The ECJ thus revised the reasoning of the GC in light of the applicable case-law.

However, if the appellant does not *clearly* identify the error of law committed by the GC, the argument is unfounded. In the same judgment, among the raised pleas on appeal, the EUIPO argued that the GC committed an error of law, in finding that it had breached the duty to state reasons by requesting too high a standard of compliance. The ECJ recalled that, according to the settled case-law, the statement of reasons required under Article 296(2) TFEU must be assessed in the light of the circumstances of each case, in particular the content of the measure in question and the nature of the reasons given.⁵⁸ It then observed that the EUIPO had not clearly identified how the GC had imposed a higher standard of compliance with the statement of reasons, and thus no error of law could be identified. Consequently, the ECJ rejected EUIPO's plea.⁵⁹

An instance in which the ECJ excludes its review as appeal court is when the submitted pleas request a factual assessment, which lays exclusively within the competence of the GC. In *Agroconsulting*⁶⁰, the appellant claimed damages following alleged irregularities committed by the Commission in the award of a public services contract. Among the pleas raised, it was argued that the GC erred in law by concluding that the unlawful acts alleged concerning award criteria could not give rise to compensation. According to the appellant, the GC restricted the action for damages solely to unlawful acts which had a certain influence over the award of the contract, whereas in accordance with the GC's case-law, any unlawful act in the tender procedure capable of affecting the chances of a tenderer being awarded the contract in question gives rise to an entitlement to compensation. In its final judgment, the ECJ did not assess this plea as it was requesting the Court to review the factual assessment of the award criteria. The ECJ would have intruded the GC's competence in carrying this assessment. Had the appellant demonstrated that the evidence was distorted by the GC, the ECJ would have assessed that argument.

What happens, however, when the correction of distorted evidence or a wrong legal qualification of facts requires a 'complex factual assessment'?⁶¹

⁵⁸ C-629/11 P *Evropaïki Dynamiki v Commission* [2012] EU:C:2012:617, para 23 and the case-law cited.

⁵⁹ However, in relation to the substantive claim for damages, the ECJ overruled the decision of the first instance, by holding that the GC committed an error of law as it had not established that the appellant would have been awarded the tender. The ECJ found that the appellant had failed to produce evidence on the suffered damage, and thus could not be awarded damages as envisaged by the GC.

⁶⁰ C-198/16 P *Agriconsulting Europe v Commission* [2017] EU:C:2017:784.

⁶¹ The notion of complex economic assessment has been extensively discussed in the literature. See, for instance, A Kalintiri, 'What's in a name? The marginal standard of review of "complex economic evaluations" in EU competition enforcement' (2016) 53(5) *Common Market Law Review* 1283.

This notion serves to delimit the instances in which the ECJ may provide its judgment without referring the case to the GC for further assessment. In the context of appeals concerning the EU non-contractual liability, central legal qualifications of facts are whether the conduct of the EU institution concerned constitutes a sufficiently serious breach of EU law,⁶² a causal link exists between the damage suffered by the claimant and the EU institution's conduct. Due to the complexity of the litigation, the ECJ might need to conduct an in-depth factual assessment. What can be reviewed and decided on appeal and what instead remains outside the jurisdiction of the ECJ as 'complex assessment of facts' is a matter of judicial interpretation. *Agraz*, *Klein* and *Staelen* illustrate the approach of the ECJ to this matter. The first case shows what a complex factual assessment *is*, while the latter two illustrate what a complex factual assessment *is not*.

The case *Agraz and Others v Commission*⁶³ concerned a group of companies that made a claim for damages allegedly suffered following the imposition by the Commission of thresholds for anti-dumping aid without taking into account Chinese prices. Although the GC found that the Commission erred in not taking into account the Chinese prices, it dismissed the compensation claim due to the uncertainty of the amount of the loss suffered by the appellants. On appeal, the ECJ held that the GC made an error in law in excluding the liability of the Commission. As a general principle of EU law, the fact that EU institutions might have discretion in a certain regulatory field does not eliminate the possibility to cause damages to third parties. The ECJ recalled the principle established in *Dorsch Consult*:⁶⁴ 'the existence of actual and certain damage cannot be considered in the abstract by the Community judicature but must be assessed in relation to the specific facts characterising each particular case in point.'⁶⁵ Therefore, by not considering the Chinese prices when setting the level of anti-dumping aid, the Commission estimated tomato price for the main producing and exporting third countries at a level appreciably higher than it would have been had those prices been taken into account.⁶⁶ The ECJ also assessed other factual elements, such as the availability of Community production through the planned management during the marketing year of reference. According to the ECJ, all these elements could not exclude the existence of a damage caused by the Commission to the appellants, who had received too little anti-dumping

⁶² C-337/15 P *European Ombudsman v Claire Staelen* [2017] EU:C:2017:256 (*Staelen*).

⁶³ C-243/05 P *Agraz and Others v Commission* [2006] EU:C:2006:708 (*Agraz and Others v Commission*).

⁶⁴ C-237/98 P *Dorsch Consult Ingenieurgesellschaft mbH v Council of the European Union* [2000] EU:C:2000:321.

⁶⁵ *ibid* para 25.

⁶⁶ *ibid* para 38.

aid. The amount of the loss suffered required, nevertheless, a complex assessment of the facts, to be carried by the GC following referral of the case.

The ECJ, in *Agraz and Others*, dealt with a legal requalification of facts, notably the existence of an actual damage. In this respect, the ECJ did not provide any specific guidance as to whether such requalification required a complex or a simple assessment of the facts. What is evident, however, is that under pleas concerning errors of legal qualifications of facts, the law and the facts are intertwined and cannot be separated: the re-assessment of the facts is an unavoidable step to correct an erroneous legal qualification by the GC. *Agraz* thus suggests that the correction of the legal qualification of facts is not a ‘complex factual assessment’, since the ECJ considered such point as falling within its appellate jurisdiction. On the contrary, the ECJ considered as a complex factual assessment the calculation of the amount of damages to be awarded to the appellants.⁶⁷ One might infer that the ECJ classifies as ‘complex factual assessments’ extra-legal evaluations, such as the calculation of the amount of suffered damage. *Klein* and *Staelen* provide further evidence on this concept.

The *Klein*⁶⁸ appeal sheds further light on the notion of ‘plea of law’ admissible on appeal, and *what is not* a complex assessment of the facts. The case concerned a longstanding litigation related to the marketing of medical devices, which were prohibited by German authorities. The justification for the ban was that the safety of these tools had not been established in a scientific manner in light of the information supplied by the manufacturer. German authorities thus requested the Commission to initiate safeguard procedures under Directive 93/42 to limit the diffusion of such medical devices in the EU market; in spite of this, such procedure was never opened. Having lodged an action for damages against the EU before the GC, the appellants claimed compensation for the loss incurred due to the failure of the Commission to open the safeguard procedure, and the costs that arose from it. In its judgment, the GC reasoned that the cessation of the distribution of the medical devices was voluntary and could not be attributed to the failure of the Commission to initiate the safeguard procedure. The GC relied upon statements that formed part of a correspondence between the Commission and atmed – a company created by the appellant after the medical devices were removed from the market. In the correspondence, sent many years after the removal from the market of the medical devices in questions, atmed explained that the cessation of the distribution of the devices was voluntary. As a result, no causal link between the conduct of the Commission

⁶⁷ *Agraz and Others v Commission* (n 63) para 50.

⁶⁸ *Klein v Commission* (n 27).

and the loss suffered by the appellants could be established, and the GC dismissed the action for damages.

In the latest appeal of the *Klein* saga, the appellant submitted that the GC had distorted the meaning of the evidence by holding that the prohibition of the marketing of the medical devices at stake could not be attributed to the Commission. The ECJ upheld this argument. It found that the cessation of the distribution of the medical device and the financial consequences stemming from it were, in fact, to be ultimately attributable to the Commission's non-adoption of a decision on that matter.⁶⁹ First, the ECJ observed that the removal of the medical devices from the market followed the decisions of the German authorities. Second, it also held that a statement issued by a company different from the appellant, many years after the cessation of the marketing of the medical device, could not be considered as binding upon the appellant. Ultimately, had the Commission adopted the decision on the marketing of the medical device, the appellants would not have suffered such significant losses.⁷⁰

Having established the unlawfulness of the Commission's conduct and the causal link with the damage suffered, the ECJ gave the final judgment without referring the matter to the GC. It ultimately excluded the liability of the EU, the appellant having failed to adduce sufficient evidence. Also in *Klein*, the Court carried out a re-assessment of facts whose interpretation had led to an incorrect legal qualification by the GC: this judgment strengthens the point that the legal re-qualifications of facts fall within the remit of the appellate jurisdiction, regardless of its content. However, in contrast with *Agraz*, in *Klein* the ECJ excluded the existence of a complex factual assessment in its final judgment concerning the determination of the EU's liability. The ECJ's final ruling merely relied on the facts of the case and the applicable case-law. Therefore, this scenario differs from *Agraz* in so far as the final judgment did not involve extra-legal evaluations, nor did it require additional evidence.

The *Staelen*⁷¹ appeal is another instance in which the ECJ provided its final judgment, excluding the presence of a complex factual assessment. This case also provides insights as to how the ECJ handles complaints concerning the exercise of discretion by the European Ombudsman under Article 340 TFEU and what constitutes a serious breach of EU law by this institution.⁷² Respect of the limits of the discretion granted to an EU institution is another a plea involving the analysis of the facts under the legal qualification of 'serious breach

⁶⁹ *ibid* para 127ff.

⁷⁰ *ibid*.

⁷¹ *Staelen* (n 62).

⁷² The ECJ has noted that the decisive test for finding a serious breach of EU law is whether the EU institution or body concerned manifestly and gravely disregarded the limits of its discretion: See *Lamberts* (n 41) para 49 and C-535/06 *Moser Baer India v Council* [2009] EU:C:2009:498, para 34 and the case-law cited.

of EU law'. *Staelen* confirms that such question falls into the jurisdiction of the ECJ on appeal.

The facts of the case are as follows. Ms Staelen had participated in a selection procedure for a position at the EU institutions; subsequently, she had raised a complaint to the European Ombudsman suspecting direct discrimination against her during the selection procedure. Having initiated damages proceedings against the EU, Ms Staelen complained that the Ombudsman had not dealt with the documents of her complaint in accordance with applicable due diligence duties. At first instance, the GC upheld the claim of Ms Staelen, having found that – in the handling of the documents of complaints – the Ombudsman had committed a series of *mere breaches* of due diligence duties. In particular, the Ombudsman had negligently relied on the assurance, given by the Parliament, that a list of candidates was circulated to other institutions, although that was not the case; furthermore, it had distorted the meaning of an opinion of the European Parliament. Considering that the Ombudsman does not enjoy discretion about the handling of complaints, the GC found that institution guilty of a serious breach of EU law under Article 340 TFEU. According to the GC, mere breaches of diligence duties triggered the liability of the Ombudsman and thus awarded compensation to Ms Staelen for loss of confidence in the EU institutions.

Having appealed the GC's decision, the Ombudsman submitted that the GC had committed an error in establishing that a mere breach of diligence duties can constitute a 'serious breach of EU law' for the purposes of Article 340 TFEU. The ECJ recalled the relevant case-law on the liability of the Ombudsman, who is merely under an obligation to use her best endeavours, and enjoys broad discretion.⁷³ Then, the ECJ moved on to recall that only in exceptional circumstances may an individual prove that the Ombudsman has committed a serious breach of EU law. According to the established case-law, the EU judiciary may only exert limited scrutiny over the activities of the Ombudsman. In light of the above, the ECJ reversed the GC's findings and established that a mere breach of diligence duties *could not* establish a serious breach of EU law by the Ombudsman. Subsequently, the ECJ assessed whether the conduct of the Ombudsman could qualify as a serious breach of EU law under Article 340 TFEU. In relation to the alleged distortion of the opinion of the European Parliament, the ECJ did not consider whether the document's content was actually misinterpreted. In this respect, it relied on the findings of the GC and stated, in paragraph 57:

[T]he fact remains that, in describing the content of a document sent to the Ombudsman, in order, as in this case, to support the conclusions reached in a decision closing an inquiry, the Ombudsman has only a reduced, or even no,

⁷³ Case T-217/11 *Staelen v European Ombudsman* [2015] EU:T:2015:238.

discretion. Consequently, the [GC] was entitled (...) to rule (...) that the Ombudsman's distortion of the content of the Parliament's opinion of 20 March 2007 constituted a sufficiently serious breach capable of rendering the European Union liable.

The ECJ identified further serious breaches of EU law, stemming from inexcusable errors made by the Ombudsman concerning the complaint of Ms Staelen, including failure to conclude the file in a reasonable time, and failure to use investigative powers to verify the information received by the Parliament.⁷⁴ On these grounds, the ECJ gave its final judgment and awarded non-material damages amounting to 7000 euros to Ms Staelen.

The *Staelen* case offers insights on the institutional balance between the duties of the Ombudsman and the rights of individuals vis-à-vis the EU administration. The ECJ has established therein a series of principles concerning the standards of conduct applied by the Ombudsman as well as the scope of the review by EU courts: first, diligence duties do not correspond to a more limited discretion of the Ombudsman. Second, the scrutiny of the EU courts over the activities of the Ombudsman is, regardless of the nature of the allegation, limited. In order to determine whether a breach of a rule of EU law by the Ombudsman is sufficiently serious, the EU judiciary must take into account *inter alia* the complexity of the situations to be regulated, the difficulties in applying or interpreting the legislation and, more particularly, the margin of discretion available to the author of the act in question.⁷⁵ Thus, the non-contractual liability of the EU can only arise in the presence of an irregularity that would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence.

From the perspective of the distinction between 'simple' and 'complex' assessment of facts, in this case the Court pronounced its final judgment following the reassessment of the facts as stated in the file of the litigation. Interestingly, the ECJ carried out a detailed re-assessment of the facts of the case. In light of this re-evaluation, the Court modified the reasoning of the GC without changing its findings as to the unlawful nature of the Ombudsman's conduct. The judgment seems to indicate that the threshold between correction of legal qualifications of facts and complex factual assessment does not lie in the 'complexity' of the factual assessment to be carried, but in the nature of the review activity requested by the ECJ. Where no new evidence is necessary and extra-legal evaluations are not requested, the threshold of complex factual assessment is not met. Consequently, in such instances the ECJ considers the matter and pronounces its final judgment on appeal. This is also confirmed in judgments

⁷⁴ *ibid* para 126.

⁷⁵ *ibid* para 33.

such as *Giordano*,⁷⁶ *Systran*,⁷⁷ *Alessandrini Srl et al v Commission*,⁷⁸ *CEVA Santé Animale S⁷⁹* and *Commission v Cantina sociale di Dolianova and Others*,⁸⁰ in which the ECJ delivered the final judgment on the requalification of facts as they were evident from the file and did not require extra-legal assessments.

Overall, the considered case-law highlights the challenge for the ECJ in balancing the limits of its own jurisdiction, covering only points of law on appeal, with the duty to provide the correct interpretation of EU law when the GC carried a wrongful assessment of the facts. Through an encompassing interpretation of the 'points of law' concept, including distortion of the evidence and incorrect legal qualifications of facts, the ECJ was able to extend the scope of its judicial review and comply with its task of declaring what EU law is. The Court has shied away from complex factual assessment, which remains within the remit of the GC. The threshold for identifying the complexity of a factual assessment depends on a series of elements, such as: whether new evidence is required; the nature of the assessment to be conducted on appeal (i.e. whether it includes non-legal considerations); the material available to the Court through the file.

Ultimately, pleas of law admissible on appeal include heterogenic elements, such as incorrect interpretations of EU law and case-law, errors in the assessment of the margin of discretion given to other EU institutions, and wrong legal qualifications of facts relevant for judicial tests. This latter category of error of law leaves a significant margin for private parties to bring appeals before the ECJ. Parties can demonstrate an error in the GC's decision by highlighting an incorrect reading or application of the ECJ precedents. In this context, the GC's interpretation of EU law passes under the ECJ's scrutiny, and the two courts thus shape the requirements needed to give rise to a cause of action. This becomes particularly evident in the case-law on actions for damages, due to the presence of intricate judicial tests to be applied by the EU courts.⁸¹ What remains so far unexplored is *how* the ECJ interprets EU law on appeal or, to put it differently, what interpretative methods are used by this court in the context of this procedure.

⁷⁶ C-611/12 P *Giordano v Commission* [2014] EU:C:2014:2282 (*Giordano*).

⁷⁷ C-103/11 *Commission v Systran and Systran Lux* [2013] EU:C:2013:245 (*Commission v Systran*).

⁷⁸ C-295/03 P *Alessandrini and Others v Commission* [2005] EU:C:2005:413 (*Alessandrini*).

⁷⁹ C-198/03 P *Commission v CEVA and Pfizer* [2005] EU:C:2005:445.

⁸⁰ C-51/05 P *Commission v Cantina sociale di Dolianova and Others* [2008] EU:C:2008:409 (*Commission v Cantina sociale*).

⁸¹ This topic was also discussed among US scholars: See, for instance, GC Christie, 'Judicial Review of Findings of Facts' (1992) 87 *Northwestern University Law Review* 14.

5. The GC's and the ECJ's Divergent Methods of Interpretation of EU Law: in search of the normative objectives of the appeal procedure

Lenaerts and Gutiérrez-Fons⁸² have acknowledged that the CJEU uses different interpretative methods according to the normative objective to be reached through a decision. The authors identify three main types of interpretative methods in the EU case-law: textual, contextual, and teleological. They argue that through the textual interpretation, the ECJ aims at ensuring legal certainty as well as predictability of its decisions. When following a contextual interpretation, this court enhances, as a rational actor, coherence of the whole EU legal system by reducing conflicts between laws. The teleological interpretation recognises, instead, the existence of constitutional objectives of paramount importance that the EU must obtain. By assessing the interpretative methods applied by the ECJ on appeal it is possible to identify the normative objective(s) pursued by the ECJ through appeal decisions.

A first example of divergent methods of interpretation of EU law by the GC and the ECJ may be found in *Giordano*.⁸³ In this case, the ECJ overruled a GC decision which had not faithfully applied the ECJ case-law on the conditions for bringing an action for non-contractual liability against the EU. The case came about after the introduction of Regulation No. 530/2008, which brought an end to the special fishing license in favour of Mr Giordano issued by the French Republic according to former EU and national legislation. The previous ECJ judgment *AJD Tuna*⁸⁴ had annulled the Regulation on the ground that it breached the principle of non-discrimination by imposing different treatments to operators from the other Member States. Subsequently, Mr Giordano brought an action before the GC seeking compensation for the harm suffered, consisting of the unfished and unsold part of his quota due to the entry into force of the annulled Regulation.

During the first instance proceedings, the GC held that the damage alleged by the appellant reflected only a hypothetical situation and could not be regarded as actual and certain. Indeed, Mr Giordano's right to fish within the limits of his quota did not require him to fish the entire quota allocated to him. Consequently, the EU could not be considered as having caused damage, as his fishing rights did not have to be exercised to their full extent. The GC had thus linked the assessment of the existence of damage with the scope of the rights of Mr Giordano, introducing a proportionality assessment to identify whether the damage suffered was worthy of protection.

⁸² Lenaerts and Gutiérrez-Fons (n 14).

⁸³ *Giordano* (n 76).

⁸⁴ C-221/09 *AJD Tuna* [2011] EU:C:2011:153.

On appeal, the ECJ overruled the GC decision. The ECJ held that, according to established jurisprudence, the existence of rights deriving from EU law is a condition to evaluate the seriousness of the breach of EU law committed by EU institutions and not the presence of a damage. It followed that the GC had misapplied ECJ precedents on the conditions for an action for damages. The ECJ also reassessed the legal implications stemming from Regulation No. 530/2008 and excluded the existence of the right for Mr Giordano to exhaust his fishing quota. In any event, his freedom to pursue a profession, protected under the Charter, had to be balanced against the objectives of general interest pursued by the Regulation. Since the ECJ found the Regulation proportionate and necessary to attain the objective of avoiding a serious threat to the conservation and recovery of bluefin tuna stock in the Eastern Atlantic and the Mediterranean Sea, it also excluded the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. Although the appeal decision did not change the outcome of the GC's decision, the ECJ applied a literal interpretation of its own case-law to ensure that all the elements of the action for damages remained separate and distinct. By doing so, the ECJ reinforced its precedents on the conditions to obtain compensation for the non-contractual liability of EU institutions, without risking an overruling by the GC.

In *Systran*,⁸⁵ the ECJ diverged from the GC's interpretation of the competence of the EU courts. This case concerned an action for non-contractual liability against the Commission arising from its alleged unfair behaviour in the context of a contractual relationship. The two courts diverged as to the limits of the EU judicature in contractual matters and displayed fairly distant approaches to the question. During the first instance proceedings, the GC stated that, contrary to the requirements of actions for the EU institutions' *contractual* liability, the CJEU's competence for claims concerning the *non-contractual* liability of EU institutions did not depend on the existence of an arbitration clause agreed upon by the parties.⁸⁶ The applicant alleged the violation of general provisions of international and EU law by the Commission during the performance of contractual obligations, and the GC held that the nature of the liability in question was non-contractual. For this reason, it affirmed its competence to adjudicate on the matter under Article 340 TFEU. The GC did not take into account the existence of a contract, but focused on the Commission's behaviour, which it qualified as violating a number of copyright principles not included in the contract.

The Commission appealed the first instance judgment on the ground that ECJ settled case-law does not allow to change the nature of a contractual rela-

⁸⁵ *Commission v Systran* (n 77).

⁸⁶ Art 272 TFEU provides that: 'The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law'.

tionship according to the law invoked by the parties.⁸⁷ The ECJ upheld this argument. Using a literal interpretation of the precedent invoked by the Commission, it held that, whenever the EU judiciary has to assess the content of contracts in order to establish a claim, that would be sufficient to classify the matter as based on the contractual liability of the EU. Consequently, it found that the GC had breached the rules on its competence.⁸⁸ The effect of the appeal in *Systtran* was judicial restraint for the EU judiciary whenever a contract is signed by an EU institution without an arbitration clause in favour of the EU courts. This is a direct consequence of Article 272 TFEU.⁸⁹

In this case, the interpretative methods of the GC and the ECJ are at variance in so far as the GC relied on general principles of law to determine the nature of the claim using a contextual method, while the analysis of the ECJ focused on the existence of a contractual relationship between the Commission and the applicant. The proved violations of international and EU general law could trigger, according to the GC, the competence of the EU courts. The GC further observed that the contract at stake did not regulate matters related to the general laws violated by the Commission. In doing so, the court took on its shoulders the task of protecting individual rights and ensuring compliance with general norms of law, instead of interpreting the intention of the parties enshrined in the contract. Such an approach was not shared by the ECJ, as it would have entailed a potential expansion of the jurisdiction of the EU in breach of the rules included in the Treaties. The judgment shows that the influence of the GC over the ECJ in changing ECJ precedents may be reduced, and that the ECJ exerts a literal interpretation in the determination of the jurisdiction of the EU courts. Judicial restraints form part of the recent trends in ECJ case-law, which endorse deference towards the choices of the legislator or those of the Member States where needed.⁹⁰

A similar situation occurred in *Staelen*,⁹¹ where the GC had offered a contextual and innovative interpretation of the notion of ‘serious breach of EU law’ under Article 340 TFEU. As discussed above, the ECJ applied a literal interpretation of its case-law and affirmed that a ‘mere’ breach of a diligence duty could not be considered, contrarily to what the GC argued, as a serious breach of a rule of law granting rights under Article 340 TFEU. The reasoning of the GC was based on the consideration that, in the case at hand, the European Ombuds-

⁸⁷ C-214/08 *Guigard v Commission* [2009] EU:C:2009:330.

⁸⁸ *ibid* para 80.

⁸⁹ This was confirmed in the subsequent case concerning whether a claim between the Commission and third parties was contractual or tortious: See Case C-19/18 P *VG v Commission* [2019] EU:C:2019:578.

⁹⁰ K Lenaerts, ‘How the ECJ thinks: A Study on Judicial Legitimacy’ (2013) 36(5) *Fordham International Law Journal* 1309.

⁹¹ *Staelen* (n 62).

man was provided with limited discretion and, consequently, any breach of her duties could be configured as ‘sufficiently serious’. The interpretation of the GC was contextual, mainly guided by the Charter of Fundamental Rights.⁹² However, the ECJ did not follow this interpretation – which could have led to a *revirement* of its settled jurisprudence. It is established case law that only serious breaches of EU law can entail the non-contractual liability of the EU. Once again, the ECJ applied a literal interpretation of its own case-law and the conditions stemming from it, while the GC followed a teleological-contextual interpretation of the requirements for the liability of the EU under Article 340 TFEU. Moreover, the considered case-law highlights the willingness of the ECJ to ensure legal certainty without further fragmenting the framework of the action for damages under Article 340 TFEU.

The interpretation of EU law by the GC may in fact be rejected on appeal when it affects legal certainty. In *Commission v Cantina sociale di Dolianova and Others*,⁹³ the ECJ found that the GC had misapplied the rules on time limits to bring an action for damages. The GC had applied a teleological approach in considering the time limit to bring an action for damages ran from the moment in which the party perceives to have suffered a damage. While this view has the benefit of bringing the parties situation at the centre of the analysis, it has the drawback of making the time-limit for this action too subjective and unclear. As a consequence, the ECJ declared that the GC had misapplied rules on time limits, and its judgment was annulled. The ECJ explained that time-limits are *objective* rules (therefore subject to literal interpretation), whose starting date runs from the day in which the loss is suffered as a consequence of the conduct of an EU institution.

The ECJ strives to achieve legal certainty also in relation to procedural requirements applied in different causes of action brought before the EU Courts. For instance, in the *HTTS*⁹⁴ appeal, the ECJ had to decide how to identify the evidence for the existence of a serious breach of EU law in the context of an action for damages. Evidence questions also arise in the context of an action for annulment, in so far as the parties need to submit proofs of when the invalidity of an EU act has occurred. By way of analogy, in *HTTS* the ECJ relied upon the principles used in the action for annulment: as the legality of a contested EU act must be assessed on the basis of the facts and the law as they stood at the time when the act was adopted, also for the action for damages the

⁹² See para 81 of the judgment. See also, confirming this, N Vogiatzis, ‘The EU’s liability owing to the conduct of the European Ombudsman revisited: European Ombudsman v. Staelen’ (2018) 55(4) Common Market Law Review 1251.

⁹³ *Commission v Cantina sociale* (n 80).

⁹⁴ C-123/18 P *HTTS v Council* [2019] EU:C:2019:694 (*HTTS*).

seriousness of the breach is to be assessed in light of the facts and the law as they stood when the act or conduct was adopted. The ECJ further clarified that

‘Sufficiently serious breach’ is a static concept, fixed at the time when the unlawful act or conduct was adopted, whilst the concept of ‘damage’ is by nature a dynamic concept since, first, the damage may emerge after the unlawful act or conduct was adopted and, second, its extent may change over time.⁹⁵

As a result of the ECJ’s interpretation, the evidence for both an action of annulment and for damages is governed by the same time limits and constraints, which strengthens the coherence of the EU system of remedies. The ECJ was also careful to explain that the principle according to which the evidence for damages should relate to the period in which the unlawful conduct was committed was already established in the case-law.⁹⁶

To conclude, on appeal the ECJ has reversed first instance decisions following contextual or teleological interpretations of EU law which could hinder legal certainty or lead to overruling of the EU established case-law. In its appeal decisions, the ECJ has privileged a textual interpretation of the applicable law and case-law. Therefore, through appeal decisions the ECJ has attained mainly two objectives: (i) it has strengthened its own precedents and (ii) it has ensured the coherence of the EU legal order.⁹⁷ This investigation suggests that appeal decisions are not used to introduce ‘teleologically’ oriented interpretations of EU law,⁹⁸ as it occurred in constitutional judgments delivered through preliminary ruling procedures such as in *Van Gen den Loos*,⁹⁹ *Internationale Handelsgesellschaft*¹⁰⁰ or *Omega Spielhallen*.¹⁰¹ While the strengthening of EU case-law enhances legal certainty, it also highlights steadiness in the interpretation of the EU law. Ultimately, the consolidation of judicial precedents facilitates litigation strategies and protects legal certainty.

One might wonder whether the ECJ’s aspiration of legal certainty and uniformity of EU law has been at all disrupted by the task of enforcing individual

⁹⁵ *ibid* para 38.

⁹⁶ *ibid* para 53.

⁹⁷ See, for further discussion on the reasoning of the EU courts: LM Soriano, ‘A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice’ (2003) 16 *Ratio Juris* 296.

⁹⁸ See, for a general discussion on judicial review: GC Christie, ‘A Model of Judicial Review of Legislation’ (1975) 48 *Southern California Law Review* 1306.

⁹⁹ C-26/62 *Van Gend en Loos* [1963] EU:C:1963:1.

¹⁰⁰ C-11/70 *Internationale Handelsgesellschaft* [1970] EU:C:1970:114.

¹⁰¹ C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] EU:C:2004:614.

rights. Legal scholars have discussed that the expansion of individual rights and fundamental rights has re-shaped the judicial activity of courts both at national and international level.¹⁰² As posited by the former president of the GC, Judge Marc Jaeger, one of the reasons for the establishment of the appeal procedure was to enhance judicial protection in the EU. The following section deals with the question of the role that has been played (if at all) by individual rights on appeal, and how these rights are balanced against the EU general interest.

6. The Protection of Individual Rights on Appeal and the Balancing with the EU General Interest

Statistics on appeals before the ECJ illustrates a sharp increase of cases lodged in recent years.¹⁰³ As a consequence, this procedure becomes increasingly vital for the ECJ to exert its activity of Supreme Court of the EU legal order, in addition to the preliminary ruling procedure. In the context of this action, the ECJ might find itself in the position of reviewing GC decisions where individual rights are at stake. In appeals concerning actions for damages, this question becomes particularly relevant: this remedy sanctions the conduct of EU institutions, and signals what is not acceptable in terms of administrative behaviours from EU institutions, while providing redress to affected individuals. Thus, the damages claim against the EU has a special place in the EU judicial architecture, offering the opportunity for the EU courts to balance the effectiveness of EU action with the protection of individual rights. It is established in the case-law that, for instance, the requirement that there be a sufficiently serious breach of a rule of EU law stems from the need to strike a balance between, on the one hand, the protection of individuals against unlawful conduct of the institutions and, on the other, the leeway that must be accorded to the institutions in order not to paralyse action by them.¹⁰⁴ A subsequent related question is thus how the ECJ balances individual rights with the EU general interest.

The case *Alessandrini Srl et al v Commission*¹⁰⁵ provides an example of this balancing exercise on appeal. Although decided before the entry into force of

¹⁰² T Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25(4) Oxford Journal of Legal Studies 697 (Poole); SE Gottlieb, 'The Paradox of Balancing Significant Interests' (1994) 45 Hasting Law Journal 825 and D Lustig and JHH Weiler, 'Judicial review in the contemporary world – Retrospective and prospective' (2019) 17(1) International Journal of Constitutional Law 315.

¹⁰³ See, for instance, Court of Justice of the European Union, 'Press Release No 39/19. Judicial statistics 2018: the Court of Justice and the General Court establish record productivity with 1,769 cases completed' (CURIA, 25 March 2019) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-03/cp190039en.pdf>> accessed 4 November 2019.

¹⁰⁴ Poole (n 102).

¹⁰⁵ *Alessandrini* (n 78).

the Lisbon Treaty, this appeal judgment constitutes a valid precedent, as it is still invoked by the EU court in relation to limitations of rights.¹⁰⁶ The case concerned an action for damages brought against the EU following the adoption of a regulation setting tariff quotas for third-country bananas. At first instance, the GC had dismissed the actions requesting the annulment of this regulation and compensation for damages arisen thereunder. On appeal, the ECJ gave a final judgment and recalled settled case-law: both the right to property and the freedom to pursue a trade or profession form part of the general principles of Community law. However, those principles do not constitute absolute prerogatives but must be viewed in relation to their social function. Consequently, the exercise of these fundamental rights may be restricted, particularly in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute – with regard to the aim pursued – a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.¹⁰⁷ The Court found that the regulation did not generate a disproportionate interference with the right to property and the freedom to undertake a profession. For both rights, individuals cannot have any legitimate expectations vis-à-vis the exercise of the regulatory powers of the EU institutions, which are exerted in light of the objectives of the internal market and the international law obligations of the EU. The enjoyment of fundamental rights is structurally subject to the EU general interest.¹⁰⁸

The robust protection of the EU general interest is testified also by the finding that damages may be awarded only subject to the assessment of the legality of EU acts adopted by the institutions. In the same judgment, the ECJ stated the GC¹⁰⁹ ought to have ascertained whether, over and above the difficulties encountered by the applicants in making full use of their reference quantities and import licences, the cause of the damage pleaded by them did not indeed lie in the alleged illegality of Regulation No. 2362/98 and, in particular, in the method of combined management of tariff quotas introduced by the Commission. The ECJ explained that the assessment of the legality of the Regulation was an essential step in the assessment of the damage claim, and thus the first instance judgment was subsequently annulled. By adding this further step in the legal evaluation of the GC, the ECJ has ensured that the activity of the EU institution be subject to scrutiny from the EU judiciary and

¹⁰⁶ C-447/15 *Ivo Muladi v Krajský úřad Moravskoslezského kraj* [2016] EU:C:2016:533.

¹⁰⁷ See C-44/79 *Hauer v Land Rheinland-Pfalz* [1979] EU:C:1979:290, para 32; C-265/87 *Schröder v Hauptzollamt Gronau* [1989] EU:C:1989:303, para 15 and C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] 1989:321, paras 17-18.

¹⁰⁸ The approach is confirmed in C-104/97 P *Atlanta AG and others v Commission of the European Communities and Council of the European Union* [1999] EU:C:1999:498.

¹⁰⁹ At the time, Court of First Instance.

stressed that EU acts may be the source of extra-contractual damages. In parallel, such finding suggests that the right to compensation cannot be granted where it would run counter to the achievement of the EU general interest.

A subsequent question is whether the entry into force of the Charter has influenced the way the ECJ balances individual rights with the EU general interest on appeal. Introducing a catalogue of fundamental rights, the Charter is provided with binding effects in the same way as the Treaties. Charter rights may be subject to limitations according to the clause included in Article 52 thereof. Limitations must be provided for by law and respect the essence of those rights and freedoms. Furthermore, restrictions to Charter rights should be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, and ultimately be proportionate. Article 52 of the Charter includes the same test considered in *Alessandrini*, but adds the protection of the essence of rights. This clause thus includes the methodology for balancing the protection of Charter rights with the EU general interest, indicating that the former may be restricted to pursue an EU objective.¹¹⁰ Therefore, the Charter has not substantively modified the model of balancing of fundamental rights with the general interest. This is confirmed in case-law, which indicates that the presence of a violation of a Charter right is unable to reverse or lighten the onerous burden of proof for individuals in appeals on actions for damages.

In *European Union v ASPLA and Armando Álvarez*,¹¹¹ the claim for damages against the EU arose due to bank guarantee charges linked to an excessively long proceeding before the GC. Because of the length of the action before the GC, the claimants bore the costs of the bank guarantee for an unreasonable time. The alleged damages thus stemmed following a violation of a Charter right, notably Article 47, granting the right to have judicial proceedings concluded in a reasonable time. In the first instance proceedings, the GC held that a causal link materialised between the excessive time taken by the GC to deliver its decision and the financial loss suffered from the appellants. It considered two elements: (i) that at the time when ASPLA and Armando Álvarez provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time was unforeseeable and that those entities could legitimately expect those actions to be dealt with within a reasonable time, and (ii) that the reasonable time for adjudicating was exceeded *after* ASPLA's and Armando Álvarez's initial decision to provide that guarantee. The GC distinguished the case at hand from *Atlantic Container Line and Others v Commission*.¹¹² Also in that case, the

¹¹⁰ See, for an analysis of the case-law under art 52 Charter: T Tridimas and G Gentile, 'The essence of rights: An unreliable boundary?' (2019) 20 German Law Journal 794.

¹¹¹ C-174/17 P *European Union v ASPLA and Armando Álvarez* [2018] EU:C:2018:1015.

¹¹² Case T-191/98 *Atlantic Container Line and Others v Commission* [2003] EU:T:2003:245.

claimant claimed damages for the provision of a bank guarantee in connection with an action lodged before the EU courts. However, both at first instance and on appeal, the EU Courts excluded the presence of a damage. The bank guarantee – provided for the proceedings before the EU courts – originated from a choice of the parties to challenge a decision of the Commission before the GC. In contrast, in *European Union v ASPLA and Armando Álvarez*, the parties could not have foreseen the excessive length of proceedings, and had to support the financial consequences of the bank guarantee beyond a reasonable time.

On appeal, the ECJ held that the assessment of the expenses related to the bank guarantee is left to the discretion of the individuals and is to be carried out in light of the conduct of the proceedings, and any potential delay in delivering the judgment. As a matter of EU law, whenever an action before EU courts is initiated, the management of a bank guarantee to cover the costs related to the possible payment of a fine which is (i) imposed by an EU institution and (ii) challenged before EU courts is not compulsory and individuals remain free to manage their costs. Consequently, the loss consisting of the guarantee fees resulted from the interested party's choice to lodge a security, with the consequence that no damage could be claimed from the EU for the costs related to the management of the guarantee. The same reasoning was applied in *European Union v Kendrion*,¹¹³ *European Union v Gascogne Sack Deutschland and Gascogne*,¹¹⁴ and *Guardian Europe v European Union*.¹¹⁵

Interestingly, in *European Union v ASPLA and Armando Álvarez*, the presence of a violation of individual rights did not change the burden of the proof under Article 340 TFEU. The appellants failed to obtain compensation not having established a damage exclusively and directly caused by the action of the EU. This high threshold recalls the *Wednesbury* rationality review carried out in UK administrative law, whereby the parties have to prove the unreasonableness of the conduct of the administration. Rationality review differs from the judicial review under proportionality, whereby once a violation of a protected interest is demonstrated, the burden is placed on the state to justify the interference.¹¹⁶ Doubts remain as to whether the finding of a violation of a fundamental right should influence the scrutiny of the ECJ towards a more proportionality-based approach.

¹¹³ C-150/17 P *European Union v Kendrion* [2018] EU:C:2018:1014.

¹¹⁴ C-138/17 P *European Union v Gascogne Sack Deutschland and Gascogne* [2018] EU:C:2018:1013.

¹¹⁵ Case C-447/17 P and C-479/17 P *European Union v Guardian Europe* [2019] EU:C:2019:672.

¹¹⁶ Under the recommendations of prominent authors, UK courts have moved towards a proportionality-based review: See CF Forsyth, 'Reconciling the protection of human rights with the principles of administrative law' (Southern African Chief Justices Forum Kasane, Botswana, 6-9 August 2009) <www.venice.coe.int/SACJF/200908BTWKasane/speeches/ForsythAdministrative%20Law%20and%20Human%20Rights.pdf> accessed 20 January 2020.

The balancing exercise between individual rights and the effectiveness of EU actions proves all the more important in sensitive fields, such as that of restrictive measures. The obstacles encountered by the Council in terms of availability of information often make the assessment that it must carry out particularly difficult. Following recent developments, the EU judiciary has in fact opened the floodgates for actions for damages to compensate non-material damages to individuals having received unlawful impositions of sanctions.¹¹⁷ This development, initiated by a GC decision, has been followed by the ECJ on appeal. The broadening of the scope of the action for damages is to be welcomed, as it indicates the willingness of EU courts to redress mistakes committed by the EU institutions even in politically sensitive areas such as restrictive measures.

The *HTTS* appeal illustrates these points.¹¹⁸ The case concerned an action for damages following the unlawful imposition of a restrictive measure. The GC judgment made a series of statements of institutional empowerment in favour of the Council, since it considered as lawful the reliance by the Council upon evidence not used to issue a restrictive measure to exclude the presence of a serious breach of EU law under Article 340 TFEU. Starting from the assumption that the objectives protected by the EU through the CFSP may justify negative outcomes for individual economic rights, the GC held that EU institutions were entitled to rely, by way of defence, on all relevant facts and matters occurring before the action for damages was – within that five-year period – brought against it. As a consequence, the Council could rely on evidence not strictly related to the time of the issuance of the sanction regime by way of defence.

Vested with the appeal of this judgment, the ECJ applied a principle of parallelism between individuals and EU institutions in the use of evidence: the only evidence which could be relied upon was that formed when the conduct of the EU institution was completed. As a matter of fact, evidence gathered in a subsequent moment, i.e. after the allegedly damaging EU institution's conduct is performed, may remain obscure to the addressees of that action. A similar principle applies also for the action for annulment, where the proof of the illegality of the EU act relates to the act as it stood when it was adopted. The requirements of coherence that underlie the system of remedies provided for by Treaties mean that the methodology for examining the legality of a measure or the conduct of an EU institution must not differ according to the type of action. The ECJ continued:

Finally, if an institution could rely on any relevant matter that was not taken into account when the decision concerned was adopted in order to demonstrate

¹¹⁷ Case T-168/12 *Georgias and Others v Council and Commission* [2014] EU:T:2014:781.

¹¹⁸ *HTTS* (n 94).

that it did not commit a breach of a rule of EU law sufficiently serious to give rise to non-contractual liability of the European Union, the outcome of the action for damages could vary according to the date on which it was brought. The award of compensation for the damage suffered on account of the conduct of the EU institutions would depend, in that context, on whether during the five-year period¹¹⁹ in which an action for damages may be brought any matter that was not taken into account at the time of adoption of the decision concerned enabled the institution that adopted it to justify its actions.¹²⁰

The ECJ then recalled that a time limit period has the function, first, of ensuring protection of the rights of the aggrieved person, who must have sufficient time in which to gather the appropriate information with a view to initiate a possible action and, second, of preventing the aggrieved person from being able to delay the exercise of his right to damages indefinitely.¹²¹ Protection of the rights of the aggrieved person could be undermined if the passage of time after adoption of the decision or conduct at issue were liable to make it more difficult to demonstrate that the institution concerned committed a sufficiently serious breach of a rule of EU law.

Thus, the illegality of an act or conduct that may give rise to non-contractual liability of the EU must be assessed on the basis of the facts and the law as they stood at the time when the act or conduct was adopted.¹²² With this principle, the ECJ has rebalanced the extensive powers of the Council against the addressee of the restrictive measure. *HTTS* further specifies that inadequacy of the statement of reasons for an act imposing a restrictive measure is not, in itself, sufficient to give rise to non-contractual liability of the EU.¹²³ Were the Court to find differently, the Council would be faced with excessive limits as to the reasons to be provided for the adoption of sanctions, which would adversely affect the ability of this institution to adopt restrictive measures.¹²⁴

The position of the ECJ in *HTTS* is evidently reasonable: rules on evidence should not differ depending on the party which must submit it and should be governed by objective principles. In this judgment, the ECJ carefully imposed the procedural duties of EU institutions without hindering the effectiveness of

¹¹⁹ See ECJ Statute (n 7) art 46.

¹²⁰ *HTTS* (n 94) para 48.

¹²¹ C-469/11 P *Evropaiki Dynamiki v Commission* [2012] EU:C:2012:705, paras 33 and 53.

¹²² *HTTS* (n 94) para 39.

¹²³ *ibid* para 103. See, to that effect, Case C-76/01 *Eurocoton and Others v Council* [2003] EU:C:2003:511, para 98 and the case-law cited. The duty to state reasons is considered to be instrumental for the protection of the right to a fair trial and defence rights protected under Article 47 Charter. ECJ 14 December 1990, C-350/88. Article 47 Charter is among the most cited ones by individuals before EU courts. Sub-rights protected under this provision have been recently considered to constitute essence of the rule of law.

¹²⁴ The same was held also in *EU IPO* (n 56).

EU action. Cases such as *HTTS*¹²⁵ and *Kadi II*¹²⁶ indicate that procedural duties may be deployed as weapons to limit the action of EU institutions and to ensure respect of the fundamental right to a fair trial. Through these judgments, the ECJ has injected procedural fairness into the adoption of sanctions by EU institutions:¹²⁷ as argued in the literature, when the community can rely on procedurally fair decisions it is also more likely to accept them.¹²⁸ At the same time, in *HTTS* the ECJ shielded the effectiveness of EU action from excessive interferences by stating that a violation of the duty to provide reasons does not *per se* suffice to give rise to EU non-contractual liability. The conditions for non-contractual liability apply in any event.

Overall, the ECJ has awarded damages on appeal only when evidently unreasonable conduct of EU institutions was traced. In other words, the ECJ reweighed the position of individuals vis-à-vis EU institutions' manifestly unlawful conducts. In *Agraz and Others v Commission*,¹²⁹ the ECJ found that the GC made an error in considering that the discretion given to the Commission in issuing anti-dumping aid does limit the possibility for a damage to arise. In its reasoning, the ECJ clarified that it is true that the existence of discretion in the hands of EU institutions may make the amount of the damage suffered uncertain. However, this does not impede the configuration of a damage where the requirements for the action for damages are fulfilled. Its amount may be calculated at a later stage of the Court's assessment.

The ECJ case-law has also provided interesting findings as to the possible non-material damages which could be compensated. In particular, the loss of confidence in an institution cannot be considered as damage subject to a duty of compensation, whilst a psychological harm derived from a negligent handling of a complaint by the European Ombudsman may give rise to the right to compensation. This was affirmed in *European Ombudsman v Staelen*, where the ECJ confirmed the GC decision¹³⁰ acknowledging serious breaches of EU law by the European Ombudsman. As a result, Ms Staelen received 7000 euros in compensation for the unlawful handling of her complaint. While the GC had considered that the loss of confidence in an EU institution could be compensated

¹²⁵ *HTTS* (n 94).

¹²⁶ C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council, United Kingdom v Yassin Abdullah Kadi* [2013] EU:C:2013:518.

¹²⁷ T Tridimas and JA Gutierrez-Fons, 'EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?' (2008) 32 *Fordham International Law Journal* 660.

¹²⁸ See, for example, Tom R Tyler, 'Restorative Justice and Procedural Justice: Dealing with Rule Breaking' (2006) 62 *Journal of Social Issues* 307.

¹²⁹ *Agraz and Others v Commission* (n 63).

¹³⁰ *Staelen* (n 62) para 129.

as a non-material damage, the ECJ seemed to focus only on the general psychological harm suffered.¹³¹

In light of the above, it may be argued that the balancing activity of the ECJ on appeal reproduces, to a large extent, the *ultra vires* review model of UK origin. Under this model, courts have the duty to control other institutions and ensure they do not step beyond the powers assigned to them.¹³² This review is conducted under the rationality paradigm, whereby individuals have to prove the unreasonableness of the action of the administration. This distinguishes the appeal procedure from judicial review models focused on the protection of individual rights.¹³³ Under the rights-based judicial review paradigm, proportionality is the guiding principle, and requires institutions to defend their position by showing how their action was proportionate to the objectives they aim to achieve. While under rationality review the starting point involves balancing the powers given to the institution, the rights-based review instead starts from the analysis of the compatibility of the action of the institution with higher laws, including individual fundamental rights.

It should be specified, however, that the scrutiny of the ECJ in the considered appeals was significantly influenced by the cause of action underlying the matters, being the non-contractual liability claim against the EU institutions. Therefore, the balancing of individual rights and the general interest of the EU in the considered appeals is the result of judicial precedents concerning only this action in particular. With reference to the non-contractual liability of the EU, the ECJ has carefully ensured the consolidation of its own precedents, and consequently the coherence of the EU system of remedies, whilst expanding the instances in which even non-moral damages caused by the EU may be awarded.

7. Conclusion

By focusing on selected aspects of appeal judgments in the context actions for damages, this article has analysed how the ECJ reviews decisions delivered by the GC and how the appeal procedure shapes the judicial dialogue between the GC and the ECJ. First, it has discussed the notion of ‘pleas

¹³¹ *Staelen* (n 62). This case is also interesting from the angle of the scrutiny applied by the GC and the ECJ. While at first instance the GC applied a more stringent review over the conduct of the Ombudsman, based on the assumption of the absence of discretion of that institution, on appeal the ECJ carried a limited scrutiny over the activities of the European Ombudsman, holding that this institutions enjoys a general discretion in its activities.

¹³² Authors who have described this model are Christopher F Forsyth and Carole Harlow. See C Harlow and R Rawlings, *Law and Administration* (2nd edn, 1997).

¹³³ See Poole (n 102) and P Craig, ‘Proportionality, Rationality and Review’ [2010] New Zealand Law Review 265, 269.

of law', pivotal in the assessment of the admissibility of appeals, and that of 'complex factual assessment', indicating a form of assessment left to the remit of the GC. Second, it has provided an overview of the interpretative methods used on appeal, and instances in which the GC and ECJ judicial interpretation of EU law diverged. Third, it has offered a discussion of how individual rights and general interest are balanced on appeal. The gathered findings are summarised below.

Although the EU appeal procedure was fashioned after the 'formalistic' procedure of the French Cassation Court, covering only points of law, the ECJ has embraced a comprehensive notion of 'pleas of law' covering also factual elements relevant for the correction of wrong legal qualifications. Whenever errors of legal qualifications are involved, the ECJ's review of facts may be triggered on appeal. Different, however, is the threshold requested for the ECJ to review mistakes concerning the interpretation of the evidence and its gathering. In these instances, parties must demonstrate a manifest and evident error based on the documents of the file. The appeal judgment *European Union Intellectual Property Office (EUIPO) v European Dynamics Luxembourg SA* offers examples of manifest errors by the GC, which reached wrong legal conclusions following an incorrect application of EU precedents. The encompassing notion of 'point of law' on appeal serves a number of purposes: first, it overcomes hurdles in dealing with pleas of law mixed with factual issues, such as the interpretation of the evidence; second, it offers a broad scope for aspiring appellants to challenge first instance decisions as long as they can prove that either EU law or EU case-law have not been correctly applied by the GC. What, instead, does not fall within the remit of the ECJ scrutiny are complex factual assessments, which may be identified in presence of multiple factors: (a) whether new evidence is required, (b) the nature of the assessment to be carried out on appeal (i.e. whether it includes non-legal considerations) and (c) the material available in the file of the litigation. In the presence of these elements, extrapolated by cases such as *Agraz*, *Klein* and *Staelen*, the ECJ does not pronounce final judgments, but refers the case to the GC for further assessment.

As to the methods of interpretation used by ECJ on appeal and how they differed from (if at all) those used by the GC, it may be remarked that, overall, the ECJ has consciously applied a literal interpretation of applicable EU legislation and jurisprudence. It has done so to avoid overruling its own precedents. Consequently, appeal decisions have strengthened the precedential value of the EU case-law. The ECJ has in fact reversed all interpretations of EU law provided by the GC which could undermine the coherence of the EU system of remedies and, ultimately, legal certainty. Instances of the divergent approach used by the GC and the ECJ are provided by the *Staelen* and *Commission v Cantina sociale di Dolianova and Others* decisions. In these cases, the ECJ quashed the judgments of the GC holding, respectively, that mere breaches of diligence duties by the European Ombudsman qualify as serious breaches of EU law, and that time limits for actions for damages may be subjectively determined. Both these first

instance decisions were subtly introducing *revirements* in the ECJ case-law, with adverse impact on legal certainty.

From the angle of balancing individual rights and the EU general interest, the considered judgments indicate that the ECJ uses a rationality review approach on appeals concerning damages claims. This paradigm of UK origin requires parties to prove the unreasonableness of the conduct of EU institutions. There is thus a presumption of validity as to the EU institutional action, and the reach of rights is to be determined in relation to the scope and objectives of EU institutions' conduct. This approach to judicial review strengthens the protection of the EU general interest, whereas the protection of individual rights become subject to the achievement of collective policy objectives. What is more, the approach of the ECJ has not changed following the entry into force of the Charter of Fundamental Rights of the European Union. The new clause of Article 52 of the Charter, laying down the methodology for the balancing of EU fundamental rights, largely reproduces the previous test set in the EU case-law. This is confirmed by recent cases such as *European Union v ASPLA and Armando Álvarez*, where the ECJ considered that the causal link necessary for a damage to materialise was not demonstrated. The ECJ maintained this position although a violation of Article 47 of the Charter had occurred and, as a consequence, individuals bore the costs related to the excessive length of proceedings. In two respects, however, it is possible to appreciate a more significant influence of individual rights in the balancing exercise on appeal. First, the ECJ has sought to re-weighing individual rights vis-à-vis institutional activity by imposing procedural duties on EU institutions. In *HTTS*, for instance, the ECJ held that, notwithstanding the sensitivity of the imposition of sanctions, the European Council cannot rely on evidence not used to issue the sanction and gathered in a later stage. Second, the ECJ has also expanded the instances in which non-moral damages may be awarded, by confirming that actions for damages may be brought in cases where sanctions were unlawfully imposed (see *HTTS*), and by granting damages for psychological harm caused by negligent complaint handling by the European Ombudsman (see *Staelen*).

To conclude, this paper wishes to offer a preliminary analysis of how the ECJ makes use of its role of Court of Appeal of the EU to shape the EU legal system. Although the discussed findings are limited to the appeals delivered in the context of damage claims, they provide a first attempt to theorise the effects of the appeal procedure in the EU legal order and its impact in shaping the judicial dialogue between the GC and the ECJ. The findings indicate that the ECJ fulfils its duty to enhance the protection of individual rights on appeal by adopting a broad notion of 'plea of law' to enable parties to seek judicial protection against incorrect GC decisions. At the same time, in the context of the appeal procedure, it preserves uniformity by applying literal interpretations of EU law and jurisprudence, and it ensures the effectiveness of EU action by subjecting the protection of individual rights to a rationality review model.

Far from being a complete account, this paper also wishes to draw attention to the growing number of appeal decisions and their under-explored effects on the judicial activity of the ECJ. The recent doubling of the number of GC judges under Regulation No. 2015/2422 may lead in fact to a higher number of first instance decisions, with the consequential opportunity for unsuccessful parties before the GC to appeal before the ECJ. How the increasing activity of the ECJ as an appeal court is going to affect its interpretative activity remains to be seen. In this respect, it will be relevant for future research in this field to study the appeal filter mechanism introduced in 2019,¹³⁴ regulating the admissibility of appeals before the ECJ. This newly introduced system will in fact impact the right to obtain judicial protection through the appeal procedure before that court.

¹³⁴ Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union [2019] OJ L111/1.