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Precedent in EU Law

— A Practitioner's View

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Abstract
This paper sets out a practitioner's view of both the nature of decisional practice, and precedents in the case law of the Court of Justice of the European Union (CJEU), based on some 40 years of experience of judicial disputes. I consider the specific case of CJEU precedents (including both the Court of Justice (ECJ) and the General Court (GC)), before moving on to comment on how EU precedents have been handled by the CJEU and, before Brexit, by English courts. From a practitioner's perspective it is always necessary to take account of varying factors that may cause a court to decide one way rather than another. Accordingly, it is not sufficient to rely on an earlier decision as a precedent: the underlying justification for the precedent and its continuing relevance to the case in hand must always be borne in mind.

Keywords
case law, decisional practice, direct effect, jurisprudence, precedent

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1. Introduction

A 'practitioner's' view of a legal topic can be understood in two ways: as a view advanced by a person who is a practitioner or as a view formed by peculiarities that differentiate a practitioner from an academic. On the latter point, academics and practitioners commonly claim to have different, and unique, insights into the law that justify each regarding the other's presence with suspicion, or at least as requiring some justification. For example, an academic might say of a practitioner's view 'what experience underpins it?' or 'what does a practitioner's view bring to the (academic) debate at hand?'. For their part, practitioners have a tendency to respond in kind, waving the trump card that, save in the relatively rare case of the academic who is also a practitioner, an academic has no answer to the first question. A more respectable version of the contest between academic and practitioner is the Hart-Devlin controversy, which, despite its many other interesting ramifications, was really a collision between a static and a dynamic view of the law. Lord Devlin, as a practitioner (judges are, of course, practitioners), was faced every day with the problem of having to make a decision in the context of a dynamic legal system, which led him to a particular view about the role of morality in the law; Hart, as an academic, was not required to develop a theory based around the problem of the resolution of legal disputes in the real world and his model was therefore essentially static (cf Cane, 2006). The different approaches of Devlin and Hart cannot, of course, be taken to define the roles of practitioner and academic, but they provide a useful insight. In particular, whether a practitioner is advising a client, conducting litigation or, as a judge, deciding it, the core of his/her activity encompasses the process of resolving actual legal disputes (which are invariably messier than they might seem to an external observer) and the consequences, in the real world and in a particular case, of their resolution. Precedent is the archetypal subject-matter of the discipline of a practitioner because a precedent is a decision that resolves a legal dispute. Whether or not and, if so, how a precedent is to be used in another case are questions that form part of the day-to-day professional experience of a practitioner. This paper sets out my own practitioner's view of precedents in the case law of the Court of Justice of the European Union (CJEU), based on some 40 years' experience of judicial disputes and the management of EU precedents.

After making some general observations about the nature of precedents, I will turn to the specific case of CJEU precedents at the Court of Justice of the European Union (CJEU/'the Court'), comprising the Court of Justice (ECJ) and the General Court (GC), and then to the basic condition for the operation of a precedent, before making some comments about how EU precedents have been handled by the CJEU and, before Brexit, English courts.

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2. General Observations on Precedents and Delusional Practice

Precedent, in the non-technical sense of a previous decision, is an element normally taken into account in human reasoning, particularly when decisions have to be made, probably because it encapsulates experience, and it is quite usual for a person to take previous experience into account when confronting a particular issue. For lawyers, precedent has a particular value for several reasons. Apart from the fact that, for practitioners, precedent is an indicator of likely future judicial behaviour, precedent may reveal not just experience but the wisdom of previous judges (in that respect, the value of a precedent may vary depending upon the qualities and abilities of the court, or the judge, that provided the precedent). Lawyers can often be conservative by nature and will therefore prefer to keep to what is already known; they may justify that stance by referring to the need for stability and predictability in the law (legal certainty) so that people can order their affairs and adjust their behaviour accordingly, without their actions being questioned, after the event, by reference to criteria that differ from those known at the material time. Furthermore, studies have shown that it can be difficult, psychologically, for judges to depart from a previous decision, to which they are a party or to which they have an institutional connection because they form part of the same court, lest to do so would suggest that the earlier decision was wrong, which would in turn have the potential to cast doubt on the decision that they are about to make (Klein & Mitchell, 2010). Judges are, of course, *always* right – unless and until overturned on appeal – because their decisions are final determinations of a dispute. Judges in courts against whom no appeal is possible are infallible: but one is then reminded of the remark made by the US Supreme Court Justice, Robert H Jackson: "we are not final because we are infallible, but we are infallible only because we are final" (*Brown v Allen* 344 US 443 (1953): 540). A precedent is not the same as a decisional practice. A (judicial) decisional practice is a settled way of doing something and implies that, after mulling the matter over in case after case, the court has concluded that there is one particular way of resolving a particular problem. A decisional practice is therefore a stronger predictor of the future behaviour of a court than a single precedent. Depending upon the legal system under discussion, a precedent or a judicial decisional practice may also amount to a source of law. From the practitioner's perspective, the question whether or not a precedent or decisional practice is, in formal terms, a source of law, is an idle one because, in either event, a practitioner is faced with the same problem of either exploiting it or navigating around it. However, there is a linguistic curiosity about precedents and judicial practices which is worth drawing attention to.

Precedents and decisional practices can be described by the phrase *case law* or by the French word *jurisprudence* (and its equivalents in other languages). Although both interpreters and translators in the EU institutions tend to treat the English phrase *case law* and the French word *jurisprudence* as meaning the same, in ordinary (legal) usage these words actually refer to different things. The clue lies in the appearance of the word *law*

in the English expression: a more useful translation of *case law* into French would be *droit jurisprudentiel*, as some legal dictionaries have it (e.g., Quemner, 1977). *Case law* is the law derived from cases; and the phrase reflects the historical origins of the common law as a system based on judicial decisions because, for many centuries, there was little legislation and no legal codes expressing in written form what the law was. Recourse was had to the legal fiction that judges simply declared what the law was and always had been; but "the law" in question was nothing more than a hazy notion that was dependent upon the decisions of judges to give it form. Those decisions were therefore a true source of law (Fuller, 1968: pp 120). The French word *jurisprudence* can bear the same dictionary meaning but is more usually used to describe what in one sense is judicial wisdom, that is, the judicial understanding of what the (written) law means and how it is to be applied in a given case, which can be compared with *doctrine* (the learning of academic commentators). That usage of the word *jurisprudence* reflects the fact that, generally, French judges have had written law to fall back on (even if, in early times, it took the form of Roman law). In that situation, a judicial decision that explains or applies a rule of written law is not, itself, a source of law. Hence, there is a very real difference between *jurisprudence*, in its usual acceptation, and *case law*. Thus, arguably, the *jurisprudence* of the French Conseil d'État is "case law" in the true sense (on the importance of *jurisprudence* in the development of French administrative law, see for example Laferrière (1887); Steiner (2018)). Where a dictionary states that the French word *jurisprudence* either has or can bear the meaning of a source of law, it is referring to an attributed, not an intrinsic, quality of *jurisprudence*.

3. The View of Precedents in the CJEU

The courts comprising the CJEU recognize in principle the force of a precedent or decisional practice, as can be seen from even the most cursory glance through a judgment of the ECJ or GC; but judgments citing earlier cases as authority for a proposition of law do not usually identify what exactly the force of the earlier case or cases is. The phrases typically used are *settled case law* and *consistent case law*, both of which are the rendering in English of the French phrase *jurisprudence constante* (it has, however, been known for the ECJ to refer to one previous decision as the *consistent case law* of that court). The use of *case law* to render the French term *jurisprudence* creates ambiguity about the legal force of a precedent for the reasons stated above. In some instances, in cases before UK courts (while the UK was a Member State), English judges removed the ambiguity by deliberately referring to ECJ case law as *practice* or *jurisprudence* (using the French word) in preference to the phrase *case law*. For example, in *Litster and others v Forth Dry Dock Engineering Co. Ltd* [1990] 1 AC 546, Lord Templeman uses *practice*; Lord Diplock was known to prefer

the French word *jurisprudence* but used *case law* in *Garland v British Rail Engineering Ltd. (No 2)* [1983] 2 AC 751.

For the most part, the CJEU explains and applies written law and, therefore, its decisions are accommodated more easily within the concept of *jurisprudence* than within the concept of *case law* (both terms, as set out above). Accordingly, a CJEU precedent, even if forming part of a group of precedents (*jurisprudence constante*), is better understood as an example of the judicial understanding of a source of law (a written text). However, there is an area in which the decisions of the CJEU approximate to the traditional approach of English courts and can therefore be said to amount to *case law*, a precedent in that area then forming a true source of law. That area is marked by the obligation imposed on the CJEU by what is now the Treaty on European Union, art. 19(1), to "ensure that in the interpretation and application of the Treaties the law is observed". What is "the law" to which that provision refers? Read in one way, the English text of art. 19(1) is circular or a form of forensic bootstrapping: when interpreting the Treaties (for example), the CJEU is obliged to adopt an interpretation that conforms to the meaning of the Treaties, properly construed (which means that the CJEU's interpretation must be soundly based upon that interpretation). In fact, of course, *the law* to which art. 19(1) refers is understood in a different way, as a reference to an ideal concept of law, or to an undefined conceptual group of legal values, sometimes expressed in the equally vague phrase *rule of law*. Following that approach, the ECJ has (for example) conferred a right of action on an entity that did not possess it under written EU law, created a procedure or form of action not provided for in written EU law, and developed (unwritten) general principles of law that are capable of overriding the clear and unambiguous terms of EU legislation (for examples of each of those situations see, Case 294/83 *Parti ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339, paras. 23-25; Case 2/88 *Imm. Zwartfeld* [1990] ECR I-3365; and Case 155/79 *AM&S Europe Ltd v Commission* [1982] ECR 1575). Such precedents can properly be described as sources of law because, as in the case of English *case law* (in the true sense), they are not products of an exegetical analysis of a pre-existing (written) source of EU law: art. 19(1) is not self-referential but directs the CJEU to provide *the law* to which it refers (judicial riffing on a theme found in a legislative or constitutional text is one thing; plucking something out of the air is another).

One point about the relationship between the ECJ and the GC should be noted here. The GC considers itself to be bound by a judgment of the ECJ where that judgment quashes (on appeal) a decision of the GC and remits the matter to the GC to be decided in the light of the ECJ's ruling on points of law or else is *res judicata* (i.e., considered to have been competently adjudicated (see Lasok, 2022: paras. 7.70–7.72)). Otherwise, the GC seems to regard itself as free to decide whether or not to follow a decision of the ECJ (e.g., Case T-162/94 *NMB France Sarl v Commission* [1996] ECR II-427, para. 36).

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4. The Essential Condition for the Operation of a Precedent

Whether precedent is *jurisprudence* or *case law*, the question of precedent, and the compelling effect of a precedent, are in the case of any court based essentially on whether or not the precedent is known[1] or, in some instances, fully known. In the civil law tradition, the primary responsibility for knowing the existence of a precedent lies with the court (following the maxim *da mihi factum, dabo tibi ius*: 'give me the facts, I will give you the law'). In the common law tradition, the primary responsibility lies with the advocate; and a court may, on occasion, ignore a precedent of which it is aware, but which the advocates before it have not mentioned, on the ground that, if the precedent has not been raised by any of the advocates, and brought into the debate before the court, there is a particular reason why the precedent is not to be regarded as relevant. In England, a barrister is not obliged to mention to a court a (potentially) relevant precedent, if his opponent has not relied on it, but is obliged to ensure that the court is fully informed of (potentially) relevant precedents where the opponent is a litigant in person.

In proceedings before the CJEU (that is, the ECJ and GC), it is common for the lawyers from civil law jurisdictions who appear frequently before the CJEU to cite previous cases and it is invariable that lawyers from, or educated in, common law jurisdictions will do so. However, not all lawyers from civil law jurisdictions cite relevant (or any) cases. Some seem to keep strictly to the principle that the court knows the law and does not need to be informed about what it has decided previously. Originally, the ECJ had two institutional safeguards that ensured that it was fully informed about its previous decisions. The first was the Advocate General: each case was assigned an Advocate General and Advocates General took particularly seriously their role to marshal the relevant cases and analyse them thoroughly. The second safeguard lay in the institutional memory of the ECJ. The GC benefited only from its institutional memory because it has never had permanent Advocates General: in GC proceedings, a judge may be tasked with performing the role of Advocate General but that happened only in some early cases and the practice,

[1] A particular problem with the discoverability of precedents arose when the ECJ (and, later, the GC) abandoned the practice of publishing all judgments in the European Court Reports but carried on citing earlier judgments even if they had never been published. In one case, I was representing the United Kingdom, which was at the receiving end of an enforcement action brought by the Commission. In the application commencing proceedings, the Commission relied on an unreported judgment. At that point in time, judgments were not available in electronic form. Therefore, if a judgment was unreported, it was discoverable only if one chanced to have in one's possession a paper copy. I did not have a copy of the judgment in question (although I tended to retain copies of unreported judgments); nor did my client. The ECJ denied being in possession of a copy of the judgment (which was manifestly wrong). Eventually the Commission kindly provided a copy. Currently, judgments and orders are in principle available on the CJEU's website; however, not all of them are; and not all of them are available in a commonly understood EU language. For example, one GC interim relief case that I came across was based on an earlier GC interim relief decision that was not available in any of the widely understood EU languages. It had presumably been drafted in one of them (probably French or German), which was why it had been cited, but no version in that language was available. Although that state of affairs may be regarded as being simply an inconvenience for lawyers who advise and represent clients, it also has an adverse effect on the Court's internal systems for recovering precedents.

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such as it was, was discontinued at an early point in the history of the GC (Lasok, 2022: paras. 1.59; 1.70).

The first safeguard (in the ECJ) was not always effective because not all Advocates General take (and took) proper care over the task of assembling and assessing all relevant previous decisions so as to ensure that the ECJ was fully informed of its previous decisions and any decisional practice. A good example can be found in the Advocate General's Opinion in Case C-62/00 *Marks & Spencer plc v Commissioners of Customs and Excise* [2002] ECR I-6325, which does not give any consideration at all to a large number of previous decisions (around 20) on the distinction between non-transposition or incorrect transposition of an EU directive in national law, and correct transposition but incorrect application of a directive in national law. Oddly, one of those cases (Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651, paras. 51–59 of which were directly on point) was cited by him in support of a different proposition (see footnote 26 of the Opinion).

Further, the use of Advocates General has diminished considerably in recent years; whereas, prior to the Treaty of Nice, an Advocate General's opinion was required in every case before the ECJ, the amended Statute of the CJEU requires a submission from the Advocate General only in cases in which a new point of law is raised (TFEU Protocol (No 3) On the Statute of the CJEU, 7 June 2016 O.J. (C 202) 210-29). This, in turn, has implications for the application of EU law at member state level. For example, see the statistic given by Lord Carnwath in *HM Revenue and Customs v Aimia Coalition Loyalty UK Ltd* (No. 2) [2013] UKSC 42 at paragraph 128. In that case, the UK Supreme Court assumed that, in the reference to it, the ECJ had not considered that the case raised a new point of law because there had been no Advocate General's Opinion (see *HM Revenue and Customs v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, para. 34 (Lord Reed) and *HM Revenue and Customs v Aimia Coalition Loyalty UK Ltd* (No. 2) [2013] UKSC 42, para. 87 (Lord Hope) and para. 128-129 (Lord Carnwath)). The basis for that belief was the Protocol on the Statute of the Court of Justice. The Supreme Court did not take into account the actual practice of the ECJ or the fact that a new point of law may become apparent after the decision has been made to dispense with an Advocate General's Opinion.

The second safeguard (applicable both to the ECJ and GC) was particularly effective when the court in question had a relatively small number of judges and the volume of case law was relatively contained (but it should be borne in mind that the members of the GC did not have direct access to the institutional memory of the ECJ). When the number of judges was relatively small, cases tended to be dealt with by the same judges or, at the least, it was more likely that a number of the judges dealing with a case would also have dealt with a similar case (initially, as ECJ cases were increasingly dealt with by chambers rather than the full court, the tendency was to allocate cases to a chamber that had already dealt with a similar case). It was therefore much easier for judges not only to know of a precedent but also to know how it came to be decided in a particular way (which might not be entirely evident from the reasoning stated in the judgment) and that knowledge could be passed on to new judges.

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However, by the early 2000s, both the ECJ and the GC had lost its institutional memory for a variety of reasons. Changes in the membership of each court, the recruitment of new members with little or no background in EU law, the increase in the number of judges and the expansion in the areas covered by EU law (and in the volume of judicial decisions) combined to fracture a pre-existing coherence in judicial thinking. In the case of the ECJ, that coincided with a reduction in the role of the Advocates General. In consequence, both in the ECJ and in the GC, a rather rocky and uncertain period commenced, from the perspective of precedent and consistency in decision-making (for example, Case C-319/12 *Minister Finansow v MDDP sp. z o.o.*, ECLI:EU:C:2013:778, paras. 40–56, concerned a point that had already been decided several times by the ECJ, but neither the Advocate General nor the ECJ in *MDDP* seem to have been aware of that fact).

5. Methods of Handling and Circumventing Judicial Precedents

The ECJ and the GC acknowledge the existence of precedents when they cite previous cases as authority for a proposition of law and, in general terms, deal with an earlier decision (assuming it to be known) in very much the same way as occurs in cases before an English court. Precedents normally fall somewhere within a spectrum ranging from approved/upheld to disapproved/overruled. The latter end of the spectrum is rarely encountered, at least openly. Where a precedent is not placed at the former end of the spectrum, it may be distinguished for some reason (usually by reference to the facts) or the Court says that the precedent does not say what it means or does not mean what it says. For example, Cases C-439/04 and C-440/04 *Kittel v Belgium* [2006] ECR I-6161 generated a huge amount of litigation and a large number of references to the ECJ for a preliminary ruling, such as Case C-285/11 *Bonik* ECLI:EU:C:2012:774, as lawyers and national courts had to wrestle with the implications of the ECJ's rulings, which had either a relatively narrow scope or a very broad one, depending upon how the judgments were to be interpreted. The position was not assisted by the ECJ sticking to what appeared to be a narrow formulation of the principle that it was applying (for example, Case C-444/12 *Hardimpex Kft v Nemzeti Ado- es Vamhivatai Ugyek es Adozok Ado Foigazgatosaga* ECLI:EU:C:2013:318, appeared to limit the principle to situations in which a person knew or should have known of the irregularity in question). It was not until Case C-131/13 *Staatssecretaris van Financien v Schoenimport "Italmoda"* ECLI:EU:C:2014:2455, that it became clear that the ECJ was applying a principle of general application (it will be observed from para. 47 of the judgment that even the Commission had thought that the principle was narrower in scope).

The situations in which the Court says that a precedent does not say what it means or does not mean what it says usually produce a restatement of the proposition in question

which is either a reflection of what the Court originally meant to say or a development of what it had said previously.

Two other techniques can be identified in the case law. The first is what I shall call "judicial amnesia", which is the pretence that a precedent does not exist. A good example is Case C-589/12 *Commissioners for Her Majesty's Customs and Excise v GMAC UK plc* ECLI:EU:C:2014:2131 (a case in which there was no Advocate General. Reading the judgment, one would not notice that the ECJ was overruling four of its previous judgments (these were Case 8/81 *Becker v Finanzamt Munster-Innenstadt* [1982] ECR 53, paras. 44–46 and 49 (not an obscure case); Case 255/81 *R.A.Grendel GmbH v Finanzamt fur Korperschaften de Hamburg* [1982] ECR 2301, para. 11; Case 70/83 *Kloppenburg v Finanzamt Leer* [1984] ECR 1075, para. 14; and Case 207/87 *Weissgerber v Finanzamt Neustadt an der Weinstrasse* [1988] ECR I-4433, para. 16) and going against at least one Advocate General's Opinion (opinion in Case C-62/93 *BP Soupergaz* [1995] ECR I-1883, para. 31). Those precedents, relating to the operation of the principle of the direct effect of directives in the particular context of VAT, effectively determined the issue in the *MDDP* case (above). This technique is not a wise one to use because, should the repressed precedent come to light: it suggests that the judgment in question is *per incuriam* (i.e. has been made in ignorance of the previous decision(s): the reader does not know that the Court was actually aware of the precedent and consciously decided not to follow it); the suppressed precedent is, at least notionally, left untouched and may be regarded as a valid precedent or a valid indication of how the Court may decide a case in the future (which may or may not be the case); and the result is confusion (causing, in addition, a lack of confidence in the Court). The problem with the suppression of a precedent is that one does not know what the Court (the ECJ of GC) would think of a judgment that omits reference to the precedent when considering a similar issue in a later case; and the Court might not know why the precedent had been (apparently) ignored.

The second technique is what I shall call "damning with faint praise" (that is, distinguishing a case on flimsy grounds while in reality disapproving it). An example of that is to be found in Case C-122/16 *P British Airways plc v Commission* ECLI:EU:C:2017:861, which raised a rather arcane question concerning the extent to which the Court can go beyond the scope of a form of order that seeks the partial annulment of the decision contested in the action when the Court has decided that, for reasons of public policy, the entire decision should be annulled. British Airways relied, *inter alia,* on a passage in Case 37/71 *Jamet v Commission* [1972] ECR 483, para. 12 (see also opinion in Case C-355/95 *TWD v Commission* [1997] ECR I-2549, paras 23–24), in support of the proposition that the Court is not confined to the form of order when it is obliged to raise the illegality of a decision of its own motion. The ECJ dismissed British Airways' arguments without mentioning *Jamet*; but that case figures in footnote 58 in the Advocate General's Opinion at the end of para. 108 of the Opinion (Case C-122/16, Opinion of AG Mengozzi), which dismisses the preceding case law as "implicit, isolated, old and, it would appear, limited to proceedings relating to civil service disputes". One is compelled to infer from the judgment

in *British Airways* that, as a general proposition and despite *Jamet*, the ECJ and GC are confined to the form of order in the case, even where the annulment of the contested measure in its entirety is a matter of public policy that the Court must take of its own motion (and even where, it must be said, a form of order seeking the annulment of the contested measure in its entirety would have been inadmissible: see e.g., Case T-691/14 *Servier SAS and others v Commission* ECLI:EU:T:2018:922, para. 92).

However, the treatment given in the Advocate General's Opinion is unsatisfactory. Taking in turn the reasons given by him, in ECJ and GC cases, precedents are often "implicit" due to the style of drafting judgments. For example, an unwritten principle of EU law often starts off with a case in which the ECJ declares that it is not contrary to EU law for a Member State to apply the principle in question. In a later case, it is then stated that the principle is a principle of EU law. The fact that a precedent is "isolated" is not obviously relevant unless, by that, is meant that the precedent is surrounded by more or less contemporary cases going in a different direction, which enables one to conclude that the precedent in question is a "one off" or an exception (in which case, *that* is how one disposes of the precedent). The fact that a precedent is "old" does not appear to be relevant: most celebrated precedents tend to be "old". The fact that a particular precedent or group of precedents appears in one area of EU law (which, as it happens, was not the case because, in *British Airways*, the precedents in question were not limited to staff cases) is spectacularly irrelevant unless there is some peculiarity about that area of the law that explains the precedent and also indicates why it cannot be transposed to another area of EU law (again, no such factor was indicated in *British Airways*). That last factor (the apparent restriction of the precedents to staff cases) is unsatisfactory for a further reason: it leaves open the possibility that the earlier precedents might still apply to staff cases. It seems that the better way of assessing the Advocate General's Opinion is to focus on what appears to be the real significance of the words "isolated" and "old": a precedent may be disavowed or overruled where it has been forgotten or left behind by an alternative line of precedents that has developed in apparent ignorance of the "isolated" and "old" precedent. This is also a good illustration of the problem that may arise where a court's institutional memory is lost.

6. The Problematic Precedents Relating to the Direct Effect of Directives

Before turning to consider how ECJ and GC precedents were used by English courts, it may be useful to explain further two of the points made above, concerning the CJEU's loss of its institutional memory and the technique of judicial amnesia, because they can be illustrated by reference to the same cases, which provide quite a neat way of looking

at how a precedent (in the sense of a case that establishes a principle) can emerge, develop and then die away.

The area of the law under consideration is value added tax (VAT), an indirect tax developed by the EU in order to replace national turnover taxes by a tax better suited to cross-border chains of transactions. In brief, VAT is a tax on the final consumer that is paid in instalments at each transaction stage from production to consumption. VAT is paid by the purchaser to the supplier at each stage and the supplier accounts to the national tax authorities for the slice of VAT attributable to the supply that he makes to the purchaser (supplies made *by* one person to another are the former's output transactions whereas a supply made *to* a person is that person's input transaction; hence the VAT charged *by* one person to another is the former's output tax and the latter's input tax).

In the *Becker* case (Case C-8/81), decided in 1982, Germany had failed to implement what was then the Sixth VAT Directive by the appointed implementation date. The consequence was that, for a period of time, certain supplies were subject to VAT under German law when they were supposed to be exempt from VAT under the Sixth Directive. Mrs. Becker, a credit broker, applied the exemption to her credit-broking transactions, as required by the Sixth Directive, and did not account for VAT on them, contrary to German law. When sued by the German tax authorities for non-payment of VAT, Mrs. Becker claimed that she was relieved of the obligation to account for VAT because the Sixth Directive overrode her obligation under German law. It should be noted that, under German law, Mrs. Becker could deduct her input tax when accounting for VAT on her supplies of credit-broking services so that she was obliged to pay the difference between the VAT that she should have charged her customers and the VAT that she had herself paid to the businesses supplying her with goods and services that she was using in her business as a credit broker. However, the effect of exempting a transaction is to make it (in effect) the final transaction in a transaction chain for VAT purposes; and a person making an exempt supply cannot deduct input tax.

In *Becker*, the German tax authorities and the German government made a full-scale attack on the principle of the direct effect of directives, which the ECJ had developed in a few previous cases (e.g., Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337). That caused the ECJ to explain, at greater length in the judgment in *Becker* than it had previously done, what was the rationale behind the principle of direct effect. The argument that really troubled the Court was the argument that, unlike other directives that, in previous cases, had been recognized as having direct effect, VAT was a system of taxation and the tax treatment of any one transaction had an effect on how VAT applied to other transactions in the same chain of transactions. Accordingly, it was argued, the direct effect of the Sixth Directive could not be recognized in relation to Mrs. Becker's supplies of credit-broking services alone without affecting the application of the tax to all the other supplies in the chains of transactions of which those services formed a part; yet it was by no means clear that any of the other persons in those chains wanted to have, or had had, their transactions dealt with under the Sixth Directive regime, as opposed to German law.

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The result was that the judgment in *Becker* contains a sequence of paragraphs addressing the problem identified by the German authorities. Those paragraphs are divided into two parts. The first part addresses the position of the person invoking the principle of direct effect and the necessity for that person to act consistently with his reliance on direct effect. The second part addresses more general difficulties arising from non-implementation of a directive, particularly the possible disruption of the operation of VAT down the chain of supply when one person in the chain acted out of step with the others, thereby affecting (perhaps unbeknownst to them) those other persons in the chain. The ECJ ruled that, under the scheme of the Sixth Directive, exemption necessarily involves a waiver of the right to deduct input tax and an inability to pass VAT onto the next person in the chain of transactions; accordingly, where a person did exactly that, there could be no objection to acknowledging his right to rely on the direct effect of the Directive (paras. 44–46). In contrast, if direct effect caused difficulties in the operation of the tax simply because *different* persons acted differently (some relying on the Directive and others relying on national law), that was not an impediment to the operation of the principle of direct effect; the Member State concerned had to put up with it because the creation of that situation was down to the Member State and no other person (para. 47).

Several points should be noted about the judgment in *Becker*. First, the ECJ was consciously addressing its remarks to a wider audience than the parties to the case and the referring court: apart from laying down in clear terms (and effectively for the first time) what the principle of the direct effect of directives was about (paras. 17–25), the ECJ was also addressing the tax authorities of the Member States and taxable persons in general. Secondly, the point that is of particular concern in the present context (the behaviour of the person invoking the principle of direct effect in the context of VAT) was the clear and obvious, logical consequence of the purpose of the principle of direct effect: the need to secure respect for the *result* intended by the directive in question. Thirdly, the ECJ expressed itself in a typically elliptical way: read literally, the judgment allowed persons whose behaviour was entirely consistent with the Sixth VAT Directive to claim the direct effect of that directive but said nothing about the position of persons whose behaviour was not consistent in all relevant respects with that directive (apart from implying that, in relation to such persons, the objections to direct effect raised in *Becker* would have to be considered).[2] The operative part of the judgment allowed a credit negotiator to invoke the direct effect of the exemption "where he had refrained from passing that tax on to persons following him in the chain of supply", leaving it unclear whether that phrase referred to the facts of the case (and therefore leaving it open to argument that direct

[2] That is the literal meaning of paras 45–46 of the judgment, in which the arguments of the German authorities were said to be unfounded (para. 45) or irrelevant (para. 46) where the person invoking direct effect had acted consistently with the Sixth VAT Directive. Note also the Advocate General's Opinion at pp. 79 and 84: Mrs. Becker had apparently acted consistently with the Sixth VAT Directive and it was wholly unclear whether or not any difficulties had ensued, or would in fact do so, as a result of her reliance on direct effect. Hence, the problem of a person acting inconsistently with his or her election to invoke direct effect did not arise on the facts of the case.

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effect could be invoked in other factual situations) or was a limit on the ability to invoke direct effect. It should also be noted that the operative part was only a partial reflection of what the ECJ had said in paragraphs 44–45 of the judgment.

Later in 1982, the ECJ decided the *Grendel* case (Case 255/81), whose facts were essentially the same as those in *Becker*. In *Grendel*, attempts were made to get the ECJ to reverse *Becker*. The ECJ declined to do so and made the same ruling as in *Becker*, complete with the qualifying words found in the operative part of the judgment in *Becker*. In 1984, the *Kloppenburg* case (Case 70/83) produced a variation on the fact-pattern because it concerned the legal effect of a later directive (the Ninth VAT Directive) which purported to extend the time limit within which certain Member States (including Germany) had to implement the Sixth VAT Directive. In paragraph 9 and the operative part of the judgment, the ECJ limited the ability to invoke the direct effect of the exemption in question to a person "who had not passed on the tax to persons following him in the chain of supply". It is interesting to note that Advocate General Verloren van Themaat took the view (on the basis of *Becker*) that a person is entitled to rely on "the intended effect of the directive", either through national law when the directive has been implemented or on the basis of the directive itself if it has not been implemented; and that led him to focus on "taxpayers who relied on the directive in good faith *and refrained from passing on any tax to their customers*" (Case 70/83, Opinion of AG Verloren van Themaat, pp. 1091–1092). The emphasis, again, was on the consistency with the Sixth VAT Directive of the behaviour of the person claiming direct effect.

We then move to 1988 and the *Weissgerber* case (Case 207/87). There, Weissgerber, a credit negotiator, had received commission from his clients by way of consideration for the supply to them of credit negotiation services. VAT had not been included in express terms in the relevant invoices, but the commissions had been included in Weissgerber's VAT assessments as part of his taxable turnover. It follows that he had accounted for VAT to the German tax authorities; but it should be noted that the VAT assessments were drawn up by the tax authorities on the basis of Weissgerber's tax returns (see para. 5). When he heard of the *Becker* line of cases, Weissgerber discovered the possibility of invoking the direct effect of the Sixth VAT Directive and requested the tax authorities to amend his returns (the purpose of doing so would have been to get back the output tax on his commissions that he had accounted for to the German tax authorities). After court proceedings had been initiated, the German tax authorities conceded (apparently on the basis of the ECJ cases) that Weissgerber's supplies of services as a credit negotiator were exempt. Further court proceedings were then initiated because the tax authorities took the view that Weissgerber had passed on VAT "covertly"; and that issue gave rise to a reference for a preliminary ruling to the ECJ. It will be observed that the assumption underlying the actions of the German tax authorities, and the decision of the German court to make the reference, was that the *Becker* line of cases excluded direct effect if the person concerned had "passed on" VAT to the next person in the chain of supply. The issue in the *Weissgerber* case was whether or not there was "passing on" of the tax if VAT

was not mentioned separately in the invoices or credit notes. In the judgment, the ECJ refused to reconsider its previous judgments and, importantly, referred to the qualifying words in the operative part of those judgments ("where he had refrained from passing that tax on to persons following him in the chain of supply") as expressing a *condition* for the exemption of a supply from VAT (by invoking direct effect) (paras. 10, 11 and 15). When explaining the nature of that condition, the ECJ began by repeating what had been said in *Becker*: exemption necessarily entailed certain consequences. The condition found in the operative part of the earlier judgments was a "particular" aspect of the consequences of claiming exemption. The condition was designed to prevent a particular form of disruption of the VAT system which could arise where the person claiming exemption had charged VAT to a customer who had then deducted it from his own output tax liability (paras. 13–15).

It should be noted that the source of the "condition" that had emerged in the case law was the statement in *Becker* that, under the legislative scheme, a person claiming exemption necessarily accepted two consequences: waiver of the right to deduct input tax; and an inability to charge output tax to a customer. That was the ECJ's answer to the objection to direct effect raised in *Becker*, that acknowledging direct effect could act to the detriment of other persons following or preceding the person claiming direct effect in the chain of supply. The "condition" fortuitously focused on the second aspect (the effect on persons further down the chain of supply) because that was perceived to be the particular problem that had arisen in the post-*Becker* cases. The true meaning of the ruling in *Becker* was that a person's tax position had to be considered in the round; and that exemption could not be considered in isolation from its two consequences. That was well understood in later cases. In Case C-62/93 *BP Soupergaz v Greek State* [1995] ECR I-1883, for example, Advocate General Jacobs observed:

> […] in the case of a directive such as the Sixth Directive, which lays down a comprehensive scheme of taxation, it is in my view possible to determine whether a taxable person has overpaid tax under national rules only by considering the combined effect of all relevant provisions of the directive on the transactions in question and by comparing the resultant liability with that arising under the national rules. The provisions determining the liability of a taxable person in respect of a particular transaction must be regarded as an inseparable whole. (Case C-62/93, Opinion of AG Jacobs, para. 31)

It is also important to note that the condition laid down in the cases was directed at the behaviour of the person invoking the direct effect of the directive in question: his behaviour had to be consistent with the consequences of his reliance on direct effect, as ascertained by reference to the scheme of the directive.

In later years, that aspect of direct effect drops out of sight in the ECJ's case law, probably because the cases that came before it tended to involve the other problem concerning direct effect: administrative difficulties caused by the failure of the Member State itself to implement the EU VAT legislation properly or at all, rather than difficulties arising from the behaviour of the person invoking direct effect. Then, in 2013, we get to the *MDDP* case (Case C-319/12). There, under Polish law, the supply of educational services

was exempt from VAT. MDDP was a supplier of such services and therefore found that it was unable to deduct input tax on the inputs that it acquired in order to enable it to supply educational services. MDDP invoked the direct effect of EU VAT legislation (at that time, Directive 2006/112, which had replaced the Sixth VAT Directive), contending that EU law did not permit the exemption of the particular educational services that it was providing. MDDP's intention was to obtain the deduction of its input tax. However, the consequence of its argument was that it would have to account for output tax on its supplies of education; and MDDP did not want to account for output tax. It wanted to rely on direct effect in order to get the benefit of input tax deduction but it wished to continue to rely on the exemption provided for in national law in order to refrain from charging, and accounting for, output tax, in accordance with the rule that a private person can invoke direct effect against a Member State but a Member State cannot invoke direct effect against a private person (cf. Case C-319/12, Opinion of AG Kokott, para. 40).

In the light of *Becker* (and, in particular, the way in which *Becker* was applied in the post-*Becker* cases), the answer to the conundrum posed in *MDDP* was obvious: MDDP could not invoke the direct effect of the EU legislation without taking the necessary consequences, namely, that if MDDP claimed that its supplies were taxed under the EU legislation, it could get deduction of input tax but only if it accounted for output tax; it also followed specifically from the earlier cases that, if MDDP had previously failed to charge VAT to its customers, in reliance on national law, it could not disrupt the chains of supply in which it was involved by reversing its position in reliance on EU legislation. However, apart from a footnoted reference to a different paragraph of the judgment in *Becker*, the *Becker* line of cases is not referred to, either in the judgment or the Advocate General's Opinion. There is no suggestion that those cases were known. What happens is that, in the judgment and the Advocate General's Opinion in *MDDP*, we get a lengthy reinvention of the wheel. The same result as that reached in *Becker* is arrived at, but by a slightly different route. It is interesting to note that in a previous case (Case C-401/05 *VDP Dental Laboratory NV v Staatssecretaris van Financien* [2006] ECR 1-12121) Advocate General Kokott had opined against what she described as the "asymmetrical reliance" on a directive (para. 95). Although she refers in the preceding sentence to para. 49 of the judgment in *Becker* (which was relevant to a different point), there is no mention of paras 44–46 of *Becker*, which she could have invoked in order to support her views. In the following year (2014), we get to *GMAC*, a particularly egregious example of the type of conduct that had been discussed before the ECJ in *Becker* and that the ECJ had decided was an unacceptable use of the principle of direct effect.[3] This time, the *Becker* line of cases is cited to the ECJ; but there is no Advocate General's Opinion and no mention of those cases is made

[3] As in MDDP, GMAC was relying selectively on the direct effect of EU legislation and national law in order to contrive a tax advantage that was not available under either EU law, taken alone, or national law, taken alone. In GMAC, the contrivance was particularly bad because the idea was to siphon money out of the fisc. The Commission thought that GMAC's behaviour was unacceptable but could not be prevented (however, the Commission had been unaware of the Becker line of cases when it formulated its position).

in the judgment. The approach to VAT previously taken in earlier years (and exemplified in the passage from the Advocate General's Opinion in *BP Soupergaz* quoted above – also cited to the ECJ in *GMAC)* is ignored, as is the approach taken in *MDDP* (which, although slightly different from *Becker*, applies the same underlying principles). The result in *GMAC* was that the ECJ endorsed an abusive manipulation of the principle of direct effect which perverted the result intended by the directive in question (contrary to the principle of direct effect itself).

Of course, not every decision of a court is correct. It could be concluded that *GMAC* is wrongly decided. On the other hand, whether rightly or wrongly decided, it is not a decision made in ignorance of previous decisions; and it is relevant to look at it from the perspective of how precedents are handled (or mishandled). It seems to be clear that, at some point in time, the ECJ's institutional memory failed it. Not only did a line of cases drop out of the ECJ's understanding of its decisional practice but, with it, went an understanding of how the direct effect of directives works where, as in the case of VAT, the different provisions of a directive interlock. It is also clear that the significance of certain passages in *Becker* (not an obscure case) had ceased to be understood once the context of *Becker* (namely, the forceful opposition in Germany to the concept of the direct effect of directives – and Germany was not alone) had been forgotten. The result was that, after a lapse of time, the ECJ found itself recreating lines of reasoning designed to deal with problems that it had already resolved. However, when the earlier solutions were drawn to its attention, it found itself unable to absorb those solutions into its developing ideas and preferred to ignore them, at least for the moment (*GMAC* does not, after all, expressly disavow the earlier cases).

Before leaving *GMAC*, it is worth noting that, in that case, the ECJ took up the description of the taxpayer's behaviour in that case as "abusive" and held that there was only one form of "abuse" known to EU VAT law: that defined in Case C-255/02 *Halifax plc and others v Commissioners of Customs & Excise* [2006] ECR I-1609 (see *GMAC*, para. 45). In its view, GMAC's behaviour could be criticised as abusive only if it corresponded to that particular form of abuse. However, the ECJ overlooked the fact that, in 2010, it had accepted the possibility of "abuse" occurring in the context of VAT but in a form that did not correspond to *Halifax*-type abuse (Case C-581/08 *EMI Group Ltd v Commissioners for HM Revenue & Customs* [2010] ECR I-8607, para. 39; the observation in *EMI* has been repeated in later cases). The topic of "abuse" (whether abuse of right or abuse of law), as it has been explored in the case law of the ECJ, is itself a complicated subject. For present purposes, it is sufficient to note that, in *GMAC*, the ECJ seems to have thought that it was caught in the trammels of one line of precedent (that relating to "abuse" as understood in the context of VAT) and had no wish to be entangled in another (the *Becker* cases); but it had an incomplete understanding of the former and therefore missed the opportunity of bringing some order into the cases.

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7. The Handling of EU Precedents by English Courts

Before Brexit, ECJ and GC precedents were dealt with by English courts in effectively the same way as other precedents. However, there are two points that should be mentioned about that. The first is that English courts comprise English lawyers, not EU lawyers. Contrary to what may be believed in some quarters, law and legal reasoning are not universal values that descend automatically on a person when donning the robe of a judge. English lawyers and EU lawyers cannot be assumed to think in the same way about legal problems or to express themselves in the same language, using the same mix of legal concepts (the same can be said of judges of other countries). As English judges were not as steeped in EU law as they are in English law, their handling of EU precedents had a tendency to be rather wooden. Often, an English court would take a great deal of time to explain a relatively simple proposition of EU law – and then get it slightly wrong. That meant that particular caution had to be exercised before using a decision of an English court as a reliable precedent for a proposition of EU law. Secondly, there is the problem of the power to make a reference for a preliminary ruling, which affects the way in which EU precedents are treated: although a national court against whose decisions there is a judicial remedy under national law is perfectly entitled to make its own mind up about a point of EU law, and therefore come to its own conclusion about the interpretation and relevance of an ECJ or GC judgment, a national court against whose decisions there is no judicial remedy is obliged to make a reference to the ECJ unless the matter is "acte clair" – so obvious that there is no scope for reasonable doubt (Case 283/81 *CILFIT and another v Ministry of Health* [1982] ECR 3415). Accordingly, an EU precedent must be totally clear if it is to be relied on by a national court of the latter sort (and no reference is to be made) whereas it need not be totally clear to be followed by a lower court. A related problem is the way in which EU precedents interfered in the English system of precedent.

The effect of section 3(1) of the European Communities Act 1972 was to make UK courts bound by previous decisions of the CJEU (unless a reference were made to the ECJ). That meant that English courts were not necessarily bound by previous decisions of English courts in regard to matters of EU law (*Crehan v Inntrepreneur Pub Co* [2004] EWCA Civ 637, para. 134). The point has been put by the ECJ in broader terms: a national court is free to make a reference to the ECJ even if, under national law, it is bound by a previous decision of a higher court in the same case or a previous case (e.g., Case 166/73 *Rheinmuhlen-Dusseldorf* [1974] ECR 33; Case 146/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* [1974] ECR 139, paras. 2–3; Case C-173/09 *Elchinov v Natsionalna zdravnoosiguritelna kasa* [2010] ECR I-8889, paras. 21–32; Case C-416/10 *Krizan v Slovenska inspekcia zivotneho prostredia*, ECLI:EU:C:2013:8, paras. 66–73). That potentially causes difficulties from the perspective of a higher national court (such as, before Brexit, the Court of Appeal of England and Wales) which sees a part of its role as being

to maintain a certain degree of hierarchical discipline amongst the courts under its jurisdictional control. Accordingly, a more nuanced approach seeking to reconcile the discretionary power of lower courts to make a reference with the judicial hierarchy may be adopted (see *Conde Nast Publications Ltd v Revenue & Customs Commissioners* [2006] EWCA Civ 976, [2007] 2 CMLR 904, [2006] STC 1721, paras 44–46).

In order to wriggle out of the desirability of making, or (in the case of courts against whose decisions there is no judicial remedy) the necessity to make, a reference for a preliminary ruling to the ECJ, a national court may seek to exploit the fact that the ECJ's jurisdiction, in the context of a preliminary ruling, is to rule on the meaning or effect of EU law, not apply EU law to the facts of the case before the referring court. However, the distinction between interpreting EU law and applying it is not as clear cut as is often thought (cf. Lasok, 2012; Atkin's Court Forms 2016: para. 24). Where a reference has been made to the ECJ in a particular case, persuading a court not to follow it in the same case is difficult but not impossible (see *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15 (13 March 2013) and [2013] UKSC 42 (20 June 2013)). In *Littlewoods Ltd and others v Commissioners for HM Revenue and Customs* [2017] UKSC 70, [2017] 3 WLR 1401, paragraphs 51 ff, the Supreme Court circumvented an ECJ judgment (delivered in the same case), without a second reference back to the ECJ (even though the Supreme Court was disagreeing with the courts below), by following a tortured and highly artificial line of reasoning that can scarcely be regarded as within easy reach of the concept of "acte clair".

8. Concluding Remark

From the practitioner's perspective, the doctrine of precedent is deceptive (whether it takes the hard form of *case law* or the softer form of *jurisprudence*): judges are adept at finding ways around a precedent, if they wish to do so. It is always necessary to gauge how the court to which a point is being made is thinking and what are the factors that may cause it to decide one way rather than another. Accordingly, it is never sufficient to rely on an earlier decision as a precedent. The underlying justification for the precedent and its continuing relevance to the case in hand must always be borne in mind.

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