

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

The Limits of Legal Reasoning and the European Court of Justice

The ECJ is widely acknowledged to have played a fundamental role in developing the constitutional law of the EU, having been the first to establish such key doctrines as direct effect, supremacy, and parallelism in external relations. Traditionally, EU scholarship has praised the role of the ECJ, with more critical perspectives being given little voice in mainstream EU studies. From the standpoint of legal reasoning, Gerard Conway offers the first sustained critical assessment of how the ECJ engages in its function and offers a new argument as to how it should engage in legal reasoning. He also explains how different approaches to legal reasoning can fundamentally change the outcome of case law and how the constitutional values of the EU justify a different approach to the dominant method of the ECJ.

Gerard Conway is a lecturer in law at Brunel University in London. He has also been a visiting lecturer at the University of Buckingham.

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

Cambridge Studies in European Law and Policy

This series aims to produce original works which contain a critical analysis of the state of the law in particular areas of European Law and set out different perspectives and suggestions for its future development. It also aims to encourage a range of work on law, legal institutions and legal phenomena in Europe, including 'law in context' approaches.

The titles in the series will be of interest to academics; policymakers; policy formers who are interested in European legal, commercial, and political affairs; practising lawyers including the judiciary; and advanced law students and researchers.

Joint Editors

Professor Dr. Laurence Gormley
University of Groningen, The Netherlands

Professor Jo Shaw
University of Edinburgh

Editorial advisory board

Professor Richard Bellamy, *University College London*

Professor Catherine Barnard, *University of Cambridge*

Professor Marise Cremona, *European University Institute, Florence*

Professor Alan Dashwood, *University of Cambridge*

Professor Dr Jacqueline Dutheil de la Rochère, *Université de Paris II, Director of the Centre de Droit Européen, Paris*

Dr Andrew Drzemczewski, *Council of Europe, Strasbourg*

Sir David Edward, *KCMG, QC, former Judge, Court of Justice of the European Communities, Luxembourg*

Professor Dr Walter Baron van Gerven, *Emeritus Professor Leuven and Maastricht, and former Advocate General, Court of Justice of the European Communities*

Professor Daniel Halberstam, *University of Michigan*

Professor Dr Ingolf Pernice, *Director of the Walter Hallstein Institut, Humboldt University*

Michel Petite, *Former Director-General of the Legal Service Commission of the European Communities, Brussels*

Professor Dr Sinisa Rodin, *University of Zagreb*

Professor Neil Walker, *University of Edinburgh*

Cambridge University Press

978-1-107-00139-8 - *The Limits of Legal Reasoning and the European Court of Justice*

Gerard Conway

Frontmatter

[More information](#)

Books in the series

EU Enlargement and the Constitutions of Central and Eastern Europe

Anneli Albi

Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective

Stefano Giubboni

The Constitution for Europe: A Legal Analysis

Jean-Claude Piris

The European Convention on Human Rights: Achievements, Problems and Prospects

Steven Greer

European Broadcasting Law and Policy

Jackie Harrison and Lorna Woods

The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space

Jo Shaw

Implementing EU Pollution Control: Law and Integration

Bettina Lange

The Evolving European Union: Migration Law and Policy

Dora Kostakopoulou

Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal

Urfan Khaliq

The European Civil Code: The Way Forward

Hugh Collins

State and Market in European Union Law

Wolf Sauter and Harm Schepel

The Ethos of Europe: Values, Law and Justice in the EU

Andrew Williams

The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries

Patrycja Szarek-Mason

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

The Lisbon Treaty: A Legal and Political Analysis

Jean-Claude Piris

New Governance and the Transformation of European Law: Coordinating EU

Social Law and Policy

Mark Dawson

The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press,
New York

www.cambridge.org

Information on this title: www.cambridge.org/9781107001398

© Gerard Conway 2012

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2012

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Conway, Gerard, 1976–

The limits of legal reasoning and the European Court of Justice / Gerard Conway.

p. cm. – (Cambridge studies in European law and policy)

Includes bibliographical references and index.

ISBN 978-1-107-00139-8

1. Court of Justice of the European Communities. 2. Judicial process –
European Union countries. 3. Law – European Union countries –
Interpretation and construction. 4. Law – European Union countries –
Methodology. I. Title.

KJE5461.C668 2012

347.24'012–dc23

2011020004

ISBN 978-1-107-00139-8 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to
in this publication, and does not guarantee that any content on such
websites is, or will remain, accurate or appropriate.

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

To my parents

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

Contents

<i>Series Editors' Preface</i>	<i>page</i> xiii
<i>Preface</i>	xv
<i>Table of Cases</i>	xix
1 Introduction and overview - interpretation and the European Court of Justice	1
Introduction	1
Methodological framework	5
The constitutional context and case selection	5
The universalisability of legal reasoning	9
The nature of interpretation	12
A note on terminology	17
'Activism', 'restraint', 'deference'	17
Terminology relating to interpretation	19
An overview of the court's case law - a short genealogy of judicial creativity	21
Introduction	21
'Constitutionalising' the Community	26
Free movement	40
Human rights	44
Criminal law	46
'Social Europe'	48
Conclusion	49
2 Reading the Court of Justice	52
Introduction	52
The early years, benign neglect and Rasmussen's critique	59
Bredimas	60
Rasmussen	60

X CONTENTS

Reaction to Rasmussen	64
Postscript to Rasmussen: Weiler on a normative theory	67
Institutional legal positivism and beyond	69
Bengoetxea	69
Maduro	74
Debating the Court	77
A dangerous institution? – Sir Patrick Neill and Judge	
David Edward	77
Hartley–Arnulf exchange	79
The intervention of Herzog and Gerken	83
Conclusion	84
3 Reconceptualising the legal reasoning of the European Court of Justice – interpretation and its constraints	86
Introduction	86
Democracy and the rule of law as meta-principles of political morality in the EU	89
Legitimacy	94
Evolutionary versus static interpretation of constitutions	97
General comments	97
Constituent power in the EU	100
Originalism contrasted with constitutional transformation or ‘juridical <i>coup d’état</i> ’	104
Some objections to originalist interpretation	107
The case for interpretative restraint in adjudication by the European Court of Justice	114
Linking democracy and the rule of law	114
Interpretation, abstraction and Waldron’s objection from democracy to constitutional review	117
Dworkinian interpretivism	120
A shared interpretative or hermeneutic framework of law	129
Texts, rules, principles and policies	139
Gaps and the completeness of the law	166
Conclusion	170
4 Retrieving a separation of powers in the European Union	172
Introduction	172
Definition and context of the separation of powers	175

Institutional configuration of the EU in light of a tripartite separation of powers	178
The legislature	178
The executive	182
The judiciary	186
The federal analogy	188
Final reflections on the separations of power in the Union	192
Some general comments	192
The concept of institutional balance	194
The Lisbon Treaty	198
Conclusion	199
5 EU law and a hierarchy of interpretative techniques	201
Introduction	201
Case studies from EU law	202
Criminal law and due process	202
Equality and citizenship	209
The interaction of the Common Foreign and Security Policy and common market competence:	
<i>Kadi</i> and smart sanctions	220
Conclusion	224
6 Levels of generality and originalist interpretation in the legal reasoning of the ECJ	225
Introduction	225
Two alternative approaches	227
The most specific relevant tradition and levels of generality	227
Coherence in determining levels of generality	229
The practicality of common principles of the Member States as a relevant tradition	232
Three case studies	232
State liability	233
Criminal law	237
The general law of external relations	240
Levels of generality and other interpretative considerations	242
Precedent in EU law	244
Conclusion	245

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

xii

CONTENTS

7 Subjective originalist interpretation in the legal reasoning of the ECJ	247
Introduction	247
Specific justification of subjective originalist interpretation	248
Direct v. indirect subjective originalist interpretation	248
Legal texts and corporate or collective intention	250
Overview of practice of the ECJ on evolutive interpretation	255
Two case studies	258
The supremacy doctrine	258
Case law doctrine on non-discriminatory obstacles	266
Conclusion	272
8 Conclusion	273
<i>Bibliography</i>	284
<i>Index</i>	310

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

Series Editors' Preface

Legal reasoning in the European Court of Justice has always been a source of much lively debate, often conducted in perhaps less than temperate terms. Allegations abound of Europe governed by judges, judges out of touch with the desires of the Member States and their populations, and judges making disastrous decisions. The debate really attracted attention with the Judicial and Academic Conference held at the Court in September 1976¹ in which Hans Kutscher lifted the veil to a certain extent on the Court's methods of interpretation: a lively debate ensued. That the Court has on many occasions been sensitive to criticism of its judgments is well known, but judicial toes should not be easily trodden on, as criticism does not have to be purely negative. A central part of the problem is that the judgments are often poorly reasoned in terms which can be readily understood. They have all the hallmarks of the definition of a picture of a camel (a horse, drawn by a committee), and recourse must frequently be had to the Opinion of the Advocate General to understand what is or may be meant. The canons of legal reasoning applied by the Court must be viewed in light of the objectives of the European Union and the fact that the Court is a creature of the Treaties, albeit a creature which takes account of general principles of law, both written and unwritten, and seeks to ensure that the actions of all the Union's institutions (including itself), agencies, other bodies comply with fundamental rights recognized in particular in the European Convention and in the Union's Charter. Against this

¹ Court of Justice of the European Communities, *Judicial and Academic Conference 27–28 September 1976, Reports* (Luxembourg, 1976); Conway refers to Judge Kutscher's contribution, which was undoubtedly the lead document, but the report also contains a number of other stimulating contributions.

background it might be thought that consistency and (to a certain extent at least) predictability in litigation should be achieved through the use of the known methods of interpretation. That this is not always the case gives cause for concern: on the one hand critics of European integration sense (rightly or wrongly) judicial activism; on the other hand it can be argued that the Court is merely confronting the Member States, the EU's institutions and indeed individuals with the logical consequences of what has been agreed.² And yet further it is sometimes argued that the Court is not always willing to follow the line of logic and consistency to reach a result which conforms to perceived expectations, sacrificing coherence on the altar of political convenience: the Court stands then accused of *uncommunautaire* reasoning.³

Gerald Conway's work is not simply yet another critical sally at the Court of Justice, but a most stimulating and constructive discussion with concrete proposals, looking at the work of classic legal theorists as well as at the work of celebrated writers discussing the pro-integration approach of the Court of Justice. This is a work which, the editors hope, will stimulate considerable discussion, not only in scholarly circles; it undoubtedly advances the literature on the methodology of the Court of Justice and contributes forcefully to the debate on legal reasoning in the Court of Justice. For these reasons in particular, we are very happy to welcome this work to the series *Cambridge Studies in Law and Policy*

Laurence Gormley
Jo Shaw

² E.g. P. Pescatore, *La carrence du législateur communautaire et le devoir du juge* in G. Lüke et al. (eds), *Rechtsvergleichung, Europarecht und Staatenintegration (Gedächtnisschrift für L.-J. Constantinesco, Heymans, Cologne, 1983)* 559–580.

³ E.g. L. W. Gormley, *Assent and Respect for Judgments: Uncommunautaire reasoning in the European Court of Justice* in L. Krämer et al. (eds.), *Law and Diffuse Interests in the European Legal Order (Liber amicorum N. Reich, Nomos, Baden-Baden, 1997)* 11–29.

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

Preface

This book seeks to offer a critical perspective on the legal reasoning of the European Court of Justice (ECJ). In particular, it focuses on the question of the limits of legal reasoning: how far creativity and freedom from constraint can go in the task of legal reasoning by the EU judiciary. This question has two aspects to it: the epistemic or descriptive possibility of conserving versus creative interpretation and the normative desirability of conserving versus creative interpretation. The argument of the book is that interpretation by the judiciary linked to the understanding or interpretation of the law-maker is both epistemically possible and normatively desirable. This conserving (or originalist or historical) approach to interpretation coheres much better with the rule of law and democracy, the twin pillars of accepted political morality in Europe, than the relatively creative, teleological approach to interpretation that is widely recognised to be the hallmark of the ECJ. It is in this sense that the book is 'critical' in its approach. However, it does not just engage in criticism, but also proposes an alternative methodology of interpretation that could be a practical guide for legal reasoning by the Court.

This is a relatively unorthodox approach in EU scholarship. As Shaw has been one of the first to note, a dominant tendency in writing in EU studies is to eulogise the contribution of the ECJ to enhancing integration, with the 'language of love' being suitable to describe how many EU specialists view the Court.¹ This comment echoes other sporadic observations in the literature. Alter has commented that many EU law academics act as a lobby

¹ J. Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic', *Oxford Journal of Legal Studies*, 16(2) (1996), 231–253, 243 referring to J. H. H. Weiler, 'A Quiet Revolution? The European Court of Justice and its Interlocutors', *Comparative Political Studies*, (1994) 26(5), 510–534, 531.

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

xvi PREFACE

group for the promotion of the jurisprudence of the ECJ,² while Klabbers observes that the community of EU law scholars tends to be a close-knit one that resists alternatives to its basic assumptions.³ Schepel has also very accurately captured this tendency, with the observation that critical approaches to the ECJ tend to be either denounced or ignored, and referred to the ‘complex stranglehold’ exercised by the ECJ on the academic literature.⁴ Rasmussen, the best known critic of the ECJ, whose important work was strongly attacked in reviews, referred to the Court’s ‘privileged relationship with academia’,⁵ a climate of opinion that, Shaw further noted, meant ‘few dared criticise the pre-eminent position of the Court of Justice’.⁶ It is hoped that the present work may be just one contribution to a more balanced academic treatment of the ECJ, and that it will contribute to a more open and diverse debate on the proper exercise of the competence of one of Europe’s most powerful institutions.

The book grew out of a long-standing research interest in the issue of creativity and constraint in judicial interpretation, which I began to study as an undergraduate student. I continued this interest on the Master of International and Comparative Law Programme at the University of Uppsala, Sweden, from which I greatly benefited. I developed the research interest especially as the subject of my doctoral thesis, which I completed at Brunel University, London. There are a large number of people to whom I am indebted. First, I would like to say special thanks to Professor Roda Mushkat, my principal supervisor at Brunel and now at John Hopkins University. The professionalism, skill and all-round helpfulness that she brought to the task made a very big contribution to the success of the research and made enjoyable the task of PhD research, and I remain very indebted for this. Two other

² K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law* (Oxford University Press, 2001), 58.

³ J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009), 142, 147–148.

⁴ H. Schepel and R. Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’, *European Law Journal*, 3 (1997), 165–188, 178.

⁵ H. Rasmussen, *On Law and Policy of the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986), 303.

⁶ Shaw, ‘European Union Legal Studies in Crisis?’, 246. The quite intense pro-integration ideology that can pervade EU studies is also captured, for example, in the comment of Dashwood that ‘... there was a time when it would have been considered impolite in Community circles to talk about drawing lines [or limits of Community competence] at all. That has changed; and I believe the change is healthy, and evidence of the growing maturity of the order’: A. Dashwood, ‘The Limits of European Community Powers’, *European Law Review*, 21 (1996), 113–128, 113.

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

people also deserve particular mention: Professor Tom Hadden, Queen's University Belfast, and Professor Abimbola Olowofoyeku, Brunel University. Professor Hadden was of help and support over several years, especially at one very important stage that facilitated the completion of my doctoral research. Professor Olowofoyeku was first a very helpful and supportive Head of School at Brunel Law School, and then a very fair and incisive internal examiner for my Brunel thesis. All three exemplify for me the values of professionalism, integrity and independence of mind that I would be like to emulate in my own career. I should also thank particularly the two external examiners at Brunel, Professor Christian Joerges (University of Bremen) and Professor Jo Shaw (University of Edinburgh), for their very helpful questions and comments on the parts of the thesis in the present work (although considerable parts were not in my Brunel thesis, and needless to say they do not necessarily endorse the parts that were), as well as for a fair and very thorough assessment of the thesis. Their own works were important sources I drew on in my research.

At Brunel, I would also like to thank the Library staff, who have been exceptionally helpful, especially Claire Grover, the Law Librarian, and Jo-Ann Nash, the Inter-Library Loans Librarian. Part of the research on which the book is based was facilitated by a PhD fees scholarship from the Department of Education of Northern Ireland and by a *Modern Law Review* Doctoral Scholarship (2006–2008). In particular, I am grateful to Mr Bob Simpson, London School of Economics and Political Science, and Mrs Michelle Madden, Queen's University Belfast, for overcoming administrative difficulty and facilitating the scholarship from the *Modern Law Review*. I would also like to thank all those colleagues at Brunel who have assisted my work during the preparation of the book. Part of this research was conducted while a visiting scholar at the University of Navarra, Spain, and I am grateful to Professor Rafael Domingo and Dr Nicolás Zambrana-Tévar for providing me with this opportunity. Dr Nicolás Zambrana-Tévar and Dr Fernando Simón Yarza also provided help subsequently, for which I also thank them.

I am very grateful to Sinéad Moloney, Joanna Breeze, and Richard Woodham of Cambridge University Press. Sinéad Moloney guided the publication process from the beginning with much tact and professionalism. All were patient with the extension of the submission deadline on several occasions. I would also like to thank Deborah Hey and Ramakrishna Reddy Syakam for their work on the manuscript. Further, I am very indebted to two anonymous reviewers from

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

xviii PREFACE

Cambridge University Press. They provided detailed and insightful comments on the first book proposal I submitted, which enabled me to develop the ideas in it considerably. Professor Emily Finch and Dr Stefan Fafinski provided valuable advice at an important point. I would also like to thank the following for facilitating my research directly or indirectly or discussing the issues raised in this book with me over the past number of years (though they may disagree with much of the content), in alphabetical order: Dr Gunnar Beck, Professor Iain Cameron, Dr Patricia Conlan, Dr Alpha Connelly, Dr Vicki Conway, Professor Gràinne de Búrca, Stephen Dodd BL, Dr Susan Easton, Professor Susan Edwards, Gianluca Gentili, Dr Ester Herlin-Karnell, Amanda Kunicki, Dr Leanne O'Leary (for help and advice over several years), Professor Roberto Toniatti, Terese Violante and Professor Emilio Viano. Some of the ideas in the book were presented at a master's course in international law I taught at the University of Buckingham in 2009, and I am grateful to Professor Edwards for inviting me to teach the course and to the students who took it for their comments.

I am grateful to the publishers for allowing me to reproduce in large part two articles from the *European Law Journal* (G. Conway, 'Levels of Generality in the Legal Reasoning of the European Court of Justice', *European Law Journal*, 14(6) (2008), 787–805 and 'Recovering a Separation of Powers in the European Union, 17 *European Law Journal*, forthcoming). Parts of an article in the *German Law Journal* (G. Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ', *German Law Journal*, 11(0) (2010), 966–1004) are also used.

I would like to express my thanks and gratitude to my family for their support while I was writing this book: my parents (to whom the book is dedicated) and brothers Brian, Noel, Joe and Paul. In particular, my parents supported my education long after they were entitled to think their job in that respect was done.

Finally, the book has been written in the belief that discussion of legal reasoning and legal theory should be expressed as clearly as possible⁷ (it is easy to get the impression that some writing in legal theory are pleased at the perceived inaccessibility of their work). The present work seeks to eschew this tendency, though it may well be that the end result falls short of the intention. The usual caveat applies: the content and any errors in the book are the sole responsibility of the author.

⁷ H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71(4) (1958), 593–629, 593.

Table of Cases

Council of Europe

- Bosphorus Hava Yollari v. Ireland* (2006) 42 EHRR 1 224
Golder v. UK (1975) 1 EHRR 524 112
James and Ors v. UK, Series A, no. 98 (1986) 8 EHRR 123 112
Kjeldson and Ors v. Denmark (Danish Sex Education) (1976) 1 EHRR 711 113
Öztürk v. Germany [1984] 6 EHRR 409 161
Soering v. UK (1989) 11 EHRR 439 112
Tyrer v. UK (1978) 2 EHRR 1 112

EU

CFI/General Court

- Case T-115/94, *Opel Austria v. Council* [1997] ECR II-39 229
 Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649 220, 221
 Case T-47/03, *Sison v. Council* [2005] ECR II-1429 223
 Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chemicals v. Commission*
 [2007] ECR II-3523 209

ECJ¹

- Case 1/54, *France v. High Authority of the European Coal and Steel Community*
 [1954–1955] ECR 1 24, 25
 Case 6/54, *Netherlands v. High Authority* [1954–1956] ECR 118 24

¹ Articles 251–281 of the Treaty on the Functioning of the European Union refer to the ECJ as the ‘Court of Justice’ (the latter term alone was generally used in previous Treaty Provisions), but the commonly used terms ‘European Court of Justice’ or ‘ECJ’ are used throughout the present work.

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

XX TABLE OF CASES

- Case 8/55, *Fédération Charbonnière Belgique v. High Authority* [1954–1956] ECR 260 24
- Case 7/56, 3/57 to 7/57, *Alegra and Ors v. Common Assembly of the ECSC* [1957] ECR 39 166
- Case 9/56, *Meroni v. High Authority* [1958] ECR 133 197
- Case 15/60, *Simon v. Court of Justice* [1961] ECR 115 258
- Case 10/61, *Commission v. Italy* [1961] ECR 1 36
- Case 3/62, *Commission v. Luxembourg and Belgium* [1964] ECR 625 24
- Case 25/62, *Plaumann & Co. v. Commission* [1963] ECR 95 205, 206
- Case 26/62, *Van Gend en Loos* [1963] ECR 1 27, 79, 105, 132, 172, 188, 213, 229, 258, 260
- Cases 28–30/62, *Da Costa* [1963] ECR 31 131
- Case 6/64, *Costa v. ENEL* [1964] ECR 585 9, 29, 63, 105, 149, 172, 188, 189, 229, 258, 259
- Joined Cases 56/64 and 58/64, *Grundig and Consten v. Commission* [1966] ECR 299 149
- Case 57/65, *Lütticke GmbH v. Hauptzollamt Saarlouis* [1966] ECR 205 27
- Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419 44, 132
- Case 9/70, *Franz Grad* [1970] ECR 825 28, 29
- Case 11/70, *International Handlesgesellschaft GmbH* [1970] ECR 1125 29, 86, 190
- Case 22/70, *Commission v. Council (Re European Road Transport Agreement) ('ERTA')* [1971] ECR 263 31, 32, 151, 241
- Case 51/70, *Lütticke v. Hauptzollamt Passau* [1971] ECR 121 147
- Case 80/70, *Defrenne v. Belgian State ('Defrenne I')* [1971] ECR 1–445 210
- Case 181/73, *R & V. Haegeman v. Belgium* [1974] ECR 449 80
- Case 2/74, *Reyners v. Belgium* [1974] ECR 631 255
- Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837 40, 41, 61, 76, 266, 267
- Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale* [1974] ECR 1405 28
- Case 35/75, *Matisa v. Hza. Berlin* [1975] ECR 1205 149
- Case 43/75, *Defrenne v. SABENA ('Defrenne II')* [1976] ECR 455 28, 48, 61, 80, 165, 210, 211, 212
- Opinion 1/76 Re Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741 33, 151
- Case 33/76, *Rewe Zentralfinanz v. LS* [1976] ECR 1989 236
- Case 45/76, *Comet v. Produktschap* [1976] ECR 2043 236
- Case 71/76, *Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765 43

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

TABLE OF CASES xxi

- Case 85/76, *Hoffman-La-Roche* [1979] ECR 461 205
- Case 106/77, *Simmenthal Spa v. Italian Minister for Finance* [1978] ECR 629 9, 30, 189, 234
- Case 142/77, *Kontroll med aedle Metaller v. Preben Larsen* [1978] ECR 1543 61
- Case 149/77, *Defrenne v. SABENA* [1978] ECR 1365 210
- Case 98/78, *Racke v. Hauptzollamt Mainz* [1979] ECR 69 93
- Case 120/78, *Rewe-Zentrale AG AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649 40, 266, 267
- Joined Cases 66, 127, and 128/79, *Amministrazione delle Finanze v. Srl. Meridionale Industria Salumi* [1980] ECR 1237 159
- Case 34/79, *R v. Henn and Darby* [1979] ECR 3795 269
- Case 104/79, *Foglia v. Novello (No. 1)* [1980] ECR 745 168
- Case 138/79, *Roquette Frères v. Council* [1980] ECR 3333 197
- Case 139/79, *Maizena GmbH v. Council* [1980] ECR 3393 197
- Case 149/79, *Commission v. Belgium* [1980] ECR 3881 255
- Case 155/79, *A. M. & S. Europe Ltd v. Commission* [1982] ECR 1575 208, 232
- Case 812/79, *Attorney General v. Burgoa* [1980] ECR 2787 37
- Case 66/80, *ICC v. Amministrazione delle Finanze* [1981] ECR 1191 131
- Case 244/80, *Foglia v. Novello (No. 2)* [1981] ECR 3045 168
- Case 14/81, *Alpha Steel* [1982] ECR 769 31
- Case 53/81, *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035 50
- Case 104/81, *Hauptzollamt Mainz v. CA Kupferberg & Cie KG* [1982] ECR I-3641 229
- Case 230/81, *Luxembourg v. Parliament* [1983] ECR 255 140
- Case 283/81, *CILFIT v. Ministry of Health* [1982] ECR 3415 24, 63, 131, 132, 147, 149, 152, 153, 159, 160, 192
- Cases 267–9/81, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* [1983] ECR 801 80
- Joined Cases 177 and 178/82, *van de Haar and Kaveka de Meern* [1984] ECR 1797 39
- Case 188/82, *Thyssen AG v. Commission* [1983] ECR 3721 207
- Joined Cases 205–215/82, *Deutsche Milchkontor GmbH v. Germany* [1983] ECR 2633 207
- Case 143/83, *Commission v. Denmark* [1985] ECR 427 256
- Case 294/83, *Parti Écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339 9, 77, 89, 178, 189
- Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority ('Marshall I')* [1986] ECR 723 27
- Case 238/84, *Hans Röser* [1986] ECR 795 149
- Case 139/85, *Kempf v. Staatsecretaris van Justitie* [1986] ECR 1741 50

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

xxii TABLE OF CASES

- Case 149/85, *Wybot v. Faure* [1986] ECR 2391 197
- Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199 29, 80, 132, 189
- Case 24/86, *Blaizot v. University of Liège* [1988] ECR 379 165
- Case 46/87, *Hoechst Ag v. Commission* [1989] ECR I 3283 45, 229, 232
- Case 94/87, *Commission v. Germany ('Alcan I')* [1989] ECR 175 207
- Case 302/87, *European Parliament v. Council* [1988] ECR 5615 30, 195
- Case C-2/88, *Zwartfeld and Others* [1990] ECR I-3365 77
- Case C-18/88, *Régie des Télégraphes et des Téléphones v. GB-Inno-BM SA* [1991] ECR 5941 75
- Case C-70/88, *European Parliament v. Council* [1990] ECR I-2041 30, 31, 77, 195
- Case C-221/88, *Busseni* [1990] ECR I-495 184
- Case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 48, 97, 165
- Case C-192/89, *Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3461 77, 80
- C-213/89, *The Queen v. The Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433 63, 192
- Case C-260/89, *ERT v. DEP* [1991] ECR I-2925 45
- Case C-292/89, *R v. Immigration Appeals Tribunal, ex parte Antonissen* [1991] ECR I-745 255
- Case C-300/89, *Commission v. Council Titanium Dioxide* [1991] ECR I-2867 39
- Joined Cases C-6/90 and 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357 30, 186, 233, 234
- Case C-159/90, *SPUC v. Grogan* [1991] ECR I-4685 81
- Case C-204/90, *Commission v. Bachmann* [1992] ECR I-249 42, 43
- Opinion 1/91 Re European Economic Area Agreement* [1991] ECR 6079 34, 35, 77, 78, 89
- Opinion 2/91 Re Convention No. 170 International Labour Organisation on Safety in the Use of Chemicals at Work* [1993] ECR I-1061 34, 36
- Case C-267/91, *Keck and Mithouard* [1993] ECR I-6097 41, 267, 268, 271, 272
- Case C-19/92, *Kraus v. Land Baden Wuerttemberg* [1993] ECR I-1663 42
- Case C-91/92, *Faccini Dori v. Recreb* [1994] ECR I-3325 27
- Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany* [1996] ECR I-1029 237
- Case C-415/93, *Union Royale Belge des Sociétés de Football Association v. Bosman* [1995] ECR I-4921 28, 40, 267

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

TABLE OF CASES xxiii

- Opinion 1/94 Re World Trade Organization Agreement* [1994] ECR I-5267 31, 33, 50, 151
- Opinion 2/94 Re Accession of the Community to the European Convention on Human Rights* [1996] ECR I-1759 44, 50, 151, 256
- Case C-13/94, *P. v. S. and Cornwall County Council* [1996] ECR I-2143 113, 216
- Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 42
- Case C-233/94, *Germany v. European Parliament and Council* [1997] ECR I-2405 38
- Joined Cases C-283/94, 291/94, 292/94, *Denkavit International and Ors v. Bundesamt für Finanzen* [1996] ECR I-5063 149, 256
- Case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland ('Alcan II')* [1997] ECR I-1591 207, 208
- Case C-329/95, *Administrative proceedings brought by VAG Sverige* [1997] ECR I-2675 255
- Case C-85/96, *Martínez Sala v. Freistatt Bayern* [1998] ECR I-2691 217
- Case C-249/96, *Grant v. South West Trains Ltd.* [1998] ECR I-621 216
- Case C-368/96, *The Queen v. Licensing Authority* [1998] ECR I-7967 255
- Case C-185/97, *Coote v. Granada Hospitality* [1998] ECR I-5199 217
- Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419 22, 39, 49, 141, 153, 222
- Case C-467/98, *Commission v. Denmark* [2002] ECR I-9519 37
- Case C-467/98, *Commission v. Germany* [2002] ECR I-9855 34
- Case C-184/99, *Grzelczyk v. Centre Public D'Aide Sociale D'Ottignies Louvain-La-Neuve* [2001] ECR I-6193 159, 165, 217, 218
- Case C-192/99, *The Queen v. Home Secretary, ex parte Kaur* [2001] ECR I-1237 26, 257
- Case C-268/99, *Jany and Ors* [2001] EC Treaty I-8615 149
- Case C-413/99, *Baumbast and R v. Home Department* [2002] ECR I-7091 219
- Opinion 2/00 Re Cartagena Protocol on Biosafety* [2001] ECR I-9713 255
- Case C-17/00, *De Coster* [2001] ECR I-9445 132
- Case C-50/00, *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677 25, 147
- Case C-320/00, *Lawrence* [2002] ECR I-7325 217
- Case C-339/00, *Ireland v. Commission* [2003] ECR I-11757 140
- Case C-444/00, *Mayer Parry Recycling* [2003] ECR I-6163 153
- Case C-103/01, *Commission v. Germany* [2003] ECR I-5369 38
- Case C-109/01, *Akrich* [2003] ECR I-9607 219

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

xxiv TABLE OF CASES

- Cases C-187/01 and C-385/01, *Gözütok and Brügghe* [2003] ECR I-1345 46, 147, 148, 187, 202, 203, 237, 238
- Case C-224/01, *Köbler v. Austria* [2003] ECR I-10239 187, 237
- Case C-257/01, *Commission v. Council* [2005] ECR I-345 183
- Case C-57/02 P, *Compañía Española para la Fabricación de Aceros Inoxidables (Acerinox) v. European Commission* [2005] ECR I-6689 208
- Case C-138/02, *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703 217, 218
- Case C-387/02, *Berlusconi and Ors.* [2005] ECR I-3565 47
- Opinion 1/03 Re Lugano Convention* [2006] ECR I-1145 36, 257
- Case C-105/03, *Maria Pupino* [2005] ECR I-5285 14, 106
- Case C-173/03, *Traghetti del Mediterraneo v. Repubblica Italiana* [2006] ECR I-5177 237
- Case 176/03, *Commission v. Council* [2005] ECR I-7879 47, 187, 239, 240
- Case C-209/03, *R (on the application of Bidar) v. London Borough of Ealing* [2005] ECR I-2119 165, 217
- C-336/03, *easyCar (UK) Ltd. v. Office of Fair Trading* [2005] ECR I-194 149
- Case C-469/03, *Miraglia* [2005] ECR I-2009 239
- Case C-144/04, *Mangold v. Helm* [2005] ECR I-9981 45, 187
- Case 436/04, *Van Esbroeck* [2006] ECR I-2333 204
- Case C-467/04, *Gasparini and Others* [2006] ECR I-9199 204
- Case 150/05, *Van Straaten* [2006] ECR I-9327 204
- Case C-252/05, *R (Thames Water Utilities Ltd.) v. Bromley Magistrates' Court (Interested party: Environment Agency)* [2007] ECR I-3883 153
- Case C-288/05, *Kretzinger* [2007] ECR I-6441 204, 205
- Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* [2007] ECR I-3633 202
- Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 49
- Joined Cases C-402/05 P and C-415/05 P, *Kadi and al Barakaat International Foundation v. Council* [2005] ECR II-3649 141, 151, 183, 220, 222, 223
- C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 49
- Case C-440/05, *Commission v. Council* [2007] ECR I-9097 47, 240
- Case C-268/06, *IMPACT v. Minister for Agriculture and Food* [2007] ECR I-12327 000
- Joined Cases C-402/05 P & C-415/05 P, *Kadi and al Barakaat International Foundation v. Council* [2008] ECR I-6351 000
- Case C-133/06, *European Parliament v. Council* [2008] ECR I-3189 183, 197

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

TABLE OF CASES XXV

C-268/06, *IMPACT v. Minister for Agriculture and Food* [2008] ECR I-2483 14, 106, 213, 214, 215

Case 523/07, *Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Korkein hallinto-oikeus of Finland* [2009] ECR I-2805, 160

Case C-550/07, *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, judgment of 14 September 2010 209

Case C-127/08, *Metock and Ors v. Minister for Justice, Equality and Law Reform* [2008] ECR I-06241 219

Germany

Brunner v. European Treaty, BVerfGE 89, 155; [1994] 1 CMLR 57 9, 189, 190, 258, 264

Europäischer Haftbefehl, 113 BVerfGE 273 (2005), reprinted in *EuGRZ* 387-408 (2005) 259

Internationale Handelsgesellschaft v. EFGV, BVerfGE 37, 271, [1974] 2 CMLR 540 9

Lisbon Treaty Case, BVerfG, 2 BvE 2/08, judgment of 30 June 2009 9, 35, 189, 190

Wünsche Handelsgesellschaft, BVerfGE 73, 339; [1987] 3 CMLR 225 9

International

Prosecutor v. Stanislav Galic, IT-98-29-T, Trial Chamber I, 5 December 2003 242

Ireland

Byrne v. Ireland [1972] IR 241 234

Goodman International v. Hamilton (No. 1) [1992] 2 IR 203

UK

Anns v. Merton London Borough Council [1978] AC 728 227

Attorney General v. Great Eastern Rly. Co. (1880) 5 App. Cas. 473 150

Donoghue v. Stevenson [1932] AC 562 226, 227

Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd. [1963] 2 All ER 575 227

Home Office v. Dorset Yacht Co. Ltd. [1970] 2 All ER 294 227

R v. Henn and Darby [1978] 1 WLR 1031 269

Cambridge University Press

978-1-107-00139-8 - The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway

Frontmatter

[More information](#)

xxvi TABLE OF CASES

R v. Richmond upon Thames Council, ex parte McCarthy and Stone Ltd. [1992] 2 AC 48 150

International Transport Roth GmbH v. Secretary of State for Home Department [2003] QB 728 14, 18

USA

Marbury v. Madison, 5 US (1 Cranch) 137; 2 L Ed 60 (1803) 192

Michael H. v. Gerald D., 491 US 110 (1989) 227, 228, 229

Thompson v. Oklahoma 487 US 815 (1988), 11

Italy

Frontini v. Ministero delle Finanze [1974] 2 CMLR 372 189

Poland

Constitutional Court of Poland, Judgment of 11 May 2005 r. in the case K 18/04 [Wyrok z dnia 11 maja 2005 r. Sygn. akt K 18/04] OTK Z.U. 2005/5A, item49 189

Spain

Constitutional Court of Spain, Declaration on the Consistency of the European Constitutional Treaty with the Spanish Constitution, DTC 1/2004, 13 Dec. 2004 189, 190