

# CONTENTS

<i>List of figures</i>	page xi
<i>Acknowledgements</i>	xiii
<i>List of abbreviations</i>	xv

<b>1</b>	<b>Introduction</b>	<b>1</b>
	A Mapping the prolific juggernaut	1
	B Four theses	6
	C The course of the book	8
<b>2</b>	<b>Setting precedents: Law made in Luxembourg</b>	<b>10</b>
	A The different meanings of precedent	10
	B The attraction of precedent	12
	i Substantive	13
	ii Systemic	14
	C Factors conducive to positive precedent	16
	i Brevity and fecundity of (treaty) language	16
	ii Absence of widespread codification	17
	iii Finality, recognition and effective enforcement	18
	iv Multiplicity of influences and polycentricity of actors	18
	D Models denying ECJ law-making	20
	i The binary model: static sources or the tyranny of the letter	21
	ii The ternary model: dynamic development or having one's cake and eating it	33
	E Models recognising ECJ law-making	40
	i The pragmatic model: the tyranny of the lawyer	40
	ii An alternative model: avoiding the tyranny of letter and lawyer	46
	(a) Limited cognition and legal information	47
	(b) The imperative strikes back	56
	(c) Beyond optionality and finality	59

F	Dimensions of positive precedent	61	
i	Not legislation or treaty-making	61	
ii	Not <i>stare decisis</i>	66	
iii	Individual law-making	66	
iv	General law-making	67	
<b>3</b>	<b>Determining the essence of ECJ precedents</b>		<b>70</b>
A	The inevitability of interpretation	70	
B	Universalisability	72	
i	Horizontal	73	
ii	Vertical	74	
C	Linking cases	80	
i	Rules of relevance	80	
ii	Scepticism	82	
iii	Reasoned reconstruction	83	
iv	Institutional memory	84	
<b>4</b>	<b>Precedent application by the ECJ</b>		<b>87</b>
A	Methodological preliminaries	87	
i	Data set	87	
ii	Caveats	89	
B	Frequency	92	
i	Popularity and density	92	
ii	Frequency: the new normativity?	93	
C	Precision	94	
i	Verbatim reproduction: echoes and LEGO®	95	
ii	General mention: forest not trees	97	
iii	Specific mention	99	
(a)	String citation	100	
(b)	Substantive citation	105	
D	Use	113	
i	Classifying a legal issue or fact	114	
ii	Identifying relevant legal provisions	115	
iii	Stating the law	116	
iv	Interpreting the law	117	
v	Interpreting specific provisions	118	
vi	Interpreting prior cases	121	
vii	Justifying an interpretation	122	
viii	Asserting facts	123	
ix	Affirming conclusions	124	
E	Interim conclusion	125	

<b>5</b>	<b>Avoiding ECJ precedents I: Distinguishing</b>	<b>127</b>
	A Technique	127
	B Practice: frequent evasion	130
	i Type 1: disapplication	131
	ii Type 2: manipulation	138
	iii Type 3: <i>obitering</i>	140
	C Coherence: the new normativity?	145
<b>6</b>	<b>Avoiding ECJ precedents II: Departing</b>	<b>155</b>
	A Technique	155
	B Practice: faux infallibility	159
	C Grounds	163
	i Precedent was incorrectly decided	163
	ii Precedent is unworkable in practice	167
	iii Legal anachronism I: incompatibility with subsequent decisions	168
	iv Legal anachronism II: incompatibility with other changes in the law	170
	v Imbalance between principles	171
	vi Changed factual or societal premises	175
	D Factors	176
	i Precedent weight: the threshold	176
	ii Equality and non-discrimination: a tentative test	179
	iii Legitimate expectations: another tentative test	180
<b>7</b>	<b>ECJ precedents in context</b>	<b>183</b>
	A Asymmetry	183
	i Effectiveness	184
	ii Lack of appellate review and ready political corrective	184
	B Function of the Court	186
	i Depoliticisation	186
	ii Different roles	186
	C Supranational aspects	189
	i Institutional embedding	189
	ii Permanence	190
	iii (De)centralisation	191
	iv Potential impact	193
	D Internal arrangements	195
	i Special formations	195
	ii Assistance	197

iii	Composite judgments	201
iv	Language	206
E	Mode and style of justification	208
F	Case-load	212
i	Age and volume of precedents	212
ii	Subject matter diversity and abstraction	213
G	Oubliettes and guillotines	216
<b>8</b>	<b>The normativity of ECJ precedents</b>	<b>218</b>
A	Conceptual approaches	218
B	Archetypes	220
i	Civil law systems	220
(a)	Codes and rational deduction	220
(b)	Entrenched negation	224
(c)	Express exceptions	228
ii	Common law systems	232
(a)	<i>Stare (in)decisis</i>	232
(b)	Historical exceptionalism	235
iii	International law	238
C	The ECJ	243
i	The view of the academy	243
ii	The view from within	245
iii	Reconstruction	253
(a)	Denial of law-making	254
(b)	Entrenched negation	254
(c)	Legality and limited mandate	255
(d)	Substantive support	259
(e)	Normative effect beyond bindingness	262
D	Sacramental fiction	272
<b>9</b>	<b>Conclusions and suggestions</b>	<b>276</b>
	<i>Appendix A: ECJ Grand Chamber data</i>	283
	<i>Appendix B: Investment Tribunal data</i>	290
	<i>Bibliography</i>	297
	<i>Index</i>	325