THE LAW OF RECITALS IN EUROPEAN COMMUNITY LEGISLATION

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Recitals, those ‘whereas’ clauses, appear in contracts as well as legislation, although not all legislation contains recitals; indeed, recitals are ‘against’ the precepts of certain styles of legislation. When, however, there are recitals, parties will argue over the way they should be interpreted in view of the operative provisions, or that they have, or don’t have, other legal repercussions. The courts must then choose among a number of interpretive variants: they may choose to view recitals as subordinate to, dominant over, or even equal to operative provisions.

Recitals are also a feature of European Community (EC) legislation, so that the same variants exist.

But the matter is complicated by a feature of EC legislation which is fairly unique: recitals in EC legislation must specify the reasons the operative provisions were adopted, and if they do not, the legislation is void. This is puzzling. Why would this be so? It does not seem to emanate from the nature of recitals themselves, nor does it seem to be reflected in the general law of recitals (principally contract law).

At the same time it is claimed that while EC recitals have no legal value and cannot be the cause of derogation from an operative provision, they nevertheless create legitimate expectations (such as would defeat an operative provision). This is also strange. Recitals are supposed to be general statements. General statements are not something which ordinarily are recognized as giving rise to legitimate expectations. But also recitals in general (for instance, in contract law) are, well, recitals, not operative provisions and it is hard to fathom how they could give rise to positive obligations or defeat operative clauses.

Thus, the doctrine surrounding recitals in EC law is mystifying. It is either irrational or so complicated as to amount to the same thing.
The aim of the paper is to explain the mystery regarding EC recitals. Why is legislation void if recitals are lacking? Why are the purported rules concerning legitimate expectations so strange?

We began research for this paper thinking that an exposition on this general topic might be of some worth, as it might clear up what we felt were some contradictions in what was purported to be the EC law of recitals. Specifically, we felt something might be amiss with the received wisdom that recitals could justify legitimate expectations such as would give rise to positive rights. Something about it didn't jibe with what we knew of legitimate expectations in this regard: only sufficiently specific statements or acts could give rise to them. Recitals, at least in EC law, are supposed to be rather general expressions of purpose; such cannot readily justify reliance. We were gratified when we found that the received wisdom was incorrect, and that recitals in EC law do not create legitimate expectations.

We certainly did feel, at the onset of our research, that the ECJ’s case-law invalidating EC legal acts on the basis that the recitals in question were insufficient was curious and therefore worthy of comment; at the very least the provision seemed unusual. The ECJ’s statements that recitals are necessary for the court to exercise its supervision seemed somewhat coy.

We were, however, surprised when our research and analysis found that the imperative nature of the requirement to state reasons in recitals in EC law was due to the need for political reassurance.

We then realized that it is only in supranational legislation where the justification assumes such importance, inasmuch as EU legislation which requires unanimity in order to be adopted does not require recitals at all.

Thus de-mystified, the law of recitals in EC legislation falls within the realm of normality. Recitals in EC law are not considered to have independent legal value, but they can expand an ambiguous provision’s scope. They cannot, however, restrict an unambiguous provision’s scope, but they can be used to determine the nature of a provision, and this can have a restrictive effect. And the voidness of an EC legal act is traceable and due to political considerations, not legal ones. *Alles ist klar.*

I. INTRODUCTION

A recital in contract law is understood to mean, at one level, any affirmation of fact. For instance, a contract may *recite* that (in the context of American contract law) consideration of a dollar has been paid and is acknowledged. Recitals, thus, in contract law are not themselves undertakings

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2. See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 274, § 61(C)(3) (4th ed., LexisNexis 2001). As Chancellor Murray points out, such recitations are generally challengeable. *Id.*
or obligations. Generally, the initial sections of a written contract will be referred to as the recitals. Descriptive and factual information, such as the identities of the parties, the background, and most importantly, the purposes of the contract are recited there. The recitals can be contrasted with the body of the contract, which contains the obligations undertaken. Often each individual recital begins with the words whereas or considering that, and stylistically they usually are written as if they were one long sentence, with the various recited facts being separated by semi-colons or other similar constructions. The recitals section usually immediately precedes what is called an "enacting clause." Enacting clauses state that, in virtue of the recited facts (the recitals), the parties do undertake certain obligations, for example, "Now, therefore, the parties do agree as follows . . . ."

Recitals also appear in legislation, although not all legislation contains recitals; indeed, recitals are 'against' the precepts of certain styles of legislation. When, however, there are recitals, parties will argue over their proper relationship to the operative provisions, or that they have or don't have,

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3. See id.
4. Id. at 481, § 88(B).
5. See 4 COMPUTER CONTRACTS Boilerplate Clauses, § 4.12-2, n.8 (2008) ("It is a recent trend in American contract drafting to omit the 'whereas' clauses entirely, leaving only 'the terms' of the contract, which 'speaks for itself'.").
8. It is, as we shall see, much the same in legislation. E.g., id. ¶ H.2 ("The City Council of the City of Des Moines Ordains as Follows . . . .").
other legal repercussions. Thus, in a particular case they may be even more important than the operative provisions.

Recitals sections are also a feature of European Community (EC) and also in European Union (EU) legislation. It is extremely important to be able to distinguish between EC and EU legislation.

The European Community is the main part of the European Union. Technically, foreign policy and interior policy are not part of the Community—they are part of the Union. In areas which do not fall within [the EC’s] exclusive competence, the Union shall take action. [Thus, the EC shall form the first ‘pillar’ of the EU.] A common foreign and security policy and a common policy on judicial affairs will form separate pillars standing beside the EC.

What is confusing, thus, is that the term “EU” has two meanings. On the one hand, it incorporates all the ‘pillars’ of the EU, and therefore includes the EC. But when used in reference to the EC, it signifies the other two, non-EC, pillars of the EU. (Viz., the foreign policy pillar is not within the EC, and thus is (merely) an EU pillar.) Thus, whenever the term “EC” is used, by definition, it refers to the first pillar, and excludes the second and third. It is therefore clear, then, that in this article we primarily are concerned with EC legislation, not EU legislation (of the second and third pillars), although we do contrast the two types. The significance of the distinction between EU and EC legislation will be made clear in Section IV (C), infra.

Since other systems also require recitals to be present in their legislation, one would think the same patterns would be followed in EC law, and about the only question that would arise would also be part of the same old song: how should recitals be interpreted as against the body of the legislative act? But the matter is complicated because the EC legislative act (law) will be void unless it contains recitals specifying the reasons the act’s operative provisions are being adopted.

If one doesn’t take this rule for granted, it is beyond curious: it is staggering. Why should this be? No known legal theory explains it; it is not

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12. HM Revenue & Customs, supra note 11, ¶ 3.17; COMPUTER CONTRACTS, supra note 5. See generally infra Part II.A and sources cited therein.

13. COMPUTER CONTRACTS, supra note 5 ("[I]n civil law countries such a [whereas] clause may be more important than the actual language of the statute. One example is the EU Directive on the Legal Protection of Computer Programs.").

14. Consult infra Part II.A.

15. ARTHUR LEWIS, EUROPEAN COMMUNITY LAW 6 (New ed., Tudor Bus. Publ’g 1997) or any primer on EU law.

16. Infra Part III.B.
a natural conclusion from the mere presence of recitals, nor is it a natural conclusion from the purposive nature of EC legislation (after all, French statutes are also purposive, but they do not contain recitals;\textsuperscript{17} legislation does not have to contain recitals in order to be purposive\textsuperscript{18}). If recitals in EC law are of such paramount importance, why is it steadfastly maintained that EC recitals have no legal value and cannot be the cause of derogation from an operative provision?\textsuperscript{19} As if the mystery were not already deep enough, the conventional wisdom also asserts that recitals are capable of creating so-called 'legitimate expectations' such as would defeat an operative provision.\textsuperscript{20} Thus, EC recitals are to be interpreted as subordinate to the operative provisions, yet at the same time it is claimed they can be dominant, even in the face of a conflicting operative provision, if they create 'legitimate expectations.' And although it is said recitals have no legal value, nevertheless they are so important that the whole measure goes down in defeat if they, the recitals, are 'insufficient,' whatever that means. This is self-contradictory, irrational, and seemingly inexplicable.

It is the thesis of this paper, however, that the law of recitals in EC legislation is not irrational and self-contradictory. We disprove certain of the claims made by the conventional wisdom, and we find reasons for the mystifying mandatory requirement of EC legislation as regards recitals. Our findings can be summarized thusly:

a) Whereas recitals are necessary in EC law because of their reassuring effect to the players;
b) Whereas they are subordinate to operative provisions in that they can only affect the scope of an ambiguous provision but cannot restrict an unambiguous one;
c) Whereas they are subordinate as in the absence of a legislative provision they create no rights (no legitimate expectations);
d) Whereas they can prevent legitimate expectations from arising but cannot of themselves cause a legitimate expectation to arise, despite the common belief to the contrary,

\textsuperscript{17} STEINER, supra note 10.
\textsuperscript{18} HM Revenue & Customs, supra note 11, § 3.1.
\textsuperscript{19} \textit{Infra} Part IV.A.
e) Now therefore the law of recitals in EC Legislation shall be explicated in the operative part of this article.

II. DRAFTING REQUIREMENTS

A. Position within Act

According to the Joint Practical Guide, recitals are part of the preamble. Recitals are to be placed between the so-called “citations” (references to superior legislation or treaties which confer the power to adopt the particular act in question) and the operative (legislative) provisions, which are, somewhat awkwardly, called “enacting terms” (even in the Joint Practical Guide the first time this term is used it is between quotation marks).

B. Purpose

The purpose of the recitals is “to set out concise reasons for the chief provisions of the enacting terms [i.e., legislative provisions].” There is no surprise here: this is the general understanding of the purpose of recitals, which is to put what follows in context.

Accordingly, § 10.1 of the Joint Practical Guide provides that:

The ‘recitals’ are the part of the act which contains the statement of reasons for the act; they are placed between the citations and the enacting terms. The statement of reasons begins with the word ‘Whereas:’ and continues with numbered points . . . comprising one or more complete sentences. It uses non-mandatory language and must not be capable of confusion with the enacting terms.

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22. Id. ¶ 7.2.

23. Id. ¶ 9.1.

24. Id. ¶ 9.

25. Joint Practical Guide, supra note 21, ¶ 7.3 (“enacting terms’ are the legislative part of the act.”). Perhaps it is only awkward (misleading?) to American ears; the British sometimes use a similar term, “enacting words” to mean the same thing. E.g., Oliver Ashworth (Holdings) Ltd. v. Ballard (Kent) Ltd. [1999] L. & T.R. 400, 418 (U.K.).


27. STATUTES, supra note 7.


While it is not the main purpose of this article to critique the quality of EU legislative drafting, one cannot but make the following comments. Stylistically, since the paragraph concerns recitals, it should not introduce another term, the statement of reasons, which the drafters of the Joint Practical Guide from the second sentence of the quoted passage use as an equivalent substitute for recitals. In the last sentence, the drafters write, "It uses . . . ." It is doubtful that a sentence can use anything, nor even a statement of reasons, although an author can use a phrase in a sentence. Therefore, the sentence should read, "Only non-mandatory language is to be used and it . . . ."

One may take issue also with the claim in the quoted passage that the "Whereas" clauses form complete sentences. They do not. They do not because they start with the word 'whereas,' and indeed the entire recitals section is one long sentence, with (typically) an EU institution being the subject and a resolve to enact the measure being the verb. This is required by the Joint Practical Guide itself (infra, subsequent paragraph). Indeed, writing a recitals section as one long sentence is not unusual, but claiming that the 'whereas' clauses are separate sentences is.

C. Enacting Clause

Under § 10.3 of the Joint Practical Guide, we find that, in EC legislation, recitals are to contain an enacting clause: "Ideally, the statement of reasons [read: recitals] should set out . . . the conclusion that it is therefore necessary or appropriate to adopt the measures set out in the enacting terms [read: operative provisions]." The term "enacting clause" is not used in the Joint Practical Guide, but it is clear that this is what is meant (again the question arises, since there is a perfectly good English term, why not use it?).

It would seem, however, that an enacting clause is not really a recital of fact, but a statement that what follows is a public act, similar to a juridical act.

32. Id.
33. See id.
34. Id. ¶ 10.3.
35. Id.
36. See City of Des Moines, supra note 7, ¶¶ E–H.
in private law. By means of this statement, rights are created or modified, thus an act occurs. Therefore, it would seem that the enacting clause is a thing apart from the recitals.

But EC Legislation typically begins, after the title of the legislation, with the statement, “The European Parliament and the Council of the European Union,” after which follow the recitals, each ending in a semi-colon save for the last, subsequent to which is the language, “Have adopted this directive: . . . .” Thus, part of the enacting clause appears before the recitals, and part just after. Therefore, it is understandable that it is described as part of the recitals. Nevertheless, it is somewhat remarkable that the Joint Practical Guide does not mention the placement of the enacting clause, save for its appearance in the Annex to the said Guide.

D. Other Formal Requirements

1. Explication of Choice of Type of Legal Act

In principle, anything which is not a reason for the legislative provisions (in EU-Speak, the “enacting terms”) should not be included in the recitals. There are, however, exceptions. For instance, the Joint Practical Guide (§ 10.8) provides:

Where a particular legal basis provides for recourse to legal acts without specifying the type (“The Council shall adopt the measures necessary . . .”) and it is not clear from the content of the measure to be taken which of the Community legal acts is appropriate, the reasons why the particular [form of] act has been chosen should be given. If, in a given case, for instance, it would be possible to legislate by means of a directly applicable regulation, an explanation should be given of why it is preferable to adopt only a directive which must be transposed into national law.

This provision is made most likely because the reasons for the choice of the type of legislation are important in terms of the legal principle of

39. Id. Accord City of Des Moines, supra note 7, ¶ H.2.
42. Id. ¶ 10.7.
43. See id. ¶ 10.8.
44. Id.
subsidiarity in EU law. Indeed, this is pointed out in the Joint Practical Guide itself.\textsuperscript{45} A definition of the principle, as taken from an official EU site, is as follows: "The principle of subsidiarity . . . is the principle whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level."\textsuperscript{46}

Some effort at justification in this regard is to be expected, inasmuch as nearly every EC legal act of general application to some extent enhances the power of the EC in relation to that of its member states.\textsuperscript{47} Thus, the provision is probably merely symbolic, albeit understandable.

A widely shared view amongst lawyers has been that the impact of the subsidiarity principle on EU legislative policy and on the conduct of the decision-making institutions is likely to be slight, given the malleability of the provisions outlined in the Treaty, the difficulty of ensuring compliance even if agreement on the meaning of these provisions were to be reached, and the improbability of judicial review playing any significant role in this respect.\textsuperscript{48}

2. Reference to Other Recitals Possible But Not Reassuring

Additionally, § 10.5.3 of the Joint Practical Guide states that, "the statement of reasons should not consist, in whole or in part, merely of a reference to the reasons given for another act."\textsuperscript{49} One would think that, in a legal sense, such a reference would be acceptable, inasmuch as reasons for one measure may be the same as those for another (indeed, this is true: see the next paragraph down). Apparently the reasoning is that this is insufficiently genuine, a word used by the Joint Practical Guide itself (§ 10.5.1) in relation to recitals.\textsuperscript{50} Another way to put it is that recitals which merely reference others

\begin{footnotesize}
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\item[45.] See id.
\item[47.] This can be said to be simply a function of federal (in the sense of supra-national) government. See RENÊ BARENTS, THE AUTONOMY OF COMMUNITY LAW 112–13, ¶¶ 130–31 (2004). See generally Roman Herzog and Lüder Gerken, [Comment] Stop the European Court of Justice, EUOBSERVER.COM OCT. 9, 2008, http://euobserver.com/7/26714 (last visited Nov. 9, 2008).
\item[49.] Joint Practical Guide, supra note 21, ¶ 10.5.3.
\item[50.] Id. ¶ 10.5.1.
\end{itemize}
\end{footnotesize}
might not be sufficiently reassuring. Indeed, it has been pointed out that reassurance may be the reason for the existence of recitals in EC law.51

One would expect then, that the actual law, or at least the case-law, would discountenance recitals which merely refer to recitals in other legislative acts. But that is not the law as interpreted by the Court of Justice of the European Communities (ECJ).52 Recitals which merely reference recitals in other legal acts are not per se insufficient.53 In the leading case, the ECJ said:

In the statement of reasons for Regulation No. 3331/74 the Council merely referred to the possibility given to the Italian Republic of altering the basic quotas on the basis of the restructuring plans “in view of its special situation in this sector.” The question of the respect in which that situation is special is not answered in the statement of reasons set out in that regulation but in that contained in the basic regulation to which reference has already been made. In view of the close connexion which exists between the basic regulation and the regulation adopted in implementation thereof such a means of stating the reasons for the detailed rules specifically pertaining to the common organization of the market in sugar in Italy must be permitted. It makes sufficiently clear to the competent authorities and to the relevant undertakings the concern which prompted the Council to enact those detailed rules and the objectives which must be pursued . . . . 54

Similarly, in the Belgian Wallpaper case, the ECJ held, “Although a decision [a legal act] which fits into a well-established line of decisions may be reasoned in a summary manner, for example by a reference to those decisions, if it goes appreciably further than the previous decisions, the Commission must give an account of its reasoning.”55

Therefore, the law is that recitals can incorporate reasons by reference (and the Joint Practical Guide should mention this), but it is not a particularly safe practice. Nor is it particularly reassuring.

51. See generally infra Part III.C.
53. Id.
54. Id. ¶ 15–16.
III. EFFECT OF RECITALS

A. Theoretical Relation of Recitals to Legislative Provisions

Recitals are not elements of either French or of British legislative drafting styles.\(^5^6\) When there are no recitals, they can't be used as weapons for those who would restrict or expand legislative provisions.\(^5^7\) But when recitals do exist, as they do in EC legislation, there are several ways they can interact with operative provisions. Jurisdictions choose amongst these doctrinal positions.

1. Possibility One: Recitals are of absolutely no effect whatsoever.

This view is unlikely to prevail in the real world. The rules pertinent to ordinance-drafting of the City of Des Moines in the State of Washington do contain something of the sort—it is stated that findings of fact in recitals are not to appear in the codified version of the ordinance.\(^5^8\) But they remain, of course, in the statute (the ordinance) and hence do not disappear.\(^5^9\)

In American contract law, it has been said that parties commonly believe that recitals have no effect (whatsoever) and that there is even some case-law to this effect (although it is understood to be erroneous).\(^6^0\) This has given birth to the curious (and, as aforesaid, erroneous) stance of some courts that a recital, to have any effect at all, must be referenced in the operative provisions of the contract.\(^6^1\)

It is also conceivable that Possibility One could be manifested in a system which does not interpret laws in any Western sense. Such systems do exist, unfortunately, and their decisions are unpredictable.\(^6^2\)

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56. STEINER, supra note 10.
57. See Contextual Elements, supra note 10.
58. City of Des Moines, supra note 7, ¶ E.5.
59. Many statutes and ordinances in the United States are passed into law and then in an ongoing process, rather automatically, codified in the sense that they are incorporated into a code. There is no analogous process in EC law: the legislative provisions are simply out there. Some assembly is required. Having said this, it is true that there is, in the EU institutions, a process called 'consolidation,' which "brings together a basic legislative act and all its amending acts in a single text." There is also something which in EU-Speak is called 'codification,' which amounts to the same thing, only the resultant document is adopted as a superseding legislative act. (European Commission, Better Regulation, Transposition and Application of EU Law, http://ec.europa.eu/governance/better_regulation/transp_eu_law_en.htm (last visited Nov. 9, 2008)). Of course, the use of the word 'codification' in such manner is a misnomer, as codification presupposes a code. The point is, there is nothing in EU law resembling the U.S. Code, nor even the consolidated ordinances of a U.S. city, and nothing resembling codification of EU or EC law.
60. 1 BRUNER & O'CONNOR CONSTRUCTION LAW Recitals § 3:10 (2007).
62. See generally Zdeněk Kůhn, Worlds Apart: Western and Central European Judicial Culture
2. Possibility Two: Recitals are dominant over the legislative provisions.

This view is said to have prevailed at one time in the United Kingdom. The argument for this position is that the recitals show the legislative intent and indeed are the best place to find it.

3. Possibility Three: Recitals are neither dominant nor subordinate to the legislative provisions. Interpretation (the search for the legislative intent) considers recitals and legislative provisions on an equal basis.

The argument in favor of Possibility Three is that recitals are adopted by the lawgiver in the same way as is the body of the act (containing the legislative provisions). It is said that this is a more defensible result than the others.

4. Possibility Four: Recitals are subordinate to the legislative provisions.

Because recitals are subordinate, they can be used to interpret only those provisions which are ambiguous. They cannot contradict an unambiguous provision. This is the proper understanding of the claims, made at various times and in varying contexts that recitals are either no part of the act or are of no legal effect.

Probably Possibility Four entails a less purposive approach than does Three, because in this approach the letter of the legislative provisions would, in theory, be given great weight (if we accept that recitals are really the better place to look for legislative purpose). But the question may really be one of degree. That is, much would depend upon the threshold of ambiguity which the court applies. Indeed, Three and Four are probably different only in terms of the threshold of ambiguity which the court applies.

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at the Onset of the European Enlargement, 52 (No.3) AM. J. COMP. L. 531 (2004) (for an enlightening study of such a non-Western judicial culture).

63. STATUTES, supra note 7, at 291.
64. See id.
65. Id. at 294.
66. Id. at 295.
67. Id. at 294.
68. STATUTES, supra note 7, at 295.
69. See id. at 294. See also City of Des Moines, supra note 7, ¶ E.2 ("Recitals are advisory only but may be considered by the courts.").
B. Doctrine Utilized in the United States

The most respected American treatise on statutory construction describes the law in the United States as consisting of a conflation of what we describe as Possibilities Three and Four above. The treatise (Sutherland’s) contains the remark that this has been termed the “whole act” doctrine of interpretation.

In the United States . . . the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms. In case any doubt arises in the enacted part, the preamble may be resorted to help discover the intention of the law maker. [T]he preamble as well as the text of the act, is useful in determining the scope of an act. It has also been said that while the preamble of the act can be used for the purpose of explaining otherwise unclear legislative intent, it does not control when the statutory language has plain and obvious meaning . . . More meaningful interpretations are achieved when the preamble is considered along with the enacted part of the law and the whole act manner of interpretation is followed.

Somewhat as an aside, U.S. contract law is in accord: the function of recitals is to state the purpose of the parties, and “all of the different parts of the agreement must be viewed together, i.e., as a whole, and each part interpreted in light of all of the other parts.”

Where there is ambiguity or inconsistency between the preamble [recitals] and the remainder of the writing, the following construction has been accepted: (a) where the preamble (recital or whereas clause) is clear and the remainder of the writing is ambiguous, the preamble will control; (b) where the preamble is ambiguous and the remainder clear, the remainder will control; (c) where the preamble and remainder are both clear but inconsistent with each other, the remainder of the writing will control.
It is our contention that, in nearly all respects, the EC law of recitals is in accord.

C. Doctrine Utilized in England

The English approach is that of Possibility Four, but this stance, it is said, is weakening and is moving toward that of Possibility Three or even Two, that is, towards an approach wherein recitals would be given relatively greater weight. This is because the approach in general, it is said, is moving towards a more purposive theory. A leading case describes the situation thusly:

By way of introduction to the issue of statutory construction I should say that in my judgment it is nowadays misleading—and perhaps it always was—to seek to draw a rigid distinction between literal and purposive approaches to the interpretation of Acts of Parliament. The difference between purposive and literal construction is in truth one of degree only. On received doctrine we spend our professional lives construing legislation purposively, inasmuch as we are enjoined at every turn to ascertain the intention of Parliament. The real distinction lies in the balance to be struck, in the particular case, between the literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other. Frequently there will be no opposition between the two, and then no difficulty arises. Where there is a potential clash, the conventional English approach has been to give at least very great and often decisive weight to the literal meaning of the enacting words. This is a tradition which I think is weakening, in face of the more purposive approach enjoined for the interpretation of legislative measures of the European Union . . . .

The passage quoted is notable for the insight that both methods described are actually purposive, in that the legislative intent is sought, but in different ways. In this manner of thinking, each of the possibilities listed above, One through Four, is purposive. But as the learned judge would agree, in the field of statutory interpretation, the term *purposive* is nevertheless usually understood as tending to emphasize judicial inferences of legislative intent over the literal meaning of the operative provisions in question.

D. Doctrine Utilized by the Court of Justice of the European Communities

EC law, including that relating to recitals, is, in the prevalent sense described in the preceding paragraph and as according to the prevalent rhetoric,

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purposive. EC legal acts are drafted with this in mind: “Purposive drafting is not a concept which can be defined exactly. . . . In particular, most commentators include as purposive drafting not only using express statements of purpose but also drafting by formulating general principles.”

Furthermore, recitals, EC case-law claims, are necessary for determining intent. The EC law of recitals thus partakes of both Possibilities Three and Four. For instance, the oft-repeated (in other jurisdictions) statement that recitals have no legal value has also been made by the ECJ; it is further claimed that in particular they “cannot be relied on as a ground for derogating from the actual provisions of the act in question,” yet, it is affirmed that recitals are often used in interpretation by the courts.

Nevertheless, EC law also embraces Possibility Two, and with a vengeance. This is because of the rule that if recitals fail to meet certain minimum criteria (that is, if there are no recitals or if they are insufficient) the act is in principle invalid. Thus, it can be said that in this special manner recitals in EC law are dominant over the operative legal provisions of the act.

IV. RECITALS AND VALIDITY

A. Legislative Source

Article 253 of the Treaty Establishing the European Community is the legislative source of the requirement that the reasons for the adoption of a legal act must be recited within the act: legal acts “shall state the reasons on which

77. See generally Steiner, supra note 10, at 22, § 1.3.


81. Id.


83. See generally infra Part III (Recitals and Validity).
they are based." Here we may note that primary legislation refers to treaties amongst the Member States, such as the EC Treaty referred to in the previous sentence, and secondary legislation refers to legal acts adopted on the basis of those treaties. Thus, it can be concluded that secondary legislation of the EC must contain recitals.

B. Imperative Nature

The requirement that EC legislation must contain recitals is imperative in nature. If the recitals are defective, the legislation is in theory invalid. The leading case is Federal Republic of Germany v. Commission. The ECJ declared void a decision by the Commission to grant only a portion of the tariff quota for wine requested by the government of (West) Germany. According to the Court, the Commission was:

... content to rely upon 'the information collected', without specifying any of it, in order to reach a conclusion 'that the production of the wines in question is amply sufficient'. This elliptical reasoning is all the more objectionable because the Commission gave no indication, as it did belatedly before the court, of the evolution and size of the surpluses, but only repeated, without expanding the reasons for it, the same statement...

The ECJ also criticized the Commission in that the recitals, instead of giving reasons for, actually contradicted the operative part of the act in question—inasmuch as if, as was stated in the recitals, there is sufficient wine on the market, it makes no sense (and is contradictory) to then go ahead and grant the request in part. In other words, the granting of part of the request was not at all explained (and in fact was contradicted) in the recitals.

The treatment of recitals as imperative is somewhat similar to the treatment of what amounts to purposes in Continental contract law (of the francophone variety). In classical theory each contract or other juridical act must have a valid and existing cause, which can be loosely defined as a

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85. LEWIS, supra note 15, at 45–46.

86. Case 24/62, supra note 80.

87. Id.

88. Id.
Contracts which lack *cause* are void *ab initio* and, indeed, it is a tenet of classical theory that such ‘contracts’ were never formed at all.\(^9\)

### C. Reason for Imperative Nature: Reassurance

The ECJ has said that recitals of the reasons for an act are necessary for the court to perform its supervisory function.\(^9\) This can’t be true, because courts in systems which do not feature recitals get along without them. Moreover, there is no requirement that national legislation of the Member States which transposes EC legislation contain recitals.\(^9\)

We conclude that because there is no legal reason for the requirement; it may be a political one based upon a need for *reassurance*. The parties most in need of such reassurance would be, then, not parties to a case, but the parties concerned in the enactment of the act and in its political acceptance.

Sometimes though, preambles and recitals may not so much serve as ... ‘battleground’ as provide reassurance to those formally approving the text. The treaty, where preambles and recitals are still commonly found, is an illustration. At the time of writing, the drafting of the preamble to the treaty embodying a new constitution for the EU shows a potential indication of performing such a role.\(^9\)

The reasons stated in recitals serve to explain, at least in principle, why the particular exercise in authority is politically legitimate.\(^9\) This is a sensitive question given the nature of the EU; that is, inasmuch as nearly every EC legal act of general application displaces the legal jurisdiction of the Member States

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89. KLIMAS, *supra* note 38, at 87.
90. *Id.* at 84.
in the matter, each such act needs at least an attempt at justification.\textsuperscript{95} Indeed, the question of whether the EU should, could, or will integrate further into a super state is the fundamental question posed by the existence of the EU.\textsuperscript{96} The anxiety over the identity, boundaries, and procedures of the EU is deep-rooted and demonstrated continually in both academic and popular circles, as is the search for justification for both the present and continued integration.

Indeed, any giving-up of authority to the center is bound to be a sensitive proposition, shown by what is described in a recent article as the attitude of the several states of the United States in a somewhat analogous situation, although one which seems self-evident and even innocuous—there is a movement to enter into a compact between the various states in relation to the children of U.S. Armed Forces' personnel, who are faced, when transferred from state to state, with difficulties caused by the varying requirements of the several states in relation to their kindergarten to high school education.\textsuperscript{97} "They were concerned about some of the language in the compact, \textit{that it might be giving up some state sovereignty},'' said Virginia Delegate Mark Cole, a Navy veteran who sponsored the compact in his state.\textsuperscript{98}

The argument that recitals in EC law have such importance because of the need for reassurance is strengthened by the fact that recitals are not an element of EU legislation, because EU legislation is intergovernmental (as opposed to EC legislation, which is supranational).\textsuperscript{99} There is no legal requirement that acts adopted pursuant to Titles V and VI of the Treaty on the European Union (TEU)\textsuperscript{100} (corresponding to the second and third "pillars" of the EU) contain recitals nor to otherwise state reasons for their adoption.\textsuperscript{101} This appears to the authors to be because the so-called pillars they relate to require unanimous consent of the Member States (as expressed by unanimity in the Council) for

\begin{footnotes}
\item[95] K\textsc{lima}, \textit{supra} note 94, ¶ V.
\item[96] \textit{Id.}
\item[98] \textit{See} Wyatt, \textit{supra} note 97.
\item[99] \textit{See generally} EEC Treaty \textit{supra} note 84; consult also \textit{supra} § I \textit{Introduction} for an explanation of the difference between the terms 'European Community' and 'European Union'; for a description of the restriction of national powers and the supremacy of EC law, \textit{see generally} Hartley, \textit{supra} note 20 at 218–19 or any primer on EU law. For an explanation of EU v. EC law, consult \textit{supra} Part I (Introduction).
\item[100] \textit{Id.}
\item[101] \textit{Manual of Precedents, supra} note 82, ¶ 4.1.1(b).
\end{footnotes}
legal acts to be adopted. Since unanimity is required, legal acts adopted pursuant to the intergovernmental second and third pillars do not engender the same kind of anxiety as to their existence as do those legal acts adopted by so-called "Community" (EC) procedures pursuant to the first (supranational) pillar.

The Director of the Directorate of Justice and Internal Affairs of the Legal Service of the General Secretariat of the Council of the EU, Julian Schutte, commented that the practice of including recitals in Third Pillar legislation was derived from the legislative drafting practice utilized under the First Pillar, which served as a model, as in the beginning there were no guidelines for Third Pillar legislation. Director Schutte also confirmed that there is no legal obligation for recitals to be included in Third Pillar legislation, but he felt "that motivations should be explained and stated, and therefore recitals are important and necessary."

A lawyer on the staff of the Directorate of External Relations of the Legal Service, who declined to be identified in this article by name, stated that the "inclusion of recitals in legal acts under the Second Pillar is more of a policy requirement than a legal one. Indeed, it has become by now a practice or custom to include them in Second Pillar legislation." This experienced jurist also pointed out that because Second Pillar legislation is addressed principally to governments, not individuals, and also because the ECJ has no jurisdiction, there is much less of a systemic need for recitals in Second Pillar legislation than in First Pillar legislation. "Our general view is that recitals in Second Pillar legislation should be kept short, for the above reasons: the fewer, the better."

Thus, we can conclude that in EC law, recitals are necessary for justification and reassurance, because supranational legislation transfers power to the center, whereas recitals and their justificatory functions are not needed in those EU (not EC, which belong to the first pillar) legal acts which are intergovern-

103. For an illustration of the use of the term 'intergovernmental' to describe the second and third, and of the term 'supranational' to describe the first pillar, see generally EU Information Centre of the Riksdag, Fact Sheet 3: Laws and Decisions in the EU 2, Jan. 2008, http://www.eu-upplysningen.se/upload/dokument/Trycksaker/eng_faktablad_3_080206_webb.pdf).
105. Id.
107. Id.
108. Id.
mental in nature. Obviously, the latter, capable of being vetoed by any EU Member State, are less controversial.

D. Other Reasons for Imperative Nature

Another reason that recitals are considered to be crucial to an act's validity may lie in the fact that they provide information to the various institutions of the EU as to which pillar a particular measure belongs, and thus which legislative procedure is applicable; thus, many legislative acts can be justified under two or more pillars. Indeed, the Parliament, Commission, and Council argue with one another as to the proper pillar to adopt an act under, that is, upon the legal basis for the act in question, and so it is clear that recitals which state the reasons for a particular legal act and which thus provide and determine its legal basis can be very important in determining the outcome of these disputes. This is more of a political than a legal fight, although there have been court cases on the question of which procedure should have been followed. In the leading case, Titanium Oxide, the intent of the measure was focused upon by the ECJ in determining which legislative procedure should have been followed. Thus, recitals can serve a channeling function, and this can help explain their mandatory nature in EC law.

Yet another underlying reason for the imperative nature of recitals (statements of reasons) in EC law has to do with those acts which are more private in nature. In these instances, the imperative that reasons be given appears to derive from notions of fundamental fairness and due process. For

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109. The legislative process in EC and EU legislation is very complex. There is no single constitution which serves as the basis for all measures, but a large number of treaties. The type of act may dictate the choice of a particular basis, and this particular basis will then determine the type of procedure needed to adopt the act. See generally HARTLEY, supra note 20 at 108–11 or any primer on EU law.


112. Case C-300/89, supra note 110, ¶ 11. Peculiarly, the intent of the act in question, although provided in the act's ultimate recital, was repeated in the act's article 1, and it is this article (and not to the recital) to which the ECJ refers in ¶ 11 of its opinion.

instance, the Court of First Instance recently quashed a legal act of the Council which added a certain organization to a list whose assets are to be frozen on the basis of the organizations being involved in terrorist acts. No reasons were given in the complained-of act as to why the Council had concluded that the particular organization was ‘involved’ in terrorist acts, and the judgment invalidated the legal act in question on that basis. Indeed, it would be hard to appeal an order of the nature complained-of if a party has not been provided with reasons why it is considered to be involved in terrorism.

It is remarkable that there is something quite similar in American law: contempt orders must contain detailed recitals of fact.

A reason behind the requirement of detailed facts is that the courts try to limit the dangers inherent in summary types of legal proceedings. Direct contempt proceedings constitute an exception to constitutional guarantees of due process, making it imperative to keep meaningful review as a possibility. Therefore, the contempt order itself must contain all the facts necessary to reveal the contumacious act. The appellate court must be able to determine, by an inspection of the record, whether contempt has in fact been committed and whether the court had jurisdiction to punish it.

This is the closest to a legal justification for the mandatory requirement that recitals of reasons and purposes appear in EC acts. Indeed, it is a legal justification. It is important to note, however, that it is applicable only in relation to what are in reality private acts, similar to administrative rulings.

E. Must be Initially Sufficient

Recitals must be initially sufficient. As the Court of First Instance of the European Communities has stated, while “persons concerned . . . may always be expected to make a certain effort to interpret the reasons if the meaning of the text is not immediately clear,” nevertheless, “the [legal act] must be self-sufficient and . . . the reasons on which it is based may not be stated in written or oral explanations given subsequently.”

114. Id. ¶ 98.
115. Id. ¶ 93.
117. For a description of private acts in EC law, see generally HARTLEY, supra note 20 at 332–33.
119. Id. ¶ 46.
F. Sufficiency Contextual

The extent of the obligation to recite facts is determined by context:

It is . . . clear from the relevant case-law that it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question . . . . 120

Additionally, as the ECJ has consistently held, the recited facts must be appropriate to the nature of the act. 121 If the specific operative provision ("enacting term") falls within the "general scheme" of the others, a recital which "clearly discloses" the "essential objective" of the institution in adopting the act is sufficient. 122

If so, then, the obverse is true. If an operative provision (a particular clause of the "enacting terms") does not fall within the general scheme of the legislative provisions as a whole, there must then be a separate recital for it. This is the meaning behind the Joint Practical Guide's admonition that "specific reasons will [sic.] be given for a number of individual provisions either because of their importance or because they are not inherent in the general philosophy." 123

V. RECITALS IN INTERPRETATION

A. No Derogation

It is doubtful that a precise taxonomy of the rules pertaining to the interaction of recitals and operative provisions in EC law can be iterated. 124 Nevertheless, certain axioms can be profitably examined and perhaps some


122. Id.

123. Joint Practical Guide, supra note 21, ¶ 10.9 (And again, while our primary goal is not a critique of the Joint Practical Guide, nevertheless, the rule therein should be re-stated so as to give more guidance and to have an operative, not passive, tone. Namely, "[e]ach operative provision which does not clearly fall within the general scheme of the act must be supported by a separate recital."). Id.

124. City of Des Moines, supra note 7, ¶ A.7.
boundaries can be delineated. For instance, it is as an oft-repeated axiom that a recital cannot be so interpreted in derogation of an operative provision. This is not surprising: American law has the same rule.

A relatively recent case illustrates the working of the rule in EC law. In Criminal Proceedings against Gunnar Nilsson (popularly and infamously known as the Free Movement of Bovine Semen case), the hapless Nilsson with several accomplices inseminated certain Swedish cows with semen from Belgian bulls approved for such purposes by Belgium. The Swedish authorities instituted criminal proceedings against Nilsson (such is our modern world) and the court in Sweden certified several questions to the ECJ. The Swedes had criminalized the behavior in question because of their concern that the cattle born as a result would exhibit a condition called hyper tropism, "which produces a muscular mass which is large in comparison to the animal’s internal organs or bones and results in the more frequent use of Caesarean sections in calving." But Belgium had certified the product (the bovine semen) according to all the applicable rules, and the applicable EC directive precluded national rules of other Member States which would prohibit the product’s use in their territory.

Sweden argued, however, that a particular recital carved out an exception and that a Member State could prohibit the use of the product (the bovine semen) when the Member State believed that such use would result in an undesirable pedigree. The recital in question:

... is the fourth recital in the preamble to Directive 87/328:
'Whereas artificial insemination constitutes an important technique for increasing the use of the best breeders and, hence, for improving the bovine species; whereas in so doing, however, any impairment of the pedigree must be avoided, particularly with regard to male

125. STATUTES, supra note 7, at 290. Accord 26A C.J.S. Deeds § 192 (2001) ("[w]here a recital and an operative part of the deed conflict, the operative part prevails if certain and definite. Thus, a recital cannot control over plain words of the granting part of the deed, and a grant in a deed cannot be diminished or qualified by a recital therein.").

126. 17A AM. JUR. 2d Contracts § 383 (2008); COMPUTER CONTRACTS, supra note 5 ("American lawyers are inclined to ignore" recitals sections in legislative acts and resolutions.).

127. Case C-162/97, supra note 80.

128. Id. ¶ 2.

129. Id.

130. Id. ¶ 43.

131. Id. ¶ 44.


133. Case C-162/97, supra note 80, ¶ 51.

134. Id. ¶ 53.
breeders, which must possess all guarantees of their genetic value and of their freedom from hereditary defects.  

The ECJ bluntly rejected the argument, stating “that the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question.” Interestingly, the ECJ utilized, as a second reason for its decision, a tautological argument. Because Belgium had certified it, the ECJ reasoned, the bovine semen in question was legally incapable of producing an “undesirable pedigree.” Hence, according to the Court, there was and could be no conflict between the recital and the operative provision.

B. No Operative Effect

Another rule of the law of recitals in EC legislation is that recitals have no independent operative effect. This is not so much a function of interpretation as it is of the nature of recitals; by definition, recitals are not operative provisions of themselves.

This rule was demonstrated by the ECJ in a case involving an accidental recital. At one time prior to the events in the case, it had been unlawful to plant vines for the production of grapes to be made into wine, but the Regulation in question had made an exception for table grapes—that is, it was lawful to plant vines for the production of grapes to be consumed as fruit. But the Regulation was amended, and the exception was done away with. At this point one Giuseppe Manfredi planted vines to produce table grapes, and the Italian authorities accordingly fined him for it. He appealed on the basis that (slightly simplifying the matter) the Regulation’s operative part had been changed, but the recital justifying the planting of table grapes remained—that is, it had not been abrogated and was still a part of the law.

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135. Id.
136. Id. ¶ 54.
137. Id. ¶ 57.
138. Id. ¶¶ 55–56.
140. Id.
141. See generally Case C-308/97, supra note 139.
142. Id. ¶ 16.
143. Id. ¶ 17.
144. Id. ¶ 2.
145. Id. ¶ 27.
The Advocate General explained that this was "a mistake," that is, accidental.\textsuperscript{146} The Court did not really address the question of whether the recital operated in a positive manner so as to concur a right; it rejected Mr. Manfredi's argument by holding that the recital in question "cannot be relied upon to interpret [the regulation] in a manner clearly contrary to its wording."\textsuperscript{147} That is all the Court stated on the matter. Unfortunately, it is probably inaccurate to state that Mr. Manfredi's argument was that the recital should be used to interpret an operative provision—it wasn't. The better holding would have been to state that a recital will not confer a right.

The case demonstrates the rule that a recital will not confer a right which is otherwise clearly not granted or denied by the operative provisions. In comparison, Nilsson (supra § IV-A) demonstrates that a recital will not restrict a right.\textsuperscript{148}

\textbf{C. Resolution of Ambiguity}

\textbf{1. Nature of Operative Provision}

It is not surprising that EC law recitals can be used to resolve ambiguity in related legislative provisions.\textsuperscript{149} In an illustrative case, the ECJ utilized recitals to resolve ambiguity in the operative provisions of a legal act.\textsuperscript{150} The question in Moskof centered on whether a provision was transitory: i.e., meant to be impermanent.\textsuperscript{151} If so, it could properly be abrogated, even retroactively. The provision itself was silent (and thus ambiguous) on the point.\textsuperscript{152} The Court looked to the recital applicable to the retroactively abrogated provision and found that the recital placed the provision in question into a context from which it was clear that the provision was transitory.\textsuperscript{153}

The case is interesting from a theoretical perspective: ordinarily, interpretation of statutory provisions operate either to expand or contract their scope. It is at least arguable in this instance that neither occurred and that the recital merely helped the court determine the nature of the provision—that this

\begin{itemize}
  \item \textsuperscript{146} Id. ¶29.
  \item \textsuperscript{147} Id. ¶30.
  \item \textsuperscript{148} See generally Case 162/97, supra note 80.
  \item \textsuperscript{149} For an excellent example of legal reasoning in relation to the resolution of ambiguity by reference to recitals in British law, see generally the opinion of Ashworth, supra note 25.
  \item \textsuperscript{151} Id. ¶¶5--6.
  \item \textsuperscript{152} Id. ¶78.
  \item \textsuperscript{153} Id.
\end{itemize}
use was not restrictive (did not derogate from) but merely explained the nature of the provision.

2. Scope of Operative Provision

A more straightforward type of interaction between a recital and a legislative provision—that is, one in which the recital was considered in determining the scope of the provision, is illustrated in what is known as the CCAA case. The case involved the question of whether a consortium was or was not a purchaser of milk. The consortium in question did not actually purchase the milk under a sales contract, but milk was indeed delivered to it, and the delivery, it was said, was sufficient to trigger the operation of a provision in an EC regulation which was at issue, imposing a duty to make certain payments. The ECJ looked to the recitals to interpret the scope of the provision: did or did it not include such parties as the consortium to which milk products were delivered, but which, strictly speaking, did not purchase them? The ECJ found that in light of the recitals the provision in question was to be interpreted broadly, as the goal was that a particular levy should be paid, and that the milk deliveries to the consortium did place it within the scope of the act. (In other words, it was held to be a purchaser, even though it purchased nothing.) Thus, the recitals here served to interpret the provision, in effect expanding its scope.

If the Court had applied a literal interpretation in CCAA, the decision might have gone the other way. The case can thus be used to illustrate the well-known argument against purposive interpretation (and purposive drafting and even, thus, of the utility of recitals): legal certainty is diminished. The

154. Case C-288/97, supra note 111.
155. Id. ¶ 4.
156. Id. ¶ 28.
157. Id. ¶¶ 7, 19, 23.
158. Id. ¶ 23.
159. The fundamental argument against the use of recitals in legislation, against purposive legislative drafting, and against purposive statutory interpretation, is that this diminishes legal certainty. For the argument in relation to French purposive legislative drafting, see generally STEINER, supra note 10, at 15, § 1.2.1 and BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 6 (2nd ed., 1992). For both an American and transystemic argument, see generally Karen M. Gebbia-Pinetti, Statutory Interpretation, Democratic Legitimacy and Legal-System Values, 21 (No.1) SETON HALL LEGIS. J. 233, 312-14 (1997) ("[I]nterpretive theories that rely on judges to discern and apply legislative meanings, intents or purposes are frustrated by charges that legislatures can have no single, coherent intent or purpose, and that judges could not neutrally discern those legislative intents or statutory purposes in any event because judges are inevitably influenced by their own experiences, biases, and contexts."). Id.
D. Legitimate Expectations

1. Legitimate Expectations

Statements or acts on the part of European Institutions may give rise to legitimate expectations. They may also serve to prevent them from arising.

[The administrative law doctrine of] legitimate expectations has long been judicially protected by means of review in the European Union. . . . . The general principle is that EU institutions will be held to their representations irrespective of whether those are procedural or substantive in nature, provided that the requirements for applying the doctrine are met. This principle is so well established in EU law that legitimate expectations are not classified as either procedural or substantive. If an expectation is created and that expectation is found to be legitimate the [ECJ] will protect that expectation by holding the relevant administrator to the representation that gave rise to the expectation.

2. Recitals Can Prevent Legitimate Expectations From Arising

A somewhat surreal (due to its economic convolutions and to what is left unstated in the case opinion) case involving Chinese toys is illustrative of recitals preventing the arising of a legitimate expectation. At one time, there had been no quotas on the import of toys into the EC from China; then, such import exponentially increased. Quotas were imposed. These expired and were not renewed; the Kingdom of Spain requested and received quotas for its traders' in these toys. Spain was the only country to request the imposition of quotas. Several months later, new regulations were adopted for all

160. Case C-244/95, supra note 111, ¶ 62.
162. Id.
164. Id. ¶ 21.
165. Id.
166. Id. ¶¶ 7–8.
167. Id. ¶ 8.
Member States, raising the quotas. The Spanish government claimed this hurt its traders and was in contradiction to their legitimate expectations:

While there was no change in the actual circumstances, an alteration in the status quo established by the earlier regulation was imposed on the traders at very short notice, even though it was not justified by a higher public interest. That resulted in serious damage to all the traders who, having regard to the former regulation, had terminated or postponed their contracts.

The Spanish traders who had contracted to bring in all that the quotas would allow would quite apparently be hurt if more toys could be brought in, particularly if they were brought in by other traders. This competition would serve to lower the prices and hence would reduce the profits realized by the Spanish traders. None of this is, however, spelled out in the opinion. Unfortunately, it wasn’t decided by Judge Richard A. Posner.

According to the ECJ, the Council argued that it is “doubtful as to whether legitimate expectations can be relied upon where the only possible consequence for the traders concerned of the increase in the quota is a different level of competition on the Community toy market.” This is wonderful legalese for, ‘Well, it’s supposed to hurt! This kind of hurt is good for you! We’re supposed to do this! It’s what we do.’

Irregardless of the damage issue, the Court found that the recitals setting out the (lower) quotas specified that the quotas:

... could be adjusted. In those circumstances, measures of the kind laid down by the contested regulation were, by and large, foreseeable by the traders concerned. It follows that, in adopting the contested regulation, the Council has not acted in breach of the principle of protection of legitimate expectations ...

Thus, because the recitals stated that the quotas could be changed, no one could legitimately expect that the quotas would not be.

169. Id. ¶ 37.
170. Id. ¶ 40.
171. Id. ¶¶ 44–45.
3. Recitals Cannot Give Rise to Legitimate Expectations

It has been asserted that recitals may give rise to legitimate expectations. The Manual of Precedents, another drafting guide utilized by the European Institutions, makes the proposition and cites two cases in support: *Spain v. Council* and *Irish Farmers' Association*. *Spain v. Council* we have described in depth in the preceding sub-section. It does not so support the contention. Neither does *Irish Farmers*, which is quite similar to *Spain*. They hold, as described above, merely that recitals can prevent legitimate expectations from arising.

We have not been able to find a case wherein a recital gave rise to a legitimate expectation which was recognized by the ECJ. Probably the reason for this is the fact that it is oft repeated by the Court that “[T]he principle of the protection of legitimate expectations may be invoked as against Community rules only to the extent that the Community itself has previously created a situation which can give rise to a legitimate expectation.”

Being as it is that in EC law the principle of legitimate expectations is considered a corollary of the principle of legal certainty, and given that recitals are, by definition, statements of intent and are not meant to stand alone, but exist in reference to operative provisions, it is hard to envision a situation wherein a recital by itself would give rise to legitimate expectations. Indeed, when such a case (*Nilsson*) did arise, that is, where a recital stood alone, the recital was considered to be of no effect, as has been noted *supra* at § IV.B.

Moreover, when a recital does not stand alone it appears understandable that its effect in EC law would be either to widen or constrict the scope of the operative provision in question, but that it would not serve to create expectations. That is, a recital is not the sort of affirmative statement or action...
which would create a situation which could legitimately be relied upon. And this is a requirement of the ECJ case-law. 79

E. Role in Transposition

Recitals may have an important role in the transposition of EC legal acts into the national legislation of the Member States.

Much of European law takes the form of directives which set out general rules and objectives but leave Member States the choice as to how to attain them. Primary responsibility for applying EU law lies with the national administrations in the Member States . . . . The transposition into national law is done by national governments and parliaments sometimes involving regional and local authorities. 80

It appears natural to suppose that statements of intent appearing in recitals would be useful to national lawmakers seeking to iterate EC directives, since the entire idea is that the local measures can be different from the EC directive in form, even radically so, but not in substance. Interestingly, since the aim is to have the operative provisions transposed, there is no requirement that the recitals appear in the national legislation. 81

Evidence, albeit indirect, of the importance of recitals in transposition can be found in every case in which the ECJ strikes down a local provision in a transposed rule due to the influence of a recital upon the scope of the transposed operative provision. 82

VI. CONCLUSION

We began our research thinking that an exposition on this general topic might be of some worth, as it might clear up what we felt were some contradictions in what was purported to be the EC law of recitals. Specifically, we felt something might be amiss with the received wisdom that recitals could justify legitimate expectations such as would give rise to positive rights.


180. European Commission, supra note 59.


182. Examples can be found supra Part IV.A.
Something in there didn’t jibe with what we knew of legitimate expectations in this regard: only sufficiently specific statements or acts could give rise to them. Recitals, at least in EC law, are supposed to be rather general expressions of purpose; such cannot readily justify reliance. We were gratified when we found that the received wisdom was incorrect, and that recitals in EC law do not create legitimate expectations.

We certainly did feel, at the onset of our research, that the ECJ’s case-law invalidating EC legal acts on the basis that the recitals in question were insufficient was curious and therefore worthy of comment; at the very least the provision seemed unusual. The ECJ’s claims that recitals are necessary for the court to exercise its supervision seemed somewhat coy. As our research progressed, it became clear that there are no legal reasons why recitals must appear in EC legislation on penalty of invalidity, and the less we took the rule for granted, the more we became aware of its extremely unusual nature. We were, however, surprised when our research and analysis indicated the imperative nature of the requirement to state reasons in recitals in EC law was due, in an underlying sense, to the need for political reassurance and, secondly (in regard to the more private type of legal acts in question), to what in the United States we would call notions of due process. Our conclusions in this regard were strengthened when we realized that it is only in supranational, that is, EC, legislation where the justification assumes such importance, inasmuch as EU legislation (that is, second and third pillar legislation) which requires unanimity in order to be adopted does not require recitals at all.¹⁸³

VII. SUMMARY

The law of recitals in EC Legislation can be summarized thusly:

a) Where both the recitals and the operative provisions are clear but inconsistent, the operative provision will control. Corollary: recitals have no positive operation of their own.
b) Where the recital is clear, it will control an ambiguous operative provision. This means that the operative provision will be interpreted in light of the recital. There have been cases wherein the nature of the operative provision is affected by a recital, and others where the scope of the operative provision is affected.
c) A function of A and B is the relation of the recital to the European doctrine of “legitimate expectations.” Recitals cannot...

¹⁸³. The term “EU legislation” does not always encompass “EC legislation;” if it did, there would be no such term as “EC legislation.” For an explanation of this terminology, consult supra Part I (Introduction).
cause legitimate expectations to arise; they have no operative effect of their own. But they can prevent legitimate expectations from arising. This is in keeping with the idea that a recital may limit the scope of an ambiguous operative provision.

d) Recitals must be sufficient as a matter of law; that is, they must sufficiently describe the purpose of the act. If found insufficient, the measure is invalid. This feature of the EC law of recitals is similar to the requirement of a cause being present in every contract as a condition of its validity. While in contract law cause can be found outside of the four corners of the agreement, and while other jurisdictions do not require a statute’s purpose to be spelled-out in the statute itself, in the EC law of recitals the mandatory nature of the statement of reasons serves political and channeling purposes but not legal ones; nevertheless this justifies and explains the rule. 184

184. Recitals serve a due process purpose and hence do have a legal justification, but only in regard to private acts (that is, in regard to administrative law), and not in regard to secondary legislation, and hence this does not present an exception to the finding that the rule imperatively requiring secondary legislation to recite its purposes has no legal, per se, justification. See supra Section IV.D.