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Comparative Legal Analysis in the EU Labour Law: the Approach of the Council of the EU*

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1. *Introduction*

Comparative legal research, akin to embarking on a journey, enables exploration and the discovery of new places and different, often surprising, points of view[1]. It serves as a fundamental tool in legal scholarship, facilitating the examination of multiple legal systems to unveil both similarities and differences. Moreover, this method is not only pertinent within academic discourse but is also firmly entrenched in the practices of judges and legal practitioners, particularly in the field of international and European law.

The Court of Justice of the European Union (C. Just.) has historically embraced the comparative law method[2]. Lenaerts and Gutman emphasise

* This paper develops the report presented at the conference "*Best practices in comparative labour law*" promoted by International Association of Labour Law Journals, 5 May 2023.

[1] Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, in *HILJ*, 1985, 26, 2, p. 412.

[2] Lenaerts, Gutman, *The Comparative Law Method and the European Court of Justice: Echoes across the Atlantic*, in *AJCL*, 2016, 64, 4, p. 842; Graziadei, *The European Court of Justice at Work: Comparative Law on Stage and Behind the Scenes*, in *JCLS*, 2020, 13, 1, p. 9. In the case law it is noteworthy C. Just., Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, where the C. Just. established that "in pursuance of the task conferred on it by Article [19 TEU] of ensuring

the pivotal role of comparative law within Union courts, highlighting its significance in interpreting and shaping EU law[3]. As a result, comparative method is well-established in the C. Just. case law, which employs it to address the lacunae in EU law, as intended by the authors of Article 340 of the Treaty on the Functioning of the European Union (TFEU)[4]. This situation is understandable given that the C. Just. is tasked with ensuring that EU law is interpreted and applied uniformly across all European countries, ensuring that countries and institutions of the Union comply with EU norms[5]. Moreover, the interpretative methodology of EU law, mostly developed by the C. Just. in the absence of specific treaty provisions[6], has been significantly influenced by legal doctrine with EU legal scholars analysing and systematising these methods[7]. There is a strong interplay between the judiciary and academia, as many Court judges were previously law professors, contributing to a scholarly environment[8]. These methods, being judge-made and unwritten,

that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the [EU] legal system and, where necessary, general principles common to the legal systems of the Member States".

[3] Lenaerts, Gutman, *cit.*, p. 842.

[4] Lenaerts, Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, in *EUI WP AEL*, 2013, 9, p. 37.

[5] See Article 19 Treaty on European Union (TEU), Articles 251 to 281 Treaty on the Functioning of the European Union (TFEU), Article 136 Treaty on the European Atomic Energy Community (Euratom Treaty), and Protocol No. 3 annexed to the Treaties on the Statute of the Court of Justice of the European Union.

[6] In fact, there are no specific provisions in the TEU and the TFEU concerning the interpretation of primary and secondary law apart from Article 6 TEU and Article 340 TFEU, both of which refer to comparative law.

[7] Petrić, *A Reflection on the Methods of Interpretation of EU Law*, in *ICLJ*, 2023, 17, 1, p. 92; Itzcovich, *The Interpretation of Community Law by the European Court of Justice*, in *GLJ*, 2009, 10, 5, p. 540. As for the literature on the C. Just.'s interpretation, see also: Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Clarendon Press, 1993; Fennelly, *Legal Interpretation at the European Court of Justice*, in *FILJ*, 1996, 20, p. 656; Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart, 2012; Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, 2012; Lenaerts, Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*, Bruylant, 2020.

[8] Bobek, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts*, in Adams *et al.* (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart, 2013, pp. 197, 227-228; Vauchez, *Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, in *EPSR*, 2012, 4, 1, p. 51.

essentially form customary norms, requiring legal officials' adherence and belief in their obligation to follow them[9]. National judges, being crucial legal officials in the decentralised EU judicial system, must accept and apply the C. Just.'s interpretation methods to ensure the EU legal system's autonomy, coherence, and functionality[10]. Despite conceptual autonomy, EU law interpretation methods closely resemble those of national laws due to shared legal traditions. These methods include textual, contextual, and purposive approaches. Since the judges of the Court come from the Member States and are trained in national legal traditions, they tend to apply these methods in an analogous way to EU law. This convergence suggests a universalistic perspective on interpretation methods in Europe[11].

Alongside the interpretation of EU law after its entry into force, the comparative method is applied in specific areas of law, with a particular focus in this essay on labour law, where it serves to inform legislative efforts[12]. Comparative method is not the most frequently adopted; however, it remains highly significant for creating law within the Union's competencies[13]. Alongside this methodology the Legal Advisers of the EU institutions employs in their activity the interpretive rules established by the C. Just.

A gap persists in the literature regarding a comprehensive understanding of the methodologies used by the main institutions of the European Union (EU), in particular the Council of the EU (Council), in their legislative processes, especially around labour law[14]. Addressing this gap is important

[9] Petrić, *cit.*, p. 92; Itzcovich, *cit.*, p. 540.

[10] Petrić, *cit.*, p. 92; Itzcovich, *cit.*, p. 540; Rosas, *The National Judge as EU Judge: Opinion 1/09*, in Cardonnel, Rosas, Wahl (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Hart, 2012, p. 105.

[11] Petrić, *cit.*, pp. 95-96.

[12] Leino-Sandberg, *What Do EU Legal Advisers Do?*, in Leino-Sandberg (eds.), *The Politics of Legal Expertise in EU Policy-Making*, Cambridge University Press, 2021, p. 75.

[13] Lyal, *The Community Dimension in Legal Education: A Personal Perspective*, in *EJLE*, 2007, 4, 1, p. 61.

[14] The literature on the role of the legal advisors of the EU institutions (Parliament, Council and Commission) is extremely scarce, among others: Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making*, Cambridge University Press, 2021; Jacqué, *The Role of Legal Services in the Elaboration of European Legislation*, in Vauchez, De Witte (eds.), *Lawyering Europe: European Law as a Transnational Social Field*, Hart, 2013, pp. 43-54. Conversely, there is a large literature on the C. Just. and its way of interpreting the law, among others: Petrić, *cit.*; Graziadei, *cit.*; Sankari, *Constitutional Pluralism and Judicial Adjudication: On Legal Reasoning, Minimalism and Silence by the Court of Justice*, in Davies, Avbelj (eds.), *Research Handbook on Legal Pluralism*

not only for academic clarity, but also to improve the effectiveness and transparency of legal decision-making within the EU.

This paper studies the interpretative method of the Legal Advisers at the Council, especially in labour legal field. In delineating the methods used by the Council in its legislative policies, it is crucial to recognise the multifaceted nature of EU decision-making processes. These processes vary depending on the policy area under consideration, embodying distinct methodologies tailored to specific contexts. The Community method, prevalent in most EU legislative acts, operates under the ordinary legislative procedure as outlined in Article 294 TFEU[15]. This method embodies the collaborative efforts of EU institutions, including the European Commission, the European Parliament, and the Council of the EU, with decisions made through qualified majority voting. Conversely, the intergovernmental method, primarily employed in domains such as the common foreign and security policy, entails shared initiative between the Commission and EU Member States, with generally unanimous decision-making in the Council[16].

and EU Law, Edward Elgar, 2018; Slaughter, Stone Sweet, Weiler, *The European Court and National Courts*, Hart, 2018; Lenaerts, Gutman, *cit.*; Lenaerts, Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*; Jakab, *Special Issue: Constitutional Reasoning*, in *GLJ*, 2013, 14, 8, pp. 1215-1278; Bobek, *cit.*; Vauchez, *cit.*; Itzcovich, *cit.*; De Búrca, Weiler, *The European Court of Justice*, in Weiler (eds.), *The Collected Courses of the Academy of European Law*, Oxford University Press, 2001; Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, in *Oxford European Community Law Series*, Clarendon Press, 1993; MacCormick, Summers, *Interpreting Statutes: A Comparative Study*, Dartmouth, 1991.

[15] Among others, European Union, *The Community and Intergovernmental Methods*, in *EUR-Lex*, 2024, https://eur-lex.europa.eu/EN/legal-content/glossary/the-community-and-intergovernmental-methods.html; Aa.Vv., *EU Constitutional Law*, in *Oxford European Union Law Library*, Oxford University Press, 2022; Devuyst, *The European Union's Community Method: Foundations and Evolution*, in *Oxford Research Encyclopaedia of Politics*, Oxford University Press, 2018; Dero-Bugny, *The Dilution of the Community Method and the Diversification of Intergovernmental Practices*, in *ROFCE/DP*, 2014 134, p. 61; De Baere, *The Community Method*, in *Constitutional Principles of EU External Relations*, Oxford University Press, 2008, pp. 73-98.

[16] Among others, European Union, *The Community and Intergovernmental Methods*, *cit.*; Aa.Vv., *EU Constitutional Law*, *cit.*; Bickerton, Hodson, Puetter, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, Oxford University Press, 2015; Dero-Bugny, *cit.*; Puetter, *Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance*, in *JEPP*, 2010, 19, 2, pp. 161-178; Tsebelis, Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, in *IO*, 2001, 55, 2, pp. 357-390.

Furthermore, it is crucial to recognise the peculiarity of the work of the Council Legal Advisers whose role is to assist "the Council and its preparatory bodies, the Presidency and the GSC in order to ensure that Council acts are lawful and well drafted. It has the right and the duty to intervene when it considers it necessary, orally or in writing, both at the level of working parties and committees and at the level of Coreper or the Council, by giving fully independent opinions on any legal question, whether at the request of the Council or on its own initiative. […] It is also responsible for checking the drafting quality of proposals and draft acts and for formulating drafting suggestions for the Council and its bodies, […]"[17]. Therefore, the work entails "a creative approach where appropriate, to identifying legally correct and politically acceptable solutions […]"[18].

Given the peculiarities of the work within the Council and the objective of understanding its approach to the construction of law, this study aims to investigate the use of comparative law in this institution, particularly in the field of labour law, and to contribute to filling the existing gap in the literature. The research question guiding this study is twofold: how does the Council employ the method of comparative law, and what significance does it hold within the spectrum of legal methodologies used in the field of labour law? This study is motivated by the need to not only elucidate the Council's approach to legal analysis but also to comprehend the broader implications of employing comparative methods in EU legislative processes.

To effectively address the research question, this article initially delves into the legal research methods employed by EU institutions, highlighting the jurisprudential framework of the interpretation forms applied by the various Legal Services of the Commission, Parliament, and Council (Section 3). Then, the essay focuses on the methods of legal interpretation applied by the Legal Service of the Council (CLS), dwelling on the legal reasons (Lisbon treaty) that lead to preferring an EU law-based or comparative method (Section 3.1). Section 4 explores legal comparison as a research method to establish the connection between doctrinal perspectives on legal research methodology and its practical application. Section 5 analyses how the Council uses comparative law in practice, thus highlighting the similarities and differences between academic theory and practical implementation focussing

[17] Council of the EU, *Comments on the Council's Rules of Procedure*, 2022, p. 37.
[18] Council of the EU, *Mission Statement of the Council Legal Service*, 2019, para. 4.

on labour law. Finally, the essay concludes by synthesising these reflections to provide a comprehensive answer to the research question.

2. *Methodology*

A fundamental premise underlying this research is the importance of the comparative method in both the academic and practical spheres. Understanding the methodological underpinnings of legal analysis is not only essential for scholarly pursuits but also crucial for informing decision-making processes within non-academic institutions and organizations, such as the Council of the EU. By elucidating the methodological frameworks employed by the Council, particularly in the context of comparative law, this study seeks to bridge the gap between academic scholarship and practical legal application.

The methodological approach adopted in this study integrates both doctrinal and empirical dimensions. Indeed, three methods have been combined in this research: critical or semi-systematic literature review[19], participant observation in the participant-as-observer approach[20], and *élites* semi-structured interviews[21].

[19] Snyder, *Literature Review as a Research Methodology: An Overview and Guidelines*, in *JBR*, 2019, 104, pp. 333-339; Bandara *et al.*, *Achieving Rigor in Literature Reviews: Insights from Qualitative Data Analysis and Tool-Support*, in *Communications of the Association for Information Systems*, 2015, 37, pp. 154-204; Wong *et al.*, *RAMESES Publication Standards: Meta-Narrative Reviews*, in *BMC Med.*, 2013, 11, 1, pp. 20; Booth, Papaioannou, Sutton, *Systematic Approaches to a Successful Literature Review*, Sage, 2012; Fink, *Conducting Research Literature Reviews: From the Internet to Paper*, Sage, 2005.

[20] K. M. Dewalt, B. R. Dewalt, Wayland, *Participant Observation*, in Bernard H. Russell (eds.), *Handbook of Methods in Cultural Anthropology*, AltaMira Press, 1998, pp. 259-299; P. Jackson, *Principles and Problems of Participant Observation*, in *HG*, 1983, 65, 1, pp. 39-46; Spradley, *Participant Observation*, Holt, Rinehart and Winston, 1980; J. Ross, M.H. Ross, *Participant Observation in Political Research*, in *PM*, 1974, 1, 1, pp. 63-88; Bogdan, *Participant Observation*, in *PJE*, 1973, 50, 4, pp. 302-308; Gold, *Roles in Sociological Field Observations*, in *SF*, 1958, 36, 3, pp. 217-223; Becker, Geer, *Participant Observation and Interviewing: A Comparison*, in *HO*, 1957, 16, 3, pp. 28-32.

[21] Lancaster, *Confidentiality, Anonymity and Power Relations in Elite Interviewing: Conducting Qualitative Policy Research in a Politicised Domain*, in *IJSRM*, 2017, 20, 1, pp. 93-103; Mikecz, *Interviewing Elites: Addressing Methodological Issues*, in *QIn*, 2012, 18, 6, pp. 482-493; Harvey, *Strategies for Conducting Elite Interviews*, in *QRes*, 2011, 11, 4, pp. 431-441; Aberbach, Rockman, *Conducting and Coding Elite Interviews*, in *APSA*, 2002, 35, 4, pp. 673-676.

The literature review conducted in this study followed a critical or semi-systematic approach[22], aligning with the complexities inherent in comparative law research. From an academic perspective, comparative law has been conceptualised and studied across diverse disciplines, leading to varied methodological approaches and fragmented research traditions. Consequently, a comprehensive systematic review of every relevant article is impractical due to the diverse conceptualisations and interdisciplinary nature of comparative law studies[23].

Instead, this study adopted a critical semi-systematic literature review approach, which emphasises the synthesis of potentially relevant research traditions using meta-narratives[24]. This approach acknowledges the broad spectrum of comparative law studies and aims to identify and understand the evolution of research in comparative social and labour law over time. By synthesising different research traditions, this methodological approach provides an understanding of complex areas while ensuring the transparency of the research process[25].

The review process involved examining key articles and works related to comparative law and labour law, focusing on identifying themes, theoretical perspectives, and common issues. References to comparative methodology literature were made when necessary to contextualise the findings and address the research questions effectively[26]. Furthermore, the literature review

[22] SNYDER, *cit.*, p. 335.

[23] For a better understanding of the motivation behind a semi-systematic literature review, see the description of meta-narrative reviews in WONG *ET AL*, *RAMESES Publication Standards,* cit.

[24] "In general, the review seeks to identify and understand all potentially relevant research traditions that have implications for the studied topic and to synthesize these using meta-narratives instead of by measuring effect size" in SNYDER, *cit.*, p. 335.

[25] "This type of analysis can be useful for detecting themes, theoretical perspectives, or common issues within a specific research discipline or methodology or for identifying components of a theoretical concept" in SNYDER, *cit.*, p. 335. See also, WARD, HOUSE, HAMER, *Developing a Framework for Transferring Knowledge Into Action: A Thematic Analysis of the Literature*, in *JHSR&P*, 2009, 14, 3, pp. 156-164.

[26] Regarding Comparative Law, among others, see: SIEMS, *Comparative Law*, Cambridge University Press, 2022; BHAT, *cit.*; KISCHEL, *Comparative Law*, Oxford University Press, 2019; REIMANN, ZIMMERMANN, *The Oxford Handbook of Comparative Law*, Oxford University Press, 2019; GOANTA, SIEMS, *What Determines National Convergence of EU Law? Measuring the Implementation of Consumer Sales Law*, in *LS*, 2019, 39, 4, pp. 714-734; SACCO, GAMBARO, *Trattato Di Diritto Comparato. Sistemi Giuridici Comparati*, UTET, 2018; SAMUEL, *cit.*; LÖHNIG, *Comparative Law and Legal History: A Few Words about Comparative Legal History*, in ADAMS, HEIRBAUT (eds.),

served as a tool to assess and understand the methodologies applied by Legal Advisers in the CLS. By analysing scholarly works alongside practical insights, this study aimed to bridge the gap between academic scholarship and practical application in the context of the Council's legal work.

To conceptualise comparative law in general and comparative labour law in particular, theoretical frameworks from Sacco, Weiss, Kestemont, Waas, Trebilcock and Finkin were used in this study[27]. The use of these models served to synthesise key debates and issues in academic research and then assess their practical implications, especially in the case of the Council.

Overall, the literature review provided a comprehensive understanding of the theoretical foundations and practical implications of comparative law research, enriching the methodological approach adopted in this study. By integrating theoretical insights with practical observations, this study aimed

The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke, Hart, 2015; Valcke, Grellette, *Three Functions of Function in Comparative Legal Studies*, in Adams, Heirbaut (eds.), *cit.*, pp. 99-112; Valcke, *Reflections on Comparative Law Methodology - Getting inside Contract Law*, in Adams, Bomhoff (eds.), *Practice and Theory in Comparative Law*, Cambridge University Press, 2012, pp. 22-48; Bussani, Mattei, *The Cambridge Companion to Comparative Law*, Cambridge University Press, 2012; De Coninck, *The Functional Method of Comparative Law: "Quo Vàdis"?*, in *RJCIPL*, 2010, 74, 2, pp. 318-350; Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence*, in Riles (eds.), *Rethinking the Masters of Comparative Law*, Hart, 2001, p. 238; Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in *AJCL*, 1991, 39, 1, p. 1-34; Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, in *AJCL*, 1991, 39, 2, pp. 343-401. Regarding Comprative Labour Law, among others, see: Finkin, *Comparative Labour Law*, in Reimann, Zimmermann (eds.), *cit.*, pp. 1109-1136; Trebilcock, *Comparative Labour Law*, Edward Elgar, 2018; Finkin, Mundlak, *Comparative Labor Law,* Edward Elgar, 2015; Zahn, *The "Europeanisation" of Labour Law: Can Comparative Labour Law Solve the Problem?*, in *NILQ*, 2010, 61, 1, pp. 79-92; Weiss, *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004*, in *ILJ*, 2010, 39, 1, pp. 92-94; Bronstein, *International and Comparative Labour Law. Current Challenges*, Palgrave Macmillan and International Labour Organization, 2009; Blanpain, *Comparative Labour Law and Industrial Relations*, Kluver Law Taxation, 1987; Finkin, *cit.*, pp. 1130-1160; Weiss, *The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool*, in *CLLPJ*, 2005, 25, 1, pp. 169-182; Fahlbeck, *Comparative Labor Law - Quo Vadis?*, in *CLLPJ*, 2005, 25, 1, pp. 7-20; Blanpain, *cit.*; Aa.Vv., *Comparative Labour Law and Industrial Relations*, Springer, 1982.

[27] Finkin, *cit.*; Sacco, Gambaro, *cit.*; Trebilcock, *cit.*; Kestemont, *Handbook on Legal Methodology. From Objective to Method*, Intersentia, 2018; Kestemont, *A Typology of Research Objectives in Legal Scholarship*, *RJJ*, 2015, 5, pp. 5-21; Finkin, Mundlak, *cit.*; Weiss, *The Transformation of Labour Law in Europe*, cit.; Waas, *A Restatement of the Law with Respect to Labour Law*, in *IJCL*, 2008, 24, 4, pp. 451-467; Weiss, *The Future of Comparative Labor Law*, *cit.*; Sacco, *Legal Formants (Installment I of II)*, cit.; Sacco, *Legal Formants (Installment II of II)*, *cit.*

to contribute to the ongoing dialogue between academia and legal practice within the European Union institutions.

From a practical perspective, the participant-as-observer approach was adopted to provide an in-depth understanding of the Council's legal service dynamics[28]. This methodological choice was influenced by the temporary nature of the author's position and the acknowledgment among colleagues of the author's dual role as both participant and observer[29]. By actively engaging in the daily activities of the legal service, the author gained firsthand experience and insights into the decision-making processes and operational mechanisms within the Council.

The participant-as-observer approach enabled the author to strike a balance between insider and outsider perspectives, minimising the potential for bias and subjective interpretation[30]. This methodological decision aimed to enhance the credibility and validity of the observations made, ensuring a nuanced understanding of the Council's legal work.

Through moderated participation in the working group, the author immersed himself in the professional environment of the Legal Advisers, gaining valuable insights into their thought processes, approaches to legal analysis and interactions with other stakeholders[31]. Being embedded within the working group, the author was able to grasp the complexities of the Council's legal decision-making processes, thus facilitating a comprehensive description and analysis of the observed phenomena.

The participant-as-observer approach not only allowed for a thorough exploration of the CLS dynamics but also facilitated a deeper understanding

[28] To carry out the participant observation, reference was made, among others, to: K.M. Dewalt, B.R. Dewalt, Wayland, *cit.*; Jackson, *cit.*; Spradley, *cit.*; J. Ross, M.H. Ross, *cit.*; Bogdan, *cit.*; Gold, *cit.*; Becker, Geer, *cit.*

[29] "Although basically similar to the complete observer role, the participant-as-observer role differs significantly in that both field worker and informant are aware that theirs is a field relationship. This mutual awareness tends to minimize problems of role-pretending; yet, the role carries with it numerous opportunities for compartmentalizing mistakes and dilemmas which typically bedevil the complete participant." in Gold, *cit.*, p. 220.

[30] Jackson, *cit.*; Gold, *cit.*; Schwartz, Green Schwartz, *Problems in Participant Observation*, *AJS*, 1955, 60, 4, pp. 343-353.

[31] "Participant observation offers the possibility of collecting information to which other methods do not give access or which is prerequisite to the use of other methods. Participant observation can be used rigorously, and can produce reliable data […]." in J. Ross, M.H. Ross, *cit.*, p. 78.

of the institutional culture, norms, and practices. By actively participating in meetings, discussions, and everyday activities, the author gained unique insights into the Council's internal dynamics and operational challenges, which significantly informed the research findings and analysis.

Overall, the participant-as-observer approach proved instrumental in providing rich, contextualised data on the CLS operations, thereby enriching the methodological rigor and depth of the study.

The semi-structured interviews conducted complemented the participant observation by providing additional perspectives and insights from key stakeholders within the CLS[32]. These interviews were conducted with the aim of minimising potential distortions caused by limited observation duration and gaining further understanding of critical aspects not fully captured through observation alone.

The interviews, conducted via video calls in the spring of 2023, were structured around specific topics related to research methods, comparative law, and decision-making processes within the Council. The topics included understanding the rationale behind choosing different research methodologies, determining the scope of legal systems for comparison, and preferences for micro- or macro-comparative approaches.

Each interview lasted approximately 45 minutes, during which the author facilitated the discussion based on a predefined framework. The interviewees were given space to discuss freely and organise their answers within the limits of disclosable information. The author took detailed notes during the interviews to capture key insights and observations.

To ensure confidentiality, the interviewees were categorised as: (a) CLS Legal Officer 1, "Interview A" and (b) CLS Legal Officer 2, "Interview B". This classification aimed to protect the anonymity of the respondents while allowing for meaningful categorisation and analysis of the interview data.

It is essential to note that the interviews were conducted with the Legal Advisers of the Council, who represent a subset of the CLS staff. In spring 2023, the CLS comprised approximately sixty legal advisers, most of whom are employed on a permanent basis. In the Directorate responsible for Employment and Social Affairs there were eight legal advisers. Approximately

[32] To carry out the interviews, reference was made, among others, to: LANCASTER, *cit.*; ALSHENQEETI, *Interviewing as a Data Collection Method: A Critical Review*, in *ELR*, 2014, 3, 1, pp. 39-45; HARVEY, *cit.*; MIKECZ, *cit.*; HARVEY, *cit.*; BERRY, *Validity and Reliability Issues in Elite Interviewing*, in *PSP*, 2002, 35, 4, pp. 679-682; ABERBACH, ROCKMAN, *cit.*; BECKER, GEER, *cit.*

between 3 and 4 persons dealt specifically with employment and social law, at least 2 full-time. The sample of interviewees was representative of 50% of the personnel, ensuring a diverse and comprehensive perspective on the issues discussed.

The information gleaned from the interviews complemented the findings from participant observation, providing valuable insights into the CLS operations, decision-making processes, and the interplay between academic and practical methodologies. Overall, the combination of participant observation and semi-structured interviews enriched the methodological approach, enhancing the comprehensiveness and validity of the study's findings.

Finally, it is important to specify that the considerations on the roles and activities of the Legal Services other than the Council are based on the analysis of the literature[33], not on interviews or participatory observations. Due to confidentiality provisions, it was not possible to discuss specific cases, making generalisations in the methodological description necessary. Overall, this comprehensive approach provides valuable insights into comparative law methodologies within the Council, contributing to both academic research and the practical application of law.

3. *Methods of Legal Interpretation in the EU Institutions*

The legal system of the European Union, like all systems, presupposes interpretation by legal operators (judges, legal advisers, and legal professionals) as a way for evolution, adaptation, and creation of EU Law[34].

Contrary to some national legal systems, such as Italy[35], the methods of

[33] Leino-Sandberg, *The Politics of Legal*, *cit.*; Lewis, T*he European Council and the Council of the European Union*, in Cini, Pérez-Solorzano, Borragan (eds.), *European Union Politics*, Oxford University Press, 2019, pp. 157-175; Jacqué, T*he Role of Legal Services in the Elaboration of European Legislation*, in Vauchez, De Witte (eds.), *Lawyering Europe: European Law as a Transnational Social Field*, Hart, 2013, pp. 43-54.

[34] In CLS Legal Officer 1, "Interview A", it emerges that the leading role of the C. Just. is crucial for the CLS. The prevailing interpretation criteria applied by the CLS are those of the C. Just.: linguistic or textual, systemic, or contextual, and teleological or purposive methods. Therefore, it is necessary to briefly reconstruct the case law on interpretation.

[35] See Article 12 of the Civil Code of Italy on legal interpretation stating: "In applying the law, no other meaning may be attributed to it than that made manifest by the grammatical meaning of the words according to their connection and the intention of the legislature.

interpretation of EU law are mainly of jurisprudential origin. The C. Just. had to intervene by introducing these methods and filling the gap in the treaties where there are no specific provisions on the interpretation of primary and secondary EU law. Petri emphasises that in the construction of the interpretative system, the C. Just. was significantly influenced by legal doctrine. Indeed, "EU legal scholars have described and systematised these methods and argued for their adaptation and modification. This was supported by a specific relationship between the 'bench' and the 'academia': on the one hand, many judges at the Court were previously law professors, which is why the Court has sometimes been referred to as 'academic' court; on the other, many (if not all) judges of the Court have regularly contributed with their extra-judicial writings to the advancement of the EU legal literature, especially in the formative years of the EU integration"[36].

Although these interpretative methods have never been crystallised in a legislative act, they inform the entire EU legal system and have become customary norms[37]. National courts have actively contributed to the solidification of the interpretative system through a fruitful dialogue with the C. Just. This is because, as Lenaerts and Gutiérrez-Fons explain, "the philosophical foundations of EU law are not those of a hierarchical legal order where interpretation is the result of a 'top-down' and dogmatic approach. On the contrary, 'to say what the law of the EU is' involves a complex balancing exercise which must be struck in a pluralist environment where the mutual exchange of ideas is of the essence"[38].

The methods of interpretation of EU law are first laid down in the *van Gend en Loos* case and are then constantly reaffirmed up to the case *Presidenza del Consiglio dei Ministri v. BV*[39]. In the former case, the C. Just. stated that "it is necessary to consider the *spirit*, the *general scheme* and the *wording* of those provisions", while in the latter, it stated that "it is necessary to consider not only the *wording* of that provision, but also its *context* and the *objectives* of the

If a dispute cannot be decided by a specific provision, reference shall be made to the provisions governing similar cases or analogous matters; if the case still remains doubtful, it shall be decided according to the general principles of the legal system of the State".

[36] Petrić, *cit.*, p. 92; Itzcovich, *cit.*, p. 540.

[37] *Ibid.*

[38] Lenaerts, Gutiérrez-Fons, *cit.*, p. 61.

[39] Cfr. C. Just., Judgment of 05 February 1963, *van Gend en Loos*, Case C-26/62, ECLI:EU:C:1963:1, para. 12-13 and C. Just., Judgment of 16 July 2020, *Presidenza del Consiglio dei Ministri v. BV*, Case C-129/19, ECLI:EU:C:2020:566, para. 38.

legislation of which it forms part"[40]. Alongside these general interpretative methods, the C. Just. consistently applies legal comparison. This method is not only additional but even legitimizes the others because they are based on the common constitutional traditions of the Member States, as also indicated by Article 6(3) TEU and Article 340(2) TFEU[41]. It is no coincidence that Lenaerts and Gutman affirm that the C. Just. is the institution that has employed the comparative legal methodology to interpret law and resolve legal antinomies since its inception[42]. Indeed, "the comparative law method constitutes an important, indeed crucial, tool for the Union courts as part of deciding all the various types of cases that are brought before them in all areas of EU law whether involving judicial interpretation or judicial lawmaking"[43].

The relevance of comparative legal analysis for EU Law is already evident in the treaties, which in fact expressly provide that in certain cases EU Law shall be interpreted "[...] in accordance with the general principles common to the laws of the Member States [...]"[44]. The call for legal comparison is even stronger in Article 6(3) of the TEU, which refers to the "constitutional traditions common to the Member States". These phrases commit the C. Just. to interpret EU Law through a bought-in methodology that considers all the legal traditions of the Member States[45].

The C. Just. is not the only institution applying the comparative methodology. Indeed, all major EU institutions – the European Commission, the Council, and the European Parliament – employ comparative legal analysis in their legislative work through their Legal Services.

[40] Emphasis added.

[41] Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, ECB decisions on the Public Sector Purchase Programme exceed EU competences, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 112: "The methodological standards recognised by the C. Just. for the judicial development of the law are based on the (constitutional) legal traditions common to the Member States (cf also Art 6(3) TEU, Art 340(2) TFEU), which are notably reflected in the case-law of the Member States' constitutional and apex courts and of the European Court of Human Rights. […] As long as the C. Just. applies recognized methodological principles and the decision it renders is not objectively arbitrary from an objective perspective, the Federal Constitutional Court must respect the decision of the C. Just. even when it adopts a view against which weighty arguments could be made".

[42] Lenaerts, Gutman, *cit.*, p. 842; Graziadei, *cit.*, p. 9.

[43] Lenaerts. Gutman, *cit.*, p. 176.

[44] Article 340, TFEU.

[45] Graziadei, *cit.*, p. 27.

The Legal Services of the three institutions are the bodies responsible for conducting technical assessments of EU legislation by applying interpretative methodologies. Advisory and advocacy are the two functions that these three Legal Services specifically fulfil. This article focuses exclusively on the Advisory function.

Legal Advisers accomplish the advisory function by providing objective and neutral technical assistance in the form of legal interpretations. While the Commission Legal Service is more involved in the preliminary stages of proposal drafting and in the contentious phase, that of the co-legislators has a more active Advisory role, having to provide a sound analysis of the legal implications of legislative proposals and to identify legitimate solutions, avoiding political considerations[46].

According to Siems, the European Commission conducts comparative legal analysis to assess its impact on Member States legislation, to evaluate how directives are transposed and how effective regulations are[47]. Legal science has dealt with understanding how the European Commission conducts comparative legal analysis through both qualitative and quantitative studies[48]. Furthermore, the European Commission often conducts preliminary comparative studies aimed at understanding common Member States principles that can serve as a model for harmonising legislation[49]. Examples of these studies are contained in the preliminary reports or impact studies that accompany legislative proposals[50].

The Legal Services of the two co-legislators use comparative analysis on an occasionally, particularly in new topics, where competencies are uncertain, or when there are significantly dissimilar legislations to be harmonised. Opinions or oral interventions based on a comparative analysis may be issued in an advisory capacity as a preliminary assessment of the conformity of the proposal with the legal basis or as a remedy with a view of addressing or preventing a legal issue or potential conflict of competence[51].

[46] Leino-Sandberg, *What Do EU Legal Advisers Do?*, *cit.*, 58.

[47] Siems, *Comparative Law*, *cit.*, p. 217.

[48] Goanta, *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach*, Intersentia, 2016; Goanta, Siems, *Comparative Law*, cit.; Börzel, *Why Noncompliance: The Politics of Law in the European Union*, Cornell University Press, 2021.

[49] CLS Legal Officer 1, "Interview A", 2023.

[50] *Ibid*.

[51] CLS Legal Officer 1, "Interview A", 2023; CLS Legal Officer 2, "Interview B', 2023.

3.1. *Methods of legal interpretation at the Council*

Having provided a general overview of the interpretation methods within EU institutions and the role of the Legal Services of the Commission and co-legislators, we now turn our attention to the interpretation methods employed within the Council.

To grasp the methodologies employed by the Council in its legislative processes, it is necessary to recognise the diverse nature of the EU's decision-making process. These processes vary across policy sectors, each characterised by specific methodologies tailored to its unique context. The Community method, extensively used in EU legislative acts, operates within the framework of the ordinary legislative procedure outlined in Article 294 TFEU[52]. It entails collaboration among EU institutions – the Commission, the Parliament, and the Council – with decisions made by qualified majority voting. Conversely, the Intergovernmental method, primarily employed in sectors such as the common foreign and security policy, involves joint initiative between the Commission and EU Member States, with decision-making typically requiring unanimity within the Council[53].

Furthermore, understanding the distinct role of Council Legal Advisers is essential. They are tasked with supporting the Council, its preparatory bodies, the Presidency, and the GSC to ensure the legitimacy and precision of legislative acts. Council Legal Advisers have the autonomy to intervene orally or in writing, providing independent legal opinions on any pertinent matter[54]. Additionally, they are responsible for evaluating the editorial quality of proposals and suggesting improvements, often necessitating a creative approach to identify legally sound and politically viable solutions[55].

According to Leino-Sandberg, the EU legislative procedure can be considered a laboratory for practical comparative law[56]. The same concept also appears in Jacqué, who emphasises how Legal Advisers working in the EU

[52] Among others, European Union, *cit.*; Aa.Vv., *EU Constitutional Law,* cit.; Devuyst, *cit.*; Dero-Bugny, *cit.*; De Baere, *cit.*

[53] Among others, European Union, *cit.*; Aa.Vv., *EU Constitutional Law*, cit.; Bickerton, Hodson, Puetter, *cit.*; Dero-Bugny, *cit.*; Puetter, *cit.*; Tsebelis, Garrett, *cit.*

[54] Council of the EU, *Comments on the Council's Rules of Procedure*, *cit.*, p. 37.

[55] Council of the EU, *Mission Statement of the Council Legal Service*, *cit.*, para. 4.

[56] Leino-Sandberg, *What Do EU Legal Advisers Do?*, *cit.*, p. 75.

legislative procedure have to be able to evaluate and examine the existing legislation of Member States[57].

The analysis of the law is accompanied by the ability to preserve the coherence of the legal system, allowing it to evolve without disruption[58]. This aspect is especially important in the EU context, where regulatory evolution is particularly rapid, and in the field of social and labour legislation, which has only been partially devolved to the EU and with very strict limits.

To analyse legislative proposals and preserve the coherence of the EU legal system, the CLS apply various methods that can be grouped into two types: (a) the *EU law-based method* and (b) the *comparative method*.

The *EU law-based method* is the one most frequently employed within the Council. It is based on a legal evaluation of norms according to the interpretative criteria established by the C. Just.[59], namely linguistic or textual, systemic, or contextual, and teleological or purposive criteria[60].

In everyday work, to understand the legal soundness of a legislative proposal, an analysis template is followed that aims to decode any legal ambiguities, antinomies, and inconsistencies. The analysis presupposes a quasi-academic study of case law related to legal basis, the regulatory framework, in which the proposal fits, and the EU law.

At this stage, it is necessary to identify all the problems that a text may have, both in terms of coherence with primary law and in terms of application. Since Article 291(1) TFEU assigns to the Member States the responsibility for implementing all binding acts, it is crucial to identify any issues that may invalidate the act or make it unenforceable and propose solutions. During the analysis and amendment phase of the legislative proposal by the Member States' representatives, the Legal Advisers are called upon by the Presidency to conduct an evaluation of the various proposals, providing an oral or written opinion on their legal soundness[61].

Legal Advisers employ EU sources (legislation, case law and doctrine) to analyse a legislative proposal. Treaty law and C. Just. case law play a leading

[57] JACQUÉ, *cit.,* p. 49.

[58] JENKS, *Craftsmanship in International Law*, in *AJIL*, 1956, 50, 1, pp. 51-52.

[59] CLS Legal Officer 1, "Interview A".

[60] C. Just., Judgment of 05 February 1963, *van Gend en Loos*, Case C-26/62, ECLI:EU:C:1963:1, para. 12-13.

[61] This reconstruction is based on the author's observation and interviewees' responses: CLS Legal Officer 1, "Interview A"; CLS Legal Officer 2, "Interview B".

role. Indeed, the initial phase of the analysis involves a preliminary assessment of the proposal's legitimacy vis-à-vis the legal basis indicated by the Commission. The purpose of this assessment is to detect antinomies and to evaluate whether the proposed legal basis is the most suitable to achieve the purpose of the legislative proposal. At this stage, the main interpretative criteria applied are teleological and systematic, as the assessment is made with respect to the Treaty and the preliminary legitimacy of the act[62].

In the second phase, the entire legislative text is studied article by article, applying a textual and systematic analysis to the meaning of the text and its relationship with all its parts and with EU law. Then, a teleological evaluation is applied regarding the conformity of the text to the purpose pursued and that indicated by the legal basis. The purpose of this evaluation is the same as the first phase: to understand how norms are formed, bring out any antinomies and inconsistencies, and preliminarily assess the conformity of the text to the treaties and EU law more generally. This phase is very delicate because it presupposes attention to detail without losing sight of the overall framework and is carried out by resorting to both legal and case law sources of the EU[63].

This biphasic evaluation is typically conducted preliminarily by a Legal Adviser who then follows the entire legislative process of that proposal. The aim is to ensure a high level of knowledge, continuity, and efficiency at the various stages of the procedure, especially considering the six-monthly rotation of Presidencies. Indeed, it is practically impossible that a proposal starts and ends its process under a single Presidency, so it is essential to ensure the continuity and independence of the administration[64].

The biphasic evaluation is repeated for each amendment of the text, to ensure high regulatory quality and legal soundness. It may also happen that on particularly complex issues, the CLS is called upon to take a position by delivering a written or oral opinion. In these opinions, the normative analysis follows the biphasic model, and the interpretation is anchored in both the general principles of law and the case law of the C. Just.[65].

The *comparative method* is less common and has a fundamentally residual

[62] *Ibid.*

[63] This reconstruction is based on the author's observations and responses from the interviews: CLS Legal Officer 1, "Interview A"; CLS Legal Officer 2, "Interview B".

[64] *Ibid.*

[65] *Ibid.*

character. This method is employed after conducting an initial evaluation through the EU law-based method, thus in a subsequent phase and with an integrative purpose.

Within the Council, resorting to the comparative method occurs in particularly sensitive legal areas, such as EU labour law, because the legal basis imposes stringent limits, the regulatory context in which the proposal is inserted is particularly complex, or there are issues of compatibility of a provision or an amendment with the EU legal order. Thus, the comparative method has a complementary and instrumental character and is used to reformulate provisions that are not legally sound to align them with primary law and/or the case law of the C. Just.. In its practical application, the comparative method employed at Council slightly differs from the model applied by legal science[66]. Therefore, Section 4 considers comparative law as a research method. Through a semi-systematic literature review, the comparative method, its features, and procedure are described. Finally, Section 5 will return to the comparative method applied at the Council.

4. *Comparative Law as a Research Method*

The study of law is one of the oldest academic disciplines whose methodology has been developed over time as implicit know-how inherent in the type of education offered in universities[67], especially civil law universities[68]. The academic education offered to law students has at its core the learning of methods aimed at identifying, analysing, applying, and improving the law[69]. For a long time, this approach made legal research impermeable to the need to formalise a precise methodology, in contrast to other social sciences[70]. However, this traditional understanding is no longer consistent

[66] *Ibid*.

[67] Hutchinson, Duncan, *Defining and Describing What We Do: Doctrinal Legal Research*, in *DLR*, 2012, 17, 1, p. 100; Kestemont, *A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool*, in *EJSS*, 2015, 17, 3, p. 362; De Theux, Kovalovszky, Bernard, *Précis de Méthodologie Juridique: Les Sources Documentaires Du Droit*, Presses de l'Université Saint-Louis, 1995, p. 87.

[68] Sébastien Pimont, *A Propos de l'activité Doctrinale Civiliste (Quelques Questions Dans l'air Du Temps)*, in *RTDC*, 2006, 4, p. 707.

[69] Kestemont, *Handbook*, *cit*., p. 1.

[70] "In the past, the under-description of the doctrinal method has not been problematic

with the needs of current scientific research[71]. Legal studies evolved rapidly and complexly in recent decades, alongside internationalisation and legal globalisation[72]. Over the past three decades, the legal disciplines have transnationally flourished, also favoured by the spread of comparative method[73].

The transnational development of law has made it necessary to reflect carefully on the methodology of legal research so that it can be understood outside the purely legal and national context[74]. Therefore, legal scholarship has clarified and organised its methodology[75].

In comparative legal research, "two or more phenomena or legal arrangements are compared with each other in order to detect similarities and/or differences"[76]. Traditionally, there are three types of comparison: internal, historical, and external[77].

Internal comparison refers to the comparative study of legal concepts or institutes that belong to the same legal system. The internal comparison may take place within the same discipline (e.g., dismissal in the private and public sector) or different disciplines (e.g., the concept of enterprise for commercial law and bankruptcy law)[78].

because the research has been directed 'inwards' to the legal community. The targeted audience has been within the legal paradigm and culture and therefore cognisant of legal norms […]" in HUTCHINSON, DUNCAN, *cit.*, p. 118.

[71] STOLKER, *Rethinking the Law School: Education, Research, Outreach and Governance*, Cambridge University Press, 2014, p. 224.

[72] LANGBROEK *ET AL.*, *Methodology of Legal Research: Challenges and Opportunities*, in *ULR*, 2017, 13, 3, p. 1.

[73] LANGBROEK *ET AL.*, *Methodology of Legal Research*, *cit.*, p. 1.

[74] VAN GESTEL, VRANKEN, *Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach*, in *GLJ*, 2011, 12, 3, p. 906; LANGBROEK *ET AL.*, *Methodology of Legal Research*, *cit.*, p. 1.

[75] Among others, see: HUTCHINSON, DUNCAN, *cit.*, p. 118-119; VAN HOECKE, *Legal Doctrine: Which Method(s) for What Kind of Discipline?*, in VAN HOECKE (eds.), *Methodologies of Legal Research : What Kind of Method for What Kind of Discipline?*, Hart, 2011, pp. 1-18; BREMS, *Methods In Legal Human Rights Research*, in COOMANS, GRÜNFELD, KAMMINGA (eds.), *Methods of Human Rights Research*, Intersentia, 2009, pp. 77-90; MCCONVILLE, WING HONG CHUI, *Research Methods for Law*, in MCCONVILLE, HONG CHUI (eds.), *Research Methods for Law*, Edinburgh University Press, 2007.

[76] KESTEMONT, *A Meta-Methodological*, *cit.*, p. 368.

[77] KESTEMONT, *Handbook*, *cit.*, p.12.

[78] KISCHEL, *Introduction: What Is Comparative Law?*, Oxford University Press, 2019, pp. 3-44; KISCHEL, *Aims of Comparative Law*, Oxford University Press, 2019, pp. 45-86; EBERLE, *The Method and Role of Comparative Law*, in *WUGSLR*, 2009, 8, 3, pp. 451-486; REITZ, *How to Do Comparative Law*, in *AJCL*, 1998, 46, 4, pp. 617-36.

Historical comparison aims at comparing legal constructs or legal systems of different periods (e.g., contract law in Roman law and contract law in contemporary private law); it is a synchronic analysis of the past that aims at a static understanding of a legal phenomenon[79]. Historical comparison must be carried out bearing in mind the historical evolution and the different problems faced by the various epochs[80].

External comparison is the most widespread and involves the comparative study of legal constructs from different legal systems or the comparative study of different legal systems. Furthermore, the purpose of external comparison can be to identify legal families, different solutions to the same problem, and to promote harmonisation of legal systems[81]. Precisely with this last purpose, the external comparison is frequently used in EU institutions.

The popularity of external comparison has encouraged the legal doctrine to formalise it in a more detailed manner. This comparison revolves around six methodological features: (a) reasons to compare; (b) nature of the comparison; (c) *tertium comparationis*; (d) choice of legal systems; (e) access to sources; and (f) comparative approach. Procedurally, external comparison follows a four-step path: (1) description of legal systems; (2) comparison between legal systems; (3) identification and explanation of similarities and differences; and (4) evaluation of the compared systems by specifying their strengths and weaknesses[82].

The first methodological feature is the "reasons for comparing", which significantly impacts subsequent methodological choices. The reasons for comparing are the pre-legal reasons for the scholar to compare.

According to Glenn, the reasons for comparing are: (i) learning and knowledge (information about the law of other countries and a better un-

[79] Löhnig, *Comparative Law and Legal History: A Few Words about Comparative Legal History*, p. 115; Husa, *Research-Designs of Comparative Law: Methodology or Heuristics?*, in Adams, Heirbaut (eds.), *The Method and Culture*, *cit.*, p. 58.

[80] Michaels, *The Functional Method of Comparative Law*, in Reimann, Zimmermann (eds.), *cit.*, pp. 339-382.

[81] Husa, *Research-Designs*, *cit.*, p. 59; Monateri, *Methods of Comparative Law*, Edwar Elgar, 2012; Tsogas, *International Labour Regulation: What Have We Really Learnt So Far?*, *RI/IR*, 2009, 64, 1, pp. 75-94; Jansen, *Comparative Law and Comparative Knowledge*, in Reimann, Zimmermann (eds.), *cit.*; Van Hoecke, *Deep Level Comparative Law*, in Van Hoecke (eds.), *Epistemology and Methodology of Comparative Law*, Hart, 2004, pp. 165-195; Hill, *Comparative Law, Law Reform and Legal Theory*, in *OJLS*, 1989, 9, 1, pp. 100-115.

[82] Kestemont, *Handbook*, *cit.*, p. 36.

derstanding of it), (ii) the development of evolutionary and taxonomic science (typical evolutions, diachronic changes, legal families), (iii) the improvement to one's legal system (better understanding it, including the endurance of its traditions, improving it, using it as a tool for interpreting the constitution) and (iv) the harmonisation of law[83].

The second methodological feature concerns the "nature of the comparison". According to Husa[84], there are two main types of comparison: macro- and micro-comparison[85]. Macro-comparison is the study of legal systems in comparison, with the aim of examining their principles, structure, spirit, and style, as well as their voting and procedural practices[86]. Micro-comparison focuses on the comparative analysis of legal constructs by bringing out the solutions adopted by different legal systems to common problems[87].

The "*tertium* (or *tertia*) *comparationis*", or the element(s) shared by the systems under comparison, is the third methodological feature. Reitz recalls that to compare two systems, they must either share the same legal principle, address the same problem, or pursue the same aim[88]. These common elements are presupposed by a study of the systems to be compared and are defined by Jansen: "tertia comparationis […] result from a choice about 'what matters', that is, which aspects of the law are relevant for the comparative lawyer, and which aspects of the law might benefit from the additional knowledge which comparison provides"[89].

The fourth methodological feature is the "choice of legal systems". This characteristic strongly depends on the purpose of the research and the reasons for the comparison. When, for instance, the research aims to study the har-

[83] Glenn, *Aims of Comparative Law*, in *Elgar Encyclopedia of Comparative Law*, Edward Elgar, 2006; Van Hoecke, *Methodology of Comparative Legal Research,* in *LM,* 2015, p. 2; Kestemont, *Handbook*, *cit.*, p. 37; Kischel, *Aims of Comparative Law*, *cit.*, pp. 45-86.

[84] Husa, *Research-Designs*, *cit.*, p. 57.

[85] Romano presents a critical theory in which Husa's dichotomy is overcome by establishing a tripartition between micro-, meso- and macro-comparison. See: Romano, *Micro-Meso-Macro Comparative Law: An Essay on the Methodology of Comparative Law*, in *CKJICL*, 2017, 17, 1, pp. 1-17.

[86] Husa, *Research-Designs*, *cit.*; Dannemann, *Comparative Law: Study of Similarities or Differences?*, in Reimann, Zimmermann (eds.), *cit.*, pp. 382-420; Zweigert, Kötz, *An Introduction to Comparative Law*, Clarendon Press, 1998, p. 4.

[87] Kestemont, *Handbook*, *cit.*, p. 37.

[88] Reitz, *cit.*, p. 622.

[89] Jansen, *cit.*, p. 314.

monisation of legislation in the EU, a comparison between the legal systems of Member States is likely to be preferred. On the other hand, when the purpose of the research is to increase scientific knowledge of legal phenomena, a legal system is likely to be studied because it deviates from others with which it is being compared[90]. Moreover, the choice of legal systems to be compared is also influenced by preparatory studies, the relevance of the tertia comparationis and the researcher's knowledge of the language of the systems studied[91].

The fifth methodological feature concerns "access to sources". Sources are divided into primary (legislative acts, judicial pronouncements) and secondary (legal doctrine)[92]. Typically, the study proceeds from primary sources; secondary sources assume a particularly significant role in the interpreting and understanding (if the language is unknown to the researcher) of primary sources[93].

The sixth and final methodological feature concerns the "comparative approach". The dogmatic and the functional comparative approaches are the two basic types of approaches.[94] The dogmatic approach projects an identified legal notion or principle onto a non-national legal system in order to identify structurally and conceptually analogous legal constructs[95]. This approach is mainly used in macro comparisons between structurally similar legal systems (e.g., two or more common law systems or two or more civil law systems). However, when adopting the dogmatic approach, one must be aware of its three main risks: (a) the risk that different meanings correspond to homonymous concepts, e.g., the word *jurisprudence* in English means "philosophy and theory of law or legal doctrine"[96] and in French means "case law"[97]; (b)

[90] Dannemann, *cit.,* p. 409; Zweigert, Kötz, *cit.*, p. 41.

[91] Kestemont, *Handbook*, *cit.*, pp. 39-40.

[92] Sacco, *Legal Formants (Installment II of II)*, *cit.*

[93] Kestemont, *Handbook*, cit., p. 41; Sacco, Gambaro, *cit.*, pp. 8-10.

[94] Siems, *Comparative Law*, cit., pp. 37-39; Valcke, Grellette, *cit.*, pp. 100-101; Husa, *Research Design*, *cit.*, p. 61; Husa, *Farewell to Functionalism or Methodological Tolerance?*, in *RJCIPL*, 2003, 37, 3, p. 422; Michaels, *cit.*, p. 341.

[95] Kestemont, *Handbook*, *cit.*

[96] Garner, Campbell, Black, *Jurisprudence*, in *Black's Law Dictionary*, St. Paul: West Academic Publishing, 2009.

[97] Pintens, *Inleiding Tot de Rechtsvergelijking*, Leuven University Press, 2003, p. 52; Watson, *Legal Transplants an Approach to Comparative Law*, University of Virginia, 1974, p. 11; Van Hoecke, *Deep Level*, cit., p. 175; Zweigert and Kötz, *cit.*, p. 35.

the risk of searching for a national legal concept in the same formant[98] of the foreign system and not finding it because in that system the concept has been established in another formant[99]; and (c) the risk that different legal concepts pursue similar objectives, e.g., *trusts* in Common law, *fiducie* in French law, *amministrazione fiduciaria* in Italian law[100].

In the functional approach, the methodological premise is a *praesumptio similitudinis* according to which "the legal system of every society faces essentially the same problems, and solves these problems by quite different means through often with similar results"[101]. This approach – adopted mainly in macro comparisons – is primarily empirical because it does not project a fixed dogmatic concept belonging to one system onto another system, but analyses how different systems solve a common problem or factual, legal, social or economic situation[102]. Functionalism fits well with comparative labour law because the latter has a clear predilection for seeking solutions to legal problems: "[…] comparative work is most often undertaken less for enlightenment per se than in search of a better solution to a pressing problem than domestic law currently affords[…]"[103].

By opting for a functional description rather than projecting national concepts, definitions and principles onto foreign legal systems, functionalist researchers reject the assumptions that originate from their domestic legal culture. As a result, the functional approach rejects ethnocentrism in favour of a neutral and objective approach akin to the natural sciences in their descriptive nature[104].

On a practical level, the rejection of ethnocentrism clashes with the impossibility of comparing systems in a completely neutral manner, due to the

[98] The formant is a concept developed by Rodolfo Sacco in comparative law. A formant is the legal basis on which the legal system of a society evolves. According to Sacco, it is possible to identify three main types of legal formants: a) case-law (common law countries), b) legislative (civil law countries); c) doctrinal. Sacco, *Legal Formants (Installment I of II)*, *cit.*; Sacco, *Legal Formants (Installment II of II)*, *cit.*; Sacco and Gambaro, *cit.*, p. 3-7.

[99] Zweigert, Kötz, *cit.*, p. 35; Pintens, *cit.*, pp. 89-90.

[100] Kestemont, *Handbook*, *cit.*, p. 44; Cerri, *Trust Affidamento Fiduciario e Fiducie. Tre Modi Di Declinare La Fiducia Nel Quadro Del Diritto Europeo*, Giuffrè, 2015.

[101] Zweigert, Kötz, *cit.*, p. 34.

[102] Van Hoecke, *Methodology*, *cit.*; Husa, *Research-Designs*, *cit.*; De Coninck, *cit.*; Michaels, *cit.*

[103] Finkin, *cit.*, p. 1140.

[104] Michaels, *cit.*

ineliminable *forma mentis* produced by legal training[105]. Consequently, the functional approach makes researchers more self-aware, enabling them to identify and reduce their own biases through objective analysis[106].

Since the functional approach originates from a problem and assumes the existence of various legal means to solve it, it is characterised by a thorough analysis of all legal sources and formants[107]. However, a number of factors, including time and resources, language skills, social, legal, political and economic context and access to legal sources, affect the accuracy of research[108].

Kestemont presents the *sui generis* approach, a heterogeneous category, in addition to the dogmatic and functional methods[109]. This approach encompasses all the variations that researchers have developed to adapt traditional ones to their research needs. A first example is the typological approach, which is based on the functional approach and aims to collect and classify all viable solutions to the same problem[110]. Another example is Schlesinger's structural comparative research. Structural comparative research is a variation of the functional approach and requires scholars to identify similar structures in different legal systems to explain their function and describe their development[111].

The *sui generis* approaches tend to combine a number of comparisons, often adopting a dual comparison involving first a diachronic and then a synchronic study or a wide-ranging comparison of many legal systems to select the most similar or dissimilar ones that are subsequently compared more specifically[112].

Procedurally, external comparison follows a four-step path: (1) description of legal systems; (2) comparison between legal systems; (3) identification

[105] Frankenberg, *cit.*, p. 443; De Coninck, *cit.*, p. 328.

[106] Frankenberg, *cit.*, p. 443.

[107] Zweigert, Kötz, *cit.*, pp. 103-104; Van Hoecke, *Deep Level*, *cit.*, p. 168; Dannemann, *cit.*, p. 408; Reitz, *cit.,* pp. 628-630; Michaels, *cit.*, p. 364; Husa, *Farewell*, *cit.*, p. 423; Kestemont, *Handbook*, cit., p. 47.

[108] Van Hoecke, *Deep Level*, *cit.*, p. 167.

[109] Kestemont, *Handbook*, *cit.*, p. 47.

[110] *Ibid.*

[111] Scarciglia, *Strutturalismo, Formanti Legali e Diritto Pubblico Comparato*, in *DPCE*, 2017, 3, pp. 649-670; Mattei, *cit.*, p. 238.

[112] Kestemont, *Handbook*, *cit.*, p. 48.

and explanation of similarities and differences; and (4) evaluation of the compared systems by specifying their strengths and weaknesses[113].

The starting point for comparison is selecting and describing two or more legal systems. Whether it is a micro or macro comparison, describing the general characteristics of the legal systems or constructs being compared is necessary. In the case of macro comparison, the scholar identifies and analyses the main formats, the hierarchy of norms, the fundamental principles of the legal systems, the methods of interpretation, and the system's internal structure to adequately reflect that system's representation of itself. In the case of micro-comparisons, the scholar describes the systems in general terms and then goes on to a rigorous comparative analysis of the legal constructs[114]. This phase can be conducted either from a diachronic or synchronic perspective, depending on the points to be made by the researcher.

The second stage is the actual comparison bringing out the similarities and differences[115]. In this stage, the objectives pursued by the study play a decisive role[116]. The scholar whose aim is legal harmonisation will tend to give greater weight to similarities and identify common principles that bind the systems[117]. Conversely, the scholar whose objective is, for instance, to analyse which social system is more generous with unemployment benefits will focus on the differences between the legal systems. However, the importance of the objectives should not be overestimated because the researcher delineates similarities and differences to be able to effectively describe and evaluate the two legal systems[118].

The third stage is the explanation of the findings[119]. This stage can be operationally placed either at the close of the comparison stage (second stage)

[113] Kestemont, *Handbook*, *cit.*, p. 36.

[114] Kestemont, *Handbook*, *cit.*, pp. 48-51; Vogenauer, *Sources of Law and Legal Method in Comparative Law*, in Reimann, Zimmermann (eds.), *cit.*, p. 872.

[115] Lemmens, *Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship*, in in Adams, Bomhoff (eds.), *cit.*, pp. 302-326; Reitz, *cit.*, pp. 619-620.

[116] Kestemont, *Handbook*, cit., p. 51; Dannemann, *cit.*, p. 415.

[117] Hill, *cit.*, p. 110; Dannemann, *cit.*, p. 415.

[118] Bell, *Legal Research and the Distinctiveness of Comparative Law*, in Van Hoecke (eds.), *Methodologies of Legal Research*, *cit.*, p. 174; Örücü, *Developing Comparative Law*, in Örücü, Nelken (eds.), *Comparative Law: A Handbook*, Hart, 2007, p. 50; Dannemann, *cit.*, pp. 399, 419; Valcke, *cit.*, p. 44.

[119] Dannemann, *cit.*, p. 416; Reitz, *cit.*, p. 626; Husa, *Research-Designs*, *cit.*, p. 54.

or at the opening of the terminal evaluation stage (fourth stage). Nevertheless, it remains a conceptually autonomous stage because it has a different purpose from the other two, namely, to explain why the similarities and differences exist. Instead, stage two aims to describe the similarities and differences, and stage four evaluates the comparison results[120]. To explain why there are similarities and differences, the researcher identifies the endogenous (legal principles, interpretation, and political choices of law) and exogenous (historical, political, social, ideological, economic) factors that have produced these results[121].

The final stage concerns the evaluation of the results. At the end of the research, the researcher evaluates the results and answers the research question[122]. Here, it is essential to highlight the limitations and choices made in the comparison and the problems with the sources so that the reader understands the foundation on which the judgement is based[123].

4.1. *Comparative Labour Law as a Research Method*

Comparative labour law serves as a vital tool in understanding the evolving dynamics of labour markets and legal frameworks,[124] particularly amidst technological advancements and global economic shifts[125].

As Trebilcock and Blanpain pointed out, comparative labour law has evolved beyond traditional national boundaries, encompassing a diverse range of governance spheres and substantive issues[126]. From international labour

[120] Kestemont, *Handbook*, *cit.*, pp. 53-54; Lemmens, *cit.*, p. 322; Van Gestel, Micklitz, *Revitalising Doctrinal Legal Research in Europe: What about Methodology?*, in Neergaard, Nielsen, Roseberry (eds.), *European Legal Method - Paradoxes and Revitalisation*, Djøf Forlag, 2011, p. 58.

[121] Lemmens, *cit.*, p. 323; Reitz, *cit.*, p. 627.

[122] Zweigert, Kötz, *cit.*, p. 46.

[123] Kestemont, *Handbook*, *cit.*, p. 54.

[124] Hepple, *Labour Laws and Global Trade*, Hart, 2005, p. 270.

[125] On the relevance of comparative labour law, one should recall the studies of Otto Kahn-Freund. See, among others, Kahn-Freund, Davies, Freedland, *Kahn-Freund's Labour and the Law*, Stevens, 1983; Kahn-Freund, *Comparative Law as an Academic Subject*, in *LQR*, 1996, 82, 40, p. 41; Otto Kahn-Freund, *Labour Relations and the Law: A Comparative Study*, Stevens, 1965. On the relevance of comparative labour law, one should recall the studies of Otto Kahn-Freund.

[126] Trebilcock, *Comparative Labour Law*; Blanpain, Baker, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer Law International, 2014.

standards to private ordering mechanisms like corporate codes of conduct, the field now incorporates multiple layers of regulation and addresses a wide array of topics within individual and collective employment law[127].

According to Rittich and Mundlak[128], comparative labour law entails more than just comparing legislative texts and court decisions; it involves examining theories, legal constructs, and reform processes across different legal systems[129]. According to Araki, "A comparative labour law study, especially a functional analysis of respective labour law systems viewed from a broad perspective remains important and clarifies the features of one's own system"[130].

In terms of methodological approaches, comparative labour law is closely linked to the research objectives and ideological perspectives of scholars[131]. Drawing on a wide range of sources, including international treaties, regional agreements, court decisions, and scholarly publications, comparative labour law research seeks to inform policy debates and promote global harmonisation while acknowledging the diversity of legal systems and social contexts. Particularly in labour matters that fall within the competence of the EU, labour legislation builds on the information of the Member States and in turn creates a new source of law[132].

Comparative labour law has often neglected an explicit discussion of

[127] SCIARRA, *The "Autonomy" of Private Governance Building on Italian Labour Law Scholarship in a Transnational Perspective*, in NUMHAUSER-HENNING, RÖNNMAR (eds.), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, Hart, 2013, pp. 65-75; ESTLUND, *Regoverning the Workplace: From Self-Regulation to Co-Regulation*, Yale University Press, 2010; MCCANN, *Law and Social Movements*, Routledge, 2006.

[128] RITTICH, MUNDLAK, *The Challenge to Comparative Labor Law in a Globalized Era*, in FINKIN, MUNDLAK (eds.), *cit.*, pp. 80-111.

[129] Among others, COLLINS, *Theories of Rights as Justifications for Labour Law*, in DAVIDOV, LANGILLE (eds.), *The Idea of Labour Law*, Oxford University Press, 2011, pp. 137-155; TREBILCOCK, *Using Development Approaches to Address the Informal Economy in Labour Law*, in DAVIDOV, LANGILLE (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Hart, 2006, pp. 63-96; FUDGE, MCCRYSTAL, SANKARAN, *Challenging the Legal Boundaries of Work Regulation*, Hart, 2012.

[130] ARAKI, *A Comparative Analysis of Security, Flexibility, and Decentralized Industrial Relations in Japan*, in *CLLPJ*, 2007, 28, 3, p. 454.

[131] ARTHURS, *Compared to What? The UCLA Comparative Labor Law Project and the Future of Comparative Labor Law*, in *CLLPJ*, 2007, 28, 3, p. 595.

[132] TREBILCOCK, *Comparative Labour Law*; in BOGG, COSTELLO, DAVIES (eds.), *Research Handbook on EU Labour Law*, Edward Elgar, 2016; SCIARRA, *cit.*; ZAHN, *cit.*

methods or methodology like other branches of legal research[133]. However, the importance of method stems from the fact that this discipline implicitly incorporates non-legal variables related to economic systems and labour relations. An important contribution in this field came from Marshall and from Arthurs who asks the question "Compared to what?"[134]. Arthurs calls for a reflection on the comparability of systems and norms.

Despite a certain lack of methodological reflection, Trebilcock states that comparative labour law follows a "formula" of presenting country-specific descriptions or analyses of a defined issue[135]. These analyses may be structured around predetermined questions or points and may incorporate interdisciplinary approaches, drawing from fields like industrial relations, law and economics, gender studies, and migration studies.

Trebilcock's formula needs to be understood in combination with the studies on comparative labour law by Finkin and Weiss. While the first proposes a taxonomy of comparative labour law, highlighting its historical development and various approaches, the second values comparative labour law as a method in scholarship and practice for its impact on the development of national and international labour law[136].

As Finkin pointed out, comparative labour law emerged alongside labour law itself in the late 19th and early 20th centuries[137]. In the taxonomy proposed by Finkin, comparative labour law is classified into four overlapping genres: descriptive; predicative; purposive; and, multidimensional. The descriptive genre involves the compilation and presentation of what one state is doing in legal matters compared to others. The predictive genre deals with how labour law reacts to social and economic changes. Comparative analysis can serve as an early warning system for emerging issues. In the purposive genre, the comparative method can offer insights into alternative approaches to legal issues, with the aim of finding better solutions than those offered by

[133] This debate appears, among others, in Adams, Husa, *Comparative Law Methodology*, in Oderkerk (eds.), *The International Library of Comparative Law*, Edward Elgar, 2017; Smits, *Elgar Encyclopedia of Comparative Law*, Elgar, 2012; Hutchinson, Duncan, *cit.*

[134] Marshall, *Revitalising Labour Market Regulation for the Economic South: New Forms and Tools*, in Marshall, Fenwick (eds.), *Labour Regulation and Development*, Edward Elgar, 2016, pp. 318-320; Arthurs, *cit.*

[135] Trebilcock, *cit.*

[136] Finkin, *cit.*; Weiss, *The Future of Comparative Labor Law*, cit.

[137] Finkin, *cit.*, pp. 1109-1120.

national laws. This genre also explores the transplantation of legal concepts between countries, considering social, political, and legal contexts. Finally, the multidimensional genre assumes that labour law is a complex field that intersects with various disciplines such as history, economics, sociology, and political theory. Multidimensional comparative labour law involves deep academic analysis that transcends mere description or prescription, enriching understanding through contextualisation[138].

Weiss's reflection is significant because it strengthens the existing link in labour law between scholarship and practitioners. In a functionalist logic, Weiss emphasises how the comparative method in the field of labour law is an appropriate tool for understanding one's own legal system and for identifying solutions to problems[139]. This approach not only enriches methodological reflection but also demonstrates how comparison in labour law is a flexible and effective tool that presupposes a deep knowledge of multiple legal systems and interdisciplinary perspectives.

The reading of Kestemont, extensively discussed in the previous section, also contributes to a better understanding of the procedures and characteristics of comparison in the field of labour law[140]. These studies have been conducted based on empirical research in comparative labour law and have allowed for the identification of underlying trends. Specifically, the comparative method in labour law can be categorized into three types: internal, historical, or external[141].

The first type involves studies concerning norms or legal concepts within the same legal system, the second type pertains to the historical evolution of a specific legal norm, and the third involves the study of legal constructs from different legal systems or the comparative study of different legal systems. External comparison is the most used approach in labour law and follows a process divided into four stages: (1) description of legal systems; (2) comparison between legal systems; (3) identification and explanation of similarities and differences; and (4) evaluation of the compared systems by specifying their strengths and weaknesses[142].

[138] Finkin, *cit.*, pp. 1120–1129.

[139] Weiss, *The Future of Comparative Labor Law*, *cit.*, pp. 172–173, 178–179.

[140] Kestemont, *Handbook*, *cit.*; Kestemont, *A Typology*, *cit.*; Kestemont, *A Meta-Methodological*, *cit.*

[141] Kestemont, *Handbook*, *cit.*, p. 12.

[142] Kestemont, *Handbook*, *cit.*, p. 36.

Kestemont systematises in this methodological framework the preceding reflection and clarifies how Trebilcock's "formula", Finikin's taxonomy, and Weiss's approaches give a specific form to comparative labour law, which, however, is rooted in and nourished by the general theories describing legal comparison discussed in the previous section.

5. *The Comparative Method Applied: the Case of the Council*

Transitioning to the examination of the comparative method in practical application, the focus will be on the CLS. The CLS plays a key role in the legislative arena, safeguarding the EU's broader interests, avoiding conflicts and supporting legally sound and politically viable solutions in the Council. As a result, the CLS facilitates the smooth functioning of EU and intergovernmental processes[143].

To examine legislative proposals and maintain the consistency of the EU legal framework, the CLS employs a range of approaches, which can be classified into two main categories: (a) the *EU law-based method* and (b) the *comparative method*. Based on observation and interview, the predominant approach employed by the CLS is the EU law-based method, which aligns with the criteria adopted by the C. Just. These criteria include linguistic or textual analysis, systemic evaluation, and teleological or purposive interpretation. While section 3.1 elaborates on approach (a), it is imperative to now delve into approach (b), both in a general sense and specifically concerning matters related to labour law.

Comparative legal analysis plays a role in cases of unclear situations regarding the legitimacy of a proposal in relation to the selected legal basis especially in EU labour law. In this area, legal bases allow the EU to act on shared or supporting competencies (Title IX, X and XIV). Consequently, conflicts can occur between the legal basis and the legislative proposal. In these situations, the comparative method has the function of preventing legal antinomies and finding legally sound solutions[144].

[143] Council of the EU, *Comments*, *cit.*, p. 37; Council of the EU, *Mission*, *cit.*, para. 4.

[144] The legal officer of CLS 1 emphasised the residual nature of the comparative method, underlining its value precisely in those fields where harmonisation is more complex due to the limitations of the legal basis. On this point, direct observation and the opinion of the legal officer of CLS 2 point to a more nuanced reality. Indeed, the use of comparative method may

According to direct observation and interviews, the CLS employs the comparative method to prevent or solve legal antinomies between the legal basis and the legislative proposal. Furthermore, this methodology is applied both in a preliminary (before interpreting the proposal to understand its principles) and in a remedial (after the proposal has been studied and an antinomy between the legal basis and the legislative act has been identified) manner.

On a more practical level, direct observation supplemented by interviews reveals that the CLS employs a micro-comparison of specific national legal structures or institutions relevant to the approval of an EU legislative act. Yet this does not mean that there may not be situations in which the focus is broadened, but it is punctual comparative research.

Regarding the *tertia comparationis*, the CLS bases its comparison on the axiomatic premise that the Member States systems are similar in general and have a similar degree of legal consistency. The understanding that the legal systems of the Member States are heavily intertwined through the EU *acquis* and are a part of the Western legal tradition serves as support for this concept[145].

Regarding the choice of legal systems to be compared, the general principle laid down by the Court of Justice of the European Union and the Treaties is that all Member States should be compared. However, legislative timeframes, the rotation of Presidencies and their political priorities, the presence of a few systems that present peculiarities, and the need to find an effective solution to a problem may impede a systematic and comprehensive study of all Member States. When forced to limit the number of systems to be examined, the CLS rationally chooses to focus on the most problematic legal systems. This decision is based on an in-depth assessment of the legislative proposal, considering the legal concerns, and on the Presidency's inputs during the working parties. The legislative procedure and the necessity of finding solutions that are both legally sound and compliant with EU law mitigate the risk of non-exhaustiveness[146]. Regarding the comparative ap-

also occur to understand the legal impact of a single article of a proposal that is otherwise analysed according to the EU law-based method. However, in generalising, it remains correct to say that the comparative method has a complementary nature.

[145] This reconstruction is based on the author's observation.

[146] This reconstruction is based on the author's observation and interviewees' responses: CLS Legal Officer 1, "Interview A"; CLS Legal Officer 2, "Interview B".

proach, the CLS demonstrates pragmatism. The CLS comparative approach is *sui generis* in that it seeks to discover parallels between national legislations and provide sound legal solutions for the EU Law. In their analyses, Legal Advisers attempt to remain impartial with respect to their domestic legal system and those being examined. Given the context of the analysis and the objectives sought, neutrality is necessary[147].

Operationally, Comparative Legal Research in the CLS follows a tripartite scheme: (a) description of the EU legislative proposal and identification of the legal systems to be compared; (b) comparison of the legal systems; (c) explanation of differences and similarities and evaluation of the results. In the balance of the analysis, the first step is crucial because the legislative proposal and the selection of systems to be micro-comparison have an impact on the other steps[148].

The description of the EU legislative proposal and the identification of the legal systems to be compared constitute the starting point. This phase is divided into three parts and begins with an examination of the EU legislative framework and legal basis. The content of the legislative proposal and the problematic issue to be managed through the comparison are then evaluated. Finally, the chosen legal systems are evaluated, with an emphasis on formants, fundamental principles, and transposition procedures of EU legislation (e.g., laws, collective agreements, administrative acts). This phase can be conducted from a diachronic or synchronic perspective, depending on the points the Legal Adviser needs to highlight[149].

The second phase is the actual comparison bringing out the similarities and differences. At this point, the analysis is shaped by the goal of harmonisation and emphasises finding common ground between legal systems. The aim of the comparative analysis is to avoid legal antinomies and find feasible alternatives so that EU legislation can effectively harmonise Member States laws[150].

The third and final phase brings together the explanation of similarities and the evaluation of results. The reason for this unification is linked to the

[147] *Ibid*.

[148] This reconstruction is based on the author's participant observation.

[149] This reconstruction is based on the author's observation and interviewees' responses: CLS Legal Officer 1, "Interview A"; CLS Legal Officer 2, "Interview B".

[150] This reconstruction is based on the author's observation and interviewees' responses: CLS Legal Officer 1, " Interview A"; CLS Legal Officer 2, "Interview B".

ultimate purpose of the CLS, which is to advise Member States. For this reason, the interest in why the differences and similarities exist is relative and greater weight is given to evaluating the results of the research and proposing adjustments. However, the internal articulation in the explanation of similarities and differences and the evaluation remains. Specifically, exposing similarities and differences contributes to the formulation of legality assessments and the presentation of sound legal solutions[151].

The observation shows that the use of the comparative method in the areas of labour law and social law has two significant differences.

Concerning the approach, it is predominantly functionalist. In other words, the methodological premise is that essentially the same issues are addressed in the law of the Member States but are solved in similar or different ways according to national traditions[152]. Since the issues are common, the aim must be to find the minimum common denominator for legally sound solutions and to harmonise legislation[153]. This essentially empirical approach is crucial because labour law integrates and hybridises by bringing together economic, social and cultural considerations. Therefore, to understand an entire legislative proposal or a single provision or to solve an antinomy, it is essential to start from the common problem. A rigid doctrinal approach would not be appropriate because it does not serve the purpose and contradicts the legal basis and limited competence of the EU in this area.

The second difference concerns the comparative procedure. Comparative analysis starts with the identification of the legal problem, which is conducted using an EU law-based assessment. The procedure leads to the identification of the problematic rules and the identification of the legal systems to be analysed, which are rarely all 27. These legal systems are identified based on certain criteria, for instance, the problematic nature of a certain legal system (because it differs from others), or the presence of effective solutions to the problem on a national basis. The third stage concerns the emergence of similarities and differences and the evaluation of these in relation to the legal basis and objective of the proposed European legislation. Based on this evaluative study, the most suitable solutions at EU level are identified

[151] *Ibid.*

[152] ZWEIGERT, KÖTZ, *cit.*, p. 34.

[153] The CLS 2 legal officer expressed this very concept by stating that the key to the whole comparison is the "problem" to be solved and the objective is to find a legally sound and politically acceptable solution.

to advise decision-makers on the best and legally most appropriate course of action[154].

Finally, the role of C. Just. jurisprudence plays an even more significant role in the framework of labour law and social law. This complex area, in which the Member States have only conferred limited competencies to the EU, is dependent on interpretations of both treaties and derived legislation by the C. Just. Therefore, it is always necessary to investigate the limits of a solution resulting from comparison, as it may not be legitimate. This is why in the fields of labour law and social law, the final evaluation of the solutions identified must undergo further scrutiny regarding their consistency with C. Just. interpretation.

6. *Conclusions*

The comparative method, especially in labour law, is a key tool for dealing with legal complexities both in academia and in professional practice. Scholars have outlined the essential methodological prerequisites for effective comparison, including the reasons for comparison, the nature of comparison, the *tertium comparationis*, the choice of legal systems, access to sources and the comparative approach. Moreover, at the operational level, this process has four stages: description of the legal systems, comparison of the legal systems, identification and explanation of similarities and differences, and evaluation of the systems under examination.

Given its complexity and the need for innovative solutions to concrete problems, labour law naturally lends itself to comparative analysis. It is no coincidence that a predominantly functional approach is observed in comparative labour law, based on the premise that different legal systems address common issues, while maintaining a neutral perspective free of ethnocentrism.

Within the EU context, the C. Just. consistently employs the comparative method to interpret EU law. This interpretative approach is deeply rooted and developed through a dialogue between the C. Just. and legal scholarship. Thus, one can speak of a bridge between academia and practice.

[154] This reconstruction stems from firsthand experience. I have been tasked with conducting structured comparisons in this way within the field of social legislation and anti-discrimination law.

Concerning the other EU institutions, co-legislators adopt the comparative method in two ways: initially, as a preliminary measure to interpret a proposal, and subsequently, in a corrective capacity to rectify any conflicts identified between the proposal and existing legal frameworks.

Focusing on the Council, this institution employs two distinct models of regulatory analysis aimed at preserving the coherence of the legal system, allowing it to evolve without interruption. These two methods are the *EU law-based method* and the *comparative method*. The EU law-based method is the one most frequently employed within the Council, based on a legal evaluation of norms according to the interpretative criteria established by the C. Just., namely linguistic or textual, systemic, or contextual, and teleological or purposive criteria.

The Council employs the comparative method as a supplementary approach, especially areas such as labour law where shared EU competence may lead to legal conflicts. Using micro-comparisons, CLS assumes Member States' legal systems share general principles and some uniformity. Legal systems are chosen based on legal, political factors, and input from the Presidency. The CLS aims to find viable legal solutions through a three-step process: describing the EU legislative proposal, comparing legal systems, and evaluating the results.

Moreover, the comparative law method serves as a vital tool for the Council in reconciling divergent legal traditions and approaches among Member States. Given the decentralised nature of the EU's legal system and the diverse socio-economic contexts across its member countries, harmonising legislation in areas such as labour law presents unique challenges. Here, the comparative method facilitates the identification of common principles and the development of legal frameworks that strike a balance between uniformity and flexibility. By drawing on insights from comparative analysis, the Council can craft legislation that reflects shared values and objectives while respecting the autonomy and diversity of national legal systems.

The results of the study illustrate the fundamental importance of comparative legal analysis in labour law, particularly in areas of limited EU competence where significant harmonisation challenges arise. This methodological approach ensures that legislative decisions are well-informed, consistent, and capable of achieving the EU's overall labour and social policy objectives.

Finally, it emerges that doctrinal input is vital and informs the interpretation methods applied by Legal Advisers, creating a bridge between theory and practice.

Abstract

This research investigates the use of comparative law within the Council of the EU, particularly in the field of labour law, with the aim of filling gaps in the literature and improving the understanding of EU legislative processes. The study examines the theoretical and practical frameworks of comparative legal analysis, focusing on its application within the Council Legal Service (CLS).

Using a multidimensional methodology encompassing both doctrinal and empirical approaches, the research integrates a critical literature review, participant observation and interviews.

Through a comprehensive synthesis of academic studies and practical insights, the study sheds light on the Council's interpretive methods, decision-making processes, and the role of comparative law within it. It delves into the CLS's methods of normative analysis, highlighting the importance of comparative legal analysis in resolving legal antinomies, particularly in labour law.

By bridging the gap between academic discourse and institutional practice, this research contributes to an understanding of comparative law analysis methods within EU legislative bodies, fostering the transparency, effectiveness, and coherence of legal decision-making processes.

Keywords

Comparative Method, Legal Analysis, EU Law, EU Labour and Social Law, Council of the EU.