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## The Many Formations of the Court of Justice: 15 Years After Nice

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## ESSAY

### THE MANY FORMATIONS OF THE COURT OF JUSTICE: 15 YEARS AFTER NICE

*Sacha Prechal\**

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#### *I. THE TREATY OF NICE MOMENTUM*

The conclusion of the Treaty of Maastricht in 1992, which profoundly modified the European Community and created the European Union, was followed by various rounds of difficult and protracted negotiations among Member States aimed particularly at creating substantial institutional changes to the European Union. The Intergovernmental Conference (“IGC”) that led to the adoption of the Treaty of Nice was indeed very much concerned with the so-called “Amsterdam leftovers,”<sup>1</sup> namely the weighting of votes in the European Council, the extension of qualified majority voting and the size of the European Commission. The need to modify the institutional framework with the view of the future major enlargement by then ten Central European and Mediterranean countries put additional pressure on the negotiations. The overall result of the Nice

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1. The Treaty of Amsterdam was signed in 1997.

negotiations was rather disappointing,<sup>2</sup> with but one bright spot: the reform of the European judiciary.

In fact, the alarming growth of the number of cases brought before the European courts<sup>3</sup> and the increasing length of their procedures, combined with the prospect of the enlargement, made clear with respect to the judiciary that “something had to be done.” The Court of Justice and the Court of First Instance anticipated the urgent need for changes in 1999 by presenting a discussion paper entitled, “The Future of the Judicial System of the European Union.”<sup>4</sup> This initiative was first picked up by the Commission and later by Member States, who could apparently relatively easily reach a consensus on a number of modifications in the structure and operations of the two courts.

As a result, the Treaty of Nice introduced some important innovations, opening the door for possibly far-reaching reforms: the introduction of specialized courts, the reallocation of jurisdiction between the Court of Justice and Court of First Instance in direct actions, and the possibility to confer upon the Court of First Instance jurisdiction to give preliminary rulings in certain types of cases. According to a number of declarations made to the Treaty of Nice, the Court of Justice and the Commission were supposed to submit proposals in order to make these novelties operational and the new rules had to be laid down in the Statute of the Court of Justice. For the most part this indeed happened.

However, a number of perhaps less striking, but, for the functioning of the Court of Justice, essential changes were decided in

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2. The Treaty of Nice was signed in 2001 and it called immediately for a “deeper and wider debate” about the future of the European Union that should lead to a new IGC. The result of a long and cumbersome process was ultimately the Treaty of Lisbon, signed in 2007. Treaty of Nice amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2001 O.J. C 80/1 [hereinafter Treaty of Nice].

3. Note that there is some confusion possible as to the denominations. The Treaty on European Union in Article 19 provides that the Court of Justice of the European Union shall include the Court of Justice, the General Court (formerly the Court of First Instance), and specialized courts. Up until now, there has been only one specialized court, namely the Civil Service Tribunal, but due to a recent reform, this Tribunal will be integrated into the General Court. Consolidated Version of the Treaty on European Union, 2012 O.J. C 326/13 [hereinafter TEU post-Lisbon].

4. There exists a wealth of literature, reports, proposals, and other documents relating to the Nice changes. *See generally* ALAN DASHWOOD & ANGUS JOHNSTON, *THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION* (2001).

Nice. One of them was that both the Court of Justice and the Court of First Instance can now set their Rules of Procedure subject to approval by the Council in a qualified majority vote instead of unanimity, as was required in the past. The second important modification was the creation of the Grand Chamber. For both courts, this meant that most of the cases that would have previously gone to the Plenary Court could from then on be referred to the Grand Chamber. Indeed, this measure would help the courts cope with their ever-increasing caseload. However, and most importantly, with the upcoming enlargement in sight, and the fact that there was no serious discussion about the principle that each Member State should have a judge in each court, it was expected that with twenty-five (and later more) judges the plenaries would change from a collegiate Court of Justice to a deliberative assembly.<sup>5</sup> From a functional point of view, this was indeed a bleak prospect.

In the present contribution, after a glance at the evolutions in the past, I will focus on the current functioning of the various formations of the Court of Justice with a greater emphasis on the Grand Chamber.

## II. *THE ADMINISTRATION OF JUSTICE THROUGH CHAMBERS IN RETROSPECT*

Initially, up until 1974, the Rules of Procedure of the Court of Justice provided for two chambers of three judges. It was the rule for this court to sit as a Full Court, composed at the time of seven judges.<sup>6</sup> The cases allocated to the chambers only concerned, practically speaking, disputes between the European institutions and their civil servants. In 1974, the situation started to change. First, the possibility to adjudicate on certain matters in a chamber of five judges was created, with two chambers of three judges and two chambers of five judges being prescribed in the Rules of Procedure. In 1979, this provision was abolished and the Court of Justice was free to regulate the number of chambers in accordance with its needs. In a subsequent

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5. See P.J.G. Kapteyn, *Reflections on the Future of the Judicial System of the European Union After Nice*, 20 Y.B. OF EUR. L. 173, 186 (2001) (citing *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union*, WKLY. BULL. ON THE ACTIVITIES OF THE CT. AND THE CT. OF FIRST INSTANCE No. 15/95, May 24, 1995, at 18).

6. This was the rule before the accession of the UK, Ireland, and Denmark on January 1, 1973. The number of judges in the European Court of Justice has gradually increased from seven at the time of its creation in 1952 to twenty-eight now.

round of modifications, the possibility to form chambers of three, five, and seven judges was created.<sup>7</sup>

Parallel to this, the categories of cases that could be dealt with in chambers were gradually extended. In the end, any type of case could be assigned to a chamber “in so far as the difficulty or importance of the case or particular circumstances are not such as to require that the Court decide it in plenary session.”<sup>8</sup> However, a Member State or Community institution that was a party to a case could always demand that the case be heard by the Plenary Court.<sup>9</sup>

Finally, another practice developed over time: while the Court of Justice was still regularly sitting in plenary session, a distinction was made between the “*petit plenum*” and the “*grand plenum*.” Just before the entry into force of the Treaty of Nice changes, this meant that the plenum consisted either of eleven or all fifteen judges, respectively.<sup>10</sup>

After the entry into force of the Treaty of Nice on February 1, 2003, the situation was as follows: a plenary session of all judges was obligatory in a limited number of cases;<sup>11</sup> the Grand Chamber consisted initially of eleven judges, but, after the enlargement in May 2004, the number increased to thirteen judges. Furthermore, a major change brought by the Treaty of Nice was the election of the presidents of the five judge chambers for periods of three years.<sup>12</sup> In 2003, there were two such chambers, whereas their number eventually increased to five. The same evolution took place regarding the number of three-judge chambers.

The extension to five chambers of five judges and five chambers of three judges took place in 2012. In fact, a chamber of three is closely associated to a chamber of five; it is composed of the judges

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7. Act Concerning the Conditions of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, and the Adjustments to the Treaties on which the European Union is Founded art. 18, 1994 O.J. C 241/08, at 25, *as amended by* Commission Decision No. 95/1/EC (Euratom) art. 2, 1995 O.J. L 1/5, *and* Consolidated Version of the Treaty Establishing the European Community art. 165, 2006 O.J. C 321 E/37 [hereinafter EC Treaty].

8. Rules of Procedure of the Court of Justice of the European Communities art. 95, 1991 O.J. L 176, *as amended by* 2011 O.J. L 162.

9. EC Treaty, *supra* note 7, art. 165, 2006 O.J. C 321 E, at 60.

10. *See* Kapteyn, *supra* note 5.

11. Protocol (No. 3) on the Statute of the Court of Justice of the European Union art. 16, 2010 O.J. C 83/210, at 213 [hereinafter Statute of the Court of Justice].

12. Before that time, those presidents were elected for a period of one year according to a *tour de role* system. This situation still exists for the presidents of the chambers of three judges.

of a chamber of five, but it does not include the president of that chamber. The president of the chamber of three sits in all the cases and the other three judges rotate.<sup>13</sup> The Court of Justice decides which judges shall be attached to the various chambers. The composition of the chambers is published in the Official Journal of the European Union.

Also, the Grand Chamber saw a change in 2012 with the new Rules of Procedure; the number of judges sitting in the Grand Chamber was extended to fifteen. According to Article 27 of the Rules of Procedure, the President, the Vice-President,<sup>14</sup> and the reporting judge of the Court—the so-called Judge-Rapporteur—sit automatically in the Grand Chamber. Furthermore, three of the five presidents of the chambers of five and nine other judges are chosen by a system of rotation on the basis of a list drawn up for this purpose and published in the Official Journal of the European Union. If either the President or the Vice-President is the Judge-Rapporteur, a tenth judge is assigned to the Grand Chamber. In brief, the composition of the Grand Chamber differs per case.

New in relation to the regime before the new Rules of Procedure of 2012 is the participation of the Vice-President, a function that was also created in 2012; the participation of a part of the presidents of chambers instead of all of them;<sup>15</sup> and a more frequent participation of other judges. This is an important aspect as it contributes to a better representation of all of the legal systems that are brought together within the Court of Justice, and better reflects the principle of equality between judges.<sup>16</sup>

Before concluding this Section, two other chambers should be mentioned: the PPU Chamber and the Reviewing Chamber. These are, in fact, existing chambers of five judges, which are designated for a period of one year to handle either a preliminary reference in an

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13. For the composition of chambers, see Rules of Procedure of the Court of Justice art. 28, 2012 O.J. L 265, *as amended by* 2013 O.J. L 173, at 19 [hereinafter Rules of Procedure].

14. The President and Vice-President of the Court and the presidents of the chambers of five are elected by their colleague judges for a period of three years. The presidents of the chambers of three change each year. In practice, a system of rotation is applied to the latter chambers.

15. The presidents of the chambers of five were *ex officio* members of the Grand Chamber.

16. Before the extension of the Grand Chamber, “ordinary judges” sat in approximately one third of the cases. After the changes, this number increased to half.

urgent procedure or a review proposal made by the First Advocate General, respectively.

The urgent preliminary procedure or the “PPU” (*procédure préjudicielle d’urgence*) was put in place in 2008 in order to enable the Court of Justice to respond quickly to particularly urgent cases.<sup>17</sup> The PPU applies only in the Area of Freedom, Security and Justice (“AFSJ”).<sup>18</sup> As of March 1, 2008, a reference for a preliminary ruling that raises one or more questions concerning the AFSJ may, at the request of a national court or tribunal (or, exceptionally, of the Court of Justice’s own motion) be dealt with by way of the PPU.

In these urgent procedures fundamental rights are often at stake, such as the right to liberty, the right to life, the prohibition of inhuman or degrading treatment, the rights of the child, the right to family life, and the right to effective judicial protection. To date, only two scenarios have been considered by the Court of Justice as being of such urgency as to justify the application of the PPU.<sup>19</sup> The first scenario concerns a person in custody, detention, or otherwise deprived of his liberty and the answer to the question referred is decisive to the assessment of that person’s legal situation.<sup>20</sup> The second situation relates to a risk of serious and potentially irreparable

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<sup>17</sup>. Rules of Procedure, *supra* note 13, arts. 107-14, at 45. An explicit reference in Article 267 of TFEU was inserted by the Treaty of Lisbon due to the need of the Court of Justice to give its ruling with minimum delay in cases concerning a person held in custody. *See* Statute of the Court of Justice, *supra* note 11, art. 23a, 2010 O.J. C 83, at 216.

<sup>18</sup>. Consolidated Version of the Treaty on the Functioning of the European Union arts. 67-89, 2012 O.J. C 326/47 [hereinafter TFEU] (concerning asylum, immigration, and judicial cooperation in civil and criminal matters).

<sup>19</sup>. *See* EUROPEAN COURT OF JUSTICE, REPORT ON THE USE OF THE URGENT PRELIMINARY RULING PROCEDURE BY THE COURT OF JUSTICE, 2008; *see also* Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, 2012 O.J. C 338/1, at 37-40.

<sup>20</sup>. *See generally* M.G. v. Staatssecretaris van Veiligheid en Justitie, Case C-383/13, 2013, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=140861&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=685758>; *accord* Zoran Spasic, Case C-129/14, 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152981&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=685809>; Mahdi v. Administrativen sad Sofia-grad, Case C-146/14, 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153314&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=685882>; Minister of Justice and Equality v. Francis Lanigan, Case C-237/15, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165908&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=685989>.

harm to a parent/child relationship or some other psychological damage.<sup>21</sup>

As mentioned above, the PPU Chamber is a chamber of five judges that is designated as such every judicial year. However, this chamber may also decide to sit in a formation of three judges or may request the Court of Justice to assign the case to a greater formation, usually the Grand Chamber.<sup>22</sup>

Between 2010 and 2014, approximately half of the applications for PPU were granted, with approximately three to four requests for PPU being granted annually.<sup>23</sup> While the average duration of a “normal” preliminary ruling case amounted to fifteen months in 2014, the average duration of a PPU is between two and two-and-a-half months today.

The Reviewing Chamber, created by the new Rules of Procedure of 2012, is entrusted with the review procedure. The reason for this procedure is that the decisions of the General Court cannot generally be appealed before the Court of Justice. However, in exceptional cases, upon the proposal of the First Advocate General, the Court of Justice may nevertheless review a decision where there is a “serious risk that the unity or consistency” of European Union law is being affected.<sup>24</sup>

The Reviewing Chamber considers the proposal of the First Advocate General to launch the review procedure and decides whether the procedure should be initiated or not.<sup>25</sup> To date, the review

21. *See generally* Jasna Detiček, v. Maurizio Sgueglia, Case C-403/09, [2009] E.C.R. I-12, ¶ 193; P v. Q, Case C-455/15, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=171789&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=686035>.

22. Rules of Procedure, *supra* note 13, art. 113, at 47; *see generally* Said Shamilovich Kadzoev (Huchbarov), Case C-357/09, [2009] E.C.R. I-11, ¶ 189; Minister for Justice and Equality v. Lanigan, Case C-237/15, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165908&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1097390>.

23. *See* COURT OF JUSTICE OF THE EUROPEAN UNION, ANNUAL REPORT 2014, at table 16. During the period of 2010 to 2014, there were thirty-three applications, of which seventeen were granted.

24. TFEU, *supra* note 18, art. 256(2), 2012 O.J. C 326/47, at 567; *see also* TEU post-Lisbon, *supra* note 3, art. 62, 2012 O.J. C 326/13, at 210. A similar provision is included for preliminary references in Article 256(3) of TFEU. However, this article will only apply when the General Court would be given jurisdiction in preliminary cases, which is not the case to date.

25. The circumstances that may justify such a review have been considered. *See generally* M. v. European Medicines Agency (EMA), Case C-197/09, [2009] E.C.R. I-12, ¶



procedure has been pursued in only a few cases, which corresponds to its exceptional nature. Like the PPU Chamber, the Reviewing Chamber may request the Court of Justice to assign the case to a formation composed of a greater number of judges.<sup>26</sup>

### III. *THE ATTRIBUTION OF CASES TO CHAMBERS*

There are only a few written rules that prescribe the attribution of a case to a specific formation.

As far as the Full Court is concerned, the Statute of the Court of Justice lists a number of cases that must be heard by the Plenary Court. These include, *inter alia*, the dismissal of the European Ombudsman and the compulsory retirement of a member of the European Commission in breach of his or her obligations.<sup>27</sup> Furthermore, the Court of Justice may decide to refer a case to the Full Court when it considers that the case before it is of exceptional importance.<sup>28</sup> Two recent examples of cases of such exceptional importance that were decided by the Full Court are: (1) the Pringle case, which concerned the compatibility of the “European Stability Mechanism” with the requirements of European Union law; and (2) Opinion 2/13 on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>29</sup>

The Court of Justice sits in a Grand Chamber when a Member State or an institution of the European Union that is party to the proceedings so requests, or when, according to the Court, the case is important or difficult.<sup>30</sup> The criteria applied are not totally fixed and

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033; *Jaramillo v. European Investment Bank (EIB)*, Case C-334/12, 2013 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=134378&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=686139>; *Commission v. Strack*, Case C-579/12, 2013, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=141785&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=686197>.

26. Rules of Procedure, *supra* note 13, art. 195(5), at 74.

27. *See generally* *Commission v. Cresson*, Case C-432/04, [2006] E.C.R. I-6387.

28. Statute of the Court of Justice, *supra* note 11, art. 16, 2001 O.J. C 83, at 213; Rules of Procedure, *supra* note 13, art. 60(2), at 31-32.

29. *Pringle v. Gov't of Ireland, Ireland, and the Att'y General*, Case C-370/12, 2012, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=130561&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=686299>; Opinion 2/13, Article 218(11) TFEU, 2014 (pending case).

30. Statute of the Court of Justice, *supra* note 11, art. 16(2), 2001 O.J. C 83, at 213; Rules of Procedure, *supra* note 13, art. 60(1), at 31.

the Court of Justice has considerable flexibility in deciding whether a case should be referred to the Grand Chamber. Various aspects may be taken into consideration by the Court of Justice, for instance, whether the questions addressed are entirely new and new guiding principles must be developed, whether there seems to be a problem of coherence in the case law, or when the court may consider departing from its precedents.

According to Article 60 of the Rules of Procedure, the Court of Justice shall assign to a chamber of five and a chamber of three any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber.

Chambers of three judges decide “routine” cases: those that do not raise new questions or, if they do, cases where such questions are relatively easy to deal with. In the latter cases, an opinion of the Advocate General will often be requested. Most of the cases decided by a chamber of three are trademark appeals and, increasingly, other appeals against decisions of the General Court, non- or hardly contested infringement proceedings against Member States and preliminary references in the area of custom classification, agriculture or value-added tax (“VAT”). Interestingly, there may often be a choice between a chamber of three judges or the Grand Chamber, depending on whether precedent must be followed or a change to the jurisprudence could be under consideration.

Chambers of five judges are the “normal” formation. These chambers decide cases that are not entirely straightforward and in which principles developed by the Grand Chamber have to be applied. But, as is often the case, this application requires further interpretation and in some respects even a further development of the law. To put it in negative terms, the cases before a chamber of five judges are, on one hand, too difficult or sensitive due to the legal issues raised for a chamber of three but, on the other hand, not important and difficult enough for the Grand Chamber. The *Léger* case can be mentioned as an example.<sup>31</sup> This case concerned the justification of a permanent prohibition banning blood donations from men who have had sexual relations with other men. Another example

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31. *Léger v. Ministre des Affaires Sociales, de la Santé et des Droits des Femmes, Établissement Français du Sang*, Case C-528/13, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164021&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=686389>.

is the *CDC* case, which concerned the question of which court victims of unlawful cartels may claim compensation before.<sup>32</sup>

The actual choice of chambers is decided in the General Meeting, a weekly meeting that includes all of the judges and Advocates General. The Judge-Rapporteur, a judge designated as such by the President of the Court, submits to the General Meeting a so-called preliminary report on a particular case.<sup>33</sup> In this report, which is prepared in cooperation with the responsible Advocate General, a reasoned proposal is made concerning, *inter alia*, what formation the case should be attributed.

A designated chamber may refer a case back to the Court of Justice at any stage of the proceedings in order to have the case reassigned to a formation composed of a greater number of judges.<sup>34</sup> This happened recently in the *PFE* case.<sup>35</sup> The case, initially pending before the Fifth Chamber, was reassigned to the Grand Chamber. The latter chamber has since reopened the oral procedure and invited “interested persons” (referred to in Article 23 of the Statute of the Court of Justice<sup>36</sup>) to give their views on the key question in the case, namely whether the concept of “court or tribunal” within the meaning of Article 267 of the TFEU should be interpreted according to a functional or organizational approach.<sup>37</sup>

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32. Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Novel NV et al., Case C-352/13, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164350&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=686471>.

33. Rules of Procedure, *supra* note 13, art. 59, at 31.

34. *Id.* art. 60(3), at 32.

35. Puligienica Facility Esco SpA (PFE) v. Airgest SpA, Case C-689/13, 2016, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175548&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=678513>.

36. These interested persons are the parties, Member States, the Commission, and the institution, body, office, or agency of the European Union that adopted the act of which the validity or interpretation is in dispute. Statute of the Court of Justice, *supra* note 11, art. 23, at 213.

37. *See generally* Puligienica Facility Esco (PFE) v. SpA, Order of the Court, Case C-689/13, 2015, <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=LST&docid=166224&occ=first&cid=201873>. Advocate General Wathelet delivered his second opinion in Additional Opinion of Advocate General Wathelet, *Puligienica Facility Esco SpA (PFE)*, C-689/13.

#### IV. THE VARIOUS CHAMBERS IN PRACTICE

A brief look at the statistics of the Court of Justice shows that since 2005, the number of cases before the Grand Chamber has oscillated between 41 in 2009 and 71 in 2010.<sup>38</sup> The average over the period of 2005 to 2014 is 55 cases per year.

The statistics over the last five years are as follows:

	2010			2011			2012			2013			2014		
	Judgments/Opinions	Orders (?)	Total	Judgments/Opinions	Orders (?)	Total	Judgments/Opinions	Orders (?)	Total	Judgments/Opinions	Orders (?)	Total	Judgments/Opinions	Orders (?)	Total
Full Court				1		1	1		1				1		1
Grand Chamber	70	1	71	62		62	47		47	52		52	51	3	54
Chambers (five judges)	280	8	288	290	10	300	275	8	283	348	18	366	320	20	340
Chambers (three judges)	56	76	132	91	86	177	83	97	180	91	106	197	110	118	228
President		5	5		4	4		12	12						
Vice-President											5	5		1	1
<b>Total</b>	<b>406</b>	<b>90</b>	<b>496</b>	<b>444</b>	<b>100</b>	<b>544</b>	<b>406</b>	<b>117</b>	<b>523</b>	<b>491</b>	<b>129</b>	<b>620</b>	<b>482</b>	<b>142</b>	<b>624</b>

As aforementioned the relative numbers show that the most common formation is a chamber of five judges, hearing approximately 55 percent of all cases. Chambers of three judges follow with some 33 percent, and the Grand Chamber, as the bench hearing the case, is limited to approximately 10 percent of cases on average.<sup>39</sup> The latter percentage may seem relatively low, especially when compared to the situation as it existed before the Treaty of Nice. Although the number of cases decided by the plenary session has consistently fallen, still some 30 percent of the cases were heard by the Full Court.<sup>40</sup> However, the restrained use of the Grand Chamber corresponds with the endeavor to call upon this formation only in

38. *Statistics of Judicial Activity*, CURIA, [http://curia.europa.eu/jcms/jcms/Jo2\\_7032/](http://curia.europa.eu/jcms/jcms/Jo2_7032/). The numbers refer to completed cases. Years 2003 and 2004 do not give a clear picture since the small plenary and the Full Court of the “previous regime” are still included. The great difference between 2009 and 2010 is due, in part, to the somewhat arbitrary cut-off date for statistics.

39. The percentages over the last five years (chamber of five, chamber of three, Grand Chamber) are: 2010: 58.06% - 26.62% - 14.31%; 2011: 55.15% - 32.54% - 11.40%; 2012: 54.11% - 34.42% - 8.99%; 2013: 59.03% - 31.77% - 8.39%; 2014: 54.49% - 36.54% - 8.68%.

40. See Kapteyn, *supra* note 5, at 187. During the years before Nice, more than 70% of the judgements or other decisions emanated from chambers. Note, however, that there was the “petit plenum” and the “grand plenum.”

fundamental cases where decisions involving basic principles of European Union law must be made.

The subject matter concerned in the cases heard by the Grand Chamber vary considerably. For example, some topics in recent case law include inter-institutional litigation cases in which the European institutions seek a clear delimitation of their respective powers in the various areas of European Union law,<sup>41</sup> cases on the scope of application of the Charter of Fundamental Rights,<sup>42</sup> cases dealing with the interpretation of the complex and sensitive rules of the Common European Asylum System,<sup>43</sup> effective judicial protection of persons against whom restrictive measures has been taken, like the freezing of funds and economic resources and in particular the use of (secret) evidence against those persons,<sup>44</sup> protection of private life and

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41. *See generally* Parliament and Commission v. Council, Joined Cases C-132–136/14, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=172988&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=681201>; Commission v. Parliament and Council, Case C-88/14, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165925&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=682365>; Council v. Commission, Case C-73/14, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=172255&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=682493>; Commission v. Council, Case C-425/13, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165904&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=682660>; Council v. Commission, Case C-409/13, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=163659&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=682556>.

42. *See generally* Aklagaren v. Fransson, Case C-617/10, 2013, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0617&from=EN>; Melloni v. Fiscal, Case C-399/11, 2013, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0399&from=EN>.

43. *See generally* N.S. v. Sec'y of State for the Home Dep't, Joined Cases C-411/10 and C-493/10, 2011, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0411&from=EN>; Centre Public d'Action Sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida, Case C-562/13, 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160943&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=683324>; M'Bodj v. Belge, Case C-542/13, 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160947&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=330710>; Achughbabian v. du Val-de-Marne, Case C-329/11, 2011, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0329>; K v. Bundesasylamt, Case C-245/11, 2012, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129325&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1096173>.

44. *See generally* Commission v. Kadi, Joined Cases C-584, 593, 595/10 P, 2013, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=139745&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1455841>; Anbouba v. Council, Case C-630/13 P, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161242&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1456941>; *see also* ZZ v. Sec'y of State for the Home Dep't, Case C-300/11, 2013, <http://curia.europa.eu/>

personal data protection,<sup>45</sup> free movement of European Union citizens and their entitlements to social benefits,<sup>46</sup> liability of the Court of Justice for the damage caused by the failure of the General Court to adjudicate within a reasonable time,<sup>47</sup> taxation and free movement of capital or freedom of establishment cases,<sup>48</sup> various aspects of environmental law,<sup>49</sup> cooperation in criminal matters and in particular cases on the European arrest warrant,<sup>50</sup> some cases on competition

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[juris/document/document.jsf?text=&docid=137981&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1457372](http://curia.europa.eu/juris/document/document.jsf?text=&docid=137981&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1457372).

45. See generally *Google Spain SL v. Agencia Española de Protección de Datos*, Case C-131/12, 2014, <http://curia.europa.eu/juris/document/document.jsf?sessionid=9ea7d2dc30d502305b17936e4df9978eb958439df01d.e34KaxiLc3qMb40Rch0SaxuSbx90?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=919770>; *Schrems v. Data Protection Commissioner*, Case C-362/14, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=921248>; *Digital Rights Ireland Ltd. v. Minister for Communications, Marine, and Natural Resources*, Joined Cases C-293/12 and C-594/12, 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1455231>.

46. See generally *Dano v. Jobcenter Leipzig*, Case C-333/13, 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=159442&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=36613>; *Jobcenter Berlin Neukölln v. Alimanovic*, Case C-67/14, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=167661&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=36806>.

47. See generally *Groupe Gascogne SA v. Commission*, Case C-58/12 P, 2013, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144942&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=37061>.

48. See generally *Finanzamt Dortmund-Unna v. Grünewald*, Case C-559/13, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=162422&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=227032>; *Nordea Bank Danmark A/S v. Skatteministeriet*, Case C-48/13, 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=155108&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=227602>; *Felixstowe Dock and Ry. Co. Ltd. v. Commissioners for Her Majesty's Revenue & Customs*, Case C-80/12, 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=150181&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=228080>.

49. See generally *Council v. Stichting Natuur en Milieu*, Joined Cases C-404–405/12 P, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161323&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1453003>; *Fish Legal v. Info Commissioner*, Case C-279/12, 2013, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=145904&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1451789>; *Bund für Umwelt und Naturschutz Deutschland eV v. Bundesrepublik Deutschland*, Case C-461/13, 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165446&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1452455>.

50. See generally *Minister for Justice and Equality v. Lanigan*, Case C-237/15, 2015, <http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0237&lang1=en&type=TEXT&ancre=>; *Curtea de Apel Constanta v. Radu*, Case C-396/11, 2013, <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:62011CJ0396&from=EN>; *Generalstaatsanwaltschaft Bremen v. Aranyosi*, Case C-404/15 (pending case).

law,<sup>51</sup> and so on. Strikingly, compared to the earlier years of what was then European Community law, current cases frequently concern the interpretation of secondary European Union law and are rather sector-specific. Such cases often do not require the intervention of the Grand Chamber and are adjudicated by a chamber of five or even three judges.

Apart from deciding fundamental cases, the Grand Chamber, as briefly mentioned above, also has an important role in guarding the consistency of the Court of Justice's case law. When most of the cases are decided in chambers, there is indeed an increased risk of inconsistencies between chamber judgements or ambiguity in certain areas of jurisprudence. If one of those scenarios occurs, the Grand Chamber may be called upon to provide guidance. All of this is in addition to the other mechanisms that should guarantee the consistency of the case law. First of all, while the composition of the Grand Chamber differs per case, the President and Vice-President are always part of the formation, together with three of the five presidents of the chambers of five. Second, the General Meeting is also important for maintaining case law consistency. At this meeting, as mentioned above, the preliminary reports in the cases currently pending before the Court of Justice are submitted. Through these reports all the members of the Court of Justice are made aware of potential parallel cases pending in other chambers. Third, the Advocate General may warn of any inconsistencies in the case law. Fourth, a measure specifically intended by the Treaty of Nice to enhance consistency in the case law is the election of the president of the chambers of five judges for three years, the practical result of which is that chambers of five judges (and of three judges) usually operate with the same judges during a period of at least three years. Finally, in their preliminary examination of the cases, the research and documentation service collaborates with the registry to spot similar pending or recently-decided cases of the Court of Justice.

An often recurring question is whether there is, or should be, specialization of the chambers at the Court of Justice. There is not, as such, an official specialization between the chambers. This is wise. Developing case law is a collective responsibility of the whole Court,

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51. *See generally* Bundeswettbewerbsbehörde v. Schenker & Co., Case C-681/11, 2013, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0681&from=EN>; *Europese Gemeenschap v. Otis NV*, Case C-199/11, 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0199&from=EN>.

where the contribution of the legal systems brought together within the Court is important. Laying the judicial decisions in certain areas in the hands of a limited number of judges is at odds with this idea. To this, one may add that even technical or sector-specific cases often touch upon horizontal issues or even foundational principles of European Union law. Specialization in chambers could potentially harm harmonious development and application of these horizontal aspects. That being said, one must admit that something akin to a certain degree of specialization may occur due to the way in which cases are assigned to a Judge-Rapporteur. The President designates the Judge-Rapporteur. The Judge-Rapporteur, together with an Advocate General,<sup>52</sup> bears the primary responsibility for the case and he or she “holds the pen” during the whole procedure. When designating the Judge-Rapporteur, the President will usually take into account whether a certain judge has been already dealing with a certain matter and has profoundly familiarized him or herself with the area of European Union law concerned. For reasons of efficiency, this judge will receive, during a certain period of time, cases that are similar. Since a judge is assigned for a certain period of time—at least for three years—to one of the chambers of five or three judges, that chamber will slightly and temporarily specialize as well.

Finally, the introduction of the Grand Chamber and the chambers of five and three judges in the wake of the Treaty of Nice have considerably contributed to the ability of the Court of Justice to face an ever increasing case load and deal with cases within a reasonable time limit.<sup>53</sup> Again, the statistics are telling. Since 2004, the duration of the proceedings, in particular the preliminary ruling proceedings, has decreased, while the number of incoming cases has increased. This is due in part to a number of other organizational measures taken by the Court of Justice. However, the use of chambers plays an important part as well. The numbers of the last few years are illustrative. While in 2013 and 2014 the Court of Justice decided some hundred more cases than in 2012, the length of the proceedings hardly changed. For a great part this is thanks to the creation of a fifth chamber of five judges and a tenth chamber of three judges in 2012.

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52. The First Advocate General designates the responsible Advocate General. Rules of Procedure, *supra* note 13, art. 16, at 14-15.

53. Notably, many other practical and organizational measures have been taken to make this possible.



	2010	2011	2012	2013	2014
References for a preliminary ruling	16.1	16.3	15.6	16.3	15.0
Urgent preliminary ruling procedure	2.2	2.5	1.9	2.2	2.2
Direct actions	16.7	20.3	19.7	24.3	20.0
Appeals	14.0	15.1	15.2	16.6	14.5

To put it briefly, the introduction of the Grand Chamber and the functioning of the other chambers as put in place after the Treaty of Nice can be considered a success. These changes, perhaps discreet for the outside world, have made it possible to deliberate in a meaningful way within a judicial body of twenty-eight judges and to increase the efficiency of the Court of Justice, which has to cope with an ever-increasing workload. There exists a constantly upward trend in the number of references for preliminary rulings and, more recently, in appeals against the rulings of the General Court. The envisaged extension of the General Court<sup>54</sup> is likely to reinforce this trend. The question is indeed what this will imply for the functioning of the Court of Justice. No doubt new measures will be necessary, starting with practical and organizational measures. However, in the long run, probably only more robust changes to the judicial structure of the European Union will help address the eternal dilemma of every judicial branch, namely how to safeguard a timely and efficient delivery of justice without sacrificing the quality of rulings and unity of the law.

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54. See Council Regulation 2015/2422 of the European Parliament and of the Council amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, 2015 O.J. L 341/14; see also David Hadroušek, *Solving the European Union's General Court*, 40 EUR. L. REV. 188, [pin cite] (2015); Cecelia Kye, *A Quagmire of Delays at the European General Court: Any Escape?*, 22 MAASTRICHT J. OF EUR. & COMP. L. 453, 455-57 (2015).