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The Court of Justice of the European Union

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The Court of Justice of the European Union

Michal Bobek*

The Court of Justice of the European Union is one of the institutions of the Union. Praised by some as the relentless and steady motor of European integration and attacked by others as an example of a clearly biased institution, more ink has perhaps been spilled over the years on discussing the (de)merits of the Court of Justice than any other Union institution. In face of such considerable literature coming from legal, political science, sociological, and more recently also historical quarters, this chapter cannot but scratch the surface of the vast topic by providing a concise introduction into selected institutional themes in a legal¹ and, where possible, diachronic perspective: the structure of the Union courts located in Luxembourg; basic information about the type of judicial business the Court of Justice carries out; the composition of the Court of Justice, including the recent changes made to the way in which judges and advocates-general are selected; the often discussed style and structure of the judgments; and, finally, the even more frequently discussed and recurring question of the legitimacy of the Court of Justice.

I. Structure

When thinking of the structure of a judicial system, the image that usually comes to a national lawyer's mind is one of a *pyramid*. There is the base formed by a number of first instance courts. On it rests the middle, already narrower, appellate level. At the very top, located under the roof, is the supreme jurisdiction. In this regard, it is no accident that judicial systems are sometimes portrayed as buildings,² each level fulfilling a different role within the structure, but synergic and complementary to each other.

The logic of the structure of the Union courts located and concentrated in Luxembourg is, however, rather one of an internal *suspension*, carried out over the years somewhat mechanically within the limits of the politically possible. There is the Court of Justice in the narrow sense, also called the European Court of Justice (ECJ), to which attached (or from which suspended) is the General Court (GC), to which attached again (or from which suspended again) is so far the only specialised court, the Civil Service Tribunal (CST). All three judicial instances put together form one institution called the Court of Justice of the European Union.³

* This chapter is forthcoming in A Arnull & D Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press, 2014). I am much obliged to Anthony Arnull, Daniel Sarmiento, and Siofra O'Leary for their valuable comments. All opinions expressed remain personal to the author.

¹ For an introduction into the political science debate on the ECJ, see e.g. Alec Stone Sweet, 'The European Court of Justice' In P Craig & G de Búrca (eds.), *The Evolution of EU Law* (2nd edn, OUP 2011).

² Unless, in case of buildings which are slightly out of proportion, such as the Brussels *Palais de justice*, one building in itself is able to personify the entire judicial system. In general, the structure and the design of a judicial building can tell a great deal about the type of court it harbours.

³ Art. 19 (1) TFEU.

1. Evolution: the Politics of Gradual Suspension

The explanation for such a singular judicial structure lies in the evolution of the Luxembourg courts. It did not follow the logic of gradual building up of a fully-fledged 'federal' judiciary, but one of de-burdening by internal delegation/suspension. When, by 1988, the average length of procedure in the then one EC jurisdiction, the ECJ, reached 18 months for a preliminary ruling and 24 months for a direct action,⁴ it was deemed necessary to unburden the ECJ by attaching the Court of First Instance (CFI) to it.⁵ As its original name indicated, the first instance decisions of the CFI could be made subject to appeal to the ECJ on points of law only. The initially narrow jurisdiction of the CFI has been enlarged step by step,⁶ turning it gradually into a genuine 'General Court' of EU law, a functional shift eventually recognized by the Treaty of Lisbon, which changed the name from the CFI to the GC.

When already some ten years after its creation, the then CFI was facing an increasing workload, the solution adopted was to replicate the same formula as in 1988, this time one level down. The Nice Treaty opened the way for 'specialized courts', previously referred to as 'judicial panels', to be attached to the CFI itself, thus creating a third level (jurisdiction) of the Luxembourg judiciary. The only so far established specialized court is the Civil Service Tribunal.⁷ In a similar vein, the decisions of the CST, or of any other future specialized court, may be subject to appeal to the GC, and very exceptionally, when specific conditions are met, also reviewed by the ECJ.

The problem that similar evolution of EU courts poses may be by now evident: the problems of narrow straits, in which the demand exceeds the capacity, is not genuinely resolved, but just internally suspended onto a new, lower level, but technically speaking within the same institution (the Court of Justice of the EU). The emerging picture is thus not one of a judicial pyramid with stable foundations, but rather one of a tall skyscraper with a somewhat shaky basis, regularly threatening to tip over.

The greatest structural instability can be currently located in the middle of the Luxembourg judicial edifice: in the past years, the GC ceased to be able to dispose of its docket in what might be considered a reasonable time. For example, in recent years, the average length of procedure in a state aid case has been about three years. A competition law case took almost four years to decide.⁸ Such alarming figures⁹ and the apparent inability of the Member States' governments to agree on at least the mechanical increase of the number of judges for the GC,¹⁰ may cast doubts

⁴ A Arnall, *The European Union and its ECJ* (2nd edn, OUP 2006) 25.

⁵ Council Decision 88/591/EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities [1988] OJ L319/1.

⁶ Further e.g. HG Schermers & DF Waelbroeck, *Judicial Protection in the European Union* (6th edn, Kluwer Law 2001) 755-758 or L Neville Brown & T Kennedy, *The ECJ of the European Union* (5th edn, Sweet & Maxwell 2000) 75-81.

⁷ Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal [2004] OJ L333/7.

⁸ Cf. *ECJ of the EU Annual Report for 2012* (Office for Official Publications 2013) 189. Between 2008 and 2012, a competition law case in the GC took 46.2 months on average. A state aid case took some 39 months.

⁹ For instance, in Joined Cases C-40/12 P, C-50/12 P, and C-58/12 P, *Gascogne and others*, judgment of 26 November 2013, n.y.r., the ECJ concluded that the length of proceedings before the GC in the appealed cases (5 year and 9 months) amounted to a violation of the Charter (Art. 47 – right to a fair trial within reasonable period of time) and could trigger liability of the EU.

¹⁰ Since March 2011, the Council has not been able to agree on the increase of the number of judges in the GC proposed by the Court of Justice. Further see e.g. AWH Meij, 'Courts in transition: Administration of Justice and how to organize it', (2013) 50 *CMLRev* 1, 6-9 and more recently

as to the future viability of the current EU judicial architecture. Also in view of the contemplated EU accession to the European Convention on Human Rights, the time might be ripe for (re)considering the Union judicial structure in broader terms, allowing for a more durable solution than the patchwork of successive suspensions that defer but do not really structurally tackle the problem of an ever increasing and more and more diverse docket.¹¹

2. The Internal Structure: the Courts within the Court

In parallel to the process of jurisdictional suspension, the expansion of the ECJ itself has been equally significant: from the seven judges and two Advocates-General that met for the first time in the Villa Vauban in 1952,¹² through a bigger but still arguably cosy family of some 250 people in the 1980s,¹³ to 28 judges, nine Advocates-General and overall staff of over 2,000 people in 2013, spread over a number of buildings. As captured by Sacha Prechal, today herself a judge but previously a legal secretary at the ECJ in the late 1980s and early 1990s, the institution has evolved from a 'bit of a family', to 'a bit of a factory'.¹⁴

That evolution has had considerable impact on the internal structure and the working methods of the ECJ. Already in 1995, in anticipation of future enlargements, the ECJ diplomatically stated that

*'any significant increase in the number of judges might mean that the plenary session of the Court would cross the invisible boundary between a collegiate court and a deliberative assembly. Moreover, as the great majority of cases would be heard by Chambers, this increase could pose a threat to the consistency of the case-law.'*¹⁵

The ECJ crossed this boundary in 2004 at the latest, when the number of its judges increased from 15 to 25. Today, with 28 judges, the ECJ is structurally a 'civilian' court.¹⁶ The plenary court virtually never sits.¹⁷ The vast majority of all cases is

'Amendments adopted by the European Parliament on 12 December 2013 on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of Judges at the General Court (02074/2011 – C7-0126/2012 – 2011/0901B(COD)), online at < <http://www.europarl.europa.eu>>.

¹¹ Critically already JP Jacqu e & JHH Weiler, 'On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27 *CMLRev* 185. For further past discussions, see e.g. A Dashwood & A Johnston (eds.), *The Future of the Judicial System of the European Union* (Hart 2001) or more recently 'Editorial Comments - Delivering justice: small and bigger steps at the ECJ' (2011) 48 *CMLRev* 987.

¹² P Mathijsen, 'Le d but: la Cour CECA' In *La Cour de justice des Communaut s europ ennes 1952-2002: Bilan et perspectives* (Bruylant 2004) 4.

¹³ Ole Due, 'Looking Backwards and Forwards', *ibid* 26. See also Ditlev Tamm, 'The History of the ECJ of the European Union Since its Origins' In *The ECJ and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Springer 2013).

¹⁴ 'Interview with Judge Sacha Prechal of the European Court of Justice: Part I: Working at the CJEU' of 18 December 2013, online at <<http://europeanlawblog.eu>>.

¹⁵ Report of the ECJ on certain aspects of the application of the Treaty on European Union [16], restated by the ECJ in *The Future of the Judicial System of the European Union (Proposals and Reflections)*, ch. IV. 1. (i), reprinted in Dashwood & Johnston (n 11) 131.

¹⁶ Further M Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the ECJ' (2008) 45 (6) *CMLRev* 1611, 1637-39. More generally on the structural differences between 'civilian' and 'common law' supreme jurisdictions, see JA Jolowicz, 'The Role of the Supreme Court at the National and International Level' in Yessiou-Faltsi (Ed.) *The Role of the Supreme Courts at the National and International Level. Reports for the Thessaloniki International Colloquium* (Thessaloniki/Athens, 1998).

¹⁷ Except for cases foreseen in Art. 16 (4) of the Statute (mandatory cases) or if the ECJ decides that a case is of 'exceptional importance' and must therefore be heard by the plenary Court pursuant to Art. 16 (5) of the Statute and Art. 60 (2) of the Rules of Procedure (discretionary cases). A rare recent example in the latter category is Case C-370/12 *Pringle*, judgment of the plenary court of 27 November 2012, n.y.r.

decided by smaller formations: either by the 'default' chambers of five judges or, if the case is believed to be a straightforward application of the existing case law, by a small chamber of three judges.¹⁸ The body entrusted to assume the coherence of the case law and also to further develop the law is the Grand Chamber, composed of 15 judges, including the president of the Court, the vice-president, and three presidents of chambers of five judges.¹⁹

Looking at the ECJ and its operation today, it might be more appropriate not to talk of 'a court', but rather a number of 'courts within the Court' with the Grand Chamber being '*the* court within the Court', or, if its unification of case law agenda were to be put into the forefront, 'the court of courts'. The rise of the Grand Chamber as the most important formation within the ECJ after 2004 is, however, not attributable to any effort to marginalize some judges.²⁰ It is rather the only way in which a body of 28 judges can reasonably operate without becoming entirely a 'deliberative assembly'. Thus, in a way, ten years after the 2004 'big bang enlargement', the pre-1995 ECJ composed of 15 judges is functionally still there. It is just called the 'Grand Chamber' now and it is hidden within a larger structure.

A similar structure brings about different internal dynamics and working methods. Perhaps similarly to 'civilian' supreme jurisdictions, but certainly not on the same scale, preserving the unity and coherence of the case law has become an important concern for the ECJ.²¹ New types of problems need to be tackled, previously unknown to a smaller, collegiate court: a five judge chamber creating its own case law in a given area, heading off unchecked by others; emerging inconsistency across chambers' decisions, making the stepping in of the Grand Chamber necessary; even worse, modification or even silent departure of a later five judge chamber decision from the previous Grand Chamber ruling; to name just a few. Correspondingly, the readers of the decisions of the ECJ are becoming perhaps more circumspect with respect to the individual decisions of 'mere' chambers, unless and until they are confirmed by either the Grand Chamber or by further decisions coming from other chambers. This is, however, a logical externalisation of the internal structural change: in civilian systems, it is the 'established case law' rather than a single precedent that is considered to form the (case) law.

II. Docket

Function-wise, the current work of the ECJ may be roughly divided into three main categories:

- (i) *References for a preliminary ruling* – are submitted in most cases pursuant to Article 267 TFEU by national courts that seek either the interpretation or the assessment of the validity of an EU act. A decision rendered by the ECJ forms part of the national proceedings and will be

¹⁸ The 2012 Annual Report (n 8) 11 and 96 indicates that in 2012, chambers of five judges dealt with 54% of cases, chambers of three judges with 34% of cases and roughly 9% of cases have been assigned to the Grand Chamber.

¹⁹ Art. 27 (1) of the Rules of Procedure. It ought to be added, however, that the establishment of the Grand Chamber has also been accompanied by some 'soul-searching' as to what precisely should that body represent. Originally composed of only 13 judges and composed primarily of presidents of chambers, the membership has now been increased to 15 judges with greater participation of elected members who are not presidents of chambers. Thus, it could be suggested that the rationale has moved from more 'unity in case law' driven composition of the Grand Chamber to perhaps more 'representative' and 'democratic' considerations.

²⁰ Critically H Rasmussen, 'Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt' (2007) *CMLRev* 1661, 1670-1675.

²¹ Further e.g. E Carpano (ed.), *Le revirement de jurisprudence en droit européen* (Bruylant 2012).

applied by the referring court, as well as later on by other courts in the Member States.

- (ii) *Judicial review* – within this functional category, the ECJ reviews, directly or more frequently today on appeal, the legality of acts of Union institutions (Article 263 TFEU). The remedy sought is the annulment of the Union act challenged. Jurisdiction falling under this head includes actions brought by the Member States directly to the ECJ, appeals against first instance decisions of the GC in cases of all other applicants,²² as well as incidental review of legality of EU acts emerging from other types of proceedings.

- (iii) *(Inter-)Institutional disputes* – regroups types of actions that oppose primarily Union institutions and/or the Member States, including infringement proceedings (Article 258 TFEU and its extension in Article 260 TFEU) and actions for failure to act (Article 265 TFEU). Remedy sought is the ECJ's declaration that a Member State or an EU institution failed to act or acted in violation of the Treaties.

This division illustrates the different type of work carried out by the ECJ, but is naturally not the only or the necessary division. Apart from the three main categories, there is also the 'left-over' jurisdictional category that cannot be put under either of the main headings outlined above. The most notable amongst these other tasks of the ECJ are opinions rendered pursuant to Article 218 (11) TFEU. In an opinion, the ECJ is called to assess the compatibility with the Treaties of a contemplated international agreement the EU wishes to sign.

The individual types of jurisdiction are the subject of detailed discussion elsewhere in this volume.²³ On the whole, however, the order in which the three main types of ECJ activity have been set out reflects how strongly each category is represented within the overall docket of the ECJ today. In the course of the last decade, one may notice a distinct rise of the number of preliminary rulings and decline in direct actions. In the past three years, about 2/3 of all cases decided by the ECJ were requests for a preliminary ruling.²⁴ Thus, in a way, a transformation of the ECJ into a supreme jurisdiction largely shielded away from direct, first instance actions, and concerned primarily with preliminary rulings and appellate review, may have occurred. However, as outlined in the previous section, the price paid for such docket 'dislocation' is becoming painfully apparent in the General Court today.

Subject-wise, the ECJ remains an essentially economic court. Browsing through the court reports of the past years, most judicial attention was devoted to the same 'usual suspects', namely taxation; intellectual property; competition; state aid; internal market (free movement of goods retreating and making way for services and persons); agriculture; public procurement; and customs. However, newer areas are certainly on the rise: judicial cooperation in civil, administrative and criminal matters, in particular the fleshing out of a number of horizontal mutual recognition regimes;

²² Art. 256 TFEU and its (partial) derogation in Art. 51 of the Statute.

²³ Preliminary rulings in ch. 11; infringement proceedings in ch. 16; and judicial review in ch. 17.

²⁴ The 2012 Annual Report (n 8) 94 and 110.

consumer protection law; environment; social policy and non-discrimination; and the various external dimensions of the Union and EU law.

Even if the ECJ remains predominantly an economic court as far as the overall subject matter of its docket is concerned, there has been a considerable change as to how such economic issues are discussed in the recent case law. In 2009, the Lisbon Treaty elevated the Charter of Fundamental Rights to the status of binding primary law. Since then, the Charter has exercised a distinct *centripetal effect* on the entire EU law discourse and the reasoning of the ECJ. Problems and issues put before the ECJ have started being (also or predominantly) framed as fundamental rights issues. To be clear: the subject-matter remained the same; it is just the language that has changed.

Similar effects of a human rights charter are not that surprising. In a way, they follow the same logic of the evolution in legal discourse in a number of national legal systems in Europe. Since the introduction of a powerful bill of rights and constitutional review after the fall of undemocratic regimes, be it after the Second World War in Germany, in the 1980s or 1990s in Southern or Central and Eastern Europe, but arguably also since the entry into force of the 1998 Human Rights Act in the UK, the discourse in these legal systems gradually refocused from 'mere' legality to fundamental rights protection and constitutionality. In a way, any legal problem can be translated into and put as a fundamental rights issue.²⁵

Realistically speaking, the Charter or any other fundamental rights catalogue do not make the analytical tools for solving cases any sharper. With most of the fundamental rights provisions indeterminate and vague, any difficult case eventually ends up in some kind of proportionality or balancing exercise, which in itself is essentially a value judgment, just hidden somewhat behind mathematical-styled algorithms or tests. The changes are rather ideological: with the Charter, individuals and their legal protection have been put structurally to the centre of legal discourse and judicial reasoning. It could be naturally said that protection of fundamental rights was provided for already before the Charter, which is certainly correct. There is, however, a slight difference in such protection being a sort of a 'by-product' of other provisions or litigation strategies or the protection being the 'product' in itself.

In a number of areas, the influx of Charter-invoking cases since Lisbon has not changed much in the actual outcome. It has just added an additional discursive layer. Thus, for instance, the fact that consumer protection cases are now argued also in terms of Article 38 of the Charter ('Union policies shall ensure a high level of consumer protection') and not just in terms of interpretation of consumer directives appears to have changed little in the overall approach of the ECJ.²⁶ On the other hand, there are also areas in which the existence of a vague 'umbrella' provision in the Charter seems to be changing the interpretation of pre-existing secondary law, such as apparently the 'freedom to conduct business' in Article 16 of the Charter for some areas of EU law.²⁷ Whether eventually, under the Charter and its authority, the ECJ might exercise its judicial review of the validity of EU secondary legislation more assertively than before, remains to be seen.²⁸ There is some ground for moderate optimism in this regard.²⁹

²⁵ Generally e.g. R Alexy, *A Theory of Constitutional Rights* (OUP 2010).

²⁶ Most recently e.g. Case C-470/12, *Pohotovost'*, judgment of 27 February 2014, n. y. r.

²⁷ See e.g. Case C-426/11, *Mark Alemo-Herron*, judgment of 18 July 2013, n. y. r., interpreting 'freedom to conduct business' in quite a sweeping manner.

²⁸ For a post-Lisbon case law review, see e.g. S Iglesias Sánchez, 'The Court and the Charter: the Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 *CMLRev* 1565 or Daniel Sarmiento, 'Who is Afraid of the Charter? The Court of Justice,

Finally, *length-wise*, the ECJ of the past years has been able to dispose of its docket within reasonable time. The average length of proceedings has been roughly one and half years for both preliminary rulings as well as appeals. This is certainly an admirable result, taking into account that at its peak in 2003, the average length of procedure on preliminary rulings was almost 26 months and 29 months for appeals.³⁰ The results have been achieved by a number of successive reforms of the rules of procedure and internal changes at the ECJ aiming at speeding up the various stages of the procedure.³¹

A more sceptical way of looking at the same results, praise-worthy as they are, might be that the reduction in the length of proceedings since 2004 has been achieved only because the ECJ has been living on borrowed time. Following the 2004 and the 2007 enlargements of the EU, the number of judges almost doubled: from 15 to 25 and 27 respectively, with the corresponding rise in the ECJ's judicial staff. At the same time, in its *Ynos* decision,³² the ECJ stated that for a request for a preliminary ruling from a new Member State to be admissible in Luxembourg, the facts of the original case before the national court must have occurred after the accession. The ECJ later silently departing from this requirement,³³ the *Ynos* decision nonetheless effectively discouraged requests for preliminary rulings from the new Member States. This created a window of opportunity to cut back on the deadlock. After the initial settling-in of the new staff, the capacity of the institution to dispose of cases has increased without there being a corresponding increase in the amount of new cases yet.

This post-accession window of opportunity has now been closing for three reasons. First, the purely post-accession cases have by now made their way through the national judicial systems in the new Member States, with a corresponding increase, moderate but steady, in the amount of preliminary rulings arriving before the ECJ. Second, the already mentioned Charter-driven transformation of the EU law discourse has had also some impact on the amount of cases being submitted to the ECJ after Lisbon. New cases may perhaps been sent to Luxembourg because it might be believed that the Charter has changed the legal situation and a national court or a litigant might wish to 'test' new grounds. A number of such 'Charter-driven' cases might eventually be considered as inadmissible because outside the scope of EU law,³⁴ but such cases consume nevertheless judicial resources. Third, in 2014, the transitional provision that so far limited the possibility of lower national courts to request preliminary rulings relating to the former third pillar measures (police cooperation and judicial cooperation in criminal matters) will lapse.³⁵ There might

National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *CMLRev* 1267.

²⁹ See for example Joined cases C-92/09 and C-93/09, *Schecke and Eifert* [2010] ECR I-11063; Case C-236/09, *Test-Achats* [2011] ECR I-773; and most recently Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, judgment of 8 April 2014, n. y. r.

³⁰ Annual Report of the Court of Justice for 2003 (Office for Official Publications 2004) 174

³¹ Further e.g. FG Jacobs, 'Recent and Ongoing Measures to Improve the Efficiency of the European Court of Justice' (2004) 29 *ELRev* 823 or V Skouris, 'Self-Conception, Challenges and Perspectives of the EU Courts' in I Pernice et al. (eds.), *The Future of the European Judicial System in a Comparative Perspective* (Nomos 2006).

³² Case C-302/04 *Ynos kft* [2006] ECR I-371.

³³ See in particular Case C-64/06 *Telefónica O2* [2007] ECR I-4887; Case C-168/06 *Ceramika Paradyż* [2007] ECR I-29; Case C-96/08 *CIBA* [2010] ECR I-2911. Critically Bobek (n 16) 1616-1620 or Nina Póltorak, 'Ratione Temporis Application of the Preliminary Rulings Procedure' (2008) 45 *CML Rev* 1373.

³⁴ In particular as far as the Member States' compliance with the Charter is concerned. Most recently see e.g. Case C-206/13, *Cruciano Siragusa*, judgment of 6 March 2014, n. y. r., applying Case C-617/10, *Åkerberg Fransson*, judgment of 26 February 2013, n. y. r.

³⁵ Art. 10 (1) and (3) of the Protocol No 36 on Transitional Provisions attached to the Treaty of Lisbon (published in OJ C 83/322 of 30 March 2010).

perhaps not be that many new criminal cases coming in from lower national courts at once. However, if they concern a person in custody, they will have to be dealt with pursuant to Article 267 (4) TFEU 'with the minimum of delay', thus likely to trigger the urgent preliminary rulings procedure. This will naturally push back the 'normal' docket and distort the internal work flow.³⁶

In sum, it will soon become apparent whether and how far the smaller scale procedural efficiency oriented measures adopted at the ECJ since 2004 may provide for a durable solution. Already in 2011 and 2012, the number of new requests for a preliminary ruling has risen for the first time over 400, in contrast to the over 200 requests of a few years before.³⁷ It is likely that the increase will continue. This starts creating backlogs that may, in not so distant future, become apparent in the overall length of procedure. Reforms aiming at 'margin squeeze' within the established system are always practicable only up to a certain point. Beyond that point, the question of deeper structural changes needs to be addressed as well. It appears likely that in few years' time, structural questions relating to the Luxembourg courts might be posed again, not only because of the General Court effectively drowning in its docket, but also because of the ECJ likely facing more difficult times as well.

III. Composition

Even though we tend to refer to a court as 'it', a court is always 'they'. In case of the ECJ the 'they' are judges, advocates-general, legal secretaries, and other staff. Both the ECJ and the GC are currently composed of 28 judges. Ever since the Coal and Steel Community Court, the convention has been that the number of judges is either equal to the number of Member States, or, in the periods when the number of Member States was even, a second judge from one Member State would be appointed to make the number of judges an odd number.³⁸ As the protracted discussions concerning the increase in the number of judges of the GC evidence,³⁹ parting from this convention appears politically very difficult.

There is certainly some virtue to the system of one state-one judge. All legal systems of the Union are represented. 'Fall-back' knowledge of each of them is available. Apart from being beneficial for the ECJ internally, the one state-one judge convention may also generate external legitimacy by representation. Each Member State feels that 'our' judge was present, even though judges naturally exercise their mandate in full independence of their Member States and will not be in most cases present when a case originating from their Member State is being decided. On the other hand, the price paid for such representation is that presently with 28 judges, the ECJ has moved more in the direction of a 'deliberative assembly', or, as already explained above, towards a 'civilian' court as to its internal functioning.

There are only two instances in which the Union courts have so far moved beyond the one state-one judge convention. First, the so far only specialized court, the Civil Service Tribunal, is composed of seven members. Its members are selected in a

³⁶ Being in turn later on translated into a rise in the overall length of procedure, even if the urgent preliminary rulings procedure itself will naturally lower the statistics a bit, but it will delay the processing of all other cases. Generally on the urgent preliminary ruling procedure, see e.g.: C Barnard, 'The PPU: Is it worth the candle? An early assessment' (2009) 34 *ELRev* 281.

³⁷ The 2012 Annual Report (n 8) 110. Moreover, according to the provisional annual report for 2013, there was 450 new requests for a preliminary ruling submitted in 2013, which represents the highest amount of references ever submitted.

³⁸ Tom Kennedy, 'Thirteen Russians! The Composition of the European Court of Justice' In AIL Campbell & M Voyatzi (eds.), *Legal Reasoning and Judicial Interpretation of European Law: Essays in honour of Lord Mackenzie-Stuart* (Trenton 1996) 69.

³⁹ Above (n 10).

Europe-wide open competition. Any Union citizen whose independence is beyond doubt and who possesses the ability required for appointment may submit an application. The (pre)selection is done by a committee which proposes the names of at least twice as many candidates as there are judges to be appointed by the Council. The appointment and the ultimate selection is done by the Council that is instructed to 'ensure a balanced composition of the Tribunal on an as broad geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented'.⁴⁰ Second, as there are only nine, soon to be increased to eleven,⁴¹ Advocates-General, their appointment is also governed by different considerations than one state-one AG.⁴²

1. The Selection of Judges and Advocates-General

Even if the convention for composing the ECJ has remained the same, what has changed considerably with the Treaty of Lisbon is the way in which judges and AGs are selected. Traditionally, it was for the respective national government to select a candidate internally. Once nominated by a Member State, a judge or an AG was then appointed by the common accord of the governments. In practice, the entire selection process was somewhat opaque. With selection criteria on the national level often unclear and selection procedures in most Member States non-transparent, it was typically not a job for which one could openly apply. Moreover, the 'common accord' stage on the EU level was rather formal, with the national governments mutually confirming their own candidates without ever questioning them, at least openly.⁴³

With the quantitative expansion of the ECJ and GC after 2004, the question of the quality of appointments became arguably more acute. The Lisbon Treaty therefore established a new body that was called to give an opinion on candidate's suitability to perform the duties of judge or advocate-general of the ECJ and the GC, now known as 'the 255 Panel' because it is provided for in Article 255 TFEU. Attached to the Council, the 255 Panel gives opinions on the suitability of individual candidates proposed by a Member State to the representatives of the governments of the Member States.⁴⁴ Thus, the Panel intervenes after a Member State has nominated a candidate but before the government representatives decide by 'common accord'.

As far as can be assessed after four years of the operation of the 255 Panel, its advent has considerably but positively changed the way in which judicial selections to the ECJ and the GC are carried out. In its first four years, the 255 Panel examined 67

⁴⁰ Art. 3 (1) of the Annex I to the decision establishing the CST, above (n 7), now in re-enacted as Annex I to the Protocol No. 3 to the Lisbon Treaty on the European Civil Service Tribunal, OJ [2010] C 83/226. Further see Leif Sevón, 'The Procedure for Selection of Members of the Civil Service Tribunal: A Pioneer Experience', Speech given at the Celebration of the fifth anniversary of the Civil Service Tribunal, available online at < <http://curia.europa.eu>>. Interestingly, the freshly established Administrative Tribunal of the European Stability Mechanism is modeled on the CST. Art. 3 of the Statute of the ESM Administrative Tribunal provides that its five members are selected by a committee following an open competition.

⁴¹ Council Decision 2013/336/EU of 25 June 2013 increasing the number of Advocates-General of the Court of Justice of the European Union [2013] OJ L179/92.

⁴² There are six AG seats permanently allocated to the larger Member States (Germany, UK, France, Spain, Italy, and since 2013 Poland) with the three (as from October 2015 five) remaining seats rotating amongst the other 22 Member States, for which today any convincing structural explanation (with the exception of blunt power politics) is lacking. Critically see R Greaves, 'Reforming Some Aspects of the Role of Advocates General' in A Arnall et al (eds.) *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 161, 171-175.

⁴³ Critically e.g. Arnall (n 4) 23-24.

⁴⁴ See Council Decision 2010/124/EU relating to the operating rules of the panel provided for in Article 255 TFEU [2010] OJ L50/18.

candidatures. Thirty-five of the candidatures concerned the renewal of the term of office of a previously already sitting judge. Thirty-two candidatures concerned candidates for a first term of office. Out of those 32 'first timers', the 255 Panel issued a negative opinion with respect to 7 candidates. This means that the 255 Panel effectively blocked about 1 in 5 candidates.⁴⁵ Although the 255 Panel gives formally just non-binding opinions, all of those opinions were so far followed by the governments of the Member States. The reason for this might be, apart from the unquestionable expertise of the 255 Panel members and ensuing authority, quite simple: unanimity. To depart from the opinion of the 255 Panel and to appoint a candidate previously not recommended by the 255 Panel, all Member States would have to agree, as their 'common accord' is required. Thus, in fact, unanimity is required for overruling a formally 'non-binding' opinion of the 255 Panel.

The advent of the 255 Panel thus started generating different institutional dynamics on the EU level as well as in the Member States. Three of them may be outlined briefly.⁴⁶ First, the six requirements set out by the 255 Panel⁴⁷ that a candidate should fulfil clearly set the benchmark higher than the Article 253 TFEU-based '*qualifications required for appointment to the highest judicial offices [...] or [...] jurisconsults of recognised competence*'. Thus, in spite of the Panel formally insisting that it only made the Treaty criteria '*more clearly and precisely explained*',⁴⁸ additional, more demanding criteria have in fact been added.

Second, the majority of the seven member Panel are senior national judges.⁴⁹ The composition of the 255 Panel therefore sensibly allows for a greater involvement of national judges in selecting Europe's judges. This may generate legitimizing potential for Union courts within the national judiciaries, in the eyes of which the previous system might have appeared too political, government-driven and determined in some Member States without any representative involvement of the national judiciary in the nomination process.

Third, the European changes in both procedure as well as substance of nominations influence both of these elements on the national levels. One may notice an example of a spill-over from the EU onto national level. First, since the 255 Panel also enquires into the national process that led to the nomination of the proposed candidate, Member States might be more inclined than in the past to make the national selection subject to an open competition.⁵⁰ Second, as the national governments are by now aware that the 255 Panel is likely to block candidates who clearly fail to meet its criteria, they started incorporating those criteria into their own assessment on the national level.

⁴⁵ Third Activity Report of the Panel provided for by Article 255 TFEU, report published 13 December 2013, SN 1118/2014, 8-9.

⁴⁶ In greater detail see the individual chapters in M Bobek (ed.), *Selecting Europe's Judges* (forthcoming, OUP 2015).

⁴⁷ According to the 3rd Activity Report (n 45) 17, these are: legal expertise, including basic knowledge of EU law; professional experience; ability to perform the duties of a judge; language skills; aptitude for working as part of a team in an international environment in which several legal systems are represented; guarantees as to impartiality and independence.

⁴⁸ 3rd Activity Report (n 45) 17. See also JM Sauvé, 'Le rôle du comité 255 dans la sélection du juge de l'Union' In *The ECJ and the Construction of Europe* (n 13) 99, 111.

⁴⁹ Within both, the first 255 Panel (with the term of office 2010-2014) as well as the second (2014-2018). See the Council Decision of 25 February 2010 [2010] OJ L 50/20 and the Council Decision of 11 February 2014 [2014] OJ L41/18.

⁵⁰ The Czech national selection process established in July 2011 may serve as an example in this regard, at least as far as its provisions are concerned, not necessarily its genuine application: see the Decision of the Czech Government No. 525 of 13 July 2011 establishing the 'Rules for the Selection of Candidates to the Office of the Judge at the Court of Justice of the European Union', online at <<https://kormoran.vlada.cz>>.

In sum, the changes in judicial selections to the Union courts since the Lisbon Treaty have been progressive and beneficial, certainly in terms of ensuring greater quality of the candidates. However, as most of these processes happen behind closed doors,⁵¹ they represent a sort of 'progress by stealth'. They encapsulate the EU's overall predicament well known from a number of other areas of European governance: the dominance of quality but technocratic output over democratic input.

2. Inside the Factory: Judges, Advocates-General, and Ghost-Writers

In contrast to the American realist tradition, EU legal scholarship does not dwell much on who the individuals are behind the 'it' of an impersonal high jurisdiction. In the ECJ, judicial individuality is suppressed. There are no dissenting opinions. No personalized style of drafting individual judgments. No individual judicial faces emerge from the collegiate court, at least in the judicial capacity. Still, who are the 'factory workers',⁵² at least within the highest of the European jurisdiction, the ECJ?

Remaining on a general level,⁵³ to a national judge or practitioner, the ECJ may appear distinctly 'academic'. It is composed of high profile experts with chiefly academic, not necessarily judicial, professional backgrounds. From within the present 37 members of the ECJ (28 judges and 9 advocates-general combined), eleven mention in their official biographies online at least some judicial experience in national ordinary courts prior to their appointment. A further three members of the ECJ, although having primarily academic professional backgrounds, have had judicial experience from national constitutional courts. The majority of current members have, however, no prior national judicial experience. They have either an academic or civil service background, or frequently both.

The more 'academic' tone in the composition of the ECJ can be justified both functionally as well as culturally, naturally provided that it does not lead to the ECJ losing touch with the reality of national judicial function(s).⁵⁴ *Functionally*, the more abstract law-making carried out by the ECJ in particular within the preliminary rulings procedure necessitates analytical minds able to rise above a single case and a national judicial routine, able to see the bigger European picture. A similar mind-set can certainly come from both sides: from the side of a theorising practitioner as well from a practically-minded academic. *Culturally* and historically, insisting on a higher court being composed of (mainly or wholly) senior judges who are believed to be the only competent persons to understand the business of judging is the reflection of one particular legal tradition within the Union. Conversely, the Continental legal traditions, and in particular the Germanic ones, are much more open towards higher courts being composed also of academics. Succinctly put in the way of a historical parallel:

⁵¹ Operating Rules of the 255 Panel in Annex to the Council Decision 2010/124/EU provide that the deliberations of the 255 Panel take place behind closed doors and hearings of candidates take place in private. Furthermore, the (final) opinion of the 255 Panel is confidential, transmitted only to the representatives of the Member States. On the other hand, the 255 Panel sought to alleviate the secrecy concerns by publishing regular reports of its activity that contain general (and anonymized) information on its activities – see Council Document No 6509/11 of 17 February 2011; No 5091/13 of 22 January 2013; and No SN 1118/2014 of 13 December 2013. All of the reports are available online at <http://curia.europa.eu/jcms/jcms/P_64268> (last accessed on 1 May 2014).

⁵² Re-using the already quoted expression by Justice Prechal (above n 14). See also P Mbongo and A Vauchez (eds.), *Dans la fabrique du droit européen: scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Bruylant 2009).

⁵³ For more individualized judicial portraits, see e.g. Brown and Kennedy (n 6) 58-63.

⁵⁴ See generally M Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' M Adams et al. (eds.), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 197, 227-229. Critically PJ Wattel, 'Köbler, CILFIT and Welthgrove: We Can't Go On Meeting Like This' (2004) 41 *CMLRev* 177.

is the preliminary ruling procedure in the end of the day that much different from the 17th or 18th century practice of 'Aktenversendung', by which any German court could have requested a legal opinion on a complex case from a 'Spruchkollegium' of esteemed law professors?⁵⁵

There are, apart from judges, other members of the ECJ: the advocates-general. In spite of having status equal to the judges, they are not judges. To capture succinctly the role of an AG is difficult. Article 252 TFEU states that AGs deliver in open court with complete impartiality and independence reasoned submissions on cases which are submitted to the ECJ. Since the Treaty of Nice, however, the involvement of the AG is not required in every case. Today, the majority of the decisions of the ECJ are reached without requesting the Opinion of the AG.⁵⁶ The fact of the AG being heard only in a minority of cases, together with the fundamental rights challenges to this office⁵⁷ may all have contributed to the on-going questions concerning the role of the AG. In contrast to the past when the AG would be heard in every case and provided a second pair of eyes and analytical layer overall, her role today has shifted perhaps more in the direction of an 'expert advisor' to the ECJ. She will be called upon only in the more complex cases, invariably a Grand Chamber case or some of the five judges' chamber ones. Within these complex cases, the AG is expected not only to succinctly present the extant law and propose a solution to the case on its basis, but ideally also to provide a broader and critical analysis of the ECJ's case law in the area.

In this way, the AG brings into play critical and discursive elements to the decision-making at the ECJ which to the outside world might appear somewhat magisterial. On the other hand, the critical and potentially 'dissenting' mirror held up by the AG reflects only case law of the ECJ in general. In contrast to a popular myth, the Opinion of the AG can hardly serve as a 'dissenting opinion' to the judgment of the ECJ in which it was issued for the simple reason that the AG drafts her Opinion months before the final judgment of the ECJ will be even deliberated. Thus, the judgment can position itself vis-à-vis the Opinion, but not vice-versa. However, in contrast to the somewhat anonymous, collegiate bench, the AG is always an 'I'. Although their influence on the ECJ might be open to debate,⁵⁸ their opinions, written in first person singular, are there in the open. Thus, they add a distinct individual level to the somehow collegiate and anonymous bench.

Finally, somewhat hidden in the shadows of the collegiate bench or the individual AGs are the legal secretaries or in French the *référéndaires*. Not members of the ECJ or the GC, they are *just* assisting individual judges or AGs. What precisely 'assisting' means will depend on the individual court member and the working habits within the respective judicial chambers. In practical terms, 'assisting' may mean anything between researching the case law and writing memoranda down to the function of a ghost writer, drafting but never signing a judgment or opinion. Whatever the case may be, it is clear that writing a judicial decision, especially at the supreme

⁵⁵ See e.g. S Vogenauer, 'An Empire of Light? Learning and Lawmaking in the History of German Law' (2005) 64 *CLJ* 481, 486.

⁵⁶ Annual Report 2012 (n 8) 11. In 2012, 53% of the judgments were delivered without an Opinion (compared with for instance 50% in 2010; 41% in 2008; 33% in 2006; or 30% in 2004).

⁵⁷ Further e.g. N Burrows and R Greaves, *The Advocate General and EC Law* (OUP 2007) or M Bobek, 'A Fourth in the Court: Why are there Advocates-General in the Court of Justice?' (2012) 14 *CYELS* 529.

⁵⁸ Apart from the individual studies in Burrows and Greaves (n 57) see more recently e.g. C Ritter, 'A New Look at the Role and Impact of Advocates-General – Collectively and Individually' (2005-2006) 12 *CJEL* 751 or I Solanke, "'Stop the ECJ'? An Empirical Analysis of Activism at the Court' (2011) 17 *ELJ* 764.

level, is nowadays a collective enterprise, both across the individual chambers as well as within.

Who are the *référéndaires*? If it was previously stated that ‘judicial biographies’ of the members of the Union courts were so far subject to little sustained research, this is even more applicable to the level of legal secretaries.⁵⁹ This is regrettable, taking into account the hardly deniable fact that legal secretaries do exercise intellectual influence over the judicial decision-making of the ECJ, coupled with the fact that a number of past legal secretaries have later become members of one of the Union courts,⁶⁰ or had illustrious careers in legal academia or practice.

IV. Judgment

After having introduced the ‘factory workers’ and their selection, the attention of this section turns to the ultimate ‘product’ of the assembly line: the judgment. The factory metaphor gains renewed pertinence with respect to the judgment of the ECJ as some of the more recent changes to the structure and style of the decisions were motivated by streamlining and increasing the overall ‘production’ of judgments.⁶¹

Opening the European Court Reports from the 1960s or the 1970s and reading through the decisions of the ECJ, the inspiration of the French drafting style is readily apparent: the ‘*attendu que*’ of the original French version of the early judgments assembled in a succinct, syllogistic structure, with a dry tone and abstract style. The judgments were also quite short, with most of the facts and details being confined to the separately printed ‘report for the hearing’. From the 1980s onwards, the style became slightly more relaxed, gradually abandoning the ‘grammatical strait-jacket of a single sentence’.⁶²

Today, it is difficult to put the style of the ECJ’s judgment into a particular cultural box. The drafting style could be said to be still ‘civilian’ in its nature, but only to a certain extent. The by now distinct judicial style of the ECJ today is characterized by (i) abstract and deductive reasoning; (ii) relatively succinct judgments, at least when seen from the common law world; (iii) immutable and fixed structure of the judgments; and (iv) the absence of any dissenting or concurring opinions.

In a decision rendered by the ECJ on a preliminary ruling, the solution adopted will frequently be ‘announced’ rather than discussed in great depth. The reasoning starts with the statement of one or more broad principles, with the solution adopted flowing, sometimes more sometimes less apparently, from those principles. The language is dry and technical. Ethical, moral and other value choices that necessarily had to be made when deciding the case will not be openly discussed.⁶³

⁵⁹ For a notable recent exception in this regard see S Gervasoni, ‘Des *référéndaires* et de la magistrature communautaire’ in *Etat souverain dans le monde d’aujourd’hui: Mélanges en l’honneur de Jean-Pierre Puissechet* (Pedone, 2008) 105. The author suggested that the community of legal secretaries at all Union courts today would be quite professionally diverse, coming from other Union institutions, legal practice, or academia. An increasing number of legal secretaries is likely to stay for longer periods, with the average age of a *référéndaire* being about 39. Finally, around one half of all the legal secretaries would be of French or Belgian nationality.

⁶⁰ In both dimensions: past legal secretaries later becoming members of the ECJ or current legal secretaries, in particular from the ECJ, becoming judges at either the GC or the CST. By way of illustration: five out of seven current members of the CST were previously legal secretaries at the ECJ.

⁶¹ Above (n 31).

⁶² Brown and Kennedy (n 6) 55.

⁶³ Contrast, for example the style and tone of reasoning by the ECJ in Case C-423/04 *Richards* [2006] ECR I-3585 with the reasoning of the ECtHR in *Christine Goodwin v. the UK*, GC judgment of 11 July 2002, No. 28957/95. Both cases concerned a similar factual situation – a transsexual who has undergone a gender reassignment operation sought the award of her retirement pension in accordance

The reasoning tends to be concise, with a fixed and immutable structure. This immutability operates with respect to both the overall structure of the judgment (macro-level) as well as on the level of particular expressions, phrases or even entire paragraphs (micro-level). Each judgment opens with a short summary of the case, followed by the legal framework of the Union; national law; facts, procedure and questions referred; arguments of the parties; ECJ's appraisal; all neatly packed in paragraphs and numbered. At the same time, within the fixed structure, the ECJ extensively uses what could be called 'cluster citations'. It reproduces sentences or entire paragraphs from its own previous decisions, sometimes copying them verbatim, sometimes slightly changing the content of the 'cluster'.

'Cluster citations' are a distinct feature of a number of the highest Continental courts, that are obliged to dispose of a number of (often parallel and similar) cases. Within the ECJ, the frequency of cluster citations may be attributed, certainly originally, rather to the issue of language and the need for a standardized text for translations. A side effect of cluster citations is the enhanced normativity of ECJ's case law and what to a common lawyer might seem a surprising degree of 'case textualism' or 'case positivism'.⁶⁴ Decisions of the ECJ are not being primarily approached as precedents, tied to a specific case and interpreted in its context, but as a collection of normative sentences that have universal validity. In future cases, such normative sentences or propositions will be applied similarly to legal provisions, unrestrained by the context of a concrete case.

The outlined structural immutability on both a macro- as well as a micro- level further enhances the sensation of 'inevitability' as to the results reached by the ECJ. It appears that the ECJ just puts together parts of the law that were already there. Naturally, such an illusion might dissipate quite quickly if a curious reader inspects more closely the references to previous decisions employed in a judgment. As the ECJ would typically not canvass its own previous decisions in any depth, with the references having more of a 'bibliographical' value, if a reader takes the effort and tracks back all the references made, she might soon find out that some references are more appropriate than others. Some might indeed point back to clear and rich established case law, whereas others would only point to rich but not really established case law. Eventually, there may also be references pointing just to the pious wishes of the ECJ that it had said something before, typically introduced by an enigmatic 'see in this sense'.⁶⁵

Whatever formation of the ECJ decided a case, the outcome will always be a single, collegiate judgment. This may regressively influence the reasoning of the ECJ. If no dissents are allowed, a court may prefer to reach unanimity, even at the cost of making compromises. Alternatively, even if eventually outvoted, the minority might be successful in introducing some of their ideas into the judgment, even if the majority solution stands. This is how gaps in the reasoning of the ECJ may appear. A reader of a judgment may sometimes have the impression that 'there is something missing here'. There is a 'non sequitur' in the flow of the argument. In extreme cases,

with her new sex. However, whereas the ECtHR would in its reasoning openly acknowledge and discuss the deeper and conflicting moral choices, the ECJ presented the (same) answer as 'naturally following' from a number of quite abstract and technical general principles of EU law and the directive in question.

⁶⁴ A feature previously observed with respect to the work with highest courts' case law in a number of civilian systems in N MacCormick, & RS Summers (eds.), *Interpreting Precedents-A Comparative Study* (Ashgate 1997). Further see also J Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 *AJCL* 149.

⁶⁵ Further see e.g. MA Jacob, *Precedent and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (CUP 2014).

collegiality might even lead to almost no reasons at all, in particular in some exceptional Grand Chamber cases.⁶⁶

Whether the above sketched format and style of judgments is an appropriate one for a European court to adopt may naturally be open to debate. The more vocal critiques of the judicial style of the ECJ came in the past in particular from Anglo-American legal commentators. The ECJ was said to be 'simply oracular and almost apocryphal'.⁶⁷ It was suggested that the ECJ should 'abandon the cryptic, Cartesian style [...] and move to the more discursive, analytic, and conversational style associated with the common law world'.⁶⁸

Two elements essential for the discussion ought to be clearly articulated: practical and normative. On the *practical* level, a working environment predetermines the judicial style. If there is an international, multi-lingual court the decisions of which are to be translated into a further 23 languages and the task of which is to provide, certainly on preliminary rulings, general statements of the law and not to solve a concrete case, then having decisions that are rather abstract, succinct, with a fixed structure, and speaking with one voice can hardly be said to be that shocking. It would be rather surprising if a court working within such an environment indulged in passing detailed, lengthy, discursive and conversational judgments in the form of a bundle of individual judicial opinions that concur in part and dissent in the rest, and which one has to disentangle first in order to understand what may be the opinion of the court.

This is certainly not to state that there is 'no choice left' with respect to how the judgment of the ECJ might look. However, how such a choice should be exercised is then the question of the *normative* vision of how a court ought to reason and for whom. Who is the audience and what does it expect? Academic expectations might be different from judicial ones. What an English judge might consider 'simply oracular' may appear a decently reasoned decision to some of her Continental colleagues. Yet again, after 2004, not only did the ECJ become a 'civilian' court as to its internal structure and working method; the vast majority of its 'judicial clients' are now in fact continental judges.⁶⁹

In sum, over the years, the ECJ developed a singular way of reasoning its judgments. Originally inspired by the French tradition, the style has by now grown into a distinct style in its own right. Although it may be made subject to critique on a number of grounds, with particular cultural/professional traditions in the background or driven by a particular normative agenda, the overall outcome is perhaps not as problematic as is sometimes portrayed. This does not preclude, as in any system, individual lapses, in which the ECJ offers questionable reasons in a decision⁷⁰ or hardly any reasons at all.⁷¹ Still, the performance of a factory ought to be assessed

⁶⁶ Cf. e.g. Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

⁶⁷ Lord Melville quoted by Brown and Kennedy (n 6) 55.

⁶⁸ JHH Weiler, 'Epilogue: The Judicial Après Nice' in G de Búrca and JHH Weiler (eds), *The European Court of Justice* (OUP 2001) 225.

⁶⁹ Further Bobek (n 54). Generally also Arnull (n 4) 9-14.

⁷⁰ An example in this category might be provided by a three paragraph "reasoning" together with a reference to an impertinent previous decision, while completely omitting to mention a number of other, pertinent previous decision, but saying actually the contrary, in Case C-302/04 *Ynos* [2006] ECR I-71.

⁷¹ See e.g. the already quoted *Ruiz-Zambrano* (n 66) or Case C-273/04 *Poland v Council* [2007] ECR I-8925. In such cases, the ECJ can be said to give 'a *circumloquacious statement of the result, rather than a reason for arriving at it* – see S Weatherill, 'The Court's Case Law on the Internal Market: 'A Circumloquacious Statement of the Results, Rather than a Reason for Arriving at It'? In Adams et al. (n 54) 87.

as to its overall output, of which the amount of rejects is just one of the factors to be taken into question.

V. Legitimacy

There is hardly any other issue relating to the operation of the Court of Justice of the EU and the ECJ in particular that would give rise to such heat and passion: the legitimacy of what the ECJ has been doing and how it has been doing it. Perhaps the problem starts already at the definition level. Legitimacy is a hopelessly indeterminate notion. When is an institution such as a court legitimate? Who assesses what exactly with respect to what constituency or respondents (general public-professional public-other specific group or constituency)?⁷² What precisely is being looked at (an institution as a whole-staff-procedures-reasoning standards of written decisions etc.)?⁷³ Against what criteria is the output of the institution measured (legal (textual)-sociological-moral)?⁷⁴ Finally, what level of legitimacy debate precisely is one engaging in? General or overall legitimacy or support for an actor or institution or specific legitimacy or support for a concrete policy or decision?

Much of the disagreement as to whether the ECJ is 'legitimate' might have thus been perhaps caused by the initial divergence in approach and yardstick. Whatever approach might be eventually opted for, the overall debate concerning the legitimacy of the ECJ today has become perhaps more critical and richer than in the past.⁷⁵ This might be due not only to the on-going Euro-fatigue and the omnipresent 'crisis-talk', but also perhaps to the fact that courts in general have been scrutinized more critically, on the international as well as on the national level.⁷⁶

Within the 'legal' strand of the legitimacy debate, as opposed to the more political science or sociological approaches, there is one issue that stands out: the question of the 'proper' reasoning method⁷⁷ to be followed by the ECJ. In the European positivist tradition, lawyers tend to assert that there is a proper, 'scientific' method for a court and hence also for the ECJ to reason. Implicitly or even explicitly, if the ECJ departs from such 'proper' ways of interpretation, its decisions are illegitimate.⁷⁸

The corresponding debate is one on legal 'activism', 'self-restraint', and the limits of legal reasoning for the ECJ. A recurring and major theme in these debates is a certain 'pro-Union' interpretative tendency in the reasoning of the ECJ. This may be called an interpretative 'meta-rule', a '*communautaire* tendency', just a collision rule

⁷² See e.g. GA Caldeira and JL Gibson, "The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support" (1995) 89 *APSR* 356.

⁷³ Cf. Nick Huls, "Introduction: From Legitimacy to Leadership" in Nick Huls et al. (eds), *The Legitimacy of Highest Court's Rulings: Judicial Deliberations and Beyond* (TMC Asser Press 2009) 3-30, at 13-18.

⁷⁴ See RH Fallon, Jr., "Legitimacy and the Constitution" (2005) 118 *HLRev* 1787.

⁷⁵ For a succinct recent review of the English literature up to 2012, see Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 52-85. From the most recent contributions, see for instance: M Adams et al. (eds.), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice* (Hart 2013); M Dawson, B de Witte, and E Muir (eds.), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013). See also Thomas Horsley, 'Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50 *CMLRev* 931.

⁷⁶ Cf. e.g. the critical analysis offered by Ch Schönberger, M Jestaedt, O Lepsius and Ch Möllers in *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp 2011) that challenges on many levels the icon of the German post-WWII constitutional system: the Federal Constitutional Court.

⁷⁷ See in general also ch. 2 in this volume on Legal Reasoning in the EU.

⁷⁸ Recently put forward e.g. by Roman Herzog and Ludwig Gerken in 'Stoppt den Europäischen Gerichtshof', published in the *Frankfurter Allgemeine Zeitung* of 8 September 2008, in English translation accessible online at <<http://www.cep.eu>>. See also the Editorial Comments 'The Court of Justice in the limelight – again' in (2008) 45 *CMLRev* 1571.

of '*in dubio pro integratione*', or dismissed as the 'pro-EU interpretative bias' on the part of the ECJ. Stated in very simplistic terms, the ECJ is said to favour the interpretative approach and outcome that enhance further integration.

The abstract issue of this 'pro-Union interpretative tendency' can be further teased out on the basis of the examples of two arguably problematic areas: first, how far can a court override relatively clear legislation? Second, can EU law be further developed in sensitive areas (criminal law; tax law; areas of judicial cooperation) to the detriment of the individual? Whereas the first type of cases is questionable in terms of the principle of separation of powers, the second type encounters problems with the rule of law.

More recent examples falling into the first category might include *Mangold*,⁷⁹ *Sturgeon*⁸⁰ and, in a lesser way, also perhaps *Pringle*.⁸¹ Naturally, already the inclusion of these cases into such a category might be contested.⁸² However, for the sake of the argument, one may suggest that in *Mangold*, the ECJ effectively overwrote the legislative choice of both the Union legislator as well as the German legislator, conjuring out of thin air a questionable general principle of EU law. In *Sturgeon*, the ECJ disregarded fairly clear categories established by the EU legislation, an interpretative approach that at least according to its own Advocate General⁸³ was not appropriate for a 'court' to take.⁸⁴ Lastly, whether the ECJ went too far in *Pringle* and effectively overwrote or just 'distinguished' categories created by primary law may perhaps be open to debate.⁸⁵ However, in terms of clear expression of legislative will, *Pringle* is perhaps the most 'restrained' amongst the illustrative triplet mentioned here.

The second category unites the examples in which the ECJ, in the interest of further development of EU law in a specific area, may appear to have disregarded area-specific principles that call for caution or restrictive interpretation in matters of for instance criminal law, tax law, or administrative sanctions. In general terms, these principles favour legal certainty and the protection of rights of the individual over 'effective enforcement of the law', by introducing principles like '*nullum crimen, nulla poena sine lege*'; the requirement of clarity and foreseeability of criminal or tax legislation; the requirement for a proper and clear statutory basis for the imposition of obligations or fines; or access to effective review and judicial remedies. If in these areas, the sweeping purposive reasoning that presumably favours unity and effective enforcement of EU law is applied, the ECJ might end up with imposing de facto sanctions without a proper legal basis, or denying legal protection to persons who are lost in between legal systems.

Examples in this category might include *Halifax* in the area of value added tax, where the ECJ concluded that abusive practice might be also an activity that is in fact not expressly prohibited by legislation, but 'the transactions concerned [...]

⁷⁹ Case C-144/04 *Mangold* [2005] ECR I-9981.

⁸⁰ Joined cases C-402/07 and C-432/07 *Sturgeon* [2009] ECR I-10923.

⁸¹ Case C-370/12 *Pringle*, judgment of the Full Court of 27 November 2012, n.y.r.

⁸² Cf the opposing views on these and other recent cases of Koen Lenaerts and JHH Weiler in M Adams et al. (n 54.)

⁸³ Cf the Opinion of AG Sharpston of 2 July 2009 in *Sturgeon* [91-97].

⁸⁴ Thus prompting also the singular request for a preliminary ruling by the *Landgericht Köln* in reaction to *Sturgeon* that inquired, in a nutshell, whether the ECJ has heard of the principle of separation of powers – see Case C-413/11 *Germanwings*, judgment of 18 April 2013, n. y. r.

⁸⁵ A debate that is not over, taking into account the recent first ever request for a preliminary ruling submitted to the ECJ by the German Federal Constitutional Court (BVerfG of 14 January 2014, 2 BvR 2728/13, online at <www.bverfg.de>), in which a number of issues addressed in *Pringle* are likely to be tackled again.

notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive [...] result in the accrual of a tax advantage the grant of which would be *contrary to the purpose* of those provisions.⁸⁶ In subsequent case of *R.*, the issue of criminal legality is picked up and discussed by the AG Cruz Villalón, leading him to the conclusion that criminal law sanctions imposed on the basis of ‘teleological’ reading of VAT legislation are not possible.⁸⁷ Again, the Grand Chamber appeared not to be impressed by such arguments and affirmed the possibility of criminal sanctions in similar cases.⁸⁸ In *Estonia v Commission*, the EU courts found no difficulty in confirming a fine imposed on Estonia, the legal basis for which was very questionable, essentially approving again a legal sanction based on the aim and purpose of a provision.⁸⁹ In a rule of law based system, can one impose restrictions or sanctions on the basis of judicially or administratively conjured purpose, without proper legal basis in the law itself?

Finally, the recent spree of horizontal cooperation mechanisms in criminal and administrative matters meant that the ECJ entered an area where a restrictive, rights-protecting approach may be deemed more appropriate than EU-enhancing, sweeping *effet utile* assertions, that may appear to further develop European integration, but also leave the individual in question without an effective remedy. The Opinion of AG Mazák in *Kyrian*⁹⁰ is a vivid example of such an approach: the full effectiveness of horizontal mutual assistance for the recovery of levies and tax cannot be called in question and must be asserted, even if the procedural system established by the Directive is clearly deficient⁹¹ and leaves the individual without any possibility of judicial review of an administrative decision in the adoption of which he did not participate in the requesting state and which was served on him in a foreign language in his home state.⁹²

With respect to examples in both of the categories as well as others, the discussion whether or not it is correct for a court to reason in this way and to arrive at such conclusions is a normative debate on the ‘proper’ method to be adopted by the ECJ and its limits. It is essentially a value judgment about the boundaries of the judicial function, often heavily determined by the personal and social background of the author. The important point is nonetheless that in terms of ‘legal’ analysis, the debate on method glides over into the discussion of the legitimacy of the ECJ: can a body consistently deciding in one direction be perceived as an independent and impartial court?

At the root of the social legitimacy of courts is arguably their impartiality: a court is called to decide because it is the independent third. That is why it was created and that is also why disputes keep being submitted to it. Can, however, a ‘biased’ institution be called a court? The legitimacy debate shifts its focus from the method to

⁸⁶ Case C-255/02 *Halifax* [2006] ECR I-1609 [86], author’s emphasis.

⁸⁷ Opinion of 29 June 2010 in Case C-285/09, *Criminal proceedings against R.* [2010] ECR I-12605, in particular [48-56].

⁸⁸ Case C-285/09, *Criminal proceedings against R.* [2010] ECR I-12605.

⁸⁹ Case T-324/05 *Estonia v Commission* [2009] ECR II-3681 [116] and [119], confirmed on appeal in Case C-535/09 P, *Republic of Estonia v European Commission* [2011] ECR I-34.

⁹⁰ Opinion of AG Mazák of 15 September 2009 in Case C-233/08 *Kyrian* [2010] ECR I-177. It ought to be added that the ECJ did not follow the Advocate-General.

⁹¹ Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties [1976] OJ L73/18.

⁹² Further examples A Albi, ‘An essay on how the discourse on sovereignty and the co-operativeness of national courts has diverted attention from the erosion of classic constitutional rights in the EU’ in M Claes et al. (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012).

its outcomes. The chief challenge becomes not (just) that the ECJ is perceived to have stepped over the boundaries of 'proper' judicial reasoning, in either of the two or more categories outlined above, but that it does so instrumentally and asymmetrically in one and only one direction: to further enhance integration. Even a more assertive court that is generally believed to have sometimes stepped over the boundaries of 'proper' judicial reasoning might still be perceived as impartial and thus somewhat legitimate, because it does so indiscriminately to the benefit/detriment of all actors.

If pushed even further, it may be suggested that the approach that once moved the ECJ forward and allowed it to make its distinct imprint on the process of European integration has now become an obstacle to its further evolution within a changed social context. Today, the ECJ arguably has the ambition to become more than a 'one-sided-economic-court'. Taking into account the spread of issues and areas coupled with the already discussed rise of the Charter and the overall refocusing of the legal discourse in EU law, the ECJ is on the verge of becoming a genuine Supreme Court of the Union. The strength and legitimacy of a genuinely supreme court lies, however, in its impartiality and independence. The source of its legitimacy rests less in substance (result or outcome) and more in the process itself. A genuine supreme court in a larger federal unity ought to decide even-handedly in favour as well as against the federation. Such a court draws its legitimacy from the impartial judicial process itself, not from one-sided 'corruption by rights' for the individuals coupled with messianic⁹³ promises of a 'Community of Destiny' to come.⁹⁴

Should this be the next step for the ECJ to take? If yes, would this also herald the evolution of the Union into a more stable and matured community that does not see a mere annulment of one or more legislative adventures as a life-threatening disaster? Equally, maturity of a political community might mean maturing of its scholarship, which may become more ready to accept that the criticism of some or even all aspects of the method of the ECJ or any other EU institution does not necessarily mean an attack on the very idea of European integration. There might be persons criticizing the style of reasoning of the ECJ that are, as to their political convictions, ardent European federalists. They just do not believe that noble political ends should be allowed to justify whatever judicial means.

Eventually, as already explained, at the heart of the conviction concerning the 'proper' judicial method spilling over into the legitimacy of the ECJ will always be a hardly further reducible judgment call. A glimpse at the on-going debates concerning the legitimacy of the ECJ offered in the closing section of this chapter, together with the institutional and structural changes the institution has been facing since 2004, later joined by today's omnipresent 'Euro-crisis' and ensuing 'Euro-fatigue', indicate that there are interesting times ahead for the Court of Justice of the European Union.

⁹³ Further JHH Weiler, 'The Political and Legal Culture of European Integration: an Exploratory Essay' (2011) 9 *ICON* 678, 682.

⁹⁴ Further M Bobek, 'Van Gend +50: the Changing Social Context of Direct Effect' In Court of Justice of the European Union, *50th Anniversary of the Judgment in Van Gend en Loos 1963-2013: Conference Proceedings* (Office for Official Publications 2013) 181, 183-186.



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