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# Twelve things everyone should know about the European Court of Justice

Hugo Brady



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## About the author

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# Twelve things everyone should know about the European Court of Justice

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In memory of Clara Marina O'Donnell  
(1983-2014)



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# Summary

The EU is a legal animal. The Union differs from other international bodies such as the UN or the Council of Europe in that it produces binding legislation. Member-states have to transpose into national law the agreements they make in Brussels or face litigation from the European Commission. The European Court of Justice (ECJ) sits at the heart of this shared law-making system.<sup>1</sup> Its rulings are faithfully applied in 28 countries, comprising the world's largest economic area. Hence it is arguably the most powerful international court.

The ECJ is poorly understood despite handing down more than 28,000 judgments since 1952. This is partly because the Court is based in Luxembourg and works solely in French (judgments are later translated). It is also frequently confused with the European Court of Human Rights (ECtHR), an entirely separate institution based in Strasbourg.

Unlike the ECtHR, the plaintiffs at the ECJ are not ordinary citizens but governments, other EU institutions and large firms. The bulk of the ECJ's work involves answering questions from judges in national courts on a point of European law. This is how the Luxembourg Court generates its own distinct body of law and integrates it simultaneously into national legal orders without directly deciding the rights and wrongs of each individual case.

As an institution, the ECJ consists of three stand-alone tribunals, each with its own separate judges, procedures and working culture. The first is the ECJ itself, the highest court, which hands down advice to national courts, hears cases against national governments and decides the Union's big constitutional questions. The second is the General Court, which handles bread-and-butter EU legal disputes over competition policy, state-aid decisions, agricultural subsidies, intellectual property rights and so on. Both courts have 28 judges, one per member-state. The ECJ proper has an additional nine senior legal counsels or 'advocates-general': their specialist opinions have a significant influence on the Court's final rulings. A smaller Civil Service Tribunal handles disputes concerning EU employees.

<sup>1</sup>: Under the Lisbon treaty, the EU's Court is now called the 'Court of Justice of the European Union'. However, EU judges, European lawyers and prominent legal commentators may use either 'ECJ' or 'CJEU' to refer either to the institution as a whole or to its highest court. For simplicity's sake, the older acronym is used for both throughout this report.

The ECJ has long worked in obscurity but its influence is becoming more apparent and contested. In July 2013, Britain announced that it would abandon a swathe of EU police and justice agreements rather than accept the Court's jurisdiction over them. In February 2014, Germany's constitutional court (Bundesverfassungsgericht) in Karlsruhe referred its first case to EU judges in more than 60 years, asking the ECJ whether the European Central Bank's (ECB) still unused Outright Monetary Transactions scheme was illegal. But this is not the victory for the EU's institutions that it seems. (The two pro-EU judges on the Bundesverfassungsgericht wanted the case dismissed.) The German judges are well-known for their antipathy to European integration and may reject the ECJ's answer. A confrontation between Karlsruhe and the ECJ over monetary union could tip the eurozone into renewed chaos.

The ECJ is beginning to look more like a supreme court for Europe, following the entry into force of the Lisbon treaty and its Charter of Fundamental Rights. More sensitive cases are coming before EU judges on illegal immigration and refugee policy, as well as gender equality and issues linked to the rights of minorities. The increasing focus on the rights of the individual is likely to be compounded by the EU's eventual accession to the European Convention on Human Rights. NGOs and human rights campaigners are eager to get their issues before the powerful Luxembourg Court, to which they do not enjoy direct access. A few have enjoyed spectacular results, such as Digital Rights Ireland, a privacy watchdog, whose legal battle in the Irish courts culminated in an ECJ ruling that annulled an EU law on internet data.

A record number of more than 1,500 new cases were received by the ECJ in 2013. Despite being the world's most highly resourced judicial institution, with a budget of €355 million, EU judges still take too long to hand down their verdicts. Some cases drag on for years. The complexity and volume of the General Court's competition and intellectual property (IP) caseload is partly to blame. By early 2014, it had become so over-stretched that EU governments agreed to allocate it nine extra judges. These may take some time to arrive as member-states bicker over how the additional judges should be nominated. The ECJ itself will receive two more advocates-general by 2015.

Still, it is an open question whether even this unprecedented boost in resources will be enough to tackle an expected rise in litigation involving chemicals regulation and IP disputes at the General Court. For its part, the ECJ will certainly have to deal with more referrals from

national courts over refugee applications and due process in cross-border criminal cases when applying EU crime measures such as the European arrest warrant. The ECJ gains full jurisdiction over EU police and justice matters from December 1<sup>st</sup> 2014. Since such trials involve life and liberty, the rest of the Court's work goes on hold until they are dealt with under the so-called *procédure préjudicielle d'urgence* (PPU). A large increase in PPU's could lead to the collapse of the ECJ's delicately balanced case-management system. The Court may have to consider setting up further specialist tribunals in the mould of its Civil Service Tribunal or even revising its language rule. French is only a fifth language for many of the newer judges.

Both the ECJ and General Court have recently overhauled their rules of procedure. These are mainly designed to boost efficiency through administrative streamlining. For example, the ECJ has done away with the 'report for the hearing', a summary of all the legal arguments involved in a case, and opted to avoid hearing witnesses in open court, if practicable. But efficiency is not everything. The ECJ needs to have an eye on the future where it is ever more likely to be at the centre of highly politically and socially sensitive issues.

One idea is that the Commission, which wins 90 per cent of its litigation battles with governments before the ECJ, could instead take countries before their own courts for breaching EU law. This would reduce the ECJ's workload, give national judges more ownership of European law and perhaps allow the Commission to take countries to court more often. In fact this change would not be as radical as it appears. In most cases, domestic courts in EU member-states have excellent records of applying European law correctly. And the Commission or government could still appeal to Luxembourg.

A second idea would be for national constitutional courts to be given the right to object formally to ECJ interpretations of the Charter of Fundamental Rights, if, say, two-thirds of them did not concur. The ECJ would have to take these 'yellow cards' seriously but would not be bound by them. This would open a badly-needed dialogue with national constitutional courts which have a tendency to view the Luxembourg Court as an interloper.

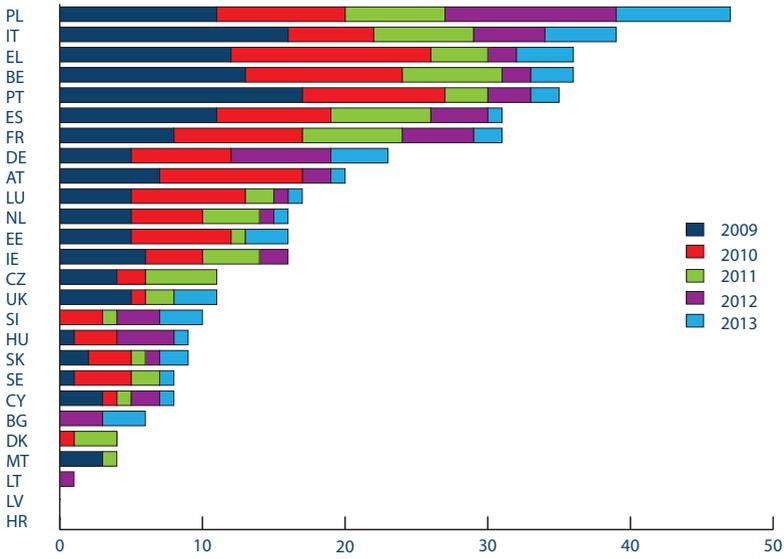
A third idea would be for the European Parliament, perhaps prompted by the European Ombudsman, to take cases before the ECJ on behalf of groups of citizens concerned about a particular EU law or decision.

A dose of ‘popular legalism’ might go some way to alleviate concerns about the Union’s distance from everyday voters and the sense that the rules governments make in Brussels are irreversible.

The latter two reforms could be attempted informally but the first would require a treaty change. So too would any attempt to introduce ‘minority judgments’ to the Court, where EU judges would be allowed to openly disagree. Some politicians and legal experts think this would make the ECJ more transparent. But the Court’s president, Vassilios Skouris, is resolutely – and probably correctly – opposed. It is unlikely that national courts would be better able to decide individual cases after receiving more than one opinion from Luxembourg.

Judges are not infallible but they do have a role in checking executive power and political radicalism. Hence the ECJ will inevitably fall foul of politicians and popular opinion at times. But the Court remains a priceless asset for Europe. It helps ensure the rule of law across the continent, functions as a global standard setter for the rights of the individual and enhances – not diminishes – the Union’s chances of becoming a more effective foreign policy actor. The ECJ has influence in the EU’s relations with the US (on counter-terrorism policy), Russia (on energy policy) and Turkey (on migration matters), to cite a few examples.

Other international clubs such as ASEAN or the Andean Community have tried to mimic the EU and its single market. Such efforts have not succeeded, among other reasons, because these regions do not have a common tribunal with the ECJ’s authority. Accordingly, EU governments are likely to put up with the Court’s minor foibles and continue to respect its role, despite occasional political rhetoric to the contrary. In the meantime, EU judges need to experiment with ways to help the outside world judge them better.



**Chart 1:**  
Europhiles and eurosceptics:  
Which member-states get taken to court

Source:  
ECJ, Annual report, 2013



# Introduction

The European Court of Justice (ECJ) is the EU's least understood major institution. From its seat in the Luxembourg suburb of Kirchberg, its judges have issued rulings for more than half a century on disputes between European governments, institutions and businesses. Their judgments on issues such as competition policy or the environment are rarely noticed by politicians, let alone ordinary citizens. However, this apathy often turns to flabbergasted surprise when a 'landmark' ECJ ruling decides hundreds of refugee claims at a stroke, changes how doctors or firefighters do their jobs, or dismisses the actions of the UN Security Council.

Take the Court's 2014 *Google* decision: the Luxembourg Court ruled that internet search engines should guarantee individuals 'the right to be forgotten' by removing their personal data from web searches on request. The ruling was praised by EU officials and other advocates as a victory for privacy. But some civil liberties campaigners said the decision promoted a new form of censorship and an unprecedented rolling back of online freedoms.<sup>2</sup> In any case, the ruling demonstrates the clear intention of EU judges to change the way the internet is governed as regards personal privacy.

Another example is the *Test-Achats* case in 2011: ECJ judges banned companies from gender-based insurance pricing when calculating car insurance premiums, because this violated the EU's strict stance on gender equality. The ruling changed Europe's auto and health insurance industries. Women now pay more for car insurance and men more for private health coverage. The case provoked a particular outcry in the UK.<sup>3</sup>

Governments quail – and various lobby groups applaud – as the ECJ's rulings delve deeper into consumer rights, gender equality, immigration, political asylum and even foreign policy. Europe's media report cases with headlines like: 'EU Court's Google ruling re-defines privacy in the internet age'; 'Shock EU ruling of 25 per cent hike in car

2: 'Index blasts EU Court on "right to be forgotten"', Index on censorship, May 2014.

3: 'Insurance and pension costs hit by ECJ gender ruling', BBC News, March 1<sup>st</sup> 2011. A Belgian consumer organisation, Test-Achats, went to court on the grounds that the insurance industry could not be exempted from the EU's Gender Equality directive 2004/113/EC.

insurance is “utter madness”; ‘European Court rules against Italy on the crime of illegal immigration’; and ‘Europe’s highest court strikes down EU sanctions against Iran.’<sup>4</sup> Inexorably, the ECJ is moving further into the limelight.

The ECJ’s judicial reach is spreading to new countries (13 in the last 15 years, the latest being Croatia), and also deepening, in areas like human rights, crime and policing, under the Treaty of Lisbon. Yet despite occasional criticisms of ECJ decisions they dislike, EU governments still turn to the Court as an independent arbiter of last resort. In 2011, Germany’s Chancellor Angela Merkel insisted successfully that the ECJ alone should be trusted to enforce the fiscal compact (a eurozone treaty that introduced mandatory controls on public debt into national constitutions).

In November 2012, EU judges held the fate of the euro itself in their hands when they ruled in *Pringle v Ireland*. In this case, the ECJ decided that the European Stability Mechanism, the eurozone’s main bail-out fund, did not contravene the Maastricht treaty’s ‘no bail-out’ clause regarding the debt of countries using the single currency. Some observers considered this critically important ruling an example of legal gymnastics in the face of overwhelming political realities.<sup>5</sup> But had the judges ruled otherwise, the eurozone could have come apart following a collapse in market confidence in official efforts to save the single currency. According to Sacha Prechal, the Dutch judge at the ECJ, the *Pringle* ruling only marks the beginning of the ECJ’s involvement in judging the new economic framework currently being constructed to try to put the eurozone on a sustainable footing.<sup>6</sup>

Developments like these make people want to understand the ECJ better: what does it do, how does it work, and what motivates its most prominent legal minds? The Court’s verdicts for even a single year could not be squeezed into one coherent story. This report tries to sketch an albeit skeletal still-life of the Luxembourg Court, incorporating some of its history, key personalities and important judgments. It touches on highly sensitive issues, such as whether the ECJ represents an EU ‘*gouvernement des juges*’. But the wider aim is to take the curious layman beyond the legal jargon to get some insight into the world’s most powerful international court.

4: Respectively: *Financial Times*, May 13<sup>th</sup> 2014; *The Express* (UK), March 1<sup>st</sup> 2011; *Il Sole 24 Ore*, April 28<sup>th</sup> 2011; Reuters, December 1<sup>st</sup> 2013.

5: Jamie Smyth, ‘Court rules Europe rescue fund within EU law’, *Financial Times*, November 27<sup>th</sup> 2012. See also Gunnar Beck, ‘The legal reasoning of the European Court of Justice’, Hart, 2012.

6: Interview with Judge Sacha Prechal of the European Court of Justice, Part I: Working at the CJEU, europeanlawblog.eu, December 2013.

# Twelve things everyone should know about the ECJ

## i) The ECJ helped create the EU

*"Many fundamental choices for society are now made, and probably have to be made, not by the legislature, not by the executive, but by the courts."<sup>7</sup>*

– Francis Jacobs, ECJ advocate-general 1988-2006

In February 2014, the US Supreme Court travelled to Luxembourg to meet the judges that some of its members consider their natural counterparts in Europe. Does that comparison flatter the ECJ? For the most part, it is a dry and technical administrative court with little of the drama, finery or pomp of higher national courts. EU judges are normally far younger than their US colleagues and more often seen in business suits than judicial robes. They are appointed to serve six-year terms, not for life, as in the US court. And whereas the Supreme Court consists of nine senior justices, each of the EU's 28 member-states appoints at least two judges to the EU Court.

More importantly, the ECJ is not yet a supreme court or the single highest court within Europe's various national jurisdictions. The bulk of the ECJ's 'docket' (list of pending cases) each year involves repetitive administrative disputes over contentious EU regulations and directives in areas like competition policy, chemicals regulation or intellectual property law. National courts have the final say in cases involving EU rules and citizens cannot appeal their decisions directly to Luxembourg. It is not the ECJ's function to arbitrate on big moral questions, or issues of life and death. But these do sometimes find their way to Luxembourg indirectly. In October 2011, EU judges were asked what constituted a human embryo in a dispute over stem cell patents; in 1991, they were confronted with both abortion in the context of Ireland's constitutional ban, and the free movement of services in the *Spuc v Grogan* case.<sup>8</sup>

7: Francis Jacobs quoted in Andrew Williams, 'The ethos of Europe: Values, law and justice in the EU', Cambridge University Press, 2010.

8: Helen Briggs, 'European Court ruling 'threatens stem cell work'', BBC News, October 18<sup>th</sup> 2011.

Where did this awkward judicial creature come from? In May 2013, EU judges held an official celebration to mark 50 years of the *Van Gend en Loos* tariff case. The case involved a complaint by a haulage company against Dutch customs for increasing the duty on a product from Germany in the then European Economic Community (EEC). In 1963, EEC judges argued that the Treaty of Rome, signed in 1957 between six European states, was not just an ambitious free trade agreement. In their view, the treaty represented a completely “new legal order” or, in effect, a kind of supranational constitution. This meant, in contrast to most international accords between sovereign states, that firms and ordinary citizens could litigate its terms before their national courts. Luuk Van Middelaar, a political thinker, writer and adviser to the president of the European Council, explains the significance of the *Van Gend* decision:

Lawyers discern in it the birth of, as the jargon goes, ‘direct effect’ – the principle that individuals can, under certain circumstances, appeal to the treaty over the heads of the states. There is nothing trivial about this. To quite a remarkable degree, it ties together European and national legal systems. [...] Every national judge was henceforth a European judge. He or she had a duty to apply European regulations, not through the Court in Luxembourg but within any court of justice or tribunal no matter how high or low in which domain of law. From this point on, any participant in economic life – manufacturer, wholesaler, employee, consumer – could force a member-state to adhere to those rules.<sup>9</sup>

The Court took this decision a step further a year later in *Costa v ENEL*. This was a small claims dispute over an electricity bill equivalent to €1 today, between an Italian consumer and his national electricity board. (Costa refused to pay because his private provider was nationalised into ENEL, a new national power conglomerate. He argued this contravened European rules against monopolies.) The judges in Luxembourg ruled that the Treaty of Rome was supreme over national law. In other words where a national rule contradicted a European one, the national law did not apply. This suggested that national courts were subservient to the supranational ECJ, albeit only in the areas covered by the treaty. This implied claim to legal supremacy over the national legislatures and judiciaries of the member-states would become more significant as the scope of the European institutions expanded in subsequent treaty revisions.

Whatever the early motivations of ECJ judges, they had an immensely practical insight. The economic community envisaged in the Treaty of

<sup>9</sup>: Luuk van Middelaar, ‘The passage to Europe’, Yale, 2013.

Rome would never happen if it was left up to governments alone to implement its clauses. The European Commission could take member-states to court if they refused to comply with its terms. But the modest bureaucracy would never by itself be able to monitor compliance with tough new rules prohibiting monopolies, cartels and state aid across six countries' economies. So the judges decided that the real guardians of the treaty would be citizens and firms seeking their rights before the courts. In effect, this made the treaty self-executing over the heads of national decision-makers. Legally, this was breathtakingly radical, even, according to some ECJ historians, a juridical *coup d'etat*.<sup>10</sup>

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## Founding fathers?

Only around 220 men and women have worn judicial robes at the ECJ since 1952, although the institution has evolved from a handful of EEC justices to an entire EU judicial branch comprising two distinct courts and a separate tribunal to hear staff disputes. Robert Lecourt, Pierre Pescatore, Giuseppe Federico Mancini and Francis Jacobs – all notable judges and advocates at the Court – should be candidates to join Jacques Delors, Helmut Kohl or Robert Schuman in the EU's pantheon of historical figures. Their ranks might also be joined by Michel Gaudet or Jean-Claude Piris, influential former heads of the legal services of the European Commission and EU Council of Ministers, respectively. The directors of these services together act like an attorney-general for the EU's institutions: they advise governments and officials as to the legal limitations on their actions.

In 1962, Robert Lecourt, a lawyer whose liberal internationalist views had irritated President Charles de Gaulle, was sent to serve at the still obscure ECJ. He would prove instrumental in crafting the *Van Gend en Loos* and *Costa* judgments, drafted to oppose De Gaulle's vision of a 'Europe of the nations' and to promote the law as a means to drive cross-border political integration in Europe.<sup>11</sup> Lecourt was also a close friend of Jean Monnet, the French diplomat considered to be a founding father of today's EU. De Gaulle took revenge on the ambitious new European institutions by withdrawing French participation from them during the 'empty chair crisis' of 1965-66.

Pescatore, a Luxembourger, helped to negotiate the Treaty of Rome and served as a judge at the ECJ for almost 20 years. He would become the intellectual godfather of European law, writing a series of eloquent

<sup>10</sup>: Quoted in Gerard Conway, 'The limits of legal reasoning and the European Court of Justice', Cambridge, 2012.

<sup>11</sup>: Karen Alter, 'The European Court's political power: Selected essays', Oxford University Press, 2009.

academic texts, which further developed the notion of a European legal system that was a unique form of public international law, neither state-like nor wholly international. Both Lecourt and Pescatore later confirmed that the Court had deliberately filled the political void left by reluctant governments in the Community's early years with "*une certaine idée de l'Europe*".<sup>12</sup>

*“Cassis de Dijon is a clear example of judicial fiat: EU judges advanced the law, rather than interpreting it.”*

Pescatore and his successors developed this ambiguous notion further in the 1970s and 1980s with rulings such as *Cassis de Dijon*. In this case, the Court created the principle of ‘mutual recognition’ for products produced in the common market, neatly circumventing the impossible task of creating harmonised standards for every kind of tradable good. The judges ruled that if a product met the legal standards of its home member-state, then it could be sold across the common market. The European Commission would use such judgments as legal battering rams to beat down protectionist policies in Europe over the years that followed. *Cassis de Dijon* is as clear an example as any of judicial fiat: EU judges advanced the law, rather than strictly interpreting it. Few today have cause to regret the Court's ruling, however.

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## Allies and enemies

The Court's landmark decisions – *Van Gend en Loos*, *Costa v ENEL*, *Cassis de Dijon* and *Defrenne v Sabena* (see section: vi) – did not come about by chance. Judges were determined that the EEC, which would eventually evolve into the European Union, should develop a robust common rule of law. So they went on a continental roadshow – writing opinion pieces, making speeches, feting national judges – to encourage domestic courts to put questions about the relationship between European and national law to the Luxembourg Court. The more that national judges asked for its legally binding opinions, the more the ECJ's power and authority would grow.

ECJ rulings like *Van Gend* were initially ignored as eccentric by governments and national judges. Several constitutional courts just over-ruled the Luxembourg Court's claims to legal supremacy in the late 1960s. However, the ECJ was supported by a small but important second constituency. This was a cadre of high-profile lawyers and legal

<sup>12</sup>: Quoted in Henri de Waele, 'The role of the European Court of Justice in the integration process: A contemporary and normative assessment', *Hanse Law Review*, 2010.

scholars passionately committed to a post-war Europe united by the rule of law, economic openness and human rights.

Pro-European lawyers sought out test cases in their national courts that were ripe for referral to Luxembourg: *Van Gend* and *Cassis de Dijon* were two of these. Sometimes the lawyers would receive hints and tip-offs from the Commission's legal service about which cases might best establish or strengthen the rule of law across borders in the Community. Law professors wrote supportive articles in respected journals arguing that the Luxembourg Court's rulings were revolutionary, far-sighted and important. Gradually, the ECJ's position as an authoritative international court came to be accepted, particularly by a new generation of European lawyers coming of age in the 1970s and 1980s.

Nevertheless, European law still faced a "Darwinian struggle" to survive, according to Allan Rosas, one of the most senior judges at today's ECJ.<sup>13</sup> Some countries, like France, ignored its more inconvenient rulings on occasion, just as they might those of other international courts. In the late-1980s and early 1990s, the ECJ was forced to issue several 'second judgments' for non-compliance with its verdicts. To save the credibility of EU law, governments agreed with a British idea during the 1991 Maastricht treaty negotiations that the Commission should be able to fine laggard countries for non-implementation of European law. Where warranted, the Court would have the power to confirm or mitigate such fines and back them up with an additional daily charge for each day a particular European regulation or directive went unimplemented. To date, Greece has incurred the most such financial penalties from the Court.<sup>14</sup>

The Maastricht negotiations were also an opportunity for governments to rein in judges who were "running wild", in the controversial words of Hjalte Rasmussen, a Danish law professor. EU leaders insisted that foreign policy, policing and immigration were areas of purely inter-governmental co-operation and therefore out of the ECJ's reach. However, the Court would continue to interpret the rules on intra-EU migration, known as the free movement of workers. For example, its 1991 *Antonissen* ruling defined 'workers' to include unemployed job-seekers. That crucial distinction would later be formally incorporated by governments into the EU's 2004 free movement directive. (Thus ECJ judgments can sometimes shape future legislation.) *Antonissen* would take on a much greater significance as the Union enlarged to Central and Eastern Europe and the Balkans.

13: Allan Rosas and Lorna Armati, 'EU constitutional law: An introduction', Hart, 2012.

14: Gerda Falkner, 'Is the European Union losing its credibility?', *Journal of Common Market Studies*, 2013.

British officials who came to Maastricht were also concerned that the ECJ was undermining the sovereignty of national parliaments as legislators. In 1990, the Court struck down national British legislation intended to stop abuse of EU fishing quotas by Spanish fishermen. This triggered a series of linked cases in the UK courts under the general name *Factortame* that examined the conflict between the supremacy of EU law and the principle of parliamentary sovereignty. The same year EU judges also pronounced against Italy in the *Francoovich* case, arguing that if parliaments failed to implement European law correctly or on time, then the state was liable to pay not only European financial sanctions, but also damages to their own citizens and firms. This simple but circular reasoning meant that legislation agreed in Brussels might give new rights to citizens even before being enacted by their national parliaments.

During the Maastricht negotiations, Britain's Conservative government pushed for the so-called Barber Protocol to come into force with the new treaty. The protocol limited the effects of one ECJ ruling that had forced Britain to equalise the retirement age for men and women, following a sex discrimination case against a large UK insurance company, the Guardian Royal Exchange Assurance Group. Up until this point, governments had never sought to reverse or qualify an ECJ decision by changing the treaties. This modest rap on the knuckles was enough to shock the judges in Luxembourg who were somewhat less controversial for the rest of the decade.

Perhaps that is why Britain and others did not insist on clipping the judges' wings further in the Amsterdam treaty negotiations of 1997, which saw border controls, immigration and asylum policy moved within the ECJ's remit. However both the UK and Ireland stood aloof from the treaty's clauses on passport-free travel, obtained case-by-case opt-ins on asylum and immigration legislation, and ensured that co-operation in the sensitive area of criminal justice would stay inter-governmental. But the treaty allowed any individual government to be bound by the ECJ's rulings on crime and policing issues, if it wished. Most of the continental member-states did so, allowing their courts to refer questions on cross-border criminal cases to Luxembourg. Accordingly, the Court issued its first crime-related ruling in 2003. Known as *Gözütok and Brügge*, these two linked cases involved the question of whether a drug dealer could be tried twice for the same crime by different countries in the Schengen area of passport-free travel. (See section: x.)

The most serious challenge to the ECJ's authority – and hence the EU's legal regime itself – would come not from rebellious governments but disgruntled constitutional courts. In a series of rulings from 1974 to 2009, Germany's constitutional court expressed deep misgivings about the compatibility of the EU treaties with Germany's Basic Law. The German judges cited the inadequacy of the Union's human rights protections, the weak democratic legitimacy of the European Parliament, and treaty clauses allowing Brussels to acquire new legal powers without approval from national constitutional courts. They have refused to see the Luxembourg Court as superior, treating it at best as an equal. Similar tensions are at play between governments and higher national courts on the one hand, and the European Court of Human Rights in Strasbourg on the other.<sup>15</sup> (See section: vii.)

The Karlsruhe court's attitude towards the EU is a crucial factor in a long judicial arm-wrestle for authority between the ECJ and national constitutional courts (or equivalent) in Britain, France, Poland, Lithuania, Spain and elsewhere. Germany's judges only allowed the Bundestag to ratify the Maastricht and Lisbon treaties, respectively in 1993 and 2009, on the condition that national governments, parliaments and courts remained "masters of the treaties" – that is: in control of the EU's future development – rather than the ambitious supranational institutions.<sup>16</sup> In 2012, the Czech constitutional court took this judicial passive aggression to a new level in the *Landtová* case. When a lower court referred to the ECJ a question on pensions payable to former citizens of Czechoslovakia, the constitutional court said the Luxembourg Court simply had no business getting involved. The incident – to which the ECJ has not formally responded – neatly illustrates how European law is often influenced by the power struggles between lower and higher courts at the national level.

The internal 'politics' of the ECJ are hard to grasp with any certainty. It is not possible to discern a spectrum of opinion within its ranks on topics such as economics, society, human rights and so on. Neither does the Court's demographic or ethnic profile offer many clues. The institution has 72 members in total: 37 at the ECJ proper, 28 in the General Court and seven serving on the Civil Service Tribunal. All are white; 14 are women, and their ages range from 44 to 75. But, as regards their stance on the EU or European policies, it is impossible to divide the judges – as commentators often do with the US Supreme Court – into 'strict constructionists' or 'judicial activists' or any other sort of category.

<sup>15</sup>: See, for example, Owen Bowcott, 'European court is not superior to UK Supreme Court says Lord Judge', *The Guardian*, December 4<sup>th</sup> 2013.

<sup>16</sup>: See the concise account of the German constitutional court's 'Solange', 'Kompetenz-Kompetenz', and 'Lisbon ruling' cases in Luuk Van Middelaar, *The passage to Europe*, Yale, 2013.

According to one senior ECJ judge: “Every colleague has their convictions. But their views are not automatically predictable: it depends on the issue. And the situation has become more complex since enlargement.” It is clear that none of the judges serving in the current ECJ is a thorough eurosceptic, however. Only with the Court’s nine advocates-general is it possible to get a flavour of the substantive debates taking place inside the ECJ. These have the same status as judges but do not deliberate. Instead they serve rather as the intellectual elite of European law, issuing independent, individual legal opinions where a case is deemed complex, unique or important enough to merit such guidance. Here, one can discern, for example, the high-minded liberalism of Eleanor Sharpston or the conservatism of Yves Bot and Pedro Cruz Villalón (advocates-general from Britain, France and Spain, respectively).

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## ‘Running wild’ redux?

Some Court watchers claim that the ECJ is returning to the radicalism of the *Van Gend* era or at least – according to Michal Bobek of Oxford University – shifting from a one-sided economic court to “the verge of becoming a genuine Supreme Court of the Union”.<sup>17</sup> By the time of the EU’s 2004 enlargement, the Court had helped remove most of the fundamental legal obstacles to the operation of the single market. From then on, its rulings began to focus more on the environment, consumer protection, labour relations and social policy. This led Roman Herzog, a former president of Germany, as well as of the German constitutional court, to rebuke the ECJ publicly in 2008. In the *Frankfurter Allgemeine Zeitung*, Herzog accused the European Court of having “a centralising fever” and “a systematic tendency to decide in favour of the EU whenever it can find any justification at all”.<sup>18</sup>

Herzog made his attack partly because the ECJ had effectively struck down part of German Chancellor Gerhard Schröder’s labour market reforms, in its 2005 *Mangold* ruling on the employment of retired workers. The former German president proposed radical action to bring the European Court to heel, including the creation of a higher court of competence to protect national sovereignty. Most considered Herzog’s proposals as dubious, however, and his intemperate remarks went unheeded.

<sup>17</sup>: Michal Bobek quoted in Anthony Arnall and Damian Chalmers (Eds.), ‘The Oxford handbook of EU law’, Oxford University Press, 2014.

<sup>18</sup>: Roman Herzog and Lüder Gerken, ‘Stoppt den Europäischen Gerichtshof!’, *Frankfurter Allgemeine Zeitung*, September 8<sup>th</sup> 2008.

Since then, the ECJ has moved further into politically-sensitive policy areas, with controversial rulings on free-movement rights, immigration and what governments had assumed to be the forbidden area of foreign and security policy. (See section: xi.) Under the current docket of cases, ECJ judges are mulling what constitutes 'benefit tourism' in the EU's free movement area; the legality of a controversial EU tax on financial transactions; whether Facebook illegally supplied personal data to the US spying programme, PRISM; and damages claims from Cypriot nationals aggrieved over losing savings during the country's 2013 euro bail-out. Perhaps most critically, the Court will soon have to answer an unprecedented challenge from Germany's constitutional court over the ECB's scheme to buy bonds from troubled eurozone treasuries. (See section xii.)

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## Part of a bigger picture

The ECJ has become so prominent because of what R Daniel Kelemen, a US academic, calls the EU's '*juris* touch'. That is the idea that almost everything the Union does tends to become legally binding and eventually subject to review by EU judges or national courts acting on their behalf. This reflects a European tendency to move difficult political conflicts, such as the eurozone crisis and the EU's 2013 fiscal compact, away from ministerial gatherings to apolitical groups of national experts, the legal realm and the courts.

When governments and MEPs in Brussels approve legislation, this is often only the end of the beginning in settling divisive policy questions. The Union's complicated legal infrastructure then takes over to decide how much the legislation will really change in practice. National legal attachés in Brussels fight legal battles with the European Commission and screen draft EU legislation for loopholes and loose language that might be interpreted broadly by the Luxembourg Court. They spar diplomatically with the Commission's legal service, in order to avoid being taken to court for late or incorrect implementation of EU rules.

The rise of the Luxembourg Court mirrors an unprecedented increase in international courts and cross-border litigation over the last 60 years. Commentators like Anne-Marie Slaughter, a US academic and former director of policy planning at the US State Department, think international courts in The Hague, Luxembourg, Strasbourg and elsewhere have joined UN diplomats and regulators in the World Trade

Organisation as part of a decentralised system of global governance. This international regime is more about dialogue and decision-making nodes than diplomacy between all-powerful states. “These institutions – like the Pope – have no legions at their disposal. What they do have, however, is the capacity to develop direct relationships with their national counterparts, who can then exercise coercive power on their behalf.”<sup>19</sup>

*“The ECJ has become so prominent because almost everything the EU does becomes legally binding.”*

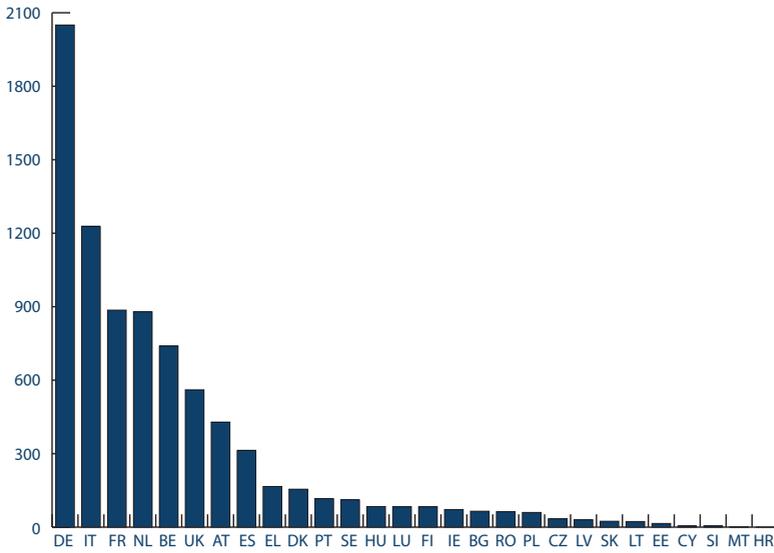
There are those who feel that such networks undermine national democracy and sovereignty. Conservatives are chilled, for example, by talk of an “international

human rights justice cascade that has reverberated around the world”, as one American academic puts it.<sup>20</sup> Instead, they see these networks as an unaccountable international ‘juristocracy’ citing each other’s decisions as grounds to entrench the liberal ideals of detached elitists, to the detriment of democratic self-government.

But the historical record suggests that effective courts naturally tend to frustrate governments, without having a hidden agenda. For example, *Roe v Wade*, the landmark decision of the US Supreme Court that liberalised abortion rights in 1973, was decided by a court predominantly nominated by Republican presidents. Courts in Western democracies function on the principle of the separation of powers, the power of argument and a commitment to objective reasoning.

<sup>19</sup>: Anne-Marie Slaughter, ‘New world order’, Princeton University Press, 2004. This sentiment is echoed by Robert Cooper – a former adviser to the EU’s High Representative for foreign policy – in ‘The breaking of nations: Order and chaos in the twenty-first century’, Atlantic Books, 2003.

<sup>20</sup>: Karen Alter, ‘The European Court’s political power: Selected essays’, Oxford University Press, 2009.



**Chart 2:**  
Communicators and  
misanthropes:  
Which countries  
have referred  
most cases to the  
ECJ since 1952

Source:  
*ECJ, 'Annual  
report', 2013*



## ii) The ECJ is an institution of three courts

As an institution, the ECJ consists of three tribunals or “courts within the court”.<sup>21</sup> These are the ECJ itself, which is the highest court; the General Court, the first port of call for many cases, and a Civil Service Tribunal for disputes between the staff of EU institutions and their employers.

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### The ECJ

The ECJ has one judge per EU country and is advised by nine advocates-general. The Court asks advocates-general to be involved in only around half its cases, partly to spare time and resources, and may reject their opinions. But, more often, these opinions act as signposts for the Court’s inscrutable internal debates and the possible future development of European law in specific areas.

The ECJ itself hears cases taken by the European Commission against member-states which do not implement EU legislation or Commission decisions correctly or on time. The Court hands out lump-sum penalties to laggard governments, which normally have two years to implement a European law after it is agreed by the EU’s Council of Ministers. In one case in 2014, the Court fined Spain €30 million because it had failed to recover state aid given illegally to the Basque region. The Court may add an additional fine of around €50,000 for each day that its judgment is not complied with by the government in question. The money goes into the overall EU budget.

If the Commission decides a country is in breach of an EU law, it will tell it informally. This is a diplomatic invitation to fall into line. If nothing happens after two months, the Commission’s next step is to send the country a confidential formal ‘reasoned opinion’ with a deadline for compliance, backed up with the threat of facing judgment from the ECJ.

Most such disputes – ‘infringement proceedings’ in EU legal jargon – between the governments and the Commission are settled at this stage. If not, the case goes to Court where the Commission wins against governments around 90 per cent of the time. (The judge from the country subject to the litigation will normally be absent from

21: Michal Bobek quoted in Anthony Arnall and Damian Chalmers (Eds.), ‘The Oxford handbook of EU law’, Oxford University Press, 2014.

the deliberations.) Such formal litigation is rare and only a last resort: these so-called direct actions now account for a mere 13 per cent of the Court's work.<sup>22</sup> At the end of 2012, the Commission had more than 1,300 infringement proceedings open with governments, mainly over EU rules on the environment, transport, taxation and the internal market. But only 46 such disputes went before EU judges that year.<sup>23</sup>

*“The proceedings are secret and decisions are made without translators or other staff present.”*

The ECJ spends most of its time fielding preliminary ruling requests from national courts looking for clarity on what various points of European law mean in specific

contexts. This mechanism is triggered when a question of EU law is pivotal to deciding the outcome of a national court case but the answer is not clear. The court in question must refer the question to the ECJ for a ruling, if there is no higher national court of appeal to judge the issue. EU judges then issue a ruling to be applied in that case and all comparable cases throughout the Union. This is how the Luxembourg Court generates its own distinct body of law and integrates it simultaneously into national legal orders.

Most 'landmark' ECJ decisions derive from this decentralised legal procedure: direct legal battles between the Commission and national governments are a mere sideshow by comparison. National courts have limited discretion over how to apply ECJ rulings and the Luxembourg court can even reformulate their original questions to address a more pertinent point of law, if it chooses. So the ECJ's opinion or ruling often decides the final outcome of cases at national level. Hence some countries' lower courts can be cautious about referring cases to an authority outside their jurisdiction. In Sweden, for example, judges sometimes seek informal advice from the government before referring questions to Luxembourg.<sup>24</sup>

It is rare for all 28 ECJ judges to deliberate as a full Court unless a case is exceptionally significant. The *Pringle v Ireland* judgment was, as were the Court's deliberations on the EU's 2004 enlargement, and its 2011 opinion opposing plans to set up a new European court to hear patent claims. The latter two examples are instances where the ECJ does not deliver a binding ruling but a highly influential legal opinion to governments.

22: Court of Justice of the European Union, 'Annual report', 2013.

23: European Commission, '30<sup>th</sup> annual report on monitoring the application of EU law', October 2013.

24: Marlene Wind, Dorte Sindbjerg Martinsen and Gabriel Pons Rotger, 'The uneven legal push for Europe: Questioning variation when national courts go to Europe', European Union Politics, 2009.

Normally, ECJ judges deliberate on cases, in an ascending scale of importance depending on the issue, in chambers of three or five, or a Grand Chamber of 15 members. The Grand Chamber is the most important judicial body within the entire institution, where most of the critical issues brought before the Court are settled. A reporting judge or *juge-rapporteur* is appointed to each case to lead deliberations and draft the initial judgment. The ECJ issues single judgments signed by each judge involved in the case: there are no minority or dissenting opinions. But judges argue vigorously with each other during deliberations and often decide contentious issues by voting. The proceedings are strictly secret and decisions are made without translators or other staff present. To establish the facts and examine the arguments in a case, each judge appoints three legal secretaries to act as their personal assistants. These *référéndaires* – numbering about 200 in total – are critical to the day-to-day working of the Court although they do not attend the formal deliberations where judges decide the law in private.

Cases before the ECJ nearly always fall into one of three categories. The Commission may take a government to court for failing to respect its regulatory decisions or implement EU law. Second, national courts may request preliminary rulings for local trials that hinge on a point of European law. Third, EU institutions, such as the European Parliament, may apply to the Court to have some Union act or action ‘annulled’ or declared illegal under the treaties. The ECB, Court of Auditors and Committee of the Regions can also bring such cases to the ECJ if their institutional ‘turf’ is threatened by the actions of other EU bodies.

If a case is deemed admissible under the Court’s detailed rules of procedure, the Court’s president allocates it to a reporting judge, who is responsible for drawing up an initial ‘preliminary report’ outlining the basic facts of the case and their relative importance. The ECJ’s senior judges and staff meet every Tuesday evening in a decades-old ritual to consider these initial case reports and decide which judges will adjudicate them. If a case raises no new points of law, it will probably be referred to a three-judge chamber; if it raises an important point of principle but breaks no significant legal ground, a chamber of five judges will take it. More complex or controversial cases may be sent to the Grand Chamber, or even the whole ECJ in exceptional circumstances.

The ECJ’s working methods were originally modelled on those of

France's Council of State, with a particular emphasis on written rather than oral arguments as the basis for reaching a verdict. To ensure fairness before the Court, its officials pay strict observance to the rules on the conduct of cases, such as how proceedings are initiated, time limits for submitting written and oral evidence, and how to appeal.

*“Governments now have a strong incentive not to appoint political favourites to the ECJ.”*

EU judges come from a variety of professional backgrounds and have different skill-sets, reflecting a range of views among member-states on who is distinguished enough to deserve nomination. Only about

ten of the current crop have served on supreme courts in their own countries. A few more are former state prosecutors or judges from lower national courts. Several of the Court's most influential members are former law professors. Others were formerly judges at the European Court of Human Rights in Strasbourg or high-ranking state lawyers.

Others are legally qualified civil servants or even former politicians or ambassadors. Endre Juhász, Hungary's current judge, previously negotiated his country's entry to the EU. The Court's president, Vassilios Skouris, has twice served as interior minister of Greece and has twice been considered seriously as a probable candidate to be caretaker prime minister. Hence “there is no such thing as a typical EU judge”, in the words of one advocate-general.

Judges are nominated to the Court by their national governments for six-year terms, renewable an unlimited number of times. Since the Lisbon treaty came into force, potential candidates for the post of EU judge are nominated by their national governments and are now screened for their suitability by a seven-member panel of judges and legal experts.

The committee, currently chaired by Jean-Marc Sauvé, vice-president of France's Council of State, puts candidates for the post of EU judge through their paces on European law, knowledge of other member-states' legal systems and their language skills.<sup>25</sup> Since it began work in 2010, the panel has established a reputation for rigour, rejecting unsuitable nominees from seven countries, including Italy, Greece, Malta, Romania and Sweden, much to the annoyance of their nominating governments.<sup>26</sup> Hence the quality of judges at the Court is

25: The other members — nominated by the ECJ's president and approved by EU governments — are Lord Mance (UK), Torben Melchior (Denmark), Péter Paczolay (Hungary) and former ECJ and General Court judges Peter Jan and Virpi Tili. The European Parliament also nominates a member, currently Luigi Berlinguer, an Italian Socialist MEP.

26: Niilo Jääskinen, 'Through difficulties towards new difficulties - wandering in the European judicial landscape', Lecture to Kings College London, February 2013.

improving. Governments now have a strong incentive not to appoint political favourites, or otherwise weak candidates, but those with the proper judicial credentials.

Apart from Germany, no country that signed the original Treaty of Rome allows supreme or constitutional court judges to publish minority or dissenting opinions after a judgment is issued. This also became the standard for the ECJ at the time of its establishment. But the absence of minority judgments means that even close observers of the Court are often confused as the exact legal debates and reasoning behind certain ECJ decisions. (See section: xii.)

National governments can take each other to the ECJ but normally the European Commission will take a case against one country on another's behalf if there is some bilateral dispute concerning EU law. For example, the Commission took France to the ECJ to force it to lift a ban on imports of British beef and veal in 1999, following the BSE crisis of the 1990s. But this may soon change, as member-states implement the EU's fiscal compact. The treaty provides for its signatories (the UK and the Czech Republic have opted out) to take each other to court for non-implementation of some EU fiscal rules, with laggards ultimately risking a Court fine equal to 0.1 per cent of their GDP.

The ECJ received almost 700 new cases in 2013, with a backlog of almost 900 awaiting judgment. President Skouris proudly announced that his Court had had its busiest and most productive year, including the highest ever number of preliminary ruling requests from national courts. However, EU judges still take well over a year to deal with such requests and over a year and a half to decide cases where the Commission takes a government to court.

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## The General Court

About a quarter of the ECJ's work involves appeals from its lower General Court. This was established as a 'court of first instance' in 1989 to take pressure off the ECJ and currently has 28 judges, one per member-state.

The General Court is the ECJ's administrative high court, with jurisdiction to hear all cases where governments, firms or other plaintiffs dispute a decision of the European Commission or an EU

agency. It does not normally hand down rulings to national courts, or hear cases against countries for failing to implement EU legislation. Instead, the Court's main business is to adjudicate on the facts of cases where EU regulations or acts of the Union's institutions are in dispute.

Lewis Crofts, chief anti-trust correspondent for *MLex*, a European law trade magazine, says that the typical subject matter before the General Court might be technical but is far from boring.

The GC (General Court) is the coalface of European litigation. Here cartels can slash millions off a sanction; the mistresses of rogue-state dictators can thaw their bank accounts; and a telecoms giant can safeguard the squiggle on its logo. If you disagree with the GC's ruling, you can always go to the last chance saloon, the Court of Justice (ECJ). But as the principal check on the EU institutions' activities, the GC is arguably the most crucial and influential of the Union's judicial bodies.<sup>27</sup>

The General Court hears 80 per cent of its cases in small three-judge chambers. This tight organisation reflects the need to economise staff resources and a rapidly growing caseload. A record 790 new cases were brought before the General Court in 2013, while more than 1,300 cases were pending judgment.

The Court's burgeoning docket is bad news because it already takes too long to dispose of its current cases, even according to the judges themselves. Companies can request 'interim judgments' directly from the Court's president, the Luxembourger Marc Jaeger, if the length and uncertainty of General Court proceedings risks ruining their business. But executives insist they need speedier judgments, lest it become untenable to do certain kinds of business in the single market. According to the late Tom Bingham, a former Lord Chief Justice for England and Wales: "For a merger appeal to have any value for business, the maximum time taken to deliver a judgment should be six months."<sup>28</sup> Yet despite better organisation, various reforms and improved technology, General Court decision times are still around 25 months on average.

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## The Civil Service Tribunal

The ECJ's lowest court is its Civil Service Tribunal (CST), established in 2005 to hear complaints from EU civil servants regarding their employer. Unlike the two other courts, it has only seven members, which avoids the need to have a nominee from every EU country.

27: Lewis Crofts, 'The view from the bench: Interview with Marc Jaeger', *MLex Magazine*, July-September 2011.

28: Quoted in Tom Bingham, 'The rule of law', Penguin, 2010.

Before the tribunal was created EU employment disputes were clogging up the General Court to an untenable extent. The tribunal was made possible by new rules under the Treaty of Nice, allowing the ECJ to set up specialist 'judicial panels'. The current president of the Civil Service Tribunal is the Belgian Sean Van Raepenbusch.

The CST has proved invaluable in ensuring that precious time is not wasted by senior EU judges having to deal with disputes – common to many workplaces – between EU officials over the meaning of 'psychological harassment', 'justified absences', 'unfair dismissal', or employee moonlighting. Around 555 cases were heard or awaited judgment by the CST in 2013.



### iii) The ECJ thinks in French

EU judges deliberate behind closed doors and without interpreters, addressing each other in formal negotiations over points of law that may continue into the night and over weekends. They must therefore all share a single language in which to argue and debate. Hence all court documents, pleadings and judgments are translated into French, under its rules of procedure. David Edward, a former ECJ judge, once described the burden of translation at the Court thus:

It is like a huge hourglass into which is poured, thousands of documents in different languages. In the middle everything is processed in French so that the cases can be judged and the judgment written. Then there is another huge outpouring into the bottom of the hourglass so that the judgments can be translated into the other languages and published to the outside world.

The ECJ has around 2,100 staff with 1,004 employed as translators and interpreters. Even then, the Court often hires additional freelancers to translate texts into English. And the latter figure does not include more than 600 ‘lawyer linguists’, who have the excruciating task of ensuring that the Court’s legal reasoning is effectively transferred to the Union’s 24 official languages.

The ECJ’s required proficiency in legal French has significant implications and has perhaps shaped the Court more than any other factor. The language rule limits who can serve at the institution, as many talented judges across the EU cannot speak French to the required degree. It also means that a majority of the judges’ *référéndaires*, and some 30 per cent of ECJ staff overall, are French or from Francophone countries.

*Référéndaires* are influential in shaping EU law since they often draft judgments for their judge to correct and complete. There are almost no legal secretaries from English-speaking countries in the General Court, where so many decisions that shape the single market are made. Judges can and do learn French on the job but this distracts from other tasks. According to one *référéndaire*: “Some judges have a lot of languages and are happy to work in French, others not so much.

My judge has to take French classes for four hours every week so this reduces the amount of time he can spend deliberating.”

*“The ECJ’s required proficiency in legal French has significant implications.”*

Nearly half the EU’s judges could more easily deliberate together in Russian than in French. For those who come from Central and Eastern European countries, French may only be their fifth language after

their mother tongue, Russian, German and English. (Advocates-general are allowed to write their opinions in their mother tongue, however.) The need to negotiate complex points of European law in an unfamiliar language is one reason why ECJ judgments are often quite brief and formulaic with little room to apply stylish legal nuance, or include expansive supporting explanations for the legal reasoning. Thus, as one advocate-general describes it: “Judgments should be as elegant and perfect as a Rhineland castle in legal terms, but in the ECJ they can look more like the Lego equivalent.”

The need to keep judgments brief is one reason why governments, firms and ordinary plaintiffs have only a limited understanding of how the Court came to certain decisions. That makes the law less certain than it should be. Several court watchers, such as the German academic and legal philosopher Gunnar Beck, think that the dominance of French is “antiquated”. In January 2012, over 60 per cent of cases before the General Court were lodged in English and German, while only 6.4 per cent were in French – fewer than those lodged in either Spanish or Italian.<sup>29</sup> However, any change to the status quo would be controversial. Although amending the EU’s treaties would not be necessary, the required change to the Court’s statute would require unanimity among the member-states, which is highly unlikely.

A less contentious solution would be to relax the Court’s procedural rules so that chambers of judges could skip the initial translation process (the first half of the hourglass), if they were all happy to work in a single language other than French from the outset. This would save precious time, possibly months for General Court cases, and could also help improve the clarity of rulings by allowing greater freedom of discussion internally. Still there are those, including inside the Court itself, who argue that the only real way to provide effective judicial oversight of the single market is to recognise that the language of the court should be that of the market.

29: Lewis Crofts, ‘Comment: EU courts’ francophone rule merits reform focus’, *MLex Market Intelligence*, January 2012.

#### iv) The ECJ is not a citizen's court, or is it?

Eric Stein, a law professor from the University of Michigan, once famously characterised the ECJ as “tucked away in the fairy-tale Duchy of Luxembourg, blessed with benign neglect by the powers that be and the mass media.” Despite a reputation for seclusion, EU judges are among the most open and accessible of any international court. They contribute to law journals, give public lectures and occasional media interviews, receive delegations of national judges in their Luxembourg chambers, talk to researchers and interact informally with officials. Several are even on LinkedIn.

The Court's website is easily the best of any EU institution and its online case database and annual report all offer huge amounts of easily accessible information in multiple languages. In addition, around 16,000 visitors enter the ECJ's premises each year – mainly to see the more ornate of its courtrooms which have golden chainmail interiors and huge chandeliers inspired, supposedly, by Istanbul's Hagia Sophia.

EU law cases often result in ordinary people having their rights vindicated in the face of overwhelming opposition from governments or big business. One example is Karen Murphy, a pub landlady in Britain. In 2012 the ECJ upheld her right to show sports games broadcast cheaply from other EU countries after she was pursued for an £8,000 fine by the Premier League on behalf of Sky Television. Another is Yvonne Watts, a 74-year-old British woman who won the right in 2006 to have her hip operation performed in France rather than wait over four months for the same treatment in the UK.<sup>30</sup>

Firms, representative organisations and citizens can take each other, as well as EU governments, to court over European rules and regulations. But they rarely get a chance to influence directly how EU judges shape the law in Luxembourg. The ECJ has notoriously strict rules on who, other than governments and EU institutions, may apply to have decisions by the Commission and other EU bodies struck down or declared illegal. The Court allows private citizens or representative bodies such as trade unions or employer federations to appear before it only if they can prove that a particular EU decision is of 'direct concern'

30: 'Pub landlady wins TV football case', BBC News, February 24<sup>th</sup> 2012 & Anna McLaughlin, 'ECJ set to bolster right to health treatment abroad', *European Voice*, May 11<sup>th</sup> 2006.

to them personally.<sup>31</sup> For instance, the Court has refused to hear challenges to the Commission's merger and state aid decisions brought by French workers' councils, or an attempt by French fishermen to overturn an EU ban on drift fishing in the so-called *Jégo-Quéré* case.

In 2000, Francis Jacobs, an influential advocate-general at the Court for 17 years, argued that anyone should be allowed to challenge EU regulatory acts directly in Luxembourg, if their personal interests were unfairly damaged by such rules. However, EU judges dread the thought of being over-run by human rights campaigners, anti-regulation eurosceptics and brass-necked attorneys brandishing copies of the Charter of Fundamental Rights on behalf of big business. The situation remains unclear as where the law currently stands. But key cases taken to strike down European regulations since the Lisbon treaty – such as a failed challenge in 2011 by Inuit hunters to an EU ban on seal products – suggest that the Luxembourg Court's doors remain closed to ordinary citizens and advocacy groups except in very exceptional cases.

*“EU judges are among the most open and accessible of any international court.”*

International refugee organisations, special interest groups and human rights NGOs care less about holding the EU to account than using European law as a stick to

beat national governments for their own reasons. Some, such as the London-based AIRE Centre and Amnesty International, have found ways of bringing immigration appeals or human rights issues before the Luxembourg Court indirectly. National courts are usually far more liberal about who may take a case before them; in the UK and Ireland, for example, the only major obstacle to seeking judicial review appears to be high legal costs. If a case then gets referred to Luxembourg over a point of European law, any NGO or representative group recognised by the national court also has leave to appear before the ECJ. The trick for human rights NGOs, or any other body seeking to influence EU law, is to pick the right national jurisdiction to maximise the chance that a preliminary ruling from the ECJ will be made during a trial. This is what an Austrian privacy campaigner, Max Schrems, did in 2014. He took a case against Facebook for alleged co-operation with Prism (the US spying programme) before Ireland's high court, guessing correctly that the Irish judges would refer the controversial issue to the ECJ.

However, given the uncertainties involved, the appearance of NGOs, campaigning groups and representative bodies before the ECJ will

<sup>31</sup>: See Article 263 of the Treaty on the Functioning of the European Union for the rules on who can bring a case before the ECJ.

continue to be a rarity. Some organisations are forming networks such as the European Network of Rights Advice Centres (ENRAC) to co-ordinate 'jurisdiction shopping' around the EU for those courts that will most readily accept certain legal cases and refer them upwards to the ECJ. France, for example, allows special interest groups to take 'public interest cases' before its courts to verify rights under its constitution. In September 2012, La Cimade and GISTI, two French human rights NGOs, successfully triggered a referral to the ECJ from the Council of State on the application of EU asylum rules. This led to the French government reversing a prior decision to withdraw subsistence benefits for would-be refugees. More importantly, this single legal victory upheld the rights of asylum seekers to receive similar benefits all over the EU.



## v) The ECJ faces a caseload crisis

In 2004 the ECJ began receiving an unprecedented windfall of 26 new judges accompanied by their supporting *référéndaires*: one ECJ and General Court judge for each of the new member-states, mostly Central and East European, that have joined the EU since then.

However, the extra resources merely meant the removal of a large case backlog that had badly damaged the ECJ's image as an efficient institution. This legacy is one reason why the first priority of Vassilios Skouris, the ECJ's president since 2003, has been case management. In March 2011, Skouris wrote a long letter to EU governments and the European Parliament, arguing that without a series of reforms at the ECJ, including new procedures and the appointment of a further 12 judges to the General Court, he would be unable to prevent a new caseload crisis.

Skouris was not crying wolf: the ECJ has lived on borrowed time since 2004.<sup>32</sup> New member-states can take years to start sending cases to Luxembourg and are usually quite diligent in their transposition of European law initially. (See Chart 2 on page 25.) Hence the new judges helped greatly at first in clearing up the backlog. But since 2008, the newer countries' own courts and businesses have started to send significant numbers of cases to Luxembourg, which also need to be translated from unfamiliar languages, adding further weight to the Court's caseload.

The General Court has experienced a 65 per cent increase in its caseload over the last decade. This trend is growing worse because of a rapid increase in appeals against decisions of the EU's trademark registry in Alicante, known as the Office for Harmonisation in the Internal Market. These repetitious and technical disputes over intellectual property now account for almost 40 per cent of new cases in the General Court.<sup>33</sup>

The General Court also expects a significant influx of appeals against decisions of another EU body, the European Chemicals Agency (ECHA). The Helsinki-based ECHA regulates the chemicals industry in accordance with the 2007 REACH regulation. Dubbed the most complex piece of EU legislation ever, REACH is potentially a prime

32: See Michal Bobek in Anthony Arnulf and Damian Chalmers (Eds.), 'The Oxford Handbook of EU Law', Oxford University Press, 2014.

33: Court of Justice of the European Union, 'Annual report', 2013.

target for litigation from the chemicals industry. Observers also fear a deluge of appeals from the General Court to the ECJ itself. In 2012, appeal cases accounted for nearly 20 per cent of the upper court's caseload. However, the expected explosion in REACH litigation has yet to materialise with only 12 new cases lodged before the General Court in 2013.

*“The creation of specialist courts would mean speedier and better decisions in technical cases.”*

Additionally, the ECJ is now dealing with a greater number of less familiar cases in sensitive areas such as asylum, policing and justice, as a result of the Lisbon treaty. Because

these can involve human life and liberty, the Court must deal with the relevant questions coming up from national courts in weeks rather than months or years. To do so, the ECJ ranks such cases under a special procedure – *la procédure préjudicielle d'urgence* (PPU) – under which several judges put their current work on hold to discharge special cases rapidly. An EU ruling might, however, resolve only part of a national case that has dragged on for months or years already.

The PPU innovation was first used in a 2008 child abduction case involving Inga Rinau, a Lithuanian mother who absconded with her daughter after her relationship with the child's German father ended. Prior to 2008, it was very rare for the ECJ's president to single out any one case for an expedited ruling, no matter how pressing. Now the Court is dealing with 15 PPU's or more annually. That number will increase as Court's delves deeper into criminal matters after 2014. One advocate-general says that only 30 PPU's a year could be the “avalanche on the hill” that wrecks the ECJ's precariously balanced case-management system.

Unlike the ECJ, the General Court is only limited by treaty to at least one judge per member-state, meaning that more judges could be appointed to it, if all EU countries agreed. Governments initially balked at Skouris's 2011 letter because of the expense involved in his request for more judges: each, along with their staffs, costs around €1 million per year. The ECJ is already the world's most highly-resourced court. In 2014, it operated on a budget of €355 million compared with €67 million for the European Court of Human Rights in Strasbourg.

However, the costs to the single market and international business of judicial gridlock and legal uncertainty are potentially far heavier.

Governments initially agreed only that the ECJ should get additional advocates-general with Maciej Szpunar from Poland becoming the ninth in 2013. In 2014, they relented further and agreed to increase the General Court by nine judges to 37 and nine extra *référéndaires*. However, there will probably be further delays, as governments bicker over which of them should provide the extra judges. The member-states have already rejected the argument that the new judges should be appointed on merit rather than nationality, an idea favoured by the European Parliament. Meanwhile, the Court's caseload will continue to grow ominously. Competition cases, for example, are still likely to take more than a year to resolve even after the arrival of the new judges.

It may be prudent to establish one or two smaller specialist courts, a possibility under the current treaties. These could follow the model of the EU's Civil Service Tribunal, dubbed "a success story" by the UK House of Lords in 2011, and focus on areas such as intellectual property, VAT and customs disputes and perhaps even asylum cases.<sup>34</sup> The creation of specialist courts would also allow for the recruitment of judges with a strong background in the relevant area of law. This would probably mean speedier and better decisions in very technical legal areas.

President Skouris is opposed to specialist tribunals, partly because they risk becoming semi-independent cabals inside his own institution. An alternative course would be to switch the sole working language of just the General Court to English and outsource the task of translating judgments to national authorities. The EU's big constitutional questions could continue to be debated and decided in French by the upper court. This would increase efficiency by bringing down translation times, particularly in the resource-intensive competition cases. It would also enlarge the pool of potential judges and other staff. The ECJ and General Court are already quite distinct from each other: both have different working cultures and behave almost as separate institutions.

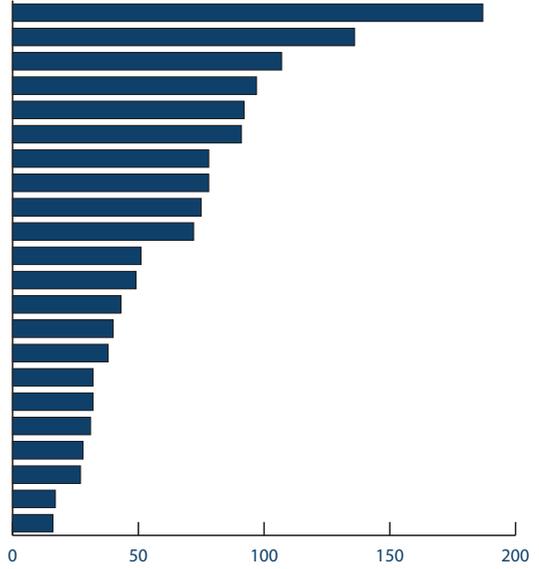
34: UK House of Lords, 'The workload of the Court of Justice of the European Union', April 2011.

Chart 3:  
Prosaic and  
profound: ECJ  
litigation by  
subject

Source:  
*ECJ, Annual  
report, 2013*

**Subject**

- Taxation
- Intellectual property
- Justice and home affairs
- Environment
- State aid
- Social policy
- Agriculture
- EU institutional affairs
- Competition
- Free movement of services
- Internal market standards
- Customs
- Free movement of capital
- Freedom of establishment
- Transport
- Industrial policy
- Free movement of persons
- Public procurement
- Social security for migrants
- EU citizenship
- External relations
- Free movement of goods



## vi) The ECJ is economically liberal but socially cosmopolitan

British eurosceptics might be shocked to learn that Hubert Legal, a former General Court judge and now one of the EU's top legal advisers, once condemned his court colleagues as "the ayatollahs of free enterprise".<sup>35</sup> Legal later withdrew his remark. Nonetheless, the dominant theme of over 60 years of ECJ case-law is undoubtedly economic freedom and the opening of European markets.

Several of the Court's most influential thinkers have been unabashed economic liberals, such as Miguel Poiares Maduro, an advocate-general at the ECJ until 2009. Large firms like B&Q and Marks & Spencer have turned to the Luxembourg Court when political lobbying at home has failed to deliver the freedom to trade on Sundays to move tax liabilities around the Union.

Trade unions are less fond of the Court. In two key cases from 2008, the ECJ ruled that workers were not justified in trying to prevent employers using low-cost labour from Central and Eastern Europe, because this would impede the free movement of workers around the Union. In these cases, called *Viking* and *Laval*, Swedish and Finnish unions protested that the Court's decision made nonsense of their traditional national wage agreements with employers. Two more rulings from the same year, *Rüffert* and the *Commission v Luxembourg*, held that companies could not be prevented from bidding for public contracts because they used low-cost labour from other EU countries. These four rulings together are known as the *Laval* Quartet.

EU judge Allan Rosas maintains that such decisions have always been about guaranteeing "free movement, rather than a political ideology... or a liberal economy as such." But even Rosas concedes that "the social dimension does not enjoy the same status as the economic strand of internal market law, especially the free movement rights and competition law."<sup>36</sup>

Britain reflexively tends to view any EU social policy measure, such as the working time directive, as being expressly aimed at it. Yet the Netherlands, Germany and Sweden are also opposed to harmonised rules on pay or social welfare. The EU's commitment to economic

35: James Kanter, 'Obscure court may be ally for business', *International Herald Tribune*, April 24<sup>th</sup> 2006.

36: Allan Rosas and Armati, 'The internal market: Liberal, social, green or chameleon?' in 'EU constitutional law: An introduction', Hart, 2012.

openness and free competition was copied into the Treaty of Rome from the so-called 'Freiburg' or 'ordoliberal' school of German economic thinking. Even before Britain, Denmark and Ireland joined the club in 1973, France and others were pushing for the creation of a European employment policy. This was intended partly to ward off unfair

competition from the perceived *laissez-faire* newcomers but also to balance out what was seen as an over-emphasis on liberalism in the treaty.

*“The Court’s strict interpretation of the EU’s working time directive is controversial in Britain.”*

To date, EU governments only have a modest framework of common employment rules, mostly to support the free movement of people around the Union: on employment contracts, working time, treatment of posted workers abroad and on the co-ordination of national social security systems. Catherine Barnard, a leading expert on EU employment law at the University of Cambridge, has characterised this European 'social policy' as “spasmodic...it makes no provision for social insurance, public assistance, health and welfare services, and housing policy.”<sup>37</sup> (However, the ECJ has had to confront many of these issues indirectly through cases dealing the EU’s free movement directive, see section: ix.)

The ECJ began ruling on social policy in 1976 with *Defrenne v Sabena*, an equal pay case involving a Belgian air hostess forced to retire at 40. Before this, lawyers could only use European law to their advantage if they could prove that a particular act or government policy impeded, or might impede, cross-border activity in the Union. But the *Defrenne* case only involved Belgium. Thus it was a demonstration that the Court considers some treaty principles to be so important that no cross-border conditions are needed to trigger them. *Defrenne* was also the first clear-cut example of private parties directly using EU treaty clauses to litigate against each other in national courts.

The ECJ has outraged Austria, Belgium, Britain, the Czech Republic, France, Germany and Sweden by effectively overturning domestic legislation or long-standing local traditions on the grounds that these might discriminate against other EU nationals. In 2005, for example, the Court forbade Austria from restricting access for foreign students to certain university courses that were already over-subscribed. In Belgium, it has waded into that country’s poisonous linguistic debate

<sup>37</sup>: Catherine Barnard, 'EU 'social policy': From employment law to labour market reform', in *The evolution of EU law*, Oxford University Press, 2011.

by requiring Flanders to recognise employment contracts written in languages other than Dutch.<sup>38</sup>

The UK has not traditionally set working hours through centralised legislation. That is why the Court's strict interpretation of the EU's working time directive is particularly controversial in Britain. The Court's 2003 *Jaeger* ruling says, for example, that firefighters and doctors may not work around-the-clock shifts, a common practice in several EU countries. The cost implications of such decisions are hugely significant for the provision of 24-hour public services. Hence some 16 EU countries, unable to agree a reform of the rules with the European Parliament, use a special opt-out in the legislation that allows workers to work more than the standard 48-hour working week.

In 2000, governments agreed European legislation banning discrimination at work on the grounds of age, disability, religion or belief and sexual orientation. Concurrent EU legislation also banned racial discrimination not only in relation to work but also social welfare, healthcare, education and housing. These two directives greatly expanded the ECJ's work on equality issues. Perhaps this is why governments have since steadfastly blocked attempts by the Commission to extend a particularly strong EU anti-racism regime to other minorities, such as lesbian, gay, bisexual and transgender, older or disabled people.

US academic R. Daniel Kelemen argues that new equality rights, coupled with the growth of consumer protections such as air passenger regulations, are part of an EU strategy to increase its legitimacy through 'popular legalism'. This might open another avenue for the EU to connect with ordinary citizens. But it also risks making Europe a more litigious place on the model of the US, characterised by "ambulance-chasing lawyers, class action lawsuits, massive punitive damage awards and, more generally, litigious relationships between government, industry and interest groups."<sup>39</sup>

38: 'Going 'beyond' Dutch', *The Economist*, April 13<sup>th</sup> 2013.

39: R Daniel Kelemen, 'Eurolegalism: The transformation of law and regulation in the European Union', Harvard University Press, 2011.



## vii) The ECJ is different from the European Court of Human Rights

The world's media refer to both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) interchangeably as 'the European Court' and – along with politicians and the public – often erroneously attribute the actions of one to the other.<sup>40</sup>

However, the ECJ and ECtHR are the judicial wings of two totally separate international bodies. The latter is the high court of the 47-member Council of Europe, a body established after World War II. The ECtHR hears cases against countries alleged to have breached the 1953 European Convention on Human Rights (ECHR). The Council of Europe's membership includes Russia, Ukraine, Switzerland and Turkey, as well as other non-EU members from the Caucasus and Balkan regions. The Convention protects 'classic' rights such as the right to life, free expression, assembly and due process of law. It prohibits torture, slave labour and racism.

Based in Strasbourg, the ECtHR has its own controversies, but remains one of the world's most powerful international courts. A single ECtHR ruling from 2008 forced Belgium, France, the Netherlands and Scotland to ensure criminal suspects' access to a lawyer during police questioning.<sup>41</sup> Since then, its most noteworthy decisions have had to do with prisoners' rights, criminal justice, counter-terrorism measures and family law issues.<sup>42</sup>

One of the key conditions of EU membership is that a country must accept the jurisdiction of the Strasbourg Court. But what authority does the ECtHR have over the EU institutions themselves? This question has excited European judges and legal scholars (but few others) for decades. The EU was founded after the Council of Europe but is now responsible for a large amount of the legislation enacted in most ECHR signatory states. EU regulations, for example, become law without the need for transposition by national parliaments. Hence human rights experts claim that a large part of the Union's *acquis communautaire* is not properly subject to the protections offered by the Convention, as the EU is not a signatory.

40: There are numerous examples but for an illustration, see Vincent Browne, 'Ruling of European Court of Justice a shameful indictment of our institutions', *The Irish Times*, January 29<sup>th</sup> 2014.

41: Marion Isobel, 'Case watch: salduz fever sweeps Europe', Open Society Foundations, April 26<sup>th</sup> 2011.

42: See 'Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights', European Parliament, April 2012.

The EU has had its own binding charter of rights since 2009. EU judges point out that both courts now cite each other's human rights law interchangeably and that this occasional practice implies that Strasbourg and Luxembourg are linked already. Judges from both

bodies hold joint meetings every year to discuss human rights. And the EU is obliged anyway to provide protections at least equivalent to the Convention under Article 52 of its own charter of rights.

*“The ECJ and European Court of Human Rights are the judicial wings of two totally separate bodies.”*

Nevertheless governments still accept the argument that the Union should not have sole responsibility for policing itself on rights. Hence governments, the EU's institutions and officials from both courts have negotiated an international treaty that will enable the Union to sign up to the European Convention on Human Rights as its first non-state member. NGOs and civil society groups hope that this will enable the Strasbourg Court to prod the European Commission to fine member-states which abuse human rights or, for instance, review the actions of Frontex, the EU's border agency. France worries that accession to the ECHR might even allow that Court to deliberate on the actions of EU civilian and military missions abroad. Such missions – like Operation Atalanta, an anti-piracy deployment off the coast of Somalia – are formally outside the jurisdiction of the ECJ.<sup>43</sup> These sorts of concerns are compounded by the fact that the Strasbourg Court successfully claimed jurisdiction over specific actions of UK soldiers in Iraq in the 2012 *Al-Skeini* case.

Speculations like these should be set in context. The ECJ is currently considering whether this draft treaty is compliant with EU law, and will deliver a verdict by early 2015. Some 20 EU countries have submitted their own legal 'observations' for the Court to take into account, in addition to its own analysis. The treaty would allow EU legislation to be challenged in the Strasbourg Court through a 'co-respondent' system where either governments or the European Commission take the lead in defending the Union's actions. (Governments and EU institutions have yet to agree exactly how this sensitive division of labour would work, however.) Importantly, the treaty also ensures that the ECJ would be asked to rule first on any fresh point of Union law raised in ECtHR proceedings, through a so-called prior involvement mechanism. Despite these precautions, the ECJ may still find a niggling reason to object. To the judges in Luxembourg, accession to the ECHR is an

43: 'NGO submissions on EU accession to ECtHR', Council of Europe, November 5<sup>th</sup> 2012.

enormous step into the unknown since it will for the first time submit EU law to the control of an outside body.

Even if the ECJ assents, Britain may yet veto accession to the ECHR, if the Conservative Party wins a general election in 2015. The UK parliament has voted to ignore the ECtHR's *Hirst* ruling on the right of prisoners to vote. British politicians lamented the Court's overturning of a deportation order served against Abu Qatada, a radical Islamist cleric, in 2012.<sup>44</sup> Senior Tory cabinet ministers have talked of withdrawing from the Convention, replacing it instead with a British Bill of Rights applied by UK judges.

Whatever the rhetoric, the withdrawal of one of Europe's oldest democracies from the ECHR remains highly unlikely. If followed through, it would simultaneously strike a blow to the moral authority both of Britain and the Strasbourg Court (as well as meaning the UK no longer met the basic criteria for EU membership). But a Conservative parliamentary majority might refuse to ratify the EU's accession to the ECHR as this would strengthen the reach of a court they dislike. And even if, as optimists assume, accession is finally agreed in 2015, it would still need to be ratified in the national parliaments of all 47 members of the Council of Europe. Hence any practical impact from the move – which has absorbed so much time and energy – will not be felt until the end of the decade at the earliest.

44: Nicholas Watt and Alan Travis, 'UK may withdraw from European rights convention over Abu Qatada', *The Guardian*, April 24<sup>th</sup> 2013.



## viii) The ECJ has its own approach to rights

The ECJ began as an economic court. But its judges have taken the protection of individual rights seriously for decades, declaring their Court a wide-ranging human rights adjudicator in the 1991 *ERT* case.<sup>45</sup> Less than a decade later, a Charter of Fundamental Rights was drawn up by legal experts in a convention chaired by the eurosceptic Roman Herzog, a former president of both Germany's constitutional court and of Germany. (Among other things, this convention was an attempt – ultimately unsuccessful – to end the old feud between the ECJ and Germany's constitutional court). Governments approved the Charter at first as a voluntary 'code of conduct' to act as a visible check on the EU's expanding powers, but later gave it legal force via the Lisbon treaty. By the end of 2013, EU judges had issued 177 judgments in which the Charter was instrumental to deciding the case.

The Charter contains 54 articles and is a close relative of the ECHR, but for EU law only and updated for 'third generation' rights such as data protection, bioethics and the right to good administration. Like EU accession to the ECHR, the Charter inspires both hope, mainly among human rights activists, pressure groups and euro-lobbyists, and fear, among governments and eurosceptics. A few European federalists, like Viviane Reding, the former European commissioner for justice, fundamental rights and citizenship, believe it will gradually become a Bill of Rights for the EU.

The evidence so far suggests something more muddled and prosaic. Governments are adamant that the Charter creates no new rights but merely highlights for citizens (and reminds officials) that the Brussels institutions are subject to judicial review. If true, then the exercise has already over-delivered by making the EU an attractive target for human rights campaigners. In 2010 alone, the European Commission received over 4,000 complaints and petitions from the public alleging human rights violations of one form or another. And MEPs in the European Parliament regularly invoke the Charter as a reason for the EU to respond to national controversies ranging from France's ban on the Islamic veil in schools to compulsory HIV testing in Italy and alleged abuses of power by the government of Viktor Orbán in Hungary.

45: Foundational EU fundamental rights cases include *Stauder* (1969), *Internationale Handelsgesellschaft* (1970), *Nold* (1974) and *Wachauf* (1989).

Governments were careful to limit the Charter's scope from the outset by negotiating clauses and 'explanations' intended to restrict its future interpretation. Article 51 of the Charter states that it applies to governments when they are applying EU law and should create no new powers for the Union. The explanations spell out what each right should mean in practice. For example, they stipulate that the Charter's social

title, which deals with issues such as the right to strike, healthcare and social housing, is only a set of guiding principles, as the EU does not legislate on these issues.

*“The European Commission has not yet taken any EU country to court for flouting human rights.”*

Judges have so far failed to justify anxieties that they will ignore the Charter's limitations and create new rights out of the blue. Thus because the EU has no legislation on the right to strike, the Charter cannot apply to this issue. The ECJ has ruled on the right to strike – in the *Viking* and *Laval* cases – but only to say that free movement rights are more important. Furthermore, in its 2012 *Pringle v Ireland* ruling, the Court declared that the Charter does not apply to economic hardships resulting from eurozone bail-out programmes.<sup>46</sup> In 2013, the ECJ failed to uphold a single attempt by private citizens to expand social rights through the Charter. Some lawyers will undoubtedly try to change this by challenging such reasoning before national courts and ultimately the Luxembourg Court itself.<sup>47</sup>

But might EU judges still stretch the wording of undisputed rights in ambitious ways? Here too the ECJ has mainly respected the limits of the politically possible. For example, the Court ruled in 2010 that the right to good administration covers not just the EU's institutions but also national bodies if they are administering European law. This might transform the EU into a reformer of standards in local government, an area where the Commission hitherto has had little say. However, the ECJ later qualified the scope of this right, saying in the *Cicala* case that it cannot hear complaints on the right to good administration regarding the situation in only one country.

EU judges themselves appear to disagree over the Charter's scope. Allan Rosas and Yves Bot, respectively a senior judge and advocate-general at the ECJ, feel that at least some of its rights have “direct effect” and do not require accompanying EU legislation to trigger them.<sup>48</sup>

46: Darren O'Donovan, 'The insulation of austerity: The Charter of Fundamental Rights and European Union Institutions', Humanrights.ie, May 16<sup>th</sup> 2013.

47: Valentina Pop, 'Bailout troika 'in breach' of EU human rights laws', EUObserver.com, January 29<sup>th</sup> 2014.

48: Allan Rosas and Lorna Armati, 'Taking rights more seriously? The EU system of fundamental rights', EU constitutional law: An introduction, Chapter 11, Hart Publishing 2012.

Contrarily, Koen Lenaerts, a Belgian judge appointed as the ECJ's first vice-president in 2012, argues that the Charter cannot be interpreted contrary to its explanations or its Article 51.<sup>49</sup> However, the Court's *Fransson* judgment appears to confirm the Rosas-Bot view. In this landmark ruling in 2013, the ECJ extended the Charter's protections, specifically on due process in criminal proceedings, to a Swedish VAT investigation where no EU law was directly involved. The ruling was subsequently described by the UK's European scrutiny committee in the House of Commons as a "landgrab" by the Luxembourg Court.<sup>50</sup>

Whatever the criticism, the Charter's impact depends on factors other than what is going on in the minds of EU judges. Other players matter too, namely the European Commission, national courts, ambitious lawyers and human rights activists. The ECJ has experienced a steep rise in human rights cases since 2009, precisely because national judges consider the Charter important and send requests for rulings to the Luxembourg Court on how to apply it. Austria's judges shocked many in 2012 by declaring that the Charter has the same value as its own constitution and that citizens are free to test any national law against its provisions.<sup>51</sup>

The European Commission has not yet taken any EU country to court solely for flouting human rights. But the Charter is forcing the institution to act as a rights watchdog as well as a regulator and drafter of legislation. Since 2009, the Commission has pursued EU countries for previously unthinkable reasons such as France's expulsion of Roma, media freedom in Hungary, deficiencies in the Greek asylum system, and Lithuanian laws banning public information concerning homosexuality.

Clemens Ladenburger, a senior legal expert in the Commission, argues that the Charter is improving the quality of legislation coming from Brussels. Officials and MEPs have had to take greater care in drafting recent laws on market abuse or credit rating agencies, because firms and citizens targeted by such legislation can appeal to the courts by invoking the Charter.<sup>52</sup>

Prior to 2009, the ECJ had never once in its 60-year history struck down a piece of European legislation on the sole grounds that it infringed

49: Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights, *European constitutional law review*', October 2012.

50: European Scrutiny Committee, 'The application of the EU Charter of Fundamental Rights in the UK: A state of confusion', UK House of Commons, March 2014.

51: Jaimie Cremeans, 'Austria court rules laws not conforming with EU rights charter are unconstitutional', *Jurist.org*, May 4<sup>th</sup> 2012.

52: Clemens Ladenburger, 'Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions – Institutional report', XXV Congress of FIDE, May 2012.

fundamental freedoms or human rights. But since the Charter entered into force, it has already done so three times. In 2010 the ECJ annulled a piece of Common Agricultural Policy legislation on data privacy concerns. In 2011 in the *Test-Achats* case it struck down the EU's attempt to exempt the insurance industry from its equal rights legislation.

Perhaps most spectacularly, the Court annulled the EU's controversial 'data retention' directive in May 2014. This legislation, originally challenged before the Irish courts by an NGO called Digital Rights Ireland, required telecoms companies to stockpile personal telephone and internet records. The idea was that law enforcement authorities would then have the right to peruse such records for use in future police investigations. The Court ruled that the directive "entails an interference with the fundamental rights of practically the whole European population".

This suggests a conclusion that few have yet considered: the Charter may limit the EU's powers, not expand them. According to Viviane Reding, "EU fundamental rights were created, first of all, to curb the new supranational power of the EU institutions. They were meant to complement national fundamental rights, not to replace them."<sup>53</sup> EU judges may even prefer to do this, setting the limits to EU action themselves, rather than agree to accept the external authority of the ECtHR.

53: Viviane Reding, 'Observations on the EU Charter of Fundamental Rights and the future of the European Union', XXV Congress of FIDE, May 2012.

## ix) The ECJ is increasingly a tribunal for migrants and refugees

Francis Jacobs, a former advocate-general at the ECJ, argued in an opinion in 1991 that EU nationals who moved to another member-state were special (academics often refer to this opinion as *civis europeus sum* – I am a European citizen). They were, he said, entitled to be treated not just as temporary economic migrants with special rights but the same as any native citizen of their host state in any area of law. This status needed to be guaranteed throughout the Union if migrants – who face the uncertainty of getting a job, learning a language, finding accommodation and dealing with cultural barriers – were to make use of their free movement rights.

Few now remember that behind the grand rhetoric Jacobs was referring only to workers. He certainly meant that free movement rights should also include unemployed job seekers, as the Court had ruled in the *Antonissen* case that year. (The *Collins* ruling in 2004 later clarified that they should have access to job seeker's allowance.) He probably meant their families too, as under international law, long-term migrants can normally extend their residency rights to their families after a couple of years. These rights are codified in the EU's 2004 free movement directive, also known as the 'citizens' directive'.

But EU judges have gone much further than Jacobs. In the 1998 *Martínez Sala* case, they started to decouple the right to move and reside in another member-state from any strict economic criterion. Later the ECJ began to emphasise the 'stickiness' of these free movement rights: a series of its rulings have dealt with the extent to which non-EU citizens may enjoy the right to free movement if they are connected to an EU national through marriage, family ties or a long-term partnership.<sup>54</sup> Not uncommonly, such cases often involve children born shortly after their parents' arrival in an EU country.

In 2005, the Court ruled in the *Metock* case that third country (non-EU) spouses of EU nationals also acquired free movement rights, even if they had never set foot in Europe or been resident for any period of time in another member-state. *Metock* concerned Nigerian and Cameroonian nationals who, having failed to gain refugee status in

<sup>54</sup>: Some key ECJ cases in this area are *Surinder Singh* (1992), *Carpenter* (2002), *Baumbast* (2002) and *Chen* (2004).

Ireland, applied for residency as the newly-weds of EU nationals – British, German and Polish – living there. Aside from their fears of a spike in sham marriages, several governments were also angry that the Court reversed earlier rulings and thus made national immigration rules more confusing and uncertain. At the time, Anders Fogh Rasmussen, then Denmark's prime minister, pledged: "Denmark's immigration policy is not going to change. We're trying to change the set of rules inside the EU so that we can get things as we want them."<sup>55</sup> Such promises were in vain, however. The European Commission had little interest in reversing the ruling by re-opening the EU's acrimoniously negotiated free movement directive. By 2009, Denmark and Ireland had dropped their demands and accepted the new status quo.

In 2011, the Court handed down its most radical judgment to date on EU citizenship and the residency rights of non-EU nationals: *Ruiz Zambrano*. The case concerned the residency and welfare rights of the Columbian parents of two children born and raised in Belgium. The ECJ refused to allow a Belgian court to deport the parents of the Zambrano children. Its reasoning was that this would "deprive citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union". The right in question was the right to a family life protected under the Charter.

Neither of the Zambrano children had ever used their free movement rights. Hence the ruling suggested that the ECJ considers that European citizenship can be federal in nature; that some rights that go with that status do not need a cross-border link or Brussels legislation to trigger them; and that the Union's Charter is indeed a Bill of Rights. Some ECJ-watchers say EU judges may simply have acted in view of the plight of the children involved. That view is backed up by the fact that the Court refused free movement rights to third country spouses in two key 2011 cases: *McCarthy* and *Dereci*.

Nonetheless, according to Jo Shaw from the University of Edinburgh, the Court of Justice could be heading into "dangerous waters" by encouraging the idea that EU citizenship can be separate from, and even superior to, national citizenship.<sup>56</sup> Take Scotland's referendum on independence. Scottish nationalists argue that the Court's rendering of EU citizenship would make an independent Scotland an automatic EU member-state. Not to do so would strip Scots of the enjoyment of their rights as EU citizens. If such arguments were upheld in Luxembourg, *civis europeus sum* might yet become synonymous with separatism.

55: Quoted in Mark Dawson and others (Eds), 'Judicial activism at the European Court of Justice', Edward Elgar Publishing, September 2013.

56: Jo Shaw, 'EU citizenship and the edges of Europe', CITSEE Working Paper Series, University of Edinburgh, 2012.

In 2011, the ECJ handed down two immigration decisions not related to EU nationals: the *El Dridi* and *NS* rulings. The first dealt with EU rules on illegal immigration under the 2008 returns directive. This directive was meant to boost confidence between members of the EU's free movement and Schengen areas – many of whom were struggling with toxic national debates over immigration – by ensuring that countries would return illegal entrants to their home country promptly, and according to the same standards.

But in the *El Dridi* case, the ECJ overturned Italy's practice of imprisoning unauthorised migrants who refuse to leave, as a deterrent to other migrants planning to enter the country illegally. Thus the returns directive, which is intended to ensure the Union has a uniform deportation policy, has opened up a legal avenue for scores of undocumented migrants from Syria, Algeria, Rwanda and other places to challenge their deportations by claiming protection under the EU's Charter of Fundamental Rights. They could not have done this before 2008 because the Union had no legislation in this area. The Court's docket of cases to do with illegal immigration is growing longer year by year.

The ECJ issued its *NS* judgment, which reviewed the rights of asylum seekers under the Charter, at the end of 2011. The EU's common rules on asylum say that refugee claims must be dealt with by the first country in which the claimant arrives. Applicants who move to other member-states are sent back to their original state of entry, under the EU's so-called Dublin system for processing refugee claims. The rationale is that conditions for would-be refugees are equally good in every EU country. But despite common EU rules setting standards on the reception and care of applicants, the Greek asylum system barely functions. Tens of thousands of asylum seekers are stuck in often filthy, overcrowded detention centres, sometimes waiting years for their claims to be heard.

The European Court of Human Rights had already denounced Belgium's practice of returning EU asylum applicants to Greece as inhumane in early 2011. The ECtHR usually steers clear of directly challenging the EU, but the Greek refugee situation had grown too serious to ignore. Normally, the ECJ's first priority would be to ensure national authorities respect the Dublin system lest other countries or courts stop respecting EU rules more generally. But EU judges agreed with their Strasbourg colleagues in the *NS* case. This said the Dublin system could be waived

in cases where their application would mean a gross abuse of human rights. The ruling simultaneously helped to decide around 300 refugee cases on hold in the UK and Ireland, as judges there waited for the ECJ's view on this specific point of law.

*“The influence of the Charter of Fundamental Rights is changing the ECJ into a human rights court.”*

The judgment also inadvertently resolved the question of whether the UK has an opt-out from the Charter of Fundamental Rights. Along with Poland, the

UK negotiated a protocol to the Lisbon treaty intended to limit the Charter's impact in Britain. British lawyers suggested that this should prevent the Charter being evoked against the UK in the *NS* case. But EU judges said the protocol merely restated the Charter's limitations which apply equally to all member-states.<sup>57</sup> This bodes ill for similar special pleading by the Czech Republic which also claims an opt-out from the Charter.

More and more asylum cases will come before the Luxembourg Court. The Lisbon treaty allows for any refugee tribunal to refer asylum questions to the ECJ. That means that, along with its expanding case-law on the rights of illegal migrants, the Court will find itself on the frontlines of Europe's bitter immigration debates more often.

The influence of the Charter is changing the ECJ from a body once best known as an upholder of economic freedoms into a human rights court. A single Charter article bans 17 different types of discrimination and the Lisbon treaty prioritises minority rights in its opening articles. EU judges may in time become better known as protectors of minorities and the vulnerable, be they EU nationals, immigrants, asylum-seekers or those of Roma ethnicity.

<sup>57</sup>: Aidan O'Neill, 'Is the UK's 'opt-out' from the EU Charter of Fundamental Rights worth the paper it is written on?', Eutopialaw.com, September 15<sup>th</sup> and 20<sup>th</sup> 2011.

## x) More crime issues will come before the ECJ after 2014

*"In a landmark ruling that is as ominous as it is deluded, the Luxembourg-based court yesterday over-ruled the governments of EU member-states, removing from them the sole right to impose their own penalties on people or companies breaking the law, and giving the unelected EU Commission an unprecedented role in the administration of criminal justice."*

– *The Times (London)*<sup>58</sup>

This hyperbolic editorial was written to protest against a 2005 ECJ ruling stating that the Commission could legislate for an EU-wide crime, subject to the approval of national governments, in order to ensure respect for European environmental rules. Prior to this, the right to set mandatory criminal sentences was an exclusive privilege of national governments or parliaments with no role for the EU's institutions at all. *The Times* leader writer would no doubt be similarly outraged at developments less than a decade later. Member-states are discussing plans for a European public prosecutor, which may be created among a core group of countries under the Lisbon treaty. The European Parliament is helping to design jail sentences for rogue traders and financial institutions.<sup>59</sup> And the European Commission will start taking EU governments to court over criminal justice standards from December 2014 onwards.

But this shift is not as radical or as sudden as it might appear. It has happened gradually since 2003 when the ECJ handed down its first real criminal justice decision, *Gözütok and Brügger*, which according to officials is the equivalent of a *Cassis de Dijon* for EU law enforcement co-operation. These cases involved Schengen area rules on double jeopardy, the idea that no-one should be tried twice for the same crime. In its ruling, the ECJ encouraged Schengen countries to behave as a single criminal jurisdiction by treating the import and export of the same cache of drugs as one crime, not two.

The following year the European arrest warrant entered into operation. The warrant is considered by officials in Brussels to be the 'jewel in the crown' of EU policing measures, since it replaced a dysfunctional system

58: 'Legal trespass', *The Times*, September 14<sup>th</sup> 2005.

59: Benjamin Fox, 'MEPs agree four-year jail term for insider trading', *EUObserver.com*, February 4<sup>th</sup> 2014.

of international extradition between EU countries. Criminal suspects are now transferred between national authorities in the EU for trial, with very limited grounds for refusal. Like the single market in *Cassis de Dijon*, the assumption is that such automatic transfers are acceptable since each national legal system should have an equally valid means for safeguarding the rights of suspects, including the right to a fair trial.

*“The European Commission will start taking EU governments to court over criminal justice standards.”*

The EU has forged around 150 agreements dealing with policing and justice. Like the arrest warrant, the vast majority of these are ‘framework decisions’: more than

inter-governmental accords, but less than normal EU legislation.

The Commission cannot yet enforce these accords and EU nationals cannot claim rights based on them. The Lisbon treaty allows framework decisions to be enforced before the courts in the same manner as single market legislation, but only after December 2014. Nonetheless, the ECJ has already produced around 50 judgments to do with police and justice co-operation. This is because 19 member-states have already voluntarily accepted the Court’s jurisdiction, to help their own courts be clear as to the exact scope and meaning of each individual EU crime and policing agreement.

Thus far, the ECJ has a conservative record on criminal matters. In 2005 it ruled in the *Pupino* case that EU police and justice decisions take precedence over conflicting domestic criminal rules. This was by far the most radical in a series of rulings, mostly to do with the arrest warrant or EU rules on victims’ rights that have been handed down since then. Overall, the Court has displayed a light touch, deferring to national criminal justice practices in most cases.

For example, Advocate-General Eleanor Sharpston proposed in the 2011 *Radu* case that the arrest warrant, used to transfer thousands of suspects between EU countries each year, should be subject to tougher human rights conditions. This was an invitation for EU judges to set down common criminal justice standards that would otherwise take years for governments to agree in Brussels. But EU judges failed to follow Sharpston’s prompt and decided the case on narrow, technical issues instead. This is despite convincing evidence from Fair Trials International, a pressure group, and former MEP Sarah Ludford, that while the arrest warrant may have ensured speedy justice, it has also opened the door to some abuses and absurd practices.

Later the ECJ took a similarly cautious stance in the *Melloni* case, rejecting a suspect's appeal against his surrender to the Italian authorities on human rights grounds. However, December 2014 will still represent a watershed. Commission officials make clear that EU police and justice accords are poorly implemented across the Union. Hence the Commission is likely to take several countries to court over their criminal justice standards, once it gains the power to do so. One example is the Union's common agreement on freezing criminal assets, which does not work as it should. And national courts in countries that had hitherto not accepted the ECJ's jurisdiction may inundate it with questions on interpretation of the arrest warrant and other framework decisions. These are likely to create their own controversies, as various points of law are tested for the first time. If so, it could be the ECJ proper, rather than the General Court, that ends up with a true caseload crisis since it is responsible for most judgments in this area. For instance, almost all European arrest warrant cases concern persons in custody and are therefore eligible to be fast-tracked to the ECJ through the *procédure préjudicielle d'urgence* (PPU).

Britain and Ireland are nervous about the EU's expanding jurisdiction in criminal justice. Most EU members have legal systems rooted in Roman or Napoleonic civil law traditions. But the two islands use the common law tradition and hence are permitted to opt in to EU criminal justice measures on a case-by-case basis. Uniquely, Britain won the right in the Lisbon treaty negotiations to pull out of all EU criminal justice measures agreed prior to 2014. The intention was to protect the UK if judges in Luxembourg were to interpret EU criminal justice rules in ways that went against its common law traditions. In mid-2013, the British government informed other EU countries of its intention to abrogate around 130 police and justice accords before the ECJ has jurisdiction over them from December 2014 – but then to seek to opt back in to some of the most important ones, such as the arrest warrant and the accords establishing Europol, the EU's police agency.<sup>60</sup>

Britain's decision has attracted widespread criticism from lawyers, civil rights activists, police, MEPs and its own House of Lords.<sup>61</sup> Other EU governments lament the decision but are still keen to keep the UK in the European arrest warrant system, Europol and Eurojust, an EU body made up of national prosecutors. In any case, the UK government has already opted into around 20 new EU criminal justice laws agreed since December 2009. These are already subject to ECJ oversight

60: See Hugo Brady, 'Britain's 2014 justice opt-out: Why it bodes ill for Cameron's EU strategy' and 'Cameron's European own goal: Leaving EU police and justice co-operation', CER policy briefs, October 2012 and January 2013 respectively.

61: UK House of Lords, 'EU police and criminal justice measures: The UK's 2014 opt-out decision', April 23<sup>rd</sup> 2013.

because they were agreed after the Lisbon treaty became the EU's new rulebook. Hence London has fully and irrevocably accepted the ECJ's jurisdiction in key areas such as cross-border criminal investigations, the right of access to lawyers during police questioning, efforts to tackle child pornography and anti-human trafficking measures.

## xi) The ECJ is a foreign policy player

The ECJ has no jurisdiction over the EU's foreign policy. But there are important caveats to this, according to the Union's treaties. Firstly, judges in Luxembourg can hear appeals against travel bans and orders to freeze bank accounts handed down by EU foreign ministers. Secondly, the ECJ can judge any international agreement concluded between the EU and other countries or international bodies, including on foreign policy or security. Thirdly, the Court can adjudicate between governments and the Union's institutions in disputes over who controls EU foreign policy.

These three caveats are more than enough to make the ECJ a foreign policy player by default. In 2006, it struck down an EU-US counter-terrorism agreement that dealt with air passenger data, at the request of the European Parliament. In 2008, the Court sided with the European Commission over control of the EU's West Africa policy in the *ECOWAS* small arms case, because the Commission has the lead role in directing the Union's development efforts. (The Lisbon treaty later re-stated that national governments were primarily in control of EU foreign policy.) In 2010, EU judges even considered the legality of Israel's occupation in the West Bank in a case over EU import duties. The judges ruled that imports from the West Bank were covered by EU agreements with the Palestinian Authority, not those with Israel.

Similarly, the Court has shaped the EU-Turkey relationship through its interpretations of the Union's association agreement with Ankara, signed in 1963. Turkish travellers have successfully challenged EU visa requirements before the Luxembourg Court on the grounds that new restrictions cannot be introduced for certain kinds of travellers. One example is the 2009 *Soysal* ruling, which abolished visa requirements for Turks travelling to Germany on business. ECJ judges argued that such requirements would amount to the erection of new borders between the EU and Turkey, in contravention of the 1963 agreement. The *Soysal* ruling prompted an emergency discussion inside the Dutch government over its potential impact on the Netherlands' fraught immigration debate. In 2010, Geert Wilders, the leader of the populist Freedom Party, threatened to withdraw support from the Dutch government unless it pressed for the EU-Turkey association agreement to be revised.

*Soysal* led the Ankara government, which has often pressed the EU for visa liberalisation, to hope the Court would eventually abolish travel restrictions for all Turkish citizens. These aspirations were dashed by the Court's 2013 *Demirkan* ruling. EU judges ruled that Turkish tourists did not count as businessmen and would therefore have to continue applying for a visa.

“The *Kadi* cases have brought the ECJ into conflict with the UN Security Council.”

The ECJ has had a direct impact in the area of EU sanctions against suspected terrorists and ‘smart sanctions’ aimed at repressive regimes. In 2006 EU judges

removed an exiled Iranian opposition group, the People’s Mojahedin Organisation of Iran (PMOI), from the EU’s list of terrorist organisations. The Court argued that the PMOI was never given the chance to contest its listing and maintained that position following challenges from EU foreign ministers. But the PMOI rulings, although controversial at the time, were quickly overshadowed by the so-called *Kadi* cases. These have brought the ECJ into conflict with the UN Security Council.

Under UN Security Council resolutions, members or supporters of the Taliban or al-Qaeda are international outlaws. Their names are placed on a UN blacklist by diplomats, based on information gathered by national intelligence agencies. Organisations and people on the blacklist have their bank accounts frozen under international law. The aim is to cripple terrorist networks financially, so as to limit their ability to operate globally.

Since UN counter-terror sanctions are essentially economic in nature, they are applied in the EU through Commission regulations. In 2008 and 2013, Yassin Abdullah Kadi, a wealthy Saudi, successfully challenged his blacklisting by the UN before the ECJ. EU judges agreed that his listing had been arbitrary: Kadi was not given the proper reasons for it and had no opportunity to challenge the intelligence on which it had been based. Legal scholars such as Joseph Weiler consider the *Kadi* ruling as ground-breaking because the Court had defied a principle of international law hitherto accepted throughout the world.<sup>62</sup>

European governments worried that the *Kadi* rulings could cripple the international counter-terror regime. A horrified European Commission appealed against both of them. But the ECJ upheld both rulings, maintaining that it has jurisdiction to annul international agreements

62: Gráinne de Búrca and J. H. H. Weiler (Eds), ‘The worlds of European constitutionalism’, Cambridge University Press, 2012.

if they undermine rights protected under EU law. Although *Kadi* is not a European citizen, such rights apply regardless of geography or nationality, so long as a person is the direct target of a 'restrictive measure' by the Union.

Since the *Kadi* case the ECJ has gone on to hear challenges against EU 'smart sanctions' aimed at foreign dictators, their families or those engaged in the proliferation of dangerous weapons or substances. In 2012, it ordered the delisting of Pye Phyo Tay Za, the son-in-law of a successful businessman from Burma, on the grounds that a mere family linkage was not sufficient proof of association with an undemocratic regime. In 2013, it effectively delisted a number of banks believed to be important to the Iranian nuclear programme, including Bank Mellat, Bank Saderat and Bank Sina. The legal reasoning behind all of these decisions was that the listings were either not backed up by sufficient evidence or were technically incorrect. The ECJ has dozens of other EU sanctions appeals pending, mostly involving banks and firms from Côte d'Ivoire, Iran and Syria.

It is highly unlikely that EU diplomats could have convinced the US and others to reform the UN's system for making terrorism blacklists. Yet the ECJ's *Kadi* decision prompted the UNSC to introduce a special 'Ombudsperson' to review the evidence on which listings by its al-Qaeda Sanctions Committee are based. Kimberly Prost, the current incumbent, has recommended the delisting of more than 20 suspects since the Office of the Ombudsperson came into being, including, in 2012, *Kadi*. Prior to the intervention of EU judges, no form of independent review or due process existed in UN counter-terrorism policy.

The *Kadi* and smart sanctions cases also reveal an awkward truth. Judges and diplomats occupy different domains and work to a different logic. The EU's legalistic nature makes its courts the perfect venue for a clash of mutual incomprehension between the two. According to Robert Cooper, a former adviser to the EU's High Representative for foreign policy: "The tendency in the EU is to think that the Court is God; us diplomats think the Security Council is God." The Court's rulings mean that EU diplomats are now making decisions based on what will pass muster with the ECJ, not the previously-accepted principle that UN Security Council resolutions are automatically binding on all UN member-states.<sup>63</sup>

The commitment of EU judges to due process and the rights of individuals is laudable. But there is a danger that the UN's whole

63: Francesco Giuglietti, 'How EU sanctions work: A new narrative', Chaillot Paper, EU Institute for Security Studies, May 2013.

sanctions regime, which gives the EU influence over questions such as Iran's nuclear programme, could fall apart under a slew of cases brought by law firms seeking judicial review of sanctions. Countries such as Russia and China (already unenthusiastic enforcers of UN sanctions) will also find reasons to pick and choose who suffers the full rigour of sanctions and who does not.

The Court needs a new *modus vivendi* with the EU's foreign policy structures lest it become a soft touch for "international ambulance-chasing", according to one non-EU national legal attaché working in Brussels. Plenty of law firms are keen to have the business of wealthy clients who may be on EU sanctions lists for good reasons. In March 2014, Marc Jaeger, the General Court's president, proposed a radical new set of court procedures that would allow governments to pass secret intelligence to the Court, to serve as evidence in sanctions cases.

If agreed by a super-majority of EU governments, judges would be able to decide whether such information is too sensitive to be shared in full with lawyers defending targeted individuals. (The European Parliament would also have to agree with this rule change.) They would then invite governments to submit an outline of the intelligence as evidence or accept that it cannot be used at all to defend the imposition of sanctions in a particular case. This is a decent attempt to address the dilemmas at the heart of the EU's sanctions regime so that such cases may be more accurately judged. But it will also receive short shrift from civil liberties groups alert – rightly – to any precedent whereby EU Courts rule against defendants who have not seen the evidence against them.<sup>64</sup>

As early as the 1990s, Anne-Marie Slaughter had observed that "the Court is widely recognised not only as an important actor in European integration, but as a strategic actor in its own right."<sup>65</sup> In the post-*Kadi* world, nobody knows whether and when the ECJ will claim still wider judicial review of the EU's external action. Some theorists speculate that the Court may even give a new role to the EU's Common Security and Defence Policy by obliging its missions abroad, such as the anti-piracy operation off the Horn of Africa, to use force to protect the safety and consular rights of EU citizens.<sup>66</sup> This is probably far-fetched. But the *Kadi* cases hint that EU judges have considerable ambitions to extend their international influence.

64: Laurence Norman and Benoit Faucon, 'EU proposes change for sanctions cases, easing rules of evidence', *Wall Street Journal*, March 25<sup>th</sup> 2014.

65: Walter Mattli and Anne-Marie Slaughter, 'Revisiting the Court of Justice', International Organisation, Winter 1998.

66: Joris Larik, 'Operation Atalanta and the protection of EU citizens: Civis Europaeus unheeded?', *Centro Studi Sul Federalismo*, 2011.

## xii) EU judges reason judicially but live in a political world

*“Cases are brought raising novel questions; and judges have to answer them. Their answers will often make law, whatever answer they give, one way or the other. So the judges do have a role in developing the law. But, and this is the all-important condition, there are limits. Judicial activism taken to extremes can spell the death of the rule of law: it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the anti-thesis (sic) of the rule of law”.*  
 - Tom Bingham, Lord Chief Justice of England and Wales 1996-2000 and Senior Law Lord 2000-2008 <sup>67</sup>

‘Democracy’ and the ‘rule of law’ trip off the tongue almost as if they were the same thing. Yet the reality is that the two concepts co-exist uneasily in liberal democracies. For example, parliamentary sovereignty is the most important governing principle in Britain: the idea that the courts generally cannot over-rule parliament and that no parliament can pass a law that cannot be undone in future. This is one reason why British eurosceptics dislike the ECJ and ECtHR so intensely. By contrast, Germany, Italy and the Czech Republic all have written constitutions with ‘eternity clauses’ which no parliamentary majority can undo.

It is no coincidence that these two governing philosophies come into conflict over questions to do with the role of the judiciary and the rights of the individual. In other words, who is really in control of the law: the elected politicians who write it or the judges who apply and uphold it? Canada’s constitution, for example, allows its parliament to overturn rulings of the Canadian Supreme Court on fundamental rights issues. But that would never happen in Germany where the public trusts the judges in Karlsruhe more than the politicians in Berlin to protect their rights.

The strongest defence of EU judges is that they are left to decide the law by others who cannot or will not. The Luxembourg Court has ultimate responsibility to decide the meaning of legislation resulting from negotiations between 28 countries and MEPs in the European Parliament. Konrad Schiemann, the former UK judge, underlined the difficulty of this task upon his departure from the ECJ in 2012:

<sup>67</sup>: Tom Bingham, ‘The rule of law’, Penguin 2011.

The parties concerned often cannot agree on a clear text but prefer to have an unclear text to having no text at all. There is nothing dishonourable in this deliberate obscurity but its effect is to push onto the Court the task of making the decision which the politicians could not bring themselves to make. This is then described by unfriendly voices as judicial activism.<sup>68</sup>

Another senior judge still serving at the Court agrees: “Not deciding anything would also be seen as a form of judicial activism. So how do you win?”

Even informed criticism of the ECJ tends to extremes. Some critics wonder if its judges are more intent on creating ‘a country called Europe’ – in the historical mould of supreme courts in the US, Canada and Australia – than on dispensing impartial justice. Others fear a Wizard of Oz scenario where the ECJ pitches its judgments at too high a level of abstraction to be useful in the real world. Each interpretation contains a germ of truth. But neither is accurate.

EU judges certainly do not decide the law according to one grand plan. Their jobs are more mundane than that and too subject to time pressure. Unlike the US Supreme Court, the ECJ has very little control over its docket: it cannot choose which cases to hear or in what order. The judges have to interpret vague European legislation consistently and logically. But they also sometimes reverse previous decisions, as with its *Metock* judgment, when they think old approaches to new problems no longer work. The ECJ’s next piece of legal gymnastics may be to reverse its *Meroni* judgment, which says that the EU cannot create new institutions totally independent of the Commission or Council of Ministers. This interpretation has hamstrung efforts to design new bodies to manage the eurozone crisis such as a banking union. Judicial reverses can look arbitrary to outsiders but are not at all uncommon in Western democracies.

The eurosceptic assumption that the public are angry about ‘judicial activism’ from the Luxembourg Court is untested. Specific cases may draw fire from specific politicians or groups, but the ECJ is almost never the subject of public or political debate. Governments usually refrain from publically criticising even radical judgments like the *Zambrano* or *Kadi* rulings. What constitutes judicial activism depends on the eye of the beholder and the attitudes of the day. Britain, for example, may complain about rulings limiting the working hours of health workers, while France is likely to be apoplectic if the ECJ broadly interprets the

<sup>68</sup>: Konrad Schiemann, ‘Creating a successful Court: The Court of Justice of the European Union as a working court’, Brussels Agenda, The Law Societies Joint Brussels Office, October 2012.

EU's services directive. Similarly, *Cassis de Dijon* was considered hugely radical in the 1970s but the single market Europe has enjoyed for the last 20 years could not function today without its doctrine of mutual recognition.

Furthermore, the Court gets little credit for holding the EU's institutions to account, often more effectively than national politicians do. EU judges have on occasion trimmed the Commission's powers to carry out 'dawn raids' on corporations during its anti-trust investigations. In 2011, they forced the European Parliament to publish the Galvin report, which recorded a litany of corrupt expenses practices by MEPs. In 2013, the Luxembourg Court rejected wage increases for Brussels officials that the Commission had proposed, noting that European civil servants were not insulated from the pressures on national governments at a time of economic austerity.<sup>69</sup> The same year, the Court agreed with Access Info Europe, a pro-transparency NGO, that the public should have access to official EU documents that governments would prefer to keep behind closed doors.

The ECJ does face sabre-rattling from time to time, from European politicians who accuse it of going too far. In 2006, Austria's then chancellor, Wolfgang Schüssel, complained that "the ECJ has in the last couple of years systematically expanded European competences, even in areas where there is decidedly no European law." And in 2013, a Dutch government review of official European policy even argued for a more aggressive approach to reversing ECJ decisions: "If the EU Court of Justice interprets legislation in a way that the legislators did not foresee or intend, the problem should be addressed as much as possible by modifying the EU legislation on which the Court based its judgment."<sup>70</sup>

Statements like these belie the sophisticated way in which governments interact with the ECJ. For example, the Netherlands' foreign ministry prepares a file on each of the hundreds of cases sent by national courts to the Court every year. EU countries have the right to intervene in any ECJ case, whether it concerns them directly or not. Hence Dutch lawyers argue before the Court in some 15 per cent of cases, when their government's policy objectives or financial interests might be at stake, even peripherally. The Dutch parliament can request that its foreign ministry take specific cases before the ECJ and has done so on occasion. The Dutch government co-ordinates its EU litigation strategy with like-minded governments on issues such as tax, gambling or transparency. They do so through informal networks of state

69: James Fontanella-Khan, 'Brussels bureaucrats forced to take pay freeze', *Financial Times*, November 19<sup>th</sup> 2013.

70: Government of the Netherlands, 'Testing European legislation for subsidiarity and proportionality – Dutch list of points for action', June 2013.

lawyers and legal attachés, according to attorneys who represent the Netherlands before the ECJ.<sup>71</sup>

Even if an EU government were able to get support from enough other countries to re-write ECJ decisions through revised legislation, the European Commission acts as a formidable gate-keeper. Only the Commission can propose EU legislation, except in justice matters where this right is shared with member-states. Its officials will, however, propose amending legislation when the ECJ has handed down genuinely poor rulings. For example, its interpretation of the 'Brussels Regulation', a set of EU rules for resolving international commercial disputes, has attracted widespread criticism because the Court has made such disputes more difficult to resolve. Governments and the European Parliament have agreed a new version of the regulation that will come into force in 2015.

Rather than refuse to apply ECJ rulings, EU countries often amend national legislation just enough to comply with the letter rather than the spirit of decisions with which they do not agree. The Commission may launch another round of infringement proceedings but these will be time-consuming, resource-intensive and expensive. And no court's writ is all powerful. Even after a legal battle is won on paper, the issues which provoked it in the first place may remain. Some national administrative or other traditions are simply too deeply entrenched.

Undoubtedly, EU judges are more concerned by sabre-rattling from constitutional courts than that from national politicians. In February 2014, Germany's constitutional court referred a case to the ECJ for the first time in 60 years. At issue is the legality of the ECB's still-unused scheme to buy bonds from troubled eurozone treasuries, known as Outright Monetary Transactions. Many will see this as a momentous step forward for the authority of the ECJ. But it is more likely that the judges in Karlsruhe could well be setting the scene for an historic confrontation by daring the Luxembourg Court to disagree with them. Most of the German constitutional court members did not concur with the ECJ's reasoning in *Pringle v Ireland* which supported the European Stability Mechanism. Furthermore, the German judges consider the ECB scheme – a vital element of maintaining market confidence in the euro – to be illegal on a strict reading of the EU treaties.<sup>72</sup>

71: Mark Dawson and others (Eds), *Judicial activism at the European Court of Justice*, Edward Elgar Publishing, September 2013.

72: Wolfgang Münchau, 'Germany's constitutional court has strengthened the eurosceptics', *Financial Times*, February 9<sup>th</sup> 2014.

The ECJ's relationship with other constitutional courts is also becoming more fraught and confrontational. Both the Czech and Lithuanian constitutional courts reserve their rights, as does their German counterpart, to be the ultimate arbiter of EU law on their own territories. In Britain, Prime Minister David Cameron may yet even propose a written constitution to give the UK Supreme Court a stronger basis for confronting judicial fiat from Luxembourg.<sup>73</sup>

In 2012 Austria's constitutional court eschewed direct confrontation with the ECJ in favour of a new approach. Its judges declared that the Charter of Fundamental Rights was part of the Austrian constitution. The ECJ never cites the rulings of national courts in its judgments, although its advocates-general may do so in their opinions. This is to avoid the appearance of giving one country's legal system more weight than another when deciding critical issues. But the 'Austrian model of incorporation' will make it hard for the ECJ to ignore or contradict what Austrian judges might say is the scope and meaning of the Charter. Other constitutional courts may well follow the Austrians' lead and adopt this strategy.

A mounting caseload will probably dampen EU judicial creativity. The ECJ was most activist when it was least busy, in the 1960s and 1970s. Hubert Legal, head of the European Council's legal service, has said that today's EU judges are neither "fanatics nor lunatics", and contends that the Court's militant period, inspired by the Christian Democratic and Kantian federal ideals of Robert Schuman and Jean Monnet, is "dead and gone".<sup>74</sup>

However, some think the Lisbon treaty and the Charter will force the ECJ towards more judicial centralisation and political controversy. Miguel Poiares Maduro, the former advocate-general and influential EU legal theorist, thinks Europe's economic crisis, among other things, makes this inevitable:

The Court is likely to be confronted with two opposing forces: on the one hand, the constitutional uncertainty and the likely increased political deadlock of the Union will increasingly put the Court at the centre of highly politically and socially sensitive issues; on the other hand, this context will tend to increase the contestability of judicial decisions.<sup>75</sup>

73: Alan Riley, 'A British constitution could resolve Cameron's EU problem', *Financial Times*, July 4<sup>th</sup> 2013.

74: Hubert Legal, 'Le rôle de la Cour de justice de l'Union européenne', *Fondation Res Publica*, May 15<sup>th</sup> 2013.

75: Miguel Poiares Maduro and Loïc Azoulay (eds), 'The past and future of EU law: The classics of EU law revisited on the 50<sup>th</sup> anniversary of the Treaty of Rome', Hart Publishing, 2010.

Whatever happens, it is unlikely that the Court can continue to cling to its air of inscrutability as it deals with more human rights, immigration, foreign policy and security-related cases. It is equally unlikely that the Court can continue to hand down radical judgments, as in *Zambrano* and *Metock*, which fail to answer convincingly, or even deign to address, rafts of dissenting legal arguments from governments or other bodies. In well-run democracies, the judiciary must be independent. But judges are also required to make clear the reasons for their rulings, as the ECJ is specifically obliged to do under the EU's treaties. Hence one of the

greatest challenges facing EU judges is to develop a framework for others to judge them as their influence expands in the years to come.

*“The ECJ was most activist when it was least busy, in the 1960s and 1970s.”*

Ronald Dworkin, the American legal theorist, wrote that “courts are the capitals of law’s empire, and judges are its princes.”<sup>76</sup> Nowhere is this sentiment more strongly endorsed than the ECJ, where Dworkin’s books sit on the shelves in judicial chambers. But Vlad Perju, a law professor at Boston College, has argued cogently that it is time for the Court’s private legal empire to go public. The way to do this, he argues, is for the ECJ to move away from its tradition of unanimous rulings to allow minority judgments and dissenting opinions. This is already the practice at the ECtHR.

Perju thinks that the introduction of minority judgments, rather than undermining European law, or ‘nationalising’ judicial debates, would shore up the Court’s authority at a critical moment in the EU’s development:

Dispensing with the single, collegiate judgment would enable the Court to ‘renegotiate’ its relationship with the European public. From its newly adjusted position, the Court could play an important role in the formation, as much as it is possible and desirable, of a shared political consciousness among the European citizenry. Far from being a mere technicality, multiple judgments are a bold, but necessary, step in the EU’s ongoing experiment in governance.<sup>77</sup>

Perju’s inspiring call for a “discursive turn” in the ECJ’s deliberations is convincing. But his views are likely to be greeted coolly by the ECJ, given its 60-year track record of delivering a European rule of law based on single judgments in French. President Skouris is resolutely opposed: minority judgments risk undermining the collegiality of his institution and exposing its internal debates.

<sup>76</sup>: Ronald Dworkin, ‘Law’s empire’, Hart Publishing, 1998.

<sup>77</sup>: Vlad Perju, ‘Reason and authority at the European Court of Justice’, Virginia Journal of International Law, 2009.

Gavin Barrett, a respected Irish academic and ECJ expert, also disagrees. Barrett cites the political pressure that might be brought upon judges – hoping for reappointment after a six-year term – not to find against governments that have nominated them to the bench. It is also unlikely that national courts, seeking a strong signal from the ECJ in preliminary rulings, would be better able to decide the law after receiving more than one opinion from Luxembourg.



Conclusion:

## Whither the ECJ?

Former ECJ judge Konrad Schiemann, during his 2012 leaving address, is said to have compared the Court to Airbus, the European aerospace company, in that “it has a French cockpit, a German fuselage, British wings and the miracle of it all is that, somehow, it flies rather well.” The ECJ is a remarkable and impressive institution. But it is also at a crossroads and facing the prospect of ever-more unfriendly scrutiny in the years ahead. One can imagine, for example, headlines over the next decade such as: ‘Anglo-German judicial alliance confronts EU judges’; ‘Germany takes France to ECJ for fiscal over-spend’; ‘EU Court says independent Scotland already in EU’; or ‘Court defies European Council over treaty change’.<sup>78</sup> Certainly EU judges are already under significant pressure in the eurozone crisis as they consider the legality of bond buying by the ECB, and the impact of the EU’s financial transactions tax on the single market.

In November 2012, the ECJ overhauled its working rules for the first time in its 60-year history. The reforms ended the practice of circulating a ‘report for the hearing’ to all interested parties before oral evidence is given in proceedings. Hitherto this was the only way that lawyers could be sure exactly what legal questions were under consideration in ECJ deliberations. Other changes allow EU judges to skip oral hearings altogether if they feel sure that they already have enough written evidence to decide a case. Only a minority of ECJ cases are settled using oral hearings, but the changes mean that plaintiffs have lost the right to demand to be heard in open court.

The judges defend such moves, saying that providing the report for the hearing had become too time-consuming and that the quality of oral hearings has improved as their quantity has decreased. Hearings are now becoming more adversarial – “less French” in the words of one Nordic judge – and have a more important bearing on the outcome on the case than hitherto. Prior to the changes being introduced, the Council of Bars and Law Societies of Europe (CCBE) had complained to the ECJ that judges were not taking oral hearings seriously enough.

78: The Lisbon treaty makes the European Council, where EU leaders meet, a formal body and therefore subject to review by the ECJ. See Jean-Claude Pirijs, ‘The Lisbon treaty: A legal and political analysis’, Cambridge, June 2010.

EU judges and governments should consider further reforms. Some could be initiated immediately. Legal secretaries still compile a report purely for internal use, called a *rapport préalable*, of all the arguments involved in each ECJ case. These could be made publically available in French or English. Furthermore, very few of the Court's 16,000 annual visitors are politicians. They should be. The European Commission could

try to change this with a special scheme aimed at encouraging delegations from national parliaments to visit the ECJ in order to better understand its work.

*“The ECJ is at a crossroads and faces the prospect of unfriendly scrutiny in the years ahead.”*

Another idea is that the Court could establish a centre for the study of national jurisprudence in its highly-regarded research department, in which EU judges could learn more about other European legal traditions. (Judges tend to absent themselves from cases to do with their own countries.) This might encourage EU judges to begin citing important national rulings in their own judgments. And President Skouris could establish a rules committee to allow a broad constituency of national judges, legal practitioners and NGOs a say in future changes to the court's rules.

The ECJ is often referred to as the ‘Cinderella’ EU institution, as governments have barely tinkered with it in more than 20 years of treaty revisions. Only the ECJ can propose changes to its own statute and rules of procedure, which set out in detail how it administers justice. If governments have to re-open the treaties in the coming years, there should also be simultaneous revision of the statute. One change that both governments and judges should consider is letting the Commission take member-states before national courts for not implementing EU rules. This would be less radical than it appears. National courts apply EU law meticulously in the great majority of cases and the Commission could appeal to the Luxembourg Court, which would still have a role in approving fines. The move would free up EU judges to deal with preliminary rulings, as it would cut their caseload by some 13 per cent a year. And it would strengthen the credibility of EU law by letting national courts hold their own governments accountable to European standards.

A second fundamental change would be to give national constitutional courts a way to contest the ECJ's interpretation of the Charter of Fundamental Rights. This could be done through a ‘yellow card’

system whereby two-thirds of the national constitutional courts (or their equivalent in countries like France, Ireland or the UK) could ask the ECJ to reconsider certain rulings. The Lisbon treaty introduced a similar system to enable national parliaments to check legislative proposals from the Commission for compliance with subsidiarity. Such an innovation for the ECJ would challenge the principle that EU law is supreme over national law. However, EU judges would be free to uphold their own reasoning after hearing views from their national counterparts. And national courts would gain a badly needed avenue for conducting a dialogue with the ECJ about rulings which concern them.

Like national parliaments, constitutional courts already have a forum in which they discuss issues of common interest: the Conference of European Constitutional Courts. This forum could help administer such a judicial yellow card system by opening a secretariat in Luxembourg. It could make a start by reviewing ECJ jurisprudence informally, in the expectation that a future treaty revision would formalise the scheme after a period of trial and error.

A third change would allow groups of concerned citizens to apply to the Court in order to strike down EU laws and claim restitution. The ECJ does not allow US-style class actions where lawyers take cases on behalf of a group sharing a common grievance or concern. Only governments and EU institutions have an undisputed right to appear in Luxembourg. However, the EU's Ombudsman could be empowered to take such cases to the ECJ in the public interest if he or she receives enough public complaints about a particular law or decision. In the absence of treaty change, the Ombudsman could take such cases before the European Parliament's legal committee where MEPs would then take the action to Luxembourg on behalf of voters. Indirect EU class actions would be likelier to enhance the Union's popular legitimacy than has the so-called citizens' initiative, whereby the Commission may propose legislation, if it has been requested by at least one million citizens from at least seven member-states.

Some eurosceptics think EU judges are a politically tone-deaf caste of elitists, jealous of their own authority and prone to justifying silly rules with Byzantine legal reasoning. Euro-optimists believe Spinoza's dictum that "the law is the mathematics of freedom", seeing the Court as the one institution capable of defending openness and liberty in Western Europe, while entrenching these principles in new members.

Euro-realists accept that the ECJ has its foibles, perhaps even some worrying ones. But they can also acknowledge – in the words of Lord Mackenzie-Stuart, a Scottish lawyer and former president of the ECJ – that the Luxembourg Court still functions as “a bulwark against the Balkanisation of Europe, and we undermine it at our peril.”<sup>79</sup>

79: ‘Obituary: Lord MacKenzie-Stuart’, *The Guardian*, May 25<sup>th</sup> 2000.

## Annex: Key ECJ rulings and their significance

Cases	Significance
<i>Meroni 1958</i>	EU institutions cannot delegate executive powers to new bodies, such as specialist agencies or a banking authority, except under strict conditions.
<i>Plaumann 1963</i>	Citizens can challenge EU decisions and legislation before the ECJ only if they are personally affected by them, in a unique way.
<i>Van Gend en Loos 1963</i>	The EU is a unique legal order that confers rights upon citizens as well as states.
<i>Costa v ENEL 1964</i>	European law is supreme over conflicting national law.
<i>Defrenne v Sabena 1976</i>	Treaty provisions on gender equality apply automatically to all EU workers. Citizens can use EU law to sue each other before national courts.
<i>Simmenthal 1978</i>	National courts are empowered to disapply domestic laws that conflict with European ones.
<i>Cassis de Dijon 1979</i>	Goods lawfully produced and marketed in one member-state can be sold in any other.
<i>Les Verts v European Parliament 1986</i>	The EU must provide legal redress to citizens aggrieved by its actions, even when not expressly provided for in the treaties.
<i>Barber 1990</i>	Pension schemes cannot operate different conditions for men and women regarding entitlements.

<i>Factortame 1990</i>	Courts must issue injunctions to prevent governments taking an action that is contrary to EU law, which always prevails in the event of a conflict with national law.
<i>Francovich 1990</i>	A member-state may be liable for damages claimed by private parties inconvenienced by its failure to transpose EU directives.
<i>ERT 1991</i>	EU countries are still bound to comply with European human rights standards, even when claiming an exemption from European law.
<i>Antonissen 1991</i>	Free movement rights apply to unemployed as well as employed EU workers.
<i>Martínez Sala 1998</i>	Non-economically active EU nationals – who are long-term residents – may be entitled to benefits in their host member-state.
<i>Rudy Grzelczyk 2001</i>	EU citizenship is destined to become the fundamental status of the nationals of the member-states.
<i>Tobacco Advertising 2002</i>	First instance of the ECJ striking down an EU directive on the basis that the Union exceeded its powers with a specific piece of legislation.
<i>Gözütok and Brügger 2003</i>	EU citizens cannot be prosecuted twice for the same crime in different member-states, even when a case is settled out of court in one country and brought to trial in another.
<i>Collins 2004</i>	Newly arrived EU workers must have immediate access to unemployment benefit, whilst seeking their first job in their host member-state.

- Jégo-Quéré 2004* The *Plaumann* limitations apply even if private individuals are also prevented from challenging some EU rules before their national courts. (See also the Court's ruling in the 2002 *Unión de Pequeños Agricultores* case.)
- Mangold v Helm 2005* EU anti-discrimination rules apply even to reforms intended to encourage retirees back into the workplace. Citizens do not have to wait for EU directives to be implemented before claiming rights based on them.
- Commission v Austria 2005* Entry requirements for university students from other member-states must be the same as for nationals.
- Commission v Council 2005* The Commission may propose common criminal penalties to be applied across the Union, to ensure effective protection of the environment.
- ECOWAS-small arms 2005* If an EU foreign policy decision can be adopted using the Community method, it should be.<sup>80</sup>
- Parliament v Council 2006* Governments were wrong to conclude a counter-terrorism agreement with the US without consulting the European Parliament.
- Viking and Laval 2008* Striking workers cannot prevent other EU citizens from exercising their right to move to and work in another member-state.
- Commission v Luxembourg 2008* Workers posted abroad in another EU member-state are bound by their own country's collective labour agreements, not those of the host state.

<sup>80</sup>: This decision was later superseded by new language in the 2009 Lisbon treaty.

<i>Rüffert 2008</i>	EU countries cannot exclude contractors from public tenders for using low cost labour from another member-state.
<i>Inga Rinau 2008 (PPU)</i>	First use of the urgent preliminary ruling procedure in a child abduction case involving Germany and Lithuania.
<i>Metock 2008</i>	Spouses of EU nationals enjoy free movement rights, even if they are entering the Union for the first time.
<i>Kadi I 2008 and Kadi II 2013</i>	The EU may not impose UN counter-terror sanctions without evidence to substantiate the individual's involvement in terrorism.
<i>Soysal 2009</i>	Commercial travellers from Turkey can enter EU countries without a visa in order to provide services, under the terms of a 1975 EU-Turkey agreement.
<i>Landtová 2011</i>	EU social security rules apply to pension arrangements made for citizens of the former Czechoslovakia.
<i>Ruiz Zambrano 2011</i>	EU citizenship rights may apply even to those persons who have never left their own member-state.
<i>Cicala 2011</i>	The right to good administration applies to the actions of governments and local authorities – as well as EU institutions – but only when they are implementing European law.
<i>Test-Achats 2011</i>	Gender-based pricing in the insurance industry is discriminatory.
<i>NS 2011</i>	EU rules requiring asylum seekers to be returned to their member-state of disembarkation may be waived on human rights grounds.

<i>El Dridi 2011</i>	Illegal migrants may not be imprisoned solely for refusing to respect a deportation order.
<i>Brüstle v Greenpeace eV 2011</i>	Stem cell inventions which require the destruction of human embryos should not be permitted on moral grounds.
<i>McCarthy 2011 and Dereci 2011</i>	Rights upheld in the <i>Zambrano</i> case (see above) may not apply if there is no parental or carer relationship to the EU citizen in question.
<i>Cimade and GISTI v Ministre de L'Intérieur 2012</i>	Asylum applicants must have access to adequate subsistence whilst either waiting to be heard or transferred to another EU country.
<i>Pringle v Ireland 2012</i>	The 2011 European Stability Mechanism was not an unlawful amendment of the EU treaties.
<i>Radu 2013</i>	European arrest warrants must be honoured by an EU country on the assumption that the suspect's human rights will be protected by the requesting member-state.
<i>Demirkan 2013</i>	Turkish tourists are not entitled to visa-free travel under the terms of a 1975 EU-Turkey agreement.
<i>Commission v Council 2013</i>	A serious and sudden deterioration in economic conditions justifies pay freezes for EU civil servants.
<i>Melloni 2013</i>	European arrest warrants have to be honoured, even for suspects convicted abroad in their own absence.

- Fransson 2013* Swedish criminal law on tax avoidance comes within the realm of EU law, in order to uphold the Charter's guarantee of the right to a fair trial.
- Anton Las 2013* Regions cannot require that cross-border employment contracts be drawn up exclusively in the local language.
- Access Info Europe 2013* The public have a right to know national negotiating positions on issues such as EU transparency rules.
- Digital Rights Ireland and Seitlinger 2014* An EU directive requiring companies to retain personal internet and phone records infringed the privacy rights of almost the entire European population.
- Google 2014* Individuals can have personal data removed from internet searches to safeguard their privacy.

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# Twelve things everyone should know about the European Court of Justice

**Hugo Brady**

The European Union is a legal animal. Yet the European Court of Justice (ECJ) – the institution that decides what the EU’s many laws really mean – remains obscure. Its influence is now becoming more apparent, and more contested, as its judges hand down landmark rulings in sensitive areas such as immigration, internet privacy, criminal justice, human rights, foreign policy and the eurozone’s crisis management tools. Hugo Brady looks beyond the legal jargon to explain what this powerful international court does, how it works and what motivates its most prominent legal minds. He argues that the ECJ remains a priceless asset for Europe – with a unique role in ensuring the rule of law across the continent – but that the case for reforming the Court is growing.

Hugo Brady is a former senior research fellow at the CER and a visiting fellow at the London School of Economics.

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