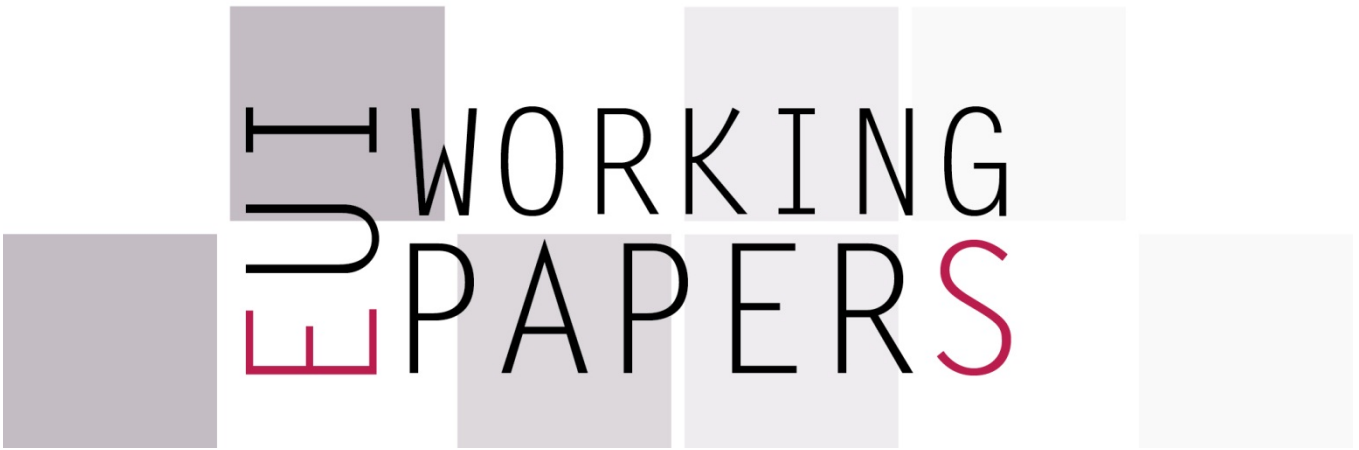
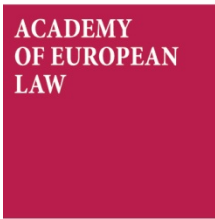




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**The Many Ages of the Court of Justice of the  
European Union**

Anthony Arnull



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## **Abstract**

From its origins in the Schuman Declaration of 9 May 1950, the Court of Justice of the European Union has developed into a legal leviathan, exercising a profound influence on the Union through its widely-studied case law. That case law has been lauded and criticised in equal measure. Some see it as bold and ingenious, while others consider it the product of a rogue court. Who were the individuals who made the early Court tick? What were the obstacles the Court had to overcome in order to achieve its current status? Why were the Member States slow to grasp the significance of the Court's work? What is the relationship between the Court and the General Court, created by the Council in 1988 to alleviate the pressure imposed on the Court itself by its growing case load? This paper addresses these questions in their temporal, political and geopolitical context.

## **Keywords**

Schuman Declaration; Court of Justice; European Union; General Court; case law



# The Many Ages of the Court of Justice of the European Union

Anthony Arnall\*

## 1. Introduction

This paper examines the role, structure and composition over time of the Court of Justice of the European Union ('CJEU' or 'Court').<sup>1</sup> The discussion comprises three substantive sections. Section 2 considers the birth of the Court of Justice of the European Coal and Steel Community (ECSC), the individuals entrusted with making it function, and the powers with which it was equipped. Section 3 looks at the effect of the Rome Treaties on the Court and the role it played in the difficult early years of the general common market that those Treaties set out to construct. Section 4 examines a major problem that confronted the Court once it had reached cruising speed: how to cope with its mounting case load. Section 5 concludes with some suggestions about the future shape of the EU's judicial architecture.

## 2. A Court is Born

### A. *The Origins of the Court and its Jurisdiction*

A visitor to the CJEU in its grandiose home in Luxembourg, a 'palais' in more than just name, might be surprised to learn of its humble origins. These are to be found in a throwaway sentence in the Schuman Declaration of 9 May 1950, which led to the signing in Paris less than a year later of the ECSC Treaty. The centrepiece of the Schuman Declaration was the proposal to place Franco-German production of coal and steel under a High Authority, whose decisions would bind France, Germany, and other European countries who chose to participate in a venture intended to 'lead to the first concrete foundation of a European federation indispensable to the preservation of peace'. Towards the end of the Declaration, the following statement appeared: 'Appropriate measures will be provided for means of appeal against the decisions of the Authority.'

With the benefit of hindsight, it is easy to recognize in that enigmatic sentence the origins of the CJEU, but at the time there were differing views about how 'means of appeal' might be provided.<sup>2</sup> Jean Monnet and colleagues who had helped draft the Schuman Declaration

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<sup>1</sup> The term 'Court of Justice of the European Union' comprises both the Court of Justice and the General Court (see Art. 19(1) TEU). The Court of Justice is the modern incarnation of the Court of Justice of the European Communities, which took the place of the Court of Justice of the European Coal and Steel Community in late 1958 (see Arts 3 and 4(1), Convention on Certain Institutions Common to the European Communities (25 March 1957)).

<sup>2</sup> See Boerger-De Smedt, 'La Cour de Justice dans les Négotiations du Traité de Paris Instituant la CECA', 14 *Journal of European Integration History* (2008) 7; Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome', 21 *Contemporary European History* (2012) 339; Rasmussen, 'Constructing and Deconstructing "Constitutional" European Law: Some Reflections on How to Study the History of European Law', in H. Koch *et al.* (eds), *Europe: The New Legal Realism* (2010) 639.

discussed among themselves a mechanism in which the High Authority would be asked to review its own decisions if they were contested. If that did not settle the matter, it might then go before an arbitral tribunal, with recourse to the International Court of Justice (ICJ) in The Hague as a last resort.

The jurisdiction of the ICJ in contentious proceedings is open only to states, yet it was clear that the activities of the High Authority would affect not just states but also private parties. By the time the Paris Conference opened, the French had therefore abandoned the idea of involving the ICJ, and a two-stage review mechanism was presented to the other states that had decided to take part: Germany, Italy, and the three Benelux countries. The right to appeal to the High Authority would extend to any Member State whose interests were affected by one of its measures and to undertakings who were individually concerned by them. The arbitral tribunal would comprise judges appointed on a case-by-case basis as and when necessary.

Monnet, anxious to ensure the effectiveness of the High Authority and avoid a ‘gouvernement des juges’, was attracted by these arrangements. However, Germany and the Benelux countries took the view that the new Community would need a permanent court with jurisdiction to review acts of the High Authority. Opinions differed on the form any such court should take. While the preference of the Benelux countries was for an international tribunal for resolving disputes between Member States, Germany favoured a constitutional court along the lines of the US Supreme Court, with access extended to private applicants.

Monnet was eventually persuaded that a court of limited jurisdiction could reinforce rather than weaken the High Authority. In the autumn of 1950, he appointed Maurice Lagrange, a member of France’s highest court in administrative law matters, the Conseil d’Etat, to help with the drafting of the Treaty articles on the new court.<sup>3</sup> In this exercise, Lagrange played a central role. He later wrote that ‘the judicial system set up under the Treaty draws directly on French administrative law’, incorporating ‘virtually the entire range of procedures available in the French administrative courts, including actions for annulment, action[s] for failure to act and non-contractual liability’.<sup>4</sup>

The French influence was reinforced by two factors. First, only the French text of the ECSC Treaty was authentic, although there were official translations into Dutch, German, and Italian. Second, French emerged from the outset as the working language of the Court. It is true that Article 27 of the Rules of Procedure of the ECSC Court provided that its official languages were French, German, Italian, and Dutch. However, according to Valentine,<sup>5</sup> the discussions on what the Court’s official languages should be were conducted entirely in French. Lagrange later observed of that language: ‘one of the Court’s official languages was spoken fluently by all its Members. No interpreter was ever needed in the deliberation room. That invaluable asset remains, ... It may even have acquired the status of a tradition.’<sup>6</sup> The Court’s decision to adopt French as its working language, a status it still enjoys today, had important implications for the

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<sup>3</sup> See D. G. Valentine, *The Court of Justice of the European Coal and Steel Community* (1955).

<sup>4</sup> *Mélanges Fernand Dehousse* (Vol. 2, 1979), available at [http://www.cvce.eu/content/publication/1999/1/1/30dbbb02-97f2-46ad-898c-49b074cb2ab2/publishable\\_en.pdf](http://www.cvce.eu/content/publication/1999/1/1/30dbbb02-97f2-46ad-898c-49b074cb2ab2/publishable_en.pdf), at 4 (accessed 18 July 2018).

<sup>5</sup> Valentine (n. 3) 147, at fn. 6.

<sup>6</sup> *Mélanges Dehousse* (n. 4) 6.



style of its judgments and its mode of reasoning.<sup>7</sup> Mancini and Keeling observed that, throughout the 1950s and early 1960s, judgments of the ECJ ‘looked like a carbon copy of the judgments of the great French courts’.<sup>8</sup> That may no longer be true, but the influence on the CJEU of French legal thinking remains significant.<sup>9</sup>

Lagrange noted that the action for annulment was more restrictive than comparable remedies in most of the Member States. Article 33 ECSC gave the Member States and the Council automatic standing before the Court ‘to have decisions or recommendations of the High Authority declared void on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers’. That list of grounds is now contained in Article 263 TFEU, under which the Member States and the Council continue to have automatic standing to bring proceedings. When it came to undertakings or associations of undertakings, however, Article 33, like Article 263 TFEU, was more restrictive. They could only challenge: (a) decisions or recommendations concerning them which were individual in character; or (b) general decisions or recommendations which they considered to involve a misuse of powers affecting them.

In other respects, the Court’s powers exceeded those usually conferred on administrative courts. For example, Article 38 enabled the Court, on application by a Member State or the High Authority, to declare an act of the Assembly or the Council void. Article 88 ECSC established an infringement procedure under which the High Authority would record the failure of a Member State to fulfil a Treaty obligation in a reasoned decision which set the State concerned a time limit for compliance. That State would then have the right to challenge the High Authority’s decision before the Court. If the State failed to comply with its obligation within the time limit set, or was unsuccessful before the Court, the High Authority would be entitled to impose sanctions on it. These could involve suspending payments due under the Treaty to the State concerned or taking or authorizing measures ‘to correct the effects of the infringement of the obligation’. Another example is Article 95 ECSC, which required the approval of the Court for changes to the High Authority’s powers if, after the end of the transitional period, unforeseen difficulties or fundamental economic or technical changes directly affecting the common market in coal and steel made this necessary. The way in which the Court exercised some of these powers is considered below.

Lagrange also drew attention to the office of Advocate General, ‘a proposal directly inspired by the French *Conseil d’État* which ... includes “*commissaires du gouvernement*” [now *rapporteurs publics*] ...’,<sup>10</sup> an office which did not then exist in most of the Member States. The decision to provide for Advocates General ended a debate over whether judges should be permitted to give dissenting opinions. It was concluded that this was unnecessary, since Advocates General would be in a position both to contribute to the doctrinal development of

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<sup>7</sup> See Arnall, ‘The Working Language of the CJEU: Time for a Change?’ 43 *European Law Review* (2018) 904.

<sup>8</sup> Mancini and Keeling, ‘Language, Culture and Politics in the Life of the European Court of Justice’, 1 *Columbia Journal of European Law* (1995) 397, 399.

<sup>9</sup> See Bobek, ‘Epilogue: Searching for the European Hercules’, in M. Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (2015) 309.

<sup>10</sup> *Mélanges Dehousse* (n. 4) 4.

Community law and to protect the independence of judges. We will return to the question of dissenting opinions in Section 5.

## **B. The Members of the New Court**

Article 32 ECSC said that the Court was to be composed of seven judges. The purpose of the extra judge was to fulfil a pledge by the six Member States to the trade union movement to include on the Court a member who was sensitive to the interests of workers. A seventh judge would also have the advantage of allowing the Court to sit *in plenum* without risk of deadlock.<sup>11</sup> Judges would be appointed for six years<sup>12</sup> by agreement between the national governments from among persons of recognized independence and competence. They were to be eligible for reappointment. Agreement on the inclusion of Advocates General having been reached only at a late stage of the negotiations, provision for them was made in Articles 11–13 of the ECSC Statute. Article 12 of the Statute said that they were to be appointed under the same conditions as the judges. Like the judges, they would be eligible for reappointment. The Statute referred to Advocates General in the plural, suggesting that there had to be more than one, but it did not specify a precise number. The number of both judges and Advocates General could be increased by unanimous vote of the Council on a proposal from the Court.

The distribution of roles within the new Court was not agreed until the last minute. One of the reasons for this was Italy's desire to have an Advocate General and its nomination of a candidate for the post of seventh judge.<sup>13</sup> It failed to secure either, but its judge (Massimo Pilotti) was appointed President of the Court by the Council of Ministers.<sup>14</sup> The other two large Member States, France and Germany, each had one judge (Jacques Rueff and Otto Riese respectively) and one Advocate General (Lagrange and Karl Roemer respectively). Belgium and Luxembourg, the smallest Member States, had one judge each (Louis Delvaux and Charles Hammes respectively).<sup>15</sup> There were two judges of Dutch nationality, but only one of them (Adrianus Van Kleffens) had the active support of the Dutch government. The other (Petrus Serrarens, a former Secretary General of the International Confederation of Christian Trade Unions) was appointed to fulfil the Member States' pledge that due account would be taken of the interests of workers.<sup>16</sup>

Thus the new Court brought together a group of people whose experiences of the previous decades had been markedly different.<sup>17</sup> Riese had been a member of the Swiss Nazi

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<sup>11</sup> Art. 18 of the ECSC Statute provided that decisions of the Court were to be valid only when an uneven number of its members were sitting.

<sup>12</sup> Reservations about the effect of this on judicial independence were expressed in Luxembourg and Belgium. See Valentine (n. 3) 12.

<sup>13</sup> See V. Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972): Une approche biographique de l'histoire d'une révolution juridique* (2018) 81.

<sup>14</sup> He was appointed on 1 December 1952 (Valentine (n. 3) 3) and reelected by his peers in 1955 (Fritz (n. 13) 100-101).

<sup>15</sup> The first and only Registrar of the Court, Albert Van Houtte, was Belgian. After the entry into force of the Rome Treaties, he became the first Registrar of the Court of Justice of the European Communities, a post he held until 9 February 1982.

<sup>16</sup> See Fritz (n. 13) 89-91.

<sup>17</sup> *Ibid.* 47-53.

Party; Roemer had been heavily engaged in the administration of occupied France; Lagrange had been closely involved in the implementation of the Vichy Government's anti-Jewish policy; Pilotti had used his position as Deputy Secretary-General of the League of Nations from 1932–37 to protect Italy from criticism of its designs on Abyssinia (now Ethiopia). Others had lived under occupation or been prisoners of war. However, according to a former référendaire of Serrarens quoted by Fritz,<sup>18</sup> the war was never discussed in the Court, even if discreet questions were occasionally asked about the role played in it by some members. Be that as it may, the capacity of these individuals to work together offered a small sign that the aspirations set out in the preamble to the ECSC Treaty might be realized.

A striking feature of the provisions applicable to the appointment of members of the ECSC Court is that candidates did not require legal qualifications. Although the initial desire of the Member States seems to have been to nominate jurists of high repute,<sup>19</sup> when this was not possible the flexibility of the Treaty proved useful. Five of the judges were indeed legally qualified but two, Serrarens and Rueff, respectively a distinguished civil servant and economist, were not.<sup>20</sup> Of the others, all except Delvaux seem to have held judicial appointments in their countries of origin. Delvaux had practised at the bar in Belgium and been active in politics and journalism. That they were all white men of a certain age would not at the time have attracted much comment.

Serrarens served only until the ECSC Court was replaced by the Court of Justice of the European Communities on 7 October 1958 following the entry into force of the Rome Treaties on 1 January of that year. Rueff continued to serve in the new Court until 18 May 1962 (and therefore just missed the start of the most momentous period in its history). In the late 1950s, Rueff combined his work as a judge with a role in economic and financial policy-making in Paris. Although this seemed to contravene the Statute of the Court<sup>21</sup> and attracted criticism from the Assembly, the Council declined to intervene.<sup>22</sup> Rueff's case did, however, expose a loophole. Because the Treaties of Paris and Rome all said that retiring judges were eligible for reappointment, it was possible for judges appointed under the ECSC Treaty, and who wished to continue when the Rome Treaties entered into force, to avoid scrutiny of whether they satisfied the more exacting criteria for appointment laid down by the latter. These are considered in more detail below.

Without any formal decision on the seat of the institutions having been taken, the members of the Court were sworn in and held their first meeting on 10 December 1952 in the Villa Vauban in Luxembourg, the city where the High Authority under the Presidency of Monnet had established itself some four months previously. Pilotti gave a speech in which he emphasized the responsibility of the Court for protecting the rights of litigants where the

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<sup>18</sup> Ibid. 54.

<sup>19</sup> Ibid. 93.

<sup>20</sup> See A. Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (2015), at 54 and 93. Brief biographical details of current and former members of the Court may be found on its website, [http://curia.europa.eu/jcms/jcms/j\\_6/en/](http://curia.europa.eu/jcms/jcms/j_6/en/) (accessed 18 July 2018).

<sup>21</sup> See Art. 4, ECSC Statute, and Art. 4 EEC Statute, both of which prevented judges from holding any political or administrative office.

<sup>22</sup> Vauchez (n. 20) 93-94.

institutions of the Community exceeded their powers.<sup>23</sup> This was a task that would later slip down the Court's list of priorities.

There had been an unresolved debate about whether the independence of the ECSC Court might be compromised if it were co-located with the Commission. Lagrange later observed: 'there was no question of the judges' independence being undermined. In fact, they undoubtedly benefited from the personal contacts they immediately established with the Members of the High Authority. This very quickly encouraged a genuine Community spirit'.<sup>24</sup> The Court would later demonstrate its independence from the High Authority.<sup>25</sup> On the eve of the entry into force of the Rome Treaties, however, the view that it would be better if the two institutions were geographically separated seemed to be supported by Pilotti. Consulted about the seat of the institutions, he said that, if there were to be more than one seat, separating the Court geographically from the others would not entail any major disadvantages.<sup>26</sup> The Commission now has its seat in Brussels, while the seat of the Court continues to be located in Luxembourg.<sup>27</sup>

### ***C. The Work of the New Court***

The first judgment of the ECSC Court was given on 21 December 1954 in a case launched on 9 February of that year.<sup>28</sup> Lagrange claimed that the members of the Court had used the intervening period to familiarize themselves with the Treaty and monitor the activities of the High Authority, draw up the Rules of Procedure and the Court's budget and recruit officials in accordance with the Staff Regulations.<sup>29</sup> They also apparently spent time studying comparative law, a reflection of their previous careers as specialists largely in domestic law.<sup>30</sup> This was significant. When the ECSC Treaty was agreed, public international lawyers had tended to see the Court it established as an international court. However, the disputes the ECSC Court was destined to hear would mainly concern challenges to the validity of measures taken by the High Authority.<sup>31</sup> To a group of lawyers with expertise in national law, these disputes resembled challenges to national measures. The Treaty itself outlined the law that was to be applied, but it left many questions unanswered. It was therefore natural for the Court to turn to the legal systems with which its members were most familiar, in order to devise solutions using the

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<sup>23</sup> Valentine (n. 3) 4.

<sup>24</sup> *Mélanges Dehousse* (n. 4) 6.

<sup>25</sup> See e.g. Case 20/59, *Italy v. High Authority* (EU:C:1960:33).

<sup>26</sup> Pennera, 'The Beginnings of the Court of Justice and its Role as a Driving Force in European Integration', 1 *Journal of European Integration History* (1995) 111, at 117.

<sup>27</sup> See Protocol No. 6 on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union, annexed to the TEU and the TFEU.

<sup>28</sup> Case 1/54, *France v. High Authority* (EU:C:1954:7).

<sup>29</sup> *Mélanges Dehousse* (n. 4) 6.

<sup>30</sup> Cohen, "'Ten Majestic Figures in Long Amaranth Robes": the Formation of the Court of Justice of the European Communities', in A. Vauchez and B. de Witte, *Lawyering Europe: European Law as a Transnational Social Field* (2013) 21, 41 (quoting Lagrange, 'Une réalité européenne. La Cour de justice de la CECA', *Cahiers Chrétiens de la fonction publique* (28 April 1955) 16, at 21).

<sup>31</sup> Pennera (n. 26) 113.

comparative method to the problems raised by the cases brought before them. Advocate General Lagrange explained in *Fédération Charbonnière Belgique v. High Authority*:<sup>32</sup>

our Court is not an international court but the court of a Community created by six States on a model which is more closely related to a federal than to an international organization ... although the Treaty which the Court has the task of applying was concluded in the form of an international treaty ... it is nevertheless, from a material point of view, the charter of the Community, since the rules of law which derive from it constitute *the internal law of that Community*.

Cohen<sup>33</sup> revealingly calls this ‘a sort of “third way” between international law and internal law’. The Court’s sense of itself not as an international court but the domestic court of an entity that constituted ‘a first step in the federation of Europe’ (as the Schuman Declaration put it) helps to explain the subsequent development of the case law and anticipated the birth in 1963 of the ‘new legal order’.<sup>34</sup>

The ECSC Treaty did not prove well-adapted to the evolution of the European coal and steel sectors in the 1950s.<sup>35</sup> The detailed rules on the operation of the common market in coal and steel were dry and technical and the reports of the disputes to which they gave rise are largely neglected nowadays. However, when given the opportunity, the ECSC Court delivered several judgments that foreshadowed ideas and debates that would later emerge under the Treaties of Rome.

The Court could only deal with the cases that came before it. The ECSC Treaty lacked a case generator comparable to the preliminary rulings procedure in the form it would later assume in the EEC Treaty. Under Article 41 ECSC, the right of national courts to seek preliminary rulings seemed to be confined to questions of validity and was apparently designed to protect the monopoly of the Court to rule on such questions.<sup>36</sup> It was not until 1990 that the Court, ruling *contra legem*, held that it also covered questions of interpretation.<sup>37</sup> Be that as it may, the Court took the opportunities presented by several direct actions to develop the law and indicate its general approach.

Take *Industries Sidérurgiques Luxembourgeoises v. High Authority*,<sup>38</sup> an action for failure to act under Article 35 ECSC. The applicant argued that an implied decision of refusal of the High Authority was incompatible with Article 4 ECSC. That provision declared certain types of measure ‘incompatible with the common market for coal and steel’ and required them to be ‘abolished and prohibited within the Community, *as provided in this Treaty ...*’ (emphasis

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<sup>32</sup> Case 8/55, *Fédération Charbonnière Belgique v. High Authority* (EU:C:1956:6), at 277 (emphasis in the original).

<sup>33</sup> Cohen (n. 30) 42.

<sup>34</sup> See Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration* (EU:C:1963:1).

<sup>35</sup> See Boerger and Rasmussen, ‘The Making of European Law: Exploring the Life and Work of Michel Gaudet’, 57 *American Journal of Legal History* (2017) 51, at 62.

<sup>36</sup> See Boerger-De Smedt, ‘La Cour de Justice’ (n. 2) 28-30; Valentine (n. 3) 122-124.

<sup>37</sup> Case C-221/88, *Busseni* (EU:C:1990:84) 135. See Arnulf, ‘The Legal Order of the ECSC’, 15 *European Law Review* (1990) 321.

<sup>38</sup> Joined Cases 7 and 9/54, *Industries Sidérurgiques Luxembourgeoises v. High Authority of the ECSC* (EU:C:1956:2).

added). It might have been inferred that the italicized words meant that Article 4 had effect only in so far as other provisions of the Treaty elaborated on it. However, the Court had already ruled that Article 4 had a fundamental status. It followed that ‘the provisions of Article 4 are sufficient of themselves and are directly applicable when they are not restated in any part of the Treaty’.<sup>39</sup> So the applicant could in principle rely on Article 4 against the respondent institution. The idea that an individual might rely directly on a Treaty provision in legal proceedings would within a decade have transformed Europe’s legal landscape.

Yet more was to come. *Humblet v. Belgium*<sup>40</sup> arrived at the Court in April 1960, after the entry into force of the Rome Treaties. The Court was now presided over by Andreas Donner, a Dutch professor of public law. Donner was 40 years old when he was nominated and brought to his task an energy that was beyond his experienced but elderly predecessor.<sup>41</sup> The *Humblet* case involved a dispute over the interpretation of the Protocol on the Privileges and Immunities of the ECSC. That Protocol gave the Court jurisdiction to rule on such disputes. The essential question was whether a Member State was entitled to take into account the remuneration of an official of the ECSC, which according to the Protocol was exempt from tax, in determining the rate of tax applicable to the income of his wife, who was not a Community official.

In the course of rejecting a challenge to its jurisdiction, the Court invoked Article 86 ECSC, the forerunner of the principle of sincere cooperation now set out in Article 4(3) TEU. It declared:<sup>42</sup>

... if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the Protocol which have the force of law in the Member States following their ratification and which take precedence over national law.

Consequently if in the present dispute the Court were to rule that the tax assessment in question was unlawful, it would necessarily follow that the Belgian government would be obliged to adopt the requisite measures to cancel it and to reimburse to the applicant any amounts which were wrongfully collected.

Thus, over two years before *Van Gend en Loos* and over three years before *Costa v. ENEL*, the Court had recognized the capacity of the ECSC Treaty to confer on individuals rights which would take precedence over inconsistent provisions of national law. It will be noticed also that the order in which these qualities were recognized—rights followed by primacy—was the same under both the ECSC and the EEC Treaties. This could have been happenstance but it might be

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<sup>39</sup> Ibid. 195.

<sup>40</sup> Case 6/60, *Humblet v. Belgium* (EU:C:1960:48) 569.

<sup>41</sup> Fritz (n. 13) 61-62. Pilotti was 73 when appointed and 79 when he retired from the Court.

<sup>42</sup> *Humblet v. Belgium* (n. 40) 569.

taken to imply that the Court saw primacy as a consequence of direct effect.<sup>43</sup> It is even possible to read into the Court's reference in *Humblet* to making 'reparation for any unlawful consequences which may have ensued' a harbinger of the principles of effectiveness and equivalence, which govern the enforcement of EU rights before national courts, and even of State liability.

Some of the Court's early case law also manifested a liberal approach to the admissibility of actions for annulment under Article 33 ECSC. This was perhaps a reflection of Pilotti's speech when the Court was sworn in. An example is *Assider v. High Authority*,<sup>44</sup> where the applicant challenged a number of decisions adopted by the High Authority. The applicant argued that they were vitiated by misuse of powers and an infringement of the Treaty. The High Authority challenged the admissibility of the application on the basis that the applicant had failed to prove that a misuse of powers had been committed. The Court rejected the High Authority's argument. At the admissibility stage, it was enough for the applicant merely to allege that a misuse of powers had taken place. Proof was not necessary until the substance of the case was considered.<sup>45</sup>

A good illustration of the use by the Court of the comparative method is provided by *Algera v. Common Assembly*.<sup>46</sup> The central issue in that case was the extent to which administrative measures giving rise to individual rights could be revoked. The Court<sup>47</sup> declared that this was a possibility which was:

... familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.

The Court stated that 'a comparative study of this problem of law ... in the six Member States' showed that a lawful administrative measure conferring individual rights could not in principle be withdrawn, whereas the law of all the Member States permitted the revocation of an unlawful administrative measure. It proceeded to examine in some detail the position in French, German, and Italian law and made a passing reference to Belgian, Luxembourg, and Netherlands law. It accepted 'the principle of the revocability of illegal measures at least within a reasonable period of time'. The applicants' claims were partly successful.<sup>48</sup>

The *Algera* case also provides an early example of the application of a general principle of law. The case required the Court to take a decision of principle on which the Treaty did not

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<sup>43</sup> The point assumed particular importance in relation to the case law on so-called 'incidental effect'. See P. Craig and G. de Búrca, *EU Law* (6th ed., 2015) 276-277.

<sup>44</sup> Case 3/54, *Assider v. High Authority* (EU:C:1955:2). See also Case 4/54, *ISA v. High Authority* (EU:C:1955:3).

<sup>45</sup> See also *Industries Siderurgiques Luxembourgeoises* (n. 38).

<sup>46</sup> Joined Cases 7/56 and 3 to 7/57, *Algera v. Common Assembly* (EU:C:1957:7). See also Case 8/57, *Acieries Belges v. High Authority* (EU:C:1958:9) 256 ('equality of treatment in the matter of economic rules').

<sup>47</sup> *Ibid.* 55.

<sup>48</sup> *Ibid.* 56.

provide any guidance. The principle was one on which the national laws of the Member States had much to say. Given their backgrounds, it was natural for the members of the Court to look to that rich body of law for guidance on the most appropriate approach to take to the case under consideration. The judgment of the Court underlined the Court's self-perception as a domestic, not an international, tribunal. Recourse to the national laws of the Member States as a source of general principles would later become well established in the case law, though the comparative analysis is now rarely set out in the judgment, as it was in *Algera*.

In *Meroni v. High Authority*,<sup>49</sup> a case decided by the ECSC Court after the entry into force of the Rome Treaties but before its successor court had been constituted, the Court drew on a different source for a general principle: the Rome Treaties themselves. One of the questions it needed to decide was the extent to which a plea of illegality was available under the ECSC Treaty. Such a plea could be invoked under Articles 184 EEC and 156 Euratom but the corresponding provision of the ECSC Treaty, Article 36, was more limited in scope and did not apply on the facts of *Meroni*. The Court observed: '[A]n illegal general decision ought not to be applied to an undertaking and no obligations affecting the said undertaking must be deemed to arise therefrom.'<sup>50</sup> Article 36 was not a special rule applicable only in the particular circumstances to which it referred, but 'the application of a general principle ...'.<sup>51</sup> Otherwise, the Court pointed out, it would be difficult for undertakings 'to exercise their right to bring actions, because it would oblige them to scrutinize every general decision upon publication thereof for provisions which might later adversely affect them or be considered as involving a misuse of powers affecting them'.<sup>52</sup>

The issue for which *Meroni* is most famous was the extent to which the High Authority was entitled to delegate its powers. The sophisticated principle laid down by the Court became part of the Union's constitutional orthodoxy and continued to be applied for several decades, although there are now signs that it is becoming less influential in the context of the Union's increasing recourse to agencies that it has itself established.<sup>53</sup> Its ruling also contained<sup>54</sup> an early reference to what is now called institutional balance—a principle which remains fundamental to the governance of the Union. This was the judgment of an increasingly assertive and self-confident court.

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<sup>49</sup> Case 9/56, *Meroni v. High Authority* (EU:C:1958:7).

<sup>50</sup> *Ibid.* 139-140.

<sup>51</sup> *Ibid.* 140.

<sup>52</sup> *Ibid.*

<sup>53</sup> R. Schütze, *European Union Law* (2015) 326-327, referring to Case C-270/12, *United Kingdom v. Parliament and Council* (EU:C:2014:18).

<sup>54</sup> *Meroni v. High Authority* (n. 49) 152.



### **3. The Rome Treaties**

#### ***A. Une Procession Dansante d'Echternach?***

On 25 March 2017, European heads of state and government gathered in Rome to celebrate the 60th anniversary of the signing of the Treaties of Rome. In the late 1950s, however, some considered those Treaties a retrograde step. For one thing, there were concerns that the proliferation of Communities might lead to internecine quarrelling. True, the Convention on Certain Institutions Common to the European Communities signed alongside the Rome Treaties had created a single Assembly and Court for all three Communities, but agreement on a single Council and Commission would not materialize until 1965.<sup>55</sup> In the meantime, the Rome Treaties enhanced significantly the powers of the Member States through the Council(s) at the expense of the now three European Executives (as the High Authority and two Commissions came collectively to be known). Moreover, the ECSC Court's attempts to open up access to individuals were peremptorily reversed by the Member States, which introduced strict standing rules for individuals wishing to launch annulment proceedings under the Rome Treaties. This remains a subject of controversy to the present day.<sup>56</sup> In addition, the infringement procedure was weakened by removing from the Commission, when acting under the Rome Treaties, the power to issue decisions declaring Member States to be in breach of their Treaty obligations and to impose sanctions in the event of continuing non-compliance. A sanctions regime for the Rome Treaties would not be added until Maastricht.

However, an innovation whose full significance was not initially appreciated was introduced following an initiative by Nicola Catalano, formerly legal adviser to the High Authority and a member of the Italian delegation during the negotiations that led to the Rome Treaties. Catalano's proposal concerned the preliminary rulings procedure. He suggested that the new treaties should give the Court jurisdiction to give preliminary rulings on questions, not only of the validity of Community acts, but also of the proper interpretation of Community law. That proposal was accepted and was to have momentous consequences, giving the Court an opportunity to rule on a host of questions which might not otherwise have reached it and enabling it to influence directly the application of Community law in the Member States.

#### ***B. Membership***

In accordance with Articles 244 EEC and 212 Euratom, the new single Court took up its duties on 7 October 1958, as soon as its members had been appointed. Four of the judges of the ECSC Court—Riese, Delvaux, Rueff, and Hammes—as well as Advocates General Lagrange and Roemer, continued in office. Lingering doubts about whether a judge representing the interests of workers could be genuinely independent led to the departure of Serrarens. Reluctant to go,

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<sup>55</sup> Treaty establishing a Single Council and a Single Commission of the European Communities (8 April 1965).

<sup>56</sup> Arnall, 'Judicial review in the European Union', in A. Arnall and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (2015) 376.

he was persuaded to do so by a substantially increased pension.<sup>57</sup> This meant that Italy's long-held desire for a second member of the Court could be satisfied. Accordingly, Catalano and Rino Rossi, a member of the Italian Court of Cassation, were appointed.

More significantly, the continued presence on the Court of members who had been involved in negotiating the Community's founding Treaties—Lagrange, Roemer, and Van Kleffens in the case of the ECSC Treaty and Catalano in the case of the Rome Treaties—must have had an effect on the culture of the Court. These individuals 'could legitimately claim to know the spirit and the philosophy of the founding Treaties'<sup>58</sup> and would have reinforced a collective sense that it was the task of the Court to contribute to the attainment of the Community's objectives.<sup>59</sup> In this, the Court was encouraged by the EEC Commission, presided over by the distinguished German lawyer Walter Hallstein, who had chaired the German delegations at both the Paris and Rome conferences and had also been involved in the negotiations which led to the European Convention on Human Rights. Other members of the Commission had also been involved in the Treaty negotiations, as had the head of its legal service, Michel Gaudet.<sup>60</sup> Originally recruited, like Lagrange, from the French Conseil d'Etat, Gaudet was a disciple of Monnet and had cultivated strong links with the United States legal profession. This gave him an Anglo-Saxon appreciation of the role courts might play.<sup>61</sup> He would soon have his moment in the sun.

The Rome Treaties had strengthened the criteria for appointment to the Court so that they now required members to be 'chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence'.<sup>62</sup> Much therefore depended on the qualifications required in each Member State for appointment to the highest judicial offices. The Treaties did not say anything about the nationality of members of the Court, it probably having been assumed that they would have the nationality of the Member State which nominated them. None the less, the Court might theoretically have been composed of, say, nine Russians.<sup>63</sup>

According to Fritz,<sup>64</sup> the appointments process was conducted without formal recruitment exercises. This effectively meant that it was confined to the great and the good in the Member States who were aware of vacancies. No thought was given by governments of the time to the effect a particular candidate might have on the ideology of the Court. Once appointed, the main concern of members was not that governments would object to the case

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<sup>57</sup> Fritz (n. 13) 102-109.

<sup>58</sup> Vauchez (n. 20) 111.

<sup>59</sup> *Mélanges Dehousse* (n. 4) 8-9.

<sup>60</sup> Cohen (n. 30) 34.

<sup>61</sup> See Boerger and Rasmussen (n. 35) 61.

<sup>62</sup> Arts 167 EEC and 139 Euratom.

<sup>63</sup> The idea of a Court composed entirely of Russians (presumably French-speaking) is attributed to Lord Mackenzie-Stuart, President of the Court from 1984-1988. See Kennedy, 'Thirteen Russians! The composition of the European Court of Justice', in A. Campbell and M. Voyatzi (eds), *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie-Stuart* (1996) 69.

<sup>64</sup> Fritz (n. 13) 123-124, 136-137.

law, but that they personally would be ousted from the Court because they no longer enjoyed the political support of their Member States. Political factors therefore seem to have been more important than the case law or legal competence in securing a lengthy tenure.

It was, however, necessary for the Member States to be realistic about the likely profile of candidates. They rightly assumed that each Member State needed to be represented on the Court and that all members of the Court would be formally of equal status. They must have known also that membership of what was still a little-known entity might be regarded as unattractive or at least entailing a degree of professional risk. It is known that many who were originally approached by the French government about membership of the Court declined the opportunity.<sup>65</sup> Rueff resigned from the Court in 1959 having been asked by the French government to join a committee to examine reforms to the French economy. Article 5 of the Statute provided that a judge who resigned should ‘continue to hold office until his successor takes up his duties’. After a delay of five months, Rueff was reappointed even though he had made clear that his preference was to return to Paris.<sup>66</sup> He did not finally leave the Court until 1962. He was succeeded by Robert Lecourt, a former minister and known Europhile who had been unsuccessful in securing an alternative post in France. It almost certainly remains the case that the professional attractions of life in Luxembourg depend, at least in part, on an individual’s career prospects at home and the lure of life in other capitals. But once there, many have been reluctant to leave.<sup>67</sup>

### **C. Case Law and Context**

The new Court’s early decisions were a puzzling mix of deference to the Member States and buccaneering constitutionalism. *Producteurs de Fruits v. Council*,<sup>68</sup> decided on 14 December 1962, was an action for the annulment under Article 173 EEC of a Council regulation on the establishment of a common organization of the market in fruit and vegetables. It was dismissed as inadmissible on the basis that the regulation was not of individual concern to the applicants. Advocate General Lagrange emphasized that there were ‘important differences’ between the EEC Treaty and the ECSC Treaty ‘which have obviously been intended by the authors of the Treaty of Rome’.<sup>69</sup> The EEC Treaty was ‘more strict than the ECSC Treaty with regard to the conditions which must be fulfilled before certain measures may be challenged’.<sup>70</sup> He reminded the Court that

these [legislative] texts have been arrived at only after considerable difficulty, and sometimes after a compromise reached in the Council, still wedded to the rule of

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<sup>65</sup> Vauchez (n. 20) 94; Fritz (n. 13) 85-86.

<sup>66</sup> Fritz (n. 13) 109-111.

<sup>67</sup> Ibid. 134-135.

<sup>68</sup> Joined Cases 16 and 17/62, *Producteurs de Fruits v. Council* (EU:C:1962:47).

<sup>69</sup> Ibid. 482.

<sup>70</sup> Ibid.

unanimity ... we are presented here, by the authors of the Treaty, with a considered choice which it cannot be for the Court to correct.<sup>71</sup>

The Court accepted that the system established by the Rome Treaties laid down

more restrictive conditions than does the ECSC Treaty for the admissibility of applications for annulment by private individuals. However, it would not be appropriate for the Court to pronounce on the merits of this system which appears clearly from the text under examination.<sup>72</sup>

The Court confirmed its restrictive approach to individual standing the following year in the ‘clementines case’, *Plaumann v. Commission*.<sup>73</sup>

These cases established a pattern of reluctance to entertain challenges to Community/Union acts by individuals that has endured to the present day. It reflects the strength of the Court’s conviction that its task—perhaps even its principal task—is to help secure the achievement of the Community/Union’s objectives. It has not been prepared to accept that, in the long run, shielding the institutions from review might undermine the EU’s legitimacy by weakening the principles of conferral and ultimately the rule of law.

In the early 1960s, however, the Court probably had little choice but to go along with the manifest intention of the Member States to make it more difficult to bring annulment actions under the Rome Treaties than under the Paris Treaty. What is surprising is that at almost exactly the same time it was delivering judgments that ran counter to what also seems likely to have been the intention of the Member States. The story of how this came about begins with Hallstein’s appointment in 1958 as first President of the EEC Commission. A federalist and proponent of a constitutional reading of the Community Treaties, he found in Gaudet a willing and highly able lieutenant. In 1958, Gaudet secured the establishment of a single Legal Service to advise all three European Executives ‘in order to make sure that the same “constructive” interpretations of the treaties would be put before the Court in each case’.<sup>74</sup> He headed the Legal Service of the European Executives, and subsequently that of the Commission of the European Communities, until 1969.

Anxious to avoid a loss of momentum on the journey towards a federal Europe, Gaudet set out to persuade the Court ‘to act as the federal Court of one single Community, considering the three different treaties all together as its “constitution”’.<sup>75</sup> One of his early initiatives was to promote the establishment of a learned society dedicated to the study of Community law with a view to creating doctrinal support for a constitutional reading of the Treaties. Gaudet also

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<sup>71</sup> Ibid. 486-487.

<sup>72</sup> Ibid. 478.

<sup>73</sup> Case 25/62, *Plaumann v. Commission* (EU:C:1963:17).

<sup>74</sup> Bailleux, ‘Michel Gaudet, a Law Entrepreneur: The Role of the Legal Service of the European Executives in the Invention of EC Law and the Birth of the Common Market Law Review’, 50 *Common Market Law Review* (2013) 359, at 363-364.

<sup>75</sup> Ibid. 362.

encouraged the publication in each Member State of academic journals devoted to Community law.<sup>76</sup>

One result of Gaudet's activities was FIDE, the *Fédération Internationale pour le Droit Européen*, whose founding congress in Brussels in 1961 was sponsored by the European Executives. Alter has claimed that FIDE and the growing number of national associations dedicated to the study of European law created 'an impression of a momentum favoring the ECJ's doctrinal creations' and 'critically defined what European legal integration became'.<sup>77</sup> M. Rasmussen observes, however, that FIDE and the national associations 'did not quite achieve the impact ... that Gaudet had initially hoped for'.<sup>78</sup> That view is supported by Byberg, who maintains that 'neither organisationally nor ideologically did FIDE and the "Euro-law associations" constitute a cohesive network in the ideological confrontation with sceptical national actors; FIDE was itself an arena of contestation'.<sup>79</sup> The communication strategy later implemented by Lecourt when he became President of the Court in 1967 to encourage national courts to make use of the preliminary rulings procedure seems to have been more effective in raising awareness of the possibilities offered by Community law.<sup>80</sup>

It was in 1961 that the Dutch section of FIDE began a project to identify self-executing provisions of the EEC Treaty. Two Dutch lawyers, H. G. Stibbe and L. F. D. ter Kuile, persuaded the *Tariefcommissie*, Amsterdam, to refer to the Court, using the new preliminary rulings procedure, two cases which raised the question whether Article 12 EEC had direct application within the territory of a Member State. One of them was *Van Gend en Loos*.<sup>81</sup> Advocate General Roemer and the three Member States that took part in the proceedings (the Netherlands, Belgium, and Germany) urged the Court to give a negative response to the question referred to it. However, the Court preferred the submissions of the Commission and endorsed the argument of the claimant.

There was an element of serendipity in the outcome. M. Rasmussen observes that the replacement of Rueff by the Europhile Lecourt 'clearly testifies to the extent to which the French leadership did not consider the Court of Justice an important actor in the Communities'.<sup>82</sup> Together with Alberto Trabucchi, an Italian judge who had replaced Catalano,<sup>83</sup> Lecourt opposed Hammes, Riese, and Donner, who were minded to follow

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<sup>76</sup> The first example of such a journal, the *Common Market Law Review*, was launched in 1963. See Byberg, 'The History of *Common Market Law Review* 1963-1993', 23 *European Law Journal* (2017) 45.

<sup>77</sup> K. Alter, *The European Court's Political Power* (2009) 73.

<sup>78</sup> Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1962-65', 21 *Contemporary European History* (2012) 375, 384.

<sup>79</sup> Byberg, 'A Miscellaneous Network: The History of FIDE 1961-94', 57 *American Journal of Legal History* (2017) 142.

<sup>80</sup> Fritz (n. 13) 148-150.

<sup>81</sup> *Van Gend en Loos* (n. 34). See Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment', 12 *International Journal of Constitutional Law* (2014) 136. The other case was Joined Cases 28, 29 and 30/62, *da Costa en Schaake* (EU:C:1963:6).

<sup>82</sup> Rasmussen, 'Constructing and Deconstructing' (n. 2) 648.

<sup>83</sup> Catalano, who had been an ally of Gaudet in the Treaty negotiations, was forced to resign shortly after being reappointed because the Italian government wished to replace him with Alberto Trabucchi, whose brother, Giuseppe, was the Italian Finance Minister: Fritz (n. 13) 113 and 200-201.

Advocate General Roemer. Ultimately, Rossi and Delvaux sided with Lecourt and Trabucchi to form a 4:3 majority in the claimant's favour.<sup>84</sup>

The case was a ringing endorsement of the constitutional reading of the Treaties espoused by Hallstein and Gaudet. True, the Court had left some gaps in its reasoning which made it possible to argue that the implications of the case were limited. How important was it that the dispute was a vertical one, between a private company and the state? How much significance should be attributed to the emphasis placed by the Court on the negative character of Article 12? Was the Court implying that directly effective provisions of the Treaty might take precedence over incompatible rules of national law? What about acts of secondary law?

Nothing could be taken for granted, but hindsight shows that some at least of these questions were easily answered. The Court said that the negative character of Article 12 was one of a number of features that made it 'ideally adapted to produce direct effects'. This clearly did not exclude the possibility that a provision with different characteristics might also have direct effect. It did indeed seem to follow from the judgment that directly effective provisions of Community law would take precedence over inconsistent rules of national law for otherwise a finding of direct effect might not make any practical difference. The reason the Court did not address the issue in *Van Gend en Loos* was simply that it was settled by Dutch law and the national judge therefore did not feel it necessary to put a question on the matter to the Court. Donner, who had been in the minority, later maintained that if the Court 'had been competent to do so it would presumably have ruled that the EEC Treaty has precedence over local law but it held that the determination at law of this priority belonged in this case ... to the competence of the domestic courts'.<sup>85</sup> As for secondary law, it was widely assumed that regulations, described by the Treaties as 'directly applicable' and as entering into force on the date specified or 20 days after publication in the Official Journal, were capable of conferring rights directly on individuals. It was also assumed that directives were not. That assumption proved to be false, although the issue of the extent to which directives might have direct effect would in due course cause the Court more difficulty than the question of whether Treaty articles might do so.

The Court's decision encouraged the advocates of a constitutional reading of the Treaties to pursue their attempts to enlist the support of the Court. Its decision in *Van Gend en Loos* was brought to the attention of professional circles and the wider public at every opportunity by judges, référendaires, lawyers involved in the case, and others, in an attempt to ensure that its potential implications were widely understood.<sup>86</sup>

An opportunity to add the next piece of the jigsaw arose in *Costa v. ENEL*,<sup>87</sup> a reference made by the Giudice Conciliatore, Milan, on 16 January 1964. In the main action, the claimant

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<sup>84</sup> Rasmussen, 'Constitutional Practice' (n. 78) 153-154. See also Pescatore, 'Robert Lecourt (1908-2004). Eloge funèbre prononcé par Pierre Pescatore, ancien Juge de la Cour, à l'audience solennelle du 7 mars 2005', 41 *Revue Trimestrielle de Droit Européen* (2005) 589, 590-591; Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt', 28 *European Journal of International Law* (2017) 935 (who finds a link between Lecourt's approach at the Court and his thesis on French property law completed in 1931).

<sup>85</sup> Donner, 'National Law and the Case Law of the Court of Justice of the European Communities', 1 *Common Market Law Review* (1963) 8, at 14.

<sup>86</sup> *Ibid.* 13.

<sup>87</sup> Case 6/64, *Costa v. ENEL* (EU:C:1964:66).

was challenging a demand that he pay a bill issued by ENEL, the recently nationalized Italian electricity company. The claimant alleged that the Law establishing ENEL infringed Articles 102, 93, 53, and 37 EEC. Because of the small amount of money involved, the referring court, which was relatively junior, was the court of first and last resort and was therefore subject to the obligation to refer under the third paragraph of Article 177 EEC.

The case has become famous because of its relationship with *Van Gend en Loos* decided less than a year before the reference was made, yet it also had major implications for Italian energy policy. The referring court provided little information about the background to the case, however, merely transmitting a copy of the case file to the Court and noting that the Italian legislation nationalizing the distribution of electricity had been alleged to contravene the articles of the Treaty mentioned above.<sup>88</sup> It did not ask what the consequences might be if that allegation were to be wholly or partly upheld and in particular whether any of the provisions in question would take precedence over the contested national legislation.

In parallel with the reference to the Court of Justice, the Giudice Conciliatore also referred the case to the Italian Constitutional Court under a domestic procedure which had partly inspired Article 177. The Italian Constitutional Court (perhaps wishing to preempt the Court of Justice) responded so quickly that Advocate General Lagrange was able to comment on its ruling in his Opinion, delivered on 25 June 1964.<sup>89</sup> As he explained, the Constitutional Court held that, since the Treaty had been ratified by an ordinary Law not having constitutional status, it would be expressly or impliedly repealed by a later Law that was inconsistent with it. There was therefore no need to consider whether the first Law was compatible with the Treaty or to make a reference to the Court of Justice. In the proceedings before the Court of Justice, the Italian Government accordingly argued that the referring court's task was simply to apply the applicable domestic Law. If Italy was in breach of its Treaty obligations, this could be brought before the Court of Justice only pursuant to the infringement procedure under Articles 169 and 170 EEC.

This argument illustrated perfectly why primacy was the necessary corollary of direct effect. Advocate General Lagrange underlined the issues at stake by insisting on 'the disastrous consequences (and I do not think this expression is too strong)' that the precedent set by the Italian Constitutional Court, if endorsed, 'would risk having as regards the functioning of the system of institutions established by the Treaty and, as a consequence, the very future of the Common Market'. Although he did not use the term, Advocate General Lagrange therefore maintained that directly effective provisions of Community law should be accorded precedence

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<sup>88</sup> However, the Court had the benefit of an extensive submission by Professor G. Stendardi on behalf of Mr Costa setting out the political and economic implications of the Law nationalizing the production of electricity: see F. Nicola in C. Kilpatrick and J. Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (OUP, forthcoming, 2020). Nicola also notes that a file relating to ENEL's industrial policy has been removed from the records on *Costa v. ENEL* at the Historical Archives of the EU at the EUI in Florence, available at <https://www.eui.eu/Research/HistoricalArchivesOfEU> (accessed 18 July 2018).

<sup>89</sup> Case 6/64, *Costa v. ENEL*, Opinion of AG Lagrange (EU:C:1964:51) 605.

over inconsistent provisions of national law, a view which the Court famously and explicitly endorsed.<sup>90</sup>

Whatever the legal niceties, it is possible that the outcome in *Van Gend en Loos* and *Costa* was affected by the political and geopolitical backdrop. This would undoubtedly have been weighing on the governments of the Member States, with which the members of the Court had close connections.<sup>91</sup> The period was one of great global tension. On 1 May 1960, an American U-2 spy plane was shot down in Soviet airspace and its pilot, Gary Powers, captured. On 17 April 1961, a paramilitary group backed by the CIA embarked on an ill-fated invasion of Cuba at the Bay of Pigs in a doomed attempt to overthrow the régime of Fidel Castro, which was backed by the Soviet Union. On 13 August 1961, the long-running crisis over the status of Berlin came to a head when the German Democratic Republic started building the infamous Berlin Wall in an attempt to stop emigration to the West. From 16–28 October 1962, the world seemed on the brink of nuclear war over the surreptitious deployment by the Soviet Union in Cuba of nuclear missiles capable of hitting targets in the continental United States. These linked incidents underlined the fragility of the post-war international order.

The failure of the European Defence Community Treaty in 1954 following a negative vote in the French National Assembly and the subsequent abandonment of the related European Political Community Treaty meant that the EEC Treaty needed to succeed. However, the idea that Europe could be constructed through a project led by the Commission to harmonize the national laws of the Member States was running into difficulty and intergovernmentalism seemed to be gaining ground.<sup>92</sup> The election in June 1958 of the eurosceptic Charles de Gaulle as French President further blighted the development of the Communities until his resignation in 1969.

Soon after his election, de Gaulle set in motion a process that would seek to shift the development of Europe away from the supranational model on which the Communities were based to an intergovernmental model—a ‘Europe of Nation States’<sup>93</sup>—more conducive to enhancing France’s international profile. That process began with the so-called first Fouchet Plan of November 1961, which envisaged<sup>94</sup> the creation of a union of states with the aim of adopting common foreign and defence policies and cooperation in the scientific and cultural fields. It was envisaged that this would ultimately absorb the European Communities. The plan unmasked disagreement among the six about the balance between intergovernmentalism and

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<sup>90</sup> Phelan (n. 84), links *Van Gend en Loos* and *Costa* with the refusal of the Court to allow Member States to take the law into their own hands. See Joined Cases 90 and 91/63, *Commission v. Luxembourg and Belgium* (EU:C:1964:80); Case 232/78, *Commission v. France* (EU:C:1979:215).

<sup>91</sup> See the discussion of Harold Macmillan’s unsuccessful efforts to take the UK into the European Community in the early 1960s in H. Young, *This Blessed Plot: Britain and Europe from Churchill to Blair* (1999) ch. 4. Archival research might reveal the extent, if any, to which the Court was influenced by that context. See generally Nicola (n. 88).

<sup>92</sup> Vauchez, ‘The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity’, 16 *European Law Journal* (2010) 1, at 6-7.

<sup>93</sup> The phrase ‘l’Europe des patries’ is often associated with de Gaulle, though at a press conference at the Elysée Palace on 15 May 1962 he denied ever having used it.

<sup>94</sup> The text is available at [http://www.cvce.eu/obj/draft\\_treaty\\_fouchet\\_plan\\_i\\_2\\_novembre\\_1961-en-485fa02e-f21e-4e4d-9665-92f0820a0c22.html](http://www.cvce.eu/obj/draft_treaty_fouchet_plan_i_2_novembre_1961-en-485fa02e-f21e-4e4d-9665-92f0820a0c22.html) (accessed 18 July 2018).



supranationalism; the role of the Atlantic alliance and NATO; and the possible involvement of the United Kingdom, which had applied for membership the previous August.

With the negotiations becoming acrimonious, France produced a second Fouchet Plan in January 1962.<sup>95</sup> Teasdale observes:<sup>96</sup> ‘... this text was characterized ... by a significant hardening of position ... accentuating the intergovernmental character of the proposed Union and enhancing its ability to act independently of the United States.’ The effect was to unite the other five Member States against France and the following month they produced a counterproposal. However, it proved impossible to find common ground and negotiations collapsed in April 1962. In May, de Gaulle attacked the Community’s institutions and underlying philosophy at a press conference, prompting five of his ministers to resign.<sup>97</sup> In January 1963, de Gaulle vetoed UK membership of the Communities. Teasdale concludes:<sup>98</sup>

The stalemate over the Fouchet Plan gradually became endemic ... Unable to secure agreement to his intergovernmental design, de Gaulle resolved to stall the Community and prevent any who opposed his institutional vision (Belgium and the Netherlands) or who might challenge France’s geopolitical interests (those states plus Britain) from getting their way. In this, he succeeded.

It was in that febrile context that the Court was asked to decide *Van Gend en Loos* and *Costa*, a context in which a new and potentially devastating world war was not a remote possibility and the most powerful Member State was seeking to unpick Treaties on which the ink had only just dried. It is not perhaps surprising that the Court felt that it was incumbent on it to do what it could to ensure that Member States complied with the obligations they had so recently accepted. It was, after all, its duty to ensure that in the application of the Treaties the law was observed.

Though the Court could not have predicted it, France was to trigger a new crisis less than a year after *Costa v. ENEL* when de Gaulle told his ministers not to attend Council meetings during the last six months of 1965. Article 205(3) EEC provided that ‘abstentions by Members present in person or represented’ did not prevent the Council from acting unanimously. Thus, if a Member State was neither present nor represented, decisions requiring unanimity could not be taken.<sup>99</sup> A particular sticking point for France was the increased use of qualified majority voting envisaged by the Treaty from the start of the third stage of the transitional period on 1 January 1966.<sup>100</sup> The crisis was resolved on 29 January 1966 by the so-

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<sup>95</sup> The text is available at [http://www.cvce.eu/content/publication/1999/1/1/c9930f55-7d69-4edc-8961-4f12cf7d7a5b/publishable\\_en.pdf](http://www.cvce.eu/content/publication/1999/1/1/c9930f55-7d69-4edc-8961-4f12cf7d7a5b/publishable_en.pdf) (accessed 18 July 2018).

<sup>96</sup> Teasdale, ‘The Fouchet Plan: De Gaulle’s Intergovernmental Design for Europe’, LSE ‘Europe in Question’ Discussion Paper Series, No. 117/2016, October 2016, at 36.

<sup>97</sup> *Ibid.* 49.

<sup>98</sup> *Ibid.* 52-53.

<sup>99</sup> This remains the rule (see Art. 238(4) TFEU).

<sup>100</sup> In a number of important areas of Community competence, qualified majority voting (QMV) was introduced progressively during the course of the transitional period. The use of QMV in the field of establishment and services, for example, was intended to take effect at the start of the second stage of the transitional period for some aspects (see Arts. 54(2) and 63(2) EEC) and the start of the third stage for others (see Art. 56(2) EEC). The start of the third stage was also intended to mark

called Luxembourg Compromise, which came to be understood as conferring a veto over Community legislation on any Member State which considered its vital national interests to be at stake, whatever the Treaties might say about how the legislation concerned was to be adopted. The result was the adoption by the Council of a practice of consensus, with legislation not being adopted until all Member States were content with it. This had the effect of slowing down the process and diluting the content of the measures adopted. It played a major role in the failure of the Community to complete the common market by the end of the transitional period on 31 December 1969 (though it did succeed in completing the customs union 18 months ahead of schedule on 1 July 1968).<sup>101</sup>

The empty chair crisis also brought Hallstein into conflict with de Gaulle. There could only be one winner, and Hallstein resigned in 1967 when the 1965 Merger Treaty, which created a single Council and a single Commission of the European Communities, took effect. Gaudet's position was also undermined and he resigned in 1969.<sup>102</sup>

It was not until the 1980s that the practice of consensus started to break down. It was delivered a mortal blow by the Single European Act, when all Member States accepted the need for qualified majority voting if the 'internal' market was to be completed by 31 December 1992.

#### **D. Completing the Common Market**

The Court was not asked to intervene over the empty chair crisis and studiously ignored the Luxembourg Compromise.<sup>103</sup> Donner later argued that, had it been asked to intervene, the Communities might have collapsed since their legal framework was not then sufficiently robust to secure compliance with whatever the Court might have said the Treaties required.<sup>104</sup> That does not, however, mean that the Court did not respond indirectly. As Lagrange explained, the Court viewed itself as under a duty, 'in securing observance of the law, to give priority to the attainment of the fundamental objectives of the Treaty, in the face of any obstacle, and, more particularly, where the Community legislative authority has failed to act within the prescribed time-limit'. Where that happened, the Court was led 'to assume responsibilities it would not have had to shoulder, had the institutions been functioning properly'.<sup>105</sup>

The Luxembourg Compromise inflicted a career-threatening injury on the Community. The Court had not been forewarned, but the decisions in *Van Gend en Loos* and *Costa* meant

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the introduction of QMV in connection with the common agricultural policy (see (Art. 43(2) EEC), the free movement of capital (see Art. 69 EEC), the common transport policy (see Art. 75(1) EEC) and the common commercial policy (see Arts 111(3) and 112(1) EEC).

<sup>101</sup> Decision 66/532 concerning the abolition of customs duties, the prohibition of quantitative restrictions as between Member States and the application of the Common Customs Tariff duties for products other than those set out in Annex II to the Treaty, JO 1966, p. 2971 (known as 'the Acceleration Decision'); D. Edward and R. Lane, *Edward and Lane on European Union Law* (2013) 446.

<sup>102</sup> Boerger and Rasmussen (n. 35) 73-74.

<sup>103</sup> Though it has made it clear that mere resolutions or declarations by the Member States cannot derogate from the rules laid down in the Treaties or in secondary law. See e.g. Case 68/86, *United Kingdom v. Council* (EU:C:1988:85) para. 38; Case C-292/89, *Antonissen* (EU:C:1991:80) para. 18.

<sup>104</sup> Quoted in Vauchez (n. 20) 48-49.

<sup>105</sup> *Mélanges Dehousse* (n. 4) 11. Lagrange acknowledged that there were limits to what the Court could do to compensate for the shortcomings of the legislature.

that it was forearmed. In the 1970s, against a background of worsening economic conditions following steep rises in the price of oil, the Court deployed the weapons with which it had equipped itself to help compensate for the Member States' failure to ensure that the common market was completed by the end of the transitional period. Particularly notable rulings from this period included *Reyners*,<sup>106</sup> *van Binsbergen*,<sup>107</sup> and *Defrenne II*,<sup>108</sup> in which it held that Treaty provisions which might have been thought to require implementation by the Community legislature were capable, in certain circumstances, of producing direct effect. In *Express Dairy Foods*,<sup>109</sup> the Court was openly critical of the Community legislature, speaking of 'the regrettable absence of Community provisions harmonizing procedure and time limits ...'<sup>110</sup> in the national courts.

It is hard to deny that the Court's case law of the 1960s and 1970s made a difference to the development of the Community. Indeed, in his famous book, *L'Europe des Juges*, published in 1976, Lecourt argued that it would have been impossible to establish the common market without the judges of the Court of Justice and their colleagues in the national courts.<sup>111</sup>

Does this mean that Jean Monnet's fear of a *gouvernement des juges* had come to pass? Not entirely. The appointments process, and particularly the fate of Catalano, as well as ongoing contacts with the Member States, made the judges very sensitive to the limits of what was politically acceptable.<sup>112</sup> The Court was seeking during this time to help the Community navigate what was a tempestuous early period, both internally and externally. Views may—and do—differ about whether or not the Court went too far in *Van Gend en Loos* and *Costa*. Certainly there is a reasonable argument that, when dealing with a framework Treaty (*traité cadre*) such as the EEC Treaty, it is sensible, perhaps even unavoidable, to approach its interpretation through consideration of its spirit and its general scheme as well as its wording. It also seems self-evident that the common market would simply not have worked in the way intended in the absence of direct effect and primacy, as Lecourt points out. Once the die was cast in the early 1960s, much of the later case law simply represented a working out of the consequences.

Moreover, Fritz has shown that the ideological direction of the Court was not uppermost in the minds of the Member States, who were preoccupied in the 1960s with more overtly national concerns.<sup>113</sup> Even in the 1970s, the Member States did not seek to use the nomination process to influence the Court's case law. A potential successor to Lecourt refused to go to Luxembourg on the basis that he disagreed with the direction of the case law and would be

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<sup>106</sup> Case 2/74, *Reyners v. Belgium* (EU:C:1974:68) (right of establishment).

<sup>107</sup> Case 33/74, *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid* (EU:C:1974:131) (right to provide services).

<sup>108</sup> Case 43/75, *Defrenne v. SABENA* (EU:C:1976:56) (equal pay).

<sup>109</sup> Case 130/79, *Express Dairy Foods* (EU:C:1980:155).

<sup>110</sup> *Ibid.*, at para. 12 of the judgment.

<sup>111</sup> See also R. Lecourt, 'Qu'aurait été le droit des Communautés sans les arrêts de 1963 et 1964?', in *Mélanges Jean Boulouis: l'Europe et le droit* (1991) 350.

<sup>112</sup> See Fritz (n. 13) 167.

<sup>113</sup> *Ibid.* 124-127.

wasting his time by constantly expressing resistance.<sup>114</sup> The person finally chosen to succeed Lecourt was Adolphe Touffait, who had played such an important role in persuading the French Cour de Cassation to accept the doctrine of primacy.<sup>115</sup> So governments continued to nominate and renominate judges who were unlikely to question the direction of the case law.

However, it was undoubtedly relevant that Lecourt, a convinced European, was joined on his appointment to the Presidency by so many like-minded judges. They included Josse Mertens de Wilmars (President himself from 1980-84) and Pierre Pescatore, described by Fritz as ‘la troupe d’assaut’ of supranationalism.<sup>116</sup> Trabucchi, who had helped swing *Van Gend en Loos*, and Walter Strauss, who succeeded Riese, were other proponents of an activist Court.<sup>117</sup>

But if national governments seemed sanguine about the direction of the case law, some apex national courts were beginning to cavil at the idea that Community law might take precedence over fundamental rights and values enshrined in national constitutions. The standard-bearers in this development were the German courts, particularly the Bundesverfassungsgericht,<sup>118</sup> whose case law reflected what Davies calls ‘a broad swath of West German intellectual and public discourse [that] was dedicated to analysing critically, comparing, and ultimately rejecting the path chosen by the ECJ for the European legal system’.<sup>119</sup>

The resistance grew following the great enlargement of 2004 and 2007, with several courts of the new Member States showing reluctance to allow their newly recovered judicial freedom to be limited by the CJEU.<sup>120</sup> To date, the Bundesverfassungsgericht has not gone so far as to defy the CJEU,<sup>121</sup> which has for its part come to accept the need to tread carefully when national constitutional values are at stake.<sup>122</sup>

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<sup>114</sup> Ibid. 127-128.

<sup>115</sup> See *Directeur Général des Douanes v. Société Vabre* [1975] 2 CMLR 336, 363; Mancini, ‘The Making of a Constitution for Europe’, 24 *Common Market Law Review* (1989) 595, at 605.

<sup>116</sup> Pescatore’s enthusiasm for closer integration was particularly evident in his involvement in the negotiations over the Fouchet Plan, where he led the Luxembourg delegation: Fritz (n. 13) 151-152.

<sup>117</sup> For a trenchant and wide-ranging assault on the Court’s alleged activism, see H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986). The extent to which the Court plays a political role is considered by Vauchez in this volume.

<sup>118</sup> See e.g. *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (‘Solange I’) [1974] 2 CMLR 540; ‘Solange II’ [1987] 3 CMLR 225; *Brunner v. European Union Treaty* [1994] 1 CMLR 57; *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13.

<sup>119</sup> B. Davies, *Resisting the European Court of Justice: West Germany’s Confrontation with European Law, 1949-1979* (2012) 201.

<sup>120</sup> See e.g. the decision of the Czech Constitutional Court in the so-called ‘Slovak Pensions’ case, Pl. ÚS 5/12, 31 January 2012; Zbiral, ‘A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed *Ultra Vires*’, 49 *Common Market Law Review* (2012) 1475.

<sup>121</sup> A case in point is Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag* (EU:C:2015:400), where the ruling of the Court was accepted: see Bundesverfassungsgericht, judgment of 21 June 2016.

<sup>122</sup> See Case C-42/17, *MAS and MB* (EU:C:2017:936), where the CJEU qualified its ruling in Case C-105/14, *Taricco and Others* (EU:C:2015:555), after it was queried by the Italian Constitutional Court. A potential flashpoint was the refusal of the Danish Supreme Court in Case no. 15/2014, 6 December 2016, to follow the ruling of the CJEU in Case C-441/14, *Dansk Industri, acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* (EU:C:2016:278). See Madsen, Olsen, and Šadl, ‘Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court’s Decision in the *Ajos* Case and the National Limits of Judicial Cooperation’, 23 *European Law Journal* (2017) 140; Neergaard and Sørensen, ‘Activist Infighting Among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and

## 4. The Price of Success

### A. Growing Pains

When the single Court of Justice opened for business on 7 October 1958, its members must have felt a mixture of excitement and trepidation. Excitement, because the integration project had become much larger in scope and the Court could be expected to play a correspondingly enhanced role. Trepidation, because it would be working with an elegantly drafted but often imprecise Treaty for which precedents set by the ECSC Court would have only limited application.

The Court might, however, have been reassured by two factors. The shortage of useful precedents meant that it would often be called upon to rule *de novo*, unencumbered by previous case law. The light case load meant that each case could be given the Court's full attention and decided fairly quickly. *Van Gend en Loos* and *Costa* were both decided in around six months. Indeed, the workload was initially so light that Rueff was not the only member of the Court who felt able to take on outside activities. Riccardo Monaco of Italy, a judge of the Court from 8 October 1964 to 3 February 1976, had previously held senior posts in the Italian Ministry of Foreign Affairs and later wrote that his workload at the Court enabled him to return to the Ministry quite frequently.<sup>123</sup>

Until 1969, the Court's annual output could be accommodated comfortably in a single volume of the European Court Reports. In 1970, when there were six Member States, two volumes were needed for the first time (see Table 1.1).

**Table 1.1. The increasing case load of the CJEU**

	1970	1980	1988
<b>Number of Member States</b>	6	9	12
<b>New cases</b>	79	279	373
<b>Judgments</b>	64	132	238

Source: T. Millett, *The Court of First Instance of the European Communities* (1990) 2.

The increasing case load of the Court had a number of fairly obvious consequences. First, membership of the Court became a full-time occupation. Second, the growing case load meant a growing body of case law, which had to be taken into account when new cases were decided. This made judgments harder to draft at a time when successive enlargements had themselves made deliberations more difficult.<sup>124</sup> Third, proceedings before the Court began to take longer (see Table 1.2).

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the *Ajos Case*', 36 *Yearbook of European Law* (2017) 275; Holdgaard, Elkan, and Schaldemose, 'From Cooperation to Collision: the ECJ's *Ajos* Ruling and the Danish Supreme Court's Refusal to Comply', 55 *Common Market Law Review* (2018) 17.

<sup>123</sup> See Vauchez (n. 20) 110. Many judges continued to be involved in activities outside the Court notwithstanding Art. 4 of the Statute: Fritz (n. 13) 161-167.

<sup>124</sup> Address of Judge T. Koopmans on the occasion of the retirement of Lord Mackenzie Stuart, 14 *European Law Review* (1989) 1, at 2.

**Table 1.2. Length of proceedings (months)**

	1975	1980	1988
<b>Preliminary rulings</b>	6	9	18
<b>Direct actions</b>	9	18	24

Source: T. Millett, *The Court of First Instance of the European Communities* (1990) 2. Figures for the length of proceedings in 1970 are not available.

### **B. The Advent of the General Court**

To address growing concern about the Court's work load, the Single European Act added to the EEC Treaty a new provision, Article 168a, authorizing the Council to establish a court of first instance.<sup>125</sup> Created by the Council in 1988,<sup>126</sup> the Court of First Instance (CFI) quickly established its credentials among practitioners and academics. Its jurisdiction was initially limited, but over time the limits were whittled away. The result is that Article 256 TFEU now confers on what is, since the Treaty of Lisbon, now called the General Court a potentially broad first instance jurisdiction, leaving much of the detail to be worked out in the Statute. It currently deals with all direct actions brought by natural or legal persons as well as certain direct actions brought by Member States.<sup>127</sup> Although Article 168a EEC had said it could not hear preliminary references, Article 256(3) TFEU now permits it to do so 'in specific areas laid down in the Statute'. No such areas have yet been specified.

In 2001, the Treaty of Nice introduced into the Union judicial system a third tier of tribunals below the CFI. Known as judicial panels, they would be created by the Council to deal at first instance with cases brought in certain specific areas.<sup>128</sup> The first (and so far only) judicial panel to be created was the EU Civil Service Tribunal (CST), set up in 2004 to deal with staff cases. These then formed a significant proportion of the new cases brought before the CFI, which was starting to face workload problems of its own. The CST comprised seven judges appointed by the Council. This gave grounds for optimism that, if the CFI continued to struggle with workload problems, the appointment of a small number of extra judges might be feasible. While the number of judges in the Court of Justice has, since the Treaty of Nice, been fixed by the Treaty at one per Member State, the number of judges in the CFI was and remains specified in the Statute, the relevant part of which may be amended without a Treaty change.<sup>129</sup>

In March 2011, the Court submitted a request to the European Parliament and the Council under Article 281 TFEU for the number of judges in the General Court to be increased by 12, from 27 to 39.<sup>130</sup> Member States seemed sympathetic to the idea in principle, but were

<sup>125</sup> Corresponding provisions were inserted in the other Treaties: see Art. 32d ECSC; Art. 140a Euratom.

<sup>126</sup> Decision 88/591, OJ 1989 C 215/1 (corrected version). See Kennedy, 'The Essential Minimum: The Establishment of the Court of First Instance', 14 *European Law Review* (1989) 7 and 15 *European Law Review* (1990) 54.

<sup>127</sup> See Art. 51 of the Statute.

<sup>128</sup> Art. 225a EC.

<sup>129</sup> Art. 245 EC/Art. 281 TFEU.

<sup>130</sup> See *The Workload of the Court of Justice of the European Union* (House of Lords European Union Committee, Session 2010-11, 14th Report, HL Paper 128) para. 53.

unable to agree on how the extra judges should be chosen.<sup>131</sup> By the first half of 2014 and notwithstanding the precedent of the CST, the Greek Presidency was driven to the conclusion that any solution involving less than one additional judge per Member State would be unlikely to secure agreement in the Council. In September 2014, the Court was therefore invited by the Italian Presidency of the Council to present new proposals on how an increase in the number of General Court judges might be agreed.

The following month, the Court took the hint and proposed a phased increase in the number of General Court judges to two per Member State. It also proposed the abolition of the CST and the return of staff cases to the General Court. The proposal noted that this had been discussed internally and that the General Court had expressed a ‘preference for the establishment of a specialized trademark court and for the status quo to be maintained as regards the CST’.<sup>132</sup>

For the Court, one of the main advantages of its preferred course was that it would enable greater flexibility in dealing with cases. The Court was also worried about alleged failures by the General Court to adjudicate within a reasonable time, thereby exposing the Union to potentially substantial claims for damages. However, this was an uncomfortable situation for the Union to find itself in.<sup>133</sup> As Table 1.3 shows, there had been no significant deterioration in the position since the 2011 request and, in some respects the position had improved. This made a plan for 28 new judges when 12 had previously been thought sufficient objectively unsustainable.

**Table 1.3. Workload of the General Court (2011–2018)**

	2011	2012	2013	2014	2015	2016	2017	2018
<b>New cases</b>	722	617	790	912	831	974	917	834
<b>Completed cases</b>	714	688	702	814	987	755	895	1009
<b>Pending cases</b>	1308	1237	1325	1423	1267	1486	1508	1333
<b>Duration*</b>	26.7	24.8	26.9	23.4	20.6	18.7	16.3	20
<b>Number of judges at year end</b>	27	27	28	28	40	47	47	47

\*Months and tenths of months.

Source: CJEU Statistics of Judicial Activity, available at [https://curia.europa.eu/jcms/jcms/Jo2\\_7032/en/](https://curia.europa.eu/jcms/jcms/Jo2_7032/en/)

<sup>131</sup> See *Workload of the Court of Justice of the European Union: Follow-Up Report* (House of Lords European Union Committee, Session 2012-13, 16th Report, HL Paper 163) para. 61.

<sup>132</sup> The CST had been widely considered a success: Alemanno and Pech, ‘Thinking Justice Outside the Docket: a Critical Assessment of the Reform of the EU’s Court System’, 54 *Common Market Law Review* (2017) 137.

<sup>133</sup> See F. Dehousse, ‘The Reform of the EU Courts (II): Abandoning the Management Approach by Doubling the General Court’ (Egmont Paper 83, March 2016). The title refers to an earlier paper by the same author: ‘The Reform of the EU Courts: The Need of a Management Approach’ (Egmont Paper 53, December 2011). Dehousse was a member of the General Court from 7 October 2003 to 19 September 2016.

Be that as it may, the proposals were eventually adopted by the European Parliament and the Council<sup>134</sup> in the form of two regulations. Regulation 2015/2422<sup>135</sup> amended the Statute of the Court to provide for a progressive increase in the membership of the General Court to 40 on 25 December 2015 and 47 on 1 September 2016. It was due to reach two judges per Member State as from 1 September 2019, although there was a delay in the appointment of the Slovak and Slovene judges. Regulation 2016/1192<sup>136</sup> transferred first instance jurisdiction in staff cases back to the General Court and dissolved the CST.

The position taken by the Council seemed all the more difficult to defend given the budgetary pressures under which the legal systems of many Member States were operating in the wake of the 2008 financial crisis. It was not as if there were no other ways to address the General Court's problems. One possibility would have been to introduce court fees, which are standard in the national systems.<sup>137</sup> Another would have been to increase the number of *référéndaires*, who undertake much of the time-consuming work of sifting and synthesizing the often voluminous case files. This option had proved successful in the past. Instead, the Council suggested reducing the number of *référéndaires* and assistants per judge in the final stage of the reform as a cost-saving measure.

The Court's 2014 proposal stated that its President and Vice-President had been 'able to explain to the members of the General Court why the Court of Justice is proceeding with the current proposal'. That bland sentence conveyed little of the strength of the opposition to the proposal in the General Court. The opposition became public when the European Parliament began to consider the Court's proposal, which Article 281 TFEU required to be adopted under the ordinary legislative procedure.

In April 2015, the Legal Affairs Committee of the European Parliament invited a number of members of the General Court to assist it in considering the proposal. This prompted the President of the Court of Justice to write to the President of the Legal Affairs Committee to say that judges were not entitled to attend a meeting of the Committee without his prior authorization and that no judge other than the President of the General Court should attend.

The meeting went ahead on 28 April 2015, when four judges of the General Court,<sup>138</sup> who had been invited as 'individual experts', presented a paper entitled 'Doubling the General Court's Judges: Why Progressive, Reversible and More Economical Solutions Are Far Better'. They revealed that the President of the Court of Justice had 'commenced an official disciplinary procedure' against the General Court 'with the aim of preventing the communication of any previously uncensored information to the legislative authorities'. They insisted that the last thing the General Court needed was 'the creation of a Mexican army of new judges, supported

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<sup>134</sup> The United Kingdom voted against the proposals while Belgium and the Netherlands abstained: Alemanno and Pech (n. 132) 138.

<sup>135</sup> OJ 2015 L 341/14.

<sup>136</sup> OJ 2016 L 200/137.

<sup>137</sup> While the proposal was under consideration in the Council, Germany invited the Court to consider the possibility of introducing fees: Dehousse (n. 133) 30, at fn. 60.

<sup>138</sup> Judges G. Berardis, A. Collins, F. Dehousse, and I. Pelikanova.



by a reduced number of qualified personnel, which will inevitably lead to a serious reduction in the productivity per personnel unit’.

In June 2015, the European Parliament rapporteur issued a press release in which he said that there was ‘no urgent need to reform the General Court’ and that ‘targeted increases of personnel at the level of legal secretaries [i.e. référendaires], registry staff and in the translation service ... give better results, are cheaper and are reversible’. According to Dehousse, this led the President of the Court of Justice to make a complaint to the President of the European Parliament. If this is true, it represents an extraordinary attempt to interfere in the democratic process of the Union.

The controversy to which the proposals had given rise was reflected in Article 3(1) of Regulation 2015/2422. This required the Court of Justice to draw up by 26 December 2020 a report, using an external consultant, on the functioning of the General Court. The report was to ‘focus on the efficiency of the General Court, the necessity and effectiveness of the increase to 56 Judges, the use and effectiveness of resources and the further establishment of specialized chambers and/or other structural changes’.

This sorry tale highlights some of the Union’s worst features. The intergovernmental instincts of the Member States and the way the Union diffuses responsibility for spending public money rendered most of the Member States incapable of focusing on the main issue: did the General Court need to be reinforced and, if so, what was the most economical way in which that could be done? Instead, those who supported the reforms seem to have allowed themselves to be distracted by self-interest.<sup>139</sup> Against that background, the risk that the reforms might make the General Court more difficult and more expensive to run proved to be a consideration that few were public-spirited enough to entertain.

Dehousse argues that consideration should be given to withdrawing the ‘exorbitant prerogative’<sup>140</sup> enjoyed by the Court of Justice—not the Court of Justice of the European Union—to request changes to the Statute. The original versions of the three Community Treaties<sup>141</sup> contained no such provision, meaning that changes to the Statute would require recourse to the full Treaty amendment procedure. Provisions allowing the Court to request amendments to certain provisions of the Statute were introduced by the Single European Act, which empowered the Council to act unanimously after consulting the Commission and the European Parliament. The Treaty of Nice permitted changes to be requested by the Commission, but it was not until the Treaty of Lisbon that the Parliament acquired a role in adopting proposed amendments.<sup>142</sup>

Given the difficulty of amending the Treaties in a Union of its current size, it seems right that a simplified procedure should be available for amending the Statute of the Court. It

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<sup>139</sup> Dehousse (n. 133), at fns 101 and 125, argues that Luxembourg, the seat of the CJEU, had an economic interest in the enlargement of the General Court and reducing the risk that any further specialized courts might be located in other Member States. The Commission may have wished to reduce the risk that a specialized competition court would be created that might subject its own decisions in that field to even closer scrutiny. Member States that were net beneficiaries of the Union budget might have seen an opportunity to secure well paid and influential jobs for their own nationals.

<sup>140</sup> Dehousse (n. 133) 6. Cf. Alemanno and Pech (n. 132) 146.

<sup>141</sup> See Art. 45 ECSC; Art. 188 EEC; Art. 160 EAEC.

<sup>142</sup> Art. 281 TFEU was foreshadowed by Arts III-381 and I-34 of the Constitutional Treaty.

also seems right that the Court should be able to initiate the procedure, because otherwise it would have to rely on the Commission, which is regularly a party to proceedings before the Court, to do so. The involvement of the Council and the Parliament in principle confers a degree of democratic legitimacy on the outcome. The authors of the Treaties are unlikely to have contemplated the collective failure of leadership among both the Member States and the Union Courts which characterized the process by which it was decided to double the size of the General Court.

Be that as it may, there is merit in Dehousse's suggestion<sup>143</sup> that Article 281 TFEU should be reformed at the next available opportunity. However, the right to submit a formal request could not simply be attributed to the CJEU as a whole, as he proposes, if that means giving the General Court a veto or permitting it to submit a request with which the Court of Justice disagrees. A reformed procedure should seek to encourage consensus within the institution but give the General Court (or any future specialized courts) a formal opportunity to submit their views to the Union legislator if overruled by the Court of Justice. This would help ensure that the legislator and the public had a complete picture of the issues at stake.<sup>144</sup> Ultimately, however, the effectiveness of any process depends on the honesty, openness, professionalism and good sense of the individuals responsible for conducting it. These qualities seem to have been in short supply in the saga of the 28 judges.

## 5. The Future of the Court?

The Court has come a long way since that distant day in 1952 when it met for the first time in Luxembourg. The intimacy which once characterized the institution was swept away with the great enlargement of 2004 and 2007, when the EU fulfilled its inescapable moral duty to the countries of central and Eastern Europe. The Court is now a legal leviathan, almost certainly the largest international court in the world. With seven female members in the Court of Justice and 16 female members in the General Court, it is no longer exclusively male, though it remains exclusively white.

However, the configuration of the Court is unstable. Once the General Court has recovered from the trauma of being force-fed 27 extra judges, it may find itself with spare capacity. The legislator may think that a good way of providing it with extra work would be by transferring to it a significant proportion of the preliminary rulings which dominate the docket of the Court of Justice. Article 3(2) of Regulation 2015/2422 required the Court of Justice to draw up by 26 December 2017 a report 'on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU'. That report was to be 'accompanied, where appropriate, by legislative requests'. The Court produced a short report concluding, perhaps predictably, that there was 'no need, at this time ... to transfer to the General Court part of the

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<sup>143</sup> Dehousse (n. 133) 66-67.

<sup>144</sup> See further Keppenne, 'Les procédures de révision du cadre réglementaire des juridictions de l'Union', 53 *Cahiers de Droit Européen* (2017) 343.

jurisdiction that the Court exercises in preliminary ruling cases'.<sup>145</sup> The Court added, however, that its present view 'should not at all be understood as a definitive position on the question'.<sup>146</sup> The Court's report was followed in March 2018 by a request for infringement actions under Articles 108(2), 258, and 259 TFEU to be transferred to the General Court and for certain categories of appeal from the General Court to be allowed to proceed only with the permission of the Court of Justice. In return, the Court asked to be given responsibility for annulment actions connected with the failure of a Member State to comply with a judgment under Article 260 TFEU.<sup>147</sup>

These measures, if implemented, could leave the Court of Justice with time on its hands, a dangerous position to be in when budgets are tight. Would the Member States dare to contemplate a reduction in the size of the Court of Justice itself? The recent reforms to the General Court show that there is unlikely to be any political appetite for unequal national representation on the Court of Justice. However, an interesting precedent is offered by the European Commission. A convention dating from the Merger Treaty gave the larger Member States two commissioners, but following the Treaty of Nice the Commission has comprised just one national from each Member State.<sup>148</sup>

Might we perhaps contemplate a streamlined Court consisting of just one member per Member State, either a judge or an Advocate General? If the present Court were to be reconfigured in this way, it would be the same size as the Bundesverfassungsgericht. There would of course need to be discussion on the right balance between judges and Advocates General and how those roles might be allocated. The Court and the Member States might also wish to consider whether the Court has the right mix of expertise to enable it to deal effectively with the increasingly diverse disputes brought before it. But is it too much to hope that this simple solution to the problem of over-capacity in the Court of Justice, should it arise, might appeal to the Member States? It would, after all, merely require them to accept the practical reality of the formal equality of status enjoyed by judges and Advocates General.

A smaller Court with a lighter case load would have a number of advantages. It would be able to address the growing criticism of the quality of its judgments.<sup>149</sup> This is in part a consequence of the growth in its case load, which means that less time is available for thinking and deliberating, resulting in judgments that are too often gnomonic in style. The arguments of the Advocate General are almost never addressed; little attempt is made to explain changes of

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<sup>145</sup> 'Report submitted pursuant to Art. 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union' (December 2017) 8. Weiler describes the Court's determination to cling on to its monopoly over the preliminary rulings procedure as 'its most cherished article of faith': Editorial, 14 *International Journal of Constitutional Law* (2016) 321, at 323.

<sup>146</sup> 'Report' (n. 145) 9.

<sup>147</sup> Interinstitutional file 2018/0900 (COD), Brussels, 28 March 2018.

<sup>148</sup> Plans to reduce the size of the Commission further have come to nought: see A. Dashwood *et al.*, *Wyatt and Dashwood's European Union Law* (6th ed., 2011) 51-52.

<sup>149</sup> See e.g. Weiler, 'Epilogue: The Judicial Après Nice', in G. de Búrca and J. Weiler (eds), *The European Court of Justice* (2001) 215, at 219 and 225.

direction in the case law;<sup>150</sup> and hardly any effort is made to persuade the reader of the correctness of the outcome. This dogmatic approach seems out of keeping with modern demands for transparency and inadequate to maintain the confidence of the national courts.

One way of addressing these problems would be to introduce dissenting opinions with a view to enabling the majority to express itself more clearly and analyse previous case law more thoroughly. The Court should also reinstate its former practice of having an Advocate General's Opinion in every (or nearly every) case. It should make clear in its judgments when it is following the advice of its Advocate General. More importantly, it should give reasons when it decides not to do so.<sup>151</sup>

The result might be a Court of Justice that is less defensive, less deferential to the Union institutions, and better at managing internal dissent. In short, a Court comfortable in its own skin.

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<sup>150</sup> A notorious illustration is Case C-144/04, *Mangold* (EU:C:2005:709), which led to the decision of the Danish Supreme Court of 6 December 2016 (n. 122). Holdgaard, Elkan, and Schaldemose (n. 122) 36, observe: '... the ECJ's *Mangold* jurisprudence is one of the most criticized lines of case law in the Court's recent history.'

<sup>151</sup> The UK Supreme Court has repeatedly criticized the Court of Justice for delivering judgments which fail to address issues raised by the Advocate General. See e.g. *Patmalniece v. Secretary of State* [2011] UKSC 11; *Aimia Coalition Loyalty* [2013] UKSC 15; *R (HS2 Action Alliance Limited) v. Secretary of State for Transport* [2014] UKSC 3; *HMRC v. Pendragon* [2015] UKSC 37; *Cavendish Square Holding v. Talal El Makdessi* [2015] UKSC 67.



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