The uncertain world of the Court of Justice of the European Union

A multidisciplinary approach of the legitimacy of the EU judiciary in the 21st century

Julien Raymond Florent Bois

PLATO Report 4
ARENA Report 2/22

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This report was originally published by the Hertie School as a doctoral thesis.
https://doi.org/10.48462/opus4-4084

ISBN 978-82-8362-048-1
ARENA Report Series | ISSN 1504-8152
PLATO Report Series | ISSN 2703-9145

Issued by:
ARENA Centre for European Studies
University of Oslo
P.O. Box 1143 Blindern
0318 Oslo, Norway
www.arena.uio.no

Oslo, March 2022

PLATO is an Innovative Training Network (ITN) under the Marie Skłodowska-Curie Actions. It is funded by the European Union's Horizon 2020 research and innovation programme under grant agreement no. 722581 (2017-2020).

Preface

The Post-Crisis Legitimacy of the European Union (PLATO) (2017-2020) was an Innovative Training Network (ITN) funded by the EU's Horizon 2020 programme under the Marie Skłodowska-Curie Actions. 15 PhD researchers have studied the legitimacy of the EU's crisis responses in a number of different areas together with senior researchers in a consortium of nine university partners and eleven training partners, coordinated by ARENA Centre for European Studies at the University of Oslo.

By investigating the legitimacy of the EU's responses to the financial crisis, PLATO has generated new understanding of where crises can also be legitimacy crises for the EU. It has used the example of the financial crisis to build and test theory of what would amount to a legitimacy crisis in the case of a multi-state, non-state political system such as the EU.

This report is part of a project series which publishes the doctoral theses written by PLATO's 15 Early Stage Researchers. This multidisciplinary monograph examines the legitimacy of the Court of Justice of the European Union (CJEU). It advocates the recoupling of normative and sociological legitimacy to fully understand the CJEU's 'right to rule'. Whilst rejecting the view that the CJEU suffers a legitimacy crisis, it identifies some legitimacy problems and makes recommendations to address them.

Chris Lord

PLATO Scientific Coordinator

Summary

The Court of Justice of the European Union is one of the most contested European Union institutions. It is a non-majoritarian body that wields power beyond the state and imposes its rule to citizens and directly legitimate national governments. Despite numerous bold rulings that went beyond the expectations of member states, added to the alleged global legitimacy crisis suffered by the EU in the 21st century, the CJEU was the most likely candidate to face total disempowerment. Yet the Court's mandate has been extended as a result of the economic and financial crisis, and its involvement in the control of the new economic recovery fund in the context of the COVID 19 crisis led 2 member states to lift their veto to the most important recovery plan of the century. How is the Court seemingly not suffering a legitimacy crisis in the 21st century?

Answers to this paradox require a comprehensive exercise of theory building of the Court's legitimacy. The latter is a concept traditionally employed to assess the justified right to rule of powerholders within nation-states and was used to describe the whole polity rather than some of its parts. Existing legitimacy concepts must be redefined in order to characterize the transnational non-majoritarian body. The thesis thus provides a comprehensive and multidisciplinary account of the legitimacy of the CJEU, drawing insights from law, political science and sociology. It recalibrates the use of concepts such as the "input-throughput-output" trichotomy to the specificities of the judiciary and combines theories of judicial review developed in legal scholarship with actor-based accounts found in empirical social sciences.

The thesis rejects the division between normative and sociological legitimacy and advocates for a recoupling of both sides in order to have a complete picture of the CJEU's right to rule. The question of the Court's audience is crucial. Standards of judicial legitimacy are forged according to the social characteristics of the Court's attentive public. Since the CJEU is a non-majoritarian institution evolving on the transnational scene and exercises an expert activity discriminating legal specialists from other citizens, the Court's attentive public is (as determined by the analysis of judges' interactions and the properties of the Court's followers on Twitter) composed by the EU legal profession.

Normative standards of judicial legitimacy in the EU must be forged according to the expectations of the Court's attentive public while respecting broader social dynamics found in all member states. In terms of the Court's sources of legitimacy, the Court must respect its mandate enshrined in the treaties and judges must be outstanding legal professionals and reflect the population of the member states. It must respect due process and associate its attentive public to the interpretation and enforcement of EU law as much as possible. It must also deliver sound results that correspond to its status as the supreme court of the Union.

The thesis concludes by claiming that the CJEU is not suffering a legitimacy crisis in the 21st century. The legitimacy deficits that characterize its activities are progressively addressed or remain minor, and do not outweigh the support that judges built with the legal profession over decades. The thesis nonetheless identified several institutional and behavioral shortcomings and includes a series of recommendations that address the mere legitimacy problems faced by the Court today.

Acknowledgements

A doctorate is an experience full of contradictions. It is long and short. It is frustrating and fascinating. It is a lonely experience, yet full of great encounters along the way. This monograph is the result of an intensive 4-year journey. And it could never have happened without the help and support of great colleagues, friends and family members.

If it were not for the support and persistence of great mentors early in my career, I may never have written this dissertation. I was a young master student when I realized that I wanted to follow a research path. I also learned that finding the right opportunity to pursue doctoral studies would not be easy. In the middle of the Great Recession, funding opportunities were scarce and the competition for grants was fierce for many great candidates. I would have given up this path early on if 2 great professors did not believe in my qualities. Professor Antoine Vauchez has always provided the great support I needed in order to keep searching for the right opportunity. As my mentor during my time at Paris 1 Panthéon Sorbonne and more importantly after that, I would not have been able to provide the high-quality research proposal needed to join the Hertie school and the Free University of Berlin. When perspectives looked bleak, Professor Ramona Coman from the Free University of Brussels did not hesitate to reach out even if she only read a few lines of my work. Her support is what helped me keeping the necessary motivation to find the right opportunity in Berlin.

The willingness to develop a multidisciplinary project is nowadays a necessity in the social sciences in order to secure a position in a competitive EU-funded project such as a MSCA Innovative Training Network. It also means however that I had to reach out to great scholars who had the willingness to leave the safe borders of disciplinary realms and wanted to accompany me in a journey in the interstitial space between political science, law and sociology. Professor Mark Dawson took this leap of faith and accepted a student who would discuss the content of legal scholarship from a completely different angle, one that could be perceived either useless or offensive for established legal scholars possessing a much higher expertise on the Court of Justice of the European Union. His willingness to discuss sociological accounts of EU legal professionals, his courage to read and re-read poorly drafted contributions I sent over the years and his relentless efforts to make this monograph incredibly better

have been instrumental in delivering this final product. I can safely admit that it would have been a totally different and much more unpleasant experience without him. My second advisor Professor Ramses Wessel taught me one of the most important lessons that an empirical behavioral social scientist must learn if he is to understand the legal profession comprehensively: he needs to familiarize himself and embrace at least partly its rigor and specificity. The autonomy of the legal system, field or profession in the EU is a long process that the researcher must understand on its own terms before he can say anything meaningful about the peculiarity of lawyers and judges in the 21st century. Thank you very much for your great supervision.

PhD students are often abandoned early and must cope with the struggles of endless loneliness. I was incredibly fortunate not to have to suffer the same fate since I was a member of the great Berlin Graduate School for Global and Transregional Studies. The efforts undertaken by Professors Tanja Börzel, Thomas Risse, Michael Zürn and Markus Jachtenfuchs to develop such a great Graduate school freed from borders and institutional constraints and with the sole purpose of forming talented young scholars must be praised. Their guidance helped me and my colleagues to be on the right path from Day 1 and to realize that research does not have to be a lonely exercise.

I would never have been able to do this PhD if it were not for the MSCA PLATO project (https://www.plato.uio.no/). I would like to thank everyone in the consortium, especially my fellow early-stage researchers, project coordinator Chris Lord and project manager Marit Eldholm for all the hard work we have put in this project. A big part of the theory of legitimacy beyond the state used in this monograph comes from the results of our long discussions, and I hope that the present work pays tribute to their efforts.

I would like to thank Gil, Yaning, Ayhan, Daniëlle and Vlad for great discussions about the Court of Justice all those years in Berlin. I would also extend my gratitude to film score composers Hans Zimmer, James Horner, Howard Shore and Steve Jablonsky. All are great musicians and ironically often unsung heroes of great lonely journeys spent at home during a pandemic. Their epic records kept me motivated even in the darkest hours of Winter when I was struggling with the first few lines of this monograph. Some of the people I am the most indebted to are without

a doubt all my great friends from the Success Group. I thus warmly thank Amelie, Anke, Katja, Julia, Oleksandra, Cédric and Jörg for all their insights during these 4 years.

I obviously finish with the people that have made this endeavor a reality way before it started. First, my family has always supported my obsession of endlessly studying (my dad always said that I would study until I was 30; I wanted to prove him wrong and thus submitted this dissertation when I was 29 years and 364 days old) and approved my choice of going abroad for an uninterrupted 6 years now, thus choosing to see each other a bit less than we would have liked to. Ángela has gone through every moment of this experience, which would never have become a reality if it were not for her love and support when I needed those the most.

Thank you very much for all your help.

Berlin, 3 June 2021

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Abbreviations

ATJ	Andean Tribunal of Justice
AG	Advocate General
BVerG	German constitutional court
CC	Constitutional court
CFR	Charter of Fundamental rights
CMLRev	Common Market Law Review
CoE	Council of Europe
CST	Civil Service Tribunal
EB	Eurobarometer
ECHR	European Convention of Human rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EJTN	European Judicial Training Network
EMU	European Economic and Monetary Union
EP	European Parliament
ERA	Europarechtsakademie
EU	European Union
EUCONSTCO	Conference of European Constitutional Courts
GC	General Court
ICJ	International Court of Justice
IO	International Organization
IP	Intellectual Property
ITLOS	International Tribunal on the Law of the Sea
MEP	Member of European Parliament
MoU	Memorandum of Understanding
NGO	Non-governmental organization
OMT	Outright Monetary Transaction Programme
PRP	Preliminary Ruling Procedure
PSPP	Public Sector Purchase Programme
QMV	Qualified-majority voting
RoP	Rules of Procedure
RT	Retweet
RTD	Revue Trimestrielle de droit européen
SADC	South-African Development Court
SGP	Stability and Growth Pact
SI	Sociological Neo-institutionalism
TCN	third-country national
UK	United Kingdom
WWII	World War II

Chapter 1

Introduction

> We live in a complex and fast-changing world and the European Union faces a number of serious challenges at the present time: terrorism, mass migration and the ongoing fallout from the banking crisis, to name just a few. Each of these societal challenges has found its way into the docket of the Court of Justice and, in its way, each may be seen as posing an existential threat to certain aspects of the EU project. I believe that it is therefore important for all of us, both as EU citizens and as lawyers, to reaffirm our belief in our fundamental values at this difficult time. We must stand up and face these challenges with determination and courage and in doing so we must refrain from having recourse to expedients that, although they may appear helpful for resolving a particular problem in the short term, in themselves undermine our way of life, our values, the very essence of the civilisation that we have taken centuries to build and that we are determined to protect.[1]

[1] K. Lenaerts, "Keynote Speech –The Court of Justice in an Uncertain World", XXVII FIDE Congress, 19.05.2016, available at: http://www.fide-hungary.eu/images/fide4.epub

The European Union (EU) is undergoing a major political crisis. It must cope with several socio-economic crises that differ in nature and scope, but all raise the question: has the EU suffered a legitimacy crisis as a result of the Eurozone, migration, Rule of Law and pandemic crises? The literature unanimously claims that the power wielded by EU institutions is challenged more than ever in the 21st century (Schmidt 2020; Bellamy 2019; Longo and Murray 2015; Schweiger 2016). The legitimacy of the EU, understood here in its Weberian sense as "justified domination" (Weber 1978: 2012-302), has become more socially relevant than ever since the last decade of the 20th century. The former European Economic Community (EEC) established in Rome in 1957 turned in 1992 into a full-fledged polity with the signature of the Maastricht Treaty[2]. The EEC was a customs union whose market-making measures were perceptibly generating absolute gains for many citizens in the member states. The turn into a polity became complete after Maastricht with the inclusion of "core state powers" (Genschel and Jachtenfuchs 2018; 2014) at the EU level. Unlike market-making measures, core state powers like monetary policy, citizenship or defense imply a "zero-sum" logic (Genschel and Jachtenfuchs 2018:181) that grants to the EU the power to establish categories of political 'winners and losers' of regional integration in Europe. The EU thus turned into a political organization that could make choices in the name of their member states, choices that at the same time could cause harm to the citizens of the EU. This right to harm results from an asymmetrical power relationship between the EU, its institutions and its staff – the 'powerholders' – and the citizens of Europe that must submit to its rule – the 'subordinates'. The EEC was already contested for wielding power beyond the state absent democratic control[3]. The newly established EU did not resolve the problem, since governance at the transnational level adds a layer of governance that feels far away to many citizens of Europe (Dahl 1994) and does not possess and a sense of shared community upon which it could safely build its authority (Scharpf 1999). National political leaders remained nonetheless convinced that European integration was the "promised land" (Weiler 2012) that must be reached in order to ensure

[2] See the treaty on European Union signed by the 12 member states of the EEC on February 7, 1992, at: https://europa.eu/european-union/sites/default/files/docs/body/treaty_on_european_union_en.pdf

[3] See for example the 1977 Manifesto of the Young European Federalists, which used for the first time the expression "democratic deficit": http://federalunion.org.uk/the-first-use-of-the-term-democratic-deficit/

prosperity for their subordinates. They forced the ratification of the Lisbon treaty after the failed attempt of having a popular European constitution voted by the citizens. The EU had its constitution in all but name and could take binding decisions affecting almost every existing policy area since 2009. The consolidation after Lisbon of the EU as an established powerholder coincided with the first crash that affected the continent: the financial crisis. The latter was soon to be followed by a debt, migration, rule of law and even pandemic crises. The continent is going through its darkest times since the end of the Second World War (WWII), corresponding to the time that EU institutions were for the first time in partial charge of forging responses to tackle the effects of the socio-economic crises. The latter refer to situations in which pre-existing arrangements do not suffice to cope with the stress that entered the system (Easton 1965). Crises thus exposed the flaws that already gangrened the EU for years: a flawed Economic and Monetary Union (EMU) that never respected the criteria of an Optimum currency area (Mundell 1961); the existence of common regulations in the field of migration but absent a shared sense of solidarity about their relocation; the unequal application of fundamental rights across Europe, leading to the rule of law crisis (Bertolini and Dawson 2021); etc.

This monograph does not challenge the thesis of a legitimacy crisis suffered by the whole EU but asks if one of its components – the Court of Justice of the European Union (CJEU) – is itself going through a legitimacy crisis. The debates about legitimacy beyond the state traditionally refer to the entire international organization (IO) such as the EU, or to global modes of domination such as international law (see for example Buchanan and Keohane 2006). Few studies ask however whether the constitutional organs of a polity have their own legitimacy standards, and if those standards could partially if not totally differ from legitimacy standards applied to states or to IOs. Second, the conceptual apparatus traditionally used to understand legitimacy (e.g. Beetham 2013; Habermas 1973 and 1996; Gilley 2009) are tailored to a particular type of polity: the state. States remain the focal unit of analysis in political science, even in governance theories that stressed that non-state actors play a role in the elaboration of political decisions (Zürn 2018).

Yet a tailormade conceptual apparatus for designing the legitimacy of the EU and of its organs remains partial (see Lord and al. forthcoming). While some common factors such as rule, belief and consent (although this

criterion does not itself receive unanimous consent: Buchanan 2002) may be present, each polity possesses its own specific societal arrangements that make the relationship between powerholders and subordinates unique. Social scientists projected legitimacy standards and indicators previously applied in a national context to the EU, such as accountability (Bovens 2010), participation (Blondel and al. 1998) and simply democracy (Eriksen and Fossum 2000; Follesdal and Koslowski 1998; Habermas 2012). The EU duplicates some legitimacy standards found in the member states, such as the "values" of the EU found in art. 2 in the Treaty of the European Union (TEU)[4]. It does not however replace nation states as the main unit of governance. It rather supplements member states in dealing with policies that national governments believe to be suited at the transnational level, such as competition or common commercial policy. Legitimacy standards of a polity that supplement a pre-existing political arrangement may conceivably not entirely eradicate former understandings about the justification of power. Some argued that the difference between the national and the transnational level about legitimacy is not of essence but of degree. Legitimacy standards would for some be the same but be less demanding for IOs (Buchanan and Keohane 2006: 409). Others on the contrary could argue that IOs must perform better than national administrations when providing policy results (*output*) because IOs are not embedded in a society with a shared language and culture (*input*) that compensate for deficits in providing sound policy outcomes (Scharpf 1999). Even if they were to apply good processes of governance such as openness and transparency (*throughput*), Schmidt (2013 and 2020) claims that these cannot compensate for deficits at the input or output levels.

If standards are equivalent at the transnational level, they may not however be a replica of the ones applied in nation states. First, the EU is not a community (Tönnies' famous *Gemeinschaft*) binding its members by a traditional and familial bond but is rather a society (*Gesellschaft*) in which the members – states and citizens alike – pertain to because for most it fits their personal interest. Second, the EU is a polity wielding power but is

[4] Which states that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

not sovereign. It takes binding decisions for individuals but is not in possession of the ultimate right of authority. Member states of the EU confer certain competences to the EU (art. 5 TEU) but retain the right to withdraw from the organization (art. 50 TEU), and thus legally claim back what was once conferred. In other words, states retain the *Kompetenz-Kompetenz* (Grimm 2017; Lindseth 2010). Third, the EU takes binding decisions but has no or little coercive tools to enforce them. The necessary interplay between legitimacy and coercion is different if not inexistent in the European Union. Subordinates who are required to obey the rule of the EU institutions know that the powerholder in the transnational polity does not possess the 'legitimate' use of force.

Research also remains scarce about the differentiated application of legitimacy standards across branches of government, or between different institutions. The various constituting organs of a polity have different means of arriving to and exercising power. Some rely on the express consent of subordinates that vote in their favor, whereas non-majoritarian institutions do not have such a direct endorsement. Some organs have an encompassing function and must deal with the infinite possibilities offered by policy options (e.g. governments), while others are in charge of applying and monitoring a specific policy (e.g. central banks and monetary policy). Finally, some organs and branches enact rules (governments and parliaments) while others oversee their interpretation (courts). Ruling bodies have different essential properties, and each will thus carry a specific legitimation logic. A legitimacy theory of a specific ruling organ must thus account for 2 sets of scope factors: 1) the specificity of the governing body under scrutiny and 2) the level of governance where it is formally located.

It is therefore not surprising that a comprehensive theory of the legitimacy of the CJEU, a non-majoritarian body in a transnational polity, is absent in the literature. It is this vacuum that this monograph seeks to fill. The topic of legitimacy is always lurking in the background of doctrinal studies in legal scholarship or in the unpacking of causal mechanisms surrounding judicialization in the EU, but it has never been tackled head-on in a book-length publication. The timing for providing a tailormade legitimacy theory of the CJEU could not be more pressing. The Court is – as mentioned by the President of the Court Koen Lenaerts in the opening quote – also caught in the midst of the 4 major socio-economic crises of the last decade. It does not possess a direct endorsement by the citizens of the

member states. And it has been heavily criticized in the past for overstepping its mandate and disregarding the separation of powers (Rasmussen 1986; de Waele and van der Vleuten 2011; Conway 2012; Schmidt 2018). In a word, the CJEU is *theoretically* one of the EU institutions that is the most susceptible to suffering a legitimacy crisis in the 21st century.

1.1 Conceptualizing legitimacy beyond the nation-state in Europe in the 21st century

Legitimacy lies among the oldest concepts debated in social science and has been treated by the greatest political philosophers and social theorists for centuries (Montesquieu 1995 [1758]; Rousseau 1963 [1762]; Locke 1992 [1690]; de Tocqueville 1992 [1835 and 1840]; Hobbes 2009 [1651]). It remains however a concept whose essence and scope remains debated. This first section here will provide the definitions of the various concepts that will be employed throughout this monograph.

Power or *domination*[5] may have two sources. The first is *coercion* and refers to the physical tools used by the *powerholder* against the *subordinate* to secure obedience. The second source is *legitimacy* and refers to uncoerced obedience. For the most part, the EU is deprived of coercive tools. In the 21st century, despite the development of common projects in Europe in the field of defense and security, the use of physical force remains firmly held by the member states. The EU must thus be legitimate if it is to wield power in the member states. Uncoerced obedience is the result of a belief among the citizens of Europe that the authority of the EU is justified. According to Beetham (2013), three criteria must be present to witness justified domination: 1) the existence of common *rules* that 2) citizens *believe* are justified, leading them to 3) express their *consent* in favor of the organization of political power.

Justified domination may take several forms in modern societies. Weber (1978) distinguished between three co-existing models. *Traditional* domination referred to the belief of subordinates in the rightfulness of political power because it has always been there. In other words, the longer a powerholder holds the reins, the more traditional legitimacy it has. The second model is *charismatic* domination and refers to the

[5] The 2 concepts will be treated as synonyms in this monograph.

sociological outstanding properties of the powerholder. The latter's domination is justified because he, she or they are displaying discriminating properties that make them better than others to govern. The third model is *rational-legal* domination and refers to a processual mode of designation of powerholders. These are appointed in the governing class because they followed a set of procedures – such as an examination – consensually viewed as rightfully allowing the winners to reach the highest bureaucratic offices. States possess the 3 types. The state has become the main type of political organization since the end of empires in the first part of the 20th century, meaning that all citizens currently living have lived under its dominion. Their political leaders possess charismatic authority they obtained through popular consent, expressed in free and fair elections. The governing structure or administration of states is composed by civil servants that gained access to the highest political functions by passing a state exam formally open to any member of the state.

The EU on the other hand may not possess all types of legitimate authority. The EU is a post-WWII international organization (IO) whose structure has been in constant mutation since the 1990s, therefore not providing the stability associated with traditional domination. Its political leaders historically lacked the media coverage and citizen attention that national elected officials comparatively get. Even if the trend towards a political Commission, whose commissioners are no longer Eurocrats but rather former ministers in national government, and the semi-successful attempt of having *Spitzenkandidaten* aimed at enhancing the charismatic nature of the EU's executive body, political leaders in the EU make it to the highest elected offices following a *national* logic. Their member state of origin determines the type of office candidates may pretend to, and the political affiliation remains dependent on their affiliation in national political parties. However, the staff of EU institutions follow a rational-legal logic like the one found in member states. Rational-legal authority trumps the other types in the EU, which lead to accusations from Eurosceptics that non-elected officials – the famous 'Eurocracy' (Georgakakis and Rowell 2013) – impose their decisions on member states.

The main accusation is that of a democratic deficit (Follesdal and Hix 2006). Whether the EU is a democracy or a "demoicracy" – i.e. a Union of people "who govern together but not as one" (Nicolaïdis 2013) – remains under discussion. The plea of a democratic deficit of the Union is

nonetheless a powerful normative critique for 2 reasons. The first is that, once societies choose democracy as their mode of political organization, polities may no longer regress to or change to an authoritarian model because democracy is normatively associated with the highest possible conception of justice (Buchanan 2002: 710-27). Since citizens of the member states live in democratic states, the undemocratic allegation made against the EU reduces the justifiability of transnational domination. Beetham acutely observed that the Weberian criterion of "belief" is not enough to understand the acceptance of power by the members of society; this domination has to be justified "in terms of their beliefs" (Beetham 2013:6). Since democracy is preached in art. 2 TEU as a fundamental value of the EU, the latter must aim at applying and respecting democratic standards. The second argument in favor of democratic standards in the EU relates to the changing nature of the EU as a polity. The scholarship that played down the democratic deficit argument (Moravcsik 2002; Majone 1998) stressed that the EU was a regulatory political organization that did not rule on redistributive issues, and whose competences were clearly defined in its mandate. Yet the introduction of core state powers (Genschel and Jachtenfuchs 2014) means the resolution of redistributive issues, which historically demand the approbation of citizens or at least of their representatives. The expression "no taxation without representation", forged to denounce British coercion in the Americas in the 18th century, captures the idea of a popular approval behind the use of common goods. The EU is now ruling in many redistributive issues, and its right to do has been challenged during the sovereign debt crisis, leading Majone himself – who described the EU as a simple regulatory polity in the past – to question whether integration had "gone too far" (Majone 2014). The EU and its institution nowadays possess many redistributive competences that demand popular consent, obligating its members to justify its actions according to democratic standards, whether the EU is itself a democracy or not.

The difficulty of justifying its extensive authority makes the EU particularly vulnerable to suffer a *legitimacy crisis*, i.e. a situation that occurs:

> when the level of social recognition that its identity, interests, practices, norms, or procedures are rightful declines to the point where the actor or institution must either adapt (by reconstituting

> the social bases of its legitimacy, or by investing more heavily in material practices of coercion or bribery) or face disempowerment.
>
> (Reus-Smit 2007: 158)

Disempowerment is a theoretical difficulty for the analysis of state legitimacy, since that type of polity does not provide for easy exit options and possesses the coercive means that can keep its authority intact. The EU does not possess coercive devices and has exit options institutionalized in its constituting instrument (art. 50 TEU). This option was activated for the 1st time on June 23, 2016 when a majority of citizens expressed their desire to leave the European Union. This episode shows that the EU has at least been partially disempowered, since it no longer has authority in the UK in 2021, except for transitory arrangements in Northern Ireland. Since the EU is still operating despite Brexit, concluding of a legitimacy crisis of the EU may be too far-fetched. However, this partial disempowerment shows that the EU suffered at least a *legitimacy deficit* in the context of Brexit.

Exit is the clearest illustration of a legitimacy deficit because geographical disempowerment is unequivocally visible. However, disempowerment may also take more subtle forms while generating the same conclusion. The Rule of Law crisis that opposes the liberal bloc in the EU to the national governments in Poland and Hungary show that even the most fundamental values that define the contemporary EU no longer generate an uncoerced obedience and lead to "illiberalism from within" (Pech and Scheppele 2017). The suspension of liberal values is the consequence of the democratic empowerment of illiberal forces. The EU is thus susceptible of suffering a legitimacy deficit from the opposition of 2 essential categorical imperatives: democracy and the rule of law.

1.2 The most likely case of a legitimacy crisis in the EU? The Court of Justice of the European Union

> We have taken back control of laws and our destiny… British laws will be made solely by the British Parliament. Interpreted by UK judges sitting in UK courts. And the jurisdiction of the European Court of Justice will come to an end.[6]

> Judicial decision-making in Europe is in deep trouble. The reason is to be found in the European Court of Justice (ECJ), whose justifications for depriving member states of their very own fundamental competences and interfering heavily in their legal systems are becoming increasingly astonishing. In so doing, it has squandered a great deal of the trust it used to enjoy.[7]

The crises that affected the EU since 2007 clearly demonstrated that the EU's main difficulty in coping with stress was to provide a democratic answer to these challenges. The EU answered to the sovereign debt crisis by reinterpreting the EMU "by stealth" (Schmidt 2020: 112-16), i.e.by genuinely modifying the substance of the treaties without recourse to popular approval. It tried to adopt a fair scheme of relocation of refugees that came to Europe either via the Mediterranean or the Balkan route, and forced its way through qualified majority voting (QMV) despite the fierce opposition of Eastern and Central European member states that keep refusing to apply years after its enactment (Kriesi 2016). Governments in Poland and Hungary refuse to respond to the European Commission queries about the rule of law – even after the activation of infringement

[6] Boris Johnson, UK Prime Minister, *Jurist*, 24 December 2020, at: https://www.jurist.org/news/2020/12/uk-government-trumpets-renewed-control-of-our-laws-and-end-of-ecj-jurisdiction-after-making-eu-brexit-deal/

[7] Herzog R. and Gerken L. (2008), "Stop the European Court of Justice", Opinion, EU Observer, 10/09/2008, available at: https://euobserver.com/opinion/26714

proceedings – since they claim that their democratic empowerment precedes the supranational intrusion of the Commission[8].

The EU has not collapsed however since some of its institutions have undergone change that increased its input legitimacy. The European Parliament receives a direct endorsement from citizens in Europe and is now a genuine co-legislator. The college of commissioners of the European Commission also receive an indirect democratic approval. The President of the Commission is chosen by the European Council voting by qualified majority and approved by the majority of members of the European Parliament (MEPs)[9]. The rest of commissioners is chosen by the President of the Commission and must receive the approval of the EP committees that correspond to the candidate's portfolio. The Commission is also collectively responsible before the EP, which may carry a motion of censure against the college. The European Council gained the status of official institution of the EU after the entry into force of the Lisbon treaty in 2009. The President of the European Council is chosen by QMV by the heads of state and government, who may also revoke the President via the same voting system[10]. Even if the EU still cannot be said to possess as much input legitimacy as a nation state, these injections of democracy at the EU level potentially allowed institutions like the Commission to compensate for failing outputs in economic and monetary policy, migration and the rule of law crisis.

However, some non-majoritarian institutions did not receive a democratic reinforcement in the successive constitutional reforms of the EU in the 21st century, and thus did not seem a priori to have augmented or simply generated input legitimacy. Besides, these bodies were like the other institutions involved in the resolution of the crises and thus associated to

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[8] Polish Minister Waszczykowski even used the democratic credentials of his government to dismiss the allegations of the Commission, especially from Vice-President Frans Timmermans: "*Mich hat dieser Brief sehr verwundert. Da schreibt ein EU-Beamter, der durch politische Beziehungen ins Amt kam, einer demokratisch gewählten Regierung. Woher nimmt er das Recht dazu? Für mich ist Herr Timmermans kein legitimierter Partner.*" ("An EU official, who came to office via political connections, writes to a democratically-elected government … Mr Timmermans is not a legitimate partner for me", in Bild, 3 January 2016, at: https://www.bild.de/politik/ausland/polen/eu-kommissar-will-polen-unter-aufsicht-stellen-43997696.bild.html)

[9] Art. 17(7) TEU

[10] Art. 15(5) TEU

the criticism of failing to provide sound policy results. These bodies were thus scoring low if they were not entirely deprived of input legitimacy, while also failing to cope with socio-economic distress. These bodies are thus prime theoretical suspects of a potential legitimacy crisis. 2 institutions come to mind: the European Central Bank (ECB) and the CJEU. The ECB is a young institution with a narrow mandate – ensuring price stability – that remained for the most part anonymous until the early moments of the sovereign debt crisis. The sovereign debt crisis put the ECB in the spotlight and made it the true "hero" (Schmidt 2020:158) that ended the "fast-burning phase" (Seabrooke and Tsingou 2019) of the crisis in July 2012. After deferring to political choices during the early phase of the crisis, the Bank became a quasi-lender of last resort and adopted what it itself called "nom-standard measures" such as buying sovereign bonds on the secondary market. The reinvention of its mandate generated some criticism in terms of process, but the ECB was eventually empowered by the Eurozone crisis. Nowadays, its policy of purchasing sovereign bonds – which generated some doubts about the legality of such measures[11] during the Eurozone crisis – has become insuperable in today's Union and has reached unequaled proportions during the COVID 19 crisis[12].

The CJEU has also been caught with the midst of the various crises of the European Union. Yet no one called the Court a hero for its actions during and after these events. The Court is viewed as a motor of European

[11] Art. 123 TFEU states that "Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments" (hereafter "prohibition of monetary financing"). The Outright Monetary Transaction (OMT) programme and the Public Sector Purchase Programme (PSPP) are large bond-buying programmes that started a judicial saga between the CJEU and the German constitutional court (BVerG) about the correct interpretation of the aforementioned treaty provision. See 2 BvR 2728/13, 21 June 2016 (OMT ruling) and 2 BvR 859/15, 5 May 2020 for the BVerG (PSPP ruling), and C-62/14, Peter Gauweiler and Others v Deutscher Bundestag (hereafter *Gauweiler*), 21 June 2016 and C-493/17, Proceedings brought by Heinrich Weiss and Others (*Weiss*), 11 December 2018

[12] See ECB, "ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP)", Press Release, 18 March 2020, at: https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html

integration (Alter 2001; Vauchez 2015; Dehousse 1998) that constitutionalized the treaties (Weiler 1991) and thus used the law of the EU as a "mask and shield" (Burley and Mattli 1993; Blauberger and Martinsen 2020) to advance integration. This judicial empowerment was a coproduction between the Court and national courts (Weiler 1991; 1994) and led judges to build a transnational regime that had not been intended by the constituent power, such as the introduction of fundamental rights into the EU legal order[13], the direct effect[14] and supremacy[15] of EU law or state liability for failed transposition of directives[16]. While this dynamic had not been noticed by outsiders and the Court was blessed "with benign neglect by the powers that be and the mass media" (Stein 1981: 1) for most of the 20th century, the Court and more generally the EU were no longer the beneficiaries of a "permissive consensus" but rather of a "constraining dissensus" (Hooghe and Marks 2009), referring to the increased scrutiny by the citizens of supranational activity. The Court's historically bold line of case law suddenly generated stronger criticism, including among national governments[17]. The latter even overrode for the first time a ruling (in *Barber*[18]) in the 1990s, signaling that the Court did not possess a blank cheque in interpreting the provisions of the EU legal order. Criticism kept coming in the 2000s, with the Austrian Prime Minister[19] and the former President of the Federal Republic of Germany[20] calling for more judicial restraint. The last decade saw the opposition to CJEU activities go beyond criticism and turn into concrete "pushback" (Hoffman 2018). 3 different national constitutional courts (CCs) declared judgements of the CJEU *ultra*

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[13] C-11-70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (*Internationale Handelsgesellschaft*), 17 December 1970

[14] C-26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (*van Gend en Loos*), 5 February 1963

[15] C-6/64, Flaminio Costa v E.N.E.L (*Costa*), 15 July 1964

[16] Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic (*Francovich*), 19 November 1991

[17] The UK tries to renegotiate the Court's mandate at the intergovernmental conference (IGC) that led to the adoption of the Amsterdam treaty, but failed to secure support from its counterparts (Alter 2009: 129-30)

[18] Case C-262/88, Douglas Harvey Barber v Guardian Royal Exchange Assurance Group, 17 May 1990 (*Barber*)

[19] "EU court 'must heed national feelings'", Financial Times, 19 April 2006, at: https://www.ft.com/content/bf6130c8-cfd5-11da-80fb-0000779e2340

[20] Herzog, n7

vires (beyond EU law's reach) and thus inapplicable in their respective states[21]. The UK government in charge of negotiating the Brexit negotiations mentioned several times that withdrawing the UK from the jurisdiction of the Court was a *sine qua non* condition[22]. In sum, the Court's authority has never been more contested.

The CJEU seems to be the prototypical EU institution (in social-scientific terminology: a most-likely case [Gerring and Cojocaru 2016: 405]) that would suffer a legitimacy crisis in the 21st century. It is a non-majoritarian institution regularly accused of overstepping its mandate, which also participated in the suboptimal EU responses to the crises. The latter could have been the final blow to an institution whose support has remained shallow since the 1990s (Gibson and Caldeira 1995; although see Kelemen 2012, and the discussion in chapter 3).

Despite the presence of all background elements, *the Court was not however disempowered as a result of the crises*. The Court's mandate has remained stable since the beginning of the EEC, and it has even been associated to international projects beyond the EU[23] as a Court issuing binding decisions[24]. The criticism it received was followed by numerous pleas of support for its activity, including blind commitments to follow its guidance in all situations[25]. The Court's authority is undeniably contested, but it remained unscathed for the most part after going through these episodes. How is it possible that the CJEU, a contested non-majoritarian

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[21] Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A., 6 December 2016, in response to C-441/14, Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen (*Ajos*), 16 April 2016; Pl. ÚS 5/12, Slovak Pensions XVII, 31 January 2012, following C-399/09, Marie Landtová v Česká správa socialního zabezpečení (*Landtová*), 22 June 2011; and the PSPP ruling of the BVerG following *Weiss* (n11).

[22] See B. Johnson, n. 6

[23] E.g. art. 37(3) of the treaty establishing the European Stability Mechanism (ESM), at: https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en.pdf

[24] Some lawyers would even argue that the Court's mandate has been extended with the expansion of its jurisdiction. The Court's core structure and mission has however remained stable.

[25] See for example D. Kelemen and al., "National Courts Cannot Override CJEU Judgments", *Verfassungsblog*, 26 May 2020, available at: https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/

institution that regularly opposed the preferences of member states, preserved its legitimacy in the 21st century?

1.3 Judicial legitimacy in the EU in the 21st century: a multidisciplinary struggle

The answer to this question requires a theoretical building of the legitimacy of the Court. It means establishing a normative theory of judicial legitimacy in the EU and assessing empirically how the Court respects various legitimacy standards. The theory-building exercise is one of necessity. A few publications treat the subject of the Court's legitimacy (Pollack in Grossman and al. 2018 [hereafter Pollack 2018]; Kuijper in Howse and al. 2018 [Kuijper 2018]; Clausen in Ruiz Fabri and al. 2020 [Clausen 2020]) and provide valuable insights to the present work. They could not however resolve theoretical difficulties (1.3.1) associated with the concept of legitimacy, nor could they overcome the disciplinary barriers that characterize the study of the CJEU today (1.3.2). Other difficulties relate to the institution itself under study. The Court is often defined as a black box, whose internal evolutions over time are difficult to grasp (1.3.3)

1.3.1 Normative and sociological legitimacy: recoupling a misleading divide

The concept of legitimacy is Janus-faced. One the one hand, it refers to the acceptability of political power following a set of standards that powerholders *ought* to apply to claim legitimacy. *Normative* legitimacy is the result of an informed exercise of political and legal philosophy/theory, leading the social scientist to survey the literature and abstract features in political systems that were historically forged as moral standards about the justification of power. Normative also refers to the set of rules that define the institution's right to act within finite bounds, allowing an assessment of the Court's practice against these rules following their interpretation (which remains a subjective exercise to start with). *Sociological* legitimacy does not ask what standards ought to be applied, but rather investigates empirically whether domination is accepted or not by the subordinates. The sociological acceptance of the political arrangement would show that subordinates 'believe' in the rightfulness of the powerholder's domination, absent the need for questioning the motives behind such an acceptance or rejection.

The divide is attractive because it generates clear lines of investigation and induces a division of labor in social-scientific research (see 1.3.2). Political and legal philosophers would forge the normative standards about the proper exercise of political power in the EU (e.g. Scharpf 2009; Lord in Brack and Gürkan 2021; Bellamy 2019) by drawing inspirations from the classic treaties developed by Hobbes, Locke, Bentham, Rousseau, Kant, Hegal and others, giving standards a contemporary nature and try to understand the similarities and differences that imply normative standards for a multi-state, non-state polity like the EU. Empirical social scientists would employ their traditional conceptual apparatus based on classic concepts such as 'trust' or 'support' (found in Easton 1965; reassessed in 1975) which allow for causal explanations and empirical operationalizations. They would then recourse to usual methods such as surveys to give a general picture of the acceptance of political domination by a representative sample of the studied society (e.g. Kelemen 2012; Gibson and Caldeira 1995). Trust may be measured for institutions themselves or for certain political orientations found in public opinion, i.e. about particular public policies such as counter-terrorism (Harsch and Maksimov 2019).

That divide is however only leading to partial accounts of the legitimacy of political power. A pure sociological appraisal of the belief in legitimate authority cannot explain why members of society perceive this domination as justified, and even less if they perceive the authority of a specific institution as political power. Legitimacy is more than the simple Weberian criterion of belief as indicator. Political power must be justified in terms of citizens' beliefs, which demands an exploration of the features driving acceptance over rejection. On the other hand, a pure normative theory of legitimacy cannot be deprived of any empirical account if it is to be authoritative in the social sciences and beyond. Normative theories must discuss, adhere to or reject shared understandings about the exercise of politics. Normative theories of EU legitimacy (especially Beetham and Lord 1998; Scharpf 1999, 2009 and 2015) are labeled as such because they do not design their theories in causal terms – causality having become the panacea of empirical social sciences (King, Keohane and Verba 1994; Gerring 2012). But they nonetheless provide insightful accounts on the acceptance of the EU's authority in the Union. Social scientists that want to establish a causal claim about justified domination tend to stay from the concept of legitimacy because the key explanatory variable – belief – is

hardly ever observable and thus not a subject of causal operationalization. They instead rely on the concept of *legitimation*, which refers to observable attempts of powerholders to cement or restore their claim to domination. Legitimation refers to a behavioral component while legitimacy makes a structural claim. The social-scientist willing to establish a comprehensive theory of an institution's legitimacy must renounce causation but may nonetheless refer to informed empirical accounts of the institution, policy or polity analyzed to reinforce the normative theory.

1.3.2 A difficult dialogue between disciplines

A few recent global theories of EU legitimacy decided to accept the necessary recoupling of normative and sociological legitimacy to give renewed accounts of the justifiability of the EU's power in the 21st century. V. Schmidt's account of the legitimacy of the EU during and after the sovereign debt crisis is compelling because it provides a heuristic approach for the entire polity (with the tryptic "input, throughput, output") and a specific account of the entire framework to specific institutions. The Commission, Council, ECB and EP all received a tailormade adaptation of the encompassing conceptual apparatus. The missing player in this analysis is the Court. This absence is striking, considering that the CJEU was a major player in the economic crisis[26] and under major heat following the first ever preliminary reference sent by the BVerG in 2014. Other political scientists have not missed the importance of the Court in the EU's overall legitimacy. R. Bellamy criticizes the Court's stance in citizenship cases for insisting too much on the rights conferred by this status and historically disregarding the "obligations" that membership to a political community entail (Bellamy 2019: 147-54). In the same vein, F. Scharpf stressed that the disequilibrium between the republican versus the liberal forms (Scharpf 2009) of democratic legitimacy in favor of the latter was the responsibility of the Court. The CJEU would be in "perpetual momentum" because of its privileged

[26] C-370/12, C-370/12, Thomas Pringle v Government of the Republic of Ireland (*Pringle*), 27 November 2012; C-270/12 - United Kingdom v Parliament and Council (*Short-selling*), 22 January 2014; T-122/15, Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank, 16 May 2017, followed by C-450/17 P, 8 May 2019; Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising Ltd and Others v European Commission and European Central Bank (*Ledra*), 20 September 2016; C-158/14, Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others (*Florescu*), 13 June 2017; *Gauweiler* and *Weiss*.

position in the institutional architecture of the EU, and its rulings that constantly favor individual rights over a sense of political "self-determination" endanger not only the Court's justified right to adjudicate cases, but also endanger the EU's raison d'être as a polity (Scharpf 2012a: 134). He went even further by saying that the EU would never be input legitimate as long as it confers major competences to independent, non-majoritarian institutions such as the Court (Scharpf 2012b:20; see also Vauchez 2016). Lindseth claims that the EU "borrows" legitimacy from its member states (Lindseth 2010). The Court must as such rely on its national counterparts and foster and a dialogue with those in order to see EU law's supremacy respected, an increasingly difficult task with the extension of the EU legal order that now includes former state competences such as fundamental rights and monetary policy (Ibid.: 166-88). While this (distant) dialogue between the CJEU and national courts helped the former in securing the latter's deference for the most part, the Court's parsimonious stance when it came to "its policing of the bounds of supranational delegation" (Ibid.:146) progressively led to claims by CCs about *Kompetenz-Kompetenz* and ultimate right to authority, which led to concrete *ultra vires* rulings after the publication of Lindseth's book.

However, the efforts undertaken by Scharpf, Lindseth, Vauchez and Bellamy to analyze the impact on the Court's role on the legitimacy of the EU remain scarce in the literature. The topic has led to many academic commentaries over the years (Banchoff and Smith 1999; Thomassen 2009), and especially in the last decade (Longo and Murray 2015; Schweiger 2016; Schmidt 2020; Guiraudon and al. 2015; van Ham and al. 2017) in which various policies (EMU, migration, rule of law, etc.) and actors are scrutinized, but the Court remains absent for the most part from these analyzes. The few debates about the legitimacy of international courts (ICs) in political science are recent (especially in the last 5 years) volumes and dedicated articles (see Howse and al. 2017; Squatrito and al. 2018; Grosman and al. 2018; Baetens 2019; Alter and al. 2019; see Romano 2020 for a review of these contributions).

Why have these actors been understudied for so long despite the general dynamic of "legalization" in world politics (see Goldstein and al. 2000; and the rest of the special issue of *International Organization* [Vol. 54, No. 3]) that was described 20 years ago? Many ICs and adjudicatory bodies have a recent existence, especially in the case of regional courts such as the Andean Tribunal of Justice (ATJ, which started its activity in 1984) or the

Economic Community of West African States (ECOWAS) court of justice (1991). Older ICs such as the international court of justice (ICJ) receive fewer cases, do not allow for non-state parties to issue proceedings and often may not induce genuine changes in the behavior of national administrations that may at any moment withdraw their consent to the ICJ's jurisdiction (Alter 2014). The CJEU does not pertain in this category. It is well established IC (Ibid.:32; Shany 2014) with compulsory jurisdiction, which allows private parties to initiate proceedings against member states and Union institutions. It has been exercising its activities since the 1950s and dealt with thousands of cases. Why then does the CJEU remain the subject of only a few analyzes in political science, produced by a few scholars that amount to a small group that could be easily contained in a classroom?

One of the reasons lies in the academic division of labor mentioned above and in the historical classification of the Court as a "legal actor" (Grimmel 2011). The Court would be removed from politics because of its mission of interpreting EU law, which would require an expert exercise than only specialists would understand. EU legal scholarship thus monopolized for decades the study of the Court. Pioneers like K. Alter and A. Stone Sweet introduced courts in governance analyzes late in the 20th century, while EU law had already become an autonomous discipline. The political scientists that heeded the warnings of E. Stein (1981) and J. Weiler (1991, 1994) had to study a class of actors that wielded power *on their own terms*. Early studies (Burley and Mattli 1993; Mattli and Slaughter 1998; Stone Sweet 2000 and 2004; Alter 2001) displayed an effort from social scientists to immerse themselves into legal scholarship in order to grasp the politics that lied underneath judicial interpretation, e.g. the trend towards more integration. The study of the CJEU became well established in political and EU studies, with numerous publications on the Court in journals like the *Journal of European Public Policy* or the *Journal of Common Market Studies*. It thus drifted apart from EU legal scholarship to become a self-standing, increasingly self-referential subdiscipline of EU studies[27]. EU legal scholarship was already an autonomous discipline at the dawn of the 21st century and conserved its autonomy for the most part, except for a few hybrid movements like Law in Context or EU socio-legal studies counting

[27] Whose proponents now exercise their research activities autonomously in dedicated groups, e.g. the European Consortium of Political Research standing group on Law and Courts.

only a handful of experts. The result is a common object of study – the Court – analyzed by 2 scholarly groups with different (if not opposed) conceptual and epistemological takes on what the Court genuinely is (an apolitical interpreter versus a political agenda-setter?) and what it does.

A recoupling of both scholarship is needed in order to establish a comprehensive account of the Court's legitimacy. Legal scholars give precious insights about the Court's activities but miss the "actorness" dimension that is associated with the exercise of power. They also often conflate the legitimacy of the Court itself with the legitimacy of the instrument it must interpret – the legitimacy of *EU law* – or of the task it performs – the legitimacy of *judicial review* in the EU. These are part of the answer but miss the part that political scientists described more in depth, i.e. the social dynamics that surround the process of judicialization. Judicial politics include a behavioral component that is often missing in legal scholarship, but often fail to grasp the specific social properties and logic of actions of the actors under study. If judges are indeed empowered individuals entitled to say what the law means (thus exercising a certain type of domination), they must however exercise their craft following a set of socio-institutional constraints – starting with EU law itself – that are specific to the CJEU. This last statement was historically downplayed if not disregarded by most political scientists, while it was on the contrary overemphasized by legal scholars. The task here is thus to attempt a reconciliation of 2 social scientific disciplines that hardly communicate despite their common research field[28].

1.3.3 The CJEU as a changing social-scientific object

Another struggle relates to the changing nature of the Court and its environment over time. The CJEU's mandate has remained stable since the establishment of the European Coal and Steel Community (ECSC) court in 1952. Yet today's bench differs from Pilotti's (ECJ's first president) court back in the 1950s. The size of the Court is also different. Judge Prechal acutely describes the change between yesterday's and today'

[28] See however the research outputs of interdisciplinary centers on law and courts such as iCourts in Copenhagen (https://jura.ku.dk/icourts/) and PLURICOURTS in Oslo (www.jus.uio.no/pluricourts/english/).

court: ""in the past it was a bit of a family, now it is a bit of a factory"[29]. The CJEU is a 2000-strong staffed institution in which *référendaires* (legal clerks) and lawyer-linguists co-produce with judges the outputs of the Court. Besides, the "benign neglect" (Stein 1981:1) that characterized the stance of outsiders not immediately associated with judicial interpretation is also over. The Court is accompanied by thousands of national judges, legal scholars specialized EU lawyers that ensure that all outputs coming from Luxembourg are immediately noticed and commented upon, at least by a few. Some even argue that the bold stance taken by judges in the 20th century is over since we allegedly observe a "retreat from activism" since the nineties (Saurugger and Terpan 2017:34-40). In sum, the Court of the 21st century is a different political object than it was at the genesis of the ECSC/EEC.

These evolutions are difficult to grasp at first glance. The Court's main mission has remained the same (interpreting EU law) and the outputs it produces (rulings) also show stability over time. Since rulings constitute the bulk of public information available from the Court, these have logically been the subject of several detailed textual analyses from which social scientists tried to abstract behavioral patterns (e.g. Larsson and Naurin 2016; Hermansen 2020). But knowledge about judges themselves remains scarce since the latter do not overly strive for publicity and media appearances[30]. The possibilities of researching the actors that give life to the judicialization process were exponentially enhanced in 2015 when the archives of the Court were made available to the public[31]. Lawyers,

[29] "Interview with Judge Sacha Prechal of the European Court of Justice: Part I: Working at the CJEU", European Law Blog, 18 December 2013, at: https://europeanlawblog.eu/2013/12/18/interview-with-judge-sacha-prechal-of-the-european-court-of-justice-part-i-working-at-the-cjeu/

[30] Biographies and current and former judges at the European Court of Justice (ECJ) and at the General Court (GC) are available on the Court's website. For the ECJ, see https://curia.europa.eu/jcms/jcms/Jo2_7026/en/ (current members) and https://curia.europa.eu/jcms/jcms/p1_217426/en/ (former members since 1952); for the GC, see https://curia.europa.eu/jcms/jcms/Jo2_7035/en/ (current members) and https://curia.europa.eu/jcms/jcms/p1_217427/en/ (former member since 1989). See also the list of former of the short-lived Civil Service Tribunal (CST, 2004-2016) at https://curia.europa.eu/jcms/jcms/p1_217428/en/

[31] Council Regulation (EU) 2015/496 of 17 March 2015 amending Regulation (EEC, Euratom) No 354/83 as regards the deposit of the historical archives of the institutions at the European University Institute in Florence

sociologists and historians were suddenly given premium evidence to explain the positions and arguments employed by various stakeholders involved in litigation processes at the CJEU. Rulings were suddenly accompanied by narratives about the possible interpretations of EU law, revealing the "EU Law stories" (Nicola and Davies 2017) hidden behind these decisions. These archives are only open however for cases dealt with more than 30 years ago. It is thus not surprising that the scholars who managed to open the black box that is the Court describe the early years of the polity, and especially the dynamics that surrounding the interpretations of classic decisions such as *Van Gend en Loos* or *Cassis*[32] (Nicola and Davies 2017; Vauchez 2015; Davies and Rasmussen 2012; Davies 2012a). The difficulty remains however for finding evidence about contemporary studies of EU law interpretation, and the struggles they generate about the legitimate right of the CJEU to say what the law is in the EU today.

1.4 Sketching a framework of judicial legitimacy in the EU in the 21st century: outline of the monograph

Chapter 2 spells out the paradigm of social action, the theoretical framework adopted to cope with the struggles detailed in section 1.3, and the methodologies used to substantiate the main arguments. It starts with the premise that legitimacy in a democratic setting is the product of shared ideals among powerholders and subordinates, and that these common understandings shape of a "logic of appropriateness" (March and Olsen 1989; 1995; 1998) that structure the behavior of all stakeholders. It embraces a redefined variant of sociological neo-institutionalism that is tailored to the exercise of judicial behavior in the EU. While renouncing the attempt of making a causal argument about justified domination, the chapter details the conditions under which a normative theory of judicial legitimacy can bring some meaningful structural and empirical observations. It embraces a theory-building process tracing design (Beach and Pedersen 2018) that relies on the theoretical arguments made in the literature about the legitimacy of the EU and the legitimacy of ICs to detail how these arguments find an echo in the EU today. The chapter goes on

[32] C-120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (*Cassis*), 20 February 1979

to detail how research carried out at the micro-sociological level of analysis allows for the opening of the black box that is the CJEU.

Chapter 3 treats the overarching theme of the Court's audience. The concept of audience is traditionally associated with sociological legitimacy. However, an informed normative theory must consider the specific social properties of the attentive public of an IC. It deconstructs the claim that every citizen is aware and has a meaningful opinion of the Court, rediscussing in the process debates about the relationship between ICs and public opinion. By using an innovative approach about legitimation from the top (meaning by judges themselves) and by analyzing the social characteristics of the Court's public on a social medium (Twitter), the chapter concludes that the Court's attentive public is – concurring with arguments made about the legal "system" (Luhmann 2008) and the legal "field" (Bourdieu 1987) – that *legal professionals* constitute the Court's attentive audience. If the general public remains for the most part unaware of judicial activities in the Union, the Court may however be brought in the spotlight under specific scope conditions, concretely during episodes of socio-economic distress.

Framing the CJEU's audience is a necessary preliminary step to take in order to build a comprehensive normative approach to the Union's judiciary. It thus guides the arguments developed in chapters 4, 5 and 6 that borrow the classic tryptic between sources (input), process (throughput) and outcome-related (output) factors of legitimacy found in the literature about the EU and ICs. Chapter 4 develops the essential conditions that are needed for a judicial institution to exercise domination beyond the state. It stresses that formal conditions found in the constituting instruments of the polity frame *de jure* the Court's mandate. The essence of the Court's legitimacy is no longer limited in the 21st century to provisions found in the treaties. As a governing institution, the composition of the Court also must reflect the society whose rules it must interpret. The sources of CJEU legitimacy have a legal and sociological component.

Chapter 5 details the processual legitimacy of the CJEU and makes the claim that process legitimacy can compensate for shortcomings at the input and output levels of legitimacy. While the Court has been found to suffer shortcomings on a key component of process – namely transparency (Dunoff and Pollack 2017) – the chapter shows that the Court

cements its authority by sharing its governing prerogatives with its attentive audience. By making other legal professionals co-interpreters and co-enforcers of EU law, the Court compensates for its lack of coercive tools – since courts do not have the power of sword nor the purse (Pollack 2018) – by establishing itself as a systemic actor in the EU legal profession that has become too big to fail, thus rendering counterfactual perceptions of an EU without a judicial body impossible. The chapter concretely details how the Court performs in terms of participation, responsiveness and transparency, concluding that the CJEU scores high on the former 2 indicators and suffers from shortcomings in the third.

Chapter 6 discusses the outcomes of the CJEU and assesses comparatively how the Court manages its function of regime support. It starts with the unpacking of 2 meta-objectives found in the literature about IC performance – justice and effectiveness – and shows that legitimacy deficits may arise if the Court does not capture the changing nature of these 2 objectives. Justice and effectiveness held a different meaning at the time of the EEC than they do in a contemporary context. The chapter then goes on to discuss the problem-solving function of the CJEU, and expose the difficulty hidden behind such an objective. The following subsection details the extent to which compliance with rulings constitute a proper indicator of legitimacy, and the last point made in the chapter discusses the temporal dimension associated with judicial review in the EU.

Chapter 7 concludes by summarizing the main points made in chapter 3 to 6 and claims unambiguously that the CJEU is not suffering a legitimacy crisis in the 21st century. It summarizes the legitimacy deficits that the Court faces especially after the decade of crises the EU went and is still going through. It goes on to discuss the theoretical shortcomings that could not be addressed in this monograph and ends with a series of recommendations that could help the institution in cementing or restoring the full acceptance of its authority.

Chapter 2

Finding the bridge: sociological institutionalism as a lens to study EU law and EU Lawyers

Legitimacy refers at the same time to moral standards and to a relationship between power holders and subordinates, referring to the distinction between normative and sociological legitimacy. A political scientist here must either make a trade-off and treat exclusively one side or attempt to treat both in the same work. Most treat only one side and solve only parts of the equation. Political philosophers like John Rawls (1971) or Allen Buchanan (2002, 2010) forge legitimacy standards like "tolerance" (Rawls 1971:220) in society or a justified "right be obeyed" (Buchanan 2002:696) are well argued opinions of how citizens *should* live with one another. Political scientists focusing on the sociological legitimacy of the Court study legitimacy from an empirical perspectives and forge typologies that capture the various types of uncontested domination. The problem here is that first legitimacy is not a directly observable phenomenon, and second that there are differences of degree between citizens (Bodansky in Dunoff and Pollack 2013: 321-42). Another issue lied with the difficulty of not the impossibility of establishing a causal research design, which is the main purpose of political scientists nowadays (Gerring 2012; King, Keohane and Verba 1994; Blatter and Haverland 2012). They must use other indicators or proxies which are

subject to empirical testing and causality, but these proxies nonetheless remain imperfect approximations of the original dependent variable.

While treating both sides of legitimacy apart allowed researchers to provide interesting contributions, these accounts always fell short of providing a complete picture of legitimacy, combining an empirical appraisal of the public's mood about their governing bodies *and* the reasons conducive of the acceptance, criticism or rejection of the justification of power. To get a complete picture, the political scientist cannot adopt an approach that is exclusively descriptive. She must articulate an approach combining reasoned belief about political power and the (in)action that follows from such beliefs.

Beliefs may be assumed since they are unobservable. Rational choice social scientists thus assume that actors act one way or the other because they try to maximize their interests. One can thus unpack social phenomena as the consequence of all these competing interests. Results depend on the bargaining power of the participants and on the potential coalitions they may build to outnumber or outpower their opponents, which sometimes obliges them to settle for suboptimal outcomes (trade-offs). The problem here is that there is a profound contradiction between the very existence of a phenomenon such as legitimacy on the one hand, and the constant pursuit of maximized interests on the other. Legitimacy implies uncoerced obedience from the subordinates, whether the ruler's decisions help the subordinate in maximizing her interests or not. On the contrary, interest-maximization assumes that actors will do everything to enhance their prerogatives. Rational choices may be legitimate, illegitimate or alegitimate (meaning that questions about the right to rule are irrelevant in such a conception). Rational choice theories of social action and legitimacy are hardly compatible, as interests are to be the sole explanatory variable of explanation of social phenomena.

If interests alone cannot explain how actors endorse or not the domination relationship between those holding power and those voluntarily submitting to it, social scientists may thus concentrate on the structure of the system itself. He may unpack the routines, habits, rules and traditions and thus witness the effects these generate in the actors. These are institutionalist modes of understanding social actions. More precisely, neo-institutionalists schools referred to the return of such approaches in the 1980s after their disappearance in favor of exclusively behavioralist

approaches of political life (Hall and Taylor 1996). Some rational choice theorists also adopted an institutionalist lens and developed interesting contributions about the creation of institutional arrangements that fit the interest of all members of the newly created institution. For the EEC, Moravcsik explained in a great fashion how material economic interests shaped the EEC in the 1950s (Moravcsik 1998). Yet they often tend to assume that actors remain with strict preferences that do not change over time, and ignore the weight established institutions have other time. The most devastating critique in EU studies of rational schools of thought comes from historical neo-institutionalists led by Paul Pierson (1996). These scholars argue that institutions are more than mere instruments. Institutions would cognitively shape up the orientations taken by the actors and the longer they are established the more difficult they are to change or overcome. Only "critical junctures" like the ones generated by the *Barber* case[33] would enable actors to overcome the weight of pre-established institutions and create new ones. Thelen tried to connect both strands by introducing the concept of "layering", referring to additional institutions that get attached to pre-established ones without replacing the original institutional core (Thelen 1999; Streeck and Thelen 2005). The main shortcoming of historical neo-institutionalist accounts is that they struggle to theorize changes that are not incremental. More importantly they tend to underestimate the actors' own abilities in shaping up pre-established institutions, without necessarily changing their nature but giving them flesh to the bones. That is something sociological neo-institutionalists (SI) – the third neo-institutionalist stream Hall and Taylor identified in their seminal article (1996) – have theorized as a back-and-forth process. Their most famous tenants, James March and Johan Olsen, described situations where actors were following pre-established institutional patterns while retaining a certain margin of maneuver in making choices. This approach seems promising in giving sufficient weight to norms and institutions while understanding that human touch can lead to change through persuasion or socialization. Equally

[33] *Barber* held that the inequality of occupational pensions between women and men was contrary to the equal pay principle enshrined in EU law. While the result in itself did not issue major controversy, the fact that the Court claimed this principle to apply retroactively sparked the UK government to push for the Barber Protocol (limiting the result of the Barber case to future situations, i.e. without retroactive effects). See Garrett and al. 1998; Pierson 1996)

importantly, it also provides an encompassing framework allowing for a recoupling of legal and political sciences.

2.1 Reconciling uneven interpretations of a common research field

March and Olsen theorize 2 different logics of social actions that are not only opposed but come to play at the same time in social phenomena (March and Olsen 1989, 1995, 1998). The logic of "consequentialism" suggests that actors follow a rational approach when making choices. But a second logic – the logic of "appropriateness" – comes to play when coping with social phenomena. This second logic hypothesizes that actors will follow pre-established routines and codes of actions in order to frame situations and act accordingly. Human-action is rule-based (March and Olsen 1998: 953) and agents follow these structures without questioning them. Humans would not be overly constrained however, since they would retain a certain margin of maneuver. It is like a football match. As long as players follow the few rules of the game (offside, no handball, no harsh tackling), anything may happen, but players do not even think of changing the size of the pitch or find new ways of winning other than kicking the ball in the back of the net .

Traditionally scholars opposed these two logics and argued that either one or the other applies in life. But March and Olsen operationalized ways by which both operate at once. One would either clearly dominate the other, or one may simply create refinements to the other. Another option is the gradual replacement of logics: the relationship between consequentialism and appropriateness is a "developmental" one, with one replacing the other over time. Concretely, actors enter an instrumental relationship with consequentialist purposes and develop a sense of rule-based identity, which they progressively share with others and may even stop questioning after some time. On the contrary, a consequentialist logic may suddenly reappear when rules and routines do not work anymore (e.g. in critical junctures) or force actors with strong pre-established routines to cope with new situations.

The passage from a logic of consequentialism to a logic of appropriateness may help to understand a couple of phenomena developed in Chapter 1. First, it helps us to understand that judges and courts are peculiar powerholders in societies that have been subject to a progressive

differentiation. Differentiation means the separation of actors in different fields (Bourdieu) or systems (Luhmann and Parsons) with their own logic of appropriateness. The development of the logic of appropriateness in the legal system means that issues dealt with by the entirety of society are coded in the Luhmannian binary alternative "legal/illegal". The autopoietic development of legal coding shows the change of social logic over time: it first serves consequentialist purposes (for example, the ECSC treaty of 1952 serves the rational purpose of making war between participating states impossible), then becomes routinized by the actors of the legal system (via the progressive development of case law and secondary legislation), and turns into the main if not only way actors of a given social system understand the reality of their work. The logic of appropriateness completes systems theory in that it describes the process by which actors perform Luhmann's "operative closure" (Luhmann 2008: 76-141). Although Parsons (1951) and Habermas (1996: 133-51) made a valid point when saying that law is a medium of communication connecting all systems, law is appraised differently depending on the system. Law generates a different logic of appropriateness in different fields and is particularly important in the legal system itself because it gives them a true professional *raison d'être*. Indeed, by being regularly associated to the application and interpretation of the *acquis communautaire*, EU lawyers will forge a strong bond with the normative order they (must) interpret. Law applies equally for all citizens in a democratic society, but it does not carry the same structuring weight for everyone. I hypothesize here that it binds the rationality of lawyers more than it would for politicians, economists or any other citizen not pertaining to the legal system (see chapter 3).

Second, if the incremental development of the logic of appropriateness and may be interpreted as a sign of the legitimacy of the system of the polity, then a return to the logic of consequentialism may be conceptualized as a crisis that challenges the routinary possibilities of action of the system. A return to the consequentialist logic signifies that rule-based action is not deeply entrenched in the cognition of agents. In other words, it means that actors forget – albeit temporarily – their routines to return to preferences of the system exogenous to the system such as power or interest maximization. A theoretically perfect logic of appropriateness – that I define as having eliminated every trace of consequentialist thinking – corresponds to the perfect belief not only in

the system's viability as operatively closed but also in the overarching society (historically the state in modern polities) that orchestrates such a differentiation. When March and Olsen claim that both logics coexist permanently, they would recognize that perfect legitimacy is an empirical impossibility. But when they argue that the majority of political scientist underestimates the logic of appropriateness, they also claim most tend to omit the importance of legitimacy (in their language of justified beliefs) when studying politics. In a more empirical fashion, one would suggest that some issues always transcend societal differentiation and apply in all social systems, and that these issues change over time but must be applied in all social systems for each of them to be perceived as legitimate, independently of the specific systemic logic. For example, I will argue below that gender balance is one of these overarching objectives of democratic societies in the 21st century and must happen in the legal system (see 4.2.4).

The problem here is that one may also view operative closure as a consequentialist logic of the whole legal profession. Bourdieu (1987) claimed that the autonomy of the various fields of society can only be understood as an attempt to demarcate itself from the rest of society. The politics of legal coding may be a conscious enterprise of lawyers who voluntarily complicate reality (by creating a parallel language and a dedicated set of procedures) to justify not only their right to rule (say what the law is) but also their existence.

Whether one believes that differentiation is a consequence of the logic appropriateness, i.e. that differentiation results from the legitimate belief that laws and powerholders organize society in justified manner, or of a consequentialist logic, i.e. that lawyers and especially judges are "liars" (Shapiro 1994) using law as a fig leaf covering their own political ambitions, one cannot deny the specificities of law and lawyers in society. How then can one distinguish between the logic of appropriateness and consequentialism when applied to the CJEU, and to a larger extent to the larger EU legal system/field?

SI provides an interesting approach that allows the researcher to combine a normative component – the "law" described by the social, legal and political philosophers exposed in the previous chapter – with an empirical actor-based description that would allow us to better understand the legitimacy of the CJEU. The main issue with March and Olsen's approach

is their broad definition of "institutions". In general, sociological institutionalists adopt a wide approach to institutions, including formal rules to accommodate cultural practices, symbols, routines, socialization, etc. (Hall and Taylor 1996:14). This key concept presents a risk of being unfalsifiable and thus unsusceptible of empirical testing, causing several political scientists to withdraw their interest in the approach. But if it were adapted to a specific social, economic, cultural and institutional context, one may provide a definition of institutions serving both as a normative benchmark for legal theories of justified power and an observable phenomenon – at least more circumscribed – leaving room for a descriptive empirical analysis. The key theoretical challenge is thus to adapt SI to the world of the CJEU, to build a design that allows for some empirical observations and to find the proper sources for testing.

2.2 Analyzing Judicial Legitimacy in the 21st century

A major part in assessing the logics that describe the world of the CJEU is to put it in its contemporary context. Societal differentiation, development of "diffuse support" (Easton 1965; 1975) and of the logic of appropriateness are processes that change over time. It means that today's court, just like the EU legal system, will have different features compared to the body presided by Massimo Pilotti in 1952 when the ECSC Court was founded. Shall differentiation and appropriateness of norms occur, one would expect the legal system to be more self-referential and the members of the system to be different. When one looks at the Court from the ECSC, he may describe a body that is heterogenous, composed of diplomats, trade union members (P. Serrarens), economists (J. Rueff) not to mention former politicians (L. Delvaux and R. Lecourt)[34]. In a word, the composition of the bench in the 1950s was a clear representation of a newly born polity or society (the ECSC then EEC) that was not at the time differentiated, thus composed of members representing different socio-professional interests. If the Court is to be a justified powerholder itself and justifies the power wielded by the polity as a whole, it must have followed the pattern of societal differentiation in modern democratic societies, meaning that its highest judges shall be appointed according to their specific background – i.e. show that they are outstanding lawyers (see 4.2).

[34] See the biography of former members of the Court (n30).

Now the problem here for most readers is that even the most recent tales about the CJEU keep telling "stories" from the early years of the community (Davies and Nicola 2017). A major emphasis remains on the 2 canonic decisions that the Court gave in the 1960s about direct effect and supremacy of EU law. While nearly unnoticed at time of their publication (see Vauchez 2015 for a brilliant account of these events), these rulings became noticed much later by lawyers (see the pioneering Stein 1981; Weiler 1991) and even more so by political scientists (Alter 2001). Since then, the contemporary flurry of commentary about these cases does not cease to grow (Nicola and Davies 2017:103-20; Grimm 2017; Schmidt 2018; Vauchez 2015; Alter 2009:63-91; Phelan 2020). Moreover, the recent relocation of the archives of the Court at the European University Institute in Florence gave new empirical material to socio-legal historians to complete and update their existing accounts of the early cases of the EEC. These archives are only accessible for rulings handed down more than 30 years ago, which thus generates extra attention to *Van Gen den Loos*, *Cassis*, *Internationale Handelsgesellschaft* and other "landmark cases" (Vauchez in Nicola and Davies 2017:21-34) that happened before the 1990s. Many of these tales recall an ambitious court with a rich agenda of expanding EU law at all costs (especially Rasmussen 1986), with the Court composed of former politicians and academics, i.e. both with visions of a united Europe described by Weiler as the "promised land" (Weiler 2012).

These contemporary descriptions of the early years of the Court are of course welcome additions to existing accounts of the Court's history, but they generate an analytical caveat when trying to understand the evolution of the CJEU in its contemporary context. Political scientists, even those who view a certain restraint in the court's case law of the last decade (Blauberger and al 2018; Martinsen 2015; Larsson and Naurin 2016), keep seeing the Court as a rational united body aiming at expanding its prerogatives or those of the EU by purposely expanding the reach of EU law. Integration-through-law would be politics by other means, and every decision expanding the scope of EU law would be the Court seizing power when made available.

These contemporary approaches follow rational choice assumptions and take for granted that the Court has fixed preferences. They do not leave room for possible changes in the way judges perceive EU law, how they would cope with either a thin legal system at its genesis (something describing the epoch of judges Lecourt, Donner, Pescatore: see Vauchez

2015) or on the contrary how newly appointed judges interpret the law of a consolidated legal system in the 21st century. The gradual development of the logic of appropriateness, combined with sociological accounts of law (either logic-based for Luhmann or actor-based for Bourdieu) suggest on the contrary that the legal system or field evolve and gain either autonomy or closure, while the actors of said spaces increasingly tend to have their actions more rule or institution-bound than with a consequentialist mode of action. The theoretical expectation here is that actors tend to believe in the rules of the game, i.e. that judges tend to see the logic of the social space as *legitimate*. In other words, rules are and ought to be for these agents decisive in shaping the behavior of legal professionals. The regime, rules and institutions of the EU are thus meant to conduce not only citizens but also judges – as empowered citizens – to be themselves bound by its normative force. Beetham (2013) showed that rules are meant to apply not only to subordinates but to powerholders themselves. Democratic regimes have established rules at the constitutional level mostly to limit their rulers' margin of maneuver. The latter's consent is expressed in the constituting instrument of the EU: the treaty on the EU (TEU) and the treaty on the functioning of the EU (TFEU). The Court is thus an institution of the treaties (Horsley 2018), and judges are expected to feel bound by these limits, a blind spot in the political science literature (see 4.1).

However, one should not equate logic of appropriateness with sound judicial activity or equate logic of consequentialism with political action. Stone Sweet importantly acknowledged that constitutional judges are tasked themselves to place the boundaries between law and politics on thus make choices on their own (Stone Sweet 2000). The logic of appropriateness here would imply that judges do not follow a rational interest-maximizing logic in performing that task. They would rather follow pre-established patterns of adjudication and reasoning. Here a major legitimacy challenge of the CJEU is to deal with a legal order that has not clear boundaries with the legal orders of the member states. The BVerG correctly observed in May 2020 in the PSPP ruling that there are inherent tensions between EU law and national constitutional law in terms of supremacy. Thus, references to norms alone are not sufficient to find solutions in such cases.

Unfortunately, many authors conflate the Court's legitimacy with deficiencies in the legal order, such as its overconstitutionalization

(Grimm 2017; Scharpf 2017) and the difficult possibility of overriding rulings interpreting the treaties (Scharpf 2006). Their plea for greater restraint of the CJEU in adjudicating cases is nonetheless equally problematic from a normative standpoint of judicial review. Judges must ensure that the law is observed[35]. Since judges ought to interpret norms that do not precise the ways by which they must trace a border between law and politics, they must find ways to justify their authority to do so, mostly by convincing their "interlocutors" (Pollack in Nicola and Davies: 577-602; see more below) of the soundness of their decisions. A neo-institutionalist reading thus entails a discursive component (Schmidt 2008) which clearly displays the coexistence of consequentialism and appropraiateness. One thus expects judges to extensively justify decisions where the law is unclear (see chapter 5). The literature stresses that judicial independence is a key legitimating feature of courts in general (see e.g. Squatrito in Howse and al 2017:405-431), but without coercion devices courts cannot exercise their authority without reaching out to their audience. On the contrary, they must rely on other players to enforce their decisions. Participation, not independence, is how the CJEU will exercise and justify its power to interpret EU law when the treaties do not help in achieving that goal (see 5.1).

2.3 Research design: combining normative and empirical insights

Comprehensive research about legitimacy does not only demand an original multi-disciplinary framework, but it also requires an unusual research design. Legitimacy research combines empirical and normative elements, thus barring the unpacking of a classic causal mechanism (King and al. 1994; Gerring 2012). This research thus combines normative indicators of judicial legitimacy as highlighted in the secondary literature and provides various empirical insights to give solidity to the overall framework.

2.3.1 Legitimacy as an unobservable phenomenon: the need for proxies

Since legitimacy is not observable, it is not suited to a classic research design aiming at proving causality between two empirical phenomena.

[35] Art. 19 TEU

Equally problematic is the problem of equifinality in explaining legitimacy: since all citizens do not have the same approach to law and courts, they would then forge different normative criteria of the legitimacy. Slightly differently, the same independent variable in such a design may generate different if not diverging conclusions depending on the individual assessing whether the CJEU is legitimate or not. Consider for example the difficult legal issues raised by the new tools of economic governance during the Eurozone crisis, which inevitably found their way to the docket of the Court[36]. Member states sought to quickly tackle the effects of the crisis despite major hurdles in the institutional structure of the Union. Member states thus either ignored the pre-existing arrangements (e.g. state aid rules[37] were set aside when member states recapitalized their ailing banks in 2008 and beyond) and established new instruments "by stealth" (Schmidt 2020) that tried to 'respect' the existing prohibition of monetary financing[38] and bailout prohibition[39] by drafting international treaties borrowing EU institutions to assist states in their task (Fiscal Compact, European Stability Mechanism). For some (e-g. national governments), having the Court validating these arrangements was welcome, since it captured the widely shared drive of changing the European economic constitution. For others such as Gunnar Beck, famous law professor and author of a great book on legal reasoning of the CJEU (Beck 2013), the validation of these arrangements is *contra legem* and should have been opposed by the CJEU (see indeed Beck 2013: 447-51; Tuori and Tuori 2014). Trying to operationalize legitimacy in a purely deductive fashion would require from the social scientist to capture the entirety of rationalities in the studied population (something which is hardly conceivable). One of the key questions to answer for a transnational non-majoritarian institution is thus to sociologically determine to whom it must be legitimate. Is the CJEU meant to address the entire citizenry on a regular basis? Are these citizens on the contrary entrusting some representatives to perform such a task, since we saw that law creates an exclusion effect between the acquainted (Durkheim's concept of the "sacred") and the outsiders (the "profane")? Do all citizens care about the activities, or do they remain "blissfully ignorant" of what

[36] *Pringle*; *Gauweiler*; *Weiss*; *Landeskreditbank Bade-Württemberg*

[37] Art. 107 TFEU

[38] Art. 123 TFEU

[39] Art. 125 TFEU

happens at the Kirchberg Palace in Luxembourg? Answering parts of these questions will help in a lot in determining what the Court can do to improve its exercise of power and what it should do as a transnational court (Chapter 3).

Legitimacy is also not a measurable phenomenon. It would thus require the use of giving indications on legitimacy. Only a combination of these indicators would approximate to the best extent possible the reasons leading citizens and governments of sovereign nation-states to submit to the judicial dominion of a transnational body. The normative appraisal starts with the *essential* qualities that make the CJEU legitimate or not. What special features do judges possess – other than the results the court produces – to be accepted ab initio as a legitimate body? The literature on non-majoritarian institutions listed above displays a common agreement about the absence of input legitimacy for the Court. Judges in the EU are not elected via the ballot box but are appointed by governments after the approval of a specialized committee[40]. The input of citizens is thus quite limited or is at best indirect since governments would do the appointments on their behalf. Which factors would thus lead citizens to accept the authority of unelected transnational judges? These sources or input legitimacy are treated in chapter 4.

Process-related factors leave empirical fingerprints that unpack a closely related but still distinct phenomenon: legitimation. Schmidt defines process legitimacy as "throughput" and claims that it cannot generate any legitimacy trade-off. While input can compensate for failing output and vice versa, throughput deficits would only harm the legitimacy of an institution, but cannot make up for the lack of democratic input or poor policy results. Chapter 5 will contest this claim for the specific case of the Court. Process in adjudication is key, especially when the legal framework is unclear and judges then dispose of several options. Judicial throughput matters equally if not more than input and output. Process involves a formal and a sociological component. Due process demands that certain rules related to the administration of proofs, standing and respect for deadlines. Process also involves a relational, outside-of-the-courtroom element involving judges in their justificatory task. While rulings are (not so often) enlightening themselves, they sometimes may fall short of performing that justificatory task, a charge often made against the CJEU

[40] Art. 255 TFEU

(Pollack 2018: 158). Judges acting beyond their judicial capacity may then compensate for what they did not or could not do when deliberating or drafting rulings. They may also address issues raised by rulings that judges did not foresee at the time of their adjudication.

2.3.2 The combination of normative yardsticks with empirical insights of legitimacy

If process is an observable fact, output legitimacy or good adjudicatory results are on the contrary impossible to operationalize in a causal fashion. A sound judicial decision for one may constitute a failing result for another. Adopting a deductive research design to assess the weight of subjective judgements is an impossible task. The use of proxies of sound judicial outcomes is thus once again required – e.g. effectiveness, compliance, time of adjudication.

Despite the difficulties associated with varying appreciations of outcomes, some factors nonetheless transcend these isolated appreciations. How did social scientists like Weber or Beetham manage to accommodate far-reaching theories of legitimacy while coping with normative component into their analysis? They adopted a design that runs counter to what most contemporary research design books teach graduate students in political science nowadays. These authors worked *inductively* before claiming any abstract feature about legitimacy. Weber read about many political systems and then abstracted features working across time and space, i.e. by comparing seemingly different polities and finding out that traditional, charismatic and rational-legal dominations were commonly perceived as legitimate. Beetham performed a similar task when he describes that in any social organization, from tribal villages to dense and complex western societies, legitimacy always arises out the existence of common rules, the shared belief between powerholders and subordinates that these rules are legitimate, thus leading subordinates to express their consent to be dominated.

Pure induction nonetheless does not exist (Beach and Pedersen 2018): the social scientist must have a set of minimal expectations that shall not be bound to the binary alternative consisting of proving or rejecting hypotheses. A way of forging these expectations is to compare the CJEU of 2020 with the CJEU of the 20th century, allowing the researcher to know the criticism raised against the Court in the past and see whether

complaints have addressed, or if on the contrary the Court persisted and did not change its habits. Comparisons with other ICs are simply indicative. The EU is a *sui generis* polity because it is a transnational organization with a legal system comparable to a state's rather than to an IO's (including the Council of Europe [CoE]), which makes the CJEU an outlier in the realm of ICs rather than a viable point of comparison.

2.4 Methodology: multiplication and triangulation of sources

The absence of a straightforward causal research design does not allow for inference methods like regression analyses. Large-N statistics thus need to be descriptive and be triangulated with qualitative sources. The innovation of this interdisciplinary work is also to combine insights from legal scholarship and political science.

2.4.1 The Court's public: quantitative and qualitative insights

The members of the CJEU, as "masters of legitimacy" (Everson 2014), justify extensively their decisions. The question of case law legitimation raises the prospect of the Court's audience: are all citizens monitoring the activities of the Court? Is it just about a narrow group of experts? The audience a power-holder targets influences the message rulers convey to their subjects they need to convince.

2.4.1.1 The information about judges themselves: CVs and encounters

The Court publishes since 2017 a list of external activities of its members, both in their formal capacity as judges and in their off-duty time[41], allowing to assess the type of activities they perform and with whom they are willing to spend some time, giving us idea of the Court's audience. These lists also indicate the venues of these encounters. It thus sheds some light on the social properties of the interlocutors of the Court.

A major argument of the logic of appropriateness refers to the importance of pre-established patterns of action. One would thus expect CJEU judges to keep their previous habits – e.g. socialization venues – that would have an incidence in their activities as judges. I thus have a look at the CVs of

[41] See the list of external activities of the members of the Court at: https://curia.europa.eu/jcms/jcms/p1_753595/en/ for 2020; 2017, 2018 and 2020 lists on file with author.

the judges and see whether they keep interacting with members of their former socio-professional body (national judiciaries, research centers, ministries for former politicians, etc.) to witness the continuing trends or on the contrary the breaking points characterizing the EU's judicial world[42] (see Vauchez 2015 for a similar endeavor).

Another way of assessing the judges' own thoughts is to look at their publications. Former academics keep publishing on a regular basis[43]. Although the usual disclaimer applies, judges always justify the reasons that led the Court to adopt the 'right' decision. And sometimes, judges say things that go beyond legal interpretation and say something meaningful about the legitimacy of the institution they serve[44]. Their publications or the minutes of their talks during conferences are thus privileged sources to have a critical discourse analysis. They are consistent with the sociological institutionalist reading of the world in that judges would defend their ideas because they see them as legitimate and thus worthy of these extra-efforts. More than judges, the members of the Court tend to act as true ambassadors of EU law and export the results of the Court's case law beyond the courtroom (see section 5.3.3).

2.4.1.2 Understanding the Court's interactions: the view of practitioners

As sole sources of evidence previous experiences and current socialization would only provide a determinist picture of judicialization without allowing for a certain margin of maneuver. Judges retain a certain freedom

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[42] CVs of the members of the ECJ are available at: https://curia.europa.eu/jcms/jcms/Jo2_7026/en/; for the GC: https://curia.europa.eu/jcms/jcms/Jo2_7035/en/; and for former members, allowing for diachronic comparisons and the evolution of the Court, see: https://curia.europa.eu/jcms/jcms/p1_217426/en/ (ECJ) and https://curia.europa.eu/jcms/jcms/p1_217427/en/ (GC), along with the former members of the short-lived Civil service tribunal at: https://curia.europa.eu/jcms/jcms/p1_217428/en/

[43] For example, the list of publications of the President of the Court is astonishing and keeps growing. See: http://lirias.kuleuven.be/cv?Username=u0003906 and see 5.3.2.

[44] E.g. Julianne Kokott (AG) and Christoph Sobotta (référendaires) claimed that the Court could not invalidate the ECB's purchases of sovereign debt because the ECB possesses stronger democratic legitimacy than the CJEU: "*These other institutions possess better technical and scientific expertise within the fields of their competence than courts of law. In addition, they usually enjoy a stronger democratic legitimacy than the courts because they are directly or indirectly responsible to an elected parliament*" (Kokott and Sobotta 2017)

in forging their own opinions. The analysis must be completed by a discourse analysis of judges. One may collect their impressions directly via semi-structured interviews. Access to the CJEU is difficult: the Court is a closed world and judges and their staff, sworn to secrecy about pending cases, are often reluctant to answer questions about their work[45]. The difficulty is even higher for a political scientist willing to interview lawyers, showing once more the divides among both worlds. Legal professionals are not willing to be accused of political bias. They are thus reluctant to have interviews with social scientists who ask more about the socio-economic impact of rulings rather than on their reasoning in specific cases. Approaching judges and staff of the Court proved difficult but not impossible and often required trade-offs. Among all recipients, the most receptive were those with an academic background and numerous publications (which I mentioned in the mail to approach them). I can only speculate here for a natural openness of academics: some will value scientific work as such, even from political science. Others would know my supervisors (both pertaining to the legal profession) and then inspire further confidence. Finally, mentioning and quoting their academic outputs demonstrated a genuine interest from my part in their work – i.e. my engagement with legal reasoning – and an attempt to take law seriously, or at least not directly accuse them exclusively of political bias. Many of the respondents demanded not be recorded. Those who understood that recordings were empirical material gave me an alternative between a recorded interview with "diplomatic" answers and unrecorded interviews with more freedom. For the most part, I picked the second option because I wanted further and unmediated engagement with the topic of judicial legitimacy and the perceptions of the respondents in that regard. In November 2019, I spent a week at the CJEU, where I attended formal audiences, 2 hearings, and conducted 9 interviews. 4 of them led to the respondents signing interview consent sheets and 3 led to recorded and anonymized interviews. In March 2020, I had a second round of interviews scheduled in Luxembourg with 5 more members of the Court, but my trip got canceled because of the COVID 19 pandemic.

While some interviews proved quite enlightening, the recorded parts are not a great source of evidence. The respondents knew all too well how to

[45] Most people I contacted for interviews at the Court did not reply to my queries.

manage difficult questions by not giving straightforward answers about uneasy questions (e.g. about *ultra vires* rulings). Often, they repeated things I heard somewhere else in other talks (see Annex 6).

Publications and minutes of talks of great EU law events give great insights about the power struggles at stake in the legal profession. They often take a written form, which means that they were carefully crafted and revised, leaving emotions and spontaneous reactions out. On the contrary, live events with their surprising questions force judges out of their comfort zone and lead them to share more emotional responses. The recording of these events – e.g. in Youtube videos but also official ceremonies of the Court[46] – are other sources evidence.

2.4.1.3 Examining citizen perception: the use of Twitter data

Most research publications spelling out sociological theories of legitimacy rely on surveys conducted after a random sampling. Surveys nonetheless present methodological difficulties that make their results open to interpretation (see 3.1.2). Social media on the other hand do not present the same methodological biases because they do not involve any manipulation of the experiment. The collection of data remains untainted by potential biases created by the researcher himself in designing questions and measurements. I surveyed the activity of both Twitter accounts (English and French) of the Court, and collected data (available in the public domain) on the followers of the Court, in order to grasp specific factors of the Court's audience. I looked at all the tweets published by the Court in December 2020 and coded all the reactions available (a total of 91 tweets, which generated a total of 3819 retweets, 1733 of whom were publicly available). The purpose of the experiment was to determine the proportion of legal professionals in the Court's audience, and check whether other identifiable groups could be found.

2.4.2 The sources of the CJEU's legitimacy: statutes, treaties, composition of the bench and institutional configuration

The Court of Justice is an institutional actor (Horsley 2018; Conway 2012). The constitutive instruments of the Union remain the cornerstone that judges ought to build upon, since rules are a legitimating element of any

[46] Which may be found here for all celebrations and events *at* the Court, such as President Skouris' retirement ceremony or the 50 years of *Van Gend en Loos*: https://c.connectedviews.com/01/cdj

sort of polity (Beetham 2013). Assessing the Court's mandate as defined by the constituent power and view if judges subsequently respect this in case law serves as another proxy for the CJEU's legitimacy. The treaties themselves provide guidelines regarding the mission of the Court and thus constitute the first normative benchmark against which to assess the EU's judiciary. These treaties also provide clear criteria regarding the persons who may sit on the Court's bench: Art. 255 lists a series of standards candidates ought to possess. A study of the appointments of judges, helped in the attempt by the six reports the Art. 255 committee has so far published[47] on the subject, is thus relevant.

While some specific guidelines are enshrined in the treaties themselves, there are overarching themes that apply equally across social groups and thus concern all powerholders. In the 21st century, these are often equated to the rule of law, human rights and fair representation of most of the different groups composing society. For example, while there is no clear rule demanding gender balance at the CJEU, the contemporary importance of the theme makes it a cornerstone of the legitimacy of any ruling institution. Thus, I will detail the contemporary balance at the Court, not only among judges but also of the staff of the Court[48]. Besides, IOs do not generate a sentiment of belonging as strong as the one created by nation states (Scharpf 1999; Grimm 2017), thus fair representation demands that states remain equally represented in EU institutions, or at least that smaller states may not be overly outweighed by the most populated and richest member states, giving grounds for the justification of the overrepresentation of certain member states in the European Parliament for example. How the CJEU represents this "constitutional balance" (Dawson and de Witte 2013) will be another key component of legitimacy for the Court. Indeed, if nationalities shall be represented at the Court, thus the various languages of the Union may find their way into the institution. Language knowledge discriminates between lawyers who speak the Court's working language and those who don't despite a great knowledge of EU law (Zhang 2016). Moreover, language structures

[47] These reports are available at: https://curia.europa.eu/jcms/jcms/P_64268/en/ (Section: "The panel provided for in Article 255 of the Treaty on the Functioning of the European Union (TFEU)").

[48] The list of référendaires is published on the Court's "Who's who" at: https://op.europa.eu/en/web/who-is-who/organization/-/organization/CJ/CJ; I cross-check with public information available about them, mostly via LinkedIn

thinking, and some concepts are difficult to translate in other languages or only find inaccurate translations (e.g. trustee for *fiduciaire* in French). Multilingualism generates various legitimacy challenges at the Court (Paunio 2013). All these elements combined make the selection of the members of the Court a tough labor, since only a few "Hercules(es)" in Europe today may fulfill all the required conditions (Bobek 2015; MacKenzie and al. 2010).

2.4.3 Processual legitimacy of the Court of Justice: rules of procedure, access to documents and clear argumentation

Process also involves a formal and a sociological component. The rules of procedure (RoP) of the Court allow us to grasp who may have standing but also which exterior intervenors may help judges in making their decisions. The inclusion of third parties may then generate imbalances between various socio-professional groups that get access to the Court. For example, the "invitation of experts" sounds *a priori* either welcome or insignificant. But behind expertise may exist profound societal cleavages. Are experts in competition law representatives of major multinational companies, small start-ups, academic experts or none of these? Rules regulating the inclusion of third parties creates more legitimacy challenges than it seems.

Process also refers to the formal parts of the Court's reasoning in its ruling. Did the Court acknowledge all points raised by the parties? Did it even consider the question national courts brough before it, or did it substitute its own problem to the case? Schmidt (2018:56) claims that the Court maintains legal uncertainty on purpose, in order to receive more references in the future, which in turn will help judges expand the reach of EU law and allowing them to keep governing by judicial fiat. But she does not really test that proposition or does not provide a null hypothesis for her theory.

The sociological component of processual legitimacy refers to the connections that the Court maintains with its "environment"[49]. While independence is formally a legitimating feature of judiciaries, participation and networking with other actors allow judges to reinforce their authority by persuading the rest of the profession of the soundness

[49] "Environment" refers in the work of N. Luhmann to the other social systems other than the one under study. All systems together make up for "society".

of their work. The main sources here are events and commemorations in which judges are active participants. A particular emphasis will be made on events organized by the Court itself or largely supported by judges with the EU budget (e.g. *Fédération Internationale du Droit Européen* [FIDE] congresses) to see if judges are showing openness to diverging views or if on the contrary these are meant to shut down contestation[50] (see 5.1.2.4).

2.4.4 Judicial outcomes: an exclusively normative debate?

Outcome legitimacy is the most normative part of the debate. Absent scientific certainty (Beck 2013), reactions to rulings can be drastically opposed. Nonetheless, some encompassing indicators transcend opinions about isolated rulings. Compliance with rulings is often an indicator used to say something about the legitimacy of an institution, whether legitimacy here is the independent or dependent variables in these designs (see Panke 2011). The numbers of preliminary references per year is a descriptive indicator of a voluntary exercise of national judges to defer interpretation to another body. While these are encouraged to do so every time there is a doubt about the meaning of an EU legal act, an encouragement which becomes a strict obligation for supreme courts (art. 267 TFEU), there is no established mechanism of any kind that monitors how national courts choose to refer or not. Having a look at the flows of references per year is saying about the bond between national courts and the CJEU, this bond being historically what helped the Court establish its "political power" (Alter 2009).

But references are not a perfect indicator. A national court that must deal with a salient socio-economic issue – e.g. the sovereign debt crisis or the migration crisis – may choose to refer a case to Luxembourg, just to shift the blame to another court. Only voluntary compliance with a CJEU judgement (not leading to another case or infringement proceedings by the Commission) is a genuine act of consent and thus signifies that at least national courts voluntarily choose to be bound by the CJEU's

[50] I focused on the FIDE congresses of 2016 in Budapest (see the minutes at: http://www.fide-hungary.eu/index.php?option=com_content&view=article&id=106:e-books&catid=2:uncategorised&lang=fr&Itemid=193) and of 2014 in Copenhagen (see: https://jura.ku.dk/english/fide2014/post-congress-materials/).

interpretation. There is only one research paper that dealt with this issue (Nyikos 2003), and I will thus discuss these results (see 6.3).

Another key observable element is the pace of proceedings. "Justice delayed is justice denied"[51], which is relevant in the case of ICs since these are known for taking a lot of time in adjudicating cases (Romano 2020; Squatrito and al 2018). The steps undertaken by the Court to reduce the time of proceedings are found the annual reports of the Court, where one may witness the gradual evolution of this pace over time[52]. Even if the evolution of the pace of proceedings is illustrative, the picture is more complete with the analysis of the reforms undertaken to ensure faster processes, i.e. the increase of the staff of the Court, or the creation of other adjudicatory bodies to reduce the backlog of the CJEU. The Skouris court particularly dealt with these issues. The GC reform of 2015 changed the course of action at the CJEU and led to a brutal internal war at the Court[53] (see 6.4.1).

Finally, the place of judicialization in the policy cycle also conditions the type of results given by the Court. When adjudication comes late in the process, judges are shielded from external pressures. When the Court is on the contrary sent in the middle of the policy process (e.g. during the Eurozone crisis), judges are suddenly under increased pressure and must reason cases accordingly (6.4.2).

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[51] An expression attributed to politician William E. Gladstone (https://www.forbes.com/quotes/author/william-e-gladstone/).

[52] The Court publishes 3 yearly reports: "The Year in Review" giving general information about the CJEU, "Management report" which relates any quantifiable data about the Court's budget and digitalization, and "Judicial Activity" that details the major trends of adjudication in a given year and contains indicators related to the proceedings themselves such as their pace. See https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels. These reports are available since 1997 and thus cover the main period of investigation of this dissertation.

[53] See the recording of the ceremony in honor of his presidency "La CJEU sous la présidence de Vassilios Skouris", 8 June 2015: https://c.connectedviews.com/01/SitePlayer/cdj?session=5417, especially the intervention of vice-president Tizzano at 03:00:22. For the minutes of the event, see https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-11/actes_du_colloque_2015.pdf

Chapter 3

Anchoring legitimacy: the Court's audience

To whom is the CJEU legitimate? One would expect that, as the EU's top judicial body and such a key player in the history of European integration, the Court would need to receive the express consent of every citizen to adjudicate constitutional cases. However, the Court exercises power beyond the state, the latter often acting as an intellectual buffer between citizens and transnational institutions. Regional economic integration may potentially not occur if citizens were to be involved in the process, which leaves the EU and governments in developing transnational activities absent genuine democratic control (Dahl 1994; Rodrik 2000). International institutions would thus be indirectly democratically legitimate and would need to be responsive first and foremost to national governments (Lindseth 2010; Shany 2014). Much less explored is the possibility that a non-majoritarian institution and its must be legitimate in the eyes of a specific socio-professional group: the legal profession. Scharpf hinted at the possibility in his seminal book on the legitimacy of the EU, without nonetheless developing the argument further (Scharpf 1999:15). This chapter will conclude with the claim that the legitimacy of the CJEU is "brokered". Judges do not seek popular support in order to justify their right to rule. Unlike other bodies such as the Commission or the European Parliament, the Court is not striving for extensive media coverage and citizen input. Most citizens ignore the Court's existence and/or the

content of its daily work. The nature of its activity – judging – and the discriminating nature of the instrument it uses to do so – the law– means an "exclusion" of the majority when it comes to assess, monitor and hold into account the EU's top judges.

These exercises fall most of the time to a crowd of socio-legal experts able and willing to perform that task. The relationship between judges and their professional has been studied for years. The most cited writings in political science about the Court stress the importance of "jurist advocacy movements" (Alter 2009: 63-91), a "weak field" of legal professionals (Vauchez 2015) or a "transnational social field" (Vauchez and de Witte 2013) in which the Court is embedded, to explain how the Court advanced integration through law in the 20th century (see 3.2). They highlight a common trend that deserves a renewed discussion in the 21st century: they see other EU legal professionals or other members of the European legal field as helping and/or serving judges in their quest for a united Europe. In other words, they equated the EU legal profession to an "advocacy coalition" (Sabatier 1988). The Court and its interlocutors (Weiler 1994) pursued altogether an agenda aiming at transforming a divided post-war Europe into a safe "promised land (Weiler 2012) where the rule of law and common values would forever ban the tyranny of arms (see Weiler 1991; and the epilogue in Poiares Maduro and Wind 2017). The purpose here is not to contest this history of the Court's development. It is rather to bring the debate up to date in order to understand the contemporary behavior of the "interlocutors" of the Court in the 21st century, which are not as united by integration-through-law as they used to in the past. The exclusively pro-integration and pro-transnational crowd that accompanied the Court in its integration-through-law paradigm now leaves room to a more critical and less integration-friendly public, a crowd that nonetheless holds a key possession in determining whether the Court's authority is justified or not.

3.1 The Court and public opinion: a genuine relationship?

I will first revisit in depth the two classic theses of the Court's sociological legitimacy. The majoritarian thesis in political science assumes that courts are responsive to public opinion to varying degrees, from being a variable among others in explaining judicial decision-making (Voeten 2013), to

potentially constitute a court-curbing mechanism explaining acceptance or backlash against CJEU rulings (Kelemen 2012), if not being the sufficient and necessary condition to explain stability and change in the Court's case law over time (Harsch and Maksimov 2019). This thesis presents interesting elements of judicial behavior and reception of case law in society, but is constructed on strong background assumptions and often debatable methodological foundations (3.1.1). The opposite thesis, shared by a minority of political scientists and a few legal scholars, postulates that courts and their activities do not generate a widespread attention among citizens. While some would have a vague idea about what courts do, many citizens would not have any idea of the activities of the judicial branch (3.1.2).

3.1.1 Public opinion: a necessary approval of the Court by the citizens of Europe?

The leading contemporary trend in EU studies sees the CJEU in need of approval from most of the population of the member states. Several theses hypothesize the relationship between popular support or trust and judicial outcomes from Luxembourg. While these studies bring interesting insights about judicial behavior in context (3.1.1.1), they could not however overcome some theoretical and methodological shortcomings related to the measurement of trust (3.1.1.2).

3.1.1.1 Theoretical insights

Erik Voeten claims that the CJEU is no longer an obscure institution "tucked away in the fairy duchy of Luxembourg" (the original expression used by Stein 1981) but rather an IC that generates high scrutiny in the 21st century (Voeten 2013). Comparing Google searches for the CJEU with searches for other institutions (EU institutions and national courts), Voeten finds that the CJEU is as popular as national judiciaries and other international bureaucracies such as the International Monetary Fund or the World Bank (Ibid:418-26). The CJEU would thus most probably need wide popular support to adopt far-reaching decisions that seem to contravene member states interest.

Kelemen goes a step further by claiming that the CJEU is "easily the most trusted institution of government in Europe at the EU or national level" (Kelemen 2012:47). Even when trust is low for the Court, it still generates more support than national governments or other EU institutions. The

(low) levels of support would be less important than the comparative advantage certain institutions have over other bodies in a context "where public institutions are widely despised, those that are even moderately respected may be in a position of strength relative to other political institutions that might attack them" (Ibid.). For Kelemen, this means that the independence of the CJEU will remained ensured if it maintains a comparative higher level, even if these levels are abysmally low. Levels of public opinions, "gauged in relative" terms, would thus shield the Court from attacks against some of its most contested judgements, e.g. the Laval quartet[54] (Ibid.:49-50).

Other political scientists even go as far as claiming that public opinion conditions the result of judicial decisions of the CJEU. Harsch and Maksimov hold that the CJEU acted the way it did in the *Kadi* saga – i.e. first by rejecting the complaint of Mr. Kadi and the Al Barakaat foundation against the freezing of Mr. Kadi's assets in order to allow him an effective judicial protection[55], then accepting in appeal Mr. Kadi's claim three years later on the ground that fundamental rights in the EU superseded any other legal act, including s resolution of the UN Security[56] – because judges followed the shift in public opinion regarding the fight against terrorism. While in 2005 public opinion was mostly in favor of a severe repression of terrorist acts, the mood shifted over time and would have indicated in 2008 an opposite trend in favor of the respect of the suspects' rights. Public opinion would thus in this story be the only potential explanatory variable that shifted between the 2 rulings. Judges would allegedly assess public moods in order to choose which course to follow, at least in contested and legally uncertain cases such as *Kadi* (Harsch and Maksimov 2019).

This scholarship details a few important arguments about the legitimacy of the CJEU. More accurately, it detects the absence of a total non-

[54] C-341/05, Laval un Partneri (*Laval*), 18 December 2007; C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (*Viking*), 11 December 2007; C-346/06, Dirk Rüffert v Land Niedersachsen (*Rüffert*), 3 April 2008; C-319/06, Commission of the European Communities v Grand Duchy of Luxemburg (*Luxemburg*), 19 June 2008

[55] T-315/01, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, 21 September 2005

[56] Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (*Kadi*), 3 September 2008)

acceptance of the Court's right to interpret EU law. All 3 publications mention a certain interest for ICs in Europe, and document it using opinion polls. They nonetheless could not overcome some theoretical and methodological difficulties that make the use of surveys incomplete in order to claim something about the legitimacy of ICs.

3.1.1.2 Theoretical and methodological shortcomings

First none may assert that public opinion support is a sufficient condition to explain judicial behavior. They did not eliminate possibilities of equifinality (Bennett and Checkel 2005: 206-07), meaning that other factors or independent variables may lead to acceptance of judicial decisions. Public opinion is indeed one of several potential factors enabling judges to adopt decisions without backlash or pushback (Hoffmann 2018), but it sits along other court-enabling or court-curbing mechanism, such as "packing" or budget control (Saurugger and Terpan 2017:100-01).

While Kelemen's argument stating that public support should be analyzed in relative terms is plausible, it does not help solving another theoretical difficulty related to the distinction between the support citizens have for the whole polity (here the EU) and the support they have for a specific institution (here the Court). Other political scientists have cautiously argued that the legitimacy of the CJEU is inseparable from the support expressed by citizens for the EU as a whole (Pollack 2018:172; Kapsis in Cini and Pérez-Solórzano Borragán 2019:199; Gibson and Caldeira 1995). On the contrary, Kelemen boldly holds that "the ECJ is consistently and by far the most trusted governmental institution in Europe" (2012:47). The assertion comes from the data chosen by the author. Kelemen's selection of compared institutions is debatable. While the first group of scholars here compare support for the Court with support for other EU institutions and other IOs, Kelemen compares support for the Court with support for national institutions. While seemingly paradoxical and incomplete, this comparison is consistent with his unsaid assumptions that the Court may only be subject to court-curbing measures by national actors, namely governments and national courts. The CJEU, when compared with other EU institutions, does not stand out as the most trusted institution in the EU at all times.

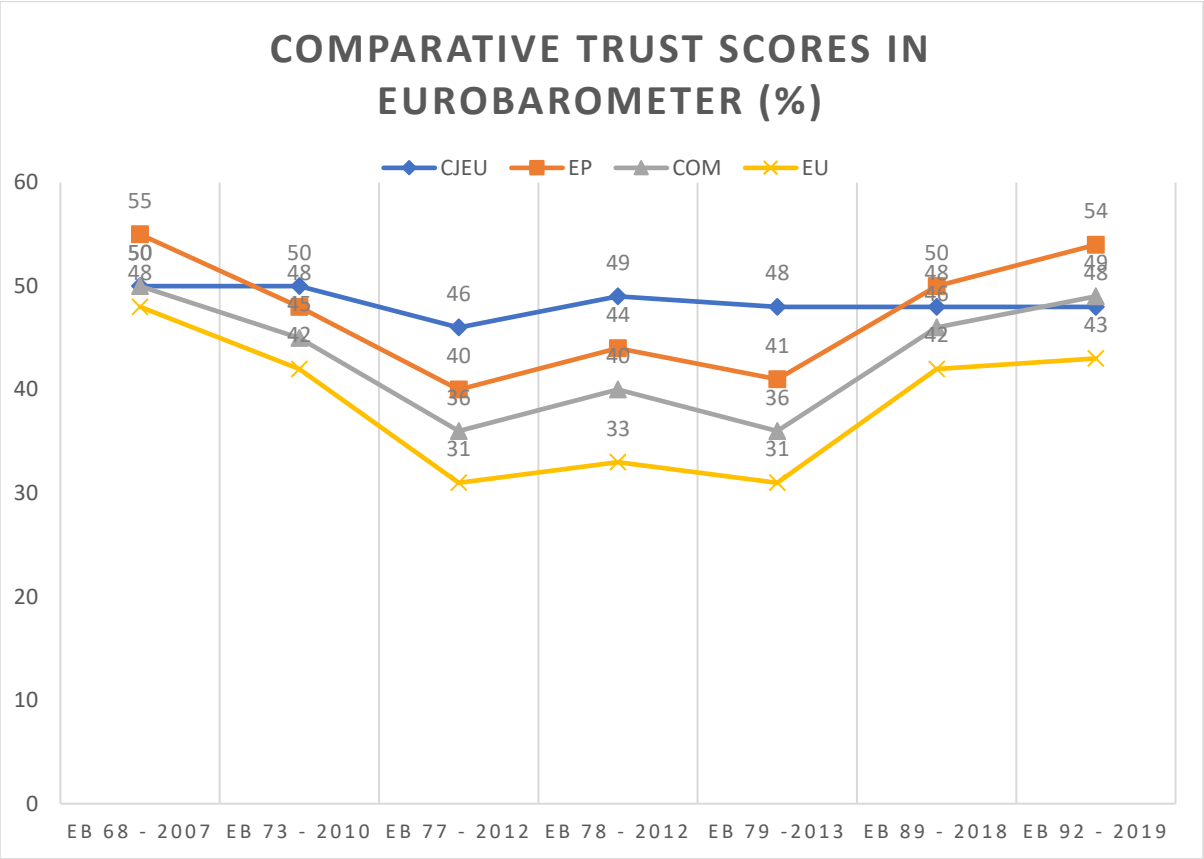

Figure 3.1: Support for the CJEU in comparative perspective

Sources: Standard Eurobarometer (EB) 68, 73, 77, 78, 79, 89 and 92.[57]

Graph: author

Indeed, support for the CJEU is never drastically differentiated from support with other EU institutions such as the Commission or the European Parliament. In times of crises or at least during the "fast-burning phase" (Schmidt 2020; Seabrooke and Tsingou 2019) of the sovereign debt and migration crisis (which would correspond to the middle part of the graph, especially the 3 central columns corresponding to the height of the sovereign debt crisis), there is an increased gap of trust scores between institutions, as well as between EU institutions and the EU. In Autumn 2012, the CJEU was trusted by 49% of respondents while only 33% of them trusted the EU. In normal times or at least during the slow-burning phases of the crises (corresponding to the edges of the chart), support for various EU institutions and the EU itself is more closely aligned, if not almost identical. Trust for the CJEU was as high as 50% in Autumn 2007 while

[57] All standard EBs may be found at: https://europa.eu/eurobarometer/surveys/browse/all/series/4961

the EU scored 48%; in Autumn 2019, when turmoil seemed to have quieted down, trust for the Court was 48% while the EU earned 43% of the trust of the respondents. Overall, it is impossible to claim that the Court is the most trusted governmental institution in the EU if we include other EU institutions in the mix.

The level of trust for the CJEU, when assessed comparatively over time, is another striking feature that puts in serious doubt the thesis claiming that ICs need public opinion in order to thrive or perish. The Court generates a stable level of trust from citizens over time, always around 50%. Its lowest score was 46% in 2012 and its highest score was 50% in 2007 and 2010. On the contrary, trust scores for other institutions such as the EP or the Commission vary according to the socio-economic context. Trust scores for the EU vary significantly for the EU depending on the time of the survey. The EU in this chart received the high score of 48% in 2007 and the lowest score of 31% in 2013, meaning a 17-point difference generated in only 6 years.

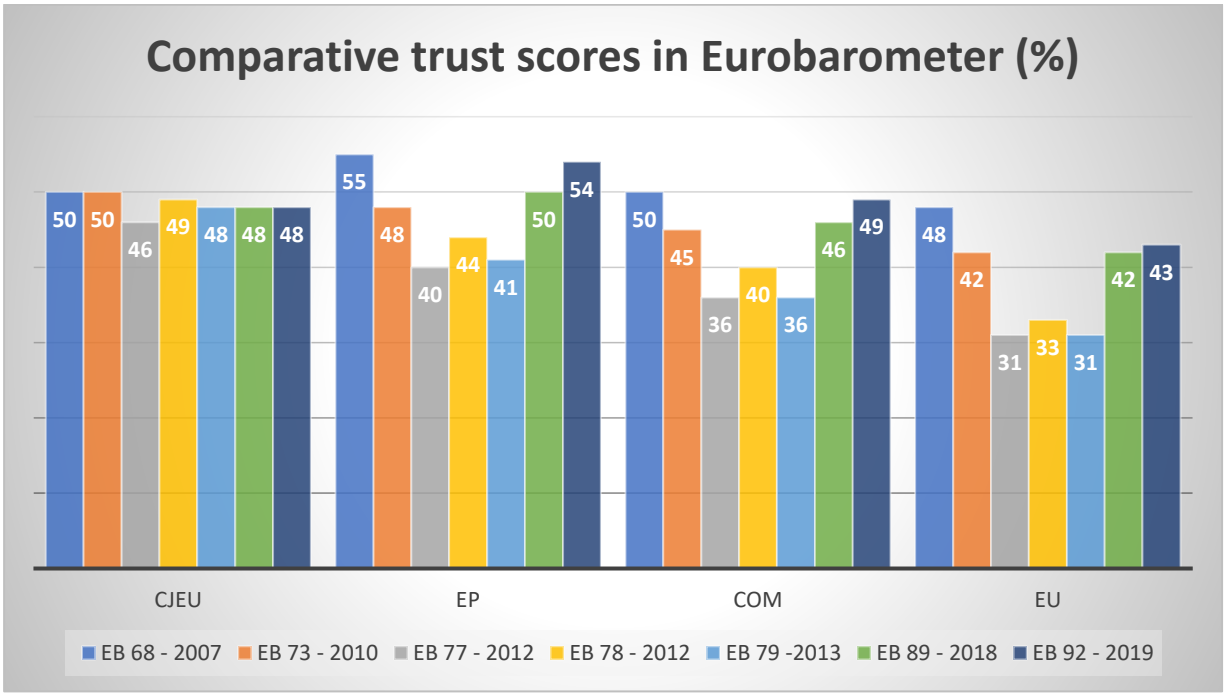

Figure 3.2: Stability of support for the CJEU

Sources: Standard Eurobarometer (EB) 68, 73, 77, 78, 79, 89 and 92.

Graph: author

The bar chart allows us to see the stability of trust expressed for the Court over this 12-year span. The Court generates the same trust levels

independently of the socio-economic context and – more importantly here when refuting the ICs-public opinion thesis – independently of the content of its own activity, which varies significantly in terms of number of cases and issues dealt with depending on the selected year (see 6.4). The Court would deal with very different cases over time, and would issue various controversial rulings such as *Mangold* in 2005[58] (right before EB68), the Laval quartet in late 2007 (after EB68 and before EB73), the *Zambrano* ruling in 2011[59] (between EB73 and EB77) or the *Kadi*, *Dano*[60] and *Alimanovic*[61] rulings in respectively 2013, 2014 and 2015 (i.e. between EB79 and EB89). These rulings would be classified in opposite directions when assessing if they either amplify or strictly circumscribe the ambit of EU law – or whether these rulings are signals of judicial activism or restraint. *Mangold*, *Zambrano* and *Kadi* would fit the "activism" category. *Dano* and *Alimanovic* would fit the "restraint" category. The Laval quartet would trigger opposite reactions, albeit all skeptical. The point here is that, following the IC- public opinion thesis, one would expect trust scores to vary according to the actions of the Court (an argument Kelemen holds true for the Court in the aftermath of Laval). These trust scores assessed diachronically firmly disprove such a hypothesis. The Court scores between 45 and 50% over the whole studied period.

Distrust scores barely mitigate this trend. While there is more variation than for trust scores, the trend is relatively stable for the Court, while there is more variation for other EU institutions such as the EP or the Commission, and even more so for the EU.

[58] C-144/04, Werner Mangold v Rüdiger Helm (*Mangold*), 22 November 2005; The *Mangold* case sparked the famous reaction of Roman Herzog pleading for the end of judicial activism at the Court: see Herzog R. and Gerken L. (2008), "Stop the European Court of Justice".

[59] C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi (*Zambrano*), 8 March 2011

[60] C-333/13, Elisabeta and Florin Dano v Jobcenter Leipzig (*Dano*), 11 November 2014

[61] C-67/14, Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others (*Alimanovic*), 15 September 2015

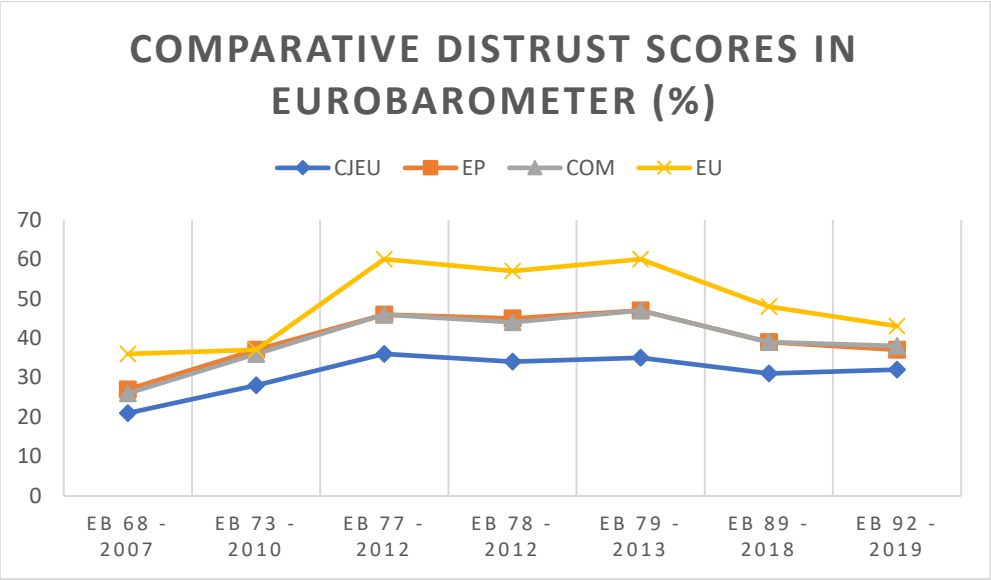

Figure 3.3: Distrust for EU institutions

If it were not for the results of EB68, levels of distrust for the Court would display a maximum variation of 8 points. The Commission scored a low 26% in 2007 and a high 47% in 2013, indicating a variation of 21 points. The EP scored a low 27% in 2007 for a high 47% in 2013, thus reaching a maximum variation of 20 points over the studied period. The EU remains the variation winner even in distrust scores (24 points), with a low score of 36% in 2007 and a high score of 60% of distrust in 2012 and 2013.

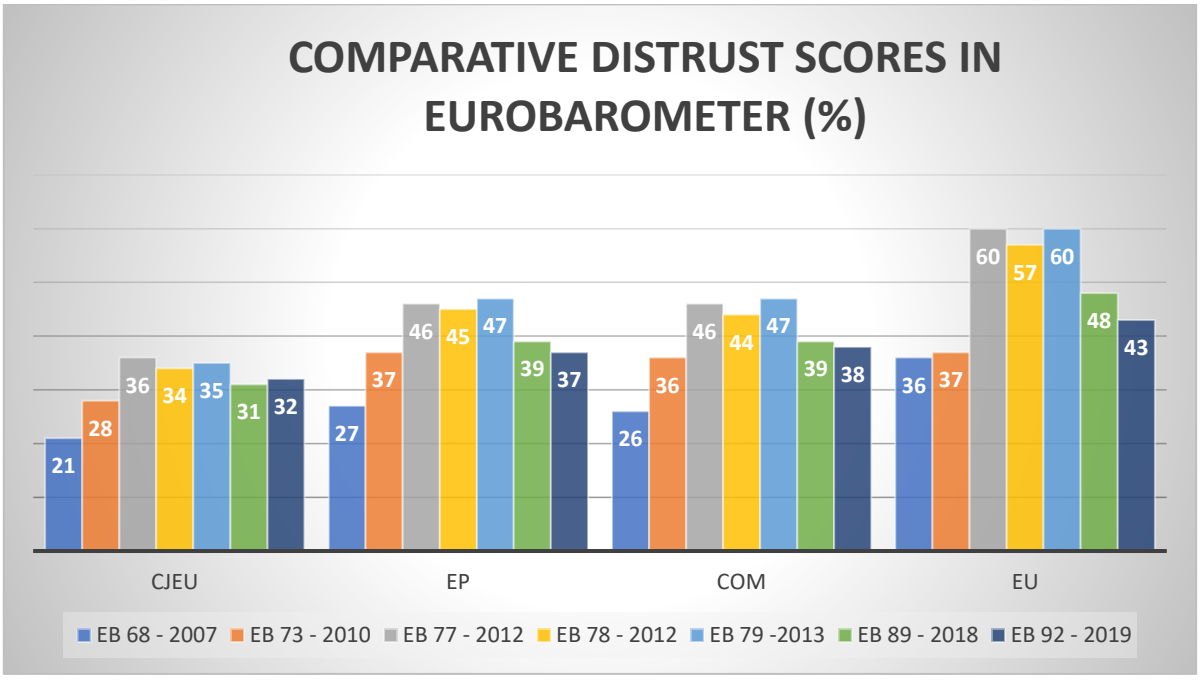

Figure 3.4: Distrust stability of the CJEU

The hypothesis about trust scores also applies for distrust: one would expect to see a variation of distrust scores according to changes in the socio-economic context or the Court's own activities. While the results are not as clear as they are for trust levels, there is anyway not enough evidence to support that hypothesis, especially considering the stability of the scores over the 2010-2019 period (maximum variation of 8 points) compared to the instability for other entities (23 points for the EU).

Overall, one may have this general conclusion about all the displayed figures: The EP, Commission and the EU generate levels of trust depending on the socio-economic context and their own actions. Before the plague of crises that struck the 2010 decade, they were trusted by around half of the respondents. During the peak or the fast-burning phase of the crises, they suffered an all-time low level of support and a correlated all-time high level of distrust. Recently, with the crises gone or in their slow burning phase[62], the EU, EP and Commission have gathered an increased trust from Europeans, although these levels still do not match pre-crises figures. The CJEU does not fit in that picture. Its levels of trust and distrust remain stable independently of the evolutions of the socio-economic context or of its own actions.

The evidence remains shallow when assessing the link between public opinion and judicial behavior because researchers face a third – this time methodological – difficulty related to respondents' bias. The questions of the EB ask for 3 different types of answer: YES, NO and DO NOT KNOW. They always contain *in the sentence* the object to be analyzed: if the question aims at gauging the level of trust of institution X, it will be written like "have you ever heard of institution X?" or "do you tend to trust/not to trust institution X?". The insertion in the question of the object to be studied generates a bias about the awareness of said object (Kalton and Schuman 1992). It eliminates *de facto* the possibility of measuring a third option: the absence of knowledge. Any element of spontaneity – which would be necessary to measure awareness, then leading to potential trust, allowing for some final cautious inference about legitimacy – is missing (see below at 3.1.2 about Gibson and Caldeira's answer to this issue).

[62] That, of course, without taking into account the effects of the COVID-19 pandemic.

The insertion of the third option – DO NOT KNOW – reduces but does not eliminate respondent bias. Even when given the possibility to admit ignorance about any subject, respondents feel more compelled to answer anything than admitting a lack of knowledge. When asked about the awareness of an institution, respondents often fall victim of the "acquiescence bias" (Watson 1992) that leads them to answer by the affirmative to the question. Moreover, respondents know that they are part of an experiment and try to select a self-perceived socially acceptable response. The sincerity of the respondent pressured to do "the right thing" is altered. While "extreme responding"[63] (Meisenberg and Williams 2008) cannot happen when questions only call for a YES or NO, this remains a possibility for questions with more than 2 possible answers.

Even when the sincerity of the respondent is genuine, a misunderstanding of the question remains probable. This situation is typical for the CJEU. The Court is often confused with the other supranational court of the continent: the European Court of human rights (ECtHR). Many citizens do not know that there is another supranational organization in Europe (CoE), which possesses its own judicial body. These uninformed citizens come to include some of the highest political officials of the continent, as demonstrated during the Brexit saga. One of the key elements of Theresa May's stance regarding the exit of the UK from the Union was that "*we* [UK citizens] *are not leaving only to return to the jurisdiction of the European Court of Justice*"[64]. The problem here was that the former UK Prime Minister did not differentiate between the 2 European supranational courts and accused the CJEU of taking decisions that came out of the Strasbourg court, especially regarding the prisoners' right to vote[65]. Former CJEU judge Sir David Edwards came to Downing street and left

[63] Meaning that respondents mostly pick the extreme options (heard/read first and last) rather than opting for middle options.

[64] Politico, "Theresa May's Brexit 'revolution'", 5 October 2016, at: https://www.politico.eu/article/theresa-mays-brexit-revolution-annual-tory-party-conference-birmingham-keynote-speech/

[65] With the famous *Hirst* case the ECtHR rendered in 2005: Hirst V. The United Kingdom (No. 2), Application no. 74025/01. 6 October 2005, at: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2274025/01%22],%22itemid%22:[%22001-70442%22]}. See also the illuminating article of Politico "9 reasons why (some) Brits hate Europe's highest court", 26 July 2017, at: https://www.politico.eu/article/brexit-ecj-european-court-of-justice-9-reasons-why-some-brits-hate-europes-highest-court/

unimpressed by what he heard, saying that the Prime minister was running into a disaster regarding the eventual EU-UK relationship agreement "*partly because she doesn't know the difference between the court of human rights* [a non-EU body] *and the court of justice* [of the European Union]."[66] He went on claiming that "*it is manifest* [May] *doesn't understand the working of the court or of the single market*". If a Prime minister confuses the CJEU for another body, why not expect other citizens to make the same mistake?

None of the 3 works cited (Voeten 2013; Kelemen 2012; Harsch and Maksimov 2019) above address these issues. They take the results of their surveys (the EB and the Pew Global Attitudes Project for Harsch and Maksimov) at face value, without asking if any of the respondent biases were addressed or present, prompting Pollack to simply "cautiously" accept the findings of Kelemen and Voeten (Pollack 2018:169). Their findings remain shallow since they do not address the question of awareness of the Court, but rather take it for granted. They also assume that citizens know what they are asked about when having to respond to a question about the Court, and they would even have for the most part have an idea of the content of the Court's activities. Unfortunately, EB data is not enough to confirm or reject these hypotheses.

Public opinion studies would nonetheless remain, along with critical discourse analysis, the main way of assessing the sociological legitimacy of any institution (Bodansky in Dunoff and Pollack 2013:334). Opinion surveys must nonetheless be carefully designed in order to avoid the biases exposed above. So far, only two political scientists – James Gibson and Gregory Caldeira – drove such an experiment. And as we will see, their conclusions diverged substantially from Voeten's and Kelemen's.

3.1.2 The Court and shallow diffuse support

Gibson and Caldeira were already experienced in gauging the legitimacy of higher courts since they conducted extensive inquiries about the US Supreme Court during their career. They chose the period after the ratification of the Maastricht treaty to assess popular support for the CJEU (ECJ at the time) (Caldeira and Gibson 1995). They benefited from the

[66] The Guardian, "May's obsession with ECJ over Brexit 'daft', says former senior judge", 13 June 2017, at: https://www.theguardian.com/politics/2017/jun/13/theresa-may-judge-european-court-justice-brexit-david-edward

support of the Directorate General for Communication of the Commission and could thus perform a special Eurobarometer about the Court (still the only one in history) in 1992 and 1993, thus using many EU resources while driving themselves the investigation[67]. Their main objective was to determine how many Europeans have "diffuse support" for the Court. This type of support refers to Easton's major contribution in *A Systems Analysis of Political Life* (Easton 1965) where the author distinguished between "specific support", i.e. an isolated approval about a policy output, and diffuse support defined as a long lasting support for an institution or the political power, including when the system must cope with stress. For Gibson and Caldeira, diffuse support is the best indicator of legitimacy. I will first detail briefly their experiment and then discuss their implications for the contemporary legitimacy of the Court.

3.1.2.1 Gibson and Caldeira's measurement of diffuse support

To measure diffuse support for the Court, the authors chose to ask respondents about the salience of EU institutions. They wanted to measure the part of the citizenry that spontaneously mentioned the Court in order to minimize respondent bias. Instead of asking bluntly whether respondents knew or trusted the Court, they instead asked them to mention spontaneously EC (now EU) institutions by asking them the following: "Which institutions of the European Community have you heard of? Please give me the names you remember".[68]

The results differ substantively from those of the various Eurobarometers detailed in the previous section:

[67] The results were published in Special Eurobarometer, "European Court of Justice. Results of Eurobarometer Surveys N° 38.0 and 40.0", DG COMM, June 1994, available at: https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/58254

[68] Special EB 38 and 40, p.6; and replicated in Gibson and Caldeira 1998:73

Table 1. The Salience of European Union Institutions, Spring 1993

	Council of Ministers	European Council	European Commission	European Parliament	European Court of Justice
Italy	12.6	17.9	13.8	46.8	8.3
Greece	5.5	9.1	8.1	19.1	9.6
Great Britain	4.1	4.0	9.2	15.7	11.6
Spain	14.9	15.2	12.0	41.0	13.3
Portugal	21.5	22.8	13.7	39.5	14.9
The Netherlands	10.3	11.1	18.1	32.4	16.1
Northern Ireland	6.7	8.1	7.4	18.5	16.1
France	19.3	27.7	24.9	44.1	17.8
Ireland	17.3	16.5	17.3	33.7	25.8
Denmark	28.3	8.7	34.4	42.1	27.9
Belgium	29.2	31.9	37.9	64.9	30.6
Germany (West)	23.1	35.5	24.0	51.9	38.3
Germany (East)	23.3	48.4	23.1	51.3	38.6
Luxembourg	26.5	18.4	41.4	54.3	47.6

Note: Entries are percentage of all respondents who spontaneously mentioned the institution. The countries are ranked according to the level of salience of the European Court of Justice.

Source: Eurobarometer Surveys N° 38.0 and 40.0, p. 33 (red rectangle added)

The column on the right indicates that an aggregate 22,6% percent of respondents asked in 1993 knew the existence of the Court of Justice, which differs substantively from the results one may find in standard EBs, e.g. 71% in EB92 of Autumn 2019. This gap of nearly 50 points is massive and suggests that measurement techniques of opinion polls are key when trying to say anything meaningful about trust and sociological legitimacy. Awareness of the Court differed drastically across member states: citizens in Luxembourg are the most aware of the Court's existence. On the contrary, Italians, Greeks, and UK citizens have mostly never heard of the Court.

In the second part of the experiment, Gibson and Caldeira chose to leave aside the part of respondents that did not mention the Court and pursued their analysis with the 22,6% of respondents who mentioned it. The authors asked the respondents of this subsample whether they supported the decisions of the Court. Interestingly, they added at that same stage an interesting a control variable – support for national higher courts decisions – allowing the readers to consider whether the transnational nature of an institution has an effect on trust, or if courts generate similar

perceptions independently of the studied level of governance. At this stage they simply measured for specific support, i.e. asking citizens about their appreciation about *rulings* (and not about the institution itself).

Table 2. Satisfaction with Judicial Decisions, European Court of Justice and National High Courts, 1993

	Level of Satisfaction							
	Not at all	Not very	Undecided	Somewhat	Very	N	Mean	Std. Dev.
Belgium								
Court of Justice	8.1	13.5	39.8	36.2	2.4	250	3.11	.95
National High Court	4.0	14.3	34.5	42.0	5.2	250	3.30	.92
Denmark								
Court of Justice	3.3	15.5	28.6	48.7	3.9	300	3.35	.90
National High Court	1.9	5.0	15.9	51.3	25.9	299	3.94	.89
Germany (West)								
Court of Justice	3.5	15.6	39.7	38.0	3.2	191	3.22	.87
National High Court	1.6	13.5	11.8	54.6	18.4	191	3.75	.96
Greece								
Court of Justice	4.3	12.7	56.8	24.2	1.9	312	3.07	.78
National High Court	8.5	17.2	24.2	42.6	7.4	312	3.23	1.09
Italy								
Court of Justice	1.6	11.1	55.7	30.5	1.2	312	3.19	.70
National High Court	4.1	31.4	22.2	39.8	2.4	312	3.05	.99
Spain								
Court of Justice	3.4	9.4	58.1	25.8	3.3	299	3.16	.77
National High Court	8.9	13.7	31.9	38.7	6.7	299	3.21	1.05
France								
Court of Justice	3.5	11.9	60.8	23.0	.8	298	3.06	.72
National High Court	1.4	10.7	47.7	38.8	1.4	298	3.28	.73
Ireland								
Court of Justice	.6	4.9	33.2	48.0	13.4	322	3.69	.79
National High Court	3.0	10.6	28.5	45.1	12.7	322	3.54	.95
Luxembourg								
Court of Justice	1.2	7.1	36.2	40.4	15.2	197	3.61	.87
National High Court	2.8	8.6	31.0	38.5	19.1	197	3.63	.98
The Netherlands								
Court of Justice	3.3	9.0	33.3	52.3	2.1	283	3.41	.82
National High Court	1.1	5.6	14.8	66.4	12.1	283	3.83	.75

	Level of Satisfaction							
	Not at all	Not very	Undecided	Somewhat	Very	N	Mean	Std. Dev.
Portugal								
Court of Justice	3.1	12.4	54.7	29.5	.4	295	3.12	.74
National High Court	3.3	10.4	47.5	37.5	1.3	295	3.23	.78
Great Britain								
Court of Justice	5.1	13.4	21.4	55.4	4.7	297	3.41	.96
National High Court	5.1	11.0	18.5	56.1	9.3	297	3.54	.98
Germany (East)								
Court of Justice	1.7	19.8	59.7	17.9	.9	313	2.97	.70
National High Court	7.0	34.9	24.7	30.7	2.6	313	2.87	1.02

Source: Eurobarometer Surveys N° 38.0 and 40.0, p. 34-35

The vast majority of respondents did not have a strong opinion about the actions of courts. The categories "Not at all" and "Very" – expressing strong opinions about the Court's activities –almost never (except for Belgium, Ireland and Luxembourg) reached the 10% mark (indicating the absence of an "extreme response" bias). Most respondents sincerely admitted they were undecided about judicial activity (around half). And the authors found a correlation between support for national courts decisions with support for the ECJ (now CJEU), which seemingly indicates that favorable predispositions towards judicial bodies work independently of the level of governance, although there tends to be slightly more support for national bodies than for the Court.

In the third step of the experiment, Gibson and Caldeira wanted to measure diffuse support by asking 2 questions (1st question: "If the European Court of Justice started making a lot of decisions that most people disagree with, it might be better to do away with [it] altogether"; 2nd question: "The right of the European Court of Justice to decide certain types of controversial issues should be reduced"). 2 "no" combined would indicate diffuse support. And the authors wanted to measure the stability of these opinions over time, thus asking respondents these same questions a few months later (Survey 38: 1992; Survey 40: 1993). Only a stable set of responses over time would indicate long-lasting support for the Court. The final results displayed a lot of instability, with nearly 2 thirds of respondents changing at least 1 response compared to their previous answers given the year before.

The outcome is unequivocal: the Court would have shallow diffuse support. While citizens seemed reasonably satisfied with ECJ decisions, they do not hold a stable opinion about the institution. The authors even said somewhere else that "overall, *the Court of Justice seems to have more enemies than friends within the mass publics of the EU*" (Gibson and Caldeira 1995:363). They relativize their findings when comparing the Court's scores with those of other EU institutions. Despite significant variations between, all EU bodies overall possess little legitimacy.

3.1.2.2 Shallow diffuse support as signs of alegitimacy and absence of consent

Gibson and Caldeira thus raise an idea hardly ever discussed in the literature: the idea of *a*legitimacy, i.e. the irrelevance for some citizens of the domination exercised upon them. Discussions about the justified exercise of political power revolve around a binary alternative: legitimate and illegitimate. This would mean in theory that any citizen has an opinion about the exercise of political domination. But the idea that some members of society are not aware of the existence of some bodies that are taking decisions on their behalf is hardly discussed in the literature. It brings a limit to the third element of Beetham's theory of legitimacy: the necessity of consent. The most critical voices of consent theory (e.g. Simmons 1976; Buchanan 2002) stress that voluntary consent from all members of society is an empirical impossibility. "Tacit consent" offers a partial response by withdrawing the necessity of a visible and/or hearable act (e.g. oath, vote) to account for consent. Buchanan argues that even this option is impossible to achieve, since citizens put in position to consent to their domination may freely choose to abstain from doing so. Here the lack of awareness of nearly 77% of the population of the 15 member states back in 1993 shows that many citizens ignore the existence of a body that changed the course of their lives in many areas, e.g. regarding the free circulation of goods (*Cassis*) from one country to the next, or their right to claim compensation to their own state in case of failed or incorrect transposal of EU directives in their national legal system (*Francovich*) to name a few recent decisions before the survey.

Can one nonetheless speak about *a*legitimacy as a structural feature of polities? There are reasons to nuance that statement, and Brexit shows another opportunity to discuss it. If only around 12% of UK citizens were somewhat aware of the existence of the Court in the early 1990s, this number most probably changed from 2016 onwards as the Court

appeared in many headlines from newspapers and tabloids in the UK[69]. And changes about the mandate of the Court are conditioned by the approval of citizens or at least of their representatives in Congress. The absence of consent from a part of the population does not necessarily mean illegitimacy or alegitimacy. Rather it may indicate that citizens choose not to hold a judgment about certain areas of political life, but rather delegate their capacity do so to other citizens, which leads me to address the question of indirect legitimacy in the next section (3.2).

Yet before closing the part about public opinion, a word of caution is needed regarding an absolute rejection of public opinion as the constituency determining the Court's legitimacy. While most citizens do not hold opinions about the CJEU, some clearly do. And the proportion of citizens doing so may differ from the one described by Gibson and Caldeira. The main limitation of unconditionally using their research results is that their inquiry happened more than 20 years ago. The EU in 2021 is much different: it has been living the effects of EU citizenship for 3 decades, it went through major crises which led to more politicization of EU issues (Hütter and Kriesi 2019), thus higher media coverage – including for the Court (Blauberger and al. 2018) – and higher salience in general.

Second, public opinion studies further the understanding that the Court is organically tied to the EU. If the latter suffers a legitimacy deficit leading to the exit of one of its members, the Court will *de facto* no longer have jurisdiction in the UK. Yet it does not mean that the Court caused Brexit, since UK citizens were asked whether they wanted to leave the EU or not. Thus, the Brexit referendum does not necessarily mean a legitimacy crisis

[69] See the Independent, "Brexit: UK to resist EU demand for European Court of Justice to govern trade deal", 28 January 2020: https://www.independent.co.uk/news/uk/politics/brexit-trade-deal-uk-eu-court-justice-boris-johnson-latest-a9305251.html; Financial Times, "Brexit: why did the ECJ become a UK 'red line'?", 11 April 2017: https://www.ft.com/content/32cd1e87-c7d1-3026-86fc-bce5229711d1; The Guardian, "Brexit: May rules out revoking article 50 after ECJ ruling", 10 December 2018: https://www.theguardian.com/politics/2018/dec/10/uk-can-unilaterally-stop-brexit-process-eu-court-rules; and the illuminating "Reality Check" of the BBC about the Court, 23 August 2017: https://www.bbc.com/news/world-europe-40630322

for the Court itself. In fact, former UK home secretary Charles Clark said that

> I certainly don't hate the ECJ and I believe that at least 95 percent of the British people don't give a toss about the ECJ, of which probably 75 percent haven't the slightest idea what it is[70].

Third, even if one believes in indirect or mediated legitimacy, a comprehensive legitimacy theory of the CJEU cannot overlook that certain overarching valued of the polity apply to all institutions. If in normal times the visibility of certain bodies is close to null, situations like political crises may change this quickly (see the Twitter experiment below; see 6.4.2). An institution like the Court must respect some values that go beyond professional standards and correspond to overarching societal values found in the member states in the 21st century.

3.2 Indirect legitimacy: legitimate to whom?

Some argue that the EU and its components are indirectly legitimate (Beetham and Lord 1998). The EU would "borrow" legitimacy (Lindseth 2010) from the nation-states that remain the masters of the treaties or the "mandate providers" of ICs (Shany 2014). It is consistent with Rodrik's famous trilemma, which states that international economic integration, national sovereignty and democracy cannot all coexist at once, and that only 2 out of the 3 elements may be combined (Rodrik 2000). Despite what unites post-national citizens around values of "constitutional patriotism" (Habermas 2012), Dahl (1994) and Lindseth (2010:23-4) claimed that delegation at another level of governance has put politics even further away from citizens. For Dahl, the idea of democracy at the supranational level (where the representation of individual citizens is drastically minimized compared to representation at state level) is dubious at best. Lindseth boldly argued that the delegation of competences to the EU is purely administrative, since it has not been accompanied by the development of a thick identity and sense of belonging, which remain firmly lodged at the national level.

The legitimacy of the Court of Justice would thus be determined not by the *demoi* of the member states but rather by their governmental

[70] Politico, "9 reasons why …", at n65.

representatives. For the Court, this would mean that the audience of the Court would either be governments themselves (Shany 2014) or national judiciaries holding the CJEU accountable (Lindseth 2010:133-87). In a word, the Court's sociological legitimacy would be the result of the approval of an audience constituted by national *institutions*.

The relationships between the Court and national governments and between the Court and national judiciaries have been the bread and butter of political analyses of the Court since Burley, Mattli, Stone Sweet and Alter launched this movement in the middle of the 1990s (see especially Slaughter and al. 1998). The latter claimed that the Court's authority increased because it empowered lower courts at the same time against national higher courts, especially constitutional courts (Alter 2001; see also Weiler 1991 and 1994). Stone Sweet rapidly nuanced the argument by saying that the relationship between the ECJ and higher courts was not as conflictual as described by Alter (Stone Sweet 2004). He argued that national courts gradually shifted their loyalties to the CJEU and helped it enforcing EU law against the preferences of national governments. Member states would have a weak control of the Court because of the institutional architecture of the Union. Rather than being an agent of member states, the Court would be a trustee enjoying independence by strategically expanding the ambit of EU law without falling victim to member state retaliation (Alter 2008; Stone Sweet 2010; Stone Sweet and Brunell 2012; for opposite views see Garrett and al.1998; Carrubba and al. 2008). Alter concurs with the difficulty for governments to oppose rulings, since they would not only have to confront CJEU judges but also their "own" judges in the process, which would put them in an untenable position vis-à-vis their domestic constituencies (Alter 2009:109-36).

Kelemen (2011) and Cichowski (2007) add another component by adding non-governmental actors into the mix, with the European legal system resembling more and more an "adversarial system" where private actors increasingly rely on judicial enforcement rather than classic parliamentary channels (Kelemen 2011). Historically in the EEC, market actors relied to judicialization to strike down national administrative barriers that impeded trade across member states. Since "positive integration" via political channels proves difficult in the EU because of high majority thresholds, "negative integration" via judicial enforcement proved to be more effective (Scharpf 1999: 50-71). Negative integration was not only exploited by market actors though. Cichowski described how non-

governmental organizations (NGOs) furthered their causes thanks to ECJ rulings (Cichowski 2007). This led the Court – defined as an actor with homogeneous and fixed preferences – to make law in every policy covered by the treaty (Stone Sweet 2010) and severely limiting the possibilities of the legislator, the latter becoming forced to enact statutes confirming the Court's guidance, even in areas where the Court had *a fortiori* no jurisdiction such as in the Common Foreign and Security Policy (CFSP) (Eckes 2016). The legislator sometimes managed to limit or even counter the effects of the Court's case law, for example in the field of patients' rights or cross-border healthcare (Martinsen 2015), but overall, the legislator – and particularly the EP – mostly supports the Court's expansionary interpretation of the treaties (Dehousse 1998). Even the Council, where theoretically national governments always do their best to protect their regulatory autonomy, welcomed at times rulings going in the policy direction desired by most governments, but which ares politically costly topic to bring before national electorates, especially regarding cross-border working or the reduction of Common Agriculture Policy subsidies.

We owe a lot to political scientists about the Court's connections with its environment. National courts, other EU institutions and private litigants have all worked together to forge the contemporary dense EU legal system in which the CJEU functioned as a central gear. By concentrating their efforts on the Court's actorness, they have altogether identified a smaller crowd which is the attentive public of the Court.

However, this overall review of the political science literature on the Court reveals a major limit when trying to understand judicial legitimacy. This limit is a shared assumption among most political scientists that every player involved in the judicialization process is acting by pure self-interest. Independently of the IR paradigm where the theoretical inspiration comes from (Neo-functionalism for Burley and Mattli or Stone Sweet; Intergovernmentalism for Garrett and al. 1998 or Larsson and Naurin 2016), and despite the move to comparative politics and the neo-institutionalist turn taken by several great analysts of the Court (Alter 2009; Pierson 1996; Schmidt 2018), the ontological feature remains that actors use judicialization and embrace the expansion of EU law because it suits their pre-established interests. The opposite, where actors involved in the judicialization process actually believe in the normative force of the law, is absent in political science. This last premise is on the contrary the main approach of social action embraced in legal scholarship. For lawyers,

rules are the starting point of any analysis since those are assumed to play a determining role in the behavior of agents (Joerges 1996; see Bois and Dawson forthcoming).

If legitimacy refers to "justified domination" or domination that "can be justified in terms of their [subordinates] beliefs", its theoretical articulation differs significantly from theorical apparatuses based on rational choice paradigms. Theorizing legitimacy in the context of judicialization would lead the researcher to hypothesize that actors engage with EU law and with the Court because they believe that the pre-judicial state of affairs (e.g. the absence of free movement of goods in *Cassis*, the right to a clean environment in *ABDHU*[71], the incompatibility of the European Stability Mechanism with the EU economic constitution in *Pringle*, etc.) does not fit the normative expectations that they wish to see applied. If such an approach could be seen as incomplete because it would not include a strategic component, the researcher may then try to operationalize a hybrid approach combining interest-based action and idea-driven mobilization leading to institutional stability of change, this addressing the 3 "I" of neo-institutionalism (ideas, interests and institutions: Hall and Taylor 1996). One may even expect empirical social scientists to address the combination of interests and beliefs, see to what extent they intersect and try to understand what happens when legitimate beliefs about the correct interpretation of EU law stand in the way of economic and/or power interests. Yet such approaches have never fully found an echo in mainstream political science (although see below). Even hybrid approaches such as an equilibrium between consequentialism and appropriateness developed by March and Olsen hardly find an echo in political science journals. There is no political science publication that proved or even simply assumed that judges may actually "believe in their myths" (I draw the expression from Veyne 1988). These beliefs would lead them to adopt bold and expansive interpretations of EU law because they believe that it is the course of action implied by the founding fathers, of that the contested legal text could be read as welcoming a more expansive application, or any other factor that would not suit exogenously defined

[71] C-240/83, Procureur de la République v Association de défense des brûleurs d'huiles usagées (*ADBHU*), 7 February 1985

preferences such as maximizing political preferences or personal prerogatives[72].

Only recently did a few political sociologists show that ideas proved to be a major factor in explaining institutional change in the EU (see Madsen and Kauppi 2013). These authors would also place the Court at the center of the game (especially Vauchez 2015; Vauchez and de Witte 2013), sharing some insights with political scientists about the privileged position of the Court in the institutional setup of the EC/EU, but also emphasizing the "entrepreneurship" of leading lawyers in furthering European integration, following certain ideals such as the primacy of the rule of law, the end of war amongst the peoples of Europe, the recognition of same-sex marriage across member states[73], Europe as a continent that protects third-country nationals (TCN) from the unjust laws of their state of origin[74] or the EU as a protector of citizens' rights against its member states[75]. In these examples, judicialization may have been activated by people motivated by their self-interest but also by entrepreneurs who believe that the EU should legitimately enforce their rights even when it

[72] One way to address this question of interests vs beliefs is to study the aftermath of judicial decisions, and more precisely to grasp whether the consequences of such decisions were actually foreseen by the Court. Following the interest-based approach, the Court would adjudicate cases in order to advance its own preferences. Yet since judges cannot propose a comprehensive public policy program in a single decision, judges would ensure that they receive more cases in the future to complete the move. To achieve this, they would maintain a certain level of "uncertainty" on purpose to confuse national judges who in turn must refer more cases, helping the CJEU furthering its agenda (see Schmidt 2018:56-9). On the contrary, a belief or logic of appropriateness argument would assume that judges give their decisions in order to solve the case at hand, without having any thoughts in follow-up litigation.

[73] C-673/16, Relu Adrian Coman e.a. contre Inspectoratul General pentru Imigrări et Ministerul Afacerilor Interne (*Coman*), 5 June 2018

[74] C-200/02, Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department (*Chen*), 19 October 2004, against the prohibition of Chinese citizens to have a second child.

[75] *Zambrano*. For more on the debate about a Europe of rights, see chapter 6.

goes against their own interests, be they power, economic resources, etc.[76] In a later work about the Court, Alter (2009:63-86) admitted that she overlooked the power of ideas and persuasion in her previous research, and found that these elements played a key role in driving the actions of EU "legal communities".

These recent sociological accounts allowed a certain openness – an openness that the "rigor" of mainstream political science hardly permits in terms of epistemological premises and research design (Pollack in Romano and al. 2013: 357-87) – towards other disciplinary account. Historians and legal scholars themselves sought answers beyond doctrine or rule interpretation (see e.g. Davies 2012a; Nicola and Davies 2017; Vauchez and de Witte 2013). They often take the level of analysis on a micro-scale, which allows the reader to immerse herself into discourses and perceptions of the stakeholders. These qualitative accounts tell a great deal about the historical landmark cases in the history of integration. But they cannot help to grasp the contemporary reality of the Court of justice, since most of the uncovered "stories" relate to older cases. While this was not the purpose of these social historians, their accounts of a Court that was in the 1960's populated by former political figures such as Robert Lecourt (see Phelan 2020) may give the impression that the Court remains this bold yet insulated body of the 1960s "tucked away in the fairy Duchy of Luxembourg" (Stein 1981), and using this to advance its own agenda.

The relationships described in this scholarship differs sensibly from the political science literature developed above. These are not the product of the collision of various self-interested motives, but rather from the joint entrepreneurship of various lawyers coming from various socio-professional backgrounds such as university professors, staff from the legal services of other EU institutions (e.g. Commission's legal secretary Michel Gaudet: see Vauchez 2013:54-55) and national civil servants who found that European integration was a major objective of the continent in the postwar period. In a word, political sociologists often unveiled the

[76] A good example is the *Wijsenbeek* case (C-378-97, Criminal proceedings against Florus Ariël Wijsenbeek, 21 September 1999) from the name of the Dutch MEP who refused to show his passport in the airport of Rotterdam in 1993 after the entry into force of the Maastricht treaty. This action cost him a fine, criminal proceedings and a 6-year litigation process leading to the CJEU's decision, whereas he simply could have chosen to take the document out of his pocket. See Morijn in Nicola and Davies 2017:178-200.

"advocacy coalitions" (Sabatier 1988) or the "epistemic communities" (Haas 1992) built with and around the ECJ in the 20th century. They detailed extensively the role played by their like-minded partners in achieving integration-through-law. However, this picture may be nuanced today since judges are no longer absent total scrutiny, and even subject to criticism (see introduction) that leads to public outcry[77].

3.3 Top-down legitimation, bottom-up monitoring: quantifying and analyzing the Court's interactions with its audience

The literature reviewed in this chapter points to the need to forge a renewed approach of the Court's audience. The main lesson is about the level of sociological analysis to be adopted. Most political sociologists cited above looked at cases on the micro-sociological level of analysis to unpack the development of ideas about the "right" judicial path in Europe. In order to say something meaningful about perceptions of the exercise of political power, a sociological legitimacy framework cannot overlook people in their analysis. Nonetheless, two difficulties arise for political sociologists working exclusively on a micro-sociological scale of analysis, namely of the problem of the generalizability of the findings and the need for empirical "fingerprints" (Beach and Pedersen 2018). Case studies are the most illustrative empirical illustrations, but there are only a few case studies that a researcher may conduct for a single project (Ibid.; Havland and Blatter 2012; Bennett and Checkel 2005). Even when one possesses several case-studies and carefully "snowballs outwards" (Beach and Pedersen 2018:112-19), the unique essence of social events (that are never perfectly replicated) makes generalization a hazardous endeavor. To get a grasp of an encompassing feature such as the legitimacy of the Court, the social-scientist needs to find a significant – read large-N – number of observations found at the micro-sociological level of analysis, and then proceed with an abstraction of recurrent features.

The second main point refers to the habit of the Court to reach out to partners. An expression such as "judges live in the real world, not on the

[77] See Herzog and Gerken, n7

moon"[78] could simply refer to judges taking into considerations the economic, social and political considerations surrounding cases. Yet the socio-historical tales of the CJEU refer to various "entrepreneurs" (Vauchez 2015) who directly mobilized the Court in Luxembourg, either via judicial means by using the path of the preliminary reference procedure (PRP) or by associating judges directly to their academic and professional events such as FIDE congresses (Rasmussen 1986: 266; Vauchez 2015: 86; Alter 2009; see chapter 5). Judges were often active participants in these events, in which they could free themselves from the burdens of the courtroom and discuss issues with more freedom, often leading to academic publications in a legal journal or in a *Festschrift* (Vauchez 2010). This is consistent with the definition of judicial legitimacy described in the introduction. Legitimacy relationships are about justification, which is an obligation for powerholders who do not possess coercion devices to assert their authority. In other words, judges must find ways to convince their audience of the soundness of their work. They may not impose decisions on their own. National courts remain the judges of facts and have some leeway in applying CJEU preliminary rulings. Governments have the democratic possibility of overriding court judgements, even though constitutional thresholds for doing so in the EU make this possibility difficult to achieve (Grimm 2017; Scharpf 2017), but not utopian (Garrett and al. 1998). National administrations may delay compliance, partially implement rulings or propose legislative acts containing the effects of judicial decisions (Conant 2002; Martinsen 2015). Reaching out to key partners in their audience is making perfect sense, whether one stresses the self-interest of judges (logic of consequentialism) or on the contrary demonstrates that judges feel compelled to do so (appropriateness). The social scientist must then trace the fingerprints of judges' interactions with their external environment in order to find out the recipients of legitimation attempts (3.3.1).

The interactions highlighted in the literature discussed in section 3.2 details relationships between judges and other empowered individuals, such as members of government or national judges. Otherer citizens seem excluded to a large extent from the analyzes of Alter, Stone Sweet, Cichowski and many others. Yet cases come to Luxembourg for facts

[78] See Wall Street Journal, "ECJ President On EU Integration, Public Opinion, Safe Harbor, Antitrust", Brussels Blog, 14 October 2015: https://www.wsj.com/articles/BL-RTBB-5170

happening to "normal" citizen, be they an Italian shareholder of a former electricity company refusing to pay the state who nationalized his former sector of business (*Costa*), a flight attendant victim of the discrimination of her employer (*Defrenne*[79]) or a French artist required as foreign citizen to pay an extra fee to the Académie des Beaux Arts in Liège (*Gravier*[80]) among many others. The sociological legitimacy of the CJEU thus goes beyond the instrumental relationship binding judges and key actors helping them in securing an uncontested and undivided interpretation of EU law. The Court may also have gained in salience in the last 30 years, something Voeten indicated with the increased number of Google searches of the Court.

The audience of the Court of Justice lies between 2 extremes, between on the one hand the narrow crowd composed of governments and national courts, and public opinion on the other. At this point, only empirics may shed further light. I suggest thus to proceed in two steps, with the help of data that was not available until recently. I will first expose legitimation from the top, i.e. trace the interactions that judges maintain with other citizens. Since 2017, the CJEU publishes the list of external activities judges and Advocates General, which contains the venues that judges visited during the year and the activities they exercised during their extra-judicial time. Despite an overwhelming number of cases coming to Luxembourg every year (see chapter 6), judges take time to travel to other EU countries on a regular basis. They meet various stakeholders either in their formal capacity as judge or in their private capacity – if such a thing exists for a CJEU judge. We may thus determine the motivations leading judges to spend time out of the Court. The reasons behind these activities may be diverse, but the law of large numbers (the key number being 828 external activities for ECJ judges in 2018) dictates that some regularities will emerge in the audience targeted by individual members of the Court.

Legitimation from the top is an enlightening, but not a sufficient source to determine the Court's audience. The fact that judges concentrate their meetings with specific stakeholders does not necessarily mean that judges meet all or at least representatives of its audience. There may even be a legitimation mismatch if judges fail to address concerns of its audience

[79] C-43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (*Defrenne*), 8 April 1976

[80] C-293/83, Françoise Gravier v City of Liège (*Gravier*), 13 February 1985

exclusively focusing on a few. The data about the activities of judges must be combined with data that shows something of the legitimacy from below, i.e. bringing some elements about the crowd that monitors CJEU activities. Since carefully crafted public opinion studies are too cumbersome to organize, I suggest looking at another source of citizens' input: the Court's Twitter accounts. While generating specific methodological challenges, social media contain many observations about the Court's audience (3.3.2).

3.3.1 Legitimation from the top: judges meeting their audience

Justification can take many forms. Publications, press releases and invitations to the premises of the CJEU are all about fostering contacts with the Court's external word, without the need for judges to take time commuting. Yet judges and AGs regularly travel and meet other actors. The literature on judicial politics often stresses that litigants come to Luxembourg to pursue their interests. It is much less frequent to see publications stressing that judges themselves reach out to the outer world.

Since 2017, citizens can know that CJEU judges (both from the ECJ and the GC) spend a lot of time travelling. The CJEU now publishes every year (in February) the list of external activities of its members[81]. These external activities do not refer to the summer holidays of judges. They are framed by a code of conduct detailing the strict commitments associated to the function of member of the CJEU, and also applies to former members[82]. Even when leaving Luxembourg and temporarily ceasing to perform their main duties, judges never truly cease to be judges. They cannot criticize the institution in any way that would harm the reputation of the institution[83] and cannot discuss pending cases. However, when activities

[81] For the 2020, see https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/tra-doc-en-div-c-0000-2018-201800885-05_01.pdf for the ECJ and https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/tra-doc-en-div-c-0000-2018-201800890-05_00.pdf for the GC.

[82] 2016/C 483/01, "Code of Conduct for Members and former Members of the Court of Justice of the European Union" (hereafter Code of Conduct): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:483:FULL&from=FR, especially its article 8 regulating the obligations of justices when acting in another capacity.

[83] Art. 6(4) Code of Conduct: "*Members shall refrain from making any statement outside the Institution which may harm its reputation*"

are "closely related to the performance of their duties"[84], judges may represent the institution at an official ceremonial event, or conduct activities of "European interest" – meaning in a more informal capacity – with two major objectives: "the dissemination of EU law and to dialogue with national and international courts or tribunals".

Judging their external activities and the main criteria of close relationship with their normal duties is assessed by the President of the Court, assisted by a consultative committee composed by the 3 longest-tenured judges and the Vice-President. In other words, judges thus decide by themselves what constitutes 'acceptable' conduct, including external activities. Taking the wording of the code of conduct for granted may thus appear naive to some social scientists, who may hypothesize that judges judging fellow judges could result in an external activities' 'integration' or 'expansion' bias.

The number of external activities shows that judges and AGs at the ECJ take this task seriously (Annex 1). In 2017, they had a combined 669 of those, which was topped the following year when judges and AGs officially left the premises of the Court 828 times (meaning an average of 21,23 external activities per judge per year). The list gives two major sources of information. The first indicates the venue of the official visit and the type of institution concerned: "Research Center", "National courts", "National institution", referring to any type of official state organ other than a court; Professional body or organization, e.g. law firm or legal publisher; international court, international organization, often here the European Free Trade Agreement; other EU institution, and "other organization", statistically marginal, referring to foundations or NGOs. The second source refers to the type of activity performed by the judge/AG: "Participating in a conference, seminar or activity contributing to the dissemination of EU law or to dialogue between courts" (A); "Teaching" (B); Participating in a meeting attended by, or at the invitation of, a public figure (C); "Receiving a title, honour or decoration" (D).

[84] Art. 8(3) Code of Conduct

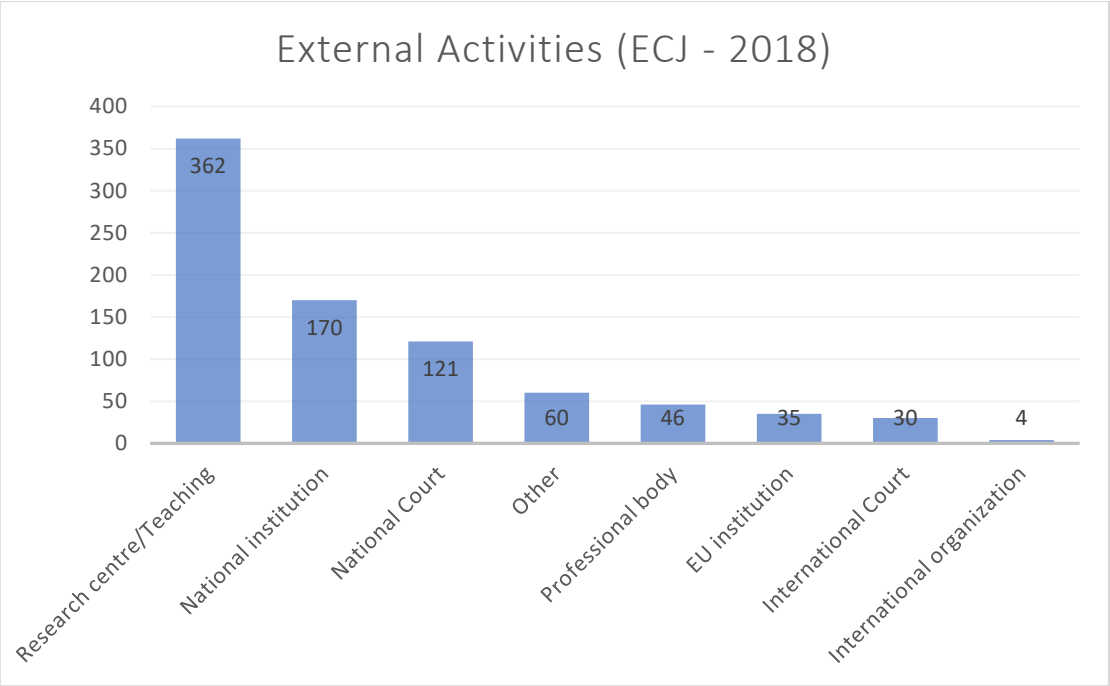

Figure 3.5: List of venues visited by the judges and AGs in 2018

Sources: Activities of European interest 2018, in List of external activities of the members of the Court

Graph: author

Universities and research centers are by far the main destination. The second in the ranking, labeled "national institution", gathers an heterogenous mix of ministries, embassies, national and regional parliaments, and various agencies. Then come national courts, before there is a significant gap with the other categories, with IOs being last with 4 judge appearances.

Judges meet for the most part members of the legal profession, i.e. fellow (or future) legal practitioners in Europe. There are of course a few contacts with outsiders, including with what will mostly interest political scientists, i.e. political figures.

ECJ judges occupy a highly ranked position that drives them to circles frequented by political and administrative officials. There is not thus a strict independence of the EU's judiciary because judges themselves happen to go where some politicians work and reside. But these numbers and this following picture do not say more than that. One must look in detail and see why the President of the ECJ went there.

ECJ President Koen Lenaerts meets President of the French Republic Emmanuel Macron at the Elysium Palace in October 2017 (source: French ministry of foreign affairs, available at https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/justice-internationale/la-france-et-la-cour-de-justice-de-l-union-europeenne/).

Visits to heads of states pertain to the protocollary obligations gathered in the first category of visits, i.e. official representation of the Court. While we may not know what is being said behind closed doors or during lunch, the main purpose of said visits is ceremonial, i.e. about recalling the importance of European integration for the member states and the general role of the Court in protecting citizens' rights, without entering into genuine debates about the current stand of EU law and politics. When judges temporarily remove their official hats of ECJ members and do "activities of European interest", freed from ceremonial burdens, political actors like the President of the French Republic totally disappear from the picture. Judges and AGs focus instead on maintaining a close bond with the community of legal professionals.

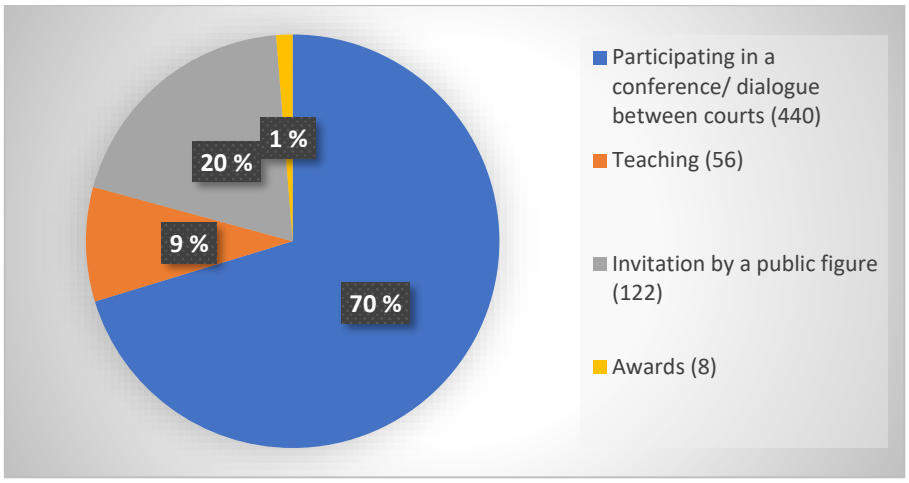

Figure 3.6: Repartition of external activities (percentage)

Source: List of external activities of the members of the Court of Justice 2018

The most represented category is also the most telling. Judges and AGs spend most of their external time with legal scholars and national judges. Most of these events are hosted by legal faculties. Academic symposiums do not always necessarily mean that judges exclusively meet with scholars. Research premises offer the possibilities for gathering large crowds and host large EU law events. For example, FIDE Congresses are hosted by universities, but they welcome many more legal professionals such as legal agents from other EU institutions, national judges of course and members from bar associations.

Yet exclusively academic visits happen, since some judges still find the time to give lectures in some law faculties, not only as guest lecturers, but as regular professors (e.g. judge Berger in Vienna, judge Rosas in Turku, AG Szpunar in Katowice for example). Many judges and AGs were faculty members before joining the Court.

The third category "Invitation by a public figure" requires some more explanation, because public figures could refer to many actors, among them politicians. These figures are unknown (the list mentions the venue, not the person), although the place where they meet ECJ judges doing activities of European interest is of course published. And these are without surprise legal faculties, bar associations and national courts. These "invitations" do not indicate a change of crowd, but rather that the nature of the activity is not centered around EU law interpretation, but

rather refer to appointment or retirement ceremonies[85]. And they occur in the same venues described for research and teaching categories.

Judges are ambassadors of EU law. They visit various EU member states (and sometimes beyond) during the year, yet with a clear bias for their member state of origin. Research and teaching activities draw judges back to their national faculties. Pertaining to the Court certainly does not mean abandoning pre-existing socialization. On the contrary, judges remain nationals of their member states of origin and bring former parts of their previous socio-professional environment to Luxembourg[86].

Their relational activities clearly target one socio-professional group, which I label the EU legal profession. Meetings with other actors than legal professionals are exclusively ceremonial (Official representation of the Court). When the substance of the Court's work is at the center of discussions (activities of European interest), judges interact almost exclusively with fellow lawyers.

This is consistent with many social scientific approaches discussed above. Social systems theorists conceptualized the legal system as an autonomous social space with its own logic. Luhmann focused on the medium (the 'law') that shaped the legal system, but he tended to exclude actors from the analysis (although see Luhmann 2008:274-304) and omitted to discuss the socio-professional transformations occurring on the agents of the system as a result of the system's operational closure. EU law has been existing for more than 60 years and has generated the development and the sociological autonomization of a particular social group. Within the system occurs a division of labor between various members of the legal profession, with judges sitting at the top of the hierarchy (Luhmann 2008), therefore needing to justify their domination.

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[85] Some activities that could be coded under the same label (A, B, C, D) are sometimes found in different categories. I did not investigate this further, but I suspect that this is the result of the judge's (or anyone in their staff) own perceptions of what "research", "teaching" and "invitations" mean. The location of external activities seems to be a more accurate indicator. See Annex 1 for detailed figures.

[86] Teaching is clearly demarcated from the rest of external activities in terms of incentives. Under article 8(2) of the Code of Conduct, judges shall not receive a remuneration for extra-judicial activities. However, "[o]nly participation in teaching activities may give rise to remuneration in accordance with the rules of the teaching establishment concerned."

The law and its declination into the alternative "legal/illegal" (although legal interpretation is more complicated than these alternatives suggest; see chapter 4) supposes a rhetorical exercise of persuasion that is not "open" not to everybody. The legal language supposes an intense effort being the equivalent of learning a foreign language. It thus generates a distinction between those who can share the word (the "sacred" if we use Durkheim's analysis of the religion as analogy here) and those who cannot (the "profane" who does not have access to the temple, here the non-lawyers). The fact that powerholders justify their actions to those who are acquainted to the extremely specific type of power exercised in the social system – here namely legal interpretation – comes as no surprise.

Fellow political scientists and legal scholars viewed these interactions with the Court's "interlocutors" (Weiler 1994; Pollack in Nicola and Davies 2017) as a way of empowering judiciaries. They were right to do so when analyzing the legal system of the 60s, 70s and 80s that was still at its genesis. The situation is now different in the second decade of the 21st century. The relationship that used to be about "judicial empowerment" is now more about "justification", i.e. in a system where there are not many constitutional gaps left to be filled anymore, and where the legal crowd is nowadays bigger and fully acquainted to understanding EU law.

3.3.2 Legitimacy from below: insights from a social medium

Knowing more about the Court and judges' targeted audience only says something about legitimation from the top, not about the CJEU's sociological legitimacy. The justification that judges give to their fellow legal professionals may even generate legitimation mismatches, both in terms of audience and content. Indeed, only focusing on lawyers may generate a discrimination between the audience that received clarifications and further interpretation of the Court's cases and the rest of citizens who are left aside or overlooked by judges, but nonetheless expected to hear from the Court. Focusing on the legal profession would also have an incidence on the nature of the message conveyed by judges. Dealing with fellow legal professionals implies a "legal" and/or "judicial" response, i.e. a message respecting the legal language (or "coding" in Luhmann's terms) that by definition generates a sociological exclusion between the insiders and outsiders of the European legal system. Justification about case law cannot be a simple repetition of the content of rulings, or it would fail to satisfy the questions of the Court's audience.

Rather, judges must expand on the principles found in rulings or rephrase it in a language that clarifies their original intent, including if needed in a non-judicial language, or removed from some of the original formalism that make some decisions obscure if not incomprehensible (accusations that the Court received regularly: Lasser 2004; see 5.2). If on the contrary most of the Court's public is composed by non-lawyers, then the justification provided by judges (if any) must adopt a language and tone that is better suited to a group of citizens with different social skills.

Top-down legitimation might also try to reach out to a broader audience than needed. EBs report that as much as 71% of EU citizens have knowledge of the Court and 78% of them hold a general opinion about the Court (while 22% say they do not know)[87]. A broader public opinion study, like Gibson and Caldeira's EB supported research in the early 1990s (see 3.1.2), would be the best path available. Such a research would allow us to see if the situation has changed since the 1990s, and grasp whether citizens are 'more' aware of the Court's existence and monitor its activities. I did unfortunately not possess the means and manpower to conduct such a broad enquiry. Gibson and Caldeira themselves benefited from the support and funding of the Commission to gather a long list of respondents and thus getting such a large-scale survey to analyze. However, there are today tools that did not exist back in the 1990s and can prove useful in gathering large-N samples of observations and which are not too costly in terms of time and finances. I will here detail the use of social media by the Court, and more importantly say something about the audience that follows and monitors the Court's activities on Twitter.

This thesis is about the legitimacy of the Court and not only about the legitimacy of judges. The Court is much more than just 88 judges and AGs

[87] EB92, Autumn 2019, pp- 111-34. I did *not* mistype the figures: there may indeed be more people holding an opinion about an institution than people having knowledge of the very object they are asked about! The EB report does not mention whether they proceeded with the 2nd question ("And please tell me whether you tend to trust/not to trust …") only with people who claimed they were aware of the Court's existence. But the numbers suggest that all citizens give an answer to both questions. According to the EB, one may hypothetically not discard that citizens could have an opinion about something they are not aware of ...

combined[88]. It is nowadays a 2000-strong factory[89] that includes référendaires (clerks), lawyer-linguists, trainees and many more. The Court also has a Directorate General for Communication. This service promotes the activities of the Court in the media and makes publicity about rulings. Some instruments have become traditional nowadays: the *annual reports* of the Court, accompanied with the reports on judicial activity and the management reports[90], offer long overviews of judicial activity each year; *press releases* are published right after rulings are handed down and summarize in a few pages the content of case law by stressing out the principle(s) or main point(s) of the Court's reasoning[91].. These tools allow members from the Court's audience to know some more about recent cases without a need to read the entire ruling, or on the contrary have a deep overview of the Court's activities in a single publication.

Modern citizens sometimes seek information in messages of 280 characters. The Court endorsed this trend and now has two official Twitter accounts, one in French[92] (working language of the Court) and one in English[93]. CJEU tweets spell out the content of judgements in noticeably short messages and contain a link guiding to the larger press release.

Twitter presents a great opportunity for generating empirical insights about the audience of the Court. First, there are a great number of observations available, giving elements for further generalization. Second, the identity of participants (around 84.000 for the English account, and ca 21.200 for the French account) and their professional occupation (if they choose to do so in their short biography) is often available. Third, it overcomes the stringiness of Gibson and Caldeira's demanding measurement of awareness. Twitter is famous for its ratchet effect that

[88] The GC is still not complete as of January 2021, with only 50 members instead of the foreseen 56. See chapter 4.

[89] There were exactly 2217 officials and staff at the Court in 2018. See the Annual Report of the CJEU 2018, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf, p. 18.

[90] These are available at: https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels

[91] These are available at: https://curia.europa.eu/jcms/jcms/Jo2_7052/

[92] https://twitter.com/CourUEPresse

[93] https://twitter.com/EUCourtPress

lead people to webpages of users at times unknown, simply because they followed another account that connects them both, or that the person viewed it as a suggestion because a CJEU tweet mentions an area of social life that matters to said user (e.g. MEP Junqueras' mandate, an event followed by many Catalans and which found its way into the docket of the Court; see below). On such a large scale of analysis, one may abstract certain social characteristics about the Court's followers, themselves being representative of the Court's audience. The biographic description provided by Twitter users remains generally short and cannot allow for a full typology of social backgrounds. But, when taken on a sufficiently large scale, they allow for testing the hypothesis about the potential legitimation mismatch generated by the Court's top-down legitimation focused on fellow legal professionals. By checking if, on a social medium open to everyone, legal professionals are the main audience of the Court, we could say some more about the potential (mis)match between judicial powerholders and their audience.

I thus conducted a month-long experiment in December 2020 when I looked at all the tweets published on the French and English accounts, and systematically checked the names with their short biographies (when available) to determine whether "lawyers"[94] are overrepresented in the Court's audience. To do so, I classified following a binary coding ("lawyer": 1; "non-lawyer": 0) the population retweeting the Court's original tweets. Since Retweets (RTs) are not endorsement of the Court's statements but rather an expression of interest of citizens in the activities of the CJEU, I use those as empirical illustration of the Court's sociological

[94] I refer to lawyers here as the persons who share that they pertain to the legal profession or express interest in legal affairs. This is a wide, encompassing definition. Nonetheless, the criteria for classifying an account as "lawyer" were quite demanding, since I coded in this category only users who expressly mention the importance of law in their lives. I even excluded ambiguous terms such as "rule of law" that could refer to other social dynamics than legal interpretation. The population identified here is thus an *a minima* population, compiling only those that could be clearly identified. This means that the population of lawyers present in the sample may be much larger than the one identified here. See the codebook in Annex 2 for more information.

legitimacy[95]. I used the same month for both the French and English accounts. As such I have the equivalent of two months of data (the accounts have different audiences) while I can compare differences generated by the language on an exactly similar content[96] (see chapter 4). I thus compiled a total of 91 tweets, which generated a total of 3819 retweets, 1733 of whom were publicly available[97]. Applying the binary coding mentioned above, the aggregated results were the following:

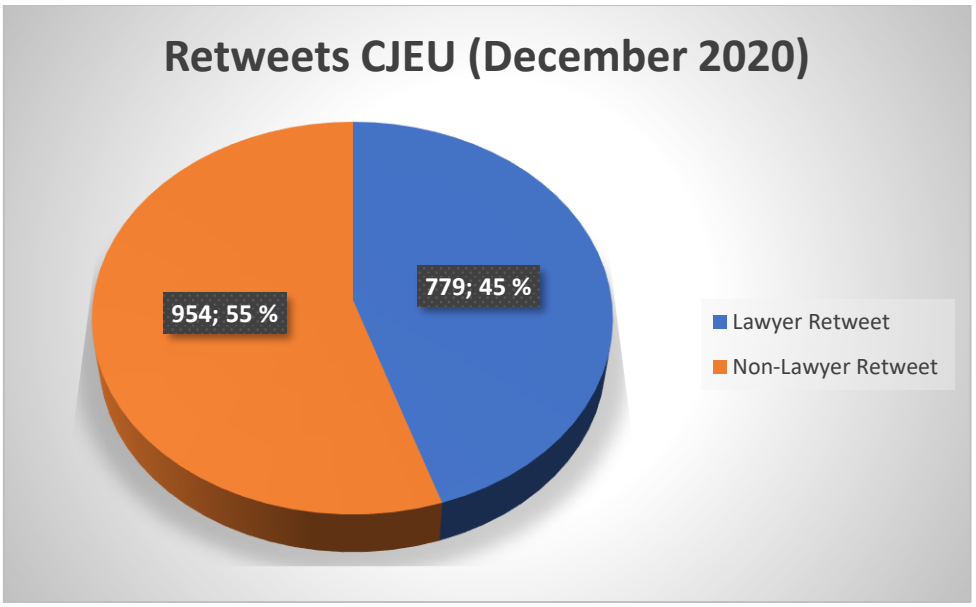

Figure 3.7: Part of lawyers in the Court's twitter account (Number and percentage)

Source: Twitter, EUCourtPress and CourtEUPresse, December 2020

Graph: author

[95] That is why I excluded "likes" from the analysis, even though I inserted them in the annex. Likes mean endorsements of the Court's activities. And since the Court is often charged with a pro-integration bias, I feared that the sample would be biased in favor of pro-Europeans and/or pro-CJEU (there is no "dislike" category to balance it out). RTs, which are not endorsements and can mean praise as much as criticism, seem to be a more objective data.

[96] The French sample has 47 tweets while the English account has 50. This difference comes from the fact that the Twitter service of the Court translated 3 tweets into the language of the member state concerned by the ruling. But the content of the information is identical on both accounts.

[97] Twitter requires a fee for providing the entirety of the identity of RTs in case of a large number of reactions. I only worked with the publicly available data. For more details on the numbers, see Annex 2.

People or associations who expressly mentioned their belonging to the legal profession amounted for 45% of the sample. If we look at the French account, we even find that identifiable lawyers are by far the majority of the population in this sample:

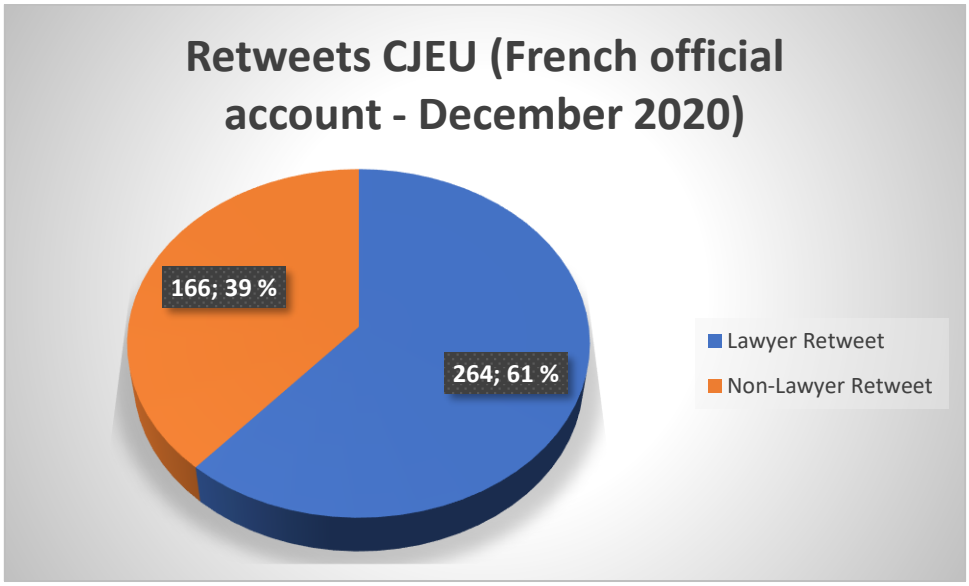

Figure 3.8: The overrepresentation of lawyers in the French-speaking Twitter account of the CJEU

This proportion of identified lawyers in the Court's Twitter audience is lower than it really is because of the limited information available and the strict coding employed in order to facilitate the interoperability of data[98] (see codebook in Annex 2). But it is impossible to tell how many more lawyers are represented here, e.g. if they represent the majority of followers overall. Of course, not everyone is following the Court's activities on Twitter, and there might be a generational bias in this sample. But these numbers are indicative of a clear overrepresentation of legal professionals.

To estimate the overrepresentation of lawyers in monitoring the Court's activities, it is fruitful to compare these numbers with the normal distribution of lawyers in the entire population of the EU. Thanks to an EP report mapping out the number of legal professionals in the EU in the

[98] In simpler words, not all users share their professional occupation on Twitter. I thus had to exclude some users that did not share their position in the legal profession, although I knew that they were lawyers. The proportion of legal professionals is necessarily higher than the one reported here.

2010s[99], the proportion of lawyers in society amounts to the combination of judges of first instance (59.713 in 2014), of appeal courts (17.230) and of supreme courts (2.623), non-judge lawyers working in courts (298.822 in 2014), prosecutors (36.991), members of the Bar or "lawyers" strictly speaking (1.155.263), notaries (42.315) and students (1.106.515). Overall, excluding non-professional judges and law professors for whom data was not available, lawyers amount to a total of a counted 2.719.472 members in 2014. The EU's population for the same year (precisely as of 1.1.2015) was up to 508.191.100 citizens[100]. Members of the legal profession accounted in 2014 for 0,53% of the total population in the EU. While some members are missing (but are unlikely to change this proportion significantly[101]), the comparison between the Twitter sample (at least 45% of lawyers) and this normal societal distribution in the population shows an overwhelming although unsurprising overrepresentation of lawyers in the Court's audience. The Court's audience is mostly composed by the EU legal profession.

3.3.3 Identifying the Court's audience: the legal professionals monitoring the Court

The meaning of 'profession' seems straightforward, but it must be analytically differentiated from other concepts such as epistemic communities or advocacy coalition. One may then proceed with the list of professionals that constitute the audience of the Court.

3.3.3.1 The key distinction: profession vs epistemic community

The relationship between the CJEU and other legal professionals is not a new social-scientific finding (see the review in 3.2). But the nature of the

[99] "Mapping the Representation of Women and Men in Legal Professions Across the EU", Study for the JURI committee, 2017, at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596804/IPOL_STU(2017)596804_EN.pdf

[100] See the Eurostat sheet about "population in the EU": https://ec.europa.eu/eurostat/documents/2995521/6903510/3-10072015-AP-EN.pdf/d2bfb01f-6ac5-4775-8a7e-7b104c1146d0

[101] There is no specific number about law professors, but Eurostat provides for the category "Grade A staff in social sciences" that amounts 22.699 in total. While law professors may be overrepresented compared to other professors from other social-scientific disciplines, they nonetheless did not amount to more than 20.000 in the EU in 2014. Non-professional judges are even more marginal in the population of legal professionals.

bond with its attentive public deserves further conceptual clarification. When judges are found interacting with their audience, scholars stress that they are seeking "allies" that either pursue their interest or because they share the same purposes as judges do, a trend clearly identified in the publications of Alter (2009) and Vauchez (2015). This alliance of legal professionals across borders and institutional belongings refers to what Peter Haas famously labeled "epistemic communities", i.e. a group of agents with similar professional characteristics, sharing common knowledge and beliefs, and aiming at enhancing their prerogatives through cooperation (Haas 1992). In this important piece, Haas also gives us ways to distinguish epistemic communities from other groups:

> Although members of a given profession or discipline may share a set of causal approaches or orientations and have a consensual knowledge base, they lack the shared normative commitments of members of an epistemic community.
>
> (Ibid.:19)

Epistemic communities in the EU legal profession may for example share the Court's drive of advancing the cause of integration through gap-filling in the grey space between the EU and domestic legal orders. The EU legal profession also shares this consensual knowledge base about EU law interpretation, but its members are not necessarily driven by their desire of enhancing integration through law. They are rather simply performing their professional task. While epistemic communities refer to an ideational component shared by several agents, the profession is a structural element of societal configuration. It gathers all the potential professionals of a given field and are thus capable and willing to express value judgements about the exercise of their craft, whether they support the actions of their peers in that field *or not*. Professionals are thus the brokering audience of a non-majoritarian body. It performs a monitoring function that structurally only associates a small part of the popularion to their activities.

The EU legal profession is the main (and most of the time only) audience of the Court. Historically, the distinction between epistemic community and profession has never been formally established regarding EU lawyers. It was probably inexistent for decades. The small crowd that built the European legal order in the 1960s and 1970s along with ECJ judges seemed

to share the commitment towards the 'promised land' of a unified Europe (Weiler 2012), which also explains how the Court could come up with true "juridical coups" (Stone Sweet 2007) absent reactions from the constituent power. If the Court's public – that assesses and brokers the legitimacy of its decisions – consents to the content of rulings, then the rest of members of society (including public opinion and governments) sociologically must accept that the Court is legitimate, at least in instances where the rest of society remains structurally excluded from the resolution of judicial problems.

While the superposition between EU law profession and EU law epistemic community was nearly perfect in the 20th century, it has however become obsolete in the 21st century. Many legal professionals raise their voice against some judicial decisions, and publicly denounce the Court's poor reasoning at times (see Pollack in Grosmann and al. 2018 for a comprehensive review). Reactions are not all endorsements nowadays, which has an incidence on the content of the Court's activities. The alleged retreat from activism that may have started after Maastricht (according to Saurugger and Terpan 2017:34-41) probably started with the expansion of the legal profession and the diversification of sensibilities about integration through law, meaning that the promised land was no longer a shared objective by everyone in the Court's network. Along with the expansion of the Court's docket to core state powers, the modification of the characteristics of the Court's public also had incidences on the Court's decisions, which go beyond the self-interests of judges.

This major change of the Court's audience, explaining a change of behavior of all participants in the legal profession, is still totally overlooked in the social scientific literature. The CJEU and what surrounds it are different from the 1960s. As we will see, the judges themselves have little in common with the first persons who sat on the bench in the ECSC Court in 1952.

There are 2 main general descriptive factors about the Court's attentive audience. First, the audience is bigger than it used to be, and now includes CJEU-skeptics. Second, this crowd is increasingly specialized in EU law. The 1960s times described by Vauchez and others referred to epochs where international, constitutional and administrative lawyers, accompanied by a few former politicians and economists, *forged* EU law. The 2020s are different. The consolidation of the legal order made EU law

a viable career for many citizens. EU law has become a self-standing discipline that provides great professional opportunities to its disciples. A good illustration of the consolidation and development of EU law is the specialization of professionals into various branches or subfields of the legal discipline: EU consumer law, EU administrative law, environmental law, and so many more. EU law has become a meta-discipline.

This profession is composed by various groups that all share an asymmetrical power relationship with the Court, but whose nature substantially differs depending on their origin and specific activity. Let us study these in turn.

3.3.3.2 The Gatekeepers of the EU legal system: national judges

Many canonical studies focused on the relationship between the EU and national courts. The PRP proved to be used much more than expected by the drafters of the treaty, with most national courts accepting to refer cases to the CJEU to interpret treaty provisions and secondary law (Alter 2001). If scholars agree that national courts remain the principal interlocutor of the CJEU, they disagree on the nature of their relationship: if some argue that national courts often rely on the CJEU and its guidance (Stone Sweet, 2004), others on the contrary insist on the tensions binding certain national courts and EU judges (Alter, 2001; Davies, 2012b). Overall, the connection binding national lower courts and the CJEU is well functioning and keeps being stronger (Mayoral and Torres Perez 2018), since this cooperation is even institutionalized in bodies promoting networking between judiciaries, like the European Judicial Training Network (Benvenuti 2013; see chapter 5.1).

The relations with higher courts, especially CCs, proved much more conflictual (Alter, 2001; Davies, 2012a). These higher courts are *both* in charge of delimiting the perimeter of European integration (Lindseth, 2010). When the repartition of competences between the EU and MS remains unclear (Scharpf, 1988), the Supreme Courts of each legal order have a *de facto* mandate of establishing the boundaries separating the two legal realms. The CJEU never fully used the principle of subsidiarity to bring limits to the reach of EU law. In response, national CCs almost never frontally defied the CJEU but often expressed reservations regarding the Court's extensive interpretations of the treaties. CCs engage in a direct debate with the Court, a trend never better expressed by the BVerG's

various appeals in the *Lisbon*[102], *Honeywell*[103], *Gauweiler* and *PSPP* rulings. CCs adopted (when asked about the compatibility of deep EU constitutional changes with their national constitution) a *Yes, But* approach in their responses to the European judiciary, acquiescing to the CJEU's bold case law while retaining the possibility of declaring CJEU rulings *ultra vires* (Grimm, 2017).

If Weiler rightly argues that "open revolt is rare" (Weiler in Adams and al. 2013: 235), sometimes CCs simply do not follow the CJEU's decisions. They are 3 recent examples from Denmark (*Ajos*), the Czech Republic (*Slovak pensions*) and Germany (*PSPP*), where contested interpretations of the treaties by the Court got rejected by the 3 CCs. However, these punctual disobediences did not lead other players to question further the interpretation of the treaties by the CJEU. On the contrary, they sparked each time a rallying call in favor of the Court rather than start an anti-activism campaign against the court [104].

3.3.3.3 CJEU staff and other EU institutions legal services: shaping a common understanding of EU law

Zhang brought a new understanding of the European legal field when she concentrated her micro-sociological analysis on the legal clerks of the courts, often referred as the "référendaires" (Zhang 2016). Notwithstanding their prominent role in shaping case-law, she also refers to the circulation of legal professionals across the different legal services of the EU. Thus, it is not uncommon that référendaires leave Luxembourg to work for the legal service of the Commission or the Council after some time. This circulation of professionals who gathered experience in other legal services may only favor a common understanding of the EU legal culture. Former Director-General of the Council Hubert Légal is great example of this. Before joining the Council, Légal worked as *référendaire* and judge at the General court[105].

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[102] 2 BvE 2/08 (Lissabon Urteil), 30 June 2009

[103] 2 BvR 2661/06 (Honeywell), 6 June 2010

[104] The best example of it is the great reaction to the PSPP ruling, crystallized by the following publication: "National Courts Cannot Override CJEU Judgments", *Verfassungsblog*, 26 May 2020, available at: https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/

[105] See his biography here: https://www.concurrences.com/en/auteur/Hubert-Legal

This assumption is confirmed by Malecki's analysis of case-law and of opinions expressed by the legal service of the Commission (Malecki, 2012). Trying to identify if EU judges expressed different opinions across a multitude of cases, he found out that the Commission and the CJEU agree on legal interpretation about 75% of the time, meaning a much higher percentage than the one of member states. The socialization mentioned in the previous paragraph and the subsequent effect on legal practice, added to the ideological purpose shared by members of both institutions of enhancing integration when the repartition of competences is not clear, explain such a high score. The legal service of the Commission also uses CJEU decisions as a base for future legislation: Susanne Schmidt brilliantly showed how the case-law of the Court constrains the policy options available to member states and paves the way for the EC to propose codifying legislation (Schmidt, 2018), e.g. the use of *Cassis* as a roadmap for the establishment of the common market (Alter and Meunier-Aitsahalia, 1994).

Nonetheless, findings remain scarce on these relations. Moreover, the fact that 25% of the time judges do not side with the Commission also shows that consensus between these two groups is not automatic. Legal services of EU institutions must defend the visions promoted by their respective institutions, which may collide with the judges' understanding of EU law. Anyway, the often-displayed agreement between lawyers of different institutions and the use of judicial decisions as legislative cornerstones are clear legitimizing devices for both institutions.

3.3.3.4 At the interface between the EU and the member states: government agents

Pollack expressed his surprise when, trying to find answers in the literature, he did not find a single study on the relationship between judges and member states legal representatives (Pollack, 2018). National governments are often represented before the Court: they always file a report when their own national legislation and practices are contested and express their views when the interests of their state are at stake (Dederke and Naurin 2018). The number of member state observations shows the contestation surrounding a legal issue and the high socio-economic impact at stake. A famous example remains the *Laval* case, when no less than 14 governments submitted their views on the rights to strike and collective bargaining and their articulation with the freedom of establishment enshrined in the treaties.

We know little about the agents that represent their government, despite their brokering role between the Court and the masters of the treaties. A way to find answers is to look at the profile and trajectories of some of these agents (see Granger in Vauchez and de Witte 2013: 55-72 for a rare analysis). Agents surprise by their professional mobility and – despite representing national interests – their full recognition as EU legal professionals. The following examples are illustrative. Thomas Henze was an agent responsible of EU litigation for the German Ministry of Economics; before serving his national administration, Henze used to be a référendaire in the CJEU from 2001-2010, working with Advocate Generals Siegbert Alber and Julianne Kokott. He is now back at the Court and works for the Registry[106]. The UK often asked Alan Dashwood to represent the country's interests at the Court. No one symbolizes more than Dashwood the multi-positionality of agents in the EU legal profession:

> Sir Alan Dashwood QC has a range of experience that qualifies him perhaps uniquely as a specialist practitioner in the law of the European Union. His 40-year career in EU law spans most forms of legal practice – as an advocate, scholar, teacher, author, editor and a senior EU civil servant. His familiarity with the European Court of Justice goes back to the time when he was Legal Secretary to Advocate General J-P Warner (1978 to 1980). He has appeared regularly before the European Courts over a period of more than 20 years, litigating in French as well as in English, initially as agent for the Council in its disputes with other EU institutions and with Member States, and since his return from Brussels to the Chair of European Law at Cambridge, as a barrister.[107]

Dashwood worked for several EU institutions while keeping a foot in academia. As his profile shows, he possesses a complete mastery of the judiciary of the EU which he shaped both from the inside as a référendaire, as a member of another EU institution and then representing a member state.

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[106] See his small biography at: https://www.ivcc.de/html/img/pool/International_VAT_Conference_2018.pdf, p. 4

[107] Alan Dashwood's profile, at: https://www.hendersonchambers.co.uk/barristers/professor-sir-alan-dashwood-qc/

Agents may be at the "margins" of the legal field, but they are pivotal actors as legitimacy brokers of the CJEU. Their formation and eventual cooptation as EU lawyers or not does not mean that they will always side with the Court, but it creates a gearing mechanism that reduces the friction between actors whore relationship remains understudied [108].

3.3.3.5 The invisible hand: legal academia

A. Vauchez was a pioneer who identified legal scholars as taking an instrumental part in shaping EU law, with research centers becoming hubs of discussions gathering various members of the EU legal field (Vauchez, 2015; Robert and Vauchez, 2010). Since then, more scholars kept asking whether EU legal scholarship was simply about doctrinal debates, or if it also shared and helped shaping a common vision of promoting integration (Byberg, 2017). Scholars helped judges shaping case law in avant-garde cases like *Van Gen den Loos* or *Internationale Handelsgesellschaft* in the early years of integration (Alter 2001). Legal scholarship began progressively to be more divided over the years on the role of the Court and its way of interpreting the treaties. Hjalte Rasmussen was the first to openly criticize the Court for its pro-integration stance (Rasmussen, 1986; Byberg 2017:55).

EU judges openly use scientific literature in their work. A bibliography is associated to every judgement of the Court and in the opinions of AGs. Several judges are legal scholars themselves. Judges still hold classes while serving at the Court, teaching being the only activity allowing judges to perceive an extra remuneration for activities held outside the premises of the Court in Luxembourg. They regularly publish in scientific journals. In sum, judges are academics and socialize regularly with other legal scholars (see 3.3.1, 5.3.2.2, Figure 3.6 and Figure 5.1).

This close connection with legal scholarship also explains the language shared by all the members of the European legal field. Being all experts of EU law, scientific legal language defines the debates on integration. The use of a seemingly 'neutral' (thus apolitical) language helps members of the legal profession to reduce opposition to judicial outcomes, since the

[108] For example, the Romanian agent before the Court of Justice got fired because he supposedly opposed his government too much in the litigation processes at the EU level: see "Govt. replaces Romania's governmental agent at the Court of Justice of the EU", Romania Insider, 18 May 2018, available at: https://www.romania-insider.com/govt-replaces-governmental-agent-court-justice-eu

latter are allegedly the product of 'reason' (thus the use of the expression 'legal reasoning'). The use of scientific language thus makes scientists great hosts of the integration-through-law debates.

Scholars thus become *co-interpreters* of EU law. Doctrine is an exercise that shatters the barrier between science and practice: it becomes an endeavor with clear normative purposes, with a clear ambition to have some echo in case law. There is a competition between publishers of doctrine – hence the competition between EU legal journals – and judges may even interfere if not control the process of today's science and tomorrow's case law. Investing in legal academia has a clear legitimation incentive (see 5.1.2.2).

Universities also create over the long term a structural element of the Court's legitimacy. Legal faculties are forming the current and future groups of legal professionals. If judges keep getting involved in research centers, they will themselves help in forging the professionals of tomorrow, including the judges of the next generation, and thus cement the legacy of the Court.

3.3.3.6 Legal representation

The focus on legal professionals would surprise the scholars that developed theories involving private parties using judicialization to achieve their goals (e.g. Kelemen 2011; Cichowski 2007). Several firms helped integration-through-law in striking down national administrative barriers that impeded the development of the four freedoms. While the rulings bear the names of the litigants themselves such as *Dassonville*[109] or *Keck*[110], a deeper look into these cases shows that litigants themselves did not see in EU law a way to secure the realization of interests or beliefs. "EU Law stories" (Nicola and Davies 2017) reconstruct the sequences that led to landmark rulings. They all point to the prominence of legal representatives. The potential litigant consults its legal representation which in turn informs her about EU law and EU courts as a potential venue for winning the case. When Mrs. Defrenne was discriminated by Sabena for being too old to work as a female flight attendant, she did not

[109] C-8/74, Procureur du Roi v Benoît and Gustave Dassonville (*Dassonville*), 11 July 1974

[110] Joined cases C-267/91 and C-268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard (*Keck*), 24 November 1993

go to Luxembourg by herself and called the ECJ to strike down the contested measure. She went to anti-discrimination activist and lawyer Elaine Vogel-Polsky, who waited for years to receive a test case that would allow her to go to the Luxembourg court and have a case of non-discrimination judged on a transnational scale (Alter 2009:159-83). Another good example is *Chen*. When Mrs. Chen fled from China to the UK in order to have a second child, she went to legal counsel and asked if there was any chance that she would be granted a residence permit in the UK. Michael Barry and Ramby de Mello, barristers from London, then suggested that the (ab)use of EU cross-border citizenship law was a possible winning path. They thought that EU law – and behind it the Court – would stand a better chance at granting Mrs. Chen and her second child legal protection than turning exclusively to immigration courts in the UK (Kochenov and Lindeboom in Nicola and Davies:201-23).

Members of the bar broker their craft of EU law to potential clients. Some of them may also be activists or "cause lawyers" (Sarat and Scheingold 2001) and thus have long-term ambitions regarding the Court and judicialization overall. Litigants simply do it for business reasons. In any case, legal representatives are the actors that are "repeat players" before the Court, while plaintiffs themselves are mostly "one-shotters" (Galanter 1974: 97). They will thus give litigants some insight about the Court to a crowd that mostly ignores its activities.

3.4 When the Court is in the 'limelight – again': beyond the brokered legitimacy of the EU legal profession

Yet the Court's legitimacy is not always determined by the perceptions of its attentive audience. While the Court's activities are mostly scrutinized by a few, some salient events make their way to Luxembourg and challenge the normal state of judicial business.

Let us look again at the English Twitter sample from December 2020 and look instead at the number of RTs per individual tweet (N=50).

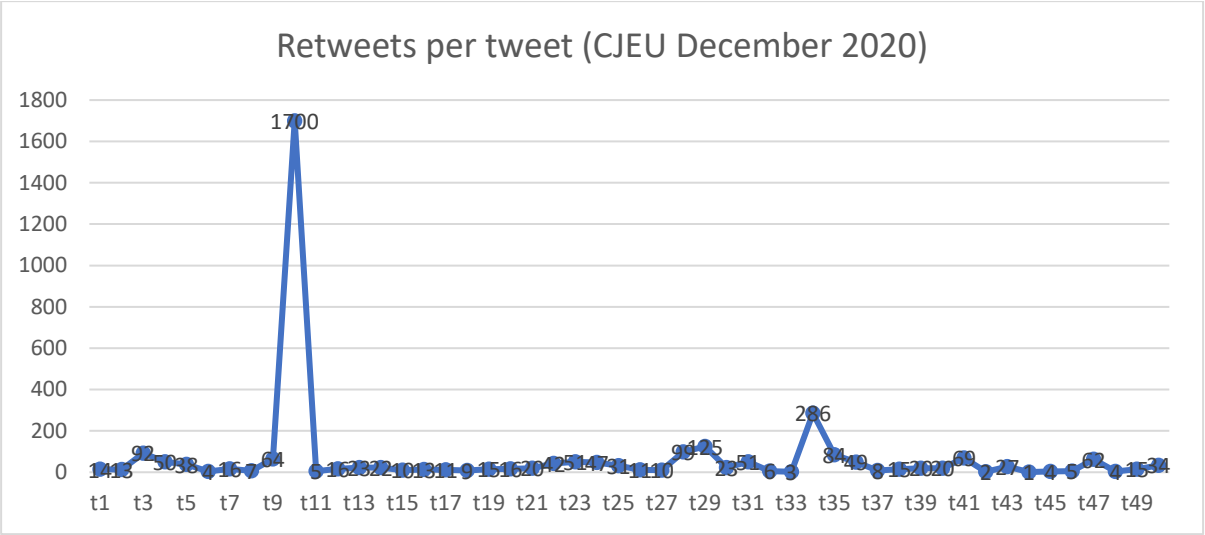

Figure 3.9: Different scales of reactions across rulings

Most tweets triggered less than 100 reactions. However, some sparked the interests of many more followers than usual. There are two noticeable spikes in this graph. T34 was retweeted 286 times: it dealt with Hungary failing to its obligations of preventing illegal returns of TCNs[111]. T10 is the clearest outlier in the sample (1700 RTs): it recalled the judgment of the Court that granted parliamentary immunity to Catalan independentist Oriol Junqueras as MEP, while he was still in prison in Spain for organizing the independence referendum on October 1st, 2017[112].

Some salient events generate unusual coverage, not least of all actors unexpectedly left out of the analysis in this chapter: governments. While judicialization is a process that does not involve many players beyond the legal profession, sometimes the vested effects of potential rulings (in terms of economic, social and political impact) lead citizens and governments to closely monitor the activities of the Court.

It is difficult to provide any metrics regarding the temporary and isolated suspension of the Court's brokered legitimacy. But a trend emerges for salient cases in dire economic times. Economic governance cases are scarce, but always placed national governments as major actors in these cases, for example regarding the application of the Stability and Growth Pact (SGP)[113] (Heipertz and Verdun 2010), the redistribution of resources

[111] C-808/18, European Commission v Hungary, 17 December 2020

[112] Case C-502/19 Junqueras Vies, 19 December 2019

[113] C-27/04, Commission v Council, 13 July 2004

with drastic consequences for the public finances of member states (*Barber*), the adoption of new tools to cope with the effects of the Eurozone crisis such as the ESM (*Pringle*), the role of newly created agencies (*Short-selling*) and the various ECB public debt purchase programs (*Gauweiler* and *Weiss*). Cases about the migration crisis (T34 in the sample) also trigger reactions beyond the legal profession. Finally, highly salient political events that somehow find their way to the docket of the CJEU, e.g. the Catalan independence debate (t10 in the sample) or Brexit (Dederke 2019) cause an unusual coverage of the Court's activities[114].

These situations remain statistically marginal, yet they deserve a particular mention not only as a limit to the model of brokered legitimacy, but also because they may increasingly happen in the future. The EU is integrating former core state powers, which are comparatively under high scrutiny in the media and involve large sums of taxpayers' money. This salience means the presence of cleavages among the public since different audiences hold different legitimacy standards (see chapter 6). The recent socio-economic crises have triggered various modifications to the legal structure of the EU in the policy fields in crisis[115]. But these solutions did

[114] See 6.4.3. Normally, discussions about CJEU activities start with the publication of the judgement and the principle(s) within them (meaning *after* the Court handed down the decision). In this category of cases, the sequence is different since coverage of Court activities start *before* the publication of the ruling.

[115] For economic governance, see Regulation 1175/2011 amending Regulation 1466/97: On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; regulation 1177/2011 amending Regulation 1467/97: On speeding up and clarifying the implementation of the excessive deficit procedure; regulation 1173/2011: On the effective enforcement of budgetary surveillance in the euro area; directive 2011/85/EU: On requirements for budgetary frameworks of the Member States; Regulation 1176/2011: On the prevention and correction of macroeconomic imbalances; regulation 1174/2011: On enforcement action to correct excessive macroeconomic imbalances in the euro area; Regulation 473/2013: On common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area; Regulation 472/2013: On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. For the migration crisis, see Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. And for the COVID-19 pandemic, see the activation of Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union ("Emergency support").

more than rectifying failing outputs. They triggered a constitutional mutation of the EU, a mutation that came to challenge a fragile pre-existing "balance" between the EU and the member states (Dawson and de Witte 2013). Constitutional mutations also awake a category of occasional yet vigilant players of the EU legal profession that nonetheless claim to hold the reins: constitutional courts (CCs).

Of course, social scientists stress the importance of these events as major features of judicialization. The case of override in *Barber* triggered some academic reactions that revived the thesis of political control of the Court by member states (Garrett and al. 1998). The recent *ultra vires* decision of the BVerG in the PSPP ruling received an unequal attention in all circles of the legal profession and beyond (Bobic and Dawson 2020), leading Chancellor Merkel and President Macron to propose solutions to avoid further contestations caused by the legal patchwork of economic governance[116]. But these instances remain isolated and only put a temporary spotlight on the Court. Easton would talk here about a withdrawal of *specific* support. These necessarily have effects on diffuse support but do not necessarily alter it significantly[117].

3.5 Conclusion: the CJEU's brokered sociological legitimacy

The CJEU's sociological is brokered by the EU legal profession. The Court's legitimacy is indirect since all citizens do not consent to the Court's actions. It remains theoretically democratic legitimacy since citizens defer legal interpretation (unlike politics) to a professional group of legal experts. Judges consequently spend their extra-judicial time meeting their fellow legal professionals.

This chapter provides a descriptive account of the relationship that binds the Court to its attentive public. This picture is nonetheless static. It cannot help us in understanding why the agents of the EU legal profession

[116] See Deutsche Welle, "Coronavirus: France, Germany propose €500 billion recovery fund", 18 May 2020: https://www.dw.com/en/coronavirus-france-germany-propose-500-billion-recovery-fund/a-53488803

[117] This of course raises the question whether a single ruling can precipitate the CJEU into a legitimacy crisis or not. This situation is more than a theoretical possibility since it happened to the South African Development Court in the 2010s (see Achiume in Alter and al 2019: 124-46).

believe in the CJEU's right to rule or not. The rest of this monograph will thus be dedicated to unpacking these "terms" or legitimacy standards that are mobilized by the Court's audience.

Chapter 4

The Sources of CJEU Legitimacy

Some normative standards are specific to the judicial profession, while other standards transcend social systems and define the polity. While some of these principles – democracy, rule of law – are as old as the polity itself, others – e.g., gender balance – are more recent and demand a readjustment from powerholders. In a system where legislative and constitutional change is hard (when not impossible) to obtain, judges themselves sometimes carried out this readjustment. Horsley describes the phenomenon as "constitutional supplementation", referring to the need for an (judicial) update of the legal order. Judges thus bring fluidity to a legal system that hardly accommodates for change. While the task is welcome and for some necessary, the line that separates fluidification from "juridical coup" (Stone Sweet 2007) is thin. Even more difficult, the threshold indicating the limits of judicial interpretation differs among actors. What constitutes activism for some is simple judicial resolution for others. There cannot be a perfectly circumscribed theory of the normative legitimacy of the CJEU. The theoretical attempt must limit itself to unpack the widely shared understandings of the Court's legitimacy and lead the researcher to accept that these criteria do not possess the same normative weight for everyone.

The CJEU's legitimacy is tied to broader developments in the EU, while it must respect standards that are proper to the judicial world. What are the normative standards of the Court's legitimacy? Normative legitimacy accounts about the EU (Schmidt 2020; Bellamy 2019) coupled with the proliferation of publications about the normative legitimacy of ICs (Squatrito and al. 2018; Grosman and al. 2018; Howse and al. 2017; Grosman 2013) provide several insights. Most agree that the legitimacy of an IC can be classified in the following 3 categories: sources (input), process (throughput) and outcome (output). Sources refer to the origin of the Court's authority and answers the following question: why submit a question to this particular institution? In other words, what makes *a priori* the CJEU as the justified adjudicator in the EU? Process refers to the quality of the sequence of governance and may refer to a formal component – "due process" – as well as to values about the quality of governance processes such as openness or transparency. Outcome refers to the results and to the criteria that lead an audience the accept the final product.

The idea of input legitimacy is intrinsically problematic for non-majoritarian institutions. The sources of the executive's and legislative's authority are derived from the people themselves in democracy. Citizens vote for their rulers and may uphold or revoke their consent to a specific powerholder at the end of her term. Judges on the other hand are not elected. They are appointed by members of the other branches of government, who will decide whether they choose to reappoint them or not.

The absence of input legitimacy coupled with failing outputs in the last decade raise a theoretical paradox. How could a judicial institution deprived of all the necessary features to govern be maintained as a justified ruler? The third legitimating device – throughput – cannot according to Schmidt compensate for missing input and failing output[118]. The understanding of sources or input must refer to something broader than just direct consent. Judges are never directly appointed by the people in European democratic systems. All courts would thus be deprived of input legitimacy. Are there however criticisms against higher courts and calls for the disempowerment of judges? That does not happen in the member states, and it remains a marginal claim in democracies overall (see

[118] The next chapter will reject Schmidt's claim for the specific case of the CJEU.

however Waldron's famous plea against judicial review in the US: 2006). Courts either do not need input legitimacy, or input should have a specific content for the judicial branch of government. This chapter will follow the second route and argue that the CJEU is input-legitimate despite the absence of popular control, because it respects another legitimacy standard found in member states: meritocracy. Judges are less dependent on the charismatic mode of domination than on the rational-legal mode. Judging refers to a (socially recognized) expert activity that demands professional specific skills. It does not however mean that judges do not receive a political endorsement (see 4.2.1).

There are two ways to capture the sources of the Courts's legitimacy. The first refers to the formal component of the polity. The constituent power of the EU enshrines its constitutional preferences in the treaties. The Court's legitimacy must be assessed against this normative benchmark (4.1). But these sources go beyond the formal letter of the treaties to include polity-encompassing values. The Court must be representative or "reflective" (Madsen in Romano and al. 2013: 388-412) of society. (4.2).

4.1 The Court as a product of EU law

T. Horsley (2018) made an important recent contribution about constitutional mandates in the EU. He claimed that if CJEU interpretation of the treaties is widely discussed in legal scholarship, the normative assessment of the Court as an institution itself of the treaties is understudied (Ibid:9-12). While Courts are created for giving the correct interpretation of the provisions of the legal order, they are also subject to said provisions.

The general mission of the Court is found in art.19 TEU which states that the Court shall ensure that "the law is observed". This formulation is abstract and deserves further specification. Observance here cannot mean compliance. Judges do not possess the coercive means to ensure compliance. It can only secure observance of the law by persuading parties of the soundness of its interpretation. This interpretation shall also be in line with the expectations of the constituent power. The Court was theoretically inserted in the constitutional structure of the Union to "stabilize the expectations" of the member states (Moravcsik 1998; Shany 2014). The nature of such expectations, however, remained incomplete. It is unsurprising since constitutions are not meant to regulate every aspect

of social phenomena. On the contrary, they orchestrate the necessary flexibility needed to adapt to diverse situations. This "adaptation" is then for all branches of government to be specified. But this "gap-filling" enterprise has a specific meaning for the CJEU and may only be fulfilled under certain conditions (4.1.1).

The treaties also imply that there is a limit to the CJEU's jurisdiction (4.1.2). The problem for the CJEU and others is to find that border of EU law's realm. Some competences (e.g. competition law) are clearly parts of the Court's jurisdiction while others (family law) are clearly excluded. The problem persists however for areas of law that are structurally connected with competences that have not been delegated to the EU. The clearest example refers to monetary and economic policy. The first is an exclusive EU competence while the second remains a part of domestic legal orders. But the actions in one area necessarily have an effect on the other. The treaties may not solve all jurisdiction problems.

4.1.1 The Court's mission: "Ensure that the law is observed"

The CJEU has often been called bold when interpreting EU law. The teleological approach embraced by the Court leads judges to assess a particular case according to the overall objectives of the EU (see 5.2.2). This leads to different interpretations. For some, the CJEU remains perceived as a bold actor that will do anything to advance its agenda because of its pro-integration stance (Grimm 2017). Others on the contrary stress that the Court is entrusted to define undiscovered principles and give the correct interpretation of EU law (e.g. Wessel in Jorgensen, Pollack and Rosamond 2006:104-13). How may bold but adequate decisions come together?

4.1.1.1 "Law-making v Gap-filling": a tiny but fundamental distinction

Many political scientists argue that the CJEU simply does law. They rallied many legal scholars who detailed that some of the "landmark" rulings did not have a firm solid base in the acquis (Rasmussen 1986; Conway 2012). Direct effect, supremacy or state liability would all be the result of activism. Others see some of these principles as constitutional "supplementation" of an incomplete treaty framework (Horsley 2018). EU law would be an incomplete contract with many legislative vacuums that the Court has the duty to fill. How can one distinguish between "gap-

filling" (that would require the intervention of the judge) and "law-making" (that precludes such intervention)?

The treaties are silent here. For some, the result of both techniques amounts to the same outcome, meaning that the Court gives the final word. But the justification behind those changes is diametrically opposed. Gap-filling is a 'legitimate' judicial intervention, while law-making is short-circuiting of the separation of powers. The limit between the 2 realms however is not enshrined in the treaties.

CJEU President Koen Lenaerts gave in various publications and speeches an explanation with several criteria that are *silently* found in the acquis[119] (Lenaerts 2013a; 2015). Gap-filling should occur when the legislation did not foresee a particular situation; the text would be incomplete and written in a way that "invites" the judge to fill the gap. The legislator voluntarily left it (albeit implicitly) to the CJEU to precise its content. If on the contrary there is a gap that the legislator did not *explicitly* intend to fill, then the Court must defer to the legislator's will and refrain from acting.

Sturgeon would for Lenaerts constitute such an invitation[120]. Regulation No 261/2004 on the "Common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights" provides clear guidelines for compensations to airline passengers whose flights were cancelled. However, the text remained silent regarding "long delays" that may cause harm to these passengers. AG Sharpston saw a gap in the acquis and claimed that passengers shall be compensated for long delays. However, the threshold that would differentiate 'normal' from 'excessive' delays is arbitrary and thus should be chosen by the legislator. The Court here should only signal the vacuum in the legal order and invite the legislator to act and out an end to legal

[119] See also K. Lenaerts (2013) "Koen Lenaerts-Law of the European Union", Distinguished Lecture at the EUI, 6 July 2013, available at: https://www.youtube.com/watch?v=DOdnDKoPmN8

[120] Joined cases C-402/07 and C-432/07, Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA (*Sturgeon*), 19 November 2009

uncertainty [121]. The Court picked nonetheless a number: a flight delayed by 3 hours or more shall be considered a long delay and entitle passengers to compensations. Lenaerts justifies this decision by claiming that:

> Regulation 261/2004 had to be construed so as to expand the categories of passengers benefiting from those rights, rather than inviting the EU legislator to revisit the entire scheme set out in this Regulation.
>
> (Lenaerts 2013a:26)

Since the text defined "long delays" as delays of 3 hours or more, the Court would simply have continued the legislator's reasoning by granting a compensation there, which would be in line with the principle of equal treatment. Lenaerts said elsewhere that the legislator left a gap open for the judge to fill, since its constituting parts would not agree on the precise content of the text and leave it to the Court to settle the matter[122].

When the legislator's intent is clear however, the Court shall not intervene. In *Commission v Spain*[123], the Court claimed that the reimbursement of medical treatment costs in another member state by the member state of affiliation does not arise under Regulation 883/2004[124] in case of unscheduled treatment, and therefore does not constitute a (disproportionate) restrictive effect to the obligation for hospital treatment in another member state[125]. The reaction of the Court's President to accusations of being "patient-friendly", or on the contrary of being an

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[121] Opinion of AG Shapston in *Sturgeon*, at 93: "Any numerical threshold for qualification for a right delineates two groups – the fortunate and the unfortunate – and in establishing that threshold the legislator must be careful not to infringe the principle of equal treatment. The legislator has the right to pick a figure and then defend it, to the extent that its choice is challenged as infringing that principle, as objectively justifiable. *The actual selection of the magic figure is a legislative prerogative*. To the extent that any figure is to some extent arbitrary, its arbitrariness is covered by that prerogative (the margin of legislative discretion)." (Italics added)

[122] See K. Lenaerts (2013) "Koen Lenaerts-Law …", at n119

[123] Case C-211/08 *Commission v Spain*, 15 June 2010

[124] Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L166/1.

[125] *Commission v Spain*, at 65

"overly conservative" court in refraining to demand the full reimbursement of cross-border healthcare, was the following:

> Those two adjectives refer to policy considerations and should therefore be reserved to the appraisal of the work done by the political process.
>
> (Lenaerts 2013a:28)

In both cases the Court was asked to interpret secondary legislation considering the relevant treaty provisions. In *Sturgeon*, the Court completed the creation of the legislator, while in *Commission v Spain* the Court abstained from "rewriting" secondary law. Of course, President Lenaerts carefully picked cases that made his point here. In the multitude of cross-border healthcare cases that favored patients over national administrations[126], including regarding further hospitalization treatments in other member states (although here about scheduled treatments[127]), the case that made a clear limit to a reimbursement for treatment in another member state (because said treatment did not trigger a reimbursement in the state where the operation was performed) came as a perfect instance of judicial strict interpretation of the acquis.

Gap-filling occurs when the other branches of government would implicitly hint at the judiciary to fill incomplete legislative contracts. But the border between legitimate filling and undue law-making – or what Horsley calls "supplementation" versus "contestation" – is very thin. There are no legislative texts that explicitly invite the Court to supplement legislation. And the examples discussed here by Lenaerts are about tiny gaps in secondary law. The CJEU historically has filled much larger gaps, for example by introducing fundamental rights protection in the EEC legal order[128].

This is where teleology – the explication of the legislator's intent – coupled with general principles of EU law come in. Gap-filling can come as to close to law-making as possible if it fits the will of the legislator and does not

[126] E.g. C-368/98, Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes, 12 July 2001

[127] C-372/04 The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health, 16 May 2006

[128] *Internationale Handelsgesellschaft*

infringe legal traditions of the member states. Together they help the Court in achieving highly detailed solutions that most ICs would refrain from taking. But these approaches do not solve the question of the legitimate right to intervene. Teleology and common traditions (mostly referring to fundamental rights[129]) help soften the impact of a potentially unwelcome ruling, but do not justify *per se* CJEU adjudication. The *Solange* saga made clear that the BVerG noticed this early after the Court affirmed the protection of fundamental rights as a key element of the EEC. After 12 years of unproblematic fundamental rights cases, during which the Court arguably developed stringent standards of fundamental rights protection (especially in the field of social rights Cichowski 2007; Caporaso and Tarrow 2009), the BVerG granted the CJEU the right to solely enforce fundamental rights, but that it would nonetheless always check whether the Court respects fundamental rights as enshrined in art. 1 to 20 of the German constitution[130].

Gap-filling by using general principles is a common and respected feature of adjudication by the EU legal profession, which remains the main audience of the Court. The younger crowd of EU lawyers has heard of the greatness of general principles of EU law in solving political gridlocks. They also would have noticed that the constituent power endorsed most of these principles and codified many of those in the Charter of Fundamental Rights (CFR). That is why there are more laudatory tales than critical retrospective accounts of judicial interpretations of EU law during the 20th century.

4.1.1.2 The legal order in the 21st century: are there more gaps to be filled?

The landmark cases that filled legislative and constitutional vacuums came at a time where the legal order still was in the EEC's founding period. The Court famously enabled the Commission to launch policy campaigns that led to the completion of the four freedoms, starting with the free circulation of goods and the completion of the internal market after *Cassis* (Alter and Meunier 1994). The 20th century EU was a peculiar legal order where the political branches were paralyzed because of the unanimity/QMV thresholds. The legislator could not at the time

[129] C-4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, 14 May 1974)

[130] BVerfGE 37, 271 (Solange I), 29 May 1974; 2 BvR 197/83 (Solange 2), 22 October 1986

substantiate the general pre-existing commitments found in the treaties, e.g. equal pay between women and men[131] or access to social benefits to economically inactive mobile EU citizens that fulfill the same conditions as nationals in a given member state[132].

The last big bang in EU integration occurred with the present constitutional charter, adopted in Lisbon. Since then, except for a few exceptions[133], the constituting instrument of the Union has remained unchanged. However, secondary legislation has been expanded in the 21st century to precise the scope of application of the Four Freedoms. While the Free Movement of Goods was purely a judicial creation that hardly needed specific legislation[134], the Free Movement of Services has a dedicated legislative instrument[135] that accompanies art. 56 TFEU. The Free movement of persons generated a huge amount of case-law in the 20th century in the areas EU citizenship regime[136], freedom of establishment[137] or cross-border healthcare[138]. These rulings all received

131 ECJ, *Defrenne*

132 C-85/96, María Martínez Sala v Freistaat Bayern (*Martínez Sala*), 12 May 1998

133 E.g. the inclusion of art. 136(3) TFEU via the simple revision procedure of Art. 48(6) TEU to "accommodate" the compatibility of the ESM with the treaties (see de Witte and Beukers 2013).

134 ECJ *Dassonville*; *Cassis*; *Keck*

135 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services directive)

136 ECJ, Martínez Sala; C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (*Grzelczyk*), 20 September 2001; C-413/99, Baumbast and R v Secretary of State for the Home Department (*Baumbast*), 17 September 2002; C-158/07, Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep (*Förster*), 18 November 2008

137 *Laval*, *Viking*, *Rüffert* and *Luxembourg*

138 Cases C-120/95 and C-158/96 Nicolas Decker v Caisse de Maladie des Employés Privés and Raymond Kohll v Union des Caisses de Maladie, 28 April 1998

codification and specification[139]. The case-law on non-discrimination[140] also received ample legislative and constitutional treatment, not least with the entry into force of the CFR[141]. Even the most uncontested area of EU law – competition and state aid – received further clarification in order to help national competition authorities in ensuring compliance with art. 101 and 102 TFEU[142]. And when the legislator did not cover every aspect of the policy in question, the Commission precised the legislator's intent via "communications"[143].

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[139] For citizenship, see Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Citizenship Directive); For cross-border healthcare, see Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare; for freedom of establishment, see Services directive and Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Posted Workers Directive); regarding circulation across borders (including for non-EU nationals), see Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive)

[140] E.g. *Defrenne*; *Barber*; *Mangold*; C-555/7, Seda Kücükdeveci contre Swedex GmbH & Co. KG, 19 January 2010; C-423/04, Sarah Margaret Richards v Secretary of State for Work and Pensions, 27 April 2006

[141] See also Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive).

[142] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Art. 101 and 102 TFEU)

[143] E.g. Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (competition law); COM/2009/0313 or Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

The legal order of the EU in the 21st century is denser than it was in the 20th century. It is close to the ones of its member states. It has its own hierarchy of norms, and with secondary law in every area of public policy. QMV has been extended to many policies, including for sensitive issues (such as refugees and asylum seekers relocation scheme[144]), which grants some flexibility to adopt provisions that did not exist before the entry into force of the Lisbon treaty. Lower voting thresholds led to a substantial increase in secondary legislation[145]. It means that the legal order is incredibly dense and thus reduces the likelihood of having gaps at the constitutional level, since doubts about interpretation will arise out of the application of secondary law. 2 main questions remain in this context about judicial review in the EU in the 21st century and the legitimate right of the CJEU to intervene: are there any more gaps to be filled? If so, must the Court fill those or not?

There are always unexpected social situations highlighting the existence of gaps, even in such a consolidated system. A recent example comes from the *Coman* case in 2018, which dealt with the Citizenship directive of 2004[146]. While the directive settles the issue of cross-border movement with their TCN family members, the text does not precise whether the term "spouse" referred to national definitions of legally wedded citizens, or if there had to be a mutual recognition of marriages from other member states. In simpler words, Mr. Coman wanted to come back to his country of origin – Romania – with his same-sex husband and wanted his marriage to be recognized there, even if the Romanian legislation prohibited same-sex marriage. The solution of the case here – the Court asked Romanian authorities to recognize Mr. Coman's union legally contracted in another member state – is not what matters here. The Coman case contains many elements that lead to unresolved gaps in EU law: the absence of a common definition in EU law of a key concept; unharmonized national practice, here same-sex marriage; and the presence of a hybrid citizenship situation – a TCN being family member of an EU citizen – which remains marginal

144 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

145 In 2019 alone, the EU adopted a total of 1428 legislative and administrative acts, a number that does not include case law or soft law norms such as communications. See https://eur-lex.europa.eu/statistics/2019/legislative-acts-statistics.html

146 C-673/16, Relu Adrian Coman e.a. contre Inspectoratul General pentru Imigrări et Ministerul Afacerilor Interne, 5 June 2018

(although significant) in the bulk of cross-border administrative processes[147]. There remain of course unforeseen situations that will demand a resolution. There are also areas of public policy that are dormant for years and become activated long after the enactment of related provisions in the legal order. Economic governance is a case in point. After its inception in Maastricht and the adoption of the subsequent SGP in 1997[148], economic governance provisions remained unchanged until the sovereign debt crisis hit the EU in 2011. This area of public policy was understudied until then and suddenly became the major topic of EU governance during the hard-burning phase of the crisis, provoking the adoption of many instruments discussed above, along with the creation of specific agencies to help controlling the situation. *Pringle* thus became a rare economic governance case that fell in the Court's docket, even if the facts occurred 20 years after the constituent power established the EMU. And the case raised the sensitive issue of an international treaty – the ESM – potentially challenging the principle of sincere cooperation of the member states when concluding international agreements outside of the EU, since 25 EU members signed an agreement that infringed in spirit the no-bailout clause of art. 125 TFEU. The same case dealt with the first ever simplified revision of treaties enshrined in art. 48(6) TEU[149], a procedure that can only be used to modify a few parts of the treaties and may not augment the prerogatives of the EU. There was thus another potential gap here that the Court had to deal with for the first time.

The persistence of gaps seems to be a feature of any legal system, independent of its level of consolidation. The existence of more legislative

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147 Although see European Citizen Action Service, "Freedom of Movement in the EU: A Look Behind the Curtain", Policy Report, especially 8-10, available at: https://ecas.b-cdn.net/wp-content/uploads/2018/03/ECAS-Long-report-final.pdf, showing that this situation is becoming increasingly frequent in Europe nowadays and keeps asking unforeseen legal questions.

148 Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Council Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the Excessive Deficit Procedure

149 See B. de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", *Swedish Institute for European Policy Studies*, European Policy Analysis 2011:6, available at: https://www.sieps.se/en/publications/2011/the-european-treaty-amendment-for-the-creation-of-a-financial-stability-mechanism-20116epa/Sieps_2011_6epa.pdf

instruments, coupled with the higher number of member states, even increases the probability of having gaps in the EU. There are more provisions to interpret, with potentially 28/27 different practices across the EU. The legislator can only foresee some situations and cannot (or at least so far has not) provide for all types of situations. These marginal but significant legal conundrums generate unforeseen gaps which justify the existence of a judicial body in the institutional architecture of the Union. I thus reject the Waldron objection against judicial review (Waldron 2006), at least in the EU context. While the idea that the legislature can strive for the better protection of rights is interesting, parliaments may not materially cover all legal situations that will arise out of newly enacted texts (see also Fallon 2005; 2008; 2018).

The second question however raises serious doubts as to whether the CJEU shall keep considering legislative gaps as an invitation to act. In the seventh decade of EU integration, the legislator had ample time to visit the areas of public policy it wanted to develop and/or amend. While the polity underwent several constitutional changes in the last 30 years, the overarching structure of the Union remained stable since 2009. Even if there are more gaps because of increased legislative outputs and a higher number of member states, these gaps are no longer of a constitutional nature. This also means that some incomplete contracts may voluntarily be left open by the legislator. One could have read the Citizenship Directive as leaving the term "spouse" open to the sovereign appreciation of member states. "*If courts go beyond their duty of saying 'what the law is', they lack legitimacy as they intrude into the political process*" (K. Lenaerts 2013a:13). The general principles of EU law are as close as possible to an intrusion because they allegedly highlight what the law does not explicitly say, and thus require a clear justification when mobilized.

It does not mean that the CJEU is not the best suited to orchestrate the EU legal order. But the mission of the Court is nowadays more about *application* of EU law than it is of *interpretation*. Art. 267 TFEU ensures that the cooperation with national courts makes up for a system that aims at clarifying doubts in the acquis, shall they arise from areas of EU law that did not receive judicial interpretation previously (e.g. in *Pringle*) or simply to point national judges towards previously solved issues, e.g. via adjudication orders (Šadl and al. 2020). Adjudicating in the 21st century is much less about creation (as it was in the 1960s and 1970s) than it is about clarification.

The various types of reasoning the Court may follow is a matter of process (see 5.2.2). But the legal system, as complete as it is, will always have loopholes, which justifies the mission of the Court. Second, even when the question has been settled, some preliminary references may ask a similar if not nearly identical question to the Court, which must respond. In that case, the Court may have the opportunity to be clearer than it was in the first place (a common criticism of CJEU case law).

4.1.1.3 The acquis as a cornerstone? On informal changes of the constitutional architecture

Interpreting unclear texts – a common feature of the acquis (Horsley 2018: 279-83) – is already a contentious task. But the constituent power has in the last decade omitted at times to proceed with the formal requirements of treaty change, even if it clearly modified the nature of the Union in the process.

The Eurozone crisis led member states to revise economic governance by stealth (Schmidt 2020). The adopted the ESM outside the treaty framework yet chose to include art. 136(3) TFEU to indicate the willingness of having a permanent bailout fund at the Eurozone level, a practice prohibited by art. 125 TFEU read in conjunction with art. 122 TFEU (that allows for *temporary* financial rescues). Economic governance is thus framed to a large extent two provisions with opposite meanings. The same financial distress led the ECB to claim it would do "whatever it takes" to save the Euro[150], in order to reassure financial markets and secure loans for states in distress. These same states created a hole in their public finances in order to rescue the financial institutions hit by Lehmann's Brothers' bankruptcy, contravening to state aid rules enshrined in the treaties at art. 101 and 102 TFEU. The Commission, guardian of the treaties, indicated in October 2008 that it would suspend its infringement proceedings against member states rescuing their banks [151]. The recent COVID 19 crisis saw the ECB adopt an immense quantitative, public and private securities

[150] Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, available at: https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html

[151] Press release, "State aid: Commission gives guidance to Member States on measures for banks in crisis", IP/08/1495, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1495

purchase program worth €750 billion[152], despite all the controversies that surrounded the purchases of public debt during the financial crisis (see Bobic and Dawson 2019; 2020).

While treaty change is seemingly not a taboo anymore[153], it has nonetheless been avoided since the almost non-ratification of the Lisbon treaty by Ireland. The difficulty of changing the treaties and the alleged urgency provoked by the plague of crises of the last decade led member states to bypass constitutional procedures, and some EU institutions to either close their eyes to this process of constitutional "contestation" (Horsley 2018: 71-8) or even to become a participant (Bois and Piquer in Lord and al., forthcoming).

In member states, courts have a legal and moral obligation to cancel *contra legem* arrangements taken by the executive and the legislature. The Euro crisis measures also found their way to national courts, and the Portuguese constitutional court cancelled the application of measures it found contrary to the social rights enshrined in the constitution[154]. The BVerG did not only question the role of the ECB during the Eurozone crisis but also struck down domestic arrangements – e.g. the creation of an ESM committee within the Bundestag – that run counter to the *Grundgesetz*[155]. The COVID 19 pandemic led various regional governments in Spain to adopt their own lockdown, curfews and even attempts at postponing elections in Catalunya[156]. These measures were struck down

[152] See the contents of the program at: https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html

[153] "Macron, Merkel: EU treaty change is not taboo", Euractiv, 23 June 2017, available at: https://www.euractiv.com/section/future-eu/news/macron-merkel-eu-treaty-change-is-not-taboo/

[154] Portuguese Constitutional Court Decision 399/2010; Decision 396/2011; Decision 353/2012; Decision 187/2013; Decision 474/2013; Decision 602/2013; Decision 794/2013; Decision 862/2013; Decision 413/2014; Decision 572/2014; Decision 574/2014; Decision 575/2014. See the review by Canotilho, Violante and Lanceiro 2015.

[155] BVerG, 129, 284 ff. and NVwZ, 495 ff., 28 February 2012. See Huber 2013.

[156] See DECRET 1/2021, 15 January 2021, "pel qual es deixa sense efecte la celebració de les eleccions al Parlament de Catalunya del 14 de febrer de 2021 a causa de la crisi sanitària derivada de la pandèmia causada per la COVID-19", available at: https://portaldogc.gencat.cat/utilsEADOP/PDF/8317/1831304.pdf

by courts for not respecting the constitution and democratic principles of legal change[157].

ICs on the contrary have as their main purpose to respect the will of their mandate providers (Shany 2014). With a single instrument to interpret in light of the political developments in areas such as law of sea for the International Tribunal on the Law of the Sea (ITLOS), international investment law for The International Centre for Settlement of Investment Disputes, or general international public law developments for the ICJ, informal changes to the constituting instrument of the regime shared by the mandate providers *must* be interpreted as the new law of the IO. The absence of further sources (except for customary norms) and the scarcity of case law coming from these bodies does not allow for a different outcome. The ICJ is thus often criticized for adopting "Solomonic" judgements (Grossman in Grosman and al 2018: 43-61), but it can hardly do otherwise or face the exit of states from its jurisdiction, including from long established Western democracies such as the US or France[158]. Even consolidated transnational legal systems such as the Andean community, the absence of compliance partners other than governments makes it hard for a body like the Andean Court of Justice to adopt a ruling that would go against their majoritarian will (Alter and Helfer 2017).

The CJEU lies between these two extremes. On the one hand, it interprets a dense legal system with a multitude of norms that specified the intent of the constituent power, which gives judges enough material to find member states in breach of their obligations. The CJEU would even be supported in the attempt by the EU legal profession, which performs the same interpretative tasks while pursuing different objectives. On the other hand, it remains a transnational court, at a level of governance where democratic input is weak. EU law is *sui generis* in the sense that it generates strong commitments from its participating members, but whose disregard will not trigger generalized contention from citizens. In other words, its

[157] E.g. regarding the Catalan elections, see Tribunal Supremo de Justicia 121/2021, 22 January 2021, available at: http://www.juntaelectoralcentral.es/cs/jec/documentos/tsjc_121_2021_12_01_2021.pdf

[158] See the ICJ's list of "Declarations recognizing the jurisdiction of the Court as compulsory" at: https://www.icj-cij.org/en/declarations

perceived binding force is not as strong as for domestic law for most citizens.

4.1.2 The limits of the Court's mission: delimiting jurisdictions in the EU

While the treaties and legal practice shaped the Court's place at the top of the judicial order inside the EU, they do not say much about its relationship with national courts that co-compose the judicial branch of the Union. Art. 267 TFEU fosters the cooperation with national courts but does not say what ii precisely entails. The acquis does not explicit either how EU law relates to the rest of international law, and thus does not specify the relationship between the CJEU and other ICs, especially with the ECtHR despite the obvious if not redundant issue of jurisdiction. The place of the CJEU in relation with its judicial counterparts comes from case-law itself. This conundrum has been filled long ago with numerous rulings coming from many courts involved, and absent opposition from the constituent power, may be analyzed as sources of legitimacy in the 21st century. However, the absence of opposition hardly means full endorsement by the constituent power. This judicial equilibrium remains unstable in 2021.

The purpose here is not to revisit the entire relationships cultivated by the CJEU over decades with other courts. The latter has been the bread and butter of many scholars in legal scholarship and political science (Alter 2001; Claes 2006; Slaughter and al 1998; Weiler 1991). Since the treaties are silent, the delimitation of jurisdictions is a matter of process (see 5.1.2.1). The purpose here is to grasp how judges cope cognitively with the unsettled issue of jurisdictions. It stresses that the logic of appropriateness regarding the hierarchy of norms – or more precisely, how agents of the EU legal profession understand the hierarchy of norms – shapes the fragile agreement between the CJEU and national courts of the member states – and thus explains the difference between CCs and other national courts. Even if judges find ways to accommodate for the existence of other courts, the legal source will always contain a contradiction that will guide to a certain extent the subsequent actions of all actors involved, meaning that potential litigants and their representatives will use the persisting uncertainty about jurisdiction.

4.1.2.1 The conventional explanation in political science

Various political scientists argued that the well-working relationship between the CJEU and lower national courts results from a power game (especially Alter 2001). Alter revisited the *Solange* saga and concluded that the PRP helps lower judges to pursue their (personal) purposes by adding another partner in the adjudication process, with the purpose of avoiding the undesired control of higher national courts. References would in turn constitute the necessary fuel for the Court to foster integration. With both self-interests enhanced, it would thus only be logical that lower judges and the CJEU would cooperate. On the contrary, the CJEU would fare poorly with higher courts because these share the same drive of being the supreme adjudicator of the land. These distanced wars would be about "competence creep" when the CJEU ascertains its jurisdiction over a contentious issue (Weatherhill 2004), while higher courts would "resist" said creep by protecting what was previously theirs (Davies 2012a).

While some lower national judges do indeed seize the PRP to contest some political developments (see indeed the role of various Spanish judges during the private debt crisis caused by the financial turmoil of the early 2010s, leading eventually to the *Aziz*[159] case by the CJEU: Mayoral and Torres Pérez 2018), the self-empowerment thesis of judges against other judges does not find much echo in practice. Historians revisited the *Internationale Handelsgesellschaft/Solange* sequence and showed that the Frankfurt Administrative Court did not instrumentalize the preliminary reference process to oppose the BVerG then. The German lower court here proved to be more a reluctant than a willing partner of the ECJ in this case (Davies in Nicola and Davies 2017:169). The most recent empirical research show that practical constraints (e.g. time available) and *knowledge* about EU are more important drivers explaining the flow of preliminary references (Dyevre and al 2020; Mayoral and al. 2014).

The second weakness of the argument lies in the description of the connection binding the Court to national "higher courts". The facts show that the CJEU has a great relationship with most higher courts, and even started numerous networks that foster shared understandings between the Court and supreme administrative courts (See 5.1.2.1). The cases of direct disobedience by higher courts of preliminary rulings are close to

[159] C-415/11, Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (*Aziz*), 14 March 2013

inexistent (Nyikos 2003; see 6.3). The generic label of "higher courts" is too broad to gain analytical leverage. The only explicit and *voluntary* rejections of CJEU rulings in the 21st century come from CCs, with the unveiled threats of disobedience in the *Solange* saga, the *Maastricht*[160] and *Lisbon*[161] rulings in the 20th century, and the 3 *ultra vires* decisions in the 2010s.

4.1.2.2 The alternative explanation drawn from legal scholarship

Self-empowerment is a potential explanation for an otherwise unsettled hierarchy of courts, but it suffers from many shortcomings described above, and it does not cancel out other more accurate explanatory variables. However, the clear differences between CCs and other national courts points to a different pattern, one that is totally ignored in the empirical social-scientific and exclusively actor-based literature on the Court. This pattern shows judges develop relationships depending on 1) the legal instruments they interpret daily, and 2) on the clarity of the hierarchy between these norms. Both relate to Kelsen's famous pyramid of norms.

Speaking of the hierarchy of norms is an uneasy task here because it is an overly easy subject for legal scholars, while it is totally alien to most social scientists concentrating their efforts on behavioral and measurable patterns. The idea of hierarchy between legal sources is the ABCs of legal scholarship. Kelsen explained that a legal system ensured its own validity by checking whether a newly enacted norm respected pre-existing norms. Not all norms have the same value. Kelsen thus talked about a pyramid of norms, where the most important and fewest norms sit on top of the pyramid and orchestrate the rest of the legal order.

The pyramid displayed here represents the hierarchy of norms found in most member states[162]. Following the constitution are international treaties (including theoretically the TEU and TFEU), then normal legislative acts ('Laws'), which themselves prime over administrative acts ('Decrees' and below). For a lower norm to be valid, it must respect higher norms.

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[160] 2 BvR 2134/92, 2 BvR 2159/92, 12 October 1993

[161] 2 BvE 2/08, 30 June 2009

[162] In the Netherlands, international treaties prime over the constitution (Arts. 93 and 94 of the Constitution).

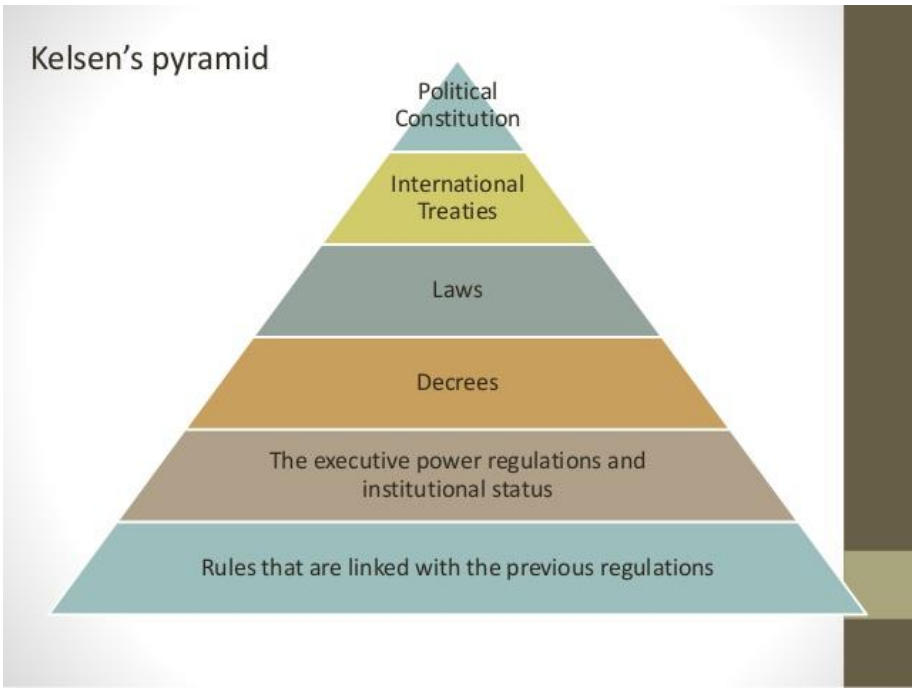

Figure 4.1: Kelsen's hierarchy of norms

Kelsen's hierarchy of norms, extracted from his "Pure Theory of Law"

Graph: "EU law and national constitutions", available at: https://app.emaze.com/@AIQRWFWR#17, slide 5

The place of EU law in this pyramid in always debated. Some put it with treaties, others place it on top, a few put it at the same level as constitutional law and others place EU law somewhere outside of it while gravitating around the pyramid. Suffice here to say that the relationship between EU law and national constitutional law is *unsettled*, while on the contrary constitutional law and EU law *clearly prime* in all member states over legislative and administrative acts.

The purpose here is not to give an opinion about the unsolvable debate of the place of EU law in this pyramid, but rather to witness the cognitive effects it has on the agents of the legal profession (in a pure logic of appropriateness fashion), which in turn conditions the nature of the relationship between judges.

Civil and administrative judges apply norms that have a lower position than EU law in the pyramid. Acts of parliament and executive decrees must unconditionally respect all principles of the acquis. In the 20th century, many national judges wondered if they had the possibility (if not

the duty) to directly control the legality of domestic norms with EU norms. The problem was especially acute for administrative judges since acts of parliaments constituted – albeit it is only a mental construct, which shows the normative force of this pyramid on judicial agents – a legislative screen between EU law and administrative acts (see Lindseth 2010: 187 and following). Other problems related to the use of directly applicable directives in member states, in case of incorrect or overdue transposal of the text in the national legal order, even though member states are only bound by the objectives of the directive[163].

These issues are long solved, and EU law is now interpreted directly by national judges when appropriate in all member states. National judges that interpret and apply lower national laws do not have a duty to call upon the CJEU in case of doubt, although they are highly encouraged to pursue that route. But they will do so, when having sufficient knowledge of the EU legal system and when material conditions grant them the time to write a preliminary reference, because their professional training and the core assumptions of the legal system stress that lower norms *ought not* to infringe higher norms in the hierarchy. Higher courts must refer cases to the CJEU[164]. This explains not only why the relationship with national courts is stronger than ever in 2020 (see Lenaerts 2020; see chapter 6), but also why national courts applying lower norms have used extensively the PRP since its inception. Having lower national norms respecting EU law may be a way to oppose judicial hierarchy, but it is also a professional obligation taught in 21st century law schools.

Most norms are lower than EU law in the pyramid. The Court said famously in *Costa* that EU law is supreme in the EU legal order and made sure in *Kadi* and *Melloni*[165] that the principle remains firmly anchored nowadays. Despite the existence this firm and incessantly repeated principle since 1964, CCs never fully endorsed the principle. And it is important to stress that *all* of them, when asked to deal with the supremacy of EU law, put at least *symbolic* limits to EU law supremacy. Some used more direct means than others to express their doubts, especially the 3 CCs that deemed CJEU rulings *ultra vires*. But the others also said when asked that their constitution keeps being supreme in their

[163] Art. 288 TFEU

[164] Art. 267 TFEU

[165] C-399/11, Stefano Melloni v Ministerio Fiscal (*Melloni*), 26 February 2013

domestic legal order. The BVerG said in *Lisbon* that the advanced state of European integration could legally not endanger the basic constitutional features of the Federal Republic as protected by Article 79 paragraph (3) of the Basic Law (the 'Eternity' clause). The Spanish CC stated that while EU law has 'primacy' over national law in areas delegated to the EU, the constitution retained overall 'supremacy' in Spain[166]. The French Constitutional Council said in its Lisbon judgement that EU integration could not bring changes to the "constitutional identity" of the Republic, and that EU integration would not remove the constitution "at the top of the internal legal order"[167].

Both the CCs and the CJEU do not give up on their right to supreme interpretation, which is translated by the alleged supremacy of the legal instrument they MUST interpret. Normally the situation is clear and free of jurisdiction problems: the competences delegated to the EU mean EU law supremacy and jurisdiction of the CJEU, while all the rest pertains to the realms of domestic laws and is orchestrated by CCs. However, the "shared competences" of art. 4 TFEU refer to policy areas that mix EU and national competences, which creates more jurisdiction issues. The treaties and national constitutions are not sources of clarity. The integration of more core state powers in the EU reinforces the phenomenon, since the delegation and pooling of said competences is never complete. The field of taxation is a good example here: while the EU has an increased lead not only via legislation but also via judicialization, the member states nonetheless remain formally entitled to address issues in this policy area (Genschel and Jachtenfuchs 2011). The major crises of the last decade reinforce this trend. The resolution of disagreements between them must be a matter of process or result or may be mitigated at the sources level of legitimacy by extra-legal factors.

4.1.3 Conclusion on law as a source of legitimacy: a necessary but insufficient condition

The CJEU draws some of its legitimacy from its mandate. Most of it is clearly delimited in the 21st century, after years of self-defining this mission. The Court does not possess as much interpretative margin of

[166] Tribunal Constitucional de España [Constitutional Tribunal of Spain] Case No. 1/2004, 13 December 2004

[167] Decisions 2004-505 DC, 19 November 2004; 2007-560 DC, 20 December 2007

maneuver nowadays as it did in the 20th century. Some judges of the Court still see their institution as a constitutional court (Lenaerts 2013a and 2013b; von Danwitz 2014), even if the constitutional mission of the institution is more reduced than ever. The main challenges of the CJEU today are more about application and making sense of the numerous sources of EU law.

Of course, some constitutional challenges remain. The constitutional framework remains imperfect if not contradictory at times (see above about the confusion generated by art. 136[3] and 125 TFEU). And there remain some gaps to be filled, caused by the activation of a dormant area of public policy (e.g. economic governance) or unseen situations (e.g. in *Coman*). National courts remain entitled to receive clarifications whenever they desire. All of this justifies from the onset the legitimacy of transnational judicial review in the EU, despite the growing uneasiness of having one in sensitive areas that used to be core state powers (Grimm 2017; Grimm in Chalmers and al. 2016: 241-65). While the treaties indicate the attribution of competences between the EU and member states, the Court mostly shaped the network that binds with it national courts.

Before turning to process and outcomes, there are other sources of the Court's legitimacy. These sources are no longer tied to the instrument judges ought to interpret, but rather relate to the socio-professional properties that make *judges* the rightful adjudicators in the EU, receiving the assent of the rest of the legal profession and of the other branches of government.

4.2 The sociological sources of the CJEU's legitimacy

The previous section could have been called the sources of the legitimacy of *judicial review* in the EU. But the activity that judges must perform are not enough sufficient to declare the Court source legitimate. While being principally monitored by the EU legal profession, the Court will at times come to the fore of EU politics and be momentarily scrutinized by non-EU professionals, for example in *Junqueras* or in *Wightman*[168] (which dealt with the potential right of unilateral revocation of the activation of art. 50 TEU). The members of an IC like the CJEU thus need to be representative, or at

[168] C-621-18, Andy Wightman and Others v Secretary of State for Exiting the European Union, 10 December 2018

least "reflective" (Madsen in Romano and al. 2013), of the broader population. In the US, this means that judges must reflect the major political preferences of the American citizens, leading the administration and Congress to appoint judges that made their political orientation not only public but also prominent in the process. What type of society is represented or reflected, if at all, at the CJEU?

Second, judicial review is akin to a scientific exercise (Beck 2013: 20-4) which requires a certain level of expertise. Such expertise will require training and practice of the law. Judges must possess socio-professional characteristics that will be viewed as respecting the "sacred" character of the profession. Judges must be representative of both the citizenry while having outstanding properties of the legal profession. The issue lies with the various criteria that lead to the appointment on the bench: shall the appointee have an outstanding record as a legal professional, or shall judges be easily interchangeable, especially in a society where being judged by our peers is a fundamental cornerstone of our judicial system? Both options have merits and flaws. The purpose here is to discuss the chosen criteria that judges should possess in the 21st century and see if they correspond to broader conceptions of the representation that a judicial body ought to have nowadays.

The selection criteria of judges (art. 255 TFEU) try to respect this difficult equilibrium between expertise and representativeness. Even if judges and AGs are not receiving the direct input of citizens, their appointment nonetheless respects the Weberian mode of rational-legal domination. Societies in member states accept that their powerholders arrive to the highest positions of power either via elections or via meritocratic considerations. Judges must possess qualities that make them the most qualified lawyers in the continent in order to become CJEU members. They also receive the assent of all governments in order to sit on the bench. They thus possess the necessary meritocratic and political endorsement that characterize all CCs in member states.

Judges must reflect the society they represent. In a "Republican Europe of states", member states remain the most legitimate unit of governance and must not be underrepresented in the highest offices of the EU (Bellamy 2019). Beyond member states, the CJEU should also reflect some encompassing features of European societies in the 21st century, especially gender balance.

Governments and the 255 committee (the consultative selection panel of the CJEU) try to combine all elements cited above. The result is counterintuitively that there is a shortage of suitable candidates. The combination of all requirements proves difficult to fulfill, including for the largest member states.

The literature on the composition of the bench of ICs (e.g. MacKenzie 2010; Bobek 2015; Baetens 2019; Grossman 2012; Guth and Elfving 2019) coupled with policy studies about earmarked practices of judicial selection[169] point out to 3 major criteria that courts ought to have to be legitimate in the 21st century: they must be composed by professionals (4.2.2), be gendered-balance (4.2.4) and reflect an equilibrium or balance of the member states that represent them (4.2.5). While the first criterion refers to socio-professional properties that pertain to the legal profession, the last 2 transcend a systemic logic and places the Court as an institution reflecting the citizens. However, some groups are not represented at the Court (4.2.3), be they willingly excluded from the judicial realm or simply not represented there.

4.2.1 Judges as a non-elected power in a democratic Union: are they input illegitimate?

National members of government and Parliament would be directly input legitimate because of their election. MEPs are also directly input legitimate because they are also directly elected, albeit some member states are

[169] "Mapping the Representation of Women and Men in Legal Professions Across the EU", EP study, Directorate General for internal policies policy department for citizens' rights and constitutional affairs legal and parliamentary affairs, 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596804/IPOL_STU(2017)596804_EN.pdf; Limbach J. and al., "Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights", International Centre for the Legal Protection of Human Rights, 2003, available at: https://www.corteidh.or.cr/tablas/32795.pdf; Omejec J., "Strengthening Confidence in the Judiciary. Appointment, promotion and dismissal of judges and ethical standards", ECHR, Opening of the Judicial Year, 25 January 2019, available at: https://www.echr.coe.int/Documents/Speech_20190125_Omejec_JY_ENG.pdf

clearly overrepresented in the EP[170]. This suboptimal representation of EU citizens in favor of states is justified on the grounds that, in any federal structure, states or regional entities are given disproportionate weight compared to direct representation of citizens in order to defend the geographical (and by extension "cultural") particularity of the represented region. It becomes even more crucial in a Union where legitimacy ultimately remains at state level (Lindseth 2010). The overrepresentation of smaller states in the EU responds to an imperfect but philosophically acceptable principle of constitutional balance (Dawson and de Witte 2013). EU Commission officials are indirectly input legitimate since the President of the Commission is appointed by the European Council and approved by simple majority by the EP[171]. The other commissioners are chosen by the President of the Commission and assessed by the various EP committees, which may veto the appointment of candidates. The Commission mixes modes of indirect democratic legitimacy, via governmental and transnational parliamentary routes.

In comparison, CJEU judges are not receiving the direct input of citizens via the ballot box. The Court is a non-majoritarian EU institution. The only part of indirect democratic legitimacy in the appointment process happens early in the procedure when national governments appoint the candidates to be evaluated by an expert panel called the 255 committee, itself appointed by the Council (see below). Citizens may not directly participate in the nomination process, and the decisions of governments may be *de facto* quashed by the 255 committee (governments have always accepted the committee's decisions). Judges do not possess direct democratic legitimacy, nor do they enjoy indirect democratic legitimacy as understood for the Commission.

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[170] The problem is not new: see N. Véron and A. Tailor "How unequal is the European Parliament's representation?", Bruegel Blogpost, 19 May 2014, available at: https://www.bruegel.org/2014/05/how-unequal-is-the-european-parliaments-representation/. For possible solutions to increase representativeness while respecting a certain intergovernmental equilibrium, see T. Chopin and J.F. Jamet, "The Distribution of MEP seats in the European Parliament between the Member States: both a democratic and diplomatic issue", *Fondation Robert Schuman*, European Issue n°71, 10 September 2007, available at: https://www.robert-schuman.eu/en/european-issues/0071-the-distribution-of-mep-seats-in-the-european-parliament-between-the-member-states-both-a

[171] Art. 17(7) TEU

Does the above mean that the Court is not democratically legitimate? The answer is clearly no. Input legitimacy is not the only type of resource to be a justified powerholder: output democracy is equally democratic (Steffek 2015). Input provides for a compensation for failed or failing outputs, thus rendering the EU particularly vulnerable when it fails to deliver sound results to the population. The absence of input or sources of legitimacy for the CJEU may be compensated by the results it provides for EU citizens (see chapter 6).

But does this mean that the CJEU, and especially the judges sitting on its bench, are totally deprived of source legitimacy? The reason for the alleged absence of source legitimacy at the transnational level lies in the conceptual oversimplification that too often assimilates input to appointment via ballot box. Input legitimacy captures a broader reality. Scharpf said it referred to the "rhetoric of 'participation' and 'consensus'". While voting is the most obvious expression of popular consent, it cannot be the only one, otherwise any polity that organizes general elections every 4 or 5 years would have little input legitimacy. Voting coexists with other modes of participation and consensus.

Weber places election and democracy in his category of charismatic source of legitimate authority (Weber 1978:266-7), while the rationalized (and bureaucratic in character) appointment process that would refer to the art. 255 procedure would fall in another source of legitimate domination: rational-legal. The criteria listed in the treaties ("candidates' legal capabilities"; "professional experience"; "ability to perform the duties of a Judge"; "language skills"; "ability to work as part of a team in an international environment in which several legal systems are represented"; "independence, impartiality, probity and integrity"[172]) are analogous to those listed by Weber about appointments to the administration[173]. Placing the Court's appointment procedure into this

[172] "Sixth activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union", 16 January 2020, p. 17, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/qcar19002enn_002_-_public.pdf

[173] Compare (Weber 1978:220-21): "*(1)They are personally free and subject to authority only with rest to their impersonal official obligations.*

(2) They are organized in a clearly defined hierarchy of office

(3) Each office has a dearly defined sphere of competence it: the Iegal sense.

category, while Weber placed election somewhere else, does not rule out that the rationalized procedure of appointment is undemocratic. Weber referred to democracy as charismatic when the leader is elected. That supposes that Weber did not theoretically exclude an uncharismatic and democratic procedure of appointment, although it did not develop this point.

It is useful to combine here this idea with Scharpf's concept of "consensus" (1999:7). This consensus would refer here to shared understandings among most of the population about what constitutes the polity's "thick identity", which Scharpf conceptualized as shaped by the pre-established social organization or "commonalities such as history, language, culture and ethnicity". This consensus could thus only arise out of pre-existing and structural elements of society. One could object to this overly stringent definition of the causes of identity. Habermas makes an interesting argument about the postnational citizen: identity would not exclusively be shaped by belonging to a geographic space, but also by the people's ability to reason and debate the values they deem appropriate for society. History, culture and language are thus completed in Europe by

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(4) The office is filled by a free contractual relationship; in principle, there is free selection.

(5) Candidates are selected on the basis of technical qualifications. In the most rational case, this is tested by examination or guaranteed by diplomas certifying technical training, or both. They are appointed, not

elected.

(6) They are remunerated by fixed salaries in money, for the most part with a right to pensions. Only under certain circumstances does the employing authority, especially in private organizations, have a right to

terminate the appointment, but the official is always free to resign. The salary scale is graded according to rank in the hierarchy; but in addition to this criterion, the responsibility of the position and the requirements of the incumbent's social status may be taken into account.

(7) The office is treated as the sole, or at least the primary, occupation of the incumbent.

(8) It constitutes a career. There is a system of "promotion" according to seniority or to achievement, or both. Promotion depends on the judgment of superiors.

(9) The official 'works entirely separated from ownership of the means of administration and without appropriation of his position.

(10) He is subject to strict and systematic discipline and control in the conduct of the office."

While some of these do not apply specifically the Court (especially on terms of promotion, although one could argue that seniority and achievements could secure primary positions within the Court, such as the presidentship), most refer to the properties set out in art. 253 and 254 TFEU as applied by the 255 committee.

beliefs about democracy, human rights and pluralism, which fall under the label of "constitutional patriotism" (Habermas 1996; Habermas 2012). The EU would be a space of shared liberal values where the development of a postnational identity progressively trumps older conceptions of identity such as the 'nation'.

While Habermas viewed the Great Recession as a major opportunity to achieve constitutional pluralism, the results of the great turmoil that threatened the EU's existence showed an increased willingness of (national) diversity and the reaffirmation of the nation-state as the symbolic safe space for citizens (see Chalmers and al. 2016). Despite these shortcomings, Habermas points to an undeniable reality about the performative formation of identities in Europe today, showing that citizens are not mentally imprisoned in their nation-state of origin. While the existence of a European public sphere may not be achieved yet, there are several transnational communities that transcend states' borders and develop a sense of shared and thick identity. The best example of that trend is the socio-professional group described in this thesis: the EU legal profession. Indeed, this group does not exclusively define itself by its belonging to a delimited geographic space or a common ethnicity. This group is also defined by shared values around democracy, the rule of law and fundamental rights. They developed a language that does not correspond to a geographic space or to the migration of populations across borders but rather refers to their professional *raison-d'être* of the profession: legal reasoning.

The conclusion of the above is a mixed picture of sources of legitimacy. Identity remains to a large extent shaped by national considerations but is in the 21st century in the EU completed by liberal values that clearly transcend national borders. These values form the core of the EU and are expressed in art. 2 TEU. While citizens do not directly 'participate' in all instances of its execution, they nonetheless "consent" to the exercise of certain values, whose exercise they willingly delegate to other actors.

The rationalized appointment of judges at the Court will be democratically legitimate if it reflects the general values enshrined in art. 2 TEU. Moreover, these appointments will be democratically legitimate if they reflect appointment standards of judges found in *all* the member states. The criteria of art. 253 and art. 254 TFEU and their interpretation by the 255 committee shall reflect these practices. While the EU is a *sui generis*

organization, its functioning results to a large extent from a projection of pre-existing standards applied at the national level. Moreover, the assessment of the Court's legitimacy depends for the most part of the judgments expressed by EU legal professionals who, despite their commitment for a uniform Union law, all have been trained in specific – read national – legal traditions (de Witte in Vauchez and de Witte 2013:101-16). If appointments represent or at least reflect these criteria, the Court – at least the judges sitting on its bench – shall be seen as indirectly democratically legitimate.

4.2.2 Judges as professionals? The progressive rationalization of the judicial position at the Court

Professional criteria have become an obligation since the entry into force of the Lisbon treaty in 2009. The 255 committee ensures that candidates possess all required qualifications in order to be appointed. However, judges must receive the assent of the political leaders in the member states in order to join the Court.

4.2.2.1 The insuperable political factor in the selection process

The first criterion of the sociological sources of the Court's legitimacy demands that judges be *professionals*. That is not a surprise at all: while gender balance and nationality transcend any type of institutional setting, judges must first be representative of their attentive public identified in Chapter 3. The empowerment of judges comes *ab initio* from their knowledge of EU law. Legal reasoning is akin in many respects to scientific research and thus requires a certain level of expertise. In Weber's framework, such expertise is assessed in by a public examination, applied equally to all candidates. The problem there is that the 'candidates' themselves come from a limited pool of candidates. The 'winners' are eventually coopted by national governments. Not everyone can submit its application to the CJEU and be assured that merit alone will secure for the best candidate a spot in the EU's judicial throne. There is no exam for entering the CJEU, be it for judges, référendaires or lawyer-linguists. While the last two categories are recruited by the staff of the Court itself, judges must be handpicked by national governments. The procedures at national level differ across member states. Some choose to involve parliaments and/or legal experts from universities and legal services, while some others reserve this prerogative to the executive alone (Dumbrovský and al. 2014).

This contravenes the idea of a rational-legal society based on meritocracy. But the appointments of judges to CCs display a similar pattern. Art. 94 of the Basic Law stipulates that the 16 judges of the BVerG shall be appointed by the Bundestag and the Bundesrat, after a specialized committee of each chamber designates suitable candidates[174]. In France, the President, the National Assembly and the Senate all get to choose 3 candidates each to sit in the Constitutional Council, according to Art. 56 of the constitution of 1958.

This political seizure of the appointment process is widely accepted for a couple of reasons. First, there are too many suitable candidates for the few positions at top of the judicial hierarchy in member states. Meritocracy and objectivity alone could not eliminate enough candidates, meaning that an external authority must intervene and arbitrarily choose a candidate. Governments and parliaments hold direct democratic legitimacy and are thus the best suited to bring an end to the rationalized process of judicial selection. The second argument relates to the substance of the work of constitutional judges. The cases ruled by CCs are almost all "hard" cases (Beck 2013:30) or pertain to Hart's famous "penumbra" of the law. They often involve the use of extra-legal "steadying factors" that lead judges to account for socio-economic developments in their decisions. In other words, they take legally motivated political decisions at times (Stone Sweet 2000). This fact justifies the existence of a hybrid selection system mixing professional competence with an endorsement from political institutions. In Germany, constitutional judges must receive the assent of various political groups since a majority of two thirds in the *Bundestag* and *Bundesrat* is required to secure their nomination. These nominations thus overcome a partisan battle.

This fact also applies to the CJEU, but the argument must be slightly refined to fit the *sui generis*, transnational identity of the institution. Politics in the EU remain entrenched at member state level. The choice of candidates falls upon member states. Historically, the executive power provided the candidate, whose appointment occurred after all national executives agreed to proceed with the candidate. Since 2009 all

[174] P. Weller, ""For the Court, it could be…": Electing Constitutional Judges in the US and Germany", Verfassungsblog, 5 October 2018, available at: https://verfassungsblog.de/for-the-court-it-could-be-electing-constitutional-judges-in-the-us-and-germany/

applications must also be examined by the 255 committee. One may discuss which institution(s) at the national level shall be responsible for proposing candidates, but this would be beyond the scope of this dissertation. What matters for the CJEU is that member states institutions, which borrow legitimacy to the EU (Lindseth 2010) which in turn must exercise its power in a *demoi*cratic fashion (Chenaval and Schimmelfennig 2013; Bellamy 2019), provide the political spark in the selection.

4.2.2.2 The progressive professionalization on the bench

The involvement of political authorities does not however mean that governments and parliaments can select anyone to be a constitutional judge. However, there are no formal obligations for national political institutions to appoint legal specialists at the position. In Germany, the selection committees of both legislative chambers (*Wahlausschuss* for the Bundestag, *Findungskomission* for the Bundesrat) have a total discretion regarding candidates if the committees respect a fair partisan representation[175]. The French CC does not mention either any socio-professional criterion that judges must possess to become constitutional judges. The selection of legal professionals by these committees is a matter of practice. While they have no formal obligation to do so, appointing authorities nevertheless pick candidates that come from the legal profession. Why they do so would require an in-depth investigation, but one could speculate here that MPs do so out of respect for the third branch of government (i.e. that the judiciary legitimately deserves high legal profiles), and/or because legal qualifications constitute an objective proof of expertise which help overcoming partisan battles over appointments. But the result is that CCs are all composed by legal professionals in the member states.

The constituent power took stock of these practices and enshrined those in the treaties themselves at art. 253 (ECJ), 254 (GC) and 255 (expert committee) TFEU. The first 2 provisions are invitations to member states to choose *ab initio* a suitable candidate. These candidates will then have to send their applications to the General Secretariat of the Council, which in turn will call upon the art. 255 committee. The composition of such committee is a key legitimating factor for the CJEU, since the members of

[175] See art.6 and 7 of Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*), available at: https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html#p0035

the panel are all eminent members of the EU legal profession giving their direct consent to CJEU judges and AGs. This however is a matter of process and will be dealt accordingly in the next chapter (5.3). What matters now are the criteria set out in the treaties and spelled out by the committee[176], along with specifications coming from the member states (Dumbrovský and al 2014).

Table 4.1: The 255 committee criteria of judicial selection

Criterion	Specification for the ECJ	Specification for the GC
Legal expertise (EU Law)	Degree	Degree
	Publications	Publications
	Hearing (questions by the committee)	Hearing (questions by the committee)
Experience	> 20 years (except "exceptional expertise")	> 12-15 years (except "exceptional expertise")
Ability to perform the duties of a Judge	Hearing: clear and reasoned answers to questions	Hearing: clear and reasoned answers to questions
Independence Impartiality	Application	Application
	Hearing	Hearing
Languages	Proficiency	Proficiency
	Publications	Publications
	Minimum level of French required	Minimum level of French required

The criteria taken altogether are demanding requirements not only in terms of professional proficiency, but also in terms of experience and cosmopolitanism. The expertise looked for is first about EU law: the application of eminent legal professionals, such as long-tenured professors of constitutional and high judges of civil, administrative and constitutional courts, will be rejected if candidates display a poor knowledge of the *acquis*. Interpreting EU law is the main mission of the

[176] See the aforementioned treaty articles and the 6 reports from the 255 committee (all available at: https://curia.europa.eu/jcms/jcms/P_64268/en/), especially the first report of 17 February 2011, pp. 9-11, (http://register.consilium.europa.eu/pdf/en/11/st06/st06509.en11.pdf) that precises the meaning and function of the 255 committee.

Court, so this criterion analyzed in isolation – meaning here not read in conjunction with the rest of standards – makes sense.

They must also have practiced law for a long time, except in cases of "exceptional expertise"[177]. The committee creates a distinction between the ECJ and the GC, namely 20 years of experience for the former and 12-15 for the latter. The distinction would make sense if the ECJ was exclusively an appeal court from the GC, which it does in certain cases (on points of law)[178]. The lower experience of the potential 56 lower judges would be compensated by the possibility of reaching the 27 ECJ members on points of law. The situation is not that simple however: the CJEU is trying to limit the number of appeals that reach the ECJ in order to control the size of its docket and demands at times from litigants to provide a justification about the relevance of the appeal[179], which reduces the likelihood that the higher bench will hear such cases[180]. Moreover, the division of labor between the 2 courts leads to a differentiated treatment of cases across areas: all questions related to agriculture, state aid, competition, commercial policy, regional policy, social policy, institutional law, trade mark and design right law and transport, along with all the annulment, failure to act, damages and civil service go to the GC, whereas all preliminary references, all litigation involving actions against member states or review of EU acts coming from the Parliament or the Council, and opinions on

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[177] It is striking to note that M. Bobek, who edited in 2015 the only dedicated book to the question of appointments at the Court (Bobek 2015) and how openly criticized the experience criterion (Ibid. at 290: *"However, if one were to logically assume that it implies reaching at least a certain position within the respective career ladder (academic, judicial, civil service), since one is unlikely to assume 'high-level' duties immediately upon graduating from university, then what we are looking at is a* de facto *imposed requirement of candidates being 50 years of age or often even older"*), entered as AG the Court that very same year at the (very young) age of 38 years old.

[178] Art. 256(1) TFEU.

[179] CJEU Press release, "The Court of Justice adopts new rules on whether or not to allow appeals to proceed in cases which have already been considered twice", Press release 53/19, 30 April 2019, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/cp190053en.pdf, indicating the changes brought to Statute of the Court (Art. 58a) and the Rules of Procedure (Art. 170a and 170b) as of 1 May 2019.

[180] That trade-off serves of course another purpose of delivering justice in time, which forces a busy court to try to avoid hearing cases that are already clearly settled. See chapter 6 (6.4).

international treaties go to the ECJ[181]. The distinction made between these dockets can take several forms: material/institutional, technical/politicized. But there are no objective criteria stating that competition or state aid cases require less experience than intra-institutional adjudication or giving a non-binding opinion on an international treaty. The issues pertaining to the high judicial business are indeed more salient and sensitive. But experience – which is the only criterion in the list that receives a differential treatment between both courts – is a possible but not necessarily obvious difference justifying the discrimination of cases across issue areas.

It is difficult to understand what "abilities" refer to, other than being a decent lawyer that can mobilize his knowledge of the acquis and apply it to specific situations. As such, the committee may only assess it by asking hypothetical questions to the candidate who in turn will the or the avatar of possible counterfactual answers.

Independence is the next criterion on the list. The committee is silent regarding the precise conditions that make a candidate independent or not. They simply affirm that candidates will be rejected if there is the slightest doubt about the candidate's independence[182]. Absent further guidelines, one may only proceed by elimination and circumscribe the definition of independence and impartiality by adding and eliminating certain borderline profiles to the list of approved candidates. Having served as a minister for example before joining the Court (e.g. judges Juhász and Biltgen) is not considered by the committee as jeopardizing the candidate's independence. Having served as a politician does not make a candidate a *persona non grata* at the Court if the other criteria are met. Having criticized – meaning displayed serious arguments that are not enthusiastically supportive of the CJEU – the Court in past does not rule out candidates either. Judges and AGs such as Bobek (2014) or Sharpston (with Barnard 1997) have expressed that the Court could or should have fared better in certain cases or issues, and they nonetheless got accepted at the Court. Independence and impartiality will thus be used in extreme

[181] For more on the internal division of labor at the CJEU, see Chalmers and al. 2019:160-65

[182] First report, p. 10

cases in which candidates display in their application or hearing a deep bias in favor or against certain member states or certain social groups.

Finally, linguistic abilities seem to be the less shining criterion in the list, but it is by far the most discriminating and caused several rejections in the past. The committee says that it assesses whether the candidate possesses sufficient proficiency French – working language of the Court – required to work at the CJEU. In the last report, the committee said that it asked questions in English or French, allegedly giving candidates both options[183]. However, the committee did not precise if the alternative was available to both judges (whose working language is French) and AGs (whose chambers may work in other languages). And at the end, the committee states that the ability to reason:

> In the working language of the European courts and thus be in a position to contribute to deliberations with other members of the court, constitutes an important assessment criterion for the panel.

The committee never explicitly mentions the working language of the Court – French – as if it had heard the immense criticism that the Court is getting for not getting in the flow with IOs in general and use English as the main working language (see Zhang 2016), a transformation that occurred in other EU institutions.

Overall, the 255 procedure is one of the most advanced selection procedures of transnational judges in the world, only to be rivaled by the CoE's Advisory Panel (Bobek 2015) in terms of stringency. The list of demanding criteria generates both advantages and constraints regarding the Court's sources of sociological legitimacy.

In terms of advantages, judges of the CJEU today are as close as possible to being a Dworkinian "Hercules" on the transnational scene, while receiving the necessary political endorsement from national executives. The two-step procedure leads directly elected bodies to confer legitimacy to the candidate who nonetheless should not only be a member of the EU legal profession, but should also be an illustrious legal professional.

[183] Sixth Report, p. 13, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/qcar19002enn_002_-_public.pdf

Judges are thus some of the most eminent socio-professional representatives of their attentive audience.

In terms of objective constraints, one may wonder why a list of criteria that should help a committee to appoint "judges" does not require candidates to already be "judges". The practice of picking former scholars over professionals to the Court is in decline but has not been eradicated (Saurugger and Terpan 2017:55)[184]. But it is a common practice across constitutional courts and ICs to appoint non-judicial nominees (MacKenzie and al. 2010). And in terms of representation, it makes sense to have members who are representatives of the diversity of legal professions, especially knowing that the functions of supreme courts are as close to politics as possible in the judicial arena.

The most pressing constraint relates to the overly demanding qualities that judges must possess. The combination of criteria required by the treaties make it hard to find candidates that are at the same time good lawyers, speak French and preferably other languages, and have experience but must be able to cope with the heavy workload at the Court. The involvement of political authorities is justified for supreme courts since merit alone may not eliminate all the potential candidates. The opposite happens in the EU though, since *there are not enough candidates* to sit on the benches of the ECJ and GC. Since the big reform of the Court in 2015[185] and its last modification of September 2019, the GC must now carry 2 judges per member state. As of January 2021, only 49 judges are sitting at the General court. The Czech Republic, Latvia and Slovakia (despite having sent 4 candidates to the committee, who were all rejected[186]) only have 1 judge at the GC. Slovenia does not have a judge at the GC![187] The

[184] Note that this diversity of profiles on the bench is what helps the Court nonetheless to keep in touch with all subgroups of the legal profession. See next chapter at 5.1.

[185] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.341.01.0014.01.ENG&toc=OJ:L:2015:341:TOC. See 6.4.2.

[186] Dominique Seytre, « Le comité 255, des apprentis sorciers ? », *land.lu*, Chroniques de la Cour, 8 November 2019, available at: https://www.land.lu/page/article/061/336061/FRE/index.html

[187] See the composition of the GC at: https://curia.europa.eu/jcms/jcms/Jo2_7035/en/

same issue occurred at the ECJ: when judge Levits left the Court in June 2019 to become President of the Latvian Republic, Latvia was deprived of a judge for more than a year before Ineta Ziemele joined the Court in October 2020[188].

The representation of 1 (ECJ) or 2 (GC) judges per member state causes a *de facto* discrimination between member states 1) in terms of the population of such states, which contains the pool of potential candidates and 2) linguistic abilities, or simply roots, that favor French-speaking countries (Belgium, France, Luxembourg) and states whose legal vocabulary draws from Latin. There is almost no wonder that Slovenia, a state with about 2,1 million citizens[189] speaking a South Slavic language, has difficulties finding 2 potential judges for the GC. This is even less surprising since the state that is the most susceptible to always have a pool of potential candidates – France with its 67 million citizens – also has troubles filling its allocated seats. When long-time AG Yves Bot suddenly passed away in June 2019[190], France suddenly had to find a replacement since it possesses a permanent AG at the ECJ. Yet it took nearly a year before Jean Richard de la Tour filled the vacant seat. In between, the French Republic sent Catherine Pignon to the 255 committee. Despite her illustrious career as a high court judge, her application got rejected for insufficient knowledge of EU law[191].

The EU nowadays has the most professional judges that an IC could possess today. Despite the demanding criteria of the committee, member states mostly find suitable candidates since less than 20% of applications have been rejected since its inception in 2010[192]. The two-step appointment process leads to having candidates with a homogenous profile: EU law

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188 See the composition of the ECJ at: https://curia.europa.eu/jcms/jcms/Jo2_7026/en/ and compare with the list of former members at: https://curia.europa.eu/jcms/jcms/p1_217426/en/

189 Eurostat, "Slovenia", available at: https://ec.europa.eu/eurostat/documents/10186/10994376/SI-EN.pdf

190 Le Monde, « Magistrat et juriste reconnu, Yves Bot est mort », 16 June 2019, available at: https://www.lemonde.fr/disparitions/article/2019/06/16/magistrat-et-juriste-reconnu-yves-bot-est-mort_5477013_3382.html

191 Le Canard Enchainé, "Encore un succès européen de la France", 16 October 2019, p.2, at: https://lire.lecanardenchaine.fr/detail/publication/315

192 Sixth Report, p. 9

experts. The candidates are thus narrowed down to the EU legal profession, which in practice translates into a narrow circle of former référendaires becoming CJEU judges (Kuijper 2017:80), generating an effect of judicial endogamy. The professionalization of the judicial function comes at the cost of the representativity of the socio-legal profession.

4.2.3 The exclusion of certain groups

The cast of judges must represent certain features found in the EU legal profession but also from the entire society. For the CJEU, it means having a perfect or at least fair representation of the various nationalities of the member states (see 4.2.5) and respecting (or aiming to respect) the principle of gender balance (4.2.4). There are also some clearly identifiable groups that have not so far found a seat at the Court. A distinction must be made between groups voluntarily and involuntarily excluded from the Court.

Groups voluntarily excluded from the Court are groups gathering EU legal professionals who possess the socio-professional characteristics to join the bench or work in the chambers as référendaires but are not proposed and/or recruited because of a discriminating factor. There is clear inclination of member states and the 255 committee to reject any application of candidates that have too much of a political background. While there is a tolerance for former ministers coming from smaller member states (whose pool of suitable candidates is small), any candidate that shows an exceeding affinity to any political formation will not be considered. The "uncharismatic" (as discussed in 4.2.1) political character of the legal professional – in the sense of not saying out loud where one puts herself on the left-right spectrum – is almost a necessity to join the Court in the 21st century. The US judicial system is thus totally at odds from the CJEU's system. In a political system where District Attorneys and federal judges are directly elected, judges there must be charismatic, which translates into making their political preferences (Democrat/Republican, progressist/conservative, etc.) officially known to the public. This is a must for candidates to top judicial positions in the US judicial system, otherwise the probability to be picked by the Administration and approved by the Senate is much lower. This fact is usually overlooked in the literature on comparative judicial politics. While the US Supreme Court is often used as a reference for comparison, the

features of candidates make this court and the US judicial system at large an outlier in judicial organizations across the world. Most judicial systems do the opposite and tend to downplay if not eliminate the political side of the candidates' profile. The insertion of the criterion "independence" refers to this reality. The Court must represent here the judges and judicial staff of the Member states. And in the 28/27 member states the option of the "*a*politicized" judiciary prevails[193]. Except for CCs, judges are appointed via rational-legal procedures. Judges and clerks are valued in the EU for their expertise and knowledge of the acquis. The law is supposed to transcend partisan cleavages, something considered either utopian or unnecessary in the US system. Former politicians may be accepted at the Court only if their political career is a matter of the past, and the 255 committee is very wary of avoiding court-packing practices from member states. The very composition of the 255 committee shows the preference for legal expertise over politics (see 5.3).

Groups involuntarily excluded from judicial offices are social groups whose discriminating factor does not mean an automatic rejection, but structurally decreases their likelihood of joining the Court. The main example here refers to the absence of members representing racial or ethnic minorities (Chalmers and al. 2019:161; Solanke 2009). Solanke made a powerful critique of an exclusively white ECJ and argued that ethnic diversity on the bench would favor a more comprehensive appraisal of issues making their way to the Court's docket (Ibid.: 111-19). She claims that, while most of the blame lies at the domestic level and that governments should consider this factor when choosing candidates, the Court itself should do a better job by hiring référendaires of minorities and support judicial networks helping to include more candidates from these discriminated social groups. While the philosophy of the argument is undeniably powerful, it downplays the insuperable sociological stratification of Western societies, and the place of lawyers within them. As developed above, legal professionals must pass rational-legal procedures, which has a major effect for Weber (1978:225): the tendency of plutocracy. Legal diplomas require long studies which in turn require

[193] See the report of the Venice Commission, the consultative body of the Council of Europe monitoring legal and judicial developments across the 47 member states: "Report on the Independence of the Judicial System Part I: The Independence of Judges", 12-13 March 2010, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e

from students the necessity to sustain themselves while not receiving an income. In plain language, it means that the wealthiest children have the highest chance of becoming lawyers. The wealthiest people on the continent are natives of member states rather than immigrants or children of immigrants[194]. The absence of performative action by the Court as denounced by Solanke is in part rendered moot (at least at this time and age) by a bigger societal structure of global wealth inequality between the natives and/or whites and the migrant/ethnic minority representatives in Europe. There is a mismatch in 2021 between the philosophical desirability of having more representatives of ethnic and racial minorities on the bench and the sociological difficulty of providing those. The Court has a duty to compensate as much as it can for this gap by rectifying ethnic and racial discrimination in judicial processes and outcomes, while it cannot overshadow broader societal dynamics.

4.2.4 Gender balance at the Court

The argument of broader, structural societal differentiations to justify an imperfect representation of citizen only holds true for certain social groups. The imbalance between genders at the Court is an historical feature of the 20th century, a time during which men overwhelmingly outnumbered women in the EU legal profession. In the 21st century, the opposite is true since women outnumber men in law lecture halls by nearly 2-to-1[195]. The philosophical argument about balance is no longer nuanced by an unfair but existing social structure that chased women away from the highest positions of the legal profession. Today, if anything, it is more of the opposite. Gender balance must be a feature of the Court of the 21st century.

There are two ways to study gender at the Court. One is about gender or "sex on the bench" (Grossman 2012). Judges are the leaders of the institution and represent it publicly, which of course requires a representation of both genders on the bench (4.2.4.1). The Court is a broad organization and is more than the judges alone. In fact, while the latter cannot influence by themselves the gender balance on the bench, they may

[194] See e.g. T. Mathä and al., "The immigrant/native wealth gap in Germany, Italy and Luxembourg", ECB Working Paper 1302, February 2011, available at: https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1302.pdf

[195] "Mapping the Representation of Women and Men in Legal Professions Across the EU", EP study. Most statistics used in this section come from this study.

however provide for a correction of imbalances by recruiting their close collaborators following a gender balance perspective (4.2.4.2).

4.2.4.1 Gender balance on the bench

The topic of gender balance at the Court remains a marginal issue in EU studies, and the rare research conducted on the subject is recent (Guth and Elfving 2019; Kenney 2012; Grossman 2012). Their results show an undeniable truth: the CJEU is still a heavily unbalanced Court in terms of gender, which creates a serious legitimacy deficit. Males outnumber female judges by 3 to 1.

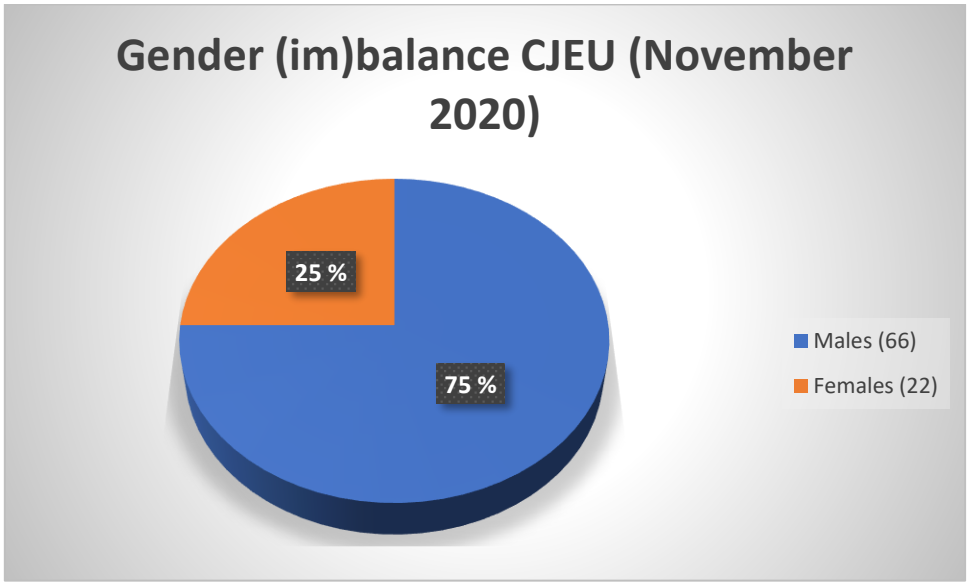

Figure 4.2: The clear imbalance between genders at the CJEU

Source: list of the members of the Court of Justice + list of members of the GC

Graph: Author

The question of gender went through a similar sociological development as described in the previous section about the representation of ethnic and racial minorities. Women were for most of the 20th century excluded not only from key judicial positions but also from the legal profession altogether. Vauchez established a list of the "legal architects of the Union" (2015:221) as some of the most important figures of the development of EU law across time (decades) and space that the profession had in the 20th century: the 9 illustrious names on that list are all males. But this time is clearly over. Women now outnumber men not only in lecture halls but in key professions as well: overall in the EU, they represent about 60% of all judges of first instance, 57% of notaries and 58,7% of prosecutors of first

instance. The overrepresentation of women nonetheless disappears when studying the gender representation of higher functions, especially for 2nd instance (appeal) and supreme court judges. In 2014, women represented 50,6% of judges in appeal courts and only 37,5% of supreme court benches.

The reverse representation of gender in higher functions of the legal profession is a result of their latest entry into the profession overall. Going up the hierarchy means bringing the necessary experience to sit on benches that deal with more difficult cases. In other words, the gender balance of the higher courts in member states – especially at the top of the hierarchy – reflects the sociological distribution of the legal profession of the 20th century, while lower courts with their newer members reflect the more recent distribution of today's legal profession.

It is thus not a big surprise to see the overrepresentation of men at the CJEU in 2020/2021. Judges must theoretically have 20 years of experience (12-15 at the GC) before they may join the institution. Older judges reflect older times, which in turn reflect older societal discriminations. However, the political endorsement in the appointment process allows national authorities to rectify that trend, which they have so far only done parsimoniously. While overdue influence from the other branches of government in judicial selections is prohibited, their necessary involvement in the process could justify the slight amendment of the meritocratic logic because of the existence of a superior societal interest. Art. 3 TEU even provides a legal base that would allow national governments to select more women to have their application checked by the 255 committee[196].

When comparing the CJEU with a few CCs whose members are selected after a similar two-step process, the Court keeps faring poorly in terms of gender balance: 4 out of 9 constitutional judges in France are female[197], 9 out of 16 (a majority) of members of the BVerG are *Richterinnen*[198], and 5

[196] Especially art. 3(3) TEU which states that the EU "*shall combat social exclusion and discrimination, and shall promote social justice and protection,* equality between women and men*, solidarity between generations and protection of the rights of the child*".

[197] "Les membres du Conseil Constitutionnel", as of January 2021: https://www.conseil-constitutionnel.fr/les-membres

[198] BVerG, "Die Richterinnen und Richter des Bundesverfassungsgerichts", as of January 2021: https://www.bundesverfassungsgericht.de/DE/Richter/richter_node.html

of the 12 *juízes* are women in the Portuguese CC[199]. The CJEU and its 1 to 3 ratio pales in comparison. However, while the political process intervenes in the selection of supreme judges, governments must however respect the criteria of the 255 committee, which ties their hands much more than it does for nominating constitutional judges because of the combined criteria of the committee.

The second major observation of gender balance at a governmental institution in the EU is that it changes over time. While the structure in place may not allow for compensating undue discriminations, diachronic comparisons of today's Court with its former self may allow us to see if the Court fares better than it used to do in the past. Annex 2 gathers all the judges and AGs that sat the ECJ since its inception in 1952, classifying judges per member state, mandate length and of course gender (light and dark blue for males, orange for female judges and yellow for female AGs). The statistics of the 20th century of quite telling: French AG Simone Rozès was the only woman at the Court in its first 48 years of existence, while 84 men sat on the bench during that span.

The dawn of the 21st century marks a clear rupture with the past. AG Stix-Hackl and judges Colneric and O'Kelly Macken joined the Court in the early 2000s. Progressively the ranks of the ECJ were filled with more women. The early 2010s mark the best period in terms of balance, when 8 out of the 35 judges and AGs were women.

[199] As of January 2021, at: http://www.tribunalconstitucional.pt/tc/juizes01.html

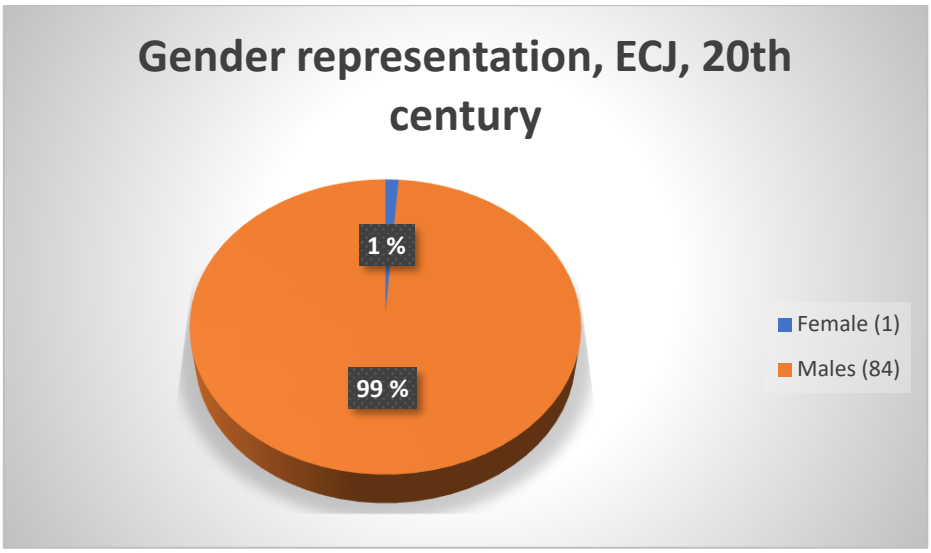

Figure 4.3: Male domination at the ECJ in the 20th century

Source: list of the members of the Court of Justice + list of members of the GC

Graph: Author

The European Court of Justice in 1997

Source: Court's annual report 1997, p. 39, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/rapportannuel1997en.pdf

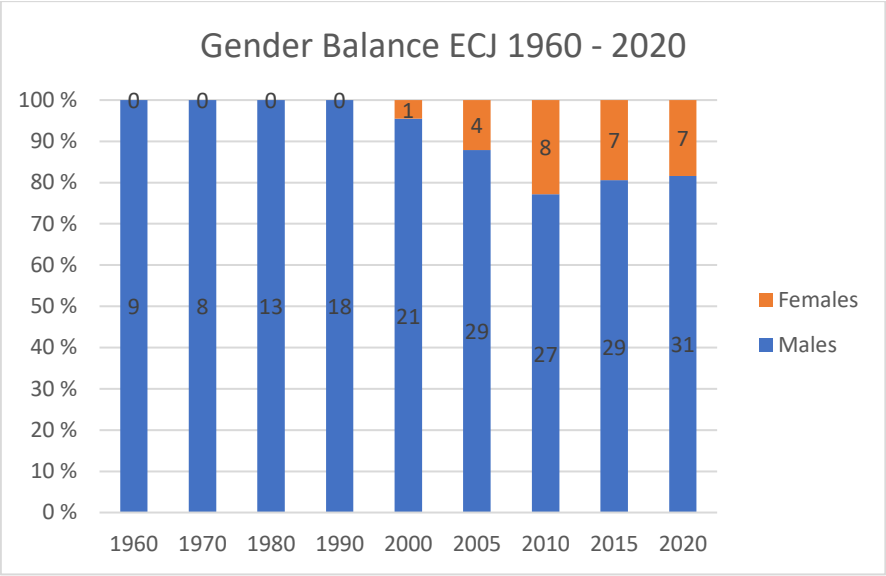

Figure 4.4: Improving but stagnating ratio in the 21st century (gender balance)

The Court of Justice in 2011

Source: Annual report 2011, p. 67, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_version_integrale_en.pdf

While a trend towards balance started in the early years of the new millennium, the figures of the last 10 years display a stagnation of balance around the 80%-20% ratio. The number of females at the ECJ still has an all-time high of 8 which occurred in 2010, while the number regressed to 7 in 2020.

There are better hopes for the GC. First the required experience by the 255 committee is lowered to 15 and sometimes to 12 years. Second, after the 2015 reform that raised the number of judges per member state to 2, the legislator indicated that the member states shall do their best in ensuring gender parity on the bench[200]. While the provision is not binding and thus lacks strength compared to the obligation of the CoE regarding mandatory gender balance at the ECtHR[201], it clearly sets a path for the future of EU courts. The results thus far have been pretty disappointing since only 15 out of 50 judges (as of November 2020), thus around 30%, were women.

The GC in 2019

Source: Annual report 2019, p. 310, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/qd-ap-20-001-en-n.pdf

[200] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, at (11): '*It is of high importance to ensure gender balance within the General Court. In order to achieve that objective, partial replacements in that Court should be organised in such a way that the governments of Member States gradually begin to nominate two Judges for the same partial replacement with the aim therefore of choosing one woman and one man, provided that the conditions and procedures laid down by the Treaties are respected*'.

[201] Resolution 2248 (2018), "Procedure for the election of judges to the European Court of Human Rights", available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25213&lang=en, containing the principles of Recommendation 1649 (2004) on the Candidates for the European Court of Human Rights, available at: https://pace.coe.int/en/files/17193/html

4.2.4.2 What judges can do about balance: hiring "unseen" actors

The previous section was about judging Europe's court, but not about judging Europe's judges. The member states choose the candidates, and the 255 committee gives its *de facto* binding opinion. Judges cannot do anything about misrepresentations of social groups on the bench. The most visible part of the institution suffers from a deficit that judges cannot rectify themselves. Part of an institution's legitimacy lies beyond the grasp of powerholders. They may legitimize their activities as much as they can, for either strategic reasons and/or because they believe that legitimacy is a moral goal to achieve, but they will never account for misperceptions or what lies beyond their institutional control. Democratic settings are in fact the most likely political systems to provoke this phenomenon: the use of checks and balances between all branches of government ensure that domination (and thus legitimacy) is divided. That is one of the reasons – along with all the trade-offs between legitimacy standards described in this monograph – that makes a perfectly legitimate democratic political system/institution an empirical *and* theoretical impossibility.

Judges cannot by themselves rectify the legitimacy deficit caused by the action of authorities in their selection. They may however rectify partially this gap by ensuring that the rest of the Court's staff – the "unseen actors" of international adjudication (Baetens 2019) – represent a much fairer balance in terms of gender.

The staff that accompanies judges all along in their work are the famous référendaires, who are judges in all but name. In terms of profiles, they have the same socio-professional trajectories than judges. In terms of labor, they co-write down the judgements of the Court. Judges and AGs are involved in many cases and do not write all the drafts of the opinion (AG), preliminary report or the ruling itself (judge-rapporteur). Instead référendaires take the lead in making the first drafts, while judges revise and comment (see also Cohen in Nicola and Davies 2017:64). While some argue that the existence of life-long référendaires with more experience than judges is over (McAuliffe in Nicola and Davies 2017:45), and that members of the Court insist that the opinions and draft rulings belong eventually to the judge who put their "signature on them", the importance of référendaires in the organization of the Court – and by extension in the interpretation of EU law – is undeniable (Cahill in Baetens 2020:496-514).

The connection between référendaires and gender balance is structurally relevant for the legitimacy of the Court. First, référendaires do not have to respect an age or experience criterion to join the Court: they must be good EU lawyers and must be recommended as such to judges. Référendaires on the 21st century tend to be between 30-45 years old since most see this career path as a steppingstone before turning to new horizons. They are younger lawyers who represent the more recent gender distribution of the legal profession. Second, judges recruit their collaborators themselves, without a third-party intervention (Zhang 2016). Assessing their hiring allows for a recoupling of the legitimacy of the Court with the legitimacy of judges. Third, the "professional" (Cohen in Nicola and Davies 2017) or judicial endogamy effect makes référendaires the likeliest candidates to be the next judges at the Court (Ibid.; Kuijper 2017: 80; see above), so if the pool of référendaires is balanced nowadays, then tomorrow's Court is more likely to follow the trend.

It is difficult to generate consistent data over time about référendaires. While Vauchez (2010) could in his socio-historical work use the outputs from "*L'Amicale des Référendaires et des anciens Référendaires de la Cour de Justice de l'Union Européenne*"[202], there is no systematic listing that would allow for a prosopography of référendaires over time. However, the list of currently working référendaires are listed on the Court's website, giving us today's picture[203]. There are about 300 référendaires at the Court assisting judges (312 total, 166 at the ECJ and 146 at the GC as of February 2021). 124 of them were women, amounting to 39,7% of the total.

There is not much difference between the ECJ and the GC. The former hosts 64 women representing about 38% of the population, while the GC host 60 women representing about 41% of all clerks.

[202] See their no longer up-to-date website: https://www.amicuria.com/

[203] https://op.europa.eu/en/web/who-is-who/organization/-/organization/CJ/CJ as of 27 February 2021. See Annex 4 for the list.

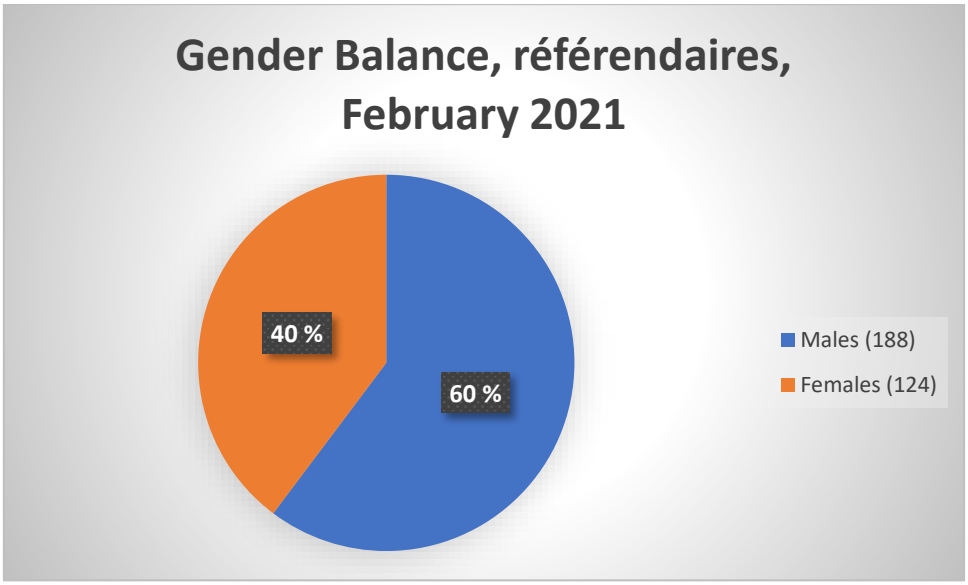

Figure 4.5: Gender balance among référendaires

Source: EU Who's who CJEU (https://op.europa.eu/en/web/who-is-who/organization/-/organization/CURIA/CURIA)

Graph: Author

Gender balance among référendaires does not reflect the broader balance in the legal profession (where women represent about 60% of the profession). While there is more of an equilibrium compared to judges, this underrepresentation of women in a public of legal professionals that studied law for most of them in the 21st century is striking, especially considering that overall about 60% of the population working at the Court (n ≈ 2000, exactly 2212 in 2018 when women represented 61% [1345] of the Court's total workforce[204]) are women. Judges and AGs (87) and référendaires (312) amount to 15-20% of that total, meaning there is an overrepresentation of women among other staff (e.g. lawyer-linguists) while they remain in 2021 outnumbered in decisional positions at the Court, a fact that is hardly justifiable today.

4.2.5 The (im)perfect representation of member states

The composition of many ICs raised the question of geographic distribution since the bench of bodies like the ICJ (n=9) does not allow for all member states to have a judge (Posner and Yoo 2005). The underrepresentation of states remains an important feature of IOs. It is not

[204] Court's annual report 2018, p.18, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf

a major normative issue, since most IOs and ICs cannot exercise domination absent the consent of all governments. The EU on the contrary wields power beyond the state, since it may enact laws via QMV, meaning that some governments are outvoted and must nonetheless comply. The same principle applies for the CJEU. The Court issues binding decisions taken by a group of 3, 5 or 15 judges (Grand Chamber) most of the time. The full court (in which all judges representing all nationalities of the EU) only sits in rare. The Court thus issues binding rulings, applying in all member states, even in member states whose judge did not take a part in the case. This possibility implies a necessary reciprocity between all member states, that must all be represented in the highest offices of the Union. The importance of states representation (which works for federations and confederations) is so important that it circumvents the full application of another key democratic principle of Western democracies: the equal representation of citizen in these IOs. The population of heavily populated states like California or Germany is less represented in the US and in the EU than the citizens of Idaho or Malta in the Senate and EP, in order to respect an accepted principle of autonomy of regional entities. In the EU, it takes the form of a "constitutional balance" between sovereign polities (Dawson and de Witte 2013).

The principle of state representation within IOs as 2 incidences regarding the sources of the Court's legitimacy. Regarding an institution's staff overall, the institution must host representatives from all regional entities present in the association, meaning citizens from all member states in the 2000-strong workforce of the Court. This representation must also display somehow the geographic balance of member states: while Maltese référendaires and lawyer-linguists may be overrepresented compared to German référendaires, they may theoretically not unreasonably outnumber them.

Second, there is a specific constitutional principle of representation in the EU stating that every member state shall have a representative in the highest ranked positions of the organization, despite attempts to abolish this unwritten custom. The Commission is the best example of the resistance of this principle. Despite the introduction in the TEU of the obligation for the 2014 Commission to carry only 18 commissioners representing two thirds of the member states [205], the Commission keeps

[205] Art. 17(5) TEU

carrying nowadays a representative per member state[206]. The idea behind a smaller Commission was clearly to abandon the narrative of borrowed legitimacy from member states, with some of them accepting (just like within states and federations, where some regions or federated states do not have a representative in the government) not to have one of their nationals at the highest level of the EU's executive. The Irish voters who rejected the Lisbon treaty in the first place[207] showed a path that has become even clearer after a decade plagued with socio-economic crises: the state remains – or has returned as – the insuperable figure of political organization, including on the transnational scene (Bellamy 2019). The Court must represent all member states at its highest level, namely on the bench.

Limits to these 2 principles can and do occur for two reasons. The 1st relates to the crystallization at the constitutional level of unequal representation (4.2.5.1), meaning that the constituent power voluntarily enshrined (as it did in art. 17[5] TFEU) the discrimination in the acquis. The second limit is about the unforeseen consequence caused by the labor arrangement of the Court, namely because of its main working language: French (4.2.5.2). The choice of any working language has an incidence on the composition and the internal division of labor within the Court, potentially leading to the overrepresentation of certain legal cultures within the Court.

4.2.5.1 The crystallization of states discrimination: the Advocates General

The legal framework of the EU provides for an equal representation of member states regarding judges. All have 1 seat at the ECJ and 2 at the GC, respecting the constitutional balance principle. However, not all states are equally represented regarding the function of AGs. These give a non-binding opinion ahead of rulings, giving the potential directions that the Court may follow. They do the preliminary research work on the issue

[206] "The European Council decides on the number of members of the European Commission", EUCO 119/13, 22 May 2013, at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/137221.pdf

[207] And it is important to recall that Irish citizens were the only citizens to vote directly on the issue (it is a constitutional obligation in Ireland), while the other member states used "other" constitutional modification means, taking the form of supermajorities in legislative chambers.

at hand. There are currently 11 AGs[208]. Art. 252 TFEU states that 8 AGs sit at the Court, but the Council may augment that number by unanimity after request of the Court. The annexed declaration[209] to the TFEU stipulates that Germany, France, Spain, Italy and Poland have a permanent AG, while the other member states will have an AG on a limited basis following a rotation system. As of January 2021, the remaining AGs come from the Czech Republic (M. Bobek), Bulgaria (E. Tanchev), Greece (A. Rantos), Denmark (H. Saugmandsgaard Øe), Ireland (G. Hogan) and Estonia (P. Pikamäe). The states in the rotation system have a 6-year term and must wait about 20 years before they may send anther AG at the Court. That means that some member states – such as Hungary, Cyprus and Malta – have thus far never sent an AG at the Court. The system voluntarily discriminates the least populated states of the Union.

The first justification behind this discrimination is that the Court does not need a high number of AGs. They are not involved at the GC, and not even in all ECJ cases if the Court decides that there is no new point of law raised in a case[210]. Having 28 AGs would thus be unnecessary in quantitative terms. Second, AGs simply give an opinion about the potential resolution of the case, which the Court may ignore. The position would be symbolic to a great extent. In legitimacy terms, AGs do not wield real power and thus would not truly raising questions of political representation.

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[208] The consequences of Brexit on the AG system remain unknown at the time of writing. There are still remain 11 AGs since Athanasios Rantos replaced departing Eleanor Sharpston in September 2020. It is likely that the former UK AG will be subject from now on to the rotational system. See Entry into office of a new Advocate General at the Court of Justice, PRESS RELEASE No 105/20 Luxembourg, 10 September 2020, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-09/cp200105en.pdf

[209] "Declaration on Article 252 of the Treaty on the Functioning of the European Union regarding the number of Advocates-General in the Court of Justice", Document 12016L/AFI/DCL/38, at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016L%2FAFI%2FDCL%2F38

[210] Art. 20 Statute CJEU

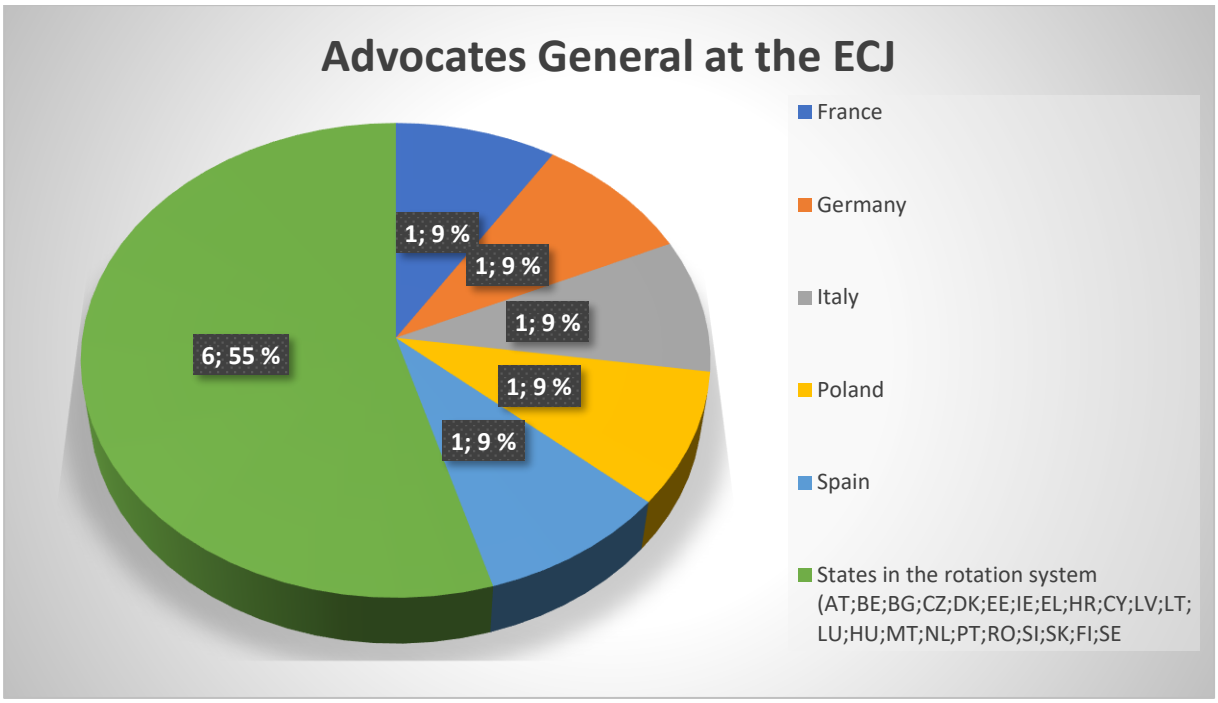

Figure 4.6: Positions of AG at the Court per member states (number; percentage)

There are at least 2 arguments refuting these justifications. The first is a matter of process and will be dealt accordingly in the next chapter (5.2). Suffice here to say that the substance of the AG's work is more than symbolic: it is a public opinion that the legal profession will analyze and use as a benchmark to assess CJEU rulings. Dissensions between opinions and rulings generate heated discussions and have an incidence on the legitimacy of the Court. Moreover, AG opinions are said to make up for the absence of dissenting opinions at the CJEU, which is an unusual of ICs and CCs (Kelemen 2018:145-48). Second, while the impact of opinions is debatable, AGs are official representatives of the CJEU. Just like judges, they are officially entitled to speak on behalf of the institution they serve, which means that they are also the voice and face of the EU's court. The number of AGs and their appointment system has an incidence on the values that Europeans wish to see in governing bodies. While the EU is theoretically respecting the principles of democracy and rule of law enshrined in art. 2 TEU, the AG system is on the contrary reflective of outdated internal relations practices emphasizing pure coercive politics, where the most equipped in terms of population and resources in a confederation get the maximum reward. The rotation system does not follow any elaborate arithmetic principle, nor does it privilege the equal democratic participation and representation of states or citizens.

The short-lived Civil Service Tribunal (CST [2004-2016]) also broke with the principle of equal representation of states in the EU. It was composed by 7 judges chosen in an EU-wide competition and selected according to the same criteria applied by the 255 committee (Bobek 2014; Vandersanden in Bobek 2015:87-94). It came to an end in 2016 when its responsibilities were transferred to the GC. While the CST did only settle issues between the administration and civil servants – thus not opposing actors at the interface of the EU and its members states or other IOs – it nonetheless raised the potential deficit of unequal state representation at the CJEU[211]. Civil services issues are now dealt by a judicial body that, at least institutionally, accommodates for the principle of constitutional and geographical balance.

4.5.2.2 Language as discriminating factor: the contested use of French as working language

The CJEU is the last body of the EU that uses French as its main working language. The Council and EP use all official languages of the EU (n=24). The Commission has English, French and German as co-existing working languages, although German has disappeared from events such as the Commission midday briefings (except for when the German or Austrian commissioner come to give a speech) and all commissioners address the media in English. The ECB uses English as its only working language. The use of French in all EU institutions made sense at the time of signing the Rome treaties, since French remained "the" diplomatic language at the time while no English-speaking state joined the ECSC (Saurugger and Terpan 2017:14). But it disappeared everywhere else in the EU, making the Court the last organ of the Union to use it as main working language.

Why is French still the working language of the Court even if English has progressively become the new hegemonic language everywhere else? There are a few hypotheses. First, lawyers are not easily prone to change. Second, the Court is in a French-speaking member state. Third, prestigious academic institutions such as the College of Europe keep giving law lectures in that language. Fourth, the members of the Court I talked to all used the path-dependent argument of "it's always been so here" (as if French had acquired some traditional authority). They also stressed that

[211] See the concurring opinion of former CJEU President V. Skouris when he presented the 2015 reform of the GC, p3: https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/8-en-argumentaire-270.pdf. See 6.4.1

switching to English as the main working language would mean a major overhaul of the legal translation department, which is the biggest service at the Court (n=600-700 out of 2000-2200). All translations involve the French language, either as target or source language. Some argue that French remains a more accurate legal language for a legal system deeply rooted in the civil law tradition.

There are however several arguments that reject the persistence of French as a working language. A. Zhang made the most powerful critique of the use of French at the CJEU, since its working language would be a major factor in making the Court "faceless"[212] (2016). First, French-speaking would lead to an overrepresentation of référendaires from France, Belgium and Luxembourg (representing about 40-50% of the whole population). Second, these référendaires would be the real masterminds behind rulings since many judges would have a poor level of French. Third, the legal traditions of French-speaking member states would consequently be overrepresented in the rulings themselves (about 80% of référendaires were trained in French-speaking law schools). Finally, it would exclude many potential good candidates who are great EU lawyers but do not speak the language.

Zhang makes compelling points. The overrepresentation of French native référendaires is undeniable. French has a clear excluding effect of a large part of the EU population: there are twice as many English speakers (around 50%) as French speakers in the EU (26%)[213].

This has an effect in terms of performance and representation. In terms of performance, it means, as Zhang rightfully point outs, the exclusion of many potential candidates, while the part of English-speakers in the attentive public of the Court is much bigger than the French-speaking subgroup. The Twitter accounts of the Court show this remarkably well: while the French account has about 21.000 followers, the English account gathers around 84.000 followers, which means exactly 4 times more people following the Court's activities in English than in French. The pace

[212] For a shorter and updated version: "The Faceless Court", *Verfassungsblog*, 3 June 2020, at: https://verfassungsblog.de/the-faceless-court/

[213] Special Eurobarometer 386, "Europeans and their languages", June 2012, at: https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_386_en.pdf

of judicial activity, although judges need to deliver justice within a reasonable amount of time (see 6.4.2), would nonetheless allow judges that are not fully proficient to take the time to assess the whole case. In terms of representation, English is more than a language from a couple of member states. It has become the language of transnationalism altogether. While only 13% of Europeans were Native English speakers (1% after Brexit), nearly half speak the language fluently (44% after Brexit), making it the most spoken language in the EU, far ahead of German with its 32% (36% after Brexit) and French with 26% (now 29%)[214].

The choice of any working language will generate discriminating effects in a transnational institution. The choice of the most legitimate (although the choice will always remain imperfect) language could consist thus in using the least discriminating idiom found in the EU, i.e. the most spoken language. This argument is about representation, and about an ideal philosophical picture of judicial legitimacy. It does not account though for the careers of people whose fate would become totally uncertain if the Court were to switch to any other language. But the fact is that French contributes to exclude citizen from a Court which remains to the day incomplete, and that can only hardly justify the absence of Slovenian judges at the GC.

4.3 Conclusion on the sources of legitimacy

The CJEU is an institution of the EU, and as such its mandate is to be found in the treaties. "Ensure that the law is observed" is not accurate depiction of the Court's role. The CJEU is to provide an interpretation of vague rules, to fill gaps in situations that the legislator and the constituent power did not foresee, and to promote legal certainty in societies in constant evolution. Most of these objectives were judge-made in consultation with other legal professionals and were accepted *ex post* by the constituent power in the 20th century. Absent further guidelines, judges and their fellow professional counterparts built a legal order by using the cognitive frames learned in law schools during the same period. Lawyers referred to Kelsen's pyramid of norms and included EC/EU law somewhere

[214] Forbes, "Despite Brexit, English Remains The EU's Most Spoken Language By Far", 6 February 2020, at: https://www.forbes.com/sites/davekeating/2020/02/06/despite-brexit-english-remains-the-eus-most-spoken-language-by-far/?sh=6fc66f09412f

around the top. This had 2 consequences regarding the CJEU's relationship with national judiciaries. It fostered a fruitful cooperation with civil and administrative courts (including Supreme Courts) via PRP since most norms reviewed by these courts (Acts of Parliament and administrative acts) are clearly lower than EU law in the pyramid of norms. On the contrary, it meant a cold and distant relationship with CCs, since their claims to supremacy could not ultimately be resolved via pre-existing conceptions of the hierarchy of norms. Some scholars came up in the 21st century with new approaches such as constitutional pluralism, which claim that legal problems may be resolved through judicial dialogue, respect and understanding of respective claims to supremacy (Kumm 2005). Apart from being too generic and unhelpful in tense situations where jurisdictions overlap, the settlement of supremacy claims would arise from extra-legal considerations such as democratic legitimacy, and the best protection of fundamental rights as justificatory modes to act in cases of indecision [215]. These frictions remained scarce for most of the 20th century but happened more frequently recently with the integration of competences that used to be core state powers. Less than pooling, such competences are often shared following unclearly defined dividing lines such as monetary and economic policy. This results in augmenting tensions between CJEU and constitutional judges whose logic of appropriateness incites them to consider their respective instrument as supreme in case of doubt. Disagreements between these bodies cannot be settled in the sources of the Court's legitimacy and will thus be a matter of process (chapter 5) and outcome (chapter 6).

But the Court is more than an institution of the treaties. It is a political institution that must be representative or at least be reflective of society. Individuals working at the Court must show that they possess outstanding qualities justifying (in a rational-legal fashion) that they deserve to be sitting on the bench, while at the same time not being totally different from the rest of the citizenry. The emphasis in the 21st century has clearly been on the professionalization of the judicial function at the Court. While judges must all pass the demanding criteria of the 255 committee in terms of language proficiency, experience, knowledge of EU law and others, this demanding procedure has had side effects in that it created or maintains an imperfect representation of today's European

[215] Although see *Melloni* where the Court sacrificed the best protection available of fundamental rights in order to safeguard the primacy of EU law.

societies. Gender balance remains a major issue at the highest positions of the Court, representation of ethnic and racial minorities remains inexistent, and even a fair representation of member states is lacking since the Court is not complete, with a member state that still does not have a judge at the GC as of January 2021, and that a few nationalities and legal traditions are overrepresented at the Court of Justice, mostly because of the use of a working language that is spoken by a minority of Europeans.

This journey through the sources of judicial legitimacy already shows that legitimacy implies trade-offs between standards, meaning that there cannot be a perfectly legitimate system. Standards analyzed in isolation are illustrative analytical tools, but they must be read in conjunction with others to say anything meaningful about the Court's legitimacy. These trade-offs are found already between various sources of legitimacy. These are likely to occur with output standards of judicial legitimacy, or with processual standards which are the object of the next chapter.

Chapter 5

Processes of good adjudication

V. Schmidt famously distinguished elements of governance processes – or throughput legitimacy – from outputs of EU institutions (2013; 2020). EU institutions must be accountable, transparent and open to interactions with citizens. But in her framework, throughput would not compensate for losses of input or output. This chapter will challenge this argument for the specific case of the CJEU. It argues that process is equally if not more important than input (which is weak for the CJEU) and output (which is often contested) to secure judicial legitimacy. The idea of justice resonates with "due process". Legal scholarship captures this perfectly. When discussing Court rulings in case notes found in the Common Market Law Review (CMLRev) or in the *Revue Trimestrielle de Droit Européen* (RTD), lawyers mention the outcome of a case in the introduction and the conclusion of their paper. But the core of their demonstration resides in dissecting the processes by which the Court arrived at certain conclusions. Moreover, elements of process are mobilized by the Court and its judges to justify contested outcomes in cases like *Zambrano* or *Dano*.

Yet the purpose here is not to analyze all procedural rules of the Court, which would require a complete exposition on the Statute of the Court

and its Rules of Procedure (see Lenaerts and al. 2014[216]). Instead, this chapter will expose how philosophical standards of processual legitimacy are endorsed and applied by the Court and its attentive public. The EU legal profession is the only audience to be considered here since processual elements are precisely what discriminate lawyers from the rest of the society (Bourdieu 1987).

Of course, elements of due process abound in domestic civil and criminal law. But the same cannot be said about ICs. Due process often refers to fact-finding and their acceptance as valid evidence. ICs and higher national courts would deal mostly with points of law. Process for the CJEU would mostly refer to the techniques of legal interpretation or reasoning (for the CJEU, see especially Beck 2013; Conway 2012, Bengoetxea 1993; Sankari 2013). The Court must adopt routines of interpretation that correspond to standards shared by fellow legal professionals. The Court of the 1960s built an entire legal order, making choices about various reasoning paths available, such as literal textual interpretation, originalist meaning, teleological, consequentialist and others (Conway 2012:19-22). Absent genuine scrutiny, the 20th century Court established its personal style of reasoning. The situation is much different nowadays. The Court has been exercising its activities for nearly 70 years, giving scholars a significant number of cases to assess the reasoning of the Court. The number of cases has also grown exponentially since the early years of the community, which also allows for synchronic assessments of judicial activities. And the CJEU is being monitored by an ever-growing EU legal profession whose core activities are to assess, shape and react to legal reasoning.

Nevertheless, processual legitimacy is not just about reasoning or due process. The legitimacy of a Court resides in justifying to the rest of the legal profession the soundness of their outcomes, which these actors will in turn broker to other spaces like law schools, litigants and of course governments. The Court is a factory of 2000 workers, which allows it to process a significant number of cases within a reasonable amount of time (see next chapter at 6.4). But it remains a small organization with many pending cases. Process about points of law require in-depth investigations of pre-existing rulings and sources of law in the case, the draft of the first

[216] The leading academic book of EU procedural law was written by 3 members of the Court.

version of a ruling, the inclusion of an AG giving an opinion, a hearing where the parties may present orally their arguments about the case, deliberations between judges, access to socio-economic information that could shed a light to a case where legal sources are scarce or missing, etc. It is a mission the CJEU cannot carry out alone. Judges and référendaires must rely on the work of others to process cases. A core element of process legitimacy is thus the *participation* of other actors in the judicial process (5.1). Historically, the opposite value – independence – is mentioned as a core legitimating feature of courts (starting with Montesquieu 1758, Book XI), including of ICs (Squatrito and al. 2018). Independence needs a conceptual refinement to refer to the reality of Western democracies: it is more a normative standard of democratic polities than it is an empirical appraisal of higher courts. Courts must be independent from political influence. But it does not mean that judges should operate in a vacuum. That is crucial for courts with a constitutional mandate, since these judges must deal with cases that stand at the frontier between law and politics. They must associate other actors to their work while maintaining the separation of powers, and thus rely on other legal professionals.

The CJEU must then be *transparent* about the way it operates (5.2). The principle of participation requires that judges be as open as possible about the content of their activities. It means that the Court must make its documents as publicly accessible as possible, while respecting the general principle of judicial secrecy. Transparence is about striking a balance between these imperatives, which in borderline cases involves difficult choices. Transparence also refers to the writing and argumentative style used by judges in rulings. In finding certain outcomes, judges must ensure that the ruling at hand is a demonstration that fits certain "reckonable" patterns of adjudication (Beck 2013:29). Such patterns must be clearly identifiable by other legal experts who will judge the Court not only using other lenses of interpretation, but against the CJEU's own benchmarks.

Finally, the Court must be responsive to the reactions of the legal profession (5.3). The Court deals with sensitive socio-economic matters that have clear repercussions in the society of member states. Some rulings will trigger some reactions from the legal profession that the Court must address. Judges must thus justify their decisions to their public, especially to the most skeptical ones. It may use several channels to do so, for example by rectifying incorrect or outdated principles in more recent

rulings, or by using extra-judicial means to reach out to its attentive audience.

5.1 Participation with and before the CJEU

Independence is the legitimacy standard that was historically used to refer to the absence of external influence. The independence of the judiciary does not however mean that judges should not receive any type of external input. Independence refers to the prohibition of undue influence from other branches of government. The executive and legislative branch may not order judges to follow certain directions. The opposite is also true: judges may not formally prescribe any type of behavior to legislative and executive actors in their respective field of action, or they would then become activists. That last observation was an issue for the CJEU because of the historical "law-politics imbalance" in the EU: the EU was developed through law and politics "lagged behind" (Dawson in Dawson and al. 2013: 11-32). The 21st century saw the legislative power closing the gap between judicial interpretation and legislative lawmaking as legal modes of integration (see 4.1.1.2). The dialogue that Dawson described as missing between the Court and the legislator has finally taken place, with the EU being akin nowadays to a domestic polity where constitutional judges think more like politicians and legislators reasoning more like judges (Stone Sweet 2000). The crises ensured that executives became major actors in EU politics. Judicial interpretation is no longer the main integration mode in the EU. It means that rulings are less likely to spark the activism critique, but also that judges and pro-EU voices may no longer use political immobilism as an excuse for judicial empowerment.

The independence of the judiciary does not mean that judges cannot seek exterior help. EU law interpretation is a craft shared by the entire legal profession, and judges may look for external inspiration in their quest for the right solution. The CJEU may even invite its professional counterparts to make EU law interpretation a shared exercise.

The work of the Court actually leads judges to be in constant interactions with legal professionals. The formal side of participation links judges with other lawyers in the adjudicatory process (5.1.1). The Court associates the parties to a hearing and allows certain external actors to submit observations to the Court. This formal side of participation remains however limited. The Court remains an opaque institution from a formal

perspective (Dunoff and Pollack 2017: 245-49; see 5.2). This shortcoming is compensated by the heavy involvement of judges in extra-judicial activities that serve to reinforce the Court's acceptance as a justified powerholder (5.1.2). Judges have tailormade interactions with specific subgroups of the legal profession. They meet national judges through judicial networks (Benvenuti 2013). They coproduce and commemorate EU law with legal scholars. They even train government agents. This has generated a common EU legal culture and *ethos* where the Court is not only a persuasive but also a systemic actor that has become too big to fail.

5.1.1 Formal participation: a mixed picture

Participation within any court is about the right to submit observations to judges or not. The principle of judicial secrecy and the serenity of proceedings[217] collide with the principles of participation, transparency and responsiveness analyzed in this chapter. But these are all cornerstones of judicial practice in the member states and in the EU since its inception, and thus justify restrictions to certain legitimacy standards.

The participation of actors in judicial proceedings – determining "who" gets a word in the debate – is thus circumscribed to a narrow circle of actors with enabled access. Most however remain excluded from participation in the whole procedure, including from simply attending otherwise public events such as hearings.

5.1.1.1 Accepted intervenors in the adjudicatory process

The Statute of the Court and the Rules of Procedure (RoP) determine who is authorized to intervene in the proceedings[218]. Most of these questions have treated at length elsewhere (Lenaerts and al. 2014:760-78; Kuijper in Howse and al 2017: 94-5), and there is not much more to add to the debate.

Parties and their legal representatives are of course strongly associated to the process. Their involvement requires both written and oral arguments, following dense and concise rules of procedure[219]. The Court will give its judgement based on the adversarial principle (Kuijper 2017:98), i.e. on the basis of the information given to judges and distributed to the parties in

[217] Art. 10 and 13 Statute of the Court.

[218] Article 40 of the Statute of the Court, Articles 129 – 132 of the Rules of Procedure of the CoJ and Articles 142 – 145 of the GC Rules of Procedure.

[219] Art. 57 and 58 for the written part; Art. 76 to 85 regarding hearings.

the written phase of the procedure, meaning that asymmetries of information are in theory avoided and parties are equals not only before the law but also before the facts. The few exceptions to these are cases dealing with market information in competition cases or blacklisting of terrorism suspects (Ibid.).

The Court recently asserted that of the right of defense and of remedy for any citizen – enshrined in art. 47 CFR – is a fundamental principle of justice in the EU, even in cases concerning the relationship between the EU and third states. The Court detailed in *Schrems*[220] that the right to a judicial remedy for persons whose personal data has been consulted must be protected, even when such an access occurred in a third state. Schrems concerned the transfer of Facebook data to the United States. The Court judged that the US did not provide a level of judicial protection equivalent to the one protected by the CFR in the EU, and thus that the Commission's decision to accept such data transfers was invalid. The Court reaffirmed the principle in *Schrems II*[221] despite the changes in the acquis (namely the EU-U.S. "Privacy Shield"[222] that was declared invalid) (see Obendiek 2020: 84-6 and 96-109). Every party has the right to be heard. However, the Court has always been extremely strict about this right in annulment proceedings. The contested measure must affect directly and individually (which *de facto* excludes almost all directives and regulations) the plaintiff[223].

Other than the parties, member states and EU institutions are privileged intervenors that may participate in all the cases before the Court. Other

[220] C-362/14, *Maximillian Schrems v Data Protection Commissioner*, 6 October 2015

[221] C-311/18, Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems, 16 July 2020

[222] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield

[223] C-25/62, Plaumann & Co. v Commission of the European Economic Community, 15 July 1963. See T-177/01, Jégo-Quéré & Cie SA v Commission of the European Communities, 3 May 2002 for an attempt by the GC to soften this standing criteria, and C-263/02, 1 April 2004, setting aside the ruling of the GC and re-establishing the *Plaumann* criteria.

bodies of the Union such as the ECB or agencies may intervene before the Court if their prerogatives are concerned in the case at hand[224].

The Court may also choose to invite external intervenors such as experts[225], something parties may not do, at least during the hearing. This possibility enables judges to invite intervenors that they believe to be independent to present conclusions, which excludes the possibility that parties invite a seemingly neutral but fundamentally biased expert. The inconvenient however here is that parties may fall victim to the Court's own biases when picking experts. Such biases are not necessarily conscious and may simply reflect majoritarian ideals about socio-economic life (e.g., neoliberal thinking about monetary and economic policy).

5.1.1.2 The exclusion of others

Accepted intervenors are few compared to the rules of procedure of other ICs. The Court does not allow for other actors to intervene for reasons that are not related to the support of one of the parties. That means that other interventions such as *Amicus curiae* briefs from scholars or NGOs, a practice found in other ICs such as the WTO Dispute Settlement Body[226], are prohibited.

Participation does not have to be active: citizens may just watch what happens in their governing institutions. The people living in Luxembourg and its surrounding have the chance to do this by seating at a hearing. These hearings are however not recorded, which impedes those who do not go to Court to see what happens in the exchanges between judges and legal representatives. The absence of recording in the rarely well-advertised cases such as *Microsoft*[227] or *Wightman* will then attract a huge crowd that the Court will logistically not be able to accommodate (Alemanno and Stefan 2014) (see 5.2).

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[224] See Art. 40 Statute of the Court for the whole list of potential intervenors before the Court.

[225] Art. 25 Statute CJEU; Art. 66 and 70 RoP

[226] Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, §105-108

[227] T-201/14, Microsoft Corp. v Commission of the European Communities, 17 September 2007

The judicial process remains selective in the number of actors participating in the proceedings. However, the privileged intervenors are all representatives – either directly for member states or indirectly for EU institutions – of the citizens. The purpose behind the limitation of inputs before the Court is to avoid the (perceived) excessive length of the procedure, and thus to judges to quickly turn their attention elsewhere. The members of the Court are ensuring that they receive sufficient exterior inputs (see 5.1.2) while they manage their time at will during their exterior activities. Judge Sacha Prechal claimed that hearings are taking a lot of time[228]. The limitations of written inputs and their subsequent repetitions at hearings is not bringing any novelty to the resolution of cases, thus limiting their amount is not perfect but understandable.

5.1.2 Balancing limited formal participation with enhanced extra-judicial access

The participation of other actors to judicial activities goes beyond the walls of the Kirchberg Palace. Judges and AGs are doing more than solving disputes. They reach out to the outer world to defend and promote the case law of the Court. As detailed in chapter 3, they focus on the EU legal profession, which broker the word of judges to other places.

5.1.2.1 The proliferation of judicial networks surrounding the Court

CJEU judges developing an enhanced cooperation with national judges is not a novelty: it is the relationship that led pioneering political scientists like K. Alter (2001) and A. Stone Sweet (2004) to study judicial politics in Europe. But they insisted on the preliminary ruling procedure, that is on the formal side of judicial politics. The 21st century saw the extra-judicial side of the cooperation crystalize via the rise of EU-funded judicial networks.

The rise of such initiatives is not obvious. While the rulings of the Court apply equally across member states, each domestic system has its own specificities that may render comparisons between civil and administrative systems unfruitful. B. de Witte acutely wondered if there

[228] Europeanlawblog.eu, "interview with Sacha Prechal", 18 December 2013: "*The deliberations are not the most time consuming thing. More time consuming are the hearings. Also because you never know what may happen at the hearing or how the parties will respond to questions. A while ago, for instance, there was a hearing scheduled for 30 minutes, but it took us three hours because of all the questions and answers and reactions*."

was in the EU not a unified EU law, but 28/27 EU laws as slightly modified by the legal academia of each member state (de Witte in Vauchez and de Witte 2013:101-116). However, there are some transversal issues that affect all national judiciaries and their connection to EU law, for example preliminary references. All legal systems also function according to a judicial hierarchy, have a pyramid of norms, possess Councils of the Judiciary, etc. These systems are comparable, allowing their members to earmark good practices. Finally, despite the near completion of 7 decades of integration, EU law remains a marginal assignment in law schools' programs. The organization of EU judicial networks allows national judicial schools to outsource somewhat this part of the formation.

Benvenuti (2013) skillfully distinguished between 2 types of judicial networks in the EU today: "networks of judicial institutions" and "networks of judicial professionals". The first refer to umbrella organizations – just like pan European federations of national lobbies in Brussels such as Business Europe or Europatat – that have national organizations such as judges' schools or ministries of judicial affairs as members. These networks serve administrative joint endeavors facilitating contacts of national judicial associations. The 2nd type of network refers to associations that organize events for individuals directly, although they often also welcome national organizations as members. All these bodies are listed in the list of the European Judicial Training Network (EJTN), that acts itself as the umbrella body for all these networks[229] (see Annex 5).

There are 13 EJTN networks that are dedicated to the question of judicial cooperation[230]. All receive EU funds, and most are based in Brussels. All aim at gathering national legal practitioners together to share knowledge from other member states and hear more about their practices. The EJTN itself ensures common training of said professionals, who are for the most part judges and sometimes prosecutors. It has no less than 11 programs for judges of all subdisciplines of law[231]. These associations cover most

[229] See the list at: https://www.ejtn.eu/About-us/Partners/

[230] I excluded here Eurojust and the European Union Agency for Law Enforcement Training (CEPOL), listed as partners of the EJTN but are self-standing EU agencies working for the Commission. I also excluded the ECtHR since it is another IC.

[231] See "EJTN Training and Programmes", at: https://www.ejtn.eu/About-us/Projects--Programmes/

areas of domestic law: civil, commercial, administrative, environmental and even criminal law.

Out of the 13, the Court has a clear role in 8 of those, either as full-time member, having some judges or référendaires as board members or honorary guests, or simply joining as observers while actively participating in the discussions. The Court is not involved in areas such as criminal (EJN, ENPE) or labor law (EALCJ). But it is present in most of these networks, while their representation there is often not automatically required. It makes sense when looking at the core subjects dealt with during meetings held (often on a yearly basis) by these networks. Many looked at the application of EU law by national judiciaries, including in networks open to non-EU members[232]. The CJEU is thus implanted in these networks, but it did not itself guide this cooperative process until 2017, when it took the lead in orchestrating the whole judicial cooperation in the EU (see below). The Commission was the necessary cornerstone behind all these initiatives, even serving for some as a secretariat dealing with all logistical aspects, as is the case for EJN-Civil.

It is hardly a surprise to see that a major area of law is missing from this list, along with its dedicated network. Constitutional courts and judges created their own independent network – the Conference of European Constitutional Courts (EUCONSTCO). The founders and date of this network are quite striking: it was created at the initiative of the Italian CC, the Austrian CC and the BVerG in 1972[233], exactly right after the ECJ gave its famous *Internationale* Handelsgesellschaft in 1970 and right before *Solange I* in 1974. 2 of the 3 CCs had historically developed various disagreements about the place of EU law in national legal orders (Davies 2012a:64-87; Lindseth 2010:134). This network is like those described above except for the fact that it is financed by CCs themselves. They are thus acting totally independently from any EU institution. However, in its last Congress organized in 2018, the Circle of Presidents – the governing

[232] 4 out of the 17 yearly colloquia organized by the Networks of Presidents of Supreme Courts were about the application of EU law (see: https://www.network-presidents.eu/views/events). 9 of the 27 yearly colloquia of ACA (7 since it took its renewed form in 1997) are about EU law (See: http://www.aca-europe.eu/index.php/en/colloques-top-en?start=0)

[233] See the "Historical Background" of EUCONSTCO at: https://www.confeuconstco.org/en/common/home.html

organ of EUCONSTCO – convened to invite the President of the CJEU as an observer (along with the Presidents of most ICs)[234].

The CJEU was following and accompanying the movement of judicial cooperation in Europe that started in the early years of the 21st century, while remaining an observer in most cases, letting the Commission finance these associations. That came to an end on March 27, 2017. The date is also important here: it was the 60th anniversary of the Treaty of Rome that instituted the EEC. The CJEU organized for the occasion a Judges' Forum that gathered the Presidents of all presidents of CCs of the EU[235]. That event served 2 purposes. The first part of this forum was, as illustrated by the speech of President Lenaerts[236], to reassure its most skeptic public that the CJEU must still embrace its glorious past as motor of integration, but that today's court is not (one could almost hear "no longer") usurping the prerogatives of the legislator and the national judge, with CJEU judges doing all their best to carefully delimit the border of EU law. Then the CJEU could proceed with its major announcement: the creation of the "Judicial Network of the European Union"[237], a comprehensive online database gathering all non-confidential documents about cases from all member states (including decisions chosen by CCs as having relevance for judicial cooperation in Europe) and the text of preliminary references from national courts since 2018. The Court will provide all its resources – meaning here legal translation and hosting the database on its website – in order to make it a cornerstone of judicial cooperation with national courts, including CCs that accepted in 2017 for the 1st time to be formally associated with the CJEU in a common networking project.

The cooperation with national courts is the most important feature of the judicial architecture of the Union and has been described as such for a long

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234 See Resolution II of the XVIIIth Congress, at: https://www.confeuconstco.org/en/resolutions/res-xviii/resolution1-2.pdf

235 See the program announced in Press Release 33/17, "Celebration of the 60th anniversary of the signing of the Rome Treaties", 27 March 2017, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170033en.pdf

236 See "Forum Des Magistrats 2017 - Séance De Clôture", min. 1:10-25:26, at: https://c.connectedviews.com/01/SitePlayer/cdj?session=9750

237 See https://curia.europa.eu/jcms/jcms/p1_2170125/en/

time now (Weiler 1991; Alter, 2001; Lenaerts 2020). But this cooperation goes beyond the idea of the judicial empowerment thesis. The CJEU does not have the power to command: it must rely on the willingness of its partners, or in the worst of cases rely on the involvement of the Commission activating infringement proceedings, to see compliance with its decisions (see 6.3). The main resource of the Court is persuasion, meaning that the Court must show national judges that they are *right* in their interpretation of EU law. National courts retain a great margin of maneuver about sending references (Davies 2012b) and provide the necessary fuel for the CJEU to exercise its domination. The concentration of sources of EU law in all (or at least most of) the languages of the EU will first spare national judges a considerable amount of time when looking for information about rulings of the CJEU (when looking for a preliminary question that may already have been answered). It may even reinforce the conviction of national judges that the CJEU is – if it was not the case already – a serious body that provides reliable (re)sources to its partners. The Judicial Network makes the CJEU the central and thus insuperable node of judicial cooperation in the EU today. And if this work does not lead to more preliminary references, it ameliorates the prospects of a (CJEU defined) correct application of EU law, thus unburdening the judicial system and allowing the Court to eventually fare better on other judicial legitimacy standards such as time efficiency (see 6.4.1).

National judges are more than recipients of EU law, even in cases where they choose to refer to the CJEU. While it gives up the ability to say what the law is in these cases, national judges remain sovereign in interpreting the facts and national law, and thus remain ultimately masters in deciding the outcome of cases. Rational choice political science would assume that power-driven judges would do anything to circumvent this prerogative of the national judge. The history of the Court's case law shows both trends. The CJEU often reminds national courts that they must choose, depending on the specifics of the case, whether the principle of the preliminary ruling applies in the case at hand or not. In *Simmenthal*[238], the Court ensured that the national judge is the one who sets aside contrary national provisions. National judges are more than recipients: they are *co-enforcers* of EU law. The few times where the Court may circumvent the margin of maneuver of national judges is when it reformulates

[238] C-106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA., 9 March 1978

preliminary questions and even suggests remedies[239]. However, it remains unclear if the Court does it for strategic purposes or does it to genuinely help the national court in providing a suitable outcome to the preliminary reference (Voss 2016). That cooperation has nonetheless been fruitful for decades, which is reflected by the high implementation rate of the Court's preliminary rulings (see 6.3).

5.1.2.2 Shaking the invisible hand: the "judiciacademic" symbiosis of the EU legal profession

Academia has always played a role in the rise and shine of the Court since the early years of the EEC. Vauchez showed how various academic entrepreneurs helped the Court in forging the early principles of direct effect and supremacy, while detailing that the most influential legists of the Union all possessed a strong academic capital. The Court "coopted" academia as a brokering arena allowing for discussions with national legal professions (Vauchez 2015:84-9). Now the academic crowd of EU legal scholarship has grown bigger and more critical, leading to a necessary reappraisal of the relationship between the Court and research centers in the 21st century.

Participation with academics is natural for most judges. "Where you stand depends on where you sit" (Miles' law) applies to judges and référendaires whose scholarly capital is strong. Saurugger and Terpan (2017:54-8) argued that academia is progressively disappearing from the bench, since judges come increasingly from legal practice, and that by May 2014, only 4 judges were previously academic "in the full sense" (Prechal, von Danwitz, Rodin and Jarašiūnas). However, using the last occupied position before joining the Court as a proxy downplays the importance that academic research plays in the lives of *most* judges. The list of external activities shows that research is the main reason driving judges out of the courtroom. 362 out of the 828 counted exterior activities (or 44%) led judges and AGs of the ECJ in 2018 to research centers and universities. Members of the Court tend to return to their country of origin to give lectures of EU law on a regular basis. Even judges who were not officially occupying an academic position before joining the Court are involved in

[239] For example, C-791/19 - Commission v Poland (Régime disciplinaire des juges), 8 April 2020

academic circles, for example in FIDE Congresses which remain hosted by universities.

Networking with scholars is a consequence of the logic of appropriateness but also of consequentialism. Scholars do more than teaching EU law: they are *co-producing* it, or at least *co-interpreting* it. The greatest symbol of this production is doctrine. Doctrine is an encompassing term that gathers case notes, discussions about counterfactual legal interpretation, or explanations some areas of law that remain obscure, for example in the field of EU's external relations or Banking Union. Doctrine is more than a scholarly exercise: it is a substantiation of EU law by other means. Legal scholarship is a peculiar social science. For the most part normative, it is thus giving an opinion and potential solutions to a legal issue. Second, legal may not be a perfect science but involves the identification of certain "reckonable" patterns (Beck, 2013:29; see 5.2). The idea of reasoning is grounded in broader conceptions of expertise and science. Yet the separation between scholarship and practice is very thin in the legal profession. Academic outputs provide inspirations to the reasoning of judges and AGs. The latter explicitly mention and use academic publications in their Opinions. The Court even establishes a bibliography of case commentaries – meaning publications about *previous* judgements – about most rulings to help with future cases raising related questions [240].

Judges would sit side-by-side with legal scholars in interpreting the law made by the legislator and the constituent power. Judges and some EU legal scholars even live in symbiosis. Some scholars find their way to the bench, and judges in return find their way to the most important positions of EU legal academia: the editorial boards of EU legal journals. Journals publish the doctrine that serve as sources of inspiration for rulings. They either confirm or reject the outputs of the Court and lay paths to future judgements. Journal articles have an impact beyond academia and are read by the entire legal profession. Doctrine will serve as a common benchmark against which lawyers will assess judicial outcomes. The persons controlling the content of publications in these journals are major brokers of legitimacy within the legal profession.

[240] See the "Current Bibliography" of the Court at: https://curia.europa.eu/jcms/jcms/p1_2170111/en/

Members of the Court try to find a seat in these editorial boards. Saying what the law is in judgments and having it subsequently endorsed by a seemingly neutral scholarship will lower the chances of dissent against the CJEU. Boards also choose among various options their desired interpretations, thus selecting between viable and unwelcome alternatives. It also leads to the rejection of arguments – as valid as they might be – that those editors do not want to see published.

Table 5.1: Part of current and former CJEU members in editorial boards (as of February 2021)

	Editors in chief	Editors	Editorial or Advisory board
Common Market Law Review		0/10	8 out of 26
Cahiers de droit européen	0 of 1		3 out of 18
European Constitutional Law Review	0 of 3	1 of 10	4 of 17
European Law Review	0 of 2	0 of 2	4 of 18
Revista de Derecho Comunitario Europeo	1 of 1	1 of 1	1 of 10
Il Diritto dell'Unione Europea	1 of 1		7 of 14
Revue Trimestrielle de Droit Européen	0 of 2	0 of 4	0 of 7
Zeitschrift für Europarecht		2 of 11	
Total	**2 of 10**	**4 of 38**	**27 of 110**
Percentage	**20%**	**10,50%**	**24,50%**

These are some of the most influential EU law journals of the profession[241]. Overall, the identified members of the Court occupy 33 out of the 158 editorial positions listed in this table, meaning about 21% of all positions available! Their involvement across journals differs significantly: while half of the advisory board of *Il Diritto* is composed by CJEU members, none of the 13 positions of the RTD are occupied by a member of the Court. These figures are the most crucial symbol of judiciacademia. Scientific work is traditionally peer-reviewed, especially in a blind fashion in order to safeguard the author's identity and reputation. However, peer-review

[241] The European Law Journal would probably have made the 2nd place in the list if it did not go through a complete restructuration of its editorial board and line in 2019 and 2020, at the time of collecting data.

is hardly blind in EU legal journals. CMLRev does not even have a blind peer-review system, since the whole board decides to accept or reject articles. The independence of legal scholarship is reduced by the presence of several court members in these boards. The latter may create a sense of self-censorship in order not to displease both eminent scholars and eminent judges. Even if the crowd of legal scholars has grown bigger and more critical, its academic production remains filtered to a certain extent by pro-Court actors (not least CJEU members themselves).

There is thus a unequal presence of judges across editorial boards, which would correspond to Vauchez' distinction of legal journals between on the one hand the well-established journals with on the one hand a more conservative style, with publications that are classically doctrinal, and historically very supportive of the Court's reasoning (Vauchez 2015:202-4; see also Byberg 2017) and on the other hand more recently established journals with more openness towards other social sciences and taking a more critical stance towards the Court. The choice of journals in AG Opinions and in the bibliography of the Court is not however a political choice of supportive journals while they set aside critical voices. These more traditional journals with classic doctrinal publications are also simply more helpful for judges to solve cases than socio-legal or "law in context" journals which emphasize the hidden importance the broader societal structure surrounding adjudication while hardly discussing spot-on issues, which is what judges are looking for.

Members of the Court do more than just attend events in universities and research centers. One could say that they possess their own university. The *Europarechtsakademie* or ERA was founded in the early 1990s at the initiative of the EP[242]. Officially in another member state than Luxembourg, the ERA is situated in Trier (in Germany, about 30 km away from Luxembourg) allowing judges, AGs and référendaires to organize several trainings and seminars about EU law. In 2019 alone, the ERA

[242] See ERA's history at: https://www.era.int/cgi-bin/cms?_SID=5f50df6d68febd77b86e466d7899a0d2855471460077284412545 6&_sprache=en&_bereich=artikel&_aktion=detail&_persistant_variant=%2F%41%62%6F%75%74%20%45%52%41%2F%54%68%65%20%46%6F%75%6E%64%61%74%69%6F%6E%2F%48%69%73%74%6F%72%79&_template_variant3=%48%69%73%74%6F%72%79&idartikel=100452

hosted 179 events gathering more than 7800 legal professionals[243], which it could organize with its massive 8 million € yearly budget. National judges are clearly the number one public of ERA, making up for a third of all participants ERA activities.

By investing heavily in academia, CJEU members ensure that legal scholars, the other co-interpreters of EU law, remain persuaded of the soundness of Court's rulings. Firmly implanted in classic doctrinal editorial boards, judges receive a structurally predictable assent from the most established journals in the discipline, because scholars in said journals simply help in shaping that assessment. Let us take one example of a contested case that received a positive commentary in major journals: *Pringle*. The case was a minefield, certain to upset some people independently of the chosen outcome (see Beck 2013:447; Tuori and Tuori 2014). With the ruling adopted in November 2012 – a ruling that promoted "safeguarding the euro area as whole" as a fundamental objective of the EU – had then to pass a major test: its analytical dissection by the academic community. Most journals dedicated an article on the issue (e.g., de Witte and Beukers 2013; Craig 2013; and see below). The European Law Review decided to give the right to comment a major Court's case – and one of the most expected decision of the last decade – to 2 co-authors, the 2nd being a scholar and the 1st being a référendaire! (Adam and Mena Parras 2013) The assessment that "the Court thus pragmatically and elegantly rejected in Pringle the EU law objections to the ESM" (Ibid:11) is then provided by an employed member of the same Court.

Finally, academia is more than research and doctrine: it is also about forming tomorrow's legal practitioners. By having a firm control at the ERA – which organized and finances at lot of these events – members of the Court ensure that younger practitioners had the "best of the best" of EU law, which *de facto* means that judges shape tomorrow's legal thinking, and that the younger generation of EU lawyers is unlikely to consider the CJEU as a potential danger. The symbiosis of "judiciacademia" ensures the perennity of the Court for decades to come.

[243] See ERA Annual Report 2019, p.19, at: https://www.era.int/upload/dokumente/22612.pdf

5.1.2.3 Double-agency as a result of participation: the formation of government agents

The major actors absent from this legitimacy framework are national governments, whose acceptance of adverse rulings never found a clear-cut answer in the literature (Alter 2009:109-37; Carrubba and al. 2008; Stone Sweet and Brunell 2012; Larsson and Naurin 2016). This monograph argues that governments are present in the judicialization of EU governance, but only at the margins since their presence is brokered by government-hired lawyers acting as representatives before the CJEU: the government agents. They remain incredibly understudied (see Granger in Vauchez and de Witte 2013:55-72) for actors that would perhaps constitute the most important legitimacy brokers of the Court. They represent their government's position in all issues that involve the legislation of their member state and their potential incompatibility with the acquis. And after the publication of rulings, agents will expose the motives of the Court to their national administration. In other words, they will translate in bureaucratic and political terms the legal decision of the Court. That is why Granger rightly puts agents at the margins of the European legal field: agents are not at the margins because they are unimportant, but because they are brokers at the frontier between the legal profession and national administrations, or at the border between the legal and administrative/political fields.

There is almost no data on government agents, nor is there a unified source that could be turned into a database. One must track these agents by checking their names mentioned in the upper part of rulings and hope that their LinkedIn profile is up to date. Nonetheless their profiles, despite their diversity, show that they pertain to the legal profession, and often to the EU legal profession. While member states remain free to recruit the candidates of their choosing, government agents tend – just like the rest of profession – to be more specialized over the years. And the members of the Court play a major role in that regard.

There is no specialized training in most universities to form government agents before the CJEU. They are so few that it does not allow for tailormade diplomas. Agents will thus have a general training when hired by their national administrations. They will thus need some complementary training that only a few organizations in the world can provide. While there are some private trainings organized by

consultancies such as the European Institute for Public Administration[244], the leading institution here is ERA. Every year, ERA organizes a 3-day course dedicated to the formation of government agents[245]. The training is complete: it addresses the classic processual issues of adjudication, completed by an EU-specific set of challenges about multilingualism, and about differences of argumentations between the GC and the ECJ. *All* the training is provided by référendaires, lawyer-linguists and judges/AGs of the Court.

This formation does not mean agents return to their national administrations having shifted their loyalty to the Court. But members of the Court ensure that agents understand the challenges associated to adjudication in the EU. They will represent their government seriously, but they will also have received the cognitive tools to understand why they lose in Court at times. And the staff of the Court plays an instrumental role in that process. That is why government agents are structurally and unconsciously double agents.

The posterior trajectories of government agents show their proximity to EU institutions and to the Court itself. For example, former agent T. Henze now works at the registry of the Court; M. Szpunar, former agent for Poland, is nowadays the 1st Advocate General of the Court.

The CJEU and national governments are often depicted in political science as necessarily pursuing diverging objectives, the former aiming at more integration and the second attempting to preserve national sovereignty at all costs. This is more an epistemological assumption than a tested hypothesis in the case of national governments, which also happen to constitute altogether a legislative organ of the Union (and thus somehow agreeing to the interpretation of an *acquis* they contributed to create) and the constituent power (giving in the European Council the first impulse of all legislative and constitutional processes). Second, many political scientists claim that governments will try to reverse or contain the effects

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244 See the program of their training in December 2020 at: https://www.eipa.eu/product/litigate-cjeu/

245 See for example the program for the 2012 (https://www.era.int/upload/dokumente/13809.pdf), 2014 (https://www.era.int/upload/dokumente/16335.pdf), 2018 (https://www.era.int/upload/dokumente/19987.pdf) and 2020 (http://inm-lex.ro/wp-content/uploads/2019/12/Agenda-EU-Litigation-in-Practice-for-Agents-5-6-martie-2020.pdf) events.

of adverse rulings (see Martinsen 2015 for a successful demonstration in health and social policy). But we never read scientific accounts in EU studies of governments genuinely accepting the result of adverse rulings, because they accepted the idea that governmental acts will be brought before courts and lead at times to government losing cases. That fact is obvious for every national administrative lawyer: administrations do not always comply with the law and are subsequently held to account by administrative courts. But the very fact that the CJEU is "transnational" would change the acceptance threshold of adverse Court rulings, which would be consistent with the lesser input legitimacy at the transnational level. However, presuming that governments will always oppose adverse rulings is a bold claim. Government agents help as brokers between governments and the Court. They convey to the latter the genuine concerns of their national administration in a manner that respects process and multilingualism. And they will come back to their governments and explain the result of cases in ways that will increase the acceptance of adverse rulings.

5.1.2.4 A common EU law ethos: circulation of professionals, commemorations of commonly generated principles and sacralization of the Wise

Some professional requirements lead to tailor-made interactions with members of the Court, who know how to adapt to different subgroups of the profession, making judges genuine conductors of the EU law's orchestra. This could not be clearer than during great EU law events where this informal hierarchy of the EU legal profession takes shape in an unequivocal fashion.

EU law is the subject of major events that transcend the differences between various professional groups. Be they organized by the Court itself or by other institutions, CJEU members always take a prominent position in these gatherings. Court-led events show the insuperable role of judges in holding together the myth of integration-through-law and the great role the founding judges played for a better Europe. It has the structures and the funds available to invite many guests and organize conferences whose magnitude is only rivaled by great academic conferences such as the general conferences of the European Consortium of Political Research. The Court held such a great conference for the 50th

anniversary of *Van Gend en Loos*[246], which attracted major legal scholars from all other Europe[247]. The crowd was equally big but more diversified for the retirement ceremony of President Skouris in 2015[248], where representatives of all legal professions were present to acknowledge the work of the CJEU President for 12 years[249]. The Court plays a prominent role in other events that it does not organize itself, such as FIDE congresses, which are historically the most important EU law gathering (see Alter 2009; Vauchez, 2010 and 2015). It sends many representatives and provides logistical support (not least translators). The organizer of the 2018 FIDE Congress in Estoril and former AG and judge at the Court José Luiz da Cruz Vilaça could not summarize better how FIDE Congresses are truly run by the CJEU:

> Furthermore, all those who are familiar with the FIDE congresses know the commitment of the Court and its members to every conference, both their participation and their support to the organization. This time, the participation of the Court was particularly impressive: 30 members – judges, advocates general, registrar – made their registration for the Congress; 16 intervened as moderators or chairmen; 18 members of the Tribunal, including its President, participated in the Congress; 37 legal secretaries of the Court's and the Tribunal's chambers were also included, as well as 8 senior officials.
>
> In addition, as usual, the Court, together with the Commission, provided interpretation for the three official languages of the Congress and, during the opening and closing sessions, for the Portuguese language. Our warm thanks are thus due to these two institutions, to their executives and to the interpreters who, in the

[246] Press release 56/13, "50 years of direct effect of EU law benefitting citizens and companies", 7 May 2013, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2013-05/cp130056en.pdf

[247] See the program: https://curia.europa.eu/jcms/jcms/P_99078/en/

[248] Press Release 66/15, « À l'initiative de plusieurs Membres de la Cour de justice, un Liber Amicorum va être remis à M. Vassilios Skouris pour célébrer les douze années passées à la tête de l'institution », 5 June 2015, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-06/cp150066fr.pdf

[249] See the proceedings of "La Cour De Justice De L'union Européenne Sous La Présidence De Vassilios Skouris", 8 June 2015, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-11/actes_du_colloque_2015.pdf

> competent and devoted manner well known and appreciated by all, enabled the understanding of what was said during the Congress. Communication and dialogue have been made possible for all in this way.[250]

These events that gather representatives from all subgroups from the legal profession serve 4 main purposes: creation, commemoration, justification and silencing.

Creation refers to the common exercise led by judges and other legal professionals to forge common interpretative standards that give substance to EU law. Creation occurred heavily in the early years of FIDE in the 1960s and 1970s. At the time when the polity was still soul-searching and that many leading figures (such as W. Hallstein, A. Donner, M. Gaudet) across all EEC institutions were lawyers, FIDE congresses helped in giving flesh to the Rome Treaty. FIDE was already the "Mecca of Jurists" (Rassmussen 1986:266) where all efforts towards integration-through-law are crystallized. The creative role of big EU law events has diminished in the 21st century for a reason developed in Chapter 4: the legal order is no longer in search of constitutional engineering. The legislator has taken over in the 21st century and integration-through-Court is no longer a defining feature of EU politics today. Most discussions that lead to contributions in the more recent *Festchriften* or *Mélanges* in the honor of former great lawyers are more about their great contributions in reducing the complexity of the imbrication of the EU and domestic legal orders, rather than setting new innovative interpreting paths (e.g. in the honor of AG F.G. Jacobs, see Moser and al. 2008 and Arnull and al. 2008; and for President Skouris, see the huge collaborative and commemorative contribution edited by Tizzano and al. 2015).

Commemorations are about gathering great EU law personalities altogether so that they may recall and celebrate great decisions such as *Van Gend en Loos* and *Costa* or honor a retiring great member of the legal profession. Commemorations of great decisions and great names allows the Court to thank their members for their great service. They have a deeper and semi-deliberate function of *mythification* of these names and decisions. *Van Gend*

[250] See "Opening and Closing Sessions and PhD Seminar CONGRESS PROCEEDINGS VOL.4", Conference Proceedings of XVIII Congress, p. 10, at: https://drive.google.com/file/d/1dpwkGmZhM6dckFk2NrelY7-9VAzNukul/view

en Loos and *Costa* used to be simple rulings. Judges could not even recall the name of the former in the early weeks of 1963 (Vauchez 2015). 57 years later, after countless commemorating events, these 2 rulings have become the holy texts of EU law, and are taught as such in law faculties, thus reinforcing the mythification effect. The same occurs for great judges and AGs, although their names often require a deeper immersion in and knowledge of the judicial world: judges like Lecourt, Pescatore or more recently Jacobs have received the socio-professional equivalent of a *canonization*. This has a clear legitimating effect, since it gives to an institution like the Court, which is situated in a polity mostly deprived of symbols and common stories that historically shaped identities in settings like the nation-state, a judicial folklore that allows it to build its own mythical history, combining both historical facts and their metaphysical version. This process is hardly visible to the outsider – read the political scientist – because it requires a deep immersion into a world that does little to be known to the rest of the world.

Source: Conference "50 Years Van Gend en Loos", available at: https://curia.europa.eu/jcms/jcms/P_101113/

Justification has become the major role of EU law events in the last 2 decades. In the absence of further constitutional principles to be

"discovered" and with the delegation of sensitive policy issues to the Union, the CJEU had to take difficult decisions, for example in the fields of citizenships (*Ruiz Zambrano*, *Dano*) and economic governance (*Pringle*, *Gauweiler*, *Weiss*) that sparked a lot of criticism within and beyond the profession. These major events allow judges to speak plainly about the reasons that led them to take said contested decisions. They thus serve as fire-breaking situations allowing for a return of the peace in the profession. President Lenaerts said the following in the FIDE Congress in Budapest in 2016, after the CJEU's ruling in *Gauweiler* but still waiting for the BVerG to approve the result:

> It is important to emphasise that the Court did not decide Gauweiler in that way because it felt under external pressure to do so. As is, I believe, clear from the reasoning that I have just described, the Court decided the case in that way – as in my experience it always seeks to do – because, in the light of the arguments presented to it and on the basis of the legal analysis that it carried out, that was the correct result. One may of course disagree with that result, but the decision-making process in such critical cases is, I submit, sound.[251]

The legal profession has grown bigger and more critical over the past few decades. Public appearances by judges before many of their professional counterparts have equally become a transparency and accountability exercise.

Silencing is the correlate of the previous factor. Gathering illustrious names from the EU legal profession shows to proven and potential dissidents that these remain clear and identifiable outliers in a much larger group, whose majority has always approved and will keep supporting the EU's judicial institution. If not silencing, these events may even have a rallying effect of dissenters who must recognize, despite isolated 'misunderstandings', that the Court is sailing in the right direction. A crucial and symbolic example of the phenomenon is the invitation of BVerG's President Andreas Voßkule to Skouris' retirement ceremony. In an event in which many applauded the efforts of the retiring president, the President of the BVerG, stuck inside the Great Chamber of the Court,

[251] XVII FIDE Congress Conference Proceedings, at: http://www.fide-hungary.eu/images/fide4.epub

was not sitting where judges usually sit but in the spot where lawyers must traditionally convince judges[252], facing a group that overwhelmingly disapproved of the BVerG's aggressive tone of the previous year in the *Gauweiler* PRP. Voßkuhle had to tread carefully and weigh arguments in favor of less activism and respect for the Court:

> La Cour constitutionnelle fédérale allemande n'a pas la réputation d'être une admiratrice inconditionnelle de la Cour de justice […] The multi-level cooperation of European Courts not only functions in oft-described cooperation procedures, as for example by way of referrals from national jurisdictions. European cooperation is also filled with life by the direct exchange between judges. After all, case law is the work of people. For a European court, exchanges with colleagues from 28 Member States is particularly difficult to handle. Therefore, I find it quite remarkable how well the judges of the European Court of Justice manage to organise an intensive exchange across all borders. In the course of my seven years in office, not one year went by in which I have not met with colleagues from the Court of Justice. In fact, we met several times in order to discuss recent legal developments and to incite mutual understanding for differing legal traditions […] Dear President Skouris, we did not always agree on all matters relevant to our respective task. But I have always held you in high esteem as a reliable colleague, prudent judge and strong President, who has brought forward the European cause.[253]

One week after that statement, the BVerG received a response in the *Gauweiler* case that went counter to the aspirations of the 7 German judges that agreed to send a preliminary reference (the CJEU found that OMT did not disregard the prohibition of monetary financing). The 2 Courts, in the midst of a potential judicial war, met via their highest representatives and softened a relationship that had grown cold for nearly a year and a half. The literature talks often about "judicial dialogue" between the CJEU and national courts. Is there a true dialogue however when a party is outnumbered 20 to 1?

[252] See Actes du colloque, p. 5

[253] Ibid, p.15

5.1.3 Conclusion on participation as an element of process legitimacy: is adjudication a product of shared rule?

The CJEU is an independent court freed from political pressures. In practice, it shows a great connection with its environment, namely with representatives of the legal profession. Either via tailormade encounters with specific subgroups or via encompassing EU law events, the members of the Court show an atypical proximity with its subordinates of the same socio-professional group. Training, co-production, exchanges, commemorations, splitting judicial duties with national courts … the Court does not operate in a vacuum. It connects to its environment in a way that leads judges to voluntarily share their power. By being involved with its partners, the Court has become a systemic actor whose demise has become inconceivable to the rest of the profession.

Does coproduction mean shared power? Not always. The CJEU cannot avoid diverging understandings of the acquis at times – as shown for example by internal differences between the Opinion of the AG and the ruling (*Sturgeon*), or between the GC and the ECJ (*Kadi*). It means that the legal profession will not always speak with the same voice. More surprising but happening are cases where the Court sides against the majoritarian opinion of the profession that hypothesized that the Court would choose another solution. Such was the case of the "citizenship turn" (see Thym 2017; Davies 2018) allegedly started with *Dano* in 2014, where various pundits expected the Court to reject the limits brought to European citizenship by Directive 2004/38/EC. The interaction with the profession sparks a common reflection about the interpretation of EU law. But the entity that always takes the decision is the Court. As such, judges, AGs and the rest of the staff must respect further standards such as responsibility and transparency.

5.2 Transparency of judicial activity

Judges must be as open as possible about their activities. These "possibilities" may however be restricted from the beginning. Judicial secrecy is a constitutional principle across all member states and enshrined as such in the treaties[254]. It implies that most of the elements of

[254] Art. 15(1) TEU

a case remain concealed to the rest of the world[255]. Everything else should theoretically be made open to the public.

Transparency takes two forms. *Formal* transparency refers to the surface of the process and is about administrative access to Court documents (5.2.1). *Substantive* transparency refers on the contrary to the content of the Court's activities and especially about its reasoning. Legitimacy is about justification: a transparent court thus must spell out the reasons that led to take the final decision, while an *opaque* court would hide the factors leading to the outcome (5.2.2).

5.2.1 Enhanced formal transparency over time

Comparing access to documents between the 20th and the 21st century amounts to comparing apples with oranges. 1996 and 1997 are the years that mark the introduction of the internet at the court[256]. The Court started using this medium to publicize its various activities, especially in its annual report. The report contained until 2015 a summary of the Court's judicial activity of the ECJ, GC and CST (2004-2016) with statistics about preliminary references and the pace of proceedings. Until 2015, the Court exclusively communicated about case law. From 2015 onwards (with a change of presidency at the Court), the content of annual reports fundamentally changed. The report is now split into 3 documents. "Judicial activity" reports correspond to the former version of annual reports. "Management reports" became a novelty and highlighted the administrative side of the Court's activities: budget and spending, staff, organization of different services, etc. The third document called "Year in review" contains the summary of the 2 other reports in a short, reader-friendly document that target a broader audience than the usual experts who have the time and knowledge to go through the entire report. The Court became an institution that suddenly communicated about every aspect of its internal activity. EU law contains an obligation for EU institutions to report about their financial activities since the sovereign debt crisis hit the EU and that public debt and spending became the major

[255] See K. Lenaerts' speech at the CJEU's annual report press conference 2017, at: https://www.youtube.com/watch?v=b0M6q0iCwmc&t=1829s, min. 36:30 – 42:37 (in German)

[256] See annual report 1997, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/rapportannuel1997en.pdf, Foreword by ECJ President Gil Carlos Rodríguez Iglesias, p. 7-8

topic of conversation in Europe[257]. The change of management at the head of the Court also played a role in increased transparency. Koen Lenaerts became the institution's 11th president in October 2015. A long-time judge and scholar, Lenaerts spends a lot of time (see below) justifying the Court's actions and deploys many means to discuss the Court's legitimacy (Lenaerts 2013a and 2013b). While everyone will not agree with his take on contentious decisions such as *Zambrano*, the President of the Court shows that he regularly monitors the criticism made to the institution he has been serving since the early 1990s, including about transparency. The Court under his leadership also publishes all documents related to the external activities of judges, which is a major source of information used in this monograph[258].

Transparency is not complete, however. Judicial secrecy prevents the divulgation of judicial documents. Administrative documents should however be made accessible. The distinction between the 2 categories can be difficult at times, which may cause a concealment of information that should be made available (5.2.1.1). A specific element of the procedure that remains inaccessible for many are hearings at the Court. Citizens that go the courtroom will gain access to hearings. Those hearings are however not recorded, and the minutes remain unavailable (5.2.1.2).

5.2.1.1 The classification of administrative and judicial documents

In general, access to administrative documents was confirmed and codified by the Court itself in 2019[259]. Except for a few exceptions[260], access is granted to every person residing in the territory of member states. TCN or EU nationals residing outside of the EU do not have access. The reasons behind this decision remain a mystery but follow the letter of art. 15(3) §1

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[257] Regulation No 966/2012 on the financial rules applicable to the general budget of the Union, as quoted by the Registrar of the Court Alfredo Calot Escobar in the 2015 Management Report, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-06/rapport_gestion_2015_en_version_web.pdf, p. 7

[258] See the Members' code of ethics of the ECJ (https://curia.europa.eu/jcms/jcms/p1_743290/en/) and the of the GC (https://curia.europa.eu/jcms/jcms/p1_743291/en/)

[259] Decision Of The Court Of Justice Of The European Union of 26 November 2019 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions, at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D0210(01)&from=FR

[260] At art. 3

TEU. The Court provides enhanced access on site and allows for copies at the library. An online access is provided on the Court's website[261]. The library of the Court will answer within a month, send the requested document or explain the grounds for rejection (see below). This decision is subject to an appeal, via resending the request and, if unsuccessful, launching annulment proceedings.

The Court even started to disclose some judicial documents, namely most documents pertaining to cases settled more than 30 years from the date of the request[262]. While deliberations remain sealed, the rest of the proceedings, including arguments of the parties, are now available for cases handed down in 1990 or before.

More recent judicial documents such as pleadings of the parties, decisions of the President to confer a case to a certain judge-rapporteur and if to request an opinion from a AG or not (taken during the General meeting on Tuesdays) and of course deliberations remain protected by judicial secrecy.

The division between administrative and judicial documents is justified on the grounds of sensitivity and judicial secrecy. Member states adopted a similar principle[263]. When a document clearly falls within one category, there is no ambiguity as to whether it will be accessible or not. Problems occur though when documents are not easily classified as one or the other: these are mixed documents. In *API*[264], the Court had to examine an appeal made against the GC[265] about access to a document, and eventually decided not to follow the Opinion of AG Poiares Maduro[266] and to quash

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261 "Application for access to documents": https://curia.europa.eu/jcms/jcms/P_95917/

262 Decision of the Court of Justice of the European Union of 10 June 2014 concerning the deposit of the historical archives of the Court of Justice of the European Union at the Historical Archives of the European Union (European University Institute) (2015/C 406/02), at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1207(01)&from=EN

263 See e.g. the decision of the French CC, Decision 2020-834 QPC, 3 April 2020.

264 Joined Cases C-514/07 P, C-528/07 P and C-532/07, Association de la Press Internationale AISBL (*API*), 21 September 2010

265 T-36/04 *API* v *Commission*, 12 September 2007

266 Opinion of AG Poiares Maduro in Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, 1 October 2009

the appealed decision. API asked the Commission to release certain written submissions of several cases at the end of 1990s and early 2000s. The Commission unveiled some submissions – namely those of cases whose decision had already handed down – but refused access to submissions of pending cases. The GC held that the Commission's submission had to remain sealed until the hearing at the Court, otherwise the Commission would be subject to public pressures and would feel compelled to address outside interventions, noting that the RoP do not allow for third-party interventions (see 5.1.1.2). The GC felt however that, once the hearing occurred, there was no reason for the Commission to conceal its position even if proceedings were still pending. After API lodged an appeal against this decision, AG Poiares Maduro gave an opinion that favored the absence of a general principle of non-access to written submissions (because of the absence of common practices and hard law in the member states) and asked the Court to assess on a case-by-case basis whether to disclose documents or not. The ECJ took however the most restrictive position possible in terms of access. It argued that all mixed documents submitted to the Court benefit from a presumption of judicial secrecy, excluding the possibility of a case-by-case analysis. Moreover, it extended this principle even after the hearing was held in these cases, saying that disclosure may only happen once the proceedings are closed[267].

The decision takes a rather firm stance regarding unclassifiable documents. While the protection of judicial proceedings is not disputed, the suggestion made by the AG seemed relevant. In the absence of a clear belonging to a category, the Court shall not presume of the nature of the document and evaluate whether the request for disclosure is justified or not (Alemanno and Steffan 2014:34). The task would however become tedious for judges and the Court's staff if they were to check said documents in every case, and it would also run counter to another legitimacy standard: give justice "in time" (see 6.4.1).

5.2.1.2 The Court's visibility in hearings and impartial access for citizens

The hearing system presents a major incoherence when it comes to transparency. Hearings happen after the parties submitted their observations and serve the purpose of helping judges in raising the unclear aspects of a case. They are made available to citizens who wishes

[267] *API*, at 94

to attend at the Court. However, these hearings are not recorded. But all judges and lawyers have a potential audience within the walls of the Court. The difference between having a few citizens watching the proceedings on site and having many watching both live and online deserves a longer discussion.

There are several reasons not to record judicial hearings. The first stems from the comparison with member states: most member states do not allow recordings of hearings (Alemanno and Stefan 2014:36). Second, the facts of the case dealt in annulment proceedings or in civil service cases imply that judges and legal representatives discuss matters of private persons whose data privacy must be respected [268]. This principle does not hold however in preliminary references or appeals since these cases only raise points of law. Facts may often play a role in adjudication, even in appeal cases. Even when allegedly irrelevant, facts will weigh in the final decision. Some of the most contested decisions of the 21st century – e.g., *Chen* or *Zambrano* – seemed to occur in situations where the law could uphold (if not favor) some injustices detrimental to weaker parties, here TCN with EU children. The argument about the insuperable role of the facts (see 6.2.1) may not however be acknowledged as such by a court of appeal, precluding judges from embracing the argument.

There are on the contrary several reasons for the Court to record hearings. The first relates to transparency as a fundamental value of the Union. Second, it would end the incoherence of hosting people at the Court for hearings but not allowing the same opportunities to citizens that do not go on site. The Court publishes on Twitter short videos on the announcement of judgements to make justice a bit livelier[269]. Third, all infrastructures are already in place since all courtrooms are equipped with cameras (Alemanno and Stefan 2014). Fourth, the ECtHR has been

[268] See of course Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.119.01.0001.01.ENG&toc=OJ%3AL%3A2016%3A119%3ATOC

[269] See Lenaerts at the Court's 2017 annual report press conference, at 42:38: https://www.youtube.com/watch?v=b0M6q0iCwmc&t=2558s

recording all hearings since 2007, and has never found it be an issue[270]. Fifth, if hearings cannot be recorded for data privacy reasons, then cases only raising points of law could be recorded.

5.2.2 Substantive judicial transparency: The Court's reasoning

The use of an expert language means exclusion and opacity for most of the population. That does not however lead to a legitimacy deficit for judges. The latter's task is to ensure that the part of population that talks the same language – fellow legal professionals – considers that the work of the CJEU is open and transparent. It means that judges must expose the reasons that led them to reach a certain outcome.

5.2.2.1 Legal interpretation in the absence of arithmetic certainty: the combination of reasoning techniques

Occasionally, reasoning resembles algebra. The work of first instance courts follows that pattern. Facts are repetitive if not identical (e.g., divorce or driving under the influence of alcohol), they activate the same provisions of the legal order, and simply require from judges to compare certain thresholds (e.g. blood alcohol content or number of assets to be divided between spouses) with pre-existing solutions. These situations would refer to Hart's "core" cases.

Appeal courts will hear clear cases as well as cases that enter law's "penumbra". The first type consists in upholding or quashing the ruling of first instance courts because they did (not) correctly characterize the facts from a legal perspective or used a wrong legal base. Penumbra cases will raise doubts in the judge's mind about the meaning of the applicable law in the case. Following Hart's model, such factual situations do not perfectly fit existing statutes and thus require a bit of engineering.

Higher and supreme courts will hear many cases found in the penumbra. Higher judges only consider the legal aspects of the case[271]. Cases that make it this high in the judicial hierarchy and this far in the judicial process either suppose a motivated and wealthy litigant willing to exhaust

[270] See https://www.echr.coe.int/Pages/home.aspx?p=hearings&c

[271] Although they may in rare occasions settle the case once and for all and thus judging the facts.

all remedies available, and/or that a legal aspect of the case necessitates further clarification.

The intervention of CCs points towards a legal vacuum. When seized by other courts asking whether a statute is compatible with the constitution or not, constitutional judges are asked to interpret the constitution considering the renewed socio-economic context. CCs must do a balancing exercise between principles that have the same legal value and must decide which one primes over the other.

These different sides of the judicial process have significant implications for the CJEU. First, the more cases climb up the judicial hierarchy, the less algebraic they become. Second, the classification of cases along the "core-penumbra" axis requires the existence of various reasoning techniques. For example, having a normal textual application of drunk-driving offences will require a much different exercise than balancing 2 fundamental rights enshrined in the constitution. Third, the CJEU must then use one of the available various techniques available depending on the type of cases. The Court is not always the constitutional adjudicator of the Union. In annulment and infringement proceedings, the Court is a first instance judge and shall behave as such, whereas in preliminary rulings the Court is a constitutional body asked to help resolving a question of legal interpretation. It means that the CJEU will hear cases from both the core and the penumbra of the law, and it must be clear about it. Fourth, the Court is to ensure that the law is observed, which means that it must apply a variety of reasoning techniques that vary across areas of law and the existence of other sources of law (soft law, *jus cogens*, stc.) or not.

Reasoning techniques are judge-made. While reasoning is no arithmetical exercise, it involves a certain "reckonability" (Beck 2013:41), meaning a repetition over time and corresponding to shared understandings of legal reasoning. As such, these normative criteria of legal reasoning are socially observable practices, shared or at least acknowledged by many and/or criticized by a few.

Table 2 summarizes the various reasoning techniques of the Court (with an inspiration drawn from Beck 2013; Conway 2012; see reviews by Bobek 2014 and Dawson 2014; see also Bengoetxea 1993 and Sankari 2013). These are scholarly constructs and are thus not found as such in rulings. They are however known by the members of the Court who remain close to

academia. MacCormick's major distinction about 1st and 2nd order justification – the first referring to a classic textual deduction, while the 2nd would imply choices from the judge – are found and discussed in the work of all authors. Conway (2012:19-21) lists the various approaches that could potentially characterize the Court's approach – and argues in favor of an interpretation sticking closer to the text of the acquis. I identified 4 main approaches of reasoning, that correspond to either 1st or 2nd order justification following MacCormick's approach.

Table 5.2: Legal reasoning techniques of the CJEU

Reasoning technique	Effects	Type of justification
Textual interpretation	Little interpretative effort, corresponding to core cases (Hart)	1st order justification: deductive and quasi-arithmetical exercise
Originalist interpretation	Interpretation following original intent of the constituent power	Mix of 1st and 2nd order justification found in sources of law (e.g. *travaux préparatoires*) but in need of adaptation to a renewed socio-economic context
Teleological interpretation	Interpretation following the main objectives of the polity	2nd order or systemic justification: interpretation beyond texts, requiring broader sources such as general principles of law
Consequentialist interpretation	Absence of rule interpretation. Reasoning stems out of the judge's self-calculated consequences of the application of the textual, originalist or teleological interpretation	

These approaches are all visible in the case law of the Court. Historically, all lawyers know that the CJEU had traditionally favored the 3rd approach in this list. Teleological or purposive reasoning refers to adjudication of a specific case read in connection with the broad objectives pursued by the polity. Many scholars plead today for abandoning a reasoning that has become "meta-teleological" (Lasser 2004) and was historically instrumentalized to justify the expansion of EU law. Some plead for a more restrictive approach that could correspond to the textual approach in the table (Conway 2012; Horsley 2018: 270-7). Others do not challenge the Court's current interpretative approach and assess the Court against its own standards (Bengoetxea 1993). Beck (2013:291-4) claims that the various criteria of legal reasoning should be cumulative and that rulings should reflect all these tendencies.

There is no agreement about a hierarchy of techniques. Such a classification corresponds however to the density of the legal order, which changes over time. The argument against teleological reasoning states that telos was a viable technique at a time when the treaties were not substantiated by secondary legislation. Since the situation has clearly changed since the founding period of the EEC, the recourse to a teleological interpretation would have become superfluous nowadays.

5.2.2.2 the Court's difficulties in justifying interpretative choices

The variety of interpretative techniques implies that judges must justify their decision to choose one over another. Judges shall detail to a great extent the reasons for rejecting a textual interpretation and recourse instead to a 2nd-order justification. They have some freedom in that regard – e.g., the text is obscure, outdated, incomplete (*Coman*), incompatible with another provision of the same legal value, etc. – since the Court is institutionally entrusted to make these choices. If judges are applying the consequentialist interpretation, they must discuss counterfactuals and explain the reasons behind a particular solution.

Openness about reasoning choices serves several purposes: it makes clear to legal professionals who must accept judicial defeat that judging implies choices and shows to litigants that judges weighed in the various potential solutions to a case. Second, judges must alert the legislator in case of a lacunae in the acquis and try as much as possible to respect the separation of powers, while maintaining its obligation of choosing a side. Legal scholars know that courts become lawmakers in some cases, and that should not be automatically dismissed nor rejected. Should litigants be denied justice because the legislator did not foresee a potential situation? This would run against the common traditions found in the member states about judicial power. Judges may make law by themselves (*Sturgeon*) if they can demonstrate that they had no other option to solve a case. But this exercise demands that judges expose qualitatively and at length the motives.

Historically, the Court has been denounced to do exactly the opposite. In terms of a writing style, Pollack perfectly summarizes the criticism:

> In recent years, a growing chorus of critics has characterized the Court's reasoning as "magisterial," "clipped," "cryptic," and "uneven and unpredictable." The Court, it is often argued, is prone

> to delivering terse, thinly reasoned decisions that fail either to explain the logic underlying its rulings or to engage systematically with the arguments put forward by the parties and intervenors (e.g., the Commission and the member governments).
>
> (Pollack 2018:157, footnotes omitted)

Why has the Court allegedly fared so poorly about transparence regarding its reasoning? There is first an historical argument about the use of the writing style employed by the French *Conseil d'État*. The French supreme administrative court has always issued rulings with a single sentence! (Lindseth 2010). While this could imply a long sentence with many semi-colons, the style involves a limited choice of words. But the Court found its own writing tradition and may not always be accused of being cryptic.

A 2nd feature relates to the internal organization of the Court and the obligation for judges to issue collegial judgments (Lenaerts 2013a). Koen Lenaerts believes that it enhances the legitimacy of the Court because it leads judges to adopt a consensus on the wording of a ruling (Ibid.:46). But it also creates disadvantages. First, it does not account for the fact that judges vote on the decision and that a simple majority is required to decide the decision taken by the Court[272]. Vauchez (2015) showed that *Van Gend en Loos* was the result of the tightest vote possible at the time (4 to 3). It means that judges who disagreed with the majority must pretend that they adhere to the outcome. Dissenting opinions are not allowed at the Court, making it an outlier in the world of ICs and CCs (Kelemen 2018). The opinion of the AG would instead provide the Court's attentive audience with enough arguments, while a cryptic ruling would protect judges from the potential retaliation of their national governments mostly by not reappointing them to another mandate[273]. But it means that the Court – namely the judge-rapporteur – must eliminate every word that generates disagreements among judges. This has several potential

[272] Art. 32(4) RoP

[273] Which implies that the constituent power cares about preserving the secrecy of a judge's opinion but not of the AG's who has made his very clear. While it makes sense in quantitative terms since only 5 AGs are potentially concerned by the immediate retaliation of their government – although former AGs may later pretend to a judge's position (e.g. N. Jääskinen for Finland) and thus be deprived of such an opportunity – transparency implies an obligation of having the position of at least a few actors known.

counterproductive effects. The first leads to the cryptic writing style of the Court discussed by Pollack. Second, since judges made their opinion already known after the vote, the judge-rapporteur would take the lead and write the entire ruling, whose drafting may eventually go unchecked by the other judges. This means that the collegial nature of rulings may only be superficial. Third, the output of cases alone is not sufficient for the legal profession as justification. Lawyers must be convinced by the soundness of the decision. *Zambrano* is a good example. The outcome – the non-expulsion of a Colombian citizen with 2 EU children in Belgium, where he lived and paid taxes for years– seems totally just and may even be legally plausible. But the whole criticism that forced Koen Lenaerts to intervene so much in the years following the ruling (including quite recently: Lenaerts 2019) was about the short reasoning of the Court summarized fantastically by Niamh Nic Shuibhne in her contribution "Seven questions for seven paragraphs" (Nic Shuibne 2011). The reasoning of judges matters more to some lawyers than the result of the case. The professionalization and expansion of the EU legal profession ensures that some lawyers, even when approving the outcome of a case, will nonetheless feel compelled to denounce the Court's lack of argumentation. The main justification brought by some judges in some contested cases is precisely that they did not have any other option to adjudicate the case (e.g., Lenaerts 2013a; 2013b). Processual justification may overcome the contestation of results (*Dano*, albeit with difficulty). The means justify the end when judging. That is why process legitimacy may compensate for the lack of sources or outcomes of legitimacy when it comes to the CJEU.

5.3 The responsiveness of the CJEU

Even if adjudication is partly a process of shared rule with other legal professionals, judges must respond to queries about case law, whether the outputs of the Court are co-produced with fellow professionals or are the sole responsibility of the Court. Responsiveness matters more for the CJEU than for most courts. Its decisions have constitutional legal value and are difficult to contain or reverse in the EU legal order. However, it does not mean that judges should voluntarily have more self-restraint to compensate for an alleged activism of the Court, since both positions present an equal normative suboptimal solution in terms of accountability to citizens themselves. Responsiveness is a necessary consequence of the lack of overruling mechanisms of CJEU rulings: the

'overconstitutionalization' of the treaties give constitutional value to policies in the EU and by extension to rulings relying on treaty provisions (5.3.1).

Responsiveness may take 2 main forms. The first is about what Koen Lenaerts called the "stone-by-stone" approach (Lenaerts 2013a; 2015) and can be found directly in the case law of the Court. The Court would account for the criticism that it receives after certain rulings and would incrementally address the shortcoming in subsequent decisions. Examples abound in citizenship cases and more recently in economic governance (5.3.2).

Judges also use extra-judicial means to justify their decisions. While these encounters used to lead to legal engineering, they have progressively turned into justificatory encounters where the members of the Court free themselves from the constraints of the Courtroom and discuss at greater lengths the reasons that led them to these outcomes. While the purpose is not repeat the content and nature of the encounters developed in section 5.1, this part will briefly detail the extra-judicial justificatory techniques employed by judges (5.3.3). Finally, the Court is institutionally accountable to both the legal profession and to the constituent power and is not as untouchable as advocated by social scientists that developed the "trusteeship" thesis (5.3.4).

5.3.1 The necessary responsiveness of the CJEU: a consequence of overconstitutionalization

Many debates about the CJEU raise the question of judicial activism (Dawson and al. 2013). Political scientists mostly take it as a given when studying judicial politics, and search for extra-legal factors that allow or impede the Court's capacity to maximize its interests (Blauberger and al. 2018; Schmidt 2018; Conant 2002). Several legal scholars reject this premise, arguing that activism versus restraint is a misleading debate since the same judicial outcome may trigger drastically opposite reactions (Lenaerts 2013a; Clausen 2020).

The isolated activism of judges generates a small legitimacy deficit that can easily be overcome in most democratic societies. Scharpf himself (1999:15) saw that CCs could act freely without impeding democratic legitimacy if 2 conditions were met: 1) the Court is controlled by the legal community and 2) the legislator can override unwelcome rulings. While

the first condition is met (see chapter 3 and 4; section 5.1), the 2nd presents more difficulties. Grimm (2017; 2016) forged the concept of "overconstitutionalization", referring to an overloading of competences *and* policies in the treaties. Constitutions orchestrate the organization of the polity, and as such normally include provisions about governing institutions, the latter's competences and human rights. Since these are the most important features of our societies, constitutions may only be amended via supermajorities or referenda, and even include principles that may not be amended without changing the constitution altogether. Once enacted, these instruments are difficult to change. However, policies such as social or economic policy remain in most states at the legislative level, meaning that simple majorities can do and undo measures with fluidity. These policies are constitutionalized in the EU. Since the constituent power inserted them directly in the treaties, most policy objectives sit at the top of the hierarchy of norms in the EU. It also means that interpretations of the legal provisions that frame these policies are constitutional, including the case law of the CJEU.

Even when simple secondary rules such as regulations or directives are interpreted, the conditions for overrule remain demanding since the Council must gather 55% of member states representing 65% of the population to initiate a legislative change in areas governed by QMV, while unanimity remains the rule for other policy areas. Overriding CJEU rulings interpreting treaty provisions would require the same procedure as a treaty change. The situation occurred once, when the member states added the Barber Protocol to the Maastricht treaty to limits the effects of *Barber* that stated that the principle of equal pay applied *retroactively* to occupational pensions. While governments shared the idea of extending the principle of equal pay to pensions, the UK government insisted that the retroactive character of the Court's ruling would cost millions to the taxpayer. The Protocol thus confirmed the principle of *Barber* but limited its effects to situations posterior to the ruling. Used as the main (and only) example that governments can keep the Court under their control (Garett and al 1998; although see Pollack 2003 and Stone Sweet and Brunell 2012), the override of the judgement could only happen because of a peculiar socio-political context. First, the EU was in a constitutional mutation phase during the negotiations of the Maastricht treaty. The Court's decision did not start the overriding process. Member states were rather willing to change the nature of the Union, and could put everything on the table,

including the temporal limitation of *Barber*. Second, the case involved a rare issue area that triggers immediate reactions from national governments: budget. Budget and economic governance (*SGP* in 2004) cases are the only instances where governments bluntly overrode or ignored CJEU interpretation. In other areas of policy, governments in the Council maneuvered to partially codify rulings, e.g. in health policy (Martinsen 2015), but never opposed frontally the Court.

Legislative or constitutional overrides are remote possibilities in the EU. It means that rulings of a non-majoritarian institution may change fundamentally the nature of the Union and have lasting effects. That is why Grimm and Scharpf came up with innovative solutions to remedy this situation. Both called for a deconstitutionalization of the TFEU, either for the whole treaty (Grimm 2017) or at least for the most contentious policy areas that are economic governance and social policy (Scharpf 2017). In "After the Crash", Scharpf suggested to make overriding a common feature of European politics by submitting all CJEU rulings to the approval of the European Council that would approve or reject rulings by simple majority (Scharpf 2015).

These authors went even further and suggested that the CJEU caused the overconstitutionalization of the treaties, by adopting broad rulings that expanded the reach of EU law in decisions like *Francovich* or *Mangold*. This statement must be nuanced. Overconstitutionalization is not the result of judicial activism but is a feature of the legal system. The Court interprets provisions that were placed by the constituent power on top of the hierarchy of norms[274], and as such act as a constitutional court of the Union. The Court nonetheless contributes to worsen the phenomenon when it unduly expands the reach of EU law into areas left out of the

[274] Some get lured into a debate where the Court changed the place of EU law to place it on top of the legal order (which it arguably did in Costa) simply because judges insisted on calling the treaties the "constitutional charter" of the Union (see C-294/83, Parti écologiste "Les Verts" v European Parliament, 23 April 1986). The name of the constituting instrument has a symbolic (see the rejection of the CT in 2005 in the Netherlands and France) but not a practical effect. If a judicial overconstitutionalization ever occurred, it was in 1964, which gave ample time to successive governments to change the situation. They even inserted Declaration 17 to the treaties which states that member states accept EU law's supremacy in the areas conferred to the Union. Overconstitutionalization is thus a feature of the system and not (anymore) the product of judicial fiat.

treaties. Most of the time, this accusation is difficult to prove since the constituent power and the legislator do not often leave *explicitly* an area of public policy out of the reach of EU law. Proving overconstitutionalization in areas such as citizenship is ambiguous since it is difficult to know if the legislator left something out or simply omitted to address potential situations (e.g. in *Coman*; see 4.1.1). One may however have a general presumption of overconstitutionalization for the reasons addressed in the previous chapter: if the legislator has not addressed an issue of public policy, the deciding factor lies in the ultimate source of authority in democracies: the people and their representatives. If the latter did not include expressly a right or obligation in a legal provision, then CJEU judges should consider that the legislator *willingly* excluded such a competence. That was the position adopted by Herzog and Gerken when they violently criticized the Court for its *Mangold* decision. But the member states codified the Mangold decision in the Lisbon treaty by prohibiting discriminations on the grounds of age. This general presumption of overconstitutionalization is debatable at best from a legitimacy perspective, and history shows that the constituent power generally endorsed *ex post* the principles of the Court, even if only partially so.

Cases of judicial overconstitutionalization are however easily identifiable when the Court expands the reach of EU law in areas unequivocally left out of EU law or its jurisdiction. These situations are not frequent since the entry into force of the Lisbon treaty. But they happened in a few policy areas. The 1st is fundamental rights as articulated by the EU legal order and understood as primary law by the Court. Concerning the application of the CFR, member states clearly indicated in art. 51(1) that the instrument applies only when the member states are *implementing* Union law. But the Court decided in 2013 that the activation of the Charter resulted from the use of provisions that enter the *scope* of EU law, equating scope with implementation[275]. Another area of identifiable judicial overconstitutionalization is the immersion of the CJEU into CFSP matters after the entry into force of the Lisbon treaty. Art. 24(1) TEU clearly excludes the jurisdiction of the Court in this area, except for a few procedural matters. While the Court did not oppose this frontally, it used

[275] C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013. The interpretation did nonetheless not cause much contestation because the *travaux préparatoires* of the CFR hinted at that broad definition.

"hidden ways" to get a grasp of CFSP provisions (Eckes 2016). In these cases, the Court cannot say that the legislator or the constituent power lacked in clarity as to whether a competence pertains to the jurisdiction of the Court or not.

Whether judges are responsible for overconstitutionalization or not, they will always be at the center of the debate. The existence of this feature leads some scholars to ask for judicial self-restraint (Schmidt 2018; Beck 2017). While there is an argument in favor of preferring restraint over activism, since judges cannot in principle usurp the legislator's competence, restraint also constitutes a suboptimal normative performance. Restraint supposes that judges adopt a consequentialist logic asking them to choose the interpretation that will lead to the weakest judicial intervention possible. It thus demands to set aside textual, originalist and teleological considerations aside. Restraint would have the positive consequence for critics like R. Herzog to respect the national particularities of each member state by avoiding "one-size-fits-all" solutions at the transnational level. But advocating restraint on a general basis also has a perverse consequence of withdrawing the stability associated to legal certainty. If citizens may no longer use the texts of the acquis as a base of their expectations but must start a counterfactual calculating process leading to potentially divergent expectations) which is the criticism made to the Court when speculating about the EU's telos), it will reduce certainty and increase litigation prospects. While increasing the flow of cases has been described has a potential strategy of the Court to extend its influence[276] (Schmidt 2018:56), it also raises the prospect of further contestation of the Court's authority, especially since the new areas of competences delegated to the Union are salient and polarizing. While restraint normatively preferable to activism for an institution that

[276] The argument about maintaining uncertainty in order to receive more cases – which would allow the Court to incrementally expand its reach over EU law and European politics – would potentially describe the Court of the early years of the EEC. This normative power-based argument is thought-provoking, but it can hardly be subject to empirical testing, and conflicts with other priorities and legitimacy standards of the Court, especially the objective of reducing the backlog of cases and thus to fulfill another legitimacy standard of giving justice within reasonable time. The increasing use of Adjudicatory orders (Naurin and al. 2020) allowing the Court to evacuate cases without adding further content to the legal order would indicate precisely the contrary.

is both non-majoritarian and transnational, these are both suboptimal alternatives.

The debate of activism versus restraint in light of overconstitutionalization blurs the bigger picture about the Court as a responsive forum. Judges are entitled to interpret the law in a non-restrictive fashion if they follow the reasoning techniques shared by the profession. But they must also be wary of the system they evolve in, namely a system where override is more a theoretical than a genuine possibility. All interviewees working at the Court admitted that making mistakes in interpreting the treaties is more than a possibility and happened in the past. But without correcting mechanisms from the other branches of government, the Court itself must monitor the aftermath of rulings and rectify the situation.

5.3.2 Taking stock of criticism

Judges are responsive when they issue rulings that answer questions raised in previous decisions or take the matter away from Luxembourg as they directly reach out to their audience.

5.3.2.1 The judicial response

How can and how does the Court address stress? Judges may rectify the course of actions in subsequent rulings. Some areas of case law are more susceptible than others to generate contention in the profession. The first category relates to competences enshrined in the treaties that received extensive precisions via secondary legislation, e.g. right to residence in another member state, cross-border healthcare and economic governance (see 4.1.1.2). These instruments have something in common: they restrict the general principles of EU law as enshrined by anterior case law. Rulings with constitutional value limit the legislator's margin of maneuver and reduce the number of policy options (Schmidt 2018:93-9). The legislator thus never opposes judicial interpretations but finds ways to limit the scope of judge-made principles. The Citizenship Directive clearly shows that member states sought to strictly regulate access to social benefits for economically inactive citizens, impose administrative registration for citizens residing for more than 90 days in another member state, and even state grounds for refusing the entry of some EU citizens (e.g. public order and public health), starting "The Third Age of EU citizenship" (Nic Shuibne in Syrpis 2012:331-62; see Yong 2019 for an alternative view).

Between the adoption of EU citizenship in the Maastricht treaty and the directive, the Court had to settle cases about the reception of social benefits in the meantime (e.g. *Martinez Sala* or *Baumbast*) and chose to assume following art. 48 TEC (now art. 45 TFEU) that the rights provided to EU workers going to another member state were since 1993 extended to all EU citizens. Subsequent cases thus had to consider the entry into force of the directive. It did so in a quite unnoticed fashion in *Förster* in 2008. *Förster* is a bizarre case that bridges the times when the Court had an expansive definition of citizenship provisions with the "citizenship turn" that saw the Court adopt a more restrictive approach in regards the right of residence in another member state. The role of directive 2004/38 EC went unnoticed in that case (although see Mataija 2009) because it was *legally* not applicable in the case at hand. Jacqueline Förster was a German citizen who went to the Netherlands to work and study. She had a few jobs that she thought would entitle her to receive some subsidies for her studies. But since she did not have an employment in the Netherlands for a few months in 2003 and did not reside for an interrupted 5-year period in the Netherlands, the Dutch administration denied her request. Förster argued on the contrary that she was integrated enough to the Dutch society to be considered like a Dutch national. *Förster* is not a normal case because posterior legislation came to justify the restrictive interpretation in a case whose facts occurred at a time when the Court adopted a different line, including a few months before in *Bidar*[277]. In the middle of long proceedings, the legislator adopted the Citizenship Directive (to be transposed by April 2006), which imposes 5 years of residence before getting access to social benefits. The ECJ remained active in helping unwealthy EU citizens, saying that Mr. Bidar – a French student in the UK – could not be excluded from financial assistance programs because he had the nationality of another member state. In early March 2005, the Dutch administration (IB-Groep) refused to grant Ms. Förster the help she asked for. A few days *later*, in reaction to the Bidar ruling, the Dutch administration (IB-Groep) adopted a "Policy rule on the adaptation of applications for study finance for students from the European Union, European Economic Area and Switzerland"[278] saying that helping

[277] C-209/03, The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills, 15 March 2005

[278] With the text in original version: https://wetten.overheid.nl/BWBR0018310/2005-05-18/

financially EU students from other member states would only become automatic after said students had resided for 5 years in the Netherlands – which means a *de facto* transposition of Directive 2004/38 EC for the specific case of students. The directive entered into force in April 2006, and the Court gave its ruling in November 2008. While the citizenship directive and the Policy rule did not formally apply in the proceedings, they played a huge role in the resolution of the case:

> 55 In that connection, Directive 2004/38, although not applicable to the facts in the main proceedings, provides in Article 24(2) that, in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families, the host Member State is not obliged to grant maintenance assistance for studies, including vocational training, consisting in student grants or student loans, to students who have not acquired the right of permanent residence, while also providing, in Article 16(1), that Union citizens will have a right of permanent residence in the territory of a host Member State where they have resided legally for a continuous period of five years.
>
> 56 The Court has also stated that, in order to be proportionate, a residence requirement must be applied by the national authorities on the basis of clear criteria known in advance (see Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 72).
>
> 57 By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the residence requirement laid down by the Policy rule of 9 May 2005 is, by its very existence, such as to guarantee a significant level of legal certainty and transparency in the context of the award of maintenance grants to students.
>
> 58 It must therefore be stated that a residence requirement of five years, such as that laid down in the national legislation at issue in the main proceedings, does not go beyond what is necessary to attain the objective of ensuring that students from other Member States are to a certain degree integrated into the society of the host Member State.

To whom should the ECJ have been responsive to in that case? To Ms. Förster, whose case did not legally trigger the use of posterior provisions of the acquis[279]? Or to the legislator and member states that made clear that the *Baumbast-Martínez Sala* line of interpretation was over, and that the right of residence was subject to stricter conditions from 2006 onwards? The Court clearly chose the latter option, embracing the intent of the member states in the field of citizenship. *Förster* is an extreme case from a legal standpoint. It shows the complexity of a moving legal order and the consequences it bears on litigants. But it also shows that the Court shows some deference to the legislator and the member states, even in case where the outcome may arguably be seen as unfair for the losing party.

The 2nd type of cases where the Court must make judicial adjustments are in "newer" or recently activated areas of public policy in the legal order. While most policies in the treaties have been pooled during the 20th century and/or never generated much litigation, the more recent introduction of former core state powers in the EU legal order did not benefit from much secondary legislation or precedents. Economic governance is a case in point. While formally enshrined in the Maastricht treaty – which developed the various stages towards the EMU – these provisions could not have many effects before the entry into circulation of the euro in 2002. Except for a few developments in 2004 when France and Germany were not complying with the rules of the stability and Growth Pact (*SGP* case) but quickly compromised in the Council, economic governance did not trigger contention until the outbreak of the sovereign debt crisis. While the legislator and the constituent power tried as much as possible to cover every legal aspect of the new tools adopted to fight the crisis, including the adoption of instruments outside of the legal order, they did not precise whether Memoranda of Understanding (MoU) were acts of EU law, and whether the CFR applies to member states and EU institutions when acting within the ESM framework. The Court adopted a restrictive approach in cases ruled during the "fast-burning phase" (Seabrooke and Tsingou 2019) of the crisis and could hardly have done differently given the time constraints (see 6.4.2). In *Pringle*, the Court gave

[279] Of course, the Court did not apply these instruments directly in the case. But its proportionality test – assessing in light of *Bidar* if the requirement of 5 years of residence was proportionate to conclude to the integration in the society of another member state – cannot be read realistically without the influence of posterior laws described in the case (something the Court bluntly admits in the ruling).

its blessing to the ESM but did not precise whether the Charter played any role when EU institutions, acting outside of the EU legal framework, were conducting policies similar to those enshrined in the treaties (Dermine 2017). When asked whether MoUs could trigger the application of the Charter since these were signed by EU institutions (via the ESM), the Court denied the requests on grounds that MoUs are not part of EU law and cannot activate the use of the Charter[280]. Responsiveness followed a reverse path that time. While national governments welcomed decisions that did not hinder their measures to tackle economic hardship, various subgroups of the legal profession exposed their discontent with restrictive rulings. MoUs received a hard criticism from various other IOs like the Economic committee of social rights[281] and the Human rights commissioner of the CoE[282]. The Portuguese constitutional court reviewed, in the absence of CJEU intervention, the compatibility of MoU obligations with its constitutions and found several violations of fundamental rights[283] (Canotilho and al. 2015). The Court eventually took stock of the various pleas and found that the Charter was applicable to EU institutions even when acting outside of the EU legal framework, opening up possibilities of damages in case of harm caused by the Commission and the ECB via the ESM (in *Ledra*). Moreover, the Court abandoned its restrictive interpretation about MoUs (at least regarding balance of payments as enshrined in art. 143 TFEU) in *Florescu* where it considered that the Charter was applicable to situations where the Romanian government implemented austerity measures as a result of the conclusion of a MoU

[280] Case C-128/12, Sindicato dos Bancarios do Norte et al. v. BPN, 7 March 2013; Case C-264/12, Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelitate Mundial26 June 2014; Case C-665/13, Sindicato Nacional dos Profissionais de Seguros e Afins v. Via Directa, 21 October 2014

[281] General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Collective Complaints Nos. 65-66/2011, decisions of 23 May 2012

[282] Council of Europe Commissioner for Human Rights, *Safeguarding Human Rights in Times of Economic Crisis* (2013)

[283] Portuguese Constitutional Court Decision 399/2010 (Surtax on Personal Income Tax 2010); Decision 396/2011 (State Budget 2011); Decision 353/2012 (State Budget 2012); Decision 187/2013 (State Budget 2013); Decision 474/2013 (Public Workers Requalification); Decision 602/2013 (Labour Code); Decision 794/2013 (40-Hour Work Week); Decision 862/2013 (Pensions Convergence); Decision 413/2014 (State Budget 2014); Decision 572/2014 (Special Solidarity Contribution 2014); Decision 574/2014 (Pay cuts 2014-2018); Decision 575/2014 (Special Sustainability Contribution)

between Romania and the Commission[284] (Dermine and Markakis 2018:645). It took an even stance in the *Portuguese judges* case where the Court claimed that austerity measures enshrined in MoUs could not threaten the independence of the judiciary (including the national judge as EU judge of first instance) on the basis of the art. 19 TEU, rather than using the CFR[285].

5.3.2.2 The judiacademic response

Judges participate in academic circles (see 5.1.2.2). But they do more than participate in the discussions of editorial boards. They co-produce doctrine. Their scholarly contributions also take the form of justification pieces, in which they may – freed from the constraints of the Courtroom and of its formal rules of procedures – talk about the content of the Court's activities. These articles are of different nature. Doctrinal contributions co-exist with articles and chapters that explain the internal functioning of the Court (e.g. Kokott and Sobotta 2014 about multilingualism; Rosas 2014 about hearings; Naômé 2012 about the Court's attribution of cases) or deal with broader questions of comparative law with other systems (e.g. Lenaerts and Gutman 2016).

Members of the Court invest heavily in that exercise. Judges and AGs published more than 1000 publications (as defined by Google scholar) in the 21st century while being sworn in office (see Figure 5.1). These publications create a retrospective discourse about the soundness of the Court's case law, while addressing conflicts and diverging interpretations that judges faced when trying to solve the case. While readers may keep disagreeing with the interpretations made by judges in a more informal capacity, the latter show that criticism does not remain unheard.

[284] See, following Council Decision 2009/458/EC of 6 May 2009 granting mutual assistance to Romania, the MoU at: https://ec.europa.eu/info/sites/info/files/ecfin_publication15409_en.pdf

[285] C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas (*Portuguese Judges*), 27 February 2018

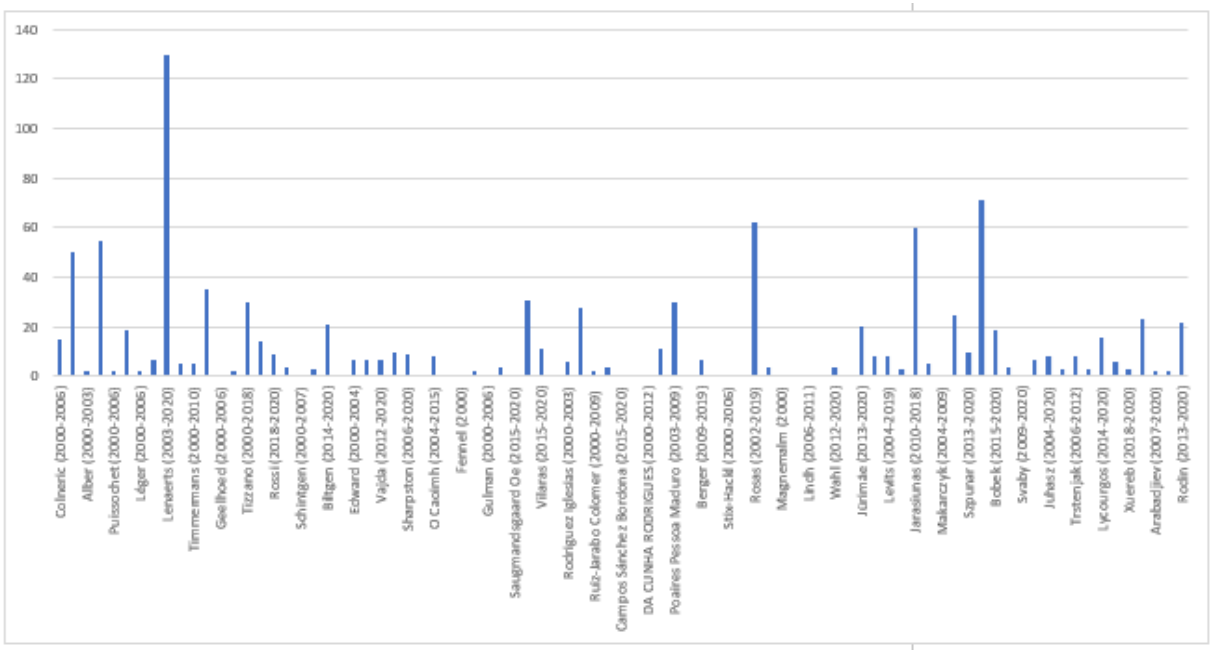

Figure 5.1: Academic Publications of judges while sworn in office (2000-2020)

Source: Google scholar (Example for Colneric: *author:"Colneric, Ninon"* in the period 2000-2006)

5.3.3 The institutional accountability of judges

Judges are not totally insulated from political pressures. Dunoff and Pollack had the CJEU scoring high on accountability in their judicial trilemma. The main factor would be the renewable terms of judges, that would make them wary of potential reactions from their national governments, which means scoring low on transparency since judges would conceal their opinion as much as they can. The prohibition of dissenting opinions and the presumption of collegiality in taking decisions protects judges from being spotted by unpleased reappointing authorities (5.3.3.1). Judges are also institutionally accountable to their peers of the legal profession, since representatives of the latter examine the conditions leading to their appointment in the 255 committee (5.3.3.2).

5.3.3.1 Political institutional accountability

National governments have the power to change judges after the end of a term. The evidence is scarce: the only documented example relates to Germany's refusal to reappoint Manfred Zuleeg in 1994 (after just 1 term in office) because Chancellor Kohl allegedly did not enjoy the Court's case law on social security (Dehousse 1998:12). Identifying the individual impact of judges in contested cases is difficult. Since rulings are collegial decisions, at least 3 judges must decide on a case. Most are decided by

chambers of 5 judges, sometimes 3, 15 in the Grand Chamber for new questions, and in rare cases the full court. The complexity and sensitivity of cases is masked by the presence of other judges whose vote remains secret. Removing a judge from office would either require tracking down all the cases he has been a part of or blame the entire institution by making the non-reappointed judge a scapegoat. AGs do not have the luxury of anonymity, but since their opinions are not binding, retaliation prospects would be less fearsome. Historically, almost all judges and concerned AGs seeking reappointment have been reappointed. The most experienced members at the ECJ in 2020 are Julianne Kokott, Rosario Silva de Lapuerta and Koen Lenaerts, who joined the institutions' highest bench in 2003, meaning they have been reappointed twice. If national governments held strong misgivings against the CJEU, it never jeopardized the stability of the ECJ. The GC cannot be much of an example here, because of the recent reform of the CJEU that doubled the number of judges at the GC. Only 4 of the current judges were sitting at the GC before 2013 (the veteran in Marc Jaeger, member of the GC since 1996), showing lesser stability, but this is not a consequence of governmental decisions not to reappoint judges. The increasing judicial endogamy effect and the experience requirement of the 255 committee leads many governments to pick GC judges to become ECJ judges (5 of the 27 judges as of February 2021), thus causing an instability of the GC which paradoxically means the stability of the whole CJEU.

From a normative point of view, the accountability of judges of the CJEU is high since governments choose their judges and AGs at least every 6 years, if not before in the case of a retiring judge. October 2021 will be an important phase of the accountability of the Court's highest members, since some their most experienced members are ending their 3rd consecutive 6-year terms (including the President and the Vice-President). After a decade of crises in the EU, reappointing these members (unless they choose to retire) would be a crucial manifestation of belief in the Court's legitimacy. In that regard, Polish judge Marek Safjan's term is also up, making things interesting from a broader political and "Rule-of-law" debate.

5.3.3.2 Socio-professional institutional accountability

The exercise of the 255 committee is of major importance in this monograph, because it already plays a role in the Court's sources of

legitimacy in demanding outstanding socio-professional properties for judicial candidates (see 4.2.2). But the committee also plays a processual accountability role because of its composition. Art. 255(2) TFEU states that:

> The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

The committee in charge of monitoring the suitability of candidates for the positions at the CJEU is composed by fellow legal professionals. These are high-profile names from the EU legal profession. 3 different panels have served since its creation in 2010 and had the following members.

These people are among the most successful legal professionals in Europe today. Except for the MEP that sits on the committee, all 255 committee members are former CJEU judges or current supreme court judges. Being appointed by this panel of experts is a great socio-professional endorsement and being reappointed by these experts is a proof of socio-professional institutional accountability. The panel is composed by CC judges whose relationship with CJEU judges are allegedly cold. Getting CC judges to endorse CJEU members will thus practically soften the impact of adverse decisions.

Table 5.3: Composition of the 255 committees (2010-2020)

Name	Function			Name	Function			Name	Function	
1st Panel	2010 - 2013			2nd Panel	2014 - 2017			3rd Panel	2017 - 2020	
J.M. SAUVÉ	Vice-President of the Conseil d'Etat	President		J.M. SAUVÉ		President		C. TIMMERMANS	Former ECJ judge	President
P. JANN	Former ECJ judge			L. BERLINGUER	MEP			S. BUSUTTIL	MEP	
L. MANCE	UK Supreme Court			P. KOSKELO	Finnish Supreme Court President			F. CLARKE	Ireland's Chief Justice	
T. MELCHIOR	Danish Supreme Court President			L. MANCE	UK Supreme Court			C. LESMES SERRANO	Spain's Supreme Court President	
P. PACZOLAY	Hungarian CC President			P. PACZOLAY	Hungarian CC President			M. MARTINS DE NAZARÉ RIBEIRO	Former GC judge	
A. PALACIO	Former MEP			C. TIMMERMANS	Former ECJ judge			A. VOSSKUHLE	BVerG President	
V. TIILI	Former GC judge			A. VOSSKUHLE	BVerG President			M. WYRZYKOWSKI	Fomer CC judge in Poland	

Reappointments have never been opposed by the 255 committee. Its members indicated nonetheless that they would in the future consider doing so. They will in October 2021 use quantitative criteria such as the pace of proceedings of judges to make their evaluation[286]. The idea of not awarding a free pass to judges seeking reappointment will potentially increase the current members' sense of accountability. However, the criteria mentioned by the 255 committee to examine reappointments are questionable. First, these criteria have no legal basis. Of course, the committee members are empowered by the treaties and by the Council that accepts its composition to perform the selection with a certain margin of maneuver. But since these criteria will be self-made, the 255 panelists will need to justify the why and how questions behind the criteria selection (e.g. similar processes found in member states, etc.). Second, the committee hinted at quantitative evidence to assess the content of decisions. While some features of adjudication may be aggregated to form a large-N sample and allow for a test of variables such as pace or proficiency over time, the internal judicial architecture of the CJEU makes it difficult – just like for national governments – to assess the individual impact of judges. The latter are part of chambers, thus making the influence of one judge compared to its 2 or 4 colleagues hardly identifiable. The only discriminating element would be to assess cases where the judge was a rapporteur. The comparison will also become dangerous at the GC because of the specialization of chambers[287]: 4 will deal with civil service cases, six with intellectual property (IP) cases while all other cases will be distributed equally across all chambers. What are the objective criteria of a fair comparison between civil service and intellectual property cases? In any case, these criteria will require an arithmetic exercise that will likely demand the intervention of external statistical experts, meaning that the panel will not be alone anymore in assessing the socio-professional suitability of candidates.

5.4 Conclusions on the processual legitimacy of the Court: the unavoidable trilemma?

Dunoff and Pollack (2017) analyzed various institutional features of ICs. They found that they can only achieve great results in 2 out of the 3

[286] Sixth Report 255 committee, p. 14-5

[287] 2019 Management report, p. 6

patterns of IC institutional design, which correspond in the present monograph to the 3 main vectors of processual judicial legitimacy: independence, transparency and accountability. In the case of the Court, independence and accountability would be high while transparency would be low. The analysis undertaken in this chapter only concurs with that statement.

While the degree of independence vis-á-vis national governments is high but not absolute, the Court shows on the contrary a great degree of participation with fellow legal professionals. Instead of remaining isolated in the walls of the Kirchberg Palace, judges, AGs and référendaires often travel to conferences and seminars to meet their colleagues. Participation makes some other members of the legal profession as 'co-interpreters' (scholars) and 'co-enforcers' (national judges) of EU law, making the Court a systemic body of the legal profession in the EU. In terms of transparency, Pollack and Dunoff stress the shortcomings of the EU judicial system. The Court does not open itself to the world easily, e.g. by recording its activities and putting those available to the citizens of the EU. The members of the Court try to mitigate this by exposing the Court's activities via non-judicial means, freed from the constraints of the courtroom. Finally, in terms of responsiveness, the CJEU performs rather well, being responsive to governments but also to their professional peers. The 255 committee embodies the endorsement and accountability exercise to the legal profession. Except for a single and simply correlational example in the 1990s, CJEU members were for the most part reappointed. Governments had the possibility to remove judges who chose to adopt bold and adverse decisions in *Chen*, *Mangold*, *Kadi*, *Zambrano*, *Kücükdevici* or *Akerberg Fransson*, but they never did.

The Court and its members have earned the respect of successive national governments despite the purposive interpretation bias of the Court. Rousseau said that the legitimacy of institution is never more visible than when it is tested. For an individual judge or AG, this test comes every 6 years. Their successive reappointments show that national governments consent to lose sometimes in court. Losing is a part of democracy if it is justified. That justificatory part remains however the weakest part of the Court's processual legitimacy. Concealing its interpretative choices and pretending that other interpretation paths were closed does not sit well anymore with a legal profession that is well acquainted to legal reasoning.

Openness and transparency allow for a dialogue with the legislature and eventually for rectifying incomplete contracts.

Processual legitimacy potentially matters more to the legal profession than outcome legitimacy. Process and outcome are intertwined: judicial outputs are in the best of cases a logical consequence of following due process and reasoning. Process will even justify some criticized decisions, either to governments (*Kadi*) or to the profession (*Dano*). Good adjudicatory processes may compensate for shortcomings on the input or output of the CJEU.

Outcomes matter though. First, while the Court generally respects the processual steps described in this chapter, it may fail to do so on a few occasions, or judges may not have the time to be as available and accountable as usual (see 6.4.2). The output legitimacy remains a major factor for a non-majoritarian institution like the CJEU. However, as undeniably argued by Schmidt there (2013), output and throughput were historically treated together and not analytically separated. The next chapter will focus on output alone and try to highlight the normative standards that the Court must try to achieve independently of sources or process legitimacy.

Chapter 6

Judicial Outcomes: The Output Legitimacy of the Court of Justice

Non-majoritarian institutions like the Court must produce sound outcomes in order to be democratically legitimate (Scharpf, 1999). While powerholders elected via the ballot box possess some relative leeway to perform imperfectly, the very ability of experts like judges to deliver sound judgements remains key in establishing their right to constrain the choices of other members of society (Levasseur, 2002). While judges may possess a certain stock of legitimacy based on their rationalized procedure of appointment (see 4.2) and a flawless due process (see chapter 5), judges may suffer a legitimacy deficit, potentially leading to their disempowerment, with a single decision. The South-African Development Court (SADC) remains the main example of a transnational adjudicatory body that was put to a (permanent) halt after a single "socio-politically dissonant decision" (Achiume in Alter and al. 2019: 124-46) did not account for unwritten societal norms regarding the expropriation of land in the region (Ibid.; Alter and al. 2016).

While it is easy to claim that outcomes matter more than anything else in international adjudication, the definition of a sound legal outcome remains ambiguous. The Luhmannian legal/illegal binary code should prove a normal starting point for any enquiry about courts. Yet other factors associated to judicial activity may come into account: are justice, effectiveness or redistributive stakes important to transnational adjudicatory bodies like the CJEU? I will discuss these questions in Section

6.1 and will show how inconclusive such debates remain. The normativity associated to these concepts prevents any social scientist from providing any type of unequivocal definition of sound judicial performance.

Most do not disagree on the contrary on the Court's mission to solve problems. If rules were clear, unequivocal and covering any type of social situation, there would not be any need for a third branch of government. Judges perform the task of solving issues that the legislator and executive authorities did not foresee. In the history of the EU, the Court solved many situations left unanswered by political authorities. Judges come therefore to "supplement", i.e. complete the treaty framework (Horsley 2018). While the idea appears simple, solving problems may generate further complications depending on the principles at hand. Solving an issue in a case like *Zambrano* by using dubious, unforeseen arguments may appease tensions on the short term, but also open a Pandora box of endless criticism that judges will never contain. The opposite technique – a closer textual interpretation of the acquis – may equally generate contention in a legal profession acquainted to broader systemic interpretations of the treaties. *Dano*, the ruling that allegedly started the citizenship turn (O'Brien 2017; Thym 2015), generated such a reaction (6.2).

Joseph Raz said that the authority of an institution is justified if it allows for better compliance with rules. In other words, the activities of an institution should actively modify the behavior of participants (Raz 1988). In simpler terms, the CJEU shall enhance better compliance with EU law. However, compliance is the result of the combination of both persuasion and enforcement tools (Panke 2011), and courts are deprived of the latter. Compliance with their decisions results from the voluntary submission to its rule in order to constitute an indicator of legitimacy (6.3).

Temporal elements affect the outcomes of the Court. Sound results over time will help a Court augmenting its "reservoir" of support (Easton 1965, 1975). Time also refers to the length of proceedings: the CJEU shall be as quick as possible in delivering its judgements, not only because the process of a preliminary ruling procedure (PRP) – which constitutes the bulk of the ECJ activities – substantially extends the time span between the submission of a case and its resolution, but also because the Court may be start suffering from an accumulation of cases it cannot deal with without accumulating a significant backlog. Moreover, the hands of the Court are tied when judges are running out of time. The judicialization of

governance traditionally occurs late in a policy process, meaning that courts assess statutes years after their original enactment. Political crises however tend to shorten this cycle and place the Court along with the legislator and the constituent power in charge of dealing with the effects of the crisis, making it difficult for judges to rule against political institutions, independently of the content of applicable legal provisions (6.4).

6.1 The controversial criteria of good outcome performance: beyond legality? On justice and effectiveness at the Court

Judges enlighten the meaning of the provisions and say whether these have been correctly applied or not. Legality is the result judges should aim for. Yet legality is not always obvious. Some lawyers contend that the Court must come up with 'the' correct interpretation of the law. This would imply that there is a single resolution to every case, which would be found according to the Kelsenian belief that the legal system provides itself the answer to every question (see Cohen 2012:26-40). Others on the contrary claim that rulings must simply be credible or plausible. Decisions would not find a resolution determined exclusively by legal considerations, but by external factors that complement what the law cannot itself resolve. Alec Stone Sweet stressed that constitutional justice proved as much a political exercise as a judicial one, since judges must balance principles with the same value (Stone Sweet, 2000). Specialists of the Court's legal reasoning stressed the existence of "steadying factors" (Beck 2013: 332-36; Dawson, 2014) having an impact on how the Court reasons cases. While most issues brought before the Court simply require clarification that judges can find in the legal system itself (proper legal basis, respect of precedents, correct interpretation, etc.), some cases require a balancing act involving extra-legal considerations.

6.1.1 Legitimacy and justice: synonyms or antonyms?

The literature on international courts stresses the importance of other factors than legality to ensure the acceptance of court decisions (Grossman and al. 2018; Squatrito and al. 2018). But statutes do not always offer a legal solution, e.g. in case of conflicting norms of the same value. What other factors do judges consider to adopt legitimate decisions that do not flow logically from statutes?

Sellers argues that justice should be the sole purpose achieved by international courts (Sellers in Grossman and al. 2018:338-353). He claims that justice means "the best dispositions of rights and duties, benefits, and burdens in society to serve the collective and individual well-being of all its members" (Ibid: 344). If law does not reflect justice, then said law is illegitimate. Judges would by extension lose legitimacy if they were applying unjust norms. The problem with this simplistic vision of the judicial function that places justice above all else is that the definition of the concept remains theoretically vague and empirically impossible to achieve at all times. The existence of principles that would benefit to all EU citizens is hardly achievable in a common market that orchestrates a competition between economic agents, i.e. creates the conditions for the establishment of a list of socio-economic winners and losers[288]. If a global Rawlsian theory of justice may help in defining loosely how citizens interact and respect each other (Rawls 1971), it seats uneasily in in a polity that essentially orchestrates inequalities resulting from the application of the ordoliberal doctrine (Lechevalier and Wielgohs 2015). The latter stipulates that public intervention should only be necessary when imbalances or inequalities become disproportionate, but that competition on the market would create benefits for most citizens. An underpinning definition of justice in the EU cannot have as premise (or at least not without fundamental contradictions) that law can serve to the *equal* benefit of all its subjects.

An historically more promising approach of justice and judicial review (albeit not expressly framed as such) remains Ely's seminal argument of counter-majoritarianism (Ely, 1980). Ely did not reject the possibility that norms could lead to uneven results for citizens. He would rather claim the opposite since laws in democratic societies are adopted by political *majorities*. Even the most important rules would reflect societal considerations of the time, especially in a polity (US) where constitutional interpretation remains a frequent judicial exercise. While it makes sense for the government and the legislature to represent the views of the majority that elected them in the first place, Ely then considered that judges should consider the interests of the forgotten, the unseen and the outvoted in order to achieve justice in a democratic setting. For Ely, only

[288] That wording – winners and losers – is precisely used by the Wall Street Journal to allow investors to track the evolution of stock market indexes. See https://www.wsj.com/graphics/track-the-markets/

a countermajoritarian approach to judicial review would allow racial, ethnic and religious minorities to see their rights as US citizens protected even if constantly underrepresented in the other branches of government. Judges serve as safeguards against the necessary (albeit mostly unconscious) tyranny of the majority.

Who are the minority groups in a transnational European polity deserving justice? The vulnerable groups that Ely identified are all entitled to judicial protection at the national level in the EU. A theory of transnational countermajoritarian judicial review must account for another factor: the existence of various levels of governance and the separation of duties between them. The CJEU may only act in competences that have been conferred to the EU, and in competences pertaining to the judiciary.

Table 6.1: Transnational countermajoritarian review in context

	Branches of government		
	Executive	**Legislative**	**Judicial**
Levels of governance	Transnational executive (Commission): transnational majority administrative duties	Transnational legislative politics (Council, EP: QMV+Simple majority): majoritarian transnational politics	Transnational adjudication (CJEU): transnational countermajoritarian review
	National executive politics: domestic majoritarian administrative enforcement	National legislative politics (Parliaments): majoritarian legislative politics	National adjudication (National courts): countermajoritarian review

The acquis in social and redistributive policies shows that EU law – and thus the jurisdiction of the Court – is activated in case of a cross-border element[289]. The main public identifiable here is logically EU citizens residing in other member states. The introduction of EU citizenship even opened the possibility for economically inactive migrants to seek activity elsewhere in the Union, for example by facilitating the circulation of

[289] Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L166/1, art. 2; Citizenship directive, art. 3; and art. 20 TFEU.

students across borders via the Erasmus program. The trend in the 20th century was a linear process towards more regional "emancipation" and the weakening of the nation-state as the main force of societal organization (de Witte 2019). The case law of the ECJ followed that trend and thus protected the audience that could legitimately benefit from transnational countermajoritarian review in cases like *Defrenne*, *Decker* or *Martínez Sala*. Among the most vulnerable in the single market were the unemployed and younger citizens who received a special judicial care in the last decade of the 20th century and early 21st century, for example in *Gravier*, *Bosman*[290], *Grzelczyk*, *Bidar* or *Chen*.

The trend shifted in the last 15 years. The entry of 10 new member states in 2004 meant that the emancipation of EU citizens was no longer the privilege of a few from a wealthy club of 15 Western member states, but suddenly meant bigger migration flows and deeper consequences for the taxpayers of host member states. These in turn changed the course of EU citizenship and led the legislator to limit the rights attached to cross-border movement. The Social security regulation, the Citizenship and Posted Workers directive, the cross-border healthcare legislation and the Services directive meant a strict set of conditions for benefitting from all the rights attached to the Four Freedoms. There were already limits to emancipation by 2008 when the financial crisis hit the continent. All crises led to a form of a "new intergovernmentalism" (Bickerton and al. 2015) with the return of member states as front-runners of European politics, accompanied in the move by most of an electorate that called for an "adjustment to European diversity" (Chalmers and al. 2016), pointing to the need for EU institutions to be coordinating but not leading actors in transnational politics. This had to be understood as a constitutional and legislative shift that set the path to a different and more restricted sense of transnational justice in the 21st century.

The Court took into account this shift, by sticking closer to the (denser) legal framework of the Union (see 6.2). Member states and their recent governments also made their intentions clearer by inscribing them in the acquis (see 4.1.1.2). The legitimacy deficit that arose for the Court in the

[290] C-415/93, " Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman (*Bosman*)", 15 December 1995

last 10 years in terms of justice is less about activism than it is an (academic) accusation of no longer protecting vulnerable populations. The discussions surrounding the *Laval* quartet and the citizenship turn of *Dano* symbolize that misunderstanding. In other words, criticism arises from a part of the legal profession that has not seen or refuses to consider the constitutional shift towards a restriction of emancipatory transnational rights. These critics embody the "liberal" side of democratic legitimacy developed by Scharpf, focused on individual rights. The EU would on the contrary be deprived of the "Republican" side of democratic legitimacy, which stresses the symbolic and financial difficulties associated to solidarity, meaning society is about redistribution generating groups of winners and losers, whose classification must be a *political* choice. Bellamy (2019) criticized the CJEU for underplaying considerations of solidarity while focusing exclusively on socio-economic rights (2019: 131-67). While Bellamy's criticism seems accurate in describing the Court's historical approach to rights, it does not capture the recent changes of case law that show a greater deference to political choices in the field of EU citizenship.

Does a denser and more accurate legal framework mean the end of justice as a deciding factor in CJEU cases? Some rulings have been described at providing justice to citizens who were unfair victims of the common market rules and its restrictions. *Zambrano* led to a ruling that put the necessary presence of a cross-border element on hold, since the case involved a TCN residing in Belgium, which seemingly was an internal situation (see 6.2.1). But despite a reasoning that seemed flawed and/or short (with the Court scoring poorly on processual legitimacy), the result seemed fair for a litigant that resided for a long time in Belgium, even if the 9 member states that submitted observations argued for the non-applicability in this situation. Justice here conflicted with a textual reading of EU law. The solution of the case and its appreciation are too normative to generate a proper scientific debate. When the Court's sense of justice and the textual interpretation of the acquis diverge, the output is likely to be contested and may only be compensated by the processual legitimacy discussed in the previous chapter. The rise of the consolidation of the legal system means that the constituent power and the legislator enshrined discriminations in law. The countermajoritarian role of the CJEU leads it consider first the interests of minorities in the market, but it cannot impose its own sense of justice to democratically enshrines discriminations, a fact that many legal scholars who keep seeing the Union as a 'rights-only'

space have not accepted yet. The consolidation of polities that chose democracy as its essential core means the creation of 'rights first' but not 'rights only' space. This is not to say that the CJEU must be unfair, but that the Court must defer to the potentially individual unfair choices of the legislator taken in the name of the greater good. Standards of justice are also shaped by the masters of the treaties.

6.1.2 On effectiveness of CJEU rulings

A way to avoid the contestation of judicial outcomes is to follow the functional goals of the organization, or in Yuval Shany's terms strive for "effectiveness" (Shany 2014). The goals of an organization are a set of objectives that are not formally enshrined in the constituting instrument of an organization. But they reflect the intended purposes of the member states when they convened to create a transnational court.

The teleological interpretation of EU law theoretically fits this mold (Lenaerts and Gutiérrez-Fons 2013:24-27). Judges would find in the common constitutional traditions of the member states (*Internationale Handelsgesellschaft*) and in international treaties (*Nold*) the global goals of the EU. The general principles of law 'discovered' in the early years of the EEC would thus be respecteing state consent, and thus stressing that the CJEU (at least seemingly) respects the principle of constitutional balance that unites the EU with its member states (Dawson and de Witte 2013).

Yet Shany acknowledges that the definition of said goals suffers from a lack of clarity and that goals may also change over time (Shany 2014). This is an understatement in the case of the EU. The EU of the 21st century barely resembles the ECSC of the 1950s. The free trade area between six states has become a full-fledged polity that deals with most public policy areas today, and increasingly functions according to principles of representative democracy (Horsley 2018). Second, states representatives do not always perfectly capture what they committed themselves to when they ratify international treaties. Madsen showed that the UK ratified the ECHR because the British government viewed the treaty as a cold war instrument that could be symbolically invoked against third states. The government did not anticipate that the rights enshrined in the ECHR might be invoked *against the British administration itself* (Madsen 2010). Third, the goals of an organization are purposely framed in a vague manner, and sometimes do not match the substantive content of policies.

Chalmers and al. showed the discrepancy existing between on the one hand the broad goals of the EU enshrined in the treaties at Art. 2 TEU[291] and rephrased by the Court[292], and on the other hand the substantive content of certain EU policies that clearly go against these objectives, such Area of Freedom, Security and Justice measures (Chalmers and al 2019: 217). The EU is like any other organization subject to contradicting dynamics. Fourth, such contradictions make their way to the docket of the Court, which has historically redefined said goals. Several commentators re-assessing *Van Gend en Loos* stress that the treaties did not include any mention about an "autonomous legal order" that would directly confer rights and obligations to citizens (Horsley 2018; Grimm 2017).

Having these limitations in mind, Shany captures a set of goals accepted by member states for the CJEU today. While some go along with features present for all ICs, others remain peculiar to the EU legal order. These are: '*supporting EU law*', '*dispute resolution and problem solving*', '*regime support*', '*regime legitimization*', '*constitutionalization of EU law*' and '*market integration*' (Shany 2014:279-87). After developing each consideration in turn, Shany finds the CJEU to be a remarkably effective IC, if not the most effective in the world today (Ibid.: 302-5), joining many other authors in such a categorization (Alter 2014; Alter and Helfer 2017). He considers that the stock of legitimacy accumulated since its inception helps the CJEU in achieving the goals of the EU.

'Supporting EU law' has received an ample treatment by the Court over decades. EU judges keep filling gaps in the normative system on a regular basis and have done so since its inception, and even went beyond textual interpretations of the acquis to provide concrete solutions in certain cases. 'Dispute resolution' is a classic feature for any court and the Court has fulfilled such a task (although it may conflict with other objectives; see below 6.2). 'Regime support' and 'regime legitimization' are two major goals of ICs. For example, it created a comprehensive human rights regime at a time where only economic freedoms were a part of the acquis.

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[291] '*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*'

[292] Opinion 2/13 (accession to the ECHR), 18 December 2014

The last goal – constitutionalization of EU law – generates mixed consequences regarding EU democratic legitimacy. It ensures that member states live up to their commitments, by forcing a strict and comprehensive implementation of all policies dealt by the Union. Constitutionalization ensures legal stability since EU law may not be sidelined by national procedures. It also leads to the crystallization at the top of the hierarchy of norms of practices that may be highly undemocratic. The Court may even have been too effective in that sense. The principle of EU law supremacy did not create any major conflict with the principle of democracy. Yet in *Melloni*, the Court privileged the supremacy of EU law over national legislation that afforded a better rights protection than granted at the EU level (no *in absentia* condemnation for serious offences in the Spanish legislation). The Court sacrificed the possibility for the Spanish constituent power to define the right to a fair trial and did so in adopting a decision that lowered the level of rights protection in Spain. Such a decision has a constitutional value since it relied on provisions of the CFR to reach its conclusion. The Court's effectiveness may dangerously erode the democratic nature of European politics[293], which may only weaken its shallow support.

6.2 Solving problems, settling disputes: conflicting criteria?

Unlike considerations of justice or effectiveness, scholars and practitioners unanimously agree that one of the CJEU's main functions is to solve disputes between parties that seized the judiciary (Adams and al. 2013). In most cases, solving problems (meaning a general legal orientation with implications beyond specific cases) and settling a dispute (finding a solution to a particular case) go hand in hand, especially in PRPs where there is a division of labor between judicial bodies, meaning that theoretically the CJEU solves the problem, and the national court subsequently settles the dispute. But sometimes both objectives may collide and generate criticism against the Court. Sometimes, judges get carried away and find a sound solution to a dispute that creates a bigger problem. *Zambrano* constitutes such a case (6.2.1). On the contrary, judges

[293] Chalmers D. (2013) "Democratic Self-Government in Europe Policy Network. Domestic Solutions to the EU Legitimacy Crisis", Policy Network paper, at: https://policynetwork.org/wp-content/uploads/2017/09/Democratic-self-government-in-Europe.pdf

may wish to address a bigger issue of the legal framework in a case whose facts may have suggested a different outcome, as was arguably the case in *Dano* (6.2.2).

6.2.1 *Zambrano*: a just outcome generating a vast controversy

Zambrano is a rare case in the 21st century that is unanimously analyzed as a result of judicial activism (Schmidt 2014 and 2018; Beck 2017: 346; Thym in Adams and al. 2013:171). The case was about the right of residence of a TCN in Belgium, without any EU cross-border movement involved. Unsurprisingly, the Commission and 9 governments asked the CJEU to deny that it had jurisdiction[294]. The Court nonetheless found that art. 20 TFEU applied to situations without a cross-border element if EU citizens –in this case the children of Mr. Zambrano – would be deprived of the enjoyment of the substance of rights associated with citizenship if their parents were deported to Colombia.

EU citizenship seemed untied from the market for the first time since its creation because citizens theoretically no longer have to cross borders to activate EU citizenship law. How could the Court in this case arrive to such a groundbreaking conclusion? The most plausible condition here is related to the considerations dealt in the previous section about justice: judges found morally intolerable that Mr. Zambrano could be deported from the EU. He arrived with his family early in the 21st century while fleeing civil war in his country; his asylum application was denied, but they were not expelled either because of the turmoil in Colombia; Mr. Zambrano then integrated the local labor market and became a taxpayer in Belgium; he resides there for years and has 2 more children with European citizenship, etc. Davies (2018) mentioned that the deservingness of litigants may explain the recent outcomes in citizenship case law. The thin reasoning of the judgement attests of the difficulty for judges to justify their argument. Keeping the text short may have allowed them to conceal their genuine motive behind the decision. And the facts were unique, something judges would constantly repeat afterwards to justify their (more restrictive) decisions in further references.

The argument started a turmoil in the legal profession that even cases like *Rottmann*[295] (the impossibility to make an EU citizen stateless) or *Chen* (the

[294] *Zambrano*, at 37

[295] C-135/08, Rottmann v Freistaat Bayern, 2 March 2010

non-expulsion of a Chinese resident with an EU child) did not generate. *Zambrano* eventually started a new paradigm, and one that was likely to be fought by governments.

Judges started to move away quickly from the path set in *Zambrano*. Less than 2 months after, the Court handed down the *McCarthy* judgement[296] in which Mrs. McCarthy, a British and Irish national who married a Jamaican citizen about to be deported, was allegedly not forced to leave the territory of the Union (although her husband was obliged to) and that she could thus still enjoy the substance of her rights[297]. The only factual difference between Zambrano and McCarthy is that minors were not forced to leave the territory. In *S and G*[298], the Court basically upheld *Zambrano* but conferred to the referring court the ability to assess whether the migrant worker (falling under the ambit of art. 45 TFEU) at hand shall receive a right of residence or not. *Iida* led the Court to uphold the *Zambrano* principle but did not apply it in the case at hand since Mr Iida was not a dependent family member who could trigger the application of the Citizenship directive, and that his situation (his former spouse and child living in another member state) was a purely *internal* matter that did not trigger the activation of EU law[299].

The Court started a "quiet revolution" (Strumia in Nicola and Davies 2017:224-44) that it subsequently tried to contain in other cases. The Court's President Koen Lenaerts tried to break the fire that started the 8th of November 2011. Sitting in all the cases mentioned in the previous paragraph, and publishing numerous papers stressing the need to approach case law of the Court with a "stone-by stone" approach (read incremental: Lenaerts 2013a; 2015), he tried as much as possible to stress the particularity of the *Zambrano* case. The principle nonetheless lingers: EU law may theoretically be activated without a cross-border element if a citizen may be deprived of the enjoyment of the substance of her rights. This activation may only be assessed on a case-by-case basis, which will trigger infinite loops of litigation and put in jeopardy legal certainty

[296] C-434/09, Shirley McCarthy v Secretary of State for the Home Department, 5 May 2011

[297] Ibid, at 49 and 50.

[298] C-457/12, S. and G., 12 March 2014

[299] C-40/11, Yoshikazu Iida v Stadt Ulm, 8 November 2012

attached to EU citizenship. Justice was served in *Zambrano*, but at a high price.

6.2.2 *Dano*: a scapegoat for EU law's greater good?

The legislator clearly intended to limit the number of rights attached to EU citizenship and free movement with the Citizenship directive. The Court followed the opposite trend in the early years of the 21st century when it helped economically inactive migrants in achieving equality of access to social benefits for foreigners. With the limits brought to citizenship in earlier rulings (*Förster*) but with some decisions (*Zambrano*) still hinting at the possibility of detaching citizenship rights from the exercise of the Four Freedoms, the Court had to come up with a clear solution that would clarify whether treaty provisions such as art. 20 TFEU, which was the basis of an expansive definition of EU citizenship law grounded in fundamental rights, could still be interpreted against the legislator's will to restrict the advantages associated with freedom of movement. The answer in *Dano* was unequivocal.

Elisabeta Dano and her son Florin are Romanian citizen who came to live in Germany. They found shelter in her sister's home. E. Dano was not actively looking for an employment, and she sought to obtain social benefits to ensure her subsistence. Her application was rejected by the *Jobcenter* of Leipzig, on the grounds that the German civil code precludes the attribution of social benefits to foreigners who are not employed or self-employed. Seizing the social court of Leipzig, she asked judges to set aside the application of the civil code because it contains a forbidden discrimination against EU citizens lawfully residing in other member states. Asking whether EU citizenship law would indeed prevent such a discrimination, the German judges referred the question to the CJEU.

The answer of the Court was incredibly "clear cut" (Thym 2015): foreigners who wish to receive social benefits in another member state must respect the conditions laid down in the Citizenship directive, stating that EU citizens must actively seek employment and must have resided in the host country for at least 5 years without interruption to receive non-contributory social benefits. Mrs. Dano and her son lost the case, and the citizenship regime finally was put finite boundaries. The decision surprised many and was perceived as the unexpected citizenship turn.

The decision is not surprising at all and follows the logical application of rules in the 21st century (Carter and Jesse, 2018; Jesse and Carter 2020). The citizenship turn started earlier than in 2014 since fingerprints of the restrictive citizenship directive could be found already in *Förster* in 2008 (see 5.3.2), even if the text did not (theoretically) apply in that case. *Dano* was the occasion for the first time in the Court's history to apply limits of the citizenship regime. The outcome was nonetheless surprising for several reasons. Many thought that the Court, despite the existence of a clear text, would draw from the general principles of EU law and its former case law to play its countermajoritarian role of protector of the weak in the common market, which in this case also included a minor of age, an element that previously meant almost automatically a ruling in favor of the vulnerable party. But the Court departed from its classic teleological interpretation to favor a close reading of the text, a choice applauded by some (Horsley 2018:275; Carter and Jesse 2020) and unsurprisingly left out of commentaries that keep stressing the persisting activism of the Court in the second decade of the 21st century (e.g. Beck 2017; Conway in Bencze and Yein Ng 2018:225-50).

The Court comes and plays its countermajoritarian role of protecting weak foreigners in the common market, and historically adopted a "rights only" approach (in Scharpf's terminology, an exclusively liberal approach of political legitimacy) that underestimates the financial and political costs of socio-economic measures in the EU. The legitimate role of the Court in the 21st century, in an EU now in charge of some redistributive issues, becomes one of adjustment in a sense that is less favorable to individual rights and more to obligations associated with burden-sharing.

The Court did this adjustment in the field of citizenship in *Dano*, which led to diverging reactions. The first is respect for a Court that had to take a difficult decision considering the facts of the case. The ruling reads incredibly clear compared to other decisions criticized for their cryptic style, and gives clear indications to the referring Court, which for scholar and now AG Bobek is the main legitimacy feature of the CJEU: give clear indications to national courts (Bobek in Adams and al. 2013, especially at 201). The Court thus solved the legal problem. The decision also fits the general mood towards restrictions of intra-EU migration, particularly in the context of David Cameron's plea in favor of a renegotiation of this core

freedom of the EU[300] (Bois and Piquer forthcoming). The Court thus seemed to have performed brilliantly according to legitimacy standards assessed in this monograph. But the ruling brought another reaction, especially in the scholarly community, about a Court that abandoned its role as the main protector of individual rights in the Union (O'Brien 2017).

The shared conclusion is that the Court is more deferential to the legislator and surveys the general mood in the member states. This fact generates opposite reactions. It is obviously supported by the political branches of government which adopted the texts. In the scholarly community, the ruling and its broader message is praised by specialists of legal reasoning and political philosophers who plead for a Union respecting national diversity. It displeased the citizenship lawyers that were used to different outcomes[301] (see Yong 2019) and needed (or still do) time to realize that a political union is not exclusively about all about protecting the weaker parties. While activism may displease national governments and some CCs, restraint also generates criticism.

6.2.3 Conclusion 6.2: the impossible legitimation to all parties when solving problems and settling disputes

Cases that come to the docket of the CJEU serve two functions. First, they help national courts in settling disputes. Second, they give the opportunity to the CJEU to clarify what the state of the law is. Sometimes these objectives diverge and put the Court in a legitimacy predicament. In *Zambrano*, the Court used a consequentialist interpretation that ensured that 2 EU citizens under 18 years old would not have to leave the EU territory. This fair outcome opened a legal Pandora Box that still has not been closed today. In *Dano*, the Court sought to bring clarity to the citizenship regime and sent a strong message to the constituent power, especially to the UK government. It acted in the rationalized fashion

[300] Emerson M. (2014) "The *Dano* case – Or time for the UK to digest realities about the balance of competences between the EU and national levels", *CEPS Commentary*, 14 November 2014

[301] See G. Balbone, "Dano and Alimanovic – the end of a social European Union", *KSLR EU Law Blog*, 22 January 2016, at: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1012; G. Vonk, "EU-freedom of movement: No protection for the stranded poor", *European Law Blog*, 25 November 2014, at: https://europeanlawblog.eu/2014/11/25/eu-freedom-of-movement-no-protection-for-the-stranded-poor/

advocated by specialists of legal reasoning, but only received a bittersweet reaction, first because the outcome meant keeping 2 citizens – including a child – in poverty, and second led to the realization that a genuine citizenship detached from market considerations never occurred.

This section shows that it is impossible for the Court to satisfy the entirety of its attentive audience and its mandate providers at the same. The EU legal profession has grown accustomed to a rights-only line of case law and is still adjusting to the change a political community with collective justice. But for political scientists who stressed the lack of Republican legitimacy in the Union (Scharpf 2009; Bellamy 2019), the sacrifice of a scapegoat – Florin Dano – means a deference to the democratic choices of the legislature, even when may academics call for opposite decisions.

6.3 Eliciting compliance with EU law

Observance of the law is the Court's mission of art. 19 TEU. Compliance thus seems like the perfect indicator to assess the legitimacy of the CJEU.

Compliance with EU law is the result of a polycentric, multicausal mechanism. Which elements of compliance may be indicative of the Court's legitimacy? Legitimacy is about voluntary submission to one's rule, neutralizing or setting aside coercion as an element of political authority. If empirically it may be impossible to fully disentangle voluntary compliance from coerced implementation, the research may focus on actors that do not have immediate strategical incentives to comply with CJEU rulings. The role of lower national courts immediately comes to mind, since these are not bound by the obligation to refer cases to the CJEU but have the possibility to do so (Davies 2012b). The number of referrals from national courts is thus a quantitative proxy for indicating the belief of the Court's most important subgroup in the legal profession (Weiler 1991). Even if partly associated to the enforcement of CJEU rulings, national courts may disagree with the principles of the Court and choose not to implement them. Consequences of non-compliance for lower judges are only symbolic since litigants may appeal cases to higher courts, and the Commission may activate infringement proceedings against member states and not courts themselves. Checking whether national courts refer cases to Luxembourg and comply with preliminary rulings is as good of an indicator as there is when using compliance as an

indicator of legitimacy or as a dependent variable caused by the CJEU's legitimacy (6.3.1).

Moreover, internal agreements or disagreements within the Court of Justice over time may say something about compliance as an indicator of legitimate expectation. Appeals against decisions of the General Court may show signs of increased disagreement by citizens against court interpretations or on the contrary of increased acceptance of CJEU decisions. Besides, divergent interpretations between the GC and the ECJ threaten the unity of the organization and frequent annulment of GC decisions will lower trust in the CJEU's lower bench (6.3.2).

6.3.1 Voluntary compliance of national courts

Some cases of non-compliance like the PSPP ruling of the BVerG generated a lot of commentary and even a wave of sympathy from the legal profession[302]. But they show that compliance with rulings is not automatic, and that national courts have motives not to implement "incomprehensible" decisions. They are the clearest illustration of the practical impossibility for the Court to generate unquestioned obedience, especially in a democratic polity whose subjects have a civic right to oppose what they perceive as unjustified domination. National courts are co-enforcers of EU law (see 5.1) and thus hold keys towards the enforcement of CJEU decisions. Exploring empirically the extent to which interpretations and rulings find an echo in national courts will then further the understanding of uncoerced compliance as a good indicator of legitimacy.

National courts will help the CJEU in fostering compliance with EU law via several means. The first is to ask the CJEU for its interpretation (6.3.1.1). The second is to implement said interpretation (6.3.1.2). Absent any of these 2 dynamics, the CJEU would either not wield any power or see its right to say what the law disregarded by the co-enforcers of EU law.

6.3.1.1 High number of referrals from national courts

National courts may voluntarily submit to the Court's rule by seeking guidance on the interpretation of EU law (art. 267 TFEU). In quantitative

[302] See Kelemen and al., "National Courts Cannot Override CJEU Judgments", *Verfassungsblog*, 26 May 2020, at: https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/

terms, it thus makes sense to have a look at this connection, which make up for two thirds of the ECJ's docket, making it its premier mission[303].

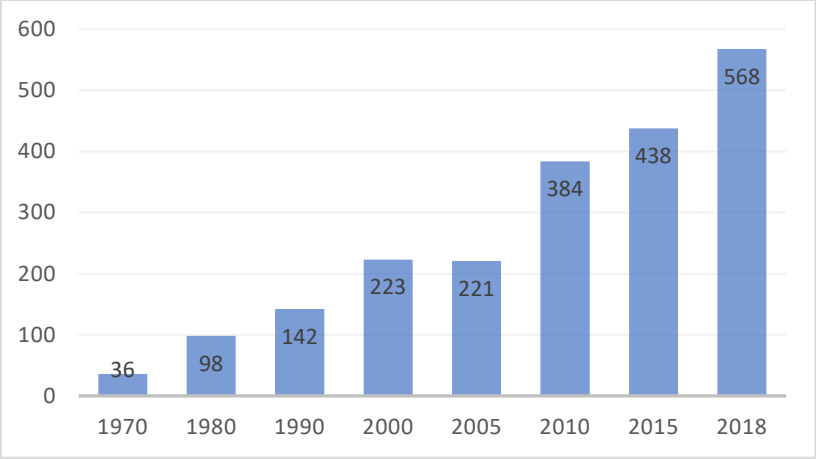

Figure 6.1: Number of preliminary references per year (1970-2018)

Source: CJEU annual reports combined

Graph: author

In 1970, the EU only had 6 member states, while it had 28 in 2018. The legal order is also quite different. In the 1970s and 1980s, the acquis was not as dense as it was in the 21st century, raising different challenges in terms of gap-filling or of clarification. The ECJ acts more like an administrative court in the 21st century since it must articulate all the proper sources of law. But the number of references has been going up since its inception. The Court must now deal with a growing backlog of cases, which prompted the major reform of 2015 (see 6.4.1). National courts have not stopped asking the ECJ for interpretations overall.

The number of references per member state may be a more accurate indicator as it cancels out the changing number of member states. Tracing its evolution over time (here in 2000, 2015 and 2017) may say something about the relationship of national courts with the ECJ.

[303] 2019 Annual Report, at 160.

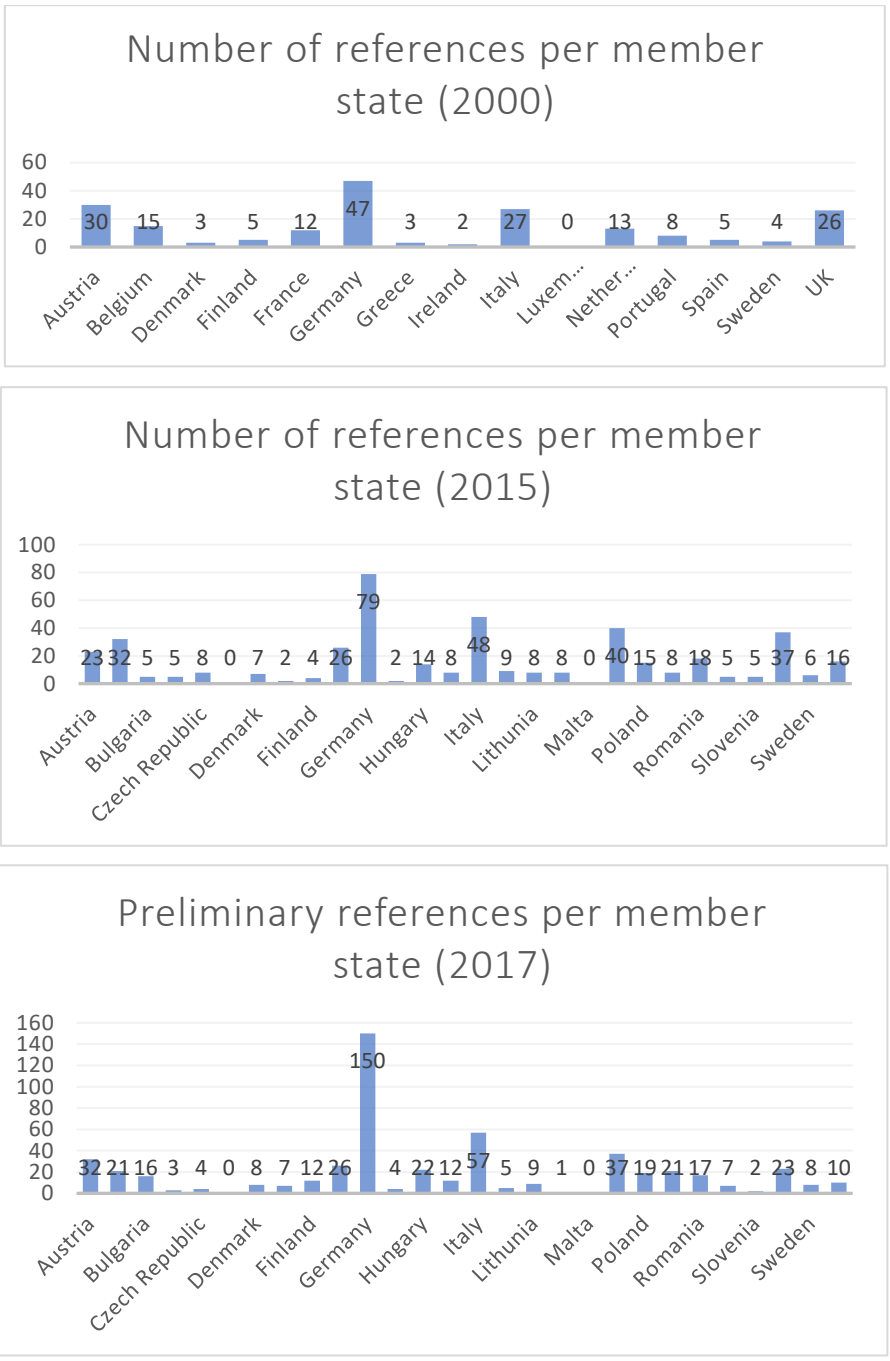

Figure 6.2, 6.3 and 6.4: Number of references across time and member states (2000, 2015 and 2017)

Source: EUTHORITY Project (KU Leuven), compiling all preliminary references since 1961[304]

Graphs: author

[304] See the EUTHORITY dataset at: https://euthority.eu/wp-content/uploads/2020/02/Replication_data_dyevre_et_al._JEPP.xlsx

These figures are all on the rise in the 21st century. The top 7 member states do not change, with Germany ahead of Italy, Austria, Belgium, the Netherlands, Spain and France. Nordic courts keep using the PRP with parsimony, explained by M. Wind as resulting from a broader societal lack of judicial review in countries such as Sweden and Denmark (Wind 2010; Wind and Follesdal 2009). The smallest EU member states in terms of population account for the lowest number of references, with Luxembourg represented only once here and Malta and Cyprus without a reference in 2015 and 2017[305]. The number of references does not perfectly follow the country-size ratio but is a good explaining factor of the overall trend. Member states with a federal or regional structure tend to refer more than states with a unitary constitutional organization (when assessing the number of references vis-á-vis the population of member states).

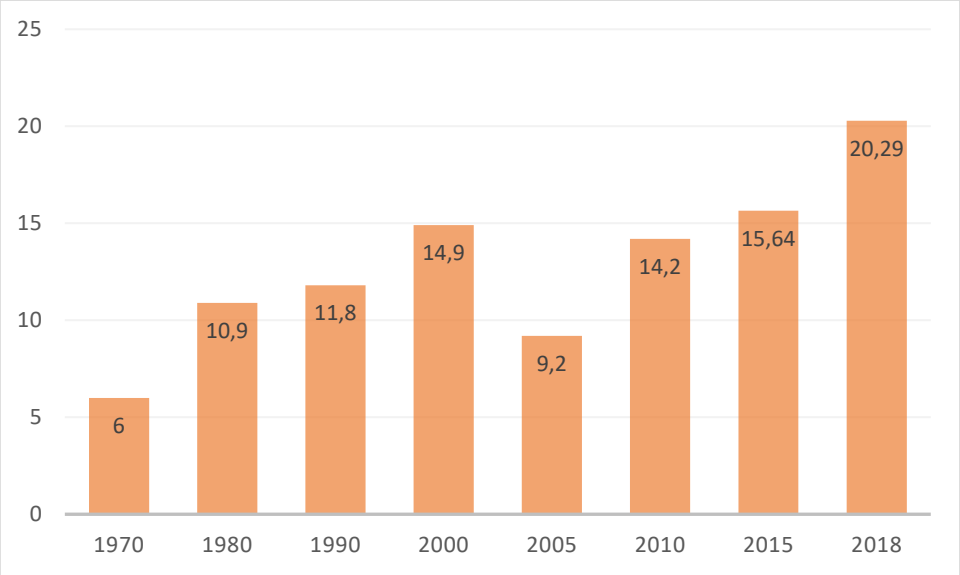

Figure 6.5: Average number of references per member state per year

In general, there is no evidence that would support a loss of faith in the PRP. On the contrary, when considering the individual situations of countries and the average number of references per member state, the number just kept going up over time. While the number of confounding variables remains too high to conclude that national courts are referring

[305] In total, Cyprus issued 9 references from 2004 and 2018, and Malta sent 3 references. Luxembourg, one of the six founding members of the EEC, has sent 96 references between 1957 and 2018, an amount reached in Germany in 2017 in about 7,5 months (data source: EUTHORITY project).

these cases because they believe in the rightful interpretation of the law by the CJEU, the uninterrupted flow of PRP shows that there is no disempowerment of the Court. On the contrary, the rise of preliminary rulings extends the possibilities of the Court to widen and tighten its grasp over the interpretation of EU law.

6.3.1.2 High enforcement by national courts

Preliminary rulings are allowing the CJEU to give its interpretation of the law. However, national courts remain sovereign in interpreting the facts (Lenaerts in Heusel and al. 2020:21-5), meaning they can conduct assessments such as proportionality or subsidiarity.

Investigating empirically co-enforcement is difficult. Lower courts may conclude that they agree in principle with the Court, but eventually decide not to apply because of the specific facts in the case. The solution of the Court may be validated but have no practical effect after the reference. These situations theoretically reinforce acceptance of the Court's *de jure* authority. The Court's *de facto* authority will however be delayed if not forever postponed[306].

Enforcement and compliance are imperfect indicators of the Court's legitimacy. The only empirically demonstrable way to assess the Court's legitimacy through this prism is to assess the proportion of cases where lower national courts apply the interpretation of the Court which combine legal and factual authority.

The only research conducted on the subject was led by Stacy Nyikos in 2003 (Nyikos 2003). Investigating hundreds of preliminary rulings from 1961 to 1994, she found that the implementation of CJEU rulings without deviation was incredibly high, at about 96% (Ibid.:410). The Court of the 20th century, despite the bold (activist?) decisions taken since its inception (*Van Gend en Loos*, *Dassonville* and *Francovich* among others), has a great implementation rate in national courts. In comparison, ECtHR rulings

[306] E.g, C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others, 4 October 1991

have an implementation rate of rulings is on average about 90%[307]. The figures almost render moot the entire criticism raised against the Court throughout this monograph. To quote Weiler:

> If we adopt a sociological approach to legitimacy, an approach which tries to gauge empirically the measure of acceptability of institutions and regimes, there is no legitimacy crisis in the European Court of Justice. It is widely respected, and rightly so, and its decisions are, we tend to believe, mostly followed – or at least open revolt is rare.
>
> (Weiler, in Adams and al. 2013:235)

Of course, Conway makes a good argument when arguing that measuring the quality of the Court's outputs in quantitative terms (mentioning judge Edward's argument that charges of activism against the ECJ were marginal) is not demanding enough to assess the Court's reasoning (Conway 2012:7). Yet in terms of outcomes, which are analyzed in this chapter, there is no equivalent among ICs in terms of compliance (see Huneeus in Alter and al. 2013:437-63).

The contemporary problem when drawing insights from Nyikos' numbers is that these describe the reality of the Court in the 20th century. They cannot account for the changes brought to the legal order since the 2000s and do not capture the present crisis-laden reality of the 21st century. Unfortunately, such an enquiry has never been replicated since.

There are reasons to believe that compliance with CJEU rulings may drop. First, the new competences enshrined in the Lisbon treaty are shared competences with high redistributive stakes and raising polarizing societal issues. The contested instruments of the 21st century, such as the economic crisis tools, the immunity of independentist Catalan MEPs or the migrant relocation scheme, involve subjects that affect the core of national sovereignty. While adverse rulings – whose implementation are

[307] I calculated the implementation rate of ECtHR rulings by dividing the number of cases that received a final resolution from the Committee of Ministers (meaning that the latter considers the judgements to be implemented) with the total number of cases concerning a member state since ratifying the Convention. For example, Belgium was involved in 242 cases since 1955, 207 of which received a final resolution, meaning an implementation rate of 85,5%. See all figures for EU member states and the country reports at: https://www.coe.int/en/web/execution/country-factsheets

the best illustration of judicial legitimacy – have thus far been implemented at a high rate, these may generate further pushback in the future.

There are also reasons to believe that compliance figures may be even higher. The legal order of the 21st century is far more complete than it was in the time span studied by Nyikos. Treaties are extensive and contained detailed provisions, themselves completed by secondary legislation receiving further substantiation in implemented and delegated acts, etc. The Court does no longer need to rely as much as in the past on general principles of EU law – which led to the most contested rulings – to settle cases. The Court's role has rather become one of clarification. This complexity associated with the higher number of legal acts could explain the rise of references in member states, asking clarification questions requiring less judicial engineering.

Finally, these figures may be steady because the EU is a rule of law system of shared beliefs among most participants. Several political scientists tend to picture EU institutions and member states as having necessarily opposite objectives regarding integration (with EU actors pushing for more integration and national governments advocating for limited but existing integration) is balanced to a great extent by a shared set of values about the separation of powers and respect decisions of the third branch of government. Members of the legal profession, especially within the judiciary, understand the principle of the hierarchy of courts, and do not frontally oppose it[308]. Compliance via co-enforcement by national courts may change in the future, but there is no element in the present configuration indicating a drastic change of the behavior of national judges regarding the implementation of rulings.

6.3.2 Internal non-compliance: the appeals within the Court

Appeals against decisions of lower courts are a normal feature of democratic societies. They essentially acknowledge the human touch in adjudication processes, and the possibilities of doing mistakes in interpreting the facts and/or the law. Contested rulings go to appeal

[308] Consider the references by lower Portuguese courts above against austerity measures during the economic crisis. Despite adverse results, lower judges did not disregard the rulings of the Court. Instead, they chose to send further references about slightly different cases, in order to "invite" the ECJ to reconsider its position.

courts, which possess the same prerogatives as lower courts in judging both facts and norm interpretation. Further appeals go to supreme courts, which usually rule on the interpretation of norms, while judging facts remains the prerogative of lower courts – the same division of labor found in the PRP between the CJEU and referring courts.

GC rulings can be appealed to the ECJ. The GC hears intellectual property cases, pleas of illegality, actions by member states against EU institutions, matters referred to the CJEU under an arbitration clause and civil service cases (dealt by the CST between 2004 and 2016) (See Chalmers and al. 2019:163-5 for a complete overview of the competences of the GC). All GC cases may be appealed on points of law to the ECJ[309].

Appeals may theoretically serve as legitimacy indicators because they express formal disagreement that parties hold against rulings. While isolated appeals are not telling much about the justified right of interpretation of the CJEU, a global trend of contesting rulings would indicate a deeper challenge to the Court's authority (6.3.2.1). Internal disagreements at the Court may also show a legitimacy deficit since both courts are similar and interpreted norms are the same. A high number of overturned GC rulings would hardly be understandable from a legal and sociological point of view (6.3.2.2).

6.3.2.1 A quantitative and contextualized appraisal of appeals against GC decisions

The number of appeals against GC decisions has been steady for the most part in the 21st century, since about 25% of cases are sent to the ECJ for a reassessment of of the case.

These numbers do not show much of an evolution since the beginning of the activities of the Court of First Instance/GC since 1989. The augmentation of the number of judges (see 6.4.1) and the reincorporation of civil service cases in 2016 after the end of the functions of the CST did not cause major changes, since the number of appeals stayed within the range of 20-30% of eligible cases. Appeals divided per issue area also show some stability.

[309] Art. 256(1) TFEU

Table 6.2: Proportion of appeals (1990-2018)

	Appeals	Eligible cases	% of cases appealed
1990	16	46	35
1995	47	143	33
1997	35	139	25
2000	67	225	30
2004	53	261	20
2008	84	339	25
2012	132	514	26
2014	110	561	20
2016	163	626	26
2018	194	714	27
Total	901	3568	26,7

Source: CJEU annual reports

Table 6.3: Percentage of cases appealed per issue area

	2006	2010	2015	2018	Average
State aid	24	49	29	32	33,5
Competition	34	45	52	29	40
Intellectual Property	29	23	19	17	22
Average	27	29	27	27	27,5

Appeals in competition and state aid cases are frequent. The number of appeals IP cases (which constitute the bulk of the GC's work[310]) remains in the average at about 27% per year.

The figures themselves cannot say much about contestation or acceptance of GC rulings, because of the specific docket of this court. IP, competition and civil service cases are specific legal areas. They involve a group of litigants that are particularly wealthy, especially in competition and state aid cases where multinationals and governments are the defending parties, leading almost unsurprisingly to the highest amount of appeals.

[310] E.g. 318 out of 679 (47%) cases were IP cases. See Annual Report 319, at 291.

These litigants will often appeal these cases in case of adverse decisions independently of their views on the GC ruling.

Appeals as such may not be considered as empirical evidence of beliefs in the illegitimacy of the Court. They seem to be a normal feature of a democratic system. What matters most here is the stability or change in the number of appeals and see whether similar phenomena occur in member states. Appeals in administrative courts in France show the same trends. Between 2014 and 2018, 991.436 cases were lodged before lower administrative courts, 156.818 were appealed[311], meaning that about 15% of these cases made their way to administrative appeal courts (15,2% in 2014, 15,9% in 2015 and 15,9%). In Germany in 2018, the decisions of civil courts were appealed about 12% of the time in 2018 (12% altogether, 9,7% in Bade-Württemberg, 21,5% in Berlin, 14,9% in Brandenburg)[312]. The stability of appeals across time, space and jurisdiction does not give any indication of legitimacy challenges for the GC in general. The number of appeals is indeed high (Chalmers and al. 2019:165) but that seems to be a structural effect that remains steady overtime, independently of the changes in the socio-economic context or of the actions of EU courts.

6.3.2.2 Divergences between the 2 benches?

The existence of appeals is thus a structural feature of democratic societies. However, if higher courts set aside to a great extent the decisions of lower bodies, the belief in the *entire* judiciary as a corps capable to interpret the law correctly will erode over time. Parties must have a right to appeal to another body if they genuinely feel like the court of first instance erred in law and be given the opportunity to expose why the argumentation of the GC was flawed. Judges remain empowered citizens with an outstanding socio-professional capital but are not immune to errors that considerations such as justice or effectiveness (see 6.1) may trigger.

On average, a GC decision is partially or totally set aside by the ECJ 1 out of 6 times in the 21st century. The high dismissal rate is unsurprising from an actor-centered perspective. Other than the different experience

311 "Les Rapports du Conseil d'Etat. Rapport d'activité 2019", 14 mars 2019, p. 31, at: https://www.vie-publique.fr/sites/default/files/rapport/pdf/194000539.pdf

312 "Rechtspflege Zivilgerichte 2018", Statistiches Bundesamt, 20 September 2019, pp. 43-8, at: https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/zivilgerichte-2100210187004.pdf?__blob=publicationFile

criterion required for judges to sit either on the ECJ or the GC, the members of both courts have similar profiles. Most members of both institutions have been acquainted to the judicial culture for some time, a phenomenon that increasingly happens because of the judicial endogamy effect of the EU legal profession (see 4.2). The collegial decisions taken by both courts also minimize the risks of divergence.

Table 6.4: Outcomes of appeals before the ECJ

	Appeals dismissed	Total Appeals	% Appeals dismissed
2000	63	78	81%
2003	46	64	72%
2005	43	50	86%
2011	109	124	88%
2013	140	160	88%
2015	105	134	78%
2018	138	165	84%
Total	644	775	82%

However, about 18% of cases are (at least partially) overturned by the ECJ, meaning that both courts hold diverging interpretations about certain provisions of the legal order. Chalmers and al. 2019 viewed 2 major areas of divergence: rules of *locus standi* (*Jégo-Quéré*) and the rights of suspects of terrorism in the EU (*Kadi*). These 18% are thus surprising for the reason mentioned in the previous paragraph: the homogeneous profile of judges. If we assume that experience brings some additional guarantee, meaning concretely that more experienced judges may make less interpretation mistakes, the EU "Hercules" (the perfect judge in Dworkin's framework: 1986) remains nonetheless human for a part, and thus may also make mistakes, without any possible appeal. The rectification may occur in subsequent cases, but there cannot be a rectification in the case at hand and thus for the litigant who lost, for example national governments directly represented by the Council in *Kadi*. The ECJ must obtain quality results on the processual side of adjudication and be as open as possible in order to open a dialogue with the legislature. That fact does not apply to the CJEU alone but to most ICs whose decisions are final. They however raise the prospect of stressing the need for national CCs to conduct

thoroughly their *ultra vires* rulings, as they remain in the EU the only actors able to overturn legally and individually an ECJ ruling. The recent plea by some scholars to criticize CCs for declaring inapplicable *ultra vires* rulings in their member states received a lot of support from eminent scholars[313], generating a lot of sympathy elsewhere because of the stakes involved in the *Weiss* case. But they unfortunately overlook the absence of potential checks of ECJ rulings, other than obtaining the unanimity of member states to adopt legal change[314].

Another indirect option for a review of ECJ cases would have been the EU's accession to the ECHR. While the ECtHR would not have heard appeals *per se*, the accession would have given an opportunity for external reviews of ECJ rulings, potentially limiting the latter's effects at least in (the most important) cases where civil and political rights are involved. This type of review (which would have constituted a desirable constitutional check) was shot down by the ECJ, since the Court expressed in *Opinion 2/13* that the current setup of both supranational institutions does not allow for the EU's accession.

6.4 The temporal dimension of adjudication in the EU

After nearly 7 decades of European integration, the CJEU has established itself as a stable institution in the EU and has even become a systemic actor in the EU legal profession. Mayoral showed recently that the CJEU generates high levels of trust from national judges in the 21st century (Mayoral 2017). Support for the Court remains steady even in political crises (see 3.1), while its attentive public remains for the overwhelming part firmly convinced that judges are performing well. The Court has fulfilled in the 21st century Easton's 3 rquirements leading to diffuse support. First, it must be durable, and resist the influence of isolated outputs. Second, it must underlie "support for the whole political community". Third, diffuse support arises out of childhood, continuing adult socialization and direct experience (Easton 1975). *The possibility of a legitimacy crisis of the CJEU seems to be more a remote than genuine possibility*.

313 Kelemen and al., "National Courts Cannot Override CJEU Judgments".

314 One may even argue that the BVerG already sought to "seek to change the EU legal norm involved by working through the EU political process" in *Gauweiler* (especially in the reference to the CJEU, rather than in the final ruling), and more generally in *Honeywell*.

Legitimacy deficits may arise however because of matters related to the temporality of adjudication. A concrete illustration refers to the length of proceedings. Judges must render their decision within reasonable time. It is an obligation for the Court since it is enshrined in the CFR[315]. Yet there is no consensual definition as to what reasonable time means (6.4.1).

While judicial institutions must strive for the quickest resolution possible, the Court may however not rush the resolution of cases. The pace of proceedings has an incidence on the types of outcomes the Court can deliver. When following a normal temporal sequence, the Court may deliver independent outcomes that will only be noticed by the legal profession. When pressed to deliver a decision however, the Court will find itself under an unusual scrutiny since actors beyond the legal professions will temporarily shift their attention to the Court in the expectation of the ruling, limiting its ability to adopt independent decisions. Such situations tend to occur in political crises when the time horizons of different actors are suddenly synchronized, shuffling altogether various vectors of legitimacy (Lord and Magnette 2004) that are suddenly applied at the same time to EU measures, including CJEU rulings (6.4.2).

6.4.1 "Justice delayed is justice denied": adjudicating cases *in* time

Justice is always delayed in cases where the judge decides to refer a preliminary question to CCs or the CJEU. The proper legitimacy standard for judges is to strike a balance that allows them to reflect and settle the case properly, without taking 'too much' time. A ruling given on facts that occurred 5 years before the judgement or more may have no authority in practice. And the winning party will have suffered a wrong for a long time without a remedy. The CJEU must do everything in its power to solve cases as quickly as possible, but not quicker than demanded by the thorough examination of a case. Justice rushed is also proper justice denied.

It is relevant to split the ECJ and the GC here. The main challenge for the first mostly lies in helping national judges in PRPs. Trials with a PRP are

[315] Art. 47(2) CFR

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law"

suspended while the ECJ gives its interpretation of the acquis. This interpretation comes back to the national judges, who must apply it to the case at hand, meaning that the process is twice or even thrice longer than it would be without a PRP (6.4.1.1). The GC faces challenges related to its specific docket. State aid and competition cases usually require an extensive scrutiny that lasts on average over 4 years. In the context of a growing backlog, President Skouris initiated the controversial reform of the GC in 2015, augmenting the number of judges to 56/54 after Brexit by September 2019, with the main objective of reducing the length of proceedings, which obviously generated consequences for the taxpayer (6.4.1.2).

6.4.1.1 Helping the national judges: the faster resolution of PRPs in the 21st century

The number of PRPs kept going up in the 21st century (6.3.1.1) while judges felt like they had to quicken the pace of resolving preliminary rulings. The ECJ undertook to fasten their resolution, and was successful in doing so when looking at the numbers.

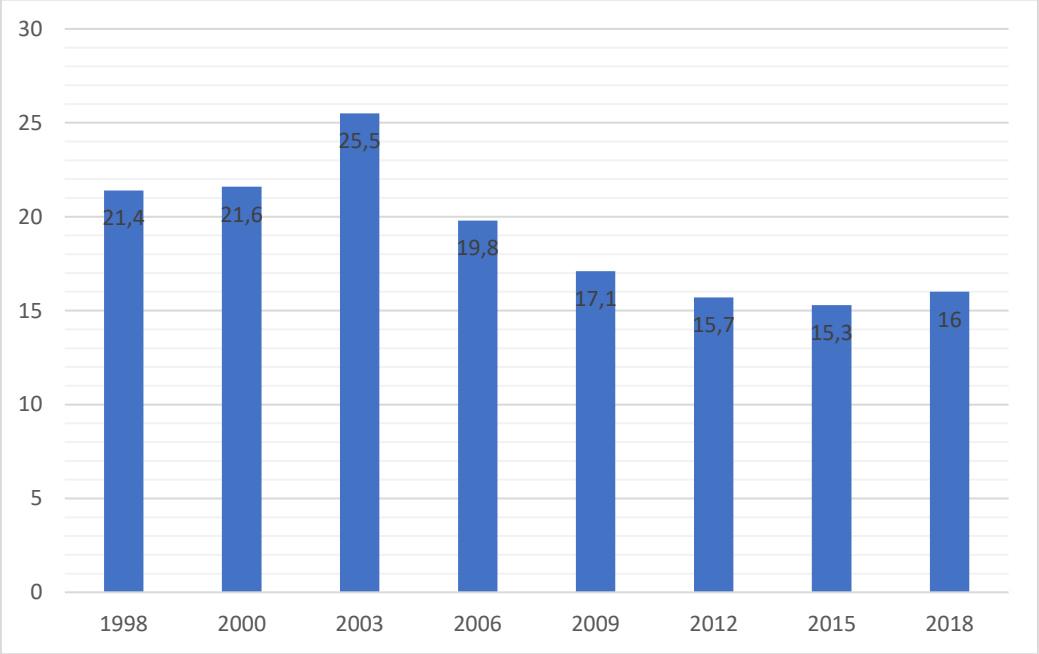

Figure 6.6: Average length of PRPs (1998-2018)

How did the ECJ manage to drop the average length of proceedings by nearly 12 months in less than 15 years, while the number of PRPs nearly tripled during that span? The quicker resolution of cases means trade-offs, for example by conferring their resolution to smaller chambers (of 5 or 3

judges instead of the Grand Chamber, etc.), meaning that the *de facto* collegiality of ECJ decisions drops with the rising number of PRPs. It also means that the ECJ, like the ECtHR, joins similar cases and settles them together, without totally considering the specifics brought by every case. The Court also increasingly uses adjudicatory orders[316] since 2003 (about 5-10% of the time in PRPs: Šadl and al. 2020:2), which may signal its "lack of interest in the debate while trying to maintain its legitimacy among Member States" (Ibid.:3). The cryptic style denounced by Weiler may also be a consequence of the perceived need to solve cases faster.

But this reduction of the time of proceedings may also result from the rationalized administration of justice studied in the previous chapter. The Court provides the parties[317] and the referring judge[318] with clear indications about the process. It invites them to be concise and avoid repetitions, propose tentative answers and base their argumentation around it. It ensures that hearings are as short as possible while using all the information available.

The legal order is denser than it used to be at the beginning of the century, rendering the mission of the Court one of application and clarification rather than one of interpretation (Conway 2012; see 4.1). The big constitutional cases leading to processes of constitutional "supplementation" (Horsley 2018) such as the introduction of fundamental rights in the EU legal order led judges to slowly process cases like *Internationale Handellsgsellschaft* in order to let scholars – the co-interpreters of EU law – to give their opinion on the subject (Alter 2001). While a few cases of constitutional nature make their way to the CJEU (*Kadi* for example), most of the cases are core cases. The rationalization and professionalization of EU law experts allows for a faster processing of

316 Orders refer to pre-existing rulings in which the same legal question raised and answered by the ECJ. It allows for a quicker resolution of the case by avoiding the drafting of an opinion from an AG, hearing of the parties, etc. See Art. 99 RoP

317 Practice Directions to Parties Concerning Cases Brought Before The Court, at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020Q0214(01)

318 Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001

all elements that help in the judicial process: clear references and parties' submissions, faster scholarly production of doctrine, etc.

In any case, the Court managed to cope with the high number of PRPs in the 21st century, and while it expresses concerns over the increasing backlog[319], it nonetheless managed to lower the pace of PRP proceedings by 40% in 15 years, thus avoiding the accumulation of cases and their slow processing, which comparatively constitutes the main legitimacy challenge of the ECtHR, generating some pushback from a few CoE member states (Madsen in Alter and al. 2019:243-74).

6.4.1.2 The growing backlog at the GC and the reform of 2015

The rationalization of the adjudication process did not prove enough to help the GC deliver justice in time. The GC historically took a much longer time than the ECJ in solving cases.

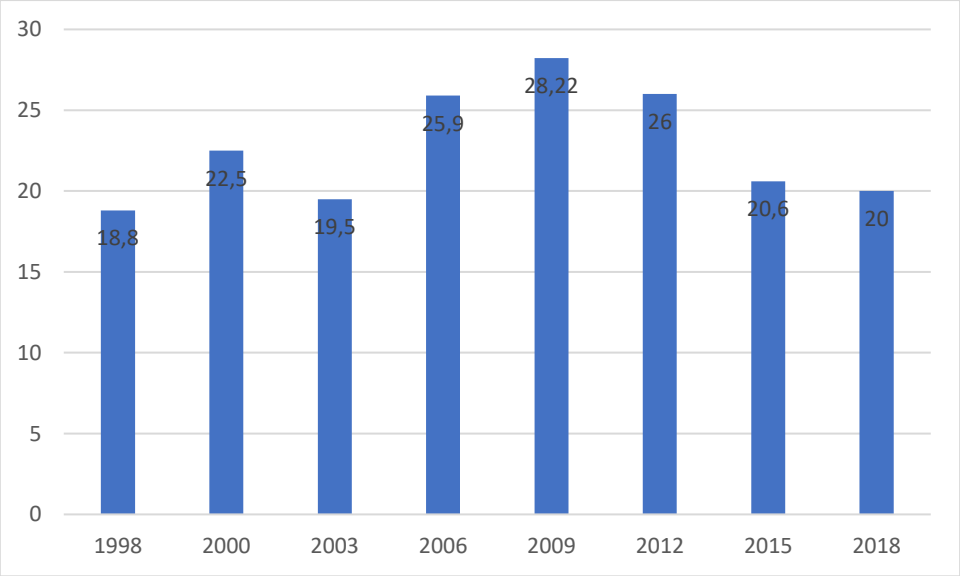

Figure 6.7: Average length of proceedings at the GC (months)

These averages do not seem comparatively excessively high, because most cases are IP cases which the GC solves within 20 months on average. However, the resolution of competition cases – about 10-15% of the GC's docket – lasts on average more than 42 months, and often exceeding the 4-year mark[320]. State aid cases represent the same proportion of cases and

[319] Annual report 2019, at 25

[320] See CJEU Annual Report 2010, at 175, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_tribunal_final_en.pdf

have historically generated long proceedings too, reaching an average of 50,3 months per case in 2009[321]. In parallel, the GC was like the ECJ a victim of its own success and saw its number of cases quadruple in 20 years.

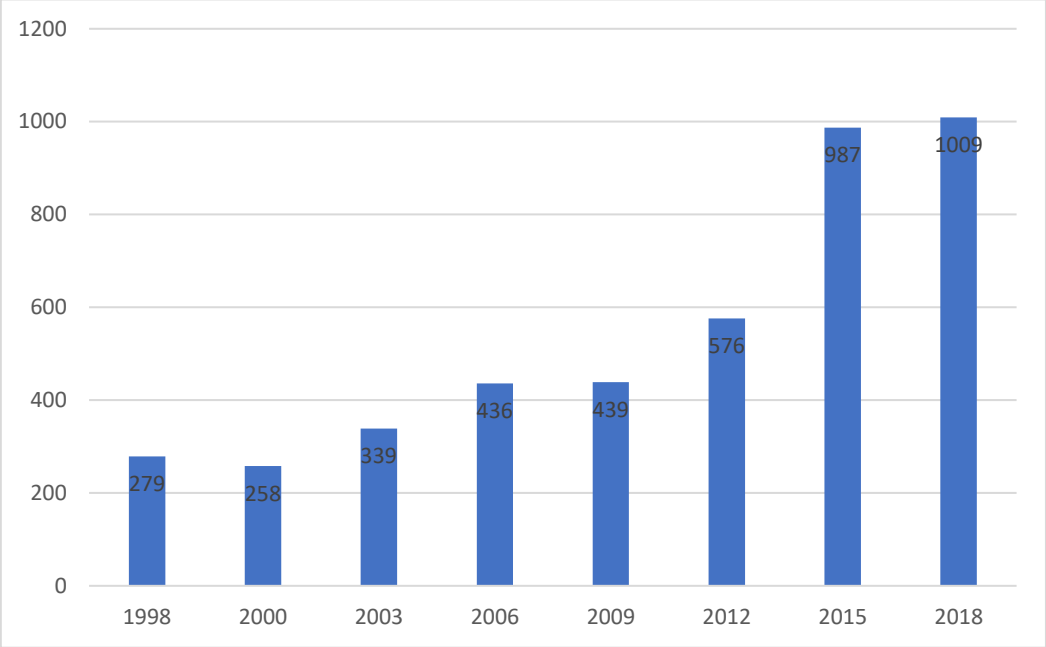

Figure 6.8: Number of cases dealt by the GC per year (1998-2018)

The nature of cases dealt by the GC coupled with an increasing backlog led the President of the Court Vassilios Skouris to launch in 2011 the reform of the GC. The ECJ opposed before the establishment of a patent court[322] on the grounds that it would undermine the unity of EU law[323]. In 2011, President Skouris sent draft amendments to the legislature indicating the intention of the CJEU to ask for an increase of the number

[321] Ibid.

[322] Opinion 1/09, 8 March 2011

[323] The creation of a specialized court pursuant to art. 257 TFEU would technically not undermine the right of the *CJEU* in ensuring the uniformity of EU law but would not associate the *ECJ* in the process. Decisions of specialized courts can be appealed on points of law to the GC which acts as a court of last instance in such cases. When patent/IP cases are raised in national courts however, the national judge would send a PRP to the CJEU, which pursuant to art. 267 TFEU would join the docket of the ECJ. Both courts would then have the possibility of saying what patent law is without a hierarchy principle. Both courts would then fittingly have to start a judicial dialogue.

of judges at the GC, 12 to be exact[324]. Doing so, he started ruthless war that opposed many people within the Court.

Skouris certainly did not expect that his fiercest opponent in the attempt to reform the GC would be the GC itself, at least via 2 of its members, at-the-time President and still a member (as of March 2021) judge Marc Jaeger and judge Franklin Dehousse, who wrote an article/policy brief summarizing the elements against the increase of judges at the GC[325]. Marc Jaeger leaked some documents that indicated that the GC was not agreeing with the propositions of Skouris, and instead opted for an increase in supporting staff (more référendaires) and the creation of a specialized IP or competition court supervised by the GC[326], i.e. what the ECJ wanted to avoid with the patent court in Opinion 1/09. The Council did not start any attempt at reforming the GC in 2011 because member states could not agree on the appointment process of judges, since states would not be equally represented[327].

The Italian presidency of the Council relaunched the idea of reforming the GC in 2014 and asked the President of the ECJ to submit renewed observations to the Council. President Skouris saw where the plan failed the first time and asked for *doubling* the number of judges at the GC in 3 stages[328]. He also argued in favor of ending the CST and reintegrating civil service cases to the GC. He even submitted a provisional budget detailing

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[324] See the full letter in Great Britain: Parliament: House of Commons: European Scrutiny Committee, "Forty-seventh Report of Session 2010-12: Documents Considered by the Committee on 23 November 2011", 9 December 2011, at 77-80

[325] See F. Dehousse," The Reform of the EU Courts: The Need of a Management Approach", *Egmont Paper No. 53*, December 2011, at: http://aei.pitt.edu/33464/

[326] Financial Times, "The 1st rule of ECJ fight club…is about to be broken", *Opinion Brussels Blog*, 27 April 2015, at: https://www.ft.com/content/b3979694-b42b-38b4-b1a7-dddbdb2c1878

[327] Politico, "Number of judges at EU court to double", 22 December 2014, at: https://www.politico.eu/article/number-of-judges-at-eu-court-to-double/#:~:text=The%20European%20Court%20of%20Justice,member%20state%20of%20the%20EU.

[328] "Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court", October 2014, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/8-en-reponse-274.pdf

the raise in expenses for the taxpayer, amounting to 22,9 million euros and thus augmenting the CJEU budget (348 million €) by 6,6%[329]. Marc Jaeger opposed the reform once more. He directly contacted the Italian presidency and argued that the proposed amendments only reflected the views of the ECJ but not of the GC. He also claimed that augmenting the number of judges at the GC and abolishing the CST was "inappropriate". He added that the GC could deal with the increased backlog by augmenting the number of assisting staff (registry and référendaires), which would be less costly for the taxpayer[330]. Skouris was furious that Jaeger reached out once more to the legislator without his consent and told him that a foreseen augmentation of référendaires to help GC judges was cancelled. Skouris even went to meet Chancellor Merkel in Berlin to "sell his reform" to the member state with the most votes in the Council, and secured the approval of the first legislative organ of the Union in the process[331]. A confused EP directorate invited both Presidents to express their points behind closed doors, in order to appease an internal civil war that had been made public since then[332]. Unsurprisingly, the EP followed the Council and sided with Skouris who had left the Court a few weeks earlier[333].

The reform reached its last stage in September 2019. The GC is still not complete (see 4.2). The reform had a direct consequence on the reduced length of proceedings at the GC, which dropped by 8 months on average in less than 10 years (see Figure 6.6). But it left the taxpayer with an extra 20 million € to take out of its pocket (The ECJ argues that the numbers are

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329 "Estimated cost of increasing the number of Judges at the General Court", October 2014, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/8-en-annexe-coutestimatif-364.pdf

330 Financial Times, "The multiplying judges of the ECJ", Opinion Brussels Blog, 17 April 2015, at: https://www.ft.com/content/4ce57462-8656-3fd3-973e-01b33c15dc6b

331 Libération, "La justice européenne au bord de la crise de nerfs", Blog « Coulisses de Bruxelles » - Jean Quatremer, 26 April 2015, at: https://www.liberation.fr/debats/2015/04/26/la-justice-europeenne-au-bord-de-la-crise-de-nerfs_1812912/

332 See Politico's Brussels Playbook of 28 April 2015 at: https://www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-eu-judges-at-war-varoufakis-out-the-le-pens-top-twiplomats-spokespeople-shuffle/

333 Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R2422&qid=1500292632025

around 13,5 million €[334]), making it one of the most expensive ICs in the world (Shany 2014: 277). Internal criticism kept coming even after the reform took place by GC judges Collins, Jaeger (who is coincidentally no longer President of the GC since 2019) and Dehousse who claimed that "doubling the court was more or less the worst solution that could be applied"[335].

It remains too early in 2021 to fully assess the effects of the Skouris reform. The number of dealt cases per year has augmented in a significant fashion, while the numbers of pending and new cases have remained stable over the 2015-2019 period. Some hypothesize that the GC may eventually run out of work[336]. While the figures of the last 5 years alone are not suggesting this potential fate, the fastest resolution of cases (an average of 16,9 months in 2019) may eventually turn the reform into a superfluous tour de force by the former President of the Court. Only time will tell if he pushed for an overly costly reform, especially in a context where debt, deficits and public spending remain a salient topic in the mind of the many citizens who went through the drastic effects of austerity measures. The adoption of said reform occurred right after the tragedy that surrounded the adoption of Greece's third bailout package in 2015, i.e. at a time where spending was a salient topic. The acceptance at that time of spending more for the development of the CJEU is another proof that member states believe in the actions of EU's top court.

6.4.2 When justice is out of time: the synchronization of judicial and political time horizons

Judges remained historically unscathed from major criticism despite bold decisions. The reason partially lies in the specific temporal horizon of the judicialization process. A normal policy cycle involves a long temporal sequence in the EU, taking years from its inception to the interpretation of the adopted measure by the Court (about 4 years). On several occasions, the Court started this inception process itself with its interpretation of EU law. For example, *Cassis* started the path leading to the free movement of goods (Alter and Meunier-Aitshala 1994). Each policy cycle is of course

[334] Council Press Release, "Court of Justice of the EU: Council adopts reform of General Court", 3 December 2015, at: https://www.consilium.europa.eu/en/press/press-releases/2015/12/03/eu-court-of-justice-general-court-reform/

[335] Politico, "Judges 'pray' for cases as European court expands", 14 January 2016

[336] Politico, "Judges 'pray' for cases as European court expands", 14 January 2016

different. Some involve more stakeholders than others, or necessitate longer discussions in the Council and the Parliament, have a differentiated implementation span depending on the legislative instrument (regulation or directive), demand implemented or delegated acts, etc. The two types of policy cycles depicted in Figure 6.9 only have the heuristic purpose of describing how cycles will likely look like in calm and crisis-laden socio-economic contexts.

In calmer times, policy moments traditionally involve different audiences. The time between agenda-setting and formulation is a technocratic exercise involving a few experts (including legal experts of the Commission) from within and outside of the EU institutions (normally Brussels-based CSOs). The span between formulation and decision involves political authorities deciding on the issue. The moment of the decision itself and the following days gather the biggest crowd possible and is the most salient part of the process: the Commission, EP members, heads of state and governments. All political actors are in the spotlight, talking and justifying the measures taken. This salience in the EU remains average at best compared to political developments in the member states. This concentration attracts the attention of EU-focused media and sometimes of national press. Attention drops when reaching the implementation phase, which becomes more of an administrative than a political process. Evaluation is also an expert and technocratic process that involves only a few experts. A subpart of evaluation – judicialization – involves an even smaller crowd: the legal profession.

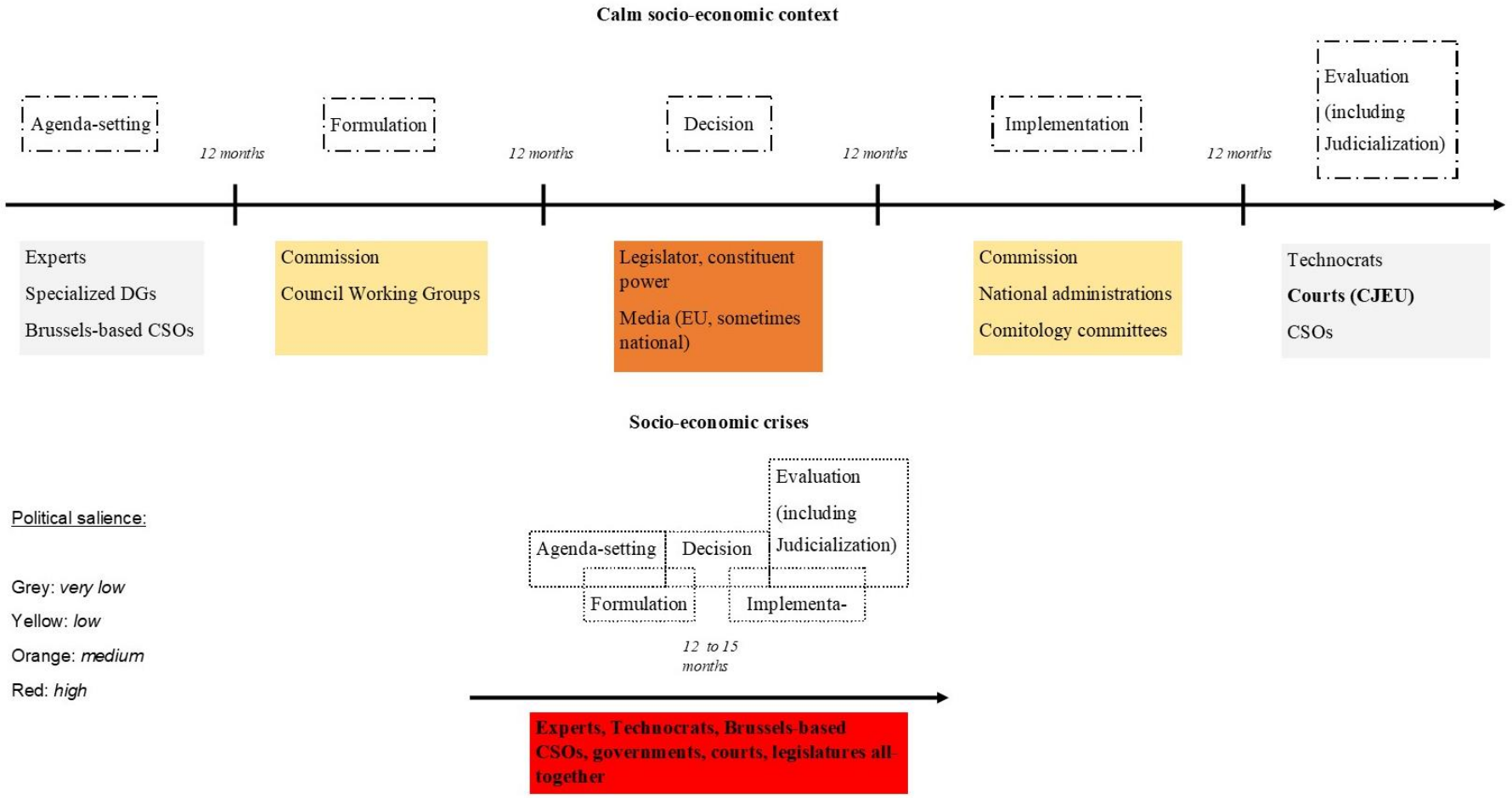

Figure 6.9: Policy cycle in the EU and actors involved

Inspiration: Best in Cini and Pérez-Solórzano Borragán 2019: 233-52

Graph: author

The judicial part of the policy process is far removed from the decision moment of the cycle, which is the only salient part of the policy process in the EU. It lies at the very end of the cycle, and only members of the legal profession are truly monitoring and *expecting* rulings. In normal times, the CJEU catches the rare attention of the media only *after* it handed down a ruling. There is almost never a media coverage of CJEU rulings before the Court made the decision public, except at times for brief announcements in Brussels-based expert media like *EU Observer* or *Politico*[337].

Politicians and lawyers have different time horizons and concentrate their attention in different fora. EU lawyers have increasingly focused on judicial activities, while politicians are the heart of the policy process when they communicate heavily about their involvement and opinion at the key phase of decision. The differentiated attention to the various parts of the policy sequence means that each mobilizes their own normative legitimacy standards or "vectors" (Lord and Magnette 2004). Agenda-setting and formulation involve experts that will mobilize technocratic standards of legitimacy to assess the activities of the Commission. Decision will be assessed by *political* and *parliamentary* standards, meaning with an emphasis on political communication (for endorsement or rejection of a decision after a vote). Implementation will be assessed according to *administrative management* standards, emphasizing *bureaucratic efficiency*. And judicial activity will be assessed according to the standards developed in this monograph.

Political crises change the pace of the cycle, squeeze together all the various steps and audiences, and lead to application of different legitimacy standards to all policy actors. Crises are "fluid" situations (Dobry 2009) in which pre-established societal arrangements break down. The various subsystems of the Union – legal, administrative and economical – that worked in silos are suddenly put altogether at the time of *Decision*, a moment which remains traditionally reserved to politicians. This expansion of actors and the salience of issues are conducive to the "politicization" (de Wilde and al. 2016) of judicial activities. The citizens and the media are suddenly acquainted to more obscure bodies like the ECB and the CJEU, put under a mediatic spotlight that these institutions and their staff are not accustomed to have. The salience and urgency of the situation render the announcement of decisions of these non-

[337] *Microsoft* being a rare exception of a case attracting media attention in normal times.

majoritarian bodies *expected*, while in normal times discussions about banking and judicial decisions happen *after* their publication. In crisis times, the Court is under an intense scrutiny, meaning that it is no longer accountable to the legal profession alone, but to political actors and citizens. It thus also means that the legitimacy standards forged by the legal profession compete with political and administrative standards of governance. In other words, courts are no longer solely judged based on judicial standards, but must also apply other legitimacy standards.

Authorities will try to cope with such crises by taking measures countering, eradicating or limiting their effects. Law may be changed or already provide for emergency mechanisms in case of temporary socio-economic stress[338], making the life of judges easier when assessing the activities of other governance actors. But the (perceived) urgency of matters will compel the administration and politicians to act fast. Because of the high voting thresholds needed to adopt new treaty provisions and derived legislation, the constituent power and legislator will act on the edge of legality and "by stealth" (Schmidt 2020). In the EU, any legal act raising suspicion regarding its compatibility with pre-existing norms will find its way into the docket of the CJEU, which will be caught in a legitimation predicament. Judges will either declare illegal measures null and void, halting the crisis-coping process and forcing the political to either forcefully overrule the judgement of the Court or simply disregard the ruling, suspending the rule of law for the time of the crisis, or judges will side with the political process and enshrine the suspension or the *de facto* obsolescence of provisions perceived as impeding the resolution of the crisis. In any case, the court will be unable to fulfill its mission of ensuring that the law is observed, since some provisions are disregarded by the other branches of government. It must also make a choice of legitimacy standards to apply: the legal profession standards, or the crisis-driven and directly legitimate political standards?

During the sovereign debt crisis, the Court chose the second option. The best example of a short cycle, breaking down of societal arrangements (including treaty rules) and suboptimal judgement, is the *Pringle* case. In *Pringle*, the Court had to decide if the establishment of the ESM and its acknowledgement in the newly adopted art. 136(3) TFEU via the simplified revision procedure of art. 48(6) TEU, did not contravene the no-

[338] For example art. 122 TFEU on temporary bailouts

bailout clause of art. 125 TFEU and did not modify EU competences beyond the third part of the TFEU, which is the only one that can be modified via the simplified procedure of art. 48(6) TEU.

Table 6.5: The temporal sequence of the Pringle case

Date	Event
16.12.10	Conclusions of the European Council: Agreement on the modification of art. 136(3) TFEU recognizing the establishment of a permanent bailout fund
25.03.11	Decision 2011/199: adoption of the constitutional modification of art. 136 TFEU
16-13.11.12	Entry into force of the Six Pack
02.02.12	Signature of the ESM Treaty
13.04.12	Action of Mr. Pringle before the High Court
17.07.12	High Court dismisses Pringle's action
19.07.12	T. Pringle appeals the High Court decision to the Supreme Court
26.07.12	ECB President M. Draghi says the Bank will do "whatever it takes" to save the euro
31.07.12	Supreme Court rejects Pringle's plead of unconstitutionality but stays in the proceedings regarding the interpretation of EU law
01.08.12	Ireland ratifies ESM
03.08.12	Supreme Court refers to the CJEU
06.09.12	ECB announces the OMT program
12.09.12	BVerG conditionally approves the ratification of the ESM, enabling the German government to ratify and *de facto* activate the ESM
27.09.12	Entry into force of the ESM (activated without the ratification of Estonia)
04.10.12	CJEU accepts the activation of the expedited procedure
23.10.12	Hearing before the Full Court
26.10.12	Opinion of AG Kokott
27.12.12	Date of the ruling
January 2013	First action launched before the BVerG about OMT
14.01.14	BVerG sends the referral ever to the CJEU

Pringle is the judicial touch of the entire EU institutional alliance that attempted to reduce the effects of the sovereign debt crisis. The constituent power agreed in December 2010 to create a permanent bailout, signaling that the temporary bailout mechanism of art. 122 TFEU became *de facto* inoperative. The member states crystallized the conclusions of the European Council in March 2011 when they modified the treaties using the simplified revision procedure[339]. After a failed attempt in July to replace the European Financial Stability Facility with a permanent fund[340], 25 member states signed the ESM treaty on February 2nd, 2012[341]. The latter is an international treaty not pertaining to the EU legal framework but using EU institutions to perform its tasks. Thomas Pringle, an independent MP in Ireland, thought that his country would lose its economic sovereignty and would be ruled by a transnational non-majoritarian institution. He thus argued that the ESM disregarded the obligations contained in the Irish constitution and in the EU treaties. After his first action was dismissed, Pringle appealed the case before the Supreme Court. The latter did not find any incompatibility with the constitution but referred the case to the ECJ to inquire about the compatibility of the newly adopted art. 136(3) with other economic governance provisions, especially with art. 125 TFEU, and to confirm that that the constitutional amendment simply created modifications in the third part of the TFEU. If not, member states would have to use the normal ratification measures of the treaties, meaning parliamentary supermajorities and referenda where required (namely Ireland itself). The Supreme Court thus referred the case to the CJEU in August 2012.

The full Court (a rare occurrence) gave its ruling on November 27, 2012, meaning that the 27 judges adjudicated the case in less than 4 months, accepting the activation of the expedited procedure in late September,

339 European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011D0199

340 European Council, "European Stability Mechanism treaty signed", 2 February 2012, at: https://web.archive.org/web/20120525163152/http://www.european-council.europa.eu/home-page/highlights/european-stability-mechanism-treaty-signed?lang=en

341 See the treaty at: https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en.pdf

organizing a hearing in late October, giving AG Kokott just 3 days(!) to draft her Opinion, on the basis of which the Court took one month and one day to adjudicate one of the most important cases in recent history. This *importance* is precisely what made *Pringle* unique. The salience of the ESM, the involvement of political actors and of the ECB at the same time in the resolution of the crisis, the parallel judicial resolution of the issue by several CCs (Fabbrini 2014) made the *Pringle* case anxiously expected within and beyond the legal profession. MEPs even interrupted a plenary session in Strasbourg in September 2012 to listen to a press release of the BVerG that announced the compatibility of the ESM with the Basic Law[342]. The Court's extended crowd was anxious because the questions raised by Thomas Pringle would lead to an intense legal debate, led by Koen Lenaerts, who was the judge-rapporteur in the case[343]. The socio-economic stakes, the intricacies of EU and international law generating many unknowns, and the first use of the simplified revision procedure of the treaties had politicians wary of judicial activities across Europe in the Fall 2012.

The decision – the ESM is not incompatible with EU law – is unsurprising (De Witte and Beukers 2013). The Court sided with the member states which indicated (at least the 25 that signed the ESM) that they wanted to change the EU economic constitution and would also do almost whatever it took to achieve that goal. The legal patchwork that is economic governance is a clear result of "institutional layering" (Thelen 1999) since national governments, remaining the key actors endowed with direct democratic legitimacy in the EU, nonetheless paid respect the pre-existing legal architecture of the Union, by using the international law route. The direct disregard of the no-bailout clause was not blatant, which was enough for the Court to declare art. 136(3) compatible with art. 125 TFEU, which is to be interpreted flexibly and allow for measures "safeguarding the euro area as a whole". Art. 125 TFEU could thus be read as allowing bailouts if member states aimed at conducting a sound budgetary policy and were led astray because of external economic shocks. The Court also firmly distinguished between monetary and economic policy, saying that these were separated by the objectives to be achieved when developing a

[342] EO Observer, "Sighs of relief as German court approves bailout fund", 12 September 2012, at: https://euobserver.com/institutional/117520

[343] Evin Dalkilic, "Mr Pringle goes to Luxembourg…", *Verfassungsblog*, 25 October 2012, at: https://verfassungsblog.de/mr-pringle-goes-to-luxembourg/

given policy instrument, and not by the effects that such measures necessarily have on the other.

The purpose here is not to revisit the entire reasoning of the Court, which legal scholars did to a great extent already (De Witte and Beukers 2013; Craig 2013; Beck 2013; Conway 2018; Borger 2013), but to assess the effects for a Court that was bound by the outcome. The CJEU had no possibility to choose another solution because of the quickness of the policy sequence and the socio-economic stakes. Had it declared the revision of the treaties null and art. 136(3) TFEU incompatible with pre-existing commitments, judges would simply have delayed the establishment of a permanent bailout fund. The *Pringle* ruling would have had effects only for a few months during which markets would still not have provided states in distress with enough funds to ensure their stability, provoking the exit from the euro area of some member states and would seemingly have threatened the stability of the whole euro area. This counterfactual assessment of the situation is not meant to be compelling, but to stress the possible non-processual arguments that went through the heads of judges. The Court simply had to make sure that its interpretation was plausible, knowing that the legal profession would for the most part accept a pragmatic judgement (De Witte and Beukers 2013; Craig 2013).

The Court potentially sacrificed some elements of processual legitimacy to reach this plausible solution. The actors that were displeased at the time all pertained to the legal profession. The 2 prolific scholars that published the most recent books on the quality of the legal reasoning of the Court expressed their disagreement over what they see as a poorly argued judgement (Conway in Bencze and al.2018: 230-5; Beck 2013: 447-51; 2017: 348). Other noticeable legal professionals picked up on the reasoning in *Pringle* and started proceedings in another case – the announcement of a bond-buying program called OMT – with a group of German constitutional lawyers led by professor Dieter Murswiek (see Murswiek 2014). He started with some colleagues the *Gauweiler* proceedings right after the publication of *Pringle*. In another short sequence – less than a year – the BVerG heard the case and decided to refer the OMT/*Gauweiler* case to the CJEU, the first time ever it used the PRP[344]. In the ruling, the BVerG aggressively recommended that the ECJ should declare the OMT program

[344] See the referral at: https://www.bundesverfassungsgericht.de/e/rs20140114_2bvr272813en.html

null and void, because it is not a monetary but an economic policy instrument, and thus encroached upon a competence of the member states. To distinguish between monetary and economic policy, the BVerG used the suboptimal definition given by the CJEU in *Pringle*. The CJEU did not agree with the recommendations of the German constitutional judges and spelled out the conditions under which the OMT program was truly 'monetary'[345], which the BVerG eventually accepted a year later[346]. However, it sent a preliminary reference to Luxembourg about another ECB bond-buying program – PSPP – which allegedly did not respect the conditions spelled out in *Gauweiler*[347]. The BVerG asked – albeit with a nicer tone – the CJEU to annul the PSPP program. The CJEU kept following its deferring attitude to the ECB and did not declare PSPP incompatible with EU law (*Weiss*), although it did not strictly respect the conditions spelled out in *Gauweiler*, e.g. maintaining uncertainty by not announcing too early the purchases the ECB would make (Bobic and Dawson 2020).

But this time the BVerG did more than bark. After following all the economic governance cases of the Court – thus adopting Lenaerts' stone-by-stone approach to CJEU case-law (Lenaerts 2015) – the German judges declared the *Weiss* ruling "incomprehensible" and eventually *ultra vires*. Since the CJEU did not carry out a genuine proportionality test, the BVerG did its own test – thus interpreting EU law itself – and found that PSPP went beyond what the treaties permitted, especially art. 123 TFEU, and demanded that the ECB presents further justification about the program.

The saga is probably not over, but it shows how political crises affect courts. The CJEU probably had no other way to decide the way it did in *Pringle*. During the hard phase of the Eurozone crisis, all players (including the BVerG) followed the European Council's lead towards a reconfiguration of economic governance. But when the situation cooled down in late 2012/early 2013, politicians and judicial actors started going

345 *Gauweiler*, 103-127

346 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, 21 June 2016, at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html

347 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, 18 July 2017, at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html

back to their pre-existing arrangements and their different time horizons. In early 2014, the BVerG thought it was time to end the process of integration by stealth that occurred in 2011 and 2012 by asking the CJEU to set aside a bond-buying program that had not even been activated. The CJEU probably had the opportunity to start the dialogue with the constituent power about the potential temporary suspension of the rule of law that occurred in economic governance in 2012, something it did in related areas already discussed (e.g. the application of the Charter to EU institutions when acting outside of the EU legal framework [*Ledra*], or whether MoUs could be subject to judicial review [*Portuguese judges*]). After all, *Gauweiler* was simply about an ECB Press release (see Borger 2016). But the Court followed its own dubious reasoning in Pringle, and "interpreted" the prohibition of monetary financing and the core mission of price stability as enabling the ECB to act. But when the ECB pursued another program which did not respect the conditions spelled out by the very CJEU, the German judges had enough of a skewed reasoning that let the ECB totally unchecked regarding its bond-buying activities[348].

6.4.3 Outcome legitimacy: the most important for a non-majoritarian body?

V. Schmidt argued that social scientists did not distinguish enough between output and throughput, arguing than many elements of process were wrongly analyzed as outcomes (Schmidt 2020; 2013). The distinction between process and outcome is particularly important for the CJEU whose means often justify the end. Judicial outcomes assessed in a vacuum will only generate strong normative statements based on superficial knowledge of the EU legal system and much more on philosophical moral standards. Some of these standards – justice and effectiveness – may explain however how outcomes seem in complete contrast with the sources and the process legitimacy of the Court. Emotions and professional considerations are often mixed in the assessment of judicial outcomes.

Some indicators are more easily identifiable. Compliance – rejected by Easton (1975:453) as a proper indicator of diffuse support – may be used as a partial indicator if one removes the coercive part of compliance and

[348] 2 BvR 859/15, 5 May 2020, at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html

focuses on voluntary obedience. In that regard, the CJEU obtains a high compliance rate from national courts.

Courts must also deliver justice on time so as not to be found in breach of the reasonable time principle. Wary of the consequences of delaying justice, judges took the matter in their own hands and modified their own practices and relationships with other legal professionals to ensure more efficiency during the proceedings. The President of the Court even convinced the legislator to double the number of judges at the GC and spend an extra 20 million € per annum at a time where every public administration in the EU was on the contrary required to limit their expenses as much as possible. There is hardly a better proof in the belief from other powerholders that the authoritative mission of the Court is justified.

These reforms do not come cheaply however and may generate disagreements within the legal profession. The objectives of some judges to perform better on overarching principles such as reasonable time or safeguarding the euro area will generate resistances within and outside of the CJEU and leave indelible marks in the track record of the Court.

Chapter 7

Conclusion: The Court of Justice of the European Union, a contested but legitimate authority in the EU in the 21st century

This monograph sought to provide a new theoretical account of the legitimacy of the CJEU. Abandoning the division between normative and sociological legitimacy which proves enticing but can only give partial accounts of justified power, the various chapters of this monograph attempted to articulate both sides of the concept into a comprehensive framework.

The purpose of this conclusion is twofold. First, it will take stock of the developments made through chapters 3 to 6. The intertwinement of sociological and normative legitimacy is difficult to bypass, although it led to an understandable division of labor between various social sciences with on the one hand philosophers and legal scholars bringing arguments to the debate about what the Court ought to do, and on the other hand political scientists and sociologists trying to measure empirically the acceptance of the Court's authority (except for Scharpf 1999; Schmidt 2020; Bellamy 2019). Citizens give their consent to the exercise of political power if it can be justified "in terms of their beliefs" (Beetham 2013). A look at survey results, detailing the results of answers to the alternative "do you tend to trust/not to trust" the CJEU only gives a partial answer to the question of judicial legitimacy in the EU today. The question of the

audience of the Court is crucial: it leads to an understanding of the social factors that in turn shape the common normative legitimacy criteria that the CJEU ought to apply or at least always aim at applying. That is why it received a special treatment in chapter 3, which serves as a cornerstone upon which the rest of the monograph is built.

"Normative" legitimacy cannot be simply normative either. Standards of legitimacy forged by the scholar or by the judge herself would be ignored for the former or contested for the latter if they do not find an echo in the public. Normative standards need to meet certain thresholds that are defined in common by the Court's audience, thus making them sociological and observable. For example, flipping a coin could be the solution to cases raising questions of competences between the national and the supranational level. It would neutralize the Court's historical tendency to integrate rather than defer to national particularities, and the law of large numbers would dictate that around 50% of the time the contested competence would be included in the EU legal order, while a similar share of issues would fall in the realm of domestic legal orders. This equal distribution would fit another pre-existing standard of judicial legitimacy in federal states, where one may expect from the highest court to rule around half of the time in favor of the federation and the other half in favor of states (Bobek 2014). Luck is a resource used in other areas of political life, e.g. the use of sortition to appoint members of popular deliberative assemblies or juries in courts. The normative argument in favor of flipping a coin may have some merit, but it would immediately be dismissed for sociological reasons, meaning that common societal understandings of judging in Europe today do not allow for flipping a coin in the judiciary. Judges must observe pre-existing standards of interpretation, shared by its audience. An institution's legitimacy will depend on the broad or narrow acceptance of these alleged normative legitimacy standards: the more these are accepted, the less contestation of its authority the CJEU will endure.

This first part of the conclusion will make the following point: the Court is not going through a legitimacy crisis. While the EU may be facing the greatest contestation of its powers to date, the Court remained unscathed from major contestation or disempowerment. On the contrary, the Court saw its prerogatives extended by each treaty revision in the EU. The Court even has the power to adjudicate cases beyond the EU legal order, for example as the court of the ESM. The Court's main alleged legitimacy

deficit came from its historical tendency to absorb as much competences as possible, described accurately as "competence creep" (Pollack 1994; Weatherhill 2004). The tendency is not completely over in the 21st century, especially in the field of fundamental rights protection and citizenship, but the retreat from activism hypothesized by Saurugger and Terpan (2017:34) seems founded. Even when the Court adopts "innovative" solutions in certain cases, its members manage to justify to the rest of the legal profession the soundness of the decision or stress its peculiarity within an immense ocean of case law (7.1).

The absence of a legitimacy crisis does not mean however that the socio-institutional setup of the Court does suffer shortcomings shortcomings. The second part of this conclusion will list a set of reforms that could help the CJEU justify even more its authority, by addressing some deficits that the legal profession raised in the past (7.2).

7.1 Weighing in vectors of legitimacy with the Court's audience: the consolidated authority of the CJEU in the 21st century

This monograph sought to complete pre-existing partial accounts of the legitimacy of the CJEU, especially by combining strands of scholarships that deal with the same object of study but use different conceptual lenses and theoretical apparatuses. This section will first summarize the results of the analysis (7.1.1) and will then briefly raise the questions about judicial legitimacy that could only find partial answers in this dissertation (7.2.2).

7.1.1 Sources, process and outcomes as framed by the Court's audience: advancing the understanding of the legitimacy of the CJEU

Using the lens of sociological neo-institutionalism, a theory of social action that describes individuals as balancing a logic of strategic behavior (consequentialism) with pre-existing beliefs and trajectories (appropriateness; see March and Olsen 1989; 1995), chapter 3 unpacked the dynamics surrounding the Court's public. While modern studies of democratic legitimacy logically hypothesize that all citizens constitute the audience of high courts (as is likely the case for some courts enjoying "popular authority" like the US Supreme Court or the BVerG [Alter and

al. 2019: 32-3]), the difficulties of associating all citizens in global or regional economic integration projects – e.g. in light of Rodrik's trilemma (2000) – nuance the argument that potentially all or even a majority of citizens would monitor and demand accountability from an IC. Alter and al. (2019) claim that ICs may enjoy "extensive authority" (Alter and al. 2019:33), meaning that IC activity would mostly capture the attention of national governments. The nature of the activity – legal interpretation – and the level of governance – transnational – where the CJEU operates are sociologically excluding factors for most of the population. If the law is according to Parsons a social medium that transcends the separation of society into subsystems, its interpretation has increasingly become the affair of a narrow group of professionals. EU law and generally legal studies used to be a necessary condition for entering all EU institutions in the early years of the EEC (see Vauchez 2015; Vauchez and de Witte 2013). But as for every polity that gains stability over time, the legal system, field or profession tends to gain autonomy and to become self-referential (Luhmann 2008:230-73). The times when lawyers used to be dominant in the population of all EU institutions is over (Georgakakis and de Lasalle, in Vauchez and de Witte 2013:137-52). EU law professionals are confined to dedicated socio-professional spaces that orbit around the CJEU. And while the CJEU is indisputably a political actor (Dawson and al. 2013:2), the ways by which it exercises its domination remains a mystery for most citizens.

Being a political actor does not turn judges into politicians. While legal professionals do not operate in a vacuum and may even have an agenda when it comes to integration, they must follow a set of routines and professional customs that other lawyers will hold them accountable for. The provisions of the legal order and the techniques of legal reasoning established in common fashion by the entire legal profession have a constraining effect even on the actors entrusted with the ultimate right of interpretation: the CJEU. This is mostly unaccounted for in political science, while it is taken for granted in legal scholarship, explaining to a large extent the difficult dialogue between both disciplines. Rational choice political scientists hardly assume that actors are cognitively bound by norms, but rather that they instrumentalize those strategically. While this line of social action might be true for certain spheres of politics and the administration, the study of the legal profession depicts an opposite tendency, in which powerholders "believe in their own myths" (Veyne

1988). Judges must respect the *modus operandi* of the legal profession because they believe that those are justified, and they know that their socio-professional counterparts will hold them accountable if they do not respect them. The question of whether judges are political actors with an agenda, or professionals who are just doing their job, becomes secondary when trying to grasp the legitimacy of the Court. Its outputs must reflect the broader understanding of what the law and its interpretation imply.

The excluding nature of legal interpretation means that most of the population does not know the Court's activities. The Court remains an institution that some citizens have potentially heard of but ignore for the most part the content of its activities, and often mistake it with other ICs such as the ICJ or the ECtHR, and vice-versa[349]. The twitter analysis performed in chapter 3 shows that the Court is capturing the attention of only a minority of citizens, which for the most part are legal professionals.

Few conceived the sociological legitimacy of a non-majoritarian institution as being truly sociological, meaning that the relevant audience is the product of social stratification, segregation or differentiation. The existence of democracy generates a widespread belief that all citizens are involved in monitoring ruling bodies. Yet only a portion of the population – the EU legal profession – truly scans judicial activities in the EU. This is consistent with Beetham's definition of legitimacy: domination has to be justified "in *terms* of their beliefs" (Beetham 2013:6, emphasis added). And since these terms are precisely alien to most of the population, it becomes (socio)logical that only the part of the population that is professionally acquainted to legal interpretation in the EU constitutes the relevant audience that brokers the legitimacy of the Court to the rest of citizens. Brokerage is a key concept here. While for most citizen the Court is an *a*legitimate institution (meaning that it is perceived as irrelevant), this does not mean that said citizens do not hold the Court's fate in their hands. While most decisions remain undocumented beyond the legal profession, some of the Court's activities have at times been the subject of a monitoring by non-legal professionals, for example after *Mangold*, *Chen* or before *Pringle* and *Gauweiler*. Moreover, general reforms about the EU have a direct incidence on the Court's authority. When a state decides to

[349] See in the 75 comments of the video "Koen Lenaerts | President of the European Court of Justice | Oxford Union" (https://www.youtube.com/watch?v=-GDG_45_u-A&t=3816s) the plethora of posts that confuse the CJEU for another IC.

join the EU, the Court's authority extends to a new territory, even if the CJEU itself is not the (main) reason for such an extension. When a member state leaves the Union, the Court's authority becomes geographically diminished even if the Court did not itself cause its disempowerment. The legitimacy of the CJEU – understood as the retention of its power to adjudicate cases over space and time – extends beyond the legal profession, but the assessment of the Court's activities is carried out by legal professionals who convey to the rest of the world whether the Court has "correctly" acted or not.

This brokered legitimacy has an incidence on the normative criteria used to appraise the Court's legitimacy. If the Court's attentive public has discriminating features, these will have an incidence on the standards used to judge judges. Broader standards used to assess the justified right to rule of polities such as the EU or other bodies such as the Commission may be relevant in the case of the CJEU, but in need of a tailormade adjustment to the specificities of the legal profession. These legitimacy standards may not however be essentially different from the rest of standards applied to the broader democratic societal organization of the EU or its member states. The CJEU remains an organ of the EU. The differences of legitimacy standards, through the prism of legal professional considerations, are differences of degree but not of kind.

Unsurprisingly, the literature on the legitimacy of IOs (Grossman and al. 2018; Howse and al. 2018; Squatrito and al. 2018; Bodansky in Dunoff and Pollack 2013) refer to standards referred in previous research on the legitimacy of polities or IOs (Buchanan and Keohane 2006; Scharpf 1999; Schmidt 2020): "source-, process- and result-oriented factors" (Grossman and al. 2018:5). Sources or input refer to the original consent granted to the CJEU to adjudicate cases. I claimed in chapter 4 that the sources of legitimacy may usefully be divided into 2 subcategories. The first refers to the formal consent enshrined in the treaties. This part has already been extensively analyzed in legal scholarship, which led me to simply stress ambiguities raised by the principle of conferral in framing the Court's mission. The CJEU historically managed to stretch the borders of EU integration by justifying bold and expansive solutions under the umbrella of "gap-filling". Judges skillfully convinced their crowd of the necessity of filling the "gaps" left by incomplete contracts and legislative vacuums. Instead of understanding it as law-making – which would render these solutions in breach of the separation of powers – the Court even convinced

some of its critics of the soundness of "constitutional supplementation" (Horsley 2018:78-81), e.g. via the introduction of fundamental rights in the EU legal order. Gap-filling has changed in the 21st century. The legal order is dense, the constituent power has constantly revised the constitutional structure of the Union in the last 20 years (thus making its intent clear), the rest of EU institutions are drafting and adopting clearer texts that leave only a reduced ambiguity and codify pre-existing judicial solutions. The Court's role has become one of clarification of legal principles in the 21st century.

The second subcategory of the sources of legitimacy of the CJEU is sociological in nature and refer to the outstanding properties of the European "Herculeses" (Dworkin 1986; Bobek 2015). The CJEU is something more than EU law or judicial review. They represent or at least must be "reflective" (Madsen in Romano and al. 2013) of society. The Court is often criticized for being a non-majoritarian institution taking binding decisions on behalf of the citizens of Europe. It would be a paradigmatical example of the shortness of input legitimacy that defines the EU. Yet the assessment must be nuanced. Comparing judicial organizations across Europe shows that electing judges is not a general practice. But sources of legitimacy and input, I argue, are more than the direct manifestation of consent of European citizens. Input can be found in situations where the appointment of powerholders reflects broader social understandings of what constitutes a legitimate ruler. Judges in CCs are appointed to their positions because their CVs display outstanding legal mastery. Meritocracy becomes a major source of legitimacy for the highest judges in Europe. Nonetheless, judging constitutional matters often requires tracing and/or displacing the border between law and politics (Stone Sweet 2000). Constitutional judges on the continent must also receive a political endorsement along with the approval of their socio-professional peers. The same occurs at the Court since 2010, where judges and AGs receive this double "political-meritocratic" approval. If the sources of legitimacy display a deficit, such a deficit would not be for the undemocratic nature of judging in the EU. This deficit would rather highlight that the standards for being a judge or an AG at the Court today have become overly demanding. The experience, knowledge and language proficiency must be combined in order to join the institution, which makes it impossible for some member states to find candidates that receive the approval of the 255 committee. The Court remains an

incomplete body, and as such represents only partially its member states, which cannot satisfy the legitimacy standards of demoicrats (Cheneval and Schimmelfennig 2013) and European republicans (Bellamy 2019).

The Court's legitimacy also depends on the processes by which it exercises its activities (chapter 5). Schmidt calls governance processes "throughput" and argued that it must be present but cannot compensate for shortcomings at the output or input levels. This monograph challenges this argument, claiming instead that process legitimacy matters equally if not more for the acceptance of the Court's powers. Traditionally, courts are associated with the principle of due process, meaning that all their activities must follow a strict core of procedural rules in terms of standing, evidence, type of pleas, etc. The CJEU does not display original features in terms of due process, which is for the most part is uncontroversial in the literature. Processual dynamics that go beyond the rules of procedures show how process-oriented considerations cement the Court's privileged position in the legal order. The CJEU's efforts in terms of participation (5.1) and responsiveness (5.3) are key elements of legitimation for the institution[350]. Associating other legal professionals as 'co-interpreters' and 'co-enforcers' lead judges to share their monopoly on law interpretation but also leads to increased acceptance from the other members of the profession who genuinely or perceptibly participated in the process of interpretation of EU law.

Transparency is a processual criterion where the Court suffers from several shortcomings. On the formal side, the Court privileges a general principle of judicial secrecy over access to documents, even if transparency is listed as a core principle of the Union. Secrecy should in this light be seen as an exception, or if secrecy must be kept the Court should justify in every case the reasons leading it to seal documents. Access to other court events like hearings are restricted for the most part to the few citizens who accept going to the courtroom. In terms of substance, the institutional organization that forces the Court to adopt collegial decisions lead to a cryptic style of writing. Transparence of

[350] The concept of legitimation – rather than legitimacy – is purposely employed here, since processual dynamics are observable phenomena aiming at restoring or firmly embedding the perceived rightfulness of the Court's activities. While legitimacy remains a normative concept, processual dynamics are practices that can be analyzed following Weber's "axiological neutrality".

judicial activities generates, after comparison with several other ICs, a perceived legitimacy deficit that would not cost much to eradicate.

This shortcoming is partially compensated by the increased sense of responsiveness and accountability. Accountability of judicial outputs proves difficult of the Union, since rulings that interpret the treaties have constitutional value and cannot be overridden by the legislator. Rulings that are perceived as infringing some principles of legal reasoning would keep producing effects without the possibility of political rectification other than a constitutional revision. That propels the Court and its members to take matters in their own hands and address criticism either via the judicial reconsideration of the principles in posterior rulings or to justify extra-legally the contested principles via academic channels. Judges, AGs and référendaires never left a contested principle unaddressed. Even if the further elements brought by members of the Court may not necessarily convince critics, the proactive involvement of the CJEU when considering and replying to criticism shows to its audience that it was willing to weigh in all considerations. Judges almost never fully overturn their criticized decisions however, but rather stress the specificity of a case like Zambrano. That behavior nuances but does not eradicate a perceived deficit in the Court's case law.

The Court must also achieve some global results that go beyond the strict interpretation of rules (chapter 6). The CJEU is an institution within a broader regime that it must support (Shany 2014). The Court must also ensure that that it adopts just solutions when the letter of the law is unclear. Conceptions about justice differ over time in the EU. In the 20th century, was about securing the existence of individual rights against the disproportionate and unnecessary influence of common market measures. The Court, with the introduction of fundamental rights in the EU legal order, became for some the institution that socially "re-embeds the market in the EU" by protecting the socio-economic rights of the citizens whose status had been weakened by regional economic integration in Europe (Caporaso and Tarrow 2009; see Höpner and Schäfer for a counterargument). The 21st century conception of justice in the EU is about the consolidation of a polity. The introduction of core state powers (fiscal policy, EMU, etc.) rather than market-making competences meant the adoption of solutions that generate categories of winners and losers (Genschel and Jachtenfuchs 2018). Justice could still mean adopting a "rights first" approach but no longer a "rights only" line of interpretation.

In clearer terms, justice in the 21st century meant that the Court accepts that EU law, even if still underpinned by fundamental rights, may harm some parts of the citizenry, most notably inactive migrants and TCNs. Judges slowly but steadily followed the trend, progressively untying EU citizenship from fundamental rights considerations (Wong 2019) and applying the legislative solutions that voluntarily discriminate between people. Here the legitimacy deficit of the Court may precisely lie in the fact that it captured the willingness of the constituent power while a part of its audience – mostly academics – has not accepted this shift yet. Effectiveness is allegedly another outcome to be achieved by the Court, meaning that judges must support via adjudication the objectives pursued by the political branches of the IO. Most of the debate about effectiveness was inconclusive, leading even to a potential argument that the CJEU had in fact been too effective in achieving political ambitions (see Shany in Grosman and al. 2018: 354-71), in the sense that it went beyond what the member states originally intended. The ex-post constitutional approbation of various judicial outcomes (for example. the Single European Act accepting the *Cassis* principle of mutual recognition) signified a political support for the Court's bold stance, which however had no guarantee that the constituent power would not exercise its power as principal to override judgements (e.g. in *Barber*).

The Court must also elicit compliance with EU law. Its decisions, giving clarity to the acquis, are meant to facilitate the understanding of norms by subordinates in the EU. Compliance is an imperfect indicator of legitimacy – rejected by Easton in his theory of diffuse support (1975) – because it may be elicited by other factors, not least the coercive infringement proceedings launched by the Commission. Only voluntary compliance may serve as indicator of legitimacy. Lower national courts, which have leeway in implementing preliminary rulings, constitute a privilege constituency to assess voluntary compliance with CJEU rulings. The scarce data on the issue (Nyikos 2003) historically showed that compliance with preliminary rulings is extremely high.

Finally, the results achieved by the Court must be understood in their temporal dimension. The Court has been contested at times but has for the most part performed its tasked flawlessly. A constraining objective of the CJEU was to give its decision *in* time. This objective, which on paper does not seem to generate any contention, started a fierce internal war at the Court about the reform of the GC. The reform has helped the Court in

coping with an increasing number of cases, and thus to avoid the constitution of an immense backlog that would hamper its activities. It remains too soon to tell whether the GC will even run out of work, as argued by some who opposed the reform in the first place. Finally, judicial results are unique because the Court comes at the latest stage of the policy cycle, absent extensive scrutiny. This situation changes during political crises, when the CJEU and other courts are associated with the political branches of government to find solutions to said crises. In these situations, the CJEU is no longer the differentiated judicial organ of the Union but simply another EU institution that must contribute to the resolution of threatening external shocks, mostly under the leadership of the European Council. The adoption of adverse decisions in such a context proves nearly impossible. This explains the difficult position of the Court during the sovereign debt crisis, when the legal solutions employed by the Council raised questions of compatibility with the treaties.

Exploring these various dimensions of the Court's legitimacy leads to the following conclusion: *the CJEU is not going through a legitimacy crisis*. Reus-Smit argued that an actor suffers a legitimacy crisis "when the level of social recognition that its identity, interests, practices, norms, or procedures are rightful declines to the point where it must either adapt (by reconstituting or recalibrating the social bases of its legitimacy, or by investing more heavily in material practices of coercion or bribery) or face disempowerment" (2007:157). I argued in the introduction that the CJEU cannot have illegitimate authority. Since judges do not have coercive tools that could allow them to secure their authority, the loss of 'social recognition' in its justified right to adjudicate cases in the EU would lead the Court to be stripped of its powers. The history of integration shows the opposite. Every modification of the constitutional structure of the Union involved the conferral of more competences, leading the Court to exercise authority in all newly integrated policy areas. In the EU, the CJEU's jurisdiction has only been excluded in the areas of CFSP and Common Security and Defence Policy, which did not prevent judges from controlling as many acts as possible orbiting around this policy area (Eckes 2016). The Court even became an adjudicator beyond the finite boundaries of the EU legal order, since it is the dispute settlement body of other IOs like the ESM, or even for member states willing to submit to the

Court cases raising issues about competences related but not conferred to the EU (e.g. double taxation)[351].

The CJEU has received its fair share of criticism for its 20th century stance of a right-only, pro-integration adjudicator that would stretch the limits of the treaties to include more competences at the EU level. Even if *a posteriori* approved by the constituent power, it constituted nevertheless an activist behavior that was hardly denied by the early members of the Court in the 1960s and 1970s (e.g. Pescatore 1972). The 21st century court is a much different body, even if the foundations remain the same. The recruitment of judges has been rationalized, the acquis is denser and in lesser need of supplementation and national governments are much more present in the integration process nowadays than they were back in the last century.

Yet this change of the Court's stance towards a more cautious and deferring line of legal reasoning has remained mostly unnoticed in political science. A reason for it is that the current members of the Court do not shy away from recalling the institution's glorious past. Rather than distancing themselves from rulings like *Van Gend en Loos* or *Les Verts*, current members of the CJEU celebrate the anniversaries of these decisions and sacralize them as founding moments of integration. This has a double effect. On the one, hand, it gives a sense of continuity at the Court and consolidates its nascent and growing *traditional* legitimacy. The Court may no longer face disempowerment since it has always been in the landscape of the postwar constitutional settlement that forged regional integration in Europe since 1945 and could only lose authority if the EU altogether were to be terminated. On the other hand, recalling its glorious political past gives the impression that the CJEU remains the not-so-impartial adjudicator that sparked the severe criticism and attempts at controlling the Court (e.g. Scharpf 2015, proposing that rulings be submitted to the approval of the European Council). It is interesting to witness that the most radical propositions of controlling and disempowering the Court came in the 21st century, i.e. at a time where integration-through-adjudication already took a halt. Of course, the CJEU had been criticized in the 2000s and 2010s, especially after the citizenship cases detailed at length in this monograph. But the Court had already changed to become

[351] Art. 273 TFEU

a more deferring body. Cases like *Coman* are the few of a nearly extinguished breed of judicial solutions that oppose national traditions.

If the Court is no longer on a crusade to absorb competences, it remains nonetheless protective of its jurisdiction. *Opinion 2/13* and *Melloni* are instances where the Court is sacrificing its former "rights only" approach to protect its prerogative of giving the ultimate interpretation of EU law. Since EU law does not submit to the ECtHR jurisdiction and does not bow to fundamental rights protected at the national level (even when said rights are better protected in some member states), the Court recalls that the sharing of its power of interpreting EU law is only partial and is firmly controlled by judges. Even if these 2 decisions are subject to criticism (e.g. Kuijper 2017), the interesting element from a legitimacy standpoint is that judges were asked to give an opinion about the protection of the EU's competences, either via an opinion or a PRP. There can be a legitimacy deficit for incorrect interpretation but not a legitimacy crisis if the Court did what it was asked to do. The potential crisis may occur if the Court chooses to disregard the actions of national governments, e.g. if it refused to cooperate with the ECtHR in fundamental rights cases.

This monograph has identified a set of challenges that the Court could cope with to address some legitimacy deficits, but has not identified a single element conducive of a legitimacy crisis for the CJEU, even at times where the authority of other EU institutions is as contested as it ever was, e.g. during the COVID 19 pandemic. The establishment of the EU's recovery fund was initially vetoed by Viktor Orbán and Mateusz Morawiecki because it tied the spending of funds to the application of the rule of law. Orbán and Morawiecki only accepted the mechanism after they secured that the provision on the rule of law be submitted to the CJEU to check its compatibility with the treaties[352]. If only a few can predict the sbehavior that the Hungarian and Polish governments will take after the Court hands down its ruling, the fact that the most important economic recovery plan of the century could eventually be secured thanks the CJEU's involvement shows a leap of faith that few would have predicted in today's Europe.

[352] EU Observer, "Poland and Hungary challenge rule-of-law tool at EU court", 12 March 2021, at: https://euobserver.com/political/151211

7.1.2 Theoretical shortcomings

This monograph concludes with the absence of a legitimacy crisis of the CJEU. It also concurs with the existence of practical shortcomings in the reasoning of the Court (Conway 2012; Horsley 2018) and in the institutional organization of the CJEU. However, this monograph fell short of addressing two theoretical gaps about legitimacy, which deserve mentioning here because they have implications for further research. These shortcomings are 1) the unresolved classification beyond the alternative "legitimacy/legitimacy crisis" and 2) the connection between source (input), process (throughput) and outcome (output) legitimacy.

7.1.2.1 Opening the legitimacy black box: beyond the dialectic "legitimacy/legitimacy crisis"

The literature surveyed in this monograph does not spell out intermediary situations between the full acceptance of the Court's authority on the one hand, and the rejection of such authority on the other. Powerholders would either have legitimacy, or they would not. Easton, who did not equate legitimacy with his key concept of diffuse support, defined the former as pre-existing beliefs about the regime or authorities that individuals either firmly hold or not at all (Easton 1975: 452). Yet his key concept of diffuse support sparks the idea that trust or support are not fixed beliefs, but are rather 'reservoirs' that may be sustained, filled or emptied over time following the actions of governing authorities. Diffuse support refers to a gradual process, putting support somewhere between emptiness and completeness. Legitimacy, defined here as the justified domination of powerholders in the eyes of subordinates, refers in in my view to such a gradual process. Citizens may hold some stable preferences about their governing authorities, but these may vary over time depending on specific outputs (or incidence on specific support) or on processual considerations such as good communication or transparency.

Moreover, the idea that a regime or a specific authority would be fully legitimate over time and space is hardly conceivable. The socio-institutional organization of a regime such as the EU essentially contains contradicting elements. For example, elements of transparency and participation of stakeholders (processual elements) may delay the production of outputs, or the protection of individual judges against potential government retaliation forces the CJEU to adopt collegial decisions that could have been clearer if dissenting opinions were

allowed. Besides, citizens do not all share the same amount of support towards powerholders. Some would hold unquestioned belief about the rightfulness of political domination, while synchronically others would mostly abide to the powerholders' rules but would also be critical about certain outputs or processual elements. These different perceptions put together cannot amount to a clear-cut result but point to certain tendencies shared by citizens about domination in the EU today.

The legitimacy black box could most certainly be open, putting categories such as "unquestioned acceptance of authority" and "complete rejection of authority" as extremes of a continuum where "justified domination" would/could figure as the middle category. The task would then consist in classifying intermediary situations. For example, this monograph referred several times to "legitimacy deficits" but did (voluntarily) not engage with the differences of degree that may exist for example between "opacity" and "unresponsiveness". The conceptual discussion of legitimacy would become much richer if we could forge a taxonomy of these intermediary situations, which would at the same time provide a more accurate sociological description of perceptions of authority.

7.1.2.2 Combination and trade-offs between sources, process and outcomes

The input, output and throughput trichotomy of legitimacy (Scharpf 1999; Scmidt 2020 and 2013) is unanimously recognized as relevant for discussing legitimacy. Discussions of each factor separately is extensive. However, the interrelationship between these three aspects of legitimacy remains undertheorized. Schmidt claims that throughput legitimacy must be present for the EU to be legitimate but may not compensate for shortcomings at the input or output levels of legitimacy (2020:38), a statement that I deny in the specific case of the CJEU (chapter 5). She also added that good output legitimacy may affect input in that good results will motivate citizens to vote for the same representatives. However, she warned that the reasons behind reappointments may not exclusively result from good policy performance.

The relationship between output and input for the CJEU would be even more problematic to measure. First, judges are not elected/reappointed/dismissed at the same time. The constituent power chose to provide a sense of stability at the Court by gradually changing its composition over time, echoed in practice by partial renewals every 3

years (with judges serving a 6-year mandate) which do not account for retirements or unforeseen resignations. Second, judicial outcomes are not the main criterion chosen, at least by the 255 committee, to assess appointments. The committee rather emphasizes the socio-professional properties of candidates. The committee nonetheless claimed in its last report that reappointments would no longer by automatic but that the activities of the members of the Court would be quantitatively appraised to assess their productivity. Third, outputs may not be the main factor in assessing the legitimacy of judges and AGs. Processual legitimacy may be equally if not more relevant to praise judicial efficiency. Respecting due process, be open about reasoning and responsive to criticism may prove more valuable than eliciting compliance or delivering rulings within reasonable time. Fourth, all outputs from the CJEU are collegial, making the task of identifying individual contributions a tedious if not impossible task, which would require a careful yet dubious statistical analysis of the presence of a given judge in certain cases, accounting for her potential weight as (non-)judge rapporteur, etc.

This monograph could not articulate any further these 3 dimensions of legitimacy, and even less provide metrics that could hypothetically attribute some artificial coefficient to the Court's vectors of legitimacy. The sources or input legitimacy of the Court have often been described as weak. But source legitimacy seems to matter little for the Court's overall assessment. The formal sources of the Court – the treaties – have historically not bound the Court's activities. These have gained more importance in the last decade with the legislative inflation of the 21st century in the EU. The sociological sources of the Court mattered even less for decades. Stone Sweet accurately claimed that appointments were a blind spot in the literature (Stone Sweet 2010). The subject has only received a scarce treatment since then, showing a lack of academic interest and maybe societal relevance. The label "Court" protects its members from extensive individual scrutiny. If the opinion of individual judges were – via the introduction of dissenting opinions – to be known, the importance of the sources of legitimacy may change, since we could identify some divisive issues within the Court.

The processual legitimacy of the CJEU sparks much more commentary. Either on the formal side of the procedure or on the extra-judicial forms of process, social scientists from several disciplines have extensively analyzed the Court in action. These careful analyzes have not however

generated the sentiment that the Court's authority is justified because it associates citizens to the process of governance, a claim that would reinforce Schmidt's point about throughput. I found out however that the Court associates its attentive audience to judicial matters. It even shares its prerogatives of interpretation and enforcement of EU law with scholars and national judges, allowing it to embed its authority in Europe further than any IC has ever done. The Court's attentive public cements the institution's legacy by co-producing the Court's outputs, which in turn in increase acceptance of judicial outcomes, even in situations where some influential pundits (like Herzog after *Mangold*, or Beck after *Pringle*) share their anger with the Court. The empirical importance of process in cementing acceptance does not mean that process may trump input and output from a normative standpoint. Political philosophers may argue that sound results and citizen input matter more than process. But the latter has an incidence on the other aspects of legitimacy.

The extent to which process may compensate for shortcomings at the outcome level is debatable and may differ from audience to audience. For the legal profession, a justified reasoning may compensate for a decision that looks unfair (*Dano*) to an audience used to a "rights-only" conception of justice, especially in the 21st century with the consolidation and growing expertise of the legal profession. For national governments, not very active in the judicialization of governance but resurfacing at times as key players, e.g. during socio-economic crises, the justified reasoning provided by the Court may not be enough to cover for the drastic socioeconomic consequences of a ruling for the public finances of a member state, as was the case after *Barber* in 1990.

There may be trade-offs between sources, process and outcome. However, my interpretation differs from Scharpf's and Schmidt's. Process legitimacy may compensate for shortcomings at the source or outcome sides of legitimacy, at least in the case of the CJEU (see above). The Court may possess less input legitimacy than other institutions found either at the EU or national level, yet its long existence has led critics to center their disapproval on a few isolated cases, and no longer on the constitutional need to 'have a Court' or not. The shallow legitimacy of the EU was manifest in the 20th century after every legitimacy-threatening deficit led to questioning the very existence of the EU. Unveiling throughput shortcomings such as corruption cases in member states generates criticism but does not raise questions of exit. On the contrary, the EU's

constitutional nature was challenged at least by a few at every turn since the ratification of the Maastricht Treaty (Lord and Beetham 1998). I claim here that the CJEU has overcome the phase of having its existence questioned. In that sense, proposals about changing the Court's nature or even existence are scarce, which testifies of the well-established character of the CJEU, a phenomenon acknowledged in various comparative works about ICs (Shany 2014; Grosman and al. 2018; Alter and al. 2019). In short, the Court has generated its own peculiar type of input legitimacy that helps it cope with criticism after rulings like *Mangold* or *Weiss*.

The 3 sides of legitimacy also conflict with each other. The existence of a perfectly legitimate institution or regime is not only an empirical impossibility but also a theoretical one since the quest for greater legitimacy at the level of sources may conflict with demands at the process and outcome levels, and vice-versa. In democratic settings, conflicts between process and outcome-related factors are often visible. The need to consult every relevant stakeholder collides with the quick resolution of proceedings and the coherence of the response (diluted by the high number of interventions), a phenomenon lived by the Court. Judge Prechal lamented the length and content (often repeating what parties sent in the written phase of the procedure) of hearings at the Court for good reasons[353]. However, hearing the parties is a measure of due process that applies in many member states. Democracy is the most attractive normative option for societies in Europe nowadays, but that does not cancel out the burdensome implications and the conflicting demands that arise out of its consolidation.

7.2 What could be done: proposing changes to enhance the Court's legitimacy

The theoretical shortcomings identified in the previous section do not rule out the identification of shortcomings or legitimacy deficits identified in the chapters 4, 5 and 6. These shortcomings pertain to two categories: the first relates to the substance (reasoning) of the Court's work and has received an ample treatment in legal scholarship. The second categories

[353] "Interview with Judge Sacha Prechal of the European Court of Justice: Part I: Working at the CJEU", European Law Blog, 18 December 2013, at: https://europeanlawblog.eu/2013/12/18/interview-with-judge-sacha-prechal-of-the-european-court-of-justice-part-i-working-at-the-cjeu/

refers to the institutional structure and organization of the Court, which has not generated much academic nor policy debate[354] (Dunoff and Pollack 2017).

Yet this section will be divided following another classificatory logic, which I believe to be more relevant for making policy recommendations. The first subsection will make recommendations that could be implemented without a reform of the treaties (7.2.1). Recommendations found in legal scholarship to change and ameliorate the Court's activities often involve vague recommendations (e.g. the "legislator should draft better laws") or imply a change in the constitutional architecture of the Union (e.g. Horsley 2018:279-80), even though treaty change remains for many a taboo option[355]. However, there are many options available to policymakers that do not imply treaty change and may help the Court obtaining a better result on the legitimacy standards developed in this thesis. The second part of this section will then inevitably beg the question of a treaty change, which would be centered around a single proposition that would be pivotal in changing the direction taken by judges today: a call for non-renewable terms and the introduction of dissenting opinions (7.2.2).

7.2.1 Changes absent treaty reform

These propositions are gathered in 3 major themes: administrative openness, legal reasoning and composition of the Court.

7.2.1.1 Increasing administrative openness and transparency

The first proposed amendment refers to the access of administrative documents. The Court decided that, in case of ambiguities about the nature of the contested document, the principle of judicial secrecy should prevail and that access to the document shall be denied. This line of policy does not respect the principle of general transparency enshrined in the treaties at art. 15 TFEU and art. 10 TEU. The Court shall make available

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354 For a rare counter-exception, see H. Brady "Twelve Things Everyone Should Know About The European Court Of Justice", *Center For European Reform*, 22 July 2014, at: https://www.cer.eu/publications/archive/report/2014/twelve-things-everyone-should-know-about-european-court-justice

355 "Macron, Merkel: EU treaty change is not taboo", *Euractiv*, 23 June 2017, at: https://www.euractiv.com/section/future-eu/news/macron-merkel-eu-treaty-change-is-not-taboo/

administrative documents whenever possible[356]. The recommendation does not call for an end of the principle of judicial secrecy. It simply asks the Court to suppress the general principle of non-access. Whenever judges believe that a document shall not be made accessible, they should motivate the reasons behind their decisions.

The second reform proposes a better access to Court hearings. The absence of recorded hearings, or the unavailability of the minutes of said hearings, hardly fits with the general principle of transparency discussed in the previous paragraph. The motive that judges discuss sensitive matters in the chambers does not hold for hearings held in PRP and appeal proceedings since only points of law may be raised in these procedures (Curtin and Weimer in Kuijper and al. 2018:357-412). Moreover, physical access to the courtroom during hearings in Luxembourg is available to any citizen willing to attend hearings on site. The content of hearings could easily be made accessible to citizens, even in cases where private and sensitive information is divulged. The minutes would simply need to anonymize the relevant sections.

7.2.1.2 Possible amendments to the Court's reasoning

Legal scholars have for a long time denounced the reasoning of the Court, or on the contrary acknowledged the difficulties for a collegial body to adopt a clearer line of reasoning (see 5.2). The recommendations here are thus debatable and do not reflect any emerging consensus in the legal profession or beyond. They are simply formulated through the prism of broader legitimacy considerations found in EU studies over the past decade (Bellamy 2019; Schmidt 2020) and tailormade to the CJEU.

The first recommendation is a call for a cautious use of general principles of EU law (see Conway 2012:166-70). General principles are used to complete the potential gaps in the legal system. The Court used arguments about "constitutional vacuums" and "incomplete contracts" (e.g., Lenaerts 2013a) to justify a judicial intervention in grey areas. While the claim here is not that the Court has always acted beyond its remit when employing general principles of EU law (the constituent power has

[356] See concurring D. Curtin, "Openness, Transparency and the Right of Access to Documents in the EU", study for the European Parliament's Committee on Petitions, June 2016, pp. 12-4 and 26, at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf

enshrined in the treaties these judicial 'interpretations'), the call for a contemporary cautious use of general principles is threefold. First, the legal order is denser in the 21st century than it was in the early years of the EEC. Second, the constituent power leads a "semi-permanent" revision process (de Witte 2002) of the constitutional architecture of the Union, which allowed successive national governments to recently make their global preferences clear about integration. Third, even in cases where the constituent power did not foresee any situation that could arise at the Court, the general principle of conferral of art. 5 TEU – along with the corollary principles of subsidiarity and conferral – point to the need for deference rather than expansion. Conway highlighted that the EU legal order "makes no claim to completeness in general" (Conway 2012:169). The Kelsenian idea of a complete legal system fits a domestic legal order in which the possibilities of legal extension are theoretically infinite. That fact most certainly does not apply to the EU. General principles should be used to a strict minimum and always be grounded in the legal traditions of *all* member states.

The second recommendation concerns the argumentation in rulings. To compensate for a lack of clarity, judges and AGs have used extra-judicial means for explaining in longer terms cryptic rulings like *Zambrano*. These mitigate potential criticism but may not compensate for the legitimacy deficit of the Court as a collegial body. Since the Court's attentive public is acquainted with the techniques of reasoning and monitors the incremental development of case law, judges may develop further some points of law, interpreted for the first time in criticized rulings, in subsequent rulings. If we endorse the "stone-by-stone" approach developed by the President of the CJEU Koen Lenaerts (2015), then we may conceive case law as a continuous dialogue between judges and the rest of the profession. The former may use new opportunities to rectify or at least address the criticism. Clearer argumentation also refers to tailormade statements applying to each ruling. The Court is found to re-use the expressions used in landmark cases and copy-paste them in other rulings. This impersonal style of reasoning may provide a sense of continuity – which is not an absolute obligation for the CJEU, since some of its members claimed that the Court is not bound by precedents[357] – but also does not do justice to the specificities of each case (see analysis by

[357] See for example the opinion of Opinion of AG Fennelly, para 139, in Joined cases C-267/95 and C-268/95, Merck v Primecrown, 5 December 1996

Bengoetxea 2015). Most rulings deal with a certain novelty, otherwise the Court would use a simple adjudicatory order claiming that the legal issue at hand has already been dealt with. Each ruling must combine the difficult but achievable balance between systemic stability and the necessary adjustment to the specifics of a new case.

The third recommendation about the substance of rulings is connected to the previous one but requires an extra (and potentially impossible) effort from the Court: the acknowledgement of previous erroneous interpretations. All interviewees pointed to the possibilities that rulings contain interpreting errors. Others analyze their work jointly with the inputs of colleagues and find that some rulings are simply incomprehensible, and thus may not satisfyingly fulfill the Court's duty of interpretation. Acknowledging errors is not easy for anyone. One may argue that it is however a necessity for the CJEU, since its rulings may only be overturned by constitutional amendment. Since the Court is not firmly bound by the *stare decisis* principle, it may free itself from the overconstitutionalization burden and rectify with the simple majority of its members the contested principles. Historically, the Court has instead stressed the specificity of the contested cases and thus does not solve the problem. Acknowledging an error does not mean that judges should bluntly say so. They may simply stress the need for overturning a precedent, considering new circumstances, a change in the interpretative line of general principles, or any other reasoning technique that always granted the Court a comfortable margin of maneuver to reason cases. The important outcome here is that the Court puts an end to a line of reasoning considered by many – like in *Zambrano* – as not sticking close enough to the treaty framework.

7.2.1.3 Reflecting 21st century legitimacy standards in the composition of the Court

The establishment of the 255 committee combined with the political endorsement of all national governments grant a double legitimating to judges and AGs. The composition of the Court suffers nonetheless from a few shortcomings, which can be addressed with the following suggestions.

The first refers to the imbalance of state representation at the function of AG. The EU is a "Republican Europe of states" (Bellamy 2019) in which the principle of "constitutional balance" (Dawson and de Witte 2013) puts

sovereign member states on an equal footing. This means that states may not be underrepresented at the confederal level. The allocation of AGs blatantly disregards this principle, since 5 member states have a permanent seat while the remaining positions are filled on a rotational basis. The proposition here is to submit all AG positions to the rotational mechanism. Such a change simply requires an intervention of the Council, since the treaties only mention that the Council may augment the number of AGs (art. 252 TFEU) while remaining silent on the repartition of positions among states.

The second recommendation here is directed at national governments and calls for the rectification of the gender imbalance at the Court. While recent instruments taken after the reform of 2015 mention the desirability of having a balanced court, the composition of the bench in 2021 has not fulfilled this expectation, which is hardly understandable and acceptable considering that women outnumber men in the legal profession. All national governments should take positive discriminatory measures favoring the application of women to be submitted to the 255 committee. This policy should continue up until the bench shows a nearly perfect balance.

The third and last proposition goes to the entire Court and the 255 committee and calls for a change of working language at the CJEU. English-speakers clearly outnumber the number of French-speakers in Europe. The immediate cost would be a complete reorganization of the translation services, which conceivably would lead some lawyer-linguists out of a job. The price is high, but it is certainly worth paying. Many great EU lawyers would suddenly gain access to the Court, enriching the institution with a talent that was voluntarily excluded until then.

7.2.2 A single treaty reform: a call for non-renewable terms

The non-renewability of terms in the highest courts is a common feature in Europe. For example, judges at the ECtHR, BVerG or French CC all leave their respective institutions after a maximum of 9 (ECtHR and French CC) or 12 years (BVerG). The treaties allow however judges of the ECJ (art. 253 TFEU) and GC (art. 254 TFEU) to be reappointed. Many judges thus served various terms and made a career at the institution. President Koen Lenaerts worked as a référendaire and has been sitting as a judge at the GC and ECJ since 1991. Renewable terms do not seem to

present a major legitimacy-threatening deficit, other than disregarding a normative call for the mandatory turnover at the highest positions of power. This last argument does not find a comparative echo in the other branches of government, since many member states allow for the reelection of their political leaders, at least for one term. A general normative standard against reelection and reappointment may not be spelled out since it does not reflect a shared societal consensus.

However, the call for non-renewable terms is an attractive normative option because the contested renewability acts as a catalyst of several legitimacy deficits affecting the judicial branch of the EU. Renewability means that judges seeking reappointment are institutionally not shielded from the retaliation of governments displeased with CJEU outputs. Thus, the Court has ensured that its judges are protected from external political pressures by adopting collegial rulings. This collegiality hides the individual inputs of judges but has a directly seen consequence in the quality of writing decisions. Moreover, collegial rulings give the impression that a single interpretation of the law is possible, even if the legal profession has stressed several times that alternative interpretative paths are often available.

Besides, even if judges are protected by the collegiality of their decision, the prospect of reappointment will have an incidence on their behavior. The 255 committee has already announced that it will genuinely control the activities of judges seeking reappointment, after a quantitative test assessing their productivity during their six-year term. This test may motivate judges to be highly productive but also incite them to rush the resolution of cases. In any case, it would disturb the judge's serenity and independence. The prospect of reappointment may also have an incidence during the deliberations. A judge that is convinced that a member state is violating its obligation under EU law may nonetheless fear the idea of drafting a strong adverse ruling, even if he feels compelled to do so.

Establishing non-renewable terms allows on the contrary for a set of possibilities that would increase not only the justifiability of the Court's power but would also foster an enhanced dialogue between the 3 branches of government. Non-renewable terms mean that judges do not have to be shielded from external pressures and can thus conduct their activity in total impartiality. The Court could thus introduce the possibilities of publishing dissenting opinions and vote tallies. Some argue that

publishing vote tallies decrease the chances of compliance with rulings that display an internal division[358]. They are however the best signal available to the legislator and constituent power that the current provisions of the acquis display an ambiguity. A close vote within a court shows that the issue is divisive and should thus be clarified politically. For example, *Van Gend en Loos* almost did not happen since the vote tally was 4 in favor and 3 against. The direct effect of EU law may not and potentially never have happened if a single judge had made up his mind differently in that case. We know already that judges do not always agree on all interpretations, thus simply begging the question of making this disagreement public or not. The main disadvantage is a potential short-term non-compliance, while the advantage is to increase legal certainty by making clear that certain provisions are already understandable or on the contrary deserve some substantiation or even a replacement by the legislator.

This reform does not change the nature of the CJEU. It shows that the Court is a well-established institution whose legitimacy is contested but is not in crisis. These propositions are simply a reminder that even legitimate powerholders can and probably should always strive for a better justifiability of their domination, especially in democratic societies.

[358] See a review in "Dissenting opinions in the Supreme Courts of the Member States", EP Study, Legal Affairs, 2012, at: https://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf

Bibliography

Adam S. and Mena Parras (2013) "The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle", *European Law Review*, 38 (6), 848-65

Adams M. and al. (2013) Judging Europe's Judges. The Legitimacy of the Case Law of the Court of Justice, Hart Publishing

- Bobek M., "Of Feasibility and Silent Elephants: the Legitimacy of the Court of Justice in the Eyes of National Courts", 197-234

- Lenaerts K. (2013a), "The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the Court of Justice", 13-60

- Thym D., "Towards 'Real' Citizenship? The Judicial Construction of Union Citizenship and its Limits", 155-74

- Weiler J., "Epilogue: Judging the Judges – Apology and Critique", 235-53

Alemanno A. and Stefan O. (2014) "Openness at the Court of Justice of the European Union: Toppling a taboo", *Common Market Law Review*, 51(1), 97-139

Alter K. (2001) *Establishing the Supremacy of European Law*, Oxford University Press

Alter K. (2008) "Agents or Trustees? International Courts in their Political Context", *European Journal of International Relations*, 14(1), 33-63

Alter K. (2009) *The European Court's Political Power*, Oxford University Press

Alter K. (2014) *The New Terrain of International Law. Courts, Politics, Rights*, Princeton University Press

Alter K. and Meunier-Aitsahalia S. (1994) "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision", *Comparative Political Studies*, 26(4), 535-61

Alter K. and al. (2016) "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences", *European Journal of International Law*, 27(2), 293-328

Alter K. and Helfer L. (2017) *Transplanting International Courts. The Law and Politics of the Andean Tribunal of Justice*, Oxford University Press

Alter K. and al. (eds) (2019) *International Court Authority*, Oxford University Press

- Achiume, "The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts", 124-46

- Madsen, "The European Court of Human Rights: From the Cold War to the Brighton Declaration and Backlash", 243-74

Arnull A. and al. (2008) *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press

Baetens F. (2019) *Legitimacy of Unseen Actors in International Adjudication*, Cambridge University Press

Banchoff T. and Smith M. (eds) (1999) *Legitimacy and the European Union: The Contested Polity*, Routledge

Barnard C. and Sharpston E. (1997) "The Changing Face of Article 177 References", *Common Market Law Review*, 34(5), 1113 – 1171

Beach D. and Pedersen R. (2018*) Process-Tracing Methods. Foundations and Guidelines*, University of Michigan Press, 2nd ed.

Beck, G. (2013), *The Legal Reasoning of the Court of Justice of the EU*, Oxford: Hart

Beck G. (2017) "Judicial Activism in the Court of Justice of the EU", *University of Queensland Law Journal*, 36(2), 333-53

Beetham D. (2013) *The Legitimation of Power*, Red Globe Press, Political Analysis, 2nd ed.

Beetham D. and Lord C. (1998) *Legitimacy and the European Union*, Routledge

Bellamy R. (2019) *A Republican Europe of States. Cosmopolitanism, Intergovernmentalism and Democracy in the EU*, Cambridge University Press

Bengoetxea J. (1993) *The Legal Reasoning of the European Court of Justice*, Oxford: Clarendon Press

Bengoetxea J. (2015) "Text and Telos in the European Court of Justice. Four Recent Takes on the Legal Reasoning of the ECJ", *European Constitutional Law Review*, 11(1), 184-216

Bennett A. and Checkel J. (2005) *Case Studies and Theory Development in the Social Sciences*, MIT Press

Benvenuti S. (2013) "Building a Common Judicial Culture in the European Union through Judicial Networks", Paper presented at the RC09 2013 Interim Meeting on "The Changing Nature of Judicial Power in Supranational, Federal, and Domestic systems", Dublin

Bertolini E. and Dawson M. (2021) "Fundamental Rights as Constraints to and Triggers for Differentiated Integration", *Swiss Political Science Review*, Forthcoming

Bickerton C. and al. (2015) "The New Intergovernmentalism: European Integration in the Post-Maastricht Era", *Journal of Common Market Studies*, 53(4), 703-22

Blatter, J. and Haverland, M. (2012) *Designing Case Studies. Explanatory Approaches in Small-N Research*, Springer

Blauberger M. and al. (2018) "ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence", *Journal of European Public Policy*, 25(10), 1422-41

Blauberger M. and Martinsen D. (2020) "The Court of Justice in Times of Politicisation: 'Law as a Mask and Shield' Revisited", *Journal of European Public Policy*, 27(3), 382-99

Blondel J. and al. (1998) *People and Parliament in the European Union: Participation, Democracy, and Legitimacy*, Oxford University Press

Bobek M. (2014) "The Court of Justice of the European Union", College of Europe, *Research Papers in Law*, 2/2014

Bobek M. (2014) "Legal Reasoning of the Court of Justice of the EU", *European Law Review*, 39, 418-30

Bobek M. (eds) (2015) *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, Oxford University Press

- Vandersanden, "The Real Test–How to Contribute to a Better Justice", 87-94

Bobic A. and Dawson M. (2019) "Court of Justice Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro: Weiss and Others", *Common Market Law Review*, 56(4), 1005-40

Bobic A. and Dawson M. (2020) "National courts Making sense of the "incomprehensible": The PSPP Judgment of the German Federal Constitutional Court", *Common Market Law Review*, 57(6), 1953-98

Bois J. and Dawson M. "EU Law and Sociological Institutionalism: A Lens to Study Judicialization", in Bartl M. and al. (eds) *Behind the Method: The Politics of Legal Research*, Edward Elgar, forthcoming

Borger V. (2013) "The ESM and the European Court's Predicament in Pringle", *German Law Journal*, 14(1), 113-39

Borger V. (2016) "Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*", *Common Market Law Review*, 53(1),139-96

Bourdieu P. (1987) "The Force of Law: Toward a Sociology of the Juridical Field", *Hastings Law Journal*, 38, 805-853

Bovens M. (2010) "Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism", *West European Politics*, 33(5), 946-67

Buchanan A. (2002) "Political Legitimacy and Democracy", *Ethics*, 112 (4): 689-719

Buchanan A. (2010) *Justice, Legitimacy and Self-Determination. The Moral Foundations of International Law*, Oxford University Press

Buchanan A. and Keohane R. (2006) "The Legitimacy of Global Governance Institutions", *Ethics and International Affairs*, 20(4), 405-37

Burley A. M. and Mattli W. (1998) "Europe Before the Court: A Political Theory of Legal Integration", *International Organization*, 47(1), 41-76

Byberg R. (2017) "The History of Common Market Law Review 1963–1993. Carving out an Academic Space for Europe", *European Law Journal*, 23(1-2), 45-64

Canotilho M. and al. (2015) "Austerity measures under judicial scrutiny: the Portuguese constitutional case-law", *European Constitutional Law Review*, 11(1), 155-83

Caporaso J. and Tarrow S. (2009) "Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets", *International Organization*, 63(4), 593-620

Carrubba C. and al. (2008) "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice", *American Political Science Review*, 102(4), 435 – 452

Carter D. and Jesse M. (2018) "The "Dano Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens", *European Papers*, 3(3), 1179-1208

Chalmers D. and al. (eds) (2016) *The End of the Eurocrats' Dream. Adjusting to European Diversity*, Cambridge University Press

- Grimm D. "Europe's legitimacy problem and the courts", 241-65

Chalmers D. and al. (2019) *European Union Law*, Cambridge University Press, 4th ed.

Cheneval F. and Schimmelfennig F. (2013) "The Case for Demoicracy in the European Union", *Journal of Common Market Studies*, 51(2), 334-50

Cichowski R. (2007) *The European Court and Civil Society*, Cambridge University Press

Cini M. and Pérez-Solórzano Borragán N. (eds) (2019) *European Union Politics*, Oxford University Press

- Kapsis I. "The Court of Justice of the European Union", 189-200

Claes M. (2006) *The National Courts' Mandate in the European Constitution*, Hart Publishing

Clausen F. (2020) "In the Name of the European Union, the Member States and/or the European Citizens?", in Ruiz-Fabri H. and al., *International Judicial Legitimacy*, Nomos, *Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law*

Conant L. (2002) *Justice Contained: Law and Politics in the European Union*, Cornell University Press

Conway G. (2012) *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press

Conway G. (2018) "The Quality of Decision-Making at the Court of Justice of the European Union", in Bencze M. and Yein Ng G. (eds) *How to Measure the Quality of Judicial Reasoning*, Springer, 225-50

Cohen J. (2012) *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge University Press

Craig P. (2013) "Pringle: Legal Reasoning, Text, Purpose and Teleology", *Maastricht Journal of European and Comparative Law*, 20(1), 3-11

Curtin D. and Weimer M. (2018) "The Court of Justice of the European Union: Supranational Adjudicator and Accountability Forum", in

Kuijper P. and al. (eds) *The Law of the European Union*, Wolters Kluwer, 5th ed., 357-421

Dahl R. (1994) "A Democratic Dilemma: System Effectiveness versus Citizen Participation", *Political Science Quarterly*, 109(1), 23-34

Davies B. (2012a) *Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949–1979*, Oxford University Press

Davies B. and Rasmussen M. (2012) "Towards a New History of European Law", *Contemporary European History*, 21(3), 305-18

Davies G. (2012b) "Activism relocated. The self-restraint of the European Court of Justice in its national context", *Journal of European Public Policy*, 19(1), 76-91

Davies G. (2018) "Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication", *Journal of European Public Policy*, 25(10), 1442-60

Dawson M. (2014) "How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice", *European Law Journal*, 20(3), 423-35

Dawson M. and de Witte F. (2013) "Constitutional Balance in the EU after the Euro–Crisis", *Modern Law Review*, 76(5), 817-44

Dawson M. and al. (2013) *Judicial Activism at the European Court of Justice*, Edward Elgar

de Montesquieu C. (1995 [1758]) *De l'esprit des lois*, Paris: Gallimard

de Tocqueville A. (1992[1835]) *De la démocratie en Amérique I*, Paris: Les Éditions Gallimard

de Tocqueville A. (1992[1840]) *De la démocratie en Amérique II*, Paris: Les Éditions Gallimard

de Waele H. and van der Vleuten A. (2011) "Judicial Activism In The European Court Of Justice — The Case Of LGBT Rights", *Michigan State Journal of International Law*, 19(3), 639-66

de Wilde P. and al. (2016) "Introduction: the Differentiated Politicisation of European Governance", *West European Politics*, 39(1), 3-22

de Witte B. (2002) "The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process", in Beaumont P. and al. (eds) *Convergence and Divergence in European Public Law*, Hart Publishing

de Witte B. and Beukers T. (2013) "The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*", *Common Market Law Review*, 50(3), 805-48

de Witte F. (2019) "Integrating the Subject: Narratives of Emancipation in Regionalism", *European Journal of International Law*, 30(1), 257–78

Dederke J. (2019) "Upgrading the CJEU's Public Relations Toolbox – Between Politicizing and Legitimizing the Court", Paper Presented at the ECPR General conference, Wroclaw

Dederke J. and Naurin D. (2018) "Friends of the Court? Why EU governments file observations before the Court of Justice", *European Journal of Political Research*, 57(4), 867-82

Dehousse R. (1998) *The European Court of Justice. The Politics of Judicial Integration*, Palgrave Macmillan

Dermine P. (2017) "The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework. ECJ 20 September 2016, Case C-8/15 to C-10/15, Ledra Advertising et al. v European Commission and European Central Bank", *European Constitutional Law Review*, 13(2), 369-82

Dermine P. and Markakis M. (2018) "Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: *Florescu*", *Common Market Law Review*, 5(2), 643-71

Dobry M. (2009 [1986]) *Sociologie des crises politiques. La dynamique des mobilisations multisectorielles*, Presses de SciencesPo, 3rd ed.

Dumbrovský T. and al. (2014) "Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in The Member States", *Common Market Law Review*, 51(2), 455–82

Dunoff J. and Pollack M. (2013) (eds) *Interdisciplinary Perspectives on International Law and International Relations*. The State of the Art, Cambridge University Press

- Bodansky D., "Legitimacy in International Law and International Relations", 321-42

Dunoff J. and Pollack M. (2017) "The Judicial Trilemma", *American Journal of International Law*, 111(2), 225 – 276

Dworkin R. (1986) *Law's Empire*, Harvard University Press

Dyevre A. and al. (2020) "Who Refers Most? Institutional Incentives and Judicial Participation in The Preliminary Ruling System", *Journal of European Public Policy*, 27(6), 912-30

Easton D. (1965) *A Systems Analysis of Political Life*, John Wiley & Sons Ltd, Underlining

Easton D. (1975) "A Re-assessment of the Concept of Political Support", *British Journal of Political Science*, 5(4), 435-457

Eckes C. (2016) "Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction", *European Law Journal*, 22(4), 492-518

Ely J. (1980) *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press

Eriksen E. and Fossum J. (eds) (2000) *Democracy in the European Union: Integration Through Deliberation?*, Routledge

Everson M. (2014) "Review of Gunnar Beck, The Legal Reasoning of the Court of Justice of the EU (Hart Publishing 2012)", *Irish Journal of European Law*, 14(1)

Fabbrini F. (2014) "The Euro-Crisis and The Courts: Judicial Review and The Political Process in Comparative Perspective", *Berkeley Journal of International Law*, 32(1), 101-60

Fallon R. (2005) "Legitimacy and the Constitution", *Harvard Law Review*, 118(6), 1787-1853

Fallon R. (2008) "The core of an uneasy case for judicial review", *Harvard Law Review*, 121(6), 1693-1736

Fallon R. (2018) *Law and Legitimacy in the US Supreme Court*, Harvard University Press

Follesdal A. and Koslowski P. (eds) (1998) *Democracy and the European Union*, Routledge

Follesdal A. and Hix S. (2006) "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik", *Journal of Common Market Studies*, 44(3), 533-62

Galanter M. (1974) "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change", *Law & Society Review*, 9(1), 95-160

Garrett G. and al. (1998) "The European Court of Justice, National Governments, and Legal Integration in the European Union", *International Organization*, 52(1), 149-76

Genschel P. and Jachtenfuchs M. (2011) "How the European Union constrains the state: Multilevel governance of taxation", *European Journal of Political Research*, 50(3), 293-314

Genschel and M. Jachtenfuchs (2014) (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford: Oxford University Press

Genschel P. and Jachtenfuchs M. (2018) "From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory", *Journal of Common Market Studies*, 56(1), 178-96

Georgakakis D. and Rowell J. (2013) *The Field of Eurocracy. Mapping EU Actors and Professionals*, Palgrave Macmillan

Gerring J. (2012) *Social Science Methodology. A Unified Framework, Cambridge University Press*, 2nd edition

Gerring J. and Cojocaru L. (2016) "Selecting Cases for Intensive Analysis: A Diversity of Goals and Methods", *Sociological Methods & Research*, 45(3), 392-423

Gibson J. and Caldeira G. (1995) "The Legitimacy of Transnational Institutions: Compliance, Support and the European Court of Justice," *American Journal of Political Science*, 39(2), 459–89

Gibson J. and Caldeira G. (1998) "Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis", *British Journal of Political Science*, 28(1), 63-91

Gilley B. (2009) *The Right to Rule: How States Win and Lose Legitimacy*, New York: Columbia University Press

Goldstein J. and al. (2000) "Introduction: Legalization and World Politics", *International Organization*, 54(3), 385-99

Grimm D. (2017) *The Constitution of European Democracy*, Oxford University Press

Grimmel A. (2011) "Integration and the Context of Law: Why the European Court of Justice is not a Political Actor", *Les Cahiers Européens de SciencesPo*, 03/2011

Grossman N. (2012) "Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?", *Chicago Journal of Internal Law*, 12(2), 647-84

Grossman N. (2013) "The Normative Legitimacy Of International Courts", *Temple Law Review*, 86(1), 61-106

Grossman N. and al (2018) *Legitimacy and International Courts*, Cambridge: Cambridge University Press

- Pollack M., "The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence", 143-173

- Sellers M., "Democracy, Justice, and the Legitimacy of International Courts", 338-53

- Shany Y., "Stronger Together? Legitimacy and Effectiveness as Mutually Reinforcing or Undermining Notions", 354-71

Guiraudon V. and al. (eds) (2015) *Europe's Prolonged Crisis. The Making or the Unmaking of a Political Union*, Palgrave Macmillan

Guth J. and Elving S. (2019) *Gender and the Court of Justice of the European Union*, Routledge

Haas P. (1992) "Introduction: Epistemic Communities and International Policy Coordination", *International Organization*, 46(1), 1-35

Habermas J. (1973) *Legitimation Crisis*, Beacon Press

Habermas J. (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press

Habermas (2012) *The Crisis of the European Union. A Response*, Wiley Publishing

Hall P., Taylor R. (1996) 'Political Science and the Three New Institutionalisms', *Political Studies*, 44(5), 396-57

Harsch M. and Maksimov V. (2019) "International Courts and Public Opinion: Explaining the CJEU's Role in Protecting Terror Suspects' Rights", *Journal of Common Market Studies*, 57(5), 1091–1110

Heipertz M. and Verdun M. (2010) *Ruling Europe: The Politics of the Stability and Growth Pact*, Cambridge University Press

Hermansen S. (2020) "Building legitimacy: strategic case allocations in the Court of Justice of the European Union", Journal of European Public Policy, 27(8), 1215-35

Hobbes T. (2002 [1651]) *Léviathan. Traité de la matière, de la forme et du pouvoir de la république ecclésiastique et civile*, "Les classiques des sciences sociales", at: http://classiques.uqac.ca/classiques/hobbes_thomas/leviathan/leviathan.html

Hoffman A. (2018) "Resistance against the Court of Justice of the European Union", *International Journal of Law in Context*, 14(2), 258-74

Hooghe L. and Marks G. (2009) "A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus", *British Journal of Political Science*, 39(1), 1-23

Horsley T. (2018) *The Court of Justice of the European Union as an Institutional Actor. Judicial Law-Making and its Limits*, Cambridge: Cambridge University Press

Howse R. and al (2018) *The Legitimacy of International Trade Courts and Tribunals*, Cambridge University Press

- Kuijper P.J. "The Court of Justice of the European Union", chap. 3, 70-137

Höpner M. and Schäfer A. (2012) "Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting", *International Organization*, 66(3), 429-55

Huber P. (2013) "The Euro Crisis Jurisprudence of the Federal Constitutional Court", *Italian Journal of Public Law*, 5(2), 85-102

Hütter S. and Kriesi H.P. (2019) "Politicizing Europe in times of crisis", *Journal of European Public Policy*, 26(7), 996-1017

Jesse M. and Carter D. (2020) "Life after the 'Dano-Trilogy': Legal Certainty, Choices and Limitations in EU Citizenship Case Law", in Cambien N. and al. (eds) *European Citizenship under Stress. Social Justice, Brexit and Other Challenges*, Brill: Nijhoff Studies in European Union Law

Joerges C. (1996) "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration", *European Law Journal*, 2(2), 105-135

Kalton G. and Schuman H. (1982). "The Effect of the Question on Survey Responses: A Review", *Journal of the Royal Statistical Society*, 145(1), 42–73

Kauppi N. and Madsen M. (eds) (2013) *Transnational Power Elites. The New Professionals of Governance, Law and Security*, Routledge

King G. and al. (1994) *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton University Press

Kelemen D. (2011) *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Harvard University Press

Kelemen D. (2012) "The political foundations of judicial independence in the European Union", *Journal of European Public Policy*, 19(1): 43-58

Kelemen K. (2018) *Judicial Dissent in European Constitutional Courts*, Routledge

Kenney S. (2012) *Gender and Justice. Why Women in the Judiciary Really Matter*, Routledge

Kokott J. and Sobotta C. (2014) "The CJEU – An Insiders' View of an Integration Workshop", *Human Rights Law Journal*, 34(1), 4-11

Kokott J. and Sobotta C. (2017) "Judicial review and institutional balance with regard to European monetary policy", in ECB Legal Conference 2017, *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4-5 September 2017, 104-11

Kriesi H.P. (2016) "The Politicization of European Integration", *Journal of Common Market Studies*, 54(1), 32-47

Kumm M. (2005) "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", *European Law Journal*, 11(3), 262-307

Larsson O. and Naurin D. (2016) "Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU", *International Organization*, 70(2), 377-408

Lasser M. (2004) *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*, Oxford University Press

Lechevalier A. and Wielgohs J. (eds) (2015) *Social Europe – A dead end: What the Eurozone crisis is doing to Europe's social dimension*, Djof Publishing

Lenaerts K. (2013b) "How the ECJ Thinks: A Study on Judicial Legitimacy", *Fordham International Law Journal*, 36(5), 1302-71

Lenaerts K. (2015) "EU Citizenship and the European Court of Justice's 'Stone-by-Stone' Approach", *International Comparative Jurisprudence*, 1(1), 1-10

Lenaerts K. (2019) "Limits on Limitations: The Essence of Fundamental Rights in the EU", *German Law Journal*, 20(6), 779-93

Lenaerts K. (2020) "The Court of Justice of the European Union as the guardian of the authority of EU law: A networking exercise", in Heusel and Rageade (eds) *The Authority of EU Law. Do We Still Believe in It?*, Springer

Lenaerts K. and Gutiérrez-Fons J. (2013) "To Say What the Law Of The EU Is: Methods Of Interpretation And The European Court of Justice", EUI Academy of European Law, *Working Paper 2013/09*

Lenaerts K. and al. (2014) *EU Procedural Law*, Oxford University Press

Lenaerts K. and Gutman K. (2016) "The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic", *American Journal of Comparative Law*, 64(1), 841–864

Levasseur A. (2002) "Legitimacy of Judges", *The American Journal of Comparative Law*, 50, "Supplement: American Law in a Time of Global Interdependence: U. S. National Reports to the 16th International Congress of Comparative Law", 43-85

Lindseth P. (2010) *Power and Legitimacy. Reconciling European and the Nation-State*, Oxford University Press

Locke J. (1992 [1690]) *Traité du gouvernement civil*, Paris: Garnier-Flammarion

Longo M. and Murray P. (2015) *Europe's Legitimacy Crisis: From Causes to Solutions*, Palgrave Pivot

Lord C. (2021) "Legitimacy Crisis in the European Union", in Brack N. and Gürkan S. (eds) *Theorising the Crises of the European Union*, Routledge

Lord C. and Magnette P. (2004) "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU", *Journal of Common Market Studies*, 42(1), 183-202

Lord C. and al., *Legitimacy Recovered? The Politics of Legitimation in the European Union*, Routledge, UACES Contemporary European Studies Book Series, forthcoming

- Bois J. and Piquer J. "Two-Way Street: Flexible and Rigid Legitimation"

Luhmann N. (2008) *Law as a Social System*, Oxford University Press

MacKenzie R. and al. (2010) *Selecting International Judges: Principle, Process, and Politics*, Oxford University Press

Madsen M. (2010) *La génèse de l'Europe des droits de l'Homme. Enjeux juridiques et stratégies d'Etat (France, Grande-Bretagne et pays scandinaves, 1945-1970)*, Presses Universitaires de Strasbourg

Majone G. (1998) "Europe's 'Democratic Deficit': the Questions of Standards", *European Law Journal*, 4(1), 5-28

Majone G. (2014) *Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far?*, Cambridge University Press

Malecki M. (2012) "Do ECJ Judges All Speak with The Same Voice? Evidence Of Divergent Preferences from the Judgments Of Chambers", *Journal of European Public Policy*, 19(1), 59-75

March J., Olsen J. (1989) *Rediscovering Institutions*. New York: Free Press

March J., Olsen J. (1995) *Democratic Governance*, New York: Free Press.

March J., Olsen J. (1998) "The Institutional Dynamics of International Political Orders", *International Organization,* 52(4), 943-969

Martinsen D. (2015) *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union*, Oxford University Press

Mataija M. (2009) "Case C-158/07, Jacqueline Förster v. IB-Groep – Student Aid and Discrimination of Non-Nationals: Clarifying or Emaciating *Bidar*?", *Columbia Journal of European Law Online*, 15, 59-64

Mattli W. and Slaughter A.M. (1998) "Revisiting the European Court of Justice", *International Organization*, 52(1), 177-209

Mayoral J.A. (2017) "In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe", *Journal of Common Market Studies*, 55(3), 551-69

Mayoral J.A. and al. (2014) "Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths

in National Judges' Assessment Regarding EU Law Knowledge", *Journal of European Public Policy*, 21(8), 1120-41

Mayoral J.A. and Torres Pérez A. (2018) "On Judicial Mobilization: Entrepreneuring for Policy Change at Times of Crisis", *Journal of European Integration*, 40(6), 719-36

Moravcsik A. (1998) *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*, Cornell, Ithaca

Moravcsik, A. (2002) "In Defence of the "Democratic Deficit": Reassessing the Legitimacy of the European Union", *Journal of Common Market Studies*, 40(4), 603–34

Moser P. and al. (2008) *Making Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice*, Edward Elgar Publishing

Mundell R. (1961) "A Theory of Optimum Currency Areas", *The American Economic Review*, 51(4), 657-665

Murswiek D. (2014) "ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014", *German Law Journal*, 15(2), 147-65

Naômé C. (2012) "Euroscepticism and the ECJ", in Brack N. and Costa O. (eds) *Euroscepticism within the EU Institutions. Diverging Views of Europe*, Routledge, 91-106

Nic Shuibhne N. (2011) "Seven Questions for Seven Paragraphs", *European Law Review*, 2, 161

Nic Shuibhne N. (2012) "The Third Age of EU citizenship", in Syrpis (eds) *The Judiciary, the Legislature and the EU Internal Market*, Cambridge University Press, 331-62

Nicola F. and Davies B. (eds) (2017) EU *Law Stories. Contextual and Critical Histories of European Jurisprudence*, Cambridge University Press

- Morijn P., "Personal Conviction and Strategic Litigation in *Wijsenbeek*", 178-200

- Pollack M., "Learning From EU Law Stories: the European Court and its Interlocutors Revisited", 577-602

- Strumia F., "Ruiz Zambrano's Quiet Revolution", 224-44

Nicolaïdis K. (2013) "European Demoicracy and Its Crisis", *Journal of Common Market Studies*, 51(2), 351-69

Nyikos S. (2003) "The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment", *European Union Politics*, 4(4), 397-419

O'Brien C. (2017) "The ECJ sacrifices EU citizenship in vain: Commission v. United Kingdom", *Common Market Law Review*, 54(1), 209-43

Obendiek A. (2020) *Data Disputes: Jurisdictional Conflicts and the Common Good in the Field of Data Governance, doctoral dissertation*, Hertie School

Panke D. (2011) *The effectiveness of the European Court of Justice*, Manchester University Press

Parsons T. (1991[1951]) *The Social system*, Routledge

Paunio E. (2013) *Legal Certainty in Multilingual EU Law Language, Discourse and Reasoning at the European Court of Justice*, Ashgate Publishing Limited

Pech L. and Scheppele K. (2017) "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 19, 3-47

Pescatore P. (1972) *Le droit de l'intégration*, Leyde, Sijthoff

Phelan W. (2020) "Robert Lecourt: The ECJ Judge as Journalist and Political Organiser", *TriSS Working Paper Series TRISS-WPS-01-2020*

Pierson P. (1996) 'The Path to European Integration: A Historical Institutionalist Analysis', *Comparative Political Studies*, 29(2), 123-63

Pollack M. (1994) "Creeping Competence: The Expanding Agenda of the European Community", *Journal of Public Policy*, 14(2), 95-145

Pollack M. (2003) *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, Oxford University Press

Posner E. and Yoo J. (2005) "Judicial Independence in International Tribunals, *California Law Review*, 93(1), 1-74

Rasmussen H. (1986) *On Law and Policy in the European Court of Justice*, Martinus Nijhoff

Raz J. (1988) *The Morality of Freedom*, Oxford University Press

Rawls J. (1971) *A Theory of Justice*, Belknap Press of Harvard University Press

Reus-Smit C. (2007) "International Crises of Legitimacy", *International Politics*, 44(2), 157-74

Robert C. and Vauchez A. (2010) "L'Académie européenne. Savoirs, experts et savants dans le gouvernement de l'Europe", *Politix*, 2010/1. 89, 9-34

Rodrik D. (2000) "How Far Will International Economic Integration Go?", *Journal of Economic Perspectives*, 14(1), 177-86

Romano C. (2020) "Legitimacy, Authority, And Performance: Contemporary Anxieties of International Courts And Tribunals", *American Journal of International Law*, 114(1), 149-63

Romano C. and al. (2013) *Oxford Handbook of International Adjudication*, Oxford University Press

- Huneeus A., "Compliance with Judgements and Decisions", 437-63

- Madsen M., "Sociological Approaches to International Courts", 388-412

- Pollack M., "Political Science and International Adjudication", 357-87

Rosas A. (2014) "Oral Hearings before the European Court of Justice", *Maastricht Journal of European and Comparative Law*, 21(4), 596-610

Rousseau J.J. (1963 [1762]) *Du contrat social ou Principes du droit politique*, Paris: Union Générale d'Éditions

Sabatier P. (1988) "An Advocacy Coalition Framework of Policy Change and the Role of Policy-Oriented Learning Therein", *Policy Sciences*, 21(2/3), 129-68

Šadl U. and al. (2020) "That's an Order! The Orders of the CJEU and the Effect of Article 99 RoP on Judicial Cooperation", *iCourts Working Paper Series,* 219

Sankari S. (2013) *European Court of Justice Legal Reasoning in Context*, Groningen: Europa Law Publishing

Sarat A. and Scheingold S. (eds) (2001) *Cause Lawyering And The State in A Global Era*, Oxford University Press

Saurugger S. and Terpan F. (2017) *The Court of Justice of the European Union and the Politics of Law*, Palgrave Macmillan

Scharpf F. (1988) "The Joint-Decision Trap: Lessons From German Federalism And European Integration", *Public Administration*, 66(3), 239-78

Scharpf F. (1999) *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press

Scharpf F. (2006) "The Joint-Decision Trap Revisited", *Journal of Common Market Studies*, 44(4), 845-864

Scharpf F. (2009) "Legitimacy in the multilevel European polity", *European Political Science Review*, 1(2), 173 – 204

Scharpf F. (2012a) "Perpetual momentum: directed and unconstrained?", *Journal of European Public Policy*, 19(1), 127-139

Scharpf F. (2012b) "Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis", *MPIfG Discussion Paper 12/6*

Scharpf F. (2015) "After the Crash: A Perspective on Multilevel European Democracy", *European Law Journal*, 21(3), 384-405

Scharpf F. (2017) "De-constitutionalisation and majority rule: A democratic vision for Europe", *European Law Journal*, 23(5), 315-334

Schmidt S. (2014) "Judicial Europeanisation: The Case of Zambrano in Ireland", *West European Politics*, 37 (4), 769-85

Schmidt S. (2018) *The European Court of Justice and the Policy Process. The Shadow of Case Law*, Oxford University Press

Schmidt V. (2008) "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse", *Annual Review of Political Science*, 11, 303-326

Schmidt V. (2013) "Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'", *Political Studies*, 61(1), 2-22

Schmidt V. (2020) *Europe's Crisis of Legitimacy. Governing by Rules and Ruling by Numbers in the Eurozone*, Oxford: Oxford University Press

Schweiger C. (2016) *Exploring the EU's Legitimacy Crisis: The Dark Heart of Europe*, Edward Elgar Publishing Ltd

Seabrooke L. and Tsingou E. (2019) "Europe's fast- and slow-burning crises", *Journal of European Public Policy*, 26(3), 468-81

Shany Y. (2014) *Assessing the Effectiveness of International Courts*, Oxford: Oxford University Press

Shapiro M. (1994) "Judges As Liars", *Harvard Journal of Law and Public Policy,* 17, 155-6

Simmons J. (1976) "Tacit Consent and Political Obligation", *Philosophy & Public Affairs*, 5(3), 274- 291

Slaughter A.M. and al. (1998) *The European Court and National Courts. Doctrine and Jurisprudence*, Hart Publishing

Solanke I. (2009) "Independence and Diversity in the European Court of Justice", *Columbia Journal of European Law*, 15(1), 89-121

Squatrito T. and al. (eds) (2018) *The Performance of International Courts and Tribunals*, Cambridge University Press

Steffek J. (2015) "The Output Legitimacy of International Organizations and The Global Public Interest", *International Theory*, 7(2), 263 - 293

Stein E. (1981) "Lawyers, Judges, and the Making of a Transnational Constitution", *American Journal of International Law*, 75(1):1-27

Stone Sweet A. (2000) *Governing with Judges. Constitutional Politics in Europe*, Oxford: Oxford University Press

Stone Sweet A. (2004) *The Judicial Construction of Europe*, Oxford University Press

Stone Sweet A. (2007) "The Juridical Coup d'État and the Problem of Authority", *German Law Journal*, 8(10), 915-27

Stone Sweet A. (2010) "The European Court of Justice and the judicialization of EU governance", *Living Reviews in European Governance*, 5(2)

Stone Sweet A. and Brunell T. (2012) "The European Court of Justice, State Non-Compliance, and the Politics of Override", *American Political Science Review*, 106 (1), 204-13

Streeck W., Thelen K. (2005) *Beyond Continuity. Institutional Change in Advanced Political Economies*, Oxford University Press

Thelen K. (1999) "Historical Institutionalism in Comparative Politics", *Annual Review of Political Science*, 2, 369-404

Thomassen J. (2009) *The Legitimacy of the European Union After Enlargement*, Oxford University Press

Thym D. (2015) "When Union citizens turn into illegal migrants: the Dano Case", *European Law Review*, 40(2), 249-262

Thym D. (eds) (2017) *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*, Hart Publishing

Tizzano A. and al. (2015) *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015). Liber amicorum Vassilios Skouris*, Larcier

Tuori K. and Tuori K. (2014) *The Eurozone Crisis. A Constitutional Perspective*, Cambridge University Press

Van Ham C. and al. (eds) *Myth and Reality of the Legitimacy Crisis. Explaining Trends and Cross-National Differences in Established Democracies*, Oxford University Press

Vauchez A. (2010) "À quoi « tient » la cour de justice des communautés européennes ? Stratégies commémoratives et esprit de corps transnational", *Revue française de science politique*, 60(2), 247-70

Vauchez A. (2015) *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity*, Cambridge University Press

Vauchez A. (2016) *Democratizing Europe*, Palgrave Macmillan

Vauchez A. and de Witte B. (eds) (2013) *Lawyering Europe. European Law As a Transnational Social Field*, Hart Publishing

- Granger M.P. "From the Margins of the European Legal Field: The Governments' Agents and their Influence on the Development of European Union Law", 55–72

- de Witte B. "European Union Law: A Unified Academic Discipline?", 101-16

- Georgakakis D. and de Lassalle M., "Where Have all the Lawyers Gone? Structure and Transformations of Top European Commission Officials' Legal Training", 137-52

Veyne P. (1988) *Did the Greeks Believe in Their Myths? An Essay on the Constitutive Imagination*, University of Chicago Press

Voeten E. (2013) "Public Opinion and the Legitimacy of International Courts", *Theoretical Inquiries in Law*, 14(2), 411-36

von Danwitz T. (2014) "The Rule of Law in the Recent Jurisprudence of the ECJ", *Fordham International Law Journal*, 37(5), 1311-47

Voss K. (2016) "But That's Not What I Asked! The Reformulation of Questions Asked in Preliminary Rulings", *Europarättslig tidskrift*, 18(4): 939-956

Waldron J. (2006) "The Core of the Case Against Judicial Review", *Yale Law Journal*, 115, 1346-1406

Watson D. (1992) "Correcting for Acquiescent Response Bias in the Absence of a Balanced Scale: An Application to Class Consciousness", *Sociological Methods & Research*, 21, 52–88

Weatherhill S. (2004) "Competence Creep and Competence Control", *Yearbook of European Law*, 23(1), 1–55

Weber M. (1978 [1922]), *Economy and Society*, University of California Press

Weiler J. (1991) "The Transformation of Europe", *Yale Law Journal*, 100(8), 2403-83

Weiler J (1994) "A Quiet Revolution - the European Court of Justice and Its Interlocutors", *Comparative Political Studies*, 26(4), 510-534

Weiler J. (2012) "Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'", *Singapore Journal of Legal Studies*, 248–268

Weiler J. (2017) "The Transformation of Europe Revisited: The Things that Do Not Transform", in Poiares Maduro M. and Wind M. (eds) *The Transformation of Europe. Twenty-Five Years On*, Cambridge University Press, 33-52

Wessel R. (2006) "A Legal Approach to EU Studies", in Jorgenson K. and al. (eds), *Handbook of European Union Politics*, London: Sage, 104-113

Wind M. (2010) "The Nordics, the EU and the Reluctance Towards Supranational Judicial Review", *Journal of Common Market Studies*, 48(4), 1039-63

Wind M. and Follesdal A. (2009) "Nordic Reluctance Towards Judicial Review Under Siege" *Nordic Journal of Human Rights*, 27(2), 131-141

Yong A. (2019) *The Rise and Decline of Fundamental Rights in EU Citizenship*, Hart Publishing

Zhang A. (2016) "The Faceless Court", *University of Pennsylvania Journal of International Law*, 38(1):71-135

Zürn M. (2018) *A Theory of Global Governance. Authority, Legitimacy, & Contestation*, Oxford: Oxford University Press

Annexes

Annex 1: External activities of the members of the Court of Justice (2017 and 2018)

The list of external activities is split into 2 categories: the "Representation of the Court" list indicating activities of judges still performing in their official capacity, and the "Activities of European interest" list indicating activities of private but related external activities.

There is no need for a codebook since the present data is simply an aggregation of the data provided by the Court of justice in its external activities. The categories found in the next tables have not been subject to theorization or relabeling.

1.1 Representation of the Court (2017)

Judge	National Court	International organisation	Professional body or organization	Teaching	National Institution	International Court	EU institution	Other	Total
Arabadjiev	3	0	0	1	0	1	0	0	**5**
Bay Larsen	3	1	2	1	0	0	2	0	**9**
Biltgen	1	0	0	0	1	1	0	0	**3**
Bobek	3	0	0	0	0	1	1	0	**5**
Bonichot	3	0	0	1	2	1	2	0	**9**
Borg Barthet	1	0	0	0	1	1	0	0	**3**
Bot	3	0	0	0	1	1	0	0	**5**
Campos Sanchez-Bordona	0	0	0	0	1	0	0	0	**1**
Da Cruz Vilaça	1	0	0	0	0	0	0	0	**1**
Fernlund	1	0	0	0	0	1	0	0	**2**
Ilesic	3	0	0	0	1	1	2	0	**7**
Jarasiunas	1	0	0	0	0	2	0	0	**3**
Jürimae	2	0	0	0	2	2	2	0	**8**
Kokott	1	0	0	1	4	1	1	0	**8**
Lenaerts	14	0	0	1	10	2	4	1	**32**
Levits	2	0	0	1	0	0	0	0	**3**
Lycourgos	2	1	0	0	0	0	0	0	**3**
Malenovsky	0	0	0	0	0	1	0	0	**1**
Mengozzi	1	0	0	0	3	0	0	0	**4**
Prechal	3	0	0	1	0	1	1	0	**6**
Regan	2	0	0	0	1	1	0	0	**4**
Rodin	3	0	0	1	1	2	0	1	**8**
Rosas	2	0	0	0	2	1	0	0	**5**

Safjan	1	0	0	0	0	1	0	1	**3**
Saugmands-gaard Oe	3	0	0	0	1	1	0	0	**5**
Sharpston	1	0	0	1	1	2	0	0	**5**
Silvia de Lapuerta	2	0	0	1	0	0	0	0	**3**
Svaby	1	0	0	0	1	1	1	0	**4**
Szpunar	1	0	1	0	0	0	0	1	**3**
Tanchev	2	0	0	0	1	2	0	0	**5**
Tizzano	3	0	0	0	4	1	1	0	**9**
Toader	3	0	0	1	0	0	0	0	**4**
Vajda	0	0	0	0	1	0	0	0	**1**
Vilaras	0	0	0	0	0	2	0	0	**2**
von Danwitz	2	0	0	1	3	1	1	0	**8**
Wathelet	2	0	0	1	1	0	0	0	**4**
Total	**76**	**2**	**3**	**13**	**43**	**32**	**18**	**4**	**191**

1.2 Activities of European interest (2017)

Type of activity: A (Participating in a conference), B (Teaching), C (Invitation at a public event) and D (Receive an award)

	Type of organization									Type of activity				
Judge	**Teaching Training Research**	**Other Organization**	**National Institution**	**National Court**	**EU Institution**	**International Organization**	**Professional Body or Association**	**International Court**	**Total**	**A**	**B**	**C**	**D**	**Total**
Arabadjiev	5	0	0	1	0	0	0	0	**6**	4	1	1	0	6
Bay Larsen	6	1	3	1	0	1	0	0	**12**	8	2	2	0	12
Berger	7	1	1	3	0	0	1	0	**13**	10	2	1	0	13
Biltgen	6	2	0	0	0	1	0	0	**9**	7	1	1	0	9
Bobek	12	2	2	1	1	0	0	0	**18**	12	3	3	0	18
Bonichot	4	2	4	2	1	0	2	0	**15**	7	0	8	0	15
Borg Barthet	0	0	3	0	2	0	0	0	**5**	2	0	3	0	5
Bot	3	0	4	5	0	0	1	0	**13**	6	1	6	0	13
Campos Sanchez-Bordona	3	0	0	0	0	0	1	0	**4**	4	0	0	0	4
Da Cruz Vilaça	10	4	7	0	2	0	3	0	**26**	8	0	16	2	26
Fernlund	3	0	0	0	0	0	0	0	**3**	2	0	1	0	3
Ilesic	11	1	0	2	0	0	1	0	**15**	14	0	1	0	15
Jarasiunas	2	0	1	3	1	0	0	0	**7**	5	0	2	0	7
Juhasz	2	0	0	0	0	0	0	0	**2**	2	0	0	0	2
Jürimae	3	2	6	2	1	0	1	0	**15**	10	1	4	0	15
Kokott	11	6	3	0	1	0	2	0	**23**	22	0	1	0	23
Lenaerts	15	3	4	1	2	0	4	0	**29**	23	0	1	5	29
Levits	3	0	3	0	0	0	1	1	**8**	8	0	0	0	8
Lycourgos	5	0	0	2	0	1	0	0	**8**	7	0	1	0	8
Malenovsky	5	0	1	0	0	0	0	0	**6**	2	3	1	0	6
Mengozzi	8	0	1	1	0	0	1	0	**11**	10	0	1	0	11
Prechal	7	2	1	0	0	0	0	0	**10**	5	4	1	0	10
Regan	0	0	1	1	0	0	0	0	**2**	2	0	0	0	2
Rodin	6	0	4	1	2	0	0	0	**13**	4	2	7	0	13
Rosas	15	2	3	3	2	1	1	0	**27**	22	3	2	0	27
Safjan	10	4	2	1	0	0	0	0	**17**	13	2	2	0	17
Saugmandsgaard Oe	8	3	3	1	0	0	2	0	**17**	12	3	2	0	17
Sharpston	13	1	1	1	0	0	2	0	**18**	16	0	1	1	18
Svaby	0	0	1	0	0	0	0	0	**1**	1	0	0	0	1
Szpunar	20	3	6	1	0	0	0	0	**30**	25	1	4	0	30
Tanchev	8	0	0	0	1	0	0	0	**9**	6	1	2	0	9
Tizzano	1	0	0	0	0	0	0	0	**1**	1	0	0	0	1
Toader	12	0	2	0	0	0	1	0	**15**	10	1	4	0	15
Vajda	8	2	1	0	0	0	1	0	**12**	11	0	1	0	12
Vilaras	4	0	0	0	0	0	2	0	**6**	5	0	0	1	6
von Danwitz	4	3	4	1	1	0	0	0	**13**	12	0	1	0	13
Wahl	8	4	2	1	0	1	0	0	**16**	14	1	1	0	16
Wathelet	11	5	3	0	1	0	3	0	**23**	16	3	4	0	23
Total	**259**	**53**	**77**	**35**	**18**	**5**	**30**	**1**	**478**	**348**	**35**	**86**	**9**	**478**

1.3 Representation of the Court 2018

Judge	National court	International organisation	Professional body or organisation	Teaching Training Research	National Institution	International Court	EU organisation	Other	Total
Arabadjiev	0	0	0	1	0	1	0	0	**2**
Bay Larsen	1	0	2	2	0	0	1	0	**6**
Berger	2	0	0	0	1	0	0	0	**3**
Biltgen	1	0	0	0	0	1	0	0	**2**
Bobek	3	1	2	0	1	0	0	0	**7**
Bonichot	2	0	0	1	0	0	0	0	**3**
Borg Barthet	0	0	0	0	0	1	0	0	**1**
Bot	1	0	0	0	0	0	0	0	**1**
Campos Sanchez-Bordona	0	0	0	1	0	1	0	0	**2**
Da Cruz Vilaça	1	0	0	1	0	0	0	0	**2**
Fernlund	2	0	0	1	1	0	0	0	**4**
Ilesic	2	0	0	1	0	1	0	0	**4**
Juhasz	0	0	0	1	0	0	0	0	**1**
Jürimae	1	0	0	1	1	0	0	0	**3**
Kokott	5	0	0	2	6	0	2	0	**15**
Lenaerts	13	0	1	3	24	2	6	3	**52**
Levits	3	0	0	1	1	0	0	0	**5**
Lycourgos	0	0	0	1	0	1	0	0	**2**
Mengozzi	1	0	0	0	1	0	0	0	**2**
Pitruzzella	1	0	0	0	0	0	0	0	**1**
Prechal	1	0	0	1	0	0	0	0	**2**
Regan	3	0	0	1	1	0	0	0	**5**

Rodin	0	0	0	2	0	0	0	0	**2**
Rosas	2	0	0	1	0	0	0	0	**3**
Rossi	0	0	0	0	1	0	0	0	**1**
Safjan	1	0	0	1	0	0	0	0	**2**
Saugmands-gaard Oe	2	0	0	2	0	0	1	0	**5**
Sharpston	2	0	0	0	1	1	0	0	**4**
Silvia de Lapuerta	2	0	0	1	1	0	0	0	**4**
Svaby	1	0	0	2	0	1	0	0	**4**
Szpunar	2	0	0	1	0	1	0	0	**4**
Tanchev	2	0	0	1	1	1	0	0	**5**
Tizzano	7	0	0	1	3	0	0	0	**11**
Toader	4	0	0	1	1	1	0	0	**7**
Vajda	3	0	0	2	3	0	0	0	**8**
Vilaras	0	0	0	1	0	1	0	0	**2**
von Danwitz	5	0	1	1	2	0	0	1	**10**
Wahl	2	0	0	1	1	0	0	0	**4**
Wathelet	0	0	0	1	0	0	0	0	**1**
Total	**78**	**1**	**6**	**38**	**51**	**14**	**10**	**4**	**202**

1.4 Activities of European interest

Type of activity: A (Participating in a conference), B (Teaching), C (Invitation at a public event) and D (Receive an award)

Judge	Type of organisation									Type of activity				
	Teaching Training Research	National institution	National Court	EU institution	International organization	Professional body or organisation	International court	Other	Total	A	B	C	D	Total
Wathelet	12	1	1	0	0	2	0	0	**16**	10	6	0	0	16
Rosas	28	5	0	0	1	0	2	1	**37**	28	5	2	2	37
Lenaerts	19	3	1	2	0	0	0	3	**28**	21	3	2	2	28
Toader	15	2	2	3	0	0	0	6	**28**	13	3	12	0	28
Da Cruz Vilaça	8	6	0	0	0	2	0	3	**19**	12	1	6	0	19
Malenovsky	6	1	0	0	0	0	0	1	**8**	4	3	1	0	8
Jürimae	2	8	3	0	0	1	1	0	**15**	12	0	3	0	15
Mengozzi	3	2	1	0	0	0	0	1	**7**	5	0	2	0	7
Berger	7	2	1	1	0	1	0	1	**13**	6	6	1	0	13
Szpunar	26	3	1	2	0	3	0	1	**36**	27	4	5	0	36
Fernlund	4	1	0	0	0	0	0	0	**5**	4	0	1	0	5
Kokott	18	2	0	1	0	4	0	7	**32**	28	0	4	0	32
Tizzano	5	2	0	2	0	0	1	1	**11**	4	2	4	1	11
von Danwitz	6	8	1	1	0	1	0	4	**21**	16	0	5	0	21
Vajda	8	1	0	0	0	4	1	1	**15**	14	0	1	0	15
Bot	2	3	6	0	0	1	0	1	**13**	5	1	7	0	13
Bonichot	1	4	4	0	0	0	0	1	**10**	4	0	6	0	10
Safjan	10	4	2	0	0	2	1	1	**20**	19	1	0	0	20
Prechal	10	1	5	0	0	0	1	6	**23**	16	5	2	0	23
Silvia de Lapuerta	1	4	0	0	0	0	0	1	**6**	2	0	4	0	6
Bay Larsen	9	6	1	0	0	1	2	0	**19**	9	3	7	0	19
Levits	9	6	2	3	1	0	0	1	**22**	19	1	1	1	22
Sharpston	13	4	1	4	0	3	1	0	**26**	22	0	4	0	26
Biltgen	5	1	0	1	0	2	1	3	**13**	11	1	1	0	13
Campos Sanchez-Bodona	3	2	0	0	0	1	0	2	**8**	5	0	3	0	8
Vilaras	6	1	0	0	0	1	0	1	**9**	8	0	1	0	9
Saugmandsgaard Oe	9	3	2	0	1	1	1	1	**18**	9	7	2	0	18
Bobek	19	4	1	3	0	1	2	0	**30**	23	3	4	0	30
Wahl	4	1	1	0	0	0	1	4	**11**	9	1	1	0	11
Rodin	11	6	0	0	0	0	0	0	**17**	11	0	6	0	17
Ilesic	16	7	3	0	0	1	0	0	**27**	20	0	7	0	27
Juhasz	1	0	1	0	0	0	0	0	**2**	2	0	0	0	2
Jarasiunas	0	4	0	0	0	0	0	0	**4**	0	0	3	1	4
Lycourgos	2	0	0	0	0	1	0	0	**3**	3	0	0	0	3
Tanchev	12	3	0	1	0	0	0	1	**17**	11	0	6	0	17
Arabadjiev	4	1	0	1	0	1	1	0	**8**	6	0	2	0	8
Regan	2	0	0	0	0	0	0	0	**2**	2	0	0	0	2
Borg Barthet	1	3	0	0	0	0	0	0	**4**	1	0	3	0	4
Svaby	1	1	1	0	0	0	0	0	**3**	2	0	1	0	3
Xuereb	1	0	0	0	0	0	0	0	**1**	1	0	0	0	1
Rossi	0	0	0	0	0	2	0	0	**2**	2	0	0	0	2
Pitruzzella	4	0	1	0	0	1	0	3	**9**	8	0	1	0	9
Jarukaitis	0	1	1	0	0	0	0	0	**2**	1	0	1	0	2
Piçarra	0	0	0	0	0	1	0	0	**1**	1	0	0	0	1
Hogan	1	2	0	0	0	2	0	0	5	4	0	0	1	5
Total	**324**	**119**	**43**	**25**	**3**	**40**	**16**	**56**	**626**	**440**	**56**	**122**	**8**	**626**

Annex 2: Twitter data (CJEU, December 2020)

2.1 Codebook

The following steps explain the production and coding of Twitter data developed in section 3.3.2.

1) Identification of all tweets from the CJUE in December 2020. The English sample amounted to N=50. The French sample amounted to N=47

2) Checking of all retweets of the identified 97 tweets. Checking the username and biography (if any) of all retweet. Names are identified in bold, usernames following @, then followed by biographies: Check the example:

3) Checking whether a retweeter is a lawyer (coded 1) or a non-lawyer (coded 0). The coding was strict. To be coded 1, the retweeter had to indicate its belonging to the legal profession. Others were systematically excluded, even known lawyers who did not provide for information at that stage.

4) To be coded as 1, retweets mentioned at least one of the following keywords: Juriste-linguiste; student; law; professor of law; apprentice-juriste; avocat; droit du travail; docteur; barreaux; legal counsel; droit international public; doctora en derecho; affaires juridiques; catédratico de derecho administrativo; master en droit; CJUE; judicial dialogue; court; LLM PIFTN (Propriété intellectuelle fondamentale et technologies numériques); Judiciaire; Tribunal; documentaliste juridique; code du travail annoté; CRFPA (centre regional de formation à

la formation d'avocat); attorney; cabinet; magistrat; arbeidsrecht; legal; procès; práctica juridica europea; annonces légales; revue pénale; Droit de l'Union européenne; M2 DPSE (Droit de la protection sociale d'entreprise); syndicat avocat; référendaire; avukat; loi et juge; M2 Propriété intellectuelle; CAPA (certificate d'aptitude à la profession d'avocat); Dalloz; ratio legis; EU law; abogado; APM Nacional; @judgesssp; lawyer; legal translator; European criminal law; legal office; MDSR (master en derecho de los sectores regulados); Barrister; letrado; avvocato; fiscal; law and politics grad; law practitioner; derecho; jurists; advokáta; judge; öffRecht; Rechtsanwälte; IP law; remedies; adwokat;legal affairs committee; dret; Europeäisches Verfassungsrecht; CJEU; Jurist; Advocaat; FDUL (Faculdade de direito da Universidade de Lisboa); competition rules; laki-ja; Parketmagistraat; Giurisprudenza; Prokuratów; attormey; ECJ; Intermediary liability; counsel; menneskeretsjurist; Recht; Prawnik; litigation; droit de la concurrence; Saudilegalquestions; Sedzia; Jura; economic law

2.2 Results (English account)

	t1	t2	t3	t4	t5	t6	t7	t8	t9	t10	t11	t12	t13	t14	t15	t16	t17	t18	t19	t20	t21	t22	t23	t24	t25	t26	t27	t28	t29	t30	t31	t32	t33	t34	t35	t36	t37	t38	t39	t40	t41	t42	t43	t44	t45	t46	t47	t48	t49	t50	**Total**
RT 1	7	8	21	28	13	1	7	3	32	1	2	7	9	9	3	6	7	3	5	6	5	14	21	18	15	5	7	12	12	12	29	2	1	23	25	22	5	8	5	12	17	1	17	0	2	3	26	2	6	10	**515**
RT 0	7	5	27	19	22	2	8	4	29	47	3	8	11	12	6	5	4	5	10	10	12	26	32	28	13	6	3	68	68	8	17	4	1	56	52	25	3	6	15	8	30	1	9	0	2	2	22	2	6	19	**788**
Total	14	13	48	47	35	3	15	7	61	48	5	15	20	21	9	11	11	8	15	16	17	40	53	46	28	11	10	80	80	20	46	6	2	79	77	47	8	14	20	20	47	2	26	0	4	5	48	4	12	29	**1303**

2.3 Results (French account)

	t1	t2	t3	t4	t5	t6	t7	t8	t9	t10	t11	t12	t13	t14	t15	t16	t17	t18	t19	t20	t21	t22	t23	t24	t25	t26	t27	t28	t29	t30	t31	t32	t33	t34	t35	t36	t37	t38	t39	t40	t41	t42	t43	t44	t45	t46	t47	**Total**
RT 1	18	11	10	20	5	0	6	3	42	7	2	12	15	7	9	3	5	3	7	12	5	17	8	17	34	9	3	5	10	4	6	6	10	33	27	19	6	14	2	20	10	16	1	3	16	10	41	**549**
RT 0	14	7	16	12	2	1	7	2	43	22	4	8	4	11	19	5	2	1	4	8	10	14	3	11	28	10	7	6	4	6	3	1	5	39	62	11	4	6	5	18	7	11	2	1	13	7	29	**515**
Total	32	18	26	32	7	1	13	5	85	29	6	20	19	18	28	8	7	4	11	20	15	31	11	28	62	19	10	11	14	10	9	7	15	72	89	30	10	20	7	38	17	27	3	4	29	17	70	**1064**

All files are available in .xlsx format and can be requested to the author for replication. Since tweets and retweets are available in the public domain, the screenshots of all data that led to the coding have been deleted. Further coding about likes is also available but has not been added for theoretical reasons ("likes" would potentially constitute a pro-court bias).

Annex 3: Gender balance at the ECJ (1952-2020)

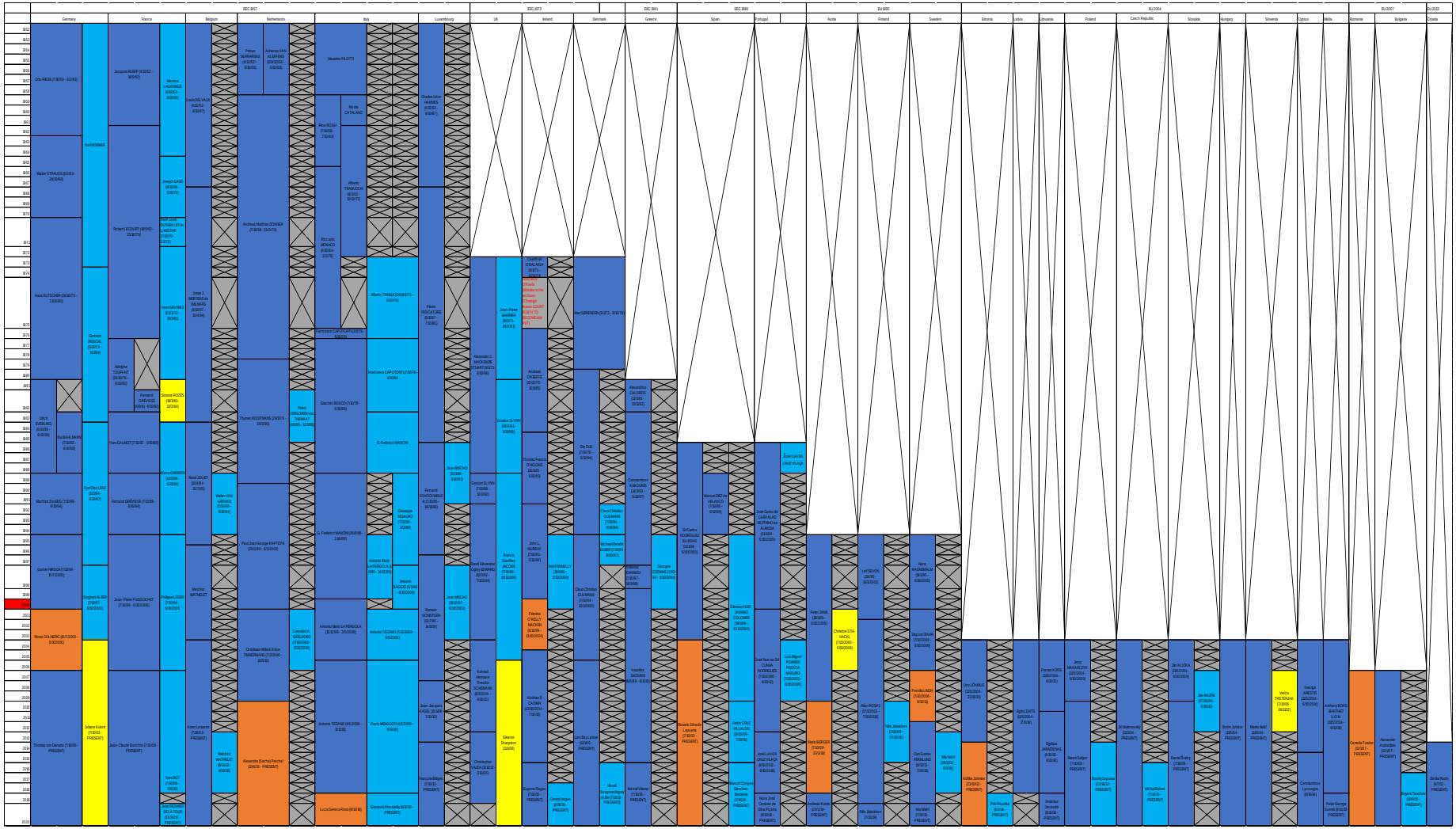
Colors:

- Dark blue: male judges
- Light blue: male AG
- Orange: female judge
- Yellow: female
- Red (left column): Year 2000

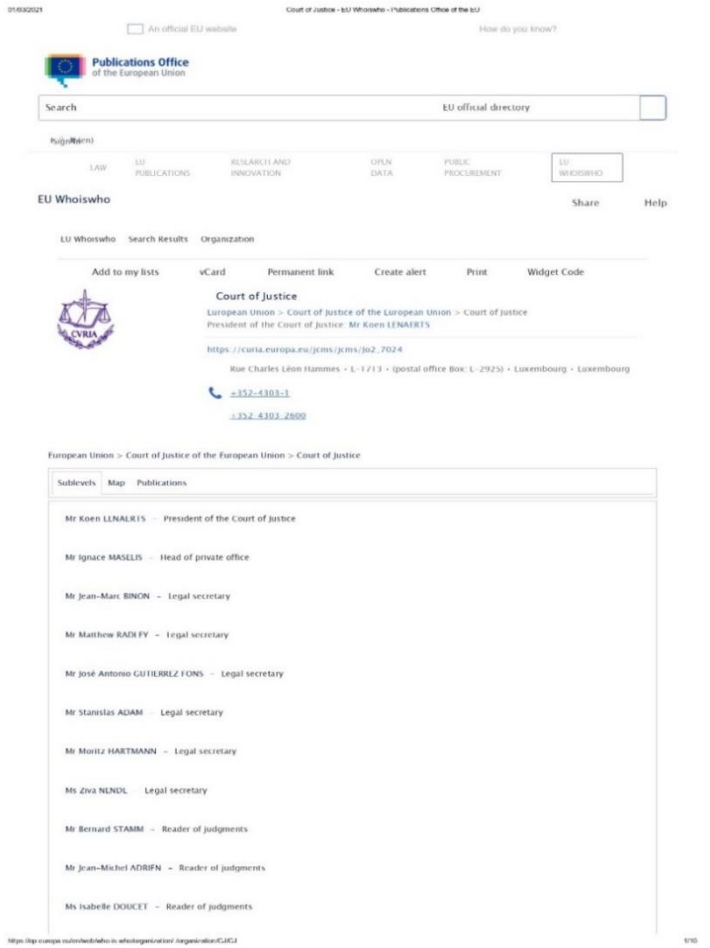
Coding:

- Countries appear in the following order, respecting the successive enlargements of the EU, in the columns: Germany, France, Belgium, Netherlands, Italy, Luxembourg, UK, Ireland, Denmark, Greece, Spain, Portugal, Austria, Finland, Sweden, Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Cyprus, Malta, Romania, Bulgaria, Croatia
- Each country has 2 columns: the left column corresponds to judges, the right column to AGs
- Years: from 1952 to 2020, on the first column on the left
- Judge/Year: a judge or AG is in the case of the corresponding year if he/she spent more than half a year at the Court. A judge that spent less than half a year will be marked in the following year (for appointment) or in the previous year (retirement).
- Grey crossed cells: refer to years (6 months +) without a member at the ECJ
- White crossed cells: the member state was not a member of the EU at the time *Example: a newly appointed judge arrives at the Court in October 2009 and retires in January 2014. The table will indicate that said judge spent the Court during the period 2010-201*

The data is available in .xlsx format on file with the author.



Annex 4: List of the members of the Court as of February 27, 2021



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Mr Stanislas ADAM – Legal secretary

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Ms Ziva NLNDL – Legal secretary

Mr Bernard STAMM – Reader of judgments

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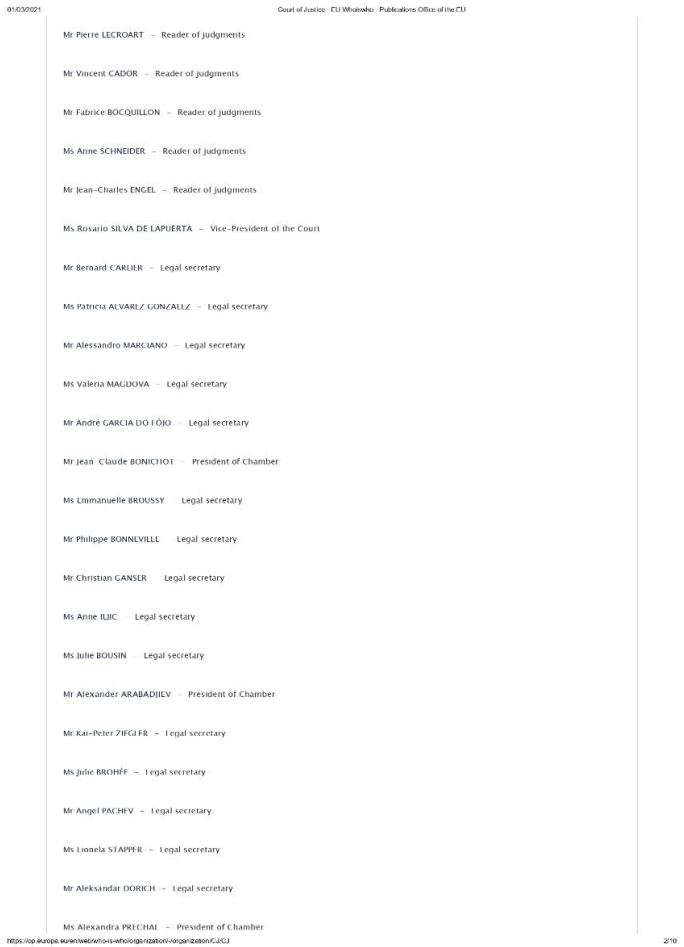

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Mr Jean-Charles ENGEL – Reader of judgments

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Annex 5: EJTN Networks in Europe

	Beginning	Network of organizations	Network of individuals	Involvement CJEU	If so, how?
Network of Councils for the Judiciary	2004	Yes	No	Yes	Observer status
Network of the Presidents of the Supreme Judicial Courts of the European Union	2004	No	Yes	Yes	Invitation to the CJEU President to attend colloquia
Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe)	2001	Yes	No	Yes	Member (Representative: Judge T. von Danwitz)
European Judicial Network (EJN)	2008	No	Yes	No	
European Judicial Network in Civil and Commercial matters (EJN-Civil)	2001	No	Yes	No	

Association of European Administrative Judges (AEAJ)	2000	Yes (National Judges Associations or Unions	No	No	
Association of European Competition Law Judges (AECLJ)	2002	No	Yes	Yes	All CJEU judges are invited to attend AECLJ events; Exexecutive Committee member: ECJ Judge I. Jarukaitis
European Association of Judges for Mediation (GEMME)	2003	No	Yes	Yes	Open to all judges
International Association of Refugee Law Judges (IARLJ)	1997	No	Yes	Yes	Open to all judges (member L. Bay Larsen
European Union Forum of Judges for the Environment (EUFJE)	2004	No	Yes	Yes	Open to members of the CJEU (2020 onlin conference: speech by C. Sobotta, référendaire)
European Network of Prosecutors for the Environment (ENPE)	2012	Yes	No	No	

European Association of Labour Court Judges (EALCJ)	1996	No	Yes	No	
Network of Public Prosecutors or equivalent institutions at the Supreme Judicial Courts of the Member States of the European Union (NADAL)	2009	No	Yes	Yes	Invitation to conferences (2019 NADAL Conference: Speech by ECJ Judge K. Jürimäe)