Chapter 13

The Court of Justice of the European Union

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Chapter Contents

Reader's Guide

This chapter provides an overview of the Court of Justice of the EU. The Court has emerged as a powerful player in the history and development of the European integration process. Its contribution to the workings of the EU and our understanding of it are central to both legal and political accounts, while its decision-making has at times been controversial. This chapter explores the history of the court as an institution of the EU, how it has developed its role and how we can understand the 'politics' of the judicial arm of the EU's institutional framework.

Introduction

As an institution of the European Union, the Court of Justice of the European Union (CJEU) is a curious beast. On the one hand, it is a court much like any other: it makes decisions, which can be enforced, it resolves disputes between parties and it offers opinions on contested points of law. It makes interpretations of the law and, depending on one's viewpoint, creates, furthers or at least recognises legal principles. It has a defined remit for its caseload and has structural relationship with other courts from which it receives cases. Like many other courts with a cross-border scope, it is made up of nominees from different countries, but it makes its decisions as an independent institution.

On the other hand, the Court is unlike any other court, whether in a national or international setting. In the historical development of the European Union, the role of the Court in the process of European integration has not merely been one which has been secondary to other institutions. Whether the account is by political scientists, legal scholars or economists,

understanding the role that the Court has played cannot be considered separately from the other institutions. Since the creation of the institution at the outset of European integration, the Court has developed constitutional principles that have a far-reaching effect and enabled the process of integration to move forward, especially when the other institutions were unable to.

Box 13.1 The distinctiveness of the Court of Justice

Trying to understand the EU's institutional framework via the prism of a national state is problematic: in a state, power is exercised by the executive, the legislature and the judiciary. However, the Commission is not the same as a national executive (government), and neither can the Parliament's composition or role be seen as directly comparable to that of a state. For the Court, although it shares common features with Courts in states, its role in resolving different kinds of disputes and its power to grand remedies – there is an important distinction. This distinction lies in the fact that the Court is a product of the Treaties that have been put in place by the EU Member State – and the purpose of the Court is to ensure that the law of the Treaties is respected. The purpose of the EU is, as we are told right at the start of the Treaty on European Union is 'the process of creating an ever closer union among the peoples of Europe' (Article 1 TEU). Understanding the Court of Justice and the other institutions must therefore be seen in this context.

The Court of Justice is a multi-national court, with its judges drawn from each of the Member States, but who must act independently. Its composition resembles other courts in multi-national settings (such as the European Court of Human Rights or International Court of Justice). But comparisons with international courts only go part way in understanding what the Court of Justice does, how and why. For instance, unlike international courts, the Court is equipped under the Treaty with remedies to ensure that its decisions are enforceable and that the law of the EU is thus upheld. It does not therefore require states to do this on its behalf.

<Box end>

Discussing the 'politics' of courts and judicial decision-making has a number of different dimensions. A substantial body of scholarship has drawn on the different theoretical and methodological tools to try to understand the role of courts in general, and the Court of Justice is no exception. The work and decisions of the Court have at times been controversial, and a vigorous debate about where the limits of the Court's decision-making power (should) lie continues to this day. The politics of the Court of Justice also speak to its relationships with the other EU institutions and national courts. As the EU has developed, the Court has been faced with an increasingly diverse set of questions to answer – and such questions are often related to key political moments in the trajectory of European integration.

This chapter explores the set-up of the Court and its role, before assessing its contribution to the EU, its relations with the other institutions and some of the key debates about the Court and its work.

The History and Development of the Court of Justice

The Court of Justice of the European Union, to give its full official title as specified in the **Treaty on European Union (TEU)** (Article 13(1)), was one of the original institutions

created by the **European Coal and Steel Community** in 1952. With the signing of the **Treaty of Rome** in 1957, the Court became a fully-fledged *institution* of the Community.

Unlike other institutions, most notably the Parliament, the Court's formal powers and role have changed little in the text of the Treaty from 1957 until the present day (Craig and de Búrca 2020, p. 92). The Court fulfils, on paper, much of the same tasks as it was originally set up to do and many of those that we would expect a court to do. However, over time its status has been enhanced in ways that were not foreseen when the original Treaties were drafted. For instance, the Court has made a series of 'constitutional' decisions in the 1960s and 70s which have consolidated its position as a key player in European integration. Such decisions included recognising 'general principles of EU law' (C-29/69 *Stauder v City of Ulm* ECLI:EU:C:1969:57). This allowed the Court to develop principles on the protection of human rights within the EU's legal order, at the same time as confirming the status of EU law as supreme over national constitutional law (C-11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114).

So although we will start by looking at what the Treaty says about the Court in terms of its composition and role, it is in the decisions made by the Court that we can evaluate how significant its contribution has been and uncovering why the Court's 'political' role has courted controversy.

Key Points

- The Court of Justice is a significant institution of the European Union.
- The Court's formal role has changed little since the creation of the EU in 1957.
- However, the Court has been vigorous in developing and applying legal principles that have enhanced its role and status.

Composition and Status

The Court of Justice sits in Luxembourg. We refer to the Court in the singular, but in fact the institution has several courts within in it: the Court of Justice itself, plus the General Court and other 'specialised courts' (Article 19 TEU). The General Court (originally created under the name of the 'Court of First Instance') was created as a means of lightening the workload of the Court of Justice and deals with certain types of cases (defined in Article 256 TFEU). Although Article 19 refers to specialised *courts* (plural), there is only one: the Civil Service Tribunal for individuals who work for the EU institutions. Further courts can be created in the future (Article 257 TFEU) if needs arise.

Judges of the Court of Justice

As per Article 19(2) of the Treaty on European Union, one judge is nominated per Member State 'from persons whose independence is beyond doubt'. In this respect, the Court is similar to the Commission: although there is a national of each Member State amongst the judges or Commissioners, they do not *represent* their home state or government and must act with complete independence. So, 'the Croatian judge at the CJEU' refers to the nationality of the judge and does not mean they represent, put forward or defend the views of that country or government. What is does mean is that the diverse national legal systems and legal traditions across Europe are represented amongst the judges of the Court as well as geographical balance.

Judges nominated to the Court must 'possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence' (Article 253 TFEU). Some CJEU and General Court appointees are career judges in their own Member State, and others might have been lawyers or academics. The condition is that they have the professional status and experience that makes them *eligible* for appointment to the highest national court. This might be the Supreme Court, Constitutional Court or similar but there is no requirement for the judges to have actually sat in the highest national court before appointment to the CJEU. Judges in CJEU do not sit in cases individually, but sit either as a full Court of 27 (although this is rare) or in groups of 3 or 5 as 'Chambers' (Statute of the Court of Justice, Article 16(1)), which helps spread the workload more evenly. For each case, the Court only gives one decision and the reasons for that decision. Unlike some national legal systems, there are no 'dissenting' views expressed by judges of the Court. Therefore, it is not possible to 'work out' what the individual judges' views on any particular issues are. The decisions are written in a way which represents a compromise between the views of the judges, and so are very carefully drafted. All of the deliberations between the judges are strictly private. Great care is taken over the precise wording since even slight variations in meaning can have important legal effects (see McAuliffe 2011).

Advocates-General of the Court of Justice

Other key actors in the Court are the Advocates-General. The Treaty (again, Article 19 TEU) states that Advocates-General 'assist' the Court of Justice. There is no comparable position of Advocates-General in many legal systems of EU Member States and their creation is the result of the early influence of the French legal system (Arnull 2020, p.3). The role of the Advocate General in the CJEU is to give an independent and impartial 'opinion' that is then considered by the judges when deciding the case (Article 253 TFEU). The opinion will set out the various legal questions, the legal background to the points of law and give a view on what the Court should decide and on what basis. As such, the Opinion is a valuable source of analysis of the law but it does not bind the Court when making its decision. The Court may come to the same outcome, but it may be on the basis of different reasoning put forward by the Advocate General. Usually, the Court does arrive at the same outcome as the Advocate General but this is by no means always the case.

Box 13.2 The Brexit effect on the Court of Justice

Judges and Advocates-General are appointed 'by common accord of the governments of the Member States after consultation of a panel responsible for assessing candidates' suitability' (Article 255 TFEU). As a result of the UK's withdrawal from the EU, the last UK nominated judge, Christopher Vajda, ended his functions on 31 January 2021. The term of the British Advocate-General, Eleanor Sharpston, was due to end in October 2021. However, the governments of the 27 Member States stated in a Declaration on 29 January 2020 that as a consequence of the UK leaving the EU, the post of Advocate General would become vacant. This was confirmed by the President of the Court of Justice several days later, and thus the Advocate-General was effectively removed from office.

Sharpston challenged her removal from office before her period of appointment ended and her replacement by a new Advocate-General. Her challenge was on the basis that removal was not included within the reasons provided for in the Treaty or the Statute of the Court of

Justice, which contains more details about the workings and procedures of the Court. As such, she claimed that it infringed 'the constitutional principle of the independence of the judiciary in EU law'. The General Court found that it had no legal powers to review the Declaration of the Member States, and dismissed the action. This has received academic criticism (Kochenov and Butler 2020). It is currently being appealed to the Court of Justice.

(T184/20 *Sharpston v CJEU* ECLI:EU:T:2020:474 and T180/20 *Sharpston v Council* ECLI:EU:T:2020:474).

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A 'supreme court for the EU'?

The main role of the Court is to 'ensure that in the interpretation and application of the Treaties the law is observed' (Article 19(1) TEU). In this respect, it has the final say on matters of interpretation of EU law. But, it is not the only Court to apply EU law: all Courts in the Member States are also required to apply EU law, from the Supreme or Constitutional Courts down to specialised financial courts, social security tribunals and so on. In this respect, national courts are 'decentralised "European" courts' (Schütze 2016, p. 198). The reason for this is that EU law is integrated within the legal systems of the Member States – if all questions arising from the considerable body of EU law were left to a single Court of Justice then it would be instantly overwhelmed (see preliminary references) and there would be too much legal uncertainty across the EU.

Therefore, is the Court a 'supreme court for the EU'? Yes and no. It is in the sense that it has the final sense of matters of EU law. This is for logical reasons: if the same piece of EU law was interpreted differently in different courts in Member States then the law would apply unevenly, which would be a major problem given that the purpose of EU law is *integration*. But, the jurisdiction of the Court of Justice *only* extends to matters of EU law. EU law is extensive and there are few areas of law in the Member States where there is no role for EU law at all. It is also perhaps true that the Court has established for itself a reputation which means that it cannot be ignored or sidelined, and that goes beyond the judicial arena. But the Court has no competence to hear cases which do not relate to EU law. As such, unlike most Courts that sit at the top of a (national) hierarchy, it does not cover all areas of law but only those over which it is given power by the Treaties. As will be seen below through the preliminary reference procedure, many of the cases that the Court deals with are referred to it but then sent 'back' to the national court which have non-EU law aspects to consider when giving a final ruling. It might be more reasonably argued that the Court of Justice is a type of *Constitutional* Court, given that the Court has developed very important legal principles which were not (and are still not, in some cases) mentioned in the Treaty. This is explored via the Court's work further below.

The Court cannot also be considered as sitting at the top of Europe's legal hierarchy due to the views of some national courts themselves. Largely for historical reasons, the debate about hierarchy has focussed on Germany and the protection of the rights and freedoms in the Constitution. A decision of the Germany Constitutional Court (*BVERFG*) in 1974 that the supremacy of EU law was not unconditional triggered a long-running debate triggered in the 'Solange' cases. 'Solange' means 'so long as' and refers to the formulation by the German Constitutional Court (in 1986) that it would accept the jurisdiction of the Court of Justice 'so long as' it respected fundamental rights (as protected in the German Constitution). In other

words, EU law is supreme because courts such as the German Constitutional Court accept it being so, but with the possibility that they will reverse this if they perceive that rights are not respected (Craig and de Búrca 2020, pp. 331-332).

One last point to make here is that the Court is often confused with the European Court of Human Rights, which sits in Strasbourg and is *not* an institution of the EU but the (separate, but confusingly named) **Council of Europe**. However, the **Charter of Fundamental Rights of the European Union** was given equal legal status with the Treaties in the **Treaty of Lisbon** and so the CJEU is empowered to interpret and apply it (see Sarmiento 2013; Peers et. al. 2014). Human rights do therefore figure amongst the extensive case-law of the Court. Furthermore, the **Treaty of Lisbon** (Protocol No. 8) foresaw that the EU itself would become a party to the **European Convention on Human Rights (ECHR),** as all the Member States are – though this has not yet occurred (for further, see Eckes 2013).

Key Points

- The Court of Justice shared similarities with national courts found in Member States, and international contexts, but it has many important differences and needs to be understood on its own terms.
- The Court cannot be accurately described as a 'supreme court' for the EU, since it only deals with matters of EU law and not general law, even though the scope of EU law has grown over time.
- EU law must be applied by all courts in the Member States, but the Court of Justice remains the final arbiter on questions of EU law. The General Court is part of the Court of Justice as an EU institution but deals with certain specific cases, including those brought by individuals against legislation or decisions of the institutions.

Role of the Court

Article 19 TEU tells us that the Court has three roles: (a) to rule on actions brought by a Member State, an institution or a natural or legal person; (b) give **preliminary rulings**, on the interpretation of EU law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties. The roles in (a) and (b) can be categorised as direct and indirect actions respectively, though in terms of legal principles the outcomes of both are the same.

Direct actions

Direct actions are when a matter is first brought before the Court of Justice rather than before a national court. These include **infringement actions**: the Commission (or another Member State, though this is very rare) considers that a Member State is breaching EU law then it may bring the matter before the Court of Justice (Articles 258 and 259 TFEU). The Member States have obliged themselves, via Art 4(3) TEU, to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties'. All Member States have found themselves on the receiving end of this procedure, for example in cases where **directives** (see chapter 16) have not been transposed (implemented) fully, properly or within the prescribed time period or where there has been a breach of procedure or practice. In 2019, the Court completed 25 cases of failures to fulfil obligations by 15 Member States, which is much lower than the approximately 200 per year between 2000 and 2009 (Court of Justice 2020). Nevertheless, in recent the Court has been asked to rule on

matters which go far beyond the technical application of the law and whether instances of 'democratic backsliding' in Member States constitute a breach of EU law. The Court of Justice did so twice in 2019, where Poland's reforms to its domestic courts (lowering the retirement ages of judges, and setting different retirement ages for male and female judges) were found to be a failure to respect both EU law on equal treatment and the right to ensure effective legal protection.

Since it was introduced by the **Treaty of Maastricht**, if a Member State does not abide by the Court's decision, then a further action before the Court can result in the imposition of penalty payments liable by the Member State (Article 260 TFEU). This was used for the first time in 2000 against Greece, and has gradually increased over time, though the Court is not obliged to follow the Commission's suggestion if a penalty is warranted. There is also the question of whether the 'carrot or stick' approach is effective (see Jack 2013). Member States do respect the Court's decisions, but more recent attention has been paid to how the Commission decides which actions to pursue on a strategic basis, given that the EU has grown in size and there are limited resources at the Commission's disposal (see Falkner 2018, Börzel and Buzogány 2019).

Box 13.3 Infringement actions decided by the Court of Justice in 2019

Infringement actions brought before the Court by the Commission against a Member State, such as the example of Poland above, can be headline-grabbing. Most, however, are not. *Commission v Austria* is a more representative example of this type of case.

Freedom to provide services in other Member States is stipulated in the Treaty (Article 56 TFEU). A 2006 Directive gives the general provisions of the law, and also the exceptions to the general freedom or conditions which may be applied by the Member States. Existing Austrian laws on companies of civil engineers and veterinary surgeons made several stipulations, such as the requirement to have the company seat in Austria and how different branches could operate, that the Commission considered breached EU law. The Austrian laws had not been changed after the Directive was passed.

The Commission's view was that the provisions of Austrian law restricted the exercise of these professions by those from other Member States in Austria by creating hindrances, and that the relevant Austrian legal provisions did not fall within the exceptions allowed under the Directive.

The Court stated that exceptions to the Directive must be interpreted narrowly, and rejected Austria's argument that an exception for 'civil servants' or professions in 'public health' applied to civil engineers (who are not specifically mentioned in the Directive) veterinary surgeons (as 'public health' applies to humans only). The Court also rejected Austria's arguments that its domestic law protected consumers or would apply only in narrow circumstances. As a result, the Court of Justice found that maintaining the legal requirements on these professions in its law, Austria had failed to fulfil its obligations under the 2006 Directive.

Source: Case C-209/18 *Commission v Austria* ECLI:EU:C:2019:632

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Actions in annulment

The Court is also able to hear actions in annulment, where an EU institution or a Member State attempts to find a piece of EU legislation to be unlawful and therefore invalid (Article 263 TFEU). This is commonly referred to as 'judicial review' and is a common (though varied) legal tool in the national legal systems of the Member States (Castillo Ortiz 2020). This action might be invoked on the grounds of the wrong procedure being used, or a lack of competence of the EU institutions. The European Parliament has used this power when it feels that a law-making procedure has been used that has sidelined its own role (Sanchez Barrueco 2020). It is possible for a natural or a legal person (such as a company) to bring an action in annulment against a piece of legislation, but the test for doing so is highly restrictive (for recent commentary, see Bogojević 2015). The rationale for such a restrictive test is that if it were not so, then the Court would be potentially facing countless claims – an argument that has been strongly criticised but which the Member States have not sought to change via the provisions of the Treaty as the highest source of EU law.

Courts in Member States are not able to declare EU legislation to be invalid – if this was possible, then EU law could apply in some states and not others, thus defeating the purpose of EU integration. However, they might refer a question of validity to the CJEU under the preliminary reference procedure. Nevertheless, actions in annulment account for around 50% of cases brought before the General Court by natural or legal persons (Court of Justice, 2020). This is because the challenge is to a decision taken by one of the EU institutions which is directly addressed to that individual or company, or which they have a particular interest. Such decisions usually relate to state aid (where the Commission has approved the granting of financial aid to a particular company, and a rival company or body attempts to contest it, such as T-894/17 *Air France v Commission* EU:T:2019:508), where a company has been fined by the Commission for a breach of competition rules (for example, T-1/16 *Hitachi-LG v Commission* ECLI:EU:T:2019:514) or where individuals or groups have been subjected to sanctions for suspected involvement in terrorism (for example, T-289/15 *Hamas v Council* ECLI:EU:T:2019:138, appealed to the Court of Justice in C-386/19 *Hamas v Council* ECLI:EU:C:2020:691) or suspected criminal activity (for example, the former President of Ukraine in T-244/16 *Yanukovych v Council* ECLI:EU:T:2019:502).

Preliminary references

Preliminary references are *indirect* actions as they are not brought to the Court of Justice by the parties to the case, but are rather referred to the Court by a national court or tribunal. 601 such cases were referred to the Court of Justice in 2019, which is double the total from ten years previously. A preliminary reference occurs when the national court is faced with an issue of EU law it is unable to answer (Article 267 TFEU). Therefore, this does not happen for every question of EU law – as explained above, all courts in the EU are bound to apply to EU law. But if there is a question of interpretation or validity that only the CJEU can answer, then the Court may make a preliminary reference in terms of a question or questions to the CJEU. The Brexit-related case of *Wightman* is a good example (see Box 13.4 1). Since any court or tribunal in a Member State may make a preliminary reference, the enlargement of the EU and the development of law and policy in a growing number of areas have contributed to the consistent growth in the number of cases referred.

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Box 13.4 Case Study: The *Wightman* decision

The process for a Member State to leave the EU is set out in Article 50 TEU. This was a new provision inserted in the **Treaty of Lisbon** and, of course, it had never been used until Brexit. According to Article 50, the Member State who wishes to leave informs the European Council and there will then be negotiations for an exit agreement. The Treaties cease to apply to the departing Member State on the date agreed in the exit agreement, or if there is no exist agreement, then two years after the notifications.

As per this procedure, the UK notified the European Council of its intention to leave the EU on 29 March 2017. Six Members of the European Parliament, Scottish Parliament and UK Parliament – from three different political parties - brought a joint case against the UK government in the **Court of Session in Scotland**. The question was whether the UK could retract its notification to the European Council if it decided that it no longer wanted to leave the EU, or whether the notification could only be withdrawn if the European Council (i.e. the Member States) gave their approval. Article 50 itself gave no help – it talks about notification, but not about withdrawal. The Scottish Court referred the following question to the Court of Justice:

'Where, in accordance with Article 50 [TEU], a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union?'

The process was expedited: the preliminary reference was made on 21 September, the AG Opinion was delivered on 4 December 2018 and the decision of the full Court on 10 December 2018.

At the heart of the matter was a largely hypothetical question: the UK had not *actually* asked to withdraw its intention to leave the EU. But the case was to establish if it could have the option to do so if (for example) a change of government or in public opinion forced the issue. The Court does not generally answer hypothetical questions, but recognised that this was a real dispute and an important (and urgent) question to be answered.

As the Advocate General Campos Sánchez-Bordona recognised in his Opinion (para 59), the views in legal academia on the question were divided. On the one hand, if there was a possibility of retraction, that this would have been stated in the Treaty. The Council and Commission supported this view. On the other, since the leaving state made the notification, then it could withdraw it too. The question is a legal one but has political consequences: a state could threaten to leave, only to revoke later, and therefore could be a political tool.

The Court decided that notification could be withdrawn. It noted that the Treaty referred to the states' 'intention' to withdraw, which is therefore not definitive or irrevocable (para 49). Rather than referring to international law which governs how Treaties work (as the Advocate General had done), the Court underlined the specific legal order of the EU and the fact that it is composed of Member States with sovereign rights to withdraw – or not. Therefore, should the UK wish to remain a Member State before the two-year period or entry into force of the exit agreement, then it could since – to quote the Court – 'a State cannot be forced to accede

to the European Union against its will, neither can it be forced to withdraw from the European Union against its will' (para 65).

Source: C-621/19 *Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999 (judgment) ECLI:EU:C:2018:978 (AG Opinion)

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Preliminary reference v 'appeal'

The CJEU answers those questions asked of it in a judgment and return the matter to the national court. This makes it different to an 'appeal' because the CJEU is not resolving the case (although, as in *Wightman*, the decision of the Scottish court it was returned to was more a formality). To ensure that the CJEU is not over-burdened with preliminary references, Courts in Member States cannot ask questions on points of law where the CJEU has already given a ruling, nor should theoretical or hypothetical questions be referred. Some of the most important points of EU law set out by the CJEU (such as the cases of *Cassis de Dijon* and *Francovich*, in the boxes below) have originated in the references from national Courts, and the decisions of the Court – as in all other cases – are made publicly and published (see Hübner 2018). For individuals who want to challenge EU law, the preliminary references procedure is a much more useful tool than the 'direct' challenge route with its restrictive test. The relationship between the CJEU and national courts has been termed as a 'partnership' rather than a hierarchy since, as mentioned above, the CJEU is not a Supreme Court in the way we understand it in national contexts.

Key Points

- The Court of Justice has a variety of roles, all of which relate to upholding and protecting the legal order of the EU. These roles are defined in the Treaty.
- The Court has the final say on matters of EU law brought before it, and a great deal of EU law has developed as courts in Member States have referred questions to it under the preliminary reference procedure.
- The Court is responsible for hearing actions brought against the Member States or EU institutions for breaching EU law and has dealt with an increasing number of cases which have strong legal *and* political ramifications.

The work of the Court of Justice

The workload of the Court of Justice has increased year on year. Partly this is due to the expanded scope of the EU's **competences** and the amount of legal instruments and decisions that can be contested. But it is also because the Court itself has expanded its role and with it the potential scope of EU law. Therefore, it is less about the amount of decisions the Court has made that explain its significance and more about the principles of EU law that it has recognised or established over the past 60 years. Recalling that the role of the Court is essentially to settle disputes, and that in the early days most of these disputes related to matters of goods crossing borders, the way in which the Court has developed its case-law has come from some surprising (and also mundane) cases (Cardwell and Hervey 2015). Few decisions have been as headline-grabbing or overtly 'political' as *Wightman* (see Box 13…) but nevertheless the importance of many and their impact on EU politics should not be underestimated.

The Court and the Single Market

The case-law of the Court also tells us about the extent to which establishing the **Single Market** and the free movement of goods, services, capital and workers has been a lengthy and complex process; working out the contours of European citizenship; deciding on matters of law that are sensitive in terms of national culture and even on the EU's international agreements which touch on issues even beyond Europe. As the EU's competence has grown to include justice and home affairs, the Court has become more involved in ruling on aspects of fundamental rights and in areas which were not foreseen at the outset of the European **integration** process, such as criminal procedure. So, cases brought to the Court of Justice have included the extent to which types of pornography are included within free movement of goods (C-34/79 *Henn and Darby* ECLI:EU:C:1979:295); whether abortion is a 'service' under EU law (C-159/90 SPUC v *Grogan* ECLI:EU:C:1991:378); if a Member State can prevent the entry of a Scientologist on the grounds of public policy (C-41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133); if an EU trade agreement with Israel covers products made in the occupied territories (C386/08 *Brita* ECLI:EU:C:2010:91; C-363/18 *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances*) ECLI:EU:C:2019:954) and the lawfulness of a regulation on trade in seal products from Canada (C-583/*11 Inuit Tapiriit Kanatami* ECLI:EU:C:2013:625).

The Court and the 'new legal order' of the EU

Some of the most significant decisions came very early on in the history of the EC/EU. In 1962, a dispute involving the import of chemicals from (West) Germany to the Netherlands and customs charges resulted in one of the most ground-breaking decisions of the Court (C-26/62 *van Gend en Loos* ECLI:EU:C:1963:1). Although this appeared to be a relatively minor dispute about recovering customs charges, the way in which Court made its decision has structured EU legal thinking ever since. The Court stated that the parties to the Treaty (i.e. the Member States) had created a 'new legal order' in the EU and that the Treaty created rights that had 'direct effect' in the Member States. In other words, every company and citizen could use EU law against the state.

The consequence of this powerful decision meant that from a very early stage, EU law was characterised as something which was neither akin to national nor international law, since the latter would not have 'direct effect'. Two years later, in the case of C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66 – where the facts were also not particularly illuminating – the Court stated that EU law was supreme over provisions of national law and in case of conflict between the two, then EU law prevails. The Court went further in 1971 by saying that this included national constitutional law too (C-11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114). What is remarkable about *Costa v ENEL* is that the Treaty – which was written by the Member States only several years previously – did not mention supremacy. Rather, the Court inferred that the intention of the drafters and signatories of the Treaty was to ensure the effectiveness of EU law via supremacy.

These early decisions have set the tone of the most longstanding debate over whether the CJEU was right or justified in coming to this decision, or whether it overstepped the mark and has allowed itself to be 'activist' in terms of creating law rather than simply interpreting and applying it. This debate is returned to below.

The Court can also be seen as responsible for facilitating the European **integration** process, especially during the 1970s. In the Treaty, the emphasis on legislation (**regulations** and **directives**) as a means to integrate the different systems of the EU was not matched by an ability of the institutions to pass such legislation. In other words, to facilitate cross-border trade relied on the agreement to create common standards on a particular product or group of products (such as chemicals, children's toys, or any goods requiring specific labelling). Such common standards requires passing detailed pieces of legislation via the Commission, Council and the Parliament. Since this process was not forthcoming in the 1970s, it fell to the Court of Justice to take the major step of interpreting the Treaty terms on free movement widely. The important cases of C-8/74 *Dassonville* ECLI:EU:C:1974:82) and *Cassis de Dijon* (see Box 13.2) show the extent to which the Court removed barriers to free movement of goods and gave the completion of the Single Market in the 1980s a boost:

<Box start>

Box 13.5 Case Study: *Cassis de Dijon* decision

To allow the free movement of goods, the Treaty forbids Member States from imposing quotas on goods than can be imported from other Member States or 'measures having equivalent effect' (now Article 34 TFEU). Cassis de Dijon is a French alcoholic liqueur that the produces were trying to export to the German market. There were no common rules on the marketing and sale of alcoholic drinks. A German law stated that the minimum alcohol level for liqueurs was 25%, which was higher than Cassis de Dijon (15-20%), meaning that it could not be sold in Germany. So, although this rule applied to drinks produced in Germany as well as outside of it, the effect of the rule was to hinder the free movement of goods as there was no way for the French producer to comply (unless they made a completely different product for the German market).

The Court did not accept Germany's arguments that the rule was necessary to protect public health (by the proliferation of more, weaker alcoholic drinks on the market) or consumer choice (so that consumers are not 'cheated' by producers) – the display of where the product was from and the alcohol percentage should suffice. Since this law had the practical effect of 'excluding from the national market products of other Member States' (para 14), the Court found that it fell foul of the Treaty. In doing so, the Court adopted a broad interpretation of 'measures having equivalent effect' and stated that rules about product (such as size, weight) that hinder free movement must be set aside. Therefore, if a product is lawfully made and marketed in one Member State, it should be allowed to enter and be sold in other Member States.

The decision in Cassis de Dijon was fundamental in shifting the balance in moving the single market forward: instead of having to wait for the institution to agree common standards via legislation, Member States could be challenged and have to justify national rules that hindered trade between the Member States. (see further, on the politics of the decision Alter and Meunier-Aitsahalia 1994 and for more recent comment, Snell 2019)

Source: C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon') ECLI:EU:C:1979:42

<Box end>

The Court and 'gap filling': *Francovich*

A further important innovation of the Court related to the harm caused by breaches of EU law. There was nothing in the Treaty to cover the situation where an individual suffered harm due to the breach of EU law by a Member State. In the case of C-6/90 *Francovich v Italy* ECLI:EU:C:1991:428, it was established that Italy had failed to implement a Directive (80/987) that would have given employees with a minimum level of protection in case of the insolvency of the employer. When the firm Francovich and others worked for became insolvent, they were thus not protected, but would have been in another Member State where the Directive had been properly transposed (implemented). They therefore brought an action against Italy for the harm suffered due to Italy's breach of EU law (failure to transpose the Directive). In the absence of Treaty provisions, the Court of Justice established the principle of state liability for harm caused to individuals by breaches of EU law. It did so on the basis that 'the full effectiveness [of EU law] would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed' (para 33) and that there was a general stipulation in the Treaty that Member States are 'required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations 'under EU law' (para 36; now Article 10 TEU) (for a recent re-evaluation of this principle see Dougan 2017; Granger 2017).

These decisions are some of the most well-known of the Court, though there are many others which established principles that have underlined the (legal) importance of EU law in the Member States, and the distinctiveness of EU law. As early as 1981, Eric Stein (1981, p.1) aptly characterised the Court as 'Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice … has fashioned a constitutional framework for a federal-type structure in Europe.' Stein's words have captured the work of the Court as representing a 'new species' of law beyond that of the nation state, which underpinned the emerging political order of the EU (Shaw and Hunt 2009, p. 94). As such, the importance of the role of the Court for both EU law and politics cannot be understated. The main debate that has permeated these developments is whether the Court of Justice's '**activism**' has been justified in doing so, to which discussion now turns.

Key Points

- The Court was originally not assumed to play a major role in the EU's institutional framework or the development of the law at the outset of the European integration process in 1957.
- However, in a number of very key areas including the single market, the Court's decision have had much more substantive effect than legislation in breaking down barriers between the Member States.
- The Court has developed legal principles, such as remedies for breaches of EU law, even where the Treaty was silent.

'Activism' of the Court?

The above decisions are a testament to the way in which the Court of Justice has sought to uphold the commitments made by the Member States in the Treaty. In looking beyond what the Treaty explicitly says (or does not say), the Court has engaged in what is known as

‘**teleological**’ interpretation. That is to say, the Court has looked at the broad terms in which the Treaty has been drafted in and interpreted them in light of the objectives of the Treaty. In the words of one former judge at the Court of Justice, to do otherwise would be a denial of justice (Lenaerts and Gutierrez-Fons 2014, p. 32). Therefore, the Court’s decisions can be seen not just as filling in the gaps left by the drafters of the Treaty but relying on the intentions behind them. In other words, in the *Francovich* case for example, if there was a clear intention for EU law to be effective as expressed in the Treaty (albeit vaguely), then the Court was justified in turning that commitment into a workable solution. This has not required the explicit consent of the Member States but has required the Court to work in partnership with national courts (see Alter 2001). In practical terms, *Francovich* set out the principle of state liability (harm caused by the state for breaches of EU law) but it would be the national courts – Italy in that case – to actually deal with the case for compensation.

Furthermore, although the Commission is the ‘motor of integration’(see Chapter 10), the Court of Justice is also an institution created by the Treaty to uphold the law. Therefore, as Poiares Maduro (2007) has written, the ‘dynamic character of the process of integration’ is guided by the overall objective of creating 'an ever closer union among the peoples of Europe' (Article 1 TEU). This explains why the Court, although acting independently, tends to favour a solution which lies on the side of more European **integration,** not less. The Court has been unimpressed with arguments which would harm **integration**. For example, the Treaty allows for Member States to make exceptions to free movement law in some circumstances, such as the protection of public health (Article 36 TFEU). But it has interpreted this very narrowly to avoid the temptation for Member States to widen these exceptions, perhaps as a mean to ‘protect’ domestic industries. Therefore, the Court would require evidence if a Member State claims that a measure is justified on these grounds (C-174/82 *Sandoz* ECLI:EU:C:1983:213).

As one might expect, the way in which the Court has gone about its business has attracted robust critique. Within the UK legal academy, Professors Hartley and Arnull debated in the 1990s the nature of judicial objectivity in the CJEU. Over twenty years later, their respective points remain valid in terms of understanding the history of the Court’s decision-making and why the Court has attracted the reputation for ‘**activism**’(see Box 13.3)

<Box start>

Box 13.6 Key Debates: the Hartley and Arnull debate

According to Hartley (1996, p. 107), the Treaties ‘are not static instruments but were intended from the beginning to be dynamic: they are "genetically coded" … to develop into the constitution of a fully-fledged federation …. . If the Treaties are indeed so coded, the judges are doing no more than their duty in developing the law in the desired direction, even if some laggard Member States are reluctant to accept such developments. According to this approach, by joining the Community, Member States accept not only the obligations written into the Treaties as they exist at the time, but also undertake to assist in their development into the constitution of a European federation.’ He points therefore to the existence of a ‘higher law’ above the Treaties in which the ‘embryonic federation’ is the goals. The problem, Hartley says is that there are two models of the EU - one as a Treaty-based organisation founded by sovereign states, and the other which is a nascent federation – and that these are incompatible (p. 109).

Arnull's response to Hartley's points is that this analysis is over-simplistic, and not all of the Court's decisions can be read in this way (p. 411). Though he notes that the Court has been at times been 'creative' (p. 420), this is within the spirit of the Treaty and its overall objectives which must be given due regard. As such, 'it would be quite wrong to suggest that the Court pursues some hidden agenda of its own: the Court looks for guidance to the preamble to the Treaty, its introductory provisions and overall structure. If there is an agenda pursued by the Court, it is therefore one set by the Treaty's authors. The Court can hardly be criticised for striving to construe the Treaty in a way which gives effect to its authors' overall design.'

<Box end>

The work of the Court and the Treaties

The Hartley-Arnull debate remains a very useful way to understand the role of the Court as an institution of the Union. It is important to recall, however, that the important constitutional principles of direct and effect and supremacy, as well as all the other significant decisions that the Court has taken, could be reversed by the Member States if they so wished (although it would need all of them to agree). The main mechanism to do so would be to change the text of the Treaty. On occasion, Treaty reforms have incorporated decisions of the Court (such as, on equal treatment in pensions, C-262/88 *Barber* ECLI:EU:C:1990:209). Despite its fundamental importance, the Member States have not done so with supremacy – though neither have they attempted to remove it either. The failed Constitutional Treaty would have included a provision about the supremacy of EU law in the main text, to give it the full recognition that (as a fundamental principle) it deserves, but the Treaty of Lisbon attached it as a Declaration (no. 17) to the Treaty instead:

> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

Therefore, we can assume that the Member States accept the principles as laid down by the Court, but do not want to give them prominence within the Treaty. A Treaty is an outcome of diplomatic negotiations, where Member State interests are present and brought to the fore. Negotiating governments are aware that the treaty must be 'sold' (including via referendums) to the general public at home, and compromises made where necessary. This would fit the liberal Intergovernmentalist view of the Member States being in control of the EU, but only so far as they do not control the CJEU.

Does the Court always favour 'more' integration?

The assumption that the Court of Justice always favours a solution which results in more **integration** and powers of the Union continues to be debated (see Terpan and Saurugger 2020, p. 33). One area where the Court has been active is in recognising rights in the Treaty relating to free movement of persons and EU citizenship. This is a complex area, since the original focus of the EU was on the free movement of workers, but is entwined with powers retained by the Member States, such as social welfare law, and where third-country nationals, that is those who come from outside the EU but who may have a family link to an EU citizen, are involved (see Strumia 2016).

For instance, in C-85/96 *Martínez Sala* ECLI:EU:C:1998:217 a Spanish woman who was resident in Germany had not been working for some time and was receiving social benefits. Her application for an additional child-raising allowance was refused by the German authorities. The Court of Justice stated that so long as she was lawfully resident, a general principle of non-discrimination applied and it was not possible to refuse her application simply because she was no longer working. Free movement is not an absolute right, but the Court has found that when Member States impose limitations (for example, to avoid individuals being a financial burden on the state), they must do not in a proportionate way that does not overly limit the exercise of Treaty rights (C-413/99 *Baumbast* ECLI:EU:C:2002:493; C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639).

However, recent cases have cast doubt on whether the court is 'hard-wired' to always maximise the effect of EU law. The case of *Dano* (C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358) touched on the sensitive issue of access to benefits of EU citizens who are not 'economically active', that is working. In this case, a non-economically active Romanian woman living in Germany with her son was refused a particular benefit, which she challenged on the basis of discrimination. The Court of Justice emphasised that Member States do have the right to require individuals to have sufficient resources to live in that state, and that the Treaty free movement rights cannot be used for 'solely in order to obtain another Member State's social assistance' (para 78). This judgment was interpreted as a move away from the previous line of case law insofar as it focuses on the entitlement of Member States to impose restrictions rather than expanding the rights on the basis of Treaty goals and the Charter of Fundamental Rights (Thym 2015; Zahn 2015).

Key Points

- The proper role and purpose of the Court of Justice has been a constant debate since its early decisions in the 1960s.
- Legal scholars have been divided on the question of whether the Court has been justified in developing its own competence and the reach of EU law, or overreached.
- The Court is generally assumed to favour solutions which support EU integration, but more recent analysis has cast doubt on some of these assumptions.

Conclusion

Through its many judgments, the Court of Justice can be understood as an institution whose contribution to the integration of the EU goes far beyond that of a merely technical body responsible for settling disputes. For this reason alone, accounts of the history, development and future of the EU which do not consider how the judicial body within the institutional framework fits in are likely to be inadequate.

Few would have predicted that a Court would have taken on and developed the status in which it has gained today. Hence, analysis of the Court, what it does and what effect it has on the other institutions as well as the Member States is not limited to legal scholars. From the early 1990s in particular, political scientists have approached what Stone Sweet (2000) has referred to as the 'judicialization of politics' and how judicial law-making influences the behaviour of other actors. The impact of the Court's work in setting the boundaries of definitions of free movement and citizenship, amongst other areas, has been argued by Schmidt (2018) to constitute a direct constraint on the policy-making abilities of the other institutions and the Member States. The Court's work in settling disputes between the

institutions goes to the heart of some of the key institutional questions about where power lies, and should lie, in an organisation with no parallel anywhere in the world. The way in which the European Parliament has strategically used actions before the Court of Justice as a means of bolstering its own power and influence is a testament to the institutional and political role of the Court (Sanchez Barrueco 2020).

Therefore, it was almost to be expected that the Court of Justice would eventually have a strongly influential role to play in the Brexit process, and very likely too the eventual consequences of the COVID-19 pandemic. The decisions of the Court in relation to the Brexit process, as well as its findings that domestic institutional reforms in Poland and Hungary have breached EU law, have thrust the Court into the public spotlight. This has not previously been the experience of the Court of Justice, save perhaps in isolated examples. For the Court, as an evolving institution it is not immune from the wider context of the European integration process and how we understand it. It may be that the age of grand decisions moving the integration process forward is now over, but there is little doubt that the role the Court has developed for itself in the governance arrangements of the EU will diminish as the polity evolves.At the same time, the Court is faced with the same challenges such as the risk of institutional overload and the need for timely decision-making, but has only limited opportunity to do anything itself. If the Court is to be reformed, either in terms of its structure, composition or its role, then this can only be fully achieved with the Member States via the Treaty arrangements. The history of the Court tells us that incremental changes, such as the creation of the General Court, are generally found to be the answer rather than wholescale reform.

Questions

1. What was the original purpose of the Court of Justice and how has its role changed?
2. What is the difference between a judge of the Court of Justice and an Advocate General?
3. What are preliminary references?
4. Do all questions of EU law go to the Court of Justice?
5. What is meant by the Court of Justice being an ‘activist’ court? Is this justified?
6. How does the Court often approach legal problems when there is no clear-cut answer?
7. How and why did the Court establish the principles of direct effect, supremacy and state liability?
8. Does the Court always pursue solutions which further EU integration?

Guide to Further Reading

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