LONGMAN LAW SERIES

EU Law

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ALWAYS LEARNING

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EU Law

European Union legal order created by the Treaties.[17] They are assisted by an army of legal clerks and translators.[18]

The CJ (the only court mentioned in the Treaty of Rome) and the GC each comprise one judge from the member states – they have 28 full members each, although the CJ has proposed an increase in the number of GC judges to 39.[19] In addition, the CJ has eight Advocates-General (AsG), who are mandated to 'assist the court' but have no judicial decision-making power. Every national legal and judicial system within the EU is represented in these two courts. The CST is different – it has only seven judges. This court is not constructed on the basis of national representation.

In comparison to the US federal system, which has 94 district courts (each with between 2 and 28 judges) and 13 circuit courts (comprising 179 judges),[20] this is perhaps a small system for use by up to 500 million people.[21] A comparison with the USA also shows that the CJEU is highly – perhaps overly – productive: in 2013, the CJ alone completed 701 cases (595 in 2012) and had 699 new cases brought before it (632 in 2012) with in addition to 884 cases pending. In just over 50 years of existence it has produced over 9,000 judgments and opinions. In comparison, the US Supreme Court – taking an average of 100 decisions per year – has produced perhaps 20,000 judgments in 200 years.

i. The structure of judicial deliberation

The CJEU is a unique court – its composition is international yet its decisions are as binding as those of a national court. Unlike other supreme courts, the appellate function is a minor part of its role[22] – the majority of its work arises from requests to interpret the Treaty or the validity of secondary legislation under Article 267 TFEU. Furthermore, unlike other supreme courts, no member of the CJEU is permanent. Judges and AsG are appointed for a term of six years, although this is renewable at the discretion of the member states. In addition, unlike most Supreme Courts, all of the CJEU rulings are unanimous – the CJEU may function in many different languages, but it is both unanimous (it produces a single decision) and univocal (if there is reasoning, it follows one line).[23]

Judicial deliberation takes place inside the 'delibere' – this is where decisions are formulated. The judges in all three courts now meet in small 'chambers' or groups of three

[17]See Opinion 1/91 [35]. Restated in Opinion 1/09 Of The Court (Full Court) on the creation of a European and Community Patents Court, 8 March 2011.

[18]The language of a case is chosen by the applicant or referring court. They can choose from Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or Swedish.

[19]CJEU Annual Activity Report 2011, p. 4

[20]Sandra Day O Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice,* Random House, 2004, pp. 208-209

[21]Niamh Nic Shuibhne, 'A court within a court: is it time to rebuild the Court of Justice?', *ELR* 34(2), 2009, pp. 173–174 (Editorial); Arjen Meij, 'Courts in transition: Administration of justice and how to organize it – Celebrating six decades of the Court of Justice in a close community of Magistrates', *Common Market Law Review* 50(3), 2013, pp. 3–14 (Guest Editorial)

[22]Cases may be appealed on their facts from the CST to the General Court and from the General Court to the Court of Justice.

[23]James Lee, 'A Defence of Concurring Speeches', *Public Law,* 2009, pp. 305–331. Between 1970 and 2000, rates of unanimity were as follows: USA 42.9 per cent; Australia 58.9 per cent; Canada 75.6 per cent; UK 81.2 per cent; South Africa 90.9 per cent. See blog by Chris Hanratty at: http://ukscblog.com/dissenting-opinons-in-the-uksc

or five[24] to decide upon cases; on very important cases the CJ will meet as a Grand Chamber of 11 or 15.[25] As stated by Lazowski,[26]

> The Grand Chamber cases are supposed to be crème de la crème of case law of the Court of Justice. They are meant to serve as precedents and to provide ultimate guidance to national courts under the preliminary ruling procedure. In case of actions for annulment and infringement proceedings they also settle constitutional disputes and institutional battles within the European Union's institutional framework and challenges to Member States' compliance with EU law (respectively).

When a Court opinion is required, the CJ can meet in a formation of 28.[27]

All chambers produce collective decisions. Under the Rules of Procedure[28] that set out its mode of operation, the Court shall deliberate in closed session. The judges participating in the delibere will be those who were present at the oral proceedings as well as the assistant rapporteur, if used. Although every judge taking part in the deliberations shall state his opinion and the reasons for it, this is never made public. Thus while the Rules state that the 'conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court', the size of the majority is never known beyond the Court.

This closure has increasingly been sharply criticised. Hepple and Barnard, for example, argued that the 'strong stench of compromise' pervading the decision of the then 15 men at the CJ in *Seymour Smith* lent 'weight to those arguing for the Court to allow for dissenting opinions'.[29] National judges are equally disgruntled – in the UK, Lord Mance argues that the CJEU should allow separate opinions to avoid 'jurisprudence that is both obscure and rigid' – 'readers and users of the European Court's jurisprudence would benefit by a change which would allow individual freedom of expression to its judges and make the Court's decision-making and reasoning more transparent, flexible and perhaps paradoxically, coherent'.[30] The CJEU's pursuit of univocality and unanimity has been described as 'artificial'[31] and out of tandem with the member states: according to a poll taken prior to enlargement on the use of dissenting opinions in the CJEU, nine member states were in favour of their use, and six were against.[32]

Separate – dissenting or concurring – opinions are controversial. It is rare to find an ambivalent position on their use. The arguments on either side to some extent mirror each other – on the one hand dissent reveals the 'deliberative nature of the court' which

[24]Article 11(a) RP

[25]The last Grand Chamber of 13 sat on 24 September 2011. It will now meet in a formation of 15 – CJEU Annual Report 2011, p. 9. The full text of proposals is available at: http://curia.europa.eu/jcms/jcms/Jo2_7031

[26]Adam Łazowski, 'Advocates General and Grand Chamber Cases: Assistance with the Touch of Substitution', in Catherine Barnard, Markus Gehring and Iyiola Solanke (eds), *Cambridge Yearbook of European Law Studies* 14, 2012, p. 635

[27]See for example Opinion 2/13 of the Court (Full Court) on accession to the European Convention of Human Rights, 18 December 2014. A formation of 27 will also meet to decide upon the Article 267 reference on the ESM from Ireland.

[28]Article 27

[29]B. Hepple and C. Barnard 'Indirect Discrimination: Interpreting Seymour Smith', *Cambridge Law Journal* 58(2), 1999, p. 399

[30]Lord Mance in Lee 2009, pp. 325–326

[31]J. Laffranque 'Dissenting Opinions in the European Court of Justice – Estonia's possible contribution to the democratisation of the European Judicial System', *Juridica International* IX, 2004, p. 21

[32]In favour: Germany, Finland, Sweden, Denmark, Spain, UK, Ireland, Greece, Portugal; Against: France, Italy, Netherlands, Belgium, Luxembourg, Austria. See Laffranque 2004, fn 29.

strengthens its institutional authority and legitimacy' in governance, but on the other dissent may 'detract from the legitimacy of a court'. Where for some, dissent allows judges to contribute to 'the marketplace of competing ideas' and produce the 'best possible rule', for others it weakens the court by undermining unanimity and weakens judicial decisions by undermining legal certainty. While for some, dissent is a 'healthy, even necessary practice that improves the way law is made' and reinforces collegiality by ensuring all points of view are articulated equally, for others it weakens judgments by obviating the need to find consensus. If for some, dissent strengthens public confidence in the judiciary by showing reasoning and debate, for others they weaken judges by undermining the secrecy that protects independence. Finally, the argument that dissent contributes to the education of judges and observers so that 'today's dissent might become tomorrow's majority' is countered with the view that they are inefficient and waste time.[33]

VIEWPOINT

Read the Editorial by Nic Shuibhne – does the EU need to be rebuilt to create a bigger court? Should a new court allow separate opinions?

a) The Advocates General – beyond the delibere

The members of the CJEU can be divided into two categories – those full members who sit inside the delibere and participate in the decision-making, and those full members who do not sit in the delibere. Only the 28 judges in the CJ and GC are the decision-making members, as are the seven judges in the CST; the eight Advocates General in the CJ are outside the delibere – they do not sit in the decision-making chamber. They are non-decision-making members in the CJ.

Nonetheless, judges and AsG are equal: they are appointed in the same manner by 'common accord of the Governments of the Member States for a term of six years from persons whose independence and competence are beyond doubt;' they are also subject to a partial replacement every three years, and eligible for reappointment.[34] At present, the formal criteria for an Advocate General (AG) is the same as for a CJEU judge and both share the same status.[35] They make the same oath to perform 'duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court',[36] enjoy immunity from legal proceedings during and after office and Community privileges in all of the member states,[37] may not hold any political or administrative post or

[33]For representations of these views see: John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?', in *Oxford Journal of Legal Studies* 20, 2000, pp. 238–244; J. Rivers, 'Proportionality and variable intensity of review', *Cambridge Law Journal* 65(1), 2006, p. 174; M. Todd Henderson 'From *Seriatim* to Consensus and Back Again: A Theory Of Dissent', John M. Olin Law and Economics Working Paper No. 363, Chicago Law School, October 2007, pp. 1–2; G. Harpaz (2006) 'The Israeli Supreme Court in search of universal legitimacy' *Cambridge Law Review* 65(1), 2006, p. 7

[34]Article 32 Treaty establishing the European Steel and Coal Community (ECSC), Paris, 18 April 1951

[35]Rules of Procedure, Article 6. The status of Advocates General was formalised in 1974 when the Rules of Procedure declared that they are of equal rank to judges.

[36]Protocol on the Statute of the Court of Justice (hereafter 'Protocol'), Article 2, ECSC

[37]Protocol, Article 3

gainful occupation,[38] and are remunerated in a similar fashion.[39] Both judges and AsG are removed from the CJEU by the member states, primarily by non-renewal of tenure. Their duties terminate upon resignation, or death.[40] Both tend to come from the higher ranks of the national judiciary and civil service, legal practice and the higher tier of academia.[41] The development of a judicial profile for members enhances the independent image of the CJEU and its legal authority, although the Treaty has never explicitly excluded non-lawyers from membership.[42]

There are at present eight Advocates General. The Rules of Procedure state that the 'Court shall take its decision in closed session after hearing the Advocate General'.[43] The AG has no judicial decision-making power in the CJEU or elsewhere. What then do they do? Their duty remains to act with 'complete impartiality and independence' in making 'in open court, reasoned submissions on cases which . . . require his involvement': the AG no longer gives an opinion on every case that comes before the CJ[44] – the Court decided to rule without it in *Asociatia ACCEPT*[45] – and only rarely provides an opinion for the General Court. The AG can be compared to a trial judge in the United States, who has more independence than US appellate judges:

> He knows that if he cannot convince the higher courts, he can be overruled, thus preventing damage to the system. He need not modify his opinions to garner the votes of others on the panel. In a sense he is, by analogy to what Justice Brandeis described as the laboratories of the states, in a position to experiment, to push the envelope of the law in the direction of what he conceives to be justice.[46]

Importantly, the AG is the only visible member of the CJEU – every opinion is signed by its author – and therefore provides some transparency at the Court. It is primarily via the AG opinion that those who are subject to the decisions of the CJEU are able to understanding its thinking.

The AG 'assists' the Court by providing an 'opinion' prior to the determination of the judges. This is neither a 'separate opinion' nor a draft judgment. The opinion produced by the AG is an independent and impartial assessment of the facts in a case assigned to them.[47] The opinion is a self-styled,[48] self-standing and complete document which expresses a personal opinion of the AG. It is not subject to deliberation, discussion and/or later amendment. There is no right to reply to the opinion.[49] Unlike Judges who have

[38]Protocol, Article 4
[39]Protocol, Article 5
[40]Protocol, Article 12
[41]A number have written textbooks on EU law – K. Lenartes, D. Arts and I. Maselis, *Procedural Law of the European Union,* 2nd edn, Sweet & Maxwell, 2006; G. Tesauro, *Diritto comunitario,* 5th edn, CEDAM, 2008; Allan Rosas and Lorna Armati, *EU Constitutional Law,* Hart Publishing, 2012
[42]Judge Vesterdorf, House of Lords European Union Scrutiny Commitee, 15th Report (2006–7), HL 75 [99]
[43]Article 3 Rules of Procedure
[44]In addition, the AG opinion is not published when provided in a case dealt with under the accelerated procedure. See C. Barnard, 'The PPU: is it worth the candle? An early assessment', *European Law Review* 34(2), 2009, p. 281
[45]C-81/12 *Asociatia ACCEPT* v *Consiliul National pentru Combaterea Discriminarii*
[46]Jack B. Weinstein, 'The Role Of Judges In A Government Of, By, And For The People: Notes For the 58th Cardozo Lecture', *Cardozo Law Review* 30(1), 2008, p. 32
[47]Online at http://curia.europa.eu/en/instit/presentationfr/index_savoirplus.htm
[48]There is no standard style for presentation of an opinion.
[49]This was conclusively ruled out by the Court in the *Emesa Sugar* ruling, where it said that the ruling by the European Court of Human Rights (ECtHR) in the *Vermeulen* case concerning the Belgian *Procueur General* was not transferable to the AG at the Court C-17/98 *Emesa Sugar* [2000] ECR I-665.

to negotiate and compromise[50] in order to reach a collective decision, the Advocate General does not have to accommodate the views of others. The Advocates General are free to determine the boundaries of their investigations: the opinion may place the questions presented to the Court within a broader geographical, economic or social context. Thus the opinions can contain considerations not developed by the parties which the Court may adopt.[51] Sometimes the Court has referred national judges to the conclusions of the Advocates General for answers to issues which the Court itself is not empowered to consider.[52] It has been argued that this facilitates a certain amount of bold exploration of legal reasoning and logic on the part of Advocates General, which in turn can embolden the CJEU to make rulings it may not have otherwise taken.[53] The personal nature of the opinion is underlined by the fact that it is neither amended nor corrected by anybody other than the AG, it is not negotiated,[54] and the AG signs her name beneath it. Such autonomy could hardly be imagined in the four words describing their formal task – 'to assist the Court'.

There is no equivalent to the AG in any legal system of the member states.[55] The Advocate General first appeared in Article 10 of the Protocol attached to the Treaty of Paris (Protocol), which established the European Coal and Steel Community (ECSC): it set out that 'the Court shall be assisted by two Advocates-General (AsG) and a Registrar'. Under Article 11 Protocol, the AG was mandated to act with 'complete impartiality and independence' and make 'in open court, oral and reasoned submissions on cases brought before the Court, in order to assist the Court in the performance of the task assigned to it . . . ' This role of assistance excluded participation in the delibere: the AG could help the Court find a decision, but not decide.

As with judges, the Council can increase the number of AsG by unanimity. The number of judges has increased with every enlargement but the number of Advocates General increased only with the enlargements of 1973, 1981 and 1986, when new seats were created to accommodate large acceding states. Apart from a brief period in the 1990s when the number increased to nine, there have been eight AsG for the last two decades. The Lisbon Treaty has opened an opportunity for this to change: Article 252 TFEU[56] states that the Court should be 'assisted by eight Advocates-General' but Article 19(2) TEU[57] removes any numerical limit.[58] Under Article 252 TFEU the number of AsG can be increased following a request of the Court of Justice and a unanimous decision by the Council.[59] It would not be surprising if the number were increased as of the current 28 member states, only five – France, Italy, Germany, Spain and the UK – have a

[50]Barnard and Hepple 1999, p. 411
[51]P.J.G. Kapteyn and P. Verloren van Themaat, *Introduction to the law of the European Communities,* 3rd edn, Kluwer Law International, 1998, p. 250, fn 393
[52]P.S.R.F. Mathijsen, *A Guide To European Union Law,* 8th edn, Sweet & Maxwell, 2004, p. 106; Renaud Dehousse, *The European Court of Justice. The politics of judicial integration,* Macmillan Press, 1998, p. 9
[53]Neville March Hunnings, *The European Courts,* John Harper Publishing, 1996, pp. 57–58
[54]C-17/98 *Emesa Sugar (Free Zone) N.V* v *Aruba* [2000] ECR I-675
[55]K. Borgsmidt, 'The Advocate General at the European Court of Justice: A Comparative Study', *European Law Review,* 1988, p. 106
[56]Treaty on the Functioning of the European Union, OJ C115/158, 9 May 2008. Formerly Article 222 TEC
[57]Treaty on the European Union, OJ C115/13, 9 May 2008
[58]Poland now has a permanent AG.
[59]The proposal to increase the number of Advocates General to 9 from 1 July 2013 and to 11 from 7 October 2015 was debated in the UK House of Lords on 10 June 2013.

permanent AG. The remaining 23 countries share three seats which are allocated on an alphabetical rotating basis.[60]

ii. Recruitment of CJEU members

Judges administer a public good – justice – which courts exist to protect. As the judiciary is the central actor in the justice system, judges without credibility result in a justice system without legitimacy.[61] The composition of the judiciary is therefore important. An important question is who can become a judge in the CJEU, delivering justice to the peoples of Europe?

It may help to reflect upon what judges do to answer this question. Although there is no definitive outline for the judicial role, the tasks allocated to the judiciary in the post-war period have become broader and more complex, due both to an increase in the number of courts and tribunals,[62] more legal and more technical[63] rules and the wider reach of regulation. Public expectation is also higher: courts around the world are called upon to respond to a broad range of social, political and economic questions. It has been argued that judicial decisions are replacing political debate in mature democracies:[64] law has displaced politics and religion as the language of power because politicians and the clergy have become discredited. More than ever, legal opinions are therefore a 'normalising force'.[65] Several authors describe courts as 'the most powerful political force in the nation.'[66]

Access to courts is therefore more important than ever:

> . . . the principle of public access to the Courts is an essential element in our system. Nor are the reasons in the slightest degree difficult to find. The Judges speak and act on behalf of the community. They necessarily exercise great power in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to the facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting

[60]I. Solanke, 'Diversity and Independence in the European Court of Justice', *Columbia Journal of European Law* 15(1), 2009, p. 89

[61]After losing a big case in Ecuador, Chevron sought to put the nation's judiciary on trial in the United States –'The Really Long Arm of American Justice', *Bloomberg Business Week,* 2011, p. 27

[62]For example, the Court of Protection created in England in 2007 to make decisions on the lives of vulnerable people, or more recently, the special tribunal created to resolve the Qantas dispute.

[63]In *Human Genome Sciences Inc (Appellant)* v *Eli Lilly and Company (Respondent)* [2011] UKSC 51 the UK Supreme Court considered the validity of a patent which claims the nucleotide sequence of the gene which encodes for a novel protein; in C-34/10 *Bruestle* v *Greenpeace plc,* the Court of Justice had to determine whether precursor cells from human stem cells could be patented.

[64]See C. Guarnieri and P. Pederzolli, *The Power of Judges: A comparative study of courts and democracy,* Oxford University Press, 2002. See also R. Hirschl, *Towards Juristocracy: the origin and consequences of the new constitution,* Harvard University Press, 2004; K. Malleson, and P. Russell, *Appointing Judges in an Age of Judicial Power*, University of Toronto Press, 2006

[65]M. Todd Henderson, 'From *Seriatim* to consensus and Back Again: A Theory of Dissent', John M. Olin Law and Economics Working Paper No. 363, October 2007, pp. 5–7

[66]Virginia A. Hettinger, Stefanie A. Lindquist and Wendy L. Martinek, 'Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals', *AJPS* 48, 2004, p. 123