Cambridge Yearbook of European Legal Studies, 23 (2021), pp. 54–72
doi:10.1017/cel.2021.4

First published online 31 August 2021

'… Wherefore by their fruits ye shall know them'

Re-appraising Success and Failure in the Life of the European Court of Justice

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Abstract

The establishment of the Court of Justice of the European Union ('CJEU') is often still regarded today as an unequivocal success story, especially compared to the troubles experienced by kindred institutions elsewhere. For non-specialist audiences, it would even seem that its performance has only recently been cast in a more negative light, pursuant to the pushback of the German Federal Constitutional Court in the *Weiss/PSPP* saga. The current article aims to unpack a collection of shortcomings that have accumulated gradually and persist right up to the present, which have however not been interrogated in sufficient depth so far. It starts off with a contextual depiction of the tug-of-war between the supranational and the national judiciaries, juxtaposing the earlier confrontations with contemporary debates and controversies. Subsequently, attention is drawn to the sustained imperfections of the judicial selection and appointment process, addressing a few pervasive questions of institutional propriety. Hereafter, the article engages in a meta-analysis of ongoing discussions on the quality of the case law, testing the veracity of popular contentions pertaining to its constant variability. Lastly, it canvasses the pressures and agitations internal to the CJEU that have become increasingly manifest since the creation of the Court of First Instance. Overall, this fourfold re-appraisal aims to put back on record some of the B-sides on the sountrack of the new legal order, so as to compensate for the lack of airplay they have received hitherto.

Keywords: Court of Justice of the European Union, European integration, judicial activism, constitutional pluralism, administration of justice, selection of judges, appointment of judges

I. INTRODUCTION

Back in 1991, Tim Koopmans remarked that the Court of Justice can be affectionately regarded as the European lawyers' hobbyhorse.[1] Thirty years later, one

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[1] T Koopmans, 'The Future of the Court of Justice of the European Communities' (1991) 11(1) *Yearbook of European Law* 15. For the sake of convenience, in this contribution the designations

might say that perhaps too much has been written on this pet topic. Indeed, scholarly work abounds on its functioning and performance that focuses on myriad select topics, ranging from its shaping of the infringement procedure to its case law on the social security rights of migrant citizens.[2] In more general and holistic assessments, the life of the Court of Justice of the European Union ('CJEU') is widely hailed as a success story.[3] Its effective establishment as a supranational judiciary over the past six decades continues to attract general admiration, even though there has been no dearth of disagreement with regard to the correctness of its dicta.[4] Compared to similar experiments in other parts of the world, the mere survival, let alone the progressive thriving of the EU's judiciary, constitutes a striking feat itself.[5] The output of the International Court of Justice ('ICJ') is known to suffer from a tragic compliance deficit, whereas other counterparts, such as the International Criminal Court and the Dispute Settlement Body of the World Trade Organization, fell victim to political sabotage activities at a relatively early age.[6] In turn, to paraphrase one of its former Presidents, one wonders what would have become of the Community/Union without the existence of its Court of Justice?[7] To the mind of many a lawyer musing on that question, little else is imaginable than a swift collapse following on acrimonious, insoluble conflicts—or at most a fledgling system, not quite the entrenched comprehensive architecture that we may still appreciate today.

Arguably, such positive appraisals display a tendency to concentrate on the sunny surface, thereby coming close to the writing of judicial hagiography. As long as the discipline of European law aspires to be a science rather than a religion, there ought to

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(F'note continued)

'CJEU' and 'Court' are used interchangeably to denote the institution as a whole during the entire 1952–2021 period. Where necessary, its branches or limbs will be explicitly distinguished as 'ECJ' (for 'European Court of Justice'), 'CFI' (for 'Court of First Instance'), and GC (for 'General Court').

[2] Eg B Smulders and L Prete, 'The Coming of Age of Infringement Proceedings' (2010) 47(1) *Common Market Law Review* 9; U Šadl and MR Madsen, 'Did the Financial Crisis Change European Citizenship Law? An Analysis of Citizenship Rights Adjudication Before and After the Financial Crisis' (2016) 22(1) *European Law Journal* 40.

[3] See eg KJ Alter, *The European Court's Political Power* (Oxford University Press, 2009); LN Brown and T Kennedy, *Brown & Jacobs. The Court of Justice of the European Communities* (Sweet & Maxwell 2000).

[4] As Michal Bobek put it, 'There is hardly any other issue relating to [its] operation that would give rise to such heat and passion: the legitimacy of what the ECJ has been doing and how it has been doing it'. M Bobek, 'The Court of Justice of the European Union' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), p 172.

[5] See eg KJ Alter, *The New Terrain of International Law. Courts, Politics, Rights* (Oxford University Press, 2014).

[6] Consider only the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep. 136 (9 July), alongside the contributions in the 2018 special issue of the *International Journal of Law in Context* entitled 'Resistance to International Courts', edited by MR Madsen, P Cebulak, and M Wiebusch.

[7] Cf R Lecourt, 'Quel eût été le droit des Communautés sans les arrêts de 1963 et 1964?', in A Barav *et al* (eds), *L'Europe et le droit. Mélanges en hommage à Jean Boulouis* (Dalloz, 1991).

https://doi.org/10.1017/cel.2021.4 Published online by Cambridge University Press

lie no taboo on listening to some of the B-sides on the soundtrack to the construction of a new legal order as well.[8] Besides, the recent historical turn in the study of the EU legal order has uncovered various concerted practices and outright opportunistic moves to achieve particular integrationists goals, whereby the personal was disconcertingly mixed with the political.[9] In these narrations, for instance, the shenanigans of the aforementioned Court President, Mr Robert Lecourt—a shrewd cabinet minister in his earlier life—take pride of place.[10] Consequently, to some extent the gloves are off already.

To be sure then, every success story has its darker sides, and that of the CJEU is unlikely to be an exception. This article intends to demonstrate the veracity of this claim, which ultimately does remain a modest one. Spectacular failures are to be observed elsewhere, and the life of the Court does not offer any support for the position that a '*debâcle*' has occurred. For our purposes, it may suffice to stick to a broader understanding of the term, indicating a collection of shortcomings that have gradually accumulated and persist up to the present. As will be pointed out, the flaws predominantly pertain to institutional features, not defects in the substantive law, which might explain the absence of inquiries attempting to interlink them. That does not mean to say academic analyses have been totally lacking, yet the pertinent arguments and commentaries did remain largely scattered so far. The present study thus aims to offer a synthesising approach, incorporating the relevant historical dimensions while departing from a contemporary vantage point.

In what follows, consecutive attention is devoted to four underexplored aspects of the Court's evolutionary trajectory. We start off with a a contextual depiction of the tug-of-war between the supranational and the national judiciaries, juxtaposing the earlier confrontations with modern debates and controversies (Part II). Subsequently, attention is drawn to the sustained imperfections of the judicial selection and appointment process, addressing a few pervasive questions of institutional propriety (Part III). We hereafter engage in a meta-analysis of ongoing discussions on the quality of the case law, testing the accuracy of popular contentions pertaining to its constant variability (Part IV). Lastly, the article canvasses the pressures and agitations internal to the CJEU that have increasingly become manifest since the creation

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[8] Yet compare the virtual ostracising of the Danish scholar Hjalte Rasmussen after publication of his *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, 1986), as asserted in JHH Weiler, 'Hjalte Rasmussen – Nemo Propheta in Patria Sua' in H Koch, K Hagel-Sørensen, U Haltern, and JHH Weiler (eds), *Europe: The New Legal Realism. Essays in Honour of Hjalte Rasmussen* (DJØF, 2010), p xiii.

[9] See eg B Davies, *Resisting the European Court of Justice – West Germany's Confrontation with European Law, 1949–1979* (Cambridge University Press, 2012); M Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment' (2014) 12(1) *International Journal of Constitutional Law* 136; A Cohen, '"Ten Majestic Figures in Long Amaranth Robes": The Formation of the Court of Justice of the European Communities' in A Vauchez and B de Witte (eds), *Lawyering Europe* (Hart/Bloomsbury, 2013), p 21.

[10] See eg B Davies and M Rasmussen, 'From International Law to a European *Rechtsgemeinschaft*: Towards a New History of European Law, 1950–1979' in J Laursen (ed), *Institutions and Dynamics of the European Community, 1973–83* (Nomos/Hart, 2014), p 97.

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of the Court of First Instance in the late 1980s (Part V). The threads are woven together in a brief concluding section (Part VI).

II. CONFINED AUTHORITY: THE RELENTLESS TUSSLE BETWEEN THE EU JUDICIARY AND NATIONAL COURTS

It appears logical to assume that relations between judicial institutions active on separate levels will always be characterised by a natural tension. Moreover, this assumption could hold true regardless of whether it concerns a vertical axis between domestic courts, or national vis-à-vis inter/supranational courts. A certain rivalry will inevitably creep into the minds of legal professionals that are expected to deliver justice and 'get it right': in order to do their work at all, each and every judge must be convinced that (s)he has reached the correct conclusion.[11] The latter implies a low tolerance for outsiders second-guessing the choices made, as individual judges are habitually inclined to think they 'know better'—an inclination that almost forms part of their job description, and is a main reason why people opt to approach an independent adjudicator anyway.[12]

It hardly comes as a surprise then that the interrelation between on the one hand the courts of the EU Member States, especially national supreme courts, and on the other hand the European judiciary, exhibits exactly such a tension. Obviously, if it were to amount to a natural phenomenon, this tension cannot be purely attributed to the CJEU. To the extent however that it is the result of specific actions that excited friction, the question arises whether it could (and whether it should) not have been avoided. On top of that, whilst it might have remained an incidental rather than a structural issue, we ended up with the contrary situation, since the relationship has been noticeably strained for several decades now. One may therefore wonder, is perhaps one side more to blame for souring the skies than the other?

The German *Bundesverfassungsgericht* is widely regarded as the most outspoken interlocutor, and the most unyielding of the CJEU's critics. This competitive saga took off in 1974 with the notorious *Solange I* judgment, when the Federal Constitutional Court dismissed the claims of an autonomous legal order that superseded the national one, trumping even the domestic norms incorporated in the *Grundgesetz*.[13] Despite the reversal in 1986 (*Solange II*), the 1993 *Maastricht Urteil* and 2009 *Lissabon Urteil*, as well as a flurry of later verdicts, have signalled a shift to the defiantly hostile mode.[14] In 2020, the antagonism reached a climax with

[11] This conviction, rather than the (f)actual correctness, is possibly the best way to interpret the famous thesis articulated in R Dworkin's *Taking Rights Seriously* (Duckworth, 1978).

[12] Cf M Shapiro, *Courts. A Comparative and Political Analysis* (Chicago University Press, 1981).

[13] BVerfG 2 BvL 52/71, 29 May 1974 (*Internationale Handelsgesellschaft* – '*Solange I*').

[14] BVerfG 2 BvR 197/83, 22 October 1986 (*Wünsche Handelsgesellschaft* – '*Solange II*'); BVerfGE 2 BvR 2134, 2159/92, 12 October 1993 (*Brunner – Maastricht Urteil*); BVerfG 2 BvE 2/08, 30 June 2009 (*Lissabon-Urteil)*; BVerfG 1 BvR 256/08, 2 March 2010 ('*Vorratsdatenspeicherung*'); BVerfG 2 BvR 2728/13, 14 January 2014 ('*OMT-Beschluss*'); BVerfG 2 BvR 2735/14, 15 December 2015 ('*Europäischen Haftbefehl*'). For incisive analyses, see FC Mayer 'The Case of Germany' in C

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the *Weiss/PSPP* decision, declaring actions of the European Central Bank *ultra vires* for want of a stronger motivation.[15] As known, the *Bundesverfassungsgericht* did not stand alone, but was already in the early days joined by, *inter alia*, its Italian and French counterparts. Later on, an unqualified acceptance of the supremacy of European law proved equally unpalatable for their colleagues in newly acceding countries, including Denmark, Ireland, and Poland. The Czech Constitutional Court and the Danish Supreme Court have tiptoed on the edge of open war.[16] Of late, the Polish Constitutional Tribunal ventured to go even further.[17] Overall, few are ready to recognise the overriding jurisdiction of the CJEU, preferring to contend that the ultimate authority of EU law flows from domestic basic norms, in particular the enabling clauses contained in the national constitution.[18]

A first failing of the European Court of Justice is thus that it did not entirely succeed in getting its message across; and that instead, it sowed the seeds for a protracted series of confrontations, by launching an unprovoked attack on the sovereign jurisdiction of Member States. So the root of the problem here does not date back to 1974, but to 1963: that year's *Van Gend & Loos* judgment, all too often cast in a favourable light, sparked a controversy that led to an erosion rather than an enhancement of the legitimacy of the proclaimed 'new legal order'.[19] While justified in *la doctrine* as a logical corollary, the emphasis on supremacy and autonomy in *Costa/ENEL* exacerbated the status quo.[20] Additionally, the Court did not do itself

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(F'note continued)
Landfried (ed), *Judicial Power* (Cambridge University Press, 2019); M Payandeh, 'Constitutional Review of EU Law After *Honeywell*: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48(1) *Common Market Law Review* 9; JH Reestman and L Besselink, 'Sandwiched between Strasbourg and Karlsruhe: EU Fundamental Rights Protection' (2016) 12(2) *European Constitutional Law Review* 213.

[15] BVerfG 2 BvR 859/15, 5 May 2020 (*EZB – Staatsanleihekaufprogramm*). This much-maligned judgement of the Second Senate deviated from the Euro-friendly judgments of the First Senate in the 'right to be forgotten' cases, just six months earlier; on this about-turn, see D Thym, 'Friendly Takeover, or: the Power of the "First Word". The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review' (2020) 16(2) *European Constitutional Law Review* 187.

[16] J Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' (2012) 8(2) *European Constitutional Law Review* 323; R Holdgaard, D Elkan, and GK Schaldemose, 'From Cooperation to Collision: The ECJ's *Ajos* Ruling and the Danish Supreme Court's Refusal to Comply' (2018) 55(1) *Common Market Law Review* 17.

[17] Trybunał Konstytucyjny, P 7/20, 14 July 2021 (*Wyrok v Imieniu Rzeczypospolitej Polskiej*).

[18] For a detailed survey, see P Craig and G de Búrca, *EU Law* (Oxford University Press, 2020), pp 317–45.

[19] *NVAlgemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen*, C-26/62, EU:C:1963:1, on which see poignantly JHH Weiler, '*Van Gend en Loos*: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12(1) International Journal of Constitutional Law 94.

[20] *Flaminio Costa v ENEL*, C-6/64, EU:C:1964:66, on which see O Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10(4) *European Journal of International Law* 763.

a service either with its ruling in the *Dairy Products* case, wherein it sealed off the Community system by rejecting any reliance on the countermeasures normally available under international law.[21] In the long run, the foregoing raised the discomfort for Member States to such a level that some even became attracted to the idea of completely abandoning the integration project. In the meantime, the Court was itself responsible for the adverse reactions from the national plane, which eventually turned into an intermittent tug-of-war. There, arguably, lies the original sin: in essence, those adjudicating on the Kirchberg brought the dogged struggle upon themselves, when a less blunt approach could have been attempted. Matters were compounded by the Court's condoning of the liberal interpretations other EU institutions gave to their own competences and those of sub-organs—fomenting the doubts of some national judges, with a further weakened authority as the predictable boomerang effect.[22] Currently the outcome, also in view of the multiplying pockets of opposition, resembles a case of self-inflicted repetitive strain injury.

That the bold pronouncements of the Court met with stiff resistance in sundry corners is not strange, nor is it unusual. Research on comparable actors suggests that they are most vulnerable to backlash in the early stages of their development, when their position has yet to be solidified, and potential supporters have yet to mobilise.[23] Nevertheless, this does not mean there is nothing to justify a principally moderate stance from the very beginning: a subtle dialogue could be as conducive to a positive result as prying the doors open yourself. Regardless of whether the inroads made by *Van Gend*, *Costa*, and *Dairy Products* were unavoidable or not, the harmonious emancipation of EU law would probably have stood to gain from decisions that excited a less antagonistic response.

Very telling and somewhat quaint is moreover the fact that an extensive 'marketing campaign' had to be undertaken to inform and persuade the Court's interlocutors.[24] Apparently, the authors of said decisions were not too sure that the key tenets would be properly understood or go down easily. In part, the ambiguity of *Van Gend & Loos* was deliberate, but it did entail that the revolutionary dimension was not appreciated

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[21] *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium*, Joined Cases C-90 & C-91/63, EU:C:1964:80, on which see especially W Phelan, 'The Troika: The Interlocking Roles of *Commission v Luxembourg and Belgium*, *Van Gend en Loos and Costa v ENEL* in the Creation of the European Legal Order' (2015) 21(1) European Law Journal 116.

[22] See eg *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co*, C-25/70, EU:C:1970:115; *European Parliament v Council of the European Communities*, C-70/88, EU:C:1990:217; see also *United Kingdom of Great Britain and Northern Ireland v Parliament and Council*, EU:C:2014:18. Conversely, the tepid approach towards the rule of law at the EU level is said to have prompted similar tendencies at the national level. See SCG Van den Bogaert, 'Editorial Comments, The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three Interrelated Problems' (2016) 53(3) Common Market Law Review 597.

[23] See eg KJ Alter, JT Gathii, and LR Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *European Journal of International Law* 293.

[24] A Vauchez, 'The Transnational Politics of Judicialization: *Van Gend en Loos* and the Making of EU Polity' (2010) 16(1) *European Law Journal* 1.

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right from the start.[25] If, however, the declaration of a new legal order, with concomitant radical ingredients like supremacy, was ever expected to inspire awe and command obedience amongst its subjects, better care might immediately have gone into the drafting process. At least in this sense, the landmark judgments of the 1960s were not the success they were later said to be.

To prevent misunderstanding, the core argument here is not that alternatives to those judgments should have been devised. In this respect, the cardinal failure of the CJEU resides plain and simple in its inability to get each and every member of the national audiences on board. Simultaneously, whilst regional integration can occasionally get off the ground without judicial activism, to claim that the 1960s judgments were wholly superfluous is to enter the realm of speculation.[26] All the same, a measured strategy might well have induced less friction, and diminished the risk that the Court's authority remains as confined as it is today. As an intriguing side-effect, that route opens the door to an alternative reality in which the theory of legal pluralism (contemplating a peaceful co-existence between multiple overlapping norm systems) never managed to catch on in academia—and never had to either, in absence of the divide it seeks to bridge.[27]

III. QUESTIONING THE COURT'S MEMBERSHIP: DEFECTS IN THE SELECTION AND APPOINTMENT PROCESS

The quality of the performance of an organisation will always depend directly on the quality of the people running the show. Disturbingly, the Treaty of Paris that laid the foundation for the CJEU did not demand that the judges appointed to the Court possess any legal qualifications, merely that they were chosen from among persons of recognised independence and competence.[28] By consequence, the backgrounds and expertise of the Court's founding members were quite heterogeneous, including such rare specimens as the Dutch trade unionist Petrus Serrarens (on the bench from 1952–1958) and the French governmental advisor Jacques Rueff (1952–1962). Party affiliations and political connections played a marked role in their recruitment, with a

[25] The dictum represented a compromise between the authors, supported by the narrowest possible majority on the bench: see Rasmussen, note 9 above, p 153.

[26] Interestingly, the European Free Trade Association ('EFTA') Court managed to secure the effectiveness of European Economic Area ('EEA') law without asserting its direct effect or autonomy: see H-P Graver, 'The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States' in C Baudenbacher, P Tresselt, and T Oerlyggson (eds), *The EFTA Court: Ten Years On* (Hart, 2005), p 79.

[27] A divide it is unable to bridge in actual practice anyway, being a descriptive and not a normative theory. See further eg K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press, 2014).

[28] Article 32 of the Treaty establishing the Coal and Steel Community. In comparison, the bar was set higher at the European Court of Human Rights ('ECtHR'), with the original Article 31(2) European Convention on Human Rights ('ECHR') prescribing that judges had to either possess the qualifications required for appointment to high judicial office, or be jurisconsults of recognised competence. Article 2 of the original ICJ Statute stipulated in nigh identical terms that the Court was to be composed of members possessing the qualifications required in their respective countries for appointment to the highest judicial offices, or jurisconsults of recognized competence in international law.

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distinct air of nepotism surrounding the selection process.[29] For almost sixty years, the system for appointing judges and advocates general was neither very complicated nor very demanding. Member States were trusted to come up with a suitable nomination whenever a vacancy arose. The system was based on mutual trust, cloaking a non-aggression pact of sorts—no country daring to question another's candidate, for fear of a future acts in retaliation.[30] The nomination was forwarded to the Council, where as a rule it was approved.[31] No serious inspection took place whether those selected had what it takes to do a good job. There is no record of anyone ever being rejected, so once proposed appointment was guaranteed. In the corridors, there are anecdotes aplenty with regard to those who turned out to be less felicitous picks, whereby the diligence of generations of *référendaires* has helped to disguise some (otherwise very embarrassing) judicial calamities.[32]

The domination of the process by Member State governments reflects a historical constant. During the negotiations on the creation of the Coal and Steel Community in 1951, the French delegation strongly pushed for maintaining their sovereign prerogative, insisting on appointment by common accord, despite objections from the German representatives who argued that this approach would jeopardise judicial independence.[33] Through the years, the European Parliament was greeted with a kindred reluctance in its repeated calls for greater involvement in the nomination procedure.[34] Since the Court considers itself powerless to review the appointment decisions, believing that these do not constitute instruments of EU law themselves, the arrangement reveals a curious gap in judicial oversight.[35] Even if such deference is no less

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[29] Alter, see note 3 above, p 127; Cohen, see note 9 above, pp 35–36. For a comprehensive study of the dynamics in the foundational period, see V Fritz, *Juges et Avocats Généraux de la Cour de Justice de l'Union Européenne, 1952–1972* (Vittorio Klostermann, 2018).

[30] Cf J-M Sauvé, 'Le rôle du comité 255 dans le sélection du juge de l'Union' in A Rosas, E Levits, and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press, 2013), p 101.

[31] Officially submitted to what is called the 'Conference of the Representatives of the Governments of the Member States'; ordinarily the Committee of Permanent Representatives (Coreper) takes a look and ensures prior approval.

[32] See eg M Cohen, 'Judges of Hostages? Sitting at the Court of Justice of the European Union and the European Court of Human Rights' in B Davies and F Nicola (eds), *EU Law Stories* (Cambridge University Press, 2017), p 58; FG Jacobs, 'Advocates General and Judges in the European Court of Justice: Some Personal Reflections' in D O'Keeffe and A Bavasso (eds), *Judicial Review in European Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, 2000); M Johansson, 'Les référendaires de la Cour de Justice des Communautés Européennes: Hommes et femmes de l'ombre?' (2007–2008) 3 *Revue des Affaires Européennes* 563.

[33] A Boerger-De Smedt, 'La Cour de Justice dans les négociations du traité de Paris instituant la CECA' (2008) 14(2) *Journal of European Integration History* 7.

[34] A Arnull, *The European Union and Its Court of Justice* (Oxford University Press, 2006), p 21.

[35] *Eleanor Sharpston v Council and Representatives of the Governments of the Member States*, T-550/20, EU:T:2020:475; *Eleanor Sharpston v Council*, C-85/20 P, EU:C:2021:485. This reminds one of the controversy sparked by the EU-Turkey Statement of 2015, and the GC's Order of 28 February 2017 in *NF v European Council*, T-192/16, EU:T:2017:128.

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logical in other domestic and international jurisdictions, it makes a mockery of the claim that the European legal order features a 'complete system of remedies'.[36]

Over time, a beefing-up of the membership criteria did occur. As Article 253 Treaty on the Functioning of the European Union ('TFEU') currently demands, the nominees are to be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or who are jurisconsults of recognised competence.[37] In line with Article 254 TFEU, members of the General Court need to be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office.[38] Pursuant to Article 255 TFEU, an advisory panel was created in 2010 that must be consulted before the Member State governments can proceed to the appointment phase. The new scrutiny mechanism definitely allows for a more objective and independent assessment of whether the candidates genuinely meet the set criteria.

Since a negative opinion of the panel can only be overturned with unanimity, it has in practice acquired a *de facto* veto status.[39] Still, this offers no silver bullet for the systemic maladies that plague the recruitment process from the opposite end. For starters, take the glaring democratic deficit that flows from the *de facto* veto power of the panel, leaving the Member States with little or no room to depart from the findings and conclusions of the experts. Moreover, it is the ECJ President who holds the competence to nominate the advisory panel's members, as well as to propose (amendments to) its rules of procedure, handing the Court a peculiar right of co-determination.[40] The Union's only directly elected body, the Parliament, was fobbed off in Article 255 TFEU with the right to suggest one panel member. Ostensibly, the technocrats have now come to hold the formerly all-powerful politicians in thrall. To be sure, the doubts that may be expressed on this front do not militate in favour of a wholesale politicisation of the selection and appointment process, but for a meaningful involvement of representative bodies.[41]

In close conjunction, there is the nagging lack of transparency. Up to 2010, the proceedings at the Council were shrouded in secrecy, so the people of Europe never got

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[36] See eg *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625.

[37] Article 167 Treaty Establishing the European Economic Community ('TEEC'), post-Maastricht Article 167 TEC, post-Nice Article 223 Treaty Establishing the European Community ('TEC').

[38] The Treaty of Lisbon inserted the adjective 'high'. Remarkable here is the (continuing) omission of the phrase 'in their respective countries'.

[39] M Bobek, 'Epilogue – Searching for the European Hercules' in M Bobek (ed), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015), p 287; H de Waele, 'Appointment of Judges: Court of Justice of the European Union', in H Ruiz-Fabri (ed), *Max Planck Encyclopedia of International Procedural Law*, para 25, https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3362.013.3362/law-mpeipro-e3362.

[40] C Krenn, 'Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success' (2018) 19(7) *German Law Journal* 2007, p 2018.

[41] D Kelemen, 'Selection, Appointment, and Legitimacy – A Political Perspective' in M Bobek (ed), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015), pp 258–59.

to know their top judges until they were formally anointed. Matters did not improve much with the new system, since the hearings of nominees by the panel take place *in camera*, and its reports are kept confidential. One rationale has been to secure the privacy of the candidates.[42] Furthermore, the arrangement is thought to facilitate the frankness of the conversation, obviating the need for excessively diplomatic answers.[43] An earlier proposal to organise hearings at the Parliament was rejected for undermining judicial independence.[44] Similar grounds underpin the non-disclosure of the panel report, in reference to the legal imperative to protect personal data.[45] Another objective is to avoid a chilling effect, i.e. discouraging potential nominees from letting their name go forward, due to risk of being rejected (and the attendant reputational damage). Each of these points can just as easily be rebutted though. For instance, the panel's legal reasons for pursuing rigorous confidentiality, keeping the individual files under lock and key, appear tenuous.[46] Equally, it has been argued that 'someone inclined to seek highest judicial office, who has a passion for the cause, should have the stomach and ability to stand a certain degree of public scrutiny', adding that it may be for their own good, as it staves off injurious gossip in case of failure;[47] that it discourages those that do not meet the necessary criteria anyway, and that solutions can be worked out that do not disproportionally affect the right to privacy (eg broadcasting the hearings to a restricted audience; redacting the reports prior to their release).[48]

In the same vein, critique have been voiced on the panel's gambit to 'more clearly and precisely explain' the conditions listed in Articles 253 and 254 TFEU, which

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[42] 'Final Report of the Discussion Circle on the Court of Justice at the European Convention', Brussels, 25 March 2003, CONV 636/03, para 6.

[43] A Torres Pérez, 'Can Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges' in M Bobek (ed), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015), p 196.

[44] See Arnull, note 34 above, p 21.

[45] The panel cites *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, interpreting Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43 and Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1. See 'Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union', Brussels, 11 February 2011, 6509/11, COUR 3 JUR 57, p 3.

[46] A Alemanno, 'How Transparent Is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections' in M Bobek (ed), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015), pp 213–14.

[47] A von Bogdandy and C Krenn, 'On the Democratic Legitimacy of Europe's Judges – A Principled and Comparative Reconstruction of the Selection Procedures' in M Bobek (ed), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015), p 179.

[48] See Torres Pérez, note 43 above, pp 197–98.

resulted in a long list spanning six separate factors.[49] Authors point to the exhaustiveness of the criteria included in the Treaty, opining that the panel exceeded its mandate by creating wholly new benchmarks in its elaboration.[50] Adding insult to injury, conspicuous by their absence are considerations related to gender.[51] On the one hand this is perfectly logical, as the procedure offers not much leeway to pick and choose candidates that ensure a balanced composition of the CJEU.[52] Attaching value to the sex of the nominee evidently amounts to a *praeter legem* move. On the other hand, not doing so prolongs the sufferance of unacceptably backward outcomes. In 2021, a third of the US Supreme Court consists of women, with the appointment of Sandra Day O'Connor dating as far back as 1981. At the EU's highest branch, the fraction presently stands at approximately one fifth,[53] with the first woman, Fidelma Macken, being appointed only in 1999. One could argue that views on this matter coalesced much earlier across the Atlantic, and that the prominence of the US Supreme Court has been relatively greater. It does not alter the fact that by now, the Union and the evaluation panel might really be expected to raise their game.

The shortcomings flagged above are, admittedly, to be attributed to institutional arrangements: the Union's judiciary itself can hardly be held accountable for the dealings of the system's architects. There is no hard proof either of gross negligence or underperformance among judges. Also, it must be noted that there exists no uniformity or consensus in national, international or supranational circles with regard to the optimal method for selection and appointment: countless variations may be observed, grand as well as subtle—ranging from entirely open recruitment strategies to less manifest 'direct tapping', and from intense review procedures to marginal

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[49] Namely: (1) legal expertise, demonstrating a real capacity for analysis and reflection upon the conditions and mechanisms of the application of EU law; (2) having acquired professional experience at the appropriate level of at least twenty years for appointment to the Court of Justice, and at least twelve to fifteen years for appointment to the General Court; (3) possessing the general ability to perform the duties of a judge; (4) the presence of solid guarantees of independence and impartiality; (5) knowledge of languages; (6) aptitude for working as part of a team in an international environment in which several legal systems are represented. In 2017, a seventh criterion was introduced, focusing on the physical capacity of candidates to carry out duties which (given their highly demanding nature) require good health. See 'Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union', Brussels, 28 February 2018, p 22.

[50] See von Bogdandy and C Krenn, note 47 above, pp 173–74.

[51] The preamble of Regulation 2015/2422 amending Protocol No. 3 on the Statute of the Court of Justice of the European Union [2015] OJ L 341/14 did mention in its eleventh recital that '[i]t is of high importance to ensure gender balance within the General Court', and that for achieving 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'. By nature, this is but a non-binding statement; mark also the use of the non-committal verb 'should'. At the time of writing, just 16 of the sitting GC judges happen to be female (= less than one third of the members).

[52] Theoretically, the Treaty text does offer room for individual Member States to present a shortlist instead of just one name.

[53] Five out of 27 judges (excluding AG); state of play as of 9 July 2021.

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suitability assessments.[54] Although the 2010 revisions heralded a change for the better, we are nonetheless able to identify several weaknesses of the EU approach, which are bound to affect the legitimacy of the Court, and yet to be addressed.

IV. THE QUALITY OF THE COURT'S OUTPUT: TOO FAR FROM HEAVEN?

Many litres of ink have been spilled on the style and structure of the judgments delivered since 1954.[55] In the beginning, a French influence is known to have loomed large in the CJEU's pronouncements, with the texts ordered in a tight corset. The reasoning was summary, each paragraph taking off from a typical '*attendu que*' flourish. The factual background sketched in the so-called report for the hearing received frighteningly little attention. Pundits trying to divine the meaning of cryptic passages could bicker endlessly about the importance of particular terms and phrases, leading to ambiguous directions for the judgments' implementation.

From the 1980s onwards, the format underwent a noticeable evolution, becoming more accessible, growing in length, providing for an almost pleasant read by the turn of the last century. Alas, behind this façade the grand strategy was maintained of announcing the decision instead of engaging in a thoughtful discussion. Underneath, a formulaic method continues to be employed whereby sentences or sections are copy-pasted from previous verdicts.[56] Deduction is favoured over induction. In so doing, the Court occasionally resorts to the fallacy known as *petitio principii*: that what needs to be established is presented as a normative necessity. This lately brought one esteemed author to lambast a string of cases that boiled down to 'a circumloquacious statement of the result, rather than a reason for arriving at it'.[57]

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[54] R Mackenzie, K Malleson, P Martin, and P Sands, *Selecting International Judges. Principle, Process, and Politics* (Oxford University Press, 2010).

[55] See eg AE Bredimas, *Methods of Interpretation and Community Law* (North Holland, 1978); C Gulmann, 'Methods of Interpretation of the European Court of Justice' (1980) 24 *Scandinavian Studies in Law* 187; M Dederichs, *Die Methodik des EuGH: Häufigkeit und Bedeutung methodischer Argumente in den Begründungen des Gerichtshofes der Europäischen Gemeinschaften* (de Gruyter, 2004); E Paunio and S Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16(4) *European Law Journal* 395; G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012); G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013); S Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing, 2013).

[56] See note 4 above, p 170; L Azoulai, 'La fabrication de la jurisprudence communautaire' in P Mbongo and A Vauchez (eds), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de Justice des Communautés européennes* (Bruylant, 2009), p 163; M Jacob, *Precedent and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press, 2014).

[57] S Weatherill, 'The Court's Case Law on the Internal Market: "A Circumloquacious Statement of the Result, Rather than a Reason for Arriving at It?"' in M Adams *et al* (eds), *Judging Europe's Judges – The Legitimacy of the Case Law of the European Court of Justice* (Hart/Bloomsbury, 2013), p 87.

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Again, to avoid misunderstandings, the quality of the output does not stand accused of falling short across the board. Without question too, during the preparatory phase, the employed *référendaires* discharge some sterling drafting tasks.[58] At the same time, a plethora of judgments can be named from different decades that is marred by grave inadequacies. Thereby, the lack of persuasiveness of the conclusions reached seems intimately related to the poor articulation and presentation of the underlying motives. Classics such as *Van Gend & Loos*, *Plaumann*, and *Chernobyl* and *Francovich* are fair game.[59] Without much effort, one shoots similarly large holes in more recent rulings such as *Mangold*, *Test-Achats*, *Ruiz Zambrano*, and *Sturgeon* and *Pringle*.[60] Commentators have taken issue with the overkill of categorical statements, inconsistencies with vested dicta, the lack of balance in interpretation techniques, a harrowing succinctness, *contra legem* proclivities, or excessive reliance on cluster citations.[61]

The presence of Advocates General ('AG'), contributing to many a case with a comparatively straightforward opinion, does help to shed light in several instances. Indeed, their guidance brings critical and discursive elements to the decision making at the ECJ.[62] Sadly the phenomenon does not offer a panacea to the aforementioned difficulties, partly due to the proposed course of the AG not always being followed by the Court, partly due to the non-binding nature of their recommendations.[63] In the

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[58] Cf Stéphane Gervasoni, 'Des référendaires et de la magistrature communautaire' in F Alabrune *et al* (eds), *État souverain dans le monde d'aujourd'hui*: *Mélanges en l'honneur de Jean-Pierre Puissochet* (Pedone, 2008), p 105.

[59] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen*, C-26/62, EU:C:1963:1; *Plaumann v Commission*, C-25/62, EU:C:1963:17; *Parliament v Council,* C-70/88, (Chernobyl); *Andrea Francovich v Italy*, C-6 & 9/90, EU:C:1991:428.

[60] *Werner Mangold v Rüdiger Helm*, C-144/04, EU:C:2005:709; *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, C-236/09, EU:C:2011:100; *Gerardo Ruiz Zambrano v Office national de l'emploi*, C-34/09, EU:C:2011:124; *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH* and *Stefan Böck en Cornelia Lepuschitz v Air France SA*, Joined Cases C-402 & C-432/07, EU:C:2009:716; *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, C-370/12, EU:C:2012:756.

[61] See eg N Nic Shuibne, 'Seven Questions for Seven Paragraphs' (2011) 36(2) *European Law Review* 161; K Hailbronner and D Thym, 'Case Note *Ruiz Zambrano*' (2011) 48(4) *Common Market Law Review* 1253; A Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?' (2006–2007) *Cambridge Yearbook of European Legal Studies*; JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in M Adams *et al* (eds), *Judging Europe's Judges – The Legitimacy of the Case Law of the European Court of Justice* (Hart/Bloomsbury, 2013), p 243; 'Editorial Comments – Reflections on the State of the Union 50 Years after *Van Gend en Loos*' 50(2) *Common Market Law Review* (2013), p 354; T Horsley, *The Court of Justice of the European Union as an Institutional Actor. Judicial Lawmaking and its Limits* (Cambridge University Press, 2018); G Davies, 'Originalism at the European Court of Justice' in S Garben & I Govaere (eds), *The Internal Market 2.0* (Hart/Bloomsbury, 2020).

[62] Bobek, note 4 above, p 168.

[63] Further eg N Burrows and R Greaves (eds), *The Advocate General and EC Law* (Oxford University Press, 2007).

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end, since they themselves cannot enhance the quality of the case law as such, they are hard to see as compensating for the latter's inadequacies in an appreciable way.

At the origin of the failings lies, predominantly, the need for a single collegiate judgment. Contrary to the situation at the European Court of Human Rights, the International Court of Justice, and the US Supreme Court, dissenting opinions are not permitted.[64] Hence, to have its way, a majority regularly sees itself forced to delete essential elements from the *ratio decidendi*.[65] In the worst case, this leads to a non-sequitur that takes away the credibility of the whole pronouncement. Unfortunately, the judgments of a Grand Chamber comprised of fifteen judges, which are supposed to carry the greatest weight of all, are most prone to display such a defect. Just as annoying are the repeated instances of 'implied reversal', where the Court backtracks on a previous position without deigning to own up to it.[66] Discrepancies between the verdicts of different chambers do not exactly encourage its popularity either.[67] Judges are warned that if they do not adhere to a minimum of consistency, their importance shall wane quickly.[68] An open admission of a *volte-face* is in any case preferable to a shallow concealment.

Having said this, the point should not be overstated. The CJEU is entrusted with a singularly difficult task. In mandating it to 'ensure that in the interpretation and application of the Treaties the law is observed', Article 19 TEU barely conveys its true scale and complexity. In view of the growing diversity of its readership, spread out across a Union of over two dozen countries, each with their own distinct cultural tastes and professional traditions, the CJEU's style is ever less capable (or likely) to appeal to everyone. Whereas the slipups ought not be swept under the carpet, the

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[64] JL Dunoff and MA Pollack, 'The Judicial Trilemma' (2017) 111(2) *American Journal of International Law* 225, p 245, comment somewhat teasingly that '[w]hile this is surely a plausible reading of the Statute, the relevant language hardly compels this conclusion'.

[65] See eg U Everling, 'The Court as a Decision-Making Authority' (1984) 82(5) *Michigan Law Review* 1308; D Edward, 'How the Court of Justice Works' (1995) 20(6) *European Law Review* 556; K Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in M Adams, *et al* (eds), *Judging Europe's Judges – The Legitimacy of the Case Law of the European Court of Justice* (Hart/Bloomsbury 2013), p 46.

[66] Compare the many examples cited by P Wattel, '*Köbler*, *CILFIT* and *Welthgrove*: We Can't Go On Meeting Like This' (2004) 41(1) *Common Market Law Review* 179; see also A Ondoua, 'L'influence de la Cour dans l'élaboration des traités européens' in P Mbongo & A Vauchez (eds), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de Justice des Communautés européennes* (Bruylant, 2009), p 199.

[67] See eg N Nic Shuibne, 'A Court Within a Court: Is It Time to Rebuild the Court of Justice?' (2009) 34(2) *European Law Review* 174.

[68] T Koopmans, '*Stare Decisis* in European Law' in D O'Keeffe and HG Schermers (eds), *Essays in European Law and* Integration (Brill, 1982), p 27; see also M Poiares Maduro, 'Interpreting European Law: Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies*, p 14: 'In other words, it is not enough for a court to be consistent in how [it] interprets a particular legal rule. It is necessary for that court to be consistent in its interpretation of that rule in the light of its interpretation of the entire legal system'. See also S Besson, 'From European Integration to European Integrity – Should European Law Speak with Just One Voice?' (2004) 10(3) *European Law Journal* 257.

same goes for the qualitative and quantitative advances in the past decade. The impression is that under the presidency of Koen Lenaerts, since 2015, the coherence and legibility of the judgment and opinions has slowly but surely improved. The doubling in size of the response provided to national courts under the preliminary reference procedure, as well as the increasing speed with which this response is furnished, deserve mentioning too.[69]

The higher a court ranks, however, the higher the demands that one may place on them: output of the supreme court of the EU ought therefore to be supremely clear and compelling. In the near future, the progress achieved in run-of-the-mill cases needs to be made also in landmark rulings—a precious genre, which has been lagging behind in multiple ways.[70] At those vital junctures in the development of the law, the magistrates of the Kirchberg cannot afford to fall back on laconic, terse, or sibylline snippets.[71] Of course, no judiciary on Earth succeeds in delivering perfection. Even so, those invested with the 'awesome power' to do justice are obliged to ensure that their decisions are as good as they can possibly get.[72]

V. ON THE BRINK OF FRATRICIDE? PRESSURES AND AGITATIONS FROM WITHIN

In the initial plans for the European Coal and Steel Community, no room was foreseen for a Court of Justice. The Council of Ministers was perceived as the antipode of, and main safeguard against, the executive High Authority.[73] The establishment of an independent judicial body came on the agenda towards the end of 1950, on the instigation of the German representatives involved in the negotiations on the draft of the European Coal and Steel Community ('ECSC') Treaty.[74] The idea was adopted, reportedly with a modicum of hesitation, and put in practice in 1952. In 1958, the ECSC Court was transformed into the institution serving the three Communities.

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[69] M Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in M Adams *et al* (eds), *Judging Europe's Judges – The Legitimacy of the Case Law of the European Court of Justice* (Hart/Bloomsbury, 2013), p 204; Court of Justice of the EU, *Annual Report – Judicial Statistics 2020*, https://curia.europa.eu/jcms/jcms/Jo2_7000.

[70] Cf M Lasser, 'Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de Cassation and the United States Supreme Court' (Jean Monnet Working Papers) 1/2003, p 49: 'In fact, despite their abandonment of the single-sentence syllogism, ECJ decisions continue to be unsigned, univocal, magisterial and largely deductive documents that reveal decidedly less than they might'.

[71] Cf T Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21(3) *European Law Review* 210.

[72] F Frankfurter, dissenting opinion in *Trop v Dulles* 356 US 86 (US Supreme Court 31 March 1958).

[73] P Reuter, *La Communauté européenne du charbon et de l'acier* (LGDJ, 1953), p 53; M Lagrange, 'La Cour de Justice des communautés européennes: Du Plan Schuman à l'union européenne' (1978) *Revue trimestrielle de droit européen* 2.

[74] J-V Louis, 'Organisations européennes' (1978) 30 *Revue international de droit compare*, p 363.

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After a relatively long honeymoon, the expansion of the Court's jurisdiction went hand in hand with the growth of its workload. Nevertheless, upon reaching maturity in the 1970s, it could wallow in the pleasure of its unique and exclusive competences —functioning at the highest imaginable level in the EC, with national courts seriously taking notice of their ability (and in specific circumstances, obligation) to approach it for a binding opinion on a case brought before them. Shortly thereafter, the Commission started to energetically pursue its task of prosecuting Member States for violations of EC law, whereby the Court enjoyed the final say. The judges gradually became aware that that this setup had a price. The Luxembourg docket soon exploded with preliminary references and so-called direct actions. By the mid-1980s, pressures reached a peak point. The hundreds of log-jammed cases, rendering a sufficiently swift adjudication impossible, stirred up momentum for an innovative remedy: the creation of a novel limb, the Court of First Instance ('CFI'), inaugurated in 1989. Even if the founders endowed it with only a limited jurisdiction, the principal aim was to effectively relieve the workload of its 'bigger brother'.[75] To avoid poaching on each other's preserve, no parallel litigation was allowed for, and a right of appeal was installed of CFI judgments to the ECJ. Thus, it seemed probable that the occasions where the two could get in each other's hair would be few and far between.

With the entry into force of the Lisbon Treaty on 1 December 2009, the Court of First Instance took on the new name 'General Court of the European Union', but despite that broader designation, no meaningful devolution of responsibilities was enacted. Already the Treaty of Nice that entered into force in 2003 enabled the CFI to decide preliminary references in a couple of fields, yet the Statute of the CJEU was never amended to define the latter precisely. A salient detail is that, in accordance with Article 281 TFEU, such an amendment requires the President of the institution to play along.[76] From his side, the willingness to concede has, up until now, been minimal. On the one hand, this is indubitably linked to the fact that in the mid-2000s, the General Court experienced difficulties itself in coping with the rising tide of direct actions. On the other hand, the reticence presumably had something to do with the internal hierarchy, and the perception thereof at the superior branch. At some moments, these sentiments are known to have flared up and run extremely high. During the 12-year reign of the previous President, when preparations were made to overhaul the CJEU's architecture, the mutual relations acquired a downright frosty character.[77] Though open clashes rarely occurred,

[75] By the same token, a seven-member Civil Service Tribunal was realised in 2005 (liquidated in 2016).

[76] Both the Commission and the Court can take the initiative; in the second situation the Council is obliged to consult the latter.

[77] D Robinson, 'The First Rule of ECJ Fight Club … Is About to Be Broken', *Financial Times* (27 June 2015); S Peers, '"Don't Mention the Extra Judges!" When CJEU Reform Turns into Farce', *EU Law Analysis* (3 July 2015); J Quatremer, 'La réforme de la Cour de Justice européenne ou l'art de créer une usine à gaz', *Libération* (7 April 2015), https://www.liberation.fr/debats/2015/04/07/la-reforme-de-la-cour-de-justice-europeenne-ou-l-art-de-creer-une-usine-a-gaz_1812920; A Alemanno and L

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various documents transpired that testify of acrimonious disputes behind the scenes.[78] These quarrels originate in the toxic mix of professional and personal agitations that had been conjured up: a keen penchant for domination at the higher instance, fatally coupled with an *incompatibilité d'humeur* between the erstwhile protagonists.

The gravity and frequency of the incidents must not be exaggerated. Moreover, the sensibilities appear to have taken a turn for the better after ECJ President Skouris and GC President Jaeger stepped down, with the present incumbents Koen Lenaerts and Marc van der Woude adopting a decidedly convivial attitude. Yet, the structural rifts run deeper. For starters, there is the frustration of the General Court having to shoulder the greater burdens and dispose of the mundane cases, with the Court of Justice sitting squarely in the limelight and deciding the spectacularly prestigious ones. Even if a GC member will not be massively disappointed by a quashing of his/her judgment, the appeals pattern inevitably bears resemblance to that of an older child chastising the younger.[79] In addition, what still has not been rectified is the organisational mismatch that lay at the heart of the recounted showdown, whereby the GC, to all intents and purposes, remains firmly subordinated to its *grand frère*. Crucially, it is not represented in the *reunion générale*, the central body that, *inter alia*, takes decisions on the budget, appointments of administrators, modifications to the Statute, and the CJEU's input in intergovernmental conferences.[80] Despite the tradition that only the ECJ President is allowed speak on behalf of the institution, the GC repeatedly voiced its discontent on not possessing its own resources.[81] Finally, the studies

(F'note continued)
Pech, 'Where Do We Stand on the Reform of the EU's Court System? On a Reform as Short-Sighted as the Attempts to Force through Its Adoption', *Verfassungsblog* (23 September 2015), https://verfassungsblog.de/where-do-we-stand-on-the-reform-of-the-eus-court-system-on-a-reform-as-short-sighted-as-the-attempts-to-force-through-its-adoption.

[78] See note 40 above, p 2016; for a pretty damning *mémoire*, see also 'EU Judge Dehousse's Farewell Address to the CJEU', *EU Law Analysis* (27 October 2016), http://eulawanalysis.blogspot.com/2016/10/eu-judge-dehousses-farewell-address-to.html.

[79] High-profile divergences emerged eg in the Kadi saga (*inter alia Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461), the Jégo-Quéré/UPA controversy (*Unión de Pequeños Agricultores v Council*, C-50/00 P, ECLI:EU:C:2002:462), as well as the Sharpston litigation (see note 35 above, alongside *Council v Eleanor Sharpston*, C-423/20 P(R), ECLI:EU:C:2020:700). Other recent examples include *Council v Dr K Chrysostomides & Co LLC*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, ECLI:EU:C:2020:1028, and *Bank Refah Kargeran v Council*, C-134/19 P, EU:C:2020:793. Cf also the ECJ's damning of the GC's competition law assessments, huffishly discussed by M Jaeger, 'The Standard of Review in Competition Cases involving Complex Economic Assessment: Towards the Marginalisation of Marginal Review', (2011) 2(4) *Journal of European Competition Law & Practice* 303.

[80] In the preparatory committee, its representatives are outnumbered seven to two. See note 40 above, pp 2013–14.

[81] 'Oral presentation by Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the "discussion circle" on the Court of Justice', 24 February 2003, CONV 575/03, https://www.cvce.eu/content/publication/2003/7/24/a09aed67-c86e-4c57-8594-f466b6cb9bdb/publishable_en.pdf.

carried out on the doubling of the number of judges imposed upon the GC paint a suspiciously rosy picture, discounting the concomitant manageability issues, conveniently rehearsing that there is no need to expand its competences.[82]

In sum, it is a public secret that hitherto, the siblings have not been getting along as smoothly as one would wish. To a certain degree, the fractious status quo emanates from the natural rivalry between judicial institutions alluded to above; Cain-and-Abel syndrome may sound like an apt diagnosis. The structural fault lines are no less worrisome, suggesting an unmitigated potential for further conflicts. Considering the indicators for good governance outlined by the European Commission in 2001, particularly 'openness', 'effectiveness', and 'coherency', the *modus operandi* falls short of the mark.[83] The slight silver lining consists of the improved communications since the presidential duo Lenaerts-van der Woude took office. The growing presence of judges at the Court of Justice that served at the General Court earlier should undoubtedly help as well. In this perspective, the next phase in the life of the institution looks quite bright so long as relapses are averted, and serious thought given to additional ameliorations.

VI. CONCLUSIONS

The oft-recounted story of the CJEU is that of a bright little actor going from strength to strength. The late Federico Mancini regaled listeners with the tale of how it had single-handedly framed a constitution for a quasi-federal polity and swayed its peers at the domestic level to accept its decisions over copious champagne-sprinkled lunches.[84] In essence, such eulogies are anything but wrong. The successes are plainly there, testimony to which is the modern-day reach and impact of EU law itself. We are therefore not dealing with the proverbial glass that is half empty or half full, depending on one's biases. From its cautious inception at the humble Villa Vauban, the Court navigated its way through the 1960s, 1970s, and 1980s, surmounting the crisis eras of political integration. Bit by bit, the judiciary managed to cement its position, instil a habit of obedience and push through the emancipation of the European legal order. Consequently, in the eyes of many it might border on the absurd to even attempt to draw up a 'taxonomy of failings'.

The foregoing sought to compile such an exposé anyhow, meaning to emphasise that every soundtrack has its B-sides, even if they received less airplay than the evergreens and monster hits. Take the rate of compliance with the CJEU's dicta, by which one can be easily overawed when comparing it to that of other regional and international courts. The pretty picture is woefully incomplete when the unresolved tensions between the national and the supranational courts are kept out of sight. Eruptions such as we have seen at the highest Czech, German, Danish, and Polish courts underscore the continuously looming risk of escalation. Next, the revamped

[82] 'Second Report on success of General Court reform published', https://eulawlive.com/second-report-on-success-of-general-court-reform-published.

[83] COM (2001) 428, *European Governance*, White Paper.

[84] KJ Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2001), p ix.

https://doi.org/10.1017/cel.2021.4 Published online by Cambridge University Press

selection and appointment procedure definitely inspires confidence, but simultaneously raises the question why it was necessary in the first place, and with which frequency suboptimal nominees have been slipping through the net before. The 2010 reform did not succeed in eradicating this concern, nor should it lead us to downplay the novel drawbacks it itself brought into being—albeit that a portion of the blame must be lobbed back to the *Herren der Verträge*. Conversely, there were enough opportunities already to consider and implement qualitative boosts to the Court's output, which have been marred for too long by a gamut of deficiencies. Although visible advances have been made in the past decade, the situation does not seem 100% under control yet. This is worrisome, as decisions of a supreme court ought to be supremely clear and compelling in order to retain a maximum amount of legitimacy. Likewise, while it would be disingenuous to overestimate the actual friction between the CJEU's senior and the junior branch, the conflicts here were not always kept under wraps either, exposing an underappreciated deeper malady. One could qualify the clashes as merely a *rite de passage*, but they leave an indelible stain on the record, nonetheless. Besides, the underlying inferiority/superiority complex that informed the feuds is unlikely to dissipate spontaneously.

Drawing up an interim balance sheet, what then to make of the Court's achievements so far? Scripture teaches us to distinguish between true and false prophets.[85] The overall message we may manage to divine, on the need of shoring up a norm system that is capable of delivering peace and prosperity on an unprecedented scale, seems clear and appealing. Countless acolytes will testify of the proverbial fruits that have, over the years, grown from this pleasantly fertile tree. At the same time, even when shying away from a wholesale critique, one ought never be blinded by the majesty of authority and shake off every mild doubt or prevarication—nor shy away especially from pointing out weaknesses that may yield greater advancement in the future.

[85] Matthew 7:15–20; cf Luke 6:43–45.

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