

# Judicial activity in the European Union

## Striving for better adjudication

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### Summary

The Court of Justice of the European Union (CJEU) is among the most powerful European institutions and its rulings have widespread effects. Sensitive areas such as taxation, foreign policy and economic governance are affected. Although the Court enjoys a high level of respect and trust and demonstrates an impressive capacity to solve a large number of cases, it could still improve when it comes to adhering to standards of openness, accountability and transparency. These are democratic standards that the European Union promotes (Art. 2 TEU), and we should also expect its judicial body to respect them.

This paper identifies some reforms to improve the EU's judicial system without asking for changes of the treaties. Three recommendations are put forward for national governments and the Court's judges:

1. Improve the Court's representativeness in terms of gender and member states.
2. Counter accusations of judicial activism by reducing the Court's resort to general principles of EU law, admitting previous erroneous interpretations of EU law, and including all arguments raised by the parties in its rulings.
3. Improve the Court's adherence to the overarching principle of transparency by assessing public disclosure of judicial documents on a case-by-case basis.

## Introduction

The Court of Justice of the European Union (CJEU) remains one of the cornerstones of the European project both within and outside of the EU. One example is disputes arising from the application of the European Stability Mechanism, where CJEU is the main adjudicator. Its role has been expanded in every treaty revision and now includes sensitive policy areas such as taxation, the Common Foreign and Security Policy, and economic governance.

The Court being one of the most powerful European institutions raises legitimacy concerns regarding the justification of the authority it has over other EU institutions, national administrations and citizens. The Court is a non-majoritarian institution. Its members are not elected but appointed by an expert committee, the so-called **255 committee** (see box), that privileges the professional experience and expertise of potential judges.<sup>1</sup> This raises the classic ‘counter-majoritarian difficulty’,<sup>2</sup> which refers to unelected officials imposing their decisions on the rest of the world.

Moreover, the law that the CJEU interprets has constitutional value. Its decisions are based on provisions of the EU treaties and can only be overruled by an unanimous vote of all member states, a difficult threshold to reach.

Finally, the CJEU is not embedded in a socio-economic setting like the nation state. The EU does not generate the same sense of shared identity among the members of the polity and thus cannot claim the same level of solidarity

between citizens as a nation state could do.<sup>3</sup> In other words, while national courts may expect unconditional compliance with their rulings from the losing parties, transnational courts may not expect the same level of compliance, taking into account that parties may include states or national governments endowed with direct democratic legitimacy.

Despite all of the above, the Court receives a tremendous support from European citizens.<sup>4</sup> It ranks third in the list of the most trusted EU institutions and scores better than those endowed with indirect democratic legitimacy, such as the Council and the European Council. Citizens’ trust in EU institutions hit all-time lows in the 2010s, in the midst of the plague of crises the EU is still going through, from

### The 255 committee (Art. 255 TFEU)

*'A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General (AG) of the Court of Justice and the General Court (GC) before the governments of the Member States make the appointments referred to in Articles 253 and 254.*

*The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.'*

<sup>1</sup> See e.g. the sixth activity report of the 255 committee. [https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/qcar19002enn\\_002\\_-\\_public.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/qcar19002enn_002_-_public.pdf)

<sup>2</sup> An expression famously pinned down by A. Bickel in *The least dangerous branch*, Bobbs-Merrill 1962.

<sup>3</sup> See famously F. Scharpf, *Governing in Europe: effective and democratic?*, Oxford University Press 1999.

<sup>4</sup> Standard Eurobarometer 92, Autumn 2019, Public Opinion in the EU, especially pp. 117-27. <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/90258>

Eurozone and migration to the rule of law. The Court had to adjudicate cases in all these issues<sup>5</sup> and remained – despite the potential socio-legal minefields these cases generated – totally unscathed from criticism.

*Despite the potential socio-legal minefield these cases generated, the Court remained totally unscathed from criticism*

On the contrary, the CJEU fares better than ever, except for a few adverse decisions by national constitutional courts.<sup>6</sup> It solves a record-high number of cases<sup>7</sup> (showing great managerial capacity), while receiving an ever-increasing number of requests for a preliminary ruling from national courts,<sup>8</sup> the lower judge in the EU legal system, showing the close cooperation between the Court and its primary interlocutors.

The CJEU's decisions remain widely respected and its guidance is sought in any major step of EU (dis)integration, such as Brexit and the EU's accession to the European Court of

Human Rights.<sup>9</sup> There is no need for a major overhaul of the EU's judicial system. However, based on a careful analysis of academic and civil-society contributions to the debate, some adjustments could improve the adjudicatory process in line with ideal standards of openness, accountability and transparency. These are democratic standards that the EU defends and promotes (Art. 2 TEU), that we should expect any EU institution, including its judicial body, to respect.

*We should expect any EU institution, including its judicial body, to respect the democratic standards that the EU defends and promotes*

A comprehensive analysis of the legitimacy of the CJEU forms the basis for these recommendations. My PhD project combines classic textual doctrinal analyses with interviews at the Court, network analysis of legal professionals, and discourse analysis. This research identifies three areas of judicial activity that would contribute to ameliorating the CJEU's adjudication: organization of the Court, legal reasoning, and access to documents.

## 1. The Court's representativeness

The CJEU is made up of judges whose professional qualities remain the top priority of member state governments who appoint them, and of the Art. 255 committee, which confirms or disapproves of such appointments. Yet the Supreme Court of any political organization must also be representative of the population it is governing through its rulings. In the US, for example, the ideological preferences of the judges of the Supreme Court are as important as their professional background

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<sup>5</sup> C-370/12 *Pringle*, C-62/14 *Gauweiler* and C-493/17 *Weiss* for the Eurozone crises; Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic* for the migration crisis; C 791/19 *Commission v Poland* for the rule-of-law crisis.

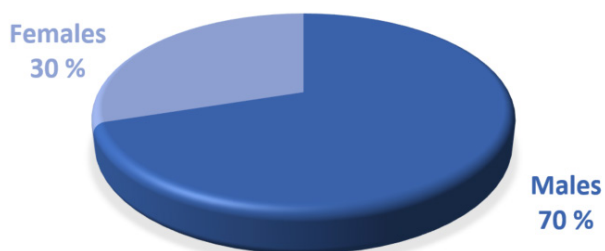
<sup>6</sup> In the Czech Republic, Pl. ÚS 5/12 *Slovak Pensions XVII* (following Case C-399/09 *Landtová*); in Denmark, Case 441/14 *Dansk Industri v Rasmussen* (following C-15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A.*); in Germany, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 (following C-493/17 *Weiss*).

<sup>7</sup> The European Court of Justice (ECJ) solved an all-time high of 860 cases in 2019, beating its 2018 record of 760 cases. Annual Report 2019 – Judicial Activity, p. 155. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/qd-ap-20-001-en-n.pdf>

<sup>8</sup> In 2019, the ECJ received 641 requests for a preliminary ruling, representing the major part of a record-breaking 966 cases brought before the CJEU in 2019.

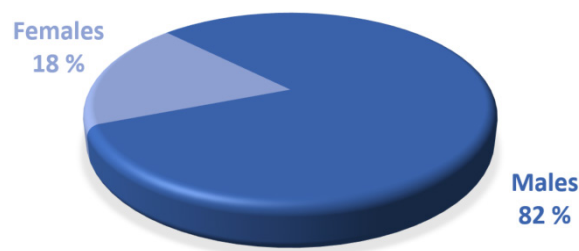
<sup>9</sup> See Opinion 2/13 (accession to the ECHR); Opinion 1/09 (Patent Court), C-621/18 *Wightman* (Brexit).

**Figure 1: Gender distribution in the General Court (GC) 2020**



Source: General Court – presentation of the Members, 19 November 2020. [https://curia.europa.eu/jcms/jcms/Jo2\\_7035/en/](https://curia.europa.eu/jcms/jcms/Jo2_7035/en/)

**Figure 2: Gender distribution in the European Court of Justice (ECJ) 2020**



Source: Court of Justice – Presentation of the Members, 19 November 2020. [https://curia.europa.eu/jcms/jcms/Jo2\\_7026/en/](https://curia.europa.eu/jcms/jcms/Jo2_7026/en/)

when appointed. Ideological preferences have never played a role in the process of judicial appointments in the EU and in the member states. On the contrary, other factors have received more emphasis.

Gender balance became an important objective for the CJEU from 2015,<sup>10</sup> at least at the General Court (GC)<sup>11</sup> that now includes two judges per member state.<sup>12</sup> Yet, only 15 women (30%) sit on the bench compared to 35 men (70%). The imbalance is even stronger at the

<sup>10</sup> Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, at (11): *'It is of high importance to ensure gender balance within the General Court. In order to achieve that objective, partial replacements in that Court should be organised in such a way that the governments of Member States gradually begin to nominate two Judges for the same partial replacement with the aim therefore of choosing one woman and one man, provided that the conditions and procedures laid down by the Treaties are respected'*.

<sup>11</sup> The CJEU is composed of two courts. The European Court of Justice (ECJ) is the higher court and treats constitutional cases, along with all preliminary references from national courts. The General Court (GC) is the lower court and deals mostly with competition and intellectual property cases.

<sup>12</sup> As of November 2020, the GC still was not complete and only carried 50 judges.

CJEU's second court, the European Court of Justice (ECJ), where more than 80% of judges were male in 2020 (see Figures 1 and 2).

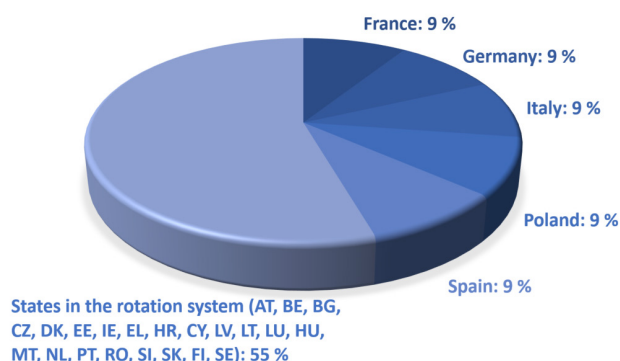
*Ideological preferences have never played a role in the process of judicial appointments in the EU and in the member states.*

Another criterion to ensure a representative bench at the Court is an equal distribution of judges per member state. While such a balance is ensured for judges (one per member state at the ECJ, two per member state at the GC), an imbalance exists for Advocates-General (AG) at the ECJ (Figure 3).

AGs prepare an opinion once a case is submitted to the Court. While judges are not obliged to follow the AG's conclusions, these nonetheless structure the deliberations of the Court. The existence of AGs often justifies the absence of dissenting opinions at the CJEU. Five member states have a permanent AG (Poland, Spain, Italy, France and Germany), while five AGs are appointed following a rotation system between the remaining 22

**Figure 3: Advocates General at the ECJ, 2020**

Distribution of AGs per EU member state (N=11)



member states.<sup>13</sup> The UK also used to have a permanent AG, which has been replaced by a Greek AG until October 2021.

The member states have chosen to reward the most populated states at the expense of the smallest ones, despite the acknowledged importance of the AG in the resolution of cases and the principle of equality of legal cultures at the CJEU.

## 2. The Court's legal reasoning

The Court is usually acknowledged as adopting a classic approach to reasoning cases,<sup>14</sup> despite the unsolved relationship between the legal orders of the Union and its member states. Nonetheless, the classic accusation of judicial activism arises from three characteristics of the Court's legal reasoning.

<sup>13</sup> See Press Release No 139/13: 'Entry into office of new Members at the Court of Justice and the General Court': <https://curia.europa.eu/jcms/upload/docs/application/pdf/2013-10/cp130139en.pdf>, updating Declaration on Article 252 of the Treaty on the Functioning of the European Union (TFEU) regarding the number of Advocates-General in the Court of Justice: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016L%2FAFI%2FDCL%2F38>

<sup>14</sup> P-J Kuijper, 'The Court of Justice of the EU', in Howse et al. *The legitimacy of international trade courts and tribunals*, Cambridge University Press 2017.

First, an **overuse of general principles of EU law**. General principles allow the judge to perform the core task of plugging gaps in the legal system. While the use of such principles proved necessary in the early years of European integration, when secondary legislation precisising the meaning of the treaties remained scarce, the EU's legal system is now as dense as never before, thus requiring less judicial intervention. More recently, the Court has often been accused of using such principles when unnecessary; when a statute already settles the issue or when there is no clear commonality between the legal cultures of the member states.<sup>15</sup>

Second, **erroneous interpretations of EU law**. Interviews I conducted with Court members<sup>16</sup> confirm that the Court in a few cases has adopted an erroneous interpretation of EU law. The doctrine suggests that, rather than acknowledging such errors, the Court finds its way around them by limiting the contested principle to a minimum.<sup>17</sup>

*The Court has introduced a regime of potentially unlimited exceptions rather than changing the contested principle*

By doing so, it introduces a regime of potentially unlimited exceptions rather than changing the contested principle. The problem is even more pressing in the EU where the

<sup>15</sup> G. Conway, *The limits of legal reasoning and the European Court of Justice*, Cambridge University Press 2012.

<sup>16</sup> During a research stay at the CJEU in November 2019, I conducted nine interviews with members and staff of the CJEU. I will present the results in my PhD dissertation *The uncertain world of the Court of Justice of the EU: the legitimacy of the European judiciary in the 21<sup>st</sup> century*, forthcoming in 2021.

<sup>17</sup> See e.g. C-434/09 *McCarthy* limiting the effects of C-34-09 *Zambrano*; Joined cases C-267/91 and C-268/91 *Keck and Mithouard* limiting the effects of Case 120/78 (*Cassis de Dijon*).



possibilities of legislative override are limited, as it requires high thresholds of qualified majority, if not unanimity.

Third, there is a **lack of argumentation**. Other scholars have found that the CJEU adopts a cryptic style of drafting judgements and does not always engage with the arguments of the parties, of the AG and even of national courts.<sup>18</sup> This reduces certainty and questions the willingness of the Court to solve the entire issue at hand.

### 3. Transparency and access to documents

Transparency is a core principle of the EU since the Lisbon Treaty (Art. 15 TFEU). While documents pertaining to the deliberations of the Court are protected by judicial secrecy, administrative documents must be disclosed to the public when requested. The Court has decided that requests to access any document related to the procedure in a case, including written pleadings, should be *automatically* denied.<sup>19</sup>

While judicial secrecy is a core value of the EU, the automatic denial of access to court documents is not in line with the overarching transparency principle. A case-by-case assessment of requests, which could potentially lead to disclosure if the serenity of the deliberations are not compromised, would be a better solution.

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<sup>18</sup> See M. Lasser, *Judicial deliberations: a comparative analysis of transparency and legitimacy*, Oxford University Press 2009 at p. 16, and M. Pollack, 'The legitimacy of the European Court of Justice', in Grossman et al. *Legitimacy and international courts*, Cambridge University Press 2018 at p. 157.

<sup>19</sup> C-514/07 P *Sweden and Others v API and Commission*.

## Conclusion

The CJEU can be characterized as a well-performing judicial institution that does not need a major overhaul. There are nonetheless possibilities to strive for even better adjudication in the EU, without reforming the EU treaties.

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### What could national governments do?

Governments, which possess direct democratic legitimacy, should ensure a better gender balance at the Court by selecting more women for the positions of judges and AGs. While this would not automatically increase gender balance, as candidates must still go through the selection process of the 255 committee, the measure would positively influence the gender balance among judges over time. It should not be up to the committee assessing the candidates' professional qualities to include this factor in their decision.

National governments make unanimous decisions in the Council, where they can use their power to support a reform of the AG system by ending the permanent appointments for only six member states. Instead, all AG positions should be submitted to the rotation system to ensure a better balance among member states and adhere to the principle of equality of legal cultures.

### What could CJEU judges do?

Judges should motivate the use of general principles of EU law by expressly demonstrating that the legislator omitted to plug a gap in the legal system of the Union. The use of general principles should be limited to such situations only.

Judges should acknowledge explicitly when

their previous interpretations of EU law have been erroneous and overrule such precedents in order to avoid further legal uncertainty. These situations may occur via Grand Chamber or Full Court sittings.

*Judges should acknowledge when their previous interpretations have been erroneous and overrule such precedents to avoid further legal uncertainty*

Judges should be as open as possible when discussing legal arguments in any case. They should engage with all the arguments raised by the parties, including the Advocate-General, to the maximum extent possible. This can be done without affecting the principle of collegial decision-making.

Judges should assess on a case-by-case basis whether to disclose documents pertaining to the judicial proceedings or not. Since transparency is an overarching principle in the EU, any denied request should be expressly motivated by the Court.

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