14 THE EUROPEAN COURT OF JUSTICE

Preview

The Court of Justice of the European Union (more often known simply as the European Court of Justice, or ECJ) does not often make the news, and it may not strictly fit the definition of a typical constitutional court (if only because there is no EU constitution), but its role in European governance is critical: its task is one of ensuring that the terms of the treaties are respected, understood and applied as accurately as possible. In its structure and character, it is one of the most clearly supranational of EU institutions.

As the judicial arm of the EU, the Court has made decisions that have expanded and clarified the reach and meaning of integration, have established key legal principles (such as direct effect, the supremacy of EU law and mutual recognition), and have helped transform the treaties into something like a constitution for the EU. Its decisions have had an influence on matters as varied as the single market, competition policy, human rights, gender equality and external trade.

Situated in Luxembourg, the ECJ has three parts. The Court of Justice works as the final interpreter and court of appeal on matters of EU law, and is helped by the General Court, which deals with less complex cases. An EU Civil Service Tribunal charged with adjudicating EU staff matters was integrated into the General Court in 2016. Although it is an entirely separate institution, the work of the European Court of Human Rights cannot be ignored, because its rulings have had important implications for the process of European integration.

Key points

- The European Court of Justice is the judicial arm of the EU, responsible for clarifying the meaning of the treaties and issuing judgments in disputes involving EU institutions, member states and individuals affected by EU law.
- The Court consists of judges appointed for six-year renewable terms by 'common accord' of the member states, assisted by advocates-general charged with reviewing cases as they come to the Court and with delivering independent opinions.
- The Court is headed by a president elected to three-year renewable terms by the judges from among their number.
- Below the Court of Justice there is a General Court that is the first point of decision on less complicated cases.
- Court actions are either preliminary rulings, where national courts ask for a ruling on a matter of EU law arising in a national court case, or direct actions, when a dispute between two parties is brought directly before the Court.
- Although it is an independent institution, the work of the Strasbourg-based European Court of Human Rights has an important bearing on EU law.

CONCEPT

Mutual recognition

The principle that while member states of the EU are free to develop and impose their own domestic standards, they cannot bar products or services provided legally in other member states. In other words, it guarantees that any product or service sold lawfully in one EU member state can be sold in another. The concept gained new significance in the 1980s and 1990s with the expansion of the European single market, and more recently with the expansion of judicial cooperation. While spelled out in none of the founding treaties of the EEC, its role in European integration has been established and promoted by the European Court of Justice.

Comparing constitutional courts

For a market to be truly open, it must be understood that a product or service that is sold legally in one part of that market should also be available in other parts of that market. In other words, local businesses cannot normally refuse to sell those products and services because they want to protect local providers, or because they have some objection to a product or service being sold. (There are exceptions; Denmark and France, for example, have banned the energy drink Red Bull because of the health dangers it might pose to people with high blood pressure or anxiety disorders.) This principle is known as **mutual recognition**, and it lies at the heart of all the efforts to build a single European marketplace – and yet it did not come easily.

An early problem arose in the 1970s when Rewe, a West German company, wanted to import and sell the French blackcurrant liqueur known as Cassis de Dijon. However, a West German law held that fruit liqueurs could only be considered as such if they contained at least 25 per cent alcohol by volume; Cassis de Dijon contained only 15–20 per cent, so the German federal body responsible for alcoholic spirits told Rewe that it could not market the product as a liqueur. Rewe asserted that this amounted to a restriction on imports, an action prohibited under the Treaty of Rome, and took its case to the ECJ. In its 1979 decision *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* (Case 120/78), the ECJ agreed with Rewe.

The issue came up again in the 1984 case *Commission* v. *Federal Republic of Germany* (Case 178/84) over a 1952 West German law that prevented beer being imported or sold in Germany that did not meet the *Reinheitsgebot*, a purity law passed in 1516 by the Duke of Bavaria that allows beer to contain only malted barley, hops, yeast and water. The West German government argued that because German men relied on beer for a quarter of their daily nutritional intake, allowing imports of 'impure' foreign beer would pose a risk to public health. The Court

Illustration 14.1: Part of the headquarters complex of the European Court of Justice in Luxembourg. The size and workload of the court has grown alongside the reach of European integration.

Source: EC - Audiovisual Service

disagreed and ruled in 1987 that Germany had to accept foreign beer imports as long as brewers printed a list of ingredients on their labels.

By confirming the principle of mutual recognition, the Court of Justice – in two key rulings – removed a key handicap from the building of the European single market. It also illustrated the critical role played in **constitutional courts** in supporting orderly and consistent government. A state may have a constitution, but without an independent court to rule on the meaning of the constitution, government runs the risk of being arbitrary and changeable. This is a principle with which all democracies are familiar (and even in many authoritarian states, the court may be the only institution with credibility and a measure of independence), and it is also one that lies at the heart of the EU political system, even though – as we saw in Chapter 8 – the extent to which the treaties can be considered a constitution is debated.

Although two-thirds of EU member states have constitutional courts, some (notably Denmark, Finland and Sweden) have chosen to delegate **judicial authority** to supreme courts that also deal with issues of civil law (laws created by legislatures) and common law (laws created and developed through court decisions). Others, meanwhile, such as Cyprus, Greece and Ireland, have opted for systems that combine the features of constitutional and supreme courts (see Ferreres Comella, 2009). Opinion is divided on whether the ECJ is a constitutional court, Vesterdorf (2006) – for example – arguing that while there is no agreement on the definition of a constitutional court, the ECJ goes beyond the job of settling questions over the meaning of EU law, and – particularly in its role as a court of appeal – looks more like a supreme court.

There are fewer questions about the role of the EU as a motor of European integration, but just what this means is debatable. Horsley (2018) notes the extensive scholarly debate about where the ECJ fits on the spectrum between restraint and activism: whether a court should apply the letter of the law and try to stay out of politics, or whether it should be willing to venture beyond narrow legal reasoning and to influence public policy. He argues that understanding the work of the Court is better informed by understanding it as an institutional actor and drawing on the research of political scientists (who have long recognized, he notes, the political functions of the Court). He concludes that the ECJ is 'engaged directly and immediately in the development of EU law through judicial interpretation', making it an important institutional actor. This view is supported by Saurugger and Terpan (2017), who argue that the Court 'is first and foremost an institution'.

The ECJ is headquartered in Luxembourg, in the Centre Européen on the Kirchberg Plateau above the city of Luxembourg. When the ECSC was created, there was some debate about where its institutions would be based, Luxembourg eventually being chosen as a provisional home. Temporary buildings were used until the opening in 1973 of the Court's new black steel and glass Palais de Justice. With the Court still growing, the Erasmus building was opened in 1988 to house the Court of First Instance, and two more extensions were opened in the early 1990s. It was only in 1992 that Luxembourg was formally confirmed as the home of the ECJ, which now shares the Centre Européen with a cluster of other European institutions that includes the Secretariat of the European Parliament, buildings for the Commission and the Council of Ministers, the seat of the Court of Auditors, and the headquarters of the European Investment Bank.

CONCEPT

Constitutional court

A constitutional court is one created to issue judgments on questions of whether or not the laws or actions of governments and government officials conflict with the spirit or the letter of constitutionally established powers, rights and freedoms. Such courts support, interpret and clarify the meaning of a constitution, and – via the process of judicial or constitution review – nullify any laws or actions proposed or taken by government officials that contravene the constitution. In federal systems – such as Austria, Belgium and Germany – courts also adjudicate in disputes between federal and state/provincial governments.

Judicial authority

The power given to judges to interpret and apply law, and adjudicate disputes. Judges are expected to consider all aspects of a case and deliver their opinions impartially, typically being guided by the principles contained in a constitution. They are only human, however, and are subject to biases, ideological leanings and subjective ideas about the meaning of law and constitutions. This raises the fundamental question of whether or not their appointments should be subject to public confirmation.

Figure 14.1 *Structure of the European Court of Justice*

- Judicial arm of the EU.
- Headquartered in Luxembourg.
- Headed by a president elected from among its judges for renewable three-year terms.
- Consists of one judge per member state, each appointed for renewable six-year terms of office, with each member state having control over one appointment.
- Judges rarely meet as a full court, more often meeting as chambers of three or five judges, or as a Grand Chamber of 13 judges.
- Assisted by 11 advocates-general appointed for renewable six-year terms and charged with reviewing cases, studying arguments and delivering opinions.
- Further assisted by the lower 46-member General Court, which hears less complicated cases in selected areas, and disputes between the EU institutions and their staff.
- Supranational in character.

How the Court evolved

The European Court of Justice traces its roots back to the founding in 1952 of the Court of Justice of the ECSC. Consisting of seven members (six judges and a representative of the trade unions in the coal and steel industry), its job was to guard the Treaty of Paris by ruling on the legality of decisions made by the ECSC High Authority in the event of complaints lodged by member states or their national coal and steel industries. During its brief existence, it reviewed just over 50 cases and issued 16 judgments.

The treaties of Rome created separate courts for the EEC and Euratom, but a subsidiary agreement gave jurisdiction over all three founding treaties to a single seven-member Court of Justice of the European Communities. The new Court had a modest workload at first, but as the reach of integration expanded, it became busier, and by the early 1980s was taking on hundreds of new cases and issuing between 130 and 200 judgments per year (a figure that has since risen to well over 800 per year). To help address growing demand, a new subsidiary Court of First Instance was created in 1989 to review less complicated cases, and an EU Civil Service Tribunal in 2004 took over responsibility for cases involving disputes between the EU institutions and their staff. With the Lisbon treaty, the Court of First Instance was renamed the General Court, and in 2016 it was merged with the Civil Service Tribunal. The two courts together are now formally known as the Court of Justice of the European Union, although informally they are known as the European Court of Justice (ECJ).

Over the years, the ECJ has established and built on a position that has made it the most clearly supranational of the EU institutions; see Understanding Integration 10. It has made numerous judgments that have clarified the meaning of the treaties, expanded the reach of the EU, and expanded the authority of the

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Supranationalism

Supranationalism is a concept very much associated with the EU, but, unlike intergovernmentalism (see Chapter 11), is more a model than a theory (although efforts have been made to explore its theoretical possibilities). Sometimes portrayed as the opposite end of a continuum that begins with intergovernmentalism, it broadly refers to a political activity involving two or more states and taking place above the level of those states. While intergovernmentalism involves governments working together to make decisions on matters of shared interest (retaining their sovereignty along the way), supranationalism means that decision-making is delegated to an institution working above the level of the states involved, and involving some degree of loss of sovereignty by the states involved.

Although none of the five major EU institutions are either entirely intergovernmental or supranational, the ECJ clearly leans towards the supranational: its judges are not the representatives of national governments, are not expected to pursue national interests, are protected from coming under the influence of the member states, are not required to come from the member states, participate in governance above the level of individual states, and are expected to focus on making decisions that are in the broad interest of the EU, using the treaties as their guide.

One of the arguments made by neofunctionalists is that because supranational institutions have their own political agenda, they are likely to see national interests being replaced over time with a focus on supranational interests. In the case of the European Parliament, for example, MEPs may be elected by national voters to represent local or national interests, but once in the EP they work with like-minded colleagues from other countries and are thus more likely to become European in their thinking. These arguments apply to a lesser degree to the European Council and the Council of Ministers, but not to the Court of Justice or the European Commission, where national interests were rarely, if ever, a factor. In other words, while all five major EU institutions are supranational in the sense that they work above the level of the member states, not all are supranational in the way they think and make decisions.

Court itself. In addition to confirming the principle of mutual recognition, two others stand out for their importance. First, the principle of **direct effect** holds that EU law is directly and uniformly applicable in all member states, and that individuals can invoke EU law regardless of whether or not a relevant national law exists (see Phelan, 2019). It was established by the 1963 Court decision *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* (Case 26/62).

The Dutch transport company Van Gend en Loos complained that the Dutch government had increased the duty it charged on a chemical imported from Germany. Its lawyers argued that this was a violation of Article 12 of the EEC Treaty, which prohibited new duties on imports and exports or increases in existing duties. The Dutch government claimed that the Court had no jurisdiction, but the Court responded that the treaties were more than international agreements and that EC law was 'legally complete … and produces direct effects and creates individual rights which national courts must protect'.

Second, the principle of the **supremacy of EU law** holds that EU law trumps national law in policy areas where the EU has responsibility. This was established by the 1964 Court decision *Flaminio Costa* v. *ENEL* (Case 6/64). Costa was an Italian who had owned shares in EdisonVolta, an electricity supply company that was nationalized in 1962 and made part of the new National Electricity Board (ENEL). Costa refused to pay his electricity bill, arguing that he had been hurt by nationalization, which was contrary to the spirit of the Treaty of Rome. When the local court in Milan asked the Court of Justice for a preliminary ruling, the Italian government argued that the ECJ had no jurisdiction. The Court disagreed, arguing that by creating 'a Community of unlimited duration … [with] its own legal capacity', the member states had 'limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves'.

Direct effect The principle that EU law is directly and uniformly applicable in all EU member states, and that challenges can be made to the compatibility of national law with EU law.

Supremacy of EU law The principle that in areas where the EU has competence (authority), EU law supersedes national law in cases of incompatibility.

Judge-rapporteur A judge on the Court of Justice who is appointed to oversee the different stages through which a case is reviewed. Equivalent to rapporteurs in the European Parliament.

Since the Lisbon treaty, the Court's authority over matters of criminal law has expanded, a development full of controversy given widely held concerns about the impact of European integration on national sovereignty. An attempt to prevent the Commission winning new powers worked its way up to the ECJ, which ruled in 2005 (*Commission of the European Communities* v. *Council* (Case 176/03)) that while criminal law as a general rule did not fall within the scope of the treaties, this did not prevent the Commission from proposing criminal sanctions when they were needed for the effective implementation of EU law (see discussion in Mitsilegas, 2016). The first EU law aimed at harmonizing national criminal law (a directive requiring all member states to consider intentional infringements of intellectual property rights carried out on a commercial scale as a criminal offence) was soon working its way through the legislative process, and others have followed.

Leadership: The president

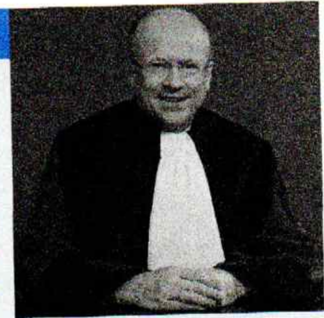
The Court of Justice is headed by a president elected by the judges from among their own number in a secret ballot by majority vote to serve a three-year renewable term (see Table 14.1). As well as presiding over meetings of the Court, the president is responsible for organizational matters such as assigning cases to chambers, appointing **judge-rapporteurs** (the judges responsible for shepherding a case through the review process), and deciding the dates for hearings. Despite the growing powers of the Court, presidents are the least known of the senior figures

Table 14.1 *Presidents of the European Court of Justice*

Term	Name	Member state
1958–61	A.M. Donner	Netherlands
1961–64	A.M. Donner	Netherlands
1964–67	Charles Hammes	Luxembourg
1967–70	Robert Lecourt	France
1970–73	Robert Lecourt	France
1973–76	Robert Lecourt	France
1976–79	Hans Kutscher	West Germany
1979–80	Hans Kutscher	West Germany
1980–84	Josse Mertens de Wilmars	Belgium
1984–88	Lord McKenzie Stuart	United Kingdom
1988–91	Ole Due	Denmark
1991–94	Ole Due	Denmark
1994–97	Gil Carlos Rodríguez Iglesias	Spain
1997–2000	Gil Carlos Rodríguez Iglesias	Spain
2000–03	Gil Carlos Rodríguez Iglesias	Spain
2003–06	Vassilios Skouris	Greece
2006–09	Vassilios Skouris	Greece
2009–12	Vassilios Skouris	Greece
2012–15	Vassilios Skouris	Greece
2015–18	Koen Lenaerts	Belgium
2018–	Koen Lenaerts	Belgium

PROFILE

Koen Lenaerts



Source: EC - Audiovisual Service

Koen Lenaerts (1954–) is the current president of the European Court of Justice. A lawyer and professor of European law from Belgium, he was educated in Belgium and at Harvard University in the United States, earning degrees in law and public administration. He was then a professor of law for several years at the Catholic University in Leuven and at the College of Europe in Bruges. He was appointed to the Court of First Instance in 1989, and to the Court of Justice in 2003. He served a term as vice-president of the Court before being appointed president in October 2015.

in the EU institutional hierarchy and their work is subject to little public and political scrutiny. When President Lenaerts was first elected to his position in 2015, it was barely reported by the European media, and his reappointment in 2018 also passed almost unnoticed.

Just how political the role of president (or even judges) has become is open to debate. President Skouris (2004) was clear when he argued that the Court was not 'a political body with the right of initiative', and that its job was to 'rule on the cases, and nothing more'. However, is there really 'nothing more'? Even with the best will in the world, judges will bring personal biases (including political views) into their assessments; they are, after all, only human. The role of politics in court decisions has long been very much part of the debate in the US about the work of its Supreme Court, with an ongoing discussion about the merits of constructionists (judges who interpret the US constitution literally, to the extent that this is possible) and activists (those who bring their own views into their judgments).

Judges of the Court

The Court of Justice is headed by one judge per member state, each appointed for a six-year renewable term of office, the beginnings of their terms staggered so that about half come up for renewal every three years. According to treaty rules (Article 9F), nominees must be 'persons whose independence is beyond doubt' and they cannot hold administrative or political office. Most judges come to the Court via national court systems, while some have experience as government ministers, in elective office, with international organizations, or as lawyers or academics. The European Parliament has little say in the appointment process, although it has argued that there should be confirmation hearings on the model of those used in the US for appointments to the US Supreme Court. The Court of Justice has opposed this idea on the grounds that its deliberations are secret, and confirmation hearings would force nominees to make public their views on judicial issues (Arnull, 2008).

Although the judges are appointed by 'common accord' of the governments of the member states, and each member state controls one of the nominations, there is no requirement that the judges come from different member states, nor even from *any* member state. Theoretically, at least, they could all be Estonian or Polish or Spanish, and the Court could even – in the words of former President Lord McKenzie Stuart – be made up 'entirely of Russians' (Brown and Kennedy, 2000, p. 45). But the desire of member states to control as many appointments as possible

Table 14.2 *Judges of the European Court of Justice, June 2019*

Name	Member state	Year of birth	Year of appointment
Allan Rosas	Finland	1948	2002
Rosario Silva de Lapuerta	Spain	1954	2003
Koen Lenaerts	Belgium	1954	2003
Endre Juhász	Hungary	1944	2004
Marko Ilešič	Slovenia	1947	2004
Jiří Malenovský	Czech Republic	1950	2004
Egils Levits	Latvia	1955	2004
Lars Bay Larsen	Denmark	1953	2006
Jean-Claude Bonichot	France	1955	2006
Thomas von Danwitz	Germany	1962	2006
Alexander Arabadjiev	Bulgaria	1949	2007
Camelia Toader	Romania	1963	2007
Marek Safjan	Poland	1949	2009
Daniel Šváby	Slovakia	1951	2009
Alexandra Prechal	Netherlands	1959	2010
Carl Gustav Fernlund	Sweden	1950	2011
Siniša Rodin	Croatia	1963	2013
François Biltgen	Luxembourg	1958	2013
Küllike Jürimäe	Estonia	1962	2013
Constantinos Lycourgos	Cyprus	1964	2014
Michael Vilaras	Greece	1950	2015
Eugene Regan	Ireland	1952	2015
Peter George Xuereb	Malta	1954	2018
Nuno José Cardoso da Silva Piçarra	Portugal	1957	2018
Lucia Serena Rossi	Italy	1958	2018
Irmantas Jarukaitis	Lithuania	1973	2018
Andreas Kumin	Austria	1965	2019

Note: For a current listing of judges, see Court website at https://curia.europa.eu.

to the EU institutions has meant that so far there has never been more than one judge from any member state (see Table 14.2).

Nominees to the Court must first be vetted by a seven-member panel made up of former members of the ECJ, members of national constitutional courts, and lawyers, with one member nominated by the European Parliament. Once confirmed in office, judges – like members of the College of Commissioners – must maintain their independence and avoid promoting the national interests of their home states. Upon appointment, each takes a short oath: 'I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court.' In order to protect their independence, they are immune from having lawsuits brought against them while they are on the Court and

even once they have retired. While they can resign from the Court, they can only be removed against their will by the other judges and the advocates-general (not by the governments of member states or the other EU institutions), and then only as a result of a unanimous agreement that they are no longer doing their job adequately.

Although most judges are renewed at least once, and no judge has ever been removed from office, the Court has more turnover than the national courts of the US, the Netherlands and Belgium, where appointments are for life. Life appointments have the benefit of exploiting the experience of judges and encouraging their independence, but they also restrict the flow of new thinking into the deliberations of a court, and make new appointments more highly contested. By contrast, limited appointments mean new ideas and higher turnover; in 2019 almost 40 per cent of the judges were still in their first term.

The Court, however, has not yet matched other EU institutions on diversity: in spite of its many rulings on matters of gender diversity, it was not until 1981 that the first female advocate-general was appointed to the Court, until 1995 that the first female judge was appointed to the General Court, and until 1999 that the first female judge was appointed to the Court of Justice. As of 2019, there were still only five women judges: Rosario Silva de Lapuerta of Spain, Camelia Toader of Romania, Alexandra Prechal of the Netherlands, Küllike Jürimäe of Estonia and Lucia Serena Rossi of Italy.

For all judges to hear cases together would be an inefficient use of time and resources, so meetings of the full Court are reserved only for proceedings to dismiss a European commissioner, a member of the Court of Auditors, or the European ombudsman. All other cases are heard by chambers of 3 or 5 judges, or by a Grand Chamber of 15 judges when a member state or another EU institution makes a specific request. To further help manage the workload, each judge has their own *cabinet* of assistants and legal secretaries, equivalent to the *cabinets* of European commissioners, and responsible for helping with research and keeping records. The Court also has about 1,500 staff members, most of whom are bureaucrats or translators.

Supporting structure

The constitutional work of the EU is supported by the activities of case officers known as advocates-general, and by a subsidiary General Court that rules on less complex cases.

The advocates-general

Advocates-general are court officers whose job is to review cases as they come to the Court of Justice, study the arguments involved, and deliver independent opinions in Court before the judges decide which laws apply and what action to take. The opinions of the advocates-general are not binding on the judges, but they provide a valuable point of reference (Burrows and Greaves, 2007). The Court has nine advocates-general appointed to renewable six-year terms. Like the judges, they are theoretically appointed by the 'common accord' of the governments of the member states, but in practice an informal system has developed by which one post is held by nationals of each of the four biggest member states (Germany, France, Italy and Spain), and the rest are held on a rotating basis by nationals of the smaller states. If needed, the number of positions can be increased by a simple decision of the Council of Ministers. One is appointed first advocate-general on a one-year rotation.

Advocate-general An officer of the Court of Justice who delivers a preliminary opinion to the Court on cases, the laws that apply, and possible action.

General Court A subsidiary court created in 1989 (as the Court of First Instance) to review less complicated cases coming before the Court of Justice.

The General Court

With the workload of the Court of Justice growing in the 1980s, a decision was taken under the Single European Act to create a new Court of First Instance that could rule on less complicated cases. These included actions against EU institutions, actions brought by member states against the Commission, selected actions brought by member states against the Council of Ministers, actions for damage against EU institutions or their staff, actions on trademarks, and appeals from the Civil Service Tribunal. If a case is lost at this level, the parties involved have the right to appeal to the Court of Justice, but only on points of law.

Renamed the **General Court** by the Treaty of Lisbon, it has approximately the same institutional structure as the Court of Justice: it has 46 judges appointed for six-year renewable terms, and its rules of procedure are similar to those of the Court of Justice (although it has no advocates-general). The number of judges can be changed by a decision of the Council of Ministers without an amendment to the treaties. The Court usually sits as a chamber of 3 judges, but a single judge can hear and decide a case, while there can also be chambers of 5 judges, a Grand Chamber of 15 judges, and for the most important cases the entire court can sit together. It is overseen by a president elected by the judges for three-year renewable terms. In 2019, Marc van der Woude – a lawyer from Belgium and a member of the General Court since 2010 – was elected president.

The General Court has been particularly active in cases dealing with competition, state aid and intellectual property. In the 2005 case *Laurent Piau v. Commission of the European Communities* (Case 193/02), for example, a player's agent named Laurent Piau complained to the European Commission that new rules adopted by FIFA, the international governing body of football, discriminated against agents for football players, amounted to abuse of dominant position and contravened EU competition law. The Commission dropped the case after FIFA changed its rules, but Piau challenged the decision to drop the case, which went to the General Court. In a 2005 judgment, the Court argued that the activities of football clubs and their national associations – as well as FIFA – were economic activities and so were subject to EU competition law, and that while the FIFA rules did not break EU competition rules, those rules could occasionally apply to sport.

(Note: an EU Civil Service Tribunal was created in 2004 to take over from the General Court any cases involving disputes between the EU institutions and their staff. Its decisions could be appealed on questions of law to the General Court, and in exceptional situations to the Court of Justice. Subjects ranged from contracts to pensions, job appraisals, promotions, discrimination, salaries and workplace facilities. With the workload of the tribunal and the General Court growing, it was decided in 2015 to merge the two and to expand the membership of the General Court. The Civil Service Tribunal was dissolved in 2016, and disputes between the EU institutions and their staff are now heard by the General Court.)

What the Court does

The Court of Justice is responsible for making sure that the treaties are correctly interpreted, and that EU law is equally, fairly and uniformly applied throughout the member states. In other words, the Court is the supreme legal body of the EU and the final court of appeal on all matters relating to EU law (see Figure 14.2).

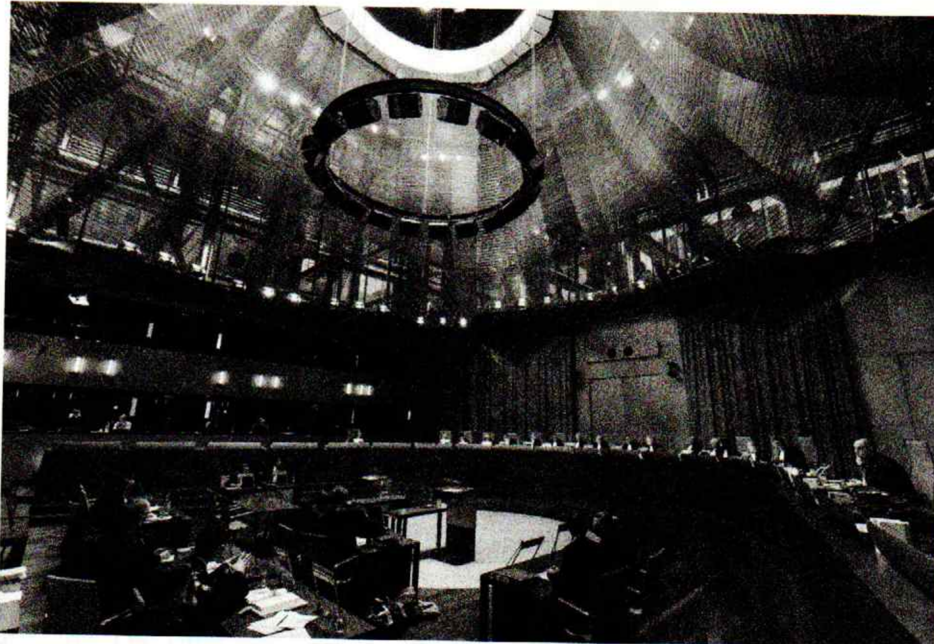


Illustration 14.2: The Court of Justice in session. Although it is the most powerful international court in the world, and has long been at the heart of the process of European integration, its work draws surprisingly little public attention.

Source: The Court of Justice of the EU

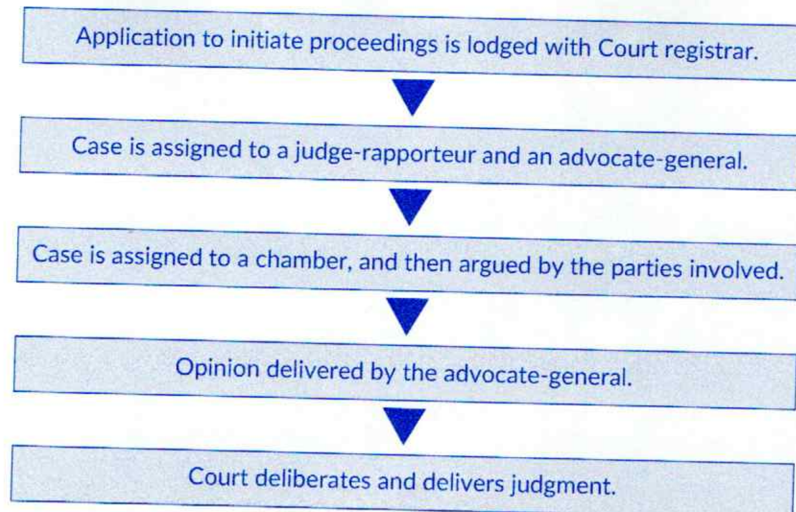
In meeting its obligations, it has been at the heart of the process of European integration, playing a particularly important role in the late 1970s and 1980s when the Community slipped into a hiatus and the Court kept alive the idea of integration as being something more than the building of a customs union (Shapiro, 1992). It is the most powerful international court in the world, but – like all constitutional courts - has no direct powers to enforce its decisions, instead exerting its influence through the work of other actors – institutions, states and individuals – who support its work (Conant, 2002).

Work on a case begins with a written application made by a lawyer or agent for the party bringing the case, which is filed with the registrar of the Court and published in its *Official Journal*. This describes the dispute and explains the grounds on which the application is based. The defendant is also notified and given a month to respond. A judge-rapporteur is assigned to the case by the president, and an advocate-general by the first advocate-general. These two officials present their preliminary reports to the Court, at which point the case is assigned to a chamber. The Court then decides whether documents need to be provided, witnesses interviewed or an expert's report commissioned, after which the case is argued before the Court by the parties involved at a hearing.

Figure 14.2 *Powers of the European Court of Justice*

- Supreme legal body of the EU and the final court of appeal on all matters relating to EU law.
- Issues preliminary rulings when national courts ask for a ruling on the interpretation or validity of an EU law that arises in a national court case.
- Makes decisions on direct actions when an individual, corporation, member state, or EU institution brings proceedings directly before the Court, usually with an EU institution or a member state as defendant.

Figure 14.3 *Workflow of the European Court of Justice*



At the end of the oral phase, the advocate-general delivers an opinion, and once the chamber has reached a decision, it delivers judgment in open court (see Figure 14.3).

The whole process may take months, or years in more complex disputes; the average time has fallen, though, since the creation of smaller chambers and the General Court. Cases can also be heard on an expedited basis if an urgent decision is needed. Court decisions are technically supposed to be unanimous, but votes are usually taken on a simple majority; all votes are secret, so it is never publicly known who – if anyone – dissented. Judges were not given the right to publicly issue dissenting or concurring opinions, argues Arnull (2008), for two main reasons. First, given that they serve short and renewable terms, they might have been tempted to go public in order to curry favour with their home governments in an attempt to be reappointed. Second, there were concerns in the early years of the Court that dissenting opinions might have undermined the Court's authority.

The work of the Court falls into two main parts, preliminary rulings and direct actions.

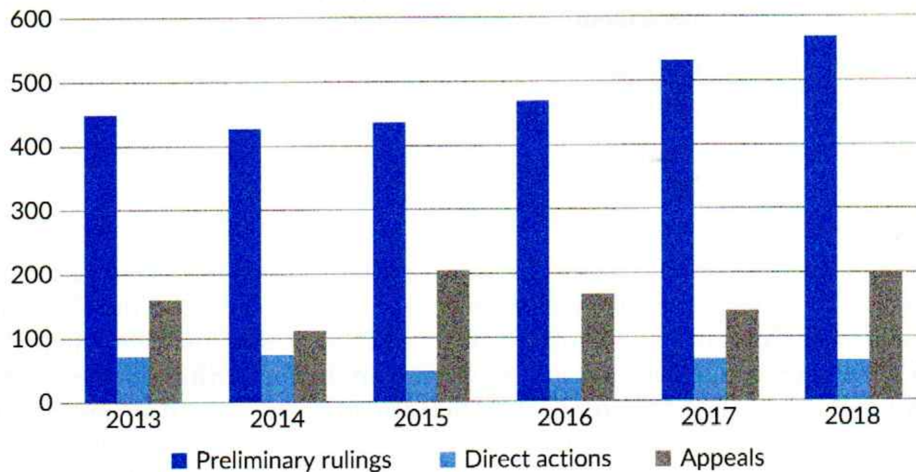
Preliminary rulings

In order to ensure consistency in the application of EU laws, national courts can (and sometimes must) ask the Court of Justice for a **preliminary ruling** on the interpretation or validity of an EU law that arises in a national court case. EU institutions can also ask for preliminary rulings, but most are made on behalf of a national court, which is then bound to respect and apply the Court's response. The word *preliminary* is misleading, because the rulings are usually requested and given *during* a case, not before it opens; hence the rulings are actually concurrent rather than preliminary.

Preliminary ruling A ruling by the Court of Justice on the interpretation or validity of an EU law that arises in a national court case.

Both *Van Gend en Loos* and *Flaminio Costa* are classic examples of preliminary rulings. Another, based on the issue of trademarks, brought the Austrian energy drink giant Red Bull into conflict with an Amsterdam coffee shop named The

Figure 14.4 *Cases heard by the European Court of Justice*



Bulldog. The latter was founded in 1975 and became a draw for tourists and celebrities, selling cannabis, tobacco products, clothing and souvenirs. In 1997, it launched an energy drink on the Dutch market. Red Bull objected, and in 2003 issued a demand that it remove the product on the grounds that the similar names and packaging of the products could be confusing. The case went to a Dutch court, where Red Bull lost. It appealed, the case went back to court, and the European Court of Justice was asked for a preliminary ruling on the matter. The ECJ ruled that the case depended on the extent to which a new product was linked to an existing product with an existing reputation. Using this judgment, the Dutch court ruled in 2017 that there was no danger of confusing the two products, and that The Bulldog had not violated the trademark rights of Red Bull.

Direct actions

Direct actions are cases in which one party brings proceedings against another, often a member state or an EU institution, wanting to be heard by the Court of Justice rather than a national court. They can take one of five main forms:

1. *Actions for failure to fulfil an obligation:* These are cases where a member state has failed to meet its obligations under EU law, with actions brought either by the Commission or a member state. By far the most common of direct actions, they often deal with consumer law, freedom of movement and freedom of establishment.

2. *Actions for annulment:* These (relatively rare) cases are aimed at making sure that EU laws conform to the treaties, and are brought in an attempt to cancel those that do not. The defendant is almost always the Commission or the Council (Lasok, 2007).

3. *Actions for failure to act:* These are cases where an EU institution has failed to act in accordance with the terms of the treaties, and can be brought by other institutions, member states or individuals.

Direct action A case in which there are two parties: a complainant (usually an individual, corporation, member state or EU institution), and a defendant (usually an EU institution or a member state).

European Court of Human Rights (ECHR) A Strasbourg-based court that hears cases and issues judgments related to the 1950 European Convention on Human Rights.

4. *Actions for damages:* These are cases in which damages are claimed by third parties against EU institutions and their employees. Most of these cases are heard by the General Court.
5. *Actions by staff:* These are cases involving litigation brought by staff members against EU institutions as their employers, and are dealt with by the General Court.

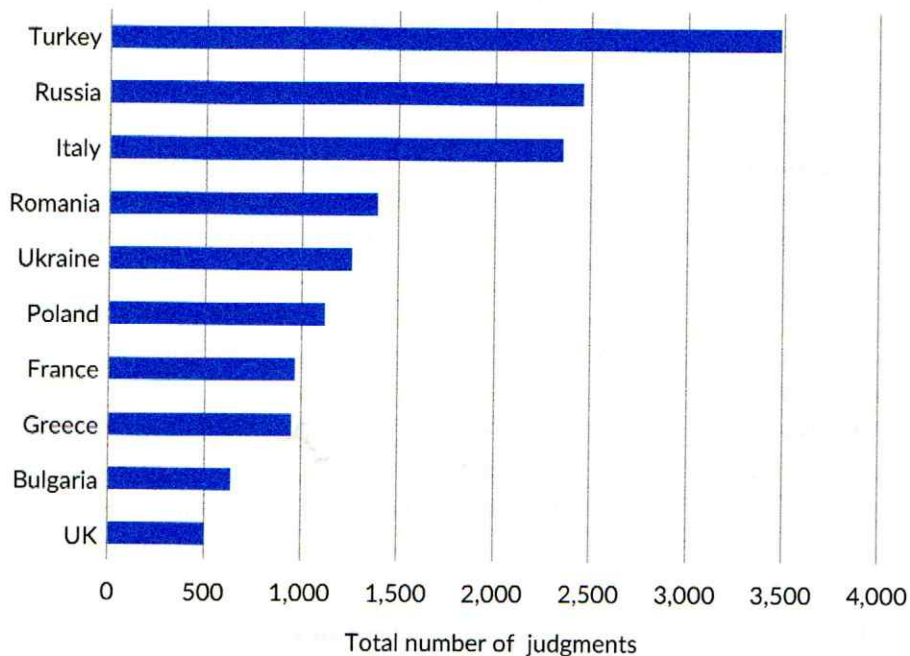
Appeals and other cases

In cases where the General Court has issued a judgment, and one of the parties in the case is unhappy with the outcome, an appeal can be lodged with the Court of Justice. The Court can also be asked by the Commission, the Council of Ministers or a member state to rule on the compatibility of draft international agreements with the treaties; if the Court gives an unfavourable ruling, the draft agreement must be changed. Finally, the Court can be called in to arbitrate on contracts concluded by or on behalf of the EU (conditional proceedings) and in disputes between member states over issues relating to the treaties.

The European Court of Human Rights

Although it is not part of the EU's network of institutions, no analysis of judicial life in the EU can be complete without addressing the work of the **European Court of Human Rights (ECHR)**. All member states of the EU – and the EU itself – are signatories of the European Convention on Human Rights and members of the ECHR, which means that in decisions dealing with human rights,

Figure 14.5 *Europe's ten biggest human rights offenders*



Source: *Based on data at European Court of Human Rights (2019). Figures are for judgments issued between 1959 and 2018.*

the Court of Justice must refer to precedent created by the decisions of the Court of Human Rights.

Headquartered in Strasbourg, the ECHR was founded in 1959 under the terms of the 1950 European Convention on Human Rights, which was in turn adopted under the auspices of the Council of Europe. The Court remained a temporary body until 1998 when it became a permanent institution to which direct access was available to citizens of the member states of the Council of Europe, which are also parties to the European Convention. This new permanence, combined with expanded membership of the Council of Europe, greater media interest in the work of the Court and simplified procedures, led to a new burst of activity: in its first 30 years the Court issued less than 70 judgments, but in the ten years after becoming permanent, it received an annual average of 45,000 applications and issued about 800–1,000 judgments per year (Greer, 2006). Turkey, Russia and Italy have topped the list of violators of human rights (see Figure 14.5); more than half the judgments for Turkey relate to the right to a fair trial and the protection of property, and more than half of those for Italy relate to the excessive length of proceedings. Meanwhile, there has been speculation that Russia might withdraw from the ECHR, having had its voting rights in the Council of Europe suspended following the 2014 Russian annexation of Crimea.

The ECHR consists of 47 judges, one for each of the member states of the Council of Europe (but not necessarily one from each member state). Judges are appointed by the Parliamentary Assembly of the Council of Europe for six-year renewable terms of office (with an age limit of 70), and they in turn elect a president and two vice-presidents. The Court is divided into five Sections, each balanced by geography, gender and the different legal systems of the member states, the membership of each Section being changed every three years. The more important cases are dealt with by a 17-member Grand Chamber.

Any contracting state or any individual who claims to have been harmed by the actions of a contracting state can bring a case to the Court. Most cases are dealt with in writing, a small minority going before a formal hearing. Each case is assigned to a Section, which can either declare it inadmissible or else decide to review it, in which case a decision is made by a simple majority vote. There is a right of appeal to a Grand Chamber, but otherwise a judgment becomes final within three months, and the Committee of Ministers of the Council of Europe is responsible for making sure that the state involved in the case has taken the necessary action to correct the problem.

This chapter would be incomplete without briefly mentioning two other courts with which the ECJ is sometimes confused, but with which there is a much looser judicial relationship. The first of these is the International Court of Justice, the judicial arm of the United Nations. Founded in 1945, it is based in The Hague, and its job is to settle disputes between UN member states, and to give opinions on legal questions submitted by international organizations and other UN bodies. The second is the International Criminal Court, also headquartered in The Hague, and founded in 2002 to prosecute individuals for crimes against humanity, war crimes and genocide. All EU member states are members of both courts, and while their rulings can have an impact on judicial matters in the EU, their relationship with the Court of Justice is not as close as that between the Court of Justice and the ECHR.