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opean Union Law and the EU's Courts

This chapter considers the interrelated topics of EU law and the EU's courts. Because it covers many areas of EU activity and because also it takes precedence over national law, EU law is a key feature of the EU system. As it impacts extensively and directly on national sovereignties, it is often also a controversial and contested feature. The need for EU law and the sources, the content, and the status of that law are all examined in the chapter.

Crucial to the successful operation of the EU's legal system are the EU's courts, which operate within the framework of the Court of Justice of the European Union (CJEU). The courts are charged to ensure that EU law is upheld in a uniform manner throughout the EU system. Accordingly, the chapter also analyses the structure of the CJEU system, the type of cases brought before the courts, and their impact and influence.

The Need for EU Law

An enforceable legal framework is the essential basis of decision-making and decision application in all democratic states. Although not itself a state, this also applies to the EU because the EU is more than merely another international organisation in which countries cooperate with one another on a voluntary basis for reasons of mutual benefit. Rather it is an organisation in which states have voluntarily surrendered their right, across a broad range of important sectors, to be independent in the determination and application of public policy.

Regarding the determination of public policy, if there was no body of law setting out the powers and responsibilities of the institutions and the member states of the EU, and if there was no authority to give independent rulings on what that law is and how it should be interpreted, effective EU decision-making on policies would not be possible. Of course law is not the only factor shaping the EU's decision-making processes. As in any organisation, practice evolves in the light of experience of what is possible and what works best. The tendency not to press for a vote in the Council even when it is legally permissible is an obvious example of this. But the law does provide the basic setting in which decisions are made. It lays down that some things must be done, some cannot, and some may be. So, it is by virtue of EU law that the Commission takes binding decisions on the permissability of proposed mergers between large companies and that the Council and EP determine the size and shape of

the EU's annual budget, restrict what and how much fishermen can catch in the seas surrounding the EU, and specify that products not meeting designated standards cannot be sold in the EU's market.

Regarding the application of public policy, the existence of EU law is also crucial because if the decisions taken by the EU's policy-makers only took the form of intergovernmental agreements, and if those agreements could be interpreted by member states in whatever way was most beneficial and convenient for them, common policies would not in practice exist and the whole rationale of the EU would be undermined. The likes of the EU's competition and agriculture policies, and the approximation of EU trading standards on matters as diverse as maximum axle weights for lorries and minimum safety standards at work, are effective only because they are based on *common laws* that are capable of *uniform* interpretation in *all* member states.

The Sources of EU Law

An EU legal order is thus an essential condition of the EU's existence. The sources of that order are to be found in a number of places: the treaties, EU legislation, judicial interpretation, international law, and the general principles of law.

The treaties

Are the treaties the EU's constitution?

The EU's treaty structure is, as was shown in Part II of this book, made up of two main component parts: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Do these two treaties constitute the EU's constitution?

National constitutions in liberal democracies normally do two main things: they establish an institutional structure for decision-making, and they set out – often in a bill of rights or a declaration of liberties – the freedoms to which citizens are entitled and restrictions on the power of decision-makers over the citizenry. The relevant component parts of the EU's treaties cover the first of these tasks, and to a considerable extent the second too. The establishment of the institutional structure can be seen, most obviously, in the identification of the Commission, the European Council, the Council of the EU, the European Parliament, and the Court of Justice of the European Union as the key decision-making institutions, and by the specification (in general terms) of their roles and powers and of what must be the nature of the relations both between them and also between them and the member states. As for the establishment of individual rights, the treaties have long had much to say about economic freedoms but in recent rounds of treaty reform they have increasingly also emphasised civil freedoms. The key article in this respect is Article 6 TEU, which states that: (a) the Charter of Fundamental Rights of the European Union (see Chapters 6 and 7) has the same legal value as the treaties (though Protocol 30 of the Lisbon Treaty limits the potential impact of the Charter in the Czech Republic, Poland, and the UK); (b) the Union shall accede to the [1950] European Convention for the Protection of Human Rights and Fundamental Freedoms; and (c) fundamental rights shall constitute general principles of the Union's law.

In addition to including not dissimilar content to national constitutions, the EU's treaties may also be said to be constitutional in nature in respect of the status of their contents and how they are determined. Treaty law is not 'ordinary' EU law that is made by 'ordinary' law-making procedures, but rather is primary law. That is to say, it is a higher status law in the sense that all 'ordinary' EU law must have a treaty base and in that also treaty law is made by its own procedure. As is shown in Part II of this book, up to the Lisbon Treaty this procedure took the form of Intergovernmental Conferences (IGCs), which were extensively pre-prepared, usually lasted several months, culminated at European Council meetings and had outcomes that were subject to national ratification processes – which in some member states were very high profile and difficult. The Lisbon Treaty amended this procedure by adding a convention stage to what was now called 'the ordinary revision procedure' and also creating a 'simplified revision procedure' for modest amendments (see Chapter 8). Both procedures normally require unanimous approval by national governments and ratification by member states according to their respective constitutional requirements.

As well as covering 'traditional' constitutional matters, the treaties are also much concerned with

the identification of the Comm[illegible]ing that is not normally considered to be Council, the Council of the E[illegible]opriate subject matter for constitutions: policy. ament, and the Court of Justice [illegible]akes the form of the setting-out of general n as the key decision-making [illegible]ples on the one hand and the identification of the specification (in general [illegible]y sectors and activities that are to be developed d powers and of what must [illegible]e other. The main general principles are those ations both between them an[illegible] are designed to promote competition and the nd the member states. As fo[illegible]movement of goods, persons, services, and capi- individual rights, the treaties [illegible]ll behind a Common External Tariff (CET) and say about economic freedom[illegible]mmon Commercial Policy (CCP). The policy f treaty reform they have in[illegible]s and activities that are identified, with varying sed civil freedoms. The key a[illegible]ees of precision on how they are to be developed, rticle 6 TEU, which states tha[illegible]ude: agriculture, social affairs, transport, regional damental Rights of the Euro[illegible], the environment, and economic and monetary s 6 and 7) has the same legal [illegible]m (all in the TFEU), and foreign, security and ugh Protocol 30 of the Li[illegible]ce policy (in the TEU). The inclusion of policy ential impact of the Charter in[illegible]ent is the main reason why the EU's treaties are nd, and the UK); (b) the U[illegible]much longer than national constitutions: the TEU 950] European Convention[illegible]55 articles and the TFEU has 357!

uman Rights and Fundame[illegible] The treaties thus do not formally constitute the EU's damental rights shall consti[illegible]nstitution in that they do not set out in a single and e Union's law. [illegible]ily understandable document that is called a con- ding not dissimilar conten[illegible]ution the fundamental bases of the EU's principles the EU's treaties may also[illegible] powers. Moreover, as Christiansen and Reh (2009: l in nature in respect of [illegible]pecially chapters 1 and 3) have pointed out, in so far nd how they are determin[illegible] the EU may be said to have a constitution there are nary' EU law that is ma[illegible]her sources in addition to the treaties. These other g procedures, but rather [illegible]urces, which include Court judgements and inter- ay, it is a higher status l[illegible]stitutional agreements, are part of an implicit, incre- inary' EU law must have[illegible]mental, and ongoing constitutionalising process.

o treaty law is made by [illegible] But although the treaties may not be the EU's wn in Part II of this boo[illegible]nstitution in a formal sense, they nonetheless have is procedure took the for[illegible]many clear constitutional features. Amidst the politi- nferences (IGCs), whi[illegible]al heat and debate surrounding the demise of the red, usually lasted sever[illegible]Constitutional Treaty (see Chapter 7), sight was opean Council meeting[illegible]perhaps sometimes lost of the fact that in important ere subject to nationa[illegible]espects the EU may be said to have already had a h in some member state[illegible]constitution, albeit of a rather non-traditional kind. fficult. The Lisbon Treat[illegible]dding a convention stag[illegible]ordinary revision proce[illegible]nplified revision proce[illegible] (see Chapter 8). Both[illegible] unanimous approva[illegible]atification by member[illegible]pective constitutional[illegible]

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EU legislation

Laws adopted by the EU institutions under Article 288 TFEU constitute secondary legislation. They are concerned with translating the general principles of the treaties into specific rules and are adopted by the European Parliament and the Council, by the Council, or by the Commission according to the procedures described in other chapters of this book (see especially Chapters 9 and 19). Whilst there is no hard and fast distinction between EP and Council, Council, and Commission legislation, the first two tend to be broader in scope, to be concerned with more important matters, and to be aimed at laying down a legal framework in a policy sphere. Commission legislation – of which in terms of volume there is much more than EP and Council and Council-only legislation – is largely of an implementing, administrative, and technical nature and is usually subject to tight guidelines laid down in enabling EP and Council or Council legislation.

The Constitutional Treaty tried to clarify the somewhat confusing nature of EU legislative instruments by distinguishing between legislative acts, which it named laws and framework laws, and implementing acts, which it named regulations and decisions. The Lisbon Treaty maintained this hierarchical distinction between legislative acts and implementing acts, but abandoned the terminology of laws and framework laws for legislative acts and reinserted the long-used terminology – based mainly on regulations, directives and decisions – for both legislative and implementing acts. An opportunity for terminological clarification was thus not taken, though there was provision for 'implementing' or 'delegated' to be henceforth added to the titles of executive acts.

The TFEU post-Lisbon thus distinguishes between, as preceding treaties have, the following types of legislation: regulations, directives, decisions, and recommendations and opinions. The nature of and the differences between these types of legislation are set out in Box 13.1.

* * *

In order to accommodate the mosaic of different national circumstances and interests that exist on many policy issues, the EU's legislative framework needs to be creative, flexible, and capable of permitting differentiation.

There are four main ways in which it is so:

- As Box 13.1 shows, the EU makes use of a variety of formal and quasi-formal legislative instruments. As Saurugger and Terpan (2016) note, the development of non-binding 'new governance' methods has in some respects challenged the traditional distinction between what is law and what is not. Hard and soft law are not completely opposing governing methods.

Box 13.1

The different types of EU legislation

Regulations

A regulation under Article 288 TFEU is:

1 Of 'general application'; that is, it contains general and abstract provisions that may be applied to particular persons and circumstances.
2 'Binding in its entirety'; that is, it bestows rights and obligations upon those to whom it is addressed, and member states must observe it in full and as written.
3 'Directly applicable in all Member States'; that is, there is no need for national implementing measures to be taken in order for a regulation to have binding force within the member states. Regulations specify the date on which they are to take legal effect. Normally this is the same day as, or very shortly after, they are published in the *Official Journal of the European Union*. This in turn is usually only a day or two after they have been adopted.

Most regulations are adopted by the Commission as delegated or implementing regulations and concern highly specific and technical adjustments to existing EU law.

Directives

A directive 'shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods' (Article 288 TFEU).

In theory, a directive is thus very different from a regulation: it is not binding in its entirety but only in 'the result to be achieved'; it is addressed to member states and does not claim general applicability; it is not necessarily addressed to all member states; and appropriate national measures need to be taken to give the directive legal effect. As a consequence, directives tend to be rather more general in nature than regulations. They are less concerned with the detailed and uniform application of policy and more with the laying down of policy principles that member states must seek to achieve but can pursue by the appropriate means under their respective national constitutional and legal systems.

The distinction between regulations and directives should not, however, be exaggerated because in practice a number of factors often result in a blurring. First, directives are almost invariably addressed to all

- There are considerable variations between directives regarding the time periods permitted for incorporation into national law. For example, amending directives may have to be incorporated almost immediately, whereas innovative or controversial directives, or directives that require substantial capital expenditure in order to be properly applied – as is common with, for example, environmental directives – may not be required to be incorporated for some years.
- Devices that allow for adaptation to local conditions and needs are often either attached to legal texts or are authorised by the Commission after an act has come into force. Examples of such devices include exemptions, derogations, and safety clauses.
- Provided the Commission is satisfied that the relevant provisions are not 'a means of arbitrary discrimination or a disguised restriction on trade between Member States' and do not 'constitute an obstacle to the functioning of the internal market' (Article 114:6 TFEU), member states are permitted to apply national legislation that is 'tougher' than EU legislation in respect of certain matters where there is not complete harmonisation. Policy areas where this occurs include protection of the environment and of the working environment.

There used to be several thousand legislative instruments issued each year, comprising annual

Box 5.1 Continued

…important reason for this is that directives are frequently concerned with the harmonisation or …mation of laws and practices in fields of EU activity. Second, some directives are drafted so tightly …re is very little room for national authorities to incorporate adjustments when transposing direc… national law. Third, directives contain a date by which the national procedures to give the directive …must have been completed. The Commission has to be notified of national implementing measures, …es that fail to comply by the due date are liable to have proceedings initiated against them, which …mately result in a case before the Court. Fourth, the Court has ruled – so as to prevent member …aking advantage of their own failures to comply – that directives may be directly applicable when …l implementing legislation has been unduly delayed or when it has departed from the intent of the …l directive.

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…sion 'shall be binding in its entirety upon those to whom it is addressed' (Article 288 TFEU). It may …dressed to any or all member states, to undertakings, or to individuals. Many decisions are highly …ific and, in effect, are administrative rather than legislative acts. Others are of a more general character …can be akin to regulations or even, occasionally, directives.

…sions are adopted in a whole range of circumstances. For example: to enforce competition policy; to …ute a pilot action programme; to authorise grants from one of the EU's funds; to allow an exemption …an existing measure; or to counter dumping from a third country.

…ft law'

…mmendations and opinions are explicitly stated by Article 288 TFEU as having no binding force, but …does not mean lack of legal effect. Indeed, on occasions the Court has referred to them. The same …ies to some of the other non-binding, 'soft law', devices used by the EU institutions for such purposes …floating ideas, starting a legislative process, promoting coordination, and encouraging harmonisation. …ese include memoranda, communications, conventions, programmes, guidelines, agreements, declara…ns, and resolutions. A typical example of soft law is a Commission recommendation of July 2014 encour…ng member states to adopt best practices so as to protect citizens from the effects of excessive gambling (European Commission, 2014).

…,000 regulations, 2,000 decisions, and 120 directives. …however, the numbers have dropped considerably in …cent years, partly because of a drive by all decision-making institutions to lighten and simplify the EU's …gislative framework. Not counting amending acts, …n an average year there now are around 1,000 regula…ons, (the great number of which are Commission …gulations), 700–800 decisions, and 20–30 direc…ves. The vast majority of these legal instruments …nsist of administrative measures of a routine, 'non-political', recurring kind. Many are replacements for …nstruments that have either been repealed (usually …ecause, as with most CAP-related legislation, they …ave become out-dated as a result of changing market conditions) or have expired.

Judicial interpretation

The Court of Justice of the European Union consists of two courts: the Court of Justice and the General Court – the latter of which was called the Court of First Instance (CFI) until its name was changed by the Lisbon Treaty. The former is the more senior of the two courts in that it deals with most cases raising major issues – including those of a 'constitutional' and/or 'political' nature – and in that also General Court judgements are, subject to specified conditions, subject to appeal to the Court of Justice. When, therefore, reference is made to EU law arising from judicial interpretation, the reference is normally to Court of Justice case law.

Although case law has not traditionally been a major source of law in most of the EU member states, the rulings of the EU's courts have played an important part in shaping and making EU law. This stems partly from the courts' duty to ensure that EU law is interpreted and applied correctly. It stems also from the fact that much of EU statute law is far from clear or complete.

The lack of precision in much of the EU's statute law is due to a number of factors: the relative newness of the EU and its constituent parts; the developing nature of EU law in many sectors; the often sharply differing views of policy actors within EU decision-making processes, which can lead to weak compromises in the content of agreed legal texts and to the avoidance of necessary secondary legislation; and the speed of change in some spheres of EU activity, which makes it very difficult for the written law to keep abreast of developments. In many fields of apparent EU competence, the EU's courts thus have to issue judgements from a less than detailed statutory base. In the different types of case that come before them – cases of first and only instance, cases of appeal, and cases involving rulings on points of EU law that have been referred by national courts – the EU's courts therefore inevitably often go well beyond merely giving a technical and grammatical interpretation of the written rules. They fill in the gaps in the law and, in so doing, they not only clarify the law but also extend it.

International law

International law is notoriously vague and weak, but the EU's courts have had occasional recourse to it when developing principles embodied in EU law. Judgements have also established that insofar as the EU has been increasingly developing an international personality of its own and taken over powers from the states, the same rules of international law apply to it as apply to them, for example with regard to treaty law and the privileges and immunities of international organisations. This process is being further advanced by the Lisbon Treaty having accorded (in Article 47 TEU) legal personality to the EU.

The many international agreements to which the EU is a party – including association, cooperation, and trade agreements – are sometimes viewed as another dimension of international law. However, since they are implemented by legislative acts they are better viewed as constituting part of EU legislation, even though the Court of Justice has ruled that they are superior in the hierarchy of EU law than secondary law (Case 24/72).

The general principles of law

Article 19 TEU states that 'The Court of Justice of the European Union … shall ensure that in the interpretation and application of the Treaties the law is observed.' The implication of this and of certain other Treaty articles (notably 263 and 340 TFEU) is that the EU's courts need not regard written EU law as the only source of law to which they may refer.

In practice this has meant that the EU's courts, when making their judgements, have had regard to general principles of law when these have been deemed relevant and applicable. Exactly what these general principles of law are, however, is a matter of controversy. Suffice to note here that principles that have been cited by the courts include non-discrimination (whether between nations, product sectors, firms, individuals), adherence to legality, and respect for procedural rights.

The Content of EU Law

The content of EU law is described at some length in Part IV of the book, in the context of the examination of EU policies that is presented there. Attention will, therefore, be confined to three points of general significance.

The first point is that EU law is not as wide-ranging as national law. It is not, for instance, much concerned with criminal law, property law, or family law. Nor does it have much to do with policy areas such as education or health. What EU law is primarily, although by no means exclusively, concerned with, and in this it reflects the aims and provisions of the treaties – is economic activity. More particularly, EU law is strongly focused in the direction of such areas of activity as the customs union, the internal market, competition policy, agriculture policy, and trade policy. It also makes up a significant element of the law applying in the member states in such policy areas as energy, transport, regional development, and the environment.

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The second, and related, point is that in virtually
policy areas EU law sits side by side with national
law. Box 17.4 (p. 309) shows, the TFEU identifies
areas where the Union has exclusive competence.
However, it is only in respect of the customs union
and the Common Commercial Policy (CCP) that a
comprehensive code of EU law exists in a major policy
that applies in all EU states. Even in areas where
there is a high degree of EU regulation, such as with
the functioning of agricultural markets, national laws
governing various matters still exist. As Boxes 17.1 and
17.2 show (pp. 305–6), EU law thus constitutes an
important part of the overall legal framework of mem-
ber states in some policy spheres, whilst being of only
minimal significance in others.

The third point is that the range of EU law has
broadened considerably over the years. As already
noted, EU law is primarily economic in character,
though less dominantly so than it was. The great expan-
sion in recent years of law related to the creation
of the area of freedom, security and justice (AFSJ)
is testament to this. So too is the considerable vol-
ume of EU environmental law that now exists, with
EU laws dealing with matters as diverse as air and
water pollution, the disposal of toxic waste, and the
protection of endangered bird species. This expan-
sion of EU law into an increasing number of policy
areas has occurred, and is still occurring, for several
reasons, prominent amongst which are: recognition
of the benefits that joint action can bring to many
fields of activity; pressures from sectional interests;
and acceptance that the internal market can function
smoothly, efficiently, and equitably only if there are
common rules not just on directly related market
activities but also on matters such as health and
safety at work, entitlements to social welfare benefits,
and mutual recognition of educational and profes-
sional qualifications.

The Status of EU Law

In Case 6/64, *Costa* v. *ENEL*, the Court of Justice stated:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their individuals and themselves.

EU law thus constitutes an autonomous legal system, imposing obligations and rights on both individuals and member states, and limiting the sovereignty of member states. There are two main pillars to this legal system: direct effect and primacy.

Direct effect

This term – which is sometimes also called direct applicability – refers to the principle whereby certain provisions of EU law may confer rights or impose obligations on individuals that national courts are bound to recognise and enforce. Having initially established the principle in 1963 in the case of *Van Gend en Loos* (Case 26/62), the Court, in a series of judgements, has gradually strengthened and extended the scope of direct effect so that it now applies to most secondary legislation except when discretion is explicitly granted to the addressee. Many of the provisions of the treaties have also been established as having direct effect, although the Court has ruled that it does not apply to all spheres.

Primacy

Somewhat surprisingly, until the Treaty of Lisbon there was no explicit reference in the treaties to the primacy or supremacy of EU law over national law. Clearly the principle is vital if the EU is to function properly, since if member states had the power to annul EU law by adopting or giving precedence to national law, then there could be no uniform or consistent EU legal order: states could apply national law when EU law is distasteful or inconvenient to them. From an early stage, therefore, the Court took an active part in establishing the primacy of EU law. National courts, it consistently asserted, must apply EU law in the event of any conflict, even if the domestic law was part of the national constitution. An example of a Court statement on primacy may be taken from *Simmenthal* v.

Commission (Case 92/78) where the Court concluded that:

> Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

In general, national courts have accepted this view and have given precedence to EU law. A few problems have remained – notably in relation to fundamental rights guaranteed by national constitutions – but for the most part the authority and binding nature of EU law has been fully established.

The Treaty of Lisbon consolidated the principle by giving it explicit treaty recognition for the first time. However, the recognition did not take the form of inclusion in the Treaty but rather recognition in a declaration on primacy that was attached to the Treaty (see Document 13.1).

The Court of Justice of the European Union

As noted above, the Court of Justice of the European Union consists of two courts: the Court of Justice and the General Court. There used to be a third court – the European Union Civil Service Tribunal, which dealt with internal EU staffing matters – but following a Council decision in 2015 this was incorporated in 2016 into the General Court.

Both courts are located in Luxembourg. Neither of them should be, though the Court of Justice in particular sometimes is, confused with the Strasbourg-based European Court of Human Rights, which is part of the Council of Europe institutional system.

Membership

The Court of Justice consists of 28 judges – one from each member state. The Court is assisted by 11 advocates-general.

Document 13.1

Declaration 17 of the Treaty of Lisbon

Declaration concerning primacy

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

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

Opinion of the Council Legal Service
of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.*

* 'It follows … that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.'

The General Court also used to consist of one [illegible] from each member state. However, following [illegible]incorporation of the Civil Service Tribunal into [illegible]eneral Court and a related 2015 Council decision [illegible]nd the Court's size to better enable it to deal [illegible] increasing workload, the Court's membership [illegible] progressively increased so that it numbers 59 [illegible]s from 2019.

[illegible] the judges and advocates-general are appointed [illegible] six-year term of office that may be, and fre[illegible]ly is, renewed. To ensure continuity, turnover is [illegible]ed in three-yearly cycles.

Under Article 253 TFEU, the judges and advocates-[illegible]eral are appointed 'by common accord of the [illegible]ments of the Member States' from amongst [illegible]ons 'whose independence is beyond doubt and [illegible] possess the qualifications required for appoint[illegible]ment to the highest judicial offices in their respective [illegible]ountries or who are juriconsults of recognised com[illegible]etence'. The Lisbon Treaty supplemented Article 253 [illegible] a preliminary stage under which, in a new Article [illegible], before being appointed by the member states [illegible] suitability of nominated candidates is considered [illegible] a seven-member panel (known as 'the 255 panel') [illegible]onsisting of former EU and national supreme court [illegible]udges and legal experts, one of whom must be pro[illegible]osed by the EP.

It used to be the case that, notwithstanding the [illegible]ormal stipulation that appointment is 'by common [illegible]ord of the governments of the Member States', each [illegible]ate was actually permitted to nominate to both the [illegible]Court of Justice and the General Court and the nomi[illegible]ations were virtually automatically accepted. Post [illegible]isbon Treaty, this is no longer so, for two reasons. [illegible]First, because the membership of the General Court [illegible]is being increased to more than double the number of [illegible]member states. Second, because the 255 panel is not [illegible]giving favourable opinions on all candidates. In the [illegible]first four years of its operation (2010–14), the panel [illegible]examined 67 candidates, 35 of whom were renewals [illegible]and 32 of whom were 'first timers'. Of the 32, seven [illegible]were given negative opinions, which resulted in their [illegible]nominations being withdrawn (Bobek, 2015: 164).

When making their nominations, governments [illegible]have in the past tended not to be overly worried about [illegible]the judicial qualifications or experience of their nomi[illegible]nees and have instead looked for a good background in [illegible]appropriate professional activities and public service. [illegible]At the time of initial appointment, the typical judge has been a legally qualified 'man of affairs' (and most judges have been men) who has been involved with judicial, governmental, or academic work in his native country in some way, but who has often not served in a judicial capacity for long (if at all) or at a high level. There is no evidence of 'political' appointments having being made, in the way that they are to the United States Supreme Court, but the fact is that soundness and safeness have been as important as judicial ability. This now seems to be gradually changing – in no small part because of the scrutiny now being undertaken by the 255 panel.

In addition to the judges and the advocates-general, each of whom are assisted by legal secretaries, the Court of Justice and the General Court employ a staff of just over 2,000, of whom almost half are engaged in linguistic services and the rest undertake supporting duties.

Organisation and numbers of cases

In most respects, the two courts are organised in similar ways.

The Court of Justice

The judges elect one of their number to be President of the Court for a term of three years. The President's principal function is to see to the overall direction of the work of the Court by, for example, assigning cases to the Court's chambers and appointing *judge-rapporteurs*. The President is also empowered, upon application from a party, to order the suspension of Union measures and to order such interim measures as are deemed to be appropriate.

Assisting the judges in the exercise of their tasks are the advocates-general. The duty of advocates-general is 'acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which … require his involvement' (Article 252 TFEU). This means that an advocate-general, on being assigned to a case, must make a thorough examination of all the issues involved in the case, take account of all relevant law, and then present his conclusions to the Court. The conclusions are likely to include observations on the key points in the case, an assessment of EU law touching on the case, and a proposed legal solution.

The increasing number of cases coming before the Court – in the 1960s there were around 50 in an average year, today there are usually around 700 (see Table 13.1) – has made it impossible for everything to be dealt with in full plenary session. The overwhelming number of cases are therefore dealt with by one of the Court's chambers. Cases that involve complex findings of fact, or novel or important points of law, and which do not require to be heard by the full Court, are handled by chambers of five judges. Over half of cases are dealt with by such a chamber. Virtually all other cases – that is, cases that are based upon relatively straightforward facts, raise no substantial points of principle, or where the circumstances are covered by existing case law – are handled in chambers of three judges.

The Court is obliged to sit in full plenary session only in very restricted circumstances, and does so only rarely. However, on matters of particular importance it does sometimes meet in a Grand Chamber, numbering 15 judges.

The General Court

The main organisational difference between the Court of Justice and the General Court is that no advocates-general are appointed to the latter. When the exercise of the function of advocate-general is seen as being necessary – which it is not in all cases – the task is undertaken by one of the judges; the judge so designated cannot take part in the judgement of the case.

As Table 13.2 shows, the number of cases coming before and dealt with by the General Court are somewhat higher than the numbers of the Court of Justice. Accordingly, just as the Court of Justice deals with its heavy workload problem by assigning most cases to chambers, so too does the General Court. But whereas in the Court of Justice over half of all cases are dealt with by chambers of five judges, in the General Court around 85 per cent of cases are dealt with by chambers of three judges.

As stated above, the heavy workload resulted in the 2015 decision to increase the size of the General Court.

Table 13.1 Cases before the Court of Justice 2014–15: numbers and stages of proceedings*

	2014	2015
New cases	622	713
Completed cases	719	616
Cases pending	787	884

* The figures represent the total number of cases without account being taken of the small number of cases where cases are joined because of their similarity.

Source: Court of Justice of the European Union (2016): 2.

Table 13.2 Cases before the General Court 2014–15: number and stages of proceedings

	2014	2015
New cases	912	831
Completed cases	814	987
Cases pending	1423	1267

Source: Court of Justice of the European Union (2016): 3.

The procedure of the courts

Most of the work of the two courts is conducted largely away from the public eye via the communication of documents between those directly involved in cases, interested parties, and Court officials. Not much happens in open court, and in some cases the parties do not require a public hearing at all.

So as to provide a flavour of Court procedures, an outline of how direct action cases (which tend to be the most important cases in terms of setting important case law) are typically channelled through the Court of Justice will now be given:

- Relevant documentation and evidence is assembled. In complicated cases, involving for example the alleged existence of cartels, hundreds or even thousands of separate items of evidence may be collected. The Court (though more so in the General Court than in the Court of Justice), under the direction of a duly appointed *judge-rapporteur*, may have to take a very proactive role in gathering the information that it needs and in soliciting the views of interested parties. This may involve holding a preparatory inquiry at which oral and documentary evidence is presented. (In preliminary ruling cases the procedure is very different.)

national court making the reference should have provided with its submission a summary of the case and of all relevant facts, a statement of the legal problem, and the – abstract – question it wishes the Court to answer.)

- The public hearing is likely to be (but is not always) the event at which the essentials of the case are outlined, the various parties are permitted to present their views orally, and the judges and advocates-general may question the parties' lawyers.
- Following the public hearing, the advocate-general appointed to the case examines it in detail. He and his staff look at all relevant EU law and then come to a decision that they consider to be correct in legal terms. A few weeks after the public hearing the advocate-general presents his submission to an open session of the Court.
- Acting on the advocate-general's submission, and on the basis of a draft drawn up by the *judge rapporteur*, the Court prepares its decision. Deliberations are in secret and if there is disagreement – as sometimes there is – the decision is made by majority vote. Judgements must be signed by all the judges who have taken part in the proceedings and no dissenting opinions may be published. (In their oath of office members swear to preserve the secrecy of the deliberation of the Court.)

* * *

Three problems associated with the proceedings of both of the Courts ought to be mentioned. First, there is a lengthy gap between cases being lodged and a final decision being issued. Table 13.3 gives the average length for the main types of cases before the Court of Justice in 2014 and 2015, with direct action cases in 2015, for example, taking almost 18 months. As for the General Court, the average length of proceedings was 23.4 months in 2014 and 20.6 months in 2015. Both these Court of Justice and General Court

Photo 13.1 The First Chamber of the Court of Justice delivering a judgement

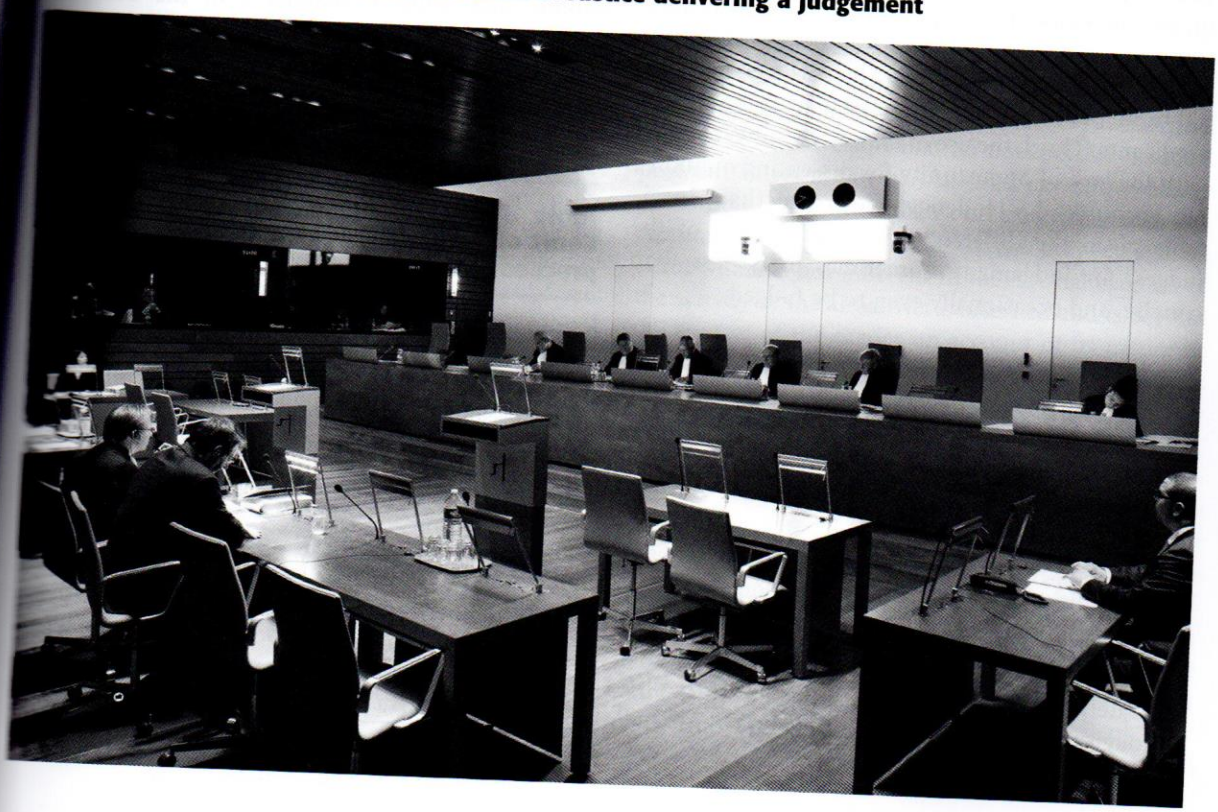

Table 13.3 Duration (in months) of proceedings in the Court of Justice 2014–15

	2014	2015
References for a preliminary ruling	15.0	15.3
Direct actions	19.7	17.6
Appeals	14.4	14.0

Source: Court of Justice of the European Union (2016): 2.

figures signify an appreciable reduction compared with the average figures of most preceding years, but they still involve a considerable wait for parties involved in legal disputes. A major factor explaining these lengths of time is that all documents have to be translated – into all 24 official languages of the Union in preliminary ruling cases. In special cases, however, interim judgements are issued and accelerated procedures are used. Second, lawyers' fees usually mean that going before the Courts in direct action cases can be an expensive business, even though there is no charge for the actual proceedings in the Court itself. This does not, of course, place much of a restriction on the ability of national governments or EU institutions to use the Courts, but it can be a problem for individuals and small firms. There is a small legal aid fund, but it cannot remotely finance all potential applicants. Third, the use of majority voting, coupled with the lack of opportunity for dissenting opinions, has encouraged a tendency, which is perhaps inevitable given the different legal backgrounds of the judges, for judgements sometimes to be less than concise, and occasionally even to be fudged.

Types of Cases Before the Courts

The EU's courts cannot initiate actions. They must wait for cases to be referred to them. Cases coming before the courts take a number of forms, the most important of which are outlined below. They are outlined by taking the courts together rather than separately. There are three reasons for this. First, although the jurisdiction of the General Court (then the CFI) was initially greatly restricted when it was established in 1988 to relieve the workload of the Court of Justice, treaty reforms have so extended its potential jurisdiction that now there are only a few types of cases with which it cannot deal. Second, in describing the responsibilities of the courts, the TFEU mostly refers to 'the Court of Justice of the European Union' – that is, it does not distinguish between the Court of Justice and the General Court. Third, most of the decisions of the General Court are subject to appeal to the Court of Justice on points of law.

As a preliminary, let it just be said that, in very broad terms, the Court of Justice's main – and unstated – role is to deal with matters that are of considerable importance to the EU's legal order, whilst the General Court is charged with dealing with matters that are generally more routine in nature. This division results in the Court of Justice being the competent court to deal with failures of member states to fulfil obligations, preliminary references from courts in the member states, and appeals against General Court decisions in direct actions. The General Court has responsibility for annulments, failures to act, disputes relating to compensation for non-contractual liability and, since it merged with the European Union Civil Service Tribunal, staff cases. Tables 13.4 and 13.5 indicate the numbers of the types of cases dealt with by the two courts.

Table 13.4 New cases brought before the Court of Justice 2013–14 according to types of proceedings

	2013	2014
References for a preliminary ruling	450	429
Direct actions	72	74
Appeals	161	170
Appeals concerning interim measures and intervention	5	10
Requests for an opinion	2	1
Special forms of procedure	9	8
Total	699	692

Source: Court of Justice of the European Union (2015): 144.

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	2013	2014
g	450	428
	72	74
	161	111
ures	5	0
	2	1
	9	8
	699	622

n Union (2015): 94.

13.5 New cases before the General Court 14 according to types of action

	2014	2015
ns for annulment	319	423
ns for failure to act	12	12
ns for damages	15	39
ation clauses	6	14
ectual property	293	295
eals	57	36
ecial forms of procedure	88	93
	790	912

Source: Court of Justice of the European Union (2015): 182.

Reference for a preliminary ruling

The types of case referred to in the sections below are known as direct actions. That is, the Union's Courts are called upon to give a judgement in a dispute between two or more parties who bring their case directly to court. References for preliminary rulings are quite different, in that they do not involve giving judgements in cases but rather giving interpretations on points of EU law to enable national courts to make a ruling.

References are made under Article 267 TFEU, which states that national courts may, and in some circumstances must, ask the Court to give a preliminary ruling where questions arise on the interpretation of the treaties or the validity and interpretation of acts of the institutions of the Union. The Court cannot make a pronouncement on a case that happens to have come to its attention unless a reference has been made to it by the appropriate national court. It is the exclusive prerogative of the national court to apply for a preliminary ruling, with parties to a dispute in a national court having no power to insist on a reference or to object to one being made. Once a reference has been made, the Court is obliged to respond, but it can only do so on questions that have been put to it and it may not pronounce on, or even directly attempt to influence the outcome of, the principal action. Interpretations made by the Court during the course of preliminary rulings must be accepted and applied by the national court that has made the referral.

Virtually all preliminary ruling cases are dealt with by the Court of Justice and, as can be seen in Table 13.4, constitute the great majority of the cases that come before it each year. Preliminary rulings serve three principal functions. First, they help to ensure that national courts make legally 'correct' judgements. Second, because they are generally accepted by all national courts as setting a precedent, they promote the uniform interpretation and application of EU law in the member states. Third, they provide a valuable source of access to the Court for private individuals and undertakings who cannot directly appeal to it, either because there is no legal provision or because of insufficient funds.

The case of *Corina van der Lans* v. *KLM* (Case C-257/14) shows how all three of these functions can apply in a single case. In summary, the District Court in Amsterdam referred the case to the CJEU to enquire whether the airline KLM was in breach of the 2004 Airline Passenger Compensation Regulation for delaying Ms van der Lans' flight by 29 hours. The Regulation provides for compensation and assistance to passengers in the event of, amongst other possible problems, long delays, but enables airlines to escape liability if delays are caused by 'extraordinary circumstances'. In September 2015, the Court of Justice ruled against the KLM claim that an unexpected technical problem in itself can be classified as 'extraordinary circumstances'. Rather, the Court stated that such circumstances can be so classified only if they relate to an event which is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the control of the carrier on account of its nature or origin. These circumstances did not apply in the case of Ms van der Lans, so the airline was liable to pay compensation.

An example of a preliminary ruling with important institutional implications is that made in a case referred to the Court in February 2014 by the German Constitutional Court. The case (Case C-62/14) concerned the compatibility with the TFEU of a mechanism – Outright Monetary Transactions (OMTs) – that was announced by the ECB in August 2012 to deal with the sovereign debt crisis and calm monetary markets. Under OMTs, the Bank can

purchase government bonds of indebted states in secondary bond markets on a conditional basis which, in the opinion of a number of prominent objectors in Germany, exceeds the Bank's authority because it strays beyond monetary policy into the realm of fiscal policy. In its judgement, which was issued in June 2015, the Court declared the OMT programme to be legal as it 'does not exceed the powers of the ECB in relation to monetary policy and does not contravene the prohibition of monetary financing of EU nations'. This judgement was widely seen as greatly empowering the Bank and, by some observers, as more broadly empowering EU 'non-political' institutions.

Failure to fulfil an obligation

Under Articles 258 and 259 TFEU, the Court of Justice rules on whether member states have failed to fulfil obligations under the Treaty. Failure to fulfil an obligation cases constitute virtually all of the direct action cases that come before the Court.

Initial actions against states for failures to act may be brought either by the Commission or by other member states In either eventuality, the Commission must first give the state(s) against which the charge is made an opportunity to submit observations and then deliver a reasoned opinion. Only if this fails to produce proper compliance with EU law can the matter be referred to the Court.

In practice, failures to fulfil obligations are usually settled well before they are brought before the Court. When an action is brought to the Court, the Commission is almost invariably the initiator. It is so partly because if a member state is behind the action it is obliged, as has just been shown, to refer the matter to the Commission in the first instance. It is partly also because member states are extremely reluctant to engage in direct public confrontation with one another (although they do sometimes try to encourage the Commission to, in effect, act on their behalf).

Such cases have led to rulings against, for example, Italy (that its duties on imported gin and sparkling wine were discriminatory), the UK (that it had introduced insufficient national measures to give full effect to the 1976 directive on sexual discrimination), and Belgium (for failing to implement directives to harmonise certain stock exchange rules).

The Maastricht Treaty gave to the Court, for the first time, the power to impose penalties on member states for not complying with Court judgements in respect of failures to fulfil obligations. The possibility of fines only arises after extensive exchanges between the Commission and the state in question, after the state has been given every opportunity to submit its observations, and after a time limit for compliance has been specified and has not been met. If these conditions apply, the Commission may bring the matter back before the Court. In so doing, the Commission must specify the amount of the lump sum or penalty payment to be paid 'which it considers appropriate in the circumstances' (Article 260 TFEU). If the Court finds that the member state has not complied with its judgement, it may impose a lump sum and/or recurring penalty payment. An example of such an imposition is that imposed on Greece in July 2009 for failing to fully abide by a previous Court ruling to recover illegal subsidies paid to the state-owned Olympic Airlines. The Court imposed a €2 million fine and a €16,000 daily penalty to be paid until the funds were recovered. Another example is penalties imposed on Italy in December 2014 for failing to tackle the dumping of illegal waste. A €40 million fine was imposed and a further €42.8 million fine would be imposed for every six months that Italy failed to implement a proper clean-up programme.

Application for annulment

Actions for annulment account for a considerable volume of the cases brought before the CJEU. Unlike with all but the most high-profile and important such cases being dealt with by the General Court, as Table 13.5 shows, constitute about 40 per cent of the General Court's new cases in an average year.

Under Article 263 TFEU, the Court 'shall review the legality of legislative acts, of acts of the Council, the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.' Initially review of acts of the European Council and of agencies was only introduced by the Lisbon Treaty

tentially very important, with the extension of the 's powers to the European Council in particular ing a very significant advance in its remit and, broadly, a very significant advance also in the tutionalisation of the EU.

The Court cannot conduct reviews on its own ini- but only in response to actions brought by a ber state, the EP, the Council or the Commission. ews may be based on the following grounds: 'lack mpetence, infringement of an essential proce- requirement, infringement of the Treaties or of rule of law relating to their application, or misuse powers' (Article 263 TFEU). If an action is well ded, the Court is empowered under Article 264 EU to declare the act concerned to be void.

The highest profile annulment case in recent years in 2004, when the Commission brought an on against the Council in connection with EMU's bility and Growth Pact (SGP). In the autumn of the Commission had recommended that the ncil require France and Germany to take the essary measures to reduce their budgetary deficits der Article 104(9) TEC. However, no majority ted for this in the Council, so as an alternative Council decided, in effect, that the excessive defi- procedures should be suspended whilst France Germany took other correcting action. Deciding this Council decision undermined both its own thority and the credibility of EMU, the Commission ught an action for annulment against the Council. When it delivered its opinion, in July 2004 (in Case C-27/04, *Commission* v. *Council*), the Court basically ruled in favour of the Commission, but refrained from insisting that the Council follow the Commission's recommendations. The judgement played an important part in the subsequent Council deliberations that led to a reform of the SGP in the spring of 2005.

Another example of an important annulment case is *United Kingdom* v. *European Central Bank* (Case T-496/11), in which the UK claimed the ECB exceeded its powers by requiring, in a policy framework paper issued in 2011, that clearing houses that process financial trades must be located within the eurozone. The UK government, which brought the case because it thought the location requirement could be damaging to the City of London, claimed the proposal undermined the functioning of the internal market. In March 2015, the General Court annulled the ECB's proposed oversight system, though not on the grounds that it was discriminatory but rather because the ECB had exceeded its powers as it 'lacks the competence necessary to regulate the activity of securities clearing systems as its [treaty] competence is limited to payment systems alone' (General Court of the European Union, 2015)

As the just cited example shows, an important aspect of Court activity in annulment cases arises in connection with the Treaty base(s) upon which EU legislation is proposed and adopted. Of some significance here is that are several procedures by which EU law can be made (see Chapter 19 for details), each of which is different in terms of such key matters as whether QMV rules apply in the Council and what are the powers of the EP. Which procedure applies in a particular case depends on the article(s) of the Treaty upon which legislative proposals are based. It thus naturally follows that if a legislative proposal is brought forward by the Commission on a legal base that a member state or the EP believe to be damaging to their interests and/or legally questionable, and if political processes cannot bring about a satisfactory resolution to the matter, they may be tempted to appeal to the Court.

Similarly, institutions sometimes appeal to the Court when they believe their prerogatives have been infringed during a legislative procedure. The EP has been very active in this regard, taking a number of cases to the Court, usually on the grounds that either it should have been consulted but was not, or the Council changed the content of legislation after it left the EP and the EP was not re-consulted. In general, the Court has tended to support the EP in such cases.

Article 263 also allows any 'natural or legal person' (that is private individuals or companies) to institute proceedings for annulment. Cases brought on this basis have included appeals by companies against Commission decisions to refuse to authorise subsidies and challenges to Commission decisions on abuse of dominant trading positions, restrictive practices, and company mergers. Generally, rulings have tended to strengthen the hand of EU institutions and to serve as useful underpinnings to some EU policies, notably competition policy and commercial policy.

In certain policy spheres, of which competition is the most important, the Commission is empowered to impose financial penalties to ensure compliance with EU regulations. Under Article 262 TFEU, the regulations governing such policy spheres may allow

unlimited jurisdiction to the Court with regard to the penalties. This means that aggrieved parties may appeal to the Court against Commission decisions and the penalties it has imposed. As such, this is another form of action for annulment. The Court may annul or confirm the decision and increase or decrease the penalties. In the great majority of judgements the Commission's decisions are upheld. (See Chapter 9 for examples of fines imposed on firms for breaches of competition law.)

Failure to act

Under the treaties there are provisions for institutions to be taken to court for failure to act. These provisions vary in nature between the treaties. Under the TFEU, should the EP, the European Council, the Council, the Commission, or the ECB fail to act on a matter provided for by the Treaty, the member states and the other institutions and, in restricted circumstances, 'natural or legal persons' may initiate an action under Article 265 to have the infringement established. Such actions are not common, but one that attracted much attention was initiated by the EP, with the support of the Commission, against the Council in 1983. The case concerned the alleged failure of the Council to take action to establish a Common Transport Policy, despite the provision for such a policy in the EEC Treaty. The judgement, which was delivered in May 1985, was not what the EP or the Commission had hoped for. The ECJ ruled that whilst there was a duty for legislation to be produced, it had no power of enforcement because the Treaty did not set out a detailed timetable or an inventory for completion; it was incumbent upon the national governments to decide how best to proceed.

Action to establish liability

'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties' (Article 340 TFEU). Under Article 268 the Court has exclusive jurisdiction to decide whether the Union is liable and, if so, whether it is bound to provide compensation.

This means that the Union may have actions brought against it on the ground of it having committed an illegal act. The complex mechanisms of the CAP have produced by far the greatest number of such cases, threatening indeed to overwhelm the Court in the early 1970s. As a consequence, the Court became increasingly unwilling to accept non-contractual liability cases, at least on the basis of first instance, and made it clear that they should be brought before national courts.

In the 1970s the Court also ruled that the circumstances in which the Community could incur non-contractual liability and be liable for damages were strictly limited. Of particular importance in this context were judgements in 1978 on two joined cases concerning skimmed milk (Cases 83 and 94/76, and 4, 15, and 40/77). Community legislation obliged the food industry to add skimmed milk to animal feed as part of an effort to reduce the surplus of powdered milk. A number of firms challenged the legality of this on the ground that the Community's solution to the problem was discriminatory. In its first judgement the Court ruled that the powdered milk regulations were, indeed, invalid because they did not spread the burden fairly across the agricultural sector. In its second judgement, however, it ruled that only in exceptional and special circumstances, notably when a relevant body had manifestly and seriously exceeded its powers, should the Community be liable to pay damages when a legislative measure of a political and economic character was found to be invalid.

Staff cases

By the early 2000s, over one-quarter of the cases coming before the CFI involved disputes between the EU and its staff. This type of case increasingly came to be seen as not being appropriate for the already overloaded CFI, so the Nice Treaty provided for the establishment of the European Union Civil Service Tribunal, which was created in November 2004 and came into operation on 1 October 2005. However, as noted above, in 2015 it was decided to reverse this practice and merge the Tribunal (which was dealing with between 150 and 200 new cases a year, many of which became the subjects of appeal to the General Court) with the General Court.

Appeals

Under Article 256 TFEU, certain decisions of the General Court are subject to appeal to the Court of Justice.

Appeals cannot be made on the substance of a case, only on points of law. There are three broad grounds for appeal: the General Court lacked jurisdiction, it breached procedural rules, or it infringed Union law. Many, but not all, of the appeals fail. They do so because the Court of Justice will only accept appeal on points of law, not points of substance, and also because the General Court follows previous case law of the Court of Justice. There are usually between 100 and 200 appeals each year, constituting some 15–20 per cent of the Court of Justice's workload.

The seeking of an opinion

Under Article 218 TFEU, a member state, the EP, the Council, or the Commission may obtain the opinion of the Court of Justice on whether a prospective international agreement is compatible with the provisions of the treaties. Where the opinion of the Court is adverse, the agreement cannot enter into force without being suitably amended or without the treaties being amended.

An example of an extremely important opinion is that issued in 1994 in respect of external powers. The Commission took the case before the Court, arguing that (the then) Article 113 of the EEC Treaty, which gave the Commission sole negotiating powers in respect of certain international commercial agreements, should extend to trade in services and trade-related aspects of intellectual property rights. The Court ruled (Opinion 1/94) that the Community and the member states shared competence to conclude such agreements and therefore the Commission did not have sole negotiating powers. (The Commission's external negotiating powers were later extended in the Lisbon Treaty.)

The Impact and Influence of the Courts

A limitation on the impact and influence of the EU's courts is that most EU law is directly implemented by national agencies and legal proceedings in respect of it are conducted mainly in national courts. Another limitation is that many EU activities are beyond the reach of the EU's courts because they do not have clear legal bases. Some such activities are based on traditional intergovernmental forms of cooperation, as is the case with most foreign and external security policies and actions, whilst an increasing number are based on forms of 'soft law' and coordination associated with the so-called 'new modes of governance', as is the case, for example, with many economic, social, and employment policies. (See Terpan, 2015 for an analysis of the growing importance of soft law in the EU.)

However, notwithstanding these limitations, the EU's courts still have two very important functions in respect of EU law. First, they are responsible for directly applying the law in certain types of case. Second, they have a general responsibility for interpreting the provisions of EU law and for ensuring that the day-to-day application of the law by national agencies and courts is consistent and uniform.

Inevitably, for the reasons explained earlier in the chapter, these duties result in the courts – and especially the Court of Justice – making what, in effect, is judicial law. This is most clearly seen in four respects.

First, as noted above, the Court of Justice has clarified and strengthened the status of EU law. Landmark decisions of the 1960s and 1970s, such as *Van Gend en Loos* and *Costa* v. *ENEL*, were crucial in paving the way to the establishment of a strong legal system, but later decisions have also been important. For example, in its 1992 judgement in *Francovich and Bonifaci* v. *Italy* (Joined Cases 6/90 and 9/90) the Court ruled that individuals are entitled to financial compensation if they are adversely affected by the failure of a member state to transpose a directive within the prescribed period. And in its 2005 judgement in *Commission (supported by the European Parliament)* v. *Council (supported by eleven member states)* (Case C-176/03) the Court strengthened the EU's implementation capacity by ruling that in some circumstances criminal law sanctions can be used for offences against EU law.

Second, EU policy competences have been both extended and limited by Court judgements. Social security entitlements illustrate this. Most governments have not wished to do much more about entitlements than coordinate certain aspects of their social security systems. The Court, however, through a number of judgements, often based on the TFEU (and before it the TEC) rather than on legislation, has played an important part in

pushing the states towards the harmonisation of some of their practices, for example with regard to the rights of migrant workers. It has also extended the provisions of certain laws in ways the states did not envisage when they gave them their approval in the Council. However, perhaps being influenced by the more eurosceptic climate that has prevailed throughout much of the EU in recent years, the Court has stopped short of trying to harmonise too much. So, for example, in cases such as *Dano* v. *Jobcenter Leipzig* (Case C-333/13) (judgement given in November 2014), and *Jobcenter Berlin Neukölin* v. *Nazifa* and others (Case C-67/14) (judgement given in September 2015), it has greatly restricted the rights of economically inactive EU citizens who are resident in a member state other than their own to access non-contributory social assistance benefits.

The area where the EU's courts have exercised the greatest influence in strengthening and extending EU policy competence is in regard to the internal market. In some instances this has been a result of practices being ruled illegal and in others it has been a consequence of judgements pressurising, enabling, or forcing the Commission and the Council to act – as, for example, in deregulating air transport following the 1986 *Nouvelles Frontières* case in which the Court held that the treaty rules governing competition applied to air transport.

Third, judgements have saved the EU the need to make law in existing areas of competence. A particularly influential judgement in this context was issued in February 1979 in the (now famous) *Cassis de Dijon* case (Case 120/78), which concerned the free circulation of the French blackcurrant liqueur of that name. The Court ruled that national food standards legislation cannot be invoked to prevent trade between member states unless it is related to 'public health, fiscal supervision and the defence of the consumer'. The principle of 'mutual recognition' – whereby a product lawfully produced and marketed in one member state must be accepted in another member state – was thus established, with the result that the need for legislation to harmonise standards in order to facilitate trade was much reduced. Of course the *Cassis de Dijon* judgement did not, and does not, rule out challenges to the principle of 'mutual recognition', or to its application. For example, in the much publicised and influential case *Commission* v. *Germany* (Case 178/84), the German government attempted to protect its brewers by arguing that whereas their product was pure, most so-called foreign beers contained additives and should be excluded from the German market on health grounds. In March 1987 the Court upheld the 'mutual recognition' principle and ruled that a blanket ban on additives to beer was quite disproportionate to the health risk involved; the German insistence on its own definition of beer amounted to a barrier to trade.

Fourth, the powers and functioning of the institutions have been clarified, and in important respects have been significantly affected, by the Court. Four important judgements will be cited to illustrate this. First, in 1980, in the famous *isoglucose* case (Case 138/79), the Court ruled that the Council could not adopt legislation until it had received the EP's opinion (see Chapter 12 for further consideration of this case). Second, in 1988, in the 'Wood Pulp' cases (Joined Cases 89, 104, 114–117, 125–129/85), the Court upheld and strengthened the power of Community institutions to take legal action against non-EC companies. (In this case the Commission had imposed fines on a number of American, Canadian and Finnish producers of wood pulp in respect of concerted practices that had affected selling prices in the Community. The Court ruled that the key factor in determining the Community's jurisdiction was not where companies were based, nor where any illegal agreements or practices were devised, but where illegalities were implemented.) Third, in 1992, in *Spain, Belgium and Italy* v. *Commission* (Joined Cases 271, 281 and 289/90) – which involved the liberalisation of the monopolistic telecommunications services market – the Court ruled that the Commission's powers in relation to competition policy were not limited to the surveillance of rules already in existence but extended to taking a proactive role to break monopolies. The fact that the Council could have taken appropriate measures did not affect the Commission's competence to act. Fourth, in 2000, in *Germany* v. *European Parliament and Council* (Case 376/98) Germany successfully sought annulment of the Tobacco Advertising Ban Directive which would have gradually phased out virtually all tobacco publicity and sponsorship by 2006. The Court ruled that the Commission had been incorrect to use Article 100a TEC (now 114 TFEU) – which provides for internal market harmonisation and elimination of competition measures – as the legal basis for the Directive. This was because other treaty articles excluded harmonisation measures designed to protect and improve human health and Article 100a could not be a general power to regulate the internal market.

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It will be noted that many of the cases cited above are now twenty and more years old. That so many of the most influential cases are now long-standing is often used by commentators to suggest that since the mid-1990s the Court has been less path-breaking and more cautious in its judgements. The Court has, it is argued, become more focused on technical decisions, more deferring to known positions of member states, more restricted in what it can do by the growth of soft law that is beyond its scrutiny. Doubtless there is something in this, but the 'retreat from activism' interpretation should not be overstated since many significant new judgements continue to be made, at least in politically sensitive policy areas where political decision-makers often find it difficult to make unambiguous decisions. Such areas are highly varied in nature, ranging from fundamental rights (which have greatly expanded in the Court's workload since the Lisbon Treaty made the Charter of Fundamental Rights of the EU clearly enforceable), access to welfare systems, and corporate taxation.

The fact is that the EU's court system has had and continues to have a very considerable impact on the content of EU law. This has been for a number of reasons, not least because those EU politicians who have been dissatisfied with judicial activism (representing a minority on most issues) have found it difficult to constrain, let alone reduce, the powers of the CJEU.

The independent influence of the CJEU should not, however, be overstated. It operates within a highly political context and, as Wincott (1999) has argued, it is not normally in a position to create a fully fledged policy by itself. There are two main reasons for this. First, the Court must usually have a treaty or legislative base upon which to act. This means that its judgements are normally constrained to at least some extent by an existing, albeit sometimes very sketchy, policy framework. Second, judgements can only be issued on cases that are referred to the Court. It cannot initiate cases itself. Consequently, as Wincott says, 'where the Court has made a striking contribution to the character of a particular policy, usually its contribution has been to unsettle an established policy regime or to break up a gridlock … rather than to create a policy itself'. Court judgements have certainly impacted on EU policy, but the most important impact has often been not so much direct as rather 'the provocation of further legislation' (Wincott, 1999: 94–5).

Concluding Remarks

The legal framework described in the previous pages constitutes the single most important feature distinguishing the EU from other international organisations. The member states do not just cooperate with one another on an intergovernmental basis but have developed common laws designed to promote near uniformity. The supremacy that applies in the interpretation, application and adjudication of these laws constitutes a central element of the supranational character of the EU.

This has necessarily involved the member states in surrendering some of their sovereignty, since they are obliged to submit to a legal system over which they have only partial control. In consequence of this, the governments of member states are sometimes obliged to apply laws they do not want and are occasionally prevented from introducing laws they desire.

The EU's courts have played an extremely important part in establishing the EU's legal order. This is because between them they exercise three key legal roles. First, there is the role of constitutional court where, for example, Court of Justice adjudicates inter-institutional disputes and disputes about the division of powers between EU institutions and member states. Second, there is the role of supreme court, as most obviously with preliminary rulings that have as their purpose the uniform interpretation and application of EU law. And third, there is the role of administrative court, as when both the Court of Justice and the General Court are called upon by private parties to offer protection against illegal and/or dubious executive acts by EU institutions.

In exercising their responsibilities, the courts, and particularly the Court of Justice, sometimes not only interpret law but also make it. Of course, judges everywhere help to shape the law, but this is especially so in the EU where there are lots of gaps to be filled in the EU's legal framework and where the courts in consequence have much more manoeuvrability available to them than is customary within states. They have used this to considerable effect: to help clarify relations between the institutions and between the institutions and the member states; to help clarify and extend EU policy in many different spheres; and arguably also to help develop and foster the EU's *esprit*.