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The Court of Justice of the European Union

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Chapter Contents

Reader's Guide

This chapter examines the Court of Justice of the European Union (CJEU), which consists of three courts: the Court of Justice (or 'the Court'), the General Court, and the Civil Service Tribunal. It focuses on issues of structure and procedure, the extent of the Courts' jurisdiction, and their role in the promotion of European integration. The chapter also discusses the criticism directed at the CJEU for the way it exercises its judicial powers, which allegedly involve political considerations normally unacceptable for a judicial body. Lastly, the chapter looks at the main challenges facing the EU courts.

Introduction

The **Treaty on European Union (TEU)** and the **Treaty on the Functioning of European Union (TFEU)**, which are the supreme laws of the EU, stipulate that the judicial arm of the European Union—the Court of Justice of the EU (CJEU)—comprises the Court of Justice (the Court), the European General Court (EGC), and specialized courts. The mission of the CJEU is to ensure that 'in the interpretation and application' of the treaties of the Union 'the law is observed' (Article 19(1) TEU). There is also a **European Court of Auditors** whose function is to control the revenues and expenditure of the EU, but this is not a

court in the same way as the others discussed in this chapter and it is not dealt with here.

The role of the CJEU is much more limited than that of national courts, as the former has jurisdiction only in specific areas of EU policy, as agreed by member states However, over time, as European **integration** expanded to new areas of policy and demands increased for more judicial controls over EU operations as a way of enhancing public confidence and democratic **legitimacy** in the Union, the CJEU was gradually granted more powers. The CJEU has been active in the process of expanding its jurisdiction. To that end the CJEU has exploited gaps in legislation and political divisions within EU. The activities of the Court of Justice have not been limited to the strengthening of the CJEU's institutional role, however. Some of its decisions, although officially focused on **enforcement** of the law, have also conveyed political messages about sensitive issues such as the nature of the EU as an international organization and its relationship with its member states. Through its decisions, the Court of Justice has emerged as a significant actor in the process of European integration, an actor whose role has been viewed by many legal scholars and politicians as not only judicial but also political. This is referred to as '**judicial activism**'.

This chapter examines in detail the CJEU's dual role, namely its judicial functions and its role as an actor in the process of political integration. As the roles of the Court of Justice and the General Court are more important for EU citizens, the chapter will concentrate on these two courts.

The history of the Court of Justice of the European Union

The Court of Justice of the EU (known at the time as the 'European Court of Justice') was created in 1951 by the Treaty establishing the **European Coal and Steel Community (ECSC)**. The Court's task was to ensure the lawful interpretation and application of the Treaty. The Court's powers were extended in 1958 by the Treaties of Rome establishing the **European Economic Community (EEC)** and the **European Atomic Energy Community (EURATOM)**. It would subsequently serve all three Communities, thus emerging as a supranational court with compulsory jurisdiction. The Court's decisions were binding on Community institutions, member states, and individuals. These early European treaties promoted economic integration by abolishing barriers to trade among the Community's member states. This had implications for the jurisdiction of the Court. It meant that the latter's work focused almost exclusively on economic rights (that is, free movement of goods) placing little emphasis on political rights, such as human rights. Even in 1986 the **Single European Act (SEA)** still excluded foreign policy matters, which had gradually emerged as a political aspect of European integration, from the Court's jurisdiction, though it did establish the Court of First Instance (CFI) (now the General Court) in order to reduce the then European Court of Justice's workload and improve its efficiency. The CFI began its work in 1989.

The establishment of the European Union by the **Maastricht Treaty** in 1992 constituted a big step forward for European integration but, initially at least, it had little impact on the Court's powers. In the EU's new three-pillar structure only the **first pillar** (known as the 'Community Pillar'), which covered economic integration, remained within the jurisdiction of the Court. As the **second and third pillars** covered sensitive policy areas, such as Common Foreign and Security Policy (CFSP) and justice and home affairs, which touched upon core aspects of national sovereignty, member states preferred to keep them intergovernmental, thus pre-empting any Court influence (see Chapter 2).

Subsequently, the **Treaty of Amsterdam** gave new powers to the Court by transferring into the Community pillar certain policies previously falling under the third pillar, such as external border control, asylum, and immigration. The Court's powers in the field of police and judicial cooperation in criminal matters (PJCCM) were also extended. However, the Court was to have no jurisdiction over operations carried out by national law enforcement agencies or over acts by member states seeking to maintain law and order and safeguarding internal security.

Further significant amendments were introduced by the **Treaty of Nice** which entered into force in 2003. The then Court of First Instance was no longer to be attached to the Court of Justice, but became a Court in its own right. The Treaty also provided for the establishment of specialized 'judicial panels' attached to the CFI. These were intended to reduce the CFI's workload by relieving it of less significant cases in specific areas. The first judicial panel, the Civil Service Tribunal, was established in 2004 to deal with litigation concerning EU staff.

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The **Lisbon Treaty (LT)**, which entered into force on 1 December 2009, changed the nomenclature for the courts. The term 'Court of Justice of the European Union' (CJEU), includes the Court of Justice (ECJ), the General Court, formerly known as the CFI, and the specialized courts, the new name for the judicial panels, which include the Civil Service Tribunal. The LT abolished the three-pillar structure and created a single institutional framework for the EU as a whole (see Chapter 3). The jurisdiction of the CJEU was extended accordingly to cover acts of all EU institutions except in areas excluded by the treaties. These include human rights in line with the incorporation of the **Charter of Fundamental Rights** into EU law. In the case of the Common Foreign and Security Policy, a policy area largely controlled by national governments, the Court now has jurisdiction to rule on the legality of decisions adopted by the Council under CFSP where these impose restrictive measures on natural or legal persons.

The history of the CJEU demonstrates its increasing involvement in European affairs. This is to be expected, as the expansion and **deepening** of European integration requires the existence of a judicial authority with adequate judicial powers to ensure the appropriate interpretation and enforcement of EU law by the Union and its member states, as well as the protection of individual rights affected by the operation of EU. However, the CJEU's jurisdiction compared to that of the courts of sovereign states is generally more restricted. The CJEU's jurisdiction is limited legally by the treaties and politically by the member states. This reflects the political decision of national governments to prevent the CJEU from closely scrutinizing legal acts across all areas of EU policy. The CJEU's limited jurisdiction has offered new arguments to those criticizing the EU for its **democratic deficit**, as full court scrutiny is deemed an essential requirement for a modern democracy and this is something that the EU appears to be lacking. Moreover as a further constraint, the CJEU has to share the enforcement of EU law with national courts as the latter are involved in the enforcement of EU law in national jurisdictions (see 'Jurisdiction').

Dissatisfied with the situation, the CJEU has attempted to remove the constraints imposed on it and cement and expand its authority by exploiting the vague provisions of the treaties and the political disagreements often arising between member states about crucial EU matters. The EU treaties are generally vague because as constitutional documents their provisions are drafted broadly and often as a result of political disagreements between the member states during negotiations. They establish only a general framework within which the EU and its institutions operate granting the CJEU and other EU institutions the ability to develop detailed rules and to fill any gaps in legislation. The CJEU has drawn on its judicial powers to make extensive use of this gap-filling opportunity, and has managed over the years to extend its powers and EU **competences** well beyond its boundaries and often at the expense of member states' influence. This has fuelled the argument about the CJEU's judicial activism. One of the techniques used by the CJEU is the **teleological** (or purposive) interpretation of the treaties, which involves 'the Court reading the text [of the treaties], and the gaps therein, in such a way as to further what it determines to be the underlying and evolving aims of the [Union] enterprise as a whole' (Craig and De Búrca, 2011: 185). Given that the 'underlying' aims of the Union cannot always be clearly inferred from the treaties, the CJEU has used the opportunity to advance its own vision for the Union by interpreting EU law in ways, which are often different from those of the member states (see Box 12.1). The CJEU has found in teleological interpretation a valuable tool to wield influence in the EU and to expand its power and therefore used it extensively.

BOX 12.1 AN EXAMPLE OF TELEOLOGICAL INTERPRETATION

The Court of Justice used teleological interpretation in Case 26/62 *Van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR I, a groundbreaking decision which shaped the legal order of EU and its relationship with the legal orders of the member states and other international agreements by establishing the principle of **direct effect**. Relying partly on the text of the Treaties existing at the time and partly on its own vision of the nature and role of the then European Economic Community (EEC), The Court ruled that member states had an obligation to respect the rights directly granted to their citizens by Community law and to allow individuals to enforce them in their courts. Member states had argued that Community law, as an international agreement between states, did not directly grant rights to individuals unless expressly permitted by the member states. The Court of Justice rejected this argument.

KEY POINTS

- The Court of Justice of the EU includes the Court of Justice, the General Court, and the specialized panels such as the European Civil Service Tribunal.
- The jurisdiction of the CJEU, which was originally limited, has expanded over the years as the EU's competences have expanded to new policy areas.
- The CJEU has general jurisdiction over all areas of EU activity except where such jurisdiction is excluded by the treaties.
- Over time, the CJEU has exploited the general and often vague content of the treaties and the political disagreements among member states to extend its powers and the authority of EU at the expense of member states.

Composition, structure, and procedure

The Court of Justice is based in Luxembourg and is made up of 28 judges (one judge per member state) and nine Advocates-General (AGs). The judges hear cases and adopt decisions, whereas AGs deliver impartial and independent opinions prior to the final decision. Their opinions are not binding on the judges but have a real impact on the final outcome of a case. The judges and AGs are appointed by the member states in accordance with their national traditions. These are usually individuals 'whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are juriconsults of recognized competence' (Article 253 TFEU). The appointment of women as judges is very rare and for a long period there were none in the CJEU. The first female judge, Fidelma Macken, was appointed by Ireland in 1999. The secrecy surrounding the appointment procedures and the political nature of the appointments (Barents, 2010: 713) has been addressed by the Lisbon Treaty. The amended appointments procedure requires that an advisory panel, comprising members of the Court, members of the national supreme courts, and prominent lawyers, one of whom is proposed by the European Parliament (EP), gives an opinion on the suitability of each candidate. Six of the nine Advocates-General are appointed by the six largest member states and three are appointed on a rotating basis by the remaining members. The LT allows for an increase in the number of AGs to 11. Finally, the Court also appoints a Registrar for six years who is responsible for procedural and administrative matters.

The judges are appointed for staggered terms of six years, which allows for a partial replacement of judges every three years. They are eligible for reappointment and there is no retirement age. The judges and AGs cannot be removed during their term in office and their duties end on their death or resignation. However, a judge or an AG can be dismissed by the unanimous decision of the other judges and AGs if they no longer fulfil the requisite conditions or meet the obligations arising from the office. The judges elect a President by secret ballot. Similarly, the AGs elect a First Advocate-General.

The Court of Justice sits in chambers of three or five judges or in a Grand Chamber consisting of 13 judges. Grand Chambers are used in important cases or if a member state or an EU institution so requests. The Court sits as a full Court only in exceptional cases. This would include proceedings concerned with the dismissal of a European Commissioner for example. The Chambers are presided over by their own respective president.

The procedure before the Court of Justice has a written and an oral stage. The written stage is the most important, comprising the application to the Court, the submission of the documents supporting the application, the defences, the communication to the parties of relevant documents, and statements of case. In the oral stage, which takes place in open court, the judge assigned to the case presents to the Court a report containing a summary of the facts and the arguments of the parties. At that point, the legal representatives of the parties may make oral submissions to the Court. The oral stage also includes examination of any witnesses or experts, as well as the delivery of the opinion of the AG. The final decision is adopted by a majority where necessary, but no mention of dissenting opinions is made in the judgment, with the latter signed by all judges and delivered in open court. This practice helps to maintain the anonymity and thereby the independence of the judges (Chalmers and Tomkins, 2007: 123). The judgment is subsequently published with a summary in the EU's Official Journal, and a more detailed version appears in the official law report. The decisions of the Court of Justice are final. In other words, there is no appeal process.

The General Court consists of 'at least' one judge per member state. However, the composition of the Court may soon increase to 56 as the member state governments appear to agree that this is the best solution to address the backlog of cases. The Treaty of Nice gave the General Court an independent status and more cases were transferred to it, such as the right to decide on certain preliminary rulings (see 'Jurisdiction'). The General Court has made a significant contribution to the development of administrative law, especially in the fields of competition and external trade law (Chalmers and Tomkins, 2007: 125). Unlike the Court of Justice, its cases tend to not involve sensitive political and constitutional issues. This allows the General Court to focus more on purely legal issues and fact finding. The rules for the appointment of judges at the General Court and their terms of office are similar to those of the Court of Justice: judges are appointed for a renewable six-year term following the advice of an expert panel. It does not have AGs but, when necessary, one of its judges will be appointed to perform this task. The judges elect a President and they appoint their own Registrar. Like the CJEU, the General Court usually sits in Chambers of three or five judges but it may also sit in a Grand Chamber of 13 judges. In special cases the General Court may sit as a full court. Its judgments are subject to appeal to the Court of Justice on points of law: in other words, appeals can be made only on the legal argumentation and never on the assessment of the facts. The General Court delivers its judgments in open court following written and oral proceedings. As in the Court of Justice, there are no dissenting or concurring opinions.

Finally, the European Civil Service Tribunal was created in 2004 to reduce the workload of the General Court by relieving it of cases involving the EU's civil service (including, for example, working relations but also invalidity, accidents at work, family allowances). The Civil Service Tribunal consists of seven judges appointed in a similar fashion as those in the Court of Justice and the General Court and ensuring a balance composition in terms of geography and national legal systems. The Tribunal elects its own President, whereas the number of judges sitting to hear cases varies. Its decisions can be appealed on points of law to the General Court. The decisions on appeal by the General Court may in turn be re-examined before the Court of Justice, in exceptional circumstances.

KEY POINTS

- The Court of Justice is currently composed of one judge per member state and nine Advocates-General whose duty is to perform the tasks assigned to the Court by the treaties.
- The General Court was created to lessen the workload of the CJEU. It consists of one judge per member state and unlike the Court of Justice it does not have permanent AGs.
- The European Civil Service Tribunal consists of seven judges. It was created to relieve the General Court of its workload by handling disputes involving the EU's civil service.
- The procedures at the Court of Justice have a written and an oral stage.
- The Court of Justice's decisions cannot be appealed but those of the General Court and the Civil Service Tribunal can be appealed on points of law.

Jurisdiction

The CJEU has often used its jurisdiction to adopt decisions that have a substantial political impact on the operation of the EU and on the EU's relationships with its member states. As far as judicial procedures are concerned, the distinction is often made between **direct actions**, which are brought directly before the CJEU and tried and decided by them, and references **for preliminary rulings**, which reach the CJEU via the intermediation of national courts, which seek the CJEU's advice on the interpretation of EU law. In this case, national courts remain competent to rule on the original case. Each type of action will be discussed in turn.

Direct actions

Direct actions can be brought by individuals, 'legal persons' (that is, companies, organizations, etc.), member states, or EU institutions. Actions brought by individuals and legal persons are handled by the General Court and on appeal by the Court of Justice. Actions brought by the member states and EU institutions are usually handled by the Court of Justice. However, since the Treaty of Nice the General Court has jurisdiction over certain direct actions brought by member states against the EU institutions, such as where an EU institution fails to act in breach of EU law.

BOX 12.2 INFRINGEMENT PROCEEDINGS INITIATED BY THE COMMISSION AGAINST GREECE

In 1991, the Commission initiated infringement proceedings against Greece, alleging its failure to comply with EU law on the disposal of toxic waste in Crete, where a rubbish tip was situated at the mouth of the river Kouroupitos. The tip operated in breach of EU law, which required that toxic and dangerous waste be disposed of without endangering human health and without harming the environment. The Greek government cited popular opposition to its plans to create new waste sites in the area for its failure to close the tip. The Court of Justice rejected the argument and in 1992 issued a judgment declaring that Greece was in breach of its obligations. Five years later, after the Greek government failed to comply with the 1992 judgment, the Commission once again brought the case to the CJEU. The Court of Justice, with its 2000 decision, imposed a payment of €20,000 for each day of delay in implementing the measures necessary to comply with the 1992 judgment. The new ruling proved more effective and, along with pressure exercised on Greece by other EU institutions, secured the closure of the tip.

Source: Case C-387/97 *Commission v. Greece* [2000] ECR I-5047.

There are three types of direct action: **infringement proceedings**; actions for judicial review (also known as the annulment procedure); and actions for damages. The EU treaties provide the Commission and member states with the power to bring infringement proceedings before the Court of Justice against member states failing to fulfil their Union obligations. Such a situation could arise, for example, if a national law were to be inconsistent with EU law or if the latter were not implemented by member states in a timely or proper fashion. Therefore, infringement proceedings aim at securing member state compliance. These proceedings have an administrative stage at which the Commission and the member state try to resolve the matter through negotiations; and a judicial stage where, following the failure of negotiations, the Court is involved. If the Court of Justice confirms the alleged infringement, the member state will have to comply; otherwise the Commission may bring a new action before the Court asking for the imposition of a penalty payment. This penalty may be a lump sum or periodic payment, or both. The provision for a penalty payment was added as a means to ensure member state compliance with Union law (see Box 12.2).

Judicial review of Union acts by the CJEU is intended to ensure that the EU is subject to judicial scrutiny and control. The CJEU has jurisdiction to review the legality of acts of the EU institutions intended to produce legal effects. This review covers **regulations**, **directives**, and decisions (see Box 12.3), but also any other EU act with binding force or which produces legal effects. If the action taken is successful, the CJEU will declare void the act concerned. The annulment of an EU act may occur due to lack of competence if an EU institution adopts an act that it has no power to adopt under EU law; it may result from an infringement of essential procedural requirements such as where an EU institution fails to comply with a requirement to explain its decision; it may arise from an infringement of EU treaties or of any rule of law relating to their application; finally, it may involve a misuse of powers, for example, where an EU institution exercises its powers for an unauthorized purpose.

EU institutions and member states have the right to bring an action of judicial review to the CJEU, but natural and legal persons—individuals and companies—are able to do so only if they pass a strict admissibility test imposed by EU law. The main reason given by the Court of Justice for the strict test in Case C-50/00 *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677 was that these applicants could use national courts instead. A potentially more convincing reason might be that the Court's aim was to prevent a

BOX 12.3 TYPES OF EU LEGAL ACTS

- *Regulations* have general application and are binding and directly applicable in all member states. 'Directly applicable' means that they do not normally require member states to adopt measures for their implementation.
- *Directives* are addressed to all or some of the member states. Directives lay down specific binding objectives that have to be achieved by specific dates, and leave to the discretion of the member states the decision on how best to achieve these objectives.
- *Decisions* are addressed to individuals and are binding in their entirety.
- *Recommendations* and *opinions* shall have no binding force.

Source: Article 288 TFEU.

...load of individual cases that would hamper its work (Arnull, 2006: 93). The Lisbon Treaty amends the admissibility test, giving private applicants more access to the CJEU. In addition to the review of EU acts, EU law provides a right to legal action in cases where an EU institution has *failed to act* in violation of the law. Lastly, EU law allows for compensation to be paid to individuals for damages suffered as a consequence of the illegal activities of Union institutions.

References for preliminary rulings

The enforcement of EU law is not a responsibility of the CJEU alone but also of national courts. The latter will be involved in cases where EU legislation is applicable in the jurisdiction of member states either directly (for example, regulations are enforced in the member states without their involvement) or indirectly through national agencies (for example, directives are enforced in member states through the enactment of national legislation and with the involvement of national bodies). In these cases national courts may be called upon to resolve disputes arising from the enforcement of EU law between citizens of the state or between citizens and their government. National courts may also have to resolve conflicts between EU law and their national laws. These instances require a mechanism that involves the Court of Justice, allowing it to offer authoritative interpretations of EU law and to coordinate action at the national level.

Preliminary references provide such a mechanism. Without it, the coherence and application of EU law would be at risk since different national courts could give contradictory interpretations of EU law provisions. According to Article 267 TFEU, a national court *may*—and where the decision to be adopted is not subject to further appeal *must*—refer questions about the interpretation of EU law arising in the cases examined by them to the Court of Justice. The Court will then provide the relevant interpretation (the preliminary ruling) and the national court will use it to decide the case. The national court is not obliged to make a reference if the meaning of EU provision is clear or if the Court has already ruled on the issue in a previous case. The reference to the Court of Justice does not have the form of an appeal, which would imply reference to a hierarchically higher court, but is aimed only at clarifying specific issues of interpretation and application of EU law. The relationship between national courts and the Court of Justice in this process is cooperative and non-hierarchical. The Court's jurisdiction concerns preliminary rulings on the interpretation of EU treaties, and on the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union.

Preliminary rulings have familiarized national courts with EU law and have played a central role in shaping the legal order of EU and its relationship with its member states because the Court of Justice has used them to issue some very important decisions with great political impact. Indeed, some of the most important legal principles of EU law, such as supremacy, direct effect, and state liability, have been defined by the Court in response to preliminary references. In the *Van Gend en Loos* case (see Box 12.1) the Court defined the principle of direct effect for the first time. The political message conveyed by this decision to member states was that EU law will intrude into the domain of national sovereignty in order to achieve adequate enforcement of EU law. In its efforts to ensure the compliance of member states, the Court was greatly assisted by two powerful allies: national courts, which saw in the enforcement of EU law an opportunity to expand their jurisdiction domestically, and the citizens of the member states who wanted to take maximum advantage of rights granted to them by the EU and to stop their governments denying them these rights.

In Case 6/64 *Costa v. ENEL* [1964] ECR 85, another preliminary rulings case, the Court defined the principle of supremacy of EU law for the first time. It established that EU law, irrespective of its nature (whether it is a treaty provision or a legal act), could not be overridden by domestic law, irrespective of the nature of national law. In other words, if there is a conflict between EU law and national law (even a national constitution), EU law must prevail. Further, in its famous ruling in Joined Cases C-6/90 and C-9/90 *Andrea Francovich and others v. Italian Republic* [1991] ECR I-5357 (1991), the Court established for the first time the principle of state liability, according to which individuals can seek compensation in national courts for loss suffered as a result of member states' breach of EU law (see Box 12.4).

The adoption of fundamental principles such as direct effect, supremacy, and state liability, which shape the legal order of EU and its relationship with member states, demonstrate the great value of the preliminary rulings procedure for the development of the Court's jurisprudence and its influence on the political

BOX 12.4 STATE LIABILITY FOR BREACH OF EU LAW

The applicants in *Francovich* brought proceedings against Italy for failure to implement Directive 80/987, which provided employees with a minimum level of protection in the event of their employer's insolvency. The directive established that the member states should give specific guarantees for payment of unpaid wage claims. The applicants, who were owed wages by their insolvent employers, sued the Italian government, claiming that the latter had to pay them either the sums payable under the directive or compensation for the damages suffered due to the non-implementation of the directive.

The Court of Justice rejected the first argument but accepted the second, concerning the right to compensation. The Court stated the full effectiveness of EU law would be impaired and the protection of rights which it grants would be weakened if individuals were unable to obtain compensation when their rights were infringed by a breach of such law for which a member state was responsible. As a result, the principle of state liability for breaches of EU law is inherent in the Treaty. The Court of Justice found further support for its argument in Article 10 TEU (ex Article 5 EC) which requires member states to take all appropriate measures to ensure the fulfilment of their obligations under EU law, including the obligation to nullify the unlawful consequences of a breach of such law.

Source: Joined Cases C-6/90 and C-9/90 *Andrea Francovich and ors v. Italian Republic* [1991] ECR-I-5357.

processes in Europe. Moreover, they demonstrate the Court's great success in exploiting the procedure to advance the goals and reach of EU law at the national level. The Court has transformed the EU's relationship with national courts from horizontal to a de facto vertical form of cooperation, where the Court, operating as a European supreme court, is able to impose its rulings on national courts. Finally, these cases illustrate the application of a teleological approach to the provisions of the Treaty, allowing the CJEU to adopt important legal doctrines and principles on the basis of a creative interpretation of the Treaty texts. This has led to concerns about the CJUE overstepping its judicial powers and becoming too political. The chapter now addresses this issue.

KEY POINTS

- Direct actions begin and end in the CJEU. They can be brought by individuals and 'legal persons', such as companies, member states, and EU institutions.
- There are three types of direct action: infringement proceedings, actions for judicial review, and actions for damages.
- Preliminary rulings provide national courts with the right to refer to the Court of Justice for guidance on issues of EU law arising in cases brought before them.
- Direct actions and references for preliminary ruling have played a crucial role in the establishment of the legal order of the EU and have shaped the relationship between the EU and the member states.

'Judicial activism' and the reaction of the member states

The CJEU's involvement in politically sensitive issues has not been limited to defining the nature of the EU or its relationship with the member states. Judicial activity has also covered inter-institutional relations within the EU and the promotion of EU policies. The significance of the CJEU in shaping inter-institutional relations can be seen in a series of important decisions such as Case 294/83 *Partie Ecologiste 'Les Verts' v. Parliament* [1986] ECR 1339, the *Comitology* Decision 87/373/EEC of 13 July 1987, and *Parliament v. Council (Chernobyl)* [1990] ECR 452,where the Court of Justice ruled that the acts of the European Parliament were subject to judicial review; and that the EP should be given the right to stand as an applicant in court procedures, even though this at the time was not explicitly provided for in the Treaty. These decisions led to the redrafting of the relevant Treaty provisions in the TEU and the Treaty of Nice, giving the EP first limited, and then full standing rights in the Court in judicial review cases. On several occasions the Court of Justice has demonstrated its commitment to the promotion of democratic principles within the EU. By way of example, in Case 45/86 *Commission v. Council* [1987] ECR 1493, the Court made it clear that the EU institutions had an obligation to give reasons for their acts, which would then be checked by the Court.

With regard to the promotion of EU policies, the free movement of goods is an illustrative example

The then Article 28 EC (now 34 TFEU) prohibits quantitative restrictions on imports and all measures having equivalent effect'. Its aim is to prevent member states from restricting the trade of goods within the Union by placing quotas on the amount of imported goods or adopting measures equivalent to quantitative restrictions (MEQR). The Court of Justice, in two seminal decisions, Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837 and Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1978] ECR 649, adopted a very broad interpretation of MEQR, including in the prohibition of then Article 28 EC not only national rules that directly discriminate against imports, but also rules which, without discriminating against imports, have a negative impact on the trade of goods within the EU. Such rules concern, inter alia, the shape, size, or weight of the product. The Court's broad understanding of MEQR has had a very positive impact on the establishment of a **single market** for goods in the EU by forcing member states to make policy adjustments and amend considerable parts of their domestic legislation in order to meet the demands of the Court.

More recently, in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-0779, and Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767, the Court of Justice recognized the workers' right to strike as a fundamental right within the EU but held that the exercise of this right might infringe employers' rights of freedom of movement and establishment under Articles 49 and 56 TFEU (ex 43 and 49 TEU). Industrial action in such cases must be justified and proportionate. The decision was characterized as 'disappointing', because the Court subordinated the right to strike to free movement, showing that its primary concern was the removal of barriers to intra-EU trade rather than the promotion of human rights (Davies, 2008: 147).

Occasionally, national courts express their disagreement with CJEU's rulings but finally accept them, thus fostering integration and policy change (Obermaier, 2008: 735). National governments seem to have followed a similar stance (Fennelly, 1998: 198). While they have largely excluded the CJEU's jurisdiction from politically sensitive areas, such as security, defence, and foreign policy, they have cautiously accepted the expansion of the role of the CJEU in European affairs and its controversial rulings in other areas. They have even amended their national constitutions to safeguard the unhindered implementation of EU law and thus pre-empt court action (Hartley, 2007: 238). There are various possible explanations for the national governments' reaction. One may be that the CJEU's decisions serve the governments' own interests. Court of Justice rulings have been a useful tool to override popular opposition on important issues such as the nature of the EU or the relationship between EU and member states. Also governments have few reasons to fear the CJEU's activism, since they are always in a position to retaliate effectively. Governments could merely fail to comply. They may be able to amend the EU treaties and their national constitutions, or insert opt-outs in the treaties that would deprive the Court of jurisdiction. For example, according to the Lisbon Treaty, the Irish Republic and the UK have the right to **opt in** or **opt out** of EU policies in the Area of Freedom, Security, and Justice. The **Treaty on Stability, Coordination, and Governance** only assigns the Court supervision of the budgetary discipline of member states in the euro zone. The Court has no effective responses to those measures. However, its activism is not a **zero-sum game**. As the history of European integration shows, the Court may not be actually competing against member states, but it may be assisting them by offering solutions that advance common interests when political processes fail (Craig and De Búrca, 2011: 64).

KEY POINTS

- The CJEU's decisions have considerable political impact, not only on the relationships between the EU and member states, but also on both EU inter-institutional relations and the promotion of EU policies.
- National courts and governments appear to support the CJEU's decisions despite occasional opposition.
- Member states can restrict the CJEU's power by amending EU treaties, fuelling domestic opposition or inserting opt-outs in the treaties.
- The CJEU, with its strong commitment to European integration, could be a useful tool in advancing common values in periods when political processes fail.

Conclusion

The CJEU has '... no rival as the most effective supranational judicial body in the history of the world' (Stone Sweet, 2004: 1). Its history has been one of great successes and the CJEU will always have a prominent position between the main actors of European integration. The 21st century, however, is presenting the Court of Justice with new challenges; namely, EU enlargement, the financial crisis, and the EU's accession to the **European Convention on Human Rights (ECHR)**. These are dealt with in turn below.

The Eastern **enlargement** led to the appointment of several new judges to the Court of Justice from countries with very diverse legal traditions; it also led to a large increase in the Court's workload. So far the transition has been smooth and the Court has developed mechanisms to deal with the enlargement challenge, such as by ensuring that the composition of the chambers includes a balanced number of more experienced and newly arrived judges (Naômé, 2008). While it is still too soon to say how the situation in an enlarged Court will develop in the long term, it is obvious that Court is faced with a heavier workload: in 2014, 912 cases were submitted to the Court of Justice, a clear increase compared to 790 cases in 2013 and 722 in 2011. To address this challenge, the Court proposed the appointment of 12 new judges to the General Court. The member state governments are likely to agree a doubling in the number of judges (up to 56), as they have typically been unable to agree on how to allocate the 12 judges initially requested by the Court and thus prefer to appoint a new judge per member state. It is interesting to note that the President of the Court, Marc Jaeger, agrees that it would be possible to address the Court's workload by other means, such as increasing, the number of legal secretaries (Robinson, 2015).

The heavier workload may impact also on CJEU's activism. However, even before the latest rounds of EU enlargement the Court's activism had shown signs of slowing down. It seems that the deepening of European integration derived from the strengthening of the European Parliament's role as co-legislator and the gradual expansion of EU competences by agreement of member states helped to 'cool down' the Court's activism.

The aftermath of the financial crisis in the eurozone, has brought forward significant revisions of EU policies on the economic front which have affected the Court's jurisdiction (see Chapter 26). Despite being an intergovernmental treaty, **the Treaty of Stability, Coordination and Governance in the Economic and Monetary Union**, which commits EU member states to balanced budgets, gives the Court a quasi-executive new role—that of ensuring member state compliance with EU fiscal rules. As Chalmers argues, this is 'symptomatic of the Court moving increasingly to centre-stage in fiscal and welfare policy-making within the European Union' (Chalmers, 2012). The Court has also ruled on the compatibility of the **European Stability Mechanism** (the EU's permanent rescue fund to deal with the financial crisis) and, more controversially, supported the European Central Bank's refusal to disclose documents concerning financial transactions by the Greek government between 2001 and 2007 (Beck, 2014).

Another major challenge for the CJEU is the EU's accession to the European Convention on Human Rights (ECHR) as required by the Lisbon Treaty. The protection of human rights has never been the strongest aspect of the EU's work. Thus while the CJEU has developed its own jurisprudence in the area and the Lisbon Treaty, which contains a list of rights that are to be protected, has incorporated into EU law the Charter of Fundamental Rights, an adequate level of protection of human rights in the EU will only be achieved through formal accession to the ECHR (Jacqué, 2011). But the ECHR is a Treaty external to the EU, which has its own court, the **European Court of Human Rights (ECtHR)**. The EU's accession to the ECHR will subject all EU institutions, including the courts, to the jurisdiction of the ECtHR, hence the EU and the CJEU will see their political and legal autonomy compromised. A draft agreement was finalized in April 2013, and in July of that year the European Commission requested an opinion from the CJEU for on the agreement's compatibility with the treaties. In its opinion of 18 December 2014, the CJEU ruled against the draft agreement, stating its incompatibility with the treaties. According to the Court, the agreement to join the ECHR undermines the autonomy of EU law; does not take account of the *sui generis* nature of the European Union (in other words, the EU is not a state); does not coordinate the level of rights protection between the EU's Charter on Fundamental Rights and the ECHR; and opens the

for preliminary rulings being brought before the ECtHR (rather than the Court of Justice) on the application of the rights and freedoms guaranteed by the ECHR. In light of the Court's opinion, and given that EU accession to the ECHR also requires ratification by all EU member states and the member states of the **Council of Europe**, this process will take some time to be completed, while legal and political arguments will have to be balanced. It is obvious, however, that despite and beyond these challenges, European integration needs the CJEU's judicial support to offer legitimacy and consistency to the process.

QUESTIONS

1. What is the role of the CJEU in the process of European integration?
2. Why were the specialized courts established? What function does the European Civil Service Tribunal perform?
3. How does EU law ensure member state compliance with their EU obligations? What is the contribution of the Court of Justice?
4. Who can bring an action for judicial review and why does this matter?
5. To what extent and in what ways is the preliminary rulings procedure necessary?
6. What is the political significance of the Court of Justice's rulings in *Van Gend en Loos*, *Costa v. ENEL*, and *Francovich*?
7. Do you agree with the criticism of the CJEU's judicial activism?
8. What are the major challenges facing the CJEU?

GUIDE TO FURTHER READING

Arnull, A. (2006) *The European Union and its Court of Justice*, 2nd edn (Oxford: Oxford University Press) This volume records and analyses the contribution the Court has made to the EU's legal framework.

Arnull, A. and Wincott, D. (eds) (2002) *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press) This contains an interdisciplinary collection of essays considering various aspects of accountability and legitimacy in the EU.

Craig, P. and De Búrca, G. (2015) *EU Law: Texts, Cases and Materials*, 6th edn (Oxford: Oxford University Press) This successful textbook offers an exhaustive analysis of the role of the CJEU and the relationship between the EU and national courts.

Dashwood, A., Dougan, M., Rodger, B., Spaventa, E., and Wyatt D. (2011) *Wyatt and Dashwood's European Union Law*, 6th edn (Oxford: Hart Publishing) This textbook offers an exhaustive analysis of EU law and institutions.

Lenaerts, K. and Van Nuffel, P. (2011) *European Union Law*, 3rd edn (Oxford: Sweet & Maxwell) This textbook offers a detailed analysis of EU law and its institutions including the courts.

WEBLINKS

http://eur-lex.europa.eu/homepage.html EUR-Lex provides direct free access to European Union law, specifically the Official Journal of the European Union, as well as the treaties, legislation, case law, and legislative proposals.

http://curia.europa.eu/jcms/jcms/j_6/ The official website of the EU courts.