CHAPTER 6

The European Court of Justice: Guardian of European Integration

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A Most Influential Court

Founded in 1952, the European Court of Justice (ECJ) began as a small 'coal and steel court' that 'did little more than control the legality of the High Authority's activities' (Stone Sweet 2010: 20). Within a relatively brief period of time, the ECJ transformed into a fully fledged constitutional court of an expanding Union, prevailing over national courts and carrying an ever-growing caseload as a result. Today, the ECJ is one of the most influential institutions of the European Union (EU).

The formal objective of the ECJ (TEU, art. 19 sub. 1) is to ensure that the interpretation and application of the Treaties and of secondary EU law is observed (Amtenbrink and Vedder 2010: 94). The Court meets this objective by advising national courts how to interpret EU law (the preliminary ruling procedure), ruling on infringement procedures

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against member states (mostly initiated by the European Commission), and annulling unlawful actions by EU institutions.

The Court has consistently interpreted the founding treaties to further an ever-closer Union. Its most famous rulings (*Van Gend en Loos* and *Costa*) established what is now widely accepted as a core principle underlying the EU: the laws of the EU directly apply to the citizens of the member states and prevail over national laws. By treating the treaties as a constitutional charter, the ECJ has made the EU 'more than an organization, more like a nonunitary polity' (Weiler 1991: 247).

The ECJ's rulings have had far-reaching effects on the integration of the EU. How did the ECJ, starting out as a very small organization, 'tucked away' (Stein 1981: 1) in a provincial corner of Europe, become such an influential institution? How did it manage to impose its interpretation of the Treaties upon member states during a time when its influence was limited and its existence unknown to most EU citizens? How has it performed this feat without alienating the EU member states? And how has the Court remained relevant in the face of a changing environment (think of treaty changes, the expansion of the Union and waves of Euroscepticism)? This is the puzzle this chapter seeks to resolve.

We start with a brief institutional history of the ECJ and describe its impact over the years. We then analyse the Court as an institution, describing its institutional characteristics and analysing its trajectory of institutional development. We end this chapter with lessons for institutional architecture in the international arena.

Foundation, Organization and Impact

The European Court of Justice was founded with the Treaty of Paris (1952) that established the EU's predecessor, the European Coal and Steel Community (ECSC).[1] The official objective was to ensure that 'in the interpretation and application of this [ECSC] Treaty and of rules laid down for the interpretation thereof, the law is observed' (Saurugger and Terpan 2017: 11). In other words, the Court was created to ensure that the High Authority of the ECSC would not overstep its jurisdiction and breach the sovereignty of the member states (Tamm 2013: 16).

We don't know much about the inner workings of the Court, beyond what its statute and rules of procedure tell us.[2] The deliberations are secret and only ruling judges can attend. Dissenting opinions are not made public.[3] The Court has been compared to 'a black hole, from which

nothing – except very brief, magisterial rulings with no hint of disagreement among the judges – can escape' (Pollack 2017: 602). Secrecy was built into its DNA: one working language (French) was reportedly adopted to prevent that interpreters would attend the secret deliberations (Saurugger and Terpan 2017: 14).

The Court has an internal division of labour. It operates in chambers. The small chamber consists of three to five judges. The grand chamber is made up of 15 judges. It assembles when the case is of greater legal difficulty or importance, or when a member state or a Union institution demands it.[4] If the case is considered to be of exceptional importance, the full court takes responsibility. It also decides on serious misconduct of officials, such as Commissioners.[5] The rulings of the court are collegial and judges try to reach consensus. If this fails, a simple majority suffices (Arnull 2006: 9).

Every member state appoints one judge to the ECJ for a (renewable) six-year term (every three years half of the judges are (re)appointed). Other member states must consent with the choice. The Treaty of Lisbon introduced a new committee in Article 255 TFEU to check the suitability of candidates to be judge or advocate-general. Eleven advocate-generals assist the Court and provide the judges with an impartial, independent and reasoned advice on how to judge a case before the Court starts its deliberations. The judges don't have to follow this advice, but they generally do (Arnull 2006). Judges are supported by a cabinet of legal *référendaires* (junior lawyers) and supportive staff (including clerks, a research and documentation service and interpreters).[6]

Judges are supposed to act independently and impartially, not representing their home country. To limit potential conflicts of interest, judges are not appointed as rapporteurs on cases from their home country. The secrecy surrounding the proceedings and the absence of dissenting opinions protect individual judges from external scrutiny. As judges are term-limited and (re-)appointed by their home governments, the salary gap to national judges in most member states is said to be used as possible lever as political pressure (Schmidt 2018: 28).

Scholars agree that the ECJ has been highly influential in advancing European integration beyond what could have been achieved via decisions of the EU's political institutions (Schmidt 2018: 27; Stone Sweet 2010). According to Stone Sweet (2010: 2), the 'significance of the ECJ's impacts rivals that of the world's most powerful courts'.

The Court's initial prospects for becoming a powerful institution were rather slim, however. The mere 'coal and steel court' was not intended to function as a court but rather as an arbitration tribunal (Vauchez 2015: 45–46). The limited mission was reflected in the composition of the Court: only three members had a legal degree, the others were technical experts.

The Court obtained a more prominent position with the Treaty of Rome (Tamm 2013: 16). The 1957 Treaty created the European Economic Community (EEC), incorporating the ECSC. In addition, it established the European Atomic Energy Community (EURATOM). To prevent a proliferation of European institutions, the Treaty 'pooled' the institutions for these communities, with the Court obtaining jurisdiction over the EEC and EURATOM (Arnull 2006: 6–7).

The Rome Treaty also expanded the Court's competences. The introduction of the preliminary ruling procedure allowed lower courts to directly ask the ECJ how a European law or regulation should be interpreted. The preliminary ruling procedure has become an especially effective mechanism, both for fostering European integration and for the ECJ to establish itself as more than just an international court (Tamm 2013: 24). Intended as a means to clarify the meaning of EEC rules, it evolved into a mechanism in which national courts check the compliance of national rules with EU law in response to the claims of private litigants. In practice, this provided near-direct access to the ECJ for citizens and corporations (without having to litigate through the national court hierarchy first). It did not take long for lawyers with an interest in European law to understand the opportunity that this new competence had created (Vauchez 2015).

In addition, the Rome Treaty introduced the annulment procedure, which allowed the ECJ to review the legality of acts produced by the European Commission and the European Council (Adam et al. 2020). The Rome Treaty also created the infringement procedure to ensure that member states comply with Community law. Both the Commission and member states could start an infringement procedure at the Court, which would then judge whether a member state was in violation. These procedures each elevated the importance of the ECJ as a protector of the EU Treaties against undermining efforts of either member states or EU institutions.

After a careful start marked by 'self limitation' (Vauchez 2015: 48–49), two landmark rulings spurred a transformation of the European legal

order, and the Court's competences. Both rulings were triggered by a request for a preliminary ruling submitted by a national court (Arnull 2006: 640). The first landmark ruling (*Van Gend en Loos*) in 1963 gave private plaintiffs the right to evoke a European provision directly in a national court; this principle became known as the principle of direct effect (Weiler 1991). In those days, international agreements usually did not directly impact citizens unless these agreements were transformed into national law. The *Van Gend en Loos* ruling established that citizens and corporations could directly invoke European law, superseding national legislation. EU law in effect became national law (Alter 2009: 113–115), thus eroding the sovereignty of member states.

The implications of the *Van Gend en Loos* ruling were not immediately understood outside legal circles, however. This was partly the result of the careful wording of the ECJ ruling and the limited attention that, in those days, national governments paid to the little Court in Luxembourg (Vauchez 2015). However, it also points to a crucial feature of the Court's power. With its rulings, the Court provides an opportunity structure that other actors, notably the European Commission, have to seize and put to use.

The second landmark ruling (Costa vs. ENEL) in 1964 clarified matters in no uncertain language. The ECJ confirmed the 'prevalence of EC law in a clear, almost provocative manner' (Vauchez 2015: 136). Not only did the ECJ confirm the *Van Gend en Loos* ruling, it established that European law always supersedes national law since states transferred rights to the community. This has become known as the principle of supremacy, and together with direct effect it gives constitutional status to EU law. The *Costa* ruling sent shockwaves through Europe. During a time when integration of the European Community was stalling (Vauchez 2015), *Costa* was immediately recognized as a landmark ruling.

The principles of direct effect and supremacy have had a profound effect on European integration. The principles enabled citizens in national courts to directly invoke European rules. In essence, these principles turned national courts into European courts, enabling individuals to force states in the national court to comply with European rules (Van Middelaar 2013: 50–51). This fostered the implementation of EU law since the task of bringing cases to the Court was no longer only upon the Commission (Van Middelaar 2013: 48–49).

The Court subsequently developed these principles further in its case law (Arnull 2006: 643–644). As a result, the European Treaties were

endowed, retrospectively, with the aura of a European constitution. The ECJ thus created a new legal layer, an alternative supreme legal order, which would ensure the impact of European rules across the member states. The policy goals of the Treaty, namely the four freedoms of goods, services, persons and capital as well as competition rules (and after the Maastricht Treaty citizenship rights) became constitutionalized, and subject to the Court's interpretation.

The ECJ did not stop there. It helped the European Parliament to increase its powers (Arnull 2006: 649). It promoted the internal market by overruling trade-inhibiting measures (Arnull 2006: 647–648). And it established fundamental rights that cannot be found in the Treaties (Saurugger and Terpan 2017: 26–28), in response to criticism of some national supreme courts. Today's Court 'applies Treaty law to policy areas that were formerly assumed to be in the domain of national governance, interprets EU statutes as if certain provisions express values of higher, constitutional status, and holds that specific policy dispositions are required by Treaty Law' (Stone Sweet 2010: 25). Altogether, the Court has extended its competences beyond what could be imagined in the 1950s.[7]

This development is remarkable because the principles that ended up underpinning it had never been incorporated into the Treaty texts. Nor did member states necessarily agree that community law should supersede national law and that citizens could derive rights directly from the Treaty (Alter 2009: 95; Van Middelaar 2013: 49). The EU Treaties do not contain a Bill of Rights, but the Court constructed a formidable apparatus to review Community Acts against it anyway (Weiler 1991: 2437). By securing direct effect and supremacy, the Court, in effect, 'rewrote the Treaty' (Stone Sweet 2010: 15).

The Court's impact has been immense. Its rulings have pushed integration in a large variety of EU domains (Schmidt 2018: 246). The Court can set the agenda if the treaty is silent or ambiguous, which usually results in empowering the Commission to act (Dehousse 1998: 82–84). In periods of stagnating integration, the Court functions as a policy innovator, with its ruling, for example, invigorating the harmonization of product standards (Dehousse 1998: 84–88; Saurugger and Terpan 2017: 201–203). ECJ rulings can spur EC legislation by pressuring member states to form EU policy. The writing on the wall is clear: if they don't act, the ECJ will rule on the basis of the Treaty instead of on secondary law, so that member states will forego influence over the outcome.

The Institutionalization of the Court

The ECJ has proven an important force in the integration of EU member states. In fact, the Court has steadily ascended the ladder of institutionalization, even as European integration itself has followed a more erratic pattern. To assess the ECJ's level of institutionalization, we make use of Selznick's (1957) three analytical dimensions: mission, inculcation and legitimacy. The first dimension (mission) refers to the envisioned identity of the organization: what does it stand for? What does it seek to accomplish and how? The second dimension (inculcation) refers to the dedication of the workforce to the espoused mission of the organization: are employees unified in their belief in the mission? The third dimension (legitimacy) refers to the external support that every public organization needs: do relevant stakeholders accept and defend the Court's mission and proposed ways of working? By assessing the ECJ on each of the three dimensions, we create an 'institutional picture' of the level of institutionalization.

A Clear Mission: Furthering 'Europe'

Most observers seem to agree that over time, the ECJ has come to adhere to a set of guiding principles in its daily work. The Court has been committed to the ideal of an 'ever-closer Union' (Schmidt 2018: 51; Vauchez 2015); its working practice being informed by the 'spirit of the treaty' (Van Middelaar 2013: 50; Burley and Mattli 1993: 68; Saurugger and Terpan 2017: 22; Tamm 2013: 14). The Court has cast itself as the guardian of the Treaties, offering as proof its landmark rulings that were delivered during the Court's 'revolutionary years' (Vauchez 2012: 60). There seems to be little doubt within the Court with regard to its *raison d'être*. The legal doctrines of direct effect and supremacy have been translated into what Vauchez (2012: 55) describes as a 'specific judicial style' which has given rise to a 'striking linguistic and legal stability of EU case law' (Vauchez 2015: 188).

Over time, the ECJ built up a unique competence as the Chief Interpreter of the European Treaties. As the Treaties have become the touchstone for the development of European case law, the texts remain in constant need of authoritative interpretation and judgement. During the 1960s, the period of institutional ascendency, the Court had six judges who had directly participated in the negotiations preceding the

Paris/Rome treaties. The Court housed a unique group of founding fathers invested with authority to interpret the treaties (Vauchez 2015: 112).

The ECJ's unique competence and its distinct judicial style turned the Court into a key venue for those lawyers schooled in its 'distinctive rules and operational logic'. Those who remained unschooled in its way of operation found it hard to win their case (Vauchez 2015: 83, 104). This created opportunities for those who were knowledgeable—Vauchez (2015) calls them Euro-lawyers—and who just happened to believe in the same ideals that the Court sought to achieve. The ECJ's mission thus had a far-reaching effect on those who sought to fight or employ European law.

A Dedicated Workforce

The Court has been described in near-idyllic terms, as a 'family' that lunches together while engaging in 'intense debates [that] take the form of disinterested legal discussion based on esteem and friendship' (Vauchez 2015: 164). Students of the Court recognize a 'transnational judicial esprit de corps' that is supported by institutional rituals, like celebrating its anniversaries and publishing *Festschriften* to honour retiring distinguished judges (Vauchez 2015: 53, 159–160; see below).

The Court, as an organization, has been marked by strong leadership of a kind that has been described as being 'more pronounced than is found in other courts' (Cohen 2017: 65). There is a focus on the consistency of rulings, which is considered crucial for achieving compliance. The Court has in place a system of 'strong internal monitoring for uniformity', which is applied through the lawyer-linguists, the lecteurs d'arrêts, who check the briefs before they are discussed in the ECJ chambers.

The consistency of the Court's judicial style and jurisprudence is impressive given the big changes that were visited upon the Court over the years. The enlargement of the EU, the widening of the EU's policy scope and the transformations that followed eight reform treaties created new audiences and new demands. Legendary judges retired and the Court expanded with the admission of new member states. In a period of three years (2004–2007), the Court doubled in size (Vauchez 2015: 155). In 2018, 75 judges were working at the ECJ and the General Court. There were 11 Advocates General. In total, there were 537 posts in the cabinets, and 994 posts in the language services (CJEU 2019b: 55, c: 18).

A High Level of Legitimacy

The Court has become the authoritative interpreter of EU law (Stone Sweet 2010: 15). But the ECJ, as any court, cannot enforce its rulings: 'it does not enjoy the power of the purse nor that of the sword' (Pollack 2017: 143). Gaining legitimacy is notoriously hard for international organizations that, by definition, are not democratically accountable, not grounded in domestic law and do not answer to national politicians. The ECJ is not different: it relies entirely on its legitimacy for its rulings to be accepted in the member states—especially when the Court rules against a member state. When the Court is not considered a legitimate source of legal authority, member states may become less responsive to its rulings.

The environment in which the Court operates has become more challenging over time. While the ECJ could still deliver monumental rulings without much notice in the early 1960s, those days would soon be over. The mid-1970s proved a turning point. As the EC did not manage to cope with the economic crises of the 1970s in a cooperative way, its institutions came under fire. The ECJ received its 'first barrage of criticism' from national governments, which produced threats to redefine the Court's powers (Vauchez 2015: 157).

Viewed from this angle, the ECJ can be considered highly successful. The ECJ's key external stakeholders—national governments, national courts and the general public (Dehousse 1998: 135)—demonstrate acceptance if not outright support for the Court.

It is true that *member states* have at times expressed reservations with the expanding mandate of the Court.[8] The Court had successfully pushed integration beyond what national governments would have agreed to (or did agree to) during intergovernmental negotiations (Stone Sweet 2010). But member states did not clip the Court's wings during the many Treaty negotiations that over the years have presented them with opportunities to do so. The Court is funded on a structural basis, the AGs and judges are frequently reappointed by the member states (Schmidt 2018: 29) and compliance with ECJ rulings is high (e.g. Saurugger and Terpan 2017: 117). A powerful indicator of the Court's legitimacy is that the member states accept Court rulings even when the rulings are (seemingly) against their interests (Dehousse 1998: 142).[9] Altogether, the ECJ has been fairly resistant to mechanisms of court curbing (overriding verdicts, resource punishment, jurisdiction stripping, court packing, judicial selection and

reappointment and eroding public opinion) (Kelemen 2012: 44–45) that the member states might use to keep the ECJ in check.

Support from *national courts* has been especially important. The ECJ has no means to force national courts to comply with its rulings (Dehousse 1998: 138). If national courts would not acknowledge the ECJ's principles of direct effect and supremacy, EU law could simply be ignored (Alter 2009: 94–95). The ECJ has consistently received support from national (especially lower) courts, which also allows them to bypass higher courts. Compliance with preliminary rulings is nearly perfect (Stone Sweet 2010: 17). The high caseload can be seen as further proof of legitimacy (Schmidt 2018: 37). It helps that support for the Court in the EU's *legal community* has always been high (Schmidt 2018: 18). The wider legal community of lawyers and scholars appears reluctant to criticize ECJ in academic journals; Conway (2012: xv) speaks of a 'language of love' between EU lawyers and the ECJ.

It is notoriously difficult to gauge *community support* for an organization of which the larger public is mostly unaware. Even those who are aware of its existence are generally not informed about the actions of the Court (Dehousse 1998: 145; Gibson and Caldeira 1995: 470). While the data is limited in scope, it does at least suggest that the Court enjoys a level of social capital (cf. Alter 2009: 82). Eurobarometer data suggests that the ECJ is the most trusted EU institution, enjoying higher levels of public support than national political actors (Kelemen 2012: 47–49). Even when the ECJ rules against the interest of a member state, this does not influence citizens' trust levels in the affected member state (Kelemen 2012). The active use of European rights by private litigants is another indicator of the ECJ's legitimacy—why else would they bother to turn to the Court (Schmidt 2018: 35)?

Explaining Institutionalization: Path Dependency and Institutional Leadership

There was nothing inevitable about the institutional ascendance of the ECJ. In its early years, the caseload of the Court was low; judges reportedly broke out champagne every time a new appeal was notified (Vauchez 2015: 49). The few rulings it produced were rather technical and did not draw much attention (Saurugger and Terpan 2017: 16; Tamm 2013: 18). Any ambitions the Court might harbour met with

'national courts, academics, zealous guardians of national and international State sovereignty [who] were against the in-house doctrines being formulated in Luxembourg' (Vauchez 2015: 77). Some lawyers argued that the Court should become a chamber of the International Court of Justice (Vauchez 2015: 49).

Nevertheless, as we have just seen, the ECJ has taken on the characteristics of an institution. It has adopted a consistent way of working by a dedicated workforce that has proven effective over time. The Court delivered authoritative rulings that continued to further integration even at times of political stand-offs about the trajectory and pace of future integration, and outright backlash against the European project. Grumbling as they did at times, member states have never once intervened to curtail the Court's judicial reach, while European citizens and corporations have found their way to the Court in ever-increasing numbers (Strasser 1995; CJEU 2019a: 121), as Table 6.1 illustrates.

So how did this happen? The Treaties were vague or open-ended, creating ambiguities that had to be resolved (Garrett and Weingast 1993). By filling in the gaps in these 'incomplete contracts' of European law, the ECJ fulfilled a critical function in furthering European integration. In academic language, we recognize a fortuitous combination of path dependency and institutional momentum (Stone Sweet 2010: 7): the Court's caseload kept rising; in its decisions, the Court provided 'defensible reasons' that honoured precedents; national courts and the member states accepted the Court's rulings, which, in turn, led to more cases before the Court. The rising number of cases had something to do with the introduction of the preliminary ruling. This 'judicial gadget' created a relation between the ECJ and national judges who could directly access the Court without referral to higher national courts. This made lower courts more receptive to both using the ECJ and accepting its rulings

Table 6.1 Cases put before the European Court of Justice, 1960–2018

Year	*No of cases*
1960	28
1970	80
1980	280
1990	381
2000	503
2010	631
2018	849

(Stone Sweet 2010: 17). The completion of the internal market further inflated the number of cases (Stone Sweet 2010: 19).

In short: as EU law became more important, the ECJ attracted increased litigation; and by appealing to EU law, litigants in turn legitimized the Court and its ongoing production of EU law. To understand the willingness of national courts of turning to the ECJ, it is central to see that the European legal order in many instances provides alternative rights that lower courts and litigants may prefer to their own national legal order (Schmidt 2018: 59). National courts perceive clear advantages in pushing and promoting the European vis-à-vis applying their national legal order.

An interesting example is the *Mangold* ruling (C-144/04) that prohibits age discrimination. It was particularly controversial in Germany (Stone Sweet and Stranz 2012). The ruling goes back to a fabricated case, where a lawyer employed an elderly person on a limited contract with the express intention of having the rule of the German labour law declared void in court afterwards.

Embedding the case in the context of anti-discrimination litigation in Germany, Stone Sweet and Stranz show how different cases, particularly with regards to women's rights since the 1970s, helped the Federal Labour Court to establish its preferred broad definition of discrimination against the narrower framing of the German Constitutional Court (Stone Sweet and Stranz 2012).

A key driver of positive feedback thus appears to be *demonstrated functionality*. The ECJ fulfilled a function that garnered support for its existence. Key actors benefited from a strong court, which means they helped strengthen the ECJ, or at least did nothing to question it. This strengthening, in turn, enhanced the Court's capacity to fulfil that function.

But this still begs the question how the ECJ arrived on this virtuous path of endless institutionalization. Here we arrive at an additional explanation: institutional leadership. While the inner life of the Court remains hard to analyse, a few students of the Court have parsed together evidence that points at institutional strategizing by powerful judges. At key moments in time, ECJ judges initiated important strategies that propelled the Court when it was stuck or set it on a different path. We will now consider how these strategies furthered the Court's mission, internal cohesion and external legitimacy.

Creating a Mission

A critical development in the ECJ's institutional trajectory was the emergence of its mission, during the early 1960s. An incoming group of pro-European judges began to cast the Court in its verdicts as the guardian of European integration. An overarching, teleological method of interpreting the Treaties as a constitution for the European entity became a hallmark of the Court. Already in its first ruling on the ECSC, the Court had stipulated that a decision should not be taken based on an individual article, but a 'dispute must be examined in relation to the Treaty in its entirety' (*French Republic vs. High Authority of the ECSC*, Opinion of the advocate-general, 1/54 in: Saurugger and Terpan 2017: 16). Referring to the Treaty as a whole indicated an emphasis on the *telos* of integration.[10] The Court's sense of mission found its first public expression in the *Van Gend en Loos* and *Costa* rulings.

The Court applied its newly discovered mission with measured zeal, relying on an incremental way of operating (Weiler 1991). Typically, the ECJ would test new and potentially far-reaching interpretations in relatively insignificant cases (Alter 1998). The new interpretations would have no immediate effects, but they did create precedents for future cases. The incremental development of case law—building on precedent—became key to the institutional expansion of the Court (Schmidt 2018: 240).

Euro law associations played an important role in the Court's discovery of its mission. With the founding of the Economic Community in 1958, Euro law associations were established at the domestic level by lawyers closely engaged with the integration process.[11] These associations consisted of lawyers, political actors and other well-placed individuals with (close) ties to the European Community, who were interested and committed to the cause of European integration under the rule of law (Alter 2009: 65–66). The Commission also established an umbrella organization: the Fédération Internationale de Droit Européen (FIDE), which organized international meetings where pro-integration lawyers could meet each other, and other lawyers could be informed about the possibilities of European law (Alter 2009: 68–69; Vauchez 2015: 119).

The impact of these 'Euro lawyers' on the formation and interpretation of EU law was vast (Alter 2009). Initial discussions about the ECJ were monopolized by lawyers who were committed to the European project (Vauchez 2015: 55). Recent historical work has uncovered the intense exchange between judges, the legal community and the legal service of

the European Commission (Rasmussen 2012), considering possible interpretations of the Treaty of Rome in order to further integration (Nicola and Davies 2017). The Court used arguments that were posed by Euro law lawyers to back their rulings: they served as the kitchen's cabinet (Alter 2009: 76–78). Through the FIDE meetings, the Court could test innovative legal reasoning at national lawyers. If they could not find any support for their arguments, they would simply not pursue them (see also Saurugger and Terpan 2017: 132). But they could also borrow arguments from lawyers to strengthen the ECJ's position.

Engineering Cohesion

It is one thing to establish an institutional mission—core values, clear goals, a way of working—but it is quite another to build an organization that can fulfil that mission. The ECJ never had the luxury of selecting its judges and AGs. There is no common training or education for incoming judges and the Court has no influence over their recruitment (Vauchez 2012: 54–55). In the beginning, it was unclear which qualifications someone should have to become an international judge. The first batch of judges had a wide variety of backgrounds.

An important development therefore was the appointment between 1958 and 1962 of five new judges (Lecourt, Donner, Catalano, Monaco and Trabucchi) who were lawyers and were deeply committed to the European project and the constitutional character of the Court, or at least the political and legal unity of the Communities (Vauchez 2015: 54–55; Phelan 2017).

Over time, the various enlargements of the EU resulted in increasing numbers of judges and growing diversity of legal cultures, making the task of maintaining a committed group both harder and increasingly important (Tamm 2013). The inevitable diversification of the ECJ 'chipped away at internal unity, putting at risk its doctrine'. This emerging risk required a 'collective strategy from the most integrated judges' (Vauchez 2015: 154–155). It was highly important for the ECJ to succeed in shaping a strong internal culture, fostering cohesiveness and a shared outlook.

The Court, therefore, had to foster a shared interpretation of mission and operations among a very diverse group of people, who did not exactly arrive *tabula rasa*. In response, the judges streamlined procedures to defend the Court's jurisprudential acquis. Two strategies were employed:

the codification of jurisprudence (through rules, SOPs, databases) and the centralization of judicial decision-making process (in the hands of centrally placed judges) (Vauchez 2015: 158). One of the judges, Pescatore, wrote a Vademecum that defined the Court's judicial style as 'an overall process of codification around a limited number of highly standardized formulas' (Vauchez 2015: 187).

The *référendaires* and *lecteurs d'arrêts* (lawyer-linguists) played an important role in forging a uniform way of working (Cohen 2017). The référendaires draft the ruling. Before the draft ruling is handed for the first time to the chamber, the lecteurs d'arrêts read the draft for inconsistencies, and also for contradictions with existing case law (Cohen 2017: 69). The lecteurs d'arrêts receive detailed training. Until the early 1970s, each judge had only one référendaire, and these référendaires were permanent staff, so that new judges inherited the référendaire of their predecessor. The use of French as the Court's working language also played a role (McAuliffe 2017). Many of those working at the Courts are not native French speakers. They tend to work with citations of earlier rulings, thus unwittingly strengthening continuity in Court proceedings.

In addition to engineering organizational mechanisms to maintain consistency, the Court also makes a strong effort to socialize incoming judges to the Court's mission and its jurisprudential acquis (Vauchez 2012: 52). This socialization effort, aimed at creating a 'transnational esprit de corps' (Vauchez 2012) can be distilled from different traditions and ceremonies.[12] Common to all these ceremonies and traditions is that they link today's Court to the Court's past (Alter 2009). The revolutionary years (1960s) of the Court are employed to reiterate the 'original prophecy' that provides current judges with a 'timeless truth' regarding their role and a 'juridical foundation' for their work (Vauchez 2012: 61, 63). This way the Court creates an invented tradition of one 'jurisprudential acquis' (Vauchez 2015: 162).

These ceremonies do not only socialize quite diverse judges into one community, making them feel part of a cohesive unit, but they also ensure intergenerational continuity by passing the legacy of the court on to new generations (Vauchez 2012: 63–64, 2015: 166). In descriptions of the Court, metaphors of family, community and brotherhood are often used. These ceremonies help shape a posterchild judge: an accomplished legal practitioner and renowned scholar, who represents a national legal culture, but is also a convinced European. A good judge adheres to

the EU's judicial spirit, and acts 'as a pontiff, a bridge between different interests in EU polity' (Vauchez 2012: 67).

Protecting and Adapting the Institution

The institutional design of the Court allows for plenty of autonomy to perform its mission. But formal autonomy is no guarantee for a high degree of institutionalization (Groenleer 2009). An institution can only exist when it enjoys the support of its stakeholders and remains largely noncontroversial. But even when stakeholders are content with the performance of the institution and support is granted, the institution cannot sit on its laurels. The world changes and so do the expectations of stakeholders, requiring an institution to adapt.

Importantly, discussions about the democratic nature of the ECJ provide a constant source of potential controversy (Schmidt 2018: 12–13, 245). The realization that a small group of judges imposes significant constraints on policy-making at the national and European level provides the ingredients for a domestic political backlash against the Court and Union, as we have seen in the debate surrounding the UK referendum. In these discussions, the rights of EU citizens to national welfare dominated the agenda; rights that were largely shaped by the Court and not by political majorities. The German President Roman Herzog at some point even pledged to stop the ECJ. During treaty negotiations—the only moment member states can rein the Court in should they so desire—the ECJ has come up (Schmidt 2018: 40–41). We may thus conclude that the level of legitimacy enjoyed by the ECJ is tenuous and vulnerable to political mood swings at the national level.

An important strategy to protect the autonomy of the Court has been its emphasis on precedent (Schmidt 2018; Stone Sweet 2002). By referring to its own jurisprudence, it can guard against criticism that the Court is overstepping its mandate. As long as the Court can make the argument that it does what it has always done, it is possible to rule on controversial cases without prompting a barrage of critique (De Somer 2019). Legal precedent therefore plays an important role in EU jurisprudence. Legal concepts that are established in one area, are taken up and adopted in another one, driven by litigants that perceive this development as advantageous. Importantly, when individuals base their claims on EU law they do not only act in their own interests, but they also legitimate European laws and ensure compliance (Van Middelaar 2013: 50). If the Court were

to change its interpretation of EU law often, it could hardly aspire to decentralized enforcement via national courts.

Some actors necessarily lose out in this process of expanding case-law development, and it is crucial to understand why they cannot block it. The highest national courts have lost their exceptional position since the ECJ became the apex of the European court hierarchy. These courts understandably were reluctant to accept the constitutionalization of EU law. Especially the French *Conseil d'État* ('supremacy challenges the sovereignty of the French Parliament') and the German *Bundesverfassungsgericht* ('the Community lacks democracy and basic rights') were reluctant. Eventually, the courts of these most powerful member states accepted the supreme position of the ECJ (France in 1989 and 1999, and Germany in 1986) (Saurugger and Terpan 2017: 33, 109–114).

Important for this step was the adaptation strategy of the ECJ, most notable vis-à-vis the German constitutional court (GCC). After the GCC had been reluctant to accept supremacy because of the missing fundamental rights protection in the framework of EU law in a decision in 1974, the ECJ developed such rights in its jurisprudence, so that the GCC could denounce the need to provide for this protection by itself in 1986 (Davies 2012).

The next question is: why did the *member states* permit the court to gain so much power? A purely functional line of argumentation, as we have seen above, would point out that the ECJ helped to clarify the ambiguities of the European Treaties. A political approach would suggest that the ECJ acted in accordance with the interests of powerful states (Garrett 1995; Stone Sweet 2010: 17). After all, the Court can only count on continued member state compliance when its rulings do not venture too far away from member state preferences. Member states can too easily ignore ECJ decisions if they are against their interests (Garrett 1995).

The ECJ has been careful not to cross any red lines that the member states had drawn (Garrett 1995: 172; Alter 2009: 120; Schmidt 2018: 42–43). The Court has not become a 'lone ranger pushing the development of case law' and has 'shown itself responsive to the way that member states intervene' (Schmidt 2018: 237, 239). It appears to assess the political ramifications of its rulings. For instance, the ECJ stopped the expansion of entitlements of economically inactive EU citizens after the issue got increasingly politicized in richer Western member states (Blauberger et al. 2018). More in general, the Court is attentive to the thrust of (written and oral) observations that governments can submit to

make their legal interpretation heard to the Court, following these about 50% of the time (Larsson and Naurin 2016).[13]

The ECJ appears to mediate between judicial activism (furthering integration) and listening carefully to the concerns of member states. The Court usually tries to justify its decisions by pointing to the common interest of the member states and the objectives of the treaty (Burley and Mattli 1993: 68). Moreover, the Court tests the impact of potentially important rulings through its incremental building of case law (Alter 1998). The preliminary ruling procedure has also been helpful in shielding the Court from national criticism. It allows the Court to avoid conflict with member states, as the formal ruling is left to the national court (Weiler 1991).

Crucial is that in building EU law the Court can rely on those *private actors* that pursue interests compatible with those of the Community (Stone Sweet 2010: 17). European law provides an opportunity structure for private actors. They can turn to European law, for instance for strengthening liberalization via the four freedoms and competition law, or further non-discrimination policies via turning to the ECJ. States are no longer gatekeepers to the EU polity (Schmidt 2018: 50). The involvement of private actors simultaneously boosts the legitimacy of the Court. Its rulings respond to needs voiced by actors that are also important interlocutors at the national level.

In addition, the Court's long-term investment in building a transnational legal community pays off (Vauchez 2015). In the early years, when the Court's existence was anything but guaranteed, ECJ personnel worked hard to establish the Court as the supreme court on questions of EU law (Burley and Mattli 1993: 62–63), ensuring that lawyers were aware of the (benefits of) the preliminary ruling procedure. The ECJ organized trips to Luxembourg for national judges, where they were wined and dined. The ECJ helped national judges by framing and writing their preliminary ruling requests. National judges were socialized into viewing the ECJ as an alternative venue that could benefit their position. European judges participated in scholarly conferences and contributed to legal journals (Alter 2009: 70). As a result, this emerging European legal community widely deliberated on the ECJ's rulings, heightening broader awareness of the Court's importance (Alter 2009: 73–76; Vauchez 2015: 124–129).

Finally, ECJ judges visited national capitals to generate news coverage and inform the general public (Alter 2009: 71). Such networking activities remain an important part of the Court's daily business. In 2018, the Court received 2292 national judges in Luxembourg for visits or training seminars (CJEU 2019c: 19). The year 2018 saw the founding of the Judicial Network of the European Union (JNEU), which links the supreme and constitutional courts of member states with the ECJ, and fosters information exchange on the interpretation of EU law and on training material (CJEU 2019c: 57).

The ECJ learned early on that it might have to sell its mission and deeds to the world. *Van Gend en Loos* presented a unique vision of Europe's nature and future: 'a unified legal order where EC norms have direct effect and prevail over national norms' (Vauchez 2015: 116). Its seminal rulings initially appeared meek. All the Court can do is providing an opportunity structure to other actors. Thus, *Van Gend en Loos* had to be used by the law community and the Commission, and the same is true for other judgements, such as the *Cassis de Dijon* ruling, which helped completing of the single market (Alter and Meunier-Aitsahalia 1994). As such, seminal rulings are ambiguously formulated and do not speak for themselves. Euro-lawyers, Court members and the Commission first have to engage in a form of 'interpretative activism' to clarify the importance of rulings, constructing each one as a 'constitutive principle of an overall doctrine' (Vauchez 2015: 125–127).

The Unplanned Institutionalization of the ECJ

The story of the ECJ reminds us how much institutionalization matters. Becoming an institution meant that a particular vision of the European treaties—as a constitution imposed on the legal order of member states—was enshrined in the thinking and ruling of a small group of appointed judges. Institutionalization guaranteed that, over time, new judges stuck with this vision and employed to formulate rights that are nowhere to be found in European treaties. By becoming an institution, the ECJ 'weaponized' (cf. Selznick 1952) a particular vision of the EU that has had tremendous impact on member states and EU institutions alike.

In its early years, the Court was an unlikely candidate for becoming one of the most important European institutions. Institutional status had to be earned. Once achieved, it remained precarious. So how did a small 'coal and steel court' become such a powerful institution? The chapter

has shown that the ECJ's institutionalization was not designed, but rather discovered. In hindsight, we can recognize certain patterns of behaviour that helped to lift the Court from its initial invisibility and expected insignificance. The eventual invention of its current mission as guardian of European integration was made possible by the appointment to the Court of a small group of influential 'believers' in the early 1960s. They introduced and organized around a powerful idea that provided guidance in the development of the Court's practices.

Once the importance of the mission was realized, its maintenance became an objective in itself. Organizational mechanisms were designed that instil a shared sense of purpose in new members, and ensure continuity and uniformity. Rituals were introduced that reiterated the importance of the golden years and the 'Big Men' who had made the Court. At the same time, the mission was applied in practice with guarded zealousness. An example is the caution of the principle that big decisions are best tested in small cases—allowing the Court a way out if it would become clear that big ideas provoke unsuspected resistance.

While Court members believed in the mission, they had an acute understanding of the importance of building strong relations with national courts, the European Commission and member states. They sensed that any of these critical stakeholders was easily rubbed the wrong way. The Court therefore built on the support of national courts and litigants while taking pains to listen to member states' perspectives. This long-term effort to create an ecology of believers who become supporters proved very helpful over the years.

Institutionalization is the path that organizations follow to become institutions. This path may be short and straight; it often turns out to be long and winding. This case study reminds us that institutionalization may also harbour the roots of future deinstitutionalization. The Court's most enduring source of legitimacy, the constitutionalization of EU treaties, has the potential to become a cause of discontent. The mechanisms that maintain the Court's mission are also the mechanisms that make adaptation hard.

Questions for Discussion

1. Can you summarize the impact that the ECJ has had on the integration of EU member states over the years?
2. We know very little about the internal functioning of the ECJ. Do you think this absence of transparency worked well for the institutionalization of the Court? What difference would a higher level of transparency have made in this regard?
3. Can you think of a scenario in which the ECJ would suffer a sustained phase of delegitimization?
4. In your opinion, who are the most important actors in the ECJ's authorizing environment?
5. The ECJ enjoys a lot of autonomy. Is that a good thing?

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Notes

1. The French legal advisor Lagrange played a central role in designing the initial court. He based its design mainly on the French Conseil d'État (Tamm 2013: 17).
2. These are published on its website https://curia.europa.eu/jcms/jcms/Jo2_7031/en/.
3. Article 35 of the Statute; Article 32 of Rules of Procedure.
4. Article 60, Article 16.
5. Article 245 TFEU.
6. In 2018, 2217 employees worked at these supportive services. The ECJs' budget was 410 million euros (CJEU 2019c: 18).
7. In 1988 the Court of First Instance (especially for cases concerning competition and intellectual property) was established to deal with the increasing workload. After Lisbon, the position of the Court changed, because the pillar system was dissolved and the Court obtained competences in the area of freedom, security and justice (with some exceptions), and the Fundamental Rights Charter was granted the same status as the Treaties (Arnull 2006: 650–657).
8. These concerns have been echoed by academics. Arguing that the ECJ has turned the intergovernmental Treaty into a constitution, Grimm (2017) argues that policy decisions are increasingly made by the Court (rather than EU legislature) and therefore speaks of 'over-constitutionalisation'. Stone Sweet (2007) even speaks of a 'juridical *coup d'état*'.

9. Intriguingly, the larger states were litigated against, and lost, more often than smaller states (Germany lost more consistently than any other state) (Stone Sweet 2010: 21).
10. The Court also started using the terms 'charter of the community' and 'constitutionality' (Tamm 2013: 19).
11. The Commission also established EU law as an academic field. European law institutes were founded at several universities, where the Commission financed doctoral positions and other Community related research. European law journals were founded in which academics could publish their research on European law and the Court's rulings (Alter 2009: 69–70). By creating a European legal academic community, groups were created which had an interest in expanding the position of the Court (Burley and Mattli 1993: 65).
12. From the mid-1970s, says Vauchez (2012: 60), the Court 'began celebrating itself as an institution'. There are ceremonies to praise departing judges, and to welcome new judges. Since the 1970s the number of commemorative venues has increased (also because of increasing turnover). *Festschriften* are partly written by former ECJ judges and there are always 'old great men' who attend the ceremonies of the ECJ. The Court also celebrates its own anniversaries.
13. Article 23 of the Protocol No. 3 on the Statute of the Court of Justice of the European Union.

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