

Victim of Its Own Success - the EU Court in Need of Reform

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From the start, the Luxembourg-based European Court of Justice (ECJ) took an active role in the creation of the constitutional order of the European Community. The Court has earned a reputation as one of the most progressive actors in the integration process and has won the esteem of the EU's national courts. However the ECJ's success has led to a surge in its caseload which the Court is ill-equipped to manage.

The importance of an EU-level mechanism for the enforcement of European Community law needs no explanation. The entire integration project aims at building an autonomous legal order, and this would not be viable were it not possible to enforce claims and obligations through a judiciary. The founding treaties duly created a judicial organ for the European Communities, the European Court of Justice, which soon established a place for itself at the heart of Community lawmaking.

Under the Treaty establishing the European Community (TEC), national courts have a duty to co-operate with the ECJ. [1] These proceedings give the ECJ access to ground-level cases of interpretation and allow it to ensure uniform application of Community law at the national level. Keen to establish a reliable body of interpretation, the ECJ has made every effort not to alienate national courts and to interpret procedural rules so as to ensure that cases referred by these courts find their way to Luxembourg. This has increased confidence in the ECJ, thereby leading to increasing applications. However a mounting caseload has resulted in delayed proceedings and ultimately undermined that very confidence. The creation of a Court of First Instance (CFI) in 1989 provided only temporary respite. This paper looks at the reasons behind this state of affairs and briefly examines the reforms envisioned in the Nice Treaty.

A fashionable court

The number of procedures conducted by the ECJ increased steeply in the mid-eighties. The pace of growth continued unrelentingly in the nineties, by which time cases referred from national courts had overtaken direct actions before the ECJ, as the chart below illustrates:

Number of cases before the European Court of Justice and the Court of First Instance [2]

	1961	1970	1980	1990	2000
Actions before the ECJ	28	80	280	384	503
- references from national courts for preliminary ruling	1	32	129	141	224
- direct actions	25	47	180	222	197
Actions before the CFI	N/a	N/a	N/a	59	398
Total actions before the Luxembourg courts	28	80	280	443	901

The number of actions handled annually by the two Courts doubled between 1990 and 2000. It is also apparent from the chart that while the number of direct actions before the ECJ, i.e. cases brought directly to the Court by member states, Community institutions and private parties, has remained steady over that period, references for preliminary rulings from national courts - when the ECJ is called upon for interpretation of Community law - have increased steadily. This increase is due to a number of factors, notably: the broadening scope of Community law, now penetrating numerous spheres of life; the progress of EU enlargement; and the enthusiasm of the Court for references. The Court has little influence over the first two of these, but it has final say over the third.

Preliminary rulings

With regard to preliminary rulings, the balance between the ECJ and the national courts has changed significantly in the last four decades. While the ECJ was at first eager to encourage national courts to refer matters for interpretation, today the Court is buried under a flood of questions from the courts of EU member states.

The ECJ has nobody to blame but itself. The Court facilitated preliminary rulings by all possible means. These steps may have been necessary to establish the authority of the new institution, but on thing is certain. In the absence of such references the ECJ would not have been occupied with issues of concrete application of Community law. Unless national courts feed the ECJ with questions, the Court has no grounds for deciding legal issues.

The Court realised early on that in order to have a say in the application of Community law it had to tame the national courts. At stake is the uniform interpretation and application of Community law. Had national courts not referred problematic issues to the Court, the application of Community law could conceivably have run amok.

So the ECJ paved the way by interpreting the notion of a "referring court or tribunal" extensively so as to include judicial panels that are not necessarily considered as ordinary courts under the laws of the respective member state. [3] In this vein, industrial tribunals, panels of professional chambers and other quasi-judicial organs were duly considered to be courts for the purposes of making preliminary references. [4]

The ECJ not only broadened the range of referring bodies, it also widened the scope of Community acts that may be the subject of interpretation. In one case, the ECJ held that non-binding acts may also be submitted for the purpose of interpretation. [5] Moreover international treaties concluded by the Community, and general principles of laws common to the constitutional traditions of the Member States were also judged to come under the auspices of the Court. [6]

It is for the national courts to decide whether the interpretation of Community law is necessary for deciding the case pending before them. The ECJ has stated on several occasions that it will not question the assessment of the national courts in this regard. [7] The Court has further emphasised that there is a unique division of labour between the two fora, where the national court is charged with establishing the facts of the case and informing the ECJ of both the facts and the domestic legislative environment. [8] On this basis, the ECJ is enabled to make a proper interpretation. The ECJ treats references in a flexible manner - it often rephrases questions submitted by national courts in order to provide a better framework for discussion of the given Community law. The ECJ rarely turns down references based on formal problems, moot questions, or issues that have been previously ruled upon.

This enthusiasm on the part of the ECJ led directly to the steady increase of matters referred to it by national courts. While this deliberate judicial policy to enhance its role in the application and interpretation of Community law has been an unquestioned success, a not insignificant side-effect has been an excessively burdensome caseload.

The new Court of First Instance

The case docket of the ECJ seemed unmanageable by the mid-eighties, and the establishment of another judicial body become inevitable. The ECJ, fearing that uniform interpretation of Community law would suffer, was reluctant to hand over too much jurisdiction to the new Court of First Instance. [9] On the other hand, certain areas of jurisdiction inevitably had to be passed on. Presently, direct actions brought by private parties and staff are heard by the CFI, and the ECJ retains jurisdiction over preliminary rulings and only those direct actions brought by member states and Community institutions. On balance, however, this has not resulted in a significant reduction in the number of cases before the ECJ, given that the docket increase is most apparent in precisely the area where it retains jurisdiction.

Painful reform

Although the docket increased steadily through the nineties, the Court was unwilling to accept any further institutional change, least of all the termination of its exclusive competence over deciding preliminary references.

A number of proposals from the academic world suggested, *inter alia*, the establishment of specialised judicial *fora* or regional courts, [10] the introduction of *certiorari* power - the power to filter references and deal with only those considered important by the Court, [11] or the elimination of the discretion of lower national courts to refer questions to the ECJ. [12] These were turned down for various reasons. The establishment of further courts was challenged as being detrimental to the unity of interpretation; the *certiorari* power was said to be unjust, running counter to legal certainty once litigation was available to all; and the role of lower national courts as the powerhouse of reference procedures was deemed indispensable. [13] As for itself, the ECJ tried to hammer out new Rules of Procedure to accommodate more cases, loosen its docket and speed up litigation. [14] Observers have suggested that the ECJ did indeed tighten its practice in admitting preliminary references, and has consistently turned down references which did not meet the criteria of providing enough material for substantive interpretation[?]. [15]

Despite these efforts, the length of proceedings constantly increases. Today it takes 21 months to get a reference answered, and more than two years for a private person to have a case decided in a direct action. [16] National courts now think twice about whether to suspend the domestic procedure for almost two years in order to have a matter decided by the Court. [17] Needless to say this undermines the institutional confidence for which the ECJ had worked so hard, and saps the will of national courts to co-operate with Luxembourg. Individuals too are likely seriously to consider whether the outcome of a matter taken the ECJ or CFI will still be relevant two years later. The delays affect that most crucial of judicial attributes: legal certainty.

The Treaty of Nice

The Nice Treaty is the first to deal with the case docket problem. An important intervention was to settle the division of competencies between the ECJ and the CFI at treaty level. The Treaty breaks with the untouchable jurisdiction of the ECJ over references for preliminary rulings, and provides that certain areas shall be transferred to the CFI according to a scheme to be drawn up by the two Courts. [18] Moreover, the Treaty states that specialised courts shall be established to deal with special areas such as trademarks, plant variety and staff cases. [19]

As the EU acquires new competencies, more and more areas of life come under the eye of the Community's judicial organs. Reform of the EC judiciary has been inevitable, primarily to lighten its present workload, but also to prepare it in advance for enlargement. With the Nice Treaty, the Community has taken the important first step of introducing institutional modifications while respecting the primary objective of the ECJ: unity of interpretation.

In doing so the Treaty has sought to keep high profile issues, such as litigation between member states and Community institutions, and the bulk of preliminary references, within the ECJ, while distributing more specialised matters to special judicial bodies.

After the entry into force of the Nice Treaty it will be apparent whether or not these reforms are sufficient to the objectives of a relaxed court docket and steady litigation.

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Footnotes

[1] Under Article 234 TEC, national courts can refer questions concerning the interpretation and application of EC law to the ECJ, whose ruling is then binding on those courts.

- [2] Source: Statistics of the Work of the Court of Justice and the Court of First Instance of the European Communities 1980, 1990 and 2000. Office for Official Publications of the European Communities.
- [3] 61/65 *Vaassen-Goebbels v. Beambtenfonds voor het Mijnbedrijf* [1966] ECR 377. Refined in 54/96 *Dorsch Consult* [1997] ECR I-4961., 4992-4996.
- [4] See for example Dutch Professional Chamber of Dentists 246/80 *Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311; The Italian investigating judge, the pretore, 14/86 *Prétore di Saló* [1987] ECR 2545; Dutch arbitral tribunal of miners. Also 61/65 *Vaassen-Goebbels v. Beambtenfonds voor het Mijnbedrijf* [1966] ECR 377. o. Danish industrial tribunal hearing labour disputes 19/88 *Handels-og Kontorfunktionærernes Forbund i Danmark* [1989] ECR 3199.
- [5] 322/88 Grimaldi [1989] ECR 4407.
- [6] Respectively 181/73 Haegeman [1974] ECR 449.and 11/70 Internationale Handelsgesellschaft GmbH [1970] ECR 1125.
- [7] 13/68 *Salgoil v. Ministero del commercio con l'estero* [1968] ECR 661.
- [8] 36/80 *Irish Creamery Milk Suppliers Association* [1981] ECR 735.
- [9] According to the Court's brochure: "The aim of the creation of the Court of First Instance in 1989 was to strengthen the judicial safeguards available to individuals by introducing a second tier of judicial authority and *enabling the Court of Justice to concentrate on its essential task, the uniform interpretation of Community law*" (emphasis added). Online here:<http://curia.eu.int/en/pres/jeu.htm> .
- [10] Jacqué, J.P., and Weiler, J.H.H., "On the Road to European Union--A New Judicial Architecture: An Agenda for the Intergovernmental Conference", 27 *CMLRev.* 185 (1990).
- [11] Kennedy, T., "First Steps Towards a European Certiorari?" 18 *ELRev.* 121 (1993).
- [12] As proposed in 1992 at the Edinburgh Summit by Germany.
- [13] Strasser, S.E. "Evolution and Effort: The Development of a Strategy of Docket Control for the European Court of Justice & the Question of Preliminary References", *Harvard Jean Monnet Working Papers*; Proceedings of the European Court of Justice in 1999.
- [14] OJ L 176, 4.7.1991, 7. o. as modified.
- [15] Barnard and Shapston, "The Changing face of Article 177" *CMLRev* 34 (1997) 1113.
- [16] Statistics of the Work of the Court of Justice and the Court of First Instance of the European Communities 2000.
- [17] Explicitly mentioned in R v Cousins [1995] 2 *CMLR* 220; R v MAFF ex parte Anastasiou [1996] *EWCA* 86.
- [18] Article 1 point 31 amending Article 225 of TEC.
- [19] Article 1 point 32 amending Article 225a of TEC and point 33 amending Article 229a of TEC.