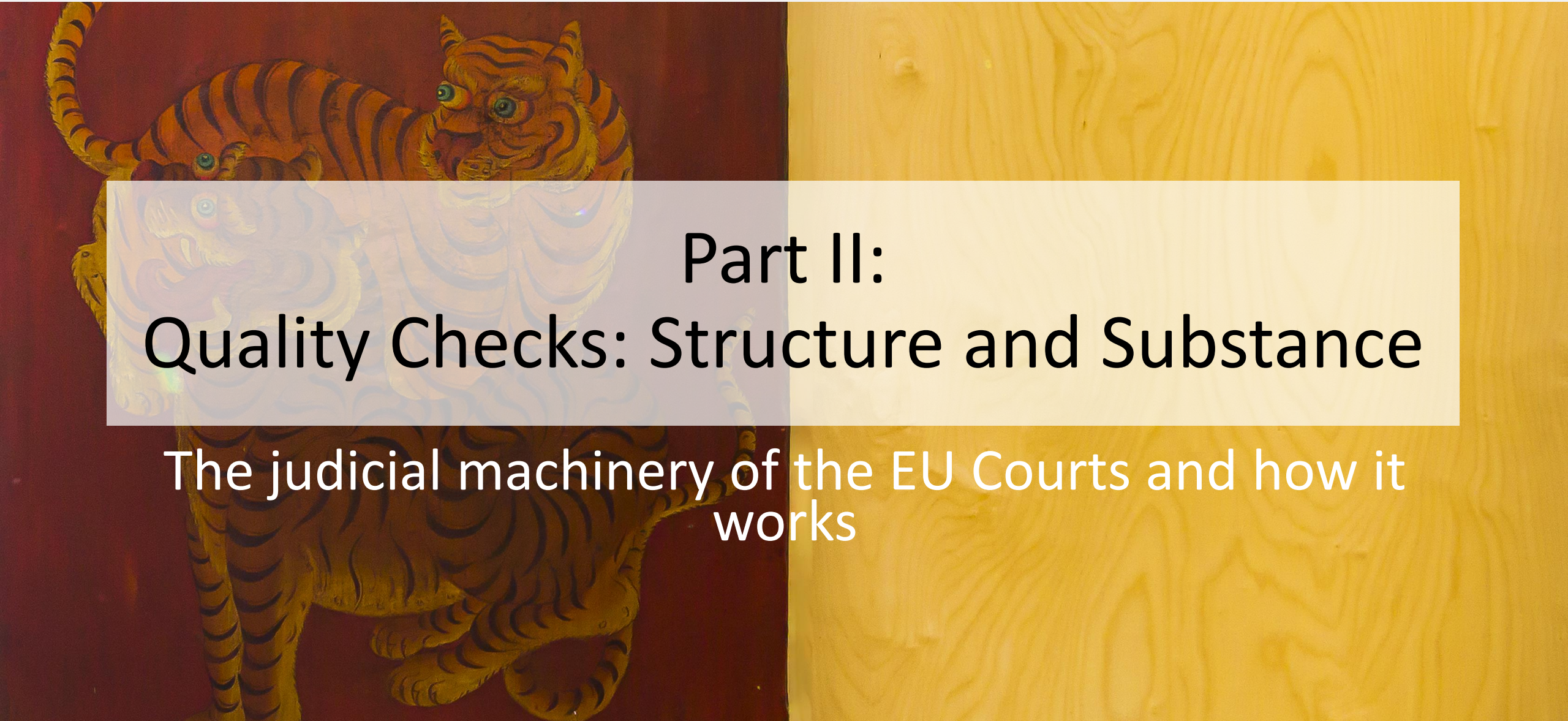
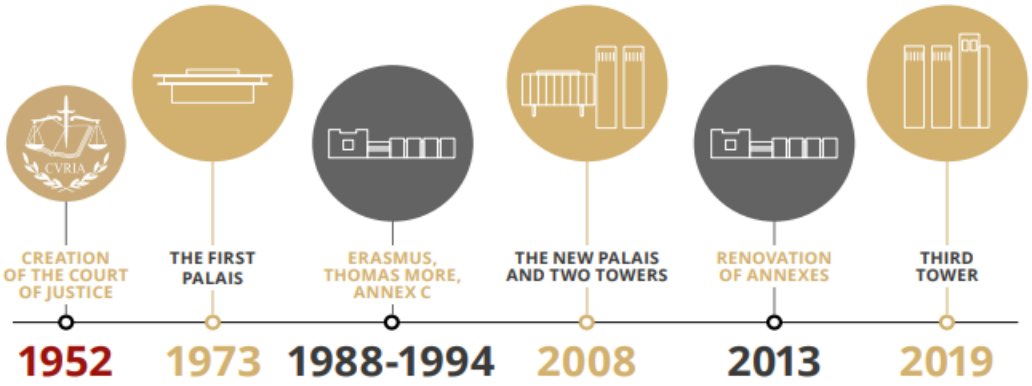
CRUZ VILAÇA ADVOGADOS



Part II:
Quality Checks: Structure and Substance

The judicial machinery of the EU Courts and how it works



The Court of Justice of the EU in numbers

- Comprises two courts: the Court of Justice and the General Court;
- More than 40 580 judgments and orders have been delivered by the two courts since 1952;
- 24 language units and 3 support units;
- 6 003 Civil Servants and temporary agents since 1952;
- Library: 12 km of volumes on the shelves;
- Budget: €465Mill for 2022.

Structure of the Courts

Court of Justice	General Court
 1 judge for each Member State for a renewable term of 6 years	2 judges for each Member State for a renewable term of 6 years (since 1 September 2019)
 1 president and 1 vice-president for a renewable term of three years	1 president and 1 vice-president for a renewable term of three years
 11 advocates-general	

Judges and AGs at the ECJ are supported by a small group of law clerks (*référendaires), trainees* and supportive staff (including clerks, a research and documentation service, translators and interpreters). The Court operates in chambers of three or five judges, the grand chamber (15 judges) and the plenary of the Court.


ECJ

Collegiality

- The **judgments** of the Court are **collegial** and judges try to reach **consensus**. The Court gives a one single, collective decision which comes from the arguments and discussions the judges undergo themselves. In the absence of consensus, a simple majority suffices.
- There is **no separate, concurring or dissenting, opinion** at the Court (according to Article 35 of the Statute and Article 32 of the Rules of Procedure, dissenting opinions are not made public);
- Collegiality enhances:
  - Independence and impartiality;
  - Collective responsibility for the judgment;
  - Unity in diversity;
- Collegiality supports a jurisprudence that is not too closely based on the legal culture or traditions of any particular Member State.

Secrecy of the deliberation

- The deliberations are secret and only deciding judges can attend;
- 'Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and **to preserve the secrecy of the deliberations of the Court**.' (Article 2 Protocol (No 3) on the Statute of the Court of Justice);
- The secrecy surrounding the proceedings and the absence of dissenting opinions enhance the authority of the judgment and protect individual judges from external pressures.

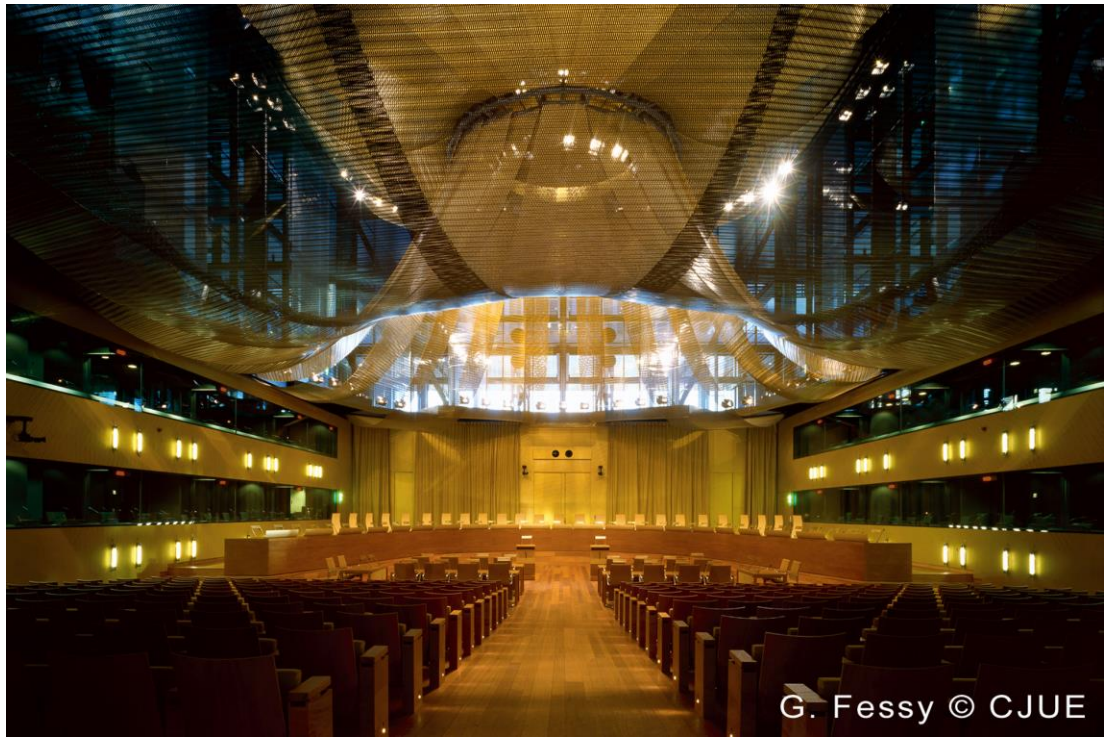
Mindset of the Courts

*'In accordance with settled case-law, when interpreting a provision of Community law, it is necessary to consider not only its **wording** but also the **context in which it occurs** and the **objects of the rules of which it is part**.'*

Judgment of 17 November 1983, *Merck Hauptzollamt Hamburg-Jonas,* C-292/82, ECLI:EU:C:1983:335, para 12.

*'(…) in order to determine whether a measure produces legal effects, it is necessary to look in particular to its **purpose**, its **content**, its **scope**, its **substance** and the **legal and factual context** in which it was adopted.'*

Judgment of 22 June 2021, Venezuela v Council (Affectation d'un État tiers), C-872/19 P, ECLI:EU:C:2021:507, para 66.



Constructivist approach

- The nature of the ECJ has changed over the years with an increased complexity of EU law and the introduction of new principles through the procedure of preliminary ruling;
- Through the preliminary ruling system, the ECJ has expanded the scope of its jurisdiction and laid the foundation of EU law;
- The doctrine of direct effect, primacy of Union law, protection of fundamental rights, and the principles of competition law and the four fundamental freedoms have all been developed through the preliminary ruling system;
- The ECJ also handles cases on issues of the environment, direct taxation, public policy, arbitration, immigration and asylum, external relations and international treaties, fight against terrorism and the most diverse forms of discrimination;
- With more matters coming under the ECJ's jurisdiction, its power to harmonize EU law is increasing. How to cope with that?

Let´s have a look at some examples!

Evolution of EU law through case law: the four freedoms and achieving the internal market

Van Gend and Loos (C-26/62)

- *'With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that **Article 9, which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges**.'*

Defrenne (C-80/70)

- *'According to the first paragraph of Article 119 of the EEC Treaty Member States are required to ensure the application of the **principle that men and women should receive equal pay for equal work**.'*
- *'The provision in the second paragraph of the article extends the concept of pay to any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.'*

Dassonville (C-8/74)

- ***"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."***

Walrave (C-36/74)

- *'The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are **fundamental objectives of the Community** (…), would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.'*

Cassis de Dijon (C-120/78)

- *'There is therefore no valid reason why, **provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State**; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.'*

Bosman (C-415/93)

- *'the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State'*
- *'nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity'*

Evolution of EU law through case law: EU citizenship

"As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States.

In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.

A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."

Judgment of 8 march 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124, paras 41-44.

Evolution of EU law through case law: fundamental rights

Stork (C-1/58)

- *'Under Article 8 of the Treaty the High Authority is **only required to apply Community law**. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. **It is not normally required to rule on provisions of national law**. Consequently, the High Authority is **not empowered to examine a ground** of complaint which maintains that, when it adopted its decision, it **infringed principles of German constitutional law** .'*

Solange I

- Since the Community lacked a codified catalogue of fundamental rights, the German Court declared that, in the hypothetical case of conflict between Community law and the guarantees of fundamental rights in the German Constitution, these guarantee should prevail "**as long as**" ("solange") the competent Community institutions have not removed the conflict of norms in accordance with the Treaty mechanism.

Internationale Handellsgeselschaft (C-11/70)

- *'However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, **respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice**. **The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community**. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.'*

Evolution of EU law through case law: European Monetary Union and the Euro

Pringle (C-370/12)

- *'The Court has held that in order to determine **whether a measure falls within the area of monetary policy** it is appropriate to refer principally to the **objectives** of that measure. The instruments which the measure employs in order to attain those objectives are also relevant.'*
- *'It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the **Member States follow a sound budgetary policy** (…). The prohibition laid down in Article 125 TFEU ensures that **the Member States remain subject to the logic of the market when they enter into debt**, since that ought to prompt them to maintain **budgetary discipline**. Compliance with such discipline contributes at Union level to the **attainment of a higher objective, namely maintaining the financial stability of the monetary union**.'* (para 135)

Gauweiler (C-62/14)

- *'The point should also be made that **the ESCB, in a wholly independent manner**, made implementation of the programme announced in the press release conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes, thereby ensuring that its monetary policy will not give the Member States whose sovereign bonds it purchases financing opportunities which would enable them to depart from the adjustment programmes to which they have subscribed. The ESCB thus ensures that **the monetary policy measures it has adopted will not work against the effectiveness of the economic policies followed by the Member States**.'* (para 60)

Weiss (C-493/17)

- *'It must be emphasised in that regard that (…) (i) without prejudice to its primary objective of maintaining price stability, **the ESCB is to support the general economic policies in the Union** and that (ii) the ESCB must act in accordance with the principles laid down in Article 119 TFEU. Accordingly, within the institutional balance established by the provisions (…), which includes the independence of the ESCB (…), **the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies**.'* (para 60)

The value of the precedent

- '*as a matter of principle, the Court is of course not bound by its own previous judgments*', since the doctrine of precedent or stare decisis is not followed as in the UK or in Ireland. '*It is none the less obvious that the Court should, as a matter of practice, follow its previous case-law except where there are strong reasons for not so doing*.' The Court may reconsider an earlier decision if there is '*strong evidence that this was wholly or partially incorrectly decided*.' (paras 139, 142, 143 AG Fennelly's Opinion in case *C-267/95*)
- '*the binding authority of precedent is not an inherent feature of the Union's judicial system. Although, in the interest of legal certainty and the uniform interpretation of Community law, the Community Courts endeavour in principle to give a coherent interpretation to the law, the general structure of both the Community legal order and the judicial system means that the Community Courts are not bound by their previous decisions*.' (AG Trstenjak Opinion in Case C-331/05 P, para 85)

- The Treaties do not mention that the Court should follow its earlier decisions and this follows neither from the Statute of the Court of Justice of the European Union nor from the Rules of Procedure of the Court of Justice;
- The Court's case law does not constitute a system of precedent in the sense applied in Anglo-Saxon laws. Although the Court often refers to the 'well established case law' (referring back to earlier decisions that support the conclusion of the given case or from which the case must be distinguished), the Court is not bound by its previous decisions;
- The Court may reconsider a previous decision if it finds it subsequently erroneous or otherwise not appropriate;
- Nevertheless, legal certainty requires a consistent and clear case law. Although the case law of the Court does not constitute a precedent system in a formal sense, deviations from the 'well established case law' are rare.

Most notorious U-turns: examples

Dassonville (C-8/74)

- *'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.'* (para 5)

Cassis de Dijon (C-120/78)

- (…)
- *'It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article [34 TFEU].'*
- *'There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.'*
- (para 14)

Keck and *Mithouard* (C-267/91 and C-268/91)

- *'In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States,* ***the Court considers it necessary to re-examine and clarify its case-law on this matter****.'*
- *'****contrary to what has previously been decided****, the application to products from other Member States of national provisions restricting or prohibiting* ***certain selling arrangements*** *is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] EC R 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.*

Most notorious U-turns: examples

Comitology (C-302/87)

- *"It follows from all the foregoing considerations that the applicable provisions, as they stand at present, **do not enable the Court to recognize the capacity of the European Parliament to bring an action for annulment**."*

Chernobyl (C-70/88)

- *"The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the **Parliament's prerogatives** when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve."*
- ***"The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap**, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities."*

Taricco I (C-105/14)

- *'(…) a national rule in relation to limitation periods for criminal offences such as that laid down by the national provisions at issue — which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to VAT had the effect of extending the limitation period by only a quarter of its initial duration — is liable to have an adverse effect on the fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify. The national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU.'* (para 58)

Taricco II (Case C-42/17)

- *'It follows, first, that it is for the national court to ascertain whether the finding, required by paragraph 58 of the Taricco judgment, that the provisions of the Criminal Code at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union leads to a situation of uncertainty in the Italian legal system as regards the determination of the applicable limitation rules, which would be in breach of the principle that the applicable law must be precise. If that is indeed the case, the national court is not obliged to disapply the provisions of the Criminal Code at issue.'* (para 59)

Most notorious U-turns: examples

Hoffmann-La Roche v Commission (C-85/76)

Intel (C-413/14)

- '*In that regard, the Court has already held that an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position*.' (para 137)

- '***However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects***." (para 138)

Advocates-General

Article 252 TFEU (ex Article 222 TEC)

'*The Court of Justice shall be assisted by [eleven] Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.*

It shall be the duty of the Advocate-General, acting with ***complete impartiality*** *and* ***independence****, to make, in open court,* ***reasoned submissions*** *on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement*.'

(1) As a matter of principle, the Opinion of an AG is sought in every case before the ECJ. However, the practice has become that of appointing an AG only in the most important cases or those raising novel questions of law (Statute of the Court, Article 20, 5th para). Opinions are sought in about 70% of cases.

(2) At the intergovernmental conference in Lisbon in 2007, the representatives of the Member States decided to raise the number of Advocates General to 11, and to allow six countries to have a permanent AG (Germany, France, Italy, Spain, Poland and at the time UK).

(3) In the absence of dissenting opinions, the AGs' Opinions play an important role and are referred to in later cases. The ECJ is not bound by these opinions; nonetheless, according to empirical research, in the case of actions for annulment of EU acts, the ECJ is 67 % more likely to follow the AG when the latter proposes to annul the impugned act.

Cases of disagreement between the Advocate General and the ECJ: some examples

- **Case C-50/00 *UPA v Council***, which concerned the interpretation of the rules on the standing of individuals before the Court to challenge EU acts not addressed to them. Advocate General, Francis Jacobs, advocated that the ECJ depart from its case law and allow for broad access of companies to the Court, but the Court decided to uphold its earlier case-law on the matter;
- **Case C-268/15 *Ullens de Schooten***, which concerned the doctrine of purely internal situations. AG Yves Bot assessment was that the facts constituted one of the exceptions to the purely internal rule, but the Court decided to strictly apply the internal situations rule;
- **Case C-561/19 *Consorzio Italian Management***, which concerned the CILFIT criteria. AG Bobek argued that it was the right moment for the ECJ to loosen its almost forty years old, overly strict, and hardly feasible CILFIT test. The Court's judgment in Grand Chamber, however, largely maintained the strict approach regarding the obligation to refer.

When the Court follows a different path from that proposed by the AG, it simply does not refer to his opinion. Instead, it has a practice of quoting him to corroborate his/her position, while referring to the AG's more detailed explanations.

Other actors in rule making process

- Lawyers, as representatives of the parties, play a crucial role in the development of European law, in particular by claiming, in any national proceedings, the protection of the rights which their clients derive from EU law;
- As we know, the preliminary procedure is based on a "direct dialogue" between the ECJ and the national judges, who are not bound by a request from a party to refer a question for a preliminary ruling;
- Very often preliminary questions derive from the procedural impulse of the parties, i.e. the lawyers. They need to demonstrate the need, the importance and the opportunity of the question for the national judge;
- Lawyers are also the ones preparing **written observations** and participating in **oral hearings**;
- **Lawyers have the possibility to shape EU law**.

Appointment of Judges and Advocates-General

Article 253 TFEU (ex Article 223 TEC)

'The Judges and Advocates-General of the Court of Justice shall be chosen from ***persons 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* ***jurisconsults of recognised competence****; they shall be appointed by common accord of the governments of the Member States for a* ***term of six years****, after consultation of the panel provided for in Article 255.*

Every three years there shall be a partial replacement *of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.*

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed. (…).'

(1) Advocates General are Members of the ECJ, and are appointed under the same procedure as Judges. They cannot be removed from office before the end of their six-year term of office.

(2) Article 253 TFEU also provides for a partial replacement of Judges and Advocates General, in accordance with the conditions laid down in the ECJ Statute.

(3) The Advocates General elect among them a First AG for a three-year term (Article 14(1) RoP ECJ). The main task of the First AG – since 1979 – is to assign cases to individual Advocates General.

Appointment of Judges and Advocates-General

Article 255 TFEU

*"A panel shall be set up in order to give an **opinion on candidates' suitability to perform the duties** of Judge and Advocate-General of the Court of Justice and the General Court **before the governments of the Member States make the appointments** referred to in Articles 253 and 254.*

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice."

CJEU cases in perspective (2020 numbers)

Preliminary ruling proceedings	Direct actions	Actions for failure to fulfil obligations:	Appeals against decisions of the General Court:	Other proceedings	Length of the proceedings
735 Cases brought → 556 preliminar ruling proceedings	735 Cases brought → 37 direct actions	735 Cases brought → 18	735 Cases brought → 131 Appeals against decisions of the General Court	Request for an Opinion: 1	Average length of proceedings: 15.4 months
792 Cases completed → 534 preliminar ruling proceedings	792 Cases complete d → 37 direct actions	792 Cases completed → 26 failures to fulfil obligations found against 14 Member States	792 Cases completed→ 204 Appeals against decisions of the General Court including 40 in which the decision adopted by the General Court was set aside	Applications for legal aid: 8	Urgent preliminar ruling procedures: 3.9 months
Main Member States from which the requests originate: Germany (139); Austria (50), Italy (44), Poland (41), Belgium (36) Cases pending: 1 045 Principal subject-matters: Agriculture (26), Area of freedom, security and justice (119), Consumer protection (56), Customs Union (24), Environment (48), Freedoms of movement and establishment, and internal market (96), Intellectual and industrial property (27), Social law (56), State aid and competition (104), Taxation (95), Transport (86)					

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