

# A Metacritique of the Court of Justice of the EU <sup>1</sup>

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## 1. Introduction

It is an extreme pleasure for me to have this splendid opportunity to talk here at the Bingham Centre for the Rule of Law about work of the Court of Justice of the European Union. As we are all aware, the Court has historically been subject to different lines of critique almost from its very beginning. By time, the Court has changed, so did the critique too change its focus. As a professor of law, I used to be one of the critics, now I have opportunity to react to the critique, both judicially and extra-judicially. That is, however, not what I plan to do today.

Instead of responding to specific traits of critique, I will try to address another kind of question, namely, what kind of critique of the Court of Justice of the European Union is possible, and by whom, at all. In other words I will present my critique of the critique – the metacritique of the Court of Justice of the European Union.

To start with, I would like to make a distinction between internal and external critique. The former attacks the very coherence of the object of critique in attempt to find its internal contradictions. It seeks to say that the object of critique does not function well due to some of its inherent contradictions. The latter relies on some external, overriding principle that renders the object of critique insufficient from an external or more general angle.

The distinction between internal and external critique does not mean that inherent contradictions are generated by, depend on or can be resolved by the object of critique itself. Even internal contradictions may well originate from external actors, possibly the same ones by which the object of critique was designed. As far as the Court of Justice of the EU is concerned, there are factors beyond its powers the critique of which needs to be addressed to a different addressees. Those that are within the Court's control can be attacked from either internal or external angle for being inherently incoherent and contradictory and for being invalid due to some overarching principle.

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Nor does the distinction between internal and external critique imply that a subject of the critique is internal or external to the Court. In reality, most of the critique originates from academic and political actors external to the judicial branch. Judges are expected to refrain from public debate that could jeopardize their neutrality and have means to respond to the critique judicially. After all, a judge criticizing her court in public comes close to a turkey voting for Christmas.

In brief, **internal critique** of the Court of Justice could be focused at elements within the Court's control, such as its capacity to control the docket, efficiency of its work, clarity and coherence of legal reasoning, rationality of judicial procedure.

On the other hand, as I mentioned, the **external critique** looks for contradictions external to the object of the critique and wants to say that even had all the vice that make object of internal critique been happily resolved, some external factors would have still been marring the Court and, for that reason, the object of critique should adjust to some higher, overarching principle. Such are elements of institutional design that are controlled by forces outside the Court itself, for example, lack of dissenting opinions, renewability of mandate every six years and quality of selection of judges and advocates general. For instance, a critique of the fact that the Court comprises 28 judges, one on behalf of each Member State, should be addressed to the political branch in Brussels and in the Member States, and not to Luxembourg. Problems of national enforcement of the Court's decisions, lack of capacity of judiciary to resolve complex social issues or, indeed, lack of legitimacy of the entire constitutional architecture of the European Union within which the Court operates also fall within the same category.

**Table: Typology of Critique**

CRITIQUE	WITHIN POWERS	IMPOSSIBLE FOR THE CJEU
<b>Internal</b>	<ul style="list-style-type: none"> <li>- Reasoning</li> <li>- Coherence and clearness</li> <li>- Rationality of procedure</li> <li>- Docket control (indirect)</li> <li>- Quantity / quality ratio</li> </ul>	?
<b>External</b>	<ul style="list-style-type: none"> <li>- Normative proposals concerning outcomes / how the Court should be deciding cases (e.g.) internal market, citizenship, subsidiarity</li> </ul>	<ul style="list-style-type: none"> <li>- Docket control (direct)</li> <li>- Dissenting opinions</li> <li>- Appointment/Term of office</li> <li>- EU constitutional legitimacy</li> <li>- National enforcement</li> </ul>

Following these short remarks here is the structure of my metacritique. **First**, I will address the line of critique of the CJEU that builds on allegedly negative synergy of renewable office, absence of docket control and lack of dissent that leads to alleged inadequacy of judicial reasoning. **Second**, I will argue that a productive critique of adjudication of the CJEU cannot be based on its correspondence with other models but on its own functional adequacy. **Third**, I

will suggest that a meaningful critique of substantive outcomes of adjudication is one that respects specific ontology of the EU. In my brief **concluding remarks**, I will question adequacy of the critique in general by introducing arguments of cultural relativism, which denies normative claims to universal validity of putatively more desirable political and legal practices. I will argue that internal critique of adjudication based on functions and ontology of European Union law is more productive than external one.

## 2. Functional Metacritique: appointment, docket control, dissent

It is a common place that law is context sensitive. Incidence of certain rule, principle or arrangement in one legal or political system does not validate the claim for its universal acceptance. In that respect, the European Union with its unique mission and distinctive institutional and legal arrangements, often forged as a result of difficult compromises, represents a case of its own. Yet, those arrangements that make the European Union possible are typically criticized from perspective of national law and the critique, to paraphrase Iris Marion Young, "... involves the universalization of a dominant's group's experience and culture, and its establishment as a norm."<sup>3</sup> In other words, while the critique, by necessity, originates from certain national context, a thoughtful critic should be able to overcome the dominant group's perspective and judge the object of the critique on its own merits. In a way, universalization of national context amounts to external critique and its main claim is typically that the CJEU does not meet certain standards which are taken for granted in the critic's own legal system. Typical targets of such critique are appointment and renewability of office, incapacity to control its docket and lack of dissenting opinions. I will try to address these issues seriously and on their own merits, trying to avoid thinking within any national context.

The three objects of critique, namely appointment, docket control and lack of dissent, collapse into a single denominator – quality of judicial reasoning. According to the argument, in the face of prospective re-appointment, judges refrain from speaking clearly and hide behind the collegial unanimity. Therefore, no dissenting opinions! To further extend the claim, even if adjudication in shadow of re-appointment is of no consequence for quality of judgments, it surely contributes to cryptic reasoning and lack of transparency because of reluctance of judges to disclose their choices to appointing authorities. Joseph Weiler relates absence of dissents directly with the re-appointment of judges every six years, which is, according to him, "an ongoing scandal unknown in all respectable jurisdictions."<sup>4</sup>

This line of critique is not isolated and its logic does not appear to be entirely

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<sup>3</sup> Young, Iris Marion, *JUSTICE AND THE POLITICS OF DIFFERENCE*, Princeton 1990, p. 59

<sup>4</sup> Adams M., de Waele H Meeusen J. and Straetmans G. (eds.), *JUDGING EUROPE'S JUDGES – THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE*, Hart Publishing, Oxford and Portland, Oregon, 2013, Joseph Weiler, *Epilogue: Judging the Judges – Apology and Critique*, at pp. 251-252

unfounded. Non-renewable or life appointment of judges is standard in many jurisdictions, to mention just European Court of Human Rights and the US Supreme Court. So are dissenting opinions. Nevertheless, it should not be forgotten that this is an external critique implying that there are overarching principles that militate in favor of different solutions, particularly, solutions that have been applied successfully elsewhere. Instead of entering into the fruitless debate about which model is "better", I would rather like to focus at internal critique that investigates whether there are functional mechanisms that blunt the edge of the argument of the external one.

In other words, I would like to present my take on relationship between the specific method of appointment of judges, transparency (i.e. lack of public dissents) and clarity of judicial reasoning of the CJEU. I will argue that, in absence of public dissents, the Court generates symbolic speech understanding of which requires an additional effort. In fact, sparse reasoning and lack of transparency are, arguably, not a systemic failure but the usual method of the Court's expression which is neither better nor worse than style of reasoning entertained by other jurisdictions but, simply, different.

(a.) Appointment of Judges

Judges and renewable advocates general are appointed for a renewable term of six years upon nomination of a respective Member State and subject to positive opinion of the Committee established pursuant to Art. 255 TFEU. <sup>5</sup>

Is the method of appointment, including possibility of reappointing judges and advocates general at the end of their term of office, an "ongoing scandal unknown in all respectable jurisdictions" as Joseph Weiler suggested? <sup>6</sup> The argument relies on a premise of causality between Member State preferences and judicial independence. Is there a causal link? I suggest there is not.

**First**, since February 2010 there is a special screening procedure before the now well-known and respected 255 Committee. The Committee issues non-binding opinions on national nominations for the Court to the ministers of the Member States who appoint judges by common accord and its scrutiny is substantial. While its work is confidential, it is known that a number of national nominations have been withdrawn based on its opinions.

**Second**, procedural rules of the Court establish the protocol and rank that have strong persuasive power on the nominating authorities in the Member States. Judges are ranked in order of seniority, which is omnipresent in the protocol.

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<sup>5</sup> The Committee was established by Art. 255 of the TFEU and started to work pursuant to the Council Decision No. 2010/124/EU of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, O.J. 50/18 of 27. 02. 2010 and the Council Decision No. 2010/125/EU of 25 February 2010 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union. For further information see [http://curia.europa.eu/jcms/jcms/P\\_64268/](http://curia.europa.eu/jcms/jcms/P_64268/)

<sup>6</sup> *Id.* at p. 251

Judges who were appointed most recently take the last seat around the table, they enter the *grande salle d'audience* last, they are last to ask questions at the hearing and they do not have priority for election to administrative functions. The protocol demands that presidents of the Court's chambers mature to certain seniority, which can only exceptionally be reached within the first six-year term, and aspirations to functions of the president and vice-president of the Court pertain to most senior judges with long experience at the Court. In this way, it becomes irrational for the Member States to erode their credibility by replacing a prospering judge.

**Finally**, presidents of the chambers, the vice-president and the president of the Court are elected by all twenty-eight judges for period of three years. Advocates general elect, among themselves the First Advocate General for period of three years what re-enforces the incentive for the Member States to prefer continuity. In that way, collegial approval interacts with scrutiny of the 255 Committee and national appointment procedures. In other words, even admitting that the reappointment system not ideal, presence of procedural and substantive safeguards, notably internal (judicial college) and external (255 Committee) peer scrutiny disrupts the causality between Member States' preferences and actual appointments.<sup>7</sup>

(b.) Transparency / Lack of Dissent

An extended sting of this line of critique suggests interrelationship of appointment procedure and lack of transparency, clarity and dissenting opinions. In absence of irrevocable mandate, it is suggested, judges refrain from speaking clear, while anonymity of deliberations serves to protect judges from national political whim. There are three factors that contradict this proposition. The first factor is the structure of the court, the second is the dynamics of its chambers and the third is residual information that emanates from text of published judgments, which I call symbolic language of the Court.

*i. Structure of the Court*

In a court of 28 judges organized in chambers of three, five and fifteen it is becoming increasingly difficult to maintain the anonymity. Composition of the chambers is known, so are outcomes of the cases. Let me briefly describe the case flow.

An incoming case is first allocated to a reporting judge by the president of the Court, and is required to write a preliminary report and, in agreement with an

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<sup>7</sup> One more note. The Court of Justice is designed by the founding fathers of the European Union as a guardian of its legal system. Regardless of their national nominations judges act as European judges, not as national judges. Lack of dissents also avoids the clash of today 28 national legal traditions. Law of the EU cannot ignore them but the result often ends to be an amalgam of more national traditions than one. Whether public dissents would result in certain degree of competition between national traditions is highly speculative but cannot be dismissed as a problem.

Advocate General allocated to the case by the First Advocate General, present it to the *Reunion Generale* - the plenum of the Court comprising all judges and advocates general. In the report, the reporting judge needs to briefly present the case and make several proposals to the RG. While the report remains confidential and is disclosed to judges and advocates general only, the decisions of the RG are public.

The particulars of the preliminary report are alphabet of the Court's symbolic speech. First, a formation of the Court needs to be decided. It can be a chamber of three, five, a grand chamber of fifteen judges, or the full court. Second, it will propose whether a judgment is needed or whether the case can be decided in a summary way by an *ordonnance*. Third, judge rapporteur may propose a hearing to be held, as well as to specify the issues of law and fact which need to be addressed in a hearing, in order to restrict the scope of the hearing to certain points only. Fourth, there will be a proposal whether an opinion of the advocate general is indicated or not, and if it is, as to which legal issues. Finally, a report will mention the agreement (or absence of it) between the reporting judge and the advocate general, on all mentioned points.

The reporting judge may also propose a number of other procedural steps to be taken, depending on the relevant procedure. In a preliminary reference procedure additional clarifications may be required from the requesting national court, and in any case a research note may be requested from the Court's Research and Documentation Department, a legal service composed of lawyers specialized in law of the Member States.

The report is circulated to 28 judges and all Advocates General prior to the RG. While the default procedure is one of the tacit approval, each judge or advocate general can submit a note in which case the preliminary report will be automatically placed at list A and discussed by the RG. There are a variety of possible outcomes.

Allocation of a case to a chamber of three judges indicates that law governing the case is clear and that the case will be handled according to the existing case law. Nevertheless, a hearing may be convened if the facts of the case are complex, if the Court does not feel sufficiently informed, or if it considers that it may be otherwise useful to resolve a contradiction existing between the parties. Conversely, there will be no hearing if the facts and legal positions of the parties were sufficiently clarified already, during the written procedure. In a chamber of three, there will, normally, be no need for an opinion of an advocate general. Instead delivering a judgment, chambers of three judges may decide by an *ordonnance* if the case is manifestly inadmissible or manifestly unfounded. In such a case, a reporting judge will specify so in the preliminary report and, following the RG quickly present a draft *ordonnance*.

Chambers of five judges decide cases that require more reflection, either on grounds of complexity of facts, either on grounds of complex legal issues. It can be said that five-judge chambers are a default formation of the Court. A chamber of five can follow existing law and extend scope of the existing case law to new

situations. It can clarify previously decided cases, harmonize case law decided by the General Court or, sometimes, by chambers of three judges. Hearings are rather a rule than an exception since complexity of facts and law may require oral explanations of the parties. Indeed, parties will often request a hearing themselves but such requests are not binding for the Court. While the reporting judge has a privilege of proposing whether a hearing is indicated or not, the RG will have the final say. Indeed, decision whether a hearing is indicated or not will often bring a case to the list A and make it subject to discussion at the RG. The same holds for the decision whether to ask for an opinion of the advocate general, though, his or her position on its necessity has a strong persuasive force. Nevertheless, a chamber of five judges can also decide by an *ordonnance*, without a hearing and without an opinion.

A grand chamber of fifteen judges is convened to decide about major legal issues that require intervention into existing law, either in order to develop new case law, to overrule the existing, or to extend its scope to new areas. It will also be indicated where the Court has not previously expressed itself on a certain legal rule or a point of law. According to the Rules of Procedure a grand chamber will have to decide upon a request of a Member State or in disputes between institutions of the EU. A grand chamber can also decide with or without an opinion of the advocate general and with or without a hearing. In this respect all considerations previously mentioned in respect of a chamber of five apply. However, decisions of the grand chamber without a hearing and an opinion are not frequent. The possibility of deciding a case by an *ordonnance* is also not excluded. However, it is exceptional and, as I will explain, usually bears certain symbolic meaning.

The Full Court decides only in exceptional situations. According to the Statute, the Court shall sit as a Full Court where it decides on dismissal of the Ombudsman,<sup>8</sup> compulsory retirement of a member of the European Commission<sup>9</sup>, or of a member of the Court of Auditors<sup>10</sup> or, where it considers that a case before it is of exceptional importance.<sup>11</sup> What represents exceptional importance can be inferred from the recent cases, notably, *Pringle*.<sup>12</sup> Usual suspects for the full court judgments are also requests for Opinions pursuant to Article 218(11) TFEU where the Court is called to rule whether an international treaty to which EU plans to commit is compatible with the Treaties.<sup>13</sup>

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<sup>8</sup> Article 228(2) TFEU

<sup>9</sup> Article 245(2) and 247 TFEU

<sup>10</sup> Article 286(6) TFEU

<sup>11</sup> Article 16 of the Statute and Article 60 of the Rules of Procedure

<sup>12</sup> Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, EU:C:2012:756

<sup>13</sup> The latest instance of a full court Opinion was on occasion of the request for Opinion concerning accession of the EU to the European Convention for Protection of Human Rights and Fundamental Freedoms

*ii. Chamber Dynamics*

The *rapport préalable*, an initial proposal how to treat a case, written by the reporting judge and endorsed by an advocate general as well as the debate at the *réunion générale* (hereinafter the RG) are not public, however, at that stage of procedure every judge and advocate general is informed about the case and can propose the Court how to treat the case. Discussion of incoming cases by all judges and advocates general at the RG is of enormous relevance for coherence of the Court's case law and for docket control. While it is true, as recently pointed out by president Koen Lenaerts in his recent interview to the Wall Street Journal, that "a court cannot set its own agenda" and that "cases are brought onto the court by parties entitled to do so", the Court can, nevertheless, control its docket and prioritize cases by allocating a case to a certain formation of the Court.

Once the formation is determined, its composition is public and it is possible for an external observer to identify the chamber's specific angle. In other words, despite of absence of the dissenting opinions, it is not impossible for an outside observer to identify the diverging legal positions. The process of detection is somewhat similar to detection of exoplanets that cannot be seen by a telescope but have to be imagined on grounds of oscillations of stellar gravity centers. So the differences in reasoning can be detected on grounds of opinions of advocates general, formation of the Court and even by absence of certain elements of reasoning.

**[Advocates General]** To start with, it has often been suggested that the role of advocates general is remedial to lack of clear reasoning of the Court and absence of dissents. According to the argument, an advocate general can go beyond the immediate legal controversy and her opinion can shed light on considerations that have not been openly disclosed in the published judgment. While this explanation is certainly plausible, reality is more complex and has to be revealed by an outside observer. The easy part is when the Court decides to follow an opinion and explicitly says so. However, the Court does not always follow AG's opinions. When it chooses not to follow one, the judgment usually ignores the argument.<sup>14</sup> In such situations it can be inferred that prevailing arguments went against the position of the AG, or at least that a different line of reasoning was chosen.

**[Formation]** Second, as I have already explained, the choice of formation deciding a case is also telling. In fact, the act of allocation performs a similar role to a writ of certiorari in the legal system of the United States. Allocation to a chamber of three judges already indicates that existing case law will be followed. Moreover, it allows a certain degree of docket control since the case will be decided in an expedient way and on the other hand it communicates the agreement of the majority of the court that certain legal issue does or does not deserve more substantial discussion. Admittedly, this will rarely reveal why the

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<sup>14</sup> See e.g. Opinion of AG Cruz Villalon in Case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa*, EU:C:2010:336

Court has undertaken certain course of action, but in context of earlier “well established” case law can be telling why it has not. For example, the Court has always been reluctant to recognize horizontal direct effect of directives but has, on the other hand, developed remedial causes of action for injured parties.<sup>15</sup>

**[Silence]** Third, for an outside observer it is often not enough to look into a single judgment to discover what the Court is saying. It is possible that, due to a variety of reasons, usually because of disagreement of judges within a chamber, certain legal issues are omitted from the final text. In such a case, where there is pre-existing case law on the point, it is reasonable to assume that the silence of the Court on the point is a symbolic recognition that the earlier case law remains valid. On the other hand, where there is no earlier case law on the point, the omission of the Court to address a legal issue can be interpreted as an act of tacit deference to either political branch or to national judiciary. The full significance of such deference will become obvious only in future judgments. It is also possible that the lack of agreement within a chamber reflects the differences among the sitting judges and that they will be settled by a larger formation of the Court at a later date and with a different majority. In such a way a minority opinion that was invisible in an earlier case may become visible in a later grand chamber case. Sometimes, referring courts themselves provoke re-interpretation of law already settled by a smaller formation of the Court. For example, in the grand chamber *Nelson and Others v. Deutsche Lufthansa*<sup>16</sup> case the referring court asked the Court of Justice to answer whether certain provisions of a Regulation, as interpreted by the five-judge Fourth Chamber in the earlier *Sturgeon and Others* case<sup>17</sup> are valid in the light of the principle of legal certainty. In such cases comparison of answers to the same legal issues may provide additional clues about motivation of respective chambers.

### iii. Residual Information (Symbolic Language)

While conventional physics teaches us that anything that falls beyond the event horizon of a black hole can never escape back, Stephen Hawking suggested that, quantum effects taken into account, black holes eventually emit radiation, which can be detected by outside observers. In that way, it is believed, information falling into a black hole is not permanently lost.

Chambers of the CJEU deliberate in secrecy and judges are not permitted to disclose the details to the outside world, not even to their fellow judges outside the chamber. Nevertheless, there is some residual information that radiates from the Court and which is, actually, publicly available. There are three elements to

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<sup>15</sup> Francovich damages, see joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, EU:C:1991:428

<sup>16</sup> Joined cases C-581/10 and C-629/1, *Emeka Nelson and Others v Deutsche Lufthansa AG and TUI Travel plc and Others v Civil Aviation Authority*, EU:C:2012:657, para. 61 of the judgment

<sup>17</sup> Joined cases C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA* EU:C:2009:716

be distinguished. The deliberations, which are secret and remain secret, the text of a judgment, which is published and the residual information, which can be identified from publicly available sources, as I have described in point a. above.

While the Court of Justice is, indeed, based on the somewhat cryptic French judicial culture, we have already been advised that lack of transparency does not necessarily mean the absence of legal reasoning.

Writing about the French judicial system Mitchel Lasser has revealed the rich internal debate within the *Cour de Cassation* as contrasted to scarce language of its decisions.<sup>18</sup> Bruno Latour, on the other hand, disclosed the method of work of the *Conseil d'Etat*.<sup>19</sup> My argument here is different from Lasser's. Instead of contrasting internal and external life of the Court, which I do not contest, I incline to think that, even in absence of dissents, and in spite of the arguably sparse published reasoning, the CJEU generates a specific language of its own. Once understood properly, that language reveals the details far beyond the facial anonymity of the plain text of the Court's judgments. The language the Court speaks is symbolic and its grammar is procedure. What is more, most of the elements of this symbolic language are publicly available.

While, undeniably, the procedure before the Court serves its own functional rationality which is the backbone of what president Koen Lenaerts writing extra-judicially calls "internal legitimacy",<sup>20</sup> it also emits residual information to other actors, such as the Member States, national courts, parties and, ultimately, everyone capable of understanding them. However, it must not be underestimated that the procedure is structured in the way to generate information scarcity. Among the multiplicity of actors, starting from the reporting judge, the advocate general, to the RG, the chamber deciding a case, a national court, parties to the original dispute, Member States, and so on, each one of them, except the formation deciding the case, will be in possession of only some information. The remaining part will have to be reconstructed from the symbolic language of the Court. In other words, the fact that the Court is not "speaking clear" at this stage is a logical and, most likely, inevitable consequence of the role-playing and information scarcity.

For example, in a preliminary reference procedure, a referring national court will have no information about the proposal of the reporting judge to the RG and the discussions within the RG are protected by secrecy. However, once the case is allocated to a, say, grand chamber, and that an advocate general was seized to write an opinion, it will become clear that there is a major legal issue at stake

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<sup>18</sup> Mitchel Lasser, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY*, Oxford University Press 2004

<sup>19</sup> Bruno Latour, *LA FABRIQUE DU DROIT. UNE ETHNOGRAPHIE DU CONSEIL D'ETAT*, Paris, La Découverte, 2002

<sup>20</sup> Koen Lenaerts, *The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice*, in Adams M., de Waele H Meeusen J. and Straetmans G. (eds.), *JUDGING EUROPE'S JUDGES – THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE*, Hart Publishing, Oxford and Portland, Oregon, 2013, at p. 13

and that the intention of the Court was to decide the case accordingly. It will be a signal to the parties to the original dispute to dig deep into their arguments, to re-assess the law that governs the case and to be prepared to develop their arguments beyond the existing case law. They will have no clue about the directions the Court is considering to explore, but they will have known that a window of opportunity has opened.

Communication between the Court and other actors is not a one-way street.<sup>21</sup> A thoughtful party to a national dispute will try to convince a national judge to formulate a preliminary reference in a way that will resonate at the Court. She will try to identify loose ends in the existing case law and to provoke the desired formation to decide the case. Again, the information will depend to the circumstances of each individual case, will be restricted to the relevant actors and to relevant issues of law and fact and will, due to scarcity of information, remain unclear to the wider audience. While for the parties and other actors to the proceedings information will be sufficient to avoid a situation where "ignorant armies clash by night",<sup>22</sup> the same information will not always be visible to an outside. However, the information scarcity and the corresponding lack of clarity is precisely a source of legitimacy for the Court. Scarcity of information and symbolic speech are deliberate, not accidental. They safeguard the very core of internal legitimacy of the deliberations by reducing complexity or, as Pierre Schlag has put it, by reducing "pluralistic messes into singular conclusions".<sup>23</sup>

It has to be reiterated that it is not only the Court that generates the symbolic speech, it is a two-way process in which "[t]he parties are compelled to "translate" their stories and claims in the idioms of law. They are compelled to adopt law's ontology, its categories, its networks of causality and symbolic associations."<sup>24</sup> Indeed, active cooperation of participants to the proceedings significantly determines the shape of judgments to come. Preliminary references are provoked by the parties, formulated by a referring judge and defended before the Court by legal representatives. All of their interventions are translated in legal idioms that ultimately crystalize as the symbolic language of the Court.

Admittedly, as a minimum requirement a judgment should make sense to those to whom it is addressed. And it is not sufficient that a party<sup>25</sup> winning an argument is comfortable with the decision, since the winning party will be

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<sup>21</sup> Jean-Claude Bonichot, *Le Rôle des parties au principal dans le traitement des questions préjudicielles*, GAZETTE DU PALAIS, No 277, 4-5 octobre 2013, p. 16

<sup>22</sup> Matthew Arnold, *Dover Beach*

<sup>23</sup> Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L. J. 803 (2009) 809

<sup>24</sup> Schlag, *id.* at p. 817

<sup>25</sup> To extent one can speak about "parties" before the Court of Justice, having in mind that the list of "actors" before the Court is much wider and includes national courts, parties to the original dispute, EU institutions, intervening Member States and other participants.

satisfied by the very fact of winning anyway. The reasoning should be equally clear to the losing party. But, save in case of strategic litigation and repeat players,<sup>26</sup> there is no easy way to know whether the parties are happy. It is quite possible that a party losing on the merits will still be comfortable with the reasoning of the Court on a select point of law and will have achieved the desired statement of law that may become relevant for future litigation.

### 3. Ontological metacritique: how the CJEU should be deciding cases?

In his contribution to this conference Prof. Derrick Wyatt suggested that the CJEU is more prone to deliver Europeanizing than de-centralizing outcomes while the two should be in balance. In that context, the argument is, that the CJEU should pay more respect to national identities of the Member States and be more vigilant in enforcing the principle of subsidiarity (DW pt.9). Prof. Wyatt also argued that the Court should favor literal interpretation of EU rules, in order to give effect to the intention of the draftsman. This is to replace the result-driven approach, that is, judgments driven by judicial policy rather than legal analysis and reasoning (DW pt. 13).

Prof. Wyatt arguments are arguments of external critique, which is based on his understanding of what the Court is doing in fact and what the Court should be doing instead, according to some higher independent principle. Accordingly, there are two ways how to respond. First, to address the factual claim about what kind of outcomes the Court is delivering and, second, to address the normative claim that the Court should be delivering certain, different, kind of outcomes, on grounds of some independent principle.

#### (a.) Are outcomes of adjudication always Europeanizing?

First of all, I would like to avoid a trap of constructing what Pierre Schlag calls “desirable X”, an object that is profoundly desired and existence of which is constructed by production of arguments.<sup>27</sup> While it is true that the Court has generated solid jurisprudence that can be characterized as Europeanizing, there are also abundant examples of what prof. Wyatt calls de-centralizing values. Let me mention just some recent cases.

In *Dano*<sup>28</sup> the CJEU held that relevant secondary legislation “...must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of

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<sup>26</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW AND SOCIETY REVIEW 1 (1974) 165

<sup>27</sup> Pierre Schlag, *Law as Continuation of God by Other Means*, 85 CAL. L. REV (1997) 427

<sup>28</sup> Case C-333/13, *Elisabeta Dano, Florin Dano v Jobcenter Leipzig*, EU:C:2014:2358

other Member States do not have a right of residence under Directive 2004/38 in the host Member State.” Similar outcome resulted from the judgment in *Alimanovic*.<sup>29</sup>

Even in the area of internal market the Court, answering to the question whether the “Renewable Energy Directive” allows a Member State to establish a support scheme which awards green certificates only to producers located within the territory of that Member State, decided to interpret the Directive as allowing a support scheme which favors national producers of green electricity, and Art. 34 TFEU as not precluding national legislation “which provides for the award of tradable certificates to green electricity producers solely in respect of green electricity produced in the territory of the Member State concerned”.<sup>30</sup>

Most recently, in the much debated judgment in *Schrems*,<sup>31</sup> the Court not only held that EU law “... does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection”, but on its own motion invalidated the relevant Decision that was standing in way of national authorities to act.

While these examples may seem to promote de-centralizing tendencies, there is no doubt that the entire interplay between central and de-centralized outcomes takes place within the constitutional framework of EU law.

#### (b.) Ontology of the EU

As to the second part of response, the question is what kinds of outcomes the CJEU should be delivering if not Europeanizing ones?

First of all, the CJEU is indeed capable of choosing among possible outcomes. Article 19 TEU endows the Court with authority to ensure „... that in the interpretation and application of the Treaties the law is observed“. Ultimately, however, it is the Court itself who defines what the law is.

Second, the CJEU is different from all other courts not only or primarily because of the difference between legal rules or problems it deals with on daily basis, but due to the founding assumptions on which the EU legal and social system is

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<sup>29</sup> Case C-67/14, *Jobcenter Berlin Neukölln v Nazifa Alimanovic, Sonita Alimanovic, Valentina Alimanovic, Valentino Alimanovic*, EU:C:2015:210

<sup>30</sup> Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten*, EU:C:2014:2037

<sup>31</sup> Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, EU:C:2015:650

based.<sup>32</sup> To start with, in formal sense, the European Union, unlike its Member States, is not a nation state under the Constitution but an association of States under the Founding Treaties that are, in essence, international.<sup>33</sup>

This said, law of the European Union depends on cohesive energy much more than any given State and the said energy is contained in the rules of EU law. The function of some of the most fundamental provisions of the Founding Treaties goes far beyond their face value. Rules on free movement, rules on competition, on Area of Freedom, Security and Justice (hereinafter: AFSJ), and other, are not a mere end in itself, but cornerstones of cohesion and vehicles of integration. They serve, as the CJEU has stated "... to the implementation of the process of integration that is the *raison d'être* of the EU itself."<sup>34</sup> Indeed, interpretation of certain legal rules and individual rights that flow from them have dramatically different consequences in national context and the context of the European Union. EU competition law not only levels the economic playground but promotes market integration. Similar can be said of rules applicable to Judicial Cooperation in Criminal Matters which do not serve only their traditional criminal law function but which facilitate free movement of persons within the AFSJ. It is precisely because this integrative function of EU law rules why certain EHR Convention guarantees, such as *ne bis in idem* or right to be heard, if interpreted in traditional way, i.e. from a single State perspective, can ruin the cooperation in criminal matters.<sup>35</sup> In a similar way the right to be heard intrudes upon some of the key concepts of EU competition law and policy, such as a presumption responsibility of a mother company for acts of her subsidiaries.<sup>36</sup> In other words, if cohesion of the EU is to be preserved, supranational adjudication has to take in account integrative function of EU law. To criticize the CJEU for interpreting law as to create integrative outcomes is a critique that generalizes national experience and national function of law and seeks to present them as being universally valid.

To my mind, interpretation of European Union law takes place within the specific framework of basic ontological identities, the term that I borrowed from Piere Schlag who was writing in American context.<sup>37</sup> Those ontological identities are the Legal Basis, the Act, the Agent and the Legitimacy of the social arrangement under which European Union law operates.

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<sup>32</sup> If sameness of courts were based on the sameness of the rules they apply, how could one explain why one and the same rule is interpreted differently in different jurisdictions?

<sup>33</sup> EU is often referred to as a "supranational" order. However, the legal and political basis of its supranationality are the Founding Treaties which are, in itself, international treaties

<sup>34</sup> Opinion 2/13 "*On accession of the European Union to the European Convention on Protection of Human Rights and Fundamental Freedoms*", EU:C:2014:2454, para. 172

<sup>35</sup> C-129/14 PPU, *Spasić*, EU:C:2014:586 , para. 63

<sup>36</sup> Case C-97/08 P *Akzo Nobel and Others v Commission* EU:C:2009:8237, para. 59; The presumption is, however, rebuttable: Case C-90/09P *Química* EU:C:2011:21, paras. 51, 52

<sup>37</sup> Pierre Schlag, *Empty Circles of Liberal Justifications*, 96 MICHIGAN L. REV. (1997) 1

Speaking about the **Legal Basis**, the Founding Treaties are often considered a constitutional charter of the EU, the reference to which can be found in the case law of the CJEU.<sup>38</sup> However, the CJEU never went so far as the Supreme Court of the United States and the powers of the EU have never been extended to an equivalent of federal competence comparable to the necessary and proper clause as encapsulated in the famous phrase: "... it is the Constitution we are expounding."<sup>39</sup>

Defining the European constitutive **Act** is another challenge. Due to the multiple amendments to the Founding Treaties, there is no certainty about when the European Union was actually founded. Is it the Treaty of Paris, or Treaty of Rome, or any of subsequent Treaties? Or is it rather a process of never-ending construction?<sup>40</sup>

Also, while in the Member States there is a single political **Agent** – the People, in the European Union it is the Member States and their Peoples. This bifurcation of the Agent is reflected in the architecture of every single institution, including the Court of Justice, which comprises 28 judges, each one being nominated on behalf of one Member State. This is not a mere expression of the European identity which is a composite of national identities rather than a monolith one deriving from European People, but also incorporates diversity of legal backgrounds of judges who, by necessity, operate within their respective internalized referential frameworks.

The fourth ontological identity, the **Consent**, is conditioned by the first three. In the European Union it derives from the Peoples of the Member States, but also from the Member States themselves, represented directly in the key legislative institution – the Council and indirectly everywhere else. Also, it is not unconditional but has to be renewed by the Agents on national referenda and

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<sup>38</sup> Case 294/83 *Parti Ecologiste Les Verts v European Parliament* EU:C:1986:1339, at para. 23; Opinion 1/76, *"On the Draft Agreement establishing a European laying-up fund for inland waterway vessels"* EU:C:1977:741, at para. 12 ("internal constitution of the Community"); Case C-314/91, *Beate Weber v European Parliament* EU:C:1993:1093, at para. 8; Case C-2/88, *Imm. Zwartfeld and Others* EU:C:1990:3365, at para. 16; Opinion 1/91, *"On Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area"* EU:C:1991:6079, at para. 21; most recently Opinion 2/13 *"On accession of the European Union to the European Convention on Protection of Human Rights and Fundamental Freedoms"*, EU:C:2014:2454, para. 163

<sup>39</sup> *McCulloch v. Maryland* 17 U.S. 316 (1819)

<sup>40</sup> Art. 1 of the TEU speaks about the "process of creating an ever closer union among the peoples of Europe." This process can indeed be understood as a basic ontological identity of the EU having in mind that it is inextricable from fundamental values of the EU. In other words, the process of creating an ever closer union existentially depends on respect for the same value framework which has to be interpreted uniformly. See Opinion 2/13 *supra*, note 14, paras. 167, 168, 170. Constitutional framework of the EU constrains interpretation, *id.* para. 177

intergovernmental conferences, on occasion of every major amendment of the Legal Basis that periodically evolves.<sup>41</sup>

The four mentioned ontological identities are relevant for demarcation of the outcome-oriented critique of the CJEU.

#### 4. Concluding remarks

Speaking about traditions, Paul Feyerabend suggests that their interactions and results beg two kinds of questions: observer questions and participant questions.<sup>42</sup> “Observer asks: what happens and what is going to happen. Participant asks: what shall I do?”<sup>43</sup> This distinction is clearly relevant for the present analysis. In context of adjudication, the question is “how shall I decide” or “how shall I respond to claims of other actors”. On the other hand an observer seeks answers to questions like “what happened” or “what does it mean”. The Court is concerned with claims and counterclaims of participants to the proceedings. A critic is concerned with the result of proceedings and its interpretation. Responses to the two sets of questions necessarily take place within different traditions. It is certainly possible if not very likely that participants and observers belong to different traditions and maintain competing normative claims according to which their respective demands are objective and their tradition independent and, that, as a consequence, one set of criteria should be preferred to another. This is, as Feyerabend explains, due to the fact that “critics of a practice take an observer’s position with respect to it but remain participants of the practice that provides them with their objections” while, in reality, the two practices simply “don’t fit each other”.<sup>44</sup> To bring an example, a divergence of traditions can be illustrated by a food critic discussing merits of Mexican food based on her experience of consumption acquired in a fusion food restaurant.

Finally, it must not be forgotten that in all future situations, the original statement of law, utterances of the Court will be re-interpreted by future audiences and that any future application will take place in different factual and legal interpretative context. The Court cannot envisage what is going to happen in the future even if it were its task to do so.<sup>45</sup> What a court can do, at best, is to

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<sup>41</sup> While both the EU and US constitutional law is evolving, there are important differences to notice. American constitutional law evolves in presence of the Constitution while European constitutional law evolves in absence of it and in context of uncertainty whether there will ever be one.

<sup>42</sup> In Feyerabends analysis, traditions are neither good or bad, they simply are, and a tradition assumes desirable or undesirable properties only in comparison with some other tradition. Paul Feyerabend, *SCIENCE IN A FREE SOCIETY*, London 1978, pp. 27 *et seq.*

<sup>43</sup> *Id.* at 18

<sup>44</sup> *Id.* at 22

<sup>45</sup> Ehrlich made a similar argument about parliamentary regulation. “The law-giver can, by means of his statutes render decisions only in those types of legal cases which come to his attention. Therefore no decisions can be derived from a statute as to legal cases of which the legislator has never thought or been able to think.” *An Appreciation of Eugen Ehrlich*, By Roscoe Pound, 36 HARV. L. REV. 140

try to rationalize the complexity of a present case in order to minimize need for future litigation.<sup>46</sup>

As Nassim Nicholas Taleb suggested, human ability to understand is encumbered by a number of factors, including the retrospective distortion. In his own words, "we can assess matters only after the fact, as if they were in a review mirror" where earlier chaos appears to look more organized and clear than at the actual time.<sup>47</sup> Briefly, men are "just a great machine for looking backward."<sup>48</sup> There appears to be a significant difference between a real-time claim for clarity and the posterior one, the latter always being interpreted in retrospect.

Feyerabend claims that traditions are neither good nor bad, but simply are.<sup>49</sup> From that point on, it does not appear controversial to suggest that claims for transparency, clarity and coherence, presence of dissents and ability of a court to control its docket can be understood as objective and tradition-free, or are they necessarily tradition-dependent?

Finally, without implying that any kind of critique can be, or should be, hastily dismissed, let me say a few words about what kind of critique of the CJEU appears to be productive. To my eyes, it is, primarily, internal critique proposing that elements, which are within the powers of the CJEU, should be improved or, that those which are, apparently, impossible for the Court to change are, in fact, within its powers. As far as external critique is concerned, there will always be normative proposals how the Court should be deciding cases. Such proposals, if based on national traditions remain within scope of external critique. They may become part of internal critique only once they are formulated as a critique of reasoning and coherence.

Ladies and Gentlemen, thank you very much for your attention.

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<sup>46</sup> For example, judgment of the Court of Justice in case C-341/05 *Laval en Partneri Ltd v Svenska Byggnadsarbetareförbundet avd. 1 Byggettan, Svenska Elektrikerförbundet*, EU:C:2007:809, caused the parties in the case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007: 772, to settle the case

<sup>47</sup> Taleb, Nassim Nicholas, *THE BLACK SWAN*, Kindle edition at 656

<sup>48</sup> *Id.* at 716

<sup>49</sup> Feyerabend, *supra* note 42 at p. 27