THE EUROPEAN COURT OF JUSTICE AFTER THE EASTERN ENLARGEMENT: AN EMERGING INNER CIRCLE OF JUDGES*

Tomas Dumbrovsky†

EUSA Twelfth Biennial Conference, Boston 2011

Last update 03/01/2013

Abstract

The article analyses the adaptation of the European judicial system on the Eastern enlargement. At first, we examine changing litigation patterns in preliminary references and infringement actions, the two major inputs of Courts' work. While the number of preliminary references increased proportionally to the increase of EU citizens, who are potential litigators, the number of infringement actions remain much behind the increase of potential wrongdoers (the Member States). Having mapped out the changes in Court's input, we look at the internal processes at the Court after the enlargement. Twelve new judges allowed setting up new chambers. That, on the one hand, enhanced the capacity of the Court, on the other hand it has threatened the ability of the Court to provide doctrinal coherence and the ability to promote particular judicial politics. As a reaction, an inner core of judges emerged. New Member States judges were diffused in several chambers without being appointed to leadership positions. Soon, the inner circle of judges on the leadership positions was partly formalized through regular weekly meetings, which gives the core informational advantage and better planning ability. The president of the Court then has increasingly used his managerial powers in order to assure the inner-core control of the decision-making in important cases. Our findings, however, suggest that the core-periphery structure, though it temporarily discriminates new Member States judges, allows for periphery members to move to the core.

Suggested citation:

Dumbrovsky, T., The European Court of Justice after the Eastern Enlargement: An Emerging Inner Circle of Judges. EUSA Conference Paper. Boston 2011 (updated version 2013).

---

* We would like to thank to Suzanne Schmidt, Luboš Tichý, Harm Schepel, Běla Plechanovová, Michael Blauberger, Sylvian Brouard, Christoph Hönnige, members of the research team on Patterns of EU Decisions-Making after Eastern Enlargement, and the participants of the ECPR Fifth General Conference's panel on Constitutional Courts and Judicial Politics held in Potsdam in 2009, the Fifth Pan-European Conference on EU Politics' panel on National Actors in EU Institutions after the Eastern Enlargement held in Porto in 2010, and the EUSA Twelfth Biennial Conference's panel on ECJ Litigation: Process, Strategy and Impact held in Boston in 2011 for the discussion on the topic and their valuable comments. All errors go with the authors.

† J.S.D. Candidate, Yale Law School, and Assistant Professor, Charles University in Prague.

TABLE OF CONTENTS

INTRODUCTION 1

1. INSTITUTIONAL CAPACITY OF THE COURT TO HANDLE INCREASED CASE LOAD 2

1.1 The caseload of the Court of Justice 2

1.2 Does More Potential Individual Litigators Mean More Preliminary References? 3

1.3 Does More Potential Wrongdoers (Member States) Mean More Infringements of EU Law? 6

1.4 Length of proceedings 8

2. INQUIRY INTO THE APPOINTMENT PROCESS AND INTERNAL WORKINGS OF THE COURT 10

2.1. Member States' appointment practices 10

2.2.The principle of one judge per Member State 17

2.3 More chambers as a solution to efficiency problem 19

2.4 Making appointments accountable? The expert panel under Article 255 TFEU 22

3. EMERGING CORE-PERIPHERY STRUCTURE 25

3.1 The Inner Core of the Court 25

3.2. The legal culture of 'newcomers' vis-à-vis the legal culture at the Court 28

3.2.1 A threat to constitutional pluralism and the existing teleological approach of the Court? 29

3.2.2. …or business as usual? 31

3.2 Individual decision-making power of new Member States' judges 35

CONCLUSION 39

BIBLIOGRAPHY 41

ANNEX 46

INTRODUCTION

This article analyses the impact of the Eastern enlargement on the European Court of Justice (hereinafter the Court or ECJ), the highest court of the European judiciary. It identifies the major challenges the Court faced and how the Court adapted to changing environment both internally and externally. In order to do so, the article assesses role of other actors in this process, mainly litigators and Member States (MS). The research question is: Has the Eastern enlargement creates a new-Member-States versus old-Member-States division at the Court or has the Court managed to prevent such development and if so, how?

Our central expectation is that due to the increased number of participants in the decision-making process at the Court in the aftermath of Eastern Enlargement, the majority of the actors will be isolated through the development of formal and informal 'inner circles'. The main premises of this claim are that due to efficiency concerns a limited number of actors will dictate substantive outcomes while informal decision-making will tend to subsume the formal process of the institution. Undoubtedly, "informal and secluded processes are endogenous rather than exogenous to a system's formal institutional framework" (Reh, Héritier, Bressanelli & Koop 2010: 5). A certain degree of informal decision-making, understood as a process of isolated dense negotiations running in parallel to the established legal framework, is not novel, unusual or normatively problematic per se. To be sure, informal interactions have existed at the Court well before the appearance of its new members. The informal space provides "solutions to problems of social interaction and coordination" and enhances "the efficiency or performance of formal institutions" (Helmke & Levitsky 2004: 727). However, with the 'Big Bang' enlargement that brought a significant increase in actors that could have altered the doctrinal course of the Court, we expect to see an attempt for accommodating change that will be connected to an ever growing number of both formal and informal inner circles defined by restricted access and shielded from public scrutiny. In such settings, representatives of the old EU members find themselves in a more favourable position due to their long-term experience, existent networks, and bargaining leverage. Conceptualised as a core-periphery structure, the Court after 2004 reveals a pattern of a

well-connected core of actors and a periphery that tries to tie to the core rather than to oppose the core by creating coalitions with other actors at the periphery. Hereafter the Court is examined both as an institution and as a *judicial* institution; therefore, the specificities of judicial decision-making are taken into account as appropriate.

First, it assesses how the two main adjudicating channels, the preliminary question procedure and the infringement proceeding, were affected by the enlargement, whether the litigation patterns changed, how it impacted the Court's working, and how the Court adapted internally to the new situation. The second part touches upon the question of Member States' strategies in the appointment of judges to the Court. Finally, the third part focuses on the relative decision-making power of judges from the new Member States vis-à-vis judges form the old Member States. The methods used are both qualitative and quantitative, with the overall inquiry to be underpinned with expert interviews with European Union law practitioners that have worked or currently work at the Court or have been involved judicial appointment processes.

The two later research areas highlight rather surprising gap in the current research on the ECJ that has achieved incredible results regarding the impact of the Court as an institutional player on the integration project at large, while the scholarship has neglected the research of both how the Member States used their appointment powers to shape the Court and who is taking lead in the Court's internal decision-making.

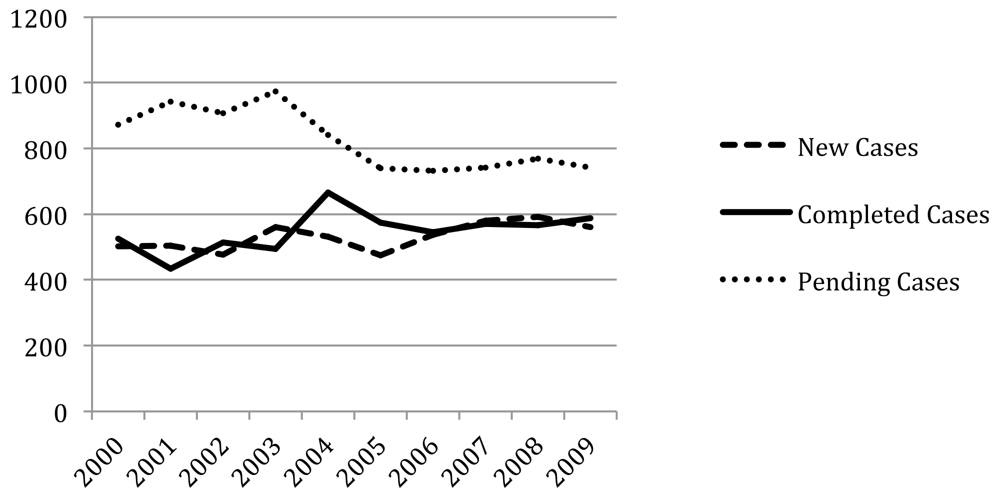
1. INSTITUTIONAL CAPACITY OF THE COURT TO HANDLE INCREASED CASE LOAD

1.1 The caseload of the Court of Justice

As expected, the statistics of judicial activity after the Eastern enlargement show that the case load of the Court is better handled by the increased number of judges. However, is this really the product of the enlargement? Figure 1 below shows that between mid-2003 and mid-2004 (that is, in the immediate pre-enlargement period) the Court was able to complete substantially more cases than before. As a consequence, there were less pending cases when the new Member States acceded. After that, the figures were more or less stable despite the slight rise in new cases post-

2004. As analysed further below, the explanation lies, among others, in the more aggressive exercise of managerial power put forward by the President of the Court, Vassilios Skouris.

Figure 1: The Court of Justice – Proceedings 2000-2009[1]



1.2 Does More Potential Individual Litigators Mean More Preliminary References?

Preliminary references are still the most common procedure brought before the European Court of Justice. The Court receives an average of about 250 to 300 such references each year. A preliminary reference is brought to the ECJ by a Member State court on an individual litigator's incentive in order to change the law application at the litigator's advantage. The national courts may and sometimes are under an obligation to send to the Court in Luxembourg such preliminary questions on the interpretation of EU law. The ECJ may then de facto invalidate national law with the result that national law will not be applicable on the basis of incompatibility with European law. The main weight of the procedure is that the decisions of the

[1] Raw Data Source for Figure 1 and Tables 1-6: Court of Justice of the European Communities (2008) *Annual Report 2007*, Luxembourg: Publication Office of the European Union; and Court of Justice of the European Communities (2010) *Annual Report 2009*, Luxembourg: Publication Office of the European Union. Our own calculations.

Court of Justice become not only binding upon the referring national court, but also on all other Member States courts, thus having a multiplying effect.

The starting hypothesis is that the increase in the overall EU population caused by the Eastern enlargement shall result in proportional increase in preliminary references of Member States' courts to the ECJ.

Table 1: Correlation between EU population and initiated preliminary references (2001-2009)

	Mean 2001-2003	Mean 2007-2009	Increase [%]
EU Population [mil.]	388	500	28.9
New Cases (Preliminary References)	222	285	28.4

Table 1 shows an almost perfect match. The increase in number of potential individual litigators corresponds to the increase in the caseload of the ECJ. This is striking given the fact that between the moment a state accedes to the Union and preliminary references being sent by this state, a certain time lapse might be expected to inevitably occur due to adjustments in litigation habits, etc. However, a closer look at the numbers below shows that with the sole exception of Hungary that was sending references from early on, this was indeed the case – there were no references at all sent in the first one to two years after the enlargement but then in the past few years, the majority of new Member States quickly 'caught up' by referring more and more cases.[2]

Table 2: Preliminary References from new MS (2004-2009)

	2004	2005	2006	2007	2008	2009	Mean 2006-2009
BG	---	---	---	1	0	8	3.0
CZ	0	1	3	2	1	5	2.75
EE	0	0	0	2	2	2	1.5
CY	0	0	0	0	1	1	0.5
LV	0	0	0	0	3	4	1.75
LT	0	0	1	1	3	3	2.0
HU	2	3	4	2	6	10	5.5

[2] Therefore we have omitted first two years for the countries in the first round of the Eastern enlargement in our calculation of the mean. For BG and RO the mean is calculated for the years 2007-2009.

MT	0	0	0	0	0	1	0.25
PL	0	1	2	7	4	10	5.75
RO	---	---	---	1	0	1	0.7
SI	0	0	0	0	0	2	0.5
SK	0	0	1	1	0	1	0.75

If we compare the preliminary references coming from the new Member States to such referred from the old Member States, we find that in 2009 the new Member States referred only 16.8% of the overall number of references in the EU, while the overall increase in references was 28.4% between 2003 and 2009. As the increase in preliminary questions does not correspond to referrals coming from the new Member States courts, it may well be worth looking into the possibility of new Member States nationals triggering referrals from the old Member States.

A paradigmatic case in this respect is *Laval*,[3] in which a company incorporated under Latvian law posted workers to Sweden in May 2004 to work on building sites operated by a Swedish company. After negotiations between Laval and the Swedish trade unions on the pay rates for posted workers failed and following a subsequent blockade on its building sites, Laval brought an action before the Swedish Labour Court that then referred a question to the ECJ. The disproportion between new Member States referrals and the overall increase in references in the European Union is explainable by the logic of trans-border litigation. Best equipped for litigation in the new Member States are trading companies. As the cheaper marginal costs of their goods or services give them a comparative advantage in the markets of the old Member States, they naturally seek to overcome free movement restrictions in the old Member States. The litigation in old Member States is beneficial not only for companies, but also for individuals coming from the new Member States. The economic benefits of employment (vocational training) in old Member States represent important incentive for individuals to litigate in the old Member States. Also, litigation might be easier for low income individuals (employees and students) in the old Member States than in the new Member States, as the former features already established structures for litigating EU law issues; structures that are virtually still missing in the new Member States.

[3] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska, Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

1.3 Does More Potential Wrongdoers (Member States) Mean More Infringements of EU Law?

Infringement proceedings are actions brought to the Court most commonly by the Commission against a Member State for breach of obligations stemming from EU law. The hypothesis tested here is that an increase in the number of Member States following the Eastern enlargement shall result in proportional increase in infringement proceedings against Member States.

Table 3: Correlation between number of EU Member States and initiated infringement actions (2001-2003)

	Mean 2001-03	Mean 2007-09	Increase [%]
Member States	15	27	80.0
New Cases (Infringement Proceedings)	174	187	7.5

Although the Eastern enlargement brought an increase in preliminary references proportional to the increase in the overall EU population (potential individual litigators), the increase in infringement proceedings does not correspond to the increase in number of Member States (potential wrongdoers). This may be explained by the strong conditionality requirements imposed on new Member States in the pre-accession period that lead to speeded implementation of *acquis communautaire*. The double standards employed then by the Commission to EU Members and Candidate-Members were heavily criticised by the academic community. As Anneli Albi writes: “the protection of national minority rights served as the most notorious and contested case in point: with the uncertain scope of protection within EU law, the candidate countries had to comply with international instruments that some Member States themselves were yet to ratify” (Albi 2009: 49). The Commission’s approach toward the candidate countries was marked by “a complete lack of clarity about the standards that the candidate countries were expected to comply with … poor analysis quality provided by the Commission, including random choice of issues, unreliable conclusions, numerous contradictions and … unjustified differentiated treatment” (Kochenov 2008: 300). This led many of the new Member States to hastily transpose EU directives and

adopt EU regulations without actually envisaging thorough enforcement mechanisms and spurred later academic criticisms of the realities in new Member States dubbed as "the world of dead letters", implying decent transposition without actual implementation of EU law (Falkner, Treib 2008: 310; Falkner, Treib & Holzleithner 2008: 158).

Table 4: Ratio in infringement actions b/n new and old MS in 2007-2009

	Mean 2007-2009 infringement actions – Art. 258 TFEU	Mean 2007-2009 [%]	Ratio between number of new and old MSs [%]
New MS	27.7	14.86	44.4
Old MS	158.7	85.14	55.6
Total	186.4	100	100

While new Member States have represented 44.4 % of all the EU Member States, they were subject to only 14.86 % of all infringement actions started by the Commission in the period 2007-2009. As it is precisely cases of wrong or late transposition that the infringement procedure mostly captures, the empirical mismatch shown above has to be traced back to the controversial conditionality mechanisms of the pre-accession period.[4]

Certainly, the fact that the Commission has absolute discretion in initiating the infringement procedure[5] as well as closing it at an earlier stage, before the file even reaches the Court, may account for the numbers if we assume that it is the intention of the Commission not to raise such infringement actions against the new Member States. When it comes to Bulgaria and Romania, a closer look reveals a certain preference of the Commission for the Cooperation and Verification Mechanism (CVM) – a tool used to monitor the progress of both countries in the fields of judicial reform, corruption and organised crime. The CVM was activated as a way to extend

[4] Melanie Smith offered yet another, and surprisingly simple explanation of disproportionally lower amount of infringement actions against new MS – based on series of interviews with Commission officials, she found that the Commission apparatus has had insufficient language capacity to overview implementation in the new Member States (Smith 2010: 155, footnote 109).

[5] 247/87 *Star Fruit v Commission* [1989] ECR 291, para. 12: "It is only if it considers that the Member State in question has failed to fulfil one of its obligations that the Commission delivers a reasoned opinion. Furthermore, in the event that the State does not comply with the opinion within the period allowed, *the institution has in any event the right, but not the duty*, to apply to the Court of Justice for a declaration that the alleged breach of obligations has occurred" (emphasis added).

conditionality beyond accession. Usually critical in its CVM reports,[6] in the period 2007-2009 the Commission brought only one infringement case against Romania and no such case against Bulgaria.[7] Infringement proceeding is the only legal way how to punish incompliance. The risk with overreliance on the CVM is that the Commission becomes both a prosecutor and a judge, thereby concentrating even more power in its hands and keeping its judgment out from the Court's review.

1.4 Length of proceedings

The third hypothesis is based on the rather commonsensical observation that increase in the number of judges at the Court should result in ability for the Court to complete more cases and shorten the overall length of proceedings. However, the overall increase in Court's capacity is somewhat lower than pure mathematical increase of number of judges. For the capacity what really matters is the overall increase in chambers. Still, we may presume that an enlargement increases number of chambers. As discussed in greater detail in part three below, judges decide cases in chambers and almost never in plenary. In the period 2001-03 the bulk of cases were decided in three five-judge chambers, two three-judge chambers and in the Grand Chamber formations. After the second Eastern enlargement (in the period 2007-09) we find the Court adjudicating in four five-judge chamber formations (the most common composition), four three-judge chambers and in the Grand Chamber (composed of eleven to thirteen judges).

Table 5: Correlation between increased capacity of the Court and completed cases 2001-2009

	2001-03 (average)	2007-09 (average)	Increase [%]
Chambers (ECJ)	6	9	50.0
Completed cases	492	575	16.9

[6] For Bulgaria see COM (2007) 377 final (June 27, 2007); COM (2008) 63 final (Feb. 4, 2008); COM (2008) 495 final (July 23, 2008); COM (2009) 69 final (Feb. 12. 2009); COM (2009) 402 final (July 22, 2009); COM (2010) 112 final (March 23, 2010); COM (2010) 400 final (July 20, 2010); COM (2011) 81 final (Feb. 18, 2011). For Romania see COM (2007) 378 final (June 27, 2007); COM (2008) 62 final (Feb. 4, 2008); COM (2008) 494 final (July 23, 2008); COM (2009) 70 final (Feb. 12. 2009); COM (2009) 401 final (July 22, 2009); COM (2010) 113 final (March 23, 2010); COM (2010) 401 final (July 20, 2010); COM (2011) 80 final (Feb. 18, 2011).

[7] Court of Justice of the European Communities (2010) *Annual Report 2009*, Luxembourg: Publication Office of the European Union, 85.

A comparison between the pre-enlargement average (2001-03) and a post-enlargement average (2007-09) of completed cases (taking into account preliminary rulings and direct actions, which cover 99% of all proceedings) shows that the potential capacity of the Court increased (number of chambers) while the increase in completed cases lagged behind that potential. The explanation seems to be obvious: the Eastern Enlargement should have provoked more litigation and increase in the caseload of the Court; the increase in number of chambers (that corresponds to the average increase of potential wrongdoers (Member States, 80%; see Table 2) and potential individual litigators (population, 28.9%; see Table 4) should only absorb the difference. And yet, contra intuitively, the average length of the proceeding has considerably shortened. While the pre-enlargement length of proceedings was 23.7 months, post-enlargement figures show the average length of the proceedings to be 17.6 months, in other words, there is a shortening of the average length of the proceedings with half a year (-25.7%). Though the flow of preliminary references has remained stable after 2007, the statistics of the Court show a relative paucity in infringement proceedings in the period 2007-2009. The overall increase of caseload is below the broadened capacity of the Court but the numbers can be accounted for not only by the relatively lower influx of infringements but also by the reforms introduced with the Nice Treaty when a portion of direct actions concerning individual concern were outsourced to the General Court (Skouris 2006: 20). The General Court has thus taken up not an insignificant portion of state aids and antidumping proceedings brought by individuals and companies and previously dealt with by the ECJ.

Some other reasons for shortening the procedure that transpired from the interview material (Interviewee 6) are related to the current President's policy that has strongly prioritised the faster delivery of judgements. This type of policy has somewhat impacted on the internal workings of the Court as for instance, the preparation of research notes that give comparative insights on national case law and legislation by the Research and Documentation Centre has become 'less popular' during the presidency of Vassilios Skouris (Ibid.). Such complementary materials feed into the opinion of the Advocate General (AG) and the Court's deliberations and final decision-making, offering additional contextual information for the Court in complex cases, and though may take longer to prepare, have usually contributed to the use of a comparative method by the

Court and thus, to high quality legal solutions (Lenaerts 2003; Lenaerts & Gutiérrez-Fons 2010).[8]

Yet another reason must be sought in the possibility, since the Nice Treaty, to dispense with an AG's opinion in a number of cases, where no new point of law has been raised (Art. 20 ECJ Statute). Also, the urgent preliminary reference procedure for criminal law cases or ex-third pillar cases belonging to the Area of Freedom, Security and Justice (Art. 23 ECJ Statute) introduced in Lisbon Treaty aims at shortening the procedure, as a judgement is then delivered after merely hearing the AG and opinions are not produced in writing. Since the opinion of the AG has value and influence in particular for understanding a new area of EU competence (Fletcher 2011), the new practice, though comprehensive data are yet to be available, has evoked due criticisms from members of the Court (Interviewee 6). Since national courts need to stay the procedure to wait for the decision of the ECJ, conscious attempts to keep the flow of national court referrals steady by maintaining the delivery of judgements within manageable time limits is understandable. Latest developments have revived old fears though: "the Court might devote itself to quantity at the expense of quality and, in doing so, neglect its *raison d'être*, that is to say the consistency of its case- law" (former ECJ judge Yves Galmot, quoted in Vauchez 2011: 10). With enlargement rounds and subsequent increase in case law, the trade-off between input and output legitimacy (Börzel 2005: 253), so often seen at the other EU institutions, has also reached the Court in the form of efficiency quest, or in Joseph Weiler's words, "delivery of industrial justice" (Weiler 2010:X) in which the shortening of the length of proceedings comes at the fore at the expense of better contextualised, deliberated and reasoned judgments.

2. INQUIRY INTO THE APPOINTMENT PROCESS AND INTERNAL WORKINGS OF THE COURT

2.1. Member States' appointment practices

Though a well-settled methodology is offered by the long tradition of research of judicial appointments to the U.S. Supreme Court and may be adapted for the particular situation of the

[8] "Thus in *Brasserie du Pêcheur and Factortame*, drawing on the comparative law analysis carried out by Advocate General Tesauro in his Opinion, the ECJ ruled that liability for loss or damage caused by a Member State could not be made conditional upon a finding of fault or negligence." (Lenaerts & Gutiérrez-Fons 2010: 1634).

Court of Justice, the latter differs substantially in the fact that in the lack of a unified procedure required by EU law the process is opaque and as demonstrated in the paper, characterised by fragmented national strategies. Renaud Dehousse pointed out the obvious obstacle in studying the judicial decision-making process in the European Court of Justice: "Unlike the situation in the USA…, where the behaviour of the members of the Supreme Court and their influence within it have long been the subject of detailed analysis, the contribution of each of the individual judges [of the ECJ] cannot be discerned easily" (Dehousse 1998: 13). There is very scarce literature on European governments' politics regarding judicial appointment to international judicial bodies, which would be more than merely descriptive. Eric Voeten in his analysis on the politics behind the appointment process in the European Court of Human Rights (ECHR) shows that states aspiring EU accession, in an attempt to increase their negotiating leverage before the European Commission, appoint activist judges in the ECHR, thus signalling to the Union that they are prepared to ensure high standards of human rights' protection (Voeten 2007: 693). Moravcsik adds that states in transition want to secure the level of human rights' protection that they have achieved against possible negative intra-state developments (Moravcsik 2000: 245).[9] Conversely, other states with high standards of protection are inclined to appoint rather non-activist judges to the ECHR because they classify their national level of human rights' protection as sufficiently high and try to avoid external 'intrusion'.[10]

The only valuable study on the issue of ECJ appointment practices so far was conducted by Sally Kenney in the late 1990's (Kenney 1998) and has not been deepened or updated since. Furthermore, the way the changing composition of the ECJ reflects the decision-making style of the Court is something that is largely speculated about in EU legal circles, though it has not systematically been analysed. While the authoritative position in the EU institutional set-up that the ECJ has secured early on for itself gives the impression of a unified voice, one has to keep in

[9] Membership in the Council of Europe as a safety lock against undemocratic development is mentioned also by Sadurski 2006: 4; however, Voeten's empirical model is not able to prove such a hypothesis.
[10] Voeten mentions the examples of the United Kingdom, Iceland and Austria (Voeten 2007: 691-692); however, he suggests yet another explanation: states with mature human rights protection would rather nominate activist judges, who can help them let other states comply with liberal objectives, while their own protection of human rights would be rarely subjected to ECHR review (Voeten 2007: 676-677).

mind that actually 27 different voices coming from 27 different legal cultures have to be synchronised in order to set the common tone.

The appointment process of the ECJ's judges consists of two main procedural stages – the first one being at the level of the Member States and the second, accomplished at the European level. The first is entirely left in the hands of each Member State and has been repeatedly criticised for lacking transparency and accountability. European law regulates ECJ's appointments indirectly only, by stipulating requirements on the candidates' compulsory expertise and independence. Therefore, the fulfilment of the Treaty conditions in respect to the candidates' personal qualifications is realised during the European stage of scrutiny. As the provisions of the Treaty are open-textured ('beyond-doubt independence'; a person of 'recognised competence')[11] and the ECJ has not so far interpreted them, the Member States are not restrained in nominating their candidates. That has slightly changed with the Lisbon Treaty when a panel composed of judges with an advisory role on the nominations, was introduced.

In order to illustrate judicial appointment practices in the Member States, we examine several national procedures.

In the United Kingdom, a nominee for a judge at the Court of Justice is chosen by the Foreign and Commonwealth Office upon a competition. When one looks into the system of appointments of national judges in the UK, he/she notices substantive changes in recent years. Over thirty years of complaints on the non-transparent, executive-dominated judicial appointment seemed to finally get closer to the political agenda when the Labour government took over the British parliament and cabinet. In Scotland, Lord Advocate, the chief government law officer, used to decide, before the Judicial Appointment Board was established, on all the judicial appointments in Scotland, without being statutory obliged to consult with anyone. However, he customary held consultations with the Lord President. Later the appointment power was exercised by the Secretary of State for Scotland, whose office was replaced by the First Minister as part of devolution.

In the Czech Republic, several institutions such as law faculties and the highest courts were

[11] Art. 253 TFEU.

asked to suggest possible candidates. The candidates were then pre-selected by an ad hoc committee composed of delegates from the Ministry of Justice and the Ministry of Foreign Affairs chaired by the Minister of Justice. All candidates were questioned before the committee[12]. The government appointed four candidates, two candidates to be nominated for the judicial positions at the ECJ and the General Court and two substitutes. All of them were known for their francophone orientation and they hold high positions in the Czech academic institutions either with an expertise in international law (for the ECJ position) or European and competition law (for the General Court's position).

In Poland, the Minister of Foreign Affairs issued a public call for tender specifying the eligibility criteria. The Minister of Foreign Affairs then selected the eligible candidates in a joint consultation with the Ministry of Justice. Finally, the Chairman of the Council of Ministers made the decision on the selection of a candidate after consulting the European Committee of the Polish Parliament (Sejm).[13]

In Belgium, candidates for the position of judge at the European Court of Justice are chosen in a highly politicized manner, dictated by the complicated federative structure of a country comprised of two nations and three language communities (Kenney 1998 and interviewee 9).

Similarly, in Germany, candidates, off record, shall bear CDU or SPD membership, if they think about a career in Luxembourg. The ECJ nomination is very likely to be part of 'nomination package' bundling many available positions in an overall trade-off. Generally, regarding ECJ nominations, the SPD and CDU would take turns in nominations. While SPD would select the candidate for ECJ judgeship on its federal level, CDU leaves to a certain extent Lander to take turns in nominations (Kenney 1998 and interviewee 9).

In Hungary, the President of the Constitutional Court is given an advisory role during the hearings of potential nominees in a panel composed of representatives of the Ministry of Justice

[12] Interviewee 11. The governmental decision that nominated the first Czech judges for ECJ and the General Court also bound the government to reappoint him or her after the end of the first judicial term if the term is shortened as envisaged in the Act of Accession (see Government decisions no. 132 of Feb. 11, 2004 and no. 142 of Feb. 15, 2006).

[13] Council Decision "The Rules and Procedure for Selecting Candidates to European Union Institutions and the Related Timetable" (adopted by the Polish Council of Ministers on January 6, 2004).

and the Ministry of Foreign Affairs (Interviewee 11).

In France, empirical data shows that judges chosen by leftist pro-integrative government have been in majority cases reappointed by Gaullist government and vice versa. The same is true for United Kingdom.[14]

Bulgarian appointment practices created a controversy on the occasion of the second nomination process after the Bulgarian judge at the General Court Teodor Chipev resigned for health reasons. Dimitar Stefanov, Chipev's legal assistant, won the national competition organised in November 2010. Stefanov was however not appointed, as arguably, he did not satisfy the requirement of being a jurist of 'recognised competence' contained in a later repelled legal act. The government argued that a twelve-year juridical practice that at the time Stefanov did not possess was required for a candidate for a judge at the national highest judiciary. We shall recall that Art. 258 TFEU sets two alternative conditions to prove expertise of a candidate: either she fulfils the requirements for a judge of the Member State's highest judiciary or is a person of recognized competence. In order to clarify the exact selection criteria, the parliament changed the law on selection of judges to the ECJ and the General Court in February 2011 (Buchkov 2011). The controversy caused that the post of a Bulgarian judge at the General Court has been vacant for seven months as at the moment of writing.

In Slovakia, the national judiciary council effectively selects the candidates for ECJ judge.[15] This competence is stipulated directly in the Slovak Constitution.[16] At least half of the council's members are judges, other half being nominated by legislature, president, and government.[17] Despite being one of the most a-politicized nomination processes, at least on its face, the constitutional court was soon asked to review the process. Ján Klučka was the first judge appointed by Slovakia to the ECJ. When his term was about to finish, judiciary council opened a

[14] The data are on file with the author.

[15] The judicial council was established in 2002 within the first phase of a judicial reform. According to Art. 141a para. 4 lit. d) of the Slovak Constitution, the judicial council "present to the Government of the Slovak Republic proposals of candidates for judges who should act for the Slovak Republic in international judicial bodies".

[16] Art. 141a para. 4 lit. d) of the Slovak Constitution.

[17] The judicial council consists of eighteen judges – eight judges elected by judges of the Slovak Republic, three members by the Slovak National Council (the legislature), three members appointed by the Slovak President, and three members appointed by the Slovak Government. The Chairman of the judiciary council is the Chief Justice of the Slovak Republic.

new competition for his position. The judiciary council interviewed number of candidates (including Ján Klučka) and proposed to the Slovak Government a nomination of Daniel Šváby.[18] Mr. Klučka considered the competition and the decision of the judiciary council to breach his constitutional rights[19] and appeal against the decision to the administrative court. The matter eventually reached the Slovak Constitutional Court. Mr. Klučka claimed that the decision of judiciary council was arbitrary, lacking objectivity and expertise. In his view, the judiciary council did not follow the conditions set in Article 253 TFEU.[20] The Slovak Constitutional Court, however, denied the claim as "clearly unsubstantiated".[21]

Interesting to note is the variety of advisory parliamentary and judicial involvement at the national level of the ECJ's appointment processes. The emphasis given on selection criteria, as well as the nature of the questions asked (provided that the procedure requires such) remain mostly unclear. All in all, the process in the new Member States, with an exception of Slovakia for instance, seems to be mostly in the hands of the executive (somewhat archaic; in line with sovereignty prerogatives as executive branch represents state 'abroad') and in the period before the establishment of the Article 255 TFEU panel, complains about the highly politicised nature of the nominations at the expense of giving weight to expertise were particularly tangible in some of these states.[22]

Do Member States follow Euro-related strategies, e.g. considering more integration versus less integration profile of candidates when seeking whom to appoint at the ECJ? It seems that first time appointments of ECJ judges are the result of complex political compromise in accordance with country specifics and resemble, as the empirical data gathered by Kenney has demonstrated, the politics behind defining ambassadorships by either rewarding certain political figures or trying to isolate others from the political stage at home. That is not in itself wrong, given that any appointment in the hand of executive and unchecked by others naturally tends to

[18] Decision no. 437 of January 9, 2009. Daniel Šváby was a judge at the General Court at that time.
[19] Art. 30 para. 4 of the Constitution (Citizens shall have access to the elected and public offices under equal conditions) in connection with Art. 1 para. 1 and 2 and Art. 141a para. 4 lit. d) of the Slovak Constitution and Art. 253 para. 1 TFEU.
[20] Arguments build mainly on the lack of objectivity as the judicial council did not reasoned its decision in writing and did not search for any evidence on the candidates' professional life, especially his record as judge of the ECJ.
[21] Case no. III. ÚS 128/09, Slovak Constitutional Court judgment of May 14, 2009.
[22] Interviewee 4.

be result of political trade-offs. What is surprising however, is lack of strategic evaluation of appointments, that is lack of aim to shape the Court's outcomes.

To be sure, after having the opportunity to evaluate the first or second term of judges they nominated, Member States' governments have a reason to be more careful when reappointing judges. However, it is not impossible that the cost-benefit analysis behind reappointments at this point is not only dictated by sovereignty concerns vis-à-vis pro-EU attitude and perhaps in certain cases by a conservative versus liberal considerations (e.g. as in Germany) but is also derived from the need to 'save face' before the partners by simply appointing people with equivalent expertise.

In Joseph Weiler's words, in the case of the ECJ, without any doubt by the late 70's and 80's it must have become clear to the national executives that 'the least dangerous branch' had in fact a serious impact on the development of EU competence. However, national executives have "eschewed any possible temptation at obvious 'court packing' or 'jurisdiction stripping'" (Weiler 1999: 198). Having said that though, it must be noted that these early years of the Court have seen the most Euro-enthusiast judges be reappointed by the governments of small Member States that arguably had more to win and close to nothing to lose with the deepening of the integration process. A fervent believer in EU integration, judge Pescatore from Luxembourg could serve eighteen years in total on the ECJ and judge Donner from the Netherlands during whose Presidency of the Court the path-breaking *Van Gend en Loos* and *Costa* decisions were delivered, had his mandate renewed for over twenty years. On the contrary, big Member States such as France and Germany (albeit in the German case also due to the linkage of party rotation to judicial appointments) have rarely appointed ECJ judges for a second term in the 70's and 80's. Judge Everling from Germany, for instance, who in his academic articles was a proponent of an expansive role for the Court in EU integration, only managed to stay at the Court for eight years despite his reported wish to remain in office.

Table 6: Average length of service of judges at the ECJ, 1952-2009[23]

[23] As patterns of appointment practices of the MS that joined the EU in 1995, 2004, and 2007 cannot be discerned yet, data for these MS are not shown in Table 7. The table is based on our own research.

Appointing Member State	Average length of service of a judge [years]
PL	14
LU	13.9
BE	12.75
ES	12
DK	11.3
NL	10.9
GB	10.5
FR	9.2
IT	8.6
DE	7.5
GR	6.3
IE	6.2

In some Western European countries and unlike in Central and Eastern Europe, the ultimate career aim for judges is considered to be the service at their highest courts and the time spent at international judicial bodies becomes only a mean to that aim; therefore, often more high profile or ambitious judges are to be found at the bench of their home countries. At least in the early years of the Court, the same pattern of taking up high judicial and political posts in their home countries was also true for ECJ judges, the most prominent example being the first Irish judge who left the Court to become President of Ireland (Kenney 1998: 106).[24] Conversely, none of the new Member States' judges left voluntarily the ECJ since 2004. As mentioned above, Bulgarian judge Chipev resigned for health issue and the Slovak judge even brought a case before the Slovak Constitutional Court for not having been reappointed.

2.2.The principle of one judge per Member State

The number of judges at the ECJ corresponds with the number of Member States. The principle of one judge from each Member States was defended and persisted through enlargement rounds and Treaty amendments because, it is claimed, it ensures equal representation of legal traditions at the Court and has contributed to the establishment of the Court's authority in terms of

[24] It is worth to recall that in the early years the justiceship at the U.S. Supreme Court was not a particularly appealing job either. The first Chief Justice John Jay resigned after couple of years mostly due to annoying and health demanding ride circuit duties. (John Adams or Hamilton or who-CHECK) declined a job offer to become a justice, considering the job not being prominent enough.

legitimising ECJ's decisions vis-à-vis national constituencies. It is hard to imagine for instance the Greek or the Spanish government agreeing to pay a lofty penalty for incompliance with EU law if a Greek or a Spanish do not form part of the judicial decision-making body that has, as a whole, come up with the fine. However, supporters of the opposing view ascertain that the growing number of judges as a result of the EU's consecutive enlargements would hamper the Court's efficiency. In the run-up to the Nice Treaty, critics of the one-judge-per-MS rule had even mockingly claimed that enlarged Court has converted into a parliamentary assembly. Moreover, in its Lisbon decision, the German Federal Constitutional Court criticised the "excessive federalisation" of the European Union that is visible, among others, in the equal composition of the ECJ by Member States' judges regardless of the number of their country inhabitants.[25]

In conformance with the persistent compromise policy-making tradition in the European Union in recent years, a middle way was found: the Lisbon Treaty conserved the principle of having judges from all 27 Member States on the bench but in order to facilitate the delivery of judgements within a reasonable timeframe, it also created additional chambers, thus reconfirming the practice already established with previous enlargement rounds of deciding cases in chambers. Although other European highest constitutional courts adjudicate in chambers too, often the cases to be heard by these chambers are strictly divided in a subject-specific manner, e.g. as in the German Federal Constitutional Court that sits in two separate senates for which judges are appointed separately (Kommers & Miller: 106). Unlike in the ECJ, where there is no such distinction between the chambers, the cases that reach the German Federal Constitutional Court are sorted according to their subject, allowing for the coherence of the court's jurisprudence to be preserved. For instance, cases concerning European integration would always be heard by the second senate (Interviewee 8).[26]

It is sustained by some that historically most Member States' legal systems have extensively drawn on the French/Latin (France, Italy, Portugal, Spain, Romania), German (Germany,

---

[25] BVerfG (Lisbon Treaty), 2 BvE 2/08 [2009] para. 288; English translation available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html (accessed 5/7/2009).

[26] Though, the second senate would here cases directly opposing European Treaties or legislation, it may happen, and indeed it did happen in recent *Mangold (Honeywell)* decision, that the case with utmost importance for EU law would fall to the other senate.

Austria, the Czech Republic, Slovakia, Hungary), Scandinavian (Denmark, Sweden, Finland), and Common law models (England, Ireland, Malta, Cyprus).[27] The question then arises as to whether there are actually 27 completely different legal systems in the Union that need to be represented at the Court. That finding a politically acceptable solution to accommodate enlargements was tantamount to leaving the selection of ECJ judges in the hands of the Member States signified that a supranational mechanism for judicial appointments would not be adopted just as yet. Opting for such a mechanism immediately after the enlargement rounds might in fact not only have been politically unacceptable from nominal representation rational point of view but also not desirable in terms of formally denying equal opportunities to the new Member States candidates that found themselves constrained in the face of pre-existent informal networks and channels of communication which they are not familiar with, relatively lower experience in European Union law compared to that of old Member States' candidates, etc. Having all Member States' legal traditions represented at the Court without increasing the number of chambers could perhaps have been better achieved though by ensuring a rotation principle of judges and Advocates General from a pool of people that have the nationality of all current Member States.[28]

2.3 More chambers as a solution to efficiency problem

In any case, the pragmatic solutions found to deal with enlargements may in effect have a surprisingly centralising repercussion for the structure of the European judiciary. On the one hand, further to chamber divisions and in the absence of a certiorari[29] function that could allow the Court to sift through its case law, the push for efficient management of an ever growing docket will most likely give the green light for the creation of more specialised EU law courts

[27] See Arminjon, Nolde & Wolff 1950-1951 and David and Brierley 1985: 34. In making an argument against the move towards adoption of a European Civil Code, Pierre Legrand argues that there are only two main insurmountably different legal traditions in Europe: the common law *mentalité* and the civil law *mentalité* as found in Continental Europe, with all the rest of differences between and within legal cultures to be "not irreducible or fundamental" (Legrand 1996: 61 ff.).

[28] Rotation principle exists for Advocates General. See below.

[29] Despite some calls from academic circles for the establishment of writ for certiorari at the ECJ, it seems that for various reasons, including the delicate relationship of the ECJ with national judiciaries, such possibility has been so far rejected. Cf. Weiler & Jacque 1990 and Heffernan 2003: 907-933.

(judicial panels under Article 257 TFEU), whose work will be supervised, in a constitutional-like fashion, on appeal by the ECJ (see the recent *M v. EMEA* case, in which the first Advocate General fully exercises its role of a gate keeper). So far only one such court exists – the EU Civil Service Tribunal; for some time though, there has been a concrete proposals for the establishment of a European and Community Patents Court.[30]

On the other hand, the chamber division may potentially concentrate more power in the hands of the President of the Court, as it is the President who bears responsibility for preserving the consistency of the Court's case law. The President of the ECJ exercises this function by having the final word in the selection of a Juge-Rapporteur to be assigned to each case that comes to the Court. According to an interviewee that worked at the Court for over twenty years:

> The choice of Juge-Rapporteur will depend on the *policy* of the President and may, in certain cases reflect the expertise of judges, for instance in technical matters, in social security cases, etc. (Interviewee 2, emphasis added).

A gradual empowerment of the President who, despite at present being elected by the members of the Court for renewable three-year term only, may eventually result in further resemblance of the ECJ with strong federal highest judiciaries, e.g. as in the case of the U.S. Supreme Court the overall direction and legacy of the highest judiciary in a given period of time becomes often referred to after the name of the presiding justice (e.g. frequent referrals to the Marshall or Warren Court). On the other hand, it can lead to another EU *sui generis* case in point – the formation of a circle of 'wise men' composed by the President of the Court and five-judge chamber Presidents. In fact, an interviewee has shared that the current President Skouris holds weekly meetings with Presidents of five-judge chambers (Interviewee 6). Still, according to some, the frequent division into chambers to handle the enlargement rounds is not necessarily going against the idea of a unified interpretation of EU law and the approach of equal national legal representation as:

> It depends on the point of view – if one looks from a national perspective only, one would want more representation. On the other hand, if you look at the Community legal order as a separate and autonomous legal order, it wouldn't matter that much… As the formation of chambers of every case is discussed in full court during the Réunion Générale [see Section 3], every Member State gets to be duly represented. (Interviewee 2)

---

[30] This decentralized court system will be common for EU patent claims and disputes arising from the Council of Europe's European Patent Convention with ECJ serving as the final appeal court. See Council Doc. 7928/09, Draft Agreement on the European and Community Patents Court. The ECJ gave its opinion upon the Council's request.

This is not to say that chamber divisions, triggered by enlargements, do not and will not have any impact on the Court. As lessons learned from the prosopographical research agenda drawn by the Polilexes team[31] show us, institutions (and their institutional culture), though living a life of their own, are not entirely disconnected from the people who constitute them. The main fear about further partition of the Court into chambers is that the Court's case law may suffer from inconsistency. Over the years the case law of the Court has been nuanced and variegated across and within policy areas (Stone Sweet 2010: 30). It is hard to discern whether these variations have been intended or may point to different views of individual chambers. In recent years we could witness some discrepancies in the development of certain areas, if viewed through standard dichotomies such as more-integrative-less-integrative one. The interviewees often refuted these allegations. Asked about the Court's case law centralising but also decentralising patterns when it comes to the division of competence between the Union and the Member States, two practitioners observe in a similar vein:

> It is true that the Court had a pro-integration stance when the integration project was still being built. Its approach nowadays is more realistic, perhaps more cautious and balanced; it takes into consideration the competence of the Member States more and is not blindly pro-integrationist. Simply some fields of European law have reached their limits now – this is the case when it comes to internal market and public health. The Court rejected an intervention in the structure and philosophy of the Member States healthcare systems in a recent case – C-171/07. At the same time, one can see the ECJ being still 'integrationist' in the field of criminal law, look at C -176/03 and C-440/05. (Interviewee 3)

and

> …[The Court's impact when it comes to division of competence] can be traced mostly to disputes on legal bases as, for example, in the environmental sanction cases [C -176/03 and C-440/05] …It can be noted that while the Court has pushed to the very edge in the sphere of free movement of goods, there are other areas of law in which centralisation has yet to take place, such as, say, in family law and social matters.[32] After all, the Court has been a court of its time. (Interviewee 1)

Next to an extra-legal environment to which the Court has shown sensitivity (Maduro 1999 *passim*), whether cases are qualified as 'activist', 'pro-integrative' or characterised by judicial self-restrain, depends and will depend more on the professional background and personal convictions of the deciding judges as important cases are decided not only in the Grand Chamber

[31] Information on the Polilexes project is available on: http://www.polilexes.com/POLILEXES/Presentation.html

[32] Indeed, recent judicial developments in these areas have already shown competence tilted to the side of the EU, respectively in the *Metock* (C-127/08) and *Maruko* judgments (C-267/06).

but also by five-judge chamber formations (e.g. the landmark *Omega*[33] case) in which the position of the President of the chamber and the Juge-Rapporteur for ensuring the majority of votes is enhanced. The oversight of the President who monitors who gets what case is evident too.

2.4 Making appointments accountable? The expert panel under Article 255 TFEU

As of January 1, 2010, an expert panel has been established under Article 255 TFEU in order to "give an opinion on candidate's suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the representatives of Member States governments make the appointments…". The Treaty further postulates that the panel comprises of 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". Thus, the ECJ President appoints proposes six members and the Parliament the remaining one. All panel deliberations are subjected to secrecy. Importantly, "the panel shall act on the initiative of the President of the Court of Justice".[34] The procedure aims to bring in the process a sense of accountability by introducing independent expertise. However, the panel effectively creates a formal inner circle. As an insider has shared:

> There is some tension if not contradiction between independence and accountability; moreover the panel's work is not supervised in any way; the final outcome of the procedure was [once again!] a compromise. Even so, the Spanish government speeded up the replacement of Advocate General Colomer, in order not to apply the new procedure. (Interviewee 1)

The pressure for opening up the process to public scrutiny coming from the European Parliament (hereinafter Parliament) has amounted over the years. In the 80's and early 90's Parliament has demanded that the Council chooses half of the ECJ judges and the Parliament the other half, or that every judicial nominee is subjected to parliamentary assent (Jacobs 1999: 17). However, while the saying of the Parliament over nominations and appointments not only at the ECJ but also at other EU institutions such as the Commission or the European Central Bank was

[33] C-36/02 Omega Spielhallen-und Automatenuafstellungs-GmbH Oberburgmeisterin der Bundesstadt Bonn; Judges were: P. Jann, President of the Chamber, A. Rosas (Rapporteur), R. Silva de Lapuerta, K. Lenaerts and S. von Bahr.
[34] Art. 255 TFEU and Council Decisions 6176/10 and 6177/10.

practically nugatory in the 80's and early 90's, the gradual grow in Parliament's powers in numerous areas and the overall climate of public demand for further governmental transparency led to practical, albeit modest results only in 2009. In fact, the only sign of accountability at the Article 255 panel is enshrined in the figure of a Parliament representative, with the rest of participants to be appointed by the Member States. The Court of Justice has itself previously refuted bolder propositions to open up the procedure to full parliamentary scrutiny by allowing for separate hearings of all nominees by a parliamentary committee. During the reform negotiations ahead of the Amsterdam Treaty back in 1995, the ECJ's submissions showed that the judges fear of what is thought of as a far-fetched politicisation of judicial confirmations in American style as such may jeopardise judicial independence and induce prospective appointees "to prejudge positions they might have to adopt with regard to contentions issues which they would need to decide in the exercise of their judicial function".[35]

The idea that judicial appointees should be made accountable to a larger audience without fully politicising the process is fairly recent in Europe but has quickly gained support in various countries. A comparative study of national appointment procedures in different European states has shown that whereas appointments are usually concentrated in the hands of the executive, advisory or even recommending bodies staffed by law practitioners and organised as independent agencies, accountable to Parliament (as is the case of Spain) are increasingly a preferred solution in an attempt to shield the appointment process from political interference and to ensure higher degree of judicial impartiality and expertise (Bell 2003: 4). In the United Kingdom, the Foreign and Commonwealth Office chooses the nominee for a judge at the Court of Justice after holding a competition.[36] When one looks into the system of appointments of national judges in the United Kingdom, substantive changes can be noticed in recent years. Over thirty years of complaints about the national non-transparent, executive-dominated procedure for judicial appointments seems to have provoked an appointment reform to finally climb up to the political agenda when the Labour government took office (Paterson 2006: 13). In Scotland, the Lord Advocate, a chief government law officer, used to decide on all the judicial appointments in

[35] Court of Justice, report of May 1995 on certain aspects of the implementation of the Treaty on European Union, para.13.
[36] Press Release of FCO UK, October 14, 2005; The Lawyer, January 9, 2003.

Scotland without being statutory obliged to consult with anyone. However, a Judicial Appointment Board was later established.[37] Today also a number of the *Länder* (regional governments) in Germany have Judicial Appointment Boards, which are made up of members of the *Länd* judiciary, the parliament, and the bar (*Ibid*.).

At present, the ECJ is clearly far from even comparing to judicial self-government but if the Article 255 panel proves to have substantive saying in the process and if its members are chosen at the will of the ECJ's President, one might foresee a subtle move in that direction. It may be interesting to follow whether the formal power of initiative for assigning panel members given by the Treaty to the President of the ECJ will be complied with by the Member States, thus allowing more leeway for the Court to decide on its own future lot. Clearly, in the first selection, Member States approved all six nominees that were recommended by the current President Skouris (Council Doc. 5932/10). Instead of openly opposing the nominations once they were announced, several Member States and especially France heavily lobbied the President of the Court in advance (Interviewee 6). France succeeded in securing its representative at the panel, Mr. Jean-Marc Sauvé, a very high-ranking official and Vice-President of the French Conseil d'Etat. Of the remaining panel members two are former ECJ and General Court judges: these are former ECJ judge Peter Jann from Austria and former General Court judge Virpi Tiili from Finland (Council Decision 6177/10). Despite initial concerns that the body may remain a toothless organ that does not exercise in practice its veto powers over Member States' candidatures, the opposite soon became known. One of the members of the panel (Interviewee 10), admitted that the panel has already disapproved some of Member States nominees. The candidates that were vetoed by the panel were nominees for the General Court by the Greek, Romanian, and Hungarian governments of whom only the Hungarian was eventually appointed (Burrows, forthcoming).

These initial findings suggest that the power of the ECJ President was considerably levelled up. He negotiates with Member States governments' candidates for the judicial panels, having thus a firm grip on the overall pool. That allows him to assemble a panel that would filter the Member States' nominees for the judicial positions at the ECJ and the General Court in a way

[37] Scotland Act 1998, sec. 95/4.

that will bring to Luxembourg like-minded judges. This gives to the ECJ President an opportunity, in the long run, to build up a European judiciary that would follow his overall policy objectives and effect the two courts' jurisprudence direction. The judicial panel, in the context of decades long calls for more public scrutiny, would be most probably soon understood by the public as an impartial organ that prevents "political nominations" of the Member States, brings more expertise to the European courts, and cut the tights between a judge and its Member State in order to promote "equal (and truly European) justice for all". In other words legitimacy of the Panel can be expected to be much higher regarding the nominations, that one of the Member States.

However, in fact the disorganized or even missing Member States' appointment strategies would be replaced by one-man appointment strategy, though indirect, of the ECJ President whose power could be effectively opposed only by powerful Member States such as France or Germany. The possible scenario, in the long run, can be that the ECJ President would be able to pursue his appointment strategy limited only by handful of Member States that do not mutually coordinate their negotiations with the ECJ President, which gives him yet another advantage. Even if he has to compromise on one or two Panel's members, he would still get the majority of four out of seven Panel members. Once the judicial panel composed of majority of "the ECJ President's people" refuses a Member State nominee for the ECJ or the General Court, it would be hard for a Member State, given what was said above, to point to mere advisory opinion of the Panel and go through with the refuted nominee.

3. Emerging Core-Periphery Structure

3.1 The Inner Core of the Court

Our findings suggest that power of individual judges at the Court varies considerably. We may see a formation of an inner core of several judges that is able to set an overall direction of the Court's jurisprudence. The two main reasons for this development is an increase in so called managerial judging (Resnik 1982; Langer & Doherty 2011) and unique expertise some of the judges may offer. While the first reason is a mix result of seniority and informal networking, the

second reason allows for inclusion of new judges into the core. Managerial judging means an increase power of certain judges due to their positions in the court management and use of these managerial powers (such as assignment of cases, selection of Juge-Rapporteur, chambers' composition, assignment of Advocate General, research note request, setting deadlines, etc.) in order to effect substantive outcomes. It was already mentioned above that more and more case are decide din five-judge chambers, where two out of five people, the chamber president and Juge-Rapporteur are more able to effect the outcome. Also it was mentioned, that President Skouris set up regular weekly meetings with presidents of five-judge chambers and that he was able to pressurize the chambers to adjudicate faster. In this section, I look into weight of individual judges.

Although the Statute and the ECJ Rules of Procedure have established rotation principles for an equal distribution of caseload among the judges, the personal weight and legal authority of each judge, defined by the number of Grand Chamber cases assigned to them plays a role. Figure 2 below shows how often have different judges sit in the Grand Chamber from 2004 to 2011. As cases decided in the Grand Chamber remain the most important ones for the direction of EU law, the judges that had the most opportunities to adjudicate such cases clearly occupy leadership positions at the Court. The data demonstrates that few of the judges from relatively small Member States such as Skouris, Lenaerts, Cunha Rodrigues, and Rosas have formed an influential core or an inner circle that is driving the institution in recent years. Enlargement rounds are likely to have increased the possibility of leadership formation at the Court as the necessity to maintain an overall uniformity of case law while keeping up with the formal requirements of equal national representation allows for informal structures to develop and thrive.

Figure 2: Nomination of judges to the Grand Chamber 2004-2011[38]

[38] Data collected from Eurlex database for all cases decided by the Grand Chamber from May 11, 2004 (the date new MS judges took their offices at the ECJ) until Feb. 23, 2011 (n=230). The results represent proportion between (i) how often a judge sits in the Grand Chamber (count) and (ii) how many times a judge could have sit in the Grand Chamber (sample). When a judge was appointed to the Court after May 11, 2004, we have coupled his performance to the performance of his predecessor from the same MS based on the rationale that the outgoing judge, who had been nominated to a Grand Chamber case, would be most likely replaced by his successor at the Court. For the Bulgarian and Romanian judges, we have counted all the cases after the first case they were nominated to for the Grand Chamber (n=177). For many of the judges coupled in the figure, the results show mostly the performance of

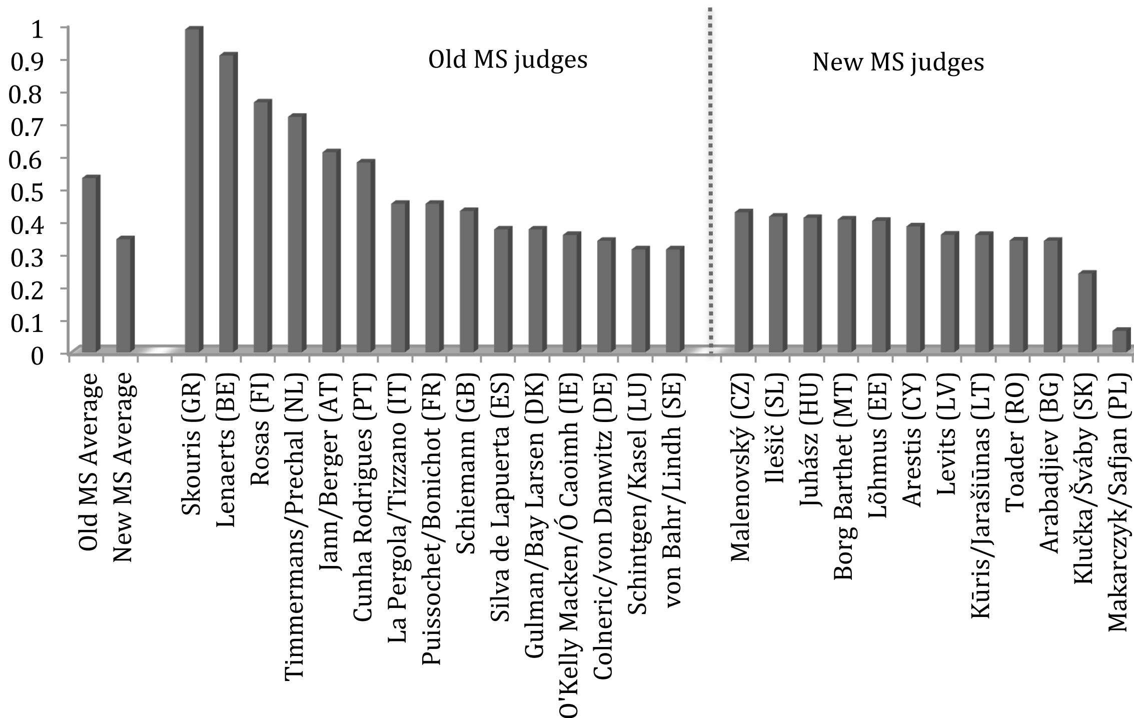


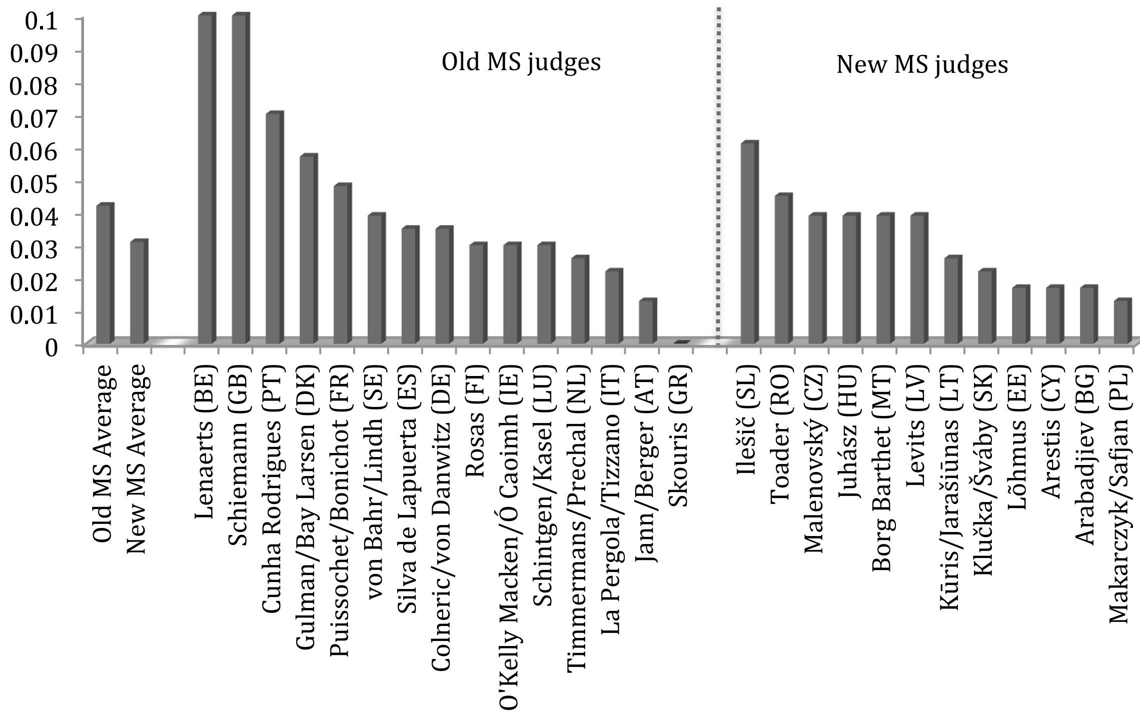
Figure 3 shows how often judges in Grand Chamber are nominated to be Juge-Rapporteur. As the Juge-Rapporteur presents a first draft of the judgment and administers the case from the moment the Court receives a file to the moment the case is resolved, the Juge-Rapporteur has an informational advantage. Figure 2 and 3 should thereby be read together. They confirm our initial expectation that, taken as a group, the new Member States are still underrepresented at the Court. However, the two groups are not homogeneous either, as some of the new Member States judges have managed to accumulate more power and are slowly moving closer to the inner circle. The striking difference between the performance of e.g. the Slovenian and the first Polish judge, reveal a dichotomy that is not based on the political weight of the judge's Member State but can better explained by higher and narrower specialisation of certain judges.[39] Hence, the

one of the judges (Timmermans, Tizzano, Klučka, Makarzyk, Jann, Bay Larsen, Bonichot, Ó Caoimh, Kūris; often due to a longer time spent at the Court than his predecessor/successor within the studied time span).

[39] For instance, judge Ilešič was reporting for most of the significant trademark cases.

division of old and new members is likely to be gradually overshadowed by a dominant core-periphery caveat.

Figure 3: Nomination of judges as Juge-Rapporteur in Grand Chamber formations 2004-2011[40]



3.2. The legal culture of 'newcomers' vis-à-vis the legal culture at the Court

The remaining part of this article focuses on the position of the new Member States judges, particularly the ten judges coming from new Member States with similar political past. While the previous parts considered a question how the Court adapted to the enlargement, this part inquires into a question what challenge the new judges represented to the Court overall direction, how

[40] Data collected from Eurlex database for all cases decided by the Grand Chamber from May 11, 2004 (the date new MS judges took their offices at the ECJ) until Feb. 23, 2011 (n=230). The results represent a proportion between (i) how often a judge was assigned as rapporteur for a case in the Grand Chamber (count) and (ii) how many times a judge could have been a rapporteur for a case in the Grand Chamber (sample). N=230, with the exception for BG and RO judges (n=177). See fn 30. Being the President of the Court, Skouris does not act as Juge-Rapporteur.

they established themselves at the Court, and given the previous findings, why they were mostly unable to reach leadership positions.

The Eastern enlargement brought to the EU institutions a large group of legal officials, that broadly speaking, represent a homogeneous compact with respect to their legal cultures rooted in a common communist past. Compared to previous enlargement rounds, the ten new ECJ judges from Central and Eastern European countries had a significant quantitative leverage at the Court and theoretically may have influenced the way things are done at the Court. In brief, the deep systemic differences between the legal cultures of old Europe and post-communist states can be traced back to the re-constitutionalization period of legal transition that CEE countries underwent in the 1990's.

3.2.1 A threat to constitutional pluralism and the existing teleological approach of the Court?

Before engaging into what happened in Luxembourg after new judges arrived, let me summarize theoretical propositions for the arguments of commonality and profoundly different legal background that stay behind the allegations that the new Member States judges could form a group that might have stood in opposition to the old Member States judges.

At first, we have to look at the pre-enlargement status quo. The majority of legal scholarship and a large part of the political science scholarship interprets European constitutionalism in a pluralist fashion. The origins of the idea of constitutional pluralism may be traced to the constructivist debate on the nature of the European Union during the 1990s. From a political science perspective, the constructivists have broadly built on the premises of the plurality of actors (state and non-state) and/or the existence of different levels of governance (Marks, Hooghe & Blank 1996: 345 ff.). These premises later found their way into the constitutional legal scholarship in the form of 'constitutional' multi-level governance (Pernice 2002, 2006, 2009) and constitutional pluralism (Walker 2002, Maduro 2003, Kumm 2005, and Halberstam 2009 and 2010). Both are variants of a constitutional theory for a system, which lacks a single hierarchically built legal order and a single supreme (final) constitutional interpreter. This constitutional construct tries to replace the Kelsenian system, whose fundament is foremost the

hierarchy of norms, whereby the validity of a norm derives from its compliance with a higher norm. Whereas the Kelsenian construct works well in a centralised sovereign state of a Westphalian type, it becomes an obstacle for the development of the poly-centered European Union. The philosophy of legal pluralism is not just an academic chimera and has clearly been professed by members of the Court.[41] Thus, before the last two Eastern enlargements, on the one hand the ECJ has successfully secured its authoritative position in the system of European governance by acting as *primus inter partes* in a constitutional dialogue with the national highest courts. This legal tradition was combined, on the other hand, with a teleological interpretation of the Treaties promoted by the ECJ. The teleological method aspires the interpretation of an individual law provision in line with the spirit and overall purpose of the Treaty, rather than with the concrete letter of the provision.

In contrast, after the fall of the totalitarian regimes, the CEE countries looked back into their democratic interwar past and revived old constitutional concepts based on a rather static, Kelsenian and far from being pluralist vision of the world, albeit at times also enriched with western constitutional solutions and human rights achievements. This approach of the CEE legal elites mostly neglected the fifty-year development of Euro-Atlantic constitutionalism. After twenty years of re-constitutionalisation, the old concepts rooted back in these systems. It is notable that almost all of the newly appointed CEE judges to the European Court of Justice had taken prominent part in the re-constitutionalisation of their respective countries and that out of the ten CEE judges that served on the Court between 2004 and 2010 (two judges were replaced in 2009), majority served as constitutional or highest court judges back home.

The absence of the rule of law, democracy and human rights' protection in totalitarian regimes had signified, for the states of CEE after the fall of the regimes, that the highest courts in these new democracies obtain a symbolically prominent position in their systems of governance (Holländer 2003: 73). In the course of the transition period, the cure for a transformation of the 'rights on paper' decoratively enlisted in the old constitutions into real rights was seen in the strict separation of the judiciary from the other branches. The constitutional courts established themselves as very active and influential actors that dictate the rules of the game to the other

[41] For a prominent example cf. academic works of former Advocate General Maduro (2003 and 2008).

actors in the political system (Sadurski 2008: 3). The newly created constitutional courts of the post-communist countries therefore gained the respect of the public for being independent guardians of social values (Zemánek 2006: 258). High public support to constitutional courts in CEE streams from the view for the role of the judiciary effectuated by the doctrine of the 'judge as a mechanical interpreter of law'. In this perception, the function of the court itself in the system of governance cannot be attacked because the court only reads and applies the law made by the political organs. Bluntly put, the parliament enacts legislation, which the courts simply apply. It follows that an unjust judicial decision can be attributed only to the legislator and not to the judiciary that, from the nature of its function, cannot redress faulty legislation. Errors of judicial decisions are seen as provoked by personal faults of the judge due to professional lack of expertise or blemished reputation. Put in other words, in post-communist political systems, the constitutional courts are not infallible because they are final, but they are the final arbiters because they are considered *ipso facto* to be infallible.[42] This strictly positivist doctrine led to 'ultra-formalism' of judicial interpretation (Kühn 2004: 533 and 539).

As a consequence of their legal cultural backgrounds, it could be expected that the newly appointed CEE judges would adopt a rather positivist and formalist approach to European law that may on the one hand, endanger pluralism, and most importantly, depart from the already established, contextual method of interpretation of the Treaties that the ECJ has long been both praised and criticised for (Hunt and Shaw 2009).

3.2.2. …or business as usual?

As one legal secretary from the team of a CEE judge at the General Court bluntly put it, "we [the new Member States judges] did not come here to make a revolution" (Interviewee 4).

In practice, both a qualitative assessment of the case law of the ECJ after 2004,[43] the academic writings of judges from the new Member States (e.g. Malenovský 2008) and the

---

[42] A paraphrase on the words of the U.S. Supreme Court Justice Robert Jackson in his concurrent opinion in *Brown v. Allen*, 344 U.S. 443 (1953): 'We are not final because we are infallible, but we are infallible only because we are final', which signifies the difference in perception of the role of the judiciary in modern liberal democracies contrasted to the one in post-communist states.

[43] Teleological interpretation can be found among many of the recent cases of the Court. For examples see the *Kadi* (Joined Cases C-402/05 P and C-415/05 P) and *Metock* (C-127/08) judgements. At the same time, though the *Mangold* (C-144/04) and *Kucükdevici* (C-555/07) cases may be interpreted as a 'shake' on judicial pluralism, the

interview material show that the Court not only did not see a revolution, but that soon enough after the initial excitement over the last rounds of enlargement passed by, in its jurisprudence as a *whole* change was hardly felt at all:

> All enlargements and the prospects for increase in the caseload of the Court were met with certain concerns but at the end, as it turns out, all goes well. The Scandinavian enlargement was met with fears because of the influence of legal realism that it might have brought along, as well as the threat of English becoming the dominant language of the Court. The Swedish judge learnt French; not too much changed. The same goes for the 2004 enlargement, which demonstrated great willingness on the side of the new Member States to adapt and constructively collaborate to the Court's work. It is professional solidarity that outweighs national perceptions and gives internal coherence of the Court of Justice … (Interviewee 2)

One possible explanation for the smooth 'accommodation' of new CEE judges is the process of professional socialisation that undoubtedly plays a role at all EU institutions. The significance of the legal community for the establishment and consolidation of doctrine in EU law has been persuasively proven already in studies of legal sociology.[44] Moreover, Antoine Vauchez convincingly tells the story of a court that has successfully used commemorative strategies, *Festschriften*, and eulogies done by present members of the Court in honour of its former members in order to narrate times and again ECJ's 'golden age' and ensure that the self-built institutional identity of the Court will be preserved (Vauchez 2011: 9). This identity, in Vauchez's terms, embodies ECJ's missionary self-understanding that is in inherent opposition to the narrow-minded views for reform of a European 'political body' which, in the Court's collective mind, has been anchored in power politics and reluctant to bring about more EU integration (*Ibid.* at 10). Creating a certain feeling of belonging and institutional pride is important for group dynamics to function in general but coupled with establishing authority and provoking respect to an external world, it has proven to be of utmost significance for the public acceptance and success of strong judicial bodies in particular. When designing the present home of the U.S. Supreme Court, for instance, the U.S. architect Cass Gilbert needed to convey a message of power and independence. In Toobin's interpretation, he choose to do that by building an imposing staircase that was there to "separate the Supreme Court from the earthy concerns of the politicians in the Capitol, while at the same time announcing that the justices would operate,

---

opinion of the AG in the *Elchinov* (C-173/09) judgment that came to the Court as a preliminary reference from a Bulgarian court can be characterized as yet another corroboration of the general persistence of mutual respect and partnership between the ECJ and the national highest judiciaries.

[44] See Schepel & Wesseling 1997; more recently, Vauchez 2010 and Cohen 2010.

literally, on a higher plane" (Toobin 2007: 2). It was up these stairs that the former clerks of the late President of the Supreme Court William Rehnquist carried his coffin in 2005 so that the rest of the justices can pay their tribute, much like the ECJ judges have used *Festschriften* to build their institutional 'esprit de corps' in the commemorative fashion described by Vauchez.

The newcomers were also faced with the strong and established administrative culture of the Court, with French being the parlance of the institution and internal coherence being ensured during the weekly *Réunion Générale* of the full Court where the formation of a chamber to hear each case is decided on a proposal made by the Juge-Rapporteur in her *Rapport Préalable*. In addition to elaborate internal workings and French as dominant working language, yet another important aspect of the ECJ institutional culture is inherited from the French administrative tradition – no dissenting or concurring opinions are allowed and a brief judgement is preferred to the style of long reasoning of the German Federal Constitutional Court or say, the U.S. Supreme Court (Interviewee 5).[45] Of course, one has to remember that next to the French style of a non-deliberative and unified judgement preceded by an independent and more argumentative opinion of an Advocate General, the administrative and legal culture of the ECJ has been also precedent-oriented in an Anglo-Saxon manner from the very inception of the Court[46] and even before the accession of the United Kingdom and Ireland.

The firmly established administrative culture of the ECJ signified that the new CEE judges may have well found themselves with relatively smaller chances to yield the procedure and overall style of the Court according to their own understanding of constitutional adjudication compared to a situation of a newly built and still flexible in terms of organisational and doctrinal matters, institution. Further research is needed in order to compare and contrast the Eastern enlargement with the impact on the decision-making style of the Court exerted by the accession of common law and Scandinavian countries, when arguably the administrative tradition of the

[45] "The judgment follows the French style of judicial writing style. In Anglo-Saxon systems, the judges use a dialectic way of writing – they examine several possible answers and reason why the one finally chosen is the right one. In contrast, the French Courts (a typical example is the Conseil d'Etat) proceed differently: there is only one way how to decide the case. Therefore there are no dissenting and concurring opinions allowed, though these were debated by the Reflection Club [established by the Berlin Declaration of 2007]." (Interviewee 5).

[46] See the early Joined cases 28 to 30/62 *Da Costa en Schaake* [1963] ECR 31, a judgment that came out straight after *Van Gend en Loos*.

ECJ might have been more susceptible to innovations. One such "innovation" was the adoption of procedural due process principles stirred by the common law influence on EU courts (Groussot 2006: 26) or the establishment of transparency principle that was helped by comparisons to "North Western European Law" (*Ibid.* at 29). At the same time, former Judge Ulrich Everling has claimed that in the course of the seventies and partly due to the arrival of judges "schooled in case law and inclined to a pragmatic approach", the Court has become increasingly reticent to lay down bold general principles of law (Everling 1984: 1301) of the type of the grand principles of direct effect and supremacy that can be found in the first generation of ECJ case law. The impact of common law on the ECJ has been, sometimes even perhaps intentionally, restricted as demonstrated by the appointment of the first British judge and later president of the Court, Sir Mackenzie Stuart who as a Scottish lawyer, judge and academic held degrees in both common *and* continental law. Be that as it may, following the Eastern enlargement and perhaps in order to avoid geographical or doctrinal groupings and maintain the doctrinal coherence of the Court:

> in the division of chambers, there is clearly an attempt to have a geographical and doctrinal balance. During the last divide, the central European states were placed in different chambers, and so were Malta, Cyprus and Ireland, the Benelux countries and the Baltic judges. This was decided at the Réunion Générale, on a proposal from the four former presidents of chambers and the President of the Court. (Interviewee 3)

Still, maintaining the overall doctrinal coherence of the ECJ jurisprudence does not mean that the new judges did not bring different hues to it. Perhaps in an attempt to get 'noticed', some of them were eager to spur a wave of intergovernmentalism. Although that only confirms the theoretical evaluations of differences in legal culture, thinking, and experience between new and old Member States summarized above, new Member States could only benefit from further economic integration. Still some of the new judges perceived the political interest of their Member State to be the opposite. Further cross-chamber case law research is needed in order to compare these allegations, but it is likely that EU enlargements have somewhat contributed to a certain tampering of the Court's tone because a number of new Member States judges were not in favour of further integration.

> Some of the new Member States judges such as the Estonian one, the former Polish and the Czech judges felt the need to preserve their national authority and show to the other judges that the Court is now composed of more than 15 members. They did so, e.g. by references to decisions of each one's own national courts. At one

point, notes started floating in-between the cabinets, as certainly some of the old Member States judges like the French judge liked the idea. (Interviewee 6).

3.2 Individual decision-making power of new Member States' judges

As mentioned above, in order to alleviate the handling of an ever-growing docket, the Court has started hearing more often cases in a composition of five and three judges and occasionally only, assigns very important cases to a formation of 11-13 judges in the Grand Chamber. When it's obliged by the Treaty for cases concerning the misconduct of EU civil servants and under the recommendation of the Advocate General in exceptional circumstances only, the Court may decide to preside in full. In accordance with the Statute of the Court and the Rules of Procedure,[47] the Grand Chamber is constituted if a Member State or an institution of the Union that is party to the proceeding so requests. Rarely, as evidenced by the interviewees, when the Advocate General and the Juge-Rapporteur discuss the formation of a chamber at the *Réunion Générale*, if they disagree as to the chamber formation, the case might go to a bigger chamber formation or even to the Grand Chamber. Whereas three judge chambers are usually assigned to decide cases in which no new points of law are likely to arise, five judge chambers are dealing with the bulk of the workload. As shown in the annual reports of the Court, an average of 55% of the cases since 2004 were decided in such chamber formations.[48] Importantly, Presidents of five judge chambers are usually sitting at the Grand Chamber together with the President of the Court who presides over the hearings and appoints the Juge-Rapporteur from the members of the chamber, with the rest of members to be filled in among all judges supposedly on a rotation principle (but see figure 2 above). While Presidents of three judge chambers are elected every year, the majority of the Court elects the four Presidents of five-judge chambers for a period of three years in a secret ballot. For each case to be heard under this chamber composition, the Presidents of five judge chambers propose to the President of the Court a Juge-Rapporteur who will write the final report of the judgement. Presidents of five judge chambers are also 'the first in line' to replace the President of the Court at hearings, if need be.

---

[47] The Rules of procedure and the Statute of the Court are available at: http://curia.europa.eu/jcms/jcms /Jo2_7031/.
[48]The annual reports of the ECJ with judicial statistics are available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/ra09_stat_cour_final_en.pdf.

It becomes clear from the above that in view of the increased significance of five judge chamber formations Presidents of such enjoy a relatively prominent position at the Court. As the present President of the Court Skouris has commented: “The fact that the Presidents of the five judge Chambers are elected for a three-year term of office is an important safeguard for the coherence of the case-law. Since these Presidents necessarily sit, along with the President of the Court, on all the cases brought before the Grand Chamber in addition to all the cases pending before their respective Chambers, they are the permanent and key link between the Grand Chamber and the 5 judge Chambers with regard to the development of their respective case law” (Skouris 2006: 23).

However, in the two elections of 2006 and 2009 after the East Enlargement, there were no Presidents of five judge chambers coming from a new Member State, be that a CEE state or Cyprus and Malta. In order to assess whether new Member States judges absence from leadership positions at the Court and their underrepresentation in Grand Chambers (figure 2 and 3) can be explained by the fear from the Court’s establishment of their inexperience or even lack of expertise, we compare their professional profile with the profiles of the old Member States judges. According to the interview material, the three most important criteria for operationalizing judicial expertise at the ECJ are experience at a national highest/constitutional court or at an international judicial body, knowledge of EU law and fluency in French. Surprisingly enough, as shown in the table 7 below, on the whole the old Member States judges score only slightly better than the new Member States judges, with the difference to be too insignificant to explain the their marginalization at the Court in the first term. Also, neither the two new judges from new Member States and seven from old Member States that were appointed before the second chamber formation vote took place in 2009 tilt the balance of expertise to either side. Since all judges participate in a secret ballot for selecting five-judge chamber presidents, the results may be explained as a voluntary deference of the new Member States judges to their colleagues of old Member States or must be sought in the insufficient capacity of the new judges to build informal coalitions at the Court in order to secure enough votes at election days.

Table 7: Expertise of new and old MS Judges at the ECJ (as of March, 1, 2010)[49]

MS of the Judge	Judicial experience		European Law expertise	Francophone	Total
	National supreme or constitutional courts = .2	International courts or EU courts = .2	Academic or other = .4	positive answer = .2	
BG	.2	0	.4	.2	.8
CY	.2	0	0	0	.2
CZ	.2	.2	0	.2	.6
EE	.2	.2	.4	0	.8
HU	0	0	.4	.2	.6
LV	0	.2	.4	.2	.8
LT	.2	.2	.4	0	.8
MT	.2	0	0	0	.2
PL	.2	0	.4	.2	.8
RO	.2	0	0	.2	.4
SL	.2	.2	0	.2	.6
SK	.2	.2	.4	.2	1
Ø new MS					**.63**
AT	0	0	.4	0	.4
BE	0	.2	.4	.2	.8
DE	0	0	.4	.2	.6
DK	.2	0	.4	0	.6
ES	.2	.2	.4	.2	1
FI	0	.2	.4	.2	.8
FR	.2	.2	.4	.2	1
GB	.2	0	0	0	.2
GR	0	.2	.4	.2	.8
IE	.2	0	.4	0	.6
IT	0	.2	.4	.2	.8
LU	0	0	.4	.2	.6
NL	0	.2	.4	0	.6
PT	0	.2	.4	.2	.6
SE	0	.2	.4	.2	.8
Ø old MS					**.68**

[49] We have observed three areas of expertise, which determine a judge's ability to perform well at the ECJ: judicial experience (whether a judge was sitting at a national court and/or international court, each given either 0 (no) or 0.2 (yes) points). The most important factor is knowledge of EU law (0.4 points). Knowledge of French was given 0.2 points. The overall expertise of a judge is measured on a scale from 0 to 1. Further research needs to be done in order to refine the separate components of the overall expertise of a judge (for instance, based on how many years a judge served at a national/international court; how good is his knowledge of EU law based on whether he obtained a specialised degree in the area or published in peer review journals in the area; what level of proficiency in French he achieved etc. So far we have gathered the data about individual judges from publicly available sources (e.g. their CVs).

So far we have concluded that first, new Member States judges have not tried to create a coalition; second, the chamber division made almost impossible to form any regional coalitions; third, their initial exclusion from the leadership positions and underrepresentation in the Grand Chamber formations do not allow them to influence the Court's direction; fourth, there experience and expertise is comparable to the judges from old Member States, so that there is no reason for their underrepresentation in decision-making; fifth, there is a potential for them to move into the inner core, mainly through building a narrow expertise; and sixth, they have attempted to transfer the specific legal culture into the Court (more intergovernmentalist views). The final question we have to assess is whether there is at least a potential for new-MS-old-MS division at the Court. The study of *Laval* and *Viking* cases serve as a laboratory for assessing the question. Traditional critique on the ECJ in the area of fundamental rights has been voiced in regards to the balancing test that the ECJ performs. Member States share core values beyond which contradictions are said to arise because the ECJ is thought to usually adjudicate in favour of economic freedoms whereas on the national level, national measures to regulate the economy are "consistently the ones that are the most weakly protected" in comparison to personal, communicative, social and cultural guarantees (Grimm 2009: 372). As the interview material has revealed, new versus old Member States' coalitions were rare though in the case of *Laval* the question of protecting social economy vis-à-vis liberalisation interests was sharply posed and the dividing lines were indeed between old and new members (Interviewee 6). The conflict centred on the selection of the Estonian judge Lõhmus as Juge-Rapporteur for this case (*Ibid*). However, as discussed before, informal groups along the lines of a more liberal approach to the common market, professed by some of the judges versus more protectionism or EU regulation espoused by others, do not necessarily present an ideal overlap with a division between new and old Europe. Judge Lenaerts has distinguished the balancing act of the ECJ in *Omega* to that in *Laval* – in contrast to the contested measure in *Omega* where laser games involving 'playing at killing' were banned by the national court and subsequently upheld by the ECJ despite their adverse effect on trans-border trade because they were deemed incompatible with the German constitution, in *Laval (*and *Viking)* the trade unions sought protectionist measures by struggling to keep jobs at home (Lenaerts 2010: 1666). The point that Lenaerts, who sat in both the *Omega* and the *Laval* case, is making, is that while in principle it is legitimate for trade unions to protect

workers from social dumping, granting them with a broad margin of appreciation, equal to that of Member States authorities, would have resulted in the ECJ tilting the balance in favour of "a 'social Europe' that arguably excludes a large number of its new citizens" (*Ibid.*).

CONCLUSION

The post-enlargement overall shortening of the length of the proceedings at the ECJ with six months can be explained not only by the proportionally less actions for infringements that were recently coming to the Court but is also due to the extension of competences of the General Court that allowed the ECJ a significant relief in caseload, particularly in the area of competition law. However, future increase in the caseload of the ECJ seems inevitable despite conscious attempts to streamline the procedure applied by the current President. Evidently, better strategies ought to be sought for increasing efficiency without jeopardising the delivery of well-researched and contextualised judgements. Further enlargements (e.g. to Croatia and Iceland) are going to, most probably, result in further chamber divisions and the establishment of more specialised EU courts with the former to enhance the responsibility and role of both the President of the Court, that of five-judge chamber Presidents and the first Advocate General, and the later to impact on the ECJ's constitutional status. Increasingly, the strong managerial grasp of the President of the Court, chamber divisions and power structures revolving around influential figures on the Court entrench a certain 'informal inner circle' of the institution, which, as a reaction to enlargements, struggles to ensure the consistency of case law in a manner that does not hamper legal certainty and the legitimate expectations of litigants.

The appointment process of judges at the national level shows a disparate and fragmented picture that creates transparency and accountability problems, only partially dealt with the recent creation of a European expert panel with vetting functions. Although promoted as a remedy for the lack of accountability in appointments, the establishment of the panel in the immediate aftermath of enlargement might have been triggered by a desire for strengthening the legal credentials of the nominees, with transparency and accountability to play a minor role. The lack of transparency in the nomination of Article 255 TFEU panel members and the secrecy of the panel's deliberations compromise its accountability functions. In fact, the panel resembles a

‘formal inner circle’, composed of insiders and secluded from the general public. Clearly not a remedy for the lack of accountability in the appointment process though, the Article 255 panel might be indeed strengthening expertise checks on all newly appointed judges while opening the way to a form of judicial self-government for the ECJ. More importantly, the Panel may strengthen the position of the ECJ President who is able to procure a majority in the Panel and develop through this indirect channel a coherent strategy for building his own court.

Also, it becomes clear that mainly due to the stable institutional culture of the Court that is being constantly maintained through commemorative rites and symbols, judges from the new Member States bearing different legal culture did not as a group exercise impact on the overall doctrinal direction and style of ECJ’s jurisprudence. New Member States judges have been underrepresented at the Court’s leadership positions and consequently, their relative decision-making power is still below the EU-27 average though their expertise does not seem to diverge significantly to that of old Member States’ judges. Nevertheless, consecutive enlargement rounds have left their print on the changing nature of ECJ decisions that, if contrasted with the first generation of strongly pro-integration biased judgements of the type of *Van Gend* and *Costa* can be seen as more tempered and increasingly marked by subject-specific variety. Cases of the type of *Laval* and *Viking* are left open-ended and could be interpreted differently according to a changing social context in which a recalibrated value consensus between old and new, market-oriented and social Europe might result in a different balancing outcome.

All in all, the Court is not divided upon new Member States judges versus old Member States judges. The efficiency and maintenance of the pre-enlargement jurisprudence direction strengthen informal structures at the Court, similarly to what happened in the other institutions studied in this book. This informal structures creates and inner core at the Court with the rest of judges being on the periphery closer or further to the core. The empirical data, however, suggest that the core-periphery structure is flexible enough to allow new members floating into the core. The membership of the core seems to be a result of seniority, knowledge of and access to informal networks, expertise. Surprisingly, nothing point to any correlation, not yet causation, between power of appointing Member State and power of the judge.

BIBLIOGRAPHY

Albi, A. (2009) 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums', *European Law Journal* 15(1): 46-69.

Arminjon, P., Nolde, B. & Wolff, M. (1950-1951) *Traité de droit comparé*, Paris: Librairie générale de droit et de jurisprudence, 3 vols.

Bradley, K. (2010) 'The European Court: Architecture, organisation and jurisdiction', Advanced European Union Legal Practice, unpublished lecture, Budapest.

Bell, J. (2003) 'Judicial Appointments: some European experiences', *Paper presented at the Conference on "Judicial Reform: Function, Appointment and Structure"*, the Centre for Public Law, University of Cambridge, at http://www.law.cam.ac.uk/faculty-resources/download/judicial-appointments-some-european-experiences-by-professor-john-bell/865/pdf (accessed 25/2/2011).

Börzel, T.A. (2005) 'What Can Federalism Teach Us About the European Union? The German Experience', *Regional and Federalist Studies* 15(2): 245-257.

Buchkov, P. (2011) Замириса на нов конкурс за наш съдия в Люксембург (Looks like a new competition for Bulgarian judge in Luxembourg is imminent) *Legal World*, Feb 4, 2011, at http://www.legalworld.bg/show.php?storyid=22463 (in Bulgarian).

Cohen, A. (2010) 'Legal Professionals or Political Entrepreneurs? Constitution Making as a Process of Social Construction and Political Mobilization', *International Political Sociology* 4(2): 107-123.

Court of Justice of the European Communities (2008) *Annual Report 2007*, Luxembourg: Publication Office of the European Union.

Court of Justice of the European Communities (2010) *Annual Report 2009*, Luxembourg: Publication Office of the European Union.

David, R. & Brierley, J.E.C. (1985) *Major Legal Systems In the World Today. An Introduction to the Comparative Study of Law*, 3rd ed., Stevens & Sons, London.

Dehousse, R. (1998) The European Court of Justice: The politics of judicial integration. New York: St. Martin's Press, p. 13.

Everling, U. (1984) 'The Court of Justice as a Decision-Making Authority', *Michigan Law Review* 82(5&6): 1294-1310, 1301.

Falkner, G., Treib, O. (2008) 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States', *JCMS* 46(2): 293-313.

Falkner, G., Treib, O. & Holzleithner, E. (2008) *Living Rights or Dead Letters? Compliance in the European Union*, Aldershot: Ashgate.

Fletcher, M. (2011) 'The Advocate General of the ECJ: a key role in the emergence of the EU criminal justice agenda', *European Law Review* (forthcoming).

Jacobs, F.B. (1999) 'Nominations and Appointments: An Evolving EU Model', paper presented at the Biennial ECSA Conference, Pittsburgh, at http://aei.pitt.edu/2303/1/002610_1.PDF (accessed 24/2/2011).

Halberstam, D. (2009) 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in J. Dunoff & J. Trachtman, (eds.) *Ruling the World? Constitutional, International Law and Global Government*, Cambridge University Press, 326-355.

Halberstam, D. (2010) 'Pluralism in Marbury and Van Gend', in M.P. Maduro & L. Azoulai (eds.) *The Past and the Future of EU Law: Revisiting the Classics on the 50th Anniversary of the Rome Treaty*, Oxford: Hart Publishing, 26-36.

Heffernan, L. (2003) 'The Community Courts Post-Nice: A European Certiorari Revisited', *The International and Comparative Law Quarterly* 52(4): 907-933.

Helmke, G. & Levitsky, S. (2004) 'Informal Institutions and Comparative Politics: A Research Agenda', *Perspectives on Politics* 2(4): 725-740.

Holländer, P. (2003) *Ústavněprávní argumentace. Ohlédnutí po deseti letech Ústavního soudu*. Prague: Linde.

Hunt, J. & Shaw, J. (2009) 'Fairy tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration', in D. Phinnemore & A. Warleigh-Lack (eds.)

Reflections on European Integration - 50 Years of the Treaty of Rome, Palgrave MacMillan.

Kenney, S. (1998) 'The members of the Court of Justice of the European Communities', *Columbia Journal of European Law* 5: 101-233.

Kochenov, D. (2008) *EU enlargement and the failure of conditionality: pre-accession conditionality in the fields of democracy and the rule of law*, Austin: Wolters Kluwer.

Kommers, D.P. & Miller, R.A. (2009) Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court, in A. Harding & P. Leyland (eds.) *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds & Hill Publishing, 102-124

Kumm, M. (2005) 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', *European Law Journal* 11(3): 262–307.

Kühn, Z. (2004) 'World Apart: Western and Central European Judicial Culture', *The American Journal of Comparative Law* 52(3): 531-567.

Langer, M. & Doherty, J.W. (2011) 'Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms', *Yale Journal of International Law* 38(2): 241-305.

Legrand, P. (1996) 'European Legal Systems Are Not Converging', *International and Comparative Law Quarterly* 45(1): 52-81.

Lenaerts, K. (2003) 'Interlocking Legal Orders in the European Union and Comparative Law', *International and Comparative Law Quarterly* (2003), 52: 873-906.

Lenaerts, K. & Gutiérrez-Fons, J.A. (2010) 'The Constitutional Allocation of Powers and General Principles of EU Law', *CMLR* 47: 1629-1669.

Maduro, M.P. (1998) *We the court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty*, Oxford : Hart Publishing.

Maduro, M.P. (2003) 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.) *Sovereignty in Transition*, Oxford: Hart Publishing.

Maduro, M.P. (2008) 'Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism', Working Paper IE Law School, WPLS08-02, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1134503 (accessed 18/11/2008).

Malenovský, J. (2008) 'The Relations between Constitutional Law, Community Law and International Law according to the Czech Constitution: Still Ambiguities to be Resolved', in M. Hofmann (ed.) *Europarecht und die Gerichte der Transformationsstaaten*, Baden-Baden: Nomos, 31-39.

Marks, G., Hooghe, L. and Blank, K. (1996) 'European Integration from the 1980s: State-Centric vs. Multi-Level Governance', *Journal of Common Market Studies* 34(3): 341-78.

Moravcsik, A. (2000) 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization* 54(2): 217-252.

Paterson, A. (2006) 'The Scottish Judicial Appointments Board: New Wine in Old Bottles?', in K. Malleson & P.H. Russell (eds.) *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World*, Toronto: University of Toronto Press, 13-38.

Pernice, I. (2002) 'Multilevel constitutionalism in the European Union', *European Law Review* 27(5): 511-529.

Pernice, I. (2006) 'The global dimension of multilevel constitutionalism. A legal response to the challenges of globalisation", in P.-M. Dupuy, Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat / Common Values in International Law: Essays in Honour of Christian Tomuschat, Kehl: Engel, 973-1006.

Pernice, I. (2009) The Treaty of Lisbon. Multilevel constitutionalism in action. *Columbia Journal of European Law*, 15(3), 349-407.

Reh, C., Héritier, A., Bressanelli, E. & Koop, C. (2010) 'The informal politics of legislation: explaining secluded decision-making in the European Union', *Paper prepared for the APSA Annual Convention*, Washington.

Resnik, J. (1982) 'Managerial Judges', *Harvard Law Review* 96: 374-448.

Schepel, H. and Wesseling, R. (1997) 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', *European Law Journal* (3): 165-88.

Skouris, V. (2006) ‘Self-conception, Challenges and Perspectives of the EU Courts’, in I. Pernice, J. Kokott & C. Saunders (eds.) *The Future of the European Judicial System in a Comparative Perspective*, Baden Baden: Nomos.

Sadurski, W. (2008) ‘Solange, chapter 3: Constitutional Courts in Central Europe – Democracy – European Union’, *European Law Journal* 14(1): 1-35.

Smith, M. (2010) *Centralised Enforcement, Legitimacy and Good Governance in the EU*, Abingdon.

Stone Sweet, A. and Brunell, T.L. (1998) ‘Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community’, *American Political Science Review* 92(1): 63-81.

Stone Sweet, A. (2010) The European Court of Justice and the Judicialization of EU Governance’, *Faculty Scholarship Series*. Paper 70, at http://digitalcommons.law.yale.edu/fss_papers/70 (accessed 24/2/2011).

Teitel, R. (1994) ‘Post-Communist Constitutionalism: A Transitional Perspective’, *Columbia Human Rights Law Review* 26(1): 167-190.

Toobin, J. (2007) *The nine: inside the secret world of the Supreme Court*, New York: Doubleday.

Vauchez, A. (2010) ‘The Transnational Politics of Judicialization: Van Gend En Loos and the Making of EU Polity’, *European Law Journal* 16(1): 1-28.

Vauchez, A. (2011) ‘Keeping the Dream Alive: International Courts, Commemorative Strategies and the Building of a Transnational Esprit de Corps’, *Paper presented at the International Studies Association Annual Conference* "Global Governance: Political Authority in Transition", Montreal, Mar 16, 2011, at http://www.allacademic.com/meta/p501145_index.html (accessed 24/2/2011).

Voeten, E. (2007) ‘The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights’, *International Organization* 61: 669-701.

Walker, N. (2002) ‘The Idea of Constitutional Pluralism’, *Modern Law Review* 65: 317-359.

Weiler, J. & Jacque, J.P. (1990) ‘On the Road to European Union - A new judicial Architecture: An agenda for the intergovernmental conference’, *CMLR* 27: 185-208.

Weiler, J.H.H. (1999) *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge, New York: Cambridge University Press.

Weiler J. (2010) 'European Citizenship', unpublished lecture, Budapest.

Zemánek, J. (2006) 'The Constitutional Courts in the New Member States and the Uniform Application of European Law', in I. Pernice, J. Kokott & C. Saunders (eds.) *The Future Of The European Judicial System in a Comparative Perspective*, Baden-Baden: Nomos Verlag, 257-265, at http://register.consilium.europa.eu/pdf/en/10/st05/st05932.en10.pdf

ANNEX

List of Interviewees by position, date and place of interview

Interview #	Position of the Interviewee	Date of the Interview	Place of the Interview
1	Former référendaire to an AG of the ECJ	11/3/2010	Brussels
2	Former director of the DG Research, Documentation and Library of the ECJ	27/4/2010	Luxembourg
3	Référendaire to a judge of the ECJ	29/4/2010	Luxembourg
4	Référendaire to a judge of the General Court	27/4/2010	Luxembourg
5	Former référendaire of an Advocate General of the ECJ	28/4/2010	Luxembourg
6	Former référendaire to a judge of the ECJ	17/11/2010	Brussels
7	Translator at the Translation Service of the ECJ	28/4/2010	Luxembourg
8	Former judge of the German Federal Constitutional Court	14/2/2011	New Haven
9	Advocate General of the ECJ	10/4/2008	Ann Arbor
10	Member of the Art.255 Panel	05/97/2010	Budapest
11	Former official of the Ministry of Foreign Affairs of the Czech Republic	18/04/2008	Ann Arbor