

## EDITORIAL COMMENTS

### *The Court of Justice in the Archives*

Analysing the judgments of the Court of Justice, identifying a *jurisprudence constante*, and critiquing developments and turns in the case law still lies at the heart of EU law scholarship. Learning to read the Court's cases, with their distinctive style, is part of our early experience of studying EU law (whether forty years ago or in 2019) and for many, if not most, of us the careful reading of cases continues to be a significant part of what we do. An important new case is seized on eagerly, if not always joyfully; it gives rise to instant commentaries in blog posts, considered assessments in journals and even day-long seminars. Case commentaries are a distinctive component of the *Common Market Law Review*, and no doubt what many readers turn to first. Certainly, the ways in which we – the community of EU law scholars – read and use cases differs and changes over time, just as our understanding of the role of the Court's case law in the process of integration has evolved.<sup>1</sup> Historians,<sup>2</sup> political scientists<sup>3</sup> and sociologists<sup>4</sup> offer perspectives to the study of the Court of Justice and its case law that complement legal analysis, broadening and deepening the scope of understanding.

1. Armstrong, "Legal Integration: Theorizing the legal dimension of European Integration", 36 *JCMS* (1998), 155; de Búrca and Weiler (Eds.) *The European Court of Justice* (OUP, 2001); Shaw and Hunt, "Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration" in Phinnemore and Warleigh (Eds.), *Reflections on European Integration: 50 Years of the Treaty of Rome*. Palgrave Studies in European Union Politics (Palgrave Macmillan, 2009). Maduro and Azoulai (Eds.), *The Past and Future of EU Law* (Hart Publishing, 2010); Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (OUP, 2018).

2. See e.g. Davies and Rasmussen, "Toward a new history of european law", 21 *Contemporary European History* (2012), 305; Rasmussen, "Law meets history: Interpreting the *Van Gend en Loos* Judgment" in Nicola and Davies (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, Law in Context (Cambridge University Press, 2017).

3. See e.g. Alter, Dehousse and Vanberg, "Law, political science and EU legal studies: An interdisciplinary project", 3 *European Union Politics* (2002), 113; Nicolaidis, "Kir Forever? The journey of a political scientist in the landscape of recognition", in Azoulai and Maduro, op. cit. *supra* note 1.

4. See e.g. Vauchez, "EU law classics in the making: Methodological Notes on *Grands Arrêts* at the European Court of Justice", in Nicola and Davies, op. cit. *supra* note 2.

As well as being stimulated and challenged by these different approaches to working with the Court's case law, we now have access to a resource which has the potential to enrich our work and to open up new avenues of research. Since 2016, the Archives of the Court of Justice, covering the first thirty years (1952–1982) have been made available to the public. It seems to us that this resource, and its availability to researchers, is not as well known as it should be. We would like to encourage the community of EU legal scholars to explore its possibilities and give thought to how it might enrich legal research.

The Historical Archives of the European Union (HAEU), housed at the European University Institute (EUI) in Florence, are an extraordinary collection in themselves, including not only the archives of the EU institutions but also many personal archives.<sup>5</sup> Regulation 2015/496 provides that each EU institution, other than the Court of Justice and the European Central Bank, shall deposit at the EUI the documents which are part of its historical archives and which it has opened to the public (normally according to a thirty year rule).<sup>6</sup> The Court of Justice and the European Central Bank are exempted from the general requirement to open their archives, but the Regulation provides that they may decide to deposit their archives with the HAEU, and to open them on a voluntary basis. And, indeed, the Court of Justice decided in 2014 to deposit its archives with the HAEU, and in 2016 took the decision to open them to the public.<sup>7</sup> Electronic versions of each item have been created, and since July 2017 all the judicial archives up to 1982 have been available, with the exception of staff cases.

The Court's judicial archives include the original signed versions of Court judgments and orders, and – most interesting for legal researchers – the *dossiers de procédure originaux*, or original procedure records. These

5. <[www.eui.eu/Research/HistoricalArchivesOfEU](http://www.eui.eu/Research/HistoricalArchivesOfEU)>.

6. Council Regulation 2015/496/EU of 17 March 2015 amending Regulation (EEC, Euratom) 354/83 as regards the deposit of the historical archives of the institutions at the European University Institute in Florence, O.J. 2015, L 79/1. The original Regulation of 1983 (Council Regulation 354/83/EEC/EURATOM of 1 Feb. 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, O.J. 1983, L 43/1) established the principle that the institutions' archives should be preserved and made available to the public; the Regulation of 2015 enshrines the institutions' practice into law, by stipulating that the archives are to be deposited with the Historical Archives of the EU at the EUI. It is accompanied by a Framework Partnership Agreement between the European Commission, on behalf of the depositing institutions, and the EUI: Framework Agreement No. SG-FPA-2015-1.

7. Decision of the Court of Justice of the European Union of 10 June 2014 concerning the deposit of the historical archives of the Court of Justice of the European Union at the Historical Archives of the European Union (European University Institute) O.J. 2015, C 406/2. In opening the archives of the first thirty years, the Court dates the case files by the date on which the procedure was closed; in practice this means that the most recent cases available date from 1979–1980.

*dossiers* include all the procedural documents related to the case, including the pleadings, letters on the appointment of the *juge rapporteur* and Advocate General in the case, evidence and supporting documents, documents submitted by the referring court in the case of preliminary rulings, submissions and observations, orders made, and the report for the oral hearing. Disappointingly, but perhaps understandably, the publicly available *dossier* does not include the record of the Court's private deliberations, or as expressed in the Court's Decision, "Under no circumstances shall access be given to documents relating to the secrecy of the deliberations".<sup>8</sup> As may be imagined, the length of the *dossiers* varies considerably: Joined Cases 56 & 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission*, for example, is over 2000 pages long, whereas the *dossier* for Case 41/74, *Yvonne van Duyn v. Home Office* is about 300 pages.

A procedure has been developed by the Court and the HAEU for accessing the case *dossiers*. It is somewhat cumbersome, and one may question whether it would cope with a significant increase in demand. Nonetheless, it does work and may no doubt be subject to adjustment with experience and if demand for access increases.

When we say that the Court's archives are "open", this does not unfortunately mean that online access to each case file is immediately available or automatic. In the first place, each case file must, the first time it is requested, be checked in its electronic version by the Court of Justice itself. The Court will remove any sensitive or confidential information,<sup>9</sup> so that the file seen by the public is redacted (pages may be missing). In the second place, a researcher (or other member of the public) wanting to access a specific case needs to put in an individual request.<sup>10</sup> The individual is then authorized to access the relevant files online in pdf format. It is thus not necessary to consult the *dossiers* at the HAEU in person. The need to redact the file means that the first time a case is requested, it might take a little time before it becomes available; at present the delay is not too great, but this might change were demand to increase. The redaction is entirely in the hands of the Court, not the HAEU, and reasons for the redaction in specific cases are not supplied, merely a statement of which pages have been redacted.

8. Decision of the Court of Justice of 10 June 2014, cited *supra* note 7, Art. 4(2).

9. Regulation 354/83, cited *supra* note 6, Art. 2 excludes "records containing information on the private or professional life of individual persons". Art. 4(1) of the Court's Decision of 10 June 2014, cited *supra* note 7, refers to Art. 35 of the Court's Statute which provides that the Court's deliberations are to remain secret. This provision applies also to the General Court (Art. 53 of the Court's Statute), and to the Civil Service Tribunal (Art. 7(1) of Annex 1 to that Statute).

10. For the procedure to access a case file, see <[archives.eui.eu/en/fonds/230050?item=CJUE](http://archives.eui.eu/en/fonds/230050?item=CJUE)>. Requests can be made via email to [archiv@eui.eu](mailto:archiv@eui.eu).

In the three years since these first thirty years of the Court's archives have been opened, the numbers of researchers consulting them in any one year has ranged from ten to fifteen, and the number of *dossiers* consulted has risen from 149 in 2016, to 382 in 2017 and 279 in 2018. Interest is increasing, but the impression is still of an underused and probably little-known resource. Why might we want to read these procedural *dossiers* from the earliest cases in the comparatively short history of EU law? What do they offer legal scholars that cannot be gleaned from the published case reports? A small research project coordinated by the EUI's Academy of European Law, and in which several members of this Editorial Board participate, represents an initial attempt to test some intuitions and explore the potential of these case files in the Court archives.<sup>11</sup> While historical research on the Court's case law so far has understandably tended to focus on a few iconic cases,<sup>12</sup> this project has chosen a number of leading cases in different fields, including free movements of goods and persons, judicial procedure, gender equality, competition law, and external relations. The aim is to bring together lawyers and those working in other disciplines to identify the content of these archival resources in comparison with published case reports and to analyse its significance.

As well expressed by Antoine Vauchez, the canon of foundational cases in EU law, through a process of summarizing and ordering, tends to become stripped down to a simplified set of principles (*Costa v. ENEL* as "primacy", *Defrenne* as "non-discrimination", etc.), forming "an uninterrupted and consistent chain of cases that map out the EU legal landscape".<sup>13</sup> This, Vauchez argues, leads to a neglect of what might be called a "thicker" account of these cases as political, legal and social "events" that are part of the history of the EU, the intersection between "the law" and the political, economic and societal context in which that law develops. This is not so much a question of writing an alternative history of EU law or moving away from doctrinal analysis, but rather of creating thicker descriptions of EU law by adding stories, actors and elements of the social environment by whom and in which it has been created.<sup>14</sup> A study of the case *dossiers* may offer one way – certainly there are others – to thicken our understanding of these cases, and through them of the conceptual genealogies of EU law.

11. For information about the project, see <ecjarchives.eui.eu/>.

12. See e.g. Rasmussen, op. cit. *supra* note 2; Vauchez, "The transnational politics of judicialization. Van Gend en Loos and the making of EU polity", 16 ELJ (2010), 1.

13. Vauchez, op. cit. *supra* note 4.

14. As expressed in an earlier Editorial Comment, "Arguably, the most important and noble task of legal scholarship is non-adjudicatory in nature: it is to develop better descriptions and understandings of the legal materials." Editorial Comment, "The critical turn in EU legal studies", 52 CML Rev. (2015), 881 at 888.

Of the different ways in which such a study might contribute, let us just suggest three. First, it may offer a deeper perspective on the legal reasoning adopted by the Court of Justice: how does the Court's expression and ordering of its reasoning reflect or differ from that of the parties, to what extent does the Court choose not to engage with arguments in the submissions or pleadings, or expressed by a referring court? Might the documents in the case shed light on the process by which certain phrases and formulas evolve and become fixed? Is there evidence in the documents of wider doctrinal or other debates in the background of the case? Second, the *dossier* may provide insights into the actors involved in shaping EU law, not only the *juge rapporteur* but, for example, the other judges, the advocates, the agents acting for the institutions in the case, and for the Member States choosing to intervene, helping to build a picture of the networks of individuals concerned.<sup>15</sup> And third, the *dossier* may contain information about the procedure itself and how that was viewed by the actors involved. Thus, for example, the *dossier* for Opinion 1/75 allows us to see the discussion – not included in the report of the case – by the Council, Commission and intervening Member States of the purpose and scope of the Opinion procedure on this first occasion on which it was used.

At the time when this first thirty years of cases were decided, the published reports routinely contained a report for the hearing prepared by the *juge rapporteur*. It is a great loss that these are no longer available,<sup>16</sup> and this changed practice brings home the importance of the judicial archives, not only as a source of information about these earliest cases but as a continuing resource in the future. As more cases become available in the archives for which the published reports are thus reduced, the *dossiers* will provide us with otherwise unavailable details of the pleadings and interventions.

Without doubt, other sources would be necessary to give a more complete picture. The Council Legal Service has not yet opened and transferred its archives to Florence and the archives of the Commission Legal Service are publicly available so far only in part. The archives of the High Authority (Coal and Steel Community) Legal Service have been deposited at the HAEU, covering the years up to the merger of the High Authority with the Euratom and EEC Commissions to form the single European Commission in 1967.<sup>17</sup> In

15. See e.g. the discussion of the role of Judge Lecourt in Joined Cases 90 & 91/63, *Commission v. Luxembourg and Belgium*, EU:C:1964:80, in Phelan, “Supremacy, direct effect, and dairy products in the early history of European law”, 14 I-CON (2016), 6.

16. The Statute of the Court of Justice was amended in 2012, *inter alia* removing the obligation of the *juge rapporteur* to present a report at the oral hearing. Regulation 741/2012/EU/EURATOM of the European Parliament and of the Council of 11 Aug. 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, O.J. 2012, L 228/1, Art. 1(4), amending Art. 20 of the Court's Statute.

17. See <archives.eui.eu/en/fonds/40349?item=CEAB01>.

the near future, further transfers of archives of the Commission's legal service are planned, representing the start of an ongoing process of opening the legal archives of the EU institutions. As part of that process, we should welcome the willingness of the Court of Justice to open its judicial archives, and hope that scholars of EU law will take advantage of the opportunity they offer.