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# A Sense of Common Purpose

## On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice

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### I Introduction

Many European Union lawyers consider the system of case assignment at the European Court of Justice (ECJ) to be a problematic feature in the court's decision-making process. At the centre of the critique is the system's discretionary character. When a new case arrives at the ECJ, the court's president picks a judge to act as judge-rapporteur. The president has full discretion to select a rapporteur among the twenty-six colleagues.<sup>1</sup> A couple of weeks later, the court's general meeting, composed of all twenty-seven judges and eleven advocates general, decides whether a case should be heard by a chamber of three judges, a chamber of five judges, the court's Grand Chamber of fifteen judges, or the Plenary.<sup>2</sup> Again, the general meeting is free to choose. This discretionary system of case assignment has been subject to severe criticism. Many see a strong tension with the fundamental right to a fair trial.<sup>3</sup> Some openly speak of a risk of

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<sup>1</sup> See ECJ RoP Art. 15. In principle, the president never acts as judge-rapporteur. Recently, there have been two cases where European Court of Justice (ECJ) President, Lenaerts, has exceptionally acted as reporting judge; see Case C-3/19, *Asmel*, EU:C:2020:423 and Case C-703/17, *Krah*, EU:C:2019:850.

<sup>2</sup> Plenary cases, in which all twenty-seven judges decide together, are extremely rare. Between 2015 and 2019 only three cases were decided by the Plenary.

<sup>3</sup> The critique is particularly articulated in the German discussion; see Bernhard Wegener, *Art. 251 AEUV*, in *EUV/AEUV. DAS VERFASSUNGSRECHT DER EUROPÄISCHEN UNION MIT EUROPÄISCHER GRUNDRECHTECHARTA* (Christian Calliess & Matthias Ruffert eds., 5th ed. 2016), ¶ 6; Ulrich Karpenstein & Kathrin Dingemann, *AEUV Art. 251*, in *DAS RECHT DER EUROPÄISCHEN UNION* (Eberhard Grabitz, Meinhard Hilf, & Martin

manipulation.<sup>4</sup> Others are even harsher, describing the system as ‘strongly authoritarian’.<sup>5</sup> Moreover, critics point to the fact that most other legal systems ban discretionary case assignment,<sup>6</sup> and that even the ECJ’s in-house sibling, the EU General Court, follows a list of abstract and predetermined assignment criteria.<sup>7</sup> And yet, despite this continuous and fundamental critique, the ECJ sticks with its way of assigning cases.

In this chapter, my goal is not to defend the court.<sup>8</sup> Rather, I aim to understand why the court maintains a system that has been under severe attack for a long time. By closely analyzing the practice of case assignment between 2003 and 2019, I argue that the ECJ’s assignment system is an important mechanism for the court’s institutional success. It has allowed the court to maintain a sense of common purpose, a strong and persistent idea of its mandate as a guardian of the effectiveness and primacy of EU law.<sup>9</sup> I identify three key functions case assignment performs. First, supporting jurisprudential stability and continuity by creating an ‘elite group’ of judges who write the bulk of the most important ECJ decisions. Second, integrating new ECJ judges through gradually assigning them more difficult cases thereby structuring a learning process for becoming a full-fledged ECJ judge. And third, the ECJ’s system of case assignment has helped to maintain what is generally lost in courts of the ECJ’s size: a place where *all* twenty-seven ECJ judges and eleven advocates general are informed on *all* incoming cases, jointly engage in systematizing the ECJ’s case law, and framing the court’s agenda.

Nettesheim eds., 2019), ¶ 19; Thomas Rönau & Annemarie Hoffmann, *Vertrauen ist gut, Kontrolle ist besser: Das Prinzip des gesetzlichen Richters am EuGH*, 7–8 *Zeitschrift für internationale Strafrechtsdogmatik* 233 (2018).

<sup>4</sup> Peter M. Huber, *AEUV Art. 251*, in *EUV/AEUV* (Rudolf Streinz ed., 3d ed. 2018), ¶ 10.

<sup>5</sup> Franklin Dehousse, *The Reform of the EU Courts (II). Abandoning the Management Approach by Doubling the General Court*, 83 *EGMONT PAPER* 1, 61 (2016).

<sup>6</sup> See Wegener, *supra* note 3, ¶ 6.

<sup>7</sup> See Dehousse, *supra* note 5, at 61.

<sup>8</sup> For this, see Juliane Kokott and Christoph Sobotta, *The CJEU – An Insiders’ View on an Integration Workshop*, 34 *HUM. RIGHTS LAW J.* 4 (2014).

<sup>9</sup> It is an idea of the role of the court that generations of ECJ judges and advocates general have actively promoted and defended; in detail, Antoine Vauchez, *Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, 4 *EUR. POL. SCI. REV.* 51, 52 (2012); Martin Höpner, *Der Europäische Gerichtshof als Motor der Integration. Eine akteursbezogene Erklärung*, 21 *BERL. J. FÜR SOZIOLOG.* 203, 220–24 (2011).

To analyze these, so far unaddressed functions of case assignment this article proposes a change of perspective in the study of ECJ decision-making. I will not look at case assignment through the dominant lens of the individual litigant and her right to a fair trial.<sup>10</sup> Rather, I will investigate what case assignment might mean for the dynamics inside the court, for processes of group building and socialization among ECJ judges. This approach seeks to bring together two strands in the research on the court that have, so far, been firmly set apart. The discussion on ECJ procedural and organizational law, in which the legal-technical analysis dominates,<sup>11</sup> and the social science perspective that seeks to understand the foundations of the court's authority.<sup>12</sup> Such a conceptual turn<sup>13</sup> requires going beyond the lawyerly toolkit traditionally employed to analyze procedural and organizational rules. As many other chapters in this book, this chapter will therefore enter new empirical ground. I will, first, rely on a statistical analysis of ECJ case assignment to reporting judges between 2003 and 2019. Second, I will use internal procedural documents that explain the process of decision-making to the ECJ members themselves, notably the court's *Guide traitement des affaires*.<sup>14</sup> This unpublished document does not reveal any hidden secrets. As we will see in the final part of this contribution, its main added value lies in providing an authentic account of the importance the ECJ itself assigns to certain steps in its decision-making processes.<sup>15</sup>

<sup>10</sup> For a comparative study from this perspective, see Marco Fabri & Philip M. Langbroek, *Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries*, 1 EUR. J. LEGAL STUD. 292 (2007).

<sup>11</sup> See, for instance, BERTRAND WÄGENBAUR, COURT OF JUSTICE OF THE EUROPEAN UNION. COMMENTARY ON STATUTE AND RULES OF PROCEDURE (2013); RICHARD PLENDER, EUROPEAN COURTS. PRACTICE AND PRECEDENTS (1997); from the early years, D. G. VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY (1955).

<sup>12</sup> See notably Antoine Vauchez, *Conclusion: Le magistère de la Cour – une sociologie politique*, in DANS LA FABRIQUE DU DROIT EUROPÉEN. SCÈNES, ACTEURS ET PUBLICS DE LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES 217, 230–33 (Pascal Mbongo & Antoine Vauchez eds., 2009).

<sup>13</sup> For a similar analysis as regards the ECJ's administrative governance, see Christoph Krenn, *Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success*, 19 GER. L.J. 2007 (2018).

<sup>14</sup> *Guide pratique relatif au traitement des affaires portées devant la Cour de Justice* (version of 2 May 2018).

<sup>15</sup> A similar window into the court's own perception of its decision-making is offered by studying how the ECJ defends its organizational design in the EU budgetary process, notably in Activity Reports and Q&As with members of the European parliament, see Christoph Krenn, *The European Court of Justice's Financial Accountability. How the*

This contribution will proceed in two big leaps. First, I will analyze the practice of assignment to reporting judges (Part II). Subsequently, I will examine the assignment to judicial formations (Part III). As we go along, I will discuss the diverse functions case assignment performs for maintaining the ECJ's historic sense of common purpose.

## II Case Assignment to Reporting Judges

This section analyzes the assignment of cases to reporting judges. Appreciating its functions requires two preliminary steps. The first step will examine what being assigned the 'rapporteurship' in an important case means in terms of responsibility for the outcome and reasoning of a case and in terms of recognition and prestige that comes with it. The second step will examine the practice of case assignment between 2003 and 2019. In a nutshell, from the data we can derive two important insights. First, case assignment is unequal. There exists a group of ECJ judges writing the most important decisions. And second, most judges, after an initial phase of a couple of years enter this 'elite group' of rapporteurs. However, not all judges do. Based on this, I will interpret the results and argue that case assignment can be seen to support jurisprudential stability, the integration of new judges, and the ECJ's independence.

### A *What It Means to Be a Judge-Rapporteur*

In every ECJ decision the name of the reporting judge is listed in brackets in the title part of the judgment.<sup>16</sup> This has not always been the case. In October 1975, under the presidency of Robert Lecourt, the practice of including the name of the judge-rapporteur in the judgment had been provisionally ceased<sup>17</sup> after a European law journal had started

*European Parliament Incites and Monitors Judicial Reform through the Budgetary Process*, 13 EUR. CONST. L. REV. 453 (2017).

<sup>16</sup> In the course of the 2012 procedural reform, the rule to include the name of the judge-rapporteur in the judgment has been included in the Rules of Procedure. See ECJ RoP Art. 87(d).

<sup>17</sup> The first case in which the practice was ceased had been 35/75, *Matisa-Maschinen*, EU: C.1975:135.

publishing cases under the name of the judge-rapporteur.<sup>18</sup> It was only during the last year of the presidency of Ole Due in January 1994 that the practice to include the name of the judge-rapporteur in ECJ decisions was taken up again.<sup>19</sup>

The practice of openly displaying a specific responsibility of one individual judge leads to recognition within and outside the court. The German daily *Süddeutsche*, for instance, held with some pride when reporting on an ECJ Grand Chamber decision on data retention:<sup>20</sup> ‘A pivotal role is played by a German: Thomas von Danwitz is the judge-rapporteur. . . . It is therefore possible that a German judge prompts the decisive step to a true European constitutional court.’<sup>21</sup> Former ECJ President Rodríguez Iglesias has been publicly praised for how he has shown his vision for Europe and his legal skills when acting as reporting judge in the well-known *Brasserie du Pêcheur* case,<sup>22</sup> shortly before becoming ECJ president.<sup>23</sup> Even in academic writings, scholars allude to the strong impact certain ECJ judges exert through their rapporteurship on the development of specific strands of ECJ case law.<sup>24</sup>

Indeed, the position of the judge-rapporteur within today’s court is an important one.<sup>25</sup> To be sure, the impact of the reporting judge on the

<sup>18</sup> See HENRY G. SCHERMERS, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 411 (1983).

<sup>19</sup> The first case in which it was taken up again had been C-435/92, *Association pour la protection des animaux sauvages*, EU:C:1994:10.

<sup>20</sup> Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, EU:C:2014:238.

<sup>21</sup> Translated from German original by Christoph Krenn, see Wolfgang Janisch, *Grundrechte vor Gericht*, SÜDDEUTSCHE ZEITUNG (9 July 2013), <http://www.sueddeutsche.de/politik/europaeischer-gerichtshof-verhandelt-ueber-vorratsdatenspeicherung-grundrechte-vor-gericht-1.1716720>.

<sup>22</sup> Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, EU:C:1996:79.

<sup>23</sup> See the speech by former ECJ judge, Günter Hirsch, on the occasion of the presentation of the Walter Hallstein Prize to former ECJ President, Gil Carlos Rodríguez Iglesias. Günter Hirsch, President, Fed. High Court of Justice, *Verleihung des Walter-Hallstein-Preises* (5 November 2003).

<sup>24</sup> See e.g., Mark Clough, *Collective Dominance – The Contribution of the Community Courts*, in *A TRUE EUROPEAN. ESSAYS FOR JUDGE DAVID EDWARD* 161, 161 (Mark Hoskins & William Robinson eds., 1st ed. 2004) (underlining the contribution of David Edward as judge-rapporteur in the field of collective dominance); see also Susanne K. Schmidt, *Who Cares about Nationality? The Path-Dependent Case Law of the ECJ from Goods to Citizens*, 19 J. EUR. PUB. POL. 8, 13 (2012) (‘We can assume that the rapporteur to a case is most influential for its solution’).

<sup>25</sup> See Mathilde Cohen, *Ex Ante versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*, 62 AM. J. COMP. L. 951, 963–66 (2014) (discussing the powerful role of the judge-rapporteur from a comparative perspective).

outcome of a case is difficult to measure, notably because the drafts that lead to a judgment are not published and deliberations are secret. And certainly, the judge-rapporteur only presents a proposal, which is then scrutinized by all other judges on the bench, revised, rewritten, and altered to reflect a consensus.<sup>26</sup> Yet, a closer look at the procedural set up suggests significant responsibility of the reporting judge for the outcome and reasoning of a case. First, even if other judges propose a host of amendments to a draft judgment, a number of the judge-rapporteur's arguments will remain. As former ECJ President Ole Due has explained: 'he may have lost as to the conclusion of the judgment, but he still has the initiative in relation to the reasoning'.<sup>27</sup> Second, the judge-rapporteur knows the case file best.<sup>28</sup> Moreover, together with the advocate general who has been assigned the case, the judge-rapporteur accompanies the procedural development of a case, requesting research notes from the court's research department,<sup>29</sup> posing written questions to the parties, and being generally the most active during the hearing. And third, all these prerogatives are exercised in a context of an increasingly high workload, with little time to prepare for deliberations and oral hearings. Time pressure increases the responsibility of the judge-rapporteur significantly.<sup>30</sup> In 2013, in an internal memo, British judge Christopher Vajda complained that the other judges in a chamber had too little time to read draft judgments, so that the judge-rapporteur becomes particularly influential due to the lack of preparation of her colleagues.<sup>31</sup>

<sup>26</sup> KOEN LENAERTS, IGNACE MASELIS, & KATHLEEN GUTMAN, *EU PROCEDURAL LAW* 22 (Janek Tomasz Nowak ed., 2014).

<sup>27</sup> Ole Due, *Looking Backwards and Forwards*, in *LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES 1952–2002: BILAN ET PERSPECTIVES* 25, 28–29 (Amicale des référendaires et anciens référendaires de la Cour de justice et du tribunal de première instance des communautés européennes eds., 2004).

<sup>28</sup> Carl Otto Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18 *FORDHAM INT'L L.J.* 388, 401(1994–95).

<sup>29</sup> SÍOFRA O'LEARY, *EMPLOYMENT LAW AT THE EUROPEAN COURT OF JUSTICE. JUDICIAL STRUCTURES, POLICIES AND PROCESSES* 32 (2002) (arguing that this can change the argumentative ground of the judgment decisively).

<sup>30</sup> See SCHERMERS, *supra* note 18, at 411.

<sup>31</sup> Dominique Seytre, *Pour une liste de juges retardaires?*, *LE JEUDI* 11 (6 June 2013).

### B *The Practice of Case Assignment (2003–2019)*

Given how the assignment of cases conveys recognition and responsibility, it is important to understand how cases are distributed among ECJ judges. As an ECJ insider has put it: as a judge you can be assigned interesting cases or ‘les cas les plus merdiques’.<sup>32</sup> To be sure, to some extent such assessment lies in the eyes of the beholder. But a good proxy to distinguish between cases that can be seen as important and those that are rather standard business is the judicial formation to which a case is subsequently assigned. The most complex and important cases are generally decided by the court’s Grand Chamber composed of fifteen judges. The Grand Chamber decides on average sixty cases per year – about 9 per cent of the ECJ’s overall workload.<sup>33</sup>

Figure 8.1 shows how many Grand Chamber cases per year on average have been assigned to individual judges between 2003 and 2019.<sup>34</sup> Only those judges were included on the list who have spent at least six years at the ECJ, that is, a full term in office.

Figure 8.1 shows a stark difference in the assignment of Grand Chamber cases to reporting judges. The most outstanding personality as judge-rapporteur between 2003 and 2019 is judge Lenaerts, today president of the court. He has acted as judge-rapporteur in forty-six Grand Chamber and two Plenary cases over the course of twelve years<sup>35</sup> (four cases/year). Judge Lenaert’s Grand Chamber cases stretch diverse fields of constitutional significance, including EU citizenship,<sup>36</sup> taxes,<sup>37</sup> economic governance,<sup>38</sup> and fundamental rights<sup>39</sup> and are generally those in which most member states intervene, a proxy for the political

<sup>32</sup> Jean Quatremer, *La justice européenne au bord de la crise de nerfs*, COULISSSES DE BRUXELLES, LIBÉRATION (30 April 2015), (‘the crappiest cases’).

<sup>33</sup> The numbers refer to the time between 2015 and 2019. The total amount of cases decided during those years has been 3,228. See, Court of Justice of the European Union, *Annual Report 2019, Judicial Activity* 167 (2019).

<sup>34</sup> Only judgments and opinions (not orders) were counted. Joined cases were only counted once.

<sup>35</sup> Since judge Lenaerts has been elected ECJ president in 2015, which ends a regular role as judge-rapporteur, only the time between 2003 and 2015 was considered.

<sup>36</sup> Case C-209/03, *Bidar*, EU:C:2005:169.

<sup>37</sup> Case C-371/10, *National Grid Indus*, EU:C:2011:785.

<sup>38</sup> Case C-370/12, *Pringle*, EU:C:2012:756.

<sup>39</sup> Case C-584/10 P, *Commission v. Kadi*, EU:C:2013:518; Case C-92/09, *Schecke and Eifert*, EU:C:2010:662.

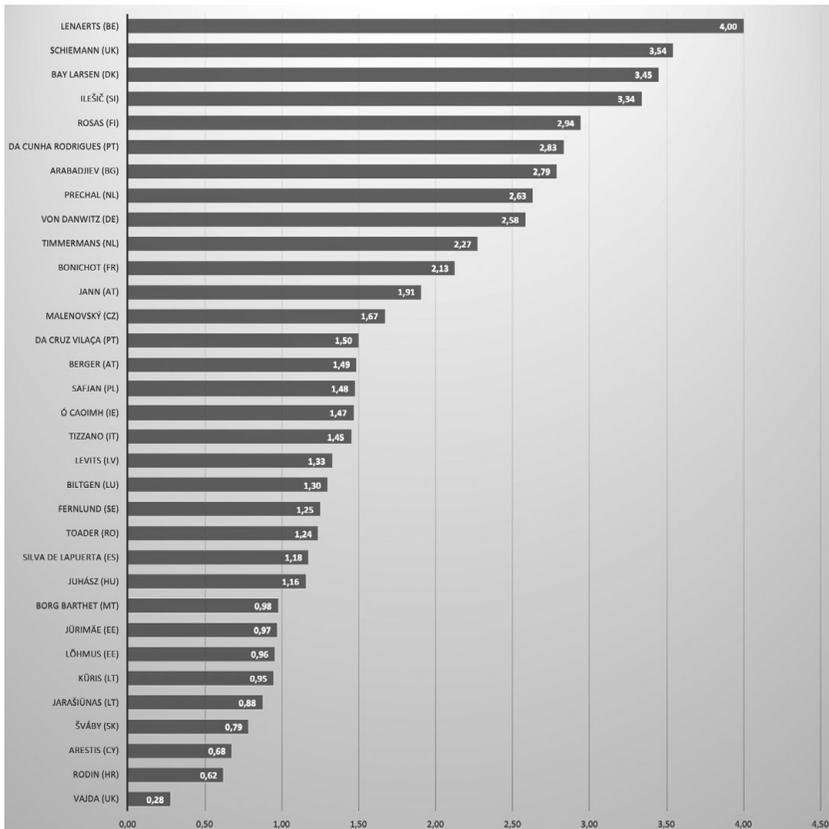


Figure 8.1 Grand Chamber judge-rapporteur assignments per year (2003–19)

salience of a decision.<sup>40</sup> Moreover, and this is truly unique in the history of the court's case assignment practice, judge Lenaerts has been almost entirely spared the business of technical and low-profile cases. He has been judge-rapporteur in 157 cases, only 8 of which (or 5 per cent) have been three-judge chamber decisions. In contrast, through the course of his ten-year career at the ECJ from 2004 to 2014, Cypriot judge George Arestis has drafted the judicial opinion in seven Grand Chamber cases

<sup>40</sup> In twenty-five of judge Lenaerts' forty-six Grand Chamber cases more than five member states joined the proceedings to submit oral or written observations.

(0.68 cases/year). He has acted as judge-rapporteur in roughly the same number of cases as judge Lenaerts, however, 21 per cent of these have been three-judge chamber judgments.

Judge Lenaerts and judge Arestis constitute two extremes regarding the position of judge-rapporteur. In general, one can observe that there is a group of judges who have served more often than others during the years 2003–19, as judge-rapporteurs in the most important cases. It is a heterogeneous group. In the top ranks one can find judges from larger and smaller member states, from Nordic states and Southern European states, from founding states and from states that joined during the enlargements in 2004 and 2007.<sup>41</sup>

There is a striking correlation between judges being part of the ‘elite group’ of reporting judges and being elected to top positions within the court, notably president, vice president, and president of a chamber of five judges (see Figure 8.2). Elections to these top positions take place every three years. The positions of president, vice president, and president of a chamber of five judges are notably important because they entail enhanced participation in the court’s Grand Chamber. The ECJ president and the vice president participate in every Grand Chamber case. From 2003 to 2012, the presidents of the chambers of five judges also had a permanent seat in the Grand Chamber. In 2012, the role of the presidents of chambers of five judges was tuned down. Today, only three out of five of the presidents of the chambers of five judges participate in any given case, rotating with the other two chamber presidents.<sup>42</sup>

<sup>41</sup> To be sure, the group is not so diverse if we consider other important diversity characteristics, notably the representation of women in the ECJ’s elite group. Female judges are generally under-represented at the court. Currently (February 2022) nine out of thirty-eight ECJ members are female, which amounts to twenty-four per cent. On the issue of gender representation at the ECJ, see JESSICA GUTH & SANNA ELFVING, *GENDER AND THE COURT OF JUSTICE OF THE EUROPEAN UNION* 37–61 (1st ed. 2019), and SALLY J. KENNEY, *GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* 108–34 (2012). On the lack of racial and ethnic minority representation at the ECJ, see Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 *COLUM. J. EUR. L.* 89 (2008).

<sup>42</sup> This reform made participation in the Grand Chamber more equal. For instance, while in 2011 the five presidents of five-judge chambers participated in average in 96 per cent of Grand Chamber cases, the remaining twenty judges participated in average in 38 per cent of Grand Chamber cases. In 2014, after the reform, the participation rates converged: 56 per cent (presidents of five-judge chambers) versus 46 per cent (other judges).

| Name of the judge       | GC cases/year | Elected positions  | Mandate (in years)  |
|-------------------------|---------------|--|---------------------|
| Lenaerts (BE)           | 4,00          | Pres. 4th Ch. (06–09)<br>Pres. 3rd Ch. (09–12)<br>ECJ Vice-Pres. (12–15)<br>ECJ Pres. since 2015 | 2003–<br>(12)       |
| Schiemann (UK)          | 3,54          |  | 2004–2012<br>(8,8)  |
| Bay Larsen (DK)         | 3,45          | Pres. 4th Ch. (12–15)<br>Pres. 3rd Ch. (15–18)   | 2006–<br>(13,9)     |
| Ilešič (SI)             | 3,34          | Pres. 3rd Ch. (12–15)<br>Pres. 2nd Ch. (15–18)   | 2004–<br>(15,6)     |
| Rosas (FI)              | 2,94          | Pres. 3rd Ch. (04–06)<br>Pres. 3rd Ch. (06–09)   | 2002–2019<br>(17,7) |
| Da Cunha Rodrigues (PT) | 2,83          | Pres. 2nd Ch. (09–12)  | 2002–2012<br>(10,3) |
| Arabadjiev (BG)         | 2,79          | Pres. 2nd Ch. (18–21)  | 2007–<br>(12,9)     |
| Prechal (NL)            | 2,63          | Pres. 3rd Ch. (18–21)  | 2010–<br>(9,5)      |
| von Danwitz (DE)        | 2,58          | Pres. 5th Ch. (12–15)<br>Pres. 4th Ch. (15–18)   | 2006–<br>(13,2)     |
| Timmermans (NL)         | 2,27          | Pres. 2nd Ch. (03–06)<br>Pres. 2nd Ch. (06–09)   | 2000–2010<br>(7,9)  |
| Bonichot (FR)           | 2,13          | Pres. 4th Ch. (09–12)<br>Pres. 1st Ch. (18–21)   | 2006–<br>(13,2)     |
| Jann (AT)               | 1,91          | Pres. 1st Ch. (03–06)<br>Pres. 1st Ch. (06–09)   | 1995–2009<br>(7,3)  |
| Malenovský (CZ)         | 1,67          |  | 2004–<br>(15,6)     |
| Da Cruz Vilaça (PT)     | 1,50          | Pres. 5th Ch. (15–18)  | 2012–2018<br>(6)    |
| Berger (AT)             | 1,49          |  | 2009–2019<br>(9,4)  |
| Safjan (PL)             | 1,48          |  | 2004–<br>(10,2)     |
| Ó Caoimh (IE)           | 1,47          |  | 2004–2015<br>(10,9) |
| Tizzano (IT)            | 1,45          | Pres. 1st Ch. (09–12)<br>Pres. 1st Ch. (12–15)<br>ECJ Vice-Pres. (15–18)                         | 2006–2018<br>(12,4) |
| Levits (LV)             | 1,33          |  | 2004–2019<br>(15,1) |
| Biltgen (LU)            | 1,30          |  | 2013–<br>(6,2)      |
| Fernlund (SE)           | 1,25          |  | 2011–<br>(8)        |
| Toader (RO)             | 1,24          |  | 2007–<br>(12,9)     |
| Silva de Lapuerta (ES)  | 1,18          | Pres. 2nd Ch. (12–15)<br>Pres. 1st Ch. (15–18)<br>ECJ Vice-Pres. (18–21)                         | 2003–<br>(16,2)     |
| Juhász (HU)             | 1,16          |  | 2004–<br>(15,6)     |
| Borg Barthet (MT)       | 0,98          |  | 2004–2018<br>(14,3) |
| Jürimäe (EE)            | 0,97          |  | 2013–<br>(6,2)      |
| Lõhmus (EE)             | 0,96          |  | 2004–2013<br>(9,4)  |
| Kūris (LT)              | 0,95          |  | 2004–2010<br>(6,3)  |
| Jarašiūnas (LT)         | 0,88          |  | 2010–2018<br>(8)    |
| Šváby (SK)              | 0,79          |  | 2009–<br>(10,2)     |
| Arestis (CY)            | 0,68          |  | 2004–2014<br>(10,3) |
| Rodin (HR)              | 0,62          |  | 2013–<br>(6,4)      |
| Vajda (UK)              | 0,28          |  | 2012–2020<br>(7,3)  |

Figure 8.2 Case assignment and elected ECJ positions (2003–2019)

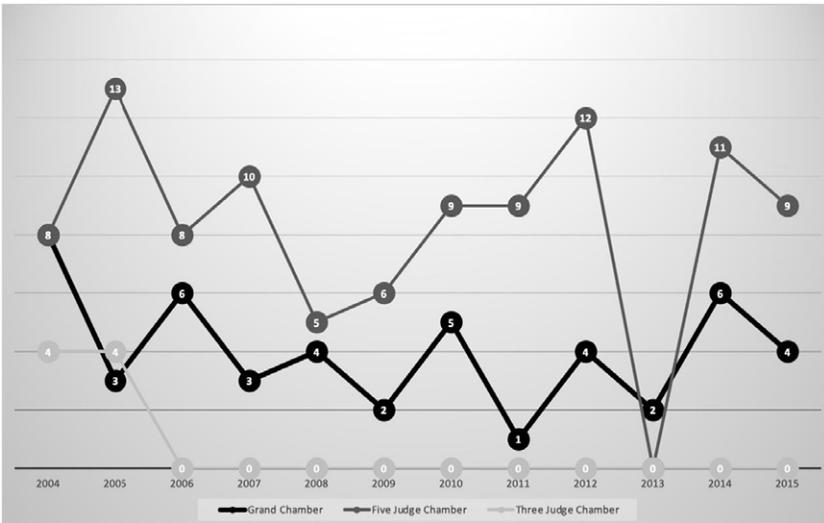


Figure 8.3 Case assignment judge Lenaerts (2004–15)

The second important feature in the practice of case assignment between 2003 and 2019, is the process through which the group of ‘elite judges’ writing the most important decisions, is devised. To better understand this process and get a full picture of a judge’s judicial status within the court, we need to enlarge the picture and include not only the assignment of Grand Chamber decisions (black line in the following figures), but also of five-judge chamber decisions (dark gray line) and three-judge chamber decisions (light gray line). By investigating at what point during their career individual judges are assigned important, medium, and less important cases, we can observe how judges move up the ranks and enter the ‘elite group’.

Generally, it takes a certain time for a judge to have earned the trust and status to act as judge-rapporteur in the most important cases. However, there are different ways to reach the top ranks. Some judges immediately belong to them upon joining the court. Judge Lenaerts (Figure 8.3) and the Danish judge Bay Larsen (Figure 8.4) are good examples. Already in their first years they have acted as judge-rapporteurs in Grand Chamber cases, have had a constant high level of five-judge chamber cases, and have been largely spared the less important three-judge chamber decisions.

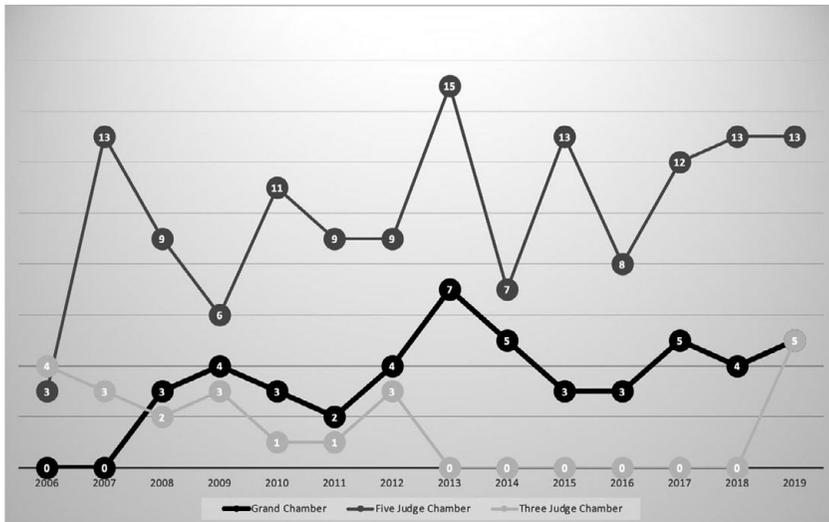


Figure 8.4 Case assignment judge Bay Larsen (2006–19)

For others, the journey to the top of the ranks takes longer. Generally, for a new judge, the path to the ‘elite group’ starts out with rather straightforward cases, such as an infringement proceeding for the non-transposition of a directive, decided in a chamber of three judges. Moving up in the ECJ ranks involves acting as judge-rapporteur in smaller formations and the specialization in a certain field, which can then lead to acting as reporting judge in the first Grand Chamber decisions. Usually, this process takes four to five years, as can be seen in the example of the Dutch judge, Sacha Prechal, who joined the court in June 2010 (Figure 8.5) and the Slovenian judge, Marko Ilešič, who joined in 2004 (Figure 8.6).

However, some judges never succeed in entering the ‘elite group’, even though they have been at the court for a long time. One example being the Maltese judge, Anthony Borg Barthet (Figure 8.7), who served at the court from 2004 to 2018. Borg Barthet, although having been at the court for fourteen years, had hardly acted as reporting judge in Grand Chamber cases and had handled a lot of three-judge chamber decisions. Another example is the Hungarian judge Endre Juhász (Figure 8.8).

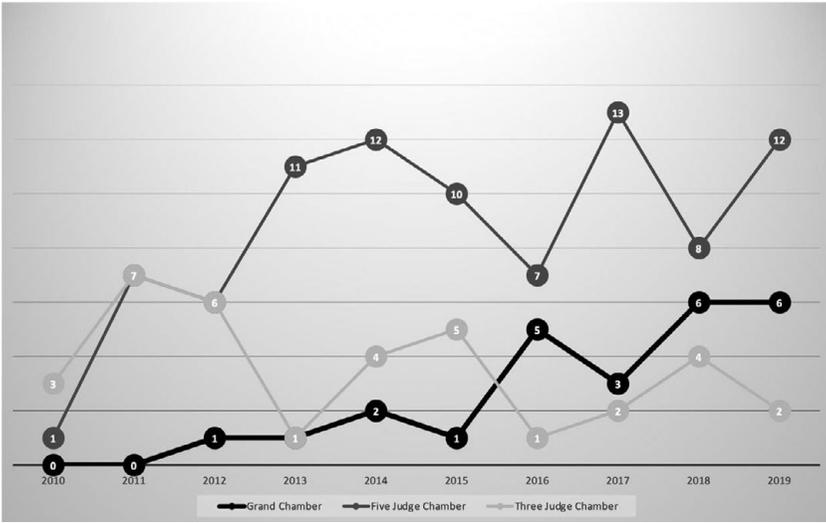


Figure 8.5 Case assignment judge Prechal (2010–19)

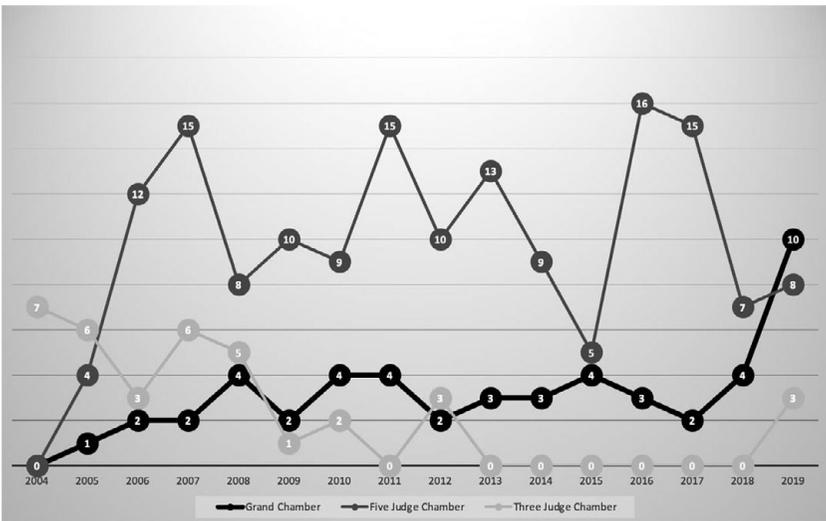


Figure 8.6 Case assignment judge Ilešič (2004–19)

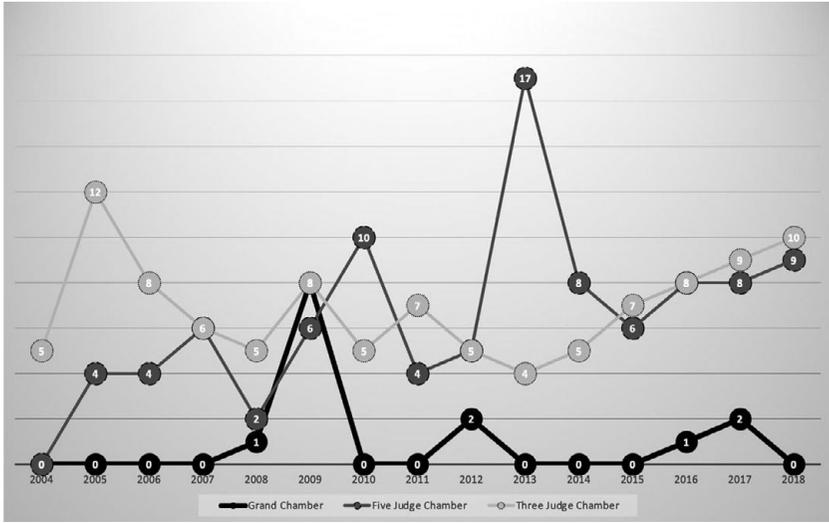


Figure 8.7 Case assignment judge Borg Barthet (2004–18)

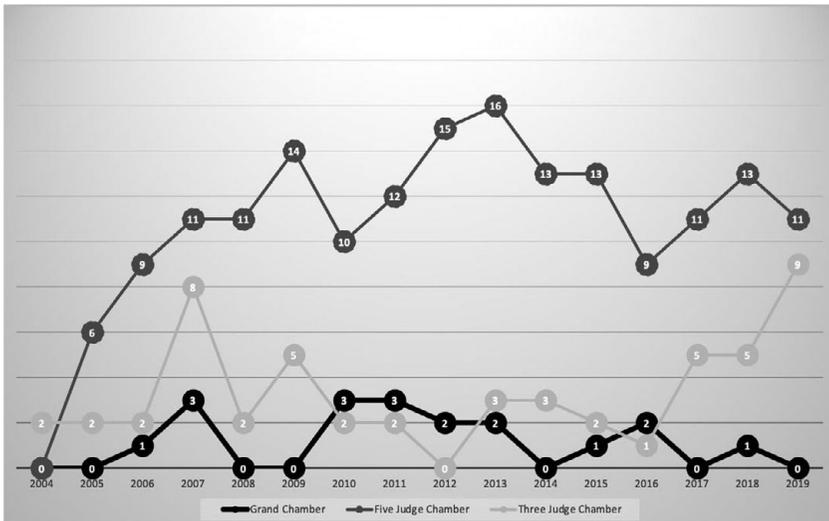


Figure 8.8 Case assignment judge Juhász (2004–19)

### C *The Functions of Rapporteur Assignment: Stability, Integration, and Independence*

How can we interpret these features of case assignment at the ECJ from the perspective of maintaining a sense of common purpose at the court? First, the practice of case assignment reinforces a process that has been described since the early 2000s, namely the formation of an ‘elite group’ of judges at the ECJ.<sup>43</sup> This process has been particularly observed in the composition of the court’s Grand Chamber, in which a number of senior judges have permanent seats. This process has been described as crucial for maintaining stability and coherence in the court’s case law.<sup>44</sup> Case assignment supports this.

Second, the practice of case assignment can arguably also be seen as a valuable tool for the integration of new ECJ judges. It allows to structure a learning process through which judges are encouraged to acquire the skills, in terms of language capacity<sup>45</sup> and knowledge of EU law, to join the top ranks of ECJ judges. Entering the group of ‘elite judges’ requires the approval of the president of the court, acting as a gatekeeper. The power of the court’s president to assign cases can possibly also be understood as providing a mechanism to incentivize judges to align with the principal institutional self-understanding at the court and to uphold it – importantly, status is awarded but it can also be taken away by the institution. Such function of case assignment seems particularly suited for a court such as the ECJ that cannot rely on a common education and socialization of its members. To some extent, case assignment can be seen as a functional equivalent for a process judges in domestic legal systems generally undergo before entering the highest court: pursuing common legal training, passing state exams, and climbing the career ladder within the respective judicial system.

To be sure, one should not overstretch this idea, notably when it comes to understanding the role of those judges who have never become part of the

<sup>43</sup> See Hjalte Rasmussen, *Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt*, 44 COMMON MKT. L. REV. 1661, 1674 (2007); Thomas von Danwitz, *Funktionsbedingungen der Rechtsprechung des Europäischen Gerichtshofs*, EUROPARECHT 769, 777 (2008).

<sup>44</sup> Vassilios Skouris, *Self-Conception, Challenges and Perspectives of the EU Courts*, in THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 19, 23 (Juliane Kokott et al. eds., 2006).

<sup>45</sup> Many judges, after joining the court, need time to adapt to the new environment, notably to writing and deliberating in French, the court’s working language. Indeed, new judges have sometimes spent their first months in office following intensive French courses besides their judicial duties. See, NEVILLE MARCH HUNNINGS, THE EUROPEAN COURTS 65 (1996).

'elite group'. A third, and possibly equally important function of the current practice of case assignment can be seen in ensuring that the best qualified judges write the most important decisions. If a judge is an expert in a certain field, in which groundbreaking Grand Chamber decisions are rare, she might be assigned fewer Grand Chamber cases than other judges. Moreover, differences in individual capacities are, first, human, and second, due to a selection procedure where the qualification of a judge has for a long time played little role.<sup>46</sup> Furthermore, French being the court's internal working language, the number of qualified *and* ready-to-work judges is, in particular in smaller member states, naturally limited. The current process of case assignment allows to react flexibly to the challenges that adapting to a new work environment entail. This might, for instance, partially explain the prominent role of judge Lenaerts, who pursued a career before coming to the ECJ that had equipped him with skills particularly suited to be an effective and ready-to-work ECJ judge. Lenaerts is not only since 1983 a professor of European Law at the University of Leuven but has also been a legal secretary at the ECJ (1984–85) and from 1989 to 2003 a judge at the Court of First Instance of the European Communities (today the EU General Court).

A final function of case assignment for the ability of the court to maintain a sense of common purpose might be seen in its effects on the appointment of new judges. The long time it takes to enter the elite group of judges means that member states have strong incentives to reappoint 'their judge'. To some extent, the court might even have an impact on these appointment and reappointment decisions. If a judge, for whatever reason, never arrives in the 'elite group', it signals to a member state that its judge is not making the strongest possible impression, which might lead to appointing a new judge. Moreover, if a judge is sent to the court to pursue an agenda that does not fit the court's institutional self-understanding, case assignment provides a mechanism to partially sideline judges. In that sense, paradoxically, the current system of election and re-election every six years, which has often been criticized from the perspective of judicial independence, might, combined with the flexibility case assignment offers, support the court's independence. It allows some judges to stay in office for twelve years (two terms), eighteen years (three terms), or even longer, while others leave after a brief six-year term.

<sup>46</sup> See Henri de Waele, *Not Quite the Bed that Procrustes Built. Dissecting the System for Selecting Judges at the Court of Justice of the European Union*, in *SELECTING EUROPE'S JUDGES. A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS* 24, 34–35 (Michal Bobek ed., 2015).

### III Case Assignment to Judicial Formations

I will now move to analyzing the assignment of cases to judicial formations. Approximately two months after a case has been assigned to a judge-rapporteur, the court's general meeting assigns a case to a judicial formation: a three-judge chamber, a five-judge chamber, the Grand Chamber or the Plenary. In many courts that have a comparable chamber system, these decisions are made in an incremental and decentralized manner.<sup>47</sup>

At the ECJ the process of assigning cases to a judicial formation looks very different. It is a collective task performed by all twenty-seven judges and eleven advocates general. The court and its members invest a significant amount of time into this process. This suggests that it fulfils additional functions besides the effective management of the court's docket. As we will see, it allows all ECJ members to inform themselves on all cases, to jointly engage in the ordering of the court's jurisprudential *acquis*, and to decide on the court's agenda. The production of case law is thereby constructed as a collective process, entailing a collective responsibility. These three functions of the assignment to judicial formations can be discerned by closely studying the contents of the preliminary report, a document drafted by the reporting judge, on which the assignment decision is based. The collective element in the process can be seen by examining how serious the court takes the joint process of deliberating on the preliminary report. To better understand the process, I will employ a close reading of the court's *Guide traitement des affaires*,<sup>48</sup> an internal document that explains in detail the contents and processing of a preliminary report.

#### A *The Preliminary Report: Information, System Building, Agenda Setting*

The court's general meeting bases its decision to assign a case to a judicial formation on a preliminary report by the judge-rapporteur. The

<sup>47</sup> In the European Court of Human Rights, for instance, the president of the court assigns incoming cases to one of the currently five Sections (ECtHR Rules of Court 52, ¶ 1, 1 January 2020, according to which the president of the European Court of Human Rights when assigning a case to a Section takes into account a fair distribution of cases between the Sections). The president of the Section then assigns a case to a single-judge formation, a committee of three judges, or a chamber of seven. If she does not exercise this right, it is for the judge-rapporteur to choose the adequate formation (ECtHR Rules of Court 49, ¶ 3(b), 1 January 2020).

<sup>48</sup> *Guide traitement des affaires*, *supra* note 14.

preliminary report is an internal document of a few pages. The first important function of the report is to inform all ECJ members on a new case and to summarize the legal framework and the main arguments of the parties and the participating EU organs and member states. A high level of quality is demanded. According to the *Guide traitement des affaires*, the presentation of the facts and the legal framework should be done in a manner so that they can be immediately used in an advocate general's Opinion or a judgment.<sup>49</sup>

The preliminary report remains a key reference document throughout the proceedings. It should, as the *Guide traitement des affaires* states, serve the members of the deciding judicial formation throughout the proceedings as a quick reference.<sup>50</sup> But the main purpose of the preliminary report lies elsewhere. The *Guide traitement des affaires* describes its central function as allowing the other court members to appreciate the significance of a case and to take a position on a number of key outstanding questions, notably to which judicial formation a case should be assigned.<sup>51</sup> When assigning a case, the court needs to integrate a new case into the dense net of existing ECJ case law. This requires identifying and ordering the existing case law, but it also means making choices of agenda setting.<sup>52</sup> If the court assigns a case to the Grand Chamber a question of principle can be decided, this will generally not happen in smaller formations.<sup>53</sup> When assigning a case, all ECJ members therefore jointly engage in a process of reflection about when to innovate, when to set a new precedent, when to cautiously experiment in smaller judicial formations.<sup>54</sup>

<sup>49</sup> *Guide traitement des affaires*, *supra* note 14, at 10–11.

<sup>50</sup> *Id.*, at 9.

<sup>51</sup> *Id.*

<sup>52</sup> Siniša Rodin, Judge, Court of Justice of the European Union, A Metacritique of the Court of Justice of the EU, Bingham Centre Talk 8 (2 November 2015).

<sup>53</sup> Grand Chamber decisions set a precedent that tends to be reused and hardly ever – at least not explicitly – overruled, *see* MARC JACOB, PRECEDENTS AND CASE-BASED REASONING IN THE EUROPEAN COURT OF JUSTICE. UNFINISHED BUSINESS 197 (2014).

<sup>54</sup> A good example is the court's approach to interpreting Article 51 of the EU Charter on Fundamental Rights. This provision delimits the field of application of the charter and in particular regulates its application to member state conduct, an issue with high constitutional stakes. In the beginning, when the charter came into force in 2009, the court let smaller formations experiment and come up with first ideas on how to tackle the question, while the Grand Chamber left the question undecided. These first cases were taken up by advocates general, cautiously, often with the indication as to the limited precedential value of the case and the still undecided status of the question (*see*, for instance, the Opinion by Advocate General Bot in Case C-108/10, *Scattolon*, EU: C.2011:211, ¶¶ 116–19). Only in 2013 did the court give the first principled guidance

The question of how to insert a case into the court's jurisprudence is discussed in a distinct part in the preliminary report. It is the last part of the report – the 'Observations du juge rapporteur'. Here, the judge-rapporteur describes the legal problems of the case ('les enjeux juridiques de l'affaire') and presents, in light of the court's case law, the main legal issues. It is certainly the report's most important part. This already appears from the fact that the *Guide traitement des affaires* mentions that the observations of the reporting judge should be intelligible without reading the second part of the report (the facts and the legal framework), but at the same time possibly no longer than five pages.<sup>55</sup> Even the most hurried ECJ member should be able to study it. Reporting judges might explain at this stage, to all ECJ judicial members, in which direction they intend to develop the judgment. As former judge Pierre Pescatore explained: personal styles and strategies of reporting judges vary. Some clearly set out the choices the general meeting faces, suggesting different options of how to decide a case and the appropriate judicial formations for the respective paths. Others only explain the legal challenges a case raises, some already propose a solution to the case.<sup>56</sup>

### B A Collective Decision

The preliminary report is a key document to inform all ECJ members on all incoming cases, to order existing case law, and to articulate choices regarding the court's agenda. Accordingly, the process of deciding on the preliminary report is taken very seriously. Preliminary reports are circulated to all ECJ judges and advocates general ten days before they are discussed in the general meeting. In the *Guide traitement des affaires* the importance the court assigns to the process of jointly treating a case in the general meeting is put very clearly:

Since most cases are assigned to a chamber, the general meeting is in principle, for the majority of ECJ members, the first and last time to examine a case brought before the court. In order to allow them to make their analysis under good conditions and, if they deem necessary, circulate a memorandum in which they explain their point of view on the case or

through the Grand Chamber in the *Åkerberg Fransson Case* (Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105).

<sup>55</sup> *Guide traitement des affaires*, *supra* note 14, at 11.

<sup>56</sup> See PIERRE PESCATORE, *VADE-MECUM, RECUEIL DE FORMULES ET DE CONSEILS PRATIQUES À L'USAGE DES RÉDACTEURS D'ARRÊTS* 11 (2007).

on its procedural handling, it is necessary to strictly abide by the rule that preliminary reports are circulated at least ten days before they are discussed in the general meeting.<sup>57</sup>

When a preliminary report has been circulated, it undergoes close scrutiny in the cabinets of the ECJ members. The cabinets have developed different strategies in organizing the screening of the reports. In some cabinets, weekly preparatory meetings exist in which the law clerks brief their judge or advocate general. For this purpose, the cases are distributed among the clerks, either by thematic specialization or according to the logic that every clerk follows a certain judge-rapporteur. In other cabinets, law clerks take turns in preparing their judge or advocate general for the general meeting. A preliminary report is not automatically discussed in the general meeting. If a judge or advocate general wishes to discuss a preliminary report in the general meeting, she needs to send a memorandum to all other members of the court before noon on the day before the general meeting takes place. A small detail shows the importance this mechanism for joint discussion has for the court. As the *Guide traitement des affaires* explains, if such a memorandum is sent out too late, the discussion of the preliminary report will, apart from exceptional circumstances, still take place, however, it is postponed to the next meeting.<sup>58</sup> In a court where timelines and efficient case management are highly valued,<sup>59</sup> such rule underlines the weight given to the process of jointly discussing the reporting judge's preliminary report.

The fact that agenda setting at the ECJ is seen as a collective endeavor implies that once the general meeting has made up its mind, its decisions are rarely challenged or changed. In other courts, assignment to a judicial formation can quite easily change throughout a case. For instance, at the European Court of Human Rights, if a three-judge committee does not reach a consensual decision the case automatically moves to the chamber of seven judges.<sup>60</sup> Moreover, the chamber of seven judges, in the course of its proceedings, can relinquish a case to the European Court of Human Rights' Grand Chamber.<sup>61</sup> Also at the ECJ, there exists the possibility to reassign a case at any stage of the proceedings to a formation with a

<sup>57</sup> Translated from French original by Christoph Krenn. *Guide traitement des affaires*, *supra* note 14, at 15.

<sup>58</sup> *Id.* at 15–16.

<sup>59</sup> See Krenn, *supra* note 15, at 464–68.

<sup>60</sup> European Convention on Human Rights Art. 29.

<sup>61</sup> European Convention on Human Rights Art. 30.

greater number of judges.<sup>62</sup> Yet, this requires first, a majority of judges in the chamber to which a case had been originally assigned, and second, leads only to the general meeting considering reassignment. This makes reassignment rare.<sup>63</sup> Usually, it occurs at a later stage in the proceedings, after the hearing and the Opinion of the advocate general.<sup>64</sup>

#### IV Conclusion

In this chapter, I have analyzed the practice of case assignment at the ECJ. The chapter's main contribution lies in explaining how case assignment contributes to maintaining a sense of common purpose at the ECJ. Yet, this chapter does not only add to our understanding of processes of socialization and group-building. It also advances the study of the role individual judges play at the court and the division of powers inside the institution. Since the creation of the court's Grand Chamber in 2003, we know that not all ECJ judges are in an equal position to influence the court's decision-making.<sup>65</sup> Judges themselves have spoken about an 'internal hierarchization'<sup>66</sup> at the court. This chapter has provided an empirical basis for describing who belongs to the court's inner circle and at what point in their ECJ career judges arrive there (if at all). Moreover, it has provided an entry point to understanding the particularly powerful position held by the court president. Through case assignment, the president can advance the internal career of judges, support their specialization in certain fields of EU law, or sideline them.<sup>67</sup> Certainly, the

<sup>62</sup> See ECJ RoP Art. 60, ¶ 3. In such case, the judge-rapporteur drafts a memorandum to the general meeting requesting that the case be assigned to a formation with more judges. Usually, this does not reflect disagreement as to the result, which can be settled by a vote, but rather a consensus that a case merits more attention than the current chamber can offer; see CAROLINE NAÔMÉ, *LE RENVOI PRÉJUDICIEL EN DROIT EUROPÉEN. GUIDE PRATIQUE* 147 (1st ed. 2007).

<sup>63</sup> On the exceptional character and the timing, see TRISTAN MATERNE, *LA PROCÉDURE EN MANQUEMENT D'ÉTAT. GUIDE À LA LUMIÈRE DE LA JURISPRUDENCE DE LA COUR DE JUSTICE DE L'UNION EUROPÉENNE* 174–75 (2012).

<sup>64</sup> For an example see the Order of April 24, 2015 in Case C-203/14, *Consorti Sanitari del Maresme*, EU:C:2015:279 (reassignment from a three-judge chamber to the Grand Chamber).

<sup>65</sup> See Rasmussen, *supra* note 43.

<sup>66</sup> Von Danwitz, *supra* note 43, at 777.

<sup>67</sup> The president's powers of case assignment are complemented by important administrative powers. For an example, see the alleged attempts by former president Skouris to create an attractive job in the court's administration for his former chef de cabinet described by Jean Quatremer, *Copinage et clientélisme à la Cour de justice européenne, COULISSES DE BRUXELLES, LIBÉRATION* (8 June 2015).

president is accountable to the fellow judges through election and re-election every three years. Yet, during a term in office, the president acts as a gatekeeper to the ECJ elite. Case assignment is hence not only a mechanism to integrate a diverse group of individuals into 'the court' and unite them behind its mission to protect the effectiveness and primacy of EU law. It also creates space for individual agendas. There has been a 'Skouris Court'<sup>68</sup> and there is a 'Lenaerts Court', and there are likely to be differences between the two.

<sup>68</sup> Daniel Sarmiento, 'The Skouris legacy and the Skouris Court', *Despite Our Differences*, 8 October 2015, [www.despiteourdifferencesblog.wordpress.com/2015/10/08/the-skouris-legacy-and-the-skouris-court](http://www.despiteourdifferencesblog.wordpress.com/2015/10/08/the-skouris-legacy-and-the-skouris-court) ('[While] the case-law is a collective task . . . Skouris has never been an ordinary judge sitting in the Grand Chamber. This was obvious to see in the course of hearings, where his authority among his peers remained unchallenged (and visible for all those present in the *salle d'audience*).').