

The European Court of Justice's Financial Accountability

How the European Parliament Incites and Monitors Judicial Reform through the Budgetary Process

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European Court of Justice – European Parliament – Accountability through the budgetary process – Fostering the European Court of Justice's democratic legitimacy through financial accountability – Accountability for how the European Court of Justice organises the institution and conducts its procedures – Efficiency versus quality as yardsticks to assess the Court's performance – The European Parliament's ambivalent practice of focusing solely on judicial efficiency – Proposals how the Parliament could take the quality of the European Court of Justice's judicial process into account when assessing the Court – A different use of judicial statistics – Inciting quality-oriented reforms such as the introduction of *amicus curiae* participation and bilingual (French/English) deliberations

ACCOUNTABILITY – A NEW KID ON THE BLOCK

The European Court of Justice (the Court)¹ is one of the most powerful judicial institutions worldwide.² Yet, in contrast to related concepts such as

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¹The Court of Justice is part of the larger institution, the 'Court of Justice of the European Union', comprising the Court of Justice and the General Court.

²From the vast literature on the topic see A. Arnulf, *The European Union and Its Court of Justice* (Oxford University Press 2006); K. Alter, *The European Court's Political Power* (Oxford University Press 2009).

legitimacy,³ responsiveness,⁴ or transparency,⁵ accountability has – so far – been of little relevance in framing the Court's authority. For good reasons. Accountability is generally defined as involving a social relationship in which an actor has to justify its actions towards a forum *and* may face consequences.⁶ As such, it is a difficult concept to be applied to judicial institutions. Courts need to be unaccountable for their judicial decisions. This is what judicial independence – at its core – demands. To be sure, they need to be responsive to arguments and transparent in their reasoning.⁷ Yet, accountability, in the sense that a court or individual judges should face immediate consequences for decisions rendered in compliance with the law, would obstruct the very essence of the judicial function.⁸

This is why judicial accountability mechanisms are generally designed to address *abuses* of judicial power.⁹ Yet, such abuses have hardly occurred at the European Court of Justice. Cases of corruption, improper behaviour, alcohol excesses, or refusal to work by members of the Court, which would in any way prompt cries for judicial accountability, have been largely absent

³C. Krenn, *Legitimacy in the Making. The Procedural and Organizational Law of the European Court of Justice* (Dissertation, Frankfurt am Main 2017); M. Adams *et al.* (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013).

⁴B. de Witte, 'Democratic Adjudication in Europe – How Can the European Court of Justice Be Responsive to the Citizens?', in M. Dougan *et al.* (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) p. 129.

⁵A. Alemanno and O. Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo', 51 *CMLR* (2014) p. 97.

⁶See M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', 13 *ELJ* (2007) p. 447 at p. 450. To be sure, if accountability were defined more broadly, as some scholars do, including, for instance, *ex ante* mechanisms such as the selection of judges, it could have a further analytical field of application. However, it would significantly lose conceptual distinctness and stretch the notion beyond its conventional use; see, also in this vein, D. Kosař, *Perils of Judicial Self-Government in Transitional Societies. Holding the Least Accountable Branch to Account* (Cambridge University Press 2016) p. 34-35.

⁷For the critique as regards the ECJ, see J.H.H. Weiler, 'Epilogue: Judging the Judges – Apology and Critique', in Adams *et al.*, *supra* n. 3, p. 235 at p. 247-251.

⁸The universal success of the social institution of dispute settlement is dependent on the independence of the decision-maker *ex ante* and mechanisms that ensure that it is not drawn into question *ex post*. Otherwise, the very function of settling a dispute could not be fulfilled; see M. Shapiro, *Courts. A Comparative and Political Analysis* (University of Chicago Press 1981) p. 2. Therefore, holding judges accountable for corruption is uniformly accepted as a normative standard. Conversely, accountability mechanisms well known from the political branches of government, such as regular re-election campaigns are rare phenomena and highly controversial. The problematic character of judicial campaigns is widely discussed in the U.S.; see 'Last Week Tonight with John Oliver: Elected Judges', 23 February 2015, <www.youtube.com/watch?v=poL7l-Uk3l8>, visited 15 April 2017.

⁹Kosař, *supra* n. 6, p. 1.

from its history.¹⁰ Accordingly, the rules on deprivation of office of a judge or Advocate General have never been applied in practice.¹¹ The occasional lift of immunity has normally been requested by judges themselves.¹² At times, the Court has been sued by its officials on labour contract issues or by private contractors on its tendering procedures,¹³ and there has been a case investigated into by the European anti-fraud office, OLAF.¹⁴ However, these remain individual, rare and scattered instances of accountability.

Is the concept of accountability hence confined to a side-show in studying the Court of Justice and framing its power? This could indeed be said, were it not for a modus of holding the Court to account that has so far gone unnoticed: the Court's financial accountability. Since the early 2000s, under the technical cloak of budgetary control, the European Parliament has established a profound accountability relationship with the Luxembourg Court. In the course of the annual budgetary process, the Parliament scrutinises the Court's performance, assesses whether it has created 'value' for the European Union taxpayers' money¹⁵ and threatens to reduce budgetary allocations in case its observations and proposals are not taken seriously.

This article, for the first time, analyses and assesses this accountability relationship. It conceptualises financial accountability, evaluates its practice and

¹⁰ See the study by Transparency International: L. Hancisse *et al.*, *The European Union Integrity System* (Transparency International EU Office 2014) p. 129; even during its early years, at a time when judicial independence was hardly on the political agenda, archival research has not found a single incident where judges were influenced, as regards concrete cases, in the process of judicial decision-making; see, in detail, V. Fritz, *Contribution à l'histoire de la Cour de Justice de l'Union européenne à travers des biographies historiques de ses premiers membres (1952-1972)* (Doctoral Thesis, Aix-Marseille 2014) p. 146.

¹¹ See Art. 6 of the Court's Statute.

¹² Between 2004 and 2013 the immunity of a Court of Justice judge or Advocate General has been lifted ten times; only one included a request by a third party; Hancisse *et al.*, *supra* n. 10, p. 129.

¹³ For examples see ECJ 1 June 1961, Case 15/60, *Simon v Court of Justice* (annulling a decision by the Court's President to withdraw a separation allowance from a Court official); CFI 8 June 2009, Case T-498/07 P, *Erika Krcova v Court of Justice of the European Communities* (on the non-renewal of contract of a juriste-linguiste); CFI 2 April 1998, Case T-86/97, *Réa Apostolidis v Court of Justice of the European Communities* (on alleged mobbing and a consequent suspension from promotion).

¹⁴ Court of Justice of the European Union, '2012 discharge questionnaire to the European Court of Justice', p. 4; for the competences of OLAF as regards the Court of Justice of the European Union and the modalities of their cooperation see, 'Décision de la Cour du 12 juillet 2011 portant modification de la décision du 26 octobre 1999 relative aux conditions et modalités des enquêtes internes en matière de lutte contre la fraude, la corruption et toute activité illégale préjudiciable aux intérêts des Communautés.'

¹⁵ European Parliament, 'Discharge decision for the financial year 2000' [2002] OJ L158/66, lit. B ('the concept of value for money is of vital importance in assessing the performance of all EU institutions').

submits proposals for reform. It can thereby rely on, to date, unstudied, and partly unpublished documents from the EU budgetary process.¹⁶

The article puts forward three arguments. First, budgetary control of the European Court of Justice has, since the early 2000s, developed into a powerful accountability mechanism. It allows the European Parliament to formulate concrete proposals on the management of the Luxembourg Court and threaten (and potentially enforce) financial sanctions in case of non-compliance. Second, the European Court of Justice's financial accountability, as practised by the Parliament, is a mechanism that can contribute to framing the Court's power and enhancing its democratic legitimacy. This is due to the specific focus the Parliament has chosen and the dialogical relationship that has evolved. The Parliament does not employ the budgetary process for debating and reacting to the Court's judicial decisions, which would be problematic from the perspective of judicial independence. Rather, it lays the focus on *how* justice is done, i.e. on how the Court organises the institution and conducts its procedures. However, third, the yardstick the Parliament has used to assess the Court's organisation and procedure is ambivalent. The Parliament has put the concept of efficiency, i.e. the time taken for deciding a case, centre stage. Thereby, it has supported the Court in introducing reforms that have allowed addressing challenges to the Court's authority triggered by the enlargement of the Union in 2004 and 2007. However, through the sole focus on efficiency, the quality of the judicial process, notably procedural mechanisms that ensure participation and deliberation, have received scant attention. The practice of financial accountability needs to develop, to convincingly contribute to framing the Court's power today.

This article is structured as follows. Firstly, it conceptualises the European Court of Justice's financial accountability. Subsequently, it assesses how this accountability relationship has played out in practice and describes achievements and problems. Finally, it proposes how the Court's financial accountability should develop in the future.

CONCEPTUALISING THE EUROPEAN COURT OF JUSTICE'S FINANCIAL ACCOUNTABILITY

This section introduces and conceptualises the European Court of Justice's financial accountability. The financing of the EU's highest court has gradually developed from a large degree of financial autonomy into a complex procedure in which the Court has to justify *en détail* how it uses EU taxpayers' money and

¹⁶ Documents have been received through the transparency regimes of both the European Parliament (public access request A(2015)11941) and the Court of Justice of the European Union (access to documents request 0017/2015D).

has to respond and react to proposals on how to improve its performance. The evolution of financial accountability will be sketched out first.

The aim and logic of the Court's financial accountability is best understood by distinguishing it from what it is not. Budgetary processes for courts are generally viewed as either an exercise in 'checking the books' or as a means to discipline courts for judicial decisions that do not align with the budgetary authority's political preferences. In the EU, the process needs to be conceptualised differently. The European Parliament avoids the peril of turning the budgetary process into a debate on the Court's judgments. Rather, it lays the focus on *how* justice is done, i.e. on how the Court organises the institution and conducts its procedures.

The power of the purse – how financial accountability works

Financial accountability is a concept that has been largely absent from the early European judiciary. When the European Court of Justice's predecessor, the Court of the European Coal and Steel Community, was set up in 1952, its autonomy in financial matters was remarkable. To a large extent the Coal and Steel Court authorised its own budget. Formally, the budget was decided by the *Commission des Présidents*, the Community's budgetary authority, which brought together the presidents of the four Coal and Steel Community institutions, the Court, the High Authority, the Common Assembly and the Council.¹⁷ Yet, in practice, within the budgetary commission, the Court and its judges had a highly influential place. The Commission was presided over by the president of the Court and met at the Court's seat. It was assisted by the Court's staff, and French judge Jacques Rueff, due to his background as an economist, was the Commission's most important advisor.¹⁸ Also, the controlling of the use of the Coal and Steel Court's funds was largely an in-house business.¹⁹

Such autonomous and cavalier times for the Court are long gone. The budgetary process has significantly evolved over the years,²⁰ in particular since the 1999

¹⁷ Art. 78 of the European Coal and Steel Community Treaty; see further L. Delvaux, *La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier. Exposé sommaire et des principes* (Pichon & Durand-Auzias 1956) p. 14.

¹⁸ A. Zipy, 'La commission des présidents', in A. Mackenzie Stuart (ed.), *XXXV Anni. 1952-1987* (Offices des Publications des Communautés Européennes 1987) p. 165 at p. 166-168 (describing how the other members of the Commission, in particular Jean Monnet, representing the High Authority, were little interested in the technicalities of the budgetary process).

¹⁹ The implementation of the budget was controlled by an accountant, but in practice this was a very modest exercise of accountability; for an example see U.J. Vaes, 'Rapport du commissaire aux comptes (1 juillet 1956 au 30 juin 1957)', <aei.pitt.edu/40117/1/A4528.pdf>, visited 15 April 2017.

²⁰ In particular by strengthening the role of the European Parliament. Before 1975 the Council dominated the budgetary process. It had the competence to decide on the budget, and grant

resignation of the Santer Commission and the EU's overall focus on employing the budgetary process as a good governance tool.²¹ The Court has to explain itself and is held accountable for the use of EU funds in the budgetary process.²²

Today's Court budget is drawn up in a complex procedure laid down in Articles 314-319 TFEU. As any other EU institution, the Court²³ draws up estimates of its expenditure for the following year. The Parliament and the Council as co-legislators revise and rewrite this draft to finally agree on an annual budget. As a former member of the Court's administration described it, in practice, the budgetary process can be seen as an instance of a good cop – bad cop game.²⁴ The Council often cuts the Court's initial budgetary proposal and leaves it to the Court how to restructure it. The Court then aims to convince the Parliament, which has the final word, to again increase certain budgetary positions. This puts the Parliament's budgetary committee – and in particular its rapporteur – in a key position.

The Court does not only need to fight for a new budget, it also needs to justify how it has used EU funds in previous years. The two processes are intertwined. In arguing for a decent budget for upcoming years it is essential to show that money has been well spent in the past. Budgetary discharge is the Parliament's sole prerogative, and crucial to its institutional place and self-understanding in the EU's political system.²⁵ Based on annual reports by the Court of Auditors, an annual activity (or 'management') report by the Court,²⁶ a recommendation by the Council and a report by the European Parliament's Committee on Budgetary Control, the

discharge on its implementation. Proposals for amendment by the European Parliament were generally ignored. See M. Rossi, *Europäisches Parlament und Haushaltsverfassungsrecht. Eine kritische Betrachtung der parlamentarischen Haushaltsbefugnisse* (Nomos 1997) p. 18 and p. 28-30.

²¹ In detail, B. Laffan, 'Auditing and accountability in the European Union', 10 *Journal of European Public Policy* (2003) p. 762.

²² See R. Grass and A. Calot Escobar, '2004-2014: Une période déterminante pour les ressources de l'institution', in A. Tizzano *et al.* (eds.), *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015). Liber amicorum Vassilios Skouris* (Bruylant 2015) p. 227 at p. 228-232.

²³ The budget is set up and decided for the ECJ and the General Court together. In this article I focus on the ECJ only. The complex internal governance issues in coordinating the ECJ and the General Court are discussed by M. van der Woude, 'Towards a European Council of the Judiciary: Some Reflections on the Administration of the EU Courts', in F. Goudappel and E.M.H. Hirsch Ballin (eds.), *Democracy and Rule of Law in the European Union. Essays in Honour of Jaap W. de Zwaan* (Springer 2016) p. 63.

²⁴ C. Kohler, 'Zur institutionellen Stellung des Gerichtshofes der Europäischen Gemeinschaften. Status, Ausstattung, Haushalt', 30 *Europäische Grundrechte-Zeitschrift* (2003) p. 117 at p. 121.

²⁵ See Rossi, *supra* n. 20.

²⁶ These reports are not to be confounded with the annual reports (also known as Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal) published on the Court's website, which focus on the Court's judicial activity. While the annual 'management reports' have traditionally not been officially published by the Court, the most recent report can be

Parliament grants discharge to the Registrar of the Court.²⁷ The discharge procedure has, over time, become more and more elaborate, in particular since the enactment of the 2002 EU Financial Regulation.²⁸ The Court's annual activity reports have become longer, from 27 pages in 2004 to 92 pages in 2015. The Parliament has made enhanced use of resolutions attached to the Parliament's discharge decisions, commenting on problems, achievements and proposing reforms.²⁹

These resolutions are key to understanding the European Parliament's power in the budgetary process. The decision on discharge is first and foremost a political act, without concrete, immediate effects.³⁰ In case of disapproval it does not lead to a budgetary impasse, neither for the general budget nor for the institution concerned.³¹ Nonetheless, the recommendations and observations contained in Parliament's resolutions carry significant weight. First, Article 166 of the Financial Regulation foresees the duty to 'take all appropriate steps to act on the observations accompanying the European Parliament's discharge decision [...]'.³² Moreover at the Parliament's request, EU institutions 'shall report on those observations and comments'.³³ Second, a failure to reply and act upon the Parliament's objections will lead to insistent inquiry during the next discharge procedure and can eventually lead to a reduction of appropriations, or placing them in reserve for upcoming years.³⁴ Budget increases will only be

found online; available at <curia.europa.eu/jcms/upload/docs/application/pdf/2016-06/rapport_gestion_2015_en_version_web.pdf>, visited 15 April 2017.

²⁷Formally, according to Art. 319 TFEU, discharge is granted to the Commission for the implementation of the budget. In practice, however, the European Parliament grants individual discharge to those in charge of implementing the budget within the specific institution. The Registrar is, under the supervision of the ECJ's president, responsible for the implementation of the Court of Justice of the European Union's budget.

²⁸Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

²⁹Since 2003 there is, every year, a resolution addressing specifically the Court of Justice of the European Union, the first being the 'Resolution of the European Parliament containing the comments accompanying the decision concerning discharge in respect of the implementation of the general budget of the European Union for the 2001 financial year – Section IV – Court of Justice', [2003] OJ L148/46.

³⁰D. Theato, 'Die Haushaltskontrolle durch das EP und sein Beitrag zur Entwicklung eines europäischen Sanktionsrechts', in J. Drexel *et al.* (eds.), *Europäische Demokratie* (Nomos 1999) p. 111.

³¹S. Magiera, 'Art. 319 AEUV', in E. Grabitz *et al.* (eds.), *Das Recht der Europäischen Union: EUV/AEUV* (Beck 2015) mn. 9.

³²Art. 166 para. 1 of the 2012 Financial Regulation (EU, Euratom) No. 966/2012 of the European Parliament and of the Council [2012] OJ L298/1.

³³*Id.*, para. 2.

³⁴As regards the Court of Justice of the European Union, this was threatened by the European Parliament in its 2004 discharge resolution, *see* [2004] OJ L330/141, point 15, regarding the non-official car use by members of the court and the system of salary weightings.

supported by the Parliament if it is generally satisfied with the institution's budgetary conduct.

Accountable for what?

Financial accountability is hence a powerful mechanism. But how can it contribute to framing the Court's power? In the scarce literature on financial accountability for supreme and constitutional courts one can generally find two conceptions of courts' financial accountability. The first is technical and often employed by legal scholars. It conceives the budgetary process as an instance of equipping courts with adequate financial means and ensuring that they are spent according to proper standards of book-keeping and accounting. It is a process for accountants.³⁵

The second conception is political.³⁶ The budgetary process, in this perspective, is a moment of judicial modesty and part of a polity's democratic life. In the United States, for instance, this conception is well represented by the notion of the 'trek to the Capitol',³⁷ describing the annual ritual whereas two U.S. Supreme Court Justices submit themselves to critical questioning by Congress in order to receive the Supreme Court's yearly appropriations. For many, the political perspective of the budgetary process is focused on reacting to a court's case law. The budgetary process is construed as a political tool, in the sense that it allows to signal approval or critique and incite courts to align themselves with the preferences of the budgetary authority.³⁸ This is often perceived as a serious threat to judicial independence.³⁹

³⁵ For such a view, see Grass and Calot Escobar, *supra* n. 22, p. 227.

³⁶ On the political nature of the European Parliament's budgetary powers see C. Harlow, *Accountability in the European Union* (Oxford University Press 2002) p. 128-130.

³⁷ D.L. Yarwood and B.C. Canon, 'On the Supreme Court's annual trek to the Capitol', 63 *Judicature* (1979-1980) p. 322.

³⁸ See notably, E.F. Toma, 'Congressional Influence and the Supreme Court. The Budget as a Signaling Device', 20 *Journal of Legal Studies* (1991) p. 131 (observing a correlation between budget allocation and Congress' approval for the Supreme Court's decisions); for such a framing as regards international courts, see T. Ingadottir, 'The Financing of International Adjudication', in C. Romano *et al.* (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) p. 594.

³⁹ See J.W. Douglas and R.E. Hartley, 'The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process', 63 *PAR* (2003) p. 441 (presenting empirical evidence for a perceived threat to independence in some state courts through the budgetary process); on international courts, K. Oellers-Frahm, 'Der institutionelle Rahmen: Status, Ausstattung und Personalhoheit internationaler Gerichte', *Europäische Grundrechte Zeitschrift* (2003) p. 107 at p. 117; in a similar vein P. Mahoney, 'Separation of Powers in the Council of Europe: The Status of the European Court of Human Rights vis-à-vis the Authorities of the Council of Europe', 24 *HRLJ* (2003) p. 152 at p. 157-159.

The European Parliament has chosen a third way. In the early 2000s, it started from a rather technical understanding of the budgetary process. It faulted invoicing irregularities,⁴⁰ and employed a special report by the Court of Auditors on the Court of Justice's expenditure on buildings,⁴¹ which revealed a number of serious problems and led to the involvement of the auditing firm KPMG. Moreover, the Parliament threatened to place part of the Court's budget for the year 2005 in reserve if its objections as to the non-official use of official cars by members of the Court and the remuneration system for judges were not remedied.⁴²

The technical task of 'checking the books' remains important today.⁴³ Yet, the European Parliament has gone far beyond that. It has articulated a political critique of the Court's performance, without, however, focusing on the Court's case law. Rather, it has centred its attention on the judicial process, on procedure and court organisation. The Parliament has expressed its views on diverse organisational issues such as regulating judges' and Advocate Generals' professional conduct – for instance their visits to academic conferences and their work ethic.⁴⁴ It has discussed the optimal length of judgments,⁴⁵ the necessity of an Advocate General's Opinion,⁴⁶ or the mechanism for designating judge-rapporteurs.⁴⁷

The budgetary discharge procedure allows assessment and discussion of how the European Court of Justice organises the institution and conducts the judicial process. This is a meaningful task for the European Parliament – a task which can strengthen the Court's democratic legitimacy. It reflects the notion that procedure is important – a key for just results and for decisions' acceptance⁴⁸ – while at the

⁴⁰ European Parliament, 'Discharge decision for the financial year 2000', [2002] OJ L158/66, para. 19.

⁴¹ European Court of Auditors, 'Special Report no 5/2000', [2000] OJ C109.

⁴² European Parliament, 'Discharge decision for the financial year 2002', [2004] OJ L330/140, paras. 5-15.

⁴³ This is notably performed by the European Court of Auditors, for the last report, 'Annual Report on the Implementation of the Budget' [2014] OJ C398/241.

⁴⁴ Court of Justice of the European Union, '2013 discharge. Questionnaire to the European Court of Justice', p. 10.

⁴⁵ European Parliament, 'Discharge decision for the financial year 2003', [2005] OJ L196/43, para. 9.

⁴⁶ *Id.*

⁴⁷ Court of Justice of the European Union, '2014 discharge: Questionnaire to European Court of Justice', p. 6.

⁴⁸ Seminal, for the former, J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1998) p. 45-60; for the latter, N. Luhmann, *Legitimation durch Verfahren* (Luchterhand 1969) pp. 11-53; for a conceptualisation of procedural and organisational law in courts from this double perspective, see Krenn, *supra* n. 3.

same time contingent, reflecting specific choices of a given political community.⁴⁹ Parliament's contribution does not lie in prescribing the Court *en détail* how to organise the European Court of Justice, but in giving political guidance and establishing a regular dialogue between the Parliament and the Court that allows a building up of expertise and trust on both sides. The Court is eager to underline that it responds quickly and aptly to the Parliament's proposals.⁵⁰ In particular in recent years, it has reacted through its activity reports explaining how it has acted upon Parliament's requests.⁵¹ The European Parliament, on the other side, has resisted turning the budgetary process into an assessment of the Court's judicial decisions. Rather, it has shown itself committed to ensuring an adequate financing for the Court. Already in the early 1980s, in the wake of severe budget cuts, the Parliament blocked attempts by the Council to include the Court among those institutions whose budget should be cut by 5%.⁵² A similar constructive take on the budgetary process is still the rule today. The Parliament generally acts vis-à-vis the Council as a guardian for the Court's adequate financing,⁵³ while at the same time critically supervising the Court's institutional and procedural development.

THE PRACTICE OF FINANCIAL ACCOUNTABILITY

Having introduced and conceptualised European Court of Justice financial accountability, this section focuses on its practice since the early 2000s. What kind of yardstick has the European Parliament employed to assess the Court's management and judicial organisation? Which reforms did Parliament incite through the budgetary process? And what consequences did this have for the

⁴⁹ The political nature of procedural and organisational law is a basic tenet of comparative studies; see, notably, M. Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (Yale University Press 1986) (reconstructing ideal types of procedural systems that reflect political choices as to the form and structure of public authority); and M. Cappelletti, *Processo e ideologie* (Il Mulino 1969).

⁵⁰ Following up the observations or recommendations in the discharge resolution of the European Parliament of 3 April 2014 for the year 2012. Replies given and steps taken by the Court of Justice. ('The Court has made every effort to act upon [the observations/recommendations expressed by the European Parliament] as soon as possible.')

⁵¹ See, for instance, Court of Justice of the European Union, *Annual Activity Report for the 2014 Financial Year (April 2015)*, p. 67.

⁵² European Parliament, Report drawn up on behalf of the Committee on Budgets on Section IV – Court of Justice – of the draft general budget of the European Communities for the financial year 1983 (25 October 1982) Document 1-781/82.

⁵³ See, for instance, the Court's statement that 'budgetary resources relating to IT functioning and development should be preserved by the budgetary authority, as done thanks to the amendments supported by the European Parliament during last years.' See 'Discharge 2011: questions from M. Kalfin', p. 4.

European Court of Justice as an institution and the way it renders its decisions? I will first discuss the yardstick the Parliament has used to assess the Court, and then discuss achievements and problems of this approach.

Efficiency as a yardstick

In the budgetary process since the early 2000s, efficiency has been *the* guideline for the European Parliament in assessing the Luxembourg Court's use of EU public funds. The focus has been on 'optimising resources.'⁵⁴ The Parliament has put all its attention on the Court's output: the number of cases decided and the length of proceedings were used to assess the Court's performance. It has envisioned a Court that focuses its personal and material resources on deciding cases quickly. On numerous occasions the Parliament '[called] on the [Court] to reduce the duration of cases further.'⁵⁵ And it aimed at establishing comparative yardsticks, *inter alia* by requesting that the Court of Auditors carry out a benchmark study on the output of comparable supreme courts in the Member States.⁵⁶

During the 2001 discharge procedure the Parliament requested a report by the Court 'to detail the problems which preclude [it] from giving an efficient service.' Its reform proposals were various: A parliamentary draft resolution proposed that the Court should 'explore possible ways of making judgments shorter, so making them easier to understand and further lightening the workload of the translation service.'⁵⁷ In the discharge procedure for the financial year 2003 the Parliament greeted as 'improvements' that 'smaller chambers delivered judgments, fewer opinions [were] presented by the Advocates General, and the simplification of the reports for the hearing drawn up by the Judge-Rapporteurs.'⁵⁸ The Parliament called on the Court to 'set performance targets and establish action plans to achieve them [...]'.⁵⁹ It pushed towards reducing the weeks without hearings.⁶⁰ Moreover, it demanded the introduction of a Code of Conduct for the members of the Court.⁶¹

⁵⁴ European Parliament, 'Discharge resolution for the financial year 2013', [2015] OJ L255/118, para. 9.

⁵⁵ European Parliament, 'Discharge resolution for the financial year 2004', [2006] OJ L340/34, para. 8.

⁵⁶ European Parliament, 'Discharge resolution for the financial year 2012', [2014] OJ L266/124, para. 11.

⁵⁷ Court of Justice of the European Union, Annual Activity Report for the Financial Year 2006, 13 February 2007, p. 57.

⁵⁸ European Parliament, 'Discharge Resolution for the Financial Year 2003', [2005] OJ L196/43, para. 9.

⁵⁹ *Id.*

⁶⁰ European Parliament, 'Discharge resolution for the financial year 2012', [2014] OJ L266/124, para. 9.

⁶¹ European Parliament, 'Discharge resolution for the financial year 2005', [2008] OJ C74E/161, para. 16.

The Court never opposed the objective of efficiency – rather, it endorsed it. The 2000 ‘Due Report’ on the reform of the EU’s judicial system, largely drafted by a number of former European Court of Justice members, framed efficiency and backlogs as key concerns when rethinking the Court’s jurisdiction and organisation.⁶² In many respects, efficiency has hence framed a joint program for reform. It has been described as the *leitmotif* of the 2003-2015 presidency of Vassilios Skouris.⁶³ The Rules of Procedure were recast in light of the concern for efficiency.⁶⁴ Moreover, the Court proudly revealed during the 2011 budgetary discharge procedure that it relies on key performance indicators, a tool developed in business administration.⁶⁵ It has, in its own words, ‘historically always been very attentive to have a detailed set of pertinent key performance indicators concerning notably: the incoming flow of new cases, the flow of completed cases, the evolution of cases pending, the duration of proceedings.’⁶⁶

Achievements and problems

The assessment of these reforms, which were guided by the concern for efficiency, needs to be undertaken against the backdrop of significant institutional challenges. In 2003, the Court’s average time to deliver a preliminary ruling had risen to almost 26 months.⁶⁷ Moreover, enlargement of the Union was looming large. In only a few years, the institution grew from a staff of 1179 officials (April 2004) to 2142 (December 2013). Twelve new judges entered the European Court of Justice between 2004 and 2007. Literally thousands of domestic courts in the new member states had to be acquainted with the preliminary reference procedure.⁶⁸ In these

⁶² Report by the Working Party on the Future of the European Communities’ Court System (January 2000) (‘Due Report’), <ec.europa.eu/dgs/legal_service/pdf/due_en.pdf>, visited 15 April 2017; see further A. Dashwood and A. Johnston (eds.), *The Future of the Judicial System of the European Union* (Hart 2001).

⁶³ D. 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>, 15 April 2017.

⁶⁴ See, in detail on the 2012 reform, M.-A. Gaudissart, ‘La refonte du règlement de procédure de la Cour de justice’, 3 *C.D.E.* (2013) p. 605 at p. 606; J. Gutiérrez-Fons, ‘Le nouveau règlement de procédure de la Cour de justice au regard du contentieux de l’Union européenne’, in S. Mahieu (ed.), *Contentieux de l’Union européenne. Questions choisies* (Larcier 2014) p. 41 at p. 41–42.

⁶⁵ Since the 1980s it is increasingly applied to public organisations, see C. Pollitt, ‘Beyond the Managerial Model: The Case for Broadening Performance Assessment in Government and the Public Services’, 2 *Financial Accountability and Management* (1986) p. 155 at p. 156.

⁶⁶ Court of Justice of the European Union, ‘Discharge 2011: Questions from M. Kalfin’, p. 2.

⁶⁷ Court of Justice of the European Union, Annual Report 2003, Table 8.

⁶⁸ See, M. Bobek, ‘Talking Now? Preliminary Rulings in and from the New Member States’, 21 *MJ* (2014) p. 782.

turbulent times, in former European Court of Justice judge Timmermans' words, the key challenge was to 'organize and maintain continuity.'⁶⁹

Reforms focused on efficiency have indeed allowed the Court to deliver its decisions more promptly. The average time to answer a reference for a preliminary ruling has gone down, from 25.5 months in 2003 to 15.3 months in 2015.⁷⁰ Deciding within a reasonable time is important to any court, notably in light of the fundamental right to a fair trial.⁷¹ However, it is of particular significance in a setting where domestic judges depend on receiving quick answers through the preliminary reference procedure, laid down in Article 267 TFUE, to carry out their duties in the national sphere.⁷²

Yet, there is another, deeper layer to the reforms introduced. The Court's univocal appearance and its institutional sense of direction have been identified, among other factors, as key to its authority and ability to foster an integrationist jurisprudence.⁷³ As in many international institutions that cannot rely on a common formation for their officials, processes of socialisation are crucial for the effective work of the institution. A group identity needs to develop, comprising a common vision of the goals of the group and the adequate behaviour of its members.⁷⁴ In the Court's early years this was ensured through the small size of the group, and in particular through the spirit of the founding generation of European integration.⁷⁵ Traditionally, there has therefore been little need for rules and hierarchy to ensure that the institution acts coherently and firmly.⁷⁶

Yet, in today's Court, in an institution that has considerably changed in size, social composition and cohesion, where contrasting visions of European integration have to be accommodated, new mechanisms of socialisation have to

⁶⁹ C. Timmermans, 'The European Union's Judicial System', 41 *CMLR* (2004) p. 393 at p. 405.

⁷⁰ Court of Justice of the European Union, Annual Report 2015, p. 88

⁷¹ Commenting on the 2012 procedural reform: M. Wägenbaur, 'Die EU-Gerichtsbarkeit – Fasse Dich kurz!?', in D. Heid *et al.* (eds.), *Festschrift für Manfred A. Daus zum 70. Geburtstag* (Beck 2014) p. 461 (praising the Court's reforms in light of the right to an effective remedy, and seeing the concern for a speedy procedure as a leitmotiv of the European judiciary).

⁷² M. Bobek, 'Of Feasibility and Silent Elephants. The Legitimacy of the Court of Justice through the Eyes of National Courts', in Adams *et al.* (eds.), *supra* n. 3, p. 197 at p. 214.

⁷³ A. Vauchez, 'À quoi « tient » la cour de justice des communautés européennes? Stratégies commémoratives et esprit de corps transnational', 60 *RFSP* (2010) p. 247; M. Höpner, 'Der Europäische Gerichtshof als Motor der Integration: Eine aktorsbezogene Erklärung', 21 *Berliner Journal für Rechtssoziologie* (2011) p. 203.

⁷⁴ See G.C. Homans, *The Human Group* (Routledge 1951) p. 79.

⁷⁵ On this, see the first-hand experience by O. Riese, 'Erfahrungen aus der Praxis des Gerichtshofs der Europäischen Gemeinschaft für Kohle und Stahl', *Deutsche Richterzeitung* (1958) p. 270 at p. 271.

⁷⁶ A. Vauchez, 'Le magistère de la Cour – une sociologie politique', in P. Mbongo and A. Vauchez (eds.), *Dans la fabrique du droit européen* (Bruylant 2009) p. 217 at p. 232.

be devised. Arguably, in this context, in the European Court of Justice, management tools, performance targets, timetables, and rules of behaviour have become an important substitute for the original spirit of the founding fathers. Two key mechanisms have been introduced – and both have been demanded by the European Parliament in the budgetary process: a Code of Conduct and a case management system.⁷⁷ They ensure that cases are handled quicker, but they also constitute important mechanisms for the socialisation of court members.

The Code of Conduct, first introduced in 2007⁷⁸ and revised in 2016,⁷⁹ formulates a number of obligations for members of the Luxembourg Court. They include loyalty towards the institution (Article 6 of the 2016 Code of Conduct), rules on discretion (Article 7) and work ethic (Article 8). Importantly, the Code is enforced. Article 10 sets up a ‘committee of eldest’, responsible for ensuring compliance with the Code, and composed of the Court’s President and the three Court members who have been longest in office. In 2014 one possible violation of the Code of Conduct was examined.⁸⁰

On a daily basis, there are two more mundane mechanisms strongly impacting on judicial behaviour and inducing work ethic. First, the regulation of outside activities of members of the Court. Article 8 of the Code of Conduct makes all external activities, from participating in conferences or seminars, to teaching, to assuming duties in foundations, subject to prior authorisation by the members’ peers – in the case of European Court of Justice members, the Court’s *réunion générale*.⁸¹ Second, various case management tools are employed at the Court.⁸² As the Court described itself, it employs ‘a constant case-flow control of each step of the procedure on the basis of complex and numerous indicators.’⁸³ An early

⁷⁷ See *supra* nn. 58–61.

⁷⁸ Code of Conduct [2007] OJ C223/1.

⁷⁹ Code of Conduct for Members and former Members of the Court of Justice of the European Union [2016] OJ C483/1.

⁸⁰ Court of Justice of the European Union, ‘2014 discharge. Questionnaire to European Court of Justice’, p. 6.

⁸¹ For the first time, during the 2014 budgetary discharge procedure, the ECJ revealed to the European Parliament a list of 158 outside activities of its members. They range from conducting exams at the University of Bucharest to participating at a lunch at the French embassy in Brussels, to representing the Court at the ‘Law, Justice and Development Week 2014’ in Washington D.C.; see Court of Justice of the European Union, ‘Décharge 2014. Questionnaire adressé à la Cour de justice. Complément de réponse aux questions n° 9 et 10: Liste des activités exercées par les Membres des trois juridictions ayant eu un impact sur le budget de l’Union européenne’.

⁸² See V. Skouris, ‘Höchste Gerichte an ihren Grenzen – Bemerkungen aus der Perspektive des Gerichtshofes der Europäischen Gemeinschaften’, in R. Grote *et al.* (eds.), *Die Ordnung der Freiheit. Festschrift für Christian Starck zum siebzigsten Geburtstag* (Mohr Siebeck 2007) p. 991 at p. 997.

⁸³ Court of Justice of the European Union, ‘2013 discharge questionnaire to the European Court of Justice’, p. 5.

warning system is in place, and 'the President/President of Chamber [intervenes] in time in order to discuss the matter with the Judge Rapporteur, eventually the Advocate General concerned.'⁸⁴

It is only through anecdotal evidence that we can grasp the pressure this system creates. In a highly unusual step, after a couple of months in office, British European Court of Justice judge Christopher Vajda harshly rejected, in an internal memo, the Court President's proposal to introduce an internal 'list of non-performers', singling out those judges who do not draft their decisions on time. Vajda criticised the unrealistic rhythm imposed on the judges and the lack of confidence by the President in the judges' diligence.⁸⁵ The time pressure created by the focus on efficiency has also been underlined by others, most forcefully by Advocate General Eleanor Sharpston. Her words should be cited in full:

[Writing] judgments that are coherent and intellectually consistent [...] cannot be readily done by a reporting judge with a gun at his head after one heated and inconclusive *délibéré* in a difficult case has left the original '*projet de motifs*' in tatters. Deleting paragraphs that cause trouble is easy enough. Formulating replacement reasoning takes longer. Shaping a new text that commands judicial consensus requires time for reflection and perhaps than a second (or even a third) *délibéré* – but that is frowned upon because it is not good for the statistics. [...] Nor can an advocate general easily write a thoughtful opinion if he is perpetually badgered to get the text out and 'stop holding things up'.⁸⁶

The critique formulated by Advocate General Sharpston as regards time pressure in European Court of Justice decision-making points to a larger problem that the focus on efficiency has entailed. As Alemanno and Pech put it: 'By putting a premium on efficiency and speedy handling over other values typifying the quality of the judicial process [...] this approach has become [...] the privileged if not exclusive lens through which the priorities and needs of the EU's judicial system are assessed.'⁸⁷ While efficiency is certainly important, it is widely established that it represents only one element in assessing the performance of a court.⁸⁸ This applies in particular to a court such as the European Court of Justice, which is

⁸⁴ Id.

⁸⁵ This has been revealed by journalist D. Seytre, 'Pour une liste de juges retardataires?' *Le Jeudi* (6 June 2013) p. 11 (citing from an internal memorandum).

⁸⁶ E. Sharpston, 'Making the Court of Justice of the European Union More Productive', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 763 at p. 766.

⁸⁷ See A. Alemanno and L. Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System', 54 *CMLR* (2017) p. 129 at p. 163.

⁸⁸ Even some conceptions of efficiency take the quality of the judicial process into account. For the Council of Europe, for instance, judicial efficiency means 'the delivery of quality decisions within a reasonable time following fair consideration of the issues.' See the 'Recommendation of the

functionally a constitutional jurisdiction, interpreting the law at the apex of the EU judicial system.⁸⁹ What follows from this for the practice of European Court of Justice financial accountability?

THE WAY FORWARD: THE QUALITY OF THE JUDICIAL PROCESS

The Parliament should incite the European Court of Justice to think about how its procedural and organisational rules need to change to reflect the concerns for quality that Court members and outside observers have voiced for some time.⁹⁰ This is the central argument of the final section of this article. It should trigger and engage in a debate about efficient *and* quality judicial decision-making. Certainly, the budgetary process is only one place among others to do so. A reform of the Court's Rules of Procedure that put the quality of justice centre stage would be highly warranted. However, the budgetary process is, as we have seen, an important institution for a regular assessment of judicial practice and for guiding and supervising reforms.

To be sure, 'quality' is a difficult and complex notion. And it is certainly more difficult to measure than the time it takes for handling a case. Yet, a number of issues are shared by most conceptions, notably transparency, an inclusive participatory structure or quality deliberation between the judges.⁹¹ They provide a good starting point for our discussion. I will limit myself to highlighting three points I consider particularly important: (1) exempting Grand Chamber decisions from time pressure;

Committee of Ministers of the Council of Europe on Judges: Independence, Efficiency and Responsibilities', CM/Rec (2010)12 of 17 November 2010, no 31.

⁸⁹ See notably, G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', 20 *MJ* (2013) p. 168 (arguing that the Court's increased role as a fundamental rights adjudicator needs to be reflected in a more open style of reasoning, enhanced transparency and participation); and De Witte, *supra* n. 4, at p. 134.

⁹⁰ Modest signs that concerns beyond efficiency might play a role for the Parliament in the budgetary process are discernible. The Parliament has referred to values such as geographical balance in the Court's personnel or safeguarding the environment; see European Parliament, 'Discharge resolution for the financial year 2012', [2014] OJ L266/124 ('Regrets the fact that the Member States which have joined in the last 10 years are not represented at Director-General and Director levels in the institution; reiterates the need for a greater geographical balance at those levels of the administration [...]') and Court of Justice of the European Union, '2012 discharge questionnaire to the European Court of Justice', p. 17.

⁹¹ See, for instance, the report by the European Commission for the Efficiency of Justice 'Measuring the quality of justice', CEPEJ(2016)12 (7 December 2016); the criteria developed by the 'International Framework for Court Excellence' (March 2013), <www.courtexcellence.com>, visited 15 April 2017; or the contribution by Jean Marc Sauvé, 'Les critères de la qualité de la Justice' at the occasion of the Celebration of 20 years of the EU General Court on 25 September 2009; <curia.europa.eu/jcms/upload/docs/application/pdf/2009-10/sauve.pdf>, visited 15 April 2017.

(2) allowing for *amicus curiae* participation; and (3) introducing English as a second language, besides French, in the deliberations between judges.

Proposal 1: time to think

Case statistics, notably those relating to the average time to handle a case, belong to the most important reference material in the budgetary process. An important step towards reflecting the concern for quality in the budgetary process would consist in a more nuanced use of these statistics. This applies notably to European Court of Justice Grand Chamber cases. These cases, roughly 50 per year, constitute the most important decisions, where the most difficult issues of EU law are deliberated and decided. In those cases, judges and Advocate Generals should enjoy the freedom to think as long as it takes to come up with the best solution for a case. In the course of the budgetary process, the European Parliament could invite the European Court of Justice to create a separate category for the duration of Grand Chamber cases in its judicial statistics. This would do away with the incentive to hurry through Grand Chamber proceedings for the sake of statistical excellence.

Proposal 2: amicus curiae participation

The second point is of a more principled nature. An important element in enhancing the quality of the European Court of Justice judicial process would consist in reflecting on the participatory structure of proceedings in the Court. Traditionally, EU Member States and the European Commission are the dominant actors. Civil society or expert communities play only a minor role, notably since, in contrast to many other courts,⁹² the European Court of Justice does not have a system for *amicus curiae* participation. Although *amicus curiae* participation needs to be tailored carefully,⁹³ it is widely

⁹²Originally found in common law jurisdictions, the institution of *amicus curiae* has spread to international courts, and is also increasingly employed in civil law jurisdictions, notably in constitutional and supreme courts. It is practised in highest courts from Latin America, such as in the constitutional courts of Brazil and Peru, or the Argentinian Supreme Court, to Europe where the French *Conseil d'État* or the Polish Constitutional Court have pursued a similar path. With these and further examples, see S. Krislov, 'Amici Curiae in Civil Law Jurisdictions', 122 *Yale Law Journal* (2013) p. 1653 at p. 1659-1663. In the European Court of Human Rights *amicus curiae* participation has become one of its defining traits: R.A. Cichowski, 'Civil Society and the European Court of Human Rights', in J. Christoffersen and M. Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) p. 77 at p. 95.

⁹³See F. Maultzsch, *Streitentscheidung und Normbildung durch den Zivilprozess. Eine rechtsvergleichende Untersuchung zum deutschen, englischen und US-amerikanischen Recht* (Mohr Siebeck 2010) p. 424-427 (describing potential inaccuracies and bias in the material provided by *amici* as problems and transparency and competition between *amici* as remedies).

accepted that it can significantly increase the quality of the judicial process. *Amici* can compensate for factual or legal lacunae in the submissions of the parties, but they can also channel a court's focus on wider interests implicated by a case or provide social science data that can underpin a Court's ruling, notably in technical areas, where specialised expertise is required.⁹⁴ They can assist weaker parties and marginalised interests to better express themselves before court,⁹⁵ and serve as a 'transmission belt' between relevant publics and the Court.

That *amici curiae*, notably non-governmental organisations, can provide important input for informed decision-making is also accepted within the European Court of Justice.⁹⁶ However, under the current rules, potential interveners are dependent on domestic rules on intervention to take part in European Court of Justice proceedings.⁹⁷ This leads to highly unpredictable and asymmetric outcomes. A good example is the field of asylum law. The Office of the UN High Commissioner for Refugees is a regular *amicus* in proceedings before the European Court of Human Rights and the UN Committee on Social Rights. Its experience and expertise in international refugee law is highly respected. EU secondary legislation such as the Qualification Directive explicitly recognises the UN High Commissioner for Refugees as a source of 'valuable guidance'.⁹⁸ Yet, in European Court of Justice proceedings, the UN High Commissioner for Refugees has so far only been able to intervene twice through the domestic

⁹⁴ K.J. Lynch, 'Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs', 20 *Journal of Law and Politics* (2004) p. 33 at p. 36, 41-42 (underpinning her analysis with interviews of U.S. Supreme Court law clerks on the usefulness of *amicus curiae* briefs).

⁹⁵ O. Scott Simmons, 'Picking Friends From the Crowd: Amicus Participation as Political Symbolism', 42 *Connecticut Law Review* (2009) p. 185 at p. 203-205.

⁹⁶ For instance, in the *N.S.* case, where the Court decided that an asylum seeker cannot be transferred to another EU country when systemic deficiencies exist in its protection of fundamental rights, it relied heavily on submissions by non-governmental organisations in European Court of Human Rights proceedings in a similar case and on the submissions of the UN High Commissioner for Refugees, Advice on Individual Rights in Europe, the Equality and Human Rights Commission and Amnesty International that had been granted leave to intervene in the domestic proceedings; ECJ 21 December 2011, Joined Cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department* and *M. E. v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, para. 90.

⁹⁷ In preliminary reference proceedings (Art. 267 TFEU), if third parties had been granted leave to intervene in the domestic proceedings from which the reference for a preliminary ruling originated, these third parties can also intervene in the ECJ proceedings; see, recently, ECJ 6 October 2015, Case C-61/14, *Orizzonte Salute – Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino – Città di Levico Terme*, para. 33.

⁹⁸ Recital 15 of Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

procedures in Hungary, Ireland and the UK respectively.⁹⁹ In other cases it drafted submissions in the form of 'statements', which are published on the organisation's website. They seem to have found their way to the Court attached to the submissions of other parties, however their status and relevance in the proceedings is far from clear.¹⁰⁰

This waste of resources and expertise is highly problematic. Legal practitioners¹⁰¹ their representative associations,¹⁰² and non-governmental organisations have expressed, often in sharp words, a feeling of alienation with the Court and have voiced concerns whether the Court is able to produce high-quality decisions without the input experts can provide.¹⁰³ The introduction of a European Court of Justice *amicus curiae* procedure could go some way to remedy this situation. The European Parliament could trigger, through the budgetary process, a discussion on the precise role *amici* could play in European Court of Justice proceedings,¹⁰⁴ and incite the Court to initiate a respective change of its Rules of Procedure.¹⁰⁵

Proposal 3: bilingual deliberations

A third important element in discussing the quality of the European Court of Justice judicial process is the process of deliberation between the judges of the

⁹⁹ In cases ECJ 19 December 2012, C-364/11, *Mostafa Abed El Karem El Kott v Bevándorlási és Állampolgársági Hivatal*; and ECJ Joined Cases *N.S.*, *supra* n. 96 (alongside non-governmental organisations such as Amnesty International and Advice on Individual Rights in Europe).

¹⁰⁰ S. Carrera and B. Petkova, 'The Potential of Civil Society and Human Rights Organizations Through Third-Party Interventions Before the European Courts: The EU's Area of Freedom, Security and Justice', in M. Dawson *et al.* (eds.), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) p. 233 at p. 256-257.

¹⁰¹ H. Storey, 'It takes two to tango' (Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union Seminar Brussels 16-17 December 2010), <www.aca-europe.eu/seminars/Brussels2010/Paper_Storey.pdf>, visited 15 April 2017, pp. 3-4 ('We were particularly concerned that matters to do with an international treaty – the Refugee Convention – were going to be decided by a group of non-specialist judges sitting in Luxembourg in the context of procedures that minimized the chances of a fully informed judicial consideration [...]').

¹⁰² See the critical comments by the Council of the Bars and Law Societies of the European Union, 'Interventions and Amicus Curiae Briefs in Proceedings Before the ECJ and the CJJ' (March 2003), <www.cbbe.eu/NTCdocument/interventions_0703031_1184053676.pdf>, visited 15 April 2017.

¹⁰³ See the open letter to then-ECJ President Skouris by the Foundation for a Free Information Infrastructure, a non-profit organisation devoted to establishing a free market in information technology, on the occasion of the refusal of the Court to accept an *amicus curiae* brief in the Opinion procedure (the request for an Opinion was finally withdrawn by the Commission) on the Anti-Counterfeiting Trade Agreement (ACTA), <blog.ffii.org/ffii-asks-eu-court-to-accept-amicus-curiae-briefs-on-acta>, visited 15 April 2017.

¹⁰⁴ For a concrete proposal see Krenn, *supra* n. 3.

¹⁰⁵ Art. 253, para. 6 TFEU.

Court. A particularly important point is the language of deliberation. Without being regulated in the Rules of Procedure, French is used in all internal communications between European Court of Justice members.¹⁰⁶ While in the 1950s French was widely spoken among lawyers associated with European integration, today, many judges, Advocate Generals and their assistants struggle to achieve a level of French apt to communicate satisfactorily. As Konrad Schiemann, a former British European Court of Justice judge, put it diplomatically: ‘[Particularly] at the beginning of their mandate, some Judges find it difficult to communicate clearly in the internal language of the Court.’¹⁰⁷ Former European Court of Justice President Skouris has also underlined this fact.¹⁰⁸ Indeed, new judges sometimes spend their first months in office with intensive French courses besides their judicial duties.¹⁰⁹

This is problematic from the perspective of quality deliberation. A lack of language proficiency can hamper effective and precise communication and negatively affect the equality between judges. The disadvantage of those with a non-francophone background has been pointed out by judges themselves.¹¹⁰ Moreover, the use of French has repercussions on the quality of the case law produced. Insufficient language capacity leads to ‘cutting and pasting’ in the drafting process, reproducing the Court’s formulaic style of judgments, and suppressing originality and novelty in the Court’s formulations.¹¹¹ Moreover, due to the importance of French for the internal decision-making process, judges tend to hire native speakers. Currently, 42% of European Court of Justice law clerks are citizens of France, Belgium or Luxembourg,¹¹² and were accordingly generally educated at francophone universities.¹¹³ Since the judges rely in their preparations

¹⁰⁶ K. Schiemann, ‘The Functioning of the Court of Justice in an Enlarged Union and the Future of the Court’, in A. Arnall *et al.* (eds.), *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008) p. 3 at p. 8-11.

¹⁰⁷ *Id.*, p. 9; *see also* Editorial Comments, ‘The Court of Justice in the Limelight Again’, 45 *CMLR* (2008) p. 1571 at p. 1577.

¹⁰⁸ Skouris, *supra* n. 82, p. 997.

¹⁰⁹ *See* N. March Hunning, *The European Courts* (Cartermill 1996) p. 65.

¹¹⁰ G. Federico Mancini and D. T. Keeling, ‘Language, Culture and Politics in the Life of the European Court of Justice’, 1 *Columbia Journal of European Law* (1994) p. 397 at p. 398; *see* O. Riese, ‘Das Sprachenproblem in der Praxis des Gerichtshofes der europäischen Gemeinschaften’, in E. von Caemmerer (ed.), *Vom deutschen zum europäischen Recht. Festschrift für Heinz Dölle* (Mohr 1963) p. 507.

¹¹¹ K. McAuliffe, ‘Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union’, 24 *International Journal for the Semiotics of Law* (2011) p. 97 at p. 107.

¹¹² A. Huyue Zhang, ‘The Faceless Court’, 38(1) *University of Pennsylvania Journal of International Law* (2016) p. 43, <ssrn.com/abstract=2640861>, visited 15 April 2017.

¹¹³ From a sample drawn by Huyue Zhang it appeared that the three graduate schools or universities most attended by *référéndaires* were the College d’Europe, Université Panthéon-Assas and Université Panthéon-Sorbonne, *see* Huyue Zhang, *supra* n. 112, p. 26.

on work done by their clerks, their argumentative ammunition will also be disproportionately coined by a francophone legal-cultural background.

An important step forward could consist in introducing English as a second language at the Court. English is – by far – the most important foreign language in Europe.¹¹⁴ In practice, it could be used besides French. The European Court of Justice could thereby follow the example of the Swiss Federal Supreme Court, which applies the ‘Helvetic principle’, i.e. in the internal communication every judge can rely on German, French or Italian – in the Swiss case – while passively understanding the other languages.¹¹⁵ To keep the costs of translation down, the internal working language for a specific case could be made dependent upon the wish of the judge-rapporteur who has been assigned to a case. All incoming documents could hence be translated either into French or English depending on who is the designated reporting judge. The deliberations, as well as the memoranda circulating between the judges, commenting on the draft judgment, could be either made in French or in English. To be sure, such a change would need to be carefully introduced. Yet, it is arguably a promising route to increase the quality of judicial decision-making. Law is language. Improving language capacity at the Court is likely to translate into improving the European Court of Justice’s legal work and the quality of EU law.

CONCLUSION: JUDICIAL REFORM AS A DEMOCRATIC PROCESS

The authority of courts constitutes one of the major challenges of public law today.¹¹⁶ This applies notably to the most powerful courts, such as the European Court of Justice. In this article, I have discussed a route to frame that Court’s authority that has, so far, received little attention: financial accountability.

Yet, this article also holds a more general lesson for how EU lawyers and notably EU legislative actors should deal with European Court of Justice procedural and organisational law, namely that judicial reform needs to be conceived as a democratic process. We have seen that choices about the orientation and development of European Court of Justice procedural and organisational law are of crucial importance and of a highly political character.

¹¹⁴ On the general trend, see J.A. Fishman, ‘The New Linguistic Order’ 113 *Foreign Policy* (1998-1999) p. 26.

¹¹⁵ See D. Richter, *Sprachenordnung und Minderheitenschutz im Schweizerischen Bundesstaat* (Springer 2005) p. 338 and 1023-1024. This practice applies also to Swiss public law conferences, where at least a passive command of French and German is expected, see G. Biaggini, ‘Die Staatsrechtswissenschaft und ihr Gegenstand: Wechselseitige Bedingungen am Beispiel der Schweiz’, in Helmuth Schulze-Fielitz (ed.), *Staatsrechtslehre als Wissenschaft* (Duncker & Humblot 2007) p. 267 at p. 269.

¹¹⁶ See R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

They entail decisions that might be critical for the Court's success (such as the focus on efficiency during the early 2000s), but they also steer what the Court does, how it does its work and whether those potentially affected are given – direct or indirect – voice in the proceedings (such as the decision whether to introduce an *amicus curiae* procedure). Traditionally, in the EU, drafting and reforming the Court's procedural and organisational law is a matter for a small and closed community, essentially dominated by European Court of Justice members.¹¹⁷ Former President of the European Court of Justice, Ole Due, has described the process of EU judicial reform as being akin to 'a party of old schoolboys'.¹¹⁸ In this article we have seen that a lot can be gained from an open, informed and critical dialogue that reaches beyond court insiders. The structure of the budgetary process has provided incentives for the Court to engage in real discussions. Despite my critique that the European Parliament has privileged efficiency to the detriment of the quality of the judicial process, it can generally be seen as a valuable partner in this endeavour. It is, in principle, supportive of the Court.¹¹⁹ Many of Parliament's contributions for the development of the EU judicial system in recent times have shown its expertise, they have been fact-based and reflexive.¹²⁰ And most importantly, as a representative body, it can lend democratic legitimacy to EU judicial reforms. Much, therefore, speaks in favour of learning from the process of financial accountability for the future reform of the EU judicial system.



¹¹⁷ See, critically, J.H.H. Weiler, 'Epilogue: The Judicial Après Nice', in G. de Búrca and J.H.H. Weiler (eds.), *The European Court of Justice* (Oxford University Press 2001) p. 215 at p. 216.

¹¹⁸ Describing his experiences in the drafting of the 2000 'Due Report', see O. Due, 'Looking Backwards and Forwards', in Amicale des référendaires et anciens référendaires de la Cour de justice et du tribunal de première instance des communautés européennes (ed.), *La Cour de Justice des communautés européennes 1952-2002: Bilan et perspectives* (Bruylant 2004) p. 25 at p. 31 ('It was great fun for us to meet again like a party of old schoolboys and, in the beginning, we also acted as such').

¹¹⁹ On the lack of such support from EU Member States, see A. Arnull, 'Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law', 31 *Fordham International Law Journal* (2007) p. 1174.

¹²⁰ Notably Parliament's Committee on Legal Affairs, responsible for the process of amending the Court's Statute, has played an important role in rationalising and making public the debate in the recent controversial process of doubling the number of General Court judges; in detail, Alemanno and Pech, *supra* n. 87, p. 144.