Articles

Using the Historical Archives of the EU to Study Cases of CJEU – First Part

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The Court of Justice in the Archives: Introduction

This Special Section is one of the fruits of a research project designed to reflect on the potential offered to legal scholars by the archives of the Court of Justice of the European Union (CJEU). Although the Court of Justice (together with the European Central Bank) is exempt from the obligation that applies to the other EU institutions to deposit their historical archives with the Historical Archives of the European Union (HAEU) at the European University Institute in Florence,[1] it may decide to do so voluntarily.[2] In 2014 the Court of Justice decided to deposit its archives with the HAEU, and in 2016 took the decision to open them to the public.[3] Since July 2017 the archives of the Court of Justice covering the first thirty years (1952 – 1982) of case law of the European Communities,[4] deposited in the HAEU, have been available to the public.[5]

[1] Regulation (EU) 2015/496 of the Council of 17 March 2015 amending Regulation (EEC, Euratom) 354/83 as regards the deposit of the historical archives of the institutions at the European University Institute in Florence. The original Regulation of 1983 (Regulation (EEC, Euratom) 354/83 of the Council of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community) established the principle that the institutions' archives should be preserved and made available to the public, normally subject to a 30-year rule; the Regulation of 2015 reflects the institutions' practice by stipulating that the archives are to be deposited with the Historical Archives of the EU at the EUI. It is accompanied by a Framework Partnership Agreement between the European Commission, on behalf of the depositing institutions, and the EUI: Framework Agreement n. SG-FPA-2015-1.

[2] Art. 8(1) and (3) of Regulation 354/83 cit. as amended by Regulation 2015/496 cit.

[3] Decision of the Court of Justice of the European Union of 10 June 2014 concerning the deposit of the historical archives of the Court of Justice of the European Union at the Historical Archives of the European Union (European University Institute). The files are made available in electronic form.

[4] Since the current 1982 cut-off date refers to the closing of the procedure, in practice the most recent cases available date from 1978-80.

[5] HAEU, *CJUE Holding* archives.eui.eu. The administrative archives of the Court are now also available to the public, including documentation on the composition of the Court, its personnel and functioning: HAEU, *CJUE.04 Administration* archives.eui.eu.

European Papers
Vol. 6, 2021, No 1, pp. 527-532
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/481

The judicial archives include the original signed versions of Court judgments and orders and the *dossiers de procédure originaux*, or original procedure records. These *dossiers* include the procedural documents related to the case, including letters on the appointment of the *juge rapporteur* and Advocate General in the case, the pleadings, evidence, and supporting documents, documents submitted by the referring court in the case of preliminary rulings, submissions and observations, orders made and the report for the oral hearing. Thus, the judgment constitutes a relatively small proportion of each *dossier*. Instead, they contain information about the parties, their lawyers, the presentation of the facts, sources that draw on national legal categories and legal scholarship to shape Community Law in a particular dispute, interim proceedings, the many steps of internal court management including decisions on who might intervene before the Court of Justice, and information on the interaction between the oral hearing and the written procedure. The *dossiers* available to scholars and the public are electronic versions of the originals,[6] and are subject to a prior check and possible redaction by the Court. When a request for a case *dossier* is received for the first time, the electronic version of the *dossier* is checked by the Court and redacted to remove sensitive or confidential information before it is released.[7] In addition, the publicly available *dossier* does not include the record of the Court's private deliberations: when deciding to make its case archives available the Court, in reference to art. 35 of its Statute, confirmed that "[u]nder no circumstances shall access be given to documents relating to the secrecy of the deliberations".[8] Despite these restrictions,[9] the *dossiers* nonetheless contain a wealth of material capable of enriching our understanding of individual cases, of the working of the Court as an institution, and of those who played a part in the evolution of European law. To reiterate a point made by Niamh Nic Shuibhne, the published reports of the cases in this first 30-year tranche all include the report for the hearing prepared by the *juge rapporteur*. Since 2012 the reports for the hearing have not been published,[10] and the contents of the *dossiers de procédure* for cases after that date, once they are eventually made available, will be all the more valuable as a source of information.

[6] They can therefore be consulted online. For the procedure to request a case dossier, see HAEU, CJUE.01.01-02.03 *Dossiers de procédure originaux* archives.eui.eu.

[7] Regulation 354/83 cit. art. 2 excludes "records containing information on the private or professional life of individual persons".

[8] Decision of the Court of Justice of 10 June 2014, art. 4(2). Art. 4(1) of the Court's Decision refers to art. 35 of the Court's Statute which provides that the Court's deliberations are to remain secret. This provision applies also to the General Court (art. 53 of the Court's Statute), and to the Civil Service Tribunal (art. 7(1) of Annex 1 to that Statute).

[9] On the impact of redaction, see in particular the analysis by Munro and Williams of the Van Duyn dossier: R Munro and R Williams, 'Caught in the Red(Act): Insights from the Van Duyn Dossier' in this Special Section.

[10] Regulation (EU, Euratom) 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, art. 1(4), amending art. 20 of the Court's Statute so as to remove the obligation of the *juge rapporteur* to present a report at the oral hearing.

A project led by the editors of the Special Section has analysed a selection of these cases with the aim of exploring how and why the archives of the Court of Justice are worthy of the attention of a wide range of scholars of European law, as well as scholars from different disciplines, including legal historians and sociologists.[11] In the last decade, a productive 'discovery' of the Court of Justice by legal historians and sociologists has occurred.[12] Legal historians have worked with documentary and oral evidence to analyse the historical processes that shaped European law.[13] Sociologists have stressed the fabrication of EU law and the legal entrepreneurs who played key roles: the lawyers, the legal services of the institutions, the *référendaires* and the routines and networks they establish.[14] Such work productively destabilises existing narratives of EU law produced by legal scholars and political scientists.[15] Yet the archival sources used to develop such work have, given their very recent opening, not been those of the Court of Justice itself but mainly personal archives or accounts, and the work done to date has almost exclusively focused on a few key cases such as *Van Gend en Loos* and *Costa v ENEL*. From this perspective the opening of the Court's archives is, as Morten Rasmussen says, a "game changer".

How, then, might the game be changed? The aim of this project has been first to illustrate the potential of the archives of the Court of Justice as an object of study and the opportunities and challenges the *dossiers de procédure* present, and second, to identify

[11] See European University Institute, *The Court of Justice in the Archives* ecjarchives.eui.eu. The project is directed by Joanne Scott, Claire Kilpatrick, Marise Cremona and Dieter Schlenker; for all researchers and the project's advisory board, see further ecjarchives.eui.eu.

[12] For an account see M Rasmussen, 'Towards a Legal History of European Law' in this Special Section.

[13] See for example B Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949-1979* (Cambridge University Press 2012); B Davies and M Rasmussen, 'Toward a New History of European Law' (2012) Contemporary European History 305; A Boerger and M Rasmussen, 'The Making of European Law: Exploring the Life and Work of Michel Gaudet' (2017) American Journal of Legal History 51; R Byberg, 'The History of the Integration Through Law Project - Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) German Law Journal 1531; V Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972) : une approche Biographique de l'histoire d'une révolution juridique* (Klostermann 2018); V Fritz, 'Activism on and off the Bench: Pierre Pescatore and the Law of Integration' (2020) CMLRev 475.

[14] See for example A Vauchez, 'The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity' (2009) ELJ 1; A Vauchez, *Brokering Europe Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

[15] See for example J Bailleux, 'Michel Gaudet, a Law Entrepreneur: The Role of the Legal Service of the European Executives in the Invention of EC Law and the Birth of the Common Market Law Review' (2013) CMLRev 359; F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017); R Schütze, "Re-reading' *Dassonville*: Meaning and Understanding in the History of European Law' (2018) ELJ 376; W Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge University Press 2019); L Clément-Wilz (ed), *Le rôle politique de la Cour de justice de l'Union européenne* (Larcier 2019); C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice* (Oxford University Press 2020).

and initiate a reflection on the ways in which the archives may enhance, or even redirect, CJEU-focused scholarship. We have selected cases from a variety of areas in which key developments took place in the first 30 years of the Court's case law: free movement of workers; free movement of goods; gender equality; access to justice; external relations; and competition law.[16] EU legal scholars have the technical know-how to deconstruct the filters through which the raw material of "facts" and "law" are passed to produce a judgment. At the same time, this exercise sheds new light on practices of rational reconstruction of successive judgments of the Court of Justice that remain a central organising feature of EU legal scholarship. In the procedures and routines and personnel practices revealed in new detail by the *dossiers*, we can obtain deeper insights into the manufacture of Court of Justice judgments. The crucial moments, sources or people behind certain outcomes may emerge from careful archival analysis.

Alongside a set of Working Papers analysing each *dossier* using a template developed within the project,[17] those working on the selected cases have reflected on a number of themes emerging from the *dossiers*. These include the roles of diverse actors and institutions, the paths taken (and not taken) in legal argument in a complex litigation, and the interaction between procedure and substantive law. This Special Section brings together a group of *Articles* exploring those themes through the medium of ten individual case studies, accompanied by reflections from others who have participated in the project from different perspectives and disciplines. It serves to introduce the possibilities offered by the Court archives, and some of the ways in which the *dossiers de procédure* may enrich our reading of case law and contextualise legal scholarship. The authors of the ten case studies, and the editors of the Special Section, are themselves legal scholars. We have approached our study – inevitably – from this perspective, accompanied by fruitful dialogue with colleagues, represented here by Antoine Vauchez, and Morten Rasmussen, who have prompted methodological reflections as to best practice. As Niamh Nic Shuibhne expresses it at the start of her paper, we began by reflecting on why we, as lawyers, might read the case *dossiers* and what we might look for in this newly available material. We were, in particular, interested in the light the *dossiers* might throw on the legal argumentation in the case, on the interplay

[16] The twelve case dossiers studied were Case 9/56 *Meroni v Haute Autorité* ECLI:EU:C:1958:7 and Case 10/56 *Meroni v Haute Autorité* ECLI:EU:C:1958:8; Case 25/62 *Plaumann v Commission* ECLI:EU:C:1963:17 (not included in this Special Section); joined cases 56/64 and 58/64 *Consten and Grundig v Commission of the EEC* ECLI:EU:C:1966:41; Case 22/70 *Commission v Council*, (*ERTA*) ECLI:EU:C:1971:32; Case 8/74 *Procureur du roi v Dassonville* ECLI:EU:C:1974:82; Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133; Opinion 1/75 *Arrangement OCDE - Norme pour les dépenses locales* ECLI:EU:C:1975:145; Case 43/75 *Defrenne v Sabena* (*Defrenne II*) ECLI:EU:C:1976:56; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49; Case 149/79 *Commission v Belgium* ECLI:EU:C:1982:195; Case 244/80 *Foglia v Novello* ECLI:EU:C:1981:302.

[17] For Working Papers analysing each of the selected dossiers, from which the authors of the case studies presented here have drawn, see European University Institute, *The Court of Justice in the Archives* cit.

between different actors, including those less visible from the published report, on the social, political and economic context of the dispute, and on the dynamic between substance and procedure in the handling of the cases. And we were conscious of the process characterised by Antoine Vauchez as "meaning-building",[18] the way in which a particular narrative of key cases is constructed over time, and asked to what extent the material in the *dossiers* might challenge these dominant readings. We were also conscious of the need to be cautious; the *dossiers* may improve our understanding but they have their limits. They may provide important insights and evidence, opening up possibilities rather than revealing certainties, and inviting, as Morten Rasmussen puts it, "a conscious effort to abandon the neat narratives of legal progress in favour of a messier, more complex, but ultimately more accurate and richer story".

The *Articles* in this collection do indeed illustrate the potential for such a fine-grained study of individual cases, as well as the offering a glimpse, in the paper by Lola Avril and Constantin Brissaud, into the potential for other more horizontal studies of the archive.

One of the more striking findings, across the cases in this set of studies, concerns the handling of legal arguments. The *dossiers* are a useful corrective to any temptation one might feel – sometimes enhanced by the style in which judgments are written – to treat the prevailing arguments as somehow inevitable. It is not simply a matter of giving more weight to one argument than to another; nor is it possible, certainly from this small sample, to detect a preference for one style of argument over another.[19] Rather, in several cases arguments emerge from the documents in the *dossier* that were effectively ignored in the judgment.[20] The analysis also demonstrates the willingness of the Court to bring into play new arguments or to reinterpret arguments made in the pleadings and submissions.[21] The *dossiers* also allow us a flavour of the interaction between different actors in the to-and-fro of argumentation, often in ways not visible from the published report of the case. Thus, for example, the *Meroni dossier* indicates the influence of Alberto Trabucchi on the evolution of the High Authority's case, and the *Foglia II dossier* provides evidence of the influence of the

[18] A Vauchez, 'EU Law Classics in the Making: Methodological Notes on Grands arrêts at the European Court of Justice' in F Nicola and B Davies (eds), *EU Law Stories* cit. 30.

[19] See for example the discussion by J Kukavica and A Petti of the Court's treatment of different styles of argument in Opinion 1/75 cit. and *ERTA* cit. respectively. J Kukavica, 'The Garden Grows Lusher: Completing the Narratives on Opinion 1/75' being published in the second part of this Special Section; A. Petti, '*ERTA* and Us: shifting constitutional equilibria on the visions of Europe' in this Special Section.

[20] See for example, the arguments supporting the existence of a genuine dispute in *Foglia II* cit.; D Ginés, 'The Court of Justice, Genuine Disputes and Jurisdictional Control: Making Sense of *Foglia II* in light of its *Dossier*' being published in the second part of this Special Section.

[21] See for example, the weight given to the principle of institutional balance in *Meroni* cit., or the use made of the principle of sincere cooperation in *ERTA* cit. Opinion 1/75 cit. is a somewhat unusual case, as the published report of the Opinion does not contain any summary of the submissions, the dossier thus revealing these for the first time, giving us the possibility of assessing the sources of the arguments adopted (and introduced) by the Court. M Patrin, '*Meroni* Behind the Scenes. Uncovering the Actors and Context of a Landmark Judgment' in this Special Section; A Petti, '*ERTA* and Us' cit.; J Kukavica, 'The Garden Grows Lusher' cit.

French government's submissions on the Court's judgment. We also see the ways in which these interactions may be iterative, as parties or other actors respond to each other's arguments, and how the arguments deployed before the Court may reflect a broader discussion between the institutions, or within academic literature.[22]

The interplay between procedure and substance is of course a feature of any litigation. Among the cases analysed here, two aspects of that interaction stand out. The first is the importance of admissibility and the way in which the discussion of admissibility may be used by the Court to frame its approach to the substantive legal issue. Thus, in *ERTA*, the Court uses admissibility to introduce the question of Community competence; and in Opinion 1/75 and in *Foglia II* the Court uses admissibility to shape its reading of its own jurisdiction in different types of procedure. The second is the use of evidence in cases such as *Dassonville*, *Defrenne*, *Van Duyn* and *Consten and Grundig*. This evidence is used not only to substantiate a particular factual scenario but also to explain the economic, legal or social context of what may appear on its face to be a highly technical case.[23] The move from a technical set of facts to a statement of broad principle, which often appears as a characteristic of the Court's judgments, is not necessarily driven simply by the Court itself but may be seen to emerge as a response – albeit unacknowledged – to evidence of the broader contextual significance of the case.

For many of the authors of the case studies which follow, an important reflection on re-reading a case in the light of its *dossier de procedure* is the contrast between the 'real time' of the documents in the *dossier* and the patina the case has accrued over subsequent years. In reading the *dossier* we see the case afresh, have our attention drawn to previously unseen dynamics between actors and arguments and appreciate its contingency, a significant added-value for lawyers accustomed to constructing rational (or at least persuasive) frameworks of law and analysing their evolution over time. This is something more than contextualisation, than knowing more about the story behind the case. It gives us a more immediate sense of the ways in which law is made, and by whom.

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[22] See for example the discussion of differing interpretations of measures of equivalent effect to quantitative restrictions in the *Dassonville* case, and the position of the different actors in *Consten and Grundig* cit. J Muller, '*Procureur du Roi v Dassonville*, the Judicial Dossier behind the Measure Equivalent to Trade Restriction Formula' in this Special Section; G Bacharis, '*Consten and Grundig* and the Inception of EU Competition Law' in this Special Section.

[23] See for example the discussions of the *Dassonville* and *Meroni* cases. J Muller, '*Procureur du Roi v Dassonville*' cit.; M Patrin, '*Meroni* Behind the Scenes' cit. As expressed by M Rasmussen in 'Towards a Legal History of European Law' cit.: "the borderline between legal doctrine and its social context [is] always fluctuating and fuzzy".

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