ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART

edited by Marise Cremona, Claire Kilpatrick *and* Joanne Scott

THE COURT OF JUSTICE IN THE ARCHIVES PROJECT: AN INITIAL REFLECTION

ANTOINE VAUCHEZ*

ABSTRACT: This *Article* offers an initial reflection on the output of the "Court of Justice in the Archives" project represented by the case studies included in this Special Section. The value of this collective endeavour is not a matter of finding the (legal or historical) truth hidden in some unpublished part of the dossier that would allow us to settle on the real "origins" of EU law. The project contributes to deepening our understanding of landmark cases decades later, during which time their meaning and scope have been simplified and codified as "EU law answers to EU law questions" at the cost of losing their many legal, sociological and economic layers. As the *Articles* bring back defeated and the marginalized arguments, and exemplify how things could have gone otherwise, the reader is led to a thought-experiment that can prove extremely useful in reopening the legal and political imagination of EU law, emancipating it from a sense of necessity and exposing more explicitly the normative choices made by the Court. And as alternative legal pasts of Europe emerge, it may become easier to conceive of alternative futures for EU legal integration.

KEYWORDS: Court of Justice of the European Union – landmark cases – *dossier de procédure* – judicial reasoning – legal scholarship – socio-legal studies.

I. INTRODUCTION

The "Court of Justice in the Archives" project and the 10 case-studies published in this Special Section are the product of an unusual alignment of planets as the long-awaited (albeit partial) opening of the archives of the Court of Justice of the European Union (CJEU) meets with a renewed interdisciplinary interest in CJEU landmark cases. While quantitativists have built large-n databases of CJEU judgments for decades, qualitativists were still

* CNRS Research professor, Université Paris 1-Sorbonne, antoine.vauchez@univ-paris1.fr.

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missing an empirical platform to test in a systematic manner the added-value of a within-case approach to EU case law. In a rare collective experiment, this new *Article* strand examines the social and political embeddedness of the EU's case law and engages in thick descriptions of its dynamics on the ground. Researchers are "encountering" thousands of pages of original empirical material.[1] While the authors of the case studies are all doctoral candidates in law and have not become historians or sociologists in the process of writing these *Articles*, they have used methodological tools and concepts from other disciplines to understand the dynamics of legal change. This rare meeting of the minds from scholars of political science, history and law may be an unexpected side-effect of the relocation of the EUI Historical Archives and the EUI Law Department to the Villa Salviati. This project owes a lot to the efforts pursued by Marise Cremona, Claire Kilpatrick and Joanne Scott, who have opened this new research platform as a friendly and open-minded collective experiment. I am grateful to them for allowing me on board!

II. The cases selected and the content of the dossiers

True enough, the 10 *dossiers* selected here are not representative of EU case law as a whole: they are cases that have "survived" the long and competitive path to (EU law) glory.[2] Yet, taken together, they offer a good mix of different types of legal procedures (opinions, preliminary rulings, judgments), legal domains (competition law, external relations, access to justice, gender equality) and time periods (from *Meroni* in 1956 to *Foglia* in 1981). Moreover, their status as "landmark cases" makes them particularly suitable for this research experiment. There is indeed no better way to test the added value of studying the *dossier de procédure* than to choose judgments whose meaning have been consolidated over several decades and through numerous volumes of legal commentary. Indeed, more often than not, legal commentaries are only written on the basis of the Court's *arrêt* and of the Advocate General's (AG's) opinion. Efforts to understand the dynamics of a case are especially limiting when the Court, as abundantly demonstrated in the papers, only makes very selective references to the arguments of the parties, while at the same time raising new issues *proprio motu*. The opening of the Archives takes us from the tip of the iceberg to an appraisal of (something approaching) its total size.

[1] For reviews of these new interdisciplinary encounters in the field of EU law scholarship, see the *Article* by M Rasmussen in this Special Section 'Towards a Legal History of European Law' and A Vauchez, 'From Close-Ups to Long Shot in Search of the "Political Role" of the Court of Justice of the European Union' in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice* (Oxford University Press 2020) 45, 61.

[2] 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. Contextual and Critical Histories of European Jurisprudence* (Oxford University Press 2017) 21, 34.

Of course, the set of archival documents available remains incomplete: beyond the *délibéré*, access to which is forbidden by law,[3] some key procedural documents are missing. This includes the draft judgment (and related memos) of the reporting judge which are critical in the initial framing of the case.[4] As access to the administrative archive of the CJEU is yet to come, it is close to impossible to enter the micro-politics of the Court, particularly in matters as strategic as the practice of case-assignment to *juge rapporteurs* and *avocats généraux*.[5] In addition, one must add the fact that the redacting of the *dossier de procédure* by the Court's archival services has been quite extensive, particularly with respect to the *rapport d'audience*. With the sanitization of the files ranging from 10% to 40%, it seems that the interpretation of privacy issues and commercial secrets is not only restrictive but also lacks stability and precise criteria.

However, despite the dead ends and holes, these files provide very substantial material with each *dossiers de procedure* ranging from 200 to 2500 pages! In fairness, a large part of these files is not very relevant, as a lot of institutional correspondence between the parties and the *greffier* of the Court are merely procedural documents. Yet others prove much richer. The submissions and *mémoires* of the different parties to the case provide a unique entry-point into the framing of competing legal strategies of Member States, individuals, firms, EC institutions, etc. A whole world of actors directly involved in the procedure emerges: long-time players of EU law litigation such as the competition lawyer Jacques Lassier (here in *Grundig*) or future CJEU judges such as Antonio Trabucchi, a legal consultant for the High Authority at the time of *Meroni*, or Antonio Tizzano, a law professor and lawyer of the *Simmenthal* company as well as "one-shotters" and forgotten figures like Arturo Cottrau who represented Italian steel companies in dozens of proceeding before the Court in the 1950s and 1960s. The submissions' annexes bring evidentiary documents (often the biggest part of the *dossiers*) that are a rich testimony to the history of EU law argumentation with variegated sets of economic and social data from national statistical institutes, comparative legal arguments drawn from the case law of national

[3] Interestingly, the 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 recognizes the "the specific nature of the activities of the Court of Justice of the European Union (CJEU) and the European Central Bank (ECB)" which "justifies their exclusion from the obligation set out in this Regulation to deposit their historical archives at the EUI. The CJEU and the ECB may deposit their historical archives at the EUI on a voluntary basis".

[4] For a full account of these holes in the archive, see F Nicola, 'Waiting for the Barbarians: Inside the Archive of the European Court of Justice, New Legal Approaches to Studying the Court of Justice' in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice* cit. 91.

[5] In his study of case assignment in the Court ever since 2002, Christoph Krenn is able to correlate case assignment to the statute and reputation of judges and identifies a group of elite judges: Koen Lenaerts has acted as *juge-rapporteur* in Grand Chamber cases of the course of 11 years in a variety of cases stretching from issues of citizenship, taxes, economic governance, fundamental rights, etc. Cf. C Krenn, 'A Sense of Common Purpose. On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice' in M Rask Madsen, F Nicola and A Vauchez (eds), *Researching the European Court of Justice. Methodological Shifts and EU Law's Embeddedness* (Cambridge University Press 2021).

courts, conventions from international organizations such as the International Labour Organization (ILO), etc. Another interesting yet often neglected procedural document is the *questions posées aux parties* by the Court, which allows us to grasp how judges progressively turn the many stakes of a case into a limited set of EU law alternatives. Lastly, the *rapport d'audience*, often the most redacted part of the *dossier*, is a unique entry point into the oral exchanges at the Court.

III. Re-assessing landmark cases

Some readers may be disappointed with the outcome of this full (archival) immersion as there are hardly any hidden secrets or "smoking guns". However, the authors have been clever enough to avoid a merely anecdotal perspective, limited to giving a more human and lively context to CJEU landmark cases (a perspective which does, however, prove useful for the sake of teaching EU law). The authors have also resisted the temptation to frame their work as a quest to find new heroes that might serve as substitutes for our traditional ones, i.e. CJEU judges. The value of this collective endeavour is not a matter of finding the (legal or historical) truth hidden in some unpublished part of the *dossier* that would allow us to settle on the real "origins" of EU law. More importantly, the project contributes to deepening our understanding of landmark cases decades later, during which time their meaning and scope have been simplified and codified as merely "EU law answers to EU law questions" – at the cost of losing their many legal, sociological and economic layers.

Seen from the *dossiers' perspective*, landmark cases hardly seem recognizable. As the various parties to the case take centre stage, judicial decision-making appears like a choral process of production, thereby downplaying the usual image of CJEU judges as sole creators of EU law. As scholars are finally able to apply the "symmetry principle" dear to science and technology studies (STS) scholars and consider all parties to the case (including the dissenting or losing legal voices), it is possible to contextualise the final judgment in a dense web of competing social and economic claims, competing legal strategies and alternative judicial solutions, regardless of the case outcome. As a result, our understanding of the "hermeneutic space" of the judgment is considerably enriched. Issues that had been ignored (or silenced) by the Court in the decision are brought back into the limelight. In Opinion 1/75 on trade agreements, the most heated legal discussions among parties were the ones related to the *kompetenz-kompetenz* of the Court itself (regarding its competence to decide on the exclusive nature of the Community's competence to conclude international agreements) - one that the Court strategically refused to address in its final decision. As Jaka Kukavica puts it in his *Article*: "the Court's silence has entirely obscured what was one of the more important issues of Opinion 1/75 in the eyes of the Member States" On the other hand, issues that had not been put forward by any of the parties, teleological arguments in particular, are added by the Court *proprio motu* along the way.

As the files immerse the reader in the complexities of the cases and their multidimensional stakes, one gets a sense of *openness* and *contingency* often lost in the consolidated teleological narrative of EU case-law. As one follows the different operations of law from *soumissions* to *mémoires* and from the *questions posées aux parties* to the *rapport d'audience*, the picture gets surprisingly more dynamic than in the usual account, where the parties appear as driven by pre-existing interests. Something actually *happens* during the proceedings themselves: arguments are abandoned, legal strategies are revised, and key legal issues emerge incidentally during the proceedings. Sometimes, the importance of the case is "discovered" *chemin faisant* as the procedure unfolds, leading to changes in strategy and legal setting.[6] As one tracks these changes in the strategies of actors, it is possible to assess how cases evolve in their meaning and scope all along the procedure. In *Meroni*, for example, the debated issue moves from discrimination and abuse of power to judicial protection and delegation.[7] As scholars are able to retrieve alternatives and identify moments of bifurcation, the sense of necessity that has often hampered the reading of EU case-law dissipates. The outcomes of cases are not foreordained and the path taken is often hard to anticipate ahead of the trial itself.[8]

Yet, this new material does not only allow us to zoom in to account for the inner dynamics of the case itself; it also enables us to escape the remits of the case and zoom out to grasp its embeddedness in the wider social, economic and political processes of its times. As the parties bring arguments and evidentiary documents from Member States and international organizations, one can see how society finds its way *into* EU case-law and it becomes possible to track the many threads that connect the case to the political and social battles of the time. To put it differently, "the context" never lies *outside* of the case but it is to be found right at the core the *dossier* itself. *Defrenne II* is a perfect example here as "the context" continuously feeds into the Court with the Paris Summit of 1972, its new emphasis on EU social policies and its concretization in a series of three EU directives regarding equal pay, equal treatment at work and equal treatment in social security.[9] Similarly, the judicial recognition of the formula on "Measures having equivalent effect to a quantitative restriction" in *Dassonville* is deeply intertwined with the many initiatives taken in parallel by the Commission from the Directive 70/50 to its 1985 White paper "on the completion of the Single Market".

[6] As is *Dassonville* (case 8/74 *Dassonville* ECLI:EU:C:1974:82) where the case moves from the Second Chamber to the Full Court: see J Muller, '*Procureur du Roi v Dassonville*, the Judicial *Dossier* Behind the Measure Equivalent to Trade Restriction Formula' in this Special Section.

[7] M Patrin, '*Meroni* Behind the Scenes, Uncovering the Actors and Context of a Landmark Judgment' in this Special Section.

[8] This open-ness should not however lead to underestimate structural slopes in CJEU litigation: see A Vauchez, 'From Close-Ups to Long Shot in Search of the "Political Role" of the Court of Justice of the European Union' cit.

[9] S Tas, '*Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*: A glance into a landmark case with more potential than what it is known for', to be published in the Second Part of this Special Section.

As the Court is repositioned in context, it becomes easier to assess, beyond the legal issues, the distributional consequences of its judgments such as the case of *Meroni*, where a small steel company claimed to be disadvantaged *vis-à-vis* large firms by the equalization mechanism and the average prices of ferrous scrap introduced by the High Authority. In the end, the richer the material available, the more it becomes possible to overcome the sharp divide between "inside" and "outside" of the Court, or between the "case" and its "context". The new picture of the case-law that emerges runs counter to the usual image of the Court as self-standing and autonomous institution.

As the *Articles* bring back the defeated and the marginalized arguments, and exemplify how things could have gone otherwise, the reader is led to a thought-experiment that can prove extremely useful to reopen the legal and political imagination of EU law. To put it differently, re-opening the files of the Court's foundational cases allows for a counterfactual exercise. *What if* competition law had been defined differently in *Grundig*? *What if* the Court had accepted the Member States' argument on the difference between public and private? This is not just a play of mind as it emancipates EU law from a sense of necessity and it exposes more explicitly the normative choices made by the Court all along the way.[10] Just as alternative legal pasts of Europe emerge to the forefront, it may become easier to conceive of alternative futures for EU legal integration.

[10] I Venzke, 'What if? Counterfactual (Hi)Stories of International Law' (Amsterdam Law School Research Paper 66-2016).