ARTICLES

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

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THE BENEFITS OF TIME TRAVEL: HARNESSING THE POTENTIAL OF THE HISTORICAL ARCHIVES OF THE COURT OF JUSTICE FOR LEGAL RESEARCH

NIAMH NIC SHUIBHNE*

ABSTRACT: This *Article* engages with a core objective of the Court of Justice in the Archives Project: how best to demonstrate and evaluate the potential of the Historical Archives of the Court of Justice for the purposes of deepening and furthering legal research. It considers two forms of novelty in that light: first, finding out things that are "literally" new; and, second, being alerted to analytical possibilities that arise from looking deeply into a case dossier. To illustrate these instances of research novelty, the *Article* identifies themes – as well as questions – emerging from the individual reports and from the transversal analysis made possible through the Project, highlighting particular strengths or "added value" factors in that context. It also reflects on the limits of the Archives from the perspective that not all Court of Justice mysteries can, or should, be uncovered.

KEYWORDS: case dossier – transversal analysis – argumentation – evidence – admissibility – legal methodology.

I. INTRODUCTION: THE ADDED VALUE OF THE ARCHIVES FOR LEGAL RESEARCHERS

In his *Article* for this Special Section, Morten Rasmussen underlines the promise and the significance of interdisciplinary research on the case law of the Court of Justice of the European Union (CJEU) and articulates, more specifically, the best practices of historical methodology in that light. That growing body of work has enabled EU lawyers to appreciate and understand critical case law steps in the evolution of EU law in a far more

* Professor of EU Law, University of Edinburgh, niamh.nicshuibhne@ed.ac.uk.

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rounded way; most strikingly through research that animated and, in a positive sense, demystified the judgments in *Van Gend en Loos* and *Costa* through lenses of analysis other than legal ones.[1] Turning the historical lens back on legal researchers, this *Article* considers the ways in which the Historical Archives of the Court of Justice in general and the findings of the Court of Justice in the Archives Project (the Project) more specifically can add value for scholars who examine the Court's case law through primarily doctrinal methods – for the purposes, to steal from the Project's aims, of "deepening and furthering legal research". It is written, in other words, from the perspective of a researcher who engages with the case law of the Court of Justice more or less every working day.

Around the same time as the Project commenced, I was re-reading all of the Court's judgments on the development of social security law; what the Project compelled me to consider more carefully was: why am I doing this, and what do I think I can actually find (out)? At one level, I was immersing myself in critical foundational case law to try to understand more about the genesis of a field and, more particularly for my own research, to trace the origins of certain principles that emerged to shape a legal framework – and which have endured, in their essentials, almost to this day. What I realised I could not answer, though, was *why* these principles, not others, became the legal framework's compass points.

"Why" certain judicial choices are made – and even, what the choices actually involved – is one of the most difficult questions to answer for a Court that publishes for each case just one collegiate judgment agreed to, publicly, by all of the judges involved in the making of it; who are, in turn, bound by a stringent commitment to the secrecy of their deliberations. If judgments are stripped of any traces of formative debate or disagreement, they produce "a version of the law that is, or can be, strangely bloodless".[2] Another consequence of the Court's unknowability, pointed to by Antoine Vauchez, is that "cases form a terrain of contention and trigger a collective, and at times conflictual, process of meaning-building that takes place in a variety of arenas from courts to learned societies, law schools, or EU institutions".[3] Analysis of and debate on the case law must, in that sense, remain speculative to a certain extent; "the Court" can never really confirm or deny. But can the Archives shed more light on "why" questions for legal scholars?

For present purposes, we should perhaps distinguish between, first, "why" questions in a subjective sense, though these are not necessarily or always beyond the reach of deep

[1] *E.g.* M Rasmussen, 'From Costa v ENEL to the Treaties of Rome: A Brief History of a Legal Revolution' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 4; A Vauchez, 'The Transnational Politics of Judicialization. Van Gend en Loos and the Making of EU Polity' (2009) ELJ 1.

[2] M Pollack, 'Learning from EU Law Stories: The European Court and Its Interlocutors Revisited' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 577.

[3] 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.

archival research, as historical analysis of *Van Gend en Loos* and *Costa* has already shown us; and, second, "why" questions in a more objective sense. What this Project demonstrates is that looking deeply into a case *dossier* can bring true novelty for legal researchers around objective "why" questions, as explained in section II. A note of caution, though, about limiting – or at least, managing – our expectations of what the Archives might reveal is worthwhile. We can never be "in the room" to witness judicial deliberations, historically or otherwise. Moreover, as the fascinating Project reports illustrate, the *dossiers* vary enormously in terms of content as well as in the balance between publicly available content and non-publicly available content.[4] In other words, in the light of structural features (and choices) that constrain deeper external understanding of the Luxembourg way of judging, the Archives can offer "insights" but cannot reveal or confirm "motivations".[5]

Investigating the Court in historical perspective reminds us too that "the institution" being viewed through the Archives – especially in terms of its size, its workload, and the historical stability of relationships and engagement that coalesced, in effect, around one core judicial grouping – does not actually exist anymore, which might, in turn, condition the transferability of insights gained; particularly on more procedural questions around case management: what can the administrative decisions and practices of "that" Court realistically tell us about the Court that we aim to investigate now? Additionally, the extent of redacted text in some *dossiers*[6] provokes not just frustration but maybe even suspicion: why *that* text; what is the Court "hiding"?

Even with these caveats in mind, though, this Project convinces beyond any doubt that remarkable benefits await legal researchers who might be willing to embark on a little time travel.

II. Travelling across time and across cases: transversal project insights

Exploring a *dossier* from the Archives enables a "deep reading" of the case in question, and often for the very first time. As a novel source for research, there is then the potential to unearth what might have remained otherwise unknowable. The *dossier* therefore presents opportunities for amplifying dimensions of our understanding of case law stories that are

[4] For example, compare R Munro and R Williams 'Caught in the (Red)Act: Insights from the *Van Duyn Dossier*' (2021) European Papers www.europeanpapers.eu 589, 591 ("the parties' argumentation was largely reflected by the court") with M Patrin, '*Meroni* Behind the Scenes: Uncovering the Actors and Context of a Landmark Judgment' (2021) European Papers www.europeanpapers.eu 539, 543 ("Only a tiny percentage of the arguments of the parties contained in the dossier de procédure are reflected in Meroni's public documents [...] Therefore, the parties' submissions reveal many aspects of the dispute that were previously unknown").

[5] D Ginés Martín, 'The Court of Justice, Genuine Disputes and Jurisdictional Control: Making Sense of *Foglia II* in Light of Its *Dossier*' (2021) European Papers www.europeanpapers.eu 655.

[6] See *e.g.* R Munro and R Williams, 'Caught in the (Red)Act' cit.; G Bacharis '*Consten and Grundig* and the Inception of an EU Competition Law' (2021) European Papers www.europeanpapers.eu 533.

seemingly already well told and already well known.[7] Moreover, it is enticingly and entirely possible that *dossiers* will produce novelty in the most literal sense: that we might actually discover aspects of a case that were not previously known to us at all. In that meaning, perhaps one of the most striking discoveries from the Project is that a *dossier* concerning infringement proceedings opens up for the legal researcher access to the papers constituting the pre-litigation phase.[8] This could prove to be an extraordinary resource over time.

But beyond new findings associated with each case investigated through the Project in an individual sense, this *Article* seeks to emphasise that the reports have yielded a research resource greater than the sum of the parts; organised here around the key elements of any historical drama: first, there are the characters or players; second, there is the substantive contribution of each case as an "episode" in the drama; and, third, there is the broader arc of the story, which develops over time.

Looking, first, at the significance of the *characters*, the reports underline above all the multiverse of contributors that participate in and can therefore influence the evolution and/or outcome of a case. It was absolutely striking to me that few Project reports addressed the most "deliberative" publicly available resource on which legal researchers (must) usually rely: the Opinion of the Advocate General; which has acquired even greater salience as an articulated repository of the arguments and perspectives offered by all of the players involved in a case now that reports for the hearing are no longer accessible through any means.[9] Reading across the reports collected for this Project, it is the national judges (and national judgments) as well as the intervening Member States and institutions that come out of the shadows as "legal entrepreneurs"[10] alongside, more expectedly, the parties directly involved in the case itself – though we can also find examples of cases that seemed to acquire legal life independently from what the dispute was actually "about" and/or how the players involved had actually characterised or argued it.[11]

Considering, second, the substantive contribution that each case makes on its own terms, the findings highlight that cases are, in the end, the products of dynamic, collaborative and iterative processes; perhaps precisely because of the interactive, paper-centred procedure practised before the Court, but traceable in action only through reviewing a case *dossier*.[12] Even the now defunct report for the hearing represented, in reality, a summary

[7] For an example of legal research that taps into the Archives to undertake deep reading in this way, see *e.g.*, R Schütze, 'Re-reading Dassonville: Meaning and understanding in the history of European law' (2018) ELJ 376.

[8] See *e.g.*, A Michiels, '*Commission v Belgium* and its *Dossier de Procédure*: A New Resource for Socio-legal Research' (2021) European Papers www.europeanpapers.eu 643.

[9] See further, Editorial, 'The Court of Justice in the Archives' (2019) CMLRev 903. In contrast, it is very much welcomed that the Court of Justice now makes the referring court's request for a preliminary ruling available on its website for proceedings under art. 267 TFEU.

[10] D Ginés, 'The Court of Justice, Genuine Disputes and Jurisdictional Control' cit.

[11] See *e.g.*, M Patrin, '*Meroni* Behind the Scenes' cit.

[12] *Ibid*.

of contributions that someone else had already filtered before presenting it to us. In contrast, the *dossier* lays bare the full extent – and co-produced quality – of argumentation before the Court. Without drilling into the Archives, how can we know now or into the future how argumentation evolved and who contributed to it, beyond what an Advocate General or the Court in its judgment selects to digest for us? These gaps in knowledge are not just resonant for legal scholarship; they have significance for the shaping of litigation strategies in practice too;[13] especially when it is remembered that, through the preliminary ruling procedure in particular, most case law actors will find themselves having to make arguments before the Court of Justice only rarely or sporadically.

Five further insights about the nature of "EU case" arguments can be drawn from the Project findings. First, interrogating the full span of a case *dossier* can reveal something about the "atmosphere"[14] at the Court at the time – about the extent to which the argumentation or reasoning that shaped case outcomes connected to the wider economic, political or social dimensions of the case; and producing, in turn, opportunities for meaningful interdisciplinary research.[15] This connects, once again, to the enrichment of litigation strategies, especially on the significance of evidence – revealing more about how it is used, and how lawyers can best prepare and engage with it.[16] However, the research has also suggested that the wider context can, in some cases, seem strangely subdued.[17] Second, the *dossiers* reveal some divergence in terms of the use of (at the time) "non-Community sources" of law as between the parties and interveners, on the one hand, who tended to engage more with national and international law, and the Court itself, on the other, occupied more consciously with the building of "Community law".[18] It will be interesting to trace this point over time. Did "Community law" become more embedded for case law actors; and does success before the Court of Justice depend at least in part on the extent to which those participating can think and argue in terms of – can speak the language of – EU law? Third, *dossiers* offer tantalising glimpses of different outcomes; illuminating sharp crossroads moments where decisions made by the Court have proven to be so critical because they could very credibly have gone a different way.[19] Again, over time, we might start to see that paths not taken at a particular historical point in time were in fact rediscovered later on. Fourth, a deep reading of the case *dossier* can unearth the significance of procedural

[13] See *e.g.*, G Bacharis, '*Consten and Grundig* and the Inception of EU Competition Law' cit.

[14] J Kukavica, 'The Garden Grows Lusher: Completing the Narratives on Opinion 1/75' (2021) European Papers www.europeanpapers.eu 621.

[15] A Michiels, '*Commission v Belgium* and its *Dossier de Procédure*' cit.

[16] See *e.g.*, S Tas, '*Defrenne v SABENA*: A Landmark Case with Untapped Potential' (2021) European Papers www.europeanpapers.eu 633.

[17] See *e.g.*, R Munro and R Williams, 'Caught in the (Red)Act' cit.

[18] See *e.g.*, G Bacharis, '*Consten and Grundig* and the Inception of EU Competition Law' cit.

[19] *Ibid*.

dimensions; opening up reflections on what we might think of as "substantive proceduralism".[20] However, limitations about the transferability of historical insights on procedural questions that were noted in section I should be recalled in that respect.

Fifth, while the Archives can disclose how perspectives or concerns – whether those of the parties directly involved in the dispute or, for example, of Member States that intervened in the case – shaped legal outcomes and can explain, far more than the judgment on its own, why certain phrases or formulas came into being (as well as the often quite specific factual matrixes that can end up shaping very general legal tests),[21] a clearly recurring theme across the Project reports is that arguments are often "disregarded" or "ignored" or "overlooked" by the Court.[22] These findings suggest gaps between matters of legal importance for the case law actors and for the Court respectively – or, perhaps more accurately, on the presentation of them.[23] This tactic raises questions about judgment silences that can be both constructive, for the project of law-building (since the narrative is not then confused by alternatives), and destructive, in terms of trying to understand the outcome of a case as an "episode" on its own terms. One striking example is that admissibility is clearly of far greater concern, and in legal as much as tactical terms, for the parties involved in the dispute than for the Court, which often dismisses extensive (as we can see because of the Archives) argumentation on that question with the tersest of statements.[24]

It is entirely logical that the Court has taken a very broad view of admissibility; this approach has certainly extended the reach of EU law into national spheres, but it has also fostered the accessibility and utility of the preliminary ruling procedure from the perspective of national courts and tribunals. Judgments of the Court are often at their most cryptic when "explaining" admissibility choices; yet the Project reports demonstrate that a wealth of argumentation might provide resources for deeper analysis. Admissibility can provoke controversial dilemmas that still, occasionally, come to the fore. For example, one of the recent Orders of the Vice-President of the Court in *Council of the European Union v Sharpston*, proceedings relating to the appointment of a new Advocate General to replace Advocate General Sharpston in the context of Brexit, dismissed an application for interim measures but also included striking – and strikingly substantive – findings about the nature of the

[20] See *e.g.*, J Kukavica, 'The Garden Grows Lusher' cit.

[21] See *e.g.*, J Muller, '*Procureur du Roi v Dassonville*: the Judicial *Dossier* Behind the Measure Equivalent to Trade Restriction *Formula*' (2021) European Papers www.europeanpapers.eu 579; demonstrating how "the famous formula" is grounded "in the parties' reality" and exposing the cross-institutional perspectives at work behind the scenes of this case, bringing to light the contributions of various institutional actors including the European Parliament.

[22] See *e.g.*, S Tas, '*Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*' cit.

[23] Explored through the lens of "judicial restraint" in A Petti, '*ERTA* and Us: Shifting Constitutional *Equilibria* on the Visions of Europe' (2021) European Papers www.europeanpapers.eu 567.

[24] More directly on admissibility, see D Ginés, 'The Court of Justice, Genuine Disputes and Jurisdictional Control' cit.

"manifestly inadmissible" main action.[25] The pertinence of admissibility will surely be reignited as a result of this case law; but the Project reports show that it is almost always an active concern for case law players even if it is under-appreciated more generally.

Thinking, finally, about case law in terms of wider story arcs, the Project reports connect vividly to scholarship that tracks the migration of ideas across place and time; evoking the contrast between Vauchez's advocacy of "thick description [of] cases *as* political, legal, and social 'events' that are fully part of the history of the European Union" and passive consolidation of accounts reproducing an "uninterrupted and consistent chain of cases that map out the EU legal landscape".[26] The Project does present a challenging paradox in this respect, since the *dossiers* – as well as the reports examining them – underline, at one level, and in a very affecting way, that cases are above all else disputes between the parties actually involved in them. In other words, spending time with the *dossier* has the effect of "re-personifying" a case quite powerfully. We are more familiar and perhaps more comfortable, as legal researchers, with doing precisely the opposite; concentrating instead on the more abstract project of fitting case law episodes together. In doing so, we move away from the specifics of each case on its own terms; we lose sight of each case's own story.

That assertion does not overlook the active mobilisation of legal disputes for the sake of change, even where this happens with the full blessing of the relevant parties. But deeper mining of case materials can, at the same time, illustrate how cases can become problematically detached from the parties involved; or even from the origins or parameters of the concrete dispute – exposing where this occurs because, for example, the eventual legal outcome was clearly under-argued in the pre-judgment process; or even where it seemed to manifest from nowhere, appearing only in the judgment as the very final *dossier* resource. That perspective raises, in turn, far more questions than answers; making the researcher feel upon exiting one *dossier* – or even, as in this Project, exiting from several of them – that the level of work needed to realise a sincerely deep reading of the case law of the Court of Justice is disconcertingly beyond reach.

What the Project therefore convinces of most of all is that the Historical Archives of the Court of Justice deserve analysis *at scale*: which can be realised both through the incremental work of legal explorers who disseminate their "wayfinding"[27] through the "paper trails"[28] laid by individual *dossiers* as well as larger, collaborative work that builds on the route charted so fruitfully by the *Court of Justice in the Archives* Project.

[25] Case C-424/20 *Représentants des Gouvernements des États membres v Sharpston* ECLI:EU:C:2020:705, order of the Vice-President of the Court; and compare the approach taken in the Order with the analysis of how admissibility was differently instrumentalised in A Petti, 'ERTA and Us' cit.

[26] A Vauchez, 'EU Law Classics in the Making' cit. 21.

[27] M Bond, *Wayfinding: The Art and Science of How We Find and Lose our Way* (Picador 2020).

[28] A Michiels, '*Commission v Belgium* and its *Dossier de Procédure*' cit.

In that vein, inspired directly by the path-breaking work undertaken by all of the Project's researchers, I have now requested a case *dossier* for the first time myself. In my previous research on the building of EU social security law, I could identify one of the fundamental legal principles that clearly shaped the Court's approach – the objective of ensuring the "greatest possible freedom of movement" for EU workers[29] – but I could not, from researching the publicly available case law materials alone, establish the origins of that principle or understand "why" it was chosen as the lodestar of the nascent legal framework for free movement rights. As a novice time traveller, I am curious to see if the *dossier* for *Unger* might hold some clues.[30] I will keep you posted.

[29] See further, N Nic Shuibhne, 'Reconnecting free movement of workers and equal treatment in an unequal Europe' (2018) ELR 477.

[30] Case 75/63 *Unger v Bedrijfsvereniging voor Detailhandel en Ambachten* ECLI:EU:C:1964:19.