The Faceless Court

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# Table of Contents

I. Introduction ..................................................................................................................4

II. How the Court Works ..................................................................................................8

III. Career Structure and Incentives ..................................................................................10
   A. EU Judges ..................................................................................................................11
      i. Selection ..................................................................................................................11
      ii. Compensation Structure .....................................................................................14
      iii. Workload Crisis and Moral Hazard ..................................................................18
   B. Référendaires .............................................................................................................25
      i. The Labor Market ..................................................................................................26
      ii. Career Structure and Conservatism ..................................................................29
      iii. Revolving Door .................................................................................................31

IV. The Dominance of French Judicial Culture .................................................................34
   A. EU Judges ..................................................................................................................35
      i. The Historical Origins of Legal Traditions ..........................................................35
      ii. The Consequences of the French Legal Tradition ..............................................38
      iii. The French Dominance .....................................................................................40
   B. Référendaires .............................................................................................................43

V. The Decision-Making Process .......................................................................................45
   A. The Aversion to Competition Appeals ......................................................................45
   B. The Dilemma of the Lower Court ..........................................................................47

VI. Conclusions and Implications ....................................................................................49

VII. Data Appendices .........................................................................................................52
Abstract

This Article is the first to study EU competition law by examining the behavior of judges and their law clerks (officially entitled référendaires) at the Court of Justice of the European Union, against the unique institutional settings in Europe. The study is both quantitative and qualitative. It provides the most comprehensive and up-to-date analysis of the background of judges and advocates general appointed to the Court since 1952. It is also the first to provide a statistical analysis on the background of référendaires. As the background of référendaires is not publicly disclosed, I hand-collected data from LinkedIn and created a dataset of 103 former référendaires and 74 current référendaires working for the Court. The study also benefits from a field trip I conducted in May 2014 and extensive interviews with former and current members and staff at the Court.

The Article has several major findings. First, the quality of EU judges varies significantly, due to a lack of procedural safeguards for appointment and a high salary that attracts political appointees. As a consequence, some judges are dominated by their référendaires. Second, both judges and référendaires, especially those at the General Court, face increasingly heavy caseloads owing to a number of inherent institutional defects. This increases the pressure on judges and their référendaires to compromise quality for quantity. It also means that more work must be delegated to référendaires. Third, référendaires are drawn from a relatively closed social network due to the lack of an open platform for recruitment. The inefficiency of the référendaire labor market results in less competition, leading many référendaires to stay longer at the Court. Meanwhile, the French style of judicial formalism increases the value of career référendaires, who become powerful conservative forces that resist changes and reform. Fourth, the revolving door between the Court and the Commission helps the latter exert influence on the Court from the inside and gain a comparative advantage in litigation. Fifth, the French legal tradition, with its emphasis on empowering the State rather than protecting individual liberty, has a dominant influence on EU judges. Meanwhile, référendaires come from a relatively homogeneous background and most of them are Francophones trained in the French legal system. Sixth, the division of labor between the lower court and the higher court creates divergent incentive structures for judges and référendaires working at different levels. While a small group of judges and référendaires at the lower court have an incentive to modernize the formalistic case law by introducing more economic analysis, they are unable to do so as the ruling could be struck down by the higher court. At the same time, while the higher court is in a position to innovate, many judges and référendaires there lack the incentive to do so as competition policy is peripheral to the constitutional law debate.

This Article further sheds light on understanding why the differences between US antitrust law and EU competition law have persisted, despite powerful forces of globalization and convergence. As institutional change is path-dependent, evolution within each of these systems is only gradual. The Article thus suggests that such a divergence is likely to persist in the future. Achieving a sound understanding of the Court is the key to legal reform. The Article concludes by contributing to the ongoing debate about how to reform the Court.
I. INTRODUCTION

Antitrust is a global enterprise. Yet despite the powerful forces of globalization and the pressure for convergence and harmonization, pronounced differences remain between the United States and the EU, the world’s two most advanced antitrust regimes. Experts have attributed this divergence primarily to the jurisprudence of the highest court in each jurisdiction. What explains these differences? And, perhaps more pertinently, will such differences persist or disappear in the years and decades to come?

This Article sheds light on these questions by showing that there are significant sources of path dependence in the judicial lawmaking of antitrust law. Judges who “make” law must face a set of institutional constraints. These “humanly devised constraints” include not only formal rules which can be subject to radical changes, but also informal constraints such as customs and traditions which tend to be sticky. These institutional constraints shape the incentive structure of judges, nourish their ideologies and beliefs, and have a direct impact on their behavior. In the United States, judicial behavior has been a popular subject deeply explored by legal scholars, political scientists, economists, and sociologists. The vast majority of this literature focuses on US judges, and naturally is predicated on the institutional settings in the United States. The study of international judges, meanwhile, remains a nascent field. This Article is the first to conduct an empirical study of judicial behavior and EU competition law against the unique institutional settings in Europe.

The focus of the inquiry is on the Court of Justice of the European Union (the Court), particularly since its expansion in 2004. In the political science literature the Court is depicted as activist, constantly expanding the scope of EU law and pushing its boundaries. Through a series of innovative decisions in the 1960s, the Court is said to have effectively “constitutionalized” Europe. While the Court is frequently

2 Eleanor M. Fox, Monopolization and Abuse of Dominance: Why Europe is Different, 59 ANTITRUST BULL. 129, 139-143 (2014).
3 Id., at 150.
5 Id., at 6. See also generally Katharina Pistor, Legal Ground Rules in Coordinated and Liberal Market Economies, in CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE US 249 (Klaus J. Hopt et al. eds., 2006).
6 See e.g., THE ECONOMICS OF JUDICIAL BEHAVIOR (Lee Epstein eds., 2013).
7 For clarity, competition law is used interchangeably with antitrust law in this Article and does not include state-aid cases.
8 See e.g., HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986); ALEC STONE SWEET, THE JUDICIAL CONSTRUCT OF EUROPE (2004); KAREN ALTER, THE EUROPEAN COURT’S POLITICAL POWER (2009); JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE (Mark Dawson et al. eds., 2013).
condemned for doing too much while fulfilling its constitutional function, it has also been criticized for doing too little. When acting as the administrative court dealing with appeals against the decisions of the Directorate General for Competition (DG Comp) of the European Commission (the Commission), the Court often seems content to retreat from rigorous judicial review by deferring to the expertise of the latter or by engaging in formalistic and legalistic analysis. For instance, in highly salient cases such as Microsoft, the General Court decided to defer to the Commission when it comes to “complex economic or technical analysis”, whereas in Intel it was persuaded by the Commission that the reliance on formalistic precedents was sufficient and completely dispensed with economic analysis. Similarly, in cartel cases the Court has tended to defer to the Commission when it comes to fine-based sanctions, despite the fact that it enjoys unlimited jurisdiction in evaluating the fines.

This phenomenon is hardly unique to competition law. But the trend is particularly worrisome for the field, because it is one of the few areas of EU law where the Commission has direct enforcement powers and judicial review is the last and only constraint that the Commission faces during its enforcement process. Competition is also a field that particularly concerns private international businesses. In recent years, large US technology giants such as Microsoft, Intel, Qualcomm, Apple and Google, as well as financial services multinationals such as Visa and MasterCard have all been challenged by the Commission for competition violations. If the Court fails to


11 Forrester, supra note 10, at 23-25.


14 As the substance of EU law becomes more technical and sophisticated, the Court has been alleged to exercise “light judicial review” in other areas. See e.g., Alberto Alemanno, Science and EU Risk Regulation: The Role of Experts in Decision-Making and Judicial Review, CONNEX REPORT SERIES No. 6 (2008), at 23, available at: http://ssrn.com/abstract=1007401; see also Eric Barbier De la Serre & Anne-Lise Sibony, Expert Evidence Before the EC Court, 45 COMMON MARKET L. REV. 941, 953 (2008); Roberto Caranta, Evolving Patterns and Change in EU Governance and their Consequences on Judicial Protection, in TRADITIONS AND CHANGE IN EUROPEAN ADMINISTRATIVE LAW 15 (Roberto Caranta & Anna Gerbrandy eds., 2011); cf Ellen Vos, The European Court of Justice in the Face of Scientific Uncertainty and Complexity, in JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE 143-144 (Mark Dawson et al. eds., 2013).
provide adequate scrutiny of the Commission’s actions, the Commission would effectively monopolize the whole enforcement process, thus turning competition enforcement into a pure administrative process.15 Such danger has already been made apparent as litigants, discouraged by the dim hope of success at the Court, have increasingly chosen to settle with the Commission rather than contesting their cases in Court.16

There are, however, a few notable exceptions. In some early competition cases,17 as well as a number of merger cases in early 2000s, the Court engaged in extensive and in-depth economic analysis, striking down a series of the Commission’s decisions. The impact of these rulings was far reaching, triggering a major internal restructuring within the Commission. Practitioners and academics further note that the willingness of the Court to engage in economic analysis also varies depending on the type of proceedings, observing that the Court seems more engaged in economic analysis in preliminary reference proceedings than in actions for annulments.18 The variance of the Court’s approach to economic analysis and its standard of review has caused much confusion to practitioners and academics, who accuse the case law of being inconsistent, illogical, and incomprehensible.19

Why does the Court seem so bold and daring in some cases, but dull and timid in others? Existing literature has tried to rationalize EU competition law by resorting to legislative history,20 philosophical underpinning,21 black-letter statutes or case law.22

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15 This phenomenon has been observed in other jurisdictions such as China. See Angela Huyue Zhang, Bureaucratic Politics and China’s Anti-Monopoly Law, 47 CORNELL INT’L L. J. 671 (2014).


18 See Bellis, supra note 10, at 34. See also Pablo Ibanez Colomo, The Law on Abuse of Dominance and the System of Judicial Remedies, 32 YEARBOOK OF EUROPEAN LAW 389, 406 (2013). Preliminary reference proceedings are proceedings dealing with questions referred to the Court by member State courts; actions for annulments are proceedings dealing with the application to annul an action by the EU institution.

19 See Forrester, supra note 11, at 41-42; see also Colomo, supra note 12, at 406. Noted that the variance of the standard of review is not limited to competition. Craig has observed such variance across the entire sphere of EU administrative law. See PAUL CRAIG, EU ADMINISTRATIVE LAW 409-29 (2012 2nd eds.)

20 See e.g., THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW (Kiran Klaus Patel & Heike Schweitzer eds., 2013); Pinar Akman, Searching for the Long-Lost Soul of Article 82 EC, 29 OXFORD J. LEGAL STUD. 267 (2009).

21 See generally DAVID GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998); Heike Schweitzer, The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORM APPROACH TO ARTICLE 82 EC (Claus-Dieter Ehlermann & Mel Marquis eds., 2008).
Such assessment tend to view the Court as a black box and ignore one crucial element in judicial law making—human behavior. Indeed, if we view judicial outcome as a good, its output is mainly determined by two factors. One is the input of human capital. The other is the process of producing the good, in this case, the process of how decisions are made. To understand judicial output, it is therefore essential to make an in-depth inquiry into both the decision-makers and the decision-making process, as well as the underlying institutional framework within which they operate.

However, this task is far from easy. Since its establishment, the Court has adopted a secretive deliberation process, with judges prohibited from revealing how the Court reached its decision in a particular case. Another daunting challenge is the secrecy of the decision-makers themselves. While judges’ profiles are disclosed by the Court, the Court does not publish any information on their law clerks (officially entitled “référendaires”). But référendaires play an important and indeed sometimes crucial role in the decision-making process. Despite these challenges, this Article hopes to draw a sketch of the faces behind the Court.

One caveat must be entered here. Like most early efforts, the one represented in this Article may be crude and groping. It does not seek to explain every single decision made by the Court. Rather, it is an attempt to understand how judges behave under the institutional constraints that the European legal system imposes, particularly in regard to competition law cases.

This project is inherently interdisciplinary and builds upon various strands of literature in law, economics, political science, sociology and psychology. It is also both quantitative and qualitative. Based on the public information disclosed by the Court, I provide a summary statistics of the background of the judges and advocates general appointed by the Court since 1952. As the background of référendaires is not disclosed, I hand-collected data from LinkedIn, a professional social networking website, and created a dataset of 103 former référendaires and 74 current référendaires working for the Court. In addition, I use data collected from the Court’s annual reports and database to analyze how exogenous factors such as caseload and the implicit hierarchy among cases can influence judicial incentives. In May 2014 I made a field trip to Luxembourg and during the subsequent twelve months I

23 See Art. 2, the Statute of the Court of Justice of the European Union (2012).
24 Référendaires are also referred to as“legal secretaries” in English.
25 The role of advocates general is explained in more detail in infra Section II. See also Iyiola Solanke, “Stop the ECJ”, An Empirical Analysis of Activism at the Court, 17 EUROPEAN L.J. 764 (2011).
26 The Court has established a search database for cases. It is publicly available at: http://curia.europa.eu/juris/recherche.jsf?language=en
conducted twenty extensive interviews with former and current members and staff of the Court.²⁷

The Article is organized as follows: Section II sets the stage by providing a sketch of the EU judicial process. Section III examines the career structures of the decision-makers, including judges and référendaires, and analyzes how these structures influence their behavior. Section IV delves into the legal traditions in Europe and explores the (potentially) dominant influence of French judicial culture on the Court. Section V probes into the unique division of labor between different levels of the Court and analyzes how such an arrangement could influence the incentive structures of the EU judges. Section VI concludes and provides implications for this study. The summary statistics of the judges and référendaires are presented in Section VII.

II. HOW THE COURT WORKS

The Court comprises three tribunals: The Court of Justice, the General Court, and the Civil Service Tribunal. Both the Court of Justice and the General Court are composed of one judge from each EU country. The Civil Service Tribunal comprises seven judges. As the Civil Service Tribunal specializes in staff cases, it is excluded for the purpose of this study. At the Court of Justice, there are also nine advocates general, with six of whom are appointed from the largest EU member states (including Germany, France, Spain, Poland, the UK and Italy). The final three positions rotate among the remaining EU countries. Similar to judges, advocates general are also officially “members” of the Court and indeed enjoy status equal to judges. However, they do not participate in the deliberation of cases. Rather, they provide an independent reasoned opinion to the Court, thus playing the role of a quasi-decision-maker. In this Article, judges and advocates general are both referred to as “EU judges”.

At each level of the Court, every judge or advocate general is entitled to three clerks (officially entitled référendaires); some judges who assume management responsibilities are entitled to four référendaires. Judges at the Court of Justice have additional help from administrateurs juristes, who are lawyers but do not work on cases directly. Currently there are 123 référendaires, 22 administrateurs juristes working at the Court of Justice and 94 référendaires at the General Court.²⁸

The Court of Justice is the highest court for the European Union, but it also acts as the Court of first instance for certain matters. Its work falls within two main categories. The first category involves direct actions against member states or EU institutions, as well as appeals from the General Court. The second category includes preliminary rulings, which are proceedings in which the Court gives clarification to a national court when the latter is in doubt about the interpretation or validity of an EU law. The

²⁷ The interviews were conducted either face to face or over the phone and lasted for about an hour on average. The interviews were open-ended and usually initiated by questions derived from my curiosity and uncertainty.

²⁸ Data requested from the Court (March 18, 2015).
work of the Court of Justice encompass all areas of EU law, such as constitutional cases involving free movements and fundamental rights, tax, environment, intellectual property, competition, state aid and social policy. The General Court is the lower level of the Court. It hears actions against EU institutions, though certain matters are reserved to the Court of Justice. It mainly deals with fact-intensive cases involving competition, state aid, trade, agriculture or trademark. Cases heard at the first instance by the General Court may be subject to appeal to the Court of Justice on points of law only.

EU judicial law-making is a cooperative enterprise and judges work together in a committee. At the Court of Justice there are ten chambers, each consisting of three to five judges. At the General Court there are nine chambers, each consisting of three judges. Certain types of important cases are reviewed by the grand chamber, which comprises the President, the Vice President, the Presidents of Chambers and a number of other judges. Extremely important cases are decided by a plenary session of the whole court. The composition of the chambers changes from time to time, and the presidency of the chambers rotates annually.29

At the Court of Justice, the President allocates a case to one judge as rapporteur and the first advocate general30 to one advocate general (though advocates general are no longer appointed in every case due to workload concern). The rapporteur assumes the responsibility of drafting the report of the hearing, which is essentially a summary of the parties’ arguments, and a preliminary report, which is purely an internal document for purposes of deliberation. The preliminary report summarizes the legal and factual background of the case, and concludes with the personal observations and recommendations of the rapporteur judge. The advocate general does not participate in the deliberation of the case, and will issue his own independent opinion. Once the advocate general has delivered the opinion, the rapporteur then circulates a note to the other judges in the panel providing his suggestions of how the case should be handled.

The deliberation among judges takes place behind closed doors and référendaires are not allowed to participate in the process. Even if there is disagreement among the judges, the Court only issues one single judgment and no dissenting opinion is allowed. In reality the rapporteur and the advocate general will be most closely involved in the case as they assume most of the responsibilities of drafting. They also gain the first mover advantage in influencing other judges on the panel in how to decide the case. The General Court largely follows a similar process, except that it has no dedicated member serving as advocate general, and advocates general are instead appointed on an ad hoc basis from among the judges.

As the EU’s main executive arm, the Commission is the most frequent party appearing in front of the Court. Since the Court’s establishment, the Commission has

30 The First Advocate-General assumes some management role in deciding whether to review certain appeals from the General Court and to allocate cases among advocates general.
served as a party in over 52% of the cases. While member states have primary responsibility for applying EU law, the Commission monitors its application and may bring infringement action against a member states for non-compliance. With regard to competition, the Commission acts as both the investigator and prosecutor and can bring actions directly against individuals and companies.

This Article focuses on how the Court behaves particularly in regard to competition cases, but it is important to note that competition is only a small part of what the Court does. As shown in Table 1 below, from 2005 to 2014, competition accounted for only 4% of all the cases decided by the Court of Justice. Similarly, although the General Court was initially created to deal with competition cases, the portion of such cases was diluted over the years as the Court’s jurisdictional competence expanded. Table 1 shows that during the same period competition accounted for only 7% of all cases handled by the General Court, whereas intellectual property (IP) cases accounted for 29%.

Table 1: Categories of Cases Handled by the Court (Year 2005 to 2014)

<table>
<thead>
<tr>
<th>Main Categories</th>
<th>Court of Justice</th>
<th>General Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture and Fisheries</td>
<td>7%</td>
<td>5%</td>
</tr>
<tr>
<td>Competition</td>
<td>4%</td>
<td>7%</td>
</tr>
<tr>
<td>Fundamental Rights</td>
<td>2%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Free Movement</td>
<td>23%</td>
<td>2%</td>
</tr>
<tr>
<td>Tax</td>
<td>9%</td>
<td>0%</td>
</tr>
<tr>
<td>Environment</td>
<td>9%</td>
<td>3%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>8%</td>
<td>29%</td>
</tr>
<tr>
<td>State Aid</td>
<td>4%</td>
<td>8%</td>
</tr>
<tr>
<td>Area of Freedom, Security and Justice</td>
<td>5%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Citizenship</td>
<td>2%</td>
<td>0.09%</td>
</tr>
<tr>
<td>Social Policy</td>
<td>5%</td>
<td>0.3%</td>
</tr>
<tr>
<td>Provision Governing The Institution</td>
<td>3%</td>
<td>6%</td>
</tr>
</tbody>
</table>

III. CAREER STRUCTURE AND INCENTIVES

Judges are, as Posner called them, “all-too-human workers”. And like other humans, judges derive their utility from maximizing the sources of their satisfaction; these include not only income, but also non-pecuniary compensation such as prestige, power and leisure. However, unlike labor participants working for private organizations, the performance of EU judges is largely insulated from performance review. To be sure, the Court’s judgments are often subject to criticisms, but the nature of judicial rulings will always create winners and losers. As long as judges do not commit gross mistakes and faithfully apply the EU treaties, a judge’s career will

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31 I hand-collected this data using the Court’s database available here: [http://curia.europa.eu/juris/recherche.jsf?language=en](http://curia.europa.eu/juris/recherche.jsf?language=en) (this data include all cases decided by the Court from its establishment to August 27, 2015).

32 I hand-collected the data based on the Court’s annual reports from 2005 to 2014.

33 RICHARD A. POSNER, HOW JUDGES THINK 7 (2008).
normally be secure no matter what interpretation he applies to the statute. Moreover, the loosely-worded EU treaties provide plenty of room for EU judges to make law. The unobservability of judicial output could therefore lead to problems of adverse selection and moral hazard. This, however, does not mean that judges are free from any constraints. The selection process for judges and référendaires, as well as the incentives and constraints imposed by the structure and rules of their careers, in fact has a significant impact on how they behave.

A. EU Judges

Since the establishment of the Court in 1952, 184 men and women have served at the Court of Justice and the General Court. 95 have served as judges and 45 as advocates general at the Court of Justice, and 66 have served as judges at the General Court. 22 judges have served multiple roles at the Court. A statistical summary of the judges’ gender, education and professional experience are presented in Appendix I.

i. Selection

As the performance of EU judges cannot be easily observed and monitored, judicial appointment becomes of paramount importance in controlling judicial quality.\(^{34}\) However, judicial appointments are not made strictly on merit. While the EU prides itself on integration, there is no common market for judges. Like many other international tribunals, candidates for judicial positions at the Court are put forward by the individual Member States. Upon nomination, governments of the Member States by common accord appoint the judge for a renewable term of six years. In practice, Member States never disagree with each other’s nomination so in effect each Member State appoints its own judges. As a consequence, each Member States follows its own judicial appointment process, which is often opaque and political.\(^{35}\)

As shown in Appendix I, more than 65% of the EU judges have worked in government prior to joining the Court. In particular, 28% of the EU judges’ primary work experience, and 27% of the EU judges’ last position before joining the Court was in government. Noticeably more judges at the Court of Justice (67%) have backgrounds in government than those at the General Court (57%). Many of them have been former ministers or legal advisors at the Ministry of Justice, or former members of the diplomatic corps. Some have even served in the parliaments of the nominating state. The preference for government officials is not surprising. As the secret deliberation rule prevents nominating states from monitoring the voting preference of their appointees, appointing governments are more prudent in choosing the candidates that they believe will act in their interests. Only 53% have prior

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\(^{34}\) See generally Damian Chalmers, Judicial Performance, Membership, and Design at the Court of Justice, in SELECTING EUROPE’S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENTS TO THE EUROPEAN COURT 51 (Michal Bobek eds., 2015). (arguing that the lack of clear vision in the function and direction of the Court during the judicial appointment stage results in the Court setting its own tasks for itself. As a consequence, judicial outcome reflects the prevailing professional disposition of the Court.)

\(^{35}\) See Sally J. Kenney, Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice, 10 FEMINIST LEGAL STUDIES 257, 260 (2002). See also Henri de Waele, Not Quite the Bed Procrustes Built, in SELECTING EUROPE’S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENTS TO THE EUROPEAN COURT 24 (Michal Bobek eds., 2015).
judicial experience in the national courts. In fact, only 17% of the EU judges’ primary work experience, and 29% of the EU judges’ last position before joining the Court was in the judiciary. But sovereign interest is not the whole story. Kenney observes that each nominating country would need to strike their own balance of interests in terms of political parties and languages when selecting the “best” candidates to the Court and other supranational tribunals. 36 Even if appointments are not driven by a specific policy agenda, personal connections to the appointing executive and party credentials are deemed paramount in some member states. 37 In some cases the nominating state has used judicial appointment as a form of patronage to reward loyal functionaries or as an opportunity to remove an undesirable political opponent. 38

Unlike the US Supreme Court’s appointment process, there is no public hearing for EU judges. The only public information the Court makes available about the judges is their profiles. These profiles generally contain a judge's birth year, year of entry and departure, position at the Court, prior education background, work experience and other public activities. However, a closer look at these profiles reveals that there is no mandatory disclosure rule and many of the profiles are incomplete. Indeed, Appendix I reveals that almost 77% of the profiles of the EU judges contain missing information about their education background, so it is not possible to verify either schools, degrees, or both. 16% of profiles do not contain sufficient information about work experience, so it is not possible to verify their primary work experience prior to joining the bench. Nor do we know the last positions of almost 18% of judges based on their public profiles. In fact, 26% of EU judges provide no information regarding their educational background whatsoever. Over 40% of judges from Portugal, Spain, Greece, Denmark and the Netherlands completely omit their educational background. An extreme example is Denmark, where five out of seven appointees provide no disclosure of educational background. This coincides with the fact that most judges appointed from Denmark come from the government.

Even when the profiles are complete, the information on paper is still far from enough to gauge the judge’s qualifications for the position. To function effectively and efficiently at the Court, EU judges need to possess three important skills: First, knowledge of EU Law; second, superb legal and research skills and an astute legal mind; and third, fluency in the French language. 39 However, the criteria as established in the EU Treaty is very loose. 40 This leaves considerable room for discretion.

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36 Kenney, supra note 35.
37 Id.
38 Id. In this regard, the Court of Justice is not so different from other international tribunals. See generally Erik Voeten, the Politics of International Judicial Appointments, 9 Chi J. INT’L L. 387 (2008).
39 See Kenney, supra note 35, at 267; See also Iyiola Solanke, Diversity and Independence in the European Court of Justice, 15 COLUMBIA J. EUROPEAN L. 89 (2008).
40 Art. 253 of the TFEU provides that “the Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence”. Art. 254 of the TFEU provides that “the members of the
In 2010, an expert committee was established under Article 255 TFEU to vet the credentials of candidates nominated by the member state as well as current members who are up for reappointment (the Committee). The Committee is comprised of seven members, who are chosen from former EU judges as well as members of national supreme courts and lawyers of recognized competence. The assessment criteria of the Committee are more comprehensive than the standards stipulated in the Treaty. It considers that judges or advocates general from the Court of Justice should possess more than twenty years of experience with high-level duties, and that judges at the General Court should have more than twelve years experience with similar duties. The Committee states that it assesses the candidates’ grasp of “the main aspects of EU law” but it does not “seek to assess the scope and comprehensiveness” of the candidate’s expertise in EU law. The requirement to speak French remains a soft constraint, and the Committee expects that the candidates to at least acquire proficiency in French “within a reasonable time.”

To be sure, the Committee constitutes an encouraging first step in providing some safeguards to the appointment process and a few member states governments have recently overhauled their own selection processes to introduce more transparency and formality. However, in a few countries such as Greece, Italy and Spain, appointment remains exclusively controlled by the executives. Moreover, the power of the Committee is very limited. It has no power to nominate or choose between candidates, but only has the power to consider one candidate at a time and issues a non-binding opinion. The composition of the Committee also suffers from democratic deficit. The President of the Court nominates six of the seven members, and one is nominated by the European Parliament.

By December 2013 the Committee had examined 67 candidates, and delivered 7 unfavorable opinions on candidates from Greece, Italy, Cyprus, Romania, Sweden, Lithuania and the Czech Republic. These candidates were all running for positions at the General Court. A few candidates were rejected for lack of professional experience, on the basis that their “length of high-level professional experience” was

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43 Id. at 19.

44 Id.


46 Id., at 467.

“manifestly too short.” Some candidates were rejected for “insufficient familiarity with EU law”. This disturbing fact reflects the severity of the lack of quality control by some nominating states during the selection process.

Without rigorous procedural safeguards for judicial appointment, the quality of the EU judges appointed to the Court is bound to vary significantly. This leads the emergence of two tiers of judges—leaders and followers. The less capable the EU judge is, the more he or she will need to rely on the référendaires to carry out the judicial functions. As a consequence, the voices of référendaires are amplified, and in some instances they may even effectively become the judges behind the scenes.

ii. Compensation Structure

The Court is an attractive workplace for European jurists not only for its prestige but also its generous compensation package. Currently the President of the Court of Justice is entitled to a €306,654 (equivalent to the President of the Commission) annual salary, the Vice President is entitled to €277,767 (equivalent to the Vice-President of the Commission), and other judges and advocates general are entitled to €249,989 (equivalent to a Commissioner of the Commission). They also enjoy generous entertainment allowances ranging from €7292 for ordinary judges to €17,016 annually for the President. The Presidents of the chambers are entitled to an additional €9729. In addition, EU judges enjoy generous fringe benefits including a car and a driver and residence allowance equal to 15% of their salary. When they leave the bench, EU judges are also entitled to generous pension benefits and transitional allowances. The judges from the General Court similarly enjoy a generous compensation package even though their salaries are lower. Currently the President of the General Court is entitled to €249,989 in yearly salary, the Vice President is entitled to €239,990, and other judges are entitled to €231,101. They also receive entertainment allowances ranging from €6650 for ordinary judges to €7292 annually for the President. The Presidents of the chambers are entitled to an

48 See Activity Report, supra note 42, at 20.
49 Id.
50 This has also been observed in the US context. See POSNER, supra note 33, at 65.
51 See REGULATION No 422/67/EEC, No 5/67/Euratom of the Council of 25 July 1967 determining the emoluments of the President and Members of the Commission, of the President, Judges, Advocates-General and Registrar of the Court of Justice, of the President, Members and Registrar of the General Court and of the President, Members and Registrar of the European Union Civil Service Tribunal. See also REGULATION No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, at 169.
52 Id., art. 4 (3).
53 Id.
54 Id., art. 4.
55 Id.
56 Id., art. 7.
57 Id., art. 21(a) (2).
58 Id., art. 21(a) (3).
additional €8873 each year. Salaries of EU judges are subject to both income tax and a solidarity levy. For instance, the net salary of a judge at the Court of Justice (with no management role) with no dependent spouse or children is €203,652.

As one of the criteria for appointment to the Court of Justice is that the candidate should possess the qualifications required for appointments to the national Supreme Court, I use the salary of the national Supreme Court judges as a crude proxy for the pre-existing salary of EU judges. To be sure, some members of the Court were in private practice immediately before they joined the Court and they could have enjoyed higher incomes than national Supreme Court justices. However, such members are only a small minority. As shown in Appendix I, 74% of the Court members were either civil servants (27%), academics (19%) or national court judges (28%) immediately before joining the Court. Only 7% were engaged in private practice, with most coming from the UK and Ireland.

Table 2 below compares both the gross and net annual salary of judges from the national Supreme Courts and those of an ordinary judge at the Court of Justice. Table 3 adjusts for the cost of living and provides the equivalent salary of national Supreme Court judges if they live in Luxembourg. These two tables show that the vast majority of EU judges received a significant pay raise, particularly for judges from Eastern European countries. This stands in sharp contrast to the status of judicial salary in the United States, where most judges could earn significantly higher wages when working for other employers. Currently, a US Supreme Court Justice receives $211,200 (roughly equivalent to €184,692), about 25% less than an ordinary judge at the Court of Justice. However, the relatively low US wages have not prevented the US judiciary from attracting the best legal minds. Indeed, judicial positions are highly regarded in the United States and “[come] as a kind of crowning achievement relatively late in life.”

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59 Id.
60 Email correspondence with the Court (July 27, 2015).
61 Id.
Table 2: Comparison of Salary of National Supreme Court Judges with EU judges

<table>
<thead>
<tr>
<th>EU Country</th>
<th>Gross Annual Salary of National Supreme Court Judges (€)</th>
<th>Net Annual Salary of National Supreme Court Judges (€)</th>
<th>EU Judge Gross Annual Salary* to National Supreme Court Judges</th>
<th>EU Judge Net Annual Salary* to National Supreme Court Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>28,019</td>
<td>25,215</td>
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<tr>
<td>Lithuania</td>
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<td>25,476</td>
<td>7.1</td>
<td>8.0</td>
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<tr>
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* According to the data provide by the Court, the current gross annual salary of a judge at the Court of Justice (with no management role) is €249,989; the net annual salary of such a judge with no dependent spouse or children is €203,652.

Table 3 Comparison of Salary of National Supreme Court Judges with EU Judges (after adjusting for cost of living)\(^{64}\)

<table>
<thead>
<tr>
<th>EU Country</th>
<th>Equivalent Gross Annual Salary of National Supreme Court Judges (€)</th>
<th>Equivalent Net Annual Salary of National Supreme Court Judges (€)</th>
<th>EU Judge Gross Annual Salary(^*) to National Supreme Court Judges</th>
<th>EU Judge Net Annual Salary(^*) to National Supreme Court Judges</th>
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<tbody>
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<td>1.1</td>
<td>N/A</td>
</tr>
</tbody>
</table>

* Here both the gross and net annual salary of EU judge include the residence allowance, which equals 15% of the judge’s salary and is not subject to tax. So the

\(^{64}\) The salary of national Supreme Court judges is adjusted using the 2014 price level index compiled by Eurosta. The index is available here: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Comparative_price_levels_of_consumer_goods_and_services#Price_level_indices](http://ec.europa.eu/eurostat/statistics-explained/index.php/Comparative_price_levels_of_consumer_goods_and_services#Price_level_indices)
The gross annual salary of a EU judge at the Court of Justice is €287,487 (without management role); and the net annual salary is €241,150.

Economists have long argued that when the appointment process is crude, the quality of the judges selected will actually be higher when judges are willing to accept a pay-cut to join the judiciary. This is because unlike private employees, the government cannot use external monitors to discipline the performance of judges. Instead, the government relies primarily on judges’ own self-restraint to promote excellence. For those who are willing to accept a lower salary, they are signaling that they view the non-pecuniary benefits of being a judge as outweighing the pecuniary loss they suffer. These individuals are more likely to exhibit self-restraint, a desirable quality for good judges.

To be sure, if a salary is set too low, the attractiveness of the judicial positions will be eroded, and the quality and independence of the judiciary will be threatened. However, EU judges’ salary is currently set at a level that far exceeds the pre-existing salary for the vast majority of national Supreme Court judges. It is therefore very likely that most judges received significant pay raise for being appointed to the Court. Such a salary structure is not only going to attract more qualified candidates, but also those less genuinely interested in judging than in the perks and benefits the job brings. As the EU judicial appointment process is often opaque and political, a higher salary could attract those primarily seeking a leisurely life in Luxembourg, or those yearning for power and influence. Indeed, leisure seekers would need a higher salary to support their leisurely activities (e.g., expensive vacations), and power seekers would find it more satisfying to work for a high-paying job as higher salary entails higher social status. Therefore, when appointment is not strictly made on merits, a high salary increases the chance that appointments are used as political patronage to reward loyal functionaries or political allies. As a consequence, more competent candidates could be crowded out by less competent ones. Interviewees observe that some judges who received significant pay increases are indeed political appointees who are not competent to perform and are dominated by their référendaires.

iii. Workload Crisis and Moral Hazard
Workload crisis is a perennial concern for the Court. Various measures have been introduced in recent years with an eye toward mitigation, including the downsizing of

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66 Greenberg & Haley, supra note 65, at 418.
67 Id.
68 Id. at 421.
69 Choi et al., supra note 65, at 55.
70 Interview with two current référendaires, Luxembourg (May 5, 2014).
chambers, the reduced involvement of the advocates general, the omission of the hearing in certain cases, the transfer of workload to lower courts, the reduction of translation and the shortening of certain court documents. Figure 1 and Figure 2 below show respectively the number of incoming cases and the cases pending at each the General Court and the Court of Justice after the Court’s expansion in 2004. They show that the workload at both levels of the Court has steadily increased, but since 2013 the General Court has faced more work pressures than the Court of Justice.

Figure 1: New Cases Received by the General Court and the Court of Justice (2005 to 2014)

Figure 2: Pending Cases before the General Court and the Court of Justice (2005 to 2014)


Several inherent institutional features of the Court account for the persistence of workload crisis.

First, the tenure for many EU judges is too short. EU judges serve renewable, six-year terms. On average, judges at the General Court served eight years, judges at the Court of Justice served nine years and advocates general served seven years, as indicated in Appendix II. But the variance is quite high. The longest a judge has served at the Court is 21 years, and the shortest stay is less than a year. Furthermore, over 42% of the EU judges served no more than six years. In particular, 41% of judges appointed to the Court of Justice and 52% of judges appointed to the General Court were not renewed after serving one term.

This short tenure hampers the productivity of judges. Judges require a year or two to familiarize themselves with the court’s procedures and style. Moreover, if a judge expects that he will only be on the job for a short period of time, he will be less likely to invest time to improve his French or learn EU law. Some judges additionally complained that they did not get sufficient support when they first started their jobs. Every three years, half of the judges at the Court are subject to renewal. These judges cannot take on much responsibility for about six months before their departure, which causes much instability in the formation of the chambers of judges and their work. Judge Franklin Dehousse from the General Court noted that in 2011, 50% of judges at his Court were appointed outside the normal triennial renewal procedure. As he observed: “The General Court is thus in permanent reorganization, and regularly looks like the waiting room of an airport, with permanent new arrivals, departures, announcements…and delays.”

Second, the requirement of French on the job further hampers judicial performance. Since the expansion of the EU in 2004, a growing number of judges, especially those from Eastern European states, have found it difficult to deliberate in French. This is because French is not a widely spoken language in Eastern European and Nordic countries, and it has been difficult for these countries to identify competent candidates that are suitable for the position. Even if those countries have superb legal minds, they are hampered by the language requirement.

73 Interview with a former référendaire, London (April 10, 2015).
76 Id.
78 See European Commission, Europeans and Their Languages Report (2012), available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_386_en.pdf, at 31. (showing that in only 1% of the population in many eastern European countries and less than 5% of the population in Nordic countries were able to speak French well enough to have a conversation).
79 Interview with a former member of the Court, London (Feb. 10, 2015). Telephone Interview with a former référendaire (April 29, 2015). See also Konrad Schiemann, The Functioning of the Court of Justice in An Enlarged Union and The Future of the Court, in CONTINUITY AND CHANGE IN EU LAW: ESSAYS IN HONOR OF SIR FRANCIS JACOB 10 (Anthony Arnall et al. eds., 2008)
Third, in recent years, the Court experienced an explosion of trademark cases and cases involving access to documents and contractual issues. As the competence of the EU expands with every major Treaty change, the very success of the harmonization initiatives places a strain on EU judicial resources. This situation is worsened by the fact that legislators adopted measures without due regard to the consequences borne by the judiciary—one stark example being trademark regulation. For instance, in 2000 there were 36 incoming competition cases and 34 IP cases at the General Court, accounting respectively for 13% and 12% of new cases that year. In 2014, 295 new IP cases were filed with the General Court, accounting for more than 32% of the new cases last year, whereas there were 41 competition cases, representing just 4% of the new caseload. Figure 3 below compares the number of new IP and competition cases received by the General Court and the Court of Justice in the period between 1999 and 2014. It shows that while the number of competition cases has fluctuated within a small range at both levels of the Court, the number of IP cases has increased significantly, particularly at the General Court. This rise in IP cases inevitably eats into the General Court’s resources to handle cases in other areas.

Figure 3: Number of IP v. Competition Cases Handled by the Court of Justice and the General Court during the Period of 1999 to 2014

P A U L C R A I G, EU ADMINISTRATIVE LAW 265 (2nd ed. 2012)
See van der Woude, *supra* note 80, at 123-25.
Over the years the General Court has been calling for the creation of a specialized trademark tribunals, an option that has been provided for under the treaty. However, the higher court strongly disfavored such a proposal. This is because the establishment of specialized IP tribunals could curtail the power of the Court of Justice to intervene in trademark cases. Under Art. 256 (2) of the TFEU, the General Court shall have the jurisdiction to decide appeals brought against decisions of the specialized courts. Only when “there is a serious risk of unity or consistency of Union law being affected” could the decision given by the General Court “exceptionally be subject to review by the Court of Justice.” As an alternative, the Court of Justice has been calling for an increase in judges at the General Court for years. This proposal has recently won legislative support but faced stiff resistance from incumbent members at the General Court.

Interestingly, while the Court has received more new cases, it has not experienced a correspondingly sharp increase in duration of proceeding. Figure 4 below shows that for certain categories of proceedings (e.g. preliminary references and appeals) handled by the Court of Justice, there is even a slight decrease in duration over the years. Figure 5 shows that with the exception of state aid, the duration of proceedings remains relatively stable at the General Court.


87 See Judge Joseph Azizi’s speech, dated September 17, 2013. The original French version is requested from the Court. (As noted in Judge Azizi’s farewell speech at the General Court, the President and Vice President of the Court of Justice attended a judicial assembly at the General Court, where they stated that the articles of the treaties providing the possibility of the creation of specialized tribunals are simply “bad law” and even called for the amendment of these articles). See also Vassilios Skouris, Self-Conception, Challenges and Perspectives of the EU Courts, in THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 27 (Ingolf Pernice et al. eds, 2006).

88 Art. 256(2) of the TFEU. See also Art. 62 of the Statute of the Court of Justice of the European Union. (If the First Advocate General finds that there is a serious risk of the unity or consistency of Union Law being affected, he may propose that the Court of Justice reviews the decision of the General Court.)

89 Duncan Robinson, European Court of Justice Doubles Number of Judges (April 12, 2015), available at: http://www.ft.com/cms/s/0/562d0236-df97-11e4-a6c4-00144feab7de.html#axzz3ekLVE4Jf

90 Data collected based on the Court’s annual reports from 2005 to 2014.
Figure 4: Duration of Proceeding (in months) at the Court of Justice during 2005 to 2014

Figure 5: Duration of Proceeding (in months) at the General Court during 2006\textsuperscript{91} to 2014

Normally when more cases come in, the waiting time should be longer. As the duration of proceedings remains stable, this suggests that the processing time judges spend on each case must be shorter. As noted by the Dutch Judge Sacha Prechal

\textsuperscript{91} Prior to 2006 the General Court provided data on duration of proceedings in different categories so the data of 2005 is not available here.
when she compared her experience as a référendaire and as a judge at the Court of Justice:

“ I was at the Court in the late eighties, early nineties...How to deal with a case, how judgments are made, how the deliberations proceed: that has remained the same to an important extent. What is different is the pace of the work. There are a huge number of cases coming in these days... The steadily increasing number of cases puts pressure on the production and mainly for this reason this pressure is much higher than it was 20 – 25 years ago.”

This is consistent with the observation of Judge Fidelma Macken, a former judge from the Court of Justice:

“Because in very practical terms it meant that judges were so busy with the cases for which they had to be juge rapporteur that they had very little time to think carefully about the cases where they were not the juge rapporteur. There wasn’t time to truly deliberate about many decisions so the only decisions that got truly deliberated would be the important ones and many others almost went by default. The conclusion was that the problem of the heavy docket, the large number of cases, was not simply a question of delayed justice but that you were short-changing yourself by doing too much and as a result not able to do it as well as you could do if you had a little bit more time.”

When the backlog increases, judges may have an incentive to prioritize their efforts in clearing the docket (which is more observable) rather than engaging in thorough review of administrative actions (which is less observable). Indeed, the main responsibility for the management elites (i.e. the President, Vice President) at the Court has been to reduce backlog and the length of proceedings. There is an obsession with the quantitative figures, as they are elaborated in detail in the annual reports published by the Court, and are the main indicator the President relies on to evaluate the Court's performance.

Quality of a judgment, on the other hand, is much more difficult to evaluate. As Judge Macken’s above statement reveals, there is a hierarchy among cases. Since only the important cases got deliberated and these cases usually go to big chambers, this implies that cases decided by small chambers do not receive adequate judicial scrutiny and are judged “by default”. Indeed, both deference to the administration and strict adherence to precedents can significantly reduce the amount of fresh analysis that judges have to perform.

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93 J. H. H. Weiler & Judge Fidelman Macken, To Be A European Constitutional Court Judge, A Conversation with Judge Fidelman Macken, NYU SCHOOL OF LAW DISTINGUISHED FELLOW LECTURES SERIES (September 4, 2003).

94 Interview with a former référendaire, London (April 10, 2015).

95 Id.
The increased work pressure has another important consequence—more work must be delegated to référendaires. This is particularly true for less able judges, who face higher costs in mental effort and the leisure forgone by working hard. As many judges experience a significant pay rise for joining the Court, the opportunity cost of working hard also increases, since it takes away time to enjoy leisurely activities that are presumably more enjoyable than those they could previously afford. Therefore, the less able a judge is, the more work the judge will need to delegate to référendaires.

B. Référendaires

Référendaires are a hidden workforce within the Court. Some call them the Court’s “ghost writers.” Their names are never mentioned in any judgments, nor does the Court publicize their profiles. Nonetheless, they play an indispensable role during the Court’s decision-making process. While the working style of each judge is different and the involvement of référendaires varies, they generally assume the responsibility of digesting the written submissions and ploughing through various annexes to understand the facts and reasoning of each case. They also shoulder much of the responsibility for drafting the various reports and providing comments.

In February 2015, I used LinkedIn to hand-collect the background data for 74 current référendaires, of whom 31 work for the Court of Justice and 43 for the General Court. This represents 25% of current référendaires at the Court of Justice and 46% of those at the General Court. In March 2015, I hand-collected the background data of 103 former référendaires from LinkedIn. The summary statistics of the education and professional experience of these référendaires are presented in Appendix III. Their years of prior work experience and tenure at the Court are presented in Appendix IV.

The data presented in Appendices III & IV is subject to an inherent limitation. Since the data is collected from LinkedIn, it is likely that some groups are underrepresented in the samples. Law firms and other private businesses tend to rely more on headhunters who use LinkedIn to tap talents than public institutions, which normally have formal channels for recruitment. Therefore, former référendaires who are currently working for public institutions such as national governments, national judiciaries and EU institutions are less incentivized to use LinkedIn than those who are in private practice. Similarly, current référendaires who plan to work for public institutions upon departing the Court are less incentivized to use LinkedIn than those who wish to go into private practice. This is especially true for référendaires who were seconded by public institutions. For instance, interviewees indicate that a

96 POSNER, supra note 33, at 65.
97 Michal Bobek, the Court of Justice of the European Union, in THE OXFORD HANDBOOK OF EU LAW (Anthony Arnulf & Damian Chalmers eds., 2015).
98 See Sally J. Kenney, Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court, 33 COMPARATIVE POLITICAL STUD. 593, 611 (2000).
99 Id. See also a fascinating account by Diane Hansen-Ingram, Tales from the Tartan Chambers, in A TRUE EUROPEAN: ESSAYS FOR JUDGE DAVID EDWARD (Mark Hoskins & William Robinson eds. 2004) (observing how Judge David Edward delegated work to his référendaires).
100 The LinkedIn data has been cross-referenced with EU’s official directory “Who’sWho”, which discloses the names of the current référendaires.
sizeable portion of référendaires are administrative judges from France but none of them appear in the samples. Notably, the bias is probably more pronounced for former référendaires as current référendaires have a number of exit options available to them.

i. The Labor Market
Like law clerks in the United States, référendaires are chosen by the individual judges; judges can also fire them at will. However, unlike the United States, where federal law clerks are recruited through an open online system, the Court lacks an official recruitment program. Thus judges rely exclusively on informal channels to recruit référendaires, such as from among their former employees, subordinates, students, or those recommended by their personal friends or former colleagues. Job seekers also lack information regarding vacancies at the Court and the particular requirements of judges. Thus the labor market for référendaires is highly inefficient for both buyers (the judges) and sellers (the référendaires). Référendaires who were interviewed note that generally candidates know someone already working there in order to get hired. As a consequence, the network of référendaires becomes relatively impermeable to outsiders.

The sample of 74 current and 103 former référendaires I collected from LinkedIn provides strong support for this observation. As shown in Table 4 below, the three schools most attended by these référendaires are all located in French-speaking countries: College of Europe (22%), Université Panthéon-Assas (9.6%) and Université Panthéon-Sorbonne (9%). The leading former employer is the Court itself (17.5%), as many référendaires used to work as linguists or researchers in the Court, followed by the Commission (16.6%); these two bodies far exceed the third most common former employers Van Bael & Bellis (4%) and Linklaters (4%). Indeed, the employment of internal administrative staff to fill in the référendaire positions shows the importance judges place on understanding the institutional workings of the Court. It also reveals the closed nature of the network inside the Court.

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102 OSCAR (https://oscar.uscourts.gov/home) allows US federal judges to post law clerk positions and law students can use the same platform to apply for clerkship. Note, however, the recruitment process of US federal judicial law clerks also faces a whole host of problems. See e.g., Christopher Avery et al., The New Market for Federal Judicial Law Clerks, 74 U. CHICAGO L. REV. 447 (2007).

103 Telephone interview with a current référendaire (Feb. 12, 2015).
Table 4: Most Common Law Schools and Former Employers Among a Sample of 177 Référendaires

<table>
<thead>
<tr>
<th>Most Common Law Schools</th>
<th>%</th>
<th>Most Common Former Employers</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. College of Europe</td>
<td>22.0</td>
<td>1. Court of Justice of the European Union</td>
<td>17.5</td>
</tr>
<tr>
<td>2. Université Panthéon-Assas (Paris I)</td>
<td>9.6</td>
<td>2. European Commission</td>
<td>16.6</td>
</tr>
<tr>
<td>3. Université Panthéon-Sorbonne (Paris II)</td>
<td>9.0</td>
<td>3. Van Bael &amp; Bellis</td>
<td>4.0</td>
</tr>
<tr>
<td>4. Harvard University</td>
<td>8.5</td>
<td>3. Linklaters LLP</td>
<td>4.0</td>
</tr>
<tr>
<td>5. King's College London</td>
<td>7.7</td>
<td>5. Cleary Gottlieb Steen &amp; Hamilton LLP</td>
<td>3.4</td>
</tr>
<tr>
<td>6. Université Libre de Bruxelles</td>
<td>6.8</td>
<td>6. European Parliament</td>
<td>2.8</td>
</tr>
<tr>
<td>7. Oxford University</td>
<td>6.2</td>
<td>7. European Free Trade Association</td>
<td>2.3</td>
</tr>
<tr>
<td>8. Katholieke Universiteit Leuven</td>
<td>5.6</td>
<td>8. College of Europe</td>
<td>2.3</td>
</tr>
<tr>
<td>9. Cambridge University</td>
<td>5.1</td>
<td>8. Allen &amp; Overy LLP</td>
<td>2.3</td>
</tr>
<tr>
<td>10. Université Catholique de Louvain</td>
<td>4.5</td>
<td>8. Freshfields Bruckhaus Deringer LLP</td>
<td>2.3</td>
</tr>
<tr>
<td>10. Institut d'études politiques de Paris (Sciences Po Paris)</td>
<td>4.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10. University of Copenhagen</td>
<td>4.5</td>
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</tbody>
</table>
Figure 6 is a sociogram of the network data of these référendaires. Each node represents one of the 177 référendaires. Two types of network connection are presented here: A green line between nodes indicates that the two référendaires were classmates at law school, while an orange line indicates that they overlapped with one another at a previous workplace. The defining feature of this sociogram is a large cluster of dense connection among 117 référendaires (66%), with three small clusters of référendaires belonging to smaller social network groups. Only 46 nodes (26%) are completely isolated, indicating that the vast majority of référendaires have strong in-group ties and most likely had connections with the Court prior to joining. Figure 6 also reveals that those référendaires who received a French legal education and were formerly employed by either the Court or the Commission are tightly interconnected at the center of the sociogram. These référendaires possess valuable social capital as their positions and connections become “[assets] in [their] own rights”.

Figure 6: The Social Network of A Sample of 177 Référendaires

(Notes:
The color of nodes represents education background of référendaires: Blue (White) nodes represent those référendaires who received (did not receive) legal education in France, Belgium or Luxembourg.
The shape of nodes represents the previous work experience of référendaires: Triangles represent référendaires formerly employed at the Commission; Upside-down triangles represent référendaires who used to work in other positions at the Court; Double-triangles represent former employment at both bodies; Circles represent référendaires who had never worked at either the Court or the Commission.

The line represents the ties between référendaires: Orange lines indicate that the référendaires were former colleagues; Green lines indicate that the référendaires were classmates at law school; Black lines indicate both.

Because of this relatively closed network, current référendaires become attractive candidates for new judges. Normally, a référendaire only serve one judge at a time and will not switch to another judge during the former's tenure. Référendaires can, however, be “inherited” by other judges upon the departure of the original judge. Thus an internal labor market of référendaires exists within the Court. As shown in Appendix III, within the sample of 74 current référendaires, 37% from the General Court and 30% from the Court of Justice have served at the Court longer than their judges, indicating that they have worked for more than one judge.

Appendix III reveals another important feature of référendaires—the vast majority of them are experienced lawyers prior to the joining the Court and many have varied experience. In particular, 20% of them worked in other positions in the Court (such as linguists and research positions), 12% served in their respective national governments, 20% worked at the Commission, 24% held academic positions and 37% were in private practice. For former référendaires, 7% held other positions in the Court, 8% worked in the national courts, 18% were government officials, 7% worked for the Commission, 27% held academic positions and 56% were in private practice. Notably, a significantly higher percentage of former référendaires were engaged in private practice than that of current référendaires. This is probably due to the fact that the sample of the former référendaires is more biased towards over-representing private attorneys and under-representing lawyers at public institutions.

As shown in Appendix IV, the average prior working experience of current and former référendaires is six years and four years, respectively. These figures contrast with those for law clerks from the United States, the vast majority of whom are fresh graduates rather than experienced lawyers. This seems to suggest that EU judges rely more heavily on their clerks to do the work for them than US judges.

ii. Career Structure and Conservatism

Référendaires are well paid. Like employees at other EU institutions, the salary of référendaires is mainly tied to age and seniority at the Court. For instance, a référendaire who was hired at the age of 35 before 2004 would be awarded a grade of A11 (step 1) and is entitled to a basic salary of approximately €110,364.105 After he works for the Court for ten years, he will be graded A14 (Step 1) and be entitled to approximately €159,864.106 Therefore, the older and more experienced the référendaire, the more expensive he or she becomes. Judges, however, do not bear the cost of hiring référendaires. While there is a quota on how many référendaires a

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105 REGULATION No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, at 169. Similar to judges, référendaires’ income is also subject to a community tax and a solidarity tax. See European Commission, Permanent Officials, available at: http://ec.europa.eu/civil_service/job/official/index_en.htm#4 See also email correspondence with the Court (July 22, 2015).

106 Id.
judge can have, there is no limit on the cost of référendaires. Judges may therefore have a preference for référendaires with more seniority and experience, even though they are more costly. 107

Unlike employees at other EU institutions, référendaires are not eligible for promotion. Some however are elected to become judges later in their careers. As shown in Appendix I, 18% of judges from the General Court, and 5% of judges and 11% of advocates general from the Court of Justice had experience working as référendaires before joining the Court. Few however are elected to become judges directly. 108 But this lack of career advancement has not discouraged référendaires from pursuing long-term careers at the Court. Financial benefit is an important consideration. Référendaires enjoy compensation packages similar to officials at other EU institutions. After 10 years of service référendaires are eligible for generous pensions as civil servants when they reach the age of 66. A 1994 study found that the Court had 56 référendaires at that time, among which the most tenured had served 13 years; two référendaires had worked for 12 years, and one had worked for 11 years; with the average amount of work experience being 5 years. 109 Based on the sample of 74 current référendaires, on average référendaires have served more than 7 years at the Court. (see Appendix IV). But the variance is once again quite high. In fact, 23 (more than 31%) have served more than a decade. One référendaire from the Court of Justice has served for more than 22 years and one from the General Court has served for more than 26 years, longer than the longest-serving judge in the Court’s history. 110

Despite the financial benefits, référendaires are temporary workers and do not have the same job security as officials in other EU institutions. They can be fired by the judges at will, and may not be able to find another job at the Court when their judges leave the bench. 111 This job insecurity has a pronounced impact on how référendaires behave, especially for those who want to pursue a long-term career inside the Court. Of course, the evaluation of référendaires solely depends on their performance to the satisfaction of their judges, but given the nature of the work delegated to référendaires, judges are unlikely to encourage their référendaires to take a bold, intellectually challenging approach to law. This is especially true for career référendaires.

107 For instance, Judge Dehousse suggested that the General Court could consider creating a limited number of senior référendaire positions with six-year, renewable terms, contractually linked to the General Court but not to a particular judge. See Dehousse, supra note 75, at 15.

108 Based on the data disclosed by the Court, Mark Jaeger from Luxembourg, Maria Eugenia Martins de Nazare Ribeiro from Portugal and Hubert Legal from France are examples of judges who worked as référendaires immediately before they joined the Court.

109 Kenney, supra note 98, at 605-6.

110 Kenney notes that in the first two decades of the Court, each member of the Court had one référendaire who was a permanent employee and each new member would inherit his or her successor’s référendaire. But référendaires became temporary posts in the 1970s. Id., at 605. See also VAUCHEZ, supra note 101, at 236 (2013) (noting that the examples of several référendaires who served decades inside the Court for multiple judges until the late 1970s and early 1980s.)

111 For this reason some référendaires took the requisite exams for EU civil servants and became functionaries, which then qualified them to work for other EU institutions. Telephone interview with a current référendaire (Feb. 26, 2015).
At the same time, the longevity of career référendaires also gives them tremendous power. Many EU judges serve relatively short tenures at the Court (almost 42% of them stay no more than six years). Some judges lack a background in EU law or struggle with the French language (or both). When judges first start at the Court, they lack adequate support and training to operate efficiently and also need time to familiarize themselves with the Court’s working procedure and drafting styles. In contrast, career référendaires are fluent in French, highly skilled in the Court’s drafting style, well-versed in EU law and precedents, and familiar with the institutional workings of the Court. Therefore less able judges rely heavily on these career référendaires. Because these référendaires have the tendency to strictly adhere to the Court’s precedents, formality and style, they represent a force of conservatism and formalism at the Court.112

The Court’s formalism can find its origin in the French legal tradition, as elaborated in Section IV below. Formalism entails rigid adherence to rules or precedents without proper regard to actual circumstances or consequences. As Judge Posner once describe it: “This is the idea that the judge has no will, makes no value choices, but is just a calculating machine.”113 Inevitably and invariably, the formalistic interpretation of law requires the Court to discount or even disregard the economic realities.114 Indeed, the Court has been subject to fierce attack for its form-based approach to law, particularly in the area of antitrust and competition.

As observed by Marc van der Woude, a judge at the General Court, when asked what he likes the least about his job:

“I have difficulties in finding negative aspects of my current job. However, there may be two things, which I sometimes find irritating and inefficient: Formalism and conservatism. Like many other lawyers, judges tend to have a disproportionate interest in form. Obviously, form is important, but the attention to form and detail should never distract from the substance of a case. Also, lawyers tend to be conservative and feel comforted by the existence of precedents. I am regularly confronted with arguments that do not have any other merit than referring to past practices or customs. This backward-looking mentality is not very helpful, if one wants to increase the Court’s productivity and the quality of its judgments.”115

iii. Revolving Door

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112 Interview with a member of the Court, Luxembourg (May 5, 2014). See also Karen McAuliffe, Precedent in the Court of Justice of the European Union: The Linguistic Aspect, 15 CURRENT LEGAL ISSUES 483, 488-491 (2013) (observing the Court’s formalistic style of drafting imposes a serious constrain on the work of the référendaires and as a consequence they have the tendency to strictly adhere the language of precedents).


115 Nicolas Petit, The Friday Slot (13) Marc Van Der Woude, Nov. 16, 2012, available at: http://chillingcompetition.com/2012/11/16/the-friday-slot-13-marc-van-der-woude/ It should be noted that while Judge Van Der Woude’s statements seem to only mention judges, they should be interpreted to also include référendaires as they are often the judges behind the scene.
Due to the difficulty of finding French-speaking candidates who are well-versed in EU law, Commission officials become an important source of talent. Based on the sample in Appendix III, 30% of current référendaires from the General Court used to work for the Commission – in particular 13% worked for the Legal Service, and 8% served at the DG Comp. The percentage at the Court of Justice is lower, on average 7% of current référendaires used to work for the Commission. Indeed, Commission officials have the opportunity to seek secondment at the Court, while keeping their ranking within the Commission. For instance, the Legal Service, which is the in-house department within the Commission and regularly represents the Commission in front of the Court, started to send secondees to the Court in the 1980s. Based on one study in 1994, among the 56 référendaires working at the Court at that time, six were seconded from the Commission.116

Among the sample of former référendaires, 7% worked at the Commission prior to joining the Court. Upon their departure, 16% joined for the Commission (9% for the Legal Service), representing a 9% increase. This suggests that experience working as a référendaire is very valuable for the Commission, particularly for the Legal Service. As the skillsets at the Legal Service and the Court are highly transferable, even when a Commission employee does not join the Court on a secondment scheme, “the Commission is glad to take him or her back at the end of the period of being a référendaire”, as one former senior Commission official puts it.117 In fact, Commission officials are also an important source of talent for judges. Based on the EU judges’ public profiles, 13 EU judges used to work for the Commission and six served at the Commission immediately before they joined the Court.

Appendix V further examines 35 former and current référendaires who have had experience working at both the Commission and the Court. Among them, 12 served at the Commission immediately before they joined the Court, 20 joined the Commission immediately after they left the Court (11 joined the Legal Service), and five served both before and after. On average they have eight years’ experience at the Commission and four years’ experience working at the Court, though the variance is very high. This shows a veritable revolving door exists between the Commission and the Court.

Abundant literature in law, economics and political science has voiced concern that revolving doors can lead to regulatory capture.118 As the Commission frequently appears before the Court, those référendaires who were seconded from the Commission or those who wish to join the Commission may have the tendency to side with the Commission. Even if such a preference is not conscious, the fact that they have chosen to become Commission officials or aspire to become ones suggests that they have the tendency to believe in the Commission’s values and ethos. They may act in perfectly good faith, but subconsciously they could be more inclined to rule in favor of the Commission.

116 Kenney, supra note 98, at 605.
117 Email correspondence with a former Commission official (Feb. 12, 2015).
The revolving door phenomenon also raises the question of whether adequate procedural safeguards exist to address the potential conflicts of interest between the Court and other public or private institutions. To be sure, a revolving door between business and government is not uncommon in Europe. As shown in Appendix III, 37% of current référendaires were engaged in private practice before they joined the Court, and 39% of former référendaires left the Court for private practice. EU Staff Regulations have put in place specific measures that address this concern. Before recruitment as an EU official, the candidate is required to inform the appointing authority of any actual or potential conflict of interest.119 Within two years after leaving the post, the official has the mandatory obligation to notify his institution of his occupational activity.120 If the activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the interests of the EU institution, the appointing authority may either forbid him from undertaking it or impose certain restrictions.121 In addition, senior EU officials are subject to a one-year “cooling off” period, which bans them from lobbying their former institutions “for their business, clients or employers on matters for which they were responsible during the last three years in service.”122 It is not entirely clear whether the EU Staff Regulations can or have been applied to manage the potential conflicts of interest for officials moving between different EU institutions. As many référendaires are temporary workers, it is also unclear whether they are subject to the same revolving door rules under the Staff Regulations. The Court’s statutes and procedures are also silent on this point.

Another consequence of the revolving door is that it allows the Commission to conduct intelligence surveillance on the Court. As Court membership is fluid and the preference of individual judges varies, the revolving door makes it possible for the Commission to keep pace with its changing landscape. Commission secondees can sharpen their litigation tactics, for instance, by learning how to present arguments that can best persuade particular judges and référendaires at the Court. On the other hand, the private bar is at a comparative disadvantage. Although the private bar can also attract référendaires from the Court, they lack the economy of scale of the Commission. The Legal Service of the Commission, which employs more than 200 lawyers, is a powerhouse that specializes in litigation before the Court. No private law firm in Europe can match its size, scale and experience in EU law litigation. Even though private law firms are also equipped with superb practitioners with in-depth knowledge of EU law, they lack a sufficient caseload to match the experience of the Legal Service. Nor are private firms able to run a secondment program as the Commission does to closely monitor the Court. While private firms could also engage experienced référendaires, the intelligence gathered by those hired tends to become stale within a few years.

Indeed, when asked to compare the quality of written submissions by the Commission and those by the private parties, the référendaires I interviewed observed that the

119 Art. 11, Regulation No. 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (hereinafter Staff Regulation).
120 Art. 16, Staff Regulation, supra note 119.
121 Id.
122 Id.
former is generally more consistent than the latter and is often superior. The consistency and reliability of the Commission’s performance leaves a good impression on the members and staff of the Court. A natural aura is formed among some members and staff of the Court—“the Commission knows what it is doing” and “more likely than not the Commission is right”. When confronted with complex facts and uncertain circumstances, judges and référendaires may have a tendency to defer to the Commission, as this entails less risk and effort, especially given its heavy workload.

**IV. THE DOMINANCE OF FRENCH JUDICIAL CULTURE**

The Court is a product of a unique set of historical circumstances. When it was created by the treaty establishing the European Coal and Steel Community in 1951, it was based upon the prototype of the Conseil d’Etat – the highest administrative court in France. This in part reflects the hegemony of French political power exerted in the early establishment of the European Community, as well as the dominance of French legal thinking among the founding member states. With the exception of Germany, five of its six founding members states—Belgium, France, Italy, Luxemburg and the Netherlands—all share the French legal tradition. Indeed, the French influence on the Court is profound and many of its rules and procedures are obvious derivatives of French administrative law.

As time moved on and the Union expanded, the Court began to acquire habits from other national legal systems. For instance, the well-established principle of proportionality, according to which an EU institution may only act to the extent that is necessary to achieve its objectives, is a concept borrowed from German law. When the United Kingdom and Ireland joined the EU in 1973, the common law judges also brought with them their own traditions. Such influence became noticeable in 1980s, when the Court showed more sensitivity to due process issues, relied more explicitly on precedents, and engaged in more interactive dialogues with counsel during oral proceedings. Today the Court comprises judges from 28 member states with legal traditions that represent virtually every classical legal tradition in Europe.

But law is path-dependent. Today the French influence on the Court remains alive and pervasive. The French language monopolizes the deliberation and drafting

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123 Telephone interviews with current référendaires (Feb., 19, 2015; Feb. 26, 2015; March 10, 2015).
124 Interview with two current référendaires, Luxembourg (May 5, 2014).
125 Id.
127 PAUL CRAIG, EU ADMINISTRATIVE LAW 247 (2nd ed. 2012).
129 Koopmans, supra note 128, at 504-5. See also Mancini & Keeling, supra note 126, at 401-2
process, the function of the advocate general is kept, the impersonal and formalistic style of judgment is utilized, and the French tradition of issuing a single, collective and unanimous judgment without dissents is still employed. But the traces of the French legal tradition are not only found in rules and procedures; they also influence the minds of the Court's decision-makers.

A. EU Judges

Judges and référendaires do not make decisions in a vacuum. Their preconceptions, which are nourished by education, work experience and political ideology, can have an impact on how they evaluate the facts and reach decisions. A judge might well not be consciously aware of having such a prior. However, no judge can ignore his prior conceptions in making a decision. As Cardozo observes: “We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.” David Edward, a former judge at the Court of Justice echoed this sentiment: “Individual judges… have their own prejudices and preconceptions. From time to time, these may influence their individual approach to the decision of particular cases.” Konrad Schiemann, another former British judge at the Court of Justice also remarks: “Each Judge comes to the Court equipped with his own collection of self-evident truths and presuppositions acquired over a lifetime.”

To be sure, EU statutes and precedents of the Court play a critical role in the decision-making of judges and référendaires, and it would be an overstatement to claim that they are disregarded in order to reach a personally desired outcome. But when judges and référendaires are confronted with complex facts and circumstances and can no longer decide them by legalistic techniques, their intuition is likely to come into play. Indeed, psychologists have long identified the risks that people tend to rely on their intuition when they are faced with uncertainty and lack of information. Judges are no exception.

i. The Historical Origins of Legal Traditions

EU judges, as Mattli and Slaughter observe, “are products of specific national legal systems.” A country’s legal heritage shapes its approach to property rights and the level of control that state sovereignty exercises over judges. Therefore, judges’ training within particular legal traditions instill in them a particular understanding of the role of courts in relation to the government, which in turn influences their

131 POSNER, supra note 33, at 65-68.
133 David Edward, Judicial Activism, Myth or Reality in LEGAL REASONING AND JUDICIAL INTERPRETATION OF EUROPEAN LAW 29 (Angus I. L. Campbell et al. eds., 1995).
134 Schiemann, supra note 79, at 9.
136 POSNER, supra note 33, at 107 (“Intuitions plays a major role in judicial as in most decision making”).
perception of the proper level of judicial intervention. Indeed, judges from the Court have been bred in legal traditions spanning the historic divide between the common law and civil law systems.\textsuperscript{138} Within the civil law systems, the EU is home to three common legal families: French, German and Nordic.\textsuperscript{139} Each of these legal traditions has a distinct model of judicial review that could be viewed on a spectrum.

At one end of the spectrum is the French model, which historically puts an emphasis on using state power to alter property rights and to ensure that judges cannot interfere.\textsuperscript{140} The French legal tradition is the product of a set of unique historical circumstances. In pre-Revolutionary France the national legal system was highly fragmented and evolved as a regionally diverse mélange of customary law.\textsuperscript{141} As the Crown sold judgships to rich families and judges promoted the interests of the elite, the image and reputation of judges deteriorated sharply.\textsuperscript{142} The French Revolution eventually turned its fury on the judiciary and relegated judges to a minor, bureaucratic role.\textsuperscript{143} Montesquieu’s doctrine of the separation of powers, a key part of the Revolutionary program, in essence protected the executive and legislature against judicial interference.\textsuperscript{144} Indeed, codification under Napoleon sought to draft a law so complete that it left no space for judges to make law. Moreover, the French legislature encouraged the development of easily verifiable “bright-line-rules” and emphasized a high degree of procedural formalism to further minimize the discretion of judges.\textsuperscript{145} Through conquest and colonization, the French tradition spread to other parts of Europe; comparative legal scholars typically identify its influence on the law of Belgium, Luxembourg, the Netherlands, Italy, Greece, Portugal and Spain.\textsuperscript{146}

At the opposite extreme is the common law tradition, which affords judges broad discretion and views judicial review as a means of protecting individual rights. Unlike the French hostility towards the judiciary, the courts in England were frequently viewed more favorably and sometimes as supporters of progressive reforms. The English courts successfully sought independence from the State during the great conflict between Parliament and the English Crown in the 16\textsuperscript{th} and 17\textsuperscript{th} century.

\begin{footnotesize}
\begin{enumerate}
\item Edward, supra note 29, at 540.
\item See generally KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW (3rd ed. 2011). Some countries adopted some laws from one legal tradition and other laws from another. But generally one legal tradition dominates in each country.
\item Id., at 110.
\item Id.
\item Id., at 110-111. See also EVA STEINER, \textit{FRENCH LAW: A COMPARATIVE APPROACH} 249-250 (2010). (quoting Montesquieu: “Judicial functions are and should remain separated from administrative ones. Ordinary judges shall not interfere in any way whatsoever with the activities of public authorities, nor hear a claim brought against a public authority in relation to the performance of their official duties.”)
\end{enumerate}
\end{footnotesize}
century and limited the Crown’s power to alter property rights and grant monopoly rights.\(^{147}\) Indeed, Anglo-American constitutional history is a record of attempts to secure the independence of the judiciary from the executive branch.\(^{148}\) In contrast to the hostility toward the judiciary seen in France, here the doctrine of the separation of powers is in essence a doctrine of the *specialization* of powers, with each branch of government capable of exercising their power free from interference from the other branches.\(^{149}\) Therefore, judicial control of the legality of administrative action is not seen as compromising the independence of the executive branch.\(^{150}\) Compared with the French legal tradition, the common law tradition typically imposes less rigid and formalistic requirements and puts great emphasis on facts and particular circumstances.\(^{151}\) Judges can react quickly to changing circumstances, and scholars have argued that this has allowed common law to evolve toward more efficient legal rules.\(^{152}\) In addition to the UK, other EU member states that now share the common law tradition include Ireland and two former British colonies – Cyprus and Malta.\(^{153}\)

The German and Nordic legal traditions lie between the French and common law traditions. German legal tradition also has its basis in Roman law and shares many procedural characteristics with the French system.\(^{154}\) However, in contrast to the French revolutionary zeal and antagonism toward judges, German legal history looks upon jurisprudence in a much more favorable light and grants more power to judges.\(^{155}\) Because Germany’s colonial history was short-lived and abruptly erased by World War II, its legal traditions did not spread as widely as the French legal tradition in Europe and scholars have typically identified the German influence as confined to Austria.\(^{156}\) The Nordic legal family is less derivative of Roman law than the French and German families, and because laws in Nordic countries are similar to each other but distinct from the rest of Europe, is normally treated as a separate family.\(^{157}\)

Since the addition of Eastern European countries to the EU, judges with ex-socialist legal background have started to join the Court. During the Soviet era, Eastern European countries adhered to the socialist legal tradition, which views law as an instrument to serve economic and social policies.\(^{158}\) After the fall of the Berlin Wall,

\(^{147}\) Beck & Ross Levine, *supra* note 145, at 257.


\(^{149}\) Id., at 5.

\(^{150}\) Id., at 6.


\(^{153}\) See Reynolds & Flores, *supra* note 146.

\(^{154}\) See Zweigert & Heiner Kotz, *supra* note 139, at 132-133.

\(^{155}\) Mary Ann Glendon *et al.*, *Comparative Legal Traditions: Text, Materials and Cases* (2nd 1994).

\(^{156}\) See Reynolds & Flores, *supra* note 146.

\(^{157}\) See Zweigert & Heiner Kotz, *supra* note 139, at 277.

\(^{158}\) Glendon *et al.*, *supra* note 155, at 400-403.
these Eastern Europe countries reverted to their pre-Soviet legal systems, which were French or German civil law.\textsuperscript{159} However, scholars note that some features of the socialist tradition have proven to be surprisingly resilient and unaffected by change.\textsuperscript{160} As a relic of the socialist legal tradition, law is still conceived of as a tool to serve and protect the political elites in many Eastern European Countries.\textsuperscript{161} Another salient feature is the reluctance of the socialist judiciary to assume responsibility for decision-making.\textsuperscript{162} As a result, they prefer to decide cases on mere formal grounds without entering into merits.\textsuperscript{163} For the purpose of our study they are grouped as a separate legal tradition.

ii. The Consequences of the French Legal Tradition

The above survey of the legal traditions in Europe reveals a sharp ideological difference between the French and common law traditions. The French tradition assumes a larger role for the state, defers more to the administration and casts the judiciary into a bureaucratic and subordinate role.\textsuperscript{164} Meanwhile, the common law tradition views judicial independence as essential to the protection of private property rights and liberty.\textsuperscript{165} This results in different institutional arrangements when it comes to reviewing executive action. While the common law does not distinguish between public and private law and offers the same protection to all legal actors, the French law makes a sharp distinction between them and offers different protection for the State and private parties, both procedurally and substantively.\textsuperscript{166}

Procedurally, under French administrative law individual grievances against the administration are handled by specialized administrative courts—the highest level being the Conseil d'État. Acting as the consultative organ of the chief executive, the Conseil d'État was more an administrative agency than a court when it was first created.\textsuperscript{167} However, the Conseil d'État does not solely handle administrative complaints, but also has other important legislative and administrative functions.\textsuperscript{168} This concentration of functions within the legislature, administration and judiciary militated against the exercise of the judicial function in a truly judicial manner.\textsuperscript{169} Indeed, the European Court of Human Rights has long voiced concern about the lack of independence of the Conseil d'État. It was not until 2008 that France resolved this conflict by a decree codifying the separation between the administrative and judicial

\textsuperscript{159} Id. at 396.
\textsuperscript{160} Id. at 435.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Mahoney, \textit{supra} note 140, at 511.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 512.
\textsuperscript{167} SCHWARTZ, \textit{supra} note 148, at 10-11.
\textsuperscript{168} Id. at 10.
\textsuperscript{169} Id. at 11.
sections of the Conseil d'État. Substantively, the rule of law applicable to contract and property rights is not the same for public bodies as for private bodies. Scholars have observed that French administrative law generally offers less intrusion into decisions made by the executive, which is entrusted with the freedom to pursue the collective public interest.

At the same time, France has long been considered a leader in the development of administrative law, and its model has long been admired by other countries in Europe. But the distinction between public law and private law has far-reaching consequences on the judicial review of administrative actions in France. To begin, administrative judges in France have a different background from private law judges. They are drawn from a distinct corps of the administration trained at the École nationale d'administration. At the Conseil d'État, a close link is maintained between the administrative court and the administration. In fact, it is regarded as highly essential that “administrative judges must have an administrative training, and they have to sustain it to retain an understanding of administrative life”. Experts observe that France an administrative judge is regarded as a detached “institutional insider”. As a consequence, they found that “the difference between a hierarchical control over the lower administration and the judicial review of legality becomes blurred.”

To be sure, French administrative judges have not hesitated to strike down administrative decisions “to teach the administration to behave properly”. In recent years, the Conseil d’État has been very active in carrying out its judicial functions and has evolved into a very powerful institution. However, it has only acted within the confines of what are deemed “the standards of good administration”. The soul of French administrative law lies in the public service the State provides, which is the very explanation for the special position the State enjoys. The ideological underpinnings of the French law have therefore remained essentially the same. The

170 Jean Massot, The Powers and Duties of the French Administrative Judge, in COMPARATIVE ADMINISTRATIVE LAW 415, 417 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010)
172 See L. NEVILLE BROWN, JOHN S. BELL, & JEAN-MICHEL GALABERT, FRENCH ADMINISTRATIVE LAW 176 (5TH ED. 1998); See also RENE DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 84 (3d ed. 1985); JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 113 (2006).
173 See DAVID & BRIERLEY, supra note 172, at 88-89.
174 BELL, supra note 171, at 41.
175 Id. at 158.
176 BROWN et al., supra note 172, at 291.
177 BELL, supra note 171, at 160.
178 Id.
179 Massot, supra note 170, at 415.
180 BELL, supra note 171, at 160.
181 Id. at 169.
State is not of equal status as private individuals; rather, it is a superior legal entity that represents the public interest and its wishes and status have a higher value.  

Indeed, as Friedrich Hayek has long observed, “the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated.” Hayek’s statement suggests that common law countries are more protective of private property as their legal tradition is associated with fewer government restrictions on economic liberty. His hypothesis has withstood scrutiny from recent empirical research. In the late 1990s, financial economists began examining the link between legal origins and economic outcomes. A seminal work by La Porta and his co-authors found that French civil law countries have the weakest shareholder protection, especially when compared with common law countries, which have been found to be associated with a poorly developed capital market. The authors attributed such differences to the historical difference in the legal origins of these countries, arguing that the French legal system has tended to support the rights of the State relative to private property rights. In contrast, the common law system has historically tended to side with property owners and has acted as a powerful constraint on the State in protecting private property rights. Subsequent empirical studies have further shown that French civil law countries exhibit heavier government ownership and regulation, and less secure protection for property rights than do common law countries.

Economists have also found that the French emphasis on judicial formalism has adverse implications for financial development. They argue that the common law is inherently more dynamic as it responds on a case-by-case basis to a society’s changing needs, whereas formalism under French law hinders the flexibility of the legal system. For example, Djankov and his co-authors found that the greater legal formalism of French civil law countries tend to be associated with less efficient contract performance.

iii. The French Dominance

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182 Bell, supra note 171, at 247.
184 Mahoney, supra note 140, at 503.
185 See Rafael La Porta et al., The Economic Consequences of Legal Origins, 46 J. ECON. LITERATURE 285 (2008) (providing a comprehensive survey of the literature in law and finance).
186 See Rafael La Porta et al., Legal Determinants of External Finance, 52 J. FINANCE 1131 (1997); Rafael La Porta et al., Law and Finance, 106 J. POL. ECON. 1113 (1998).
187 See e.g., Rafael La Porta, Rafael et al., Government Ownership of Banks, 57 J. FINANCE 265 (2002); Rafael La Porta, Rafael et al., The Regulation of Entry, 117 QUARTERLY J. ECON. 1 (2002); Botero, Juan C et al., The Regulation of Labor, 119 Q. J. ECON. 1339 (2004); Casey B. Mulligan & Andrei Shleifer, Conscription as Regulation, 7 AM. & ECON. REV. 85 (2005).
189 Beck & Levine, supra note 145, at 261.
190 Id.
191 Simeon Djankov et al., Courts, 118 Q. J. ECON. 453 (2003)
Based on the aggregate number of years a country has been a member of the Court, Figure 7 below shows that countries with the French legal tradition have served the longest and presumably exert more influence over the Court than countries with other legal traditions.

Figure 7: Years of National Membership on the Court (1952-2015)

In fact, Figure 7 probably *underestimates* the impact of the French legal tradition.
During the first two decades of the Court’s history, all the judges and advocates general serving on the Court (except those from Germany) were trained in the French legal tradition. These jurists gained a first-mover advantage in shaping EU law and laid the foundation for many important principles. While there is no stare decisis at the Court, in practice the Court adheres to its own case law. As a result, these early precedents impose a constraint on judges in interpreting EU law. For instance, Consten & Grundig, decided by the Court in 1966, was the first time the Court explicitly applied a deferential approach to the Commission’s action in competition cases. It famously established the “marginal judicial review” doctrine when reviewing complex economic assessments by the Commission: “‘[a] judicial review of [the Commission’s complex evaluations on economic matters] must take account of their nature by confining itself to an examination of the relevance of facts and of the legal consequences which the Commission deduces therefrom.’” Five of the six judges in the case were bred in the French law legal tradition.

Moreover, among the 45 advocates general who have served on the Court, 26 of them (more than 57%) were bred in the French legal tradition. In particular, four of the five advocates general who served on the Court in the first two decades were bred in the French legal tradition. While these advocates general do not participate in deliberation, they still influence case outcomes through the independent opinions they provide to the Court. Their contribution to EU jurisprudence should therefore not be underestimated.

Certainly legal origin is not the whole story. Each individual’s preconceptions are a complicated mixture of experience and background and it is difficult to reach a conclusion by simply relying on any one single aspect. One example is Rene Joliet, who is widely regarded as one of the most pragmatic judges to have served on the Court. While he received his early legal training in Belgium, he studied antitrust law for three years in the United States and received his doctoral degree from Northwestern University. He served as the rapporteur judge in the famous Woodpulp case, one of the two rare cases in which the Court appointed an economic expert and conducted intense scrutiny of the Commission’s action. As Judge David Edward once recalled: ‘He [Joliet] wasn’t a Euroskeptic, but he was always urging caution in the direction the Court might go and he held very strong opinions and if one was on the other side from him then the argument could sometimes become fierce.’ Indeed, Joliet’s attention to facts and pragmatic style seem more reminiscent of common law

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192 See T. Koopmans, Stare Decisis in European Law (1982); see also Takis Tridimas, Precedent and the Court of Justice in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

193 Forrester, supra note 10, at 18-19.


influences than the French legal tradition. But Joliet is an outlier; few EU judges from Continental Europe have received extensive legal training in common law countries.

B. Référendaires

Compared with the diverse nationalities of EU judges, the background of référendaires is relatively homogeneous. The requirement of French as a working language significantly limits the pool of eligible candidates for référendaires. Therefore, native French speakers enjoy an inherent advantage. As Judge Mancini once remarked:

"Yet the fact of having to speak French, which has been the Court’s working language since 1952, in the deliberation room and having to draft judgments in French, puts the non-francophones at a definite disadvantage vis-à-vis their brethren from France, Belgium and Luxembourg. Being of course accomplished gentlemen, they would never consciously take advantage of their colleagues’ handicap; but the full mastery of a language—is an irresistible weapon; and the owner of that weapon will not be likely to refrain from using it."

According to data provided by the Court, over 42% of référendaires at the Court of Justice are citizens from Belgium, France and Luxembourg (see Table 5). At the level of the General Court the percentage is higher, at 49%. The population of référendaires is concentrated among a few countries, especially those with the French legal origin and in Germany. On the other hand, référendaires from the Nordic, common law and ex-socialist countries are underrepresented. Indeed, at the General Court there is only one référendaire from Nordic countries and two from common law countries.

Using the country of origin as a crude proxy of the legal tradition in which a référendaire is bred, Table 5 also shows the strong influence of the French legal tradition on référendaires. This is consistent with the data provided in Appendix III, which indicates 79% of référendaires at the Court of Justice and 83% at the General Court were educated in law schools located in France, Belgium or Luxembourg. Few référendaires come from common law countries, indicating that the common law tradition probably has a relatively weak influence on référendaires working in the Court.

197 Free Circulation of Goods: The Keck and Mithouard Decision and the New Directions in the Case Law, 1 COLUM. J. EUR. L. 436 (1995) (“Although the Court’s procedural rules do not allow dissenting or concurring opinions, one gathers from the available information that he played a very important role in the jurisprudence of the Court. Known for his outstanding analytical skills and persuasive reasoning, Judge Joliet was fond of precision, conciseness, and rigor of legal thought. At the same time, he was hostile to abstract theory, aspiring to keep law as close as possible to social reality. Avowedly supportive of Europe’s legal integration through the Community institutions, Judge Joliet was nevertheless committed to a proper separation of powers not only among the institutions, but also between the institutions and the Member States.”)

198 Mancini & Keeling, supra note 126, at 398.

199 Data requested from the Court (March 18, 2015).
While it is possible that some référendaires with French legal educations also receive common law training, they are probably a minority. For instance, based on the education background of référendaires in the sample presented in Appendix III, 38% of current référendaires received law degrees in common law countries. But this figure is likely to overestimate the common law influence as the samples in Appendix III over-represent those référendaires with private practice backgrounds and under-represent those with public institution backgrounds. This is because the private bar (particularly UK and US law firms) have a stronger preference for common law legal education than institutional employers. Accordingly, it is likely that the actual percentage of current référendaires who received common law training is lower than 38%.

Table 5: Référendaires based on Country of Origin and Legal Origin

<table>
<thead>
<tr>
<th>Legal Origin</th>
<th>Country of Origin*</th>
<th>Court of Justice</th>
<th>%</th>
<th>%</th>
<th>General Court</th>
<th>%</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>French</td>
<td>France</td>
<td>30</td>
<td>23%</td>
<td>38</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Belgium</td>
<td>22</td>
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<td>8</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Luxembourg</td>
<td>3</td>
<td>2%</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Italy</td>
<td>9</td>
<td>7%</td>
<td>8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Spain</td>
<td>7</td>
<td>5%</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Portugal</td>
<td>2</td>
<td>2%</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Netherlands</td>
<td>0</td>
<td>0%</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Greece</td>
<td>6</td>
<td>5%</td>
<td>5</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>German</td>
<td>Germany</td>
<td>19</td>
<td>14%</td>
<td>12</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Austria</td>
<td>3</td>
<td>2%</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Switzerland**</td>
<td>0</td>
<td>0%</td>
<td>2</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Nordic</td>
<td>Denmark</td>
<td>1</td>
<td>1%</td>
<td>0</td>
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<td></td>
</tr>
<tr>
<td></td>
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<td>2%</td>
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<tr>
<td></td>
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<td>1</td>
<td>1%</td>
<td>1</td>
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</tr>
<tr>
<td>Common Law</td>
<td>Ireland</td>
<td>4</td>
<td>3%</td>
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<td></td>
</tr>
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<td></td>
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<td>4%</td>
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</tr>
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<td>1%</td>
<td>0</td>
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<tr>
<td></td>
<td>Cyprus</td>
<td>1</td>
<td>1%</td>
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</tr>
<tr>
<td>Ex-Socialist</td>
<td>Bulgaria</td>
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<td>0%</td>
<td>0</td>
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<td></td>
<td></td>
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<tr>
<td></td>
<td>Croatia</td>
<td>1</td>
<td>1%</td>
<td>1</td>
<td></td>
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<tr>
<td></td>
<td>Czech</td>
<td>1</td>
<td>1%</td>
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<td></td>
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</tr>
<tr>
<td></td>
<td>Estonia</td>
<td>1</td>
<td>1%</td>
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<tr>
<td></td>
<td>Hungary</td>
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<td>2%</td>
<td>0</td>
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<tr>
<td></td>
<td>Latvia</td>
<td>1</td>
<td>1%</td>
<td>1</td>
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</tr>
<tr>
<td></td>
<td>Lithuania</td>
<td>2</td>
<td>2%</td>
<td>1</td>
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</tr>
</tbody>
</table>
V. THE DECISION-MAKING PROCESS

Judges derive power from judicial activity. In the opinion of many serving at the Court, the success of the Court was built in its early days when it acted with “courage, foresight and imagination” in “constitutionalizing” the Community.\(^{200}\) EU judges are nostalgic about the Court’s “glorious past”, as evidenced by the proliferation of their celebration of the Court’s achievements in law journals and magazines.\(^{201}\) But their exercise of judicial power faces an important constraint: The jurisdictional competence of the Court. Due to its hierarchical structure and the implicit hierarchy among different cases, the division of labor between the General Court and the Court of Justice could lead to divergent incentives for judges working at different levels of the Court.

A. The Aversion to Competition Appeals

At the Court of Justice, a large bulk of the work is handling preliminary references, which are questions referred from the national courts of the EU member states. As shown in Table 6 below, 49% of cases handled by the Court of Justice from 2005 to 2014 are preliminary reference. In preliminary reference proceedings, the role of the Court is to give the ultimate interpretation of the EU law and ensure uniformity in its application. Many political scientists have attributed the Court’s success to the preliminary reference proceedings. By engaging with individual litigants and national courts, preliminary references were the main mechanism through which the Court could expand the EU legal order and advance the goal of European integration.\(^{202}\) Preliminary reference is therefore regarded as “the jewel in the crown” in the jurisdictional competence of the Court of Justice,\(^{203}\) and many if not most of the Court’s most audacious and groundbreaking decisions are preliminary rulings. Table 6 below shows that during the period from 2005 to 2014, 60% of the cases handled by the grand chamber and the full court were preliminary reference proceedings, a higher percentage than the portion (49%) among all cases. This suggests that in general a preliminary reference carries more weight than other types of proceedings.

<table>
<thead>
<tr>
<th></th>
<th>Poland</th>
<th>Romania</th>
<th>Slovakia</th>
<th>Slovenia</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>3</td>
<td>3</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2014</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>

*Note that a number of référendaires have dual nationalities.

** Switzerland is not a member of the Court but there are two référendaires who hold dual citizenship with an EU member state and with Switzerland.

\(^{200}\) See Giuseppe Federico Mancini & David T. Keeling, Democracy and the European Court of Justice, 57 MODERN L. REV. 175, 182 (1994).


\(^{202}\) See Mattli & Slaughter, supra note 137, at 181. See also Karen J. Alter, Who are the “Masters of the Treaty”? European Governments and the European Court of Justice, 52 INT’L ORG. 121, 126 (1998).

\(^{203}\) Paul Craig, EU ADMINISTRATIVE LAW 263 (2012 2nd eds.)
Table 6: Preliminary Reference v. Appeals by Court of Justice (2005-2014)\textsuperscript{204}

<table>
<thead>
<tr>
<th></th>
<th>All Cases</th>
<th>Grand Chambers and Full Court Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals</td>
<td>19%</td>
<td>14%</td>
</tr>
<tr>
<td>Preliminary Reference</td>
<td>49%</td>
<td>60%</td>
</tr>
</tbody>
</table>

In comparison, appeals follow a form of adversarial procedure where the Court is called upon to determine only those questions the parties have chosen to litigate. Because an appeal is a lawsuit against a jurisdictional act – i.e., the judgment of the General Court – its procedure is subject to many constraints and must be handled with great caution and precision. Moreover, appeals are much more effort-intensive compared with preliminary references and are generally very time-consuming.\textsuperscript{205} The Court has to meticulously examine the judgment of the General Court, and to thoroughly review the various written submissions in order to determine whether the lower court ignored any pleas from the parties. In contrast, during preliminary reference proceedings the Court of Justice is required only to interpret the law; it does not step into the shoes of the national court to rule on the merits of the case. While appeals demand higher efforts than preliminary reference proceedings, they carry less weight and play a less central role in enhancing the authority and legitimacy of the Court. As shown in Table 6, only 14% of grand chamber and full court decisions are appeals, a lower percentage than the portion (19%) among all cases. This shows that in general appeals carry less weight than other types of proceedings, particularly compared to preliminary reference proceedings.

Meanwhile, the vast majority of the competition cases handled by the Court of Justice are appeals - see Table 7 below. Compared with other cases the Court handles, competition appeals have lower visibility and rarely capture media attention. From 2005 to 2014, over 52%\textsuperscript{206} of all competition law appeals concerned the calculation of fines in cartel cases. For those yearning for power, the calculation of cartel fines is probably among the least exciting cases that will push the frontiers of EU law. Indeed, in these cases, the parties usually admitted their wrong-doing and only contested the Commission’s calculation of fines. At the same time, these cases are also very effort-intensive. As a consequence, there is an aversion among members and staff at the higher court in handling such appeals.\textsuperscript{207} As members and staff of the Court of Justice do not want their dockets flooded with appeals from the General

\textsuperscript{204} I hand-collected this data using the Court’s database available here: http://curia.europa.eu/juris/recherche.jsf?language=en

\textsuperscript{205} Telephone interview with a former référendaire (April 29, 2015). Interview with a former référendaire, London (Feb. 19, 2015).

\textsuperscript{206} I hand-collected this data using the Court’s database available here: http://curia.europa.eu/juris/recherche.jsf?language=en

\textsuperscript{207} Telephone interview with a former référendaire (April 29, 2015). Interview with a former référendaire, London (Feb. 19, 2015).
Court, they are likely to be less inclined to annul the Commission’s decisions. The situation is different when it comes to preliminary reference proceedings, which generally concern novel and difficult questions that the national courts were not able to resolve. In those occasions judges and référendaires have the freedom to reformulate the questions they would seek to answer. An insider suggests that this explains why the Court appears much more receptive to economic analysis and provides more reasoned analysis when dealing with competition law cases in preliminary reference proceedings than in appeals.208

Table 7: Competition Cases Decided by the Court of Justice (2005 to 2014)209

<table>
<thead>
<tr>
<th>All Competition Cases</th>
<th>Grand Chambers and Full Court Competition Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals</td>
<td>Preliminary Reference</td>
</tr>
<tr>
<td>74%</td>
<td>24%</td>
</tr>
</tbody>
</table>

B. The Dilemma of the Lower Court

Compared with the Court of Justice, the General Court is more specialized and has a narrower scope of jurisdiction. The General Court was set up in 1989 to reduce the workload of the Court of Justice in dealing with competition and staff cases and to search more deeply into case facts. While the jurisdictional scope of the General Court has expanded over the years, it has not dealt with preliminary reference cases.210 Unlike the situation at the higher court, competition occupies a more central role among its case portfolio. As Judge Forwood once put it: “for some Judges of the CFI [now General Court] at least, [competition] has been their primary raison d’être.”211 This has to do with the jurisdictional scope of the General Court, which generally deals with fact-intensive cases that are largely standard and routine. Therefore, competition cases are generally regarded as “more interesting and visible” compared to other categories of cases. It also has to do with the Court's human capital. The General Court is an attractive workplace for judges and référendaires with a competition law background, as it handles many more competition cases than the higher court. Interviewees indicate that judges and référendaires who are interested in competition law tend to be more engaged with economic analysis and in-depth scrutiny of the Commission’s assessment.212 However, because the General Court is bound by the rulings of the Court of Justice, it operates within a tight straightjacket.

208 Interview with a former référendaire, London (Feb. 19, 2015).
209 I hand-collected this data using the Court’s database available here: http://curia.europa.eu/juris/recherche.jsf?language=en
210 The Nice Treaty expressly provides for the possible transfer of certain preliminary ruling cases to the General Court. However, the Treaty left it to the discretion of the Court of Justice to implement it. See Nicolas Forwood, The Court of First Instance, Its Development, and Future Role in Legal Architecture of the European Union, in CONTINUITY AND CHANGE IN EU LAW: ESSAYS IN HONOR OF SIR FRANCIS JACOB 40 (Anthony Arnull et al. eds., 2008)
211 Id., at 44.
212 Telephone interview with a former référendaire (April 29, 2015).
While in principle the General Court does not need to adhere to the rulings by the Court of Justice, in practice there is pressure on it to do so because its decisions could be subject to appeal.\footnote{Marc Van Der Woude, The Court of First instance, the First Three Years 16 FORDHAM INT’L L. J. 412, 459-460 (1992); See also Tridimas, supra note 192.} Moreover, the General Court frequently refers to the judgments of the Court of Justice as a basis for its reasoning, thus reinforcing its subordination to the higher court.\footnote{Id.} In fact, were the General Court to deviate from the higher court’s ruling, it would undermine the authority of the Court of Justice before the national courts.

Not surprisingly, when some judges at the General Court attempted to conduct more intense scrutiny of the Commission’s economic analysis, the Court of Justice reminded it that it lacks the power to do so.\footnote{Jaeger, supra note 194, at 303-305.} As explained by Mark Jaeger, the President of the General Court when defending the General Court’s “deferential approach”: “If the General Court’s message as to its willingness to review the Commission’s assessments of complex economic matters through an intense—though marginal—review seems to be clear, the intervention of the Court of Justice may, however, confuse the issue in the eyes of interested observers.”\footnote{Id. at 303.} He then went on to note three instances in which the General Court attempted to apply more intense scrutiny to the Commission’s economic analysis.\footnote{Id. at 303-305} For instance, in Impala, decided in 2006, the General Court criticized the Commission for its failure to verify the accuracy and relevance of the data submitted by the parties, especially in light of the fact that the data contradicted the information the Commission gathered during market investigation. In GlaxoSmithKlein, the General Court abandoned the per se approach in analyzing vertical restraint cases and conducted a deeper assessment of the economic effects of the agreement in question. In Alrosa, the General Court conducted close scrutiny of the various commitments offered by the parties to settle their case with the Commission and annulled the Commission’s decision for infringement of the principle of proportionality.

All these attempts, however, failed, and in each case the General Court was scolded by the Court of Justice for overstepping the confined boundary of a marginal review of the Commission’s “complex economic assessment”.\footnote{Id. at 305.} As a result, the General Court needs to tread a very fine line between (in the words of Judge Jaeger): “intense control of all elements on which the Commission relied leading to its appraisal—especially those expressed in the judgment of the General Court and...recognition of a certain discretion on the part of the Commission in recalling that marginal review prevents judges substituting their own appreciation to the decision-makers—as brought out in some recent judgments by the Court of Justice”.\footnote{Id. at 305.} The Court of Justice, on the other hand, is in a position to innovate and overrule those outdated precedents. But many judges and référendaires there lack the incentives to do so due...
to their aversion to competition law appeals. As a consequence, lowering the intensity of judicial oversight in these cases could be an indirect way to limit competition appeals.\textsuperscript{220} This unique institutional design of the Court therefore leads to a very unfortunate outcome: those who want to innovate lack the power to do so, whereas those with the power lack the incentive.

VI. CONCLUSIONS AND IMPLICATIONS

Political scientists and legal scholars who study the Court tend to view it as a unitary entity. They build their study upon an assumption that the Court has a single, coherent objective to achieve the political goal of integrating Europe. But a significant portion of cases decided by the Court today are not politically charged. This Article closes a gap in the literature by examining how the Court performs in those cases without major constitutional significance, particularly in the area of antitrust and competition. Instead of viewing the Court as a whole, the Article considers the individuals who comprise it. It examines how formal institutional constraints such as the career incentives for judges and référendaires and the hierarchical structure of the Court influence judicial behavior. It also delves into informal institutional constraints such as varying legal traditions, and explores the influence of the French judicial culture on the Court.

The Article has several major findings.

First, the quality of EU judges varies significantly, due to a lack of procedural safeguards for appointment and a high salary that attracts political appointees. As a consequence, some judges are dominated by their référendaires.

Second, both judges and référendaires, especially those at the General Court, face increasingly heavy caseloads owing to a number of inherent institutional defects. This increases the pressures on judges and their référendaires to compromise quality for quantity. It also means that more work must be delegated to référendaires.

Third, référendaires are drawn from a relatively closed social network due to the lack of an open platform for recruitment. The inefficiency of the référendaire labor market results in less competition, leading many référendaires to stay longer at the Court. Meanwhile, the French style of judicial formalism increases the value of career référendaires, who become powerful conservative forces that resist changes and reform.

Fourth, the revolving door between the Court and the Commission helps the latter exert influence on the Court from the inside and gain a comparative advantage in litigation.

Fifth, the French legal tradition, with its emphasis on empowering the State rather than protecting individual liberty, has a dominant influence on the members of the

\textsuperscript{220} Craig observed that this technique of limiting case load has also been applied to preliminary reference proceeding. See PAUL CRAIG, EU ADMINISTRATIVE LAW 267 (2012 2nd ed.)
Court. Meanwhile, référendaires come from a relatively homogeneous background and most of them are Francophones trained in the French legal system.

Sixth, the division of labor between the lower court and the higher court creates divergent incentive structures for judges and référendaires working at different levels. While a small group of judges and référendaires at the General Court have the incentive to modernize the formalistic case law by introducing more economic analysis, they are unable to do so as their rulings could be struck down by the higher court. At the same time, while the Court of Justice is in a position to innovate, many judges and référendaires there lack the incentive to do so as competition policy is peripheral to the constitutional law debate.

EU competition law is often used as a yardstick for many other countries and its precedents have been widely followed by competition authorities around the world. At the same time, there is considerable dissatisfaction with the Court, whose rulings in competition often stand in sharp contrast with its US counterparts. This Article sheds light on why the differences between US antitrust law and EU competition law have persisted. As institutional change is path-dependent, evolution within each of these systems is only gradual. The Article thus suggests that such a divergence is likely to persist in the future.

While this Article is motivated primarily by my observation of the problems extant in EU competition law, its analysis also applies to other areas of EU law – such as intellectual property, state aid, and environment and agriculture – where the Court has the power and discretion in “making law”. The Article is another illustration that institutions matter for law enforcement and development. Indeed, institutions have a significant impact on shaping the incentive structures of the enforcers, be they bureaucratic agencies in China or the judges “tucked away in the fairyland Grand Duchy of Luxembourg”.

Achieving a sound understanding of the Court is key to legal reform. The current EU proposal to reform the Court, which focuses primarily on increasing the number of judges in order to reduce backlog, misses the bigger picture. This Article points to a few critical aspects in need of reform.

First, instead of continuing the current fragmented approach to nominating EU judges, the EU needs a unified policy for judicial appointment. The Committee established under Article 255 TFEU is a promising step, but its power is limited and is inadequate to address concerns over judicial quality. Meanwhile, more careful consideration should be given to the optimal structure of judicial careers (e.g., compensation, tenure, exit option), which directly influences selection into the judiciary and the behavior of judges.

Second, the Court should reconsider the use of the French language as a working language. One oft-cited reason to preserve the French language is to reduce

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221 Zhang, supra note 16.
222 Stein, supra note 9, at 1.
administrative cost. But this argument overlooks the impact of the French language on judicial decision-makers. The difficulty of the French language has prohibited many EU countries from finding suitable candidates to serve at the Court. Equally important, but often ignored, is that French also artificially reduces the size of the labor market for référendaires, resulting in an outcome wherein Francophones have a disproportionate influence on shaping EU law. Accordingly, changing the working language could effect significant transformation for the Court as it works directly to break the dominance of the French legal culture. English is the obvious alternative. As a foreign language English is much more widely spoken than French in Europe and it has functioned well as the official language in other EU institutions such as the Commission.

Third, the recruitment, management and governance of référendaires should command more attention from EU policymakers. Establishing an official online platform for recruiting référendaires will increase the efficiency for both the application and hiring processes. In addition, an adequate mechanism should be created to address any potential concern of a revolving door between the Court and other public and private institutions. The secondment program from the Commission to the Court raises serious conflict issues, and it is questionable whether such a scheme should be allowed to continue. Considering that many référendaires serve longer than their judges, it is well worth considering whether the tenure of référendaires should be capped, as otherwise they risk exerting a powerful conservative force upon the Court and dominating less experienced judges.

As a product of unique historical circumstances, the Court continues to operate under profound French influence. The findings in the literature on law and finance show that French legal origin countries tend to provide less secure property rights protection to investors. This raises a profound concern about the dominance of French judicial culture at the Court. As the Court continues its deference to the administration and sticks to its formalistic precedents without adequate protection for individual rights and property, will it be walking a dangerous path that hinders Europe’s economic growth and development? This is a deeply important question, which I leave for future study.

223 See Schiemann, supra note 79, at 10-11 (noting the difficulty in finding English-speaking supporting staff to serve at the Court, especially considering the Court is located in a French-speaking country).

224 See European Commission, supra note 78, at 5 (showing English is the most widely spoken language in the EU (38%), far exceeding French (12%)).
## VII. DATA APPENDICES

### Appendix I  
Background Information of Judges and Advocates General

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>GC Judge</th>
<th>CJ Judge</th>
<th>AG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
<td>184</td>
<td>66</td>
<td>95</td>
<td>45</td>
</tr>
<tr>
<td>Gender (M=1, F = 0)</td>
<td>0.892</td>
<td>0.831</td>
<td>0.917</td>
<td>0.911</td>
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<tr>
<td>Current Member</td>
<td>0.346</td>
<td>0.508</td>
<td>0.302</td>
<td>0.244</td>
</tr>
<tr>
<td>Complete Education Information</td>
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<td>0.277</td>
<td>0.188</td>
<td>0.178</td>
</tr>
<tr>
<td>Education (PHD 1, non-PHD 0)</td>
<td>0.416</td>
<td>0.385</td>
<td>0.469</td>
<td>0.311</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Previous Experience</th>
<th>Total</th>
<th>GC Judge</th>
<th>CJ Judge</th>
<th>AG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Academia</td>
<td>0.619</td>
<td>0.600</td>
<td>0.630</td>
<td>0.733</td>
</tr>
<tr>
<td>Private Practice</td>
<td>0.335</td>
<td>0.415</td>
<td>0.313</td>
<td>0.333</td>
</tr>
<tr>
<td>Référendaire at the Court</td>
<td>0.108</td>
<td>0.182</td>
<td>0.052</td>
<td>0.111</td>
</tr>
<tr>
<td>CJEU</td>
<td>0.135</td>
<td>0.000</td>
<td>0.063</td>
<td>0.133</td>
</tr>
<tr>
<td>National Court</td>
<td>0.535</td>
<td>0.508</td>
<td>0.552</td>
<td>0.467</td>
</tr>
<tr>
<td>National Government</td>
<td>0.654</td>
<td>0.569</td>
<td>0.667</td>
<td>0.756</td>
</tr>
<tr>
<td>European Commission</td>
<td>0.070</td>
<td>0.108</td>
<td>0.042</td>
<td>0.089</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Primary Prior Work Experience</th>
<th>Total</th>
<th>GC Judge</th>
<th>CJ Judge</th>
<th>AG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government</td>
<td>0.281</td>
<td>0.215</td>
<td>0.292</td>
<td>0.289</td>
</tr>
<tr>
<td>Academia</td>
<td>0.276</td>
<td>0.262</td>
<td>0.313</td>
<td>0.244</td>
</tr>
<tr>
<td>Judiciary</td>
<td>0.173</td>
<td>0.231</td>
<td>0.156</td>
<td>0.089</td>
</tr>
<tr>
<td>Private Practice</td>
<td>0.108</td>
<td>0.123</td>
<td>0.094</td>
<td>0.067</td>
</tr>
<tr>
<td>Unknown</td>
<td>0.162</td>
<td>0.169</td>
<td>0.146</td>
<td>0.311</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Last Position</th>
<th>Total</th>
<th>GC Judge</th>
<th>CJ Judge</th>
<th>AG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government</td>
<td>0.270</td>
<td>0.262</td>
<td>0.271</td>
<td>0.222</td>
</tr>
<tr>
<td>Academia</td>
<td>0.189</td>
<td>0.154</td>
<td>0.240</td>
<td>0.178</td>
</tr>
<tr>
<td>Judiciary</td>
<td>0.286</td>
<td>0.292</td>
<td>0.281</td>
<td>0.222</td>
</tr>
<tr>
<td>Private Practice</td>
<td>0.070</td>
<td>0.138</td>
<td>0.021</td>
<td>0.089</td>
</tr>
<tr>
<td>Unknown</td>
<td>0.184</td>
<td>0.154</td>
<td>0.188</td>
<td>0.289</td>
</tr>
</tbody>
</table>

**Notes**

1. This table provides the summary statistics of the background information of current and former judges and advocates general (both referred to as EU judges) at the General Court and the Court of Justice. It does not provide information on the judges at the Civil Service Tribunal (CST).
2. “Count” indicates the number of valid data points.
3. GC=General Court; CJ=Court of Justice; AG=Advocate General; Court = GC+CJ; “CJEU” =GC+CJ+CST.
4. “Complete education experience” means that the schools and the degrees received by the EU judge are both specified in his public profile.
5. “Previous experience” refers to an EU judge's prior working experience before joining the Court. The vast majority of EU judges have varied experience.
6. “Primary prior work experience” refers to the longest job experience of an EU judge prior to joining the Court. For instance, if a judge worked for ten years as a judge at the national court and five years as an academic prior to joining the Court, his primary prior work experience is judiciary.
7. “Last position” refers to the last position immediately before the EU judge joins the Court.
## Appendix II

### Tenure of Former Judges and Advocates General (in years)

<table>
<thead>
<tr>
<th></th>
<th>GC Judge</th>
<th>CJ Judge</th>
<th>AG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average</td>
<td>8.243</td>
<td>8.985</td>
<td>7.278</td>
</tr>
<tr>
<td>Median</td>
<td>7</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>Std Dev</td>
<td>4.136</td>
<td>4.310</td>
<td>4.286</td>
</tr>
<tr>
<td>Min</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Max</td>
<td>18</td>
<td>21</td>
<td>20</td>
</tr>
</tbody>
</table>

**Notes:**
1. This table provides the summary statistics of the tenure of the former EU judges at the General Court and the Court of Justice.
2. GC=General Court; CJ=Court of Justice; AG=Advocate General.
## Appendix III

### Basic Background Information of A Sample of 74 Current and 103 Former Référendaires

<table>
<thead>
<tr>
<th>Count</th>
<th>Current Référendaires</th>
<th>Former Référendaires</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>CJ</td>
</tr>
<tr>
<td>Gender (M=1, F = 0)</td>
<td>0.622</td>
<td>0.516</td>
</tr>
<tr>
<td>Worked for Multiple Judges at the Court</td>
<td>0.338</td>
<td>0.300</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Education</th>
<th>Current Référendaires</th>
<th>Former Référendaires</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>CJ</td>
</tr>
<tr>
<td>Doctoral</td>
<td>0.273</td>
<td>0.357</td>
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<tr>
<td>Master</td>
<td>0.939</td>
<td>1.000</td>
</tr>
<tr>
<td>French-Speaking Law Schools</td>
<td>0.812</td>
<td>0.793</td>
</tr>
<tr>
<td>Common-law Law schools</td>
<td>0.382</td>
<td>0.375</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Previous Professional Experience</th>
<th>Current Référendaires</th>
<th>Former Référendaires</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>CJ</td>
</tr>
<tr>
<td>National Government</td>
<td>0.118</td>
<td>0.107</td>
</tr>
<tr>
<td>Academia</td>
<td>0.235</td>
<td>0.429</td>
</tr>
<tr>
<td>Private Practice</td>
<td>0.368</td>
<td>0.536</td>
</tr>
<tr>
<td>Intership in the Court</td>
<td>0.088</td>
<td>0.107</td>
</tr>
<tr>
<td>Other Positions in the Court</td>
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<td>0.286</td>
</tr>
<tr>
<td>Intership in the Commission</td>
<td>0.147</td>
<td>0.107</td>
</tr>
<tr>
<td>Commission</td>
<td>0.206</td>
<td>0.071</td>
</tr>
<tr>
<td>Commission: Legal Service</td>
<td>0.074</td>
<td>0.000</td>
</tr>
<tr>
<td>Commission: DG Comp</td>
<td>0.059</td>
<td>0.036</td>
</tr>
<tr>
<td>Commission: Others</td>
<td>0.074</td>
<td>0.036</td>
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**Notes:**
1. This table provides the summary statistics of education and professional experience of 74 current and 103 former référendaires based on information hand-collected from LinkedIn.
2. Count indicates the number of valid data points.
3. GC=General Court; CJ=Court of Justice; Commission= European Commission; Court= GC +CJ; DG Comp = Director General for Competition at the Commission.
4. “French-speaking law schools” means if the référendaire attended a law school located in Belgium, France, or Luxembourg.
5. “Common law schools” means if the référendaire studied in common law countries (e.g., UK, United States).
6. “Other positions in the Court” means the référendaire worked in positions other than référendaires at the Court (e.g., linguist, researcher).
7. “Former référendaire exit option” means the first job a référendaire joined upon departing the Court.
Appendix IV
Tenure and Work Experience of A Sample of 73 Current and 103 Former Référendaires

<table>
<thead>
<tr>
<th></th>
<th>Years Working as Référendaires</th>
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<tr>
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<td>Current Référendaires</td>
<td>Former Référendaires</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>CJ</td>
</tr>
<tr>
<td>Mean</td>
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<td>6.77</td>
</tr>
<tr>
<td>Median</td>
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<td>7.00</td>
</tr>
<tr>
<td>Std. Dev</td>
<td>5.07</td>
<td>5.21</td>
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<tr>
<td>Max</td>
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</table>

Notes:
1. This table provides the summary statistics of the years of previous job experience and the tenure of 74 current and 103 former référendaires at the General Court and the Court of Justice based on information hand-collected from LinkedIn.
2. GC=General Court; CJ=Court of Justice
Appendix V  Revolving Door between the Commission and the Court

<table>
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<tr>
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<th>Mean</th>
<th>Median</th>
<th>Std Dev.</th>
<th>Min</th>
<th>Max</th>
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Notes:
1. This table provides the summary statistics of 35 current and former référendaires who have experience working full-time at both the Commission and the Court. The data is hand-collected from LinkedIn.
2. Commission= European Commission; Court= General Court +Court of Justice; DG Comp=Director General for Competition
3. “Commission to Court” means if the référendaire worked for the Commission immediately before joining the Court.
4. “Court to Commission” means if the référendaire joined the Commission upon departing the Court.