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THE FACELESS COURT

ANGELA HUYUE ZHANG*

ABSTRACT

This Article is the first to examine the behavior of judges and their law clerks (officially entitled *référéndaires*) at the Court of Justice of the European Union. It identifies a number of serious issues affecting Court performance. First, the Article finds that the Court's high judicial salaries and lack of procedural safeguards for EU judicial appointments attract political appointees. As a consequence, some judges who are selected are not competent to perform their duties and are dominated by their *référéndaires*. Moreover, the high turnover rate of EU judges hampers their productivity and increases their dependence on the *référéndaires*.

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Using a sample of data hand-collected from LinkedIn, the Article demonstrates that référendaires are drawn from a relatively closed social network. There is no open platform for recruiting référendaires, and the requirement of French as the working language significantly limits the pool of eligible candidates. The inefficiency of the référendaire labor market results in less competition, leading many référendaires to stay longer at the Court. The revolving door between the Court and the European Commission raises serious conflict issues, as the Commission is able to exert influence on the Court from the inside and gain a comparative advantage in litigation. In addition, the Court's practice of issuing a single, collegial decision encourages free-riding, increases pressures for judges and référendaires to conform, and suppresses dissent, as illustrated in the *Microsoft* case. Last but not least, 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.

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1. INTRODUCTION

The Court of Justice of the European Union (“the Court”)¹ is the most powerful supranational court in the world. In the political science literature the Court is often depicted as activist, constantly expanding the scope of EU law and pushing its boundaries.² Indeed, through a series of innovative decisions in the 1960s, the Court is said to have effectively “constitutionalized” Europe.³ Today the Court’s power and influence have extended far beyond its founders’ original goal of unifying Europe. As regulations originating from Brussels have penetrated many aspects of economic life,⁴ the Court not only delineates the fundamental rights of European citizens but also greatly influences the way multinational companies are conducting business within and outside of Europe. Acting as a veritable “Supreme Court” of Europe, the Court has the authority to provide the ultimate interpretation of EU regulations in a wide range of areas affecting global commerce. Multinational companies, ranging from European leaders like GlaxoSmithKline and LVMH, to America’s iconic businesses such as Google and Facebook, and to China’s national champions such as Huawei and ZTE, all need to pay heed to the Court’s rulings.

Despite this considerable global profile, we know very little about the Court itself. Indeed, existing literature on EU law tends

¹ The Court of Justice of the European Union comprises three tribunals: The Court of Justice, the General Court, and the Civil Service Tribunal. For purpose of this article, the Court refers to the Court of Justice and the General Court.

² See generally e.g., KAREN ALTER, *THE EUROPEAN COURT’S POLITICAL POWER* (2009) (analyzing the political influence of the Court); *JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE* (Mark Dawson et al. eds., 2013) (discussing the Court’s political role); HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE* (1986) (explaining the Court’s role in judicial pro-community policymaking in Europe).

³ See e.g., Eric Stein, *Lawyers, Judges and the Making of A Transnational Constitution*, 75 AM. J. INT’L L. 1, 24–27 (1981) (demonstrating the effect of the Court of Justice on the European Community’s legal framework); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413–22 (1991) (discussing the transformation which occurred in the European Community’s relationship with the individual Member States between 1958 and 1992).

⁴ See generally Anu Bradford, *The Brussels Effects*, 107 NW. U. L. J. 1 (2012) (discussing the increasingly expansive role of the Court of Justice of the European Communities in the European judicial process).

to view the Court as a black box and ignores one crucial element in judicial law making—human behavior. This partly has to do with the “faceless” nature of EU judicial law making. Since its establishment, the Court has followed the French tradition of issuing a single, collective, and unanimous judgment without dissents. In fact, judges are prohibited from revealing how the Court reached its decision in a particular case.⁵ Another daunting challenge in understanding the Court 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 “référéndaires”⁶). But référéndaires 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. The project is inherently interdisciplinary and builds upon various strands of literature in law, economics, political science, and sociology. It is also both quantitative and qualitative. Based on the public information disclosed by the Court, I provide summary statistics of the background of the judges and advocates general (collectively referred to as “EU judges” hereinafter) appointed by the Court since 1952. As the background of référéndaires is not disclosed, I hand-collected data from LinkedIn, a professional social networking website, and created a dataset of 103 former référéndaires and seventy-four current référéndaires working for the Court. In May 2014, I made a field trip to Luxembourg, and during the subsequent twelve months I conducted twenty extensive interviews with former and current members and staff of the Court.⁷

The Article is organized as follows: Section II sets the stage by providing a sketch of the EU judicial process. Section III delves in-

⁵ See The Statute of the Court of Justice of the European Union, art. 2, Aug. 11, 2012, 2012 O.J. (C 326) 201, 210 (directing each Judge to “preserve the secrecy of the deliberations of the Court”).

⁶ Référéndaires are also referred to as “legal secretaries” in English.

⁷ The interviews were open-ended and conducted either face to face or over the phone and lasted for about an hour on average. They were conducted on condition of anonymity, and thus, interviewee’s names have been omitted from this article.

to the appointment process of EU judges and analyzes how the salary of EU judges could, in turn, influence their judicial quality. Section IV studies the hidden decision-makers at the Court by examining the labour market, social network, country of origin, and career structure of *référéndaires*. It also probes into the affiliation of some *référéndaires* with the European Commission (“the Commission”) and explores the potential consequences. Section V analyzes how the Court’s practice of issuing a single judgment could suppress dissent, as illustrated in the *Microsoft* case. Section VI studies the unique division of labor between different levels of the Court and analyzes how such an arrangement could influence the incentive structure for the EU judges. Section VII concludes and provides implications of this study. The summary statistics of the EU judges and *référéndaires* are presented in Section VIII.

2. HOW THE COURT WORKS

The Court is comprised of three tribunals: The Court of Justice, the General Court, and the Civil Service Tribunal.⁸ Both the Court of Justice and the General Court are composed of one judge from each EU country.⁹ The Civil Service Tribunal comprises seven judges.¹⁰ As the Civil Service Tribunal specializes in staff cases, it is excluded for the purpose of this study. As of July 2015, there were also nine advocates general at the Court of Justice, six of whom are appointed from the largest EU Member States (including Germany, France, Spain, Poland, the UK, and Italy).¹¹ The final

⁸ Consolidated Version of the Treaty of the European Union, art. 19 (1), Oct. 26, 2012, 2012 O.J. (C 326) 27.

⁹ See Consolidated Version of the Treaty on the Functioning of the European Union, art. 253–54, Oct. 12, 2012, 2012 O.J. (C 326) 159 [hereinafter TFEU] (noting the criteria by which judges of the General Court and Court of Justice are selected).

¹⁰ HUGO BRADY, TWELVE THINGS EVERYONE SHOULD KNOW ABOUT THE EUROPEAN COURT OF JUSTICE 32(2014), http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/hugo_brady_12_things_ecj_22.07.14-9313.pdf [<https://perma.cc/Z2UA-SZYJ>].

¹¹ See Press Release No 139/13, Court of Justice of the European Union, *Entry into Office of New Members at the Court of Justice and the General Court* (Oct. 23, 2013), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-10/cp130139en.pdf> [<https://perma.cc/B7EL-L8XJ>] (noting changes in the com-

three positions rotate among the remaining EU countries.¹² Similar to judges, advocates general are also officially “members” of the Court and indeed enjoy status equal to judges.¹³ However, they do not participate in the deliberation of cases.¹⁴ Rather, they provide an independent reasoned opinion to the Court, thus playing the role of a quasi-decision-maker.

At each level of the Court, every judge or advocate general is entitled to three clerks (officially entitled *référéndaires*); some judges who assume management responsibilities are entitled to four *référéndaires*.¹⁵ Judges at the Court of Justice have additional help from *administrateurs juristes*, who are lawyers but do not work on cases directly.¹⁶ According to the data provided by the Court in March 2015, there were 123 *référéndaires* and 22 *administrateurs juristes* working at the Court of Justice and 94 *référéndaires* at the General Court.¹⁷

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.¹⁸ The second category includes preliminary rulings, which are proceedings in which the Court gives clarification to a national court when the latter is in

position of advocates general and that the court would appoint two additional advocates by Oct. 2015).

¹² *Id.*

¹³ See Court of Justice of the Eur. Union, Annual Report 2014, 67–89 (2015) (showing that judges and advocates general are both members of the court, and they enjoy the same status).

¹⁴ TFEU, *supra* note 9, at art. 252.

¹⁵ This is based on the Author’s search of the Court of Justice of the European Union in the official directory of the European Union. *EU Whoiswho*, EUROPA, <http://europa.eu/whoiswho/public/> (last visited Oct. 6, 2016) [<https://perma.cc/6EK3-HD67>].

¹⁶ E-mail from Access to Documents Unit, Court of Justice of the European Union to Author (Mar. 20, 2015, 15:30 GMT) (on file with Author) (providing data about the *référéndaires* and *administrateur juristes*).

¹⁷ *Id.*

¹⁸ David Edward, *How the Court of Justice Works*, 20 EUR. L. REV. 539, 543 (1995).

doubt about the interpretation or validity of an EU law.¹⁹ The work of the Court of Justice encompasses all areas of EU law, such as constitutional cases involving free movement, 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, and trademarks. 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.²⁰ At the General Court there are nine chambers, each consisting of three judges.²¹ Certain types of important cases are reviewed by the grand chamber, which is comprised of the President, the Vice President, the Presidents of Chambers, and a number of other judges.²² Extremely important cases are decided by a plenary session of the whole court.²³ The composition of the chambers changes periodically, and the presidency of the chambers rotates on an annual basis.²⁴

At the Court of Justice, the President allocates a case to one judge as rapporteur and the First Advocate-General²⁵ allocates it to one advocate general (though advocates general are no longer appointed in every case due to a workload concern). The rapporteur

¹⁹ *Id.* at 544–45.

²⁰ *See* Court of Justice of the Eur. Union, *supra* note 13, at 85–86 (listing the presidents of each of the ten chambers at the Court of Justice and the order of precedence for the judges overall).

²¹ *See id.* at 175 (listing the president of each of the nine chambers at the General Court and the order of precedence for the judges overall).

²² Court of Justice of the Eur. Union, Consolidated Version of the Rules of Procedure of the Court of Justice of the European Union [hereinafter Rules of Procedure], art. 27(1) (Sept. 25, 2012), http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf [<https://perma.cc/S6A7-YRNJ>].

²³ *Id.* at art. 60(2).

²⁴ Edward, *supra* note 18, at 542–43.

²⁵ The First Advocate-General assumes a management role in deciding whether to review certain appeals from the General Court and to allocate cases among advocates general.

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.²⁶ 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.²⁷ Once the advocate general has delivered the opinion, the rapporteur then circulates a note to the other judges in the panel providing his suggestions on how the case should be handled.²⁸

The deliberation among judges takes place behind closed doors and référendaires are not allowed to participate in the process.²⁹ Even if there is disagreement among the judges, the Court only issues one single judgment and no dissenting opinions are allowed.³⁰ In reality the rapporteur and the advocate general will be most closely involved in the case as they assume most of the drafting responsibilities. 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 served as a party in over 52% of the cases.³¹ While Member States have primary responsibility for applying EU law, the Commission monitors its application and

²⁶ Edward, *supra* note 18, at 551-52.

²⁷ *Id.* at 555.

²⁸ *Id.*

²⁹ Rules of Procedure, *supra* note 22, at art. 32.

³⁰ Edward, *supra* note 18, at 555-57.

³¹ This data was hand-collected using the Court's database and includes all cases decided by the Court from its establishment to August 27, 2015. InfoCuria, *Case-law of the Court of Justice*, CURIA, <http://curia.europa.eu/juris/recherche.jsf?language=en> [<https://perma.cc/WA2D-2ERA>] (last visited Aug. 27, 2015).

may bring infringement actions against Member States for non-compliance. With regard to competition cases, the Commission acts as both the investigator and prosecutor and can bring actions directly against individuals and companies.

3. EU JUDGES

Judges are, as Posner called them, “all-too-human workers.”³² 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 judges is largely insulated from performance review. To be sure, judicial opinions are often subject to criticisms, but the nature of judicial rulings will always create winners and losers. As long as a judge does not commit gross mistakes and faithfully applies the statutes, a judge’s career will normally be secure no matter what interpretation he applies to the statute. Indeed, 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 EU judges are free from any constraints. The selection process for EU judges, as well as the incentives and constraints imposed by the structure and rules of their careers, has a significant impact on how they behave.

As of the end of 2015, 184 men and women have served at the Court of Justice and the General Court. Ninety-five have served as judges. Forty-five have served as advocates general at the Court of Justice, and sixty-six have served as judges at the General Court. Twenty-two judges have served multiple roles at the Court. A statistical summary of the judges’ gender, education, and professional experience is presented in Appendix I.

³² RICHARD A. POSNER, *HOW JUDGES THINK* 7 (2008).

3.1. Selection

As the performance of EU judges cannot be easily observed and monitored, judicial appointment becomes of paramount importance in controlling judicial quality.³³ 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.³⁴ Upon nomination, governments of the Member States, by common accord, appoint the judge for a renewable term of six years.³⁵ In practice, Member States never disagree with each other's nomination, so in effect each Member State appoints its own judges.³⁶ As a consequence, each Member State follows its own judicial appointment process, which is often opaque and political.³⁷

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 positions before joining the Court were 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

³³ See 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, 55 (Michal Bobek ed., 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, causing the judicial outcome to reflect the prevailing professional disposition of the Court).

³⁴ See Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 *FEMINIST LEGAL STUD.* 257, 259-60 (2002) (describing the general method by which judges are appointed).

³⁵ TFEU, *supra* note 9, at art. 253.

³⁶ See Kenney, *supra* note 34 (noting that appointments are rarely a subject of attention and states simply need to inform the council of their decision).

³⁷ See *id.* at 260 (2002) (explaining the secrecy surrounding Court appointments). 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*, *supra* note 33, at 24 (analyzing the system for selecting judges at the Court of Justice of the European Union).

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 judicial experience in the national courts. In fact, only 17% of the EU judges' primary work experience and 29% of the EU judges' last positions before joining the Court were 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.³⁸ 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.³⁹ 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.⁴⁰

Worse yet, there is no public hearing during the appointment process. The only public information the Court makes available about the judges are 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 attended, degrees obtained, 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

³⁸ Kenney, *supra* note 34.

³⁹ *Id.*

⁴⁰ *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) (discussing the influence that governments exert over the decisions of international judges through the appointment process).

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.⁴¹ However, the criteria as established in the EU Treaty are very loose.⁴² This leaves considerable room for discretion.

In 2010, an expert committee ("the Committee") was established under Article 255 of the Treaty on the functioning of the European Union (TFEU) to vet the credentials of candidates nominated by the member states as well as current members who are up for reappointment.⁴³ 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.⁴⁴

⁴¹ See Kenney, *supra* note 34, at 267 (noting the threshold for merit for EU judges). See also Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 COLUM. J. EUR. L. 89, 105 (2008) (addressing the need for improved diversity, independence, and additional transparency in the Court of Justice).

⁴² 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." TFEU *supra* note 9, at art. 253. Art. 254 of the TFEU provides that "the members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office." *Id.* at art. 254.

⁴³ Tomáš Dumbrovský et al., *Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States*, 51 COMMON MKT. L. REV. 455, 459 (2014).

⁴⁴ Council Decision 2010/125/EU, Appointing the Members of the Panel

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.⁴⁵ 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.⁴⁶ The requirement to speak French remains a soft constraint, and the Committee expects the candidates to at least acquire proficiency in French "within a reasonable time."⁴⁷

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.⁴⁸ However, in a few countries, such as Greece, Italy, and Spain, appointment remains exclusively controlled by the executives.⁴⁹ 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 to issue a non-binding opinion.⁵⁰ 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 Euro-

Provided for in Article 255 of the Treaty on the Functioning of the European Union, art. 1, 2010 O.J. (L 50) 20, 20 (EU).

⁴⁵ The Council of the Eur. Union, Activity Report of the Panel Provided for in Article 255 of the Treaty on the Functioning of the European Union, 6509/2011, at 9–10 (Feb. 17, 2011), <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206509%202011%20INIT> [<https://perma.cc/FM3W-N8PU>].

⁴⁶ The Council of the Eur. Union, Third Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union, 19, SN 11118/2014 (Dec. 13, 2013), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf> [<https://perma.cc/4XHU-T2F9>].

⁴⁷ *Id.*

⁴⁸ Dumbrovský, *supra* note 43.

⁴⁹ *Id.* at 467.

⁵⁰ TFEU, *supra* note 9, at art. 255. *See also* Dumbrovský, *supra* note 43, at 459 (describing the power of the panel to give a favorable or unfavorable opinion but not including any nomination powers).

pean Parliament.⁵¹

By December 2013, the Committee had examined thirty-two new candidates and delivered seven unfavorable opinions on candidates from Greece, Italy, Cyprus, Romania, Sweden, Lithuania, and the Czech Republic.⁵² 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 “manifestly too short.”⁵³ Some candidates were rejected for “insufficient familiarity with EU law.”⁵⁴

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. Interviewees indicated that the less capable the EU judge is, the more he or she will need to rely on the *référéndaires* to carry out the judicial functions.⁵⁵ As a consequence, the voices of *référéndaires* are amplified, and in some instances they even effectively become the judges behind the scenes.⁵⁶

3.2. Compensation

The Court is an attractive workplace for European jurists, not

⁵¹ *Id.* at 460.

⁵² Dumbrovský, *supra* note 43.

⁵³ The Council of the Eur. Union, *supra* note 46, at 20.

⁵⁴ *Id.*

⁵⁵ Telephone Interview with Former *Référéndaire* (Apr. 29, 2015) (notes on file with Author); Interview with Former *Référéndaire*, London, Eng. (April 10, 2015) (notes on file with Author); Interview with Former *Référéndaire*, London, Eng. (April 10, 2015) (notes on file with Author); Interview with Member of the Court, in London, Eng. (Mar. 12, 2015) (notes on file with Author); Interview with Former *Référéndaire*, in London, Eng. (Feb. 19, 2015) (notes on file with Author); Interview with Member of the Court, in Luxembourg (May 5, 2014) (notes on file with Author); Interview with Current *Référéndaire*, in Luxembourg (May 5, 2014) (notes on file with Author); Interview with Current *Référéndaire*, in Luxembourg (May 5, 2014) (notes on file with Author).

⁵⁶ See *supra* note 55 (referring to the same series of interviews).

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).⁵⁷ They also enjoy generous entertainment allowances ranging from €7,292 for ordinary judges to €17,016 annually for the President.⁵⁸ The Presidents of the chambers are entitled to an additional €9,729.⁵⁹ In addition, EU judges enjoy generous fringe benefits, including a car and a driver and a residence allowance equal to 15% of their salary.⁶⁰ When they leave the bench, EU judges are also entitled to generous pension benefits⁶¹ and transitional allowances.⁶² 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 €231,101.⁶³ They also receive entertainment allowances ranging from €6,650 for ordinary judges to €7,292 annually for the President.⁶⁴ The Presidents of the chambers are entitled to an additional €8,873 each

⁵⁷ See Council Regulation 422/67/EEC, 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, art. 2, 1967 O.J. (L 187) 222, 222 (showing salary and pension information by different criteria such as age, years of service, title, etc.). See also Council 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 Regulations], art. 66, 1962R0031, http://ecdc.europa.eu/en/aboutus/jobs/documents/staff_regulations_2014.pdf [<https://perma.cc/XHV7-UB4F>] (laying out the monthly salaries for EU staff members).

⁵⁸ Council Regulation 422/67/EEC, *supra* note 57, at art. 4(3).

⁵⁹ *Id.*

⁶⁰ *Id.* at art. 4.

⁶¹ *Id.*

⁶² *Id.* at art. 7.

⁶³ *Id.* at art. 21(a)(2).

⁶⁴ *Id.* at art. 21(a)(3).

year.⁶⁵ Salaries of EU judges are subject to both income tax and a solidarity levy.⁶⁶ For instance, the net salary of a judge at the Court of Justice (with no management role) with no dependent spouse or children is €203,652.⁶⁷

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 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 1 below compares both the gross and net annual salary of judges from national Supreme Courts and those of an ordinary judge at the Court of Justice. Table 2 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 salaries in the United States, where most judges could earn significantly higher wages when working for other employers. 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.”⁶⁸

⁶⁵ *Id.*

⁶⁶ E-mail from Press and Information Unit, Court of Justice of the European Union to Author (July 22, 2015, 06:38 GMT) (on file with Author).

⁶⁷ *Id.*

⁶⁸ JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN

Table 1: Comparison of Salaries of National Supreme Court Judges with EU judges⁶⁹

EU Country	Gross Annual Salary of National Supreme Court Judges (€)	Net Annual Salary of National Supreme Court Judges (€)	EU Judge Gross Annual Salary* to National Supreme Court Judges	EU Judge Net Annual Salary* to National Supreme Court Judges
Bulgaria	28,019	25,215	8.9	8.1
Lithuania	29,103	22,118	8.6	9.2
Hungary	35,289	25,476	7.1	8.0
Latvia	37,616	25,573	6.6	8.0
Malta	40,221	32,919	6.2	6.2
Romania	42,049	29,493	5.9	6.9
Slovakia	42,916	N/A	5.8	N/A
Estonia	48,077	37,924	5.2	5.4
Czech	54,272	N/A	4.6	N/A
Greece	57,009	47,030	4.4	4.3
Poland	60,998	43,445	4.1	4.7
Croatia	63,120	31,320	4.0	6.5
Slovenia	63,664	34,212	3.9	6.0
Portugal	66,204	N/A	3.8	N/A
Sweden	94,500	N/A	2.6	N/A
Germany	104,711	N/A	2.4	N/A
Spain	107,565	66,690	2.3	N/A
France	110,082	93,762	2.3	2.2
Belgium	118,643	56,536	2.1	3.6
Austria	119,771	41,418	2.1	4.9
Finland	128,700	78,553	1.9	2.6
Netherlands	128,900	67,000	1.9	3.0
Luxembourg	129,943	N/A	1.9	N/A
Cyprus	133,219	N/A	1.9	N/A
Denmark	176,769	N/A	1.4	N/A
Italy	179,747	97,833	1.4	2.1
Ireland	197,272	N/A	1.3	N/A
UK-England	256,206	N/A	1.0	N/A

AMERICA 34 (3d ed. 2007).

⁶⁹ The salary data of judges at the national Supreme Courts is compiled based on the 2012 data collected by the European Commission for the Efficiency of Justice. Eur. Comm'n for the Efficiency of Justice, *European Judicial Systems—Edition 2014* (2012 data): Efficiency and Quality of Justice 309 (2014), http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf [<https://perma.cc/7UPY-P5S8>].

* As described above, according to the data provided 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 dependents (spouse and/or children) is €203,652.

Table 2: Comparison of Salaries of National Supreme Court Judges with EU Judges (after adjusting for costs of living)⁷⁰

EU Country	Equivalent Gross Annual Salary of National Supreme Court Judges (€)	Equivalent Net Annual Salary of National Supreme Court Judges (€)	EU Judge Gross Annual Salary* to National Supreme Court Judges	EU Judge Net Annual Salary* to National Supreme Court Judges
Bulgaria	70,048	63,038	4.1	3.8
Lithuania	54,568	41,471	5.3	5.8
Hungary	74,293	53,634	3.9	4.5
Latvia	62,693	42,622	4.6	5.7
Malta	58,151	47,594	4.9	5.1
Romania	93,442	65,540	3.1	3.7
Slovakia	74,637	N/A	3.9	N/A
Estonia	73,028	57,606	3.9	4.2
Czech	101,760	N/A	2.8	N/A
Greece	79,547	65,623	3.6	3.7
Poland	130,710	93,096	2.2	2.6
Croatia	113,051	56,096	2.5	4.3
Slovenia	92,044	49,463	3.1	4.9

⁷⁰ The salary of national Supreme Court judges is adjusted using the 2014 price level index compiled by Eurostat. The index is available online. *Comparative Price Levels of Consumer Goods and Services*, EUROSTAT (last modified June 15, 2016), http://ec.europa.eu/eurostat/statistics-explained/index.php/Comparative_price_levels_of_consumer_goods_and_services#Price_level_indices [https://perma.cc/XG8H-SL3D].

Portugal	98,080	N/A	2.9	N/A
Sweden	90,720	N/A	3.2	N/A
Germany	123,189	N/A	2.3	N/A
Spain	138,794	86,052	2.1	2.8
France	122,313	104,180	2.4	2.3
Belgium	130,616	62,241	2.2	3.9
Austria	134,323	46,450	2.1	5.2
Finland	125,561	76,637	2.3	3.1
Netherlands	139,351	72,432	2.1	3.3
Luxembourg	129,943	N/A	2.2	N/A
Cyprus	179,621	N/A	1.6	N/A
Denmark	153,712	N/A	1.9	N/A
Italy	211,467	115,098	1.4	2.1
Ireland	195,642	N/A	1.5	N/A
UK	252,006	N/A	1.1	N/A

* As described above, an EU judge receives a residence allowance which equals 15% of the judge's salary and is not subject to tax, and thus the gross annual salary of a EU judge at the Court of Justice with the residence allowance is €287,487, 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.⁷¹ This is because unlike private employees, the government cannot use external monitors to discipline the performance of

⁷¹ See Stephen J. Choi et al., *Are Judges Overpaid? A Skeptical Response to Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47, 55 (2009) (stating how individuals that are committed to furthering the public welfare or that are hard workers are more willing to become judges even with lower salaries); Paul E. Greenberg & James A. Haley, *The Role of Compensation Structure in Enhancing Judicial Quality*, 15 J. LEGAL STUD. 417, 418 (1986) (explaining that those willing to accept a reduction in compensation in exchange for positions as judges seek non-pecuniary benefits of holding such a position and are therefore more likely to be better judges because non-pecuniary driven individuals are more likely to show self-restraint).

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.⁷² These individuals are more likely to exhibit self-restraint, a desirable quality for good judges.⁷³

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.⁷⁴ 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 a 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. As Choi and his co-authors argue, 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.⁷⁵ Therefore, when the appointment is not strictly made on the merits, a high salary increases the chance that appointments are used as political patronage to reward loyal functionaries or political allies. Interviewees observed that some judges who received significant pay increases are indeed political appointees who are not competent to perform their duties and are dominated by their *référéndaires*.⁷⁶

⁷² Greenberg, *supra* note 71, at 418.

⁷³ *Id.*

⁷⁴ *Id.* at 421.

⁷⁵ Choi, *supra* note 71, at 55.

⁷⁶ Telephone Interview with Former *Référéndaire* (Apr. 29, 2015) (notes on file with Author); Interview with Former *Référéndaire*, in London, Eng. (Apr. 10, 2015) (notes on file with Author); Interview with Former *Référéndaire*, in London, Eng. (Feb. 19, 2015) (notes on file with Author); Interview with Member of the Court, in Luxembourg (May 5, 2014) (notes on file with Author); Interview with Current *Référéndaire*, in Luxembourg (May 5, 2014) (notes on file with Author);

3.3. Tenure

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 variability is quite high. The longest a judge has served at the Court is twenty-one 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.⁷⁷ As shown in Appendix I, only 18% and 5% of the judges at the General Court and the Court of Justice have clerked at the Court before. Some judges who are not familiar with the Court's procedures and formality complained that they did not get sufficient support when they first started their jobs.⁷⁸ 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 great instability in the formation of the chambers of judges and their work.⁷⁹ Thus, if a judge stays at the Court for only one term, his productive time spent on the Court is likely to be only three to four years. Worse yet, Judge Franklin Dehousse from the General Court observed

Interview with Current Référendaire, in Luxembourg (May 5, 2014) (notes on file with Author).

⁷⁷ See Marc van der Woude, Judge, Eur. Union Gen. Court, Presentation at King's College London: The General Court: The Need and Opportunity for Reform (Mar. 8, 2013) (presenting the slides available at <https://www.kcl.ac.uk/law/research/centres/european/KCL-Marc-van-der-Woude-GC-Reform-08-03-13.pdf>).

⁷⁸ Interview with Former Référendaire, in London, Eng. (Apr. 10, 2015) (notes on file with Author).

⁷⁹ House of Lords, Eur. Union Comm., *Report of Session 2006-2007, An EU Competition Court* 96 (2007) (testimony from John Cooke, a former Irish judge at the General Court).

that in 2011 50% of judges at his Court were appointed outside the normal triennial renewal procedure.⁸⁰ As he noted: “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.”⁸¹

Moreover, 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.⁸² This is because French is not a widely spoken language in Eastern European and Nordic countries,⁸³ and it has been difficult for these countries to identify competent candidates that are suitable for the position.⁸⁴ Thus, 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. This uncertainty in judicial reappointment and the high turnover of EU judges means that judges must rely more heavily on their référendaires to do the work for them.⁸⁵

⁸⁰ FRANKLIN DEHOUSSE, EGMONT PAPER NO. 53, *THE REFORM OF THE EU COURTS THE NEED OF A MANAGEMENT APPROACH* 14 (2011), <http://www.egmontinstitute.be/wp-content/uploads/2013/09/ep53.pdf> [<https://perma.cc/2V4U-9NBH>].

⁸¹ *Id.*

⁸² Editorial Comments, *The Court of Justice in Limelight Again*, 45 COMMON MKT. L. REV. 1571, 1577 (2008).

⁸³ See Eur. Comm’n, *Europeans and Their Languages Report*, 31, Special Eurobarometer no. 386, (2012), http://ec.europa.eu/public_opinion/archives/ebs/ebs_386_en.pdf [<https://perma.cc/3FNY-Y5F8>] (showing that 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).

⁸⁴ Telephone Interview with Former Référendaire (Apr. 29, 2015) (notes on file with Author); Interview with Former Member of the Court, in London, Eng. (Feb. 10, 2015) (notes on file with Author). 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: ARTICLES IN HONOR OF SIR FRANCIS JACOB 3, 10 (Anthony Arnall et al. eds., 2008) (explaining how it is very difficult to find judges that have the necessary French language skills to provide meaningful input in complex cases).

⁸⁵ Telephone Interview with Former Référendaire (Apr. 29, 2015) (notes on file with Author); Interview with Former Member of the Court, in London, Eng. (Feb. 10, 2015) (notes on file with Author); Interview with Member of the Court, in

4. RÉFÉRENDAIRES

Référendaires are a hidden workforce within the Court. Some call them the Court's "ghost writers."⁸⁶ 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.⁸⁷ They also shoulder much of the responsibility for drafting the various reports and providing comments.⁸⁸

In February 2015, I used LinkedIn⁸⁹ to hand-collect the background data for seventy-four current référendaires, of whom thirty-one work for the Court of Justice and forty-three for the General Court. This represents 25% of current référendaires at the Court of Justice and 46% of those at the General Court.⁹⁰ In March 2015, I hand-collected the background data of 103 former référendaires

Luxembourg (May 5, 2014) (notes on file with Author); Interview with Current Référendaire, in Luxembourg (May 5, 2014) (notes on file with Author); Interview with Current Référendaire, in Luxembourg (May 5, 2014) (notes on file with Author).

⁸⁶ Michal Bobek, *The Court of Justice of the European Union*, in *THE OXFORD HANDBOOK OF EU LAW* 153, 169 (Anthony Arnall & Damian Chalmers eds., 2015).

⁸⁷ 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 *COMP. POL. STUD.* 593, 611 (2000) (showing how référendaires take on great responsibility for examining the submissions filed at the Court, preparing the reports for hearings, assisting with the drafting of opinions, and how these tasks vary according to the role of the judge they work for).

⁸⁸ *Id.* See also DIANE HANSEN-INGRAM, *Tales from the Tartan Chambers*, in *A TRUE EUROPEAN: ARTICLES FOR JUDGE DAVID EDWARD* 1, 3 (Mark Hoskins & William Robinson eds., 2004) (observing how Judge David Edward delegated work to his référendaires).

⁸⁹ LinkedIn, <https://www.linkedin.com/> [<https://perma.cc/CNS5-8MLJ>] (last visited Oct. 8, 2016).

⁹⁰ The LinkedIn data has been cross-referenced with EU's official directory "Whoiswho," which discloses the names of the current référendaires. *EU Whoiswho*, *supra* note 15.

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.

Admittedly, 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 from public institutions. For instance, interviewees indicate that a sizeable portion of référendaires are administrative judges from France but none of them appear in the samples.⁹¹ Notably, the bias is probably more pronounced for former référendaires as current référendaires have a number of exit options available to them.

4.1. *The Labor Market*

Like law clerks in the United States, référendaires are chosen by the individual judges who can also fire them at will. However, unlike the United States, where federal law clerks are recruited through an open online system,⁹² the Court lacks an official re-

⁹¹ Interview with Current Référendaire, in Luxembourg (May 5, 2014) (notes in file with Author); Interview with Current Référendaire, in Luxembourg (May 5, 2014) (notes in file with Author)

⁹² See OSCAR, U.S. COURTS, <https://oscar.uscourts.gov/home> [<https://perma.cc/9NKR-GKUG>] (allowing US federal judges to post law clerk positions and law students to use the same platform to apply for clerkship). Note, however, that 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. CHI. L. REV. 447, 476-83 (2007) (highlighting explod-

cruitment program. Thus judges rely exclusively on informal channels to recruit *référéndaires*, 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 *référéndaires* is very inefficient for both buyers (the judges) and sellers (the *référéndaires*). A *référéndaire* who was interviewed noted that candidates generally know someone already working there in order to get hired.⁹³

Meanwhile, the requirement of French as a working language significantly limits the pool of eligible candidates for *référéndaires*. Compared with the diverse nationalities of EU judges, the background of *référéndaires* is relatively homogeneous. The requirement of French as a working language significantly limits the pool of eligible candidates for *référéndaires*. Therefore, native French speakers enjoy an inherent advantage.

As a consequence, the network of *référéndaires* becomes relatively impermeable to outsiders. The sample of seventy-four current and 103 former *référéndaires* I collected from LinkedIn provides strong support for this observation. As shown in Table 3 below, the three schools most attended by these *référéndaires* are all located in French-speaking countries: College of Europe (23.6%), Université Panthéon-Assas (10.3%), and Université Panthéon-Sorbonne (9.7%). It should be noted, however, that College of Europe also offers a significant portion of its classes in English. The leading former employer is the Court itself (16.9%), as many *référéndaires* used to work as linguists or researchers in the Court, followed by the Commission (13.6%); 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 *référéndaire* positions shows the importance that judges place on understanding the institutional workings of the Court. It also reveals the closed nature of the net-

ing offers, high market compression, and moral dilemmas as some of the issues of the US federal judicial recruitment system).

⁹³ Telephone interview with Current *Référéndaire* (Feb. 12, 2015) (notes on file with Author).

work inside the Court.

Table 3: Most Common Law Schools and Former Employers Among a Sample of 177 Référéndaires

Most Common Law Schools ⁹⁴	%	Most Common Former Employers ⁹⁵	%
1. College of Europe	23.6	1. Court of Justice of the European Union	16.9
2. Université Panthéon-Assas (Paris II)	10.3	2. European Commission	13.6
3. Université Panthéon-Sorbonne (Paris I)	9.7	3. Van Bael & Bellis	4.0
4. Harvard University	9.1	3. Linklaters LLP	4.0
5. King's College London	7.9	5. Cleary Gottlieb Steen & Hamilton LLP	3.4
6. Université Libre de Bruxelles	7.3	6. European Parliament	2.8
7. Oxford University	6.7	7. European Free Trade Association	2.3
8. Katholieke Universiteit Leuven	6.1	8. College of Europe	2.3
9. Cambridge University	5.5	8. Allen & Overy LLP	2.3
10. Université Catholique de Louvain	4.8	8. Freshfields Bruckhaus Deringer LLP	2.3
10. Institut d'études politiques	4.8		

⁹⁴ Twelve of the 177 référendaires' LinkedIn profiles contain no education background. The data here therefore only presents the education information of 165 référendaires.

⁹⁵ Thirteen of the 177 référendaires' LinkedIn profiles contain missing information about their work experience so it is possible that the actual shares of these former employers are higher than what is presented here.

de Paris (Sciences Po Paris)			
10. University of Copenhagen	4.8		

Figure 1 is a sociogram of the network data of these référendaires.⁹⁶ Each node represents one of the 177 référendaires. Two types of network connections 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 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 1 also reveals that those référendaires who received legal education in French-speaking countries and who 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.”⁹⁷

⁹⁶ The network data only shows the connection among the 177 référendaires based on their LinkedIn profiles. As the profiles of some référendaires are incomplete (as discussed in *supra* notes 94 and 95 and the accompanying text), it is possible that there are more connections among these référendaires than what is presented in Figure 1 here.

⁹⁷ RONALD S. BURT, *BROKERAGE & CLOSURE: AN INTRODUCTION TO SOCIAL CAPITAL* 4 (2005).

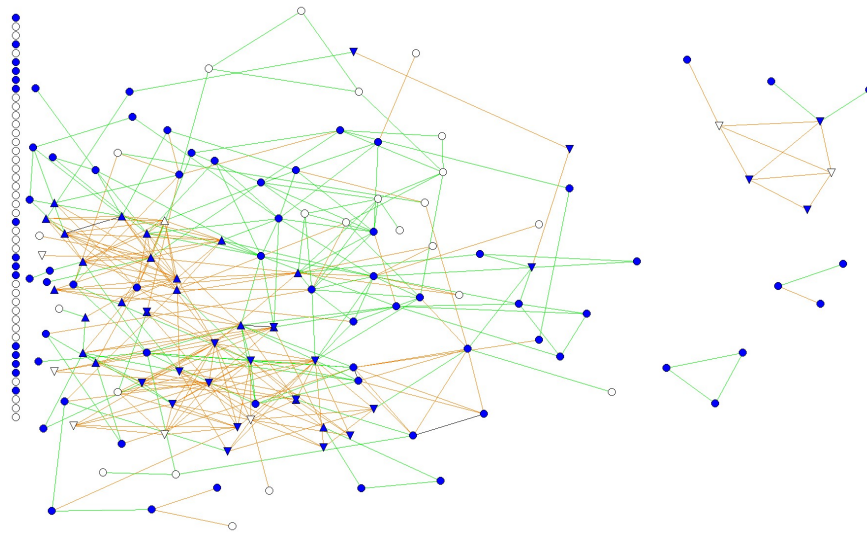


Figure 1: The Social Network of a Sample of 177 *Référendaires*⁹⁸

(Notes: The color of the nodes represents the educational background of *référendaires*. Blue (white) nodes represent those *référendaires* who received (did not receive) their legal education in France, Belgium, or Luxembourg. The shape of the nodes represents the previous work experience of *référendaires*. Triangles represent the *référendaires* formerly employed at the Commission. Upside-down triangles represent the *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 lines represent 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 serves 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

⁹⁸ Figure 1 can be viewed in color at: <http://scholarship.law.upenn.edu/jil/vol38/iss1>.

the Court. As shown in Appendix III, within the sample of seventy-four 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 must 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 experiences. In particular, 20% of current référendaires worked in other positions in the Court (such as linguists and researchers); 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 do.

4.2. 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 thirty-five before 2004 would be awarded a grade of A11

(step 1) and is entitled to a basic salary of approximately €110,374.⁹⁹ After he works for the Court for ten years, he will be graded A14 (Step 1) and be entitled to approximately €159,866.¹⁰⁰ 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 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 costlier.¹⁰¹

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.¹⁰² 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 ten years of service, référendaires are eligible for generous pensions as civil servants when they reach the age

⁹⁹ Staff Regulations, *supra* note 57, at art. 66. Similar to judges, référendaires' income is also subject to a community tax and a solidarity tax. See *Permanent Officials*, EUR. COMM'N, http://ec.europa.eu/civil_service/job/official/index_en.htm#4 [<https://perma.cc/VK3Z-Q36U>] (showing the taxes European servants are subject to); E-mail from Press and Information Unit, *supra* note 41 (nothing the taxes these salaries are subject to).

¹⁰⁰ Staff Regulations, *supra* note 57, at art. 66.

¹⁰¹ 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. Dehousse, *supra* note 80, at 15.

¹⁰² 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. InfoCuria, *General Court*, CURIA, http://curia.europa.eu/jcms/jcms/p1_217427/en/ [<https://perma.cc/X8AS-VD5S>] (last visited Oct. 8, 2016); InfoCuria, *Presentation des Membres*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7035/fr/ [<https://perma.cc/6LG5-927M>] (last visited Oct. 8, 2016).

of sixty-six.¹⁰³ A 1994 study found that the Court had fifty-six référendaires at that time, among which the most tenured had served thirteen years; two référendaires had worked for twelve years, and one had worked for eleven years; with the average amount of work experience being five years.¹⁰⁴ Based on the sample of seventy-four current référendaires, as seen in Appendix IV, on average référendaires have served more than seven years at the Court. But the variability is once again quite high. In fact, twenty-three (more than 31%) have served more than a decade. One référendaire from the Court of Justice has served for more than twenty-two years, and one from the General Court has served for more than twenty-six years, longer than the longest-serving judge in the Court's history.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷ This is especially true for career référendaires.¹⁰⁸

At the same time, the longevity of career référendaires also

¹⁰³ See Staff Regulation, *supra* note 57, at art. 77.

¹⁰⁴ Kenney, *supra* note 87, at 605-06.

¹⁰⁵ 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. *Id.* at 605. But référendaires became temporary posts in the 1970s. *Id.*

¹⁰⁶ 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 Current Référendaire (Feb. 26, 2015) (notes on file with Author).

¹⁰⁷ Interview with Former Référendaire, in London, Eng. (Feb. 19, 2015) (notes on file with Author); Interview with Member of the Court, in Luxembourg (May 5, 2014) (notes on file with Author).

¹⁰⁸ *Id.*

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 *référéndaires* 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 *référéndaires*. Interviewees noted that because these *référéndaires* 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.¹⁰⁹

The Court's formalism can find its origin in the French legal tradition. When the Court was first established it was modeled after the prototype of the *Conseil d'Etat* – the highest administrative court in France.¹¹⁰ The French influence on the Court is profound and many of its rules and procedures are obvious derivatives of French administrative law.¹¹¹ Compared with the common law tradition, the French legal tradition emphasized a high degree of procedural formalism to minimize the discretion of judges.¹¹² As Judge Posner once described 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 economic

¹⁰⁹ *Id.* See also Karen McAuliffe, *Precedent in the Court of Justice of the European Union: The Linguistic Aspect*, 15 CURRENT LEGAL ISSUES 483, 488–91 (2013) (observing how the Court's formalistic style of drafting imposes a serious constraint on the work of the *référéndaires*, causing them to tend to strictly adhere to the language of precedents).

¹¹⁰ Edward, *supra* note 18, at 539.

¹¹¹ See Giuseppe Federico Mancini & David T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 COLUM. J. EUR. L. 397, 399 (1994) (observing that France's political and legal thinking hegemony framed the foundational treaties of the European Union).

¹¹² Thorsten Beck & Ross Levine, *Legal Institutions and Financial Development*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 251, 255 (Claude Menard & Mary M. Shirley eds., 2005).

¹¹³ Richard A. Posner, *Judicial Self-Restraint*, 59 IND. L. J. 1, 3 (1983).

realities.¹¹⁴ 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

4.3. *Revolving Door*

Due to the relatively close social network and 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 Directorate-General for Competition. The percentage at the Court of Justice is lower; 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.¹¹⁶ Based on one study in 1994, among the

¹¹⁴ Barak Orbach, *The Durability of Antitrust Formalism*, 100 IOWA L. REV. 2197, 2199 (2015).

¹¹⁵ Nicolas Petit, *Marc Van Der Woude*, THE FRIDAY SLOT (Nov. 16, 2012), <http://chillingcompetition.com/2012/11/16/the-friday-slot-13-marc-van-der-woude/> [<https://perma.cc/M52U-RK6J>]. 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 scenes.

¹¹⁶ Interview with Former Référendaire, in London, Eng. (October 7, 2015)

fifty-six référendaires working at the Court at that time, six were seconded from the Commission.¹¹⁷

Among the sample of former référendaires, 7% worked at the Commission prior to joining the Court. Upon their departure, 16% joined the Commission (9% for the Legal Service), representing a 9% increase. This suggests that the experience of working as a référendaire is very valuable for the Commission, especially 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.¹¹⁸

Appendix V further examines thirty-five former and current référendaires who have had experience working at both the Commission and the Court. Among them, twelve served at the Commission immediately before they joined the Court, twenty joined the Commission immediately after they left the Court (eleven joined the Legal Service), and five served both before and after. On average they have eight years of experience at the Commission and four years of experience working at the Court, though the variance is very high. This shows that 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.¹¹⁹ As the EU’s main executive arm, the Commission is the most frequent party appearing in front of the Court.¹²⁰ This raises

(notes on file with Author).

¹¹⁷ Kenney, *supra* note 87, at 607.

¹¹⁸ E-mail from Former Official, European Comm’n to Author (Feb. 12, 2015) (on file with Author).

¹¹⁹ For a comprehensive survey of literature on the revolving door, see generally Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015) (explaining the need to recognize the “incentive for regulators to expand the market demand for services they would be providing when they exit the government”).

¹²⁰ Since the Court’s establishment, the Commission has served as a party in over 52% of the cases. I hand-collected this data using the Court’s database. In-

the immediate question of whether adequate procedural safeguards exist to address the potential conflicts of interest between the Court and the Commission. To be sure, a revolving door between business and government is not uncommon in Europe. 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.¹²¹ Within two years after leaving the post, the official has the mandatory obligation to notify his institution of his occupational activity.¹²² 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.¹²³ 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.”¹²⁴

It appears, however, that the EU Staff Regulations have never been applied to manage the potential conflicts of interest for officials moving between different EU institutions. Based on the Court’s disclosure, référendaires have the obligation of declaring any actual or potential conflict of interest situation at the time of his or her employment.¹²⁵ Yet according to the Rules for Good Conduct for référendaires adopted by the Court in 2009, référendaires only have the obligation to inform their judges or advocates general if they worked on the same case in their former workplaces.¹²⁶ It is then left up to their judges or advocates general to de-

foCuria, *supra* note 31.

¹²¹ Staff Regulations, *supra* note 57, at art. 11.

¹²² *Id.* at art. 16.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ E-mail from Access to Documents Unit, Court of Justice of the European Union to Author (Oct. 7, 2015) (on file with Author).

¹²⁶ La Cour de Justice des Communautés Européennes, Decision du 17 Février 2009, Portant Adoption De Regles de Bonne Conduite des Referendaires, art. 2(2) (Feb. 17, 2009). The original version of the Code of Good Conduct is in French and was requested from the Court.

cide whether they can continue working on the same matter.¹²⁷ Even if they are prohibited from doing so, Commission secondees are free to work on any other cases as long as they were not personally involved in the matter. Since the Commission is an important player in most EU cases, in reality Commission secondees cannot possibly be excluded from all cases in which the Commission appears.

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 preferences of individual judges vary, 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.¹²⁸ 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,¹²⁹ is a powerhouse that specializes in litigation before the Court. 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.

¹²⁷ *Id.*

¹²⁸ Telephone Interview with Current Référendaire (Mar. 12, 2015) (notes on file with Author); Telephone Interview with Current Référendaire (Feb. 19, 2015) (notes on file with Author).

¹²⁹ This is based on the Author's search of the legal service department within the European Commission on the official directory of the European Union. *EU Whoiswho*, *supra* note 15.

4.4. *The French Dominance*

Compared with the diverse nationalities of EU judges, the background of *référéndaires* is relatively homogeneous. The requirement of French as a working language significantly limits the pool of eligible candidates for *référéndaires*. 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.”¹³⁰

According to data provided by the Court and provided in Table 4,¹³¹ over 42% of *référéndaires* at the Court of Justice are citizens from Belgium, France, and Luxembourg. At the level of the General Court the percentage is higher, at 49%. The population of *référéndaires* is concentrated among a few countries, especially those with the French legal origin and in Germany. On the other hand, *référéndaires* from the Nordic, common law, and ex-socialist countries are underrepresented. Indeed, at the General Court there is only one *référéndaire* from Nordic countries and two from common law countries.

Using the country of origin as a crude proxy of the legal tradition¹³² in which a *référéndaire* is bred, Table 4 also shows the strong influence of the French legal tradition on *référéndaires*. This is consistent with the data provided in Appendix III, which indicates 79% of *référéndaires* at the Court of Justice and 83% at

¹³⁰ Mancini, *supra* note 111, at 398.

¹³¹ E-mail from Access to Documents Unit, *supra* note 16.

¹³² For the legal origin of each EU member state, see generally THOMAS H. REYNOLDS & ARTURO A. FLORES, *FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD* (1989).

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.

While 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 4: Référendaires based on Country of Origin and Legal Origin

Legal Origin	Country of Origin*	Court of Justice	%	%	General Court	%	%
French	France	30	23%	60%	38	38%	72%
	Belgium	22	17%		8	8%	
	Luxembourg	3	2%		3	3%	
	Italy	9	7%		8	8%	
	Spain	7	5%		7	7%	
	Portugal	2	2%		1	1%	
	Netherlands	0	0%		2	2%	
German	Greece	6	5%	17%	5	5%	15%
	Germany	19	14%		12	12%	
	Austria	3	2%		1	1%	
Nordic	Switzerland**	0	0%	3%	2	2%	1%
	Denmark	1	1%		0	0%	
	Finland	2	2%		0	0%	
Common Law	Sweden	1	1%	8%	1	1%	2%
	Ireland	4	3%		1	1%	
	United Kingdom	5	4%		1	1%	
	Malta	1	1%		0	0%	
Ex-Socialist	Cyprus	1	1%	12%	0	0%	10%
	Bulgaria	0	0%		0	0%	

* 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.

5. THE CONSEQUENCE OF BANNING DISSENTS

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.¹³³ Over the years the Court has been subject to numerous criticisms for its practice of issuing a single judgment without dissents.¹³⁴ While the practice of issuing a single judgment is common in civil law countries, the Court now finds itself alone among supranational and international courts (and the majority of national supreme courts and constitutional courts in Europe) in prohibiting the publication of separate opinions.¹³⁵ Nevertheless, the practice has persisted.

One major reason for upholding this practice is to preserve the independence of judges, out of a fear that disclosure of votes will subject judges to political scrutiny in times of reappointment.¹³⁶ Another often-cited reason for banning dissents is to preserve the authority and legitimacy of the Court.¹³⁷ Proponents of this line of reasoning argue that the “collegial” decision-making process means that the Court “holds together throughout the process of judgment,” and the minority is not excluded from the deliberations of the majority.¹³⁸ Moreover, a single judgment enhances the Court's legitimacy as it fosters the public's perception of the law as dependably stable and secure.¹³⁹ While this was deemed especially valuable and crucial in the formative years of the Court, the argument is much less convincing today as the Court's authority has been well established, and there are few incidents of non-compliance.

¹³³ See Statute of the Court of Justice of the European Union, *supra* note 5, at art. 2 (establishing the duty of judges to perform their duties impartially and in a confidential manner).

¹³⁴ E.g., HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION 736 (6th ed. 2001) (showing the different arguments utilized to support the use of dissenting and concurring opinions).

¹³⁵ Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 309 (2009). See also Director General for Internal Policy, Eur. Comm'n, *Dissenting Opinion in the Supreme Court of the Member States* 7 (2012), <http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf> [<https://perma.cc/56BU-USQB>] (noting that only seven EU Member States never allow their Supreme Court judges to publish individual opinions).

¹³⁶ SCHERMERS, *supra* note 134.

¹³⁷ *Id.*

¹³⁸ Edward, *supra* note 18, at 556.

¹³⁹ *Id.*

At the same time, even proponents of the single judgment acknowledge its shortcomings. A single judgment that takes into account different opinions inevitably tends to blur distinctions and resorts to qualifications, reducing the clarity of the judgment. Sometimes ambiguity and unequivocal language are used to cloak disagreement, leading to criticisms that some of the judgments are “simply oracular and almost apocryphal.”¹⁴⁰ As Judge Edward maintains: “A camel is said to be a horse designed by a committee, and some judgments of the Court of Justice are camels.”¹⁴¹

Another risk with single judgments is that they make it more difficult to assess judicial performance and monitor judicial behavior. In the common law system, the reputation of a judge largely rests on his or her opinions. This nourishes a judge’s ego by enabling him to cultivate an admiring audience among his peers, practitioners, law professors and the public at large. However, EU judges cannot establish their individual reputation through judgments. The most they could claim is that they sat on the panel of a certain case, but the secrecy rule prevents them from making clear their personal contribution. The unobservability of their inputs could therefore encourage free riding and judicial shirking.

To be sure, judges face peer pressure when working at the Court and, thus, would also strive to win the respect of fellow justices and référendaires. This is especially true at the Court of Justice, where the President has exercised discretion in assigning cases according to the competence and expertise of the judges.¹⁴² This works as both a carrot and a stick. It incentivizes the judges to perform, because otherwise they risk being marginalized – assigned to small and unimportant cases and excluded from the grand chamber.¹⁴³ However, at the General Court cases are allocated on a basis of rotation, and the President at the General Court generally does

¹⁴⁰ L. NEVILLE BROWN AND FRANCIS G. JACOB, *THE COURT OF JUSTICE OF THE EUROPEAN UNION* 55 (1977).

¹⁴¹ Edward, *supra* note 18, at 556–57.

¹⁴² Interview with Current Référendaire, in Luxembourg (May 5, 2014) (notes on file with Author); Interview with Current Référendaire, in Luxembourg (May 5, 2014) (notes on file with Author).

¹⁴³ *Id.*

not interfere with case allocation.¹⁴⁴ As a consequence, judges at the General Court face fewer constraints than those at the higher court. Moreover, given the short tenure of judges and the uncertainty in judicial re-appointment, judges who know they are not renewed are less incentivized to put in effort. As Rasmussen, one of the most vocal critics of the Court, once wrote:

“[T]he ban on dissents has served to shield the identity of the judges making up the majority behind the Court’s decisions, thus shielding them from accountability. When the names of the judges forming a fragile majority are made known, such a majority will certainly invest all their intellectual capacity into delivering well-founded legal reasoning for their judgments; not the poor type of reasoning we have seen in the past ten or fifteen years.”¹⁴⁵

Such consequences have been observed elsewhere. In the United States, where courts nowadays dispose of a significant percentage of cases by unpublished judgments, judges are seen as less likely to devote as much effort to unpublished opinions as they do to signed ones.¹⁴⁶ Judges have observed that unpublished cases are prepared less carefully and are often delegated to staff attorneys or law clerks.¹⁴⁷ As a commentator observed: “When anonymity of

¹⁴⁴ See Court of Justice of the Eur. Union, *Criteria for Assigning Cases to Chambers*, 2011 O.J. (C 232) 2, 2–3 (noting that the President of the General Court will not interfere with rotations unless cases are related or derogation is needed to ensure an even case workload). See also Marc Barennes & Pascale Hecker, *Strategic and Efficient Brief Writing Before the General Court of the European Union: Practical Suggestions Regarding the Application and the Reply in Competition Law Cases*, 4 CONCURRENT 1, 7 (2012) (noting similarly that the President allocates cases on a rotation and, thus, no one chamber has exclusive access to competition cases).

¹⁴⁵ Hjalte Rasmussen & Louise Nan Rasmussen, *Comment on Katalin Kelemen – Activist EU Court “Feeds” on the Existing Ban on Dissenting Opinions: Lifting the Ban is Likely to Improve the Quality of EU Judgments*, 14 GERMAN L. J. 1373, 1385 (2013).

¹⁴⁶ Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139 (1990). See also RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 165 (2d prt. 1999) (explaining that without the threat of the opinion being precedential, judges can use unpublished opinions to avoid professional criticism or to “shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty”).

¹⁴⁷ See Ginsburg, *supra* note 146 (explaining that “unsigned work products, more often than signed opinions, are fully composed by hands other than a judge’s own – by staff attorneys or law clerks – and let out with scant editing by

pronouncement is combined with security in office, it is all too easy for the politically insulated officials to lapse into arrogant *ipse dixits*.”¹⁴⁸ This is not to say that EU judges are lazy. They are simply trying to increase their productivity and spend time on things that they value more. Indeed, despite their perennial complaint of an unbearable caseload, EU judges find time to contribute academic articles in great profusion and keep up a busy schedule of interviews, lectures, speeches, and conferences. Some EU judges work very hard indeed.¹⁴⁹

Because separate opinions are disallowed, dissenting judges will not be able to exert a credible threat on the majority. This could lead to the suppression of dissenting opinions. A forceful dissent points out the inaccuracies and inadequacies in the majority's opinion, and thus its “foremost and undeniable external consequence” is to undermine the majority's opinion.¹⁵⁰ This puts pressure on the majority and increases its incentives to “get it right.” Judge Fidelma Macken from Ireland recalled that one of her “most awful times” at the Court was when thirteen other judges outvoted her in a case in which she was acting as the rapporteur.¹⁵¹ The case she was dealing with involved some cutting-edge trademark law issues, and she was the only person “on the Court of Justice with a very strong intellectual property background.”¹⁵² Had Judge Macken been given the right to dissent, the majority would probably have taken her opinions more seriously. Even if she was still outvoted, her dissent may still have served an alert function that would signal to the future court and legislature that the case could be troubling.

Moreover, because consensus-building is highly valued in or-

the supervising panel”).

¹⁴⁸ *Id.* (internal quotations omitted).

¹⁴⁹ Judge David Edward, a prolific writer and one of the most highly regarded EU judges, is exemplary in many regards. See Hansen-Ingram, *supra* note 88, at 3 (describing his secretary's recollection).

¹⁵⁰ Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HISTORY 33, 35 (1994).

¹⁵¹ J. H. H. Weiler & Judge Fidelman Macken, Lecture at the New York University Law School Distinguished Global Fellows Lecture Series: To Be A European Constitutional Court Judge, A Conversation with Judge Fidelman Macken (Sept. 4, 2003).

¹⁵² *Id.*

der to produce a single coherent judgment, it exerts pressures on judges to conform. This could lead to “groupthink,” an undesirable group decision-making phenomenon identified by scholars of organizational behavior.¹⁵³ Scholars have found that because people are extremely vulnerable to unanimous opinions, even a single dissenter is likely to create a huge impact.¹⁵⁴ They observe that corporate boardrooms that encourage dissenting opinions are likely to perform better than those that silence their members.¹⁵⁵ One study shows that the highest-performing companies have extremely contentious boards that regard dissent as an obligation.¹⁵⁶

Skeptics note that even if EU judges were given the right to dissent, they would be unlikely to do so, and thus it wouldn’t lead to a difference in practice anyway.¹⁵⁷ Indeed, “dissent aversion” has been well documented in US appellate judging.¹⁵⁸ Writing a dissent requires effort and is costly to the author.¹⁵⁹ Dissent also imposes a cost on the majority by requiring the latter to revise its opinions to address the concerns raised in the dissent.¹⁶⁰ Judges do not like to be criticized,¹⁶¹ and thus dissents tend to fray collegiality among judges.¹⁶² Epstein and her coauthors predict that the more often judges sit together, the more likely they will be to invest in

¹⁵³ See generally IRVING L. JANIS, *GROUP THINK* (2d ed. 1982) (analyzing information from various scholars and publications on the role of “groupthink” in policy decisions).

¹⁵⁴ *Id.* See generally CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003) (arguing that societies and nations are more likely to prosper with a healthy amount of dissent).

¹⁵⁵ Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, *HARV. BUS. REV.* (Sept. 2002), <https://hbr.org/2002/09/what-makes-great-boards-great> [<https://perma.cc/UR4E-ZPDR>].

¹⁵⁶ *Id.*

¹⁵⁷ See Director General for Internal Policy, *supra* note 135, at 36 (noting that dissents would not be mandatory and judges would remain free to continue their current practices).

¹⁵⁸ See generally Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 *J. LEGAL ANALYSIS* 101, 103 (2011) (explaining the phenomenon regarding “‘dissent aversion’ which sometimes causes a judge not to dissent even when he disagrees with the majority opinion”).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 104

¹⁶¹ POSNER, *supra* note 32, at 32.

¹⁶² Epstein, *supra* note 158, at 104.

collegiality and the less likely they will be to dissent.¹⁶³ Applied to the EU context, we would expect more disagreement in a grand chamber than in a small chamber of three or five judges. Nonetheless, it is important to recognize that having the *option* to dissent is different from actually exercising that option. When judges are given the right to dissent, it is equivalent to the right of withdrawal in a collective enterprise.¹⁶⁴ Having the right of withdrawal itself disciplines free-riders and creates a more credible threat to the majority, who need to consider dissenting opinions more carefully.

Defenders of the single judgment note that the function of advocates general, who issue their own independent opinions for the Court, was created exactly to compensate for the lack of dissenting opinion.¹⁶⁵ However, the function of the advocates general is an inferior substitute. Advocates general have no voting power and do not participate in the deliberation. Their opinions therefore exert less of a threat on the majority. Moreover, advocates general now participate in a small proportion of cases and are called upon only in highly complex and difficult cases.¹⁶⁶ And because advocates general are appointed early on, the Court may well overlook some cases that only later turn out to be complex and difficult.¹⁶⁷ At the General Court, there is no dedicated member who serves as an advocate general.¹⁶⁸ Sometimes a judge could be appointed as an advocate general on an ad hoc basis, but it is rare. In the history of the General Court, there have been only eighteen occasions where the General Court has appointed an advocate general in

¹⁶³ *Id.*

¹⁶⁴ See Justin Yifu Lin, *Collectivization and China's Agricultural Crisis in 1959-1961*, 98 J. POL. ECON. 1228, 1240-43 (1990) (arguing that it was the deprivation of the right to withdraw from a collective in 1958 that led to the agricultural crisis in 1959-1961 in China).

¹⁶⁵ Director General for Internal Policy, *supra* note 135, at 35.

¹⁶⁶ Michal Bobek, *A Fourth in the Court: Why Are There Advocates General in the Court of Justice?*, 14 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 529, 535 (2011).

¹⁶⁷ See e.g., Case C-179/12P, *The Dow Chemical Company v. Commission*, 2013 E.C.R. 1, 3 (involving an appeal which asserts that the General Court failed to properly examine various factors that would have been favorable to the appellant).

¹⁶⁸ See Statute of the Court of Justice of the European Union, *supra* note 5, at art. 49 (noting that members may be designated the task of advocate general if and when needed).

competition cases.¹⁶⁹ As a consequence, in the vast majority of competition cases it decided not to reap the supposed benefits of opinions from the advocates general.

5.1. A Case Study of the Microsoft Split

On September 17, 2007, the General Court upheld the Commission's decision finding that Microsoft had infringed EU competition law for refusing to supply interoperability information to competing suppliers of workgroup servers and for illegally tying Windows Media Player to the Windows PC operating system ("the *Microsoft* judgment").¹⁷⁰ The judgment is widely thought to be an important victory for the Commission, who suffered a series of setbacks in early 2000 when the General Court quashed a number of the Commission's merger decisions.¹⁷¹ It further reinforced the Commission's invincible record in abuse of dominance cases. Ever since the establishment of the Court, few appeals against abuse of dominance cases brought by the Commission have been won on substantive grounds.¹⁷²

The *Microsoft* judgment, which runs 416 pages in the European Court Reports, offers a scathing criticism of Microsoft's arguments and a strong endorsement of the Commission's decision.¹⁷³ It projects the image of a unanimous decision signed by thirteen judges in the Grand Chamber. For many, the decision "came as something of a surprise."¹⁷⁴ Indeed, when Microsoft requested interim relief to suspend the Commission's remedial orders in 2004, Bo

¹⁶⁹ I hand-collected this data using the Court's case search database. Info-Curia, *supra* note 31.

¹⁷⁰ Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3619, 4026-28.

¹⁷¹ DANIEL J. GIFFORD & ROBERT T. KUDRLE, *THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY* 35 (2015).

¹⁷² See Pablo Ibañez Colomo, *The Law on Abuse of Dominance and the System of Judicial Remedies*, 32 Y.B. OF EUR. L. 389, 403 (2013) (identifying only one judgment where the decision was annulled on substantive grounds since 1992).

¹⁷³ See *Microsoft*, 2007 E.C.R. at 3878-80 (describing one of many issues on which the Court quickly rules against Microsoft and dismisses its arguments).

¹⁷⁴ HARRY FIRST, *STRONG SPINE, WEAK UNDERBELLY: THE CFI MICROSOFT DECISION*, 1 (2007).

Vesterdorf, then President of the General Court, recognized that there was a serious dispute on a number of points. Though he dismissed Microsoft's request for interim relief, Vesterdorf held that Microsoft's other arguments on interoperability and tying issues could not be dismissed "as *prima facie* unfounded."¹⁷⁵ Why did the General Court, which appeared to entertain some points of Microsoft's defense in 2004, completely demolish them in the later main action? Answering this question requires unveiling the faces behind the *Microsoft* judgment.

In March 2008, Bo Vesterdorf gave a lecture at Queen Mary School of Law at the University of London on the *Microsoft* judgment. The lecture was certainly timely, as Vesterdorf had presided over *Microsoft* and left the Court only a few months prior.¹⁷⁶ It is common for EU judges to give keynote speeches and participate in panel discussions at public events. But what was unusual about Vesterdorf's speech was his comment at the end of the lecture: "From a purely academic point of view, it may be regretted that the judgment was not brought on appeal before the ECJ so Europe's highest Court could have its final say in the case."¹⁷⁷ This statement sends a signal that he disagreed with the outcome of the case. In other words, he was probably outvoted in *Microsoft*.

His lecture, which was later published in the Queen Mary's student law review, offers cautious and subtle criticisms of the *Microsoft* decision. Understanding this critique requires some context. Earlier EU competition law precedents had identified a cumulative four-part test for identifying an abusive refusal to supply on the part of a dominant firm. The refusal must: (a) relate to a product or service indispensable to the exercise of a particular activity on a neighboring market; (b) exclude any effective competition in the neighboring market; (c) prevent the emergence of a new product for which there is a potential consumer demand; and (d) have no objective justification.¹⁷⁸ Vesterdorf observed that the General

¹⁷⁵ *Id.* (italics added).

¹⁷⁶ Bo Vesterdorf, *Article 82 EC: Where Do We Stand After the Microsoft Judgment?*, GLOBAL ANTITRUST REV. 1, 14 (2008), <http://www.icc.qmul.ac.uk/docs/gar2008/144723.pdf> [<https://perma.cc/4MXG-5V9W>].

¹⁷⁷ *Id.* at 14.

¹⁷⁸ *Id.* at 4.

Court had expanded the scope of each of these conditions in order to dismiss Microsoft's claims.

First, he observed that the General Court had deviated from earlier cases such as *Volvo*, *Magill* and *IMS Health*, and *Commercial Solvent* and expanded the concept of "indispensability" to cover "economic indispensability."¹⁷⁹ He noted that this would make it easier for the Commission to satisfy its burden of proof in abuse cases and leave intellectual property holders with more uncertainty as to when its refusal to grant a license could be deemed abusive.¹⁸⁰ He further noted that the judicial scrutiny of the Commission's assessment of what would be deemed "economically viable" is very limited, given the fact that the Commission enjoys a margin of appreciation in economically complex assessments.¹⁸¹

With regards to the second requirement, Vesterdorf also noted a shift from the requirement in case law such as *IMS Health* and *Magill*.¹⁸² He observed that the Court had shifted from the elimination of all competition to the elimination only of effective competition, which loosened the condition and again made it easier for the Commission to satisfy its burden of proof.¹⁸³

Regarding the third requirement of "new products," Vesterdorf found that the Court also expanded the requirement in *IMS* and *Magill* to not only cover "production or markets, but also . . . technical development."¹⁸⁴ As such, "prevention of technical development" could be deemed abusive.¹⁸⁵ Further, Vesterdorf expressed concern that the Court, while dismissing Microsoft's objective justification for refusing to deal, left open the question of how the burden of proof could be satisfied by the dominant undertaking.¹⁸⁶

¹⁷⁹ *Id.* at 6-7.

¹⁸⁰ *Id.* at 7.

¹⁸¹ *Id.*

¹⁸² *Id.* at 8.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 8-9.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 9-10.

The second issue in *Microsoft* deals with whether the Windows operating system and Media Player are two separate products and Microsoft had illegally tied the two products together in violation of EU competition law.¹⁸⁷ Again, Vesterdorf expressed sympathy with Microsoft's arguments that the packaging of Windows with the Media Player had not prevented PC manufacturers from selling a package that contained other media players and that buyers were also free to add other media players into their PC.¹⁸⁸

Concluding the lecture, Vesterdorf expressed concern about the "far reaching consequences" of the *Microsoft* decision.¹⁸⁹ He observed that the case expanded the power of the Commission and the national authorities in pursuing dominant firms, and this might have "negative consequences for holders of IPRs" by discouraging their incentives to innovate.¹⁹⁰ In regards to the tying claim, he reminded readers that "overstretching the concept of tying can become a serious constraint for what otherwise would be valuable development and innovation to the benefit of consumers."¹⁹¹

The *Microsoft* case offers a textbook example of how the collegial decision-making process in fact suppresses dissent and creates the illusion of a single, unanimous decision. Had the *Microsoft* case allowed dissent, it would have sent a signal to the Court of Justice that there was in fact fierce disagreement among the members of the panel. However, the final decision was crafted as a strong endorsement of the Commission's decision exactly to avoid communicating any such signal to the higher court.

6. THE ASYMMETRIC JURISDICTION

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"

¹⁸⁷ Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3619, 3866-67.

¹⁸⁸ Vesterdorf, *supra* note 176, at 10-13.

¹⁸⁹ *Id.* at 14.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

in “constitutionalizing” the Community.¹⁹² 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.¹⁹³ 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.

6.1. *The Aversion to 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 5 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 EU law and ensure uniformity in its application.¹⁹⁴ 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.¹⁹⁵ Preliminary reference is

¹⁹² See Giuseppe Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175, 182 (1994) (noting the Court’s achievements despite the inherent and built-in weaknesses of the procedure).

¹⁹³ See Harm Schepel & Rein Wesseling, *The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe*, 3 EUR. L. J. 165, 178-79 (1997) (arguing that the structure and community of EU lawyers played a significant impact in the development of the law).

¹⁹⁴ See Edward, *supra* note 18, at 544-45 (describing the courts’ role in references to determine the nature of EU law that national courts will apply and that will be applicable throughout the European Community).

¹⁹⁵ See Walter Mattli & Ann-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT’L ORG. 177, 200 (1998) (finding that national courts were relatively accepting of the direct effect and supremacy of EU law). 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) (showing that the ECJ intentionally encourages national courts to set aside incompatible national policies by using the pre-

therefore regarded as “the jewel in the crown” in the jurisdictional competence of the Court of Justice,¹⁹⁶ and many, if not most, of the Court’s most audacious and groundbreaking decisions are preliminary rulings. As revealed in Table 5 below, 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 5: Preliminary Reference v. Appeals by Court of Justice (2005-2014)¹⁹⁷

All Cases		Grand Chambers and Full Court cases	
Appeals	Preliminary Reference	Appeals	Preliminary Reference
19%	49%	14%	60%

In comparison, appeals follow a form of adversarial procedure where the Court only rules on the questions and issues the parties have decided to litigate.¹⁹⁸ 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.¹⁹⁹ 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

liminary ruling mechanism (Article 177) to indicate in its decisions whether or not certain types of national law would be in compliance with EC law).

¹⁹⁶ PAUL CRAIG, *EU ADMINISTRATIVE LAW* 263 (2d ed., 2012).

¹⁹⁷ This data is hand-collected using the Court’s database. *InfoCuria*, *supra* note 31.

¹⁹⁸ Edward, *supra* note 18, at 543.

¹⁹⁹ Telephone Interview with Former Référéndaire (April 29, 2015) (notes on file with Author); Interview with Former Référéndaire, in London, Eng. (Feb. 19, 2015) (notes on file with Author).

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 5, 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 6 below. Compared with other cases the Court handles, competition appeals have lower visibility and rarely capture media attention. From 2005 to 2014, over 52%²⁰⁰ 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.²⁰¹ As members and staff of the Court of Justice do not want their dockets flooded with appeals from the General 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

²⁰⁰ This data is hand-collected using the Court's database. InfoCuria, *supra* note 31.

²⁰¹ Telephone Interview with Former Référendaire (April 29, 2015) (notes on file with Author); Interview with Former Référendaire, in London, Eng. (Feb. 19, 2015) (notes on file with Author).

dealing with competition law cases in preliminary reference proceedings than in appeals.²⁰²

Table 6: Competition Cases Decided by the Court of Justice (2005 to 2014)²⁰³

All Competition Cases		Grand Chambers and Full Court Competition Cases	
Appeals	Preliminary Reference	Appeals	Preliminary Reference
74%	24%	73%	27%

6.2. *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.²⁰⁴ While the jurisdictional scope of the General Court has expanded over the years, it has not dealt with preliminary reference cases.²⁰⁵ Unlike the situation at the higher court, competition occupies a more central role among its case

²⁰² Interview with Former Référéndaire, in London, Eng. (Feb. 19, 2015) (notes on file with Author).

²⁰³ This data is hand-collected using the Court's database. InfoCuria, *supra* note 31.

²⁰⁴ Memorandum by the CBI to the U.K. House of Lords, in HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, JUSTICE AND INSTITUTIONS SUB-COMMITTEE, INQUIRY INTO THE WORKLOAD OF THE WORKLOAD OF THE EUROPEAN UNION WRITTEN EVIDENCE 7, 10 (2010), <https://www.parliament.uk/documents/lords-committees/eu-sub-com-e/CourtOfJustice/euwriddenevidence.pdf> [<https://perma.cc/SB9M-XGHL>] (U.K.). See also Council Decision 88/591/ECSC, Establishing a Court of First Instance of the European Communities, art. 1, 1988 O.J. (L 319) 1, 1 (establishing the General Court).

²⁰⁵ The Nice Treaty expressly provides for the possible transfer of certain preliminary ruling cases to the General Court, leaving its implementation to the discretion of the Court of Justice. 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: ARTICLES IN HONOR OF SIR FRANCIS JACOB 34, 40 (Anthony Arnall et al. eds., 2008) (“[T]he Treaty provided expressly, for the first time, for the possible transfer to the CFI of competence in certain preliminary cases, such a transfer again being limited to ‘specific areas’ of Community law”).

portfolio. As Judge Forwood once put it: “for some Judges of the CFI [now the General Court] at least, [competition] has been their primary *raison d’être*.”²⁰⁶

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.²⁰⁷ It also has to do with the Court’s human capital. The General Court is an attractive workplace for judges and *référéndaires* with a competition law background, as it handles many more competition cases than the higher court. Interviewees indicate that judges and *référéndaires* who are interested in competition law tend to be more engaged with economic analysis and in-depth scrutiny of the Commission’s assessment.²⁰⁸ However, because the General Court is bound by the rulings of the Court of Justice, it operates within a tight straightjacket. 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.²⁰⁹ 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.²¹⁰ 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.²¹¹ As explained by Mark Jaeger, the President of

²⁰⁶ *Id.* at 44.

²⁰⁷ Telephone Interview with Former *Référéndaire* (April 29, 2015) (notes on file with Author).

²⁰⁸ *Id.*

²⁰⁹ Takis Tridimas, *Precedent and the Court of Justice: A Jurisprudence of Doubt?*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* 307, 307 n.4 (Julie Dickson & Pavlos Eleftheriadis eds., 2012); Marc van der Woude, *The Court of First Instance, the First Three Years*, 16 *FORDHAM INT’L L. J.* 412, 459–60 (1992) (stating that the possibility of appeal renders the CFI practically deferential to ECJ decisions).

²¹⁰ Woude, *supra* note 209, at 459.

²¹¹ Mark Jaeger, *The Standard of Review in Competition Cases Involving Complex*

the General Court, when defending the General Court's "deferential approach . . . [i]f 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."²¹² 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.²¹³ 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 its market investigation.²¹⁴ 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.²¹⁵ 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.²¹⁶

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."²¹⁷ 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

Economic Assessment: Towards the Marginalisation of the Marginal Review, 2 J. EUR. COMPETITION L. & PRAC. 295, 303–05 (2011).

²¹² *Id.* at 303.

²¹³ *Id.* at 303–05.

²¹⁴ *Id.* at 303.

²¹⁵ *Id.* at 303–04.

²¹⁶ *Id.* at 304.

²¹⁷ *Id.*

Court of Justice.”²¹⁸ The Court of Justice, on the other hand, is in a position to innovate and overrule those outdated precedents. But many judges and *référéndaires* 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.²¹⁹ 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.

7. CONCLUSIONS AND IMPLICATIONS

Political scientists and legal scholars who study the Court tend to view it as a unitary entity.²²⁰ They build their study upon an assumption that the Court has a single, coherent objective to achieve the political goal of integrating Europe. Instead of viewing the Court as a whole, this Article considers the individuals who comprise it. It examines the selection process, career structures and incentives of the EU judges and their *référéndaires*, as well as the Court’s decision-making process, and investigates how these can influence judicial behavior. It has several major findings.

First, the Article finds that the Court’s high judicial salaries and lack of procedural safeguards for EU judicial appointments attract political appointees. As a consequence, some judges who are selected are not competent to perform their duties and are dominated by their *référéndaires*. Moreover, the uncertainty inherent to judicial re-appointment and the high turnover rate of EU judges hampers their productivity, and increases their dependence on the *référéndaires*. Meanwhile, *référéndaires* are drawn from a relative-

²¹⁸ *Id.* at 305.

²¹⁹ Craig observed that this technique of limiting caseload has also been applied to preliminary reference proceedings. *See* Craig, *supra* note 196, at 267 (discussing the technique of indirectly limiting case load by limiting the intensity of judicial oversight).

²²⁰ *See generally* ALTER *supra* note 2 (describing the Court’s political influence as a collective unit); ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004) (analyzing the many roles the European Court has played, but considering it a single unit in its role).

ly closed social network due to the lack of an open platform for recruitment and the requirement of French as the working language. The inefficiency of the *référéndaire* labor market results in less competition, leading many *référéndaires* to stay longer at the Court. The longevity of career *référéndaires* also gives them tremendous power; some of these *référéndaires* become conservative forces that resist changes and reform. The revolving door between the Court and the Commission raises serious conflict issues, as the Commission was able to exert influence on the Court from the inside and gain a comparative advantage in litigation. Moreover, the Court's practice of issuing a single, collegial decision encourages free-riding and increases pressures for judges and *référéndaires* to conform and suppresses dissent, as illustrated in the *Microsoft* case. Last but not least, the division of labor between the lower court and the higher court creates divergent incentive structures for judges and *référéndaires* working at different levels.

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,²²¹ misses the bigger picture. This Article points to three 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 options), which directly influences selection into the judiciary and the behavior of judges. For instance, overpaying judges could increase the risks of political interference during appointment. Moreover, the six-year term for EU judges is too short and severely reduces their productivity. A longer, non-renewable tenure, would increase judge productivity

²²¹ See Press Release of the Council of the European Union, *Q&A on the Reform of the General Court* (June 23, 2015), <http://www.consilium.europa.eu/en/press/press-releases/2015/06/23-questions-answers-general-court/> [<https://perma.cc/XKG3-P8GL>] (stating that the General Court will double its number of judges in a few years).

while allowing greater independence. Judges would then have the freedom to dissent, which would provide them with the necessary incentives to exert effort to improve the quality of opinions.

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 administrative cost.²²² 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 *référéndaires*, resulting in an outcome wherein Francophones have a disproportionate influence on shaping EU law. English is the obvious alternative. As a foreign language English is much more widely spoken than French in Europe²²³ and it has functioned well as the official language in other EU institutions such as the Commission.

The recruitment, management, and governance of *référéndaires* should command more attention from EU policymakers. Establishing an official online platform for recruiting *référéndaires* 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 *référéndaires* serve longer than their judges, it is well worth considering whether the tenure of *référéndaires* should be capped, as otherwise they risk exerting a powerful conservative force upon the Court and dominating less experienced judges.

²²² See Schiemann, *supra* note 84, 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).

²²³ See Eur. Comm'n, *supra* note 83, at 5 (showing English is the most widely spoken language in the EU (38%) and far exceeding French (12%)).

Appendix I Background Information of Judges and
Advocates General

	Total	GC Judge	CJ Judge	AG	
Count	184	66	95	45	
Gender (M=1, F = 0)	0.892	0.831	0.917	0.911	
Current Member	0.346	0.508	0.302	0.244	
Complete Education Information	0.227	0.277	0.188	0.178	
Education (PHD 1, non-PHD 0)	0.416	0.385	0.469	0.311	
Previous Experience	Academia	0.619	0.600	0.630	0.733
	Private Practice	0.335	0.415	0.313	0.333
	Référendaire at the Court	0.108	0.182	0.052	0.111
	CJEU	0.135	0.000	0.063	0.133
	National Court	0.535	0.508	0.552	0.467
	National Government	0.654	0.569	0.667	0.756
	European Commission	0.070	0.108	0.042	0.089
Primary Prior Work Experience	Government	0.281	0.215	0.292	0.289
	Academia	0.276	0.262	0.313	0.244
	Judiciary	0.173	0.231	0.156	0.089
	Private Practice	0.108	0.123	0.094	0.067
	Unknown	0.162	0.169	0.146	0.311
Last Position	Government	0.270	0.262	0.271	0.222
	Academia	0.189	0.154	0.240	0.178
	Judiciary	0.286	0.292	0.281	0.222
	Private Practice	0.070	0.138	0.021	0.089
	Unknown	0.184	0.154	0.188	0.289

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). The information was coded from the court's website.²²⁴
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 a 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.

²²⁴ InfoCuria, *Court of Justice*, CURIA, http://curia.europa.eu/jcms/jcms/p1_217426/en/ [<https://perma.cc/BX29-LXFU>] (last visited Oct. 15, 2016); InfoCuria, *General Court*, CURIA, http://curia.europa.eu/jcms/jcms/p1_217427/en/ [<https://perma.cc/X8AS-VD5S>] (last visited Oct. 15, 2016); InfoCuria, *Presentation of the Members*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7026/en/ [<https://perma.cc/3P6C-SG2Z>] (last visited Oct. 15, 2016).

Appendix II Tenure of Former Judges and Advocates
 General (in years)

	GC Judge	CJ Judge	AG
Average	8.243	8.985	7.278
Median	7	8	6
Std Dev	4.136	4.310	4.286
Min	2	0	2
Max	18	21	20

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. The information was coded from the court's website.²²⁵

2. GC=General Court; CJ=Court of Justice; AG=Advocate General.

²²⁵ InfoCuria, *Court of Justice*, CURIA, http://curia.europa.eu/jcms/jcms/p1_217426/en/ [<https://perma.cc/BX29-LXFU>] (last visited Oct. 15, 2016); InfoCuria, *General Court*, CURIA, http://curia.europa.eu/jcms/jcms/p1_217427/en/ [<https://perma.cc/X8AS-VD5S>] (last visited Oct. 15, 2016); InfoCuria, *Presentation of the Members*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7026/en/ [<https://perma.cc/3P6C-SG2Z>] (last visited Oct. 15, 2016).

Appendix III Basic Background Information of a Sample of Current and Former *Référendaires*.²²⁶

	Current <i>Référendaires</i>			Former <i>Référendaires</i>	
	Total	CJ	GC		
Count	74	31	43	103	
Gender (M=1, F = 0)	0.622	0.516	0.698	0.709	
Worked for Multiple Judges at the Court	0.338	0.300	0.366	N/A	
Education	0.273	0.357	0.211	0.271	
Doctoral	0.939	1.000	0.895	0.979	
Master	0.812	0.793	0.825	0.628	
Law Schools located in French-speaking Countries	0.382	0.375	0.392	0.598	
Common-law law schools	0.118	0.107	0.125	0.188	0.069
National Government	0.235	0.429	0.100	0.271	0.216
Academia	0.368	0.536	0.250	0.563	0.392
Private Practice	0.088	0.107	0.075	0.073	0.000
Internship in the Court	0.203	0.286	0.146	0.083	0.000
Other Positions in the Court	0.147	0.107	0.175	0.052	0.000
Internship in the Commission	0.206	0.071	0.300	0.073	0.156
Commission	0.074	0.000	0.125	0.031	0.088
Commission: Legal Service	0.059	0.036	0.075	0.031	0.029
Commission: DG Comp	0.074	0.036	0.100	0.010	0.039
Commission: Others					

Notes:

1. This table provides the summary statistics of education and professional experience of seventy-four 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. "Other positions in the Court" means the *référendaire* worked in positions other than as *référendaire* at the Court (e.g., linguist, researcher).
5. "Former *référendaire* exit option" means the first job a *référendaire* obtained upon departing the Court.

²²⁶ *Supra* note 89–90 and accompanying text.

Appendix IV Tenure and Work Experience of a Sample of Current and Former *Référendaires*.²²⁷

	Years Working as <i>Référendaires</i>			Years of Previous Work Experience				
	Current <i>Référendaires</i>			Current <i>Référendaires</i>				
	Total	CJ	GC	Total	CJ	GC	Former <i>Référendaires</i>	Former <i>Référendaires</i>
Mean	7.11	6.77	7.56	5.85	6.25	5.26	4.33	4.33
Median	7.35	7.00	7.50	5.60	6.00	4.60	3.95	3.95
Std. Dev.	5.07	5.21	4.84	3.87	3.97	3.63	3.44	3.44
Min	0.1	0.2	0.1	0	0	0.5	0	0
Max	26	26	22.2	18	18	17.3	15.5	15.5

Notes:

1. This table provides the summary statistics of the years of previous job experience and the tenure of seventy-four 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

²²⁷ *Id.*

Appendix V The Revolving Door Between the Commission and the Court.²²⁸

	Mean	Median	Std Dev.	Min	Max
Current Member of the Commission	0.49	0	0.50	0	1
Commission to Court	0.34	0	0.47	0	1
Court to Commission	0.57	1	0.49	0	1
Legal Service	0.46	0	0.50	0	1
Commission	0.37	0	0.48	0	1
Other Departments	0.46	0	0.50	0	1
Years of Commission Experience	7.69	4.7	7.14	1	36
Years of Référendaires Experience	4.40	3.6	3.14	0.8	12

Notes:

1. This table provides the summary statistics of thirty-five current and former référendaires who have experience working full-time at both the Commission and the Court. As described above, 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.