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Not All that Glitters is Gold -
The Covert Failings of the EU's
Court of Justice

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NOT ALL THAT GLITTERS IS GOLD

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THE COVERT FAILINGS OF THE EU'S COURT OF JUSTICE

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Abstract:

The Court of Justice of the European Union (CJEU) is widely hailed as a success story. Indeed, the life of the CJEU, as well as its contemporary position, hardly offer support for the thesis that a debacle has occurred in the traditional sense of the term. The current paper however opts for a broader understanding of that notion, indicating a collection of shortcomings that have gradually accumulated and persist up to the present day. The paper moreover suggests that the flaws are largely covert instead of overt, something that may well explain the lack of focused inquiries so far. To underpin these contentions, the analysis proceeds from a contemporary vantage point, consciously incorporating a historical dimension. Hereby, attention is devoted to four aspects that are believed to qualify as defects: the intermittent tug-of-war between the supranational and national judiciaries since the early 1960s; the sustained imperfections of the judicial selection and appointment process; the constantly variable quality of the case law; the internal pressures and agitations popping up since the creation of the Court of First Instance in the late 1980s. The findings demonstrate how every success story has its darker sides, with the CJEU constituting no exception to that rule.

Keywords:

European Union (EU); Court of Justice of the European Union (CJEU); administration of justice; judicial activism; legal pluralism; selection of judges; judicial appointments; quality of judgments; judicial authority.

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I. Introduction

The Court of Justice of the European Union is widely hailed as a success story.¹ Even though disagreement with regard to the legitimacy of its output seems steadily on the rise, its effective establishment as a supranational judiciary over the past six decades continues to attract general admiration.² Compared to similar experiments in other parts of the world, the mere survival, let alone the progressive thriving of the EU's judiciary constitutes a remarkable feat itself.³ In turn, to paraphrase one of its former Presidents, one wonders what would have become of the Community or Union without the existence of the Court?⁴ To the mind of many a lawyer musing on that question, little else is imaginable than a swift collapse, pursuant to acrimonious, insoluble conflicts, or at most a fledgling system – not the entrenched comprehensive architecture that we may still appreciate today.

Writing about the failures of the CJEU might hence very well amount to a decidedly unenviable task, somehow evoking the scene of Diogenes meeting the great Alexander – admitting that the king deserved genuine reverence for his deeds, but caustically requesting that he now please step out of the sun. And yet, with European law aspiring to be a science rather than a religion, there ought to be no fears for accusations of blasphemy.⁵ Besides, the recent ‘historical turn’ in the study of the EU legal order has revealed various concerted practices and outright opportunistic moves to achieve particular goals, whereby the personal was remorselessly mixed with the political.⁶ In these narrations, for instance, the dealings of the aforementioned Court President, Mr. Robert Lecourt – a celebrated

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¹ For the sake of convenience, the designations ‘CJEU’ and ‘Court’ are used interchangeably in this contribution to denote the institution as a whole during the entire 1952-2018 period. Where necessary, its branches or limbs will be explicitly distinguished as ‘ECJ’ (for ‘European Court of Justice’) and ‘CFI’ (for ‘Court of First Instance’), or ‘CJ’ (for ‘Court of Justice’) and GC (for ‘General Court’).

² With regard to the first statement, indeed “There is hardly any other issue relating to [its] operation that would give rise to such heat and passion: the legitimacy of what the ECJ has been doing and how it has been doing it”, (M. Bobek, ‘The Court of Justice of the European Union’, in A. Arnall & D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (2015), 172. See inter alia M. Adams, H. de Waele, J. Meeusen & G. Straetmans (eds.), *Judging Europe’s Judges – The Legitimacy of the Case Law of the European Court of Justice* (2013); ‘Editorial Comments, The Court of Justice in the Limelight – Again’ 45 *Common Market Law Review* (2008), 1571.

³ See e.g. K. J. Alter, *The New Terrain of International Law. Courts, Politics, Rights* (2014).

⁴ Cf. R. Lecourt, ‘Quel eût été le droit des Communautés sans les arrêts de 1963 et 1964?’, in A. Barav *et al.* (eds.), *L’Europe et le droit. Mélanges en hommage à Jean Boulouis* (1991), 349.

⁵ Yet, compare the virtual ostracising of the Danish scholar Hjalte Rasmussen after publication of his *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986), as asserted in J.H.H. Weiler, ‘Hjalte Rasmussen – Nemo Propheta in Patria Sua’, in H. Koch, K. Hagel-Sørensen, U. Haltern & J.H.H. Weiler (eds.), *Europe: The New Legal Realism. Essays in Honour of Hjalte Rasmussen* (2010), xiii.

⁶ See e.g. B. Davies, *Resisting the European Court of Justice – West Germany’s Confrontation with European Law, 1949-1979* (Cambridge University Press 2012); M. Rasmussen, ‘Revolutionizing European Law: A History of the Van Gend en Loos Judgment’ 12 *International Journal of Constitutional Law* (2014) 136; A. Cohen, “Ten Majestic Figures in Long Amaranth Robes”: The Formation of the Court of Justice of the European Communities’ in A. Vauchez & B. de Witte (eds.), *Lawyering Europe* (2013), 21.

French cabinet minister in his earlier life – take pride of place.⁷ Consequently, to a fair extent, the gloves are off already – and from an academic perspective, it would be rather more disingenuous to shy away from addressing elements that could enhance our understanding of where we are, which roads were (rightly or wrongly) taken, and on which path the European project may most advisedly proceed.

To be sure then, every success story has its dark sides, and that of the CJEU is unlikely to be an exception. The current paper intends to demonstrate the veracity of that claim, which ultimately does remain a modest one. Spectacular failures are to be observed elsewhere. The life of the Court definitely does not offer support for the position that a ‘debacle’ has occurred in the traditional sense of the term. For our purposes, it suffices to stick to a broader understanding, indicating a collection of shortcomings that have gradually accumulated, and persist up to the present day. The ‘debacle’ shibboleth may optionally be employed in this context, but only to signify the failure to resolve every single one of them satisfactorily.

The paper, in short, aims to highlight ‘all that is still wrong with the European Court of Justice’. As will be pointed out below though, these flaws are predominantly covert instead of overt, which arguably explains the lack of focused inquiries so far. That does not mean to say that there exists a dearth of scholarly criticism, yet the key arguments and analyses are largely scattered. Apart from the synthesising approach, the innovation offered by this contribution resides in the conscious incorporation of the historical, while principally departing from a contemporary vantage point.

In what follows, consecutive attention is devoted to four aspects of the CJEU that are believed to qualify as defects: the intermittent tug-of-war between the Union and the national judiciaries since the early 1960s (paragraph 2); the sustained imperfections of the judicial selection and appointment process (paragraph 3); the constantly variable quality of the case law (paragraph 4); the internal pressures and agitations popping up since the creation of the Court of First Instance in the late 1980s (paragraph 5). These threads are woven together in a brief concluding section (paragraph 6).

II. Confined Authority: The Relentless Tussle between the European and the National Courts

It probably does not go too far to assume that the relation between judicial institutions active on separate levels is always characterised by a natural tension. Moreover, this assumption could hold regardless of whether it concerns a relation between domestic courts, or between national and inter/supranational courts. A certain rivalry inevitably creeps into the minds of legal professionals that are expected to serve justice and ‘get it right’: in order to do their work at all, each and every judge must be convinced that he has reached the correct conclusion.⁸ The latter implies a low tolerance for outsiders second-guessing the choices made, for individual judges are habitually inclined to think they

⁷ See e.g. B. Davies and M. Rasmussen, ‘From International Law to a European *Rechtsgemeinschaft*: Towards a New History of European Law, 1950–1979’, in J. Laursen (ed.), *Institutions and Dynamics of the European Community, 1973–83* (2014), 97.

⁸ This conviction, rather than the (f)actual correctness, is arguably the best way to interpret the famous thesis articulated in R. Dworkin’s *Taking Rights Seriously* (1978).

'know better' – an inclination that virtually forms part of their job description, and a main reason why people opt for an independent adjudicator anyway.⁹

It hardly comes as a surprise then that the interrelation between on the one hand the courts of the Member States, especially national supreme courts, and on the other the European Court of Justice, exhibits exactly such a tension. This can obviously not be attributed to the CJEU if it indeed constitutes a natural phenomenon. To the extent however that it is the result of specific actions that excited friction, the question arises whether it could (and should) not have been avoided. Furthermore, whereas it might have been an incidental rather than a structural issue, we are faced with the contrary, since the interrelation has been strained for several decades now. Is one side perhaps more to blame for souring the waters?

The German *Bundesverfassungsgericht* is widely regarded the most outspoken interlocutor, and the most unyielding of the CJEU's critics. Many consider the saga to begin in 1974 with the notorious *Solange I* judgment, dismissing the claims of an autonomous legal order that supersedes the national one, including domestic norms of a constitutional nature.¹⁰ Despite the reversal in 1986 (*Solange II*), the later *Maastricht Urteil* and *Lissabon Urteil*, as well as a flurry of recent pronouncements, signalled a shift to the defiantly hostile mode.¹¹ As known, the *Bundesverfassungsgericht* did not stand alone, but was readily joined by inter alia its Italian and French counterparts. An unqualified acceptance of the supremacy of European law proved equally unpalatable for their colleagues in newly acceding countries, including Denmark, Ireland and Poland. Of late, the Czech Constitutional Court and the Danish Supreme Court even tiptoed on the edge of open war.¹² Overall, few are ready to recognise the absolute competence of the CJEU, preferring to contend that the ultimate authority of EU law flows from the basic domestic norms, in particular the enabling clauses contained in the national constitution.¹³

A first failing of the European Court of Justice is thus, that it did not entirely succeed in getting its message across; and that instead, it sowed the seeds for a protracted series of confrontations, by launching an unprovoked attack on the sovereign jurisdiction of Member States. So, the root of the problem here does not date back to 1974, but to 1963. That year's *Van Gend & Loos* judgment is all too often cast in a favourable light, but sparked a controversy that led to an erosion, rather than an

⁹ Cf. M. Shapiro, *Courts. A Comparative and Political Analysis* (1981).

¹⁰ BVerfG 2 BvL 52/71, 29 May 1974 (*Internationale Handelsgesellschaft – 'Solange I'*).

¹¹ BVerfG 2 BvR 197/83, 22 October 1986 (*Wünsche Handelsgesellschaft – 'Solange II'*); BVerfGE 2 BvR 2134, 2159/92, 12 October 1993 (*Brunner – Maastricht Urteil*); BVerfG 2 BvE 2/08, 30 June 2009 (*Lissabon-Urteil*); BVerfG 1 BvR 256/08, 2 March 2010 (*Vorratsdatenspeicherung*); BVerfG 2 BvR 2728/13, 14 January 2014 (*OMT-Beschluss*); BVerfG 2 BvR 2735/14, 15 December 2015 (*Europäischen Haftbefehl*). For incisive analyses, see M. Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' 48 *Common Market Law Review* (2011) 9; J.H. Reestman & L. Besselink, 'Sandwiched between Strasbourg and Karlsruhe: EU Fundamental Rights Protection' 12 *European Constitutional Law Review* (2016) 213.

¹² J. Komárek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' 8 *European Constitutional Law Review* (2012) 323; R. Holdgaard, D. Elkan, G. K. Schaldemose, 'From cooperation to collision: The ECJ's *Ajos* ruling and the Danish Supreme Court's refusal to comply', 55 *Common Market Law Review* (2018) 17.

¹³ For a detailed survey, see P. Craig & G. de Búrca, *EU Law* (2015) 278-308.

enhancement of the legitimacy of the alleged 'new legal order'.¹⁴ While justified in *la doctrine* as a logical corollary, the emphasis on supremacy and autonomy in *Costa/ENEL* exacerbated the status quo.¹⁵ Additionally, the Court did not do itself a service either with its ruling in the *Dairy Products* case, wherein it sealed off the Community system by rejecting any reliance on the countermeasures normally available under international law.¹⁶ In the long run, the foregoing increased the discomfort for Member States to such a level that some became attracted to the idea of completely abandoning the integration project. In the meantime, the Court was itself responsible for triggering various adverse reactions from the national plane, which eventually turned into an intermittent tug-of-war. There, arguably, lies the original sin: in essence, those adjudicating on the Kirchberg brought that dogged struggle upon themselves, when a less blunt approach could have been attempted. Matters were compounded by the Court's condoning of the liberal interpretations that other EU institutions gave to their own competences – fomenting the doubts of national judges, with a further weakened authority as the predictable boomerang effect.¹⁷ The upshot over the course of sixty years, also in view of the multiplying pockets of opposition, resembles a case of self-inflicted repetitive strain injury.

That the bold dicta of the Court met with stiff resistance is not strange, nor is it unusual: research on comparable actors suggests that they are most vulnerable to backlash in the early stages of their development, when their position has yet to be solidified, and potential supporters have yet to mobilise.¹⁸ Nevertheless, this does not mean that there is nothing to justify a moderate stance from the very beginning: a subtle dialogue could have been just as conducive to a positive result. Whether the inroads made by *Van Gend*, *Costa* and *Dairy Products* were truly necessary or not, the harmonious emancipation of EU law would have stood to gain from decisions that excited a less antagonistic response.

Telling and somewhat quaint is moreover the fact that an extensive 'marketing campaign' had to be undertaken to inform and persuade the Court's interlocutors.¹⁹ Apparently, the authors of said decisions were not too sure that the key tenets would be properly understood, or go down easily. In part, the ambiguity of *Van Gend & Loos* was deliberate, but it did entail that the revolutionary dimension was not appreciated right from the start.²⁰ If however the declaration of a new legal order, with

¹⁴ Judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, C-26/62, ECLI:EU:C:1963:1, on which see J. H. H. Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 *International Journal of Constitutional Law* 94.

¹⁵ Judgment of 15 July 1964, *Flaminio Costa v. E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66, on which see O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *European Journal of International Law* 763.

¹⁶ Judgment of 13 November 1964, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, joined cases C- 90 & C-91/63, ECLI:EU:C:1964:80, on which see W. Phelan, 'The Troika: The Interlocking Roles of *Commission v. Luxembourg and Belgium*, *Van Gend en Loos* and *Costa v. ENEL* in the Creation of the European Legal Order' 21 *European Law Journal* (2015) 116.

¹⁷ Conversely, the tenuous upholding of the rule of law at the EU level is said to have prompted similar tendencies at the national level. See 'Editorial Comments, The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated Problems' (2016) 53 *Common Market Law Review* 597.

¹⁸ See e.g. K. J. Alter, J. T. Gathii & L. R. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' 27 *European Journal of International Law* (2016) 293.

¹⁹ See A. Vauchez, 'The Transnational Politics of Judicialization: *Van Gend en Loos* and the Making of EU Polity' 16 *European Law Journal* (2010) 1.

²⁰ The outcome represented a compromise between the authors, supported by the narrowest possible majority on the bench: see Rasmussen, *supra* note 6, at 153.

attendant radical features, was ever expected to inspire awe and command obedience amongst its subjects, better care might immediately have gone into the drafting process. At least in this sense, the landmark judgments of the 1960s were not the success that they were later said to be.

To prevent misunderstanding, the central argument here is not that alternatives to those judgments should have been devised. The historic failure of the CJEU resides plain and simple in its inability to get each and every member of the national audience on board. Simultaneously, whilst regional integration can occasionally get off the ground without judicial activism, to claim that the 1960s judgments were wholly superfluous is to enter the realm of speculation.²¹ All the same, a measured strategy might well have induced less friction, and diminished the risk that the Court's authority remains as confined as it is today. As an intriguing side-effect, that route opens the door to a world where the theory of legal pluralism (contemplating a peaceful co-existence between multiple overlapping norm systems) never caught on – and in fact, never had to catch on either, in absence of the divide it seeks to bridge.²²

III. Questioning the Court's Membership: Defects in the Selection and Appointment Process

The quality of the performance of an organisation will always depend on the quality of the people running the show. Disturbingly, the Treaty of Paris that laid the groundwork for the CJEU did not demand that the judges appointed to the Court possess any legal qualifications, merely that they were chosen from among persons of recognised independence and competence.²³ By consequence, the backgrounds and expertise of the Court's founding members were quite heterogeneous, including such rare specimens as the Dutch trade unionist Petrus Serrarens (on the bench from 1952-1958) and the French governmental advisor Jacques Rueff (1952-1962). Party affiliations and political connections played a marked role in their recruitment, with a distinct air of nepotism surrounding the selection process.²⁴ For almost sixty years, the system for appointing judges and advocates general was neither very complicated nor very demanding. Member States were trusted to come up with a suitable nomination whenever a vacancy arose. The system was based on mutual trust, cloaking a non-aggression pact of sorts – no country daring to question another's candidate, for fear of a future acts in retaliation.²⁵ The nomination was forwarded to the Council, where as a rule it was approved.²⁶ No

²¹ Interestingly, the EFTA Court managed to secure the effectiveness of EEA law without asserting its direct effect or autonomy: see H.-P. Graver, 'The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States' in C. Baudenbacher, P. Tresselt & T. Oerlyggson (eds.), *The EFTA Court: Ten Years On* (2005), 79.

²² A divide it is unable to bridge in actual practice anyway, being a descriptive and not a normative theory. See e.g. K. Jaklic, *Constitutional Pluralism in the EU* (2014).

²³ See Article 32 of the Treaty establishing the Coal and Steel Community (1951).

²⁴ See e.g. K. J. Alter, *The European Court's Political Power – Selected Essays* (2009) 127; W. Feld, 'The Judges of the Court of Justice of the European Communities' 9 *Villanova Law Review* (1963) 45; Cohen, *supra* note 6, 35-36.

²⁵ Cf J.-M. Sauvé, 'Le rôle du comité 255 dans le sélection du juge de l'Union' in A. Rosas, E. Levits & Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (2013), 101.

²⁶ Officially submitted to what is called the 'Conference of the Representatives of the Governments of the Member States'; in reality, the Committee of Permanent Representatives (Coreper) ensured prior approval.

serious inspection took place whether those selected had what it takes to do a good job. There is no record of anyone ever being rejected, so once proposed, appointment was guaranteed. Rumours abound with regard to those that turned out less felicitous picks, whereby the diligence of generations of *référéndaires* has helped to disguise some (otherwise very embarrassing) judicial calamities.²⁷

The domination of the process by Member State governments reflects a historical constant. During the negotiations on the creation of the Coal and Steel Community in 1951, the French delegation strongly pushed for maintaining their sovereign prerogative, insisting on appointment by common accord, despite objections from the German representatives who argued that this approach would jeopardise judicial independence.²⁸ The European Parliament has through the years met with a comparable lack of success with its repeated calls for greater involvement in the nomination procedure.²⁹

Meanwhile, a beefing-up of the criteria has occurred: as Article 253 TFEU currently demands, the nominees are to 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.³⁰ In line with Article 254 TFEU, members of the General Court need to be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office.³¹ In line with Articles 253 and 254 TFEU, a new advisory panel was created in 2010 that must be consulted before the Member State governments can proceed to the appointment phase. The new scrutiny mechanism definitely allows for a more objective and independent assessment of whether the candidates truly meet the set criteria.

Since a negative opinion of the panel can only be overturned with unanimity, it has in practice acquired a *de facto* veto.³² Still, this offers no silver bullet for the systemic maladies that plague the recruitment process. For starters, take the glaring democratic deficit, in that the Council members are left with little or no room to depart from the report submitted by the experts. The technocrats now rule supreme, holding the formerly all-powerful elected officials in thrall, while the Parliament was fobbed off with the right to install one panel member. To be sure, the argument here is not one for a wholesale

²⁷ See e.g. M. Cohen, 'Judges of Hostages? Sitting at the Court of Justice of the European Union and the European Court of Human Rights' in B. Davies & F. Nicola (eds.), *EU Law Stories* (2017), 58; F. G. Jacobs, 'Advocates General and Judges in the European Court of Justice: Some Personal Reflections' in D. O'Keefe & A. Bavasso (eds.), *Judicial Review in European Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000), 17; M. Johansson, 'Les référendaires de la Cour de justice des Communautés européennes: hommes et femmes de l'ombre?' *Revue des Affaires Européennes* 563 (2007-2008).

²⁸ A. Boerger-De Smedt, 'La Cour de justice dans les négociations du traité de Paris instituant la CECA' 14 *Journal of European Integration History* (2008) 7.

²⁹ A. Arnulf, *The European Union and its Court of Justice* (OUP 2006) 21.

³⁰ Article 167 TEEC, post-Maastricht Article 167 TEC, post-Nice Article 223 TEC. The requirements were originally derived from the Statute of the International Court of Justice; see Cohen, *supra* note 6, p. 29.

³¹ The Treaty of Lisbon inserted the adjective 'high'. Remarkable is the (continuing) omission of the phrase 'in their respective countries'.

³² M. Bobek, 'Epilogue – Searching for the European Hercules' in M. Bobek (ed), *Selecting Europe's Judges – A Critical Review of the Appointment Procedures to the European Courts* (2015) 287; H. de Waele, 'Appointment of Judges (Court of Justice of the European Union)', in: H. Ruiz-Fabri (ed.), *Max Planck Encyclopedia of Procedural Law* (forthcoming), par. 25.

politicisation, but for a meaningful involvement of representative bodies in the selection and appointment process.³³

In close conjunction, there is the nagging lack of transparency. Up to 2010, the proceedings at the Council were completely shrouded in secrecy, so the people of Europe never got to know their top judges until they were formally anointed. Matters did not improve much with the new system, since the hearings of nominees by the panel take place *in camera*, and its reports are kept confidential. One rationale has been to secure the privacy of the candidates.³⁴ Furthermore, the arrangement is thought to facilitate the frankness of the conversation, obviating the need for excessively diplomatic answers.³⁵ An earlier proposal to organise hearings at the Parliament was moreover rejected for undermining judicial independence.³⁶ Similar grounds underpin the non-disclosure of the panel report, in reference to the legal imperative to protect personal data.³⁷ Another objective is to avoid a chilling effect, i.e. discouraging potential nominees from letting their name go forward, due to risk of being rejected (and concomitant reputational damage). Each of these points can be rebutted though. The legal reasons for rigorous confidentiality appear to be flawed.³⁸ Equally, it has been argued that “someone inclined to seek highest judicial office, who has a passion for the cause, should have the stomach and ability to stand a certain degree of public scrutiny”, adding that it may be for their own good, as it staves off injurious gossip in case of failure;³⁹ that it discourages those that do not meet the necessary criteria anyway, and that solutions can be worked out that do not disproportionately affect the right to privacy (e.g. broadcasting the hearings to a restricted audience; redacting the reports before their release).⁴⁰

In the same vein, critique have been voiced on the panel’s gambit to “more clearly and precisely explain” the conditions listed in Articles 253 and 254 TFEU, which resulted in a longlist spanning six separate factors.⁴¹ Authors point to the exhaustiveness of the criteria included in the Treaty, opining

³³ D. Kelemen, ‘Selection, Appointment, and Legitimacy – A Political Perspective’ in M. Bobek (ed), *Selecting Europe’s Judges – A Critical Review of the Appointment Procedures to the European Courts* (2015) 258-259.

³⁴ ‘Final Report of the Discussion Circle on the Court of Justice at the European Convention’, Brussels, 25 March 2003, CONV 636/03, point 6.

³⁵ A. Torres Pérez, ‘Can Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges’ in M. Bobek (ed), *Selecting Europe’s Judges – A Critical Review of the Appointment Procedures to the European Courts* (2015) 196.

³⁶ Arnulf, *supra* note 29, at 21.

³⁷ The panel cites Judgment of 29 June 2010, *European Commission v. The Bavarian Lager Co. Ltd*, C-28/08 P, ECLI:EU:C:2010:378, interpreting Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] O.J. L 145/43 and Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] O.J. L 8/1. See ‘Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union’, Brussels, 11 February 2011, 6509/11, COUR 3 JUR 57, p. 3.

³⁸ A. Alemanno, ‘How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections’ in M. Bobek (ed), *Selecting Europe’s Judges – A Critical Review of the Appointment Procedures to the European Courts* (2015) 213-214.

³⁹ A. von Bogdandy & C. Krenn, ‘On the Democratic Legitimacy of Europe’s Judges – A Principled and Comparative Reconstruction of the Selection Procedures’ in M. Bobek (ed), *Selecting Europe’s Judges – A Critical Review of the Appointment Procedures to the European Courts* (2015) 179.

⁴⁰ Torres Pérez, *supra* note 35, at 197-198.

⁴¹ Namely: 1) legal expertise, demonstrating a real capacity for analysis and reflection upon the conditions and mechanisms of the application of EU law; 2) having acquired professional experience at the appropriate level of at least twenty years for appointment to the Court of Justice, and at least twelve to fifteen years for appointment to the General Court; 3) possessing the general ability to perform the duties of a judge; 4) the presence of solid guarantees of independence and impartiality; 5)

that the panel exceeded its mandate by creating wholly new benchmarks in its elaboration.⁴² Adding insult to injuring, conspicuous by their absence are considerations related to gender. On the one hand this is perfectly logical, as the procedure offers no leeway to pick and choose candidates that ensure a balanced composition of the CJEU.⁴³ Attaching value to the sex of the nominee evidently amounts to a *praeter legem* move. On the other hand, not doing so prolongs the sufferance of unacceptably backward outcomes. In 2018, a third of the US Supreme Court consists of women, with the appointment of Sandra Day O'Connor dating as far back as 1981. At the EU's highest branch, the fraction presently stands at less than one fifth,⁴⁴ with the first female Fidelma Macken being appointed only in 1999. If the panel indeed has no compunction to surreptitiously extend its mandate, in this respect it really ought to raise its game.

The shortcomings flagged above are, admittedly, to be attributed to institutional arrangements: the Union's judiciary itself can hardly be held accountable for the dealings of the system's architects. There is no hard proof either of gross negligence or underperformance among judges. Also, it must be noted that there exists no uniformity or consensus in national, international or supranational circles with regard to the optimal method for selection and appointment: countless variations may be observed, grand as well as subtle – ranging from entirely open recruitment strategies to less manifest 'direct tapping', and from intense review procedures to marginal suitability assessments.⁴⁵ Although the 2010 revisions heralded a change for the better, we are nonetheless able to identify several weaknesses of the EU approach which are bound to affect the legitimacy of the Court, and are yet to be addressed.

IV. (Too) Far From Heaven: The Quality of the Court's Output

Litres of ink have been spilled on the style and structure of the judgments delivered since 1954.⁴⁶ In the beginning, the French influence loomed large, with the texts ordered in a tight corset. The reasoning was summary, each paragraph taking off from a typical '*attendu que*' flourish. The factual background, sufficiently sketched in the report for the hearing, received little attention. Pundits trying

knowledge of languages; 6) aptitude for working as part of a team in an international environment in which several legal systems are represented. In 2017, a seventh criterion was introduced, focusing on the physical capacity of candidates to carry out duties which (given their highly demanding nature) require good health. See 'Activity Report of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union', Brussels, 28 February 2018, 22.

⁴² See e.g. von Bogdandy & Krenn, *supra* note 39, at 173-174.

⁴³ Theoretically the Treaty text does offer room for individual Member States to present a shortlist, instead of just one name.

⁴⁴ 5 out of 28 judges (excluding AG); state of play at 1 May 2018.

⁴⁵ See e.g. R. Mackenzie, K. Malleson, P. Martin & Ph. Sands, *Selecting International Judges. Principle, Process, and Politics* (2010).

⁴⁶ See e.g. A.E. Bredimas, *Methods of Interpretation and Community Law* (1978); C. Gulmann, 'Methods of Interpretation of the European Court of Justice' 24 *Scandinavian Studies in Law* (1980) 187; M. Dederichs, *Die Methodik des EuGH: Häufigkeit und Bedeutung methodischer Argumente in den Begründungen des Gerichtshofes der Europäischen Gemeinschaften* (2004); E. Paunio & S. Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' 16 *European Law Journal* (2010) 395; G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2012); G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (2013); S. Sankari, *European Court of Justice Legal Reasoning in Context* (2013).

to divine the meaning of cryptic passages could bicker endlessly about the importance of particular terms and phrases.

From the 1980s onwards the format underwent a noticeable evolution, becoming more accessible, growing in length, providing for an almost pleasant read by the turn of the century. Behind this façade, alas, the grand strategy was maintained of announcing the decision, instead of engaging in a thoughtful discussion. A formulaic method is employed, whereby sentences or sections are conveniently copy-pasted from previous pronouncements.⁴⁷ Deduction is favoured, induction rare. In so doing, the Court occasionally resorts to the fallacy known as *petitio principii*: that what needs to be demonstrated is presented as a normative necessity. Of late, this brought one esteemed author to lambast a string of cases that boiled down to “a circumloquacious statement of the result, rather than a reason for arriving at it”.⁴⁸

Again, to avoid misunderstandings, the quality of the output does not stand accused of falling short across the board. At the same time, a plethora of judgments can be named from different decades that is marred by grave inadequacies. Thereby, the lack of persuasiveness of the conclusions reached seems intimately related to the poor articulation and presentation of the underlying motives. Classics such as *Van Gend & Loos*, *Plaumann*, *Chernobyl* and *Francovich* are fair game.⁴⁹ Without much effort, one shoots similarly large holes in recent rulings such as *Mangold*, *Test-Achats*, *Ruiz Zambrano*, *Sturgeon* and *Pringle*.⁵⁰ Commentators have taken issue with inter alia the overkill of categorical statements, inconsistencies with vested dicta, the lack of balance in interpretation techniques, a harrowing succinctness, *contra legem* proclivities, or excessive reliance on cluster citations.⁵¹ At the origin of these failings lies predominantly the need for a single, collegiate judgment. Contrary to the situation at the European Court of Human Rights, the International Court of Justice and the US Supreme Court,

⁴⁷ See Bobek, *supra* note 2, p. 170; L. Azoulay, ‘La fabrication de la jurisprudence communautaire’ in P. Mbongo & A. Vauchez (eds.), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (2009), 163; M. Jacob, *Precedent and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (2014).

⁴⁸ S. Weatherill, ‘The Court’s Case Law on the Internal Market: “a Circumloquacious Statement of the Result, Rather than a Reason for Arriving at it”?’ in M. Adams, H. de Waele, J. Meeusen & G. Straetmans (eds.), *Judging Europe’s Judges – The Legitimacy of the Case Law of the European Court of Justice* (2013), 87.

⁴⁹ Judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, C-26/62, ECLI:EU:C:1963:1; Judgment of 15 July 1963, *Plaumann v. Commission*, C-25/62, ECLI:EU:C:1963:17; Judgment of 22 May 1990, *Parliament v Council*, C-70/88, (Chernobyl); Judgment of 19 November 1991, *Andrea Francovich v Italy*, Joined cases C-6 & 9/90, ECLI:EU:C:1991:428.

⁵⁰ Judgment of 22 November 2005, *Werner Mangold v. Rüdiger Helm*, C-144/04, ECLI:EU:C:2005:709; Judgment of 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres*, C-236/09, ECLI:EU:C:2011:100; Judgment of 8 March 2011, *Gerardo Ruiz Zambrano v. Office national de l’emploi*, C-34/09, ECLI:EU:C:2011:124; Judgment of 19 November 2009, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck en Cornelia Lepuschitz v. Air France SA*, Joined cases C-402 and C-432/07, ECLI:EU:C:2009:716; Judgment of 27 November 2012, *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*, C-370/12, ECLI:EU:C:2012:756.

⁵¹ See e.g. N. Nic Shuibne, ‘Seven Questions for Seven Paragraphs’ 36 *European Law Review* (2011) 161; K. Hailbronner & D. Thym, ‘Case Note *Ruiz Zambrano*’ 48 *Common Market Law Review* (2011) 1253; A. Dashwood, ‘From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?’ *Cambridge Yearbook of European Legal Studies* 2006-2007, 81-109; J. H. H. Weiler, ‘Epilogue: Judging the Judges – Apology and Critique’ in M. Adams, H. de Waele, J. Meeusen & G. Straetmans (eds.), *Judging Europe’s Judges – The Legitimacy of the Case Law of the European Court of Justice* (2013), 243; ‘Editorial Comments – Reflections on the State of the Union 50 Years after *Van Gend en Loos*’ 50 *Common Market Law Review* (2013), 354; T. Horsley, ‘Reflections on the Role of the Court of Justice as the “Motor” of European Integration: Legal Limits to Judicial Lawmaking’ 50 *Common Market Law Review* (2013) 931; S. Weatherill, ‘The “Principles of Civil Law” as a Basis for Interpreting the Legislative *Acquis*’ 6 *European Review of Contract Law* (2010) 74.

dissenting opinions are not permitted.⁵² Hence, to have its way, a majority regularly sees itself forced to delete essential elements from the *ratio decidendi*.⁵³ In the worst case, this leads to a *non-sequitur* that takes away the credibility of the whole verdict. Unfortunately, the judgments of a Grand Chamber comprised of fifteen judges, which are supposed to carry the greatest weight of all, are most prone to display such a defect. Just as hated are the repeated instances of 'implied reversal', where the Court backtracks on a previous position without deigning to own up to it.⁵⁴ The increasing discrepancies between the verdicts of different chambers do not exactly encourage its popularity either.⁵⁵ The judges are warned that if they do not adhere to a minimum of consistency, their importance shall diminish quickly.⁵⁶ An open admission of a *volte-face* is in any case preferable to a shallow concealment.

Having said this, the point should not be overstated. The CJEU is entrusted with a singularly difficult task. In mandating it to "ensure that in the interpretation and application of the Treaties the law is observed", Article 19 TEU barely conveys the true scale and complexity. In view of the growing diversity of its readership, spread out across a Union of two dozen countries with their own distinct cultural tastes and professional traditions, the CJEU's style is ever less capable (nor likely) to appeal to everyone. Whereas the slipups ought not be swept under the carpet, the qualitative and quantitative advances deserve mentioning too – such as the doubling in size of the response provided to national courts under the preliminary reference procedure, in roughly twenty years.⁵⁷

The higher a court ranks however, the higher the demands that one may place on them: output of the supreme court of the EU ought therefore to be supremely clear and compelling. In the near future, the progress achieved in run-of-the-mill cases needs to be made also in landmark rulings – a precious genre, which so far keeps lagging behind in multiple ways.⁵⁸ At those crucial junctures in the development of the law, the magistrates of the Kirchberg cannot afford to fall back on laconic, terse,

⁵² But contrast J.L. Dunoff & M.A. Pollack, 'The Judicial Trilemma' 111 *American Journal of International Law* (2017) 245, expounding that "[w]hile this is surely a plausible reading of the Statute, the relevant language hardly compels this conclusion".

⁵³ See e.g. U. Everling, 'The Court as a Decision-Making Authority' 82 *Michigan Law Review* (1984) 1308; D. Edward, 'How the Court of Justice Works' 20 *European Law Review* (1995) 556; K. Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in M. Adams, H. de Waele, J. Meeusen & G. Straetmans (eds.), *Judging Europe's Judges – The Legitimacy of the Case Law of the European Court of Justice* (2013), 46.

⁵⁴ Compare the many examples cited by P. Wattel, 'Köbler, CILFIT and Welthgrove: We Can't Go On Meeting Like This' 41 *Common Market Law Review* (2004) 179; see also A. Ondoua, 'L'influence de la Cour dans l'élaboration des traités européens' in P. Mbongo & A. Vauchez (eds.), *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (2009), 199.

⁵⁵ See e.g. N. Nic Shuibne, 'A Court within a Court: Is it Time to Rebuild the Court of Justice?' 34 *European Law Review* (2009) 174.

⁵⁶ T. Koopmans, 'Stare Decisis in European Law' in D. O'Keefe & H. G. Schermers (eds.), *Essays in European Law and Integration* (1982), 27; see also M. Poiars Maduro, 'Interpreting European Law: Adjudication in a Context of Constitutional Pluralism' 1 *European Journal of Legal Studies* (2007) 14: "In other words, it is not enough for a court to be consistent in how [it] interprets a particular legal rule. It is necessary for that court to be consistent in its interpretation of that rule in the light of its interpretation of the entire legal system." See also S. Besson, 'From European Integration to European integrity – Should European Law Speak with Just One Voice?' 10 *European Law Journal* (2004) 281.

⁵⁷ M. Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in M. Adams, H. de Waele, J. Meeusen & G. Straetmans (eds.), *Judging Europe's Judges – The Legitimacy of the Case Law of the European Court of Justice* (2013), 204.

⁵⁸ Cf M. Lasser, 'Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court' *Jean Monnet Working Paper* 1/03 (2013), 49: "In fact, despite their abandonment of the single-sentence syllogism, ECJ decisions continue to be unsigned, univocal, magisterial and largely deductive documents that reveal decidedly less than they might."

or sibylline snippets.⁵⁹ Of course, no judiciary on earth succeeds in delivering perfection. Even so, those invested with the “awesome power” to do justice are obliged to ensure that their decisions are as good as they can possibly get.⁶⁰

V. On the Brink of Fratricide? Pressures and Agitations From Within

In the initial plans for the European Coal and Steel Community, no room was foreseen for a Court of Justice: the Council of Ministers was perceived as the antipode of, and main safeguard against the executive, the High Authority.⁶¹ The establishment of an independent judicial body appeared on the agenda in late 1950, on the instigation of the German representatives involved in the negotiations on the draft of the ECSC Treaty.⁶² The idea was adopted, allegedly with some hesitation, and put in practice in 1952. In 1958, the ECSC Court was transformed into the institution serving the three Communities.

After a relatively long honeymoon, the expansion of the Court’s jurisdiction went hand in hand with the growth of its workload. Nevertheless, upon reaching maturity in the 1970s, it could wallow in the pleasure of its unique and exclusive competences – functioning at the highest imaginable level within the EC, with national courts seriously taking notice of their ability (and in specific circumstances, obligation) to approach it for a binding opinion on a case brought before them. Shortly thereafter, the Commission started to energetically pursue its task of prosecuting Member States for violations of EC law whereby the Court enjoyed the final say.

The judges gradually became aware that that this setup had a price. Soon, the Luxembourg docket exploded with preliminary references and so-called direct actions. By the mid-1980s, pressures reached a peak point. The hundreds of log-jammed cases, rendering a sufficiently swift adjudication impossible, stirred up momentum for an innovative remedy: the creation of a novel limb, the Court of First Instance (CFI), inaugurated in 1989. Though the principal aim was to effectively relieve the workload of its ‘big brother’, the founders consciously endowed it with only a limited jurisdiction.⁶³ To avoid poaching on each other’s preserve, no parallel litigation was allowed for, and a right of appeal was installed of CFI judgments to the ECJ. Thus, it seemed probable that the occasions where the two could get in each other’s hair would be few and far between.

With the entry into force of the Lisbon Treaty on 1 December 2009, the Court of First Instance took on the new name ‘General Court of the European Union’, but despite that broader designation, no meaningful devolution of responsibilities was enacted. Already the Treaty of Nice that entered into force in 2003 enabled the CFI to decide preliminary references in a couple of fields, yet the Statute of

⁵⁹ Cf. T. Tridimas, ‘The Court of Justice and Judicial Activism’ 21 *European Law Review* (1996) 210.

⁶⁰ F. Frankfurter, dissenting in *Trop v Dulles*, 356 U.S. 86 (1957).

⁶¹ P. Reuter, *La Communauté européenne du charbon et de l’acier* (1953), 53; M. Lagrange, ‘La Cour de justice des communautés européennes: du Plan Schuman à l’union européenne’ *Revue trimestrielle de droit européen* (1978) 2.

⁶² J.-V. Louis, ‘Organisations européennes’ 30 *Revue internationale de droit comparé* (1978) 363.

⁶³ By the same token, a seven-member Civil Service Tribunal was established in 2005 (liquidated in 2016).

the CJEU was never amended to define the latter precisely. A salient detail is that, in accordance with Article 281 TFEU, such an amendment requires the President of the institution to play along.⁶⁴ From his part, the willingness to concede has, up until now, ostensibly been minimal. On the one hand, this is without question linked to the fact that in the mid-2000s, the General Court experienced difficulties in coping with the rising tide of direct actions. On the other hand, the reticence presumably had something to do with the internal hierarchy, and the perception thereof at the superior branch. At some moments, these sentiments are known to have flared up and run high. During the 12-year reign of the previous President, when preparations were made to overhaul the CJEU's architecture, the mutual relations acquired a downright frosty character.⁶⁵ Open clashes rarely occur, but various documents have transpired that testify of acrimonious disputes behind the scenes.⁶⁶

The gravity and frequency of the incidents must not be exaggerated, but the recurring pattern bears a strong resemblance to that of an older child chastising the younger. Seemingly, the rift runs deeper than the casual frustration of the General Court having to shoulder the greater burdens and dispose of the more mundane cases, whilst the Court of Justice sits squarely in the limelight, deciding the spectacularly prestigious ones. A GC member will not be massively disappointed by a quashing of his/her judgment either.⁶⁷ The quarrels do suggest a toxic mix of professional and personal agitations: an innate but ill-received penchant for domination, coupled with an engrained *incompatibilité d'humeur* between several protagonists.⁶⁸

In sum, it is a public secret that hitherto, the siblings have not been getting along as well as one would wish. To some extent, the fractious status quo emanates from the natural rivalry between judicial institutions, alluded to above; Cain-and-Abel syndrome sounds like an apt diagnosis. Considering the indicators for good governance outlined by the European Commission in 2001, in particular openness, effectiveness and coherence, the conduct falls woefully short of the mark.⁶⁹ The same goes for the standards provided by the Bangalore Principles of Judicial Conduct, in particular the values of integrity, diligence and propriety.⁷⁰ The silver lining consists in the palpably improving communications since the CJEU's new President, elected in 2015, took office. Undoubtedly, the increasing presence of judges at the Court of Justice that served before at the General Court helps. There are other hopeful signs of a thawing on the outside and the inside.⁷¹ The next stage in the life of this important institution

⁶⁴ Both the Commission and the Court can take the initiative; in the second situation the Council is obliged to consult the latter.

⁶⁵ See e.g. D. Robinson, 'The First Rule of ECJ Fight Club ... Is About To Be Broken', *Financial Times* (London, 27 June 2015); S. Peers, "'Don't Mention the Extra Judges!' When CJEU Reform Turns Into Farce' (3 July 2015) <www.eulawanalysis.blogspot.com> (last visited 31 May 2018); A. Alemanno & L. Pech, 'Where Do We Stand on the Reform of the EU's Court System? On a Reform as Short-sighted as the Attempts to Force through its Adoption' (23 September 2015) <www.verfassungsblog.de> (last visited 31 May 2018).

⁶⁶ For a pretty damning *mémoire*, see also 'EU Judge Dehousse's Farewell Address to the CJEU' (27 October 2016) <www.eulawanalysis.blogspot.com> (last visited 31 May 2018).

⁶⁷ But compare the ECJ's damning of the GC's competition law assessments, huffishly discussed by M. Jaeger, 'The Standard of Review in Competition Cases involving Complex Economic Assessment: Towards the Marginalisation of Marginal Review', 2 *Journal of European Competition Law & Practice* (2011) 303.

⁶⁸ See the sources mentioned *supra*, note 65, and the documents referred to therein.

⁶⁹ 'European Governance – A White Paper' COM (2001) 428.

⁷⁰ UN Commission on Human Rights, Resolution 2003/43; UN Economic and Social Council, Resolution 2006/23, Annex 1.

⁷¹ See the relatively upbeat conclusion of Judge Dehousse's valedictory speech, cited *supra* note 66.

therefore looks bright. If relapses are averted, the strenuous phase may rapidly fade from memory, and the scant evidence wind up as a collection of minor items in the archives.

VI. Conclusion

The often recounted story of the Court of Justice of the European Union is that of an actor going from strength to strength. The late Federico Mancini for instance regaled listeners with the amazing tale of how it had single-handedly framed a constitution for a quasi-federal polity, swaying colleagues at the domestic level to accept its decisions over copious champagne-sprinkled lunches.⁷² At heart, such enthusiasts and eulogists are anything but wrong. We are not dealing with the proverbial glass that is half empty or half full, depending on one's bias: the powers, privileges and recognition granted to the institution located today at the Boulevard Konrad Adenauer speak for themselves. From its cautious inception at the Villa Vauban, the Court deftly navigated its way through the tumultuous 1960s-1970s crisis era. Bit by bit, the judiciary managed to cement its position, instil a habit of obedience, and realise the emancipation of the European legal order. Consequently, in the eyes of many, it borders on the absurd to even attempt to draw up a 'taxonomy of failings'.

The foregoing attempted such an exposé notwithstanding, stressing the inevitable paucity of the findings. The common denominator of the flaws that have been identified is their covertness. We can easily be overawed by the rate of compliance with the CJEU's dicta, but that hides from view the unresolved tensions between the national and the supranational courts. Incidental eruptions such as the cheeky posturing of the Czech Constitutional Court and the Danish Supreme Court underscore the looming risk of escalation. Prima facie, the newly revamped selection and appointment procedure inspires confidence, but it simultaneously raises the question why this was necessary in the first place, and with which frequency suboptimal past nominees (undeservedly) slipped through the net. The 2010 reform did not eradicate these and other concerns, albeit that a big share of the blame must be placed on the *Herren der Verträge*. Conversely, there should be enough (internal) opportunities to consider and implement qualitative improvements to the Court's output, marred by a variable gamut of deficiencies. While visible advances have been made, the situation still does not seem to be entirely under control. This is worrisome, for the decisions of a supreme court ought to be supremely clear and compelling, in order to retain a sufficient measure of legitimacy. Likewise, while it is disingenuous to overestimate the friction between the 'senior branch' and the 'junior branch' of the CJEU, the protagonists did not always succeed in keeping the conflicts under wraps. One could qualify the struggle as a *rite de passage*, but they leave an indelible stain on the record nonetheless – and the underlying inferiority/superiority complex that informed the feuds is unlikely to dissipate automatically.

In this context, it would be foolhardy and absolutely inappropriate to apply the label 'debacle' in the traditional sense of the term. The current paper merely endeavoured to flag up some problematic

⁷² See K. J. Alter, *Establishing the Supremacy of European Law* (2001) ix.

elements that are frequently overlooked, worthy of note, and yet to be overcome; it constitutes no wholesale critique. All sincere *chroniqueurs* will acknowledge that both honours and blemishes belong in the annals of the integration project. Observers aiming for amelioration that dare to put a finger on the sore spots are, however, rarely greeted with applause.⁷³ Consolation is to be found in the old Roman creed that "*initium est salutis notitia peccati*".⁷⁴

⁷³ Cf. *supra*, note 5.

⁷⁴ "The awareness of an impropriety enables the healing process to begin" – Seneca, *Epistulae Morales ad Lucilium*, no 28 (author's free translation).



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