

# The European Court of Justice is now little more than a rubber stamp for the EU. It should be replaced with better alternative arrangements for central judicial guidance.

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*Last Friday saw the ECJ taking on new roles as ‘enforcer’ of the new fiscal compact to limit budget deficits and debt across 25 EU member states. Damian Chalmers argues that the Court has grown too institutionally close to the EU to now be judicially effective. In order to check EU Institutions the ECJ could be replaced by a new Court with members drawn from national constitutional courts. And in interpreting EU law a European-wide database of national judgments would be cheaper and provide more legal certainty than the ECJ.*



In my first blog yesterday I outlined how the Treaty on Stability, Coordination and Governance, signed last Friday by twenty five member states, has made the European Court of Justice (ECJ) into an active agent of EU executive government. The Court is now so enmeshed with the regular policy-making of the EU as to lose much of its original purpose. I also showed that the ECJ has been a little scrutinized EU institution whose record as a judicial institution is unimpressive.

So what alternatives exist to continuing with the Court as it is, and allowing it to become ever more of a rubber stamp for the EU? There are, crudely, three options.

## Replacing the Court as a check on the other EU Institutions

The Court of Justice is supposed to act as a constraint on the behavior of the EU Institutions, by reviewing their behavior, or ordering them to pay damages where they have acted illegally. This is a highly valuable role. It should prevent competence creep, secure commitments, and give citizens and others a secure sense of what the EU Institutions can expect of them and they can expect of the EU Institutions.

However, it does not work like that. In over thirty five years of EU fundamental rights law, there is not one instance, to my knowledge, of the Court of Justice, striking down a Directive (the central legislative instrument of the EU) because it violates fundamental rights. Similarly, despite the Court being part of the EU legal furniture for nearly twenty years, the EU has yet to annul a measure because it violates ‘subsidiarity’, the constitutional principle central to democratic self-government within the European Union, whereby all decisions should be made at the lowest feasible governmental level. By contrast, the Court has been quick to annul measures if they touch on its own institutional prerogatives, most recently the international agreement setting up a unified European and Community Patents Court. This shameful record suggests that if you are a democrat or a liberal you cannot be a supporter of the Court of Justice.

The Court of Justice has too much institutional investment in the development of the European Union to discharge its checks and balances role successfully. Effective legislative review of EU Institutions requires that the Court should be stripped of that role, and that this be given to a brand new body comprised of judges chosen from national constitutional courts. These senior lawyers would have more expertise. The institutional authority of their own courts would be better connected to the domestic body politics of the member states of the European Union. And such a new body would have none of the conflicts of interest which so mark the Court of Justice’s work.

## **Policing European Commission enforcement of sanctions on member states**

A second key role of the European Court of Justice is to adjudicate on enforcement actions brought by the Commission against member states of the Union for violating EU law. Once again, this is in theory a valuable role. It dissolves problems of free-riding by member states that might otherwise bedevil the implementation of law-making processes. And it enables business operators and citizens to be fairly confident that their EU law entitlements will be secure.

However, the Court's role in this process is largely a ratificatory one. During 2010 the Commission reached a settlement with the member states in 88 per cent of cases before the matter reached the Court of Justice. Of the few cases reaching the Court of Justice between 2006 and 2010, the Commission won in 91 per cent of cases. This is an astonishing statistic when one considers that when it did lose the Commission often did so only because it had not followed procedure properly.

In short, matters are only brought before the Court where there is a manifest breach of EU law to which the Court's role is to apply a legal rubberstamp. This is still an important function – but is it necessary to have a whole court with such grandiose pretensions as the ECJ for doing just that?

### **Adjudicating EU law**

The final role of the Court, and the one that it most celebrates, is adjudicating points of EU law asked of it by national courts, where these have arisen in disputes before them. This provision allows the ECJ to rule on a much wider array of scenarios, so these rulings form the crucible for the Court's hermeneutic adventurism and institutional pretensions. All the problematic judgments cited in my [first blog](#) emerge from this context. The justifications for this procedure are that

- it helps the national judges to decide the dispute;
- and it generates a corpus of EU law.

However, the procedure fails on both tests. The first problem, discussed in my first blog, is that the Court of Justice's comparative expertise in law is open to doubt.

The referral procedure is secondly skewed by a long backlog, which biases the docket. Parties wishing to enlarge EU law through a Court ruling win not only the case in hand but they secure a more general change of the law within their jurisdiction, because domestic law has to be adapted to the new settlement. As a result many parties to cases are happy to accept the delay. By contrast, there are no such incentives for parties who wish to secure a retrenchment of EU law. It is rare that the Court will reverse its previous rulings, so a better path is to seek domestic legal resistance by asking for interpretations of domestic law that only just comply with EU law. The consequence of this asymmetry is that almost all the legal questions referred to the European Court of Justice ask for it to extend rather than to retract EU legal obligations. There is no pluralist process before the Court, but simply a relentless one-way traffic.

The final sin of the current system is that it supplants and thereby neglects Europe's rich legal resources. By investing the final word in a single isolated institution, it overlooks the twenty seven legal jurisdictions out there with years of diverse experimentation, creativity and experience behind them. In this linked up world, judges struggling with a thorny dispute or wishing to build a common European legal heritage should turn their eyes in the direction of Europe's accumulated wealth of legal ideas, which lies there ready to help.

So here's a thought. Replace the current 'preliminary reference procedure' for going to the ECJ for a ruling with a database. All the appellate courts within the European Union interpreting a point of EU law in each of the 27 member states would be required to submit their judgments to that database. Translators would then make the judgments available in the different languages of the European Union. Courts from states outside the European Union interpreting EU law (it happens more than you think!) would also be invited to submit their judgments to the database, if they so wish. Judges in the EU countries interpreting EU law would then be required to consider rulings in

the database on the provision in question – but they could also give reasons why it would not be suitable for their jurisdiction, bearing in mind the obligations of EU membership.

This database would provide quicker justice than a reference to the European Court of Justice. It would almost certainly generate more legal certainty and uniformity, simply by dint of more judgments being available to the local judge to guide her. It would cultivate Europe's legal riches rather than seek to replace them with an inauthentic legal currency of its own. Lastly, it would possibly be cheaper because it would allow the Court's size to be reduced considerably.

Far-fetched? Well, who would ever have thought that we would have transnational courts directing domestic constitutional change, welfare policy and public finances? The repugnancy of that scenario makes now a good time to think about alternatives for the European Court of Justice.

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