The Court of Justice and the transformation of Europe: looking to the future, dealing with the present, but living in the past?

Marie-Pierre F. Granger

Abstract

Legal and political sciences scholars have described at length how the European Court of Justice (ECJ), driven by the ultimate goal set by the founding fathers - the 'ever closer union between the peoples of Europe' - and prompted and supported by supranational institutions (Commission, European Parliament) and sub-national actors (national courts, litigants) promoted its own idea of Europe (supranational, federal, centralised, unified, and driven by law). Post-Maastricht trends, away from the classic Community method and exploring alternative ways of making Europe, are challenging the Court’s ideal. These developments are captured under the analytical label of new intergovernmentalism. This paper investigate the Court’s contribution and reaction to these transformations, by analysing judicial developments (case law, procedures, practices and communications) to find out whether, indeed, the Court’s is still pursuing the same European ideal, how it approaches the setting up of new decision-making bodies, and whether the Court supports and adopt more consensual and deliberative processes. Rather than providing a comprehensive and systematic assessment, this chapter identify directions for further research, whilst offering a more in-depth analysis of some relevant developments. Preliminary conclusions point to a Court attempting to transform from an agent of integration, in the traditional (ie supranational) way, into a constitutional court operating within a complex and changing institutional environment, which it is struggling to keep pace with, and adjust to.

Introduction

Few would dispute that the European Court of Justice (hereinafter ECJ or Court) was instrumental in the first 'Transformation of Europe (Weiler 1991). From the 1960s to the early 1980s, as politics at European level were fundamentally deadlocked, as a result of the 'empty chair crisis’ and unanimous decision-making in the Council, the Court, '[t]ucked away in the fairy tale duchy of Luxembourg’ (Stein 1981:1), and driven by its own 'certaine idée de l'Europe’ (Pescatore 1983: 157) turned judicial procedures and interpretation into powerful integrative devices to pursue the ideal of the founding fathers, reshape and foster the Community method, and achieve the internal market.

1 Ph.D Exeter. Associate Professor, Central European University (Center for European Union Research; Department of Public Policy, Legal Studies Department, International Relations and European Studies Department). I am thankful to the participants to the Research Workshop - ”The methods of European integration” - organized by the Center for European Union research (CEUR), at Central European University – 21 June 2012, for their comments and feedback.
Since the adoption and coming into force of the Maastricht treaty, however, the Court’s European ideal and integration by ‘judicial fiat’ are placed under strains by both the empirical reality and competing normative perspectives on European integration. The powerful judicial engine, which had been praised for pulling at fast speed legal and market integration, started to become a real worry, as one realised that political and social processes were not following, and important decisions were made further away from the people, in Brussels, or Luxembourg. The silent consensus turned into vocal disagreement, as politicians, eminent national judges (Herzog and Gerken 2008), and well-known scholars (eg Rasmussen 1986, Hartley 1996, Scharpf 2010, Chalmers 2012, etc) sharply criticised the Court. It is held responsible for the problematic imbalances which plague Europe (eg legal/political, market/social, EU/national, technocracy/democracy, rights/duties, public/private interests, etc).

EU leaders and policy-makers responded by opening new roads towards integration and the handling of common problems. Post-1992 trends, which are captured by the concept of new intergovernmentalism, at first sight do no augur too well for the Court. To recall, after Maastricht, (intergovernmental) deliberation and consensus have becomes ends in themselves, and are not a transitory stage to supranational decision-making; supranational institutions are not hard wider to pursue the ‘ever closer union’; decision-making powers are no longer transferred to supranational institutions, but to newly created bodies; preference formation is constitutive of EU decision-making processes; high and low politics are more and more blurred; and finally, the EU is in a permanent state of crisis, which highlights a fundamental disequilibrium (Bickerton, Hodson, and Puettter 2014).

Amongst the many challenges which new intergovernmentalism pose to the Court, one identifies a few fundamental ones. First, new intergovernmentalism alters, as well as displaces the classic ‘Community method’ which the Court had actively supported as ‘the’ mode of integration in Europe and in which it secured itself a core position, in favor of more informal, flexible and intergovernmental coordination mechanisms which push law and the Court to the margin (if not out). Second, growing institutional fragmentation threaten the unity, integrity and coherence which constitutes the foundations of the EU legal framework, and the Court’s own jurisdiction. Third, by entertaining a state of confusion as to what the EU ultimately is about (ie the European telos, Weiler 1995), new intergovernmentalism renders toothless the Court’s most powerful ‘integrative’ tool, the teleological (or purposive) method of interpretation. Fourth, new intergovernmentalism questions some of fundamental policy paradigms which underlie EU case law (eg internal market). Finally, it calls for a reassessment of the role of law, courts and lawyers in European integration process.²

Given the historical role played by the Court in the early chapters of European integration, which few deny, and the nature and scope of the challenges which the post-Maastricht dynamics bring to the Court, it is worth investigating how the Court, as an institution, handles and reacts to these developments. Although much has been written about the Court’s case law and role over the last two decades, in both legal and political

² On this point, see also the contribution by Cardwell and Hervey.
sciences scholarship, there has been few attempts to look at judicial developments through broader analytical lenses which seek to make sense of post-Maastricht Europe.

This paper thus picks up the discussions on the role of the Court in European integration where the intergovernmentalists and neofunctionalists left it in the 1990s, and analyses the post-1992 Court through new intergovernmentalist lenses. The chapter starts with a brief analysis of the Court’s contribution to European integration until the early 1992, and a quick overview of relevant literature addressing the Court’s in the post-Maastricht era. It then analyses post-1992 developments concerning the Court’s role, along some of the claims made by new intergovernmentalism (the ineluctable pursuit of the ‘ever closer Union’, the use of de novo bodies, the role of consensus and deliberation).

The paper does not seek to provide a comprehensive and systematic assessment. Rather, by identifying ‘hints’ in recent judicial practices and academic commentaries, it takes stock and identifies avenues for further and more focused research. The clues gathered suggest that the Court’s role as reluctant participant in the second transformation of Europe. They highlight its attempt to transform from an agent of integration, in the traditional (ie supranational) way, into a constitutional court operating within a complex and changing integration process, which it is struggling to keep pace with, and adjust to.

1. The Court and the story of the first transformation of Europe

The European Court of Justice boosted European integration, in times where politicians were driving it into the wall of political disagreements. The Court’s main contributions to Europe’s first transformation, as well as what scholars made of it, are sketched out below.

The European Court of Justice, which is the highest tier of what is now known as the Court of Justice of the European Union (CJEU), was set up by the European Coal and Steal Community Treaty, and taken over by the European Economic Community, and later the European Union. The CJEU’s role is to ensure, that ‘in the application and interpretation of the Treaties, the law is observed’ (Article 19 TFEU). The CJEU has the power to annul EU measures on request by the Member States or the EU institutions as well from natural and legal persons, although under restrictive conditions (Article 263 TFEU). It can also award compensation for damages caused by violations of EU law (Articles 268 and 340 TFEU). Prompted by the Commission or a Member State, it can declare member states in breach of their EU obligations (Article 258 TFEU). What turned out to be the most significant procedure is the possibility, and in some circumstances the duty, for national courts to ask the ECJ for preliminary rulings regarding either the validity of EU measures, or the interpretation of EU law (Article 267 TFEU). It is through this interpretative jurisdiction that the Court could fashioned European integration in line with its own vision.

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3 The Court of Justice of the European Union (CJEU) comprises the Court of Justice (or European Court of Justice), the General Court (GC), which prior to the Lisbon Treaty was called the Court of First Instance (CFI), and the Civil Service Tribunal (CST). The analysis in this paper will focus on the role of the ECJ, referred to as ECJ or the Court. Case law and practices of the General Court may however also be mentioned, where relevant.
The 'quiet revolution', as Weiler (1994) puts it, took place in the legal realm, but it had significant political and social implications and was not immune to its broader political context (Weiler 1981, 1991). Triggered by litigants and national courts under the preliminary reference procedure, the Court, faced with the many 'silences' of the Treaty and unrestrained by generally passive national governments, established that European Economic Community (which has now become the European Union) had created its own special and autonomous legal order, whose subjects were not only states but also their nationals. These could therefore rely on EU law in proceedings before national courts (direct effect) and asked for their application in lieu and place of conflicting national measures, including constitutional requirements (supremacy). In doing so, the Court killed many birds with one stone. It constitutionalised Community law and created a federal legal structure, positioning itself as the federal constitutional court. It also set up additional judicial law-making and decentralised enforcement mechanisms. The Court also shape and promoted the so-called classic Community method. It supported more supranational modes of decision-making (by favoring the choice of legal basis which granted more influence to the Commission and Council) and extensive transfers of sovereignty to the supranational level (eg acceptance of the use of the general legislative basis in the Treaty to confer new policy powers to the EU institutions, development of a doctrine of implied competence, etc) thereby contributing to the centralization of decision-making in the EU towards Brussels. It also significantly fleshed out of the EU legal and policy frameworks. Centered on the completion of the internal market through the realisation of the so-called economic freedoms, the Court’s case law contributed to the removal of barriers to the cross-border movements of goods, services, companies, self-employed and workers (negative integration). This led to the dismantling of a vast array of national regulations, which triggered some degree of re-regulation at EU level (positive integration).

To sum up, the Court positioned itself as a central element of the ‘best’ variant of the Community method, characterised by supranational decision-making and effective and uniform enforcement of supranational law (Dehousse 2012). Legal scholars have examined the role of the Court in European integration (Berlin 1992, etc.); however, most earlier accounts were descriptive or normative, and largely supportive of the Court’s integrative case law (but see Rasmussen 1986, Hartley 1996). Luxembourg’s jurisprudence was systematically justified by reference to the spirit of the Treaty and the Court’s commitment to the founding fathers’ ideal. Even the more critical works were keen to attribute the ECJ’s case law to the characteristics (eg liberal bias) of the EU Treaties, rather than to the Court’s own policy preferences (eg Maduro 1997, Conway 2012). Legal scholarship is now increasingly identifying legal and normative limits to the

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Formally speaking, the European Union only exists since the Treaty of Maastricht, and EU law only referred to the law of the Common Foreign and Security, and Justice and Home Affairs Pillar, whilst the rules related to the first Community Pillar was called Community law. Since the Lisbon treaty, the Community is replaced by the Union, and thus Union law refers to all the law of the European Union, including what was formerly Community law, contained in the Treaty on the European Union, the Treaty on the functioning of the European Union and EU acts (Directives, Regulations, ex-Framework decisions, etc.). For the sake of convenience, this paper will generally refer to EU law as also encompassing Community law, unless a distinction proves necessary.

Court’s own involvement in EU politics (De Burca 1998, Horsley 2013, Conway 2012), thus suggesting that the institutional environment in which the Court’s operates does not inevitably need to lead to further integration in the sense of further transfer of sovereignty to the EU or its supranational institutions.

Neofunctionalists (Burley and Mattli 1993, Mattli and Slaughter 1995, 1998, Sandholz and Stone Sweet 1998) and intergovernmentalists (Garrett 1992, 1995, Moravcsik 1993, 1995) strongly disagreed on who of the member states or the Court drove (legal) integration, but they did agree on one point: that the Court had its own vision of Europe. Rational choice institutionalists (Garrett and Weingast 1993, Garrett, Kelemen and Schultz 1998, Tallberg 2000, Pollack 1998, Pierson 1998, Alter 1998, Carruba et al 2008), using principal-agent approaches, debated on the degree of autonomy enjoyed by the Court, as an agent (still) pursuing its own vision of Europe, and the ability of member states, the 'multiple principals', to resort to effective means of control the Court. Historical institutionalists working on the Court (Alter 1998, 2001, 2009, Stone Sweet 2004, Schmidt 2010), for their part, highlighted the path-dependency which the ECJ case law creates, thus determining future integrative process. Most theoretical perspectives and empirical assessments of the Court’s role in European integration focused on its pre-Maastricht constitutional and internal market case law, and the Court’s role in the context of the Community method. The role of the Court in the transformed and complex post-Maastricht context has not been subject to much systematic analysis.

At Maastricht, the member states excluded the Court from the new areas of institutionalised intergovernmental cooperation (ie Common Foreign and Security Policy and Justice and Home Affairs). Opt-outs were negotiated. The drafters of the Treaty set up new modes of governance, such as the Open Method of Cooperation, which do not rely on the adoption of binding rules at EU level. EU institutions started to rely more and more on informal, 'soft law' mechanisms, to achieve policy objectives.

Later Treaty revisions (essentially the Amsterdam and Lisbon amendments) brought much of what was in the Justice and Home Affairs pillar (as well as very limited aspects of the Common Foreign and Security Policy) under the Court’s jurisdiction. Yet, the post-Maastricht era remains characterised by an institutional fragmentation and greater

6 Intergovernmentalists, which placed emphasises on the domestic preferences and EU level bargaining and relied on rationalist accounts to explain European legal integration, argued that the Court could only push legal integration the way it did because it was at least tacitly supported by the most powerful or a majority of member states (Garrett 1992, 1995, Moravcsik 1993, 1995). These, it was argued, considered that the benefits arising from the Court’s (addressing incomplete contracting, reducing transaction costs, reducing free-rider’s problems, blame-shifting, etc.) overall compensated for the partial loss of sovereignty which resulted from the Court’s decisions. Neofunctionalists challenged this view, arguing that the member states did not agree to these judicial developments, but could not stop them, because law acted as a ‘mask’ and ‘shield’ for the Court’s integrative activities (Burley and Mattli 1993, Mattli and Slaughter 1995, 1998, Sandholz and Stone Sweet 1998). The Court, according to them, was fuelled and supported by subnational actors (national courts, litigants) and supranational institutions (Commission, European Parliament). Although the turn to new institutionalism and governance approaches in EU studies took integration out of the equation, it did not take attention away from the Court.

7 For critical reviews of political sciences scholarship on legal integration or judicialised governance in the EU, see Armstrong 1998, Josselin and Marciano 2007, Conant 2007, Stone Sweet 2010.

informality which have repercussions for the Court’s role and influence over the process of integration.

Commentators have studied interactions between the pillars, or between different modes of governance. For example, rulings, or the prospects of them, trigger policy adjustments at national levels (Conant 2002, Littler et al 2011), but also incentivises the member states to try to ‘do something’ EU level, thus encouraging and shaping intergovernmental policy coordination (Armstrong 2012, 24; Greer 2008). Furthermore, it is argued that ‘experimental forms of governance …work more effectively when yoked to framework norms conventionally expressed in legal texts’ (Armstrong 2011, 21). Conversely, the setting up of concurrent modes of governance or integration and new bodies can, in reverse, call for a rethinking of the Community method and the role of the Court.

Recent new institutionalist scholarship argues, based on empirical investigations, that the fragmented and formalised nature of EU decision-making ineluctably contributes to the judicialization of EU politics (Kelemen 2012). Whilst one can see how institutional fragmentation which trigger increased reliance on institutional border-patrolling mechanisms (such as courts), the increased informality of EU process is not easily amenable to judicial mechanisms. The informality claim may be over-stated, or informal processes are eventually formally institutionalised. It remains that a lot of the day-to-day operation of the EU occurs through informal interactions which may support formal relations, but may also undermine them. In legal jargon, the difference between ‘law-in-books’ and ‘law-in-practice’).

How does the post-Maastricht new intergovernmentalism affect the Court’s vision and promotion of Europe? How does the Court approach the myriad of new institutions and bodies created since Maastricht? Have the Court’s own decision-making process or its perspective on political processes in the EU adjusted? Has the Court accepted the post-Maastricht redrawing of interinstitutional boundaries? How does the Court deal with political pressure occasioned by the controversially and politically charged cases which it has to decide on? These questions are explored in the following sections, which analyses the evolution of the Court’s idea of Europe, its approach the institutional proliferation and fragmentation, and its perspective on political and judicial decision-making processes.

3. The Court’s changing idea of Europe – from the ’ever closer union’ to ’what now’?

According to most accounts of legal integration in Europe, the Court has been driven by its own vision of Europe, characterised by specific goals, modes of governance, polity organization and policy orientations. In the changed post-Maastricht context, the Court remains presented - for the better or the worst - as the last bastion of European integration, ‘as we knew it’. Indeed, both legal and political science analysts take it for granted that the Court has remained true to its old idea, and tries to stay the course.

9 Certain legal commentators criticize what they see as the Court’s unfailing pursuit of a unitarian and market-driven ideal, either because such normative template is not appropriate given European diversity and social foundations (Rasmussen 1986, Maduro 1992, Conway 2012, Chalmers 2012) or because of the manner in which it is purused, which conflicts with democratic requirements (Conway 2012, Horsley 2013, Lasser 2013, Bengoetxea 1996). Political scientists debate on the Court’s ability to impose this vision
against all odds, only temporary ‘retreating’ to address conjectural set-backs. Is this assumption empirically grounded?

3.1 The Court’s good old idea of Europe and what it was all about

Just after the adoption of the Maastricht treaty, the Court’s own members explained that the Court had not choice but to pursue the aim of ‘the ever closer union’ (telos).

The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an ‘ever closer union among the peoples of Europe’. (Mancini and Keeling 1994, 186).

Recurrent references to this ultimate purpose were not only instrumental in enabling the Court, through teleological interpretation of the Treaties, to reach supranational solutions; it also had a strong legitimizing effect on the Court’s activities (‘political messianism’, Weiler 2012).

The next important element of the Court’s vision concerns the role played by law. The central idea was that of ‘integration-through-law’ (Cappeleti et al. 1986), which assigned to law transformative capacities. Law is both an ‘object’ and an ‘agent’ of integration (Dehousse and Weiler 1990: 243). Given the place given to law, integration would proceed by judicial fiat (Axline 1968), involving both national and EU courts.

When it comes to the mode of integration, the Court, in its jurisprudence, clearly protected and reinforced the Community method. Its doctrines on supremacy, direct effect, state liability and national remedies contributed to the effective enforcement of European bargains. Its continued reluctance to accept or address challenges to the validity of EU regulatory and legislative measures by maintaining extremely strict standing requirements for judicial review is reminiscent of the Court’s desire to protect Community legislative and regulatory processes and outputs. The Court also favoured more supranational variants of the Community method, by annulling Community measures whose legal basis chosen the EP’s influence (Cullen and Charlesworth 1999, McCown 2003, Bradley 2011).

Commentators identified a more ambitious political vision, which was revealed through a close reading of the Court’s case law and the writing of its members: that of a United States of Europe. The Court’s redesigning of the EU legal system around the magic triangle (direct effect, supremacy, preliminary preference) set the grounds for a federal architecture (Everling 1984, Lenaerts 1990, Hartley 2007, Rasmussen 1986, Weiler 1994, Lenaerts and Gutman 2006). The Court also seemed to favour centralisation of decision-

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10 For a judicial statement, see Advocate General Gelhoeld’s opinion in the Köbler case (C-224/01 Köbler [2003] ECR I-10239): ‘Established by law, the European Communities have been developed and consolidated essentially through law. ... At the ‘crossroads’ of a number of legal systems, [national courts’] role is to make an important contribution to the effective application of Community law and, eventually, to the development of the process of European integration’ (para 53).

11 See below.

making competences at federal/supranational level. It did so by developing principles, such as mutual recognition (Cassis de Dijon),\textsuperscript{13} which outlawed national regulations and created the need to re-regulate at EU level in a large array of policy areas previously under national competence. It also endorsed the use by the EU legislator of the Treaty general legal basis to regulate new policy areas (ie ‘competence-creep’, Weatherill 2004). Overall, the Court vision was strongly infused by the notion of ‘unity’ (uniform application and interpretation of law, integrated and hierarchical organised legal system, systemic interpretation, etc).

In substantive terms, the ‘internal market’ paradigm formed the ‘core ethos of European integration’ (Kochenov and Plender 2012, 370), and has left a strong legacy in EU law (Schmidt 2012, Plender and Kochenov 2012). This is not to say that the Court neglected ‘Social Europe’. For example, the Court interpreted a Treaty provision guaranteeing equal pay for equal work between men and women in an extensive manner and developed a general legal framework to fight sex-based discrimination in the member states.\textsuperscript{14} It also highlighted the social dimension of the free movement of workers, including the right not to be discriminated against based on nationality grounds, in particular with regard to access to public services such as education\textsuperscript{15} or social benefits (Craig and De Burca 2011, 748-752). Finally, starting in the late 1960s, the Court developed general principles to protect fundamental rights against interference by EU institutions or Member States when they act within the scope of EU law.\textsuperscript{16}

For the Court, Europe was to be supranational, federal, centralised, unified, market-focused and driven by law.

3.2 The Court and the multiple teloi of Europe

Since Maastricht, the EU institutions, which include the Court, have embarked on a journey with no (longer) a clear destination (Weiler 1994, Maduro 1999) or even a specific path to follow. This state of confusion as to the core purpose and method of European integration transpires from a number of Treaty provisions. The ultimate aim of ‘the ever closer union among the peoples of Europe’ is tempered by democratic and transparency objectives (Article 1 TFEU) and the respect for human rights (Articles 6 TEU). The direct objectives of the Union are increasingly diversifying (Article 3 TEU). The Union has to sustain a range of values (Article 2 TEU) and integrate diverse interests (Article 4 TFEU). The EU citizenship provisions call for a reassessment of the nature and ultimate goal of the EU and a rebalancing of economic, political and social integration processes. The Treaty adds to the Community method new modes of integration, through intergovernmental cooperation under the Economic and Monetary Union, the Common

\textsuperscript{13} Case 120/78 Rewe-Zentral (Cassis de Dijon) [1979] ECR 649.
\textsuperscript{15} Case 293/83, Gravier v City of Liège , 1985 ECR 593
\textsuperscript{16} Although the principled statements were not necessarily accompanied by effective human rights scrutiny, in particular when that would undermine EU decisional processes (Coppel and O’Neill 1992, De Burca 1996, Williams 2004).
Foreign and Security Policy and Justice and Home Affairs Pillars, or more informal modes of governance, such as the Open Method of Cooperation.

The Lisbon treaty sets out what the seven formal EU institutions, which include the CJEU, are meant to do. They ‘shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions’ (Article 13 TEU). This supposes that when the Court ensures that ‘in the interpretation and application of the Treaties, the law is observed’ (Article 19 TFEU), it must do so bearing in mind these various values, objectives, and interests.

The Court, as a collegial organ, rarely speaks of ‘European integration’ as such. The Courts’ current website makes no reference to the objective or nature of the European project, or of its own role in European integration. Instead, the historical contribution of the Court is framed only in terms of protecting the (EU) rights of citizens.17

The Court refers explicitly to European integration and the aim of the ‘ever closer union among the peoples of Europe’ only when prompted by EU law provisions, which explicitly call for an analysis of integration. This leads to the odd situation where the ECJ talks about integration and its ultimate goal in the context of transparency and differentiation!

Most direct references to the aim of an ‘ever closer union’ concern cases about transparency, and consist merely in the citation of Article 1 TEU, according to which the Treaty ‘marks a new stage in the process of creating an ever closer union between the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’.18 These are cases which challenge the centralized and still secretive nature of EU decision-making processes, traditional features of the Community method.19

Other judicial references to the concept of integration concern … ‘differentiation’! In the Schengen context, these were prompted by the Schengen agreement statement as to its contribution to European integration.20 On these occasions, the Court stressed the complementarity, or continuity, rather than rupture, between different modes of integration. Schengen ‘aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice’.21 However, one senses in the Court’s approach an overall attempt to distinguish between the ‘hard core’ of European integration, represented by the Community method and the more ‘intergovernmental’ policies and forms of cooperation

17 ‘The development of its case-law illustrates the Court’s contribution to creating a legal environment for citizens by protecting the rights which European Union legislation confers on them in various areas of their daily life.’ The Court then list a number of areas in which the Court improved the life of EU citizens. http://curia.europa.eu/jcms/jcms/Jo2_7024/

18 E.g. T 300/10 Internationaler Hilfsfonds eV v European Commission, 22 May 2012, para 65.

19 The Court has, interestingly, refused to grant direct effect to this provision T-191/99, Commission v Petrie and others [2001] ECR II-3677, para 35.


established by the EU Treaty’. There is also a sense of it being a transitory stage towards something else.

More recently, the Court, again triggered by the text of the Treaty which requires an assessment of the impact of enhanced cooperation on integration, considered that setting up the new European patent system under the enhanced cooperation mechanisms contributed to ‘uniformity’ and ‘integration’. The displayed readiness of the Court to accept this arrangement, which went around the ordinary Community procedure, despite the opposition of the two excluded member states (Spain and Italy), and the fact that the new regime provides for a separate court, may signal that the Court is ready to relax his stand on unity, in order to facilitate action at EU level. This approach nonetheless contrasts with its previous insistence on the uniform application of EU laws to all member states and the EU law community skepticism towards a Europe of ‘Bits and Pieces’ (Curtin 1993).

The positions expressed by the Court and its members during the discussions on the Convention on the Future of Europe revealed that, whilst the notion of ‘unity’ still resonated in the minds of European judges, other considerations, such as concerns for the rule of law, accountability, democracy, human rights, social justice or pluralism, were gaining grounds (Granger 2005). Moreover, empirical studies on chamber decisions show that the current judges are not all pro-European, at least in the supranational/federal sense, and project views ranging from Euro-skepticism to Europhilia (Malecki 2012).

One of the most explicit judicial endorsement of the post-Maastricht transformation of the concept of integration comes from Advocate General V. Trstenjak, in a case concerning the participation of the United Kingdom in the Schengen framework.

> The traditional concept of European integration flows from the notion of unity of integration, that is to say the creation of uniform rules that are valid in all the Member States. Following the amendments to the founding Treaties, which extended the competences of the European Community and the European Union, and following later enlargements of the Union, which involve greater heterogeneity of structures and interests, the concept of unitary integration can no longer be applied in the same way as [before].

Advocate General Maduro added that European integration is not really about unity, but about preserving (legal) pluralism: ‘[t]hose concurrent claims to legal sovereignty are the very manifestation of the legal pluralism that makes the European integration process unique.’

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23 C-274/11 and C-295/11 Spain and Italy v Council, 16 April 2013, para 62.

24 Case C-137/05 United Kingdom v Council [2007] ECR I-11593, para 76-77. The case concerned the Schengen agreement, and was brought by the United Kingdom against the Council’s adoption of a Regulation on security features and biometrics in passports and travel documents.

The recent *Melloni* judgment\(^{26}\) offers nonetheless a reminder that the Court’s idea of unity ‘die hard’, and that the Court may not be ready to tackle the pluralist challenge. As for the background, we should recall that the Treaty instructs the EU to respect the constitutional identities of the member states (Article 4(2) TEU) and the EU Charter specifies that ‘nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized… by the Member States’ constitutions’ (Article 53). Scholars had speculated whether this provision could pose a threat to the principle of supremacy of EU law (Liisberg 2001, Lenaerts 2012). The Court put an end to the controversy, by confirming the principle of primacy as an essential feature of the EU legal order, and asserting that higher human rights standards in some member states (ie constitutional pluralism) had to give way to lower EU standards when member states implement EU law, otherwise ‘the primacy, unity and effectiveness of EU law’ would be ‘compromised’.\(^{27}\)

One thus senses that there remains, within the Court, a strong attachment to primacy and a unitary vision of the EU legal framework. Furthermore, the temptation still exists to call on the ‘ever closer union’ to bring matters under judicial supervision. A recent example is Advocate General Bot’s claim that the aim of ‘an ever closer union’ and peace justified EU interference with diplomatic relations between two member states.\(^{28}\) The Court did not follow him. It declined competence, leaving it to international and diplomatic law to solve the matter.

### 3.3 The Court, committed to the Community method

The pre-1992 Community method was based around the concept of ‘institutional balance’ and centred on formalised interactions in the ‘institutional triangle’ (Commission, Council, European Parliament), which the ECJ was due to monitored.

Post-Maastricht, the Community method has quite significantly transformed. Things look more messy. The European Council, endowed with the legitimacy bestowed on Heads of States and Governments, plays a political impulsion role which has become an essential element of the contemporary version of the Community method. The Commission retains legislative initiative monopoly, but increasingly responds to requests by the European Council (and to a lesser extend the European Parliament). Formal decision-making processes are increasingly pre-empted or over-taken by informal processes, such as the systematic reliance on informal trialogues between a few representatives of the political institutions (Häge and Kaeding 2007, Rasmussen and Reh 2013), consensus-seeking in the Council (Petersen and Bomberg 1999, Adler-Nissen 2009), reliance on soft law, etc.

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\(^{26}\) C-399/11 Melloni [2013] ECR I-0000

\(^{27}\) Para 59-60.

\(^{28}\) ‘The Member States should not exercise their diplomatic competence in a manner that might lead to a lasting break in diplomatic relations between two Member States. Such a break would, in fact, be incompatible with the integration process aimed at creating, in the words of the preamble to the EU Treaty, ‘an ever closer union among the peoples of Europe’ and would constitute a barrier to the attainment of the essential objectives of the Union, including the aim of promoting peace.’ Case C-364/10 *Hungary v Slovak Republic* [6 March 2012] para 58.
The Council and the European Parliament are co-legislators, but the details of EU legislation are fleshed out using formal instruments as well as informal means by the Commission (Cini 2001, Stefan 2008), Comitology committees or their post-Lisbon equivalent, and EU agencies (Heisenberg 2005). Member states’ have individually negotiated opt-outs from specific EU policies, in particular in the fields of Justice and Home Affairs (Curtin 1993, Adler-Nissen 2009, Peers 2011); alternatively, groups of member states went ahead to adopt common legal frameworks applicable to selected members (Euro, Schengen, European Patent). The neat institutional triangle has thus become a fuzzy ‘trapeze’ (Bertoncini and Kreilinger 2012, 4), with broken lines and grey areas.

Although transformed, the method still occupies a prevalent place in the process of integration. Quite interestingly, although the member states went outside of the EU Treaties framework to adopt it, the ‘intergovernmental’ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (also known as the ‘Fiscal Compact’) to a large extend sets up a cloned version of the Community method (Armstrong 2012). Still, it is no longer the only acceptable mode of integration and it under constant challenge from alternatives.

New modes of governance or integration (eg Open Method of Coordination, Union Method30) are traditionally presented as a threat for the Community method, and for the Court. The Court’s old ally, the Commission, continues to display a strong attachment to the Community method. As expressed by Barroso, [a]s methods go, they do not come more profound or important than the Community method. … The very term evokes the spirit of the European integration process.” (Barroso 2012, 34-35). But what does the Court make of this? Does it continue to fight to preserve the classic Community method, or is it swayed by new intergovernmentalist pressures.

As noted before, the Court has been over the years incredibly protective of the decision-making process and outputs of the Community method, and we see little change post-Maastricht. Its reluctance to scrutinise and interfere with EU law-making processes and results, which contrasts sharply with the Court’s eagerness to make sure that EU law is effectively enforced in the member states,31 is nowhere more visible than in the Court’s tough stance on the standing by non-privileged applicants to challenge EU legislative or regulatory measures.

The Treaty, since the origins, enabled private parties to directly challenges ‘decisions’ or decisions adopted in the form of regulations’ directly, through an action for annulment. However, non-privileged applicants, which include individuals, companies, NGOs but also local authorities, have had a hard time contesting EU measures (other than decisions addressed to them in a individualised manner). Indeed, since the notorious Plaumann

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29 Although the post-1992 emphasis on informal processes may also result from evolving analytical lenses which shifted the projector from formal rules and institutions to informal ones.
30 Chancellor Merkel in an address to the College of Europe, Bruges, November 2010.
31 See its already mentioned case law on direct effect, supremacy and State liability, as well as its decisions on national remedies (eg Case222/96 UNECTEF V Heylens [1987] ECR 4097; C-228/98 Dounias v Ypourgio Oikonomikon [2000] ECR I- 577; Case C-432/05 Unibet [2007] ECR I-2271).
case, the ECJ has endorsed a narrow interpretation of the standing requirement of ‘individual concern’, which applicants have to establish before they are allowed to contest the merits of EU decisions and regulations. In short, this means that applicants would get standing to sue, only where they belonged to a ‘closed group’ of persons affected by the measure, and the institution which adopted the measure was under a duty to take into account the effects of the act on that closed category. This proved ‘mission impossible’, in particular where legislative or regulatory measures with general application were concerned. The case law resulted in the paradoxical situation that the more people were affected by a measure, the less likely they would be individually concerned and thus able to challenge it.

Despite pressures from academic commentators (e.g. Arnull 1995, 2001, Harlow 1992, Mancini 2000, Neuwahl 1993, Craig 2012) as well as from within its own ranks, the Court did not relax these standing rules. Hiding behind an unusual desire not to overstretch its competences and go beyond a (questionable) literal interpretation of the Treaty, it refused to tackle the matter and instead instructed the Treaty-makers to initiate such relaxation of locus standi, if they so wished (Granger 2003).

The drafters of the Lisbon Treaty partially responded, by doing away with the requirement of individual concern for challenges to regulatory acts. The Court however swiftly clarified that these relaxed standing rules introduced by Lisbon only apply to non-legislative measures, namely implementing and delegated acts. The Court’s restrictive Plaumann doctrine, still holds in relation to legislative acts (and this despite the right to

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32 Private parties have to show that the measure ‘affect[ed] them by reason of certain attributes which [were] peculiar to them or by reason of circumstances in which they were differentiated from all other persons and by virtue of these factors distinguish[ed] them individually just as in the case of the person addressed.’ Case 25/62 Plaumann & C° v Commission [1963] ECR 95; C-309/89 Codorniu v Council [1994] ECR I-1853.


35 C-50/00P Union de Pequenos Agricultores [2002] ECR I-6677.

36 Provided they are of direct concern and do not entail implementing measures (thus excluding Directives)

- new Article 263(4) TEU.

37 T-262/10 Microban Internal and Microban (Europe) v Commission [2011] ECR II-0000; T-18/10 Inuit Tapiriit Kanatami and Others v Parliament and Council [2011] ECR. This formalistic approach contrast the manner in which the Court used to determine whether a measure was a decision or a regulation, by looking at the actual nature of the act, not its form (Case 789 and 790/79, Calpak SpA and Societa Emiliana Lavorazione Frutta SpA v. Commission [1980] ECR 1949). See also the case law of the ECJ on sui generis acts, amenable to judicial review (Case 22/70 Commission v. Council (ERTA) [1971] ECR 263). This will be defined formalistically, not by examining the actual nature of the act, but with regard to the procedure used for its adoption (thus excluding all acts adopted under any ordinary or special legislative procedure, Article 289 TFEU. This approach must be contrasted with the Court’s approach to determine whether a measure was a decision or a regulation, by looking at the nature of the act (Case 789 and 790/79, Calpak SpA and Societa Emiliana Lavorazione Frutta SpA v. Commission [1980] ECR 1949). See also the case law of the ECJ on sui generis acts, amenable to judicial review (Case 22/70 Commission v. Council (ERTA) [1971] ECR 263).
effective judicial protection being protected by Article 49 of the EU Charter of Fundamental Rights, made legally binding by Lisbon).

Consequently, it is still impossible for non-privileged applicants, that is citizens, companies, NGOs, local authorities, etc) to directly challenge EU legislative measures, whether Regulations or Directives. They have the option to do so indirectly, by contesting national implementing or application measures, and then ask the national court to send a request for preliminary ruling to the ECJ. But the Court actively discourages national courts from questioning the validity of EU legislation.39 Besides, as noted by Advocate General Jacobs, few applicants would be willing to engage on such a risky, lengthy, costly and ‘doomed to fail’ endeavour.40

Even when the Court hears such challenges to EU general measures, it tends to show deference to the EU legislative or regulatory organs. Despite significant controversies surrounding the adoption of many EU legislative or regulatory acts (eg Data Retention Directive), both process and content-wise, the Court is still very reluctant to invalidate them. In the last two decades, the Court has even been less inclined to support the European Parliament’s challenges choices of legal basis which favour the Council (intergovernmentalism). The Court usually interprets away potential illegalities in EU Directives and Regulations, placing the responsibility on the Member States to implement and apply them in conformity with the Treaties and general principles.

On the issue of participatory governance, the EU Courts have been timid. The Commission itself adopts an increasingly sympathetic stance on consultation, accepting that ‘good consultation serves a dual purpose by helping to improve the quality of the


39 National courts shall refer such validity questions only when they have serious doubts as to the validity of the EU measures. Cases 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199, para. 14; Case C-344/04 IATA and ELF AA [2006] ECR I-403; Case T-47/02 Danzer [2006] ECR II-1779. This should be contrasted with the acte clair approach to questions concerning interpretation, whereby national courts must refer such interpretation questions when they have the slightest doubt (Case 283/81 Srl CILFIT and Lanificio di Gavardo Spa v Ministry of Health [1982] ECR 3415, 21). Moreover, the ECJ will not check on its own motion the validity of an EU provision where the questions sent by the domestic court only asked about interpretation (C 1/11 Interseroh Scrap and Metals Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM), 29 March 2012 (NYR). For example, from 1 Jan 2012 and 24 May 2012, only two preliminary references out of 72 concerned the validity of an EU provision (C-338/10: declaration of invalidity of a regulation; C-309/10: validity of the regulation confirmed).

40 AG Jacobs’ Opinion in case C-50/00P Union de Pequenos Agricultores [2002] ECR I-6677, 36-44.


44 ref
policy outcome and ... enhancing the involvement of interest parties and the public at large’ (EC 2002, 5).\textsuperscript{45} It increasingly consults before adopting important policy proposals, through White and Green Papers, or other instruments such as the Interactive Policy Making (IPM) through the online platform ‘Your Voice in Europe’\textsuperscript{46} (Quittkat and Finke 2008). However, the Commission remains firmly opposed to translating this into legally enforceable rights (EC 2002, 10, 15), despite imposing such access rights onto national authorities.\textsuperscript{47} The EU Courts have so far deferred to this reluctance to formally enshrine general participatory rights. They have enforced participatory requirements where these were provided in the Treaty or EU acts,\textsuperscript{48} but did not go beyond. They have refrained from developing general consultation or participation rights in EU law-making processes (Mendes 2011)\textsuperscript{49} and consider that voluntary participation decision-making processes,\textsuperscript{50} or in investigations leading to a final measure, or failure to act, in Court. This neglect towards participatory rights concerns not only legislative processes within the Community method, but also regulatory mechanisms under the Comitology procedures (and their post-Lisbon versions), and the Open Method of Coordination, as these do not provide for legally enshrined participatory rights (Craig 2012, 297). Legal commentators generally deplore this state of affairs (e.g. Mendes 2011, Craig 2012).

To conclude, and quite paradoxically, the picture that emerges from the Court is that EU acts can only be challenged by those who make them, that is the EU institutions and the Member states’ governments.\textsuperscript{52} Unless they have been marginalised in the process by the operation of qualified majority voting (Granger 2004, Dotan and Hofnung 2005), or their powers have been undermined by the choice of alternate decision-making procedures (ie the ‘legal basis game’, Cullen and Charlesworth 1999), these actors have little incentive to contest the validity of such acts, even if these are procedurally or substantially flawed.

\textsuperscript{46} http://ec.europa.eu/yourvoice/ipm/index_en.htm
\textsuperscript{51} T-583/93 Stichting Greenpeace Council (Greenpeace International) v Commission [1885] ECR II-2205.
\textsuperscript{52} To some extent, member states’ governments’ privileged applicants, may act on behalf of other actors (e.g. regions, trade unions) and represent views which may have been side-stepped during the EU decision-making process; for example, Nordic countries have brought judicial challenges seeking to promote transparency and openness in the EU decision-making process (Bignami 2005). Furthermore, Article 8 of the Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality confers to national parliaments acting through their Member States standing to challenge EU legislative acts on grounds of infringement of the principle of subsidiarity.
This state-of-affairs tends to lock-in Community outcomes, and prevents participation in EU policy- and law-making processes, by those whose values and interests are not represented in the ‘institutional trapeze’ and the maze of informal relations that it generates and builds upon (lobbying, triilogue, etc.)

This approach, whilst it clearly reveals the Court almost unconditional support for the Community method, in its interinstitutional, formal and exclusive aspects, does not sit well with its constitutional functions (counter-majoritarian role, protection of fundamental rights). Limitations on those who can challenge legislation, as well as the conditions under which such a constitutional review mechanism can be triggered, are common-place in domestic legal systems; yet, they tend to be more open to individual challenges to legislative acts, at least when these impinge on their basic rights (Sadurski 2011, Ferejohn 2007).

We saw earlier that the Court had to address the question of whether forms of enhanced cooperation (i.e Schengen) contributed to integration. It did not respond negatively, but imposed certain limits on the operation of ‘flexible arrangements’. The UK opt-outs from Justice and Home Affairs measures, and its request to opt into certain elements of European policies (e.g. participation in FRONTEX, despite opt-out from the border control regime) gave the Court the opportunity to clarify its take on a ‘Europe à la carte’.

Calling upon the need to maintain the integrity of EU policy framework and the effectiveness, coherence and uniformity of European law, the Court limited the possibility for member states to cherry-pick their obligations. Furthermore, the ECJ has interpreted the British ‘opt-out’ of the EU Charter of Fundamental Rights in a restrictive manner, suggesting that there should be no differentiation with regard to the application of EU human rights standards.

When it comes to addressing the rise of informality in the operation of the Community method, the Court had recognized that so-called ‘soft law’ instruments may have legal consequences. The Court increasingly takes into account and refers to soft law in its case law, using it as an interpretative device to make sense of ‘hard laws’ (Stefan 2008). However, the Court struggles with informal relations. It still looks for the formal holder of institutional power, even though the real decision may have been made elsewhere.

Moving on to how the Court’s addressed alternative to the Community method, following the Maastricht pillarization of the EU (Common Foreign and Security Policy, Justice and Home Affairs), it is clear that the Court worked hard to protect the First pillar and method from intrusion from the intergovernmental pillars and ‘ways of doing things’ (Van Oik 2008, Peers 2011). Quite early on, the Court was asked whether an EC development treaty signed with India had been validly adopted under the First Pillar, when a member state argued that it should have been adopted under the Third Pillar, since some of its

55 See also C-399/11 Melloni [2013] ECR I-0000.
56 Case C-322/88, Grimaldi, [1989] ECR 4407
57 For example, the Commission is held accountable for decisions made based on opinions by EU agencies, even if it has little control over the activities of these agencies.
provisions related to drug addiction. The Court exercise its power to check that the Community had acted within its powers, and confirmed the valid adoption of the measure. Subsequently, the Commission or Parliament started to challenge acts adopted under the Second and Third Pillar, arguing they fell under the First Pillar competence. In the first of such cases, the Court firmly disagreed with the British government argument that it had no jurisdiction, and established that, despite its jurisdictional exclusion from the intergovernmental pillar, it could review the content of a measure adopted outside the Community pillar, in order to assess whether the Community (and not the EU) had competence, and to annul it if needed. In the context, this time, of a preliminary reference, the CFI accepted to examine a CFSP Common Position, to make sure that it did not encroach on the Community competence.

In its reviews of the contested measures, the Court would look at whether the Community would have been competent to adopt the act, and did not engage in a comparison of the Community and Union competences. If it considered the matters fell under the First Pillar’s competence, it would declare the measure invalid. In this way, it struck down a number of Second and Third Pillar measures which it considered could have been adopted under the supranational Community pillar (eg Small Arms, Environmental Crime, Ship Source Pollution, Passenger name record cases). By the same token, it controversially granted the Community harmonizing powers in criminal matters.

This pro-Community approach may be explained by ex-Article 47 TEU which provided that Union measures should be without prejudice to the powers of the European Community, thereby suggesting from kind of priority for the Community pillar, in case a measure could be based on both First and Second or Third pillar provisions. It may also reflect the Court’s original ‘disapproval’ of the pillar structure. We however notice a difference of treatment between the Second and Third Pillar, with the Court adopting a softer approach towards Common Foreign and Security matters (Lavranos 2008, 317).

Post-Lisbon, the Treaty no longer has an order of precedence between different legal bases. It will be interesting to watch how the Court will patrol the border between the classic Community method and other modes of integration. The recent European Patent case, mentioned earlier, as well as the *Pringle* case, which dealt with the validity of the intergovernmental Treaty which established the European Stability Mechanism, show the Court ready to ex-post facto rubber-stamp member states’ experimentation with alternative methods, even when these are not explicitly provided for by the existing treaties. The Court seems however eager to see in these alternative some of the ‘essential’ elements of the Community method features (eg judicial supervision).

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60 T-228/02 Organization des Modjahedines du peuple d’Iran (OMPI) [2006] ECR II-04665
62 Ex-Article 47 TEU.
63 New Article 40 TEU.
64 Case C-370/12 Pringle v Ireland [2012] ECR-I nyr.
3.4 The Court, moving beyond the internal market?

The Court’s interlocutors, as well as some of the Court’s own members, are increasingly calling for a broadening of the substantive scope of European integration and for a reinforcement of its social dimension. Recent case law show that the Court is trying to get beyond a market approach to European integration, but is finding the task a challenging one.

Advocate General Trstenjak (again) explains that integration (in the narrow - or ‘traditional’ - sense) should not be ‘used indiscriminately’ but ‘brought into harmony with the values of other policy areas.’ Advocate General Jääskinen reminded us that ‘the free movement of goods… is based on the premise [sic] that any barriers to trade within the Community can be justified’. These views clearly call for a balancing between market objectives and values against other, ie social or environmental, ones. Yet, the EU legal framework is still tilted in favour of the free movement principle, even if member states can justify proportionate restrictions which pursue legitimate public objectives. It would be useful to review the Court’s use of proportionality testing as a way to save – or not to save - legitimate national policies.

Since Maastricht, the Court and its members are trying to sidelining the economic dimension of European integration and emphasizing instead its social aspects. Shortly after the adoption of the Maastricht Treaty, Advocate General Jacobs, one of the Court’s most influential members ever, recalled the fundamental social purpose of integration.

‘the Community is not just a commercial arrangement between the governments of the Member States but is a commercial enterprise in which all the citizens of Europe are able to participate as individuals. No other aspect of Community law [non-discrimination] touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the “ever closer

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65 Case C-324/07 Coditel Brabant SPRL v Commune d’Uccle and Région de Bruxelles – Capital [2008] ECR I- 8457, para 81.
66 Case C-143/09 Ministère public v V.W. Lahousse and Lavichy BVBA [2010], 123.
67 Maduro’s analysis showed that the ECJ generally left in place national regulatory frameworks which were endorsed by a majority of member states (Maduro 1997).
union among the peoples of Europe”, proclaimed by the preamble to the Treaty, would be an empty slogan’. 69

Twenty years later, Advocate General Trstenjak reminded that ‘the European Union should [not] disregard the social dimension of integration’, since “[t]he promotion of social cohesion in the sense of the idea of ‘solidarity’ is and remains an important aim of European integration...’.’ 70

However, whether these are rhetorical devices or represent genuine attempts remains to be proven. Two of the most decried ECJ decisions of the recent years, Viking and Laval, throw light on difficulties which the Court faces when it comes to the actual balancing of market integration and social considerations (e.g. models of labor organization, social rights). 71 In these cases, the Court explicitly acknowledged the social aim of integration. Yet, the fact that the default option remains free movement, and not other aim (social policy, human rights), which have to be justified in order to survive, as well as the empirical observations that the final balancing act continues to weight in favor of the free movement, 72 signal that the Court is struggling to move beyond the primacy of the internal market.

Court members however are looking for new paradigms. For example, human rights are presented as the next step towards integration, rather than a constraint on it. 73 As put by Advocate General Maduro, human rights protection ‘flows logically from the nature of the process of European integration.’ 74 The Kadi saga, in which the Court invalidated restrictive EU anti-terrorism measures adopted by the Council in implementation of UN Security Council resolution, 75 could be a signal that human rights considerations may be taking over integration objectives (in the sense of supranational decision-making) (Craig and De Burca 2012, 377-378). However, it could also be driven by institutional considerations. Indeed, it is quite symptomatic that the Court’s closer scrutiny of the EU human rights performance arose in relation to decisions which have been made in the context of intergovernmental cooperation (Common Foreign and Security Policy) and

69 C-326/92 Phil Collins and Others [1993] ECR I-5145, para 11. See also statement by Advocate General Ruiz-Jarabo Colomer, paraphrasing his predecessor Tesauro: ‘if we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot fail to live up to what is expected of us’. Case C-117/01 K.B. v The National Health Service Pensions Agency and the Secretary of State for Health [2003] para 80. On the development of the social (aka non-discrimination based on gender) aspect of European integration, see also the beginning of Trabucchi’s Opinion in the Defrenne case (Case 43/75, Defrenne [1976] ECR 176,473).

70 Case C-182/10 Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, 8 Septembre 2011, para 159.

71 Case C- 438/05 Viking [2007] ECR I-10779-10840; Case C-341/05 Laval [2007] ECR. I-11767

72 Empirical evidence is provided by...


74 Case C-380/05 Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni and Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni [2007] para 20.

originating from another international organization (UN Security Council). Furthermore, this increased attention to human rights’ issues may also be linked to the Court’s growing perception of itself as mainly a constitutional court of the European Union, whose task is to protect peoples’ rights. All this casts doubts as to genuine nature of the ‘social concerns’ underlying the Court’s approach.

The recent case law on EU citizenship (Zambrano, McCarthy, Dereci) is however also sending signals that the Court is trying to get beyond and over the (internal) market paradigm, although not without experiencing serious conceptual difficulties (Kochenov and Plender 2012). To recall, long before Maastricht, the Court had developed an ‘incipient’ form of EU citizenship on the basis of the free movement of workers and services (Plender 1976), and thus rooted in the internal market logic. In short, the Court interpreted the Treaty and EU free movement legislation as affording equal treatment and residency rights to mobile and economically active citizens. The Court, accompanied and followed by the EU legislator, increasingly offered ‘citizenship’ rights (equal treatment, residency rights) to non-economically active EU migrants (eg students, retired persons, unemployed, ‘play-boys’, etc). Yet, economic considerations still mattered in principle (eg conditions of sufficient resources) and in practice (Plender and Kochenov 2012).

At Maastricht, the member states incorporated the concept of EU citizenship and corresponding rights (residency, equal treatment, voting rights, etc.) in the Treaty on the European Union, in what was presented as an attempt to tighten the link between the Union and its citizens and foster a European identity. The ‘internal market logic’, requiring at least a cross-border element (if not a potential economic contribution to the internal market), is indeed not obviously visible based on a reading of the Treaty provisions on EU citizenship (Plender and Kochenov 2012). It is, nonetheless, exposed explicitly in the 2004 Citizenship Directive, in the light of which the Treaty must be interpreted (Articles 20 and 21 TFEU).

The Court did not seem to radically change its approach to citizenship in the post-Maastricht era. The internal market paradigm, according to which EU citizenship was about securing free movement rights, and cross-border movement triggered EU citizenship rights, remained dominant (although the Court was willing to find a cross-border element where it was not obviously relevant). EU citizenship was thus allocated

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78 A number of directives were introduced based on relevant internal market legal basis (Directives on Students, pensioners…
79 eg Case 168/91, Konstantinidis, ECR 1993 I-1191;
80 According to Europa, ‘With the Treaty of Maastricht, the Community clearly went beyond its original economic objective, i.e. creation of a common market, and its political ambitions came to the fore.’ (http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_maastricht_en.htm). ‘The aim of European citizenship is to strengthen and consolidate European identity by greater involvement of the citizens in the Community integration process.’ http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a12000_en.htm
81 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
82 C-60/00 Carpenter [2002] ECR I-06279
a residual function, despite all the Court’s rhetoric about EU citizenship being ‘destined to be the fundamental status of Member States’ nationals’. Based on a free movement approach, the Court afforded residency rights to third country nationals family members of EU citizens who went and settled in another member state, as well as access to social benefits for even non-economically active EU migrants, under certain conditions (eg. genuine link with the labor market of the host country or sufficient integration in the host society). This internal market anchoring deprived static EU citizens (97% of the EU population) from any benefits of EU citizenship.

However, in Zambrano, the Court signalled a departure from the free movement and internal market perspective which had infused all its previous case law. It recognised that EU citizenship provisions could also protect EU citizens from the ‘deprivation of the genuine enjoyment of the substance of their rights’ as EU citizens, even in the absence of a cross-border element. In this way, it brought what were previously considered ‘internal situations’ (ie claims by static nationals against their own state) under the scope of EU law. With this recent case law, the Court is finally coming to terms with the fact that ‘the [post-Maastricht] Union has overcome its existence as a functional entity devoted to market integration’ (Von Bogdandy et al 2012, 495). The follow up cases, McCarthy and Dereci, however reveal the difficulties which the Court is facing in operating the shift (Plender and Kochenov 2012). The Court has failed to clarify what are this ‘substance of rights’ which all EU citizens enjoy as a matter of EU law, and has applied it in a very narrow manner, thus undermining the transformative potential of this new approach to EU citizenship. It also did not explain what kind of violations would trigger the EU citizenship protection (threshold), and which institutions (national courts or the ECJ) should assess and apply them (Kochenov and Plender 2012, Kochenov 2013). The ambiguities and uncertainties in the reasoning that supports the new ‘right-based approach’ to EU citizenship (Plender and Kochenov 2012, 388) may be a result, and reflection, of the Court’s internal divisions on what (should) drive Europe. Commentators also remarked that in Dereci, the Court, by entrusting the national court with the assessment of the ‘denial of the enjoyment of the substance’ of EU citizens, and thus the applicability of EU law, seemed to give up on the ‘supranational legal status’ of EU citizenship right, strangely refuting the dogma of unity (‘uniform application ‘) which it normally rule by (Plender and Kochenov 2012, 392).

The Court’s idea of Europe is thus evolving, but the adjustment is difficult and seems to reveal tensions within the Court. There is however one aspect of new intergovernmentalism which the Court is fighting hard and nails, its monopoly over the

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83 Case C-184/99 Rudy Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve (CPAS) [2001] ECR-I 6193

85 Reference
86 In Zambrano, the Court considered that minor EU citizens had the right to live with their third country national parents in the territory of the EU, but in MacCarthy and Dereci, the Court did not recognize the right of an EU citizen to live with their third country spouse or children on the territory of the European Union.
interpretation of EU law, even if it has relaxed its previous strict stance on the EU institutional balance and integrity. More on that below.

4. Delegation to de novo bodies – the Court’s long lasting effort to prevent institutional fragmentation in the EU

The pre-1992 Court was eager to enhance the status, powers and competences and protect the institutional integrity of the other two 'supranational institutions', the European Parliament and the Commission. It was also extremely concerned with maintaining itself as 'the' only judicial organ of the EU, although operating within a multi-level system of judicial governance where law enforcement powers are largely delegated to national courts. The Court is still very committed to preserve supranational institutional integrity, but it is starting to accept a certain degree of institutional fragmentation, except when it concerns the Court itself.

4.1 The Court and 'new' bodies – from prohibition to conditional acceptance

As noted earlier, the Court was generally inclined to support the choice of a legal basis for EU acts that gave further powers and influence to the Commission and Council. In Les Verts, the European judges accepted a challenge against an act adopted by the European Parliament, although this possibility was not explicitly provided for in the Treaty. In doing so, it upgraded the EP to the status of fully-fledged institution, on a par with the Commission and Council. It was further confirmed a few years later, when the Court recognised the EP’s power to challenge an act adopted by the Council which could undermine its prerogatives, against without explicit Treaty provisions allowing it. The Court also enhanced the scope of the Commission’s policy competence through its doctrine of implied powers. This doctrine enabled the Commission, acting on behalf of the Community, to instigate international negotiations in policy areas for which the Treaty did not confer explicit external competences.

The Court really looked after the integrity of supranational institutions, in particular that of the Commission, even against attempts by these same institutions to shuffle some of their tasks unto other public or private bodies. In the name of preserving the institutional balance and legal accountability, the Court prohibited the delegation of formal regulatory powers to independent bodies other than the existing EU institutions. In the Meroni case, decided back in 1958, and which concerned a challenge to the delegation by the High Authority of decision-making power to implement an ECSC scheme for the equalisation of ferrous scrap to two private law bodies, the Court said that EU institutions could only delegate clearly defined implementing powers, to be carried out under the supervision of the delegating institution on the basis of specific and objective criteria. In Romano, which concerned the powers of the Administrative Commission for the Social Security of

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88 C-70/88, European Parliament v. Council (Chernobyl case), [1990] ECR I-2041
Migrant Workers to adopt measures which would be binding on national authorities, the Court established that the EU legislator could not empower bodies other than the Commission with the power to adopt binding implementing measures.\textsuperscript{91} The Commission has, until recently, consistently referred to the Meroni doctrine to stop encroachment upon its regulatory powers (Majone 2002, Chamon 2010).\textsuperscript{92} Member states also started to rely on it, to preserve the autonomy of national regulators.\textsuperscript{93}

Although it was not obvious that the Meroni jurisprudence actually applied to EU agencies, since the case concerned delegation by an institution to private bodies created outside of any legal framework, the Court’s Meroni and Romano doctrines nonetheless operated as a strict framework for the creation and design of EU agencies. Over the years, and in particular over the last decade, the Treaties or secondary legislation provided for the creation of more than thirty EU agencies, staffed with experts and supervised by member states and Commission’s representatives. However, Meroni and Ramone prevented the conferral of discretionary regulatory powers to independent bodies, and blocked the way to the creation of US-style fully fledged independent regulatory agencies in the EU, which would take formal regulatory powers away from the Commission and national administrative authorities. Thanks to the Court’s case law, the Commission thus remained the EU ’super-regulator’.

Some agencies (eg the Office for Harmonisation in the Internal Market, the Community Plant Variety Office, the European Aviation Safety Agency, the European Chemicals Agency, the European Medicines Agency, the Agency for the Cooperation of Energy Regulators) could nonetheless make binding individual decisions. Furthermore, other agencies (eg European Medicines Agency, European Food Safety Agency, etc) acquired significant de facto adjudicatory powers, as the Commission systematically endorsed their opinions, responded to their requests (Dehousse 2002, Gehring and Kraphol 2007, Chamon 2013) and subjected them to only loose political control (Dehousse 2002). Agencies are also increasingly involved, both informally but also through formal consultation or drafting requirement, in the adoption of implementing measures (Chamon 2013).\textsuperscript{94}

The grip of Meroni and Ramone is thus slowly ‘loosening’. Legal scholars actually contest its applicability to EU agencies, in particular given the evolution of the EU administrative system into an integrated multi-level regime (Dehousse 2002, Schneider 2009). The Commission itself is changing position on EU agencies.\textsuperscript{95} It is worth noting that one of the reason for the Commission’s new enthusiasm towards ’real’ agencies is based on the realisation that it may be a way to achieve further conferral of competence

\textsuperscript{91} Case 98/80, Giuseppe Romano v Institut national d’assurance maladie-invalidité, [1981] ECR 1241
\textsuperscript{93} Eg UK, see below.
\textsuperscript{94} Eg. European Maritime Safety Agency, European Railway Agency, the new EU financial supervisory authorities.
to EU-level bodies which would otherwise be resisted if such powers were to be transferred to the Commission.

The Treaties have not been adjusted to address the 'agencification' of the EU. In a way which is quite puzzling, the Treaty does not explicitly envisage agencies’ involvement in EU regulatory and adjudicatory processes (ie the adoption of delegated and implementing acts under new Articles 290 and 291 TFEU). The only relevant amendment, introduced by Lisbon, allows challenges against 'acts adopted by European bodies, offices or organizations intended to produce legal effects vis-a-vis third parties (Article 263 TFEU), thus suggesting that agencies do have the power to adopt discretionary measures which affect the legal positions of third parties (otherwise the inclusion would be pointless). This seems to prepare the grounds for the creation of independent European regulators. However, it is worth noting that agencies will have to operate under the CJEU supervision, a point on which we will come back later.

Strangely enough, although the creation of agencies has been subject to contestation,\(^96\) the Court never had the opportunity to apply the Meroni and Ramone case law to EU agencies and to review the validity of the delegation of discretionary decision-making power to an EU agency. However, the United Kingdom has now taken legal action to challenge the establishment of the European Securities and Markets Authority (ESMA), invoking the Meroni and Romano case law,\(^97\) and thus forcing the Court to apply, and if needs be, adjust its case law to what has become a 'fait accompli' ( attribution of discretionary decision-making powers to independent agencies). ESMA not only was granted power to adopt legally binding acts, but also to make decisions which prevail over conflicting measures by national regulators. The Court has not ruled on it yet, but it is likely to follow the Opinion of the Advocate General on the applicability of the ECJ doctrines. He argued that the founding Regulation 'does not entail a delegation of authority by either of the EU executive institutions (...) to an agency, but is rather concerned with a direct conferral of power to an agency by the legislature pursuant to [a]... legislative act’ thus suggesting that Meroni does not apply. Furthermore, the Advocate General points to the new possibility for judicial review of acts of EU agencies since the adoption of the Lisbon Treaty, which implies that such agencies can adopt legal binding acts, thus undermining the relevance of Romano. Interestingly however, the Advocate General advises the Court to annul the Regulation because it does not have a sufficient legal basis. Thus, he proposed a compe tence-based review of the setting up of the new bodies. It remains questionable whether the Court will follow his lead, unless it considers that consensus (ie unanimity) should be achieved for the conferral of super-regulatory powers to EU agencies.

The most significant exception to the Court’s strong defence of the Commission’s institutional integrity was the Court’s easy acceptance of Comitology.\(^98\) To recall, Comitology consists in the setting up of special committees staffed with national experts,

\(^{96}\) Eg C-217/04 United Kingdom v Parliament and Council [2006] ECR 1—3771
which supervise the Commission’s implementing activities (Vos 2009). Such system, which was not provided for in the original Treaty, came under challenge. The Court however decided that since the Treaty conferred powers to the Council to delegated implementing powers to the Commission, then the Council could introduce a mechanism to supervise the Commission’s implementing activities. This finding sits at odds with the displayed preferences of the Court for supranational decision-making, and its general support for the institutional position of the Parliament, which was totally side-lined in Comitology. The Comitology regime has been modified by Lisbon. It no longer applies to delegated acts, but a modified version is still in place when it comes to implementing acts. However, as the distinction between delegated and implementing acts is far from clear (Craig and De Burca 2011), it would be interesting to see which position the Court will take, when the question of the choice of the regulatory legal basis will come before it. Will it seek to support an extensive use of the delegated act procedure which frees the Commission from member states’ oversight or not? In other words, will the Court support deliberative processes between member states and the Commission in the context of the Comitology committees (Joerges and Neyer 1997), or prefer to give the Commission greater autonomy?

When given the chance, the Court tries to bring new EU bodies under the EU accountability frameworks (and by the same token, its own jurisdiction). As highlighted by Advocate General Jäaskinen in the context of the UK challenge to ESMA, the main reason for the Court to refuse the delegation of powers to the private bodies in Meroni was, apparently, that these were not subject to judicial oversight. In a dispute between the Commission and the European Central Bank (ECB), the Court considered the ECB to be an institution under the Treaty, which could thus be subject to investigation by OLAF, the EU anti-fraud office, and whose acts could be judicially challenged.

As revealed through these brief analysis, the Court has, overall, looked after the institutional integrity of EU institutions and has try to limit institutional fragmentation. Eventually, as it has to come to terms with the reality of agencification, it is likely that the Court will accept a degree of fragmentation in the regulatory framework of the EU. However, one thing remains sacred. This should not undermine the Court’s institutional integrity and oversight over EU legal affairs.

4.2 The Court’s protection of its own institutional integrity and power

The Court has worked hard preserve its own integration and oversight over EU judicial matters. It consolidated the EU judicial structure around a unitary, centralised and

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99 But see the obiter dicta by the Advocate General in the case currently pending before the Court, C-270/12 United Kingdom v Council and Parliament, OJ 2012 C 273/3: ‘[t]he FEU Treaty... has introduced a sharp conceptual distinction between delegated acts and implementing acts. Article 290 TFEU delegated acts are non-legislative (regulatory) acts of general application adopted by the Commission in order to amend or supplement non-essential elements of a legislative act. Article 291 TFEU implementing acts can be either regulatory acts or individual administrative decisions. They can be adopted by the Commission or the Council in order to secure uniform implementation of legally binding EU measures.’ para 81.

100 C-270/12 United Kingdom v Council and Parliament.

101 C-15/00 Commission v EIB [2003] ECR I-728

102 The Court also took this opportunity to define the degree of autonomy enjoyed by the ECB.
hierarchical model. It fought attempts to create alternative judicial bodies or to transfer oversight of specific litigation to other courts. It also resisted the institutional fragmentation of the EU which limit the scope of judicial control over EU law-making activities.

In the 1980s, the ECJ, worried by the growth of its case load, asked for the creation of the Court of First Instance (renamed since ‘General Court’ by Lisbon). However, this new court was not an autonomous judicial body; it was ’attached’ to the ECJ. When judicial reform resurfaced on the agenda of European treaty-makers, during the negotiations of the Nice treaty and amidst concerns raised by the forthcoming large scale EU enlargement, the Court voiced its opposition to the creation of decentralised courts in various European locations, arguing that it would undermine the coherence of EU law. It was nonetheless supportive of further elaborating a multi-tier EU judicial system, over which it would exercise strict control (Granger 2002). With that in mind, the Court accepted the ’detachment’ of the CFI, which became an autonomous unit endowed with a general competence for the application and interpretation of EU law, yet subject to appeal mechanisms (Granger 2002). This letting go could be interpreted as a sign that the ECJ had been satisfied with the overall quality of the CFI’s case law and the ’loyalty’ it had displayed towards its ’hierarchy’. Later on, the Court also supported the creation of a specialised court to handle EU personnel litigation (the Civil Service Tribunal, CST).

What is quite remarkable in this EU judicial architecture, beyond the pyramidal control exercised by the ECJ, is the unitary and generalist approach which underpins the whole set-up. When one considers the diversity and very specialised nature of the cases which come to the EU courts (constitutional, administrative, competition, commercial, labor, IP, etc.), it is indeed surprising that so far, very few specialised jurisdictions have been set up. In addition to the OHIM for Intellectual Property cases, and the CST for EU personal case, and some specialisations of the General Court’s chambers (ie competition), the EU judicial system has remained generalist and very integrated. The Lisbon treaty makes this unity more explicit by bringing the three-tier of the system under the single institutional framework of the Court of Justice of the European Union, comprising the ECJ, the GC and the specialised courts.

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104 The Court had already accepted the idea of specialised courts and of a three-tier system back in 1994, when the Office for Harmonization in the International Market (OHIM) was set-up. That office, which was in charge of the registration of intellectual property titles, was also granted jurisdiction to review the validity of the decisions issued by that same office, subject to appeal mechanisms to the then-CFI and review to the ECJ.

105 Quite interestingly, shortly after this detachment, the CFI adopted a more critical and autonomous stance towards the ECJ on the question of standing for non-privileged applicant. Contrast T-177/01 Jego-Quere SA v Commission [2002] ECR 11-2365, C-50/00 P Union de Pequenos Agricultores v Council [2002] ECR 1-6677
Both before and after Maastricht, the Court has been actively protecting its interpretative monopoly and autonomy against attempts to dilute it.

In 1991, the Court found the Agreement establishing the European Economic Area (EEA) to be incompatible with Community law, in part because the envisaged EEA court would be able to interpret equivalent Community law provisions, thus undermining the ECJ’s interpretative monopoly and autonomy over the interpretation of EU law. The Court also argued that if interpretation of such agreement was to be entrusted to the ECJ, then it could not just be advisory and should have binding effect on the EEA courts requesting it.\(^{106}\)

In 1994, the Court unequivocally barred the way to the then Community’s accession to the European Court of Human Rights, for lack of competence.\(^{107}\) Given that the Court had been, in the past, quite inclined to find internal or external competences even in the absence of explicit treaty provisions, many commentators speculated that the Court position had more to do with its own reluctance to be subjected to the ultimate jurisdiction of the European Court of Human Rights (EctHR) in cases involving human rights than with legal contraints (De Burca 2003, 53). The position of the ECJ on this matter has however evolved towards a more favorable stance, likely the result of the Court’s changing perception of its own role and identity, as the Court increasingly views itself as the constitutional court of the EU (Granger 2005). The Lisbon Treaty has lifted the legal obstacle to accession and even instructed the EU to accede (Article 6(2) TEU). However, the ECJ case law on the autonomy of the legal order is posing serious obstacles to the EU’s formal accession to the ECHR (Lock 2011). The Court is closely following the design of the instruments of accession, so as to make sure that it will have ’the first say’ on potential violations of the ECHR resulting from EU law and thus preserve interpretative and judicial authority.\(^{108}\)

The creation of the Pillar structure at Maastricht was perceived by the legal community as a way to keep the Court at bay from new areas of European intergovernmental cooperation in sensitive fields, such as justice and home affairs and common foreign and security policy. The idea was to foreclose the type of constitutionalization and judicialization in operation in the Community pillar. Consequently, the Court was almost totally excluded from these pillars.

However, conventions adopted under the Third Pillar could grant the ECJ the power to apply and interprete them.\(^{109}\) Some of the conventions, such as the Europol convention, or fraud conventions were adopted without an agreement on the Court’s jurisdiction. Eventually, the member states agreed to confer application and interpretation powers to the Court, if such disputes could not be resolved in the Council within six months, but left

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\(^{106}\) Opinion 1/91, 14 December 1991. For further commentaries, see Lock 2011.


\(^{109}\) Ex- Article K.3(2)(c) EU provided that the Court could be given jurisdiction to interpret or settle disputes concerning Conventions adopted under the Third Pillar, ’in accordance with such arrangements’ as each Convention might (or might not) lay down.
it to individual member states to decide on the scope and possibility of national courts referring preliminary references to the ECJ regarding the interpretation of these conventions (Peers 2011). In fact, the Brussels Convention on civil jurisdiction and recognition of civil and commercial judgments has been quite intensely litigated before the ECJ.\textsuperscript{110}

During the negotiation of the Amsterdam treaty, faced with severe criticism caused by the exclusion of judicial supervision in policy areas (visa, asylum, immigration, justice and police cooperation in civil and criminal matters) which could lead to serious human rights violations, the member states responded by formally granted the ECJ the power to monitor respect for human rights in the EU (ex-Article 6(2) TEU), by bringing part of the Third Pillar issues (ie immigration, asylum and cooperation in civil matters) under the Community pillar, although with transitional arrangements and and by setting up some judicial review mechanisms with regard to measures that could be adopted in policy area that remained under the Third Pillar (cooperation in criminal matters). The member states however carefully circumscribed the Court’s powers and sought to limit litigation in those fields.

In the communitarised areas of Justice and Home Affairs only last resort courts could refer cases for a preliminary ruling to the ECJ (ex-Article 68(1) EC). Given that most references came from lower courts, this provision would seriously limit the flow of cases to the ECJ. In fact, national courts referred only a handful of cases concerning asylum and immigration to the ECJ.\textsuperscript{111} Furthermore, measures relating to the abolition of internal border controls and which concern ‘the maintenance of law and order and the safeguarding of internal security’ (ie police actions) were excluded from review (Article 68(2) EC). Although the Treaty provided for the possibility to expand the Court’s jurisdiction through a Council decision, this was never done, under the pretext that the ECJ would not be able to cope with the flow of asylum cases (Peers 2011).

As for police and criminal matters (the left-overs in the Third Pillar), the member states basically followed the 1990s conventions template, leaving it up to individual member states to decide whether to allow national courts to make preliminary references (ex-Article 35 TEU). Remarkably, a majority of member states enabled all their courts to make references.\textsuperscript{112} The Court was also granted normal direct review powers with regard to Framework Decisions or Decisions (ex-Article 35(6) TEU). The ECJ could, however, not review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (ex-Article 35(5) TEU). The member states also explicitly excluded the possibility that third pillar framework decisions (the Third Pillar


\textsuperscript{112} Most member states actually allowed their courts to make a reference (except the United Kingdom, Denmark and Ireland), and most of those who opted-in also authorised all their courts to refer cases, not just the higher ones (except Spain and Hungary).
equivalent to Directives) could produce direct effects (ex-Article 34(2) TEU). The Court has been dealing with a handful of cases in police and criminal matters every year.

The Court was manifestly frustrated by the post-Maastricht original exclusion and remaining limitations. As we saw earlier, when prompted in the context of legal basis litigation, the Court vigorously protected the Community pillar – and its own jurisdiction - against intergovernmental intrusions (Bradley 2011, Van Oik 2008). The Court also expanded the range of measures it could review, beyond what had been explicitly provided under the Treaty. The Court appealed to the ‘rule of law’ principle to assert judicial review power over decisions by bodies adopted under the Third Pillar, such as Eurojust.\(^{113}\) As we saw earlier, it also used the inter-pillar border provision (ex-Article 47 TEU), to indirectly review measures adopted in the Second and Third Pillar.

The Court also set to ‘normalise’ (or one could also say ‘communitarise’) judicial supervision in (ex) Pillar matters, by extending Community principles to Third Pillar issues. The Court considered that the basic rules and principle of the Community annulment action applied to the Third Pillar judicial review mechanism,\(^{114}\) and that the general preliminary reference framework applied to the Third Pillar preliminary reference (except for the special rules set in Article 35 TEU).\(^ {115}\) In the \textit{Gestoras} case,\(^ {116}\) which concerned the implementation of a UN Council resolution on the freezing of assets of persons suspected of supporting terrorist activities, by means of a Council’s common position, adopted under both second and third pillar, the ECJ, arguing that the EU was based on the rule of law, considered that any measure which would produce legal effects on third parties could be contested by them, even if it bore the name ‘common position’, (for it was the substance, not the form of an act, which mattered). In \textit{Kadi}, the Court declared itself competent to review the validity of EU regulations freezing the financial resources of persons allegedly affiliated with terrorists, based on Second Pillar common positions and implementing UN Security Council resolutions.\(^ {117}\) Furthermore, in the \textit{Pupino} case,\(^ {118}\) the Court called upon the aim of the ‘ever closer union’ to justify extending the requirement of ‘consistent interpretation’ – an important alternative to direct effect, also known as indirect effect (Betlem 2002), to a Third Pillar Framework Decision, thereby partially undermining the member states’ limitation of the domestic effects of EU third pillar instruments. However, in \textit{Gestoras}, the Court adopted a more cautious approach, refusing to award damages to applicants whose assets had been frozen, arguing that the EU Treaty did not contain a provision on damages similar to that contained in the EC Treaty. The CFI established that rules on access to documents also applied to Third Pillar measures, and assumed control over their application to Third Pillar measures.\(^ {119}\) The Schengen \textit{acquis}, which covered matters belonging to the First

\(^{113}\) C-160/03 \textit{Spain v Eurojust} (on the language requirements of Eurojust staff) [2005] ECR I-2077, para 35-43
\(^{114}\) C-176/03 \textit{Commission v Council} (on the validity of a Framework Decision on environmental crime) [2005] ECR I-17879
\(^{117}\) C-402/05 P \textit{Kadi} [2008] ECR I-6351
\(^{118}\) C-105/03 \textit{Pupino} [2005] ECR I-5285, para 41.
\(^{119}\) T-174/95 Svenska Journalistersforbundet
and Third Pillar, posed problems to the Court. The Court nonetheless refrained from normalising it.  

The Lisbon treaty brings an end to the pillar structure. It confirms the CJEU jurisdiction to review acts adopted under the new Title V on the Area of Freedom Security and Justice, which covers immigration, asylum and civil law, as well as police and criminal law. With regard to these matters, the regular infringement procedure and preliminary reference procedure applies. Moreover, the Court is entrusted with applying the EU Charter of Fundamental Rights to all AFSJ matters. The Court can resort to an urgent procedure in AFSJ cases. However, it still cannot scrutinise police operations (Article 276 TFEU). Furthermore, member states such as the United Kingdom, Ireland and Denmark, have opted-out of the Court’s jurisdiction with regard to pre-Lisbon measures and retain the right to carry on with these, as well as opt-out/in of future measures.

These reforms have led to a significant increase in the number of asylum and immigration cases referred to the Court, as well as cases concerning the European Arrest Warrant. However, the most significant quantitative leap is more likely to occur once transitional arrangements are over, that is after December 2014. A closer review of these cases could offer clues as to whether the Court is following similar patterns of reasoning and practices that when it deals with internal market matters.

The Court remains excluded from supervising EU foreign and security measures. It can only monitor the ‘border’ between matters which fall under the Union competence and those which fall under the common foreign and security policy umbrella (Article 40 TEU) and review the legality of restrictive measures adopted against natural or legal persons (Article 275(2) TFEU) in the context of the fight against terrorism (akin to a codification of the pre-Lisbon ECJ case law). The EU anti-terrorism policy has already generated interesting case law development highlighted earlier, which may reveal a mutation in the Court’s own identity.

The Court has been, over all, protective of the institutional integrity and powers of the EU supranational institutions. Although perhaps not intentionally, its case law prevented the regulatory powers of the Commission from dispersion between newly created agencies. The Court has been particularly careful to protect its own powers and integrity, successfully fighting attempts to undermine them and managed to gradually expand its powers even over intergovernmental cooperation area. However, over the last few years, the Court seems to be relaxing its stance, and accept that powers are delegated to bodies other than the traditional institutions, as long as these powers are exercised under its judicial control. Should we understand that the Court does not care (so much) as to who has influence over EU decision-making (intergovernmental bodies, agencies, private actors...), as long as it keeps the powers to review these measures, when they produce some kind of legal effects? However, that also suggests that the Court needs to tackle this institutional supervision (ie constitutional) role seriously and engage in more or less

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intense scrutiny of EU decision-making processes, something which it has largely refrained from doing, at least as far as EU legislative and regulatory measures are concerned.

5. Consensus, consensus everywhere – The Court, no longer Hercules of integration but not yet Hermes of the European Constitution?

New intergovernmentalism places deliberation and consensus at the core of the process of integration. Does the Court support such trends in EU political processes? Is the Court itself a place for deliberation and consensus? An analysis of the Court’s rules and practices regarding EU decision-making, as well as access to Court and the operation of judicial procedures call for a mixed assessment.

5.1 Consensual and deliberative politics in the EU – view from the Court

The rise of qualified majority voting in the EU, the proliferation of legal bases with different decision-making arrangements and institutional fragmentation increases the possibility for institutional and governmental actors to be sidelined, outvoted, or undermined in EU politics. These may turn to the Court to ‘rectify’ the situation, thus contributing to a judicialisation of EU politics (Stone Sweet 2004, Kelemen 201). However, the extent of this judicialization phenomenon will largely depend on whether the ECJ accepts to scrutinise EU political processes. Furthermore, the Court’s handling of these institutional cases may support or undermine the deliberative and consensual nature of legislative and regulatory processes.

As noted above, the Court tends not to annul EU legislation, whether adopted unanimously or following the qualified majority voting rule (Weatherill 2004, Wyatt 2009). This overall protective stance towards EU legislative and regulatory measures suggest that the Court was more concerned about preserving hard won EU legislative outputs, than about the deliberative and consensual nature of the decision-making process. These patterns have been observed in the context of the pre-Maastricht internal market context. Whether similar trends are in place play in other policy contexts (eg European Union citizenship, criminal matters, foreign policy, etc) in the post-Maastricht era is an empirical question that deserves further investigation. A glance at the case law over the last decade shows that the Court continues to uphold EU legislative measures, even those which seem problematic from a human rights’ or competence point of view.

One also finds numerous examples where the Court modified its own case law in order to defer to EU legislative choices. One such instance is the Förster case, concerning the access to social benefits and assistance of non-economically active citizens. In its prior case law interpreting relevant Treaty provisions, the Court had considered that member state could not use a blanket approach in determining whether non-economically active EU citizens could access benefits and that they needed to appreciate, on a case by case basis, whether the citizen in question could ‘demonstrate a real or effective link’ with the

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123 Studies of the free movement case law suggest, for their part, that the Court appeared eager to save regulatory measures which were endorsed by a majority of member states (Gabel et al, 2010), thus earning the label of ‘majoritarian activist court’ (Maduro 1991, Stone Sweet and 2010).

124 C-158/07 Förster [2008] ECR I-8507
host member states.\textsuperscript{125} In Förster, the Court did not apply this test, and instead accepted that the ‘blanket’ five year residence requirement, which was the one provided for in the Citizenship Directive\textsuperscript{126} for obtaining permanent residency and access to social benefits, was suitable to determine whether an applicant for social benefit was sufficiently integrated in the host society. In the recent Pringle case,\textsuperscript{127} which concerns a challenge to the European Stability Mechanism (ESM), the Court backed up the member states in their consensual attempt to solve the Euro-crisis outside of the EU framework, despite serious concerns as to the ‘legality of such initiative (Borger 2013, Van Malleghem 2013).

The Court nonetheless does not always ‘respect’ political consensus. On a few occasions, it simply ignored ‘political’ instructions (Rasmussen 1986, Conway 2012, Horsley 2013), relying on its own interpretations of Treaty provisions to circumvent legislative restrictions. For example, in cases concerning the ability of patients to obtain reimbursement for medical treatment received in another member state,\textsuperscript{128} the Court interpreted the Treaty’s free movement of services provisions and created a more patient-friendly, authorization-free scheme, which enabled patients to go around the prior authorization scheme set up by relevant EU legislation.\textsuperscript{129} More recently, in the Zambrano case, the Court’s blatantly disregarded the Directive on EU citizenship\textsuperscript{130} to extend the scope of protection of EU citizenship Treaty provision to the non-EU family members of ‘static’ EU citizens (not covered by the Directive) where national immigration rules would ‘deprive them of the genuine enjoyment of the substance’ of their rights as EU citizens\textsuperscript{131} (although in later cases, McCarthy and Dereci,\textsuperscript{132} the Court was careful to significantly restrict the scope of application of the Zambrano doctrine, thus suggesting that it is not insensitive to the political and institutional context in which it operates).

Intergovernmental deliberation and consensus are, apparently, easier and more effective when carried out behind closed-doors, protected from national electorates’ scrutiny (Checkel 2001). The Court, prompted by pro-transparency countries and parties (Granger 2004, Bignami 2005) was called to open-up EU legislative and regulatory processes. The CJEU originally resisted. The CFI and the ECJ refused to formally recognise transparency as a general principle of the EU,\textsuperscript{133} always relying instead on EU legislation,\textsuperscript{134} and its many exceptions (including for the Court...).\textsuperscript{135} They at first applied

\textsuperscript{125} C-184/99 Grzelczyk, C-224/98 G’Hoop, C-209/03 Bidar
\textsuperscript{126} Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
\textsuperscript{127} Case, C-370/12, Pringle v. Ir., 2012. E.C.R., I-
\textsuperscript{129} Regulation 1408/71 of the Council of 14 June 1971 (Article 22).
\textsuperscript{131} C-34/09 Ruiz Zambrano [2011] E.C.R.
\textsuperscript{132} C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, [2011] ECR I-; Case C-256/11 Dereci and others v Bundesministerium für Inneres [2011] ECR
\textsuperscript{134} C-184/99 Grzelczyk, C-224/98 G’Hoop, C-209/03 Bidar
and interpreted the 2001 Access to Document Regulation in a way which did not always favour transparency.\textsuperscript{136} They accepted that EU institutions had a significant margin of discretion in their assessment of protected interests (Adamski 2009).\textsuperscript{137} In the recent years however, their approach quite radically shifted in favor of a principle of full transparency, interpreting restrictively exceptions set out in the EU legislation.\textsuperscript{138} Significantly, the Court told the Council that the EU legislative process should be transparent and that it could not hide information about it, in particular the identities of which member states voted in favor or against a particular legislative proposals. The Council’s argument that such secrecy was essential in order to preserve the ‘effectiveness of the legislative decision-making process’ was rejected.\textsuperscript{139}

These recent judgments are not necessarily aimed at undermining deliberative processes, but rather about making them more inclusive, to improve civil society and active citizenship participation, in light of a deliberative democracy ideals (Eriksen and Fossum 2000, Craig 2012) This dimension is further stressed by the Lisbon Treaty (Articles 1, 10(3) and 11 TEU, Articles 15(2-3) and 16(2) TFEU, Article 42 of the EU Charter), which may explain, in part, the Court’s change of approach.

It is nonetheless difficult to anticipate the impact of such transparency requirement on EU political dynamics. By enforcing a strong transparency requirement on formal decision-making processes, the Courts risk shifting actual deliberation and de facto decision-making to the informal margins (the ‘corridors’). Moreover, it could further incentivise Member States, EU institutions and other stake-holders to resort to less formal modes of governance or to do things ‘outside of the Treaty’, to do away with transparency requirements and judicial control.\textsuperscript{140}

The Court is, in any case, more demanding of the EU political institutions than it is of its own decision-making process. Whilst judicial decision-making at the ECJ is inherently consensual, it is restricted to a small range of participants, and the style of engagement, although clearly argumentative, is not fully deliberative, and far from transparent.


\textsuperscript{136} See cases such as C-266/05 P Sison [2007] ECR I-1233.

\textsuperscript{137} Advocate general Geelhoed puts it quite bluntly: “[the] decision whether or not to grant access to a document which has a bearing on [the interests protected by the exceptions provided for in Article 4(1)(a)] necessarily depends on policy considerations and must be taken on the basis of information which is available only to the competent political authorities. As the efficacy of policy in this area in many cases depends on confidentiality being observed, the Community institutions involved must have complete discretion in respect of determining whether one of the interests listed in Article 4(1)(a) could be undermined by disclosure of documents”. Opinion of Advocate General Geelhoed of 22 June 2006 in case C-266/05 P, Sison/Council, [2005] ECR II-1429 para. 30

\textsuperscript{138} The shift started with cases such as C-514, 528 and 532/07 Sweden v ApPI and Commission [2001] ECR, C-64/05 P Sweden v Commission [2007] ECR II-11839; and was confirmed with recent cases such as Joined cases C-39/05 P and C-52/05 P, Sweden and Turco/Council [2008] ECR I-4723 and Case T-233/09, Access Info Europe/Council [nry] (on appeal: pending Case C-280/11 P, Council/Access Info Europe);

\textsuperscript{139} C-280/11 P, Council v Access info eurpe [2013] ERC I-0000. The Court however did so based on the regulation, not any general principles or fundamental rights, which probably motivated the Commission and some of the member states to propose a more restricting ‘recast’ Regulation (Ratman 2012).

\textsuperscript{140} For difficulties created by the confrontation of hard law and soft norm, see C-144/04, Werner Mangold v. Rüdiger Helm [2005] ECR I-9981.
5.2 The Court, Hermes in the making?

The decision-making process within the Court, organised around the principle of a collegial decision without the possibility for dissenting opinions, imposes to search for, and reach, an internal consensus (i.e. between the judges). The Court of the 1960s-1980s was apparently bound by a strong ‘esprit de corps’ (Mancini and Keeling 1995: 398), which facilitated the integration of newcomers and smooth decision-making. However, the increase in the size and diversity of the Court’s membership following the successive enlargements, as well as the changing and contested perceptions of European integration (Malecki 2012) act to reduce judicial cohesiveness and render collegial decision-making more delicate.

Furthermore, in the years following the adoption of the Maastricht Treaty, prominent members of the Court suggested, extra-judicially, that the role of the Court should no longer be to promote actively a unitary vision of integration but to act as a more neutral arbiter between different interests, values, and norms (Koopmans 1996, Rodriguez Iglesias 1996). Scholars too increasingly view courts as collective problem solving mechanisms, which must be responsive to societal needs (Everling 1984) and must reconcile ‘economic and social values and in-state and out-of-state interests... through appropriate and transparent processes’ (Armstrong 2011, 27). To borrow the mythological analogy used by F. Ost (1990), these call for the ECJ to metamorphoses from the Hercules to the Hermes of European integration. One question which arises in relation to the Court is thus ‘whether institutionally it can handle being drawn into the inevitable conflicts that arise in seeking to reconcile competing interests’ (Armstrong 2011, 27).

Since the Court fleshes out EU Treaties and measures, and defines the parameters within which the other EU institutions and bodies, as well as member states, operate, its own decision-making processes should be examined in the light of consensual and deliberative trends. Those who analysed the Court’s pre-Maastricht case law characterised the ECJ more as an Herculean court trying hard, on its own, to preserve the founding father’s ideal of integration from the vagaries of political life (Mancini and Keeling 1995, Bengoetxea 1993, Hunt and Shaw 2009). However, most accounts show that the Court did not do it all alone, working in close cooperation with some interlocutors (Weiler 1994), in particular (corporate) litigants which had the resources to bring and sustain litigation (Harding 1992, Harlow and Rawling 1992, Chalmers and Chaves 2012, Burley and Mattli 1993, Mattli and Slaughter 1995, 1998, Alter 2006, Cichowski 2004), (lower) national courts (Slaughter et al. 1997, Alter 1996, 2001, 2009, Nyikos 2006), the Commission (Stein 1981, Cichowski 2004, 2007), the EU law community (Schepel and Wesseling 1997) as well as with its own Advocates General (Burrows and Greaves 2007). But what about national governments and parliaments, local authorities, civil society organizations, or citizens?

141 Unlike the EU political institutions, the Court must come up with a decision in cases which are brought to it. Otherwise, it would be denying justice, which is prohibited.

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Deliberation opportunities and mechanisms for reaching a broader political and societal consensus are limited. The judicial process is not inclusive and its deliberative aspects constrained by legal reasoning and procedural formalities. Governments do occasionally, and increasingly, bring cases before the Court, usually to challenge EU measures. However, they are not the most active litigants in the field. They nonetheless are increasingly active (and astute) participants in cases which are heard by the Court, in particular in preliminary references (Granger 2004). Yet, despite ‘good intentions’ (Everling 1984), the Court has not engaged much with governments’ arguments (Stone Sweet 2010, Cichowski 2007, Conway 2012, Horsley 2013, but see Carruba et al. 2008, Granger 2004).

As noted above, some private parties (or their lawyers) have a voice in the Court, in particular if they want to complain about member states’ failure to comply with EU law, less so if they want to question EU level regulatory and legislative processes. Moreover, there are few opportunities for third party interventions.

In the context of preliminary references, which is the procedure through which the Court contributes most intensely to the making of EU law, legal or natural persons who are not parties to the domestic proceedings have no right to submit observations. This is to be contrasted with the unlimited rights of EU institutions and Member States to submit briefs to the Court. Individuals or companies concerned by the meaning or validity of EU laws may only participate in preliminary ruling proceedings before the ECJ if they have secured their status as parties in domestic proceedings. Not only national procedural rules vary on the matter, but it may be particularly difficult for a ‘foreign’ interested person to be added as a party in proceedings started in another member state, in particular at a late stage.143 Where domestic rules are not prone to allow such interventions, the EU courts have not tried to ‘compensate’ by allowing interested parties to submit observations directly before the EU courts.144

This strict limits to the participation of interested parties also applies to most direct actions before the EU Courts. Indeed, under the Court’s Statute, ‘Member States and institutions of the Union may intervene in cases before the Court of Justice’ and ‘the same right shall be open to … any other person which can establish an interest in the result of a case submitted to the Court’. This generous invitation is however quickly qualified: ‘[n]atural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union’ (Article 40 Statute). Consequently, individuals or companies can intervene only in cases in which a private party is already involved in a case, either as an applicant or defendant. Automatically, these will be limited to cases concerning decisions or, post-Lisbon, regulatory acts, and exclude legislative acts. Moreover, they can only intervene in support of one of the parties, which limits the range of propositions which they can make.

The significance of such limitation on ‘external’ participants can be tempered by a consideration of the Court’s existing diversity. The Court itself is not a monolithic bloc. EU judges and legal staff come from very different legal traditions and political systems,

with expertise in various policy and legal areas. Recent empirical studies also suggest that the Court’s members and staff are not all ‘old school’ integrationists (Malecki 2012). Moreover, one could argue that the needs of diversity and collective and deliberative problem-solving are catered for by the increased mobilization and participation in judicial proceedings of governments of the member states (Granger 2004). Yet, member states’ tend to mobilize to defend their own policies and legislations; they support interpretation of EU measures which interfere less with their policy autonomy, but they rarely challenge EU measures, which they themselves contributed to adopting (unless they opposed it). National courts also bring their contributions, by selecting questions for references, and also sometimes submitting their own views on the questions they refer (Nykos 2006). However, as national courts are mobilized essentially by participants who seek to challenge domestic measures and not EU ones, for the reasons explained above, the judicial dialogue, at least as far as lower courts are concerned, is inevitably biased. Finally, the Court does not operate in a bubble; it is sensitive to comments and criticism emanating from civil society, politicians, or academics, and is able to adjust to these (Granger 2005, Arnull 2011).

Still, the EU judicial process remains centred around the representation of formal institutional interests’ representation. Twenty years ago, Harlow suggested that the Court’s procedure and practices be adjusted to allow greater participation by interested parties (Harlow 1992, 236). Her call was relayed a year later by the Council of the Bars and Law Societies of the European Union.145 Not much changed since, however. The restrictive approach to participation by interested third parties in EU judicial proceedings is mandated by the Court’s organizational framework (Statutes and Rules of Procedures), which is agreed upon by the member states; yet, such rules could be modified at the Court’s request, or could be interpreted in a relaxed, or evolutive, fashion. To my knowledge, such opening up of the EU judicial process to broader participation has never been seriously considered.

This restrictive attitude to participation in judicial proceedings of interested parties must be contrasted with the practice of domestic constitutional courts, such as the US Supreme Court.146 It also suffers from the comparison with the attitude of international judicial bodies, such as the European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and even the World Trade Organization (WTO) Dispute Settlement Body. The latter was not stopped by rules only allowing participation rights to governments,147 and authorized in the famous Shrimp/Turtles case,148 the submission of amicus curiae briefs, in particular by organizations representing non-governmental and non-commercial interests. Although the amicus curiae brief poses some challenges to judicial bodies (quantity, representativeness, content and length requirements, etc), it is undeniable that such opening of the judicial process enables the integration of interests and points of views

146 Supreme Court Rule 37. On the impact of such briefs, see Spriggs and Wahlbeck 1997.
147 See Understanding on Rules and Procedures Governing the Settlement of Disputes.
which otherwise would not have been represented by the parties (Charnovitz 2000, Bush and Rheinhard 2006).

If, in the light of what happened in the context of the WTO, the Court, quite understandably, is worried to be swamped by briefs submitted by business and civil society organizations, it could at the very least make a greater use of the possibility to ask parties and entitled participants (member states, institutions, agencies and offices) to submit observations (Article 24 Statute), like it did in Faccini Dori, when it had to decide on whether to extend the direct effect of Directive to horizontal situations, or ask ‘any individual, body, authority, committee or other organisation’ to submit an expert opinion (Article 25 Statute), like it did in the AM & S case. Although statistics are missing, the Courts do not seem to resort frequently to such ‘outside’ assistance. Still, this did not deter some interest groups from taking the initiative to submit informal amicus curiae briefs, in the form of letters addressed to the Court. The extent to which these informal briefs were taken into account in judicial proceedings at all is an open question.

The EU judicial arena is thus tightly fenced off, and occupied by EU institutions and states (Harlow 1992) and corporate or marginal groups which use EU law against domestic measures, to further their own personal or policy interests, but in a manner which promotes centralization (Harding 1992, Harding and Gibbs 1995, Chalmers and Chaves 2011). Even amongst the close circle of participants, deliberation, at least in an interactive sense, is not the dominant mode of operation.

The procedure is largely written, offering one or maximum two rounds of written observations, and a short (or even no) oral hearing. In preliminary rulings, parties to the case do not have the possibility to respond to the Advocate General’s Opinion. The Court sometimes tries to stimulate debates on important legal issues which it has to address by encouraging national courts to submit references which contain sufficient information for parties and participants to offer meaningful inputs. The Court’s reasoning itself does not engage much with participants’ arguments and although it is more extensive nowadays than in the past, it remains terse (Lasser 2004). Moreover, the Court’s judicial policy has for long sidelined political or societal consensus (eg ‘historical’ or

149 Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325
150 Case 155/79, AM & S v. Commission, [1982] ECR 1575. In this last case, the Court called for the CCBE (Consultative Committee of Bars and Law Societies of the European Communities) to present its view on the common law doctrine of professional privilege.
151 See, amicus curia brief submitted by a group of NGOs in an action for annulment brought by Ireland against the Data Retention Directive (C-301/06 Ireland v Council and EP [2009]), and which supplemented Ireland’s argument based on the choice of legal basis with arguments addressing violations of human rights. Available at http://www.vorratsdatenspeicherung.de/images/data_retention_brief_08-04-2008.pdf. Other organizations, such as the International Trademark Association, follow the practice of attaching their brief to the file of the applicant in domestic courts (i.e. the trademark owner), in the hope that the Court finds their observations of interest. See letter attached to case C-105/05 Europolis [2008] ECR I-7605, available at http://www.inta.org/Advocacy/Documents/INTABovemijBenelux.pdf) and in case C-16/6 SARL Céline v. SA Céline, at http://www.inta.org/Advocacy/Documents/INTACeline.pdf.
152 Information note on references from national courts for a preliminary rulings, 2011/C 160/01, 28.5.2011. For example, on the recent Data retention Directive, C-293/12 Digital Rights Ireland and C-594/12 Seitlinger and Others.
subjective methods of interpretation) as a tool for clarifying the meaning of EU legal documents in favor of techniques which give prevalence to the objective of European integration and instruments (Bredimas 1978, Conway 2012, Horsley 2013).

There are however some exceptions, and it may be worth investigating in which circumstances is the Court more likely to search for a broad consensus, and how it goes about it. The current case challenging the validity of the Data Retention Directive may mark a new beginning, and offers an example of the Court’s deliberative engagement with the parties of the case.

Conclusion

The European Court of Justice, which had promoted and fostered the Community method and its own ‘idée de l’Europe’ is reluctantly but surely coming to terms with the idea that European integration is changing around it. The Community method, which has many variants, has transformed. No longer centered around the formal institutional triangle, it involves an eclectic range of institutions and bodies, informal norms and practices, and differentiation. Moreover, there are other ways of achieving European ‘integration’, such as the Open Method of Coordination, or intensive intergovernmental cooperation. The Court at first largely ‘fought’ these trends, trying to preserve what it considered the only acceptable mode of integration. However, over the last decade or so, the Court is starting to adjust. It would be worth investigating the factors which contribute to these adaptations, by exploring the influence of the Court’s interactions with a broader sets of interlocutors, through which all reassess their ideas of what Europe is about, and their own role in it (Granger 2005). What seems to transpire from the recent case law, is not primarily that the Court’s idea of integration is changing (although there are signs that it is), but rather an indication of the gradual transformation in the Court’s own identity, from an ‘integration court’ into a ‘constitutional court’. The Court is currently juggling with both identities, which often pull in different directions, hence the tensions and inconsistencies revealed in the case law. There are implications for new intergovernmentalism. Until recently, the Court has left the EU decision-making processes largely undisturbed, as it concentrated on its integration mission (making sure that EU law is applied effectively and uniformly in the member states, and filling the gaps left by EU institution in the integration legal framework). The Court, as a constitutional court, would become more regarding as to the manner in which EU instruments are adopted, as well as to their content. A greater shadow involvement in

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154 For see recent case Eg. Case T-262/10 Microban International and Microban (Europe) v Commission [2011] ECR II-0000. In this case, the Court used historical interpretation, referring to the process which led to the adoption of the amendment of the relevant Treaty provision, to derive the meaning of regulatory acts for which standing requirements could be relaxed. The reference to political consensus in that case is particularly interesting, given that it was an area where the Court had refrained from engaging in expansive interpretation of standing requirement which would have enabled individuals to challenge EU regulatory measures more easily.

155 C-293/12 Digital Rights Ireland and C-594/12 Seitlinger and Others. The Court send a questionnaire to the parties in the cases and asked them to concentrate their oral hearing submissions on the compatibility of the Directive aith Article 7 and 8 of the Charter.
decisional and legislative processes, which would result from the Court taking its constitutional functions seriously, may interfere with the dynamics of new intergovernmentalism. It should also bring the Court to reassess its own contribution to EU integration, in the light of democratic and separation of powers considerations.

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