The growing legal remit of the European Union via the functioning of the European Court of Justice

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In this article, **Matthew Zammit** examines the activism of the Court of Justice of the European Union to highlight its role in developing the EU's legal order, primarily through the preliminary reference procedure.

TAGS: EU law

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olj online law journal

The historical development of the European Union (EU), since its more than humble beginnings, has seen the scope, role and influence of its institutions and their functions evolve greatly. By way of the functioning of the Court of Justice of the European Union (or CJEU, henceforth referred to as 'the Court') as one of the EU's primary institutions, and through the substantial body of case-law which has been developed over the years, and significantly even through the very language handed down in its judgements and official interpretations, one can track a growing authoritative influence with which the Court arguably consolidates the legitimacy and purposes of the wider Union in itself.

This paper does not mean to go into the merits of the specific cases it will be referring to, but rather will limit itself to a macro understanding of the policies driving the interpretation and adjudication processes of that Court, in an attempt to establish a pattern by primarily relying on the watershed judgements of ***Van Gend & Loos***[1] (1963) and subsequent cases of preliminary rulings. These are the first-hand accounts reflecting the direction and tone of future developments of the Court of Justice and, by extension, of the Union itself.

Before delving any deeper, one first has to elaborate on two main concepts which centrally establish both the role of the Union as well as the remit of the Court. Firstly, we will define the concept of 'competence' in relation to the Union and thereby establish the jurisdiction of the Court, as expressed by the Treaty of the European Union[2] (TEU), which is then defined in greater detail by the Treaty on the Functioning of the European Union[3] (TFEU). Secondly, the 'preliminary ruling' process will also be explored, mainly in order to trace the Court's legalistic evolution. As we will see, these concepts are essentially the driving forces which in themselves enable both Law and the Union itself to evolve via the work of the institutions.

The very first article of the TEU - which, for all intents and purposes, together with the TFEU, is one of the two treaties which concretely establishes and defines the modern European order - makes explicit reference to the concept of 'competence', basically founding this essential principle and defining the primary function of the Union, whilst also enshrining the legal parity of the Treaties. It states:

> *By this Treaty, the* [Member States] *establish among themselves a European Union* […] *on which the Member States confer*

[1] C-26/62, *Van Gend & Loos vs Nederlandse Administratie der Belastingen* [1963] ECLI:EU:C:1963:1.
[2] Consolidated Version of the Treaty on European Union (TEU) [2012] C326/13-45.
[3] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] C326/47-390.

> *competences to attain objectives they have in common* […] *The Union shall be founded on the present Treaty and on the TFEU* […] [both] *shall have the same legal value.*[4]

Article 5 TEU further elaborates the 'conferring' principle set in motion by Article 1.[5]

The concept of 'conferral' defines and illustrates how Member States, having voluntarily, that is, by the very membership to the Union, given over some of their sovereign legal authority to otherwise take independent decisions, have by their ascension to the Treaty delivered this right to the Union's institutions, specifically in the areas then elaborated by Articles 3, 4 and 6 TFEU as the areas of exclusive, shared or limited competence. 'Exclusive' competences defines those areas where the Union and its institutions alone have the sole and supreme say-so, almost lying exhaustively within the areas and scope of the customs union and the Internal Market.[6] Competences with a 'shared' remit between the EU and the Member States cover a much vaster range, as listed in Article 4 TFEU, and these range from environment to energy and from security to justice.[7] There are also other competences where the Union is expected to take up a more peripheral support and coordination role, in areas like culture, education and tourism, as listed in Article 6 TFEU.[8]

It is also worth mentioning that in conjunction with the principle of the conferral of competences, another primary principle, the principle of 'subsidiarity', effectively checks the otherwise unrestricted and centralised brokerage of power in the Union/Member State relationship.[9]

The first few articles of the Treaties then clearly attempt to define the limits and boundaries of the European order. It follows naturally then, that the next question has to be, who is ultimately arbitrating and who exactly is to judge what is or what is not within the remit of the Union and its vested direct or indirect interest, especially in the grey areas? The answer to this is very simple: The Treaties rule supreme and the competences are defined within them, and conversely, the Court of Justice has the sole responsibility and right to ultimately interpret said Treaties.

By way of ensuring this effective and essential functioning of the legal order from the top down, the Court of Justice is exclusively endowed with the 'preliminary ruling' procedure. This procedure gives the Court jurisdiction over the following:

i) the interpretation of the Treaties;

[4] TEU (n 2) Article 1(1).
[5] ibid, Article 5(2).
[6] TFEU (n 3) Article 3.
[7] ibid, Article 4.
[8] ibid, Article 6.
[9] TEU (n 2) Article 5(3).

ii) the validity and interpretation of acts [of the Union].[10]

Article 267 goes on to say that a national court or tribunal might well 'decide' to refer questions to the Court of Justice 'if it considers that a decision on the question is necessary to enable it to give judgment' and would refer to the Court 'to give a ruling thereon'.[11]

However, in cases where 'there is no [other] judicial remedy under national law' a national court or tribunal is obliged to bring the matter before the Court.[12] The premise of the 'preliminary ruling' procedure therefore, implicitly gives the prerogative of final adjudication, that being the right to arbitrate as the final recourse at law, on rulings which concern the application or any alleged misapplication of Treaty Law and other aspects of the acts of the Union therein, exclusively to the CJEU. This obligation invariably gives the Court a great amount of power, making it subordinate to nothing but the Treaties themselves. Thereby the Court itself serves as both its exclusive interpreter and, in a way, a guarantor of its effective functioning, by being the final remedy at law.

Looking at past case-law is a useful tool to attempt to trace and establish a pattern leading to the current *status quo*. In particular, cases in the early history of the Court, in the late fifties and early sixties, which tend to capture the original direction of what the signatories of the international arrangement of the Treaty of Rome had come together and agreed to, and how and what this reflected in practice. The evolution of the language and strength of the judgements would come to define how far and wide could the remit of the Court (and of the Union in the areas it is involved) be expanded and interpreted, and what exactly the impact and ramifications of this are.

Case in point is the landmark judgement of ***Van Gend & Loos***. The applicant of the complaint, the Dutch company 'Van Gend & Loos' of Utrecht, objected to an internal tariff in the form of an import duty (introduced after the EEC Treaty came into force after 1 January 1958, by way of another international treaty, the Protocol of 25 July 1958, signed by the Benelux countries) imposed by Dutch revenue authorities on the importation of their product from West Germany. After having resorted to the Tariefcommissie of Amsterdam, it instigated a preliminary ruling which was referred to the Court of Justice in 1962.

The question was put forth to the Court in the preliminary ruling concerning the application of Article 12 of the EEC Treaty, which abolished the introduction of any new tariff barriers or duties (paving the way for Article 13 which set a plan to abolish these altogether, 'progressively'). Importantly the question for a preliminary ruling asks '[Whether] nationals of such a State can, on the basis of the Article in question, lay claim to

[10] TFEU (n 3) Article 267(1), originally Article 177 Treaty of Rome.
[11] ibid Article 267(2).
[12] ibid Article 267(3).

individual rights which the courts must protect'.[13]

More so than the practical 'tariff' concern of this case at face-value as to whether the application (or lack of) of Article 12 was actually in conflict with Treaty Law, the question being brought up significantly carried much more weight.

The hypothesis was, simply put: Can nationals of a Member State, on the basis of the Articles of the Treaties, expect to claim their individual rights as well as their uniform application? Would this be the case even if these may possibly defy national legislation or the judgement of the national juridical order therein?

The positions of the various parties involved in the preamble are in themselves elucidating and finally the Court's answer to the question would be one that reverberated thereafter. Fundamentally, the Dutch Government questioned the procedural validity of this question itself and whether the case of the 'alleged infringement of the Treaty by a Member State' was admissible to the Court in this manner in the first place.[14] It was their view that this was not in line with the procedure laid down by the Treaty of Rome, which only made reference to the recourse to the Court of Justice (when failing to fulfil Treaty obligations) under two conditions as listed in Articles 169 and Article 170 - that is, on the initiative of the Commission or that of another Member State.[15]

The Belgian government similarly in its own statement also emphasised their jurisdictional disagreement with the case being brought forth for a preliminary ruling. In its view, the question being asked was purely:

> *a problem of constitutional law, which falls exclusively within the jurisdiction of the Netherlands court* […] *It must decide under national law - assuming that they are in fact contradictory - which treaty prevails over the other or more exactly whether a prior national law of ratification prevails over a subsequent one.*[16]

While the Belgian Government concretely held that this was 'a typical question of national constitutional law' with its only possible resolution being that which was in accordance with 'the constitutional principles and jurisprudence of the national law of the Netherlands' and having effectively 'nothing to do with the interpretation of an Article of the EEC Treaty', the Commission and the Court would argue and deliberate otherwise.[17] The legal uncertainty at this point in time was the exact point of law which was being (rather incidentally) contested by the applicant, Van Gend & Loos.

The Commission in its submission to the Court emphasises that 'the effect

[13] *Van Gend & Loos* (n 1) European Court reports 3.
[14] ibid, 6.
[15] Treaty of Rome (EEC Treaty) [1957] Articles 169-170, Section 4 'The Court of Justice'.
[16] *Van Gend & Loos* (n1) 6.
[17] ibid, 6-7.

of the provisions of the Treaty on the national law of Member States cannot be determined by the actual national law of each of them but by the Treaty itself'.[18]

Furthermore, the Commission pointed at the absurd case should the question in front of the Court be found inadmissible. 'A finding of inadmissibility would have the paradoxical and shocking result that the rights of individuals would be protected in all cases of infringement of Community law except in the case of an infringement by a Member State', as the national governments were indeed sustaining.[19]

The Court would indeed step in and vociferously make use of the preliminary judgement as an effective way 'to secure uniform interpretation of the Treaty by national courts and tribunals' and henceforth made it clear that 'Community [Treaty] law has an authority which can be invoked by [a Member State's] nationals before those courts and tribunals,' also recognising and confirming that the EEC Treaty had established 'institutions endowed with sovereign rights.'[20]

In so doing, the Court's conclusions in ***Van Gend & Loos*** were a significant stepping stone establishing the supremacy, sovereignty and authority of this and successive Treaties and of the Court of Justice more generally. Prior to the Court's pronouncement in 1963, the Commission stated that the judgement would not only have an impact 'on the interpretation of the provision at issue in a specific case and on the effect which will be attributed to it in the legal systems of Member States but also on certain other provisions of the Treaty which are as clear and complete as Article 12.'[21] This can be taken to mean that this judgement, as indeed would be the case, would set the bar for the applicability of Community and Union law over and above any conflicting national legislation or any national court's deliberation which may conflict with the Law. In this way, a supranational authoritative and legal body by way of the institution of the Court could match the 'new legal order of international law' as established by the Treaty of Rome.[22]

It also followed that, in this way, by the adoption of the Treaties, and 'independently of the legislation of Member States,' the Treaty conferred not only obligations but also rights:

> *not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the* [Union].[23]

[18] ibid, 6.
[19] ibid.
[20] ibid, 12.
[21] ibid, 7.
[22] ibid, 12.
[23] ibid, 12.

This judgement, then, also imposed on the national courts the added obligation of extending the applicability of the individual rights granted by the Treaty universally, especially in those cases where the Treaty articles could be read as producing 'direct effects'- clear and unambiguous directions which confer rights 'which national courts must protect.'[24]

Subsequent landmark judgements, like ***Costa v ENEL***[25] (1964) - again, a case of conflicting national vs supranational legislations; this time concerning state monopolies (the question in part concerning the claimed infringement of Article 37 EEC concerning discriminatory monopolies and quantitative restrictions between Member States). It is evident that the preliminary ruling indicates how in the very creation of a Community, with its own institutions and personality, with 'real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community', created a new body of law binding Member States and their nationals to the supranational legal body.[26] In ***Costa v ENEL***, the primacy of the Treaty, and therefore, Treaties thereafter as well, is emphasised above all else. The following excerpt from the judgement concluded that:

> *the law stemming from the Treaty* […] *could not, because of its special and original nature, be overridden by domestic legal provisions* […] *without being deprived of its character as Community Law and without the legal basis of the Community itself being called into question.*[27]

These cases clearly reinforce one another, as was the case with ***Internationale Handelsgessellschaft***[28] (1970), which judgement echoes word for word the answer to ***Costa v ENEL***, but then adds to it that:

> [Any] *recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law*,

and always with the previous judgement taken into consideration would add that:

> [T]*he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.*[29]

[24] ibid, 13.
[25] C-6/64, *Costa v ENEL* [1964] ECLI:EU:C:1964:66.
[26] ibid, European Court reports 593.
[27] ibid, 594.
[28] C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle fur Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114.
[29] ibid, European Court reports 1133-34.

The repeated doctrinal principle of the primacy of Treaty Law is evident here, as well as in numerous other occasions thereafter, empowering the Court's authoritative judgements. It is apparent that this principle was worth repeating in the Court's well-voiced opinion, and in looking at the judgements and the language utilised, one gets a better sense of the scope and pretext driving the Court; this being centrally linked to its foundational doctrine.

Even in more recent cases, like ***Kücükdeveci v Swedex***[30] (2010), the Court builds and reiterates the precedent establishing supremacy, but also goes beyond and arguably even establishes a space for the retroactivity in the interpretation of Union Law, beyond the actual point or date of entry of these laws into practice.[31] The Court in this case does not rely on the Treaties directly but rather makes reference to the Charter of Fundamental Rights of the European Union, as formulated in 2000 and adopted in 2008 in the wake of the Lisbon Treaty, which gave the Charter legal parity to the Treaties as stated in Article 6 TEU: '*the Charter* […] *shall have the same legal value as the Treaties*'.[32]

This case, which specifically concerned German national labour law and a subsequent conflict with the Charter, evoked Article 21(1) of the Charter, prohibiting '*any discrimination based on* […] *age*', and presented this as a question for preliminary ruling. In this particular case, the subject was a woman who had been dismissed from a company 'Swedex', where she had been working between 1996 and 2007. According to German labour law, periods of employment completed before the age of 25 would not be taken into account in calculating the notice period.[33] The Higher Labour Court of Düsseldorf referred her case for a preliminary ruling as she argued that German law did not give her a fair and equal treatment in the way the notice period for her dismissal was calculated, infringing her rights as set aside by the Charter.[34] The Court agreed with the claim of discrimination and in its deliberation stated that '*European Union law, more particularly the principle of non-discrimination on grounds of age* […] *must be interpreted as precluding national legislation*'.[35]

It then went on to state that it was up to the national courts themselves:

to ensure that the principle of non-discrimination on grounds of age […] *is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement* […] *to ask the Court of Justice of the European Union for a preliminary ruling on*

[30] C-555/07, *Kücükdeveci v Swedex* [2010] ECLI:EU:C:2010:21.
[31] Bram van der Bruggen, 'The Charter and Creeping Competences - The fear of the Member States for the Charter of Fundamental Rights' (Tilburg University 2011) 31.
[32] TEU (n 2) Article 6(1).
[33] *Kücükdeveci v Swedex* (n 30).
[34] ibid, 17.
[35] ibid, 43 (emphasis added).

the interpretation of that principle.[36]

In this direct manner, the Court of Justice's judgement clearly gives direction to the national court, in cases where EU Law is concerned, and ultimately extends its effective sphere of influence as a Court of Justice, in a direct way, to the national courthouses of the Member States, going so far as precluding national courts from utilising the national legislation and directing them to disapply national constitutional legislation, when in conflict with Primary Treaty, or in this case, Charter Law. This judgement was also particular in the way it created a precedent for a 'retroactive effect' of interpretation of the Charter, as the specific contents of the case itself predated the actual implementation of the Charter.[37] Van der Brugger, in his thesis concerning the indirect growth of competence, when commenting on the validity of this judgement in the light of the Union and Court's competences argues that in the manner by which the Court gave such 'retroactive effect' to this judgement, the Court was acting somewhat atypically. Instead it acted in a manner more akin to that of 'a typical constitutional court in the years after its creation in the sense that it cannot disregard fundamental rights whenever applicable.'[38]

What one can start to see, in an analysis of the case-law and particularly the judgements in the preliminary rulings of the Court over the years, is a pattern which has characterised the development of the Court and, by proxy, the Union up to its current state - one which in many ways has sacrificed the traditional establishment and the competing influences and authoritative legitimacy of the traditional multitude of European states, and, through the entrenchment of the EU and its strengthening via the function of its institutions; the Court, in this instance, has seen for a drastic slide in the decision-taking power moving from one side to the other, from the singular to the collective. This has mired such a subject in controversy at times, and the function of the European Court vis-à-vis its supreme legal standing and its decision taking capacities on behalf of the Member States, has been showered by its fair share of critics, often highlighting the very core issues of legitimacy and democracy.

According to Weiler, a 'democracy deficit' problem, as a result of the 'serious "dumbing down" of democracy and its meaning by the European Court,' becomes a more flagrant and serious 'chronic' issue, eating away at the legitimacy of the Court's decisions and its authority as a legal body.[39] To quote:

[36] ibid, 56.

[37] Bram van der Bruggen (n 31) 32.

[38] ibid, 32, where he goes on to make a striking comparison of this Court's functions in this manner to those of the Federative United States Supreme Court.

[39] Joseph H. H. Weiler, 'Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual', from Conference Proceedings: *50th Anniversary of the Judgement of Van Gend en Loos 1963-2013* (13 May 2013) 17-20.

> [While] it is perfectly understood that the Union is not a State […] [the EU] is in the business of governance and has taken over extensive areas previously in the hands of the Member States[…] Democracy is not about States. Democracy is about the exercise of public power - and the Union exercises a huge amount of public power. We live by the credo that any exercise of public power has to be legitimated democratically and it is exactly here that process legitimacy fails.[40]

He goes on to call the form of European governance a 'governance without Government,' one that is perhaps 'not designed for political accountability.'[41]

The case-law reflects this, and unequivocally attempts to build a central juridical doctrinal order ensuring the efficient and universal application of the various articles of the Treaties, and creating a uniform interpretation in as much as possible. It is this very 'legally active' approach, which has seen the scope and influence of the Court grow so drastically.[42] The activism of the Court in this manner, through its productivity and the proactive drive it has taken throughout its history and via the exclusivity of its medium of interpretation of the highest law, has given it significant power and influence. The application of Treaty law has also effectively empowered the individuals making up the populations of the Member States to act as watchdogs and in a way - to paraphrase ***Van Gend & Loos*** - expects that the individual's 'vigilance' with respect to the protection of their rights insofar as the Articles of the Treaties provide 'amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States'.[43]

The Court in its function has therefore raised the essential standing of the individual in the EU. It goes without saying that one cannot have a European Union without Member States, nor can one have a European project of this scale and ambition working towards attaining common goals and principles, without the effective side-lining of state and national sovereignty for the sake of the practical concerns which a project of such scope demands. Thereby evidently, we have what Joseph H. H. Weiler succinctly puts as a trade-off positively affecting the 'economic interests of individuals' at the expense of a questionable democratic legitimacy of the state and the national courts.[44] Whether this is clear or not to the individuals at the heart of this development, is unclear.

[40] ibid, 18.
[41] ibid, 18-19.
[42] Bram van der Bruggen (n 31) 31-34, 41.
[43] *Van Gend & Loos* (n 1) 13.
[44] Joseph H. H. Weiler (n 39) 20.


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