

**‘Extra-Legal Steadying Factors’ in
the Article 267 TFEU Preliminary
Reference Procedure**

**A thesis submitted for the Degree of Doctor of
Philosophy in Law by**

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Abstract - 'Extra-Legal Steadying Factors' in the Article 267 TFEU Preliminary Reference Procedure - John Cotter

This dissertation presents the thesis that there are 'extra-legal steadying factors' in the EU legal system and the preliminary reference procedure that serve to reduce significantly the impact of obstacles to 'legal certainty', or put differently, promote 'reconability' in the Article 267 TFEU procedure. In advancing this thesis, the dissertation utilises the theories of Llewellyn in *The Common Law Tradition: Deciding Appeals* (1960), devised in the context of American appellate courts. Llewellyn's fourteen 'steadying factors' are categorised, consistent with existing scholarship, as 'legal' (the normative character of 'legal doctrine' and 'known doctrinal techniques') and 'extra-legal'. The dissertation focusses on the role of the latter in preliminary references, and sub-categorises them as 'internal', 'external' and 'procedural'. The dissertation also emphasises, as an important result of the thesis, that Llewellyn's 'steadying factors', or at least those examined herein, are capable of application outside of the American appellate court context (the 'applicability by-product').

Part One analyses the only 'internal extra-legal steadying factor' testable to any extent, 'law-conditioned officials'. It is accepted, with some reservation, that 'law conditioning' should generally lead to an internalised acceptance by judges of the 'legal steadying factors' and of values that underpin the legal system in which judges work. Llewellyn's definition of a 'law-conditioned official' is recast into a three-level model, and formalist and realist analyses of the 'law conditioning' of the past and present Court of Justice Judges is conducted. Having examined the legal rules on appointments (the formalist analysis) and assessed the Judges' educational and professional backgrounds (the realist analysis), Part One concludes that all but two of the Judges have been 'law-conditioned officials'. It is further concluded that the current Judges share such commonalities in their backgrounds that they may be described as 'EU lawyers'. Part Two examines the sole applicable 'external extra-legal steadying factor', 'judicial security and honesty'. A hypothesis is drawn that suggests that the Court and its Judges are sufficiently independent of their 'countervailing powers' that they cannot be shaken from their adherence to the 'legal steadying factors', whilst being simultaneously so accountable to these 'powers' that they are disincentivised significantly from abandonment of such adherence. This hypothesis is again assessed by formalist and realist analyses: the former examines legal rules that purport to ensure the Court's independence and accountability; the latter, through the conceptualisation of four adjudicative 'scenarios' and utilisation of political science theories of the Court's position vis-à-vis its 'countervailing powers', tests the extent to which the hypothesis holds true pragmatically. Part Three assesses all six 'procedural extra-legal steadying factors' in the Article 267 TFEU procedure context: 'an opinion of the court'; 'a frozen record from below'; 'issues limited, sharpened, phrased'; 'adversary argument by counsel'; 'group decision'; 'a known bench'. These 'steadying factors', which arise through the operation of procedural rules and practices, are applied to the preliminary reference procedure in the chronological order in which they occur typically.

The dissertation concludes that the 'extra-legal steadying factors' studied serve to promote 'reconability' in the Article 267 TFEU procedure by, *inter alia*, (1) reinforcing the pressures of the 'legal steadying factors'; (2) narrowing the number of conceivable outcomes; and, (3) providing various 'signposts' to the lawyer attempting to forecast prospective judicial interpretations. The dissertation concludes also that those of Llewellyn's 'steadying factors' studied are capable of application to contexts outside of that for which they were devised, even if the 'steadying factors' may require some alteration or refinement, and even if some of them contribute to 'reconability' in a manner different to that described by Llewellyn.

DECLARATION

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

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John Cotter

23rd February 2017

SUMMARY

This dissertation presents the thesis that there are ‘extra-legal steadying factors’ in the EU legal system and the preliminary reference procedure that serve to reduce significantly the impact of obstacles to ‘legal certainty’, or put differently, promote ‘reckonability’ in the Article 267 TFEU procedure. As a significant result of this thesis, the dissertation emphasises that Llewellyn’s ‘steadying factors’ in *The Common Law Tradition: Deciding Appeals* (1960), or at least those examined herein, are capable of application outside of the American appellate court context (the ‘applicability by-product’).

Based on Llewellyn’s ‘descriptive thesis’ in *The Common Law Tradition*, this dissertation proposes that there are ‘steadying factors’ in the preliminary reference procedure that serve to promote ‘reckonability’ of outcome. Llewellyn’s fourteen ‘steadying factors’ are then categorised as ‘legal’ and ‘extra-legal’ in a manner consistent with existing scholarship. The ‘extra-legal steadying factors’ are further sub-categorised as ‘internal’, ‘external’ and ‘procedural’. The dissertation proceeds from the ‘first principle’ that the pressures exerted by the ‘legal steadying factors’ (the normative character of ‘legal doctrine’ and ‘known doctrinal techniques’) constitute the first and most significant limitation on the Court of Justice. However, the dissertation asserts that the operation of the ‘legal steadying factors’ depends upon the existence of ‘extra-legal steadying factors’, the latter of which this dissertation explores.

Part One analyses the only ‘internal extra-legal steadying factor’ that is testable to any extent, ‘law-conditioned officials’. It is accepted, with some reservation, that ‘law conditioning’ should generally lead to an internalised acceptance by judges of the normative character of the ‘legal steadying factors’ and of values that underpin the legal system in which judges work. Llewellyn’s definition of a ‘law-conditioned official’ is recast into a three-level model, and formalist and realist analyses of the ‘law conditioning’ of the past and present Judges of the Court of Justice is conducted. Having examined the legal rules regulating appointments (the formalist analysis) and assessed the Judges’ educational and professional backgrounds (the realist analysis), it is concluded that all but two of the ninety-seven Judges have been ‘law-conditioned officials’. Moreover,

Part One concludes that the current Judges share such commonalities in their backgrounds that they may be described as ‘EU lawyers’.

Part Two examines the sole applicable ‘external extra-legal steadying factor’, ‘judicial security and honesty’. A hypothesis is drawn which suggests that the Court and its Judges are sufficiently independent of their ‘countervailing powers’ that they cannot be shaken from their adherence to the ‘legal steadying factors’, whilst being simultaneously so accountable to these ‘powers’ that they are disincentivised significantly from abandonment of such adherence. This hypothesis is again assessed by means of formalist and realist analyses: the formalist analysis examines EU legal rules that purport to ensure the Court’s independence and accountability; the realist analysis, through the conceptualisation of four adjudicative ‘scenarios’ and utilisation of political science theories of the Court’s position vis-à-vis its ‘countervailing powers’, tests the extent to which the hypothesis holds true in a pragmatic sense.

Part Three assesses all six of the ‘procedural extra-legal steadying factors’ in the context of the preliminary reference procedure: ‘an opinion of the court’; ‘a frozen record from below’; ‘issues limited, sharpened, phrased’; ‘adversary argument by counsel’; ‘group decision’; ‘a known bench’. These ‘steadying factors’, which arise by reason of the operation of procedural rules and practices, are analysed in the context of the preliminary reference procedure in the chronological order in which they occur in the procedure.

The dissertation concludes that the ‘extra-legal steadying factors’ studied serve to promote ‘reconability’ in the Article 267 TFEU procedure by, *inter alia*, (1) reinforcing the pressures of the ‘legal steadying factors’; (2) narrowing the number of conceivable outcomes; and, (3) providing various ‘signposts’ to the lawyer attempting to forecast prospective judicial interpretations. The dissertation concludes also that Llewellyn’s ‘descriptive thesis’ is capable of application to contexts outside of that for which it was devised, even if the ‘steadying factors’ may require some alteration or refinement, and even if some ‘steadying factors’ contribute to ‘reconability’ in a manner different to that described by Llewellyn.

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To Elaine and Rosa

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TABLE OF ABBREVIATIONS

CFREU	Charter of Fundamental Rights of the European Union
Ch	Chancery Reports
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Reports
COREPER	Committee of Permanent Representatives in the European Union
EC	European Communities
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EHRR	European Human Rights Reports
EPC	European Policy Centre
EU	European Union
Euratom	European Atomic Energy Community
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILO	International Labour Office
IRLR	Industrial Relations Law Reports
OECD	Organisation for Economic Co-operation and Development
RP	Rules of Procedure of the Court of Justice
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
US/USA	United States of America

I. Obstacles to ‘Legal Certainty’ in the Article 267 TFEU Preliminary Reference Procedure

The principle of ‘legal certainty’ has been described as “express[ing] the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly.”¹ The principle is important for a number of inter-related moral and pragmatic reasons implicit in this description. ‘Legal certainty’ is a core promise of the rule of law.² Implied or express in many theoretical constructions of the rule of law, in turn, is a requirement that a legal system guarantee legal foreseeability.³ Such foreseeability in the law allows citizens to ensure their planned behaviour aligns with the law’s requirements. The economic benefits of ‘legal certainty’ should, therefore, be obvious.⁴

The principle of ‘legal certainty’ is neither a modern creation nor of especial cultural specificity. The Roman legal system appears to have understood the

¹ Tridimas, T., *The General Principles of EC Law* (Oxford: Oxford University Press, 1999), p. 163. See also, Maxeiner, J.R., “Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law”, (2006) 41 *Valparaiso University Law Review* 517.

² Casper, G., “Rule of Law? Whose Law?”, (Center on Democracy, Development and the Rule of Law, Working Paper No. 10, 2004); Maxeiner, J.R., “Some Realism about Legal Certainty in the Globalization of the Rule of Law”, (2008) 31(1) *Houston Journal of International Law* 27, at 30 and fn. 15. The Foreign Ministers of the G8 in declaring their dedication to the rule of law stated that it is “imperative to adhere to the principle[] ... of legal certainty.” (<http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/texts/summit/20070530.D2E.html>) (last accessed on Tuesday, the 9th February 2016 at 10:22) (cited by Maxeiner, J.R., “Some Realism about Legal Certainty in the Globalization of the Rule of Law”, (2008) 31(1) *Houston Journal of International Law* 27, at 28, fn. 2).

³ For instance, Zolo’s argument that a state must guarantee foreseeability in the law (Zolo, D., “The Rule of Law: A Critical Appraisal” in Costa, P. and Zolo, D. (eds.), *The Rule of Law: History, Theory and Criticism* (Dordrecht: Springer, 2007), p. 3) (cited by Maxeiner, J.R., *supra* n. 2, at 30, fn. 15). See also Raz’s formal conception of the rule of law that requires prospectivity, openness, clarity and relative stability in the law (Raz, J., “The Rule of Law and its Virtue”, (1977) 93 *Law Quarterly Review* 195). Even Dicey’s substantive conception of the rule of law implies a modicum of foreseeability: in his first aspect of the rule of law, Dicey states “that no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land.” (Dicey, A.V., *Introduction to the Study of the Constitution* (London: Macmillan & Co, 10th ed., 1959), pp. 187-195) (cited in Le Sueur, A., Sunkin, M. and Murkens, J.E.K., *Public Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2nd ed., 2013), p. 85).

⁴ “Economic and commercial life is based on advanced planning so that clear and precise legal provisions reduce transaction costs and promote efficient business.” (Tridimas, T., *supra* n. 1, p. 163, citing Sharpston, E., “Legitimate Expectations and Economic Reality”, (1990) 15 *European Law Review* 103).

importance of ‘legal certainty’.⁵ In more modern times, the Foreign Ministers of the G8⁶ and the OECD⁷ have recognised its significance. Philosophers such as Radbruch⁸ and Bendix⁹ have espoused the centrality of the concept in law, and it has been described as “a fundamental principle of the national legal systems of Europe”¹⁰. Moreover, Raitio has asserted that the principle of ‘legal certainty’ has made its way into common law legal systems.¹¹

In the EU legal system, the principle of ‘legal certainty’ attains even greater profundity, a fact evidenced by its position as a general principle of EU law.¹² The Court of Justice¹³ has ruled that ‘legal certainty’ requires that “the effect of [Union] legislation must be clear and predictable for those who are subject to it.”¹⁴ Writing extra-judicially, President of the Court Lenaerts has opined that the Court has striven “to achieve overall consistency in judicial decision-

⁵ Leoni, B., *Freedom and the Law* (Indianapolis: Liberty Fund, 3rd ed., 1991) (http://oll.libertyfund.org/titles/920#Leoni_0124b_270) (last accessed on Tuesday, the 9th February 2016 at 10:49): “The Romans accepted and applied a concept of the certainty of the law that could be described as meaning that the law was never to be subjected to sudden and unpredictable changes. Moreover, the law was never to be submitted, as a rule, to the arbitrary will or to the arbitrary power of any legislative assembly or of any one person, including senators or other prominent magistrates of the state. This is the long-run concept, or, if you prefer, the Roman concept, of the certainty of the law.”

⁶ *Supra* n. 2. The G8 contains legal systems as diverse as the Canada, France, Germany, Italy, Japan, Russia and the UK.

⁷ OECD Development Assistance Committee, *Issues Brief: Equal Access to Justice and the Rule of Law* (2005) (cited by Maxeiner, J.R., *supra* n. 2, at 30, fn. 16).

⁸ Leawoods, H., “Gustav Radbruch: An Extraordinary Legal Philosopher”, (2000) 2 *Washington University Journal of Law and Policy* 489, at 493 (cited by Maxeiner, J.R., *supra* n. 2, at 30-31, fn. 21).

⁹ Bendix, L., *Das Problem der Rechtssicherheit: zur Einführung des Relativismus in die Rechtsanwendungslehre* (Berlin: Heymann, 1914) (cited by Maxeiner, J.R., *supra* n. 2, at 31, fn. 22).

¹⁰ Maxeiner, J.R., *supra* n. 2, at 31. It is, for instance, *Rechtssicherheit* in Germany, *sécurité juridique* in France (see Maxeiner, *supra* n. 2, at 31-32).

¹¹ Raitio, J., *The Principle of Legal Certainty in EC Law* (Dordrecht: Springer, 2003), p. 127.

¹² See generally, Tridimas, T., *supra* n. 1, pp. 163-201.

¹³ The Court of Justice is the most senior of the three constituent courts that make up the Court of Justice of the European Union (CJEU), the other two being the General Court, formerly the Court of First Instance, and the Civil Service Tribunal. Although Article 256 TFEU confers upon the General Court jurisdiction “to hear and determine questions referred for a preliminary hearing under Article 267, in specific areas laid down by the Statute”, the Court of Justice retains exclusive jurisdiction over Article 267 TFEU preliminary references since no such allocation of jurisdiction to the General Court has occurred. This dissertation, concerned as it is with the steadiness of preliminary rulings, will concern itself with the Court of Justice. References to the ‘Court of Justice’ or ‘the Court’ should be read as references to the Court of Justice as a constituent of the Court of Justice of the European Union, which hereinafter is referred to as ‘the CJEU’. All factual or legal assertions made in this dissertation are correct as of the 16th June 2016.

¹⁴ Joined Cases 212-17/80 *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others; Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato* [1981] ECR 2735, para 10. See Tridimas, T., *supra* n. 1, pp. 165-166.

making as a basis for its legitimacy.”¹⁵ The general principle of ‘legal certainty’ in EU law is linked inextricably to what is perhaps the arch-principle of the EU legal system: the uniform interpretation and application of EU law throughout all twenty-eight Member States.¹⁶ The interface between uniformity and ‘legal certainty’ is nowhere better exemplified in the EU legal system than in the preliminary reference procedure.¹⁷ This procedure, provided for by Article 267 TFEU, grants the Court of Justice jurisdiction to provide rulings on questions concerning the interpretation of the Treaties or acts of the institutions, bodies, offices or agencies of the EU, as well as questions concerning the validity of the latter, referred by national courts or tribunals.¹⁸ The Court of Justice, realising early in its history that the uniform application of EU law would depend upon its faithful application in a national context by Member State courts and tribunals, transformed the preliminary reference procedure from a bilateral procedure, in which rulings were addressed to the referring national court or tribunal only, into a multilateral procedure, in which rulings would serve as authoritative interpretations of EU law addressed to all national courts and tribunals.¹⁹ The effect of the Court’s rulings in cases such

¹⁵ Lenaerts, K., “How the ECJ Thinks: A Study on Judicial Legitimacy”, (2013) 36 *Fordham International Law Journal* 130, at 1304.

¹⁶ This is evident in the reasoning of the Court of Justice in Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, in which the Court ruled that it had sole jurisdiction to determine whether Union measures are valid. See Tridimas, T., *supra* n. 1, p. 167.

¹⁷ The Court of Justice stated in Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, para 2 that the then Article 177 (now Article 267 TFEU) preliminary reference procedure is “essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.”

¹⁸ Article 267 TFEU provides: “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”

The procedural aspects of Article 267 TFEU are discussed in greater detail in Part Three of this dissertation.

¹⁹ Craig, P. and de Búrca, G., *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 6th ed., 2015), p. 465. See also, Alter, K., “Who are the ‘Masters of the Treaty’? European Governments and the European Court of Justice”, (1998) 52(1) *International Organization* 121, at 133-135.

as *Da Costa*²⁰ and *CILFIT*²¹ was to raise the Court to the apex of a system of EU courts and render its preliminary rulings sources of law, binding on the national courts and tribunals in a manner akin to common law precedent.²² The preliminary rulings of the Court of Justice, therefore, in taking on a wider and forward-looking normative function designed to inform and guide national judges in their interpretation and application of EU law should, in the same way as EU legislation, “be clear and predictable for those who are subject to [them]”.²³

Notwithstanding the vaunted aim of ‘legal certainty’, it should be obvious that ‘certainty’, at least in the sense of its literal meaning, is not achievable.²⁴ Laws and judgments are communicated through language, and language has well-acknowledged limitations in communicating objective meaning.²⁵ Though a

²⁰ Case 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* [1963] ECR 31. In this case, the facts of which resembled closely those of the famous *Van Gend en Loos* preliminary reference (Case 26/62 *Van Gend en Loos* [1963] ECR 13), the Court of Justice ruled that in circumstances where the question being raised by a preliminary reference is materially identical to a question which has already been the subject of a preliminary ruling in a similar case, a national court or tribunal of final instance, which is otherwise required by the third paragraph of Article 267 TFEU to refer, may rely on the Court’s previous ruling rather than making a reference.

²¹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415. The impact of this case is described succinctly by Craig and de Búrca as follows: “A previous ruling [of the Court of Justice] can ... be relied on [by a national court or tribunal] even if it did not emerge from the same type of proceedings, and even though the questions at issue were not strictly identical.” (Craig, P. and de Búrca, *supra* n. 19, p. 473).

²² Although, in Case 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* [1963] ECR 31, the Court of Justice did give national courts the option of seeking a new ruling on a point already decided by the Court of Justice. For an account of the effect of judgments of the Court of Justice as precedent for the national courts, see Brown, L.N. and Kennedy, T., *Brown & Jacobs: The Court of Justice of the European Communities* (London: Sweet & Maxwell, 5th ed., 2000), pp. 377-381. The character of previous preliminary rulings as precedent is also implicit in Article 99 of the Rules of Procedure of the Court of Justice, which allows the Court to forego an oral hearing and formal opinion of the Advocate General and deliver a reply by reasoned order where the reply “may be clearly deduced from existing case-law.”

²³ *Supra* n. 14. One is reminded of Lord Bingham’s assertion (in the context of common law courts) that the requirement of predictability applies to both the legislature and the courts (Bingham, T., “The Rule of Law”, (2007) 66 *Cambridge Law Journal* 67, at 70). See also, Bingham, T., *The Rule of Law* (London: Allen Lane, 2010).

²⁴ See generally, Beck, G., *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2012), pp. 52-114.

²⁵ While it is beyond the scope of this dissertation to engage with the philosophical work on this problem, it would seem that it has been an area of intense enquiry for German philosophers. The eighteenth century philosopher Johann Georg Hamann perhaps expressed the limitations of language best: “Not only the entire ability to think rests on language... but language is also the crux of the misunderstanding of reason with itself.” (Nadler, J. (ed.), *Sämtliche Werke*, (1949-1957), vol. III, p. 286). In the twentieth century, building upon the earlier work of Martin Heidegger, Hans-Georg Gadamer rejected the idea that the meaning of a text could be ascertained by attempting to uncover the original intention of the author; rather, meaning is gleaned from the interpreter’s subjective engagement with the text. Gadamer’s

legal rule may afford a greater or lesser degree of leeway to the interpreter, there appears no way in which matters of economic or societal complexity can be regulated through language without some concession to certainty: the more detailed and technically-worded the rule, the more scope there may be for confusion; the more abstract and simplistically-worded the rule, the more space it will leave for interpretative creativity and subjectivity.²⁶ The most obvious evidence of the unattainability of ‘legal certainty’ is the very existence of judiciaries to mediate on disputes on the meaning of laws, and the existence of lawyers to advise citizens as to how to avoid such disputes and, where necessary, how the courts are likely to determine them.

However, the obstacles to objective ‘legal certainty’ do not originate just from the limitations *within* legal doctrine itself (what may be termed ‘legal obstacles’). As implied in the previous paragraph, the degree of legal uncertainty created by, *inter alia*, the limitations of language has created the judicial and legal professions. The activity of rule interpretation by these professions has, in turn, added further obstacles to ‘certainty’ existing *outside* of legal doctrine itself, which we may term ‘extra-legal obstacles’.²⁷ The

theory of philosophical hermeneutics is therefore a rejection of the idea that a text has an objective meaning. See generally, Gadamer, H.-G., *Wahrheit und Methode* (Tübingen: Mohr, 1960); Warnke, G., *Justice and Interpretation* (Massachusetts: MIT, 1993); Weinsheimer, J.C., *Gadamer’s Hermeneutics* (New Haven: Yale University, 1999). On the contribution of linguistic vagueness to legal uncertainty, see Beck, G., *supra* n. 24, pp. 52-75.

²⁶ This is a conundrum that was recognised by Napoleon Bonaparte in his noble efforts to create a French civil code of such detail, clarity and accessibility that it would render subjective interpretation impossible: “I often perceived that over-simplicity in legislation was the enemy of precision. It is impossible to make laws extremely simple without cutting the knot oftener than you untie it, and without leaving much to incertitude and arbitrariness.” (Lobingier, C.S., “Napoloen and His Code”, (1918) 32(2) *Harvard Law Review* 114, at 129). By the time the Code Commission was finishing its work on Napoleon’s civil code, he had come to realise that the “[reduction of] laws to simple geometrical demonstrations, so that whoever could read and tie two ideas together would be capable of pronouncing on them ... was an absurd idea.” (Lobingier, C.S., “Napoloen and His Code”, (1918) 32(2) *Harvard Law Review* 114, at 126). Frank summed up this problem succinctly: “[Simplicity] implicates flexibility, while precision leads in the direction of rigidity and completeness.” (Frank, J., *Law and the Modern Mind* (London: Stevens & Sons Limited, 1949), p. 310).

²⁷ The designation of ‘legal’ and ‘extra-legal obstacles’ to ‘legal certainty’ is of some importance in this dissertation. As will become apparent, the dissertation relies on Llewellyn’s ‘steadying factors’ drawn in the context of the American appellate courts (Llewellyn, K.N., *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960) to argue that there are factors that contribute to ‘reckonability’ or steadiness in preliminary reference outcomes. These ‘steadying factors’ are divided into ‘legal’ and ‘extra-legal steadying factors’, with the dissertation focussing on the identification of and contribution of the latter to the steadiness of preliminary rulings. It should be noted that in his work on the legal reasoning of the CJEU, Beck also draws upon Llewellyn’s ‘steadying factors’ and creates his own distinction between ‘legal’ and ‘extra-legal steadying factors’, though the factors he discusses are not Llewellyn’s (see Beck, G., *supra* n. 24). The author of this dissertation had been using

identification of these ‘extra-legal obstacles’ and their isolation for study was perhaps one of the more significant contributions of American legal realism to legal thought.²⁸ Firstly, the activity of interpretation is performed by human beings, whether acting alone or in a group. This fact introduces the influence of individual values, prejudices, methods and other idiosyncrasies to interpretation (or ‘internal extra-legal obstacles’).²⁹ Secondly, those persons charged with interpreting the meaning of laws may in exercising their task be subjected to external pressures, legitimate and illegitimate, known and unknown.³⁰ These ‘external extra-legal obstacles’ may also influence interpretative outcomes in ways that may not be apparent to observers.³¹ Thirdly, the task of interpretation does not take place in a vacuum: rather, rules are generally interpreted to be applied to factual situations and changing economic and societal conditions.³² The factual situation must be determined before the appropriate rule is interpreted and applied to it. The vagaries of fact-finding and determination as sources of legal uncertainty were perhaps elucidated best by Frank, who argued that the major cause of legal uncertainty

the concepts of ‘legal’ and ‘extra-legal constraints and influences’ prior to the publication of Beck’s book in December 2012 (for instance, at a colloquium at the University of Rostock in March 2012).

²⁸ American legal realism, which arguably reached its peak of influence in the 1920s and drew inspiration from American pragmatist philosophers such as John Dewey (1829-1952) and jurists such as Oliver Wendell Holmes (1841-1935), may be seen as a revolt against legal formalism, an orthodoxy which proclaimed that adjudication was done with reference to rules alone and that the law could be derived solely from its sources. The realists argued that legal disputes were not settled by rules alone and that any attempt to achieve legal certainty would have to take account of extra-legal factors such as judicial bias and the contemporary conditions in which the case was being decided. Prominent realists included Jerome Frank (1889-1957), Underhill Moore (1879-1949) and, of course, Karl Llewellyn (1893-1962). A useful introduction is provided to American legal realism in chapter 9 of Freeman, M.D.A., *Lloyd’s Introduction to Jurisprudence* (London: Sweet & Maxwell, 2001), at pp. 799-853. See also, Fisher, W.W., Horwitz, M.J. and Reed, T.A., (eds.), *American Legal Realism* (Oxford: Oxford University Press, 1993); Bix, B.H., *A Dictionary of Legal Theory* (Oxford: Oxford University Press, 2004), pp. 3-5).

²⁹ See, for instance, Frank’s thoughts on the “personal equation” (Frank, J., *supra* n. 26, pp. 142-143); Oliphant, H., “A Return to Stare Decisis” in Fisher, W.W., Horwitz, M.J. and Reed, T.A., (eds.), *supra* n. 28, p. 199, at p. 201; Kennedy, D., *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997).

³⁰ See, for instance, Llewellyn on ‘judicial security and honesty’ as a ‘steadying factor’ (Llewellyn, K.N., *supra* n. 27, pp. 32-33).

³¹ The ‘internal’ and ‘external’ nomenclature here is drawn from Posner’s description of “internal” and “external constraints on judging” (Posner, R.A., *How Judges Think* (Cambridge: Harvard University Press, 2008), pp. 125-203). Again, the designation of ‘internal’ and ‘external extra-legal obstacles’ to ‘legal certainty’ is of importance in this dissertation. As will become evident, the ‘extra-legal steadying factors’ identified and described in this dissertation are divided into three sub-categories: (1) ‘internal extra-legal steadying factors’; (2) ‘external extra-legal steadying factors’; and (3) ‘procedural extra-legal steadying factors’. It should be noted that Beck also refers to ‘internal’ and ‘external steadying factors’ (Beck, G., *supra* n. 24, p. 42).

³² See, for instance, Oliphant, H., *supra* n. 29.

“is fact uncertainty – the unknowability, before the decision, of what the court will ‘find’ as the facts, and the unknowability after the decision of the way in which it ‘found’ those facts.”³³ There is also a host of other case-by-case variables that may impact on the eventual outcome: the quality of counsel and the arguments being proffered by them³⁴; whether the decision is to be made by a single judge or a panel of judges³⁵; whether the lawyers will know the identity of the judge or judges prior to framing their legal arguments³⁶; whether the matter will be dealt with by way of written pleadings and/or an oral hearing³⁷, etc. These obstacles to ‘legal certainty’ may be referred to as ‘procedural extra-legal obstacles’.

Each of the ‘legal’ and ‘extra-legal obstacles’ to ‘legal certainty’ identified heretofore would appear to be heightened in the context of the EU legal system, generally, and in the preliminary reference procedure, specifically.

The ‘legal obstacles’ are considerable. Firstly, the unique character of the EU legal system with its twenty-eight Member States and twenty-four official working languages³⁸ serves to create greater divergence in terms of uniform interpretation of legal norms than would be the case in a mono-linguistic legal system.³⁹ Secondly, as Arnall observes, the manner in which EU law is often drafted results in norms of lesser precision than might be expected from the national laws of many Member States, with a consequent gain in scope for

³³ Frank, J., *supra* n. 26, p. xii.

³⁴ Llewellyn, K.N., *supra* n. 27, pp. 29-31.

³⁵ Llewellyn, K.N., *supra* n. 27, pp. 31-32.

³⁶ Llewellyn, K.N., *supra* n. 27, pp. 34-35.

³⁷ Llewellyn, K.N., *supra* n. 27, p. 29.

³⁸ Article 1 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community. Article 1 was last amended by Council Regulation (EU) No 517/2013, which added Croatian as the twenty-fourth official language of the EU.

³⁹ For a treatment of this issue, see: Paunio, E., *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (London: Ashgate, 2013); McAuliffe, K., “The Limitations of a Multilingual Legal Order”, (2013) 26(4) *International Journal for the Semiotics of Law* 861; McAuliffe, K., “Precedent at the ECJ: The Linguistic Aspect”, (2013) 15 *Current Legal Issues* 483; McAuliffe, K., “Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ” in Solan L. and Tiersma P. (eds), *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press, 2012); McAuliffe, K., “Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union”, (2011) 24(1) *International Journal for the Semiotics of Law* 97; McAuliffe, K., “Enlargement at the European Court of Justice: Law, Language and Translation”, (2008) 14(6) *European Law Journal* 806; Arnall, A., *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2nd ed., 2006), pp. 174-175 and pp. 608-611.

judicial intervention to fill *lacunae*.⁴⁰ This will particularly be the case where Treaty provisions are to be interpreted, since the Treaties as *de facto* constitutional documents cannot be expected “to foresee all possible consequences that may arise and to provide for them”, their role being rather to lay down “general principles” and to express their “aims and purposes”.⁴¹ Moreover, EU acts are the result of significant inter-governmental and/or inter-institutional compromise of competing values, which may result in vague law.⁴² Thirdly, there is the increased likelihood of what Beck, drawing on the ideas of Isaiah Berlin, calls ‘value pluralism’ as the competences of the EU have grown with each amending Treaty: Rasmussen’s 1986 suggestion that simply taking into account the Court’s pro-Community bias would assist predictability of the Court’s rulings appears outdated in an era where human rights protected at Treaty level by the CFREU may come into conflict with the four economic freedoms.⁴³

The ‘extra-legal obstacles’ are no less daunting. Firstly, in terms of ‘internal extra-legal obstacles’, the judges charged with interpreting EU law at both national and supranational level come from a variety of linguistic, cultural and legal-cultural backgrounds which may serve to enhance the idiosyncrasies introduced by judicial personality into adjudication. Secondly, in the context of ‘external extra-legal obstacles’, it could be argued that the CJEU as a supranational institution having working relationships with multi-level actors at sub-national, national and supra-national level operates in a far more complex institutional environment, thereby exposing it to greater, and perhaps less

⁴⁰ Arnulf, A., *supra* n. 39, pp. 611-620.

⁴¹ The author of the dissertation is here quoting the rather infamous tirade of Lord Denning MR in *Bulmer Ltd v Bollinger SA* [1974] Ch 410, at 425 somewhat out of context: “The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them... How different is this Treaty! It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or Directives. It is the European way ... much is left to the judges. The enactments give only an outline plan. The details are to be filled in by the judges.” See also, Beck, G., *supra* n. 24, pp. 183-184.

⁴² See Beck, G., *supra* n. 24, pp. 175-180 on ‘value pluralism’ in the context of the EU legal system.

⁴³ Rasmussen, H., *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986), p. 36. Although Rasmussen did at the time realise that this situation was in the process of changing (p. 49, n. 31). See Phelan, D.R., “Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union”, (1992) 55(5) *Modern Law Review* 670; Beck, G., *supra* n. 24, pp. 175-180.

transparent, external constraints and influences than is the case with national judiciaries. Thirdly, with reference to ‘procedural extra-legal obstacles’, the expansion of the EU in terms of the number of Member States has also led to a growth in the number of the Judges at the Court of Justice, as well as in the workload of the Court.⁴⁴ The increased number of Judges and preliminary references has in turn led to a fragmentation of the Court into chambers, increasing the danger of a resulting fragmentation in decision-making.⁴⁵ Furthermore, while preliminary rulings may serve as interpretative precedents for national courts and tribunals, the Court of Justice has demonstrated a preparedness to disregard its earlier rulings in a much more liberal manner than would be expected of a supreme court in a common law jurisdiction.⁴⁶ Most significant, however, is the fact that preliminary references should by definition be ‘hard cases’: a properly made reference should be the result of a national court or tribunal being unsure of the validity or correct interpretation of an EU norm.⁴⁷

The obstacles presented and described above demonstrate that ‘legal certainty’, at least if one is to adopt a literal meaning of the word ‘certainty’, does not

⁴⁴ Rasmussen, in 1992, also recognised this as a source of increasing disunity in the Court’s reasoning (Rasmussen, H., *supra* n. 43, p. 141).

⁴⁵ Rasmussen, *supra* n. 43, p. 141, n. 25. See also: Malecki, M., “Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgments of chambers”, (2012) 19(1) *Journal of European Public Policy* 59.

⁴⁶ The Court of Justice has on numerous occasions shown a preparedness to overrule its previous rulings. Broberg and Fenger provide the following examples: Case C-10/89 *Hag* [1990] ECR I-3711; Case C-268/91 *Keck and Mithouard* [1993] ECR I-6097; Case C-299/05 *Commission v Council and European Parliament* [2007] ECR I-8695; Case C-2/06 *Kempter* [2008] ECR I-411; Case C-119/06 *CELF* [2008] ECR I-469; Case C-127/08 *Metock* [2008] ECR I-6241. (Broberg, M. and Fenger, N., *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2nd ed., 2014), p. 453).

⁴⁷ Bengoetxea, J., “Text and Telos in the European Court of Justice”, (2015) 11 *European Constitutional Law Review* 184, at 189. However, the degree of doubt which must exist in the mind of the national court or tribunal is not specified by Article 267 TFEU. Therefore, in the case of courts and tribunals which are not obliged to refer under the third paragraph of Article 267 TFEU, i.e. courts or tribunals other than those of final instance, the national court or tribunal will have full discretion as to whether it should make a reference or not. The result is that many references which are made may not in fact be hard cases. This fact is reflected in Article 99 RP which provides: “Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.” However, of the 377 preliminary references completed in 2015, 296 (nearly 80%) were decided by Judgments (Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2016), p. 80). Alternatively, the referring court or tribunal may be of the view that the Court of Justice should revisit one of its earlier decisions.

exist generally or in the context of preliminary rulings specifically, nor can it be reasonably expected.⁴⁸ This is hardly a profound conclusion: while the concept of ‘legal certainty’ retains currency in Europe, the concept has fallen into disuse amongst legal academics and practitioners in the USA, who, it would appear, are resigned to ‘legal indeterminacy’.⁴⁹ ‘Legal indeterminacy’, however, is not the same as ‘legal uncertainty’: ‘uncertainty’ is accepted as a given, with the understanding that a quotient of ‘uncertainty’ will cause ‘indeterminacy’.⁵⁰ There is some disagreement in the USA as to the extent to which law is ‘indeterminate’. Maxeiner refers on the one hand to ‘radical indeterminacy’⁵¹, which views the law as “always infinite and never certain”⁵² and presents “law as nothing more than politics by another name”⁵³, and, on the other, ‘underdeterminacy’, which holds that “while the law constrains judicial decision, it does not uniquely determine it.”⁵⁴ The observation that ‘legal certainty’ in its literal sense does not exist, however, should not be so problematic as to threaten the adherence of a legal system or a specific court to the rule of law: the observation that there is no absolute ‘legal certainty’ is not probative of an argument that there exists a ‘radical indeterminacy’⁵⁵ or arbitrariness. This dissertation acknowledges that there may be significant uncertainty or ‘underdeterminacy’ in preliminary reference outcomes due to the role of the ‘legal’ and ‘extra-legal obstacles’ to ‘certainty’ identified above. However, drawing on the theories of Karl Llewellyn devised in the context of the American appellate courts, the dissertation asserts that the EU legal system and the preliminary reference procedure contain within them a number of

⁴⁸ The Oxford English Dictionary defines ‘certainty’ as: “1. That which is certain; the certain state of matters, the fact, the truth; a certain account. 2. A fact or thing certain or sure (with pl). 3. Assurance, surety, pledge. 4. The quality or fact of being (objectively) certain. 5. a. The quality or state of being subjectively certain; assurance, confidence; absence of doubt or hesitation; = certitude n. moral certainty: see moral adj. 7. b. with pl. A certain or definite number or quantity. 7. for, (in, at obs.), of, to (a) certainty: as a matter of certainty, beyond doubt, assuredly.” (“certainty, n.”. OED Online. December 2015. Oxford University Press. <http://www.oed.com/view/Entry/29979?redirectedFrom=certainty> (last accessed on Tuesday, the 5th January, 2016 at 14:25).

⁴⁹ Maxeiner, J.R., *supra* n. 2, at 28 and at 35-38.

⁵⁰ Lawson, G., “Legal Indeterminacy: Its Cause and Cure”, (1995-1996) 19(2) *Harvard Journal of Law & Public Policy* 411, at 416.

⁵¹ This thesis was generally advanced by the Critical Legal Studies movement.

⁵² Maxeiner, J.R., *supra* n. 2, at 35.

⁵³ Maxeiner, J.R., *supra* n. 2, at 35.

⁵⁴ Maxeiner, J.R., *supra* n. 2, at 36. Maxeiner points out astutely that this conclusion does not appear to differ greatly from the work of Llewellyn (Maxeiner, J.R., *supra* n. 2, at 36).

⁵⁵ The ‘radical indeterminacy’ thesis has been “dispatched” according to Maxeiner. He cites Kress, K., “Legal Indeterminacy”, (1989) 77 *California Law Review* 283 and Solum, B., “On the Indeterminacy Crisis: Critiquing Critical Dogma”, (1987) 54 *University of Chicago Law Review* 488 (Maxeiner, J.R., *supra* n. 2, at 35, fn. 64).

‘legal’ and ‘extra-legal steadying factors’ that contribute to reducing significantly the impact of these obstacles and to the steadying of outcomes.⁵⁶ The theories of Llewellyn and the ‘steadying factors’ are described and conceptualised in the paragraphs that follow.

II. ‘Steadying Factors’ in the Article 267 TFEU Preliminary Reference Procedure

This dissertation argues that there are a number of ‘steadying factors’ present in the EU legal system and the preliminary reference procedure that contribute to reducing significantly the impact of ‘legal’ and ‘extra-legal obstacles’ to ‘legal certainty’.⁵⁷ The concept of ‘steadying factors’ has been borrowed from the theories of the American legal realist Karl Llewellyn in his 1960 book *The Common Law Tradition: Deciding Appeals*⁵⁸, which were drawn in the context of the American appellate courts. The paragraphs that follow describe Llewellyn’s ‘descriptive thesis’ in this book, together with key concepts central to an understanding of these theories such as ‘reckonability’ and ‘steadying factors’. Thereafter, there is a consideration of existing criticisms of Llewellyn’s thesis, followed by an attempt to re-model this thesis in light of those criticisms adjudged to be warranted. The problems with the application of this re-modelled thesis to the Court of Justice are then considered.

⁵⁶ Beck, drawing on Llewellyn, has argued that ‘legal’ and ‘extra-legal steadying factors’ operate to contribute to some ‘reckonability’ at the CJEU (Beck, G., *supra* n. 24). However, Beck’s ‘extra-legal steadying factors’ differ from those of Llewellyn, and Beck’s definition of a ‘steadying factor’ seems confined to matters that help to ‘signpost’ how the CJEU might decide *within* the ‘legal doctrine’ in cases of uncertainty. In this dissertation, however, the concept of a ‘steadying factor’ denotes not only factors that ‘signpost’ rulings, but factors that reinforce the ‘steadying effect’ of the ‘legal steadying factors’.

⁵⁷ This argument is also made by Beck, himself drawing upon Llewellyn’s ‘steadying factors’ as conceptual apparatus (Beck, G., *supra* n. 24). It should be emphasised that this dissertation is in no way asserting that these ‘steadying factors’ *eliminate* the impact of the obstacles to ‘legal certainty’. There is, for instance, no suggestion that the political preferences of the Judges of the Court of Justice will not influence preliminary reference outcomes. There is empirical research emerging that suggests that the policy preferences of the members of the Court do influence behaviour at the Court, voting behaviour in the context of the Advocates General, and citations in the context of the Judges: see Frankenreiter, J., “Are Advocates General Political? Policy preferences of EU member state governments and the voting behavior of members of the European Court of Justice”, Working paper, ETH Zurich, Center for Law and Economics, 11th May 2016; Frankenreiter, J., “The Politics of Citations at the ECJ: Policy preferences of EU Member State governments and the citation behavior of members of the European Court of Justice”, Working paper, ETH Zurich, Center for Law and Economics, 11th May 2016. This author wishes to thank Mr Frankenreiter for allowing him access to these working papers.

⁵⁸ Hereinafter, ‘*The Common Law Tradition*’.

1. *The Common Law Tradition*, ‘Reckonability’ and ‘Steadying Factors’: A Brief Account of Llewellyn’s ‘Descriptive Thesis’⁵⁹

In 1960, Karl Llewellyn, one of the leading figures of American legal realism, asserted that there was a “crisis in confidence”⁶⁰ among lawyers in their ability to predict how American appellate courts would decide cases.⁶¹ Llewellyn believed that this ‘crisis in confidence’ contained a “novel corrosiveness”⁶², both in terms of its effects on the legal profession’s faith in the work of the courts and the faith of the individual lawyer in his/her own utility in advising clients.⁶³ In what Twining describes as the “descriptive thesis”⁶⁴ of *The Common Law Tradition*, Llewellyn attempted to demonstrate that this ‘crisis in confidence’ was unfounded. Rather, Llewellyn argued that the decisions of the American appellate courts were “reckonable”.⁶⁵ ‘Reckonability’, utilised by Llewellyn instead of ‘certainty’, is a key concept in *The Common Law Tradition* and it is one which keeps the work rooted in American legal realist thought. In an “Excursus on ‘Certainty’, ‘Predictability’, Reckonability””, Llewellyn rejected any attempt at attaining absolute legal certainty:

“[I]n dealing with any aspect of life which is relevant to the great-institution of Law-Government, I reject as useless and misleading the dichotomy which infected so much writing of the ‘20’s and ‘30’s: absolute or 100 per cent certainty versus anything else at all as being ‘uncertainty’. I see no absolute certainty of outcome in any aspect of legal life, and think that no man should ever imagine that any such thing could be, or could be worth serious consideration. Instead I see degrees of lessening uncertainty of outcome ranging from what to the observer or participant seems pure chance, into a situation where a

⁵⁹ For an in-depth description and analysis of this book, see Twining, W., *Karl Llewellyn and the Realist Movement* (Cambridge: Cambridge University Press, 2nd ed., 2012), pp. 203-269.

⁶⁰ Llewellyn, K.N., *supra* n. 27, p. 3.

⁶¹ Llewellyn, K.N., *supra* n. 27, pp. 3-7.

⁶² Llewellyn, K.N., *supra* n. 27, p. 3.

⁶³ Llewellyn, K.N., *supra* n. 27, pp. 3-4.

⁶⁴ Twining, W., *supra* n. 59, pp. 206-207.

⁶⁵ Llewellyn, K.N., *supra* n. 27, p. 4. Twining divides Llewellyn’s arguments in *The Common Law Tradition* into ‘descriptive’ and ‘prescriptive’ theses. The ‘descriptive thesis’ is Llewellyn’s account of the fourteen factors (including the ‘Period-Style’) and how they create greater ‘reckonability’. The ‘prescriptive thesis’ is Llewellyn’s argument that the courts should, *inter alia*, adopt the ‘Grand Style’ of judicial decision-making (Twining, W., *supra* n. 59, pp. 206-207). This dissertation concerns itself with Llewellyn’s ‘descriptive thesis’ only. Twining’s book gives an excellent overview of Llewellyn’s entire canon as well as its context in contemporary jurisprudence, together with biographical details. Chapter 10 provides a succinct summary and critique of *The Common Law Tradition*.

skilled, experienced guess (though only a guess) is yet a better bet than the guess of the ignorant, through a situation where the odds run plainly a little one way, through one where skilled counsel can be expected to materially increase the odds, and on through the situation which is a business gamble or better into the one which is for human living 'safe'.”⁶⁶

It is apparent that Llewellyn was concerned that American legal realists, especially Frank, in their perhaps hyperbolic efforts to demonstrate the non-existence of 'legal certainty' had created a similarly dangerous myth of 'legal uncertainty', a myth that underpinned the alleged 'crisis in confidence'.⁶⁷ It also seems evident from the quotation above that 'reckonability' is not 'certainty', but the lessening of uncertainty. Hints regarding what Llewellyn might mean by 'reckonability' are scattered throughout *The Common Law Tradition*, even if a precise or singular definition is not provided.⁶⁸ He states, for instance, that the work of the American appellate courts “is reckonable ... quite sufficiently for skilled craftsmen to make usable and valuable judgments about likelihoods, and quite sufficiently to render the handling of an appeal a fitting subject for effective and satisfying craftsmanship.”⁶⁹ Llewellyn also emphasised that his assertion as to the 'reckonability' of American appellate court outcomes related to the individual case, and not to statistical or historical 'reckonabilities' in institutions as a whole.⁷⁰ He further asserted that it is unreasonable to require 'reckonability' from appellate courts given that “[t]he very reason [they] exist is that there is doubt, that skilled men do not agree about the outcome.”⁷¹ The reason for the apparent imprecision is wilful, however: Llewellyn argued that 'reckonability' would mean different things according to the “base line of judgment”⁷², with a higher degree of 'reckonability' expected in appeals than in trials of action, owing to the vagaries of fact-finding in the latter.⁷³ In the context of the American appellate courts, to which Llewellyn confined his arguments in *The Common Law*

⁶⁶ Llewellyn, K.N., *supra* n. 27, p. 17.

⁶⁷ Twining, W., *supra* n. 59, p. 207.

⁶⁸ Llewellyn also discusses 'reckonability' in his subsequent volume *Jurisprudence*, published shortly after his death in 1962 (Llewellyn, K.N., *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962), pp. 186-187).

⁶⁹ Llewellyn, K.N., *supra* n. 27, p. 4.

⁷⁰ Llewellyn, K.N., *supra* n. 27, p. 6.

⁷¹ Llewellyn, K.N., *supra* n. 27, p. 6.

⁷² Llewellyn, K.N., *supra* n. 27, p. 17.

⁷³ Llewellyn is here acknowledging the work of Frank, who highlighted the uncertainty in trials of action arising from the vagaries of fact-finding and determination.

*Tradition*⁷⁴, Llewellyn guessed, taking the close of the trial as his base line, that “a skilled man ... ought even in the present state of our knowledge to average correct prediction of outcomes eight times out of ten, and better than that if he knows the appeal counsel on both sides or sees the briefs.”⁷⁵

Llewellyn attributed this ‘reckonability’ in the work of the American appellate courts to fourteen ‘steading factors’, which are of particular importance in this dissertation:

- “(1) Law-conditioned Officials
- (2) Legal Doctrine
- (3) Known Doctrinal Techniques
- (4) Responsibility for Justice
- (5) The Tradition of One Single Right Answer
- (6) An Opinion of the Court
- (7) A Frozen Record from Below
- (8) Issues Limited, Sharpened, Phrased
- (9) Adversary Argument by Counsel
- (10) Group Decision
- (11) Judicial Security and Honesty
- (12) A Known Bench
- (13) The General Period-Style and Its Promise
- (14) Professional Judicial Office”⁷⁶

Llewellyn, however, did not devote a substantial part of the book to discussion of these ‘steading factors’: only 42 pages of the 565-page volume discuss the ‘steading factors’ explicitly.⁷⁷ Twining is correct in observing that Llewellyn “was content to deal with these factors on a common-sense basis, without defining his terms with precision or trying to establish by empirical means how and to what extent each factor affects judicial behaviour.”⁷⁸ The one exception

⁷⁴ Llewellyn, K.N., *supra* n. 27.

⁷⁵ Llewellyn, K.N., *supra* n. 27, p. 45. Although it should be added that Llewellyn was presupposing “the existence of that half or so of the cases which really are foredoomed.” (p. 45).

⁷⁶ Llewellyn, K.N., *supra* n. 27, p. 19. A succinct description of these ‘steading factors’ is provided by Lasswell in his review of *The Common Law Tradition* (Lasswell, H.D., “The Common Law Tradition – Deciding Appeals”, (1961) 61 *Columbia Law Review* 940, at 942-943).

⁷⁷ Llewellyn, K.N., *supra* n. 27, pp. 19-61.

⁷⁸ Twining, W., *supra* n. 59, p. 209.

to this approach, also noted by Twining⁷⁹, is Llewellyn's treatment of what has become the most well-known of his 'steading factors': the 'Period-Style'.⁸⁰

The paragraphs that follow discuss criticisms of Llewellyn's 'descriptive thesis' in *The Common Law Tradition*, and attempt to re-model the 'descriptive thesis' in line with these criticisms (where these criticisms are justified), so that the 'steading factors' can be tested in this dissertation in the context of the preliminary reference procedure.

2. Criticisms of the 'Descriptive Thesis' in *The Common Law Tradition*

Although American reviewers of *The Common Law Tradition* were "almost unanimous in their enthusiasm"⁸¹, there have been a number of criticisms levelled at the volume. Five main points of criticism may be isolated:

⁷⁹ Twining, W., *supra* n. 59, p. 209.

⁸⁰ Llewellyn, K.N., *supra* n. 27, pp. 35-45, pp. 64-72. See also, Llewellyn, K.N., *supra* n. 68, pp. 174-192. The 'Period-Style' is explained concisely by Becht in his review of *The Common Law Tradition*. Having explained that Llewellyn creates a distinction between a 'Grand Style' and 'Formal Style' of decision-making, Becht states that the latter style "refers to the practices of trying to satisfy both the written rule and the justice sensed in the occasion, of refusing to put a case under a rule when the reason for the rule does not comfortably fit the case, and of constantly improving the rules as the cases provide new insights." (Becht, A.C., "A Study of 'The Common Law Tradition: Deciding Appeals'", (1962) *Washington University Law Quarterly* 5, at 7). The 'Formal Style', in contrast, is characterised, in Llewellyn's own words by the following indicia: "[T]he rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law. Opinions run in deductive form with an air or expression of single-line inevitability." (Llewellyn, K.N., *supra* n. 27, p. 38). Twining has provided an excellent summary of the indicia of each of Llewellyn's 'styles' in the form of a table: Twining, W., *supra* n. 59, p. 213. Llewellyn was of the view that the 'Grand Style' contributed to 'reckonability' because judges had recourse to 'sense', and the matters concerning judges were more open and transparent in the published ruling; the 'Formal Style' in contrast caused "conscious creation" to be driven "all but underground" (Llewellyn, K.N., *supra* n. 27, p. 40).

⁸¹ Twining, W., *supra* n. 59, p. 266. Both the *University of Pennsylvania Law Review* and the *Washington University Law Quarterly* published symposium editions dedicated to the book. In contrast, as Twining points out, there was not a single review of the book in a British legal periodical. Generally positive assessments of *The Common Law Tradition* included: Becht, A.C., *supra* n. 80; Haseltine, H.S., "The Pursuit of Reckonability", (1962) *Washington University Law Quarterly* 42; Cohen, J., "Llewellyn's Lea-Ways", (1962) *Washington University Law Quarterly* 64; Cooperrider, L.K., "The Common Law Tradition – Deciding Appeals", (1961) 60 *Michigan Law Review* 119; Breitel, C.D., "The Common Law Tradition – Deciding Appeals", (1961) 61 *Columbia Law Review* 931; Lasswell, H.D., *supra* n. 76; Friendly, H.J., "The Common Law Tradition – Deciding Appeals", (1961) 109 *University of Pennsylvania Law Review* 1040; Levy, B.H., "The Common Law Tradition – Deciding Appeals", (1961) 109 *University of Pennsylvania Law Review* 1045; Shestack, J.J., "The Common Law Tradition – Deciding Appeals", (1961) 109 *University of Pennsylvania Law Review* 1051.

- There was no evidence to support Llewellyn’s assertion that there was a ‘crisis in confidence’ among American lawyers about the predictability of appellate court decisions⁸²;
- The style of prose and manner in which Llewellyn presented his ideas makes *The Common Law Tradition* unnecessarily inaccessible to many readers or, at least, results in it being difficult to digest⁸³;
- Llewellyn’s downplaying of the role of the subjective in judicial decision-making constituted a betrayal of the cause of American legal realism⁸⁴;
- Llewellyn’s ‘common-sense’ approach to his ‘steadying factors’ was an inadequate method of evidencing his assertion that his ‘steadying factors’ promote ‘reckonability’ in the American appellate courts;⁸⁵
- Llewellyn in his discussion of his ‘steadying factors’ failed to indicate the inter-relationship between them or to signify their relative weight or importance.⁸⁶

The first three of these points of criticisms may be considered in a relatively straightforward manner. The first criticism is justified: Llewellyn did not advance any evidence to support his assertion that there existed a ‘crisis in confidence’. Twining is correct to point out that this complicates the book somewhat: Llewellyn presented this alleged ‘crisis in confidence’ as the *raison d’être* of the study, but then proceeded to write a book which “neither

⁸² Twining, W., *supra* n. 27, p. 268; Clark, C.E. and Trubek, D.M., “The Creative Role of the Judge, Restraint and Freedom in the Common Law Tradition”, (1961) 71(2) *Yale Law Journal* 255, at 258.

⁸³ Cooperrider was critical of the presentation of Llewellyn’s theses: “They flow over and engulf the reader. If they could be lined up in systematic and less overwhelming form, they could be a large part of the antidote to another crisis than the one to which he has referred.” (Cooperrider, L.K., *supra* n. 81, at 123). Mark de Wolfe Howe also had written a scathing attack on Llewellyn’s prose style in the book, but withdrew it upon learning of Llewellyn’s death in 1962 (Twining, W., *supra* n. 59, p. 266). Twining himself describes the structure and prose of the book as “overwrought”, with the prose having “some redeeming features”, the structure “few, if any.” (Twining, W., *supra* n. 59, p. 267).

⁸⁴ This is the main thrust of Clark and Trubek’s attack: Clark, C.E. and Trubek, D.M., *supra* n. 82.

⁸⁵ Twining, W., *supra* n. 59, p. 268.

⁸⁶ Becker, T.L, *Political Behavioralism and Modern Jurisprudence: A Working Theory and Study in Judicial Decision-Making* (Chicago: Rand McNally, 1964), pp. 63-64; Rumble, W.E., *American Legal Realism* (Ithaca: Cornell University Press, 1968), p. 173.

documents nor analyses this phenomenon.”⁸⁷ However, Twining is also accurate in observing that “[t]he principal themes of the book are not dependent on the beliefs or the morale of the bar at a particular moment of time” and that the assertion was most likely a device by Llewellyn to grab the attention of judges and lawyers.⁸⁸ Moreover, one could credit Llewellyn with a premonition of the ‘radical indeterminacy’ thesis that would not long after his death gain some traction.⁸⁹ The second criticism is also warranted: *The Common Law Tradition* is at times imprecise, disjointed and unwieldy. Great pains have had to be taken at various points in this dissertation to re-organise Llewellyn’s categories⁹⁰, re-define his terms with greater precision to permit their application⁹¹, and to extrapolate meaning from his observations where it would appear he has abandoned an idea or not seen it through to its logical conclusion.⁹² While this does make Llewellyn’s book frustrating at times, it does not render its ideas unilluminating or beyond use. The third criticism, in contrast, constitutes perhaps a misunderstanding of Llewellyn’s ‘descriptive thesis’: Llewellyn was not stating that personal or subjective factors do not influence judicial outcomes, he was merely arguing that there are ‘steadying factors’ in the American appellate courts that militate against such personal or subjective factors, and that sceptics have been guilty of overstating these personal or subjective factors. As Freeman opines, Llewellyn managed to eliminate “a good many myths ... and, in particular, both the myth that certainty can be achieved under a legal system, or its opposite, that predictability is unattainable.”⁹³

The latter two criticisms, however, raise more troubling and substantive concerns about Llewellyn’s ideas and methods.

⁸⁷ Twining, W., *supra* n. 59, p. 268.

⁸⁸ Twining, W., *supra* n. 59, p. 268.

⁸⁹ Maxeiner, J.R., *supra* n. 2, at 35.

⁹⁰ See, for instance, the re-modelling of Llewellyn’s ‘descriptive thesis’ in the paragraphs that follow.

⁹¹ An obvious example of this occurs in Part One of this dissertation where an attempt is made to provide a multi-levelled definition of what constitutes a ‘law-conditioned official’.

⁹² An obvious example of this occurs in Part Two of this dissertation where Llewellyn’s ideas on his eleventh ‘steadying factor’, ‘judicial security and honesty’ are developed to advance a hypothesis that the Court of Justice and its Judges are sufficiently independent to withstand pressure from external actors to maintain their duty to ‘legal doctrine’, yet sufficiently accountable to ensure that they cannot abandon this duty.

⁹³ Freeman, M.D.A., *supra* n. 28, p. 996.

As regards the fourth point of criticism, Twining has expressed best the methodological problems in *The Common Law Tradition*:

“Another weakness of *The Common Law Tradition* is the eccentric methodology; judged by basic social science criteria it falls short of accepted standards: the principal categories are elusive, the hypotheses are vague and are not clearly expressed in verifiable form, data are not consistently separated from interpretation, the sampling is idiosyncratic, and the findings are not presented in orderly fashion. While some of the principal conclusions about predictability are asserted rather than proved, the methods used to establish the renaissance of the Grand Style and the variety of precedent techniques may have been unnecessarily elaborate. It is not so much that failure to adopt suitable methods invalidates the most important conclusions as that those conclusions might easily have been much more precise and sophisticated if the conceptual apparatus had been more refined.”⁹⁴

These criticisms are not inaccurate and it certainly seems ironic that a jurist who had spent his professional life encouraging the study of law in connection with other social sciences would be so unconcerned with method. However, to focus unduly on the methodological shortcomings of Llewellyn’s exposition of his ‘steadying factors’ is to perhaps misconstrue his intentions: Llewellyn asserted these ‘steadying factors’ as part of his continuous mission to codify what he considered the “neglected obvious”.⁹⁵ Despite Twining’s criticisms of Llewellyn’s methods in *The Common Law Tradition*, it is evident that he also understands Llewellyn’s intentions:

“[H]is treatment of the steadying factors is an example of Llewellyn at his best: a useful summary of years of the lessons of experience, perceptive and unpretentious. Its role in the argument is to remind readers of the presence of a number of factors which they would probably agree tend to some extent to promote regularity, and hence predictability, of judicial behaviour.”⁹⁶

⁹⁴ Twining, W., *supra* n. 59, p. 268.

⁹⁵ Twining, in particular, has noted Llewellyn’s fixation on codifying what he considered “the neglected obvious”. In *The Common Law Tradition*, he stated rather humbly: “In such matters as in all other matters in this study, I preach the neglected beauty of the obvious.” (Llewellyn, K.N., *supra* n. 27, p. 339). See Twining, W., *supra* n. 59, p. 211 and p. 501, fn. 15. See also, Westwood, H., “The Common Law Tradition – Deciding Appeals by Karl N. Llewellyn”, (1961) 61(5) *Columbia Law Review* 948. Llewellyn also makes the, somewhat unconvincing, argument that he chose to limit himself to “simple observation and description” in an “attempt to limit text.” (Llewellyn, K.N., *supra* n. 27, p. 16).

⁹⁶ Twining, W., *supra* n. 59, p. 209.

However, Llewellyn's enumeration of his 'steading factors' as mere assertions presents problems for anyone wishing to test their role and/or effectiveness in contributing to the 'reckonability' of outcomes. Llewellyn evidently did not see this as his problem, but as one for those who might take up the challenge of using the 'steading factors' as a conceptual apparatus to study the behaviour of courts.⁹⁷ This challenge is taken up in part in this dissertation in an attempt to test the relevance of a selection of Llewellyn's 'steading factors' in the context of the preliminary reference procedure. In taking up this challenge, it must be recognised that Llewellyn's terminology and categorisation of his 'steading factors' need to be refined to render these 'steading factors' capable of examination in that context.⁹⁸

The fifth point of criticism, which is related closely to the fourth, is perhaps the most significant and enduring: Llewellyn's failure to attribute relative significance to each of his 'steading factors' in terms of their contribution to the 'reckonability' of judicial outcomes and to indicate the inter-relationship, if any, between the 'steading factors'. Becker's criticism was particularly pointed in this regard:

“Unfortunately ... Professor Llewellyn jumps off in mid-stream and neglects to extrapolate upon the nature of the interrelationship between these factors, the extent and nature of overlap, the probable varying degrees of importance between the elements, as well as many other problems raised by a mere listing. Bare mention of each element is deemed to be sufficient.”⁹⁹

Again, it must be acknowledged that there is a large element of truth in this observation. There is no weight attached to any of the 'steading factors' in terms of their contribution to 'reckonability', and the sequence in which they

⁹⁷ As Twining states: “The crux of the matter is that *The Common Law Tradition* is founded on a number of *aperçus*, some original, others neglected, which are of fundamental importance and which provide a starting-point for a wide range of potentially fruitful investigations: the steading factors...” (Twining, W., *supra* n. 59, p. 269).

⁹⁸ An attempt at such 'refinement' of Llewellyn's 'descriptive thesis' occurs in the paragraphs that follow, where it is endeavoured to re-model Llewellyn's thesis for application in the preliminary reference context. See also, *supra* n. 91 and n. 92. As Twining states: “The chief weaknesses [of *The Common Law Tradition*] are remediable: the terminology can be refined; more orderly techniques for analysing and comparing judicial opinions may be evolved; better methods for testing predictability have begun to be devised, and so on.” (Twining, W., *supra* n. 59, p. 269).

⁹⁹ Becker, T.L., *supra* n. 86, pp. 63-64; Rumble, W.E., *supra* n. 86, p. 173.

are listed seems to lack any significance.¹⁰⁰ There is also no indication as to how the ‘steading factors’ might interact or overlap with one another. However, the criticism is also partly unwarranted: Llewellyn’s focus was on prediction of the individual appeal¹⁰¹, with the fourteen ‘steading factors’, which, incidentally, are not expressed as being exhaustive¹⁰², presenting a list of considerations that should assist a skilled lawyer in making an accurate prediction. The idea of these ‘steading factors’ playing a consistent and uniform role in each and every appeal is, therefore, unrealistic: the ‘steading factors’ are the tools, and it is for the lawyer to reflect on their weight and interplay in the appeal he/she is seeking to forecast. That is not to say, however, that some ‘steading factors’ are not more important than others in terms of their contribution to ‘reckonability’ in a general sense, and that the ‘steading factors’ could not have been categorised in a manner that reflected the manner in which they contribute to such ‘reckonability’. The paragraphs that follow attempt to re-model Llewellyn’s ‘descriptive thesis’ in order to deal with this criticism, as well as the others recognised above.

3. Re-Modelling the ‘Descriptive Thesis’ in *The Common Law Tradition* for Application in the Context of Preliminary Rulings

To summarise the observations of the previous paragraphs, Llewellyn’s exposition of his ‘steading factors’ in *The Common Law Tradition* suffers under unrefined terminology, a failure to test his assertions, and a failure to indicate the relative significance of and interplay between his ‘steading factors’ in their contribution to ‘reckonability’. In order to remedy these weaknesses in Llewellyn’s ‘descriptive thesis’, an attempt is made in the paragraphs that follow to refine Llewellyn’s terminology and provide a more ordered model of Llewellyn’s thesis. This ordering or re-modelling of the ‘descriptive thesis’ consists of a categorisation of Llewellyn’s ‘steading factors’, with this categorisation being based on the different roles played by

¹⁰⁰ Although, curiously, Llewellyn made the rather baffling assertion that the fourteenth ‘steading factor’ was “most important among all the lines of factor which make for reckonability in American appellate judicial deciding...” (Llewellyn, K.N., *supra* n. 27, pp. 45-46). Twining has also criticised the unevenness with which Llewellyn treated his ‘steading factors’: Twining, W., *supra* n. 59, p. 267 and fn. 251.

¹⁰¹ Llewellyn, K.N., *supra* n. 27, p. 6.

¹⁰² Llewellyn also referred to there being “ten to fifteen clusters of ... factors...” (Llewellyn, K.N., *supra* n. 27, p. 51). See also, Llewellyn, K.N., *supra* n. 27, pp. 45-46, fn. 41.

the ‘steadying factors’ in contributing to ‘reckonability’. Furthermore, in order to prepare Llewellyn’s re-modelled ‘descriptive thesis’ for application to the preliminary reference procedure, an initial examination is conducted of his ‘steadying factors’ to determine which of those ‘steadying factors’ may be applied in the preliminary reference context.

a) A Categorisation of Llewellyn’s ‘Steadying Factors’

Previously, it was argued that there are a number of ‘obstacles’ to ‘legal certainty’ as the concept relates to the prediction of litigation outcomes. These ‘obstacles’ were categorised as follows:

- ‘Legal obstacles’: obstacles that arise from the uncertainty *within* legal rules caused by, *inter alia*, the limitations of language in communicating objective meaning, ‘value pluralism’, etc.;
- ‘Extra-legal obstacles’: obstacles that arise from *outside* the legal rules by virtue of the interaction of human beings or procedures with those rules. These ‘extra-legal obstacles’ were sub-categorised as follows:
 - ‘Internal extra-legal obstacles’: obstacles that arise from the subjective values, prejudices, methods and other individual idiosyncrasies of those involved in the interpretation of legal rules;
 - ‘External extra-legal obstacles’: obstacles that arise from the external pressures that may be placed on those involved in the interpretation of legal rules;
 - ‘Procedural extra-legal obstacles’: obstacles that arise from the variables of each case, such as the vagaries of fact-finding and determination.

Just as the ‘obstacles’ to ‘legal certainty’ may be categorised according to the manner in which they contribute to uncertainty, the ‘steadying factors’ may be categorised, in part, in terms of how they combat these ‘obstacles’. Accordingly, it is argued that Llewellyn’s fourteen ‘steadying factors’ may, following in part the categorisation suggested by Beck¹⁰³, be categorised as follows:

- ‘Legal steadying factors’: the normative and methodological pressures exacted upon judicial actors by ‘legal doctrine’ and the limited number of known accepted methods for the interpretation of that ‘doctrine’. These pressures decrease uncertainty by ensuring that judicial actors in justifying their conclusions make some connection between each conclusion and a valid legal norm.¹⁰⁴ This requirement imposes an outer-limit on the substantive discretion of judicial actors in each case, which, in turn, narrows the number of conceivable outcomes in the individual case, allowing lawyers to rely upon their training and skill to forecast likely outcomes, and reducing the impact of subjectivities on outcomes. The ‘legal steadying factors’ do not necessarily contribute greatly to reducing the uncertainty *within* legal rules; the extent to which the ‘legal steadying factors’ narrow the number of conceivable outcomes will differ depending on the leeway afforded by the applicable legal rules;

¹⁰³ Beck also categorises his ‘steadying factors’ as ‘legal’ and ‘extra-legal’ (*supra* n. 27).

¹⁰⁴ This dissertation is uninterested in measuring the legal reasoning of the Court of Justice against a ‘normative’ theory of interpretation. Scholars such as Weiler (Weiler, J.H.H., “Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics” in Wiklund, O. (ed.), *Judicial Discretion in European Perspective* (The Hague: Kluwer, 2003), p. 150) and Conway (Conway, G., *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012)) have developed their own normative theories to measure the legitimacy of the legal reasoning of the Court. While this is an interesting enquiry, such normative theories are the product of the subjective values of their creators and not reflective necessarily of the manner in which the Court conducts legal reasoning in reality. Others such as Bengoetxea (Bengoetxea, J., *The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon Press, 1993)) and Beck (Beck, G., *supra* n. 24) have developed ‘descriptive’ or ‘explanatory’ accounts of the Court’s legal reasoning. Beck agrees with Bengoetxea to the extent that “the Court indeed relies on more or less the same broad categories of *topoi* of legal argumentation when justifying its decisions, as other higher or appeal courts.” Bengoetxea acknowledged, however, that his identification of the Court’s interpretative techniques did not have predictive value. Beck’s contribution has been to adopt a heuristic approach which allows the ‘steadying factors’ to complement “legal doctrine and *topoi* and schemata of legal argumentation” to allow for some ‘reckonability’.

- ‘Extra-legal steadying factors’¹⁰⁵: ‘steadying factors’ that serve to: (1) reinforce the pressures exerted by ‘legal doctrine’ and the use of valid techniques for their interpretation (reinforce the ‘legal steadying factors’); (2) narrow the number of conceivable outcomes; and, (3) provide various ‘signposts’ to the lawyer attempting to forecast prospective judicial interpretations. The ‘extra-legal steadying factors’ may be divided into three sub-categories relating to the role they play in reducing the impact of the ‘extra-legal obstacles’ to ‘certainty’:
 - ‘Internal extra-legal steadying factors’: those ‘extra-legal steadying factors’ that reduce the impact of the subjective values, prejudices, methods and other individual idiosyncrasies of those involved in the interpretation of legal rules;
 - ‘External extra-legal steadying factors’: those ‘extra-legal steadying factors’ that reduce the impact of the external pressures that may be placed on those involved in the interpretation of legal rules;
 - ‘Procedural extra-legal steadying factors’: those ‘extra-legal steadying factors’ that reduce the impact of the variables of each case, such as the vagaries of fact-finding and determination.

In the paragraphs that follow, Llewellyn’s fourteen ‘steadying factors’ are placed in the categories and sub-categories identified above.

¹⁰⁵ It should be noted that the use of the term ‘extra-legal’ is to connote that these ‘steadying factors’ exert their pressure or influence *outside* of the substantive legal rules relevant to the dispute before a court. That is not to say, however, that the ‘extra-legal steadying factors’ are not themselves the product of legal rules. This is especially the case with the ‘procedural extra-legal steadying factors’, most of which are the result of procedural rules, such as those that limit a court’s decisional jurisdiction to consideration of a question of law and deprive it of jurisdiction to find or determine facts.

aa) 'Legal Steadying Factors'

(1) Llewellyn's 'Legal Steadying Factors'

In accordance with the description of the 'legal steadying factors' provided before, two of Llewellyn's fourteen 'steadying factors' may be identified as such: the second, 'legal doctrine', and the third, 'known doctrinal techniques'.

In connection with his second 'steadying factor', 'legal doctrine', Llewellyn wrote:

"It is understood and accepted that the context for seeing and discussing the question to be decided is to be set by and in a body of legal doctrine; and that where there is no real room for doubt, that body is to control the deciding; that where there is real room for doubt, that body of doctrine is nonetheless to guide the deciding; and that even when there is deep trouble, the deciding should strive to remain moderately consonant with the language and also with the spirit of some part of that body of doctrine."¹⁰⁶

Llewellyn, therefore, rather than seeing rules as "pretty playthings"¹⁰⁷, recognised 'legal doctrine' as a constraint on, guide to or pressure on legal decision-making. Llewellyn, however, also recognised that this body of 'legal doctrine' can afford a judicial decision-maker significant leeway and that the significance of its pressure will depend on the individual case, the clarity of the applicable doctrine and the sensibleness of its application.¹⁰⁸ Llewellyn also applied a very wide definition of 'legal doctrine', extending it to cover "pervading principles" and "living ideals".¹⁰⁹

¹⁰⁶ Llewellyn, K.N., *supra* n. 27, p. 20.

¹⁰⁷ Llewellyn's rather unfortunate hyperbole to describe the role of legal rules in adjudication in an earlier work: Llewellyn, K.N., *The Bramble Bush: On Our Law And Its Study* (New York: Oceana, 1930), p. 5.

¹⁰⁸ Llewellyn developed these ideas further in a later chapter of *The Common Law Tradition* entitled "Reckonability of Result: *Theory of Rules*": Llewellyn, K.N., *supra* n. 27, pp. 178-199.

¹⁰⁹ "That body [of legal doctrine], of course, includes not merely the very elaborate body of recorded directions which we know as rules of law, whether gathered and phrased in unchanging rigor (e.g., statutes) or scattered and loosely phrased in case law style. The body includes also the accepted lines of organizing and seeing these materials: concepts, 'fields' of law with their differential importance, pervading principles, living ideals, tendencies, constellations, tone." (Llewellyn, K.N., *supra* n. 27, p. 20).

On the subject of his third ‘steading factor’, ‘known doctrinal techniques’, Llewellyn wrote:

“It is understood and accepted that the doctrinal materials are properly to be worked with only by way of a limited number of recognized correct techniques. Among these techniques many are phrased, taught, and conscious; many are rarely phrased or *taught*, but are still to be viewed as known and conscious and *learned*; many are felt and are used in standard fashion, but are learned and indeed used almost without consciousness of the users as they use them.”¹¹⁰

Llewellyn, therefore, was not arguing merely that decision should take place within the limited body of ‘legal doctrine’; the decisions made within the legal body of doctrine (“dealing with, shaping, and selecting among, the many pre-existing doctrinal *possibilities*”¹¹¹) should be made by way of a limited number of ‘known doctrinal techniques’. As with the differential constraint or guidance imposed by the body of ‘legal doctrine’, Llewellyn acknowledged that these techniques could also afford very significant leeway to the judicial decision-maker:

“[T]he known and felt correct techniques for use of the authoritative materials contain huge correct leeways to produce variant results, and contain almost no explicit guidance for work with or within the leeways.”¹¹²

Nevertheless, Llewellyn maintained there were a limited number of techniques that exerted pressure on the judges, stating that “disregard of the law of leeways is felt as unjudicial.”¹¹³

In essence, Llewellyn’s second and third ‘steading factors’ can be codified into a simple assertion that judges ought to decide cases in a manner that is at least ‘moderately consonant’ with ‘legal doctrine’ whilst utilising recognised valid techniques for interpretation of that ‘doctrine’: in other words, there is a recognition of the normative character of ‘legal doctrine’. Though it has been

¹¹⁰ Llewellyn, K.N., *supra* n. 27, p. 21.

¹¹¹ Llewellyn, K.N., *supra* n. 27, p. 22.

¹¹² Llewellyn, K.N., *supra* n. 27, p. 22. Llewellyn famously demonstrated the freedom afforded to the American appellate courts by these leeways in a later chapter in *The Common Law Tradition*, entitled “The Leeways of Precedent”, in which he recognised sixty-four different techniques with which those courts treated precedent (Llewellyn, K.N., *supra* n. 27, pp. 77-91).

¹¹³ Llewellyn, K.N., *supra* n. 27, p. 23.

acknowledged that the “mature”¹¹⁴ Llewellyn did not belong with those realists criticised for not recognising the normative character of legal rules, it is truly unfortunate that he did not isolate his second and third ‘steadying factors’ from the others in a manner that might indicate their importance relative to the remaining ‘steadying factors’. In contrast, in this dissertation, these two ‘steadying factors’ (as the ‘legal steadying factors’) are considered, as a matter of first principle¹¹⁵, the most important of those factors since they establish the first and most fundamental limitation on judicial discretion and protection against arbitrariness: the requirement to maintain some adherence to ‘legal doctrine’ and valid techniques of interpreting that ‘doctrine’.¹¹⁶ The role of the ‘extra-legal steadying factors’, in contrast, is both auxiliary to the ‘legal steadying factors’, in the sense that they reinforce the duty to recognise the normative character of ‘legal doctrine’, and enhancing, in that they may serve to further limit discretion, and thereby potential outcomes, allowable *within* the ‘doctrine’. It should be emphasised, however, that it is the ‘legal steadying factors’ that impose the outermost boundaries on judicial discretion.

(2) Beck’s Rationalisation of Llewellyn’s ‘Legal Steadying Factors’ in the CJEU Context

Beck, in his book *The Legal Reasoning of the Court of Justice of the EU*¹¹⁷, rationalised Llewellyn’s ‘steadying factors’, providing commendable clarity to Llewellyn’s unrefined terminology, and enumerated his own list of ‘legal steadying factors’ in the context of the CJEU. Beck recognises three ‘legal steadying factors’, with the first consisting of two sub-categories:

- “A. The Normative Constraints of Law: (*Steadying Factor I*): the Accepted *Topoi* of Legal Argumentation, Axioms, and Doctrinal Techniques”¹¹⁸

¹¹⁴ Freeman, M.D.A., *supra* n. 28, p. 996 and fn. 53.

¹¹⁵ *Infra*, n. 226-n. 233.

¹¹⁶ What that minimal standard is and what those valid techniques are may differ from legal system to legal system.

¹¹⁷ Beck, G., *supra* n. 24.

¹¹⁸ Beck, G., *supra* n. 24, pp. 335-339. Beck characterises the normative constraints of law as follows: “[T]he Court is constrained though rarely compelled by the terms of accepted legal argumentation: it can only reach a decision which it can justify publicly in terms of the available *topoi* and doctrinal techniques. And that whereof the Court cannot speak in legally

- “B. The Normative Constraint of Precedent (*Steadying Factor Ia*)”¹¹⁹
- “C. The Linguistic Constraints of Law (*Steadying Factor II*): the Terms of the Question, the Wording of the Primary Legal Materials, the Ordinary Use of Language, and Basic Interpretative Plausibility”¹²⁰
- “D. The Normative Constraints of Value Pluralism and Norm Collision (*Steadying Factor III*)”¹²¹

Only ‘steadying factors I’ and ‘Ia’ would appear to be analogous with Llewellyn’s ‘legal steadying factors’. As Beck states, these ‘steadying factors’ “delineate[] the ‘judicially arguable’.”¹²² However, Beck’s assertion that the ‘legal steadying factors’ in all cases ‘constrain’ the Court of Justice appears inconsistent with Llewellyn’s argument that the pressure exerted by ‘legal doctrine’ on courts will range, in descending order, from ‘control’ to ‘guidance’ to a requirement to achieve at least ‘moderate consonance’ between ‘legal doctrine’ and result.¹²³ Beck does, however, appear to provide for different levels of ‘constraint’: his ‘steadying factor II’ suggests that the level

accepted terms and which it cannot therefore justify publicly, that it cannot hold in favour of and it must decide the other way.” (Beck, G., *supra* n. 24, pp. 337-338). Beck defines *topoi* as “the accepted or acceptable legal arguments that can be given in support of one interpretation or another...” (Beck, G., *supra* n. 24, p. 27).

¹¹⁹ Beck, G., *supra* n. 24, pp. 339-341. Beck describes the normative constraint of precedent as follows: “The Court of Justice ... is constrained not only by, and must present its decision in terms of, the range of available *topoi* and accepted doctrinal techniques, but also its own previous decisions. The normative constraint imposed by precedents reflects a strong normative presumption in all legal systems that courts within the same legal system should decide relevantly similar cases consistently, unless there is a good reason not to do so or a material difference between them which justifies judicial departure from the previous decision.” (Beck, G., *supra* n. 24, p. 339).

¹²⁰ Beck, G., *supra* n. 24, pp. 341-347. Beck describes the linguistic constraints of law as follows: “Ordinary language imposes plausibility constraints on the Court’s interpretation of the relevant primary legal materials including the issues raised and any relevant precedents, in at least two basic respects: i. the scope and terms of the issues raised before, including the questions asked of, the court; ii. the wording of the legal norm the Court is interpreting, and in particular its level of clarity and precision, as the Court rarely overturns the clear literal meaning of a provision.” (Beck, G., *supra* n. 24, p. 341-342).

¹²¹ Beck, G., *supra* n. 24, pp. 347-349. Beck points out that there are cases where the Court of Justice will be confronted with conflicting values or norms of equal legal hierarchical weight. In such cases, Beck suggests that the Court of Justice has increased discretion and “favours reliance on non-literal *topoi* because the rules, although not necessarily unclear, nevertheless clash.” (Beck, G., *supra* n. 24, p. 347).

¹²² Beck, G., *supra* n. 24, p. 334.

¹²³ Llewellyn, K.N., *supra* n. 27, p. 20.

of clarity and precision with which a legal norm is expressed will affect the degree of leeway it affords the judicial decision-maker¹²⁴; his ‘steadying factor III’ allows greater discretion to the Court where there is a conflict of legal norms.¹²⁵

In this dissertation, based as it is more closely on Llewellyn’s theory than Beck’s treatment, the ‘legal steadying factors’ are understood to refer to the normative controls, guidance or pressures of ‘legal doctrine’ and of the limited number of accepted doctrinal techniques. This correlates roughly with Beck’s ‘steadying factors I’ and ‘Ia’, informed by the component of Beck’s ‘steadying factor II’ that acknowledges the differential pressures exerted by ‘legal doctrine’ resulting from varying levels of clarity and precision of the ‘legal doctrine’, and by Beck’s ‘steadying factor III’ which acknowledges greater interpretative discretion in cases of ‘value pluralism’ and norm collision. Llewellyn’s term ‘legal doctrine’ is also used in preference to Beck’s term ‘law’, since the former includes different forms of legal norm as well as ‘pervading principles’, which would appear appropriate in the context of the EU legal system.¹²⁶ However, the aspect of Beck’s ‘steadying factor II’ that suggests that “the scope and terms of the issues raised before, including the questions asked of, the Court”¹²⁷ is a constraint on the Court’s discretion is categorised in this dissertation as a ‘procedural extra-legal steadying factor’, mirroring as it does Llewellyn’s eighth ‘steadying factor’: ‘issues limited, sharpened, and phrased in advance’.¹²⁸

In summary, where in this dissertation the concept ‘legal steadying factors’ is utilised, it is to be understood to refer to the pressures exerted upon the Court of Justice by the normative character of ‘legal doctrine’ as well as the limited number of accepted doctrinal techniques for the treatment of that ‘doctrine’. As Beck states, these ‘legal steadying factors’ denote the “judicially arguable”¹²⁹. One of the core roles of the ‘extra-legal steadying factors’ discussed in this

¹²⁴ Beck, G., *supra* n. 24, p. 342.

¹²⁵ Beck, G., *supra* n. 24, p. 347.

¹²⁶ Llewellyn’s conceptualisation of ‘legal doctrine’ is discussed *infra* at n. 204-n. 218.

¹²⁷ Beck, G., *supra* n. 24, p. 342.

¹²⁸ Llewellyn, K.N., *supra* n. 27, p. 29. This ‘steadying factor’ is discussed in Part Three (n. 8ff).

¹²⁹ Beck, G., *supra* n. 24, p. 334.

dissertation is to reinforce a need for the Court of Justice to remain within the bounds of these ‘legal steadying factors’ or, put differently, ensure that the Court keeps its rulings within the confines of what is ‘judicially arguable’.

bb) ‘Extra-Legal Steadying Factors’¹³⁰

In accordance with the description of the ‘extra-legal steadying factors’ provided before, the remaining twelve of Llewellyn’s fourteen ‘steadying factors’ may be identified as such.¹³¹ These twelve ‘extra-legal steadying factors’ may be further divided into ‘internal’, ‘external’ and ‘procedural extra-legal steadying factors’ in accordance with the role they play in reducing the impact of ‘obstacles’ to ‘legal certainty’.

(1) ‘Internal Extra-Legal Steadying Factors’

It will be recalled that the ‘internal extra-legal steadying factors’ are those that reduce the impact of the subjective values, prejudices, methods and other individual idiosyncrasies of those involved in the interpretation of ‘legal doctrine’ that tend to undermine ‘legal certainty’. ‘Internal extra-legal steadying factors’ may be described as values, outlooks and working methods that have been internalised by judges, or at least ought to have been. Since one of these values should be an acceptance of the normative character of ‘legal

¹³⁰ Beck created his own list of ‘extra-legal steadying factors’ in the context of the CJEU. However, these ‘extra-legal steadying factors’ differ from those of Llewellyn. While Llewellyn’s ‘steadying factors’ relate to “the abiding importance of accepted doctrinal techniques and patterns of argumentation as well as internalised and external institutional and professional pressures and constraints influencing judicial decisions”, Beck by his own admission adopts a narrower focus, confining his ‘extra-legal steadying factors’ to the ‘motivations’ behind judicial decision. (Beck, G., *supra* n. 24, p. 27). Beck recognises eight categories of such ‘extra-legal steadying factors’: A. judicial deference in areas of constitutional, political and budgetary sensitivity to Member States (national governments and national courts); B. areas of political fashion; C. issues of general or fundamental principle for the EU legal order; D. the interests of the EU institutions and issues affecting the Court’s jurisdiction; E. infringement v annulment actions; F. hard cases and their arresting individual facts; G. extent of Member State opposition; H. special factors (i. ‘more favoured’ categories of litigants; ii. individual Juges Rapporteur or chambers of the Court; iii. Use of PPU or other quick procedure) (Beck, G., *supra* n. 24, pp. 349-433). This dissertation adopts Llewellyn’s wider conception of ‘steadying factors’ dividing his ‘extra-legal steadying factors’ into three sub-categories: ‘internal’, ‘external’ and ‘procedural’.

¹³¹ (1) ‘Law-conditioned officials’; (4) ‘responsibility for justice’; (5) ‘the tradition of one single right answer’; (6) ‘an opinion of the court’; (7) ‘a frozen record from below’; (8) ‘issues limited, sharpened, phrased’; (9) ‘adversary argument by counsel’; (10) ‘group decision’; (11) ‘judicial security and honesty’; (12) ‘a known bench’; (13) ‘the general Period-Style and its promise’; (14) ‘professional judicial office’ (Llewellyn, K.N., *supra* n. 27, p. 19).

doctrine’, these ‘internal extra-legal steadying factors’ should serve to reinforce ‘doctrine’ as the outermost boundary on judicial discretion. Moreover, more uniformly-held internalised values and working methods among a judiciary tend to lead to more consistent decision-making. In accordance with this description of ‘internal extra-legal steadying factors’, four of Llewellyn’s ‘steadying factors’ may be sub-categorised as such:

- ‘Law-conditioned officials’¹³²: Llewellyn’s argument that the training and experience of American appellate court judges meant that they thought like lawyers, specifically like *American* lawyers, rather than like laymen, seeing legal problems in terms of legal concepts, and certain shared internalised legal-cultural values. Commonly-held internalised values and working methods result in more uniform decisional outputs.
- ‘Responsibility for justice’¹³³: Llewellyn’s argument that “[t]here exists, and guides and shapes the deciding, an ingrained deep-felt need, duty and responsibility for bringing out a result which is just.”¹³⁴ Although Llewellyn recognised that this “drive for justice [could] run somewhat or utterly at odds with the pressures set up by legal doctrine”, and that the meaning of ‘justice’ was intangible and could vary from court to court, he believed that a desire by judges to resolve doubts as to the proper interpretation of legal rules according to ‘justice’ (within the leeways afforded by those rules) would lead to greater regularity than an approach which ignored ‘justice’.¹³⁵
- ‘The tradition of one single right answer’¹³⁶: Llewellyn’s argument that judges operate under “an ideology ... that there can only be one single

¹³² Llewellyn’s first ‘steadying factor’ (Llewellyn, K.N., *supra* n. 27, pp. 19-20). This ‘steadying factor’ is examined in the context of the preliminary reference procedure in Part One.

¹³³ Llewellyn’s fourth ‘steadying factor’ (Llewellyn, K.N., *supra* n. 27, pp. 23-24).

¹³⁴ Llewellyn, K.N., *supra* n. 27, pp. 23-24.

¹³⁵ This sentence is adapted from Twining’s “Restatement of Grand Style and Formal Style as Theoretical Models” (Twining, W., *supra* n. 59, p. 213). An appeal to ‘justice’ in interpreting rules is an indicator of the ‘Grand Style’ at work. In contrast, it is an indicator of the ‘Formal Style’ at work where the court’s conception of its role is to “discover and declare the applicable rule and to apply it to the facts of this particular case.” (Twining, W., *supra* n. 59, p. 212).

¹³⁶ Llewellyn’s fifth ‘steadying factor’ (Llewellyn, K.N., *supra* n. 27, pp. 24-25).

right answer.”¹³⁷ Llewellyn argued that this ideology would lead to greater ‘reckonability’ in “less troubling cases ... by discouraging inquiry into available alternatives.”¹³⁸ Conversely, however, Llewellyn suspected that in ‘hard cases’ the ideology created “materially greater chanciness than does the tougher inquiry into which of the known permissible possibilities seems the probable best, and why.”¹³⁹

- ‘The general Period-Style and its promise’¹⁴⁰: Llewellyn’s argument that there existed in the American appellate courts at varying times two primary ‘styles’ of “thought and work”¹⁴¹: the ‘Formal Style’ and the ‘Grand Style’. The former was “authoritarian, formal, logical”¹⁴², and characterised by strict interpretation of statutory rules, an obsession with the creation of “large-scale order”¹⁴³ in ‘legal doctrine’ and the detachment of legal reasoning from wider societal context. The latter, while respecting the pressures imposed by ‘legal doctrine’, was, in contrast, characterised by recourse to principles, policy and wider societal context to test and reformulate legal rules, the use of purposive interpretation, the drive to provide guidance for future disputes and an open acknowledgment of the court’s law-making function. Llewellyn believed that the ‘Grand Style’ was superior in terms of promoting ‘reckonability’ since it reconciled the demands of the legal rules with the felt demands of justice, provided better guidance for future cases and, unlike the ‘Formal Style’, did not “drive *conscious* creation all but underground.”¹⁴⁴

¹³⁷ Llewellyn, K.N., *supra* n. 27, p. 24.

¹³⁸ Llewellyn, K.N., *supra* n. 27, p. 25.

¹³⁹ Llewellyn, K.N., *supra* n. 27, p. 25.

¹⁴⁰ Llewellyn’s thirteenth ‘steadying factor’ (Llewellyn, K.N., *supra* n. 27, pp. 35-45). Llewellyn described the ‘Period-Style’ as “the general and pervasive manner over the country at large, at any given time, of going about the job, the general outlook, the ways of professional knowhow, the kind of thing the men of law are sensitive to and strive for, the tone and flavour of the working and of the results.” (Llewellyn, K.N., *supra* n. 27, p. 36). For an excellent commentary on and restatement of Llewellyn’s ‘Period-Style’, see Twining, W., *supra* n. 59, pp. 210-215.

¹⁴¹ Llewellyn, K.N., *supra* n. 27, p. 36. See also, Llewellyn, K.N., *supra* n. 68, p. 176.

¹⁴² Llewellyn, K.N., *supra* n. 68, p. 183.

¹⁴³ Llewellyn, K.N., *supra* n. 27, p. 39.

¹⁴⁴ Llewellyn, K.N., *supra* n. 27, p. 40.

(2) 'External Extra-Legal Steadying Factors'

The role of 'external extra-legal steadying factors' in promoting 'reckonability' is to reduce the impact of external pressures that could be placed upon courts and judges to (1) cause them to abandon their duty to adhere to 'legal doctrine' and 'known doctrinal techniques', and (2) cause them to choose one solution among a number of possible solutions within the leeways afforded by the legal rules because that solution is preferred by the external actor exerting pressure on the court.¹⁴⁵ Simultaneously, the 'external extra-legal steadying factors' also contribute to 'reckonability' by ensuring that courts and judges are accountable where they abandon their duty to adhere to 'legal doctrine' and 'known doctrinal techniques', thereby disincentivising such licentiousness. In accordance with this description, two of Llewellyn's 'steadying factors' may be sub-categorised as 'external extra-legal steadying factors':

- 'Judicial security and honesty'¹⁴⁶: Llewellyn's argument that the immunity of court and judge from attack because "some person or persons may dislike the decision or find it wrong"¹⁴⁷ promotes 'reckonability' in that it serves to prevent "the perversion of judgment"¹⁴⁸ and push "the major factors which motivate decision so largely into the open".¹⁴⁹
- 'Professional judicial office'¹⁵⁰: Llewellyn's argument that the holding of judicial office places pressures upon the judge to be selfless, impartial and just.¹⁵¹ These matters "are driven home" by "[t]ime, place, architecture and interior arrangement, supporting officials, garb,

¹⁴⁵ The former effect would lead to arbitrariness in judicial decision-making, which can never be good for the forecasting of outcomes. The latter effect would lead to unpredictability of outcome where one cannot know that there is external pressure being exerted on the court or cannot know what the preferences of the external actor exerting the pressure are; conversely, if one is aware of these matters, then such knowledge could lead to a measure of predictability, providing the external actor with this influence has consistent and transparent preferences (see Llewellyn, K.N., *supra* n. 27, pp. 32-33).

¹⁴⁶ Llewellyn's eleventh 'steadying factor' (Llewellyn, K.N., *supra* n. 27, pp. 32-33).

¹⁴⁷ Llewellyn, K.N., *supra* n. 27, p. 32.

¹⁴⁸ Llewellyn, K.N., *supra* n. 27, p. 33.

¹⁴⁹ Llewellyn, K.N., *supra* n. 27, p. 33.

¹⁵⁰ Llewellyn's fourteenth 'steadying factor' (Llewellyn, K.N., *supra* n. 27, pp. 45-51).

¹⁵¹ Llewellyn, K.N., *supra* n. 27, p. 46.

ritual...”¹⁵² Implicit is a pressure to conform to decision within the leeways afforded by ‘legal doctrine’.

(3) ‘Procedural Extra-Legal Steadying Factors’

The ‘procedural extra-legal steadying factors’ promote ‘reckonability’ of outcome by diminishing the influence of case-level ‘obstacles’ to ‘legal certainty’ such as human error and the vagaries of fact-finding and determination. These ‘procedural’ factors generally owe their existence to procedural rules and practices in litigation that serve to, *inter alia*, limit the lines of decision and remind a court of its duty to the pressures of ‘legal doctrine’. In accordance with this description, six of Llewellyn’s ‘steadyding factors’ may be described as ‘procedural extra-legal steadyding factors’:

- ‘An opinion of the court’¹⁵³: Llewellyn’s argument that the “felt pressure or even compulsion to follow up with a published ‘opinion’ which tells any interested person what the cause is and why the decision – under the authorities – is right, and perhaps why it is wise”¹⁵⁴ promotes ‘reckonability’ by indicating how future similar cases might be decided. Llewellyn further argued that the threat of a dissenting opinion promoted ‘reckonability’ by serving to expose a majority which does not adhere to the leeways afforded by the ‘legal doctrine’.
- ‘A frozen record from below’¹⁵⁵: Llewellyn’s argument that the vagaries of fact-finding and determination as a cause of uncertainty do not play a significant role in the American appellate courts since the “fact material which the appellate judicial tribunal has official liberty to consider in making its decision is largely walled in.”¹⁵⁶
- ‘Issues limited, sharpened, phrased’¹⁵⁷: Llewellyn’s argument that the matters to be decided (whether to affirm, reverse, modify, etc.) arrive

¹⁵² Llewellyn, K.N., *supra* n. 27, p. 46.

¹⁵³ Llewellyn’s sixth ‘steadyding factor’ (Llewellyn, K.N., *supra* n. 27, pp. 26-27).

¹⁵⁴ Llewellyn, K.N., *supra* n. 27, p. 26.

¹⁵⁵ Llewellyn’s seventh ‘steadyding factor’ (Llewellyn, K.N., *supra* n. 27, p. 28).

¹⁵⁶ Llewellyn, K.N., *supra* n. 27, p. 28.

¹⁵⁷ Llewellyn’s eighth ‘steadyding factor’ (Llewellyn, K.N., *supra* n. 27, p. 29).

before American appellate courts “already drawn, drawn by lawyers, drawn against the background of legal doctrine and procedure, and drawn largely in frozen, printed words”¹⁵⁸, a fact that “tends powerfully both to focus and to limit discussion, thinking and lines of deciding.”¹⁵⁹

- ‘Adversary argument by counsel’¹⁶⁰: Llewellyn’s argument that adversary oral and written argument, where made by counsel who are “skilled and reasonably in balance” serves to promote the ‘reckonability’ of outcomes by “gathering and focusing the crucial authorities, making the fact-picture clear and vivid, illuminating the probable consequences of the divergent decisions contended for, and by phrasing with power the most appealing of the divers possible solving rules.”¹⁶¹
- ‘Group Decision’¹⁶²: Llewellyn’s argument that a decision by a group “all of whom take full part is likely to produce a net view with wider perspective and fewer extremes than can an individual...”¹⁶³ Llewellyn further argued that “continuity is likely to be greater with a group.”¹⁶⁴
- ‘A Known Bench’¹⁶⁵: Llewellyn’s argument that the study of a court’s opinions over a period of time will reveal of courts and judges “ways of looking at things, ways of sizing things up, ways of handling authorities, attitudes in one area of life-conflict and another”¹⁶⁶, which assist a lawyer in forecasting how a court or judge is likely to decide an individual appeal.

However, not all of these ‘steadying factors’ are amenable to study in the context of this dissertation. The paragraphs that follow identify those ‘steadying factors’ which are not so amenable, providing justification for this conclusion in each case.

¹⁵⁸ Llewellyn, K.N., *supra* n. 27, p. 29.

¹⁵⁹ Llewellyn, K.N., *supra* n. 27, p. 29.

¹⁶⁰ Llewellyn’s ninth ‘steadying factor’ (Llewellyn, K.N., *supra* n. 27, p. 29-31).

¹⁶¹ Llewellyn, K.N., *supra* n. 27, p. 30.

¹⁶² Llewellyn’s tenth ‘steadying factor’ (Llewellyn, K.N., *supra* n. 27, pp. 31-32).

¹⁶³ Llewellyn, K.N., *supra* n. 27, p. 31.

¹⁶⁴ Llewellyn, K.N., *supra* n. 27, p. 31.

¹⁶⁵ Llewellyn’s twelfth ‘steadying factor’ (Llewellyn, K.N., *supra* n. 27, pp. 34-35).

¹⁶⁶ Llewellyn, K.N., *supra* n. 27, p. 34.

b) Isolating 'Steadying Factors' for Study

This dissertation does not propose to examine all fourteen of Llewellyn's 'steading factors' in the context of the preliminary reference procedure. For starters, the dissertation does not seek to analyse the 'legal steading factors' in that context: rather, the idea that the Court of Justice and its Judges are subject to a duty to deliver rulings that are controlled or guided by a limited body of 'legal doctrine' and a limited number of doctrinal techniques is treated as a 'first principle'.¹⁶⁷ Instead, the dissertation will examine the 'extra-legal steading factors', those factors that, *inter alia*, reinforce the normative character of 'legal doctrine' and diminish the impact of subjectivities on decisional outcomes. However, the dissertation does not propose to examine each of the twelve 'extra-legal steading factors' identified previously. The overriding reason for this is that it is simply beyond the scope of the dissertation to conduct a study of that breadth. More specifically, three reasons can be identified for the exclusion of certain 'steading factors' from this study:

- The 'steading factor' amounts to no more than an assertion, which would appear incapable of re-definition or refinement to render it amenable to ready application to the preliminary reference procedure. This may be a result of the absolute intractability of the 'steading factor' itself or may be owing to the limited skill set of the author of this dissertation.¹⁶⁸
- The 'steading factor' would appear to be so culturally specific to the context in which Llewellyn was writing, the American appellate courts, that it is not amenable to examination in the Court of Justice context.

¹⁶⁷ In the context of the American appellate courts, it will be recalled that Llewellyn argued that the courts ought to "remain moderately consonant with the language and also with the spirit of some part of [the] body of [legal] doctrine." (Llewellyn, K.N., *supra* n. 27, p. 20). However, this as a minimum standard of adherence to 'legal doctrine' may be culturally specific or subjective. For this reason, the meaning of the 'legal steading factors' in the context of the EU legal system and the Court of Justice is considered below (*supra* n. 193-n. 223).

¹⁶⁸ This author is a lawyer, rather than a behavioural psychologist, for instance.

- A study of the ‘steading factor’ is deserving of a discrete treatment that is beyond the scope of this dissertation.

For the first reason, three of Llewellyn’s ‘steading factors’ may be excluded from consideration in this dissertation. The first is Llewellyn’s fourth ‘steading factor’, ‘responsibility for justice’. The argument advanced in favour of this factor is a mere assertion: judges have an “in-grained deep-felt need, duty, and responsibility”¹⁶⁹ to be ‘just’. It would seem, short of carrying out behavioural tests on judges, there is no way to test this assertion.¹⁷⁰ This issue occurs also with a second ‘steading factor’, Llewellyn’s fourteenth, ‘professional judicial office’. The third such ‘steading factor’ is Llewellyn’s fifth, ‘the tradition of one single right answer’. Again, this is presented by Llewellyn as a bald assertion: deciding is done under an ideology that there is a single right answer. This assertion could conceivably be tested through the examination of judicial decisions or through interviews with judges to gain insight into their attitudes on this ideology. However, these approaches could run into significant problems. Judicial decisions as recorded may amount to mere deductive justifications of the decision and reveal little about the decision-maker’s attitude to alternative answers.¹⁷¹ Judges, assuming that their responses in interviews are honest, may not be aware of subconscious or

¹⁶⁹ Llewellyn, K.N., *supra* n. 27, pp. 23-24.

¹⁷⁰ Analysis of Llewellyn’s first ‘steading factor’, ‘law-conditioned officials’ is also troubled by this problem: Llewellyn simply asserts that legal education and professional experience result in certain shared internalised values, outlooks and methods. However, the ‘law-conditioned officials’ ‘steading factor’, unlike the ‘responsibility for justice’ ‘steading factor’ does at the very least provide some limited scope for application in the Court of Justice context; specifically, the question as to whether the past and present Judges are ‘law-conditioned officials’ within Llewellyn’s meaning of the concept. These issues are discussed in the context of the ‘law-conditioned officials’ ‘steading factor’ in Part One, n. 118-n. 149.

¹⁷¹ Drawing upon the theories of Alexy (Alexy, R., *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford: Clarendon Press, 1989)), Bengoetxea recognises in judicial decision-making a distinction between ‘discovery’ and ‘justification’ (Bengoetxea, J., *supra* n. 104, p. 86, p. 96, pp. 110-122, p. 128, pp. 134-135, p. 165; Bengoetxea, J., MacCormick, N. and Moral Soriano, L., “Integration and Integrity in the Legal Reasoning of the European Court of Justice” in de Búrca, G. and Weiler, J.H.H. (eds.), *The European Court of Justice* (Oxford: Oxford University Press, 2001), p. 43 at 48-50)). The distinction between discovery and justification is perhaps best explained by Conway in his assessment of Bengoetxea: “Discovery is the actual process or influences producing a judicial decision, which may be a complex of various background political, social and psychological factors never articulated in the judgment itself, while justification is the reasoning actually provided in the public record of the judgment itself.” (Conway, G., *supra* n. 104, p. 70). This view of judicial decision-making is consistent with the American legal realist view that the published reasons for judicial decisions may well be *ex post facto* justifications: take Judge Hutcheson’s infamous admission that he decided cases based on ‘judicial hunch’ (Hutcheson, J.C., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision”, (1929) 14 *Cornell Law Quarterly* 274). Llewellyn also recognised the judicial opinion as a retrospective rationalisation (Llewellyn, K.N., *supra* n. 68, p. 58).

unconscious processes that lead them to their decisions. Although there might be some scope for a similar assertion being made in the context of the Court of Justice, particularly in the context of preliminary references where uniformity and certainty are of critical importance, it is considered safer not to repeat it in the context of this dissertation.¹⁷²

In respect of the second and third reasons, one ‘steadying factor’ may be omitted from consideration in this dissertation: Llewellyn’s thirteenth, ‘the general Period-Style and its promise’. Llewellyn did not preclude the possibility of his ‘Period-Style’ having relevance beyond the context of the American appellate courts. However, he evidently saw it as having very limited cross-cultural relevance, asserting that apart from American courts in the early nineteenth century, he had come across the ‘Grand Style’ only twice: “in Cheyenne Indian Law¹⁷³ and in the classical Roman period.”¹⁷⁴ The apparent cultural specificity of Llewellyn’s ‘Period-Style’¹⁷⁵, as well as the fact that an investigation into its relevance in the context of the Court of Justice is deserving of its own study¹⁷⁶, mean that it is beyond the scope of the dissertation to follow this line of enquiry.

¹⁷² The Court of Justice in its preliminary rulings has as a matter of practice provided alternative answers to questions referred by national courts. However, this approach has been limited to circumstances where “there is a reasonable doubt about whether the EU rule referred to in the preliminary question is the only question which is relevant to the case...” (Broberg, M. and Fenger, N., *supra* n. 46, p. 420) or where “the referring court has not given sufficient information about the relevant facts or national legal provision...” (Broberg, M. and Fenger, N., *supra* n. 46, p. 421). Neither circumstance is probative of non-adherence to a single-right-answer ideology.

¹⁷³ Llewellyn was here referring to his study with the anthropologist E. Adamson Hoebel of the dispute settlement processes of the Cheyenne Indian tribe: Llewellyn, K.N. and Adamson Hoebel, E., *The Cheyenne Way* (Norman: University of Oklahoma Press, 1941). For a commentary on this work, see Twining, W., *supra* n. 59, pp. 153-169.

¹⁷⁴ Llewellyn, K.N., *supra* n. 27, p. 45, fn. 40.

¹⁷⁵ This author did some preliminary enquiries into this question in preparation for a presentation entitled “The Grand Style decision-making of the Court of Justice in the creation of ‘a new legal order’: a case study of judicial style in the formative years of a constitution” at the Annual Conference of the Society of Legal Scholars at the University of York on Wednesday, the 2nd September 2015. This initial enquiry did reveal evidence of ‘Grand-Style’ reasoning where the Court of Justice was dealing with what might be termed ‘constitutional’ issues in the following early seminal cases: Case 26/62 *Van Gend en Loos* [1963] ECR 13; Case 6/64 *Costa v ENEL* [1963] ECR 585; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 125; Case 106/77 *Simmenthal II* [1978] ECR 629. Conversely, the author detected the workings of the ‘Formal Style’ in the Court’s reasoning as it pertained to ‘non-constitutional’ issues.

¹⁷⁶ Llewellyn, for instance, devoted the entirety of Part II of *The Common Law Tradition* to demonstrating the ‘Grand Style’ at work: Llewellyn, K.N., *supra* n. 27, pp. 401-507. It is a study this author wishes to take up at a later date.

By the process of elimination, therefore, this dissertation examines, in the preliminary reference procedure context, the following eight ‘extra-legal steadying factors’ organised here along the lines of their previously allocated sub-categories:

- ‘Internal extra-legal steadying factors’: ‘law-conditioned officials’¹⁷⁷;
- ‘External extra-legal steadying factors’: ‘judicial security and honesty’;
- ‘Procedural extra-legal steadying factors’: ‘an opinion of the court’; ‘a frozen record from below’; ‘issues limited, sharpened, phrased’; ‘adversary argument by counsel’; ‘group decision’; ‘a known bench’.¹⁷⁸

However, the fact that these ‘extra-legal steadying factors’ are adjudged amenable to consideration in the context of the Court of Justice does not mean that there may not be significant problems in applying them in that context. The paragraphs that follow consider these issues.

4. Applying Llewellyn’s ‘Steadying Factors’ to the Article 267 TFEU Preliminary Reference Procedure

Before proceeding to discussing the problems that might arise in applying those of Llewellyn’s ‘steadying factors’ selected previously to preliminary rulings, there are a number of very obvious questions that may be posed about the appropriateness of the endeavour in the first place.

¹⁷⁷ This ‘steadying factor’, examined in the context of the Judges of the Court of Justice, in Part One, is subject to a more limited enquiry than the factors analysed in Parts Two and Three. In Part One, Llewellyn’s assertion that ‘law conditioning’ contributes to ‘reckonability’ is accepted, albeit with some reservation. The focus of the enquiry in Part One is whether the Judges of the Court of Justice are ‘law conditioned’. Parts Two and Three, in contrast, seek to demonstrate the manner in which the ‘steadying factors’ therein examined contribute to ‘reckonability’ in the preliminary reference procedure.

¹⁷⁸ This author is aware that an apparent imbalance in terms of the number of ‘steadying factors’ in each sub-category examined could be open to criticism. However, this apparent imbalance has much to do with Llewellyn’s unequal treatment of his ‘steadying factors’ (see, for instance, Twining, W., *supra* n. 59, p. 267 and fn. 251). It should become evident that Llewellyn’s eleventh ‘steadying factor’, ‘judicial security and honesty’ is deserving of as much, if not more, treatment than all six of Llewellyn’s ‘procedural extra-legal steadying factors’ combined. Indeed, Part Two, which is an examination of Llewellyn’s eleventh ‘steadying factor’, has more pages dedicated to it than all six of the ‘procedural extra-legal steadying factors’ combined, which are discussed in Part Three.

a) *The Appropriateness of Llewellyn's 'Steadying Factors'*

One may pose two separate, though related, questions as to the appropriateness of examining Llewellyn's 'steadying factors' in the context of the preliminary reference procedure.

The first of these questions is whether it is appropriate to apply a theory confined by its author to a specific legal-cultural and procedural context, American appellate courts, to the EU legal system, which is often said to be *sui generis*.¹⁷⁹ The title of Llewellyn's book in itself suggests this potential problem. It might be argued that theories developed by European legal realists or Scandinavian legal realists might be more suitable. This author proffers two points in reply. Firstly, Llewellyn's 'descriptive thesis' would appear to be the only grand or comprehensive theory that has sought to catalogue all of the factors that contribute to 'steadying' individual judicial outcomes. European legal realism, both in its 'old'¹⁸⁰ and 'new'¹⁸¹ incarnations, has focussed on explaining wider phenomena: in the case of the 'old' realists, the methods of legal decision and the motivations behind decision, and in the case of 'new'

¹⁷⁹ A result of the assertion by the Court of Justice in its early case law that the EU legal system was a 'new legal order' (Case 26/62 *Van Gend en Loos* [1963] ECR 13; Case 6/64 *Costa v ENEL* [1963] ECR 585; Case 106/77 *Simmenthal II* [1978] ECR 629). See generally, Suami, T., "EU Law, EEA Law and International Law: The Myth of Supranational Law and Its Implications for International Law" in Baudenbacher, C., Speitler, P. and Pálmarsdóttir, B. (eds.), *The EEA and the EFTA Court: Decentred Integration* (Oxford: Hart, 2014), p. 529; Phelan, W., "What is Sui Generis about the European Union? Costly International Cooperation in a Self-Contained Regime", (2012) 14(3) *International Studies Review* 367.

¹⁸⁰ Bobek describes a "European realist tradition" and cites the following works as examples of this tradition: Ehrlich, E., *Freie Rechtsfindung und freie Rechtswissenschaft* (Leipzig: C.L. Hirschfeld, 1903); Gény, F., *Méthodes d'interprétation et sources en droit privé positif: Essai critique* (Paris: F. Pichon et Durand-Auzias, 1919); Esser, J., "Motivation und Begründung richterlicher Entscheidungen" in Perelman, C. and Foriers, P. (eds.), *La motivation des décisions de justice* (Brussels: Bruylant, 1978); Esser, J., *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt: Athenäum, 1970). See Bobek, M., "The Changing Nature of Selection Procedures to the European Courts" in Bobek, M. (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford: Oxford University Press, 2015), p. 1, fn. 1.

¹⁸¹ European new legal realism is a legal method that has emerged in the past decade. Influenced heavily by Scandinavian legal realism as well as Rasmussen's examination of the alleged activism of the Court of Justice in *On Law and Policy in the European Court of Justice* (*supra* n. 43), which itself was inspired by American legal realism, European new legal realism focusses on the use of social science research methods to explain phenomena like legal integration. Unlike the American legal realism of the 1920s and 1930s, it does not concern itself with the prediction of what the courts will do in individual cases. Notable European new legal realist works include: Neergaard, U.B. and Nielsen, R. (eds.), *European Legal Method: Towards a New Legal Realism* (Copenhagen: DJØF Publishing, 2013); Koch, H., Weiler, J.H.H., Hagel-Sørensen, K. and Haltern, U. (eds.), *Europe: The New Realism – Essays in Honour of Hjalte Rasmussen* (Copenhagen: DJØF Publishing, 2010).

realists, judicial activism and European legal integration. Scandinavian legal realists, in contrast to American legal realists, focussed on freeing “legal science ... from mythology, theology and metaphysics.”¹⁸² Secondly, the author of this dissertation has always suspected that many, if not most, of Llewellyn’s ‘steading factors’ enjoy a significant degree of universality, and this suspicion has been confirmed, in part¹⁸³, by Beck’s use of Llewellyn’s ‘steading factors’ as a conceptual apparatus to develop his own ‘legal’ and ‘extra-legal steading factors’ in the context of the CJEU.¹⁸⁴ While this dissertation argues that the selected ‘extra-legal steading factors’ operate in the preliminary reference procedure to reduce uncertainty, it does not argue that they operate in a manner identical to how Llewellyn asserts they do in the American appellate court context: in some cases, a ‘steading factor’ may exert greater influence in the Court of Justice context, in others less. It is equally obvious that many of Llewellyn’s concepts and ‘steading factors’ require adjustment in order to be applied in the Court of Justice context, particularly in the case of the ‘procedural extra-legal steading factors’.¹⁸⁵

The second question is whether Llewellyn’s ‘steading factors’, designed in the context of an appellate court, are appropriate for application to the preliminary reference procedure. Would it not make more sense to seek to apply Llewellyn’s ‘steading factors’ to the appellate jurisdiction of the Court of Justice?¹⁸⁶ Even discounting full *de novo* appeals, one must concede there are a number of differences between appeals on a point of law¹⁸⁷ and preliminary references. Most obviously, the decisional choice in appeals is essentially a binary one: affirm or reverse.¹⁸⁸ In contrast, in preliminary references, the Court of Justice is more often faced with an open question of

¹⁸² Freeman, M.D.A., *supra* n. 28, p. 1036. For a succinct account of Scandinavian legal realism, see Freeman, M.D.A., *supra* n. 28, pp. 1035-1076.

¹⁸³ “In part”, because Beck chose to develop his own ‘extra-legal steading factors’ rather than utilise Llewellyn’s. Nevertheless, the first two of Beck’s four ‘legal steading factors’, (1) ‘the normative constraints of law’ and (2) ‘the normative constraint of precedent’, resemble closely Llewellyn’s second and third ‘steading factors’ (Beck, G., *supra* n. 17, pp. 332-436).

¹⁸⁴ Beck, G., *supra* n. 24, pp. 332-436.

¹⁸⁵ In contrast to the American appellate courts, there are no dissenting opinions permitted at the Court of Justice, for instance.

¹⁸⁶ Article 256(1) TFEU, Articles 56-61 of the Statute, Articles 167-190 of the Rules of Procedure. See Wägenbaur, B., *Court of Justice of the EU: Commentary on Statute and Rules of Procedure* (Oxford: Hart, 2013), pp. 455-484.

¹⁸⁷ Appeals from the General Court to the Court of Justice are limited to those on a point of law only: Article 56(1) of the Statute. See Wägenbaur, B., *supra* n. 186, pp. 457-458.

¹⁸⁸ Llewellyn, K.N., *supra* n. 27, p. 29.

interpretation, although it may sometimes be called upon to rule on the validity of an EU act.¹⁸⁹ Moreover, the Article 267 TFEU procedure is almost by definition for ‘hard cases’¹⁹⁰, whereas many appeals may be, in Llewellyn’s terms “foredoomed”¹⁹¹. These facts alone must result in different expectations as to predictability in both procedures. Notwithstanding these differences, there are also important similarities between both types of procedure. The most obvious of these is that in both an appeal on a point of law and the preliminary reference procedure, the deciding court has no jurisdiction to find or determine facts, which should remove a major cause of uncertainty in litigation. In short, it is argued that the ‘steadying factors’ selected are capable of application to the preliminary reference context, although, again, it is acknowledged that their influence may differ and that they may require adjustment.

The author of this dissertation has chosen to seek to apply Llewellyn’s ‘steadying factors’ to the preliminary reference procedure rather than appeals from the General Court for two reasons. First, while the appellate jurisdiction of the Court of Justice is an important one and does take up an increasing amount of the Court’s time¹⁹², its role in contributing to European legal integration pales in comparison to that played by the preliminary reference procedure. Moreover, while regularity in an appellate court’s approach is a matter of some gravity, even greater significance can be attached to ‘certainty’ in preliminary rulings given their role in promoting the uniformity and effectiveness of EU law.¹⁹³ Examining ‘steadying factors’ in the preliminary reference procedure is, therefore, a more significant enquiry. Second, because there are more obvious and subtle procedural differences between the appellate context in which Llewellyn was writing and the preliminary reference procedure than is the case with the more analogous Court of Justice appellate jurisdiction, the successful application of the ‘steadying factors’ in the

¹⁸⁹ *Supra* n. 18.

¹⁹⁰ *Supra* n. 47.

¹⁹¹ Llewellyn, K.N., *supra* n. 27, p. 25.

¹⁹² In 2010, 84 (15%) of the total number of cases completed by the Court of Justice that year were appeals from the General Court; in 2011, 117 (18%) out of 638; in 2012, 117 (20%) out of 595; in 2013, 155 (22%) out of 710; and, in 2014, 157 (22%) out of 719 (Court of Justice of the European Union, *supra* n. 47, p. 98). In 2015, 127 (21%) out of 616 cases completed were appeals from the General Court (Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2016), p. 79).

¹⁹³ *Supra* n. 16.

preliminary reference context demonstrates better a degree of universality in Llewellyn's 'steading factors'.

While it may be asserted, albeit rather tentatively, that Llewellyn's 'steading factors', as selected above, may be examined in the context of the preliminary reference procedure, there remain a number of *prima facie* problems with their application to be discussed.

b) Prima Facie Problems in Applying Llewellyn's 'Steading Factors' in the Preliminary Reference Procedure Context

An initial consideration of Llewellyn's 'descriptive thesis' in *The Common Law Tradition* and of the eight selected 'extra-legal steading factors' presents a number of *prima facie* problems relating to their application in the preliminary reference procedure context. These problems may be divided into two categories:

- The 'legal-cultural relativity' of many of Llewellyn's key concepts, in particular, 'reckonability', 'legal doctrine' and 'known doctrinal techniques';
- The very evident need to refine and adjust many of Llewellyn's 'steading factors' for application to the Court of Justice.

These issues are now discussed in turn.

aa) The 'Legal-Cultural Relativity' of Concepts Key to Llewellyn's 'Descriptive Thesis'

In the attempt to isolate 'steading factors' for application to the preliminary reference procedure, it was concluded that the apparent 'cultural specificity' of Llewellyn's thirteenth 'steading factor', the 'Period-Style', rendered it inappropriate for application in this dissertation. However, as well as there being 'culturally specific' concepts in Llewellyn's 'descriptive thesis', there exist also 'culturally relative' concepts that may cause significant difficulty.

Key concepts such as ‘reckonability’, ‘legal doctrine’ and ‘known doctrinal techniques’ are ‘culturally relative’ in the sense that Llewellyn’s definitions of them in the American context may not be appropriate in the context of the EU legal system and in preliminary references, more particularly. These concepts, therefore, require re-consideration in the EU legal context as they underpin the core arguments in this dissertation.

(1) ‘Reckonability’

The genesis of the concept and Llewellyn’s account of the meaning of ‘reckonability’ have already been described.¹⁹⁴ Reference has been made, in particular, to Llewellyn’s own assertion that the concept could mean different things in different contexts: for instance, the “base line of judgment”¹⁹⁵ in the trial of an action, where the facts have yet to be collected and determined, will differ significantly from that in an appeal on a point of law, where the court is presented with a ‘frozen record’¹⁹⁶ of the facts.¹⁹⁷ The measure of ‘reckonability’ that can reasonably be expected in these different contexts will differ accordingly. This author has noted some differences in the ‘base line of judgment’ between appeals on points of law and preliminary references previously.¹⁹⁸ An appeal presents to a court a binary problem; a reference, unless it concerns a determination on the validity of an EU act, presents a more open-ended interpretative problem: in Llewellyn’s words, “a choice between two alternatives is vastly more predictable than one among a welter.”¹⁹⁹ It is not only the number of potential outputs, however, that may make preliminary rulings more difficult to predict; it is also the nature of the output: prediction of a preliminary ruling may require the forecasting of a substantive interpretation. In contrast, in the context of appeals, it is evident that Llewellyn expected prediction of the answer to the binary proposition and not of the reasons provided to justify that answer.²⁰⁰ Moreover, references ought to be ‘hard cases’ with a consequent increase of uncertainty *within* the legal rules; appeals

¹⁹⁴ *Supra* n. 65-n. 75.

¹⁹⁵ Llewellyn, K.N., *supra* n. 27, p. 17.

¹⁹⁶ Llewellyn, K.N., *supra* n. 27, p. 28.

¹⁹⁷ Llewellyn, K.N., *supra* n. 27, pp. 17-18. *Supra* n. 73.

¹⁹⁸ *Supra* n. 188-n. 191.

¹⁹⁹ Llewellyn, K.N., *supra* n. 27, p. 29.

²⁰⁰ Llewellyn, K.N., *supra* n. 27, p.

need not be so. To expect ‘a skilled man or woman’, therefore, to predict the substantive outcome of a preliminary reference “eight times out of ten”²⁰¹, as Llewellyn expected in the context of the American appellate courts, is clearly fanciful. ‘Reckonability’, in terms of what can reasonably be expected from the preliminary reference procedure, differs evidently. How then to quantify ‘reasonable reckonability’ in the context of the procedure? This is a theoretical enquiry deserving of its own study, and not one that can be resolved here.²⁰² More significantly, it is an enquiry that does not require resolution here. This dissertation does not assert, as Llewellyn’s did in the context of appeals, that preliminary references are ‘reckonable’: rather, it proposes that there are ‘steadying factors’ within the EU legal system and the preliminary reference procedure that reduce significantly the ‘obstacles’ to ‘legal certainty’²⁰³ or, in other words, promote ‘reckonability’.

(2) ‘Legal Doctrine’

Llewellyn’s broad understanding of ‘legal doctrine’ has been described previously²⁰⁴ as including not only rules of law, but also “the accepted lines of organizing and seeing these materials: concepts, ‘fields’ of law with their differential importance, pervading principles, living ideals, tendencies, constellations, tone.”²⁰⁵ Whether such a broad conception of ‘legal doctrine’, beyond legal rules, is appropriate in the context of the EU legal system should be considered. There is an argument to support its utilisation in the EU context. When reading Llewellyn’s understanding of ‘legal doctrine’, one may be struck

²⁰¹ Llewellyn, K.N., *supra* n. 27, p. 45.

²⁰² However, a few general, and perhaps rather trite, observations may be made. If the preliminary reference procedure is to fulfil its core function in ensuring the uniformity and effectiveness of EU law, and the Court of Justice is to operate in a manner consistent with the rule of law, rulings should at the very least be ‘steady’, or ‘coherent’ or ‘relatively stable’, or put differently, rulings should not be arbitrary or uncertain. A lawyer ought, at the very least, to retain some confidence that the forecasting of preliminary rulings is a matter of legal skill rather than pure guesswork. The concept of ‘steadiness’ is derived from Llewellyn’s ideas in *The Common Law Tradition*; the concept of ‘coherence’ is derived from Bengoetxea, MacCormick and Moral Soriano, who in turn borrowed it from Dworkin’s idea of ‘law as integrity’ (Bengoetxea, J., MacCormick, N. and Moral Soriano, L., *supra* n. 171, p. 47; Dworkin, R., *Law’s Empire* (Oxford: Hart, 1998), pp. 225-275); the concept of ‘relative stability’ is derived from Raz’s formal concept of the rule of law (Raz, J., *supra* n. 3). It is not suggested that these concepts are analogous in any precise sense.

²⁰³ Or, to paraphrase Llewellyn, lessen the degrees of uncertainty of outcome (Llewellyn, K.N., *supra* n. 27, p. 17).

²⁰⁴ *Supra* n. 109.

²⁰⁵ Llewellyn, K.N., *supra* n. 27, p. 20.

by his conception of ‘pervading principles’ as a guide for the ‘organisation’ and ‘seeing’ of the legal rules: indeed, similarities to Dworkin’s theory on the role of ‘principles’ in the application of rules and his ideas of ‘law as integrity’ occur.²⁰⁶ Dworkin argued that the manner in which judges interpret legal rules is controlled by ‘principles’²⁰⁷ and argued further that judges should view ‘law as integrity’, that is: “identify legal rights and duties ... on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.”²⁰⁸ This ‘integrity’ requires “consistency of principle”²⁰⁹. Llewellyn’s insistence on the existence of ‘pervading principles’²¹⁰ suggests a similar belief in an *integral* legal system.²¹¹ Talk of ‘principle’ and ‘integrity’ should chime with any scholar of EU law. Bengoetxea has expressly identified the pertinence of Dworkin’s theories in the context of the EU legal system:

“In any case it is of interest to analyse the ECJ as an institution which engages in social action mainly by furthering the Community project and continually reshaping EC law as a coherent order inspired by some notion of integrity or system. It is in this respect that the ECJ is a Dworkinian court.”²¹²

That a definition of ‘legal doctrine’ in the context of the EU legal order cannot be limited to traditional notions of the sources of law (such as the Treaties, those instruments provided for in Article 288 TFEU²¹³ and the case-law of the CJEU) is obvious from the reasoning of the Court of Justice itself. It has time

²⁰⁶ At least one legal scholar has observed the similarity between Llewellyn’s understanding of the role of ‘principles’ and that of Dworkin, even if Dworkin himself in his criticism of *The Common Law Tradition* did not see it: “In his urging judges to follow the language and spirit of a doctrine to cover cases where the doctrine itself is not fully clear, Llewellyn was in a metaphorical way urging them to do exactly what Dworkin demands, that is, to follow other standards which are not personal preferences, but rather - are inherent or implicit in the law itself. Llewellyn was providing a principle to govern the resolution of hard cases.” (Reynolds, N.B., “Dworkin as Quixote”, (1975) 123 *University of Pennsylvania Law Review* 574, at 594). Reynolds is referring to Dworkin, R., “Judicial Discretion”, (1963) 60 *Journal of Philosophy* 624.

²⁰⁷ See, for instance, Dworkin, R., *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), pp. 82-88. For a general introduction to Dworkin’s ideas, see Freeman, M.D.A., *supra* n. 28, pp. 717-833.

²⁰⁸ Dworkin, R., *supra* n. 202, p. 225.

²⁰⁹ Dworkin, R., *supra* n. 202, p. 228.

²¹⁰ This author’s emphasis.

²¹¹ This is evidenced further by Llewellyn’s assertion that in the American legal system “‘freedom’ is an underlying drumbeat and slogan that informs not merely life but law.” (Llewellyn, K.N., *supra* n. 27, p. 20).

²¹² Bengoetxea, J., *supra* n. 104, p. 9.

²¹³ Regulations, directives, decisions, recommendations and opinions.

and again relied on what might be termed ‘pervading principles’ of the EU legal order such as ‘uniformity’²¹⁴ and ‘effectiveness’²¹⁵ to guide its interpretation of legal rules.²¹⁶ Moreover, the Court of Justice has, drawing upon the legal traditions of the Member States, created a series of ‘general principles’ of EU law²¹⁷, which also serve to inform the Court’s interpretation of the ‘paper rules’. Llewellyn’s broad conception of ‘legal doctrine’ would appear, therefore, to have a home in the context of EU legal scholarship.²¹⁸

(3) ‘Known Doctrinal Techniques’

This author has noted that in the context of his third ‘steadying factor’²¹⁹, ‘known doctrinal techniques’, Llewellyn asserted that ‘reckonability’ was promoted due to an understanding and acceptance that ‘legal doctrine’ should “be worked with only by way of a limited number of recognized correct techniques.”²²⁰ In *The Common Law Tradition* and elsewhere, Llewellyn devoted a significant amount of energy to observation of legitimate and illegitimate techniques of interpretation employed by the American courts in action.²²¹ In demonstrating sixty-four different techniques with which the courts treated precedent, for instance, he more than evidenced his assertion that notwithstanding the existence of a limited number of ‘doctrinal techniques’, significant leeway remained within ‘legal doctrine’.²²² In considering the relevance of Llewellyn’s third ‘steadying factor’ in the context of the Court of Justice, one must distinguish his general claim – that it is understood and

²¹⁴ In the context of the preliminary reference procedure, see: Case C-260/07 *Pedro IV Servicios SL v Total España SA* [2009] ECR I-2437, para 32; de la Mare, T. and Donnelly, C., “Preliminary Rulings and EU Legal Integration: Evolution and Stasis” in Craig, P. and de Búrca, G., *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), p. 391.

²¹⁵ See Tridimas, T., *supra* n. 1, pp. 276-312.

²¹⁶ Such principles may also be observable even if not expressed: see, for instance, Maduro’s theory that the Court of Justice has developed its jurisprudence in the area of the free movement of goods in line with an approach of ‘majoritarian activism’. ‘Majoritarian activism’, according to Maduro, involves the Court of Justice measuring the compatibility of national rules with Article 34 TFEU by reference to their consistency with the rules governing the same issue in the majority of Member States (Maduro, M.P., *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart, 1998)).

²¹⁷ See generally, Tridimas, T., *supra* n. 1.

²¹⁸ References to ‘legal doctrine’ in this dissertation shall, therefore, refer to Llewellyn’s understanding of the concept.

²¹⁹ *Supra* n. 110.

²²⁰ Llewellyn, K.N., *supra* n. 27, p. 21.

²²¹ Llewellyn, K.N., *supra* n. 27, pp. 62-120 and pp. 178-199; Llewellyn, K.N., *The Theory of Rules* (Chicago: University of Chicago Press, 2011).

²²² Llewellyn, K.N., *supra* n. 27, pp. 62-120.

accepted that there are a limited number of recognised correct techniques through which ‘legal doctrine’ must be worked – and his observations on the operation of these techniques in the common law tradition. The former claim ought to enjoy a degree of universality across functioning judicial systems. However, the ‘doctrinal techniques’ observed by Llewellyn in the American context would seem ‘culturally relative’ or, perhaps, even ‘culturally specific’ to the common law. The nature of the EU legal system and its ‘legal doctrine’, as well as the influence of the varying national legal traditions, necessitated, and indeed made inevitable, the creation of *sui generis* ‘techniques’ of interpretation, or perhaps more accurately, a *sui generis* hierarchy of ‘techniques’. The considerable academic literature describing the ‘techniques’ for the treatment of ‘legal doctrine’ evidences their limited number.²²³ Whether these ‘techniques’ are ‘correct’ or desirable is another matter, and there are many who are very critical of them.²²⁴ However, this controversy is not relevant in the context of this dissertation: at this stage, it suffices to postulate that the Court of Justice and its Judges utilise a limited number of ‘doctrinal techniques’ and the operation of these techniques is to some extent observable from the Court’s past rulings.

bb) The Need for Refinement and/or Adjustment of Llewellyn’s ‘Extra-Legal Steadying Factors’

The observation that those of Llewellyn’s ‘steady factors’ selected for examination in this dissertation require some refinement and/or adjustment in order to be applied in the context of the preliminary reference is perhaps a well-worn one. For instance, in the examination of the ‘law-conditioned officials’ ‘steady factor’, it is necessary to re-model Llewellyn’s rather opaque description of ‘law conditioning’; in the discussion of the ‘judicial security and honesty’ ‘steady factor’, it is necessary to extrapolate from

²²³ For instance, Bengoetxea, J., *supra* n. 104; Bengoetxea, J., MacCormick, N. and Moral Soriano, L., *supra* n. 171; Beck, G., *supra* n. 24; Conway, G., *supra* n. 171; Bredimas, A., *Methods of Interpretation and Community Law* (Oxford: North-Holland, 1978); Weiler, J.H.H., “Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics” in Wiklund, O. (ed.), *supra* n. 104, p. 150; Maduro, M.P., *supra* n. 216.

²²⁴ Notable examples include Conway, G., *supra* n. 171; Rasmussen, H., *supra* n. 43; Neill, P., *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995); Hartley, T., “The European Court, Judicial Objectivity and the Constitution of the European Union”, (1996) 112 *Law Quarterly Review* 95.

Llewellyn's imprecise treatment a hypothesis that the Court of Justice is disincentivised significantly from ignoring the pressures of 'legal doctrine' by reason of the opposing forces of judicial independence and accountability. Differences between American appellate procedures and the preliminary reference process also necessitate many adjustments to the 'procedural extra-legal steadying factors'. Obvious relevant differences between both processes include the fact that the Court of Justice, unlike American appellate courts, issues a collegiate ruling with no publication of dissenting opinions; the preliminary reference, unlike an appeal, is not, in a *de jure* sense at least, an adversarial procedure; the roles of the national referring court, Judge-Rapporteur and Advocate General, where relevant, in the preliminary reference procedure; the greater emphasis on written argument than oral hearing before the Court of Justice, etc. The consideration of the utility of Llewellyn's 'steadying factors' in the preliminary reference procedure in Part Three takes these differences into account.

III. The Thesis and 'First Principles'

The paragraphs that follow describe the thesis advanced in this dissertation, as well the 'first principles' that underpin it. The dissertation does not propose to test the 'first principles'; rather, it relies upon them as working assumptions, an approach that is explained below. Thereafter, a brief note of the structural overview of the argument and methodology is provided. Finally, there is a consideration of the contribution of this dissertation to scholarship and its originality.

1. The Thesis

There are 'extra-legal steadying factors' in the EU legal system and the preliminary reference procedure that serve to reduce significantly the impact of obstacles to 'legal certainty', or put differently, promote 'reconability' in the Article 267 TFEU preliminary reference procedure.²²⁵ These 'extra-legal steadying factors', which may be divided

²²⁵ For the purposes of clarity, this dissertation does not assert that preliminary rulings are predictable or even 'reconable'. Rather, it is asserting that they are not 'unreconable',

into three sub-categories ('internal', 'external' and 'procedural') promote 'reckonability' by, *inter alia*, (1) reinforcing the pressures of the 'legal steadying factors'; (2) narrowing the number of conceivable outcomes; and, (3) providing various 'signposts' to the lawyer attempting to forecast prospective judicial interpretations.

2. 'First Principles'

a) Preliminary Observations

Before proceeding to catalogue the 'first principles' from which this dissertation proceeds, it is necessary to comment briefly on the appropriateness and necessity of adopting such 'first principles' without continuing on to interrogate them. In the first place, the 'first principles' set out below are extrapolated from Llewellyn's 'descriptive thesis' in *The Common Law Tradition*, as developed further by this author.²²⁶ This author does not deny that many of these 'first principles' may be contestable. Furthermore, this author is aware that it could be asserted that there is a limitation in this dissertation to the extent that the thesis it advances depends upon the correctness of the 'first principles' as stated. There are at least two responses to these potential charges. To begin with, this author asserts that any challenge to the 'first principles' set out below that relate to the pressurising role of the 'legal steadying factors' would of necessity involve a denial of the role of 'legal doctrine' in setting the outer limits of judicial discretion, essentially the claim of 'radical indeterminacy' that has been discredited in legal scholarship.²²⁷ Even if one were to entertain the 'radical indeterminacy' claim, this author reiterates that the purpose of this dissertation is to demonstrate through application of those of Llewellyn's 'steadying factors' characterised herein as 'extra-legal' that there are similar 'extra-legal steadying factors' observable in the preliminary reference procedure. It is beyond the scope of the dissertation and beyond the capability of this author to interrogate every assertion made by Llewellyn in support of his 'descriptive thesis', an undertaking that would in any case be a

'uncertain' (in an absolute sense) or 'indeterminate', owing to the impact of the 'steadying factors' under discussion.

²²⁶ *Supra* n. 104-n. 107.

²²⁷ *Supra* n. 55. It is, moreover, a claim that contradicts any lawyer's engagement in a functional legal system underpinned by the rule of law.

dissertation in itself. This author submits that while reliance on certain assumptions as to the correctness of Llewellyn's work may mean there are some limitations inherent in this dissertation, this dissertation still makes a number of important contributions to knowledge, which are described further on.²²⁸

b) The 'First Principles' Catalogued

- The first and most important 'steadying factors' in the preliminary reference procedure are the pressures imposed on judicial discretion by the normative character of 'legal doctrine' and the limited number of 'recognised correct techniques' for its treatment (the 'legal steadying factors')²²⁹;
- The resulting pressure on judicial discretion serves to reduce the number of conceivable preliminary reference outcomes to those that are 'judicially arguable';
- The resulting pressure on judicial discretion serves to reduce, though not eliminate completely²³⁰, the negative influence of individual judicial ideologies and other subjectivities and vagaries on 'reckonability' of outcome;
- The reduction of the number of conceivable rulings to those that are 'judicially arguable' allows lawyers attempting to predict outcomes to rely upon 'legal doctrine' and the limited number of known accepted doctrinal techniques to forecast outcomes, i.e. the 'legal steadying factors' provide 'signposts' to the lawyer;

²²⁸ *Infra* n. 236-n. 244.

²²⁹ This is essentially the assertion that no matter how a judge approaches a problem, he/she will have to justify his/her solution to it within the legal rules, i.e. in a manner that is 'judicially arguable'. The judge may consult the rules first and let them control his/her decision, or let them guide him/her to his/her decision. Alternatively, he/she may arrive at a desirable solution based on personal or ideological reasoning. However, in the latter circumstance, the judge will have to justify his/her solution within the legal rules *ex post facto*, lest he/she be perceived as acting unjudicially. The thesis in this dissertation argues that there are 'extra-legal steadying factors' that reduce significantly the likelihood of unjudicial behaviour by reinforcing the 'legal steadying factors'.

²³⁰ *Supra* n. 57.

- Even where rulings adhere to the ‘legal steadying factors’, there may still be scope for significant uncertainty *within* the body of ‘legal doctrine’. Or stated otherwise, rulings that adhere to the ‘legal steadying factors’ will not necessarily reduce the impact of the ‘legal obstacles’ to ‘legal certainty’ such as vagueness or ‘value pluralism’. There may remain significant ‘leeways’ *within* the ‘legal doctrine’. However, such ‘uncertainty’ does not equal ‘radical indeterminacy’ or ‘absolute uncertainty’: the ‘legal steadying factors’ continue to place the outermost bounds on the discretion of the Court. The ‘legal steadying factors’ therefore ensure a modicum of consistency and ensure that the rulings can be characterised as ‘legal’;

- The ‘legal steadying factors’ will not operate as ‘steadying factors’ unless they are reinforced by ‘extra-legal steadying factors’. For instance, ‘legal doctrine’ does not possess a mystical ‘normative character’: rather, respect for its normative character should be accepted or internalised by the Judges of the Court of Justice as a duty²³¹ and/or must be reinforced by real consequences where the Judges fail to respect this normative character;²³²

- The ‘law conditioning’ of judges results in an internalised acceptance of the pressures imposed by the ‘legal steadying factors’ and of values that underpin a legal order.²³³

²³¹ This is discussed in detail in Part One in the context of Llewellyn’s first ‘steadying factor’, ‘law-conditioned officials’. The observation made here is consistent with Hart’s emphasis on the ‘internal point of view’ (Hart, H.L.A., *The Concept of Law* (Oxford: Oxford University Press, 2nd ed., 1997), pp. 100-110). ‘Extra-legal steadying factors’ may also have a role in augmenting as well as reinforcing the ‘legal steadying factors’: those ‘extra-legal steadying factors’ that reveal the likely ‘motivations’ behind judicial decision or provide ‘signposts’ as to how the Court may decide will narrow further the likely interpretative choices *within* the limited body of ‘legal doctrine’.

²³² This is discussed in detail in Part Two in the context of Llewellyn’s eleventh ‘steadying factor’, ‘judicial security and honesty’.

²³³ This is an assumption upon which the argument made in Part One relies. Part One maintains, based on Llewellyn’s argument for his first ‘steadying factor’, that if the Judges of the Court of Justice may be described as ‘law-conditioned officials’, it follows that this ‘law conditioning’ is an ‘internal extra-legal steadying factor’ that promotes ‘reckonability’ in preliminary rulings, since the Judges’ internalised acceptance of the pressures of ‘legal doctrine’ and of values underpinning the EU legal order will reinforce the ‘steadying effect’ of that doctrine and contribute to more uniform decision-making. This assumption and the resulting limitation of the argument advanced in Part One are discussed below (Part One, n. 38-n. 44).

3. Structural Overview of the Dissertation and Methodology

The principal aims of this dissertation are to demonstrate that the ‘extra-legal steadying factors’ chosen for study contribute to ‘reckonability’ and to describe how they do so. As stated previously, the thesis asserts that the ‘extra-legal steadying factors’ promote ‘reckonability’ of outcome by, *inter alia*, (1) reinforcing the pressures of the ‘legal steadying factors’; (2) narrowing the number of conceivable outcomes; and, (3) providing various ‘signposts’ to the lawyer attempting to forecast prospective judicial interpretations. Since the ‘steadying factors’ being applied emanate from *The Common Law Tradition*, a significant by-product of the demonstration of the thesis will be the evidencing of the applicability of Llewellyn’s ‘descriptive thesis’ outside of the American appellate court context. This ‘applicability by-product’, therefore, also forms part of the consideration in this dissertation.

The dissertation is divided into three parts in line with the three sub-categories of ‘extra-legal steadying factors’ discussed: ‘internal’, ‘external’ and ‘procedural’.

Part One concerns itself with the ‘internal extra-legal steadying factors’. Previously, this dissertation identified four of Llewellyn’s ‘steadying factors’ as ‘internal’: (1) ‘law-conditioned officials’; (2) ‘responsibility for justice’; (3) ‘the tradition of one single right answer’; and, (4) ‘the general Period-Style and its promise’. For reasons identified before, only one of these ‘steadying factors’, ‘law-conditioned officials’ has been chosen for study in Part One. Part One proceeds from the ‘first principle’ that if the Judges of the Court of Justice can be termed ‘law-conditioned officials’, their ‘law conditioning’, involving as it should an internalised acceptance of the normative character of ‘legal doctrine’ and a more uniform judicial outlook, should promote ‘reckonability’ of outcome, in particular, by reinforcing the pressures of the ‘legal steadying factors’. Part One, therefore, limits itself to enquiring as to whether the former and current Judges of the Court of Justice were/are ‘law-conditioned officials’. After re-modelling Llewellyn’s rather unrefined description of a ‘law-conditioned official’, Part One undertakes formalist and realist analyses of the extent to which, if at all, the former or current Judges of the Court can be

termed ‘law-conditioned officials’ within this re-modelled definition. The formalist analysis entails a doctrinal examination of the legal rules governing the qualifications required of a person to be appointed a Judge at the Court. The realist analysis involves a qualitative assessment of the data available on the educational and professional backgrounds of the past and present Judges prior to their appointments. Part One concludes that all but two of the ninety-seven Judges appointed to the Court of Justice since 1952 have been ‘law-conditioned officials’, with the vast majority possessing a high level of ‘law conditioning’. It is also concluded that the Judges should share a significant degree of uniformity in terms of the principles and values that they are likely to have internalised owing to their expertise in European law. In terms of the application of Llewellyn’s first ‘steadying factor’ in the Court of Justice context, Part One concludes that though Llewellyn’s ‘law-conditioned officials’ ‘steadying factor’ presents a number of challenges in terms of its application to the Court, in particular Llewellyn’s unrefined terminology and the apparent cultural specificity of aspects of the ‘steadying factor’, the re-modelled version applied in Part One provides an illuminating standard against which the Judges’ education, training and experience could be measured.

Part Two concerns itself with the ‘external extra-legal steadying factors’. Earlier, two of Llewellyn’s ‘steadying factors’ were identified as ‘external’: (1) ‘judicial security and honesty’; and, (2) ‘professional judicial office’. Again, for reasons discussed previously, Part Two examines the ‘judicial security and honesty’ ‘steadying factor’ only. In Part Two, this author extrapolates the following hypothesis from Llewellyn’s ‘steadying factor’:

- The Court and its Judges enjoy sufficient independence and security to deliver preliminary rulings which adhere to the ‘legal steadying factors’, even where such rulings are adverse to the interests of their ‘countervailing powers’²³⁴;
- Simultaneously, the Court is sufficiently accountable to certain ‘countervailing powers’, in particular referring national courts and

²³⁴ This term is defined in Part Two, n. 170-n. 177.

tribunals, that the Court is disincentivised significantly from ignoring the pressures of the ‘legal steadying factors’.

As with Part One, this hypothesis is tested by way of formalist and realist analyses. The formalist analysis consists of a doctrinal examination of the legal rules designed to protect the institutional independence of the Court and the security of its Judges, as well as those legal rules designed to ensure its accountability where it fails to respect the normative character of ‘legal doctrine’ and/or utilise the accepted doctrinal techniques. This formalist analysis concludes that there are sufficient legal protections of the Court’s independence and its Judges’ security, as well as assurances of its accountability, were it to forego adherence to the ‘legal steadying factors’. However, recognising the limitations of doctrinal/formalist analyses of legal rules, Part Two then conducts a realist examination of the hypothesis to test the likelihood of countermeasures being adopted by the Court’s ‘countervailing powers’ against it in different adjudicative ‘scenarios’. This examination entails, firstly, the conceptualisation of four types of preliminary ruling outcome or adjudicative ‘scenarios’:

- ‘Scenario 1’: where a ruling adheres to the ‘legal steadying factors’ and is not adverse to ‘countervailing power’ interests;
- ‘Scenario 2’: where a ruling adheres to the ‘legal steadying factors’ but is adverse to ‘countervailing power’ interests;
- ‘Scenario 3’: where a ruling does not adhere to the ‘legal steadying factors’ but does adhere to ‘countervailing power’ interests; and,
- ‘Scenario 4’: where a ruling does not adhere to the ‘legal steadying factors’ and does not adhere to ‘countervailing power’ interests.

Since the hypothesis would suggest that the Court of Justice is free to make ‘scenario 1’ and ‘2’ rulings without the threat of countermeasures by its ‘countervailing powers’ and should face such countermeasures where ‘scenario 3’ and ‘4’ rulings are made, Part Two considers, utilising political science theories (in particular, the neofunctionalist/intergovernmentalist dichotomy),

the likely consequences for the Court in each ‘scenario’. In essence, the realist analysis seeks to establish whether ‘countervailing powers’ are free to utilise legal and/or non-legal countermeasures against the Court of Justice merely to hold it accountable for ‘unjudicial’ decision-making (which would confirm the hypothesis) or whether these countermeasures are also likely to be adopted where the Court merely reaches ‘judicially arguable’ rulings which are contrary to the interests of these ‘powers’ (which would suggest the non-applicability of Llewellyn’s eleventh ‘steadying factor’ in the preliminary reference procedure). The realist analysis concludes that the legal and political protections of the independence of the Court and its Judges allow the Court the latitude to make rulings that adhere to the ‘steadying factors’ (‘scenarios 1’ and ‘2’), even where adverse to the interests of countervailing powers (‘scenario 2’). Put differently, the Court is protected to the extent that it cannot be intimidated into abandoning adherence to the ‘legal steadying factors’. However, these protections will not be effective where the Court abandons adherence to the ‘legal steadying factors’, at which point the Court will be susceptible to countermeasures by its ‘countervailing powers’. Accordingly, the Court is disincentivised significantly from abandoning adherence to the ‘legal steadying factors’ (‘scenario 3’ and ‘4’ outcomes). Put simply, the EU legal system ensures that the Court cannot be scared out of adherence to the ‘legal steadying factors’, but it can be scared into such adherence. Part Two concludes that the interplay between the legal rules designed to protect the independence of the Court and its Judges with the rules designed to ensure their accountability serves to promote ‘reckonability’ of preliminary rulings by reinforcing the ‘legal steadying factors’. As regards, the application of Llewellyn’s eleventh ‘steadying factor’ in the preliminary reference context, Part Two concludes that although the hypothesis had to be extrapolated from Llewellyn’s less-than-clear espousal of the ‘steadying factor’, the ideas expressed by Llewellyn under the heading of his ‘judicial security and honesty’ ‘steadying factor’ are of equal relevance to the Court of Justice.

Part Three concerns itself with the ‘procedural extra-legal steadying factors’. Above, six of Llewellyn’s ‘steadying factors’ were identified as ‘procedural’: (1) ‘issues limited, sharpened, phrased’; (2) ‘a frozen record from below’; (3) ‘adversary argument by counsel’; (4) ‘a known bench’; (5) ‘an opinion of the

court'; and, (6) 'group decision'. Part Three examines each of these 'steading factors' in the context of the stage at which they occur in the preliminary reference procedure: the first four 'steading factors' arise in the procedure before the national referring court or tribunal and the procedure before the Court of Justice; the latter two arise at the deliberative stage of proceedings. In the case of each of the 'procedural' factors examined, a brief description is provided of Llewellyn's account of the 'steading factor', before its relevance in the context of the preliminary reference procedure is considered. This latter consideration involves a doctrinal analysis of procedural rules and practices in the preliminary reference process, which are analogous to those discussed by Llewellyn in the context of American appellate courts, to determine the extent to which, if any, the 'steading factor' under discussion promotes 'reconability' of rulings. In many cases, Llewellyn's 'extra-legal steading factors' require significant alteration in order to be rendered applicable in the preliminary reference procedure. Part Three concludes that these 'procedural extra-legal steading factors' contribute in sum and isolation to the 'reconability' of preliminary rulings by progressively narrowing the decisional competence of the Court of Justice, reinforcing the pressures of the 'legal steading factors' and providing 'signposts' to the lawyer attempting to forecast prospective rulings.

The dissertation concludes that the 'extra-legal steading factors' discussed in the three parts of the dissertation contribute to 'reconability' in a manner that supports the veracity of the thesis. It further concludes that all eight of Llewellyn's 'steading factors' discussed in the dissertation, despite the need for some alteration and refinement, are capable of a significant degree of application in the context of the Court of Justice.

As should be evident from the foregoing, this dissertation utilises a mixed methodological approach. While the main approach adopted in the dissertation is a legal theoretical one, doctrinal methods are also used, particularly in the formalist analyses of Parts One and Two, as well as in the analysis of the procedural rules and practices in the Article 267 TFEU procedure in Part Three. The realist analysis in Part One involves, in part, a rudimentary empirical approach, the results of which are contained in Appendices 1-10 of

the dissertation. The realist analysis in Part Two, utilising as it does political science theories, employs an interdisciplinary approach.

4. Contribution to Scholarship and Originality

This dissertation contributes in an original manner to two areas of legal scholarship: (1) scholarship on the Court of Justice and the preliminary reference procedure; and, (2) scholarship on American legal realism, the theories of Karl Llewellyn and *The Common Law Tradition*. These contributions are now considered in turn.

a) Contribution to Scholarship on the CJEU and the Preliminary Reference Procedure

There is an abundance of legal and political science scholarship on the CJEU and it would be exceedingly difficult to provide an exhaustive list of works. Lawyers²³⁵ and political scientists²³⁶ have focussed on the contribution made

²³⁵ Weiler, J.H.H., “The Transformation of Europe”, (1991) 100(8) *Yale Law Journal* 2403; Weiler, J.H.H., “Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration”, (1993) 31(4) *Journal of Common Market Studies* 417; Cappelletti, M., *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989); Stein, E., “Lawyers, Judges, and the Making of a Transnational Constitution”, (1981) 75 *American Journal of International Law* 1; Lenaerts, K., *supra* n. 15; Beck, G., *supra* n. 24; Mancini, G.F., “The Making of a Constitution for Europe”, (1989) 26 *Common Market Law Review* 595; Pescatore, P., *The Law of Integration: Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Leiden: A.W. Sijthoff, 1974).

²³⁶ Stone Sweet, A. and Brunell, T.L., “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community”, (1998) 92 *American Political Science Review* 63; Stone Sweet, A. and Brunell, T.L., “How the European Union’s Legal System Works – and Does Not Work: Response to Carrubba, Gabel and Hankla”, (2010) *Faculty Scholarship Series – paper 68*; Stone Sweet, A. and Brunell, T.L., “The European Court of Justice, State Noncompliance, and the Politics of Override”, (2012) 106(1) *American Political Science Review* 204; Stone Sweet, A., *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); Burley, A.-M. and Mattli, W., “Europe before the Court: A Political Theory of Legal Integration”, (1993) 47(1) *International Organization* 41; Mattli, W. and Slaughter, A.-M., “Revisiting the European Court of Justice”, (1998) 52(1) *International Organization* 177, at 179-180; Carrubba, C.J., Gabel, M. and Hankla, C., “Judicial Behavior under Political Constraints: Evidence from the European Court of Justice”, (2008) 102(4) *American Political Science Review* 435; Garrett, G., Kelemen, R.D. and Schulz, H., “The European Court of Justice, National Governments, and Legal Integration in the European Union”, (1998) 52(1) *International Organization* 149; Garrett, G. and Weingast, B.R., “Ideas, Interests and Institutions: Constructing the European Community’s Internal Market” in Goldstein, J. and Keohane, R.O. (eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca: Cornell University Press, 1993), p. 173; Garrett, G., “The Politics of Legal Integration in the European Union”, (1995) 49 *International Organization* 171; Garrett, G., “International Cooperation and Institutional Choice: The European Community’s Internal Market”, (1992) 46(2) *International Organization* 533; Dehousse, R. *The European Court of*

by the CJEU to European legal integration, with the latter concerning themselves in particular with explaining the driving forces behind this integration and theorising the freedom of the CJEU vis-à-vis other supranational actors, as well as national and subnational actors. Legal academic works have concentrated on accusing the CJEU of judicial activism, illegitimacy, or poor reasoning or defending it from such charges.²³⁷ Lawyers have also attempted to develop normative or descriptive accounts of the legal reasoning of the CJEU.²³⁸ The constitutional boundaries of EU law vis-à-vis Member State constitutional law have also been theorised.²³⁹ Studies have been

Justice (London: MacMillan Press, 1998); Alter, K., *The European Court's Political Power* (Oxford: Oxford University Press, 2009); Alter, K., *supra* n. 19.

²³⁷ A notable accusation of judicial activism was made by Rasmussen (Rasmussen, H., *supra* n. 43). Another important example of such criticism is that made by Phelan, who argued that the Court's development of an autonomous legal order was done in a manner that implied "a break between the actual origin of primary positive European Community law in the treaties establishing the European Communities and the legitimisation of European Community law." (Phelan, D.R., *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Dublin: Round Hall Sweet & Maxwell, 1997), p. 12). Phelan supported this assertion with a detailed commentary of the Court's jurisprudence on individual rights (pp. 62-140). Accusations of illegitimate reasoning have been made by Herzog and Gerken, as well as Conway, among others (Herzog, R. and Gerken, L., "Stop the European Court of Justice", (<https://euobserver.com/opinion/26714>) (last accessed at 19:33 on Thursday, the 18th February 2016); Conway, G., *supra* n. 104). The Court's reasoning has also been criticised by Hartley, Neill and Beck among others. Beck was particularly critical of the Court's ruling in Case C-370/12 *Pringle v Government of Ireland and Others* [2013] 2 CMLR 2 (Hartley, T., *supra* n. 224; Neill, P., *supra* n. 224; Beck, G., "The Legal Reasoning of the Court of Justice of the EU - A Reply to Michal Bobek", (2014) 39(4) *European Law Review* 579; Beck, G., "The Court of Justice, the Bundesverfassungsgericht and Legal Reasoning during the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon", (2014) 20(3) *European Public Law* 539; Beck, G., "The Court of Justice, Legal Reasoning, and the Pringle Case - Law as the Continuation of Politics by other Means", (2014) 39(2) *European Law Review* 234; Beck, G., "The Legal Reasoning of the Court of Justice and the Euro Crisis – the Flexibility of the Court's Cumulative Approach and the Pringle Case", (2013) 20(4) *Maastricht Journal of European and Comparative Law* 645). The Court of Justice has been defended against Rasmussen's accusation by Cappelletti, Toth and Weiler (Cappelletti, M., "Is the European Court of Justice 'Running Wild'?", (1987) 12 *European Law Review* 3; Toth, A., "On Law and Policy in the European Court of Justice", (1987) *Yearbook of European Law* 411; Weiler, J.H.H., "The Court of Justice on Trial", (1991) 100(8) *Yale Law Journal* 2403). The legitimacy and soundness of the Court's reasoning has been defended by former Judge Edward, current President of the Court Lenaerts, Arnull, Hänsch and Craig among others (Edward, D., "Judicial Activism – Myth or Reality" in Campbell, A. and Voyatzi, M. (eds.), *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie Stuart* (London: Trenton Publishing, 1996), p. 34; Lenaerts, K., *supra* n. 15; Arnull, A., "The European Court and Judicial Objectivity: A Reply to Professor Hartley", (1996) 112 *Law Quarterly Review* 411; Hänsch, K., "A Reply to Roman Herzog and Lüder Gerken", (2007) 3(2) *European Constitutional Law Review* 219; Craig, P., "Pringle and the Nature of Legal Reasoning", (2014) 21 *Maastricht Journal of European and Comparative Law* 205). An engaging review of the debate on the Court of Justice is provided by Conway, G., *supra* n. 104.

²³⁸ Both Weiler and Conway have attempted to create normative accounts of the legal reasoning of the CJEU: Weiler, J.H.H., *supra* n. 104; Conway, G., *supra* n. 104. Bengoetxea, Maduro and Beck have attempted to provide descriptive accounts: Bengoetxea, J., *supra* n. 104; Maduro, M.P., *supra* n. 216; Beck, G., *supra* n. 24). Phelan provided a descriptive account of the Court's reasoning in the event of norm collision: Phelan, D.R., *supra* n. 43.

²³⁹ Phelan, D.R., *supra* n. 237.

conducted on the system of appointment to the CJEU and the backgrounds of the Judges.²⁴⁰ Judges of the Court, writing extra-judicially, have provided invaluable insights into how the Court goes about its work.²⁴¹ As regards the preliminary reference procedure, descriptive legal works have been composed and the procedure's role in the advancing of European legal integration has been acknowledged widely.²⁴²

Despite the wealth of scholarship on the Court of Justice and the preliminary reference procedure, there has been very little, if any, focus on the 'reconability' of the Court's work and, more specifically, in preliminary rulings.²⁴³ The one possible exception to this observation is Beck, who, utilising Llewellyn's 'steading factors' as conceptual apparatus, suggests that there are 'legal' and 'extra-legal steading factors' that serve to promote 'reconability' in the work of the CJEU. However, the focus of Beck's book is the development of a descriptive account of the legal reasoning of the CJEU. Furthermore, Beck adopts, by his own admission, a narrow understanding of 'extra-legal steading factors', confining them largely to the 'motivations' behind the decisions to be made *within* the constraints of the 'legal steading factors'. In this way, Beck is concerned with 'extra-legal steading factors' as augmentations of the 'steading effect' of the normative character of 'legal doctrine' and the limited number of accepted doctrinal techniques (the 'legal steading factors'). As such, in Beck's account, the role of the 'extra-legal

²⁴⁰ Bobek, M. (ed.), *supra* n. 180; Feld, W., "The Judges of the Court of Justice of the European Communities", (1963) 9 *Villanova Law Review* 37; Kenney, S.J., "The Members of the Court of Justice of the European Communities", (1998-1999) 5 *Columbia Journal of European Law* 101; Solanke, I., "Diversity and Independence in the European Court of Justice", (2009) 15(1) *Columbia Journal of European Law* 89.

²⁴¹ For instance, Lenaerts, K., *supra* n. 15; Edward, D., "How the Court of Justice Works", (1995) 20 *European Law Review* 539; Mancini, G.F., *supra* n. 235; Cappelletti, M., *supra* n. 235.

²⁴² Broberg, M. and Fenger, N., *supra* n. 46; Anderson, D.W.K. and Demetriou, M., *References to the European Court* (London: Sweet & Maxwell, 2nd ed., 2002); de la Mare, T. and Donnelly, C., *supra* n. 214; Barnard, C. and Sharpston, E., "The Changing Face of Article 177 References", (1997) 34 *Common Market Law Review* 1113.

²⁴³ There are some mentions made to the predictability of the Court's work. There is, for instance, Rasmussen's suggestion that simply taking into account the Court's pro-Community bias would assist predictability of the Court's rulings (Rasmussen, H., *supra* n. 43, p. 36). Moreover, there is Bengoetxea's admission that his descriptive theory of the Court's legal reasoning would not assist in the prediction of outcomes (Bengoetxea, J., *supra* n. 104, p. 140), which Conway takes as an admission that the Court's case-law is unpredictable (Conway, G., *supra* n. 104, p. 71). Much of the criticism levelled at the reasoning of the Court of Justice also implies that its mode of reasoning contributes to uncertainty (*supra* n. 237).

steadying factors’ is to provide the lawyer with an idea as to which of the interpretative choices within the ‘legal doctrine’ the CJEU is likely to take.²⁴⁴

This dissertation, however, proceeds from a much broader understanding of the ‘extra-legal steadying factors’, and one which is more consistent with Llewellyn’s account of his ‘steadying factors’: the role of the ‘extra-legal steadying factors’ is not merely to augment the pressures of the ‘legal steadying factors’ or to ‘signpost’ likely interpretative choices *within* ‘legal doctrine; they also play a central role in reinforcing the pressures of the ‘legal steadying factors’ and reducing significantly the negative influence of subjectivities, external pressures and the vagaries of the individual case on ‘certainty’. This dissertation, therefore, is the first attempt to identify a more comprehensive set of ‘extra-legal steadying factors’ (‘internal’, ‘external’ and ‘procedural’) in the preliminary reference procedure beyond those that simply point to the interpretative choices that will likely be made by the Court within the body of applicable ‘legal doctrine’. The dissertation demonstrates a set of ‘extra-legal steadying factors’ that serve to reduce the impact of ‘internal’, ‘external’ and ‘procedural’ obstacles to ‘legal certainty’. Since this wide-ranging set of ‘extra-legal steadying factors’ in the preliminary reference procedure can be thought of as an insurance (albeit not an absolute one) of doctrinally consonant judicial decision-making or as a protection (again, not a complete one) against arbitrary rulings, this dissertation has implications for one’s understanding of concepts such as the ‘rule of law’ and ‘legal certainty’ in the procedure and in the EU judicial system more generally. The Court’s rulings should be ‘judicially arguable’ not only because they *ought* to be: this normative pressure will, it is assumed, be internalised as a value by the Judges; the Court is disincentivised significantly from reaching rulings that are not ‘judicially arguable’; and, procedural rules and practices serve to reinforce this normative pressure by, *inter alia*, ensuring the Court is confronted with its own previous rulings.

²⁴⁴ Although Beck does acknowledge that there are ‘steadying factors’ beyond those discussed in his book (Beck, G., *supra* n. 24, p. 42). Beck does also mention the “restraining effect of internalised institutional norms, shared professional interests and the moderation of individual idiosyncrasy achieved by the greater relative stability of group judgments of three or more judges in most higher courts.” (p. 42). Though Beck does not cite Llewellyn here, it is evident he is referring to the first, fourteenth and tenth of Llewellyn’s ‘steadying factors’. Nevertheless, Beck does not discuss these ‘steadying factors’ in any detail, confining his study instead to ‘signposting’ or augmenting ‘extra-legal steadying factors’.

b) Contribution to Scholarship on American Legal Realism, the Theories of Karl Llewellyn and The Common Law Tradition

This dissertation contributes in an original manner to scholarship on American legal realism and the theories of Karl Llewellyn for the following reasons:

Firstly, the dissertation takes account of the criticisms levelled at Llewellyn's 'descriptive thesis' and performs a rationalisation of Llewellyn's 'steadying factors'. There is, for instance, the re-categorisation of Llewellyn's 'steadying factors' in line with their contribution to reducing significantly the influence of 'obstacles' to 'legal certainty', as well the refinement of many of Llewellyn's 'steadying factors' and his conceptual terminology. Moreover, this dissertation emphasises expressly the importance of the normative character of 'legal doctrine' by acknowledging the 'legal steadying factors' as the most significant pressure on judicial decision.

Secondly, this dissertation takes up the challenge of applying a set of Llewellyn's 'steadying factors', expressed as mere assertions by Llewellyn, as conceptual apparatus to show how they promote 'reckonability'. In other words, this dissertation is Llewellyn's 'steadying factors' applied. It should be recalled that Beck, though using Llewellyn's 'steadying factors' as a framework, created his own 'extra-legal steadying factors' rather than apply Llewellyn's.

Thirdly, as a by-product of the thesis, this dissertation seeks to emphasise that Llewellyn's 'steadying factors', or those examined in this dissertation at least, have application beyond the American appellate courts (the 'applicability by-product'). The extent to which the 'steadying factors' discussed are capable of application in the context of the preliminary reference is considered in the concluding sections of Parts One, Two and Three, as well as in the Conclusion to the dissertation.

‘Internal Extra-Legal Steadying Factors’

A. Introduction

In this dissertation, the thesis suggests that there are ‘extra-legal steadying factors’ in the EU legal system and the preliminary reference procedure that serve to reduce significantly the impact of obstacles to ‘legal certainty’, or put differently, promote ‘reconability’ in the Article 267 TFEU procedure. These ‘extra-legal steadying factors’ are categorised as ‘internal’, ‘external’ and ‘procedural’ depending upon the role they play in promoting ‘reconability’. Part One examines the most significant ‘internal extra-legal steadying factor’ identified in this dissertation: that the Judges of the Court of Justice are, and historically have been, ‘law-conditioned officials’.

Part One commences by acknowledging a very significant obstacle to ‘reconability’: that the ‘steadying effect’ of, or the pressure exerted by, the ‘legal steadying factors’ depends ultimately on the Judges’ perceptions of those factors as possessing normative character. Llewellyn’s answer to this problem in the context of the American appellate courts is then introduced: that judges are ‘law-conditioned officials’ who have an internalised acceptance of the limiting effect of the ‘legal steadying factors’ and who, due to commonalities in their backgrounds and outlook, apply more uniform solutions to substantive legal interpretative problems. Part One then proceeds by examining what Llewellyn meant by ‘law-conditioned official’, and describing his views on how the ‘law conditioning’ of judges promotes ‘reconability’. Recognising significant vagueness in Llewellyn’s description of a ‘law-conditioned official’, an effort is made to provide a definition of ‘law conditioning’, which, while remaining consonant with Llewellyn’s outline description, is more precise, and against which the former and present Judges of the Court of Justice may be measured. Accepting, with some reservation, the premise of Llewellyn’s argument on the contribution of ‘law conditioning’ to ‘reconability’ as a general rule, an examination is then conducted as to

whether the former and current Judges of the Court of Justice can be described as ‘law-conditioned officials’ in accordance with the more precise definition proffered. This examination takes the form of two analyses: formalist and realist. The formalist analysis consists of a study of the legal rules concerning the qualifications required of persons for appointment as Judges to the Court of Justice in order to determine whether there is a *de jure* requirement that only persons who may be described as ‘law conditioned’ be appointed. The realist analysis consists of a study of the educational and professional backgrounds of the past and present Judges prior to their appointment to determine whether these Judges have *de facto* been ‘law conditioned’.¹ Based on these analyses, a conclusion is then drawn on the question of whether the former and current Judges of the Court were/are ‘law-conditioned officials’. Moreover, the extent, if any, of the applicability of Llewellyn’s first ‘steading factor’, drawn as it was in the context of American appellate courts, to the Court of Justice is considered.

B. The Problem of the Subjective in Adjudication as Undermining the ‘Legal Steading Factors’: The ‘Law-Conditioned Official’ as Llewellyn’s Response

It is, for many, a core aspect of ‘legal certainty’ and the rule of law that laws be predictable.² Linked inextricably to this premise is another characteristic ascribed to that concept: that legal disputes should be resolved by application of the law and not by the exercise of discretion.³ The Constitution of Massachusetts (1780) expresses this principle more pithily as “government of

¹ As the scope of this dissertation is limited to ‘steading factors’ in the preliminary reference procedure, the formalist and realist analyses in Part One are limited to examination of the past and present Judges of the only constituent of the CJEU that is currently empowered to rule on preliminary rulings: the Court of Justice. Although Advocates General are members of the Court of Justice, the question of their ‘law conditioning’ is not considered since they do not take part in the deliberations that lead to a preliminary ruling.

² This is certainly the case in formal, if not substantive, understandings of the rule of law. Raz, for instance, defines a system as having a rule of law if its laws are open, clear, prospective, and relatively stable (Raz, J., “The Rule of Law and its Virtue”, (1977) 93 *Law Quarterly Review* 195). Lord Bingham, in his attempt to create a comprehensive theory of the rule of law, identified as the first of his eight sub-rules supporting his core principle that there should be equality before the law: “The law must be accessible and so far as possible intelligible, clear and predictable.” (Bingham, T., “The Rule of Law”, (2007) 66 *Cambridge Law Journal* 67, at 69). Lord Bingham makes it clear (at 70) that this requirement applies equally to the courts.

³ Bingham, T., *supra* n. 2 at 72.

laws and not of men”⁴. Herein, however, lies a problem: the recognition of purported rules as having normative character is often expressed as depending upon their reception as such by human beings.⁵ The same problem occurs in the application and interpretation of such rules where recognised as valid: notwithstanding the ideal that legal disputes should be resolved by laws and not by human beings, laws are not only the product of humans, but questions of their meaning and application are resolved by humans, most obviously judges in legal disputes. Translated into the language of Llewellyn, as interpreted by this dissertation, the pressuring effect of the ‘legal steadying factors’ depends, in part⁶, on judicial recognition of this effect.

One of the primary contributions of the American legal realists was to make it a truism that while legal rules do constrain or pressure judges to a greater or lesser extent⁷, there are a possibly indeterminate number of extra-legal considerations at play in judicial decision, which may have an impact on a decision-maker’s interpretation of those rules and/or the outcome of the dispute.⁸ The most troubling of these extra-legal considerations, in terms of the ideals of ‘legal certainty’ and the rule of law, and their constituent value, predictability, are those tied to the vagaries of the judge’s personality: personal prejudices and biases, political views, social, cultural or religious background, etc.⁹ While the realists are to be commended for sweeping aside the naïve

⁴ Article XXX of the Constitution of Massachusetts (1780).

⁵ For instance, Hart in describing the criterion for the validity of rules in *The Concept of Law* argued that primary rules and obligations in a legal system can be recognised by reference to a secondary rule of recognition. However, according to Hart, a secondary rule of recognition could only exist where it was accepted and used by officials and private persons as the criterion for identifying primary rules of obligation. (Hart, H.L.A., *The Concept of Law* (Oxford: Oxford University Press, second edition, 1997), pp. 100-110). Austin’s and Bentham’s earlier versions of legal positivism also, in Hart’s words, relied on a ‘social condition’, i.e. that “the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons, who themselves habitually obey no one.” (p. 100).

⁶ This dissertation argues that there are also ‘external’ and ‘procedural extra-legal steadying factors’ that reinforce this pressurising effect.

⁷ Llewellyn, for instance, recognised that legal rules afforded differential leeway to judges, which depended on how high the rule rated for wisdom and how technically neat and tidy it was (Llewellyn, K.N., *The Common Law Tradition: Deciding Appeals* (Chicago: Little Brown, 1960), pp. 178-184). See also, Llewellyn, K.N., *The Theory of Rules* (Chicago: the University of Chicago Press, 2011).

⁸ The success of the realists is often encapsulated by the adage “we are all realists now”. (Freeman, M.D.A., *Lloyd’s Introduction to Jurisprudence* (London: Sweet & Maxwell, 8th ed., 2008), p. 997); Singer, J., “Legal Realism Now”, (1988) 76 *California Law Review* 465.

⁹ American legal realism is often ridiculed by the assertion that the movement, if it was a movement, can be summarised in the idea that how a judge decides will depend on “what the judge had for breakfast”, a quote which is often attributed to Jerome Frank. While Frank was the only major realist to suggest that a judge’s personality had more bearing on decision than

assumptions of legal formalists about judicial decision-making held widely theretofore, a number of realists can also be criticised for exaggerating the influence of these extra-legal considerations and underplaying the pressuring effect of legal rules.¹⁰ The assault of the realists on the premises of formalism may have been so successful that by 1960 Llewellyn was bemoaning that most lawyers were of the belief that the decisions of the American appellate courts were unpredictable because they were being made by judges and not by laws, an attitude he referred to as a “crisis in confidence”.¹¹ Llewellyn’s answer to this ‘crisis’ was, of course, his argument that the decisions of the American appellate courts were ‘reckonable’ owing to the existence of his ‘steadying factors’. It will be recalled that as the second of fourteen such factors he enumerated, Llewellyn recognised that ‘legal doctrine’ performed a constraining or guiding effect on the decisions of the judges.¹² However, Llewellyn, as a realist, was also acutely aware that the judges were human beings, “all readers of news, most of them affected ... by those tides of interest and of opinion which wash over the decades, the years and sometimes shorter periods...”¹³ Against this, however, Llewellyn also recognised that the judges were ‘law-conditioned officials’, “all trained and in the main rather experienced lawyers” who saw things through “law-spectacles” and thought like lawyers.¹⁴ This factor not only had the effect of causing judges to recognise the pressures of ‘legal doctrine’, but caused judges to interpret and

the legal rules, there would not appear to be any credible evidence that Frank ever uttered the infamous ‘breakfast’ comment: Tumonis, V., “Legal Realism and Judicial Decision-Making”, (2012) 19(4) *Jurisprudence* 1361, at 1371. Such caricatures of realism have been used by theorists who should have known better: Ronald Dworkin, in his dismissal of realism as “deeply implausible as a semantic theory”, describes the contribution of the realists in the following terms: “They said there is no such thing as law, or that law is only a matter of what the judge had for breakfast.” (Dworkin, R., *Law’s Empire* (Oxford: Hart, 1986), pp. 36-37).

¹⁰ For instance, Holmes’ claim that prophecies of what the courts will do in fact, and nothing more, is what he meant by the law (Holmes, O.W., “The Path of the Law”, (1897) 10(8) *Harvard Law Review* 457 at 461). Verdun-Jones has stated, “Frank frequently utilized the technique of gross exaggeration to underscore his arguments...” (Verdun-Jones, S.N., “The Jurisprudence of Jerome N. Frank: A Study In American Legal Realism”, (1973-1976) 7 *Sydney Law Review* 180, at 189). Not even Llewellyn was immune: to wit, his infamous reference to rules as “pretty playthings”: Llewellyn, K. N., *The Bramble Bush: On Our Law And Its Study* (New York: Oceana, 1930), p. 5.

¹¹ Llewellyn, K.N., *supra* n. 7, pp. 3-7.

¹² Llewellyn, K.N., *supra* n. 7, pp. 20-21. Llewellyn also recognised that the accepted techniques for handling ‘legal doctrine’, his third ‘steadying factor’, ‘known doctrinal techniques’, further narrowed the discretion of the judges (pp. 21-23). Beck has also recognised the constraining effect of ‘legal doctrine’ and ‘doctrinal techniques’ in the context of the Court of Justice (Beck, G., *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2012), pp. 28-31).

¹³ Llewellyn, K.N., *supra* n. 7, p. 201.

¹⁴ Llewellyn, K.N., *supra* n. 7, pp. 19-20.

apply legal rules in a more consistent manner due to the relative uniformity in their thought and interpretative processes, a result of commonalities in their educations and professional backgrounds, which tended to dampen the effect of personal prejudices and biases on decisions.¹⁵ In fact, Llewellyn saw the constraining or guiding effect of ‘legal doctrine’, as well as the techniques for its interpretation, as dependent upon judges internalising their normative character.¹⁶

The paragraphs that follow describe in detail Llewellyn’s observations on his first ‘steadying factor’: ‘law-conditioned officials’. In particular, this author seeks to define what Llewellyn meant by the concept, and to synthesise Llewellyn’s views on how ‘law conditioning’ might contribute to ‘reckonability’.

C. Llewellyn’s First ‘Steadying Factor’: ‘Law-Conditioned Officials’

I. What is a ‘Law-Conditioned Official’? Llewellyn’s Thoughts

The first of the ‘steadying factors’ identified by Llewellyn in *The Common Law Tradition* was his characterisation of American appellate judges as ‘law-conditioned officials’.¹⁷ Llewellyn’s discussion of this factor can conveniently be divided in two. Firstly, Llewellyn argued that owing to their common training and legal professional backgrounds, the judges of the American appeal courts were ‘law conditioned’, with resultant gains in the ‘reckonability’ of decisional outcomes of those courts due to the innate commonalities of approach of those judges to the solution of factual or legal disputes.¹⁸ Secondly, the fact that the judges thought like *American* lawyers, “not like

¹⁵ These conclusions are not always rendered explicitly by Llewellyn, but can be surmised from his discussions of other ‘steadying factors’.

¹⁶ Llewellyn, K.N., *supra* n. 7, pp. 20-21. Llewellyn stated: “It is *understood and accepted* that the context for seeing and discussing the question to be decided is to be set by and in a body of legal doctrine.” (p. 20). In the context of ‘known doctrinal techniques’, he wrote: “It is *understood and accepted* that the doctrinal materials are properly to be worked with only by way of a limited number of recognised correct techniques.” (p. 21). (This author’s emphases).

¹⁷ Llewellyn, K.N., *supra* n. 7, pp. 19-20.

¹⁸ Llewellyn, K.N., *supra* n. 7, pp. 19-20.

German or Brazilian lawyers” enhanced the commonality caused by this ‘law conditioning’.¹⁹

Llewellyn viewed the significance of the commonality in the legal educational and professional backgrounds of the judges of the American appellate courts in the following terms:

“The personnel are all trained and in the main rather experienced lawyers. Few judges ‘make’ the American appellate bench without twenty and more years of active work in some aspect of the law, in addition to their schooling. The judges are therefore not mere Americans. They have been law-conditioned. They *see* things, they see *significances*, both through law-spectacles, in terms of torts and trusts and corporations and due process and motions to dismiss; and this is the way that they sort and size up any welter of facts. Moreover, they *think* like lawyers, not like laymen...”²⁰

However, this simple observation leads to at least two further questions: firstly, what did Llewellyn mean by ‘training’? and, secondly, what did he mean by “active work in some aspect of the law”? Llewellyn’s ideas of ‘training’ and ‘active work in some aspect of the law’ are quite wide. In fact, he acknowledges that the diversity in terms of educational and professional experience of the judges may undermine any argument as to the unifying effect of their ‘law conditioning’. As to the schooling or training of the judges in the law, Llewellyn wrote:

“[T]he American schooling or training for the law varies from apprenticeship or even in occasional cases correspondence school on through to leading universities...”²¹

It is, therefore, evident that Llewellyn regarded different types of university and vocational legal education as legal training for the purposes of his description of the American appellate court judges as ‘law-conditioned officials’. There would appear to be no suggestion that a university education in the law is a prerequisite or that a vocational education or professional

¹⁹ Llewellyn, K.N., *supra* n. 7, p. 20.

²⁰ Llewellyn, K.N., *supra* n. 7, pp. 19-20. However, Llewellyn acknowledged that it may be inappropriate to overemphasise the commonality of educational and professional backgrounds of American appellate judges, given the diverse legal professional backgrounds of those judges (p. 20).

²¹ Llewellyn, K.N., *supra* n. 7, p. 20.

qualification is required. As to the post-educational active work of the judges in some aspect of the law, Llewellyn again cast a wide net, including a vast array of different types of lawyers, legal academics, government officials and politicians.²²

It is clear, however, from Llewellyn's treatment of his first 'steading factor' that he was uninterested in any scientific understanding of the term 'law-conditioned official'. He merely considered the judges of the American appellate courts, observed rather offhandedly that they were all trained in the law and that most of them had significant active experience in some aspect of the law, and concluded therefrom that they were 'law-conditioned officials'. Llewellyn does not provide a precise definition of what a 'law-conditioned official' is in terms of a minimum standard against which a judge may be compared in order to determine whether he/she can be described as such. In order to ascertain whether the former and current Judges of the Court of Justice were/are 'law-conditioned officials' (the main endeavour of Part One) it is therefore obvious that an effort is required to provide a definition of the term that, while remaining consistent with Llewellyn's description, is sufficiently rigorous to allow those Judges to be measured against it. The paragraphs that follow undertake this work.

II. What is a 'Law-Conditioned Official'? A More Rigorous Model

In order to fashion precision from Llewellyn's rather patchy and offhand treatment of his first 'steading factor', attention should be paid, however, to

²² "[T]he active 'work' can have varied from that of the rounded small-town man to tight specialization in the metropolis, it can be primarily that of trial lawyer, office lawyer, government official, law teacher, or what have you. It can be that of the civic leader, that of the political hack, that of the lion of justice or that of designing Maginot lines for vested privilege, that of a prophet, of a crusader, of a pussyfooter, or of a purblind routineer. Mostly, it has been a bit-better-than-average-work, done with at least some contact with at least some one variety of ordinary guy; but there are so many and so divergent varieties of ordinary guy. Moreover, and particularly, in this country any preliminary work or training of the appellate judge has no need at all to be in any aspect of office as a judge." (Llewellyn, K.N., *supra* n. 7, p. 20). This chimes with Llewellyn's concerns about "overprofessionalization" in the judiciary, i.e. judges with little experience in the world outside the learning and practice of law in the traditional sense (Llewellyn, K.N., *supra* n. 7, p. 23, fn. 14).

what he did provide us. The following excerpt would appear to be the key to understanding what he meant by the term ‘law-conditioned official’:

“The personnel are all trained and in the main rather experienced lawyers. Few judges ‘make’ the American appellate bench without twenty and more years of active work in some aspect of the law, in addition to their schooling. The judges are therefore not mere Americans. They have been law-conditioned.”²³

In order to retain consonance with Llewellyn’s ideas, it is from this excerpt that this author must work a more rigorous definition. A harmonious and deductive reading of the three sentences would appear to offer the following:

- Since *all* judges of the American appellate courts are trained lawyers, it follows that in order for judges to be termed ‘law conditioned’, they *must* be trained in the law;
- Since *not all* judges of the American appellate courts are experienced lawyers, it follows that such experience is not an absolute prerequisite for ‘law conditioning’;
- However, while experience in some aspect of the law is not an absolute prerequisite, such experience serves to augment the ‘law conditioning’ resulting from the judges’ legal training;
- The longer the experience in some aspect of the law, the greater the augmentation of this ‘law conditioning’, with twenty and more years being the seeming ideal quotient.

From the foregoing points, this part of the dissertation proposes three levels of ‘law conditioning’ against which the educational and professional backgrounds of the former and current Judges of the Court of Justice may be measured in order to ascertain their ‘law conditioning’, if any:

- ‘Level 1 law conditioning’: This entails ‘schooling or training for the law’.²⁴ In this connection, Llewellyn’s wide definition of ‘schooling or

²³ Llewellyn, K.N., *supra* n. 7, p. 19.

²⁴ Llewellyn, K.N., *supra* n. 7, p. 20.

training for the law’ should be recalled.²⁵ This schooling or training is, however, a prerequisite and a person not possessing it cannot be defined as a ‘law-conditioned official’;

- ‘Level 2 law conditioning’: This entails the possession of ‘schooling or training for the law’ followed by ‘active work in some aspect of the law’. Again, Llewellyn’s catholic definition of ‘work’ should be kept in mind²⁶;
- ‘Level 3 law conditioning’: This entails the possession of ‘schooling or training for the law’ followed by twenty years or more ‘active work in some aspect of the law’.

However, before the past and present Judges of the Court of Justice can be measured against this proposed model of ‘law conditioning’, it is first necessary to consider Llewellyn’s arguments on how ‘law conditioning’ contributes to ‘reckonability’.

III. How do ‘Law-Conditioned Officials’ Contribute to ‘Reckonability’?

From Llewellyn’s thoughts on the American appellate judges as ‘law-conditioned officials’, it may be concluded that he saw his first ‘steadying factor’ as promoting ‘reckonability’ in two ways:

- The ‘law conditioning’ of the judges resulted in an internalised acceptance and understanding of the normative character of the ‘legal steadying factors’, and resulted in more uniform approaches by the judges to substantive legal interpretative problems;
- The commonality of the judges’ legal-cultural backgrounds (*American lawyers in the context of American appellate courts*) created even greater uniformity of judicial outlook in judges when making decisions, since such judges have internalised the same principles and values that

²⁵ *Supra* n. 21.

²⁶ *Supra* n. 22.

underpin the legal order in which they operate and, indeed, such principles and values may even be unique to that legal order.

Each of these proposed contributions to ‘reckonability’ are now considered in turn.

1. Acceptance of the ‘Legal Steadying Factors’ and Uniform Approaches to Interpretative Problems

For Llewellyn, the significance of the judges of the American appellate courts being ‘law-conditioned officials’ was that they thought like lawyers and not like laymen.²⁷ The consequences of this would appear to be that ‘law-conditioned officials’ see legal disputes and interpretative problems through “law-spectacles”²⁸, meaning that they see significances in legal concepts, and owing to their training have a relatively uniform method of resolving legal disputes and interpretative problems. Therefore, decisions involving the interpretation of legal rules and principles that are taken by those with legal training of one kind or another will be more predictable than would be case if such decisions were taken by a layperson or group of laypersons. This is because legal training causes a decision-maker to develop, firstly, an innate acceptance and understanding of the normative character of ‘legal doctrine’²⁹, and, secondly, causes a decision-maker to adopt more uniform methods of treating and solving factual and legal problems. This innate acceptance and understanding of the normative character of ‘legal doctrine’ thereby moves the decisions of ‘law-conditioned officials’ closer to the ideal of judgment by laws and not by men, since ‘law conditioning’ serves to dampen vagaries of judicial personality in a manner which would not be replicated in a layperson, to whom such significances will not be as evident. Beck, in his treatment of institutional ethos at a court³⁰ as an ‘extra-legal steadying factor’, in many ways echoes Llewellyn’s statements on judges as ‘law-conditioned officials’:

²⁷ Llewellyn, K.N., *supra* n. 7, p. 20.

²⁸ Llewellyn, K.N., *supra* n. 7, p. 19.

²⁹ This argument is not rendered explicitly in Llewellyn’s discussion of the ‘law-conditioned officials’ ‘steadying factor’. It is, however, more evident in his discussion of the second ‘steadying factor’, ‘legal doctrine’, when he states that it is “accepted and understood” that the decision is to be made “in” a body of doctrine (Llewellyn, K.N., *supra* n. 7, p. 20).

³⁰ This, in itself, echoes Llewellyn’s fourteenth ‘steadying factor’, ‘professional judicial office’.

“No judge is an island, and newly appointed judges, like other professionals or officials, have not only internalised, and will continue to internalise, the norms and values common in their professional world in general, but they have also become members of a particular institution...”³¹

Llewellyn, although not as accurate in his use of terminology as Beck, was also evidently of the view that the ‘law conditioning’ of judges caused them to internalise the ‘legal steadying factors’ as pressures on their discretion: on the judges’ understanding and acceptance of ‘known doctrinal techniques’ as limiting them, Llewellyn wrote:

“Among these techniques many are phrased, taught, and conscious; many are rarely phrased or *taught*, but are still to be viewed as known and conscious and *learned*; many are felt and are used in standard fashion, but are learned and indeed used almost without consciousness of the users as they use them.”³²

However, the internalisation of the normative character of ‘legal doctrine’ was not the sole attribute of the ‘law-conditioned official’: Llewellyn placed emphasis also on the shared legal-cultural backgrounds of American appellate judges, a matter considered in the paragraphs that follow.

2. Legal-Cultural Unity

Not only did the judges of the American appellate courts think like lawyers and not like laymen, they thought “like *American* lawyers, not like German lawyers or Brazilian lawyers.”³³ The significance of this commonly held legal-cultural outlook, resulting from a shared education and experience, for Llewellyn, was an understanding by the judges that:

“Cases have authority, dictum can be and is to be marked off from holding, strict ‘system’ is unfamiliar and uncomfortable, ‘freedom’ is

³¹ Beck., G., *supra* n. 12, p. 39 (this author’s emphasis added). Beck also speaks of “an internalised common normative and intellectual horizon which refers to shared professional, social norms and intellectual traditions as a result of similar background, training and shared professional experience and ways of thinking and evaluating practical issues. This commonality of outlook and thinking is shared to some extent amongst lawyers and judges generally, but can and often does assume a more concrete and powerful form in particular higher courts at a particular time.” (p. 39).

³² Llewellyn, K.N., *supra* n. 7, p. 21.

³³ Llewellyn, K.N., *supra* n. 7, p. 20.

an underlying drumbeat and slogan that informs not merely life but law.”³⁴

Therefore, American lawyers had innate understanding, owing to their American legal education and experience, of methods of dealing with ‘legal doctrine’, such as precedent techniques, which were peculiar to the American lawyer. Llewellyn, anticipating his discussion of ‘pervading principles’ and ‘living ideals’ as forming part of the ‘legal doctrine’ within which legal disputes must be decided³⁵, and perhaps even foretelling Dworkin’s theories on law as integrity³⁶, views American ‘law conditioning’ as resulting in an innate recognition of certain principles or ideals, specifically ‘freedom’, as underpinning the law.³⁷ Llewellyn would appear to have been of the view that this commonly-held understanding, internalised by American legal training and experience, created a more uniform decision-maker, who applied more uniform decision-making processes, which, in turn enhanced ‘reckonability’.

³⁴ Llewellyn, K.N., *supra*, n. 7, p. 20. Llewellyn also appears to have viewed common socio-economic and cultural backgrounds of judges as contributing to ‘reckonability’ of outcome: at p. 201 in *The Common Law Tradition*, in characteristically florid language, Llewellyn highlights the general commonality of general background of American appellate judges as a factor unifying judicial approach: “One can begin with the fact already mentioned, that the appellate judges are human, all of them. They are, moreover all American and almost all male, almost all of at least middle age, all readers of news, most of them affected – though with divergence in their ‘law-conditioned’ resistances – by those tides of interest and of opinion which wash over the decades, the years, sometimes shorter periods: for instance, bothers over juvenile delinquency, or the current “crime wave” scare, or the rising and threatening power of the trusts or the enemy or the rackets or the corrupt union leaders or subversive organizations, or Russia’s technological or educational advances. They are almost all white-collar in background, and raised in Judaeo-Christian morality. State and section by section and State, the particular bench entire also shares its portion of the State and section attributes. It is an almost sure bet that there are not two single-taxers, polygamists, anarchists, spies, Moslems, ex-convicts, major poets, first-class trombones, or mining engineers among the lot. As one wanders and ponders among the myriad facts of this nature, it is heartening how much alike these appellate judges come to seem: Strong, J., Gavegan, J., McLeish, J., Bartoletti, J., Olsen, J., Cohen, J., Olinski, J., make up a bench, whichever is the Chief.” This celebration of a lack of diversity as creating greater uniformity may be troubling in a moral sense, however. The lack of diversity at the Court of Justice has been criticised by both Solanke and Kenney: Solanke, I., “Diversity and Independence in the European Court of Justice”, (2009) 15(1) *Columbia Journal of European Law* 89; Kenney, S.J., “Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice”, (2002) 10 *Feminist Legal Studies* 257. See also, Petkova, B., “Spillovers in Selecting Europe’s Judges: Will the Criterion of Gender Equality Make it to Luxembourg?” in Bobek, M. (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford: Oxford University Press, 2015), p. 222.

³⁵ Llewellyn, K.N., *supra* n. 7, p. 20.

³⁶ Dworkin, R., *supra* n. 9.

³⁷ Llewellyn, K.N., *supra* n. 7, p. 20.

3. Synthesis of Llewellyn's Theories on 'Law-Conditioned Officials' and 'Reckonability'

From the foregoing, Llewellyn's thoughts on the contribution of 'law-conditioned officials' to 'reckonability' may be summarised as follows:

- Their educational and professional backgrounds cause 'law-conditioned officials' to have an innate understanding of the normative character of the 'legal steadying factors';
- 'Law-conditioned officials' due to their educational and professional backgrounds see legal disputes and issues of legal interpretation through legal concepts, which causes them to adopt a relatively uniform manner of resolving factual and interpretative disputes;
- The conclusions drawn heretofore result in greater 'reckonability' of outcome by enabling or reinforcing the pressures exerted by 'legal doctrine', thereby reducing the impact of individual judicial personality on outcomes, and creating a more consistent approach to the resolution of legal disputes and/or interpretative problems, which in turn lessens uncertainty of outcome;
- The resultant gains to 'reckonability' are enhanced in the specific context of the American appellate courts by the fact that the judges of these courts think not only like lawyers, but like *American* lawyers. American lawyers, due to their shared training and experience in the American legal culture, share a closer innate understanding and acceptance of appropriate doctrinal techniques and an innate acceptance and understanding of the principles which underpin the American legal system.

As was the case with Llewellyn's description of a 'law-conditioned official', there is a considerable lack of precision in his description as to what extent 'law conditioning' contributes to 'reckonability' of outcome in an individual case. Rather, Llewellyn's observations may be reduced to the following

statements: (1) decision-makers with legal training and experience internalise the normative character of ‘legal doctrine’, and therefore recognise the controlling or guiding effect of that doctrine; (2) decision-makers with legal training and experience perceive legal and factual problems in a more uniform manner than lay decision-makers; (3) the ‘steadying effect’ of the second statement is heightened where decision-makers with legal training and experience share a common legal-cultural background and have internalised the values and principles underpinning that legal culture.

As is the case with Llewellyn’s argument in the context of his fourth ‘steadying factor’, ‘responsibility for justice’ that American appellate court judges have “an in-grained deep-felt need, duty, and responsibility for bringing out a result which is just”³⁸, these statements are mere assertions, which are not within the power of this author to test.³⁹ This dissertation does not endeavour, therefore, to interrogate these statements⁴⁰, viewing them as being examples of Llewellyn’s characteristic exposition of the “neglected obvious”⁴¹, even if, strictly speaking, they may be contestable. Even so, this author does not hold these statements to be ever-present truths: even if one accepts their wisdom generally, one cannot discount the presence of the ‘bad judge’ who is impervious to the effects of ‘law conditioning’ described above.⁴²

³⁸ Llewellyn, K.N., *supra* n. 7, pp. 23-24.

³⁹ As with Llewellyn’s fourth steadying factor, these assertions, this author imagines, would have to be tested by behavioural psychologists. See Introduction, n. 170.

⁴⁰ Even if the statements are inaccurate, it is argued that there are other ‘extra-legal steadying factors’ that promote ‘reckonability’. In any case, it is beyond the scope of the dissertation to interrogate each and every aspect of Llewellyn’s ‘descriptive thesis’ given the restrictions imposed by word count, etc. The main contributions to knowledge made by this dissertation are the demonstration of a number of ‘extra-legal steadying factors’ in the EU legal system and the preliminary reference procedure to promote ‘reckonability’ in the Article 267 TFEU procedure, and, as a consequence, the demonstration of the applicability of Llewellyn’s ‘steadying factors’ in a context outside of the American appellate courts.

⁴¹ Twining, in particular, has noted Llewellyn’s fixation on codifying what he considered “the neglected obvious”. In *The Common Law Tradition*, he stated rather humbly: “In such matters as in all other matters in this study, I preach the neglected beauty of the obvious.” (Llewellyn, K.N., *supra* n. 7, p. 339). See Twining, W., *Karl Llewellyn and the Realist Movement* (Cambridge: Cambridge University Press, 2nd ed., 2012), p. 211 and p. 501, fn. 15. See also, Westwood, H., “The Common Law Tradition – Deciding Appeals by Karl N. Llewellyn”, (1961) 61(5) *Columbia Law Review* 948. There is, in any event, some support for Llewellyn’s views on the effects of legal education and training in other doctrinal studies. Kennedy, for instance, has written of the impact of legal education in indoctrinating students in acceptance of hierarchical behaviour: Kennedy, D., “Legal Education as Training for Hierarchy” in Kairys, D. (ed.), *The Politics of Law: A Progressive Critique* (New York: Basic Books, 3rd ed., 2010), p. 60. See also, Stone, A.A., “Legal Education on the Couch”, (1971) 85(2) *Harvard Law Review* 392.

⁴² There are many historical examples of trained lawyers acting in a demonstrably ‘unjudicial’ manner when measured against the values of the legal system in which they were educated and

Notwithstanding the foregoing reservation, Part One proceeds on an assumption as to the accuracy of the foregoing statements as a general rule.⁴³ Consequently, rather than investigating Llewellyn's arguments as to the 'steadying effect' of 'law conditioning', Part One seeks to determine to what extent, if any, the former and present Judges of the Court of Justice may be considered 'law-conditioned officials' within Llewellyn's, albeit imprecise, meaning. If it is concluded following the formalist and realist analyses that the Judges are or have been 'law-conditioned officials', it follows, if one accepts the correctness of the above statements, that these statements are applicable in the context of the preliminary reference procedure. The result of the application of these statements would be that the Judges' 'law conditioning' is an 'internal extra-legal steadying factor', which should serve to promote the 'reckonability' of preliminary rulings by, *inter alia*, reinforcing the 'steadying effect' of the 'legal steadying factors'. The author must accept, however, that the utilisation of the assumption that the above statements are accurate as a general rule is a limitation of the argument made in Part One, since the cogency of the conclusion drawn in Part One is contingent on the soundness of this assumption.⁴⁴

trained: take, for instance, the behaviour of Roland Freisler, as President of the Volksgerichtshof during the Nazi regime, who received his legal education and training in the Weimar Republic. While Freisler may have internalised the values of the legal system in which he operated under the Nazis, his example demonstrates that legal education and training in a democratic system that adheres to the rule of law is no guarantee of 'judicial' behaviour in future judges. This author also realises that the statement in the main text is value-dependent. For instance, one could not, or at least should not, describe a judge who failed to internalise the discriminatory values underpinning an apartheid-style system as a 'bad judge'.

⁴³ That is to say that the 'bad judge' will be a rare exception, rather than the rule. While this assumption that is clearly contestable, the *de facto* track record required for appointment to high judicial office in a functioning legal system should in the vast majority of cases be sufficient to weed out those without an allegiance to basic values underpinning the rule of law. In any event, this dissertation maintains that even if a Judge has not internalised the normative character of 'legal doctrine' as a value or has not internalised other values underpinning the legal system in which he/she works, there are other 'extra-legal steadying factors' in the preliminary reference procedure that militate against the deleterious impact of such a Judge on 'reckonability' such as accountability to 'countervailing powers' for 'unjudicial' behaviour and collegiate decision-making ('group decision').

⁴⁴ However, even if 'law conditioning' does not result in an internalised acceptance that there is a duty to respect the normative character of the 'legal steadying factors' in every Judge, there are other 'steadying factors' discussed in this dissertation that will still militate against 'unjudicial' behaviour (*supra* n. 43).

D. Are the Judges of the Court of Justice ‘Law Conditioned’?

I. The Parameters of the Enquiry

In accordance with the meaning of the term as extrapolated from Llewellyn’s writing, in order for a Judge to be considered a ‘law-conditioned official’, he/she must be, at the very least, a ‘trained’ lawyer⁴⁵ (‘level 1 law conditioning’), which is to say that he/she must possess ‘schooling or training for the law’⁴⁶. Again, it should be emphasised that this legal training may be wholly academic or wholly vocational, or may be a mixture of both.⁴⁷ This ‘level 1 law conditioning’, which is a prerequisite, will be enhanced by ‘active work in some aspect of the law’⁴⁸ (‘level 2 law conditioning’), which may include experience in legal practice, government, politics, or legal academia.⁴⁹ The greater the ‘level 2 law conditioning’, the more ingrained the ‘law conditioning’, with twenty and more years of such experience resulting in ‘level 3 law conditioning’.

The examination of whether the former and current Judges of the Court of Justice were/are ‘law conditioned’ is divided into two analyses: firstly, an analysis of the rules relating to the qualification requirements for office as Judge of the Court to determine the extent to which, if any, those legal rules require a person to possess any of the varying levels of ‘law conditioning’ (the formalist analysis); and, secondly, an analysis of the available biographical details of the past and present Judges of the Court to determine the extent to which, if at all, the Judges have been/are ‘law conditioned’ by reference to the foregoing levels of law conditioning (the realist analysis). These analyses are now conducted in turn.

⁴⁵ Llewellyn, K.N., *supra* n. 7, p. 19.

⁴⁶ Llewellyn, K.N., *supra* n. 7, p. 20.

⁴⁷ *Supra* n. 21.

⁴⁸ Llewellyn, K.N., *supra* n. 7, p. 19.

⁴⁹ *Supra* n. 22.

II. Are the Judges of the Court of Justice ‘Law Conditioned’? A Formalist Analysis

The qualification requirements for Judges and Advocates General of the Court of Justice are set out in the first clause of the first paragraph of Article 253 TFEU, which provides that they “shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence.”⁵⁰ This means that candidates for appointment must meet two conditions to be deemed appointable:

- They must be persons whose independence is beyond doubt; and,
- They must possess the qualifications required for appointment to the highest judicial offices in their respective countries or must be a jurisconsult of recognised competence.

It is the second condition, which is relevant to any consideration as to whether the first paragraph of Article 253 TFEU necessitates that an appointee to the Court be ‘law conditioned’. An obvious observation, in respect of the second condition for appointment, is that there are two alternative ways of satisfying it:

- A person who possesses the qualifications required for appointment to the highest judicial offices in his/her respective country; and/or,
- A jurisconsult of recognised competence.

⁵⁰ This formula can be contrasted with that contained in the second paragraph of Article 254 TFEU on the qualifications required of the Judges of the General Court: “The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office.” Four differences are immediately apparent: firstly, the possibility of appointment does not extend to “jurisconsults of recognised competence”; secondly, Article 254 TFEU refers to the *ability* required for appointment to high judicial office, rather than the *qualifications* required; thirdly, Article 254 TFEU refers to the ability for appointment to *high judicial office*, rather than the qualifications required for *highest judicial office*; and, fourthly, the ability for appointment to high judicial office is not qualified by the words “*in their respective countries*”.

The extent to which these alternative criteria guarantee that only ‘law-conditioned officials’ will be appointable to the Court requires close examination. It has been assumed that Article 253 TFEU requires a candidate to have a prior legal qualification. Brown and Kennedy, for instance, distinguish what is now Article 253 TFEU from Article 32 ECSC as originally drafted⁵¹, the latter of which did not require Judges of the Court of Justice of the ECSC to have any legal qualifications.⁵² It would appear the drafters of Article 167 of the Treaty of Rome (now Article 253 TFEU)⁵³ intended to ensure that Judges of the Court of Justice of the new European Communities would have some legal background, in contrast to the situation that prevailed theretofore. However, a closer inspection of Article 253 TFEU, which was modelled very closely on Article 2 of the Statute of the ICJ⁵⁴ and Article 21(1) ECHR^{55, 56} reveals a number of subtleties in the formula contained in the Article, which may call into question the assumption that it requires appointees to have legal training or experience. The paragraphs that follow consider the two alternative routes for qualification.

⁵¹ Article 32 ECSC: “The Court shall be composed of seven judges, appointed for six years by agreement among the governments of the member States from among persons of recognised independence and competence.”

⁵² Brown, L.N. and Kennedy, T., *Brown and Jacobs: The Court of Justice of the European Communities* (London: Sweet & Maxwell, 2000), p. 50. See also: Arnall, A., *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2006), pp. 19-20; de Waele, H., “Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union” in Bobek, M. (ed.), *supra* n. 34, p. 24, p. 25. Rasmussen has stated: “The Treaty’s appointment requirements bar men and women of less than the highest moral standing and legal professional skills and repute from ever ascending to membership of the Community Court.” (Rasmussen, H., *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986), p. 215). Feld also assumed “all appointees must at least have a law degree...” (Feld, W., “The Judges of the Court of Justice of the European Communities”, (1963) 9 *Villanova Law Review* 37, at 41).

⁵³ The first paragraph of Article 167 of the Treaty of Rome 1957: “The Judges and Advocates-General shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the Governments of the Member States for a term of six years.” The present first paragraph of Article 253 TFEU is worded identically insofar as it relates to the qualifications required for office.

⁵⁴ Article 2 of the Statute of the ICJ: “The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.”

⁵⁵ Feld, W., *supra* n. 52 at 40-41. Article 21(1) ECHR: “The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.”

⁵⁶ Brown, L.N. and Kennedy, T., *supra* n. 52 at 49.

1. Article 253 TFEU: Qualifications Required for Appointment to Highest Judicial Office “in their respective countries”

In respect of the first of the alternative qualifying criteria, the requirement that Judges and Advocates General of the Court possess the qualifications required for appointment to the highest judicial offices in their respective countries, two observations may be made.

Firstly, it is not clear in this context what the term “their respective countries” means.⁵⁷ Lasok, writing in 1994, pointed out that there were three possible alternative meanings of the term: the country of which the candidate is a national, the country in which the candidate is resident, or the country nominating the candidate.⁵⁸ Lasok discounted the possibility that it was the nominating country being referred to, preferring instead to interpret the term to refer to the candidate’s country of nationality, although accepting that there was no authority for this view.⁵⁹ Article 19(2) TEU, inserted by Article 1 of the Treaty of Lisbon, which now requires that the Court of Justice “shall consist of one judge from each Member State” may to some extent have clarified this matter. However, this formula of words may again have the same possible meanings: on the one hand, it may mean that the Court must contain a national (or at least resident) of each of the twenty-eight Member States; on the other, it may mean that a nominee of each Member State be appointed to the Court. Since one must assume that the purpose of Article 19(2) TEU was to ensure that each Member State would have the right to have a suitably qualified nominee appointed to the Court, this would appear to be the more sensible construction. This is also supported by the different wording contained in Article 17(4) and (5) TEU which concerns the composition of the Commission: the former providing that prior to the 1st November 2014 the Commission “shall consist of one national of each Member State” and the latter providing that thereafter the members of the Commission “shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and

⁵⁷ This limitation does not apply to the qualifications required for appointment to the General Court: *supra* n. 50.

⁵⁸ Lasok, K.P.E., *The European Court of Justice: Practice And Procedure* (London: Butterworths, 1994), p. 15.

⁵⁹ Lasok, K.P.E., *supra* n. 58, p. 15.

geographical range of all the Member States.”⁶⁰ It has always been assumed that the Member States are not required to nominate their own nationals to the Court: indeed, the then President of the Court, Lord Mackenzie Stuart, asserted in 1988 that the Court could consist “entirely of Russians”.⁶¹ Article 19(2) TEU does not appear to have altered this situation and, together with Article 253 TFEU, leaves the nationality of nominees to the Court to the discretion of the Member State seeking to appoint them. This being so, Lasok’s 1994 interpretation of the “respective countries” of the Judges as meaning the countries of their nationality must be called into question, given that it would lead to an absurdity. If any Member State is empowered to appoint a national of any state, it is technically open to a Member State to appoint a national of a non-EU member state. This being so, the operative question must surely be whether the nominee possesses the qualifications to be appointed to the highest judicial offices in the Member State seeking to appoint him/her, rather than whether he/she possesses such qualifications in respect of the non-EU member state of which he/she is a national.⁶² The conclusion can be drawn, therefore, that if a Judge is to be appointed by reason of him/her possessing the requisite qualifications to hold the highest judicial offices in his/her respective country, he/she should, at the very least, be qualified to hold the highest judicial offices in at least one Member State, specifically the one nominating him/her. This rather weak conclusion leads to a second, and more significant, problem with the first qualifying criterion in Article 253 TFEU.

⁶⁰ The German version of Article 19(2) TEU would also tend to support this interpretation: „Der Gerichtshof besteht aus einem Richter je Mitgliedstaat.“ Directly translated, this means: the Court of Justice consists of one Judge per Member State (this author’s translation), i.e. one Judge *per* Member State, not one Judge *from* each Member State.

⁶¹ Interview with *The Times* (18th August 1988), referred to by Brown L.N. and Kennedy T., *supra* n. 52, p. 48. However, Feld, writing in 1963, does not assume this to be the case: “The Treaties are silent about the nationality of the appointees for a judgeship. Since according to explicit provisions in the Treaties the members of the executive organs - the ECSC High Authority and the EEC and Euratom Commissions - must be nationals of the Member States, some writers have concluded that such a requirement does not apply to the judges of the Court, and that therefore a national of any state may be appointed as a justice. However, the validity of the argument *e contrario* is open to serious doubt since the judges, in a broad sense, are civil servants of the Communities and the personnel statutes specify that normally only nationals of the Member States can be given a permanent civil service appointment.” (*Supra* n. 52, at 41).

⁶² Otherwise, it would be possible for a Member State to nominate and have appointed to the Court of Justice a national of North Korea with the argument that the candidate is qualified for the office because he/she is qualified for the highest judicial offices of North Korea. Although what are we to make of the use of the word “countries”, which would imply a wider understanding than “in their respective Member States” would? The German version of Article 253 TFEU uses the formula “in ihrem Staat” (in their state) would tend to indicate qualifications in the Member States seeking to appoint the candidate, though not necessarily, as the word “Mitgliedstaaten” (Member States) is not utilised. (This author’s translations).

Secondly, the first of the alternative qualifying criteria measures suitability of candidates not by reference to a uniform EU-wide objective standard, but ties it rather to the candidates' qualifications to hold the highest judicial offices 'in their respective countries'. The question, therefore, of whether the candidate is qualified to take up office as a Judge is to be determined by reference to the rules in the Member State that is seeking to appoint him/her. Leaving aside the indeterminacy of the term 'highest judicial offices', it is obvious that each Member State is permitted to have its own rules as to which persons it deems fit in its own jurisdiction to hold 'highest judicial office'. While it may be assumed, although this cannot be confirmed in this dissertation, that each of the twenty-eight Member States require that appointees to such offices have some legal training, there is nothing in the EU Treaties to prevent a Member State adopting national rules that would allow persons with no legal training to be appointed to the highest judicial offices within that Member State, thereby clearing the way for qualification as a Judge of the Court of Justice. There may also be some significance in the difference in wording between Article 253 TFEU, which provides for the qualifications of Judges to the Court of Justice, and that contained in Article 254 TFEU, which provides for the qualifications of members of the General Court.⁶³ Article 253 TFEU refers to the need for members of the Court of Justice to possess the *qualifications* required for appointment to the highest judicial offices *in their respective countries*. Article 254 TFEU, in contrast, requires the members of the General Court to possess the *ability* required for appointment to *high judicial office*. The result is that in many situations the latter requirement, for an inferior court, may be more stringent than those required for the Court of Justice. This is the case because the question of whether a candidate possesses the *qualifications* required for appointment to the highest judicial offices of the Member State nominating him/her is one which is capable of being assessed objectively by reference to the rules existing in that Member State.⁶⁴ If the Member State's rules do not require any particular legal qualification, none will be required for the Court of Justice. If the Member State's rules are drafted in a manner that does not necessarily guarantee a high quality candidate, persons who meet these

⁶³ *Supra* n. 50.

⁶⁴ Leaving aside the question of what is meant by "highest judicial offices" in each Member State and how that should be determined.

national standards will also be appointable to the Court.⁶⁵ In contrast, the criterion for appointment to the General Court – possession of the *ability* required for appointment to high judicial office – is a matter to be assessed subjectively by reference to the candidate’s *ability*, rather than the objective assessment of whether he/she possesses the *qualifications* required by the Member State nominating him/her. This subjective assessment is crucially not limited to assessing whether the candidate has the ability required for appointment to high judicial office in his/her country, but whether he/she possesses such ability generally. The qualification criterion for the General Court is, therefore, a uniform criterion applied in the same way to all candidates to that court, regardless of which Member State is nominating them.

In summary, as a matter of pure theory, there is no requirement *de jure* that a person possess any prior legal training or professional experience to qualify as a Judge of the Court, since the matter is determined solely by reference to the question of whether the person possesses the requisite qualifications to hold highest judicial office in the Member State nominating him/her. As such, there is no requirement, in theory at least, that a Judge possess the minimum of ‘level 1 law conditioning’.

⁶⁵ Ireland’s rules on suitability for appointment to the Supreme Court and High Court are illustrative in this regard in that minimum suitability is determined solely by the candidate’s length of time in practice as a barrister or solicitor. Section 5(2)(a) of the Courts (Supplemental Provisions) Act 1961, as amended by section 4 of the Courts and Court Officers Act 2002, provides that: “A person shall be qualified for appointment as a judge of the Supreme Court or the High Court if the person is for the time being a practising barrister or practising solicitor of not less than 12 years standing who has practised as a barrister or a solicitor for a continuous period of not less than two years immediately before such appointment.” A person who is a member of the Law Library at the time of appointment and has maintained membership of the Law Library for the previous twelve years is therefore appointable to the High Court and Supreme Court even where he/she has not had an active practice. Convention, however, tends to prevent this from occurring. In the context of similar requirements in England and Wales, Atiyah has opined: “But it is today also a firm convention that nobody is appointed as a judge who has not had many years of active professional practice at the bar. Thus, the statutory requirement of ten years standing would not in practice be regarded as satisfied by someone who had not been in active practice for at least that length of time; in fact, few judges are appointed who have not been active barristers for at least twenty to twenty-five years. No law professor has, as such, ever been appointed to the English bench.” (Atiyah, P.S., “Lawyers and Rules: Some Anglo-American Comparisons”, (1983-84) 37 *Southwestern Law Journal* 545, at 557).

2. Article 253 TFEU: Jurisconsult of Recognised Competence

An examination of the second alternative qualifying criterion (a ‘jurisconsult of recognised competence’) also reveals a number of interpretative problems.⁶⁶ In the first place, it is not abundantly clear to everyone what is meant by the term ‘jurisconsult’. Lasok has highlighted that “[o]n the basis of the French and Italian texts of the Treaties it is possible to argue that ‘jurisconsult’ means a professional legal adviser and not simply a person learned in the law.”⁶⁷ However, in contrast, the German language version of the term “Juristen von anerkannt hervorragender Befähigung” clearly refers to the latter, rather than the former.⁶⁸ The appointment of numerous academics to the Court of Justice over the years would tend to suggest that the latter understanding of the term ‘jurisconsult’ is widely accepted. Secondly, unlike the first of the alternative qualifying criteria, the ‘jurisconsult of recognised competence’ criterion is not qualified in any way by reference to any country.⁶⁹ Whereas the first qualifying criterion requires that candidates possess the qualifications for appointment to the highest judicial offices ‘in their respective countries’, the question of the recognition of the competence of a jurisconsult is not limited to perceptions in any geographical area or state. In theory, therefore, a Japanese jurist recognised in Japan only for his/her competence as a jurist would be qualified for appointment to the Court. Thirdly, the competence for which the jurisconsult is recognised is not limited by the wording of Article 253 TFEU to any specific area of law. This differs from the similarly worded Article 2 of the Statute of the ICJ, which refers to “jurisconsults of recognised competence *in international law*”.⁷⁰ So, in the context of qualification for appointment to the Court of Justice, there would appear to be no requirement that a candidate be an expert in international law or comparative law or EU law, or indeed the law of any particular Member State.⁷¹ Indeed, as Lasok has pointed out, an expert in Roman or Canon law would qualify.⁷² The result is that although the second

⁶⁶ It should be noted that this is not one of the qualifications for appointment to the General Court: *supra* n. 50.

⁶⁷ Lasok, K.P.E., *supra* n. 58, p. 15.

⁶⁸ Directly translated, this means ‘a jurist of known outstanding ability’ (this author’s translation).

⁶⁹ Lasok, K.P.E., *supra* n. 58, p. 15.

⁷⁰ Emphasis added.

⁷¹ Lasok, K.P.E., *supra* n. 58, p. 15.

⁷² Lasok, K.P.E., *supra* n. 58, p. 15.

of the alternative criteria does require a ‘law-conditioned official’, in that such a person will be, to paraphrase Llewellyn, trained and in the main an experienced lawyer with ‘active work in some aspect of the law’, the criterion is expressed in such a loose manner to make appointable a jurist whose recognised competence lies in Filipino fishing law.

3. Interim Conclusion

Having examined the qualifications criteria for Judges of the Court of Justice, this author must conclude, as a matter of strict theory, that the requirements do not necessarily require ‘level 1 law conditioning’. Setting aside the criterion of independence, there are two alternative criteria for appointment: possessing the qualifications required for appointment to the highest judicial offices of the nominating Member State and/or being a jurisconsult of recognised competence. In respect of the former, suitability is tied to qualification for the highest judicial offices of the nominating state. As such, there is no uniform minimum standard candidates must meet and, in theory, it would be possible for Member States to specify no qualification criteria for appointment to the highest judicial offices in their territories, thereby making potentially anybody appointable to the Court. As regards the second alternative criterion, that the person be a ‘jurisconsult of recognised competence’, it has been seen that the meaning of the term is somewhat opaque, and while it does require a person appointed pursuant to this criterion to have some experience in some aspect of the law, it does not require that this aspect of the law have any relation to the activities of the Court of Justice. However, the fact that the first paragraph of Article 253 TFEU does not *de jure* require Judges to be ‘law conditioned’ does not preclude the possibility that all Judges of the Court of Justice have been, or are, *de facto* ‘law conditioned’. In order to assess this question, the realist analysis of the question that follows is required.

III. Are the Judges of the Court of Justice ‘Law Conditioned’?

A Realist Analysis

1. Introduction

Having concluded in the formalist analysis that appointees to the Court of Justice are not required to possess ‘level 1 law conditioning’, it is necessary to conduct a realist analysis that takes into account the educational and professional backgrounds of the former and current Judges of the Court in order to determine the *de facto* level, if any, of their ‘law conditioning’.

Since the beginnings of the CJEU on the 4th December, 1952⁷³ (as the Court of Justice of the ECSC), the constituent court known now as the Court of Justice has had a total of ninety-seven Judges, forty-six Advocates General⁷⁴ and five Registrars. There are currently twenty-eight Judges at the Court of Justice assisted by ten Advocates General.⁷⁵ This author has already concluded that the two alternative qualifying criteria in Article 253 TFEU for appointment to the

⁷³ This is the date on which the Court “was installed in the Villa Vauban ... and 7 judges took their Oaths of Office.” (Brown, L.N. and Kennedy, T., *supra* n. 52, p. 46, fn. 1).

⁷⁴ Nine persons, five of whom were Italian, have served as both Advocate General and Judge. Alberto Trabucchi, of Italy, served as Judge from the 8th March 1962 to the 12th December 1972, and subsequently as Advocate General from the 9th January 1973 to the 6th October 1976. Francesco Capotorti, also of Italy, served as Judge from the 3rd February 1976 to the 6th October 1976, and subsequently as Advocate General from the 7th October 1976 to the 6th October 1982. Gordon Slynn, of the UK, served as Advocate General from the 26th February 1981 to the 6th October 1988, and subsequently as Judge from the 7th October 1988 to the 10th March 1992. G. Federico Mancini, of Italy, served as Advocate General from 1982 to 1988, and subsequently as Judge from the 26th September 1988 to the 21st July 1999. Claus Christian Gulmann, of Denmark, served as Advocate General from the 7th October 1991 to the 6th October 1994, and subsequently as Judge from the 7th October 1994 to the 10th January 2006. Antonio Mario La Pergola, of Italy, served as Advocate General from the 1st January 1995 to the 14th December 1999, and subsequently as Judge from the 15th December 1999 to the 3rd May 2006. Antonio Tizzano, of Italy, served as Advocate General from the 7th October 2000 to the 3rd May 2006, and has been a Judge since the 4th May 2006 (Vice-President of the Court since 2015); José Luís Da Cruz Vilaça, of Portugal, served as Advocate General from 1986-1988, and has been a Judge at the Court since the 8th October 2012. Melchior Wathelet, of Belgium, served as a Judge from 1995-2003, and has been an Advocate General since the 8th October 2012.

⁷⁵ The first paragraph of Article 252 TFEU provides: “The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.” Council Decision of 25 June 2013 increasing the number of Advocates-General of the Court of Justice of the European Union (2013/336/EU) increased the number of Advocates General to eleven from the 7th October 2015. As of the 1st June 2016, there are ten Advocates General at the Court, with a Bulgarian Advocate General yet to be appointed, though it would appear that Bulgaria has nominated Atanas Semov (<http://www.focus-fen.net/news/2015/07/29/379098/bulgaria-nominates-atanas-semov-for-eu-court-of-justice-advocate-general.html>) (last accessed at 15:57 on Wednesday, the 21st October 2015).

Court, more specifically the first of the alternative criteria, do not, *de jure*, require a person to possess ‘level 1 law conditioning’. That is not to say, however, that none of the Judges have been ‘law conditioned’. Llewellyn, as a pragmatist, was not concerned with the *de jure* qualifications required for judicial appointments.⁷⁶ Instead, he concluded from his observations on the holders of judicial office at appeals courts that they were “trained and in the main rather experienced lawyers.”⁷⁷ The extent to which the same is true in the context of the Court of Justice may, therefore, be assessed only by reference to a study of the educational and professional backgrounds of the Judges.

From 1952-1957, appointments to the Court of Justice were made pursuant to Article 32 ECSC. Thereafter, appointments were made to the Court pursuant to Article 167 of the Treaty of Rome, now Article 253 TFEU. The paragraphs that follow consider the training and professional backgrounds of the Judges appointed under Article 32 ECSC, and thereafter those former and present Judges appointed under what is now Article 253 TFEU in order to assess the extent, if any, of the ‘law conditioning’ of those Judges by reference to the level-based model presented heretofore.

In order to ascertain the extent of the Judges’ legal education, training and professional experience, this author has consulted a number of biographical sources. Greatest reliance has been placed on the biographical notes provided for each of the former and present Judges of the Court on the CJEU website⁷⁸,

⁷⁶ Indeed, the US constitution does not set out any qualifications which must be held by federal appellate court judges, nor does any federal law (Atiyah, P.S., *supra* n. 65, at 558: “There are no constitutional or statutory qualification requirements for federal judicial appointments other than that district judges must be residents of the district to which they are appointed.”) For an account of the appointment of American appellate judges which is almost contemporaneous to *The Common Law Tradition*, see Goldman S., “Judicial Appointments to the United States Courts of Appeals”, (1967) *Wisconsin Law Review* 186.

⁷⁷ Llewellyn, K.N., *supra* n. 7, p. 19. This assertion would tend to be supported by Goldman’s almost contemporaneous study of judicial appointments to the US Courts of Appeals, published in 1967: “The President’s men in the Justice Department strive to appoint competent people to appeals court posts. They strive because they wish to do a ‘good’ job, i.e. to support these important courts, and, in general, avoid the damaging image of ‘playing politics’ with the judiciary. The criteria for being ‘qualified’ or ‘well qualified’ are ambiguous and difficult to define but include being a ‘respected’ lawyer or judge and having the professional competence and judicial temperament thought to befit an appointee to the appeals courts. Trial court experience is usually a plus mark in the evaluation of candidates. Public legal experience seems to be prominent in the backgrounds of the appointees.” (Goldman, S., *supra* n. 76, at 192).

⁷⁸ The biographical details of the former members of the Court of Justice are available at: http://curia.europa.eu/jcms/jcms/Jo2_7014/ (last accessed at 19:10 on Monday, the 14th March

with this information being supplemented by additional information contained in the Court's Annual Reports⁷⁹ and Council Press Releases. A number of secondary sources have also been utilised where these sources contain information additional to that contained in the information provided by EU institutions.⁸⁰

2. 'Level 1 Law Conditioning': 'Schooling or Training for the Law'

In the paragraphs that follow, the 'schooling and training for the law' possessed by the former Judges of the Court appointed pursuant to Article 32 ECSC, that of the former Judges appointed under what is now Article 253 TFEU, as well as that of the current Judges of the Court is considered. From the biographical sources described above⁸¹, this author has completed the following three appendices to this dissertation, which relate to the legal education and training of the former and present Judges:

- Appendix 1: Legal Education and Training of the Judges of the Court of Justice Appointed Pursuant to Article 32 ECSC;
- Appendix 2: Legal Education and Training of the Former Judges of the Court of Justice Appointed Pursuant to Now Article 253 TFEU;

2016). The biographical details of the present members of the Court are available at: http://curia.europa.eu/jcms/jcms/Jo2_7026/ (last accessed at 19:10 on Monday, the 14th March 2016).

⁷⁹ A full list of the reports consulted is contained in the bibliography to this dissertation. *Synopsis of the Work of the Court of Justice and Court of First Instance of the European Communities: Report of Proceedings 1992-1994* (Luxembourg: 1995) was the last report to provide detailed biographies of the Judges: thereafter, the short biographical note provided on the website was reproduced in the reports (or vice-versa). All of the Annual Reports listed up to and including *Synopsis of the Work of the Court of Justice, the General Court and the European Civil Service Tribunal: Annual Report 2012* (Luxembourg: 2013) are available in full at: http://aei.pitt.edu/view/eusubjects/courtojustice.html#group_1973 (last accessed at 19:12 on Monday, the 14th March 2016). The latest two Annual Reports are available in full on the website of the CJEU at: http://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels and http://curia.europa.eu/jcms/jcms/Jo2_7000/ (both last accessed at 19:13 on Monday, the 14th March 2016).

⁸⁰ Feld, W., *supra* n. 52; Brown, L.N. and Kennedy, T., *supra* n. 52, at 430-440; Rasmussen, H., *supra* n. 52; Kenney, S.J., "The Members of the Court of Justice of the European Communities", (1998-1999) 5 *Columbia Journal of European Law* 101; Scheingold, S.A., *The Rule of Law in European Integration: The Path of the Schuman Plan* (New Haven: Yale University Press, 1965); Chalmers, D., "Judicial Performance, Membership, and Design at the Court of Justice" in Bobek, M. (ed.), *supra* n. 34, p. 49.

⁸¹ *Supra* n. 79 and n. 80.

- Appendix 3: Legal Education and Training of the Current Judges of the Court of Justice Appointed Pursuant to Now Article 253 TFEU.

Between them, these appendices provide firstly the names, years of service (including years of service as President or Vice-President of the Court), and nationality of each of the ninety-seven Judges. The fourth column of these appendices provides the level of legal education, if any, of the Judges, ranging from a first law degree or diploma through to doctorate. Degrees in non-law subjects have not been considered, nor have honorary degrees. On a number of occasions, it was unclear from a Judge's biographical details whether he/she possessed any legal education. Where this is the case, the entry in the fourth column in respect of such a Judge is the word 'unclear'. The fifth column of the appendices provides the professional legal training, if any, held by the Judges, whether that of lawyer or judge. Classification of legal training created difficulties in places, particularly where biographical information was scant. Where it is evident that a Judge is a qualified lawyer, he/she is described as such in the fifth column. However, where this is not clear, but the Judge has served in judicial office in his/her Member State, such a Judge is described as qualified as a judge in the fifth column, due to the tradition of the separate judicial career stream in civil law countries. Where it is not evident from the Judge's biographical details that he/she is qualified as a lawyer or judge, the entry in the fifth column in respect of such a Judge is the word 'unclear'. The 'level 1 law conditioning' of the former and present Judges of the Court is now considered based on the information collated in these appendices.

a) Judges Appointed Pursuant to Article 32 ECSC

As has been discussed previously, Article 32 ECSC did not require Judges of the Court of Justice of the ECSC to possess any legal qualifications. Appendix 1 contains details of the legal educations and training of the seven Judges appointed to the Court pursuant to Article 32 ECSC.

From the fourth column of Appendix 1, it is evident that five (71%) of the Judges possessed tertiary legal educational qualifications⁸², and four (57%) of these Judges possessed doctoral degrees in law.⁸³ The same five Judges (71%) are also classified in the fifth column of Appendix 1 as having completed a legal professional qualification, with three (43%) having been former national judges, and two (29%) having been former lawyers.⁸⁴

Brown and Kennedy have pointed out, however, that two of the Judges appointed in 1952 did not possess any legal educational qualifications or training: Petrus Serrarens, of the Netherlands, and Jacques Rueff, of France.⁸⁵ Appendix 1 confirms this. Judge Serrarens had served in both Chambers of the Dutch parliament and had worked as a deputy member of the board of administration of the ILO, and as Chairman of the Social Affairs Committee of the Council of Europe. Judge Rueff, who continued as a Judge of the Court of Justice of the European Communities from 1958 to 1962, had been “an expert in finance and banking who had distinguished himself in administrative and ministerial posts in France.”⁸⁶ Given that Rueff was re-appointed pursuant to the fourth paragraph of Article 167 of the Treaty of Rome (now Article 253 TFEU) which provides: “Retiring judges and Advocates-General may be reappointed”, it can safely be said that at least one Judge of the Court of Justice

⁸² Massimo Pilotti, of Italy; Otto Riese, of Germany; Louis Delvaux, of Belgium; Charles Léon Hammes, of Luxembourg; and, Adrianus van Kleffens, of the Netherlands.

⁸³ Judges Pilotti, Riese, Delvaux and Hammes. Judge van Kleffens possessed a law degree.

⁸⁴ Judge Pilotti had from 1901 served as a judge in numerous domestic Italian Courts, as well as the Permanent Court of Arbitration in The Hague. Judge Riese had served as Assistant Judge at the Landgericht (Regional Court), Frankfurt-am-Main, and as President of Chamber at the Bundesgerichtshof (Federal Court of Justice), Karlsruhe. Judge Delvaux had practised at the Bar at Louvain and Nivelles. Judge Hammes had practised law privately at the Luxembourg Bar (1922-1927). He had also held a number of judicial posts in Luxembourg, culminating in his promotion to the bench of the Cour supérieure de justice (High Court of Justice) (1945-52). Judge van Kleffens had served as a judge at the Rechtbank te Amsterdam (Court of Amsterdam).

⁸⁵ Brown, L.N. and Kennedy, T., *supra* n. 52, p. 50. Rasmussen appears to contradict this statement by suggesting that Judge Rueff was the first and last non-lawyer to be appointed to the Court (Rasmussen, H., *supra* n. 52, p. 217). This would suggest that Judge Serrarens had, at the very least, a legal qualification. However, both Scheingold and Chalmers characterise Judge Serrarens’ background as being in politics (Scheingold, S.A., *The Rule of Law in European Integration: The Path of the Schuman Plan* (New Haven: Yale University Press, 1965), p. 26; Chalmers, D., “Judicial Performance, Membership, and Design at the Court of Justice” in Bobek, M. (ed.), *supra* n. 34, p. 49, p. 58), and there is nothing in the biographical information available on Judge Serrarens to suggest he had pursued any ‘schooling or training for the law’.

⁸⁶ Brown, L.N. and Kennedy, T., *supra* n. 52, at 50. Judge Rueff is characterised as an economist by Scheingold and as an academic and civil servant by Chalmers: Scheingold, S.A., *supra* n. 85, p. 26; Chalmers, D., *supra* n. 85, p. 58.

since 1958 has not possessed the minimum ‘level 1 law conditioning’. However, Judge Rueff was not appointed pursuant to the first paragraph of Article 167 (now Article 253 TFEU) and may, therefore, be an anomaly.⁸⁷ The question, therefore, is whether all of the Judges appointed pursuant to the first paragraph of what is now Article 253 TFEU have possessed legal educational and/or vocational qualifications. However, in the case of those appointed pursuant to Article 32 ECSC, it is evident that two (29%) of the seven Judges appointed were not ‘level 1 law conditioned’ and, therefore, not ‘law-conditioned officials’.

b) Former Judges Appointed Pursuant to Now Article 253 TFEU

Appendix 2 contains details of the legal educations and training of the sixty-two former Judges appointed to the Court of Justice pursuant to now Article 253 TFEU.

From the fourth column of Appendix 2, it is evident that fifty-seven Judges (92%) had with certainty completed some form of tertiary legal education, with thirty-five (56%) possessing doctoral degrees in law, three (5%) possessing Master’s degrees in law, twenty-three (37%) possessing undergraduate law degrees, and one (2%) possessing a Diploma in Legal Studies as their most advanced legal academic educational qualifications. In respect of five Judges (8%)⁸⁸, this author could not ascertain with confidence from their rather limited biographical details that they possessed any legal educational qualifications. However, in the case of all five of these Judges, they possessed a legal professional qualification.⁸⁹

⁸⁷ Scheingold paints a rather troubling picture of the circumstances surrounding Judge Rueff’s re-appointment: “Also symptomatic of the autonomy that member states enjoy with regard to their judicial appointments is the case of the well-known economist, Jacques Rueff, the original French member of the Court of Justice. Judge Rueff, while still a member of the Court, served as vice-chairman of a study committee appointed by President de Gaulle to work out a program to overhaul the French economy. This impropriety was compounded by the failure of the French government to appoint a successor to Judge Rueff after he resigned under fire in November 1959. As a final blow, Judge Rueff – having completed his work for the French government – was reappointed to fill his own vacancy.” (Scheingold, S.A., *supra* n. 85, p. 31).

⁸⁸ Judges Rossi, Slynn, Grévisse, Murray and La Pergola.

⁸⁹ Judge Rossi had held numerous judicial offices in Italy; Judge Slynn was a barrister, later Queen’s Counsel; Judge Grévisse had been President of the First Sub-Section of the Judicial Section of the French Council of State; Judge Murray had been a barrister, later Senior Counsel; and, Judge La Pergola had been President of the Italian Constitutional Court.

From the fifth column of Appendix 2, it is evident that forty-eight Judges (77%) certainly possessed a legal professional qualification, with twenty-nine (47%) being qualified lawyers and nineteen (31%) being former national judges. As regards fourteen (23%) of the Judges⁹⁰, it could not be stated with certainty that they had undertaken legal professional training. However, in the case of these Judges, all possessed law degrees, with twelve of them possessing doctoral degrees.⁹¹

In summary, it is evident that all of the former Judges of the Court of Justice appointed pursuant to now Article 253 TFEU have been ‘law-conditioned officials’ in that they have possessed the minimal ‘level 1 law conditioning’: ‘schooling or training for the law’.

c) Present Judges Appointed Pursuant to Article 253 TFEU

Appendix 3 contains details of the legal educations and training of the twenty-eight current Judges at the Court of Justice.

From the fourth column of Appendix 2, it is evident that twenty-seven Judges (96%) had completed some form of tertiary legal education, with fifteen (54%) possessing doctoral degrees in law, two (7%) possessing Master’s degrees in law, and ten (4%) possessing undergraduate law degrees as their most advanced legal academic educational qualifications. It is only in respect of one Judge (Judge Vilaras) (4%) that possession of an academic law degree cannot be asserted positively. However, Judge Vilaras qualified as a lawyer in Greece.

From the fifth column of Appendix 3, it is evident that twenty-two Judges (79%) certainly possessed a legal professional qualification, with fifteen (54%) being qualified lawyers and seven (25%) being former national judges. In the case of six Judges (21%)⁹², it could not be determined with certainty that they

⁹⁰ Judges Donner, Trabucchi, Pescatore, Sørensen, Capotorti, Chloros, Joliet, De Carvalho Moitinho de Almeida, Rodriguez Iglésias, Kapteyn, Sevón, Skouris, Makanczyk and Kūris.

⁹¹ Judges Donner, Trabucchi, Pescatore, Sørensen, Chloros, Joliet, Rodriguez Iglésias, Kapteyn, Sevón, Skouris, Makanczyk and Kūris held Doctor of Laws degrees. Judges Capotorti and De Carvalho Moitinho de Almeida possessed law degrees.

⁹² Judges Rosas, Levits, Berger, Prechal, Rodin and Jürimäe.

possessed a legal professional qualification. However, in each case, the Judges possessed law degrees, with five of the six possessing doctoral degrees.⁹³

As with the former Judges of the Court appointed pursuant to now Article 253 TFEU, each of the Judges of the present Court of Justice possess the minimum of ‘level 1 law conditioning’ in that they have been schooled or trained in the law.

d) Interim Conclusion

From the details contained in Appendices 1-3 described above, the following interim conclusions may be drawn:

- Five (71%) of the seven Judges appointed to the Court of Justice pursuant to Article 32 ECSC were ‘law-conditioned officials’ in that they possessed ‘schooling or training for the law’ (‘level 1 law conditioning’). Only two Judges (Judges Serrarens and Rueff) (29%) had no such schooling or training, and were, therefore, not ‘law-conditioned officials’;
- All sixty-two (100%) former Judges of the Court appointed pursuant to the qualifications requirements in now Article 253 TFEU have possessed either ‘schooling or training for the law’ (‘level 1 law conditioning’), and can therefore be described as ‘law-conditioned officials’;
- All twenty-eight (100%) of the Judges of the present Court possess either ‘schooling or training for the law’ (‘level 1 law conditioning’), and can therefore be described as ‘law-conditioned officials’.

It now remains to be seen to what extent the former and present Judges of the Court possess ‘law conditioning’ at the more advanced ‘levels 2’ and ‘3’ described heretofore.

⁹³ Judges Rosas, Levits, Berger, Prechal and Rodin possess a Doctor of Laws degree. Judge Jürimäe possesses a law degree.

3. ‘Level 2 Law Conditioning’: ‘Active Work in Some Aspect of the Law’

The paragraphs that follow consider the question of whether the former Judges of the Court appointed pursuant to Article 32 ECSC, the former Judges appointed under what is now Article 253 TFEU, as well the current Judges of the Court have in addition to their ‘schooling or training for the law’ performed ‘active work in some aspect of the law’ (‘level 2 law conditioning’) prior to taking up judicial office at the Court. From the biographical sources described above, this author has completed the following three appendices to this dissertation, which relate to the professional backgrounds of the former and present Judges:

- Appendix 4: Post-Educational ‘active work in some aspect of the law’ of the Judges of the Court of Justice Appointed Pursuant to Article 32 ECSC;
- Appendix 5: Post-Educational ‘active work in some aspect of the law’ of the Former Judges of the Court of Justice Appointed Pursuant to Now Article 253 TFEU;
- Appendix 6: Post-Educational ‘active work in some aspect of the law’ of the Current Judges of the Court of Justice Appointed Pursuant to Now Article 253 TFEU.

These appendices provide in their first columns the names of the each of the ninety-seven former and present Judges of the Court of Justice. The Judges’ professional activities are then divided into six separate headings: legal academic (column 2); legal practitioner (column 3); civil servant/government official (column 4); judge (column 5); international or supranational organisation (column 6); and, politician (column 7). These classifications have been chosen to represent Llewellyn’s wide-ranging description of what constitutes “work in some aspect of the law”.⁹⁴ The categorisations are also consonant, if not entirely consistent, with those utilised by Scheingold and Chalmers in their studies of the professional backgrounds of the members of

⁹⁴ *Supra* n. 22.

the Court.⁹⁵ However, the current study differs from those of Scheingold and Chalmers in that it does not attempt to characterise the ‘dominant strain’ of a Judge’s background as Scheingold did, nor does it attempt to provide weighting to one particular background over another as Chalmers did. Rather, the purpose of Appendices 4-6 is to illustrate whether or not there is evidence that an individual Judge had any experience, regardless of how insignificant in terms of time spent, in the six areas of professional activity identified. Where a Judge has such experience, it is indicated by means of a ‘tick’ icon in the appropriate column. Those Judges against whose name a ‘tick’ icon is entered in any one of the six career categories may be considered as possessing ‘level 2 law conditioning’ as he/she will have conducted ‘active work in some aspect of the law.’

A number of difficulties in the classification of certain types of professional activity should be mentioned. One such problem was how to categorise legal work for the state, such as that of an attorney general or state prosecutor, specifically whether such work should be characterised as that of a legal practitioner or civil servant/government official. In all such cases, the decision was made to categorise such work as that of the latter. Another difficulty was ministerial positions in government, and whether these should be categorised as the work of a civil servant/government official or a politician. Although it may seem to run contrary to the common understanding of what a politician is, it was decided to categorise politicians as those who had been elected to their office. Therefore, where there was no indication as to whether the person concerned was an elected official, he/she was categorised as a civil servant/government official, rather than as a politician.

⁹⁵ Scheingold’s work, published in 1965, analysed the ‘dominant strain’ of the professional backgrounds of the eighteen members of the Court (fourteen Judges, three Advocates General and one Registrar) that had been appointed at the time. Scheingold identified eleven categories of career: judge, international trade union leader, law professor, economist, attorney, politician, government official, Italian government, High Authority attorney, Conseil d’État and banking official (Scheingold, S.A., *supra* n. 80, pp. 26-27). Chalmers’ more recent study in 2015 of members appointed from 1958 onwards provides seven categories: politician, academic, practitioner, civil servant, EU institution, lower court judge and senior court judge (Chalmers, D., *supra* n. 80).

a) Judges Appointed Pursuant to Article 32 ECSC

It has already been determined that two of the Judges appointed pursuant to Article 32 ECSC, Judges Serrarens and Rueff, did not possess ‘level 1 law conditioning’ in that they had not been schooled or trained for the law. As ‘level 1 law conditioning’ is a prerequisite in order to be described as a ‘law-conditioned official’, it follows that these two Judges cannot be described as such. As for the other five Judges, it is evident from Appendix 4 that all five (71%) of them conducted ‘active work in some aspect of the law’ after their legal education and/or training, with two (29%) having had experience in legal academia, two (29%) in legal practice, all five (71%) in the civil service or government officialdom, four (57%) in international or supranational organisations, and one (14%) in politics. Indeed, all five (71%) of the Judges had worked in three or more of the categories, with Judge Hammes having worked in five out of the six.

In summary, all five (71%) of the Judges appointed pursuant to Article 32 ECSC that had possessed ‘level 1 law conditioning’ also had conducted ‘active work in some aspect of the law’ and, therefore, also possessed at least ‘level 2 law conditioning’.

b) Former Judges Appointed Pursuant to Now Article 253 TFEU

It has already been determined that all sixty-two former Judges appointed pursuant to now Article 253 TFEU possessed ‘level 1 law conditioning’. The information contained in Appendix 5 assists in determining how many of these Judges conducted ‘active work in some aspect of the law’ (‘level 2 law conditioning’). It is apparent from Appendix 5 that all sixty-two (100%) of the Judges had some experience in one or more of the six categories of professional background, with forty-three (69%) having had experience in legal academia, twenty-one (34%) in legal practice, forty-two (68%) in the civil service or government officialdom, forty-one (66%) in the judiciary, thirty-four (55%) in international or supranational organisations, and seven (11%) in politics. Of the sixty-two Judges, forty-three (69%) had some experience in

three or more of the career categories, with six Judges (10%)⁹⁶ having some experience in five of the six career categories. Of the remaining nineteen Judges, only five (8%) had experience in one of the career categories only.⁹⁷

In summary, all sixty-two (100%) of the former Judges appointed pursuant to now Article 253 TFEU possessed at least ‘level 2 law conditioning’.

c) Present Judges Appointed Pursuant to Article 253 TFEU

It has already been determined that all twenty-eight of the current Judges possess ‘level 1 law conditioning’. The information contained in Appendix 6 assists in determining how many of these Judges have conducted ‘active work in some aspect of the law’ (‘level 2 law conditioning’). It is apparent from Appendix 6 that all twenty-eight (100%) of the Judges had some experience in one or more of the six categories of professional background, with twenty (71%) having had experience in legal academia, ten (36%) in legal practice, eighteen (64%) in the civil service or government officialdom, sixteen (57%) in the judiciary, twenty-three (82%) in international or supranational organisations, and six (21%) in politics. Of the twenty-eight Judges, twenty-one (75%) had some experience in three or more of the career categories, with one Judge having experience in all six career categories⁹⁸, and two Judges having some experience in five of the six career categories.⁹⁹

In summary, all twenty-eight (100%) of the Judges of the current Court of Justice possess at least ‘level 2 law conditioning’.

d) Interim Conclusion

From the foregoing paragraphs the following interim conclusions may be drawn:

⁹⁶ Judges Bosco, Koopmanns, O’Higgins, Diez de Velasco, La Pergola and Schintgen.

⁹⁷ Judges Donner, Trabucchi, Joliet, Schockweiler and Rodriguez Iglésias.

⁹⁸ Judge Da Cruz Vilaça, the only Judge in the Court’s history to do so according to the appendices to this dissertation.

⁹⁹ Judges Jarašiūnas and Vilaras.

- Five (71%) of the seven Judges appointed to the Court of Justice pursuant to Article 32 ECSC possessed at least ‘level 2 law conditioning’ in that they had conducted ‘active work in some aspect of the law’;
- All sixty-two (100%) former Judges appointed to the Court pursuant to now Article 253 TFEU possessed at least ‘level 2 law conditioning’;
- All twenty-eight (100%) Judges at the current Court possess at least ‘level 2 law conditioning’.

It now remains to be seen whether the ninety-five (98%) ‘law-conditioned’ Judges out of the ninety-seven former and current Judges of the Court of Justice have sufficient experience to possess ‘level 3 law conditioning’.

4. ‘Level 3 Law Conditioning’: Twenty Years or More ‘Active Work in Some Aspect of the Law’

Based on biographical details compiled on the former and present Judges, three further appendices detail the length (in terms of time spent) of experience of each of the Judges in ‘active work in some aspect of the law’:

- Appendix 7: Approximate Length of Post-Educational ‘active work in some aspect of the law’ of the Judges of the Court of Justice Appointed Pursuant to Article 32 ECSC at the Date of Appointment;
- Appendix 8: Approximate Length of Post-Educational ‘active work in some aspect of the law’ of the Former Judges of the Court of Justice Appointed Pursuant to Now Article 253 TFEU at the Date of Appointment;
- Appendix 9: Approximate Length of Post-Educational ‘active work in some aspect of the law’ of the Current Judges of the Court of Justice Appointed Pursuant to Now Article 253 TFEU at the Date of Appointment.

It should be noted that the sparseness of biographical detail in places meant it was not always possible to ascertain with precision the number of years spent in a given career category as defined in Appendices 4-6, or the length in years of a Judge's post-educational or training career prior to appointment. As a result, a decision was made to calculate the length in years of a Judge's aggregate time spent in the six career categories as defined in Appendices 4-6, with any overlaps between the six categories to be calculated concurrently, rather than consecutively, and to categorise the length of professional careers in ten-year blocks (0+, 10+, 20+, 30+, 40+, etc.). Where there was room for doubt as to which of these ten-year blocks would most accurately describe a Judge's aggregate experience, the decision was made to err on the side of caution and to attribute to a Judge the number of years that could be positively asserted from the biographical details available, invariably the lesser number.

a) Judges Appointed Pursuant to Article 32 ECSC

This author has already asserted that five of the seven Judges appointed pursuant to Article 32 ECSC possessed 'level 2 law conditioning' in that they had conducted 'active work in some aspect of the law'. The question that arises now, however, is whether that 'active work' was of the duration of twenty years or more necessary to attain 'level 3 law conditioning'. It is evident from Appendix 7 that at least four (57%) of these five Judges had twenty and more years' 'active experience in some aspect of the law', with Judge van Kleffens being categorised as having had 10+ years' experience.¹⁰⁰ Accordingly, it can be concluded that at least four (57%) out of the seven Judges appointed to the Court pursuant to Article 32 ECSC possessed 'level 3 law conditioning'.

¹⁰⁰ In the case of Judge van Kleffens it is merely a lack of information that does not allow one to assert positively that he had 20+ years' experience. It is clear from his biographical details on the CJEU website that he held several posts prior to 1934 when he became Director of the External Trade Department of the Ministry for Economic Affairs. His service in this department was interrupted during World War II when he was taken as a prisoner of war. On balance, it is most likely that Judge van Kleffens had 20+ years' 'active work in some aspect of the law', but since it cannot be demonstrated by recourse to the available biographical details such as assertion is not being made here.

b) Former Judges Appointed Pursuant to Now Article 253 TFEU

This author concluded previously that all sixty-two former Judges appointed to the Court pursuant to now Article 253 TFEU possessed at least ‘level 2 law conditioning’. The details provided in Appendix 8 indicate that out of these sixty-two Judges, at least fifty-seven (92%) had twenty and more years’ ‘active experience in some aspect of the law’, with only five (8%) of the Judges¹⁰¹ having less experience, and in all such cases 10+ years. Accordingly, it can be concluded that at least fifty-seven (92%) out of the sixty-two former Judges of the Court appointed pursuant to now Article 253 TFEU possessed ‘level 3 law conditioning’.

c) Present Judges Appointed Pursuant to Article 253 TFEU

This author concluded previously that all twenty-eight of the current Judges at the Court possess at least ‘level 2 law conditioning’. The details provided in Appendix 9 indicate that out of these twenty-eight Judges, at least twenty-six (93%) had twenty and more years’ ‘active experience in some aspect of the law’ prior to appointment, with only two (7%) Judges¹⁰² having less experience, and in both cases 10+ years. Accordingly, it can be concluded that at least twenty-six (93%) out of the twenty-eight present Judges possess ‘level 3 law conditioning’.

¹⁰¹ Judges Donner, Joliet, de Carvalho Moitinho de Almeida, Rodriguez Iglésias and Wathelet. In the case of Judge Donner, his appointment at the young age of forty explains his relatively brief pre-Court of Justice career. Judge Joliet had an impressive education which continued until 1968 (when he was thirty years old). He took his first post as an associate lecturer at the University of Liège in 1970, and was appointed to the Court of Justice in 1984 at age forty-six (*Synopsis of the Work of the Court of Justice of the European Communities in 1984 and 1985 and Record of the Formal Sittings in 1984 and 1985* (Luxembourg: 1986), p. 131). Judges de Carvalho Moitinho de Almeida and Rodriguez Iglésias were the first Judges nominated to the Court by Portugal and Spain respectively. The unedifying dictatorships which persisted in those countries to just over a decade before their appointments in 1986 might at least explain Judge Rodriguez Iglésias’ young age on the date of his appointment (thirty-nine), and consequent brevity of his pre-Court of Justice professional career. In the case of Judge de Carvalho Moitinho de Almeida however, it is a lack of dates on his biographical details in all the sources consulted that makes it difficult to assert positively the length in years of his professional experience. The available information on Judge Wathelet’s throws up a similar problem: there is no information on his professional experience prior to 1977 when he became Professor of European Law at the Catholic University of Louvain and the University of Liège.

¹⁰² Judges Levits and von Danwitz. In the case of Judge Levits, it is merely a lack of detail on dates that prevents the making of a positive assertion that he had 20+ years’ professional experience prior to his appointment. In the case of Judge von Danwitz, he would appear to have had a lengthy education, beginning his professional career in 1990.

d) Interim Conclusion

From the foregoing paragraphs the following interim conclusions may be drawn:

- At least four (57%) of the seven Judges appointed to the Court pursuant to Article 32 ECSC possessed ‘level 3 law conditioning’ in that they had conducted twenty years or more ‘active work in some aspect of the law’;
- At least fifty-seven (92%) of the former Judges appointed to the Court pursuant to now Article 253 TFEU possessed ‘level 3 law conditioning’;
- At least twenty-six (93%) of the twenty-eight Judges at the current Court possess ‘level 3 law conditioning’.

5. Interim Conclusion

Appendix 10: Level of ‘Law Conditioning’ of the Judges of the Court of Justice (1952-Present) collates the results of the examinations described above, and may be summarised as follows:

- Of the ninety-seven Judges appointed to the Court since 1952, ninety-five (98%) have possessed ‘schooling or training for the law’ (‘level 1 law conditioning’). All of these ninety-five Judges, therefore, meet the minimum requirement for description as ‘law-conditioned officials’. The two Judges not fulfilling this minimum standard, Judges Serrarens and Rueff, were appointed pursuant to Article 32 ECSC, meaning that every Judge appointed to pursuant to now Article 253 TFEU has been a ‘law-conditioned official’;
- All of these ninety-five (98%) ‘law-conditioned officials’ possessed at least ‘level 2 law conditioning’ in that they had in addition to their

education and training conducted ‘active work in some aspect of the law’;

- At least eighty-seven (90%) of the ninety-seven Judges possessed ‘level 3 law conditioning’ in that they had conducted twenty years or more ‘active work in some aspect of the law’ in addition to their ‘schooling or training for the law’.

It is, therefore, evident notwithstanding the fact that Article 253 TFEU does not, in theory, require any legal qualifications or professional experience, that not only have those appointed all been ‘law-conditioned officials’, close to 90% of the Judges have possessed the highest level of ‘law conditioning’, ‘level 3 law conditioning’, i.e. ‘schooling or training for the law’ followed by twenty years or more ‘active work in some aspect of the law’. Llewellyn’s profile of the inhabitants of American appellate court benches as “all trained and in the main rather experienced lawyers”¹⁰³ can be applied *a fortiori* to the Judges of the Court of Justice, especially those newly appointed post 1957. This should not be surprising given the importance of the Court’s mission.

As a consequence of the Judges’ ‘law conditioning’, the attendant gains in ‘reckonability’ described by Llewellyn as resulting from his first ‘steady factor’, recognition of the normative character of the ‘legal steady factors’ and more uniform approaches to substantive legal interpretative problems, should be of equal application in the preliminary reference procedure, if one accepts the premise of Llewellyn’s argument. However, Llewellyn also recognised that there were significant divergences in the type of legal training or education, as well as in active work in the law, which judges of the American appellate courts had experienced, a fact which Llewellyn accepted could inhibit the unifying effect of ‘law conditioning’. Llewellyn also emphasised the legal-cultural homogeneity of the American appellate judge, something that would appear not to be applicable to Judges of the Court of Justice, originating as they do from twenty-eight different national legal systems. These *per contra* propositions, which appear *prima facie* to apply *a fortiori* to the Court of Justice, are examined in the context of the Court in the

¹⁰³ Llewellyn, K.N., *supra* n. 7, p. 19.

paragraphs that follow. However, before this examination is undertaken, it is first desirable, by way of a brief *excursus*, to consider why, despite the absence of a strictly legal requirement, the Member State governments choose to appoint ‘law-conditioned officials’, and why it is unlikely that they can or will change this approach.

E. *Excursus*: Why the Member States Choose to Appoint ‘Law-Conditioned Officials’

It should be emphasised there are a number of factors that conspire to make it unlikely that non-‘law-conditioned officials’ could be appointed to the Court. Firstly, there is the very high probability that national rules do require persons to have undergone some legal training or schooling to qualify for highest judicial office.¹⁰⁴ Secondly, the requirement pursuant to Article 19(2) TEU and Article 253 TFEU that Judges be appointed by common accord of the Member State governments, allied with the assumed interest of some, if not all, of these governments in the maintenance of a strong Court to ensure that all Member States adhere to the rules of the internal market, disincentivises the appointment of sub-par candidates.¹⁰⁵ Thirdly, there is the influence of the opinion of the Article 255 TFEU Panel on the suitability of a person nominated

¹⁰⁴ As has been stated already, it is assumed by many writers on the subject that this is the case (*supra* n. 52). Moreover, countries seeking accession to the EU must satisfy the ‘Copenhagen Criteria’ which require candidate countries to abide by rules in thirty-five policy chapters, the twenty-third of which concerns the “Judiciary and fundamental rights”. In meeting the requirements of Chapter 23, candidate countries are expected to achieve the following: “The establishment of an independent and efficient judiciary is of paramount importance. Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place. Equally, Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption. Member States must ensure respect for fundamental rights and EU citizens’ rights, as guaranteed by the *acquis* and by the Fundamental Rights Charter.” (http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm) (last accessed at 19:28 on Monday, the 14th March 2016).

¹⁰⁵ The possible use by Member State governments of the appointments processes to hold the Court accountable or to harm its effectiveness is considered in Part Two (n. 414-n. 434). Part Two also discusses the so-called ‘joint decision trap’, which serves to inhibit anti-Court measures due to the difficulty of mobilising a sufficient number of Member State governments to take action against the Court due to the interests, particularly of small Member States, in protecting the Court (n. 282).

by a Member State government.¹⁰⁶ Although Article 253 TFEU requires that the Member State governments merely consult with the Article 255 TFEU Panel prior to making an appointment, the experience thus far has been that all candidates deemed by the Panel to be unsuitable have subsequently been withdrawn.¹⁰⁷ When one compares the five aspects the Article 255 TFEU Panel takes into account when considering the suitability of a candidate, it is apparent that the fulfilment of these five aspects requires ‘level 3 law conditioning’, right down to “professional experience at the appropriate level of at least 20 years for appointment to the Court of Justice”.¹⁰⁸ The Panel’s willingness to consider “any high-level duties performed by the candidate, with due regard to the diverse practices and legal, administrative and university systems in the

¹⁰⁶ Article 255 TFEU provides: “A panel shall be set up in order to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254. The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel’s operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.” The operating rules of the Panel were established by Council Decision 2010/124/EU relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union. The members of the first Panel were appointed by way of Council Decision 2010/125/EU. The members appointed for a period of four years from the 1st March 2010 were: Mr Jean-Marc Sauvé (President), Mr Peter Jann, Lord Mance, Mr Torben Melchior, Mr Péter Paczolay, Ms Ana Palacio Vallelersundi and Ms Virpi Tiili. A new Panel was appointed on the 1st March 2014, with three of the 2010 Panel re-appointed (Mr Sauvé, who remains President, Lord Mance and Mr Paczolay). The new appointments, who remain on the Panel for a period of four years, are: Mr Luigi Berlinguer, Ms Pauliine Koskelo, Mr Christiaan Timmermans and Mr Andreas Vosskuhle (Council Decision 2014/76/EU appointing the members of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union). The Panel since its inception has published three reports on its activities: *Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union* (6509/11); *Second activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union* (5091/13); *Third activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union* (1118/2014). These reports are available on the CJEU website (<http://curia.europa.eu>).

¹⁰⁷ According to the first three of the Panel’s Activity Reports, seven candidates have been deemed unsuitable, and in each case the candidate has been withdrawn (de Waele, H., *supra* n. 52, p. 44). See also, Dumbrovský, T., Petkova, B. and van der Sluis, M., “Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States”, (2014) 51 *Common Market Law Review* 455; Sauvé, J.-M., “Selecting the European Union’s Judges: The Practice of the Article 255 Panel” in Bobek, M. (ed.), *supra* n. 34, p. 78, pp. 82-85.

¹⁰⁸ This is the second aspect. The five aspects considered by the Panel are: (1) legal expertise; (2) professional experience; (3) candidates’ ability to perform the duties of judge; (4) assurance of independence and impartiality; (5) language skills and aptitude for working in an international environment in which several legal systems are represented: *Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, *supra* n. 106, pp. 8-11. See also, de Waele, H., *supra* n. 52, p. 37. For a critical account of these five aspects, see Bobek, M., “Epilogue: Searching for the European Hercules” in Bobek, M. (ed.), *supra* n. 34, p. 279.

different Member States”¹⁰⁹ is also similar to Llewellyn’s wide-ranging understanding of “active work in some aspect of the law”.¹¹⁰ Fourthly, the collegiate manner in which the Court of Justice conducts its work, with no decision ever taken by fewer than three Judges, should not be ignored. Although, the Judges do not represent the Member States that nominated them, one must assume that Member State governments will want to nominate, and see appointed, persons from their own countries that are capable of wielding influence at the Court. Although numerous factors such as individual personality may be important to an ability to influence colleagues on the bench, the extent of a Judge’s prior education and experience may, at least in the initial stages of that Judge’s tenure, impact significantly on other Judges’ perceptions of the weight of his/her views. Again, the nomination of a sub-par candidate would appear to be simply contrary to the interests of a nominating government.

F. Llewellyn’s *Per Contra* Arguments and their Resolution in the Context of the Court of Justice

This author has already concluded that all of the ninety Judges that have been appointed to the Court of Justice pursuant to now Article 253 TFEU have been ‘law-conditioned officials’, a fact that should, if Llewellyn’s arguments on the contribution of ‘law conditioning’ to ‘reconability’ are accepted, promote the ‘reconability’ of preliminary rulings. However, Llewellyn himself recognised a number of arguments *per contra* his assertion that ‘law conditioning’ contributed to ‘reconability’. The paragraphs that follow describe Llewellyn’s *per contra* arguments and then proceed to consider their applicability in the context of the Court of Justice.

¹⁰⁹ *Activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, *supra* n. 106, p.10.

¹¹⁰ *Supra* n. 22.

I. Llewellyn's *Per Contra* Arguments

1. Diversities in the Legal Education or Training and Professional Experience of the Judges

Per contra the proposition that 'law conditioning' steadied judicial decision in the American appellate courts, Llewellyn accepted that there were often wild divergences in the nature of that training and experience which could undermine any unifying effect of such conditioning.¹¹¹ These observations would appear to apply *a fortiori* to the bench of the Court of Justice. The manner in which lawyers are educated and trained in different Member States may vary significantly.¹¹² Perceptions of the judicial role may also vary.¹¹³ Historically, the Court has contained Judges from numerous different career backgrounds, a fact that is evident in Appendices 4-6. The different manners in which the Judges have acquired their 'law conditioning' may differ, therefore, to the extent that the Judges have a limited common acceptance and understanding of the extent to which 'legal doctrine' limits their discretion or of methods of resolving legal disputes and/or interpretative problems. In the context of a supranational court such as the Court of Justice, differences in internalised legal-cultural values may exacerbate this diversity of educational and professional background, a problem that the next paragraphs consider.

2. European Legal-Cultural Diversity

It will be recalled that Llewellyn placed great emphasis on the fact that judges of the American appellate courts thought like American lawyers, "not like German or Brazilian lawyers."¹¹⁴

Any assertion that a similar observation could be made in terms of a unified way of thinking among 'EU lawyers', if indeed such lawyers exist, would

¹¹¹ Llewellyn, K.N., *supra* n. 7, p. 20.

¹¹² For instance, in civil law jurisdictions, the office of judge is a specific career path. However, in Ireland and the UK, judicial office is limited to those with professional legal qualifications.

¹¹³ See generally, Bell, J., "European Perspectives on a Judicial Appointments Commission", (2003-2004) 6 *The Cambridge Yearbook of European Legal Studies* 35; Bell, J., *Judiciaries within Europe: A Comparative Perspective* (Cambridge: Cambridge University Press, 2006).

¹¹⁴ Llewellyn, K.N., *supra* n. 7, p. 20.

appear problematic from the outset. While there is a measure of diversity in the USA from region to region (north and south, east coast and west coast, etc.), and indeed from state to state, comparative to the EU, the USA is homogenous. All states, with the notable exception of Louisiana, operate a common law system. English, notwithstanding the influence of Spanish, is undoubtedly the dominant legal language. Lawyers are educated, trained and practice under relatively uniform conditions from state to state. Lawyers are educated with a primary allegiance to the US constitution and the overarching principles it embodies. In contrast, the Judges of the Court of Justice come from twenty-eight different Member States of the EU. The EU has twenty-four official languages, all of which enjoy equal status.¹¹⁵ There is an often-startling divergence between the Member States in terms of culture and history. In terms of legal systems, the UK, Ireland and Cyprus are common law jurisdictions, while the remaining twenty-five Member States may be described as civil law jurisdictions. However, among those twenty-five Member States, further divergences may be noted. Malta, for instance, owing to its history as a British colony, has some traces of British influence in its legal system.¹¹⁶ More significant, however, is the vintage of the current legal systems existing in the civil law Member States. While one may assume that all lawyers and judges practicing in the non-common law western European legal systems were educated and experienced solely in civil systems derived from Roman law, the same cannot be said of their more senior brethren in the former Soviet bloc countries, as well as Croatia and Slovenia, many of whom were educated and experienced first in Marxist legal systems. There may also be conflicting loyalties or allegiances: as Phelan has pointed out, Judges of the Court may previously have taken judicial oaths in national legal systems, the values of

¹¹⁵ Article 1 of Regulation No 1/1958 determining the languages to be used by the European Economic Community. Croatian is the latest language to be added to this list (Council Regulation (EU) No 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia).

¹¹⁶ Chamber of Advocates of Malta, “Legal Setup” (available at <http://www.avukati.org/content.aspx?id=36441>) (last accessed at 19:38 on Monday, the 14th March 2016). Moreover, there is the “relative insularity of the Scandinavian countries, geographical isolation, immunity from international commerce, [which] together with early formulations of law, meant that Roman law had little impact on their civilisations ... [and resulted in] [t]heir law [being] less codified than the rest of Europe and ... more judge-orientated.” (Freeman, M.D.A., *supra* n. 8, p. 1035).

which may conflict with those of the EU legal system.¹¹⁷ *Prima facie*, therefore, while the Judges may be ‘law-conditioned officials’, they have received their ‘law conditioning’ in different legal-cultural contexts, which may undermine any unifying or ‘steadying effect’ of their ‘law conditioning’.

One must be careful, however, not to exaggerate these professional and legal-cultural divergences. The paragraphs that follow attempt to resolve the two *per contra* arguments presented heretofore by, firstly, highlighting the commonalities in the professional backgrounds of the Judges of the present Court and, secondly, by arguing that the present Court is inhabited primarily by a transnational elite of ‘EU lawyers’, who are likely to have internalised the values and principles which underpin the EU legal order.

II. Resolution of the *Per Contra* Arguments

1. Commonalities in the Backgrounds of the Judges of the Court

Despite the differing national backgrounds of the former and current Judges of the Court, there are a number of obvious commonalities in their backgrounds. One of the more obvious trends that has persisted from the Court’s genesis is the appointment of persons with experience of working with or in international or supranational organisations. The aggregate of the information gathered in Appendices 6-9 suggests that sixty-three (65%) of the ninety-seven Judges appointed in the Court’s history had some such experience prior to appointment. The trend is particularly marked in the current Court, with twenty-three (82%) of the twenty-eight Judges having some experience of working with or in international or supranational organisations. This figure includes, *inter alia*, three former *référéndaires* at the Court¹¹⁸, five former Judges of the Court of First Instance or General Court¹¹⁹, two former Advocates General¹²⁰, two former employees of the Commission’s Legal

¹¹⁷ Phelan, D.R., “The Weakening of Allegiance to the Polity in the Institutional Practices of European Judges and Courts” in Bradley, K., Travers, N. and Whelan, A., *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Oxford: Hart, 2014), p. 397.

¹¹⁸ Judges Lenaerts, Bonichot and Prechal.

¹¹⁹ Judges Lenaerts, Šváby, da Cruz Vilaça, Jürimäe and Vilaras.

¹²⁰ Judges Tizzano and da Cruz Vilaça.

Service,¹²¹ and one former member of the European Parliament.¹²² Perhaps, this should not be surprising given that part of one of the five aspects considered by the Article 255 TFEU Panel when deciding on a candidate's suitability is "aptitude for working in an international environment in which several legal systems are represented".¹²³ What it points to, however, is an internationalisation, or at least Europeanisation, of the Court's Judges prior to appointment. This internationalisation or Europeanisation means that these Judges are not merely national lawyers with parochial concerns, ignorant of other legal systems, a fact that, in turn, may assist in surmounting their differing national legal-cultural backgrounds, and create greater uniformity of outlook than could be supposed otherwise. This internationalisation or Europeanisation is also evident because of a very practical issue: in order to be appointed to the Court, a candidate must possess sufficient fluency in the French language, since it is the working language of the Court.¹²⁴ The Judges should all, in theory at least, be French speakers.¹²⁵

Closer examination of the pre-appointment careers of the Judges of the present Court demonstrates the level of internationalisation or Europeanisation of those Judges discussed in the previous paragraph. It is evident from the available biographical details on the current Judges that the majority of them have been experts in international or comparative law, with a significant number having expertise in EU law specifically. Sixteen Judges had significant judicial experience prior to their appointment.¹²⁶ Of these Judges, nine had prior judicial experience in international or supranational courts or tribunals.¹²⁷ All but one of these sixteen Judges also had some, if varying experience, in some aspect of international law, comparative law or European law (in some cases,

¹²¹ Judges Rosas and Vilaras.

¹²² Judge Berger.

¹²³ *Supra* n. 108.

¹²⁴ Again, language knowledge is one of the five aspects considered by the Article 255 TFEU Panel when determining a candidate's suitability: *supra* n. 108.

¹²⁵ Bobek, who has since (in October 2015) been appointed an Advocate General at the Court, suggests that the linguistic domination of French "spills over into *intellectual* domination, which leads to ideas, notions, or solutions from outside the Francophone legal family not being genuinely represented within the institution..." (Bobek, M., *supra* n. 108, p. 309).

¹²⁶ Judges Lenaerts, Ilešič, Malenovský, Levits, Larsen, Bonichot, Arabadjiev, Toader, Safjan, Šváby, Jarašiūnas, Fernlund, da Cruz Vilaça, Vajda, Jürimäe and Vilaras (see Appendix 6).

¹²⁷ Judges Lenaerts, Ilešič, Malenovský, Levits, Arabadjiev, Šváby, da Cruz Vilaça, Jürimäe and Vilaras.

EU law specifically).¹²⁸ Twenty Judges were formerly legal academics.¹²⁹ Out of the twenty, the academic expertise of fourteen would appear to be in some form of international, supranational law or comparative law.¹³⁰ Thirteen appear to be academic experts in European law or some aspect of European law.¹³¹ Ten of the twenty-eight Judges spent part of their careers prior to appointment as private legal practitioners.¹³² It would appear that at least three of these ten Judges were experts in European law in their own legal practices, though the paucity of biographical information makes this difficult to ascertain.¹³³

Taking the figures in the previous paragraphs in their totality, eighteen of the current Judges have done at least one of the following prior to taking up judicial office at the Court: worked previously at the CJEU (eight Judges)¹³⁴; been employed at or been members of another institution of the EU (three Judges)¹³⁵; been academic experts in some area of European law (thirteen Judges)¹³⁶; or, carried on a private legal practice with specialisation in some area of European law (three Judges).¹³⁷ Of the remaining ten Judges¹³⁸, six had significant experience of working with EU institutions.¹³⁹ However, that is not to say that the remaining four Judges were not experienced in matters of European law, with at least three of them able to demonstrate significant engagement in European or comparative law matters.¹⁴⁰ It should also be mentioned that five of these ten Judges were the first appointments of newly-

¹²⁸ Judges Lenaerts, Ilešič, Malenovský, Levits, Larsen, Bonichot, Arabadjiev, Toader, Safjan, Šváby, Fernlund, da Cruz Vilaça, Vajda, Jürimäe and Vilaras.

¹²⁹ Judges Lenaerts, Tizzano, Rosas, de Lapuerta, Borg Barthet, Ilešič, Malenovský, Levits, Larsen, Bonichot, von Danwitz, Toader, Safjan, Berger, Prechal, Jarašiūnas, da Cruz Vilaça, Rodin, Lycourgos and Vilaras.

¹³⁰ Judges Lenaerts, Tizzano, Rosas, de Lapuerta, Ilešič, Malenovský, Bonichot, von Danwitz, Toader, Safjan, Prechal, da Cruz Vilaça, Rodin and Vilaras.

¹³¹ Judges Lenaerts, Tizzano, Rosas, de Lapuerta, Malenovský, Bonichot, von Danwitz, Toader, Safjan, Prechal, da Cruz Vilaça, Rodin and Vilaras. Although doubts have been raised as to how uniform an academic discipline EU law is: de Witte, “European Union Law: A Unified Academic Discipline?” in Vauchez, A. and de Witte, B. (eds.), *Lawyering Europe: European Law as a Transnational Social Field* (Oxford: Hart, 2013), p. 101.

¹³² Judges Lenaerts, Tizzano, Toader, Jarašiūnas, da Cruz Vilaça, Vajda, Biltgen, Lycourgos, Vilaras and Regan.

¹³³ Judges de Cruz Vilaça, Vajda and Regan.

¹³⁴ Judges Lenaerts, Tizzano, Bonichot, Šváby, Prechal, da Cruz Vilaça, Jürimäe and Vilaras.

¹³⁵ Judges Rosas, Berger and Vilaras.

¹³⁶ Judges Lenaerts, Tizzano, Rosas, de Lapuerta, Malenovský, Bonichot, von Danwitz, Toader, Safjan, Prechal, da Cruz Vilaça, Rodin and Vilaras.

¹³⁷ Judges da Cruz Vilaça, Vajda and Regan.

¹³⁸ Judges Juhász, Borg Barthet, Ilešič, Levits, Larsen, Arabadjiev, Jarašiūnas, Fernlund, Biltgen and Lycourgos.

¹³⁹ Judges Juhász, Larsen, Arabadjiev, Fernlund, Biltgen and Lycourgos.

¹⁴⁰ Judges Levits, Jarašiūnas and Ilešič.

acceded Member States.¹⁴¹ All in all, only the available biographical details of Judge Borg Barthet of Malta do not reveal, explicitly at least, any education or experience in international, comparative or European law.

The number of Judges at the Court who would appear to have pre-appointment expertise in European law tends to support the argument that the Court is not inhabited by parochial national lawyers who are merely products of their national legal cultures, but by elite ‘EU lawyers’, who are more likely¹⁴² to have internalised the values and principles that underpin the EU legal order, an argument developed in the paragraphs that follow.

2. The Emergence of an ‘EU Lawyer’

Vachez, in his study on lawyers’ politics at the genesis of European integration from 1950 to 1970, has written of a transnational elite of lawyers, who through their mastery of the foreign languages and comparative law were able to draw upon the cultures and concepts of the legal systems of the Member States to create a European legal space.¹⁴³ Vachez has also pointed to the fact that “six of the 16 judges and advocates general that succeeded one another at the Court of Justice between 1951 and 1969 had directly participated in writing the treaties...”¹⁴⁴ A close examination of the first Court appointed in 1952 demonstrates that one of the common characteristics of the Judges was experience in international or comparative law, and indeed, in some cases, evidence of an integrationist ideology.¹⁴⁵ As these Judges and their successors

¹⁴¹ Judges Juhász (Hungary), Borg Barthet (Malta), Ilešič (Slovenia), Levits (Latvia) and Arabadjiev (Bulgaria).

¹⁴² There is, of course, no guarantee that these Judges have internalised any values or principles underpinning the EU legal order. This assertion is again dependent on the assumed wisdom of Llewellyn’s premise that common legal education and experience results in internalisation of the values underpinning a legal system.

¹⁴³ Vachez, A., “How to become a Transnational Elite: Lawyers’ Politics at the Genesis of the European Communities (1950-1970)” in Petersen, H., Kjær, A.-L., Krunke, H., and Madsen, M. (eds), *Paradoxes of European Legal Integration* (Aldershot: Ashgate, 2008), p. 129. See also, Vachez, A. and de Witte, B. (eds.), *supra* n. 131; Alter, K., “Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975) in Alter, K., *The European Court’s Political Power* (Oxford: Oxford University Press, 2009), p. 63.

¹⁴⁴ Vachez, A., *supra* n. 131, p. 145. See also, Cohen, A., “‘Ten Majestic Figures in Long Amaranth Robes’: The Formation of the Court of Justice of the European Communities” in Vachez, A. and de Witte, B. (eds.), *supra* n. 143, p. 21.

¹⁴⁵ Massimo Pillotti, of Italy, the first President of the Court of Justice had been Deputy Secretary-General of the League of Nations (1932-37), President of the International Institute

helped in the creation of a discipline now known as EU law, more and more of the Judges appointed began to be recognisable as experts in this discipline, rather than being mere generic experts in international and/or comparative law, with an upsurge in appointees with previous experience in other EU institutions. This pattern began as early as 1958 with the appointment of Judge Rossi who had from 1953 to 1956 been the Legal Adviser of the High Authority of the ECSC, the predecessor of the Commission. However, this trend began to accelerate noticeably after the appointment of Judge Koopmans in 1979.¹⁴⁶ The impressive, if expected, number of EU law experts at the

for the Unification of Private Law and a Member of the Permanent Court of Arbitration, The Hague. Petrus Serrarens, of the Netherlands, who was not legally trained or experienced, had been General Secretary of the International Federation of Christian Trade Unions (1920-52), Deputy member of the board of administration of the ILO and Chairman of the Social Affairs Committee of the Council of Europe. Otto Riese, of Germany, had studied English law in London (1928) and had worked at the University of Lausanne, Switzerland. He also had been a Member of CITEJA (International Technical Committee of Legal Aeronautical Experts) (from 1926). Jacques Rueff, of France, who like Judge Serrarens had not been legally trained or experienced, had served as a Member of the Economics and Finance Section of the Secretariat of the League of Nations (1927), Assistant Delegate at the first and second assemblies of the United Nations (1946), French Member of the Economics and Employment Committee of the United Nations (1946), and Honorary President of the International Council of Philosophy and Human Sciences. Charles Léon Hammes, of Luxembourg, had served as a Member of the Benelux Commission on Unification of Law, and President of the National Commission for The Hague Conference on Private International Law. Adrianus van Kleffens, of the Netherlands, had worked in the General Secretariat of the League of Nations in Geneva, as a Member of the International Maritime Commission associated with the development of European economic integration, and was principal author, on behalf of the Netherlands, of the project for Benelux Union. Only Louis Delvaux, of Belgium would appear not to have had experience internationally or supranationally.

¹⁴⁶ Thymen Koopmans, of the Netherlands, appointed in 1979 had previously served as Legal Adviser in the Legal Department of the Council of the European Communities (1962-65). Ulrich Everling, of Germany, appointed in 1980, was a member of the Executive Committee of the Deutsche Wissenschaftliche Gesellschaft für Europarecht. René Joliet, of Belgium appointed in 1984, had been Ordinary Professor (1974-84) and Special Professor (from 1984), Faculty of Law, University of Liège (Chair of European Community Law), and had taught European Competition Law at the College of Europe, Bruges (1979-84). José Carlos de Carvalho Moitinho de Almeida, of Portugal, appointed in 1986, had been Head of the European Law Office in Lisbon and Professor of Community Law (Lisbon). Gordon Slynn, of the UK, appointed in 1988 had been Advocate General at the Court of Justice from 26 February 1981 to 6 October 1988. Manfred Zuleeg, of Germany, appointed in 1988, had been Academic Assistant at the Institute for European Community Law of the University of Cologne, and Professor of Public Law, Public International Law and European Law at the Universities of Bonn and Frankfurt. David Alexander Ogilvy Edward, of the UK, appointed in 1992 had been Judge at the Court of First Instance from 25 September 1989 to 9 March 1992. Claus Christian Gulmann, of Denmark, appointed in 1994, had been *référéndaire* to Judge Max Sørensen, and later Advocate General at the Court of Justice from 7 October 1991 to 6 October 1994. Antonio Maria La Pergola, of Spain, appointed in 1994 for a brief period and again in 1999, had been elected to the European Parliament (1989-94) and served as Advocate General at the Court of Justice from 1 January 1995 to 14 December 1999 between his stints as a Judge of the Court. Jean-Pierre Puissochet, of France, appointed in 1994, had served as Director, and subsequently Director-General, of the Legal Service of the Council of the European Communities (1968-73). Melchior Wathelet, of Belgium, appointed in 1996, had been Professor of European Law at the Catholic University of Louvain and the University of Liège. Romain Schintgen, of Luxembourg, appointed in 1996, had served as Judge at the Court of

current Court has been detailed in the previous paragraphs.¹⁴⁷ Again, this serves to support the argument that the vast majority of the past and present Judges at the Court have not been narrowly-focussed national law experts prior to their appointments, but internationalists or Europeans. While it must be acknowledged that differences in national legal-cultural backgrounds will manifest themselves at the Court¹⁴⁸, the fact that a significant majority of the Court are what Vauchez terms ‘EU lawyers’ prior to appointment should serve to create a more common outlook, a *communautaire* outlook¹⁴⁹, which with its priorities of uniformity and effectiveness, should underpin the Court’s work in

First Instance from 25 September 1989 to 11 July 1996, and Government Representative on the European Social Fund Committee, the Advisory Committee on Freedom of Movement for Workers and the Administrative Board of the European Foundation for the Improvement of Living and Working Conditions (until 1989). Krateros Ioannou, of Greece, appointed in 1997, had been Professor of Public International Law and Community Law in the Law Faculty of the University of Thrace. José Narciso da Cunha Rodrigues, of Portugal, appointed in 2000, had been a member of the Supervisory Committee of the European Union Anti-Fraud Office (OLAF) (1999-2000). Christiaan Willem Anton Timmermans, of the Netherlands, appointed in 2000, had served as an official of the European Commission (1969-77), and Deputy Director-General at the Legal Service of the European Commission (1989-2000). He had also been Professor of European Law at the University of Groningen (1977-89). Ninon Colneric, of Germany, appointed in 2000, had been Honorary Professor at the University of Bremen in labour law, specifically in European labour law. Jerzy Makarczyk, of Poland, appointed in 2004, had been the author of several works on public international law, European Community law and human rights law. Pernilla Lindh, of Sweden, appointed in 2006, had been responsible for legal and institutional issues at the EEA negotiations (Deputy Chairperson, then Chairperson, of the EFTA Group) and the negotiations for the accession of the Kingdom of Sweden to the EU, and subsequently Judge at the Court of First Instance from 18 January 1995 to 6 October 2006. Jean-Jacques Kasel, of Luxembourg, appointed in 2008, had been Chairman of working groups of the Council of Ministers (1976), Chairman of the EPC working groups (Asia, Africa, Latin America), Adviser, then Deputy Head of Cabinet, of the President of the Commission of the European Communities (1981), Director, Budget and Staff Matters, at the General Secretariat of the Council of Ministers (1981-84), Special Adviser at the Permanent Representation to the European Communities (1984-85), Chairman of the Budgetary Committee, Chairman of the Policy Committee (1991), Ambassador, Permanent Representative to the European Communities (1991-98), Chairman of Coreper (1997).

¹⁴⁷ *Supra* n. 118-n. 141.

¹⁴⁸ See, for instance, Edward, D., “How the Court of Justice Works”, (1995) 20 *European Law Review* 539, at 548-549.

¹⁴⁹ As to the importance of the Court’s *communautaire* mindset in its interpretation, see Bengoetxea, J., “Text and Telos in the European Court of Justice: Four Recent Takes on the Legal Reasoning of the ECJ”, (2015) 11(1) *European Constitutional Law Review* 184, at 189. Judge Mancini, writing extra-judicially, even suggested that if a Judge did not arrive at the Court with this perspective, he/she would soon be converted to it: Mancini, G.F., “The Making of a Constitution for Europe”, (1989) 26 *Common Market Law Review* 595, at 597. Institutional accounts of the judicial role also suggest that “judges internalize the institutional mission of the judiciary”: Edwards, H.T., “The Effects of Collegiality on Judicial Decision Making”, (2003) 151(5) *University of Pennsylvania Law Review* 1639, at 1663. All of these observations are consistent with Llewellyn’s instinct on the role of the institution of judicial office as limiting behaviour not viewed as befitting the office: see Llewellyn’s views on his fourteenth ‘steadying factor’, ‘professional judicial office’: Llewellyn, K.N., *supra* n. 7, pp. 45-60. Llewellyn’s fourteenth ‘steadying factor’ may, therefore, be viewed, in the parlance of this dissertation, as an ‘external extra-legal steadying factor’ that reinforces not only the ‘steadying effect’ of the ‘legal steadying factors’, but that of any pre-existing internalised values associated with ‘law conditioning’.

much the same way as Llewellyn alleged that ‘freedom’ and other principles underlay the work of American judges.

III. Interim Conclusion

In respect of Llewellyn’s *per contra* arguments that divergences in educational and professional backgrounds of judges and differences in legal-cultural background could undermine the unifying nature of ‘law conditioning’, the following conclusions may be drawn:

- Notwithstanding the fact that there are clear divergences in terms of the professional backgrounds of the Judges of the present Court of Justice which could be seen as undermining the unifying nature of their ‘law conditioning’, there is also evidence of commonality, and perhaps even typology, in the persons who have been appointed;
- What is particularly noticeable, and perhaps unsurprising, is the prior experience of the Judges in international law and comparative law generally and/or EU law specifically;
- The Judges, therefore, are not, by and large, parochial lawyers steeped solely in the legal culture and traditions of their own Member States, but are members of a transnational elite of ‘EU lawyers’. Because international law and, in particular, EU law have their own specific legal languages and concepts, it may be argued that there will be a significant degree of uniform ‘law conditioning’ among the Judges which may be capable of overcoming many of the divergences resulting from their national legal-cultural perspectives.

G. Conclusion

The conclusion to Part One is divided into two sections. The first, in furtherance of the thesis argument, discusses the Judges of the Court as ‘law-conditioned officials’ and the contribution played by this ‘law conditioning’ as

an ‘internal extra-legal steadying factor’ to the ‘reckonability’ of preliminary reference outcomes. The second section, further to the dissertation’s emphasis on the ‘applicability by-product’ of the thesis argument, discusses the extent to which Llewellyn’s first ‘steadying factor’ is of application in the Court of Justice context.

I. The Judges as ‘Law-Conditioned Officials’ as an ‘Internal Extra-Legal Steadying Factor’

Part One commenced by acknowledging and describing the role of the subjective in adjudication as a significant obstacle to ‘reckonability’. First, it was stated that the normative character of the ‘legal steadying factors’ depends on human perception and acceptance of this phenomenon, and second, it was suggested that the application and interpretation of laws are activities conducted by judges who are human beings, products of their socio-economic backgrounds, with their own individual and subjective perceptions, biases and ideologies. It was, of course, American legal realism, of which Llewellyn was a leading figure, that did much to highlight the problems caused by this subjective element of judging, even if they often, in their enthusiasm, exaggerated them. By 1960, Llewellyn clearly thought that the decisions of American appellate courts were ‘reckonable’, and that the risk of indeterminacy caused by the idiosyncrasies of individual judges was counterbalanced, to some extent at least, by the fact that the judges were “all trained and in the main rather experienced lawyers”¹⁵⁰, who possessed “schooling or training for the law”¹⁵¹ and had usually conducted “twenty and more years of active work in some aspect of the law, in addition to their schooling.”¹⁵² They were, in his inimitable style, “law-conditioned officials”.¹⁵³ This ‘law conditioning’ served to reduce the role of the subjective in judicial decision-making by causing judges to possess an internalised acceptance and understanding of the normative character of the ‘legal steadying factors’, and also promoted ‘reckonability’ by causing ‘law-conditioned officials’ to

¹⁵⁰ Llewellyn, K.N., *supra* n. 7, p. 19.

¹⁵¹ Llewellyn, K.N., *supra* n. 7, p. 20.

¹⁵² Llewellyn, K.N., *supra* n. 7, p. 19.

¹⁵³ Llewellyn, K.N., *supra* n. 7, p. 19-20.

perceive and deal with legal interpretative problems in a more uniform manner than would be the case among laypersons. Llewellyn emphasised further that this uniformity of outlook was augmented by the fact that American appellate court judges possessed a common legal-cultural background, which caused them to internalise common principles and values not necessarily held by other legal cultures.

Assuming, with some reservation, that ‘law conditioning’ should as a general rule contribute to ‘reckonability’ in the manner suggested by Llewellyn, Part One then proceeded to consider whether the Court of Justice is inhabited by ‘law-conditioned officials’. As it was accepted that Llewellyn’s description of a ‘law-conditioned official’ was vague, it was felt necessary to create a more rigorous model of the concept, which, while remaining consonant with Llewellyn’s description, could be applied to the Judges of the Court of Justice. Accordingly, three levels of ‘law conditioning’ were proposed: first, ‘level 1 law conditioning’, which entailed ‘schooling or training for the law’; second, ‘level 2 law conditioning’, which required ‘level 1 law conditioning’ plus post-educational or –training ‘active work in some aspect of the law’; and, third, ‘level 3 law conditioning’, which consisted of ‘level 1 law conditioning’ plus twenty and more years’ post-educational or –training ‘active work in some aspect of the law’. In order to ascertain, firstly, that the Judges of the Court could be described as ‘law-conditioned officials’ (possessing the requisite minimum ‘level 1 law conditioning’), and, secondly, what level of ‘law conditioning’, if any, the Judges possessed, a study composed of two separate analyses was then undertaken: a formalist analysis, which questioned whether the qualifications required by the Treaties for appointment as a Judge require ‘law conditioning’; and, a realist analysis, which examined the pre-appointment education, training and professional experience of all the former and present Judges of the Court, based on available biographical details. The formalist analysis concluded that now Article 253 TFEU, like its predecessor Article 32 ECSC, does not *de jure* require appointees to the Court to be ‘level 1 law conditioned’ in that the first alternative criterion for appointment is tied to the qualifications required for highest judicial office in the nominating Member State, and there is nothing to prevent a Member State from requiring minimal or no qualifications to hold such office. The realist analysis (the results of

which are contained in Appendices 1-10) examined the legal education, training and professional experience of all sixty-nine former Judges and twenty-eight current Judges, and concluded that all but two Judges possessed at least ‘level 1 law conditioning’, with those two Judges (Judges Serrarens and Rueff) being appointed in 1952 pursuant to the now defunct Article 32 ECSC. It was further concluded that all remaining ninety-five Judges had in addition to their legal education and/or training conducted ‘active work in some aspect of the law’, whether as legal academic, legal practitioner, civil servant/government official, judge or politician (‘level 2 law conditioning’), with eighty-seven of the Judges having twenty and more years’ such experience (‘level 3 law conditioning’). By way of an excursive discussion, it was speculated that the Member State governments tended to appoint Judges possessing ‘level 3 law conditioning’ for a number of reasons, including the process for appointment which allows any Member State to veto a nomination, and the role of the Article 255 TFEU advisory panel. In respect of the role of the Panel, this author noted the similarity between Llewellyn’s description of a ‘law-conditioned official’ (in particular, ‘level 3 law conditioning’ as extrapolated therefrom) and the five aspects the Panel considers when deciding upon the suitability of a candidate for judicial office at the Court.

Having concluded that the vast majority of the former and present Judges of the Court of Justice possessed ‘level 3 law conditioning’, Llewellyn’s arguments *per contra* the ‘steadying effect’ of ‘law conditioning’ were considered in the context of the Court: first, that diversities in education and training, as well as in professional experience, could undermine uniformity of principles and values he alleged judges internalised; and, second, that diversity in terms of the Judges’ legal-cultural backgrounds could similarly undermine such uniformity. While it was acknowledged that Llewellyn’s *per contra* arguments could apply *a fortiori* to the Court of Justice, given the diversity of educational and career backgrounds, as well as legal-cultural origins of its Judges when compared with national courts, it was argued that there were also significant commonalities in the Judges’ backgrounds. The most significant commonalities noted were expertise and experience in international and comparative law generally, and European or EU law specifically. This, added to knowledge of languages and the growing tendency for Judges to have

experience in or with international or supranational organisations prior to appointment, mean that the vast majority of Judges now tend to conform to the typology of the ‘EU lawyer’.¹⁵⁴ In other words, the Judges are not mere parochial national lawyers with an attendant narrowness of concern, but are internationalised or Europeanised lawyers, who are more likely to have internalised certain principles and values of EU law such as the need for the uniformity and effectiveness of EU law. While the internalisation of such values is not professed to eliminate divergences of outlook that national legal-cultural backgrounds may cause, this author argues that it may go some way to limit the influence of such divergences.

In summary, this author concludes that the Judges of the Court of Justice are ‘law-conditioned officials’ who are likely to share a significant degree of uniformity in terms of the principles and values they should have internalised as a result of their expertise in European law. This ‘law conditioning’ and degree of legal-cultural commonality should contribute to ‘reckonability’ of preliminary references by reason of the Judges’ internalisation of the normative character of the ‘legal steadying factors’ (which reinforces the ‘steadying effect’ of those factors), and the greater uniformity in terms of their approach to resolving legal interpretive problems. Llewellyn’s first steadying factor, ‘law-conditioned officials’, can therefore be described as an ‘internalised extra-legal steadying factor’ in the context of the preliminary reference procedure. There is, of course, one proviso to this conclusion: the status of the past and present Judges of the Court of Justice as ‘law conditioned officials’ as an ‘internal extra-legal steadying factor’ is contingent upon the correctness of the assumption made in Part One, namely, that Llewellyn is correct when he states that ‘law conditioning’ does result in judges having an internalised acceptance of, *inter alia*, the normative character of ‘legal doctrine’.

¹⁵⁴ Vauchez, A., *supra* n. 143.

II. Extent of the Applicability of Llewellyn's First 'Steadying Factor' to the Preliminary Reference Procedure

As is to be expected with the application of any concept outside of the context in which its author conceived it, there have been a number of difficulties with the utilisation of Llewellyn's first 'steadying factor' in the context of the Court of Justice. The first problem was a generic one: Llewellyn's vague definition of a 'law-conditioned official'. This had to be resolved through the development of the three-level model of 'law conditioning' before the Judges of the Court could be measured against the standard of a 'law-conditioned official'. The second problem was one that has been mentioned on several occasions heretofore: the conclusion in Part One depends upon an assumption that Llewellyn was correct in his assertion that 'law conditioning' leads to judicial internalisation of values such as the duty to respect the normative character of 'legal doctrine'. This assertion would appear to be sensible in this author's subjective view, even if, strictly speaking, it is contestable. Moreover, it would require an inter-disciplinary study to interrogate it, an activity beyond the scope of this dissertation and beyond the powers of this author. The third problem was also significant: Llewellyn's assertion that American appellate court judges decided cases more uniformly because they were *American* lawyers, rather than German or Brazilian lawyers, with common internalised values. This assertion caused difficulty, firstly, because of its specificity to the American context, and, secondly, because the Court of Justice, unlike American appellate courts, is made up of Judges from twenty-eight different sovereign countries with their varying cultural, linguistic and legal-cultural backgrounds. One must acknowledge that this second problem of application could not be resolved completely. Nevertheless, Llewellyn's description of a 'law-conditioned official' when developed into the three-level model did provide an illuminating standard against which the education, training and professional experience of the Judges of the Court of Justice could be measured. Its validity in the context of the Court of Justice is perhaps evidenced best by the fact that the requirements for 'level 3 law conditioning' are remarkably consistent with the aspects considered by the Article 255 TFEU Panel when considering the suitability of a nominee to the Court. Moreover, although the diversity of legal-

cultural backgrounds of the Judges was acknowledged, it was also argued that there were commonalities in their backgrounds, particularly their expertise in European law and experience in international and supranational organisations, that resulted in the majority of the Judges being ‘EU lawyers’, who are more likely to share internalised principles and values. Accordingly, there has been scope for the application of Llewellyn’s first ‘steadying factor’ in the context of the Court of Justice, even if it has required further development of Llewellyn’s rather vague conceptualisation of it.

‘External Extra-Legal Steadying Factors’

A. Introduction

Part One concluded that the ‘law conditioning’ of the Judges of the Court of Justice, if one accepts the premise of Llewellyn’s argument that ‘law conditioning’ results in recognition of the duty to adhere to the ‘legal steadying factors’ as an internalised value, is an ‘internal extra-legal steadying factor’, which reinforces the limiting of the Court’s discretion to the ‘judicially arguable’, and reduces the influence of individual judicial personality on outcomes.

However, the gains made to ‘reckonability’ by the ‘legal steadying factors’ and any advances made by ‘law conditioning’ may be negated or undermined by ‘external extra-legal obstacles’ to ‘legal certainty’, in particular, pressures placed upon courts and judges by external actors, most usually legislative and executive powers. Such pressures may be so significant that judges may be forced or intimidated into abandoning their ‘law conditioned’ adherence to the ‘legal steadying factors’, with ‘unsteadiness’ resulting. A legal system must, therefore, provide protections for courts and judges against such pressures if it is to expect regularity in judicial decision-making. Conversely, a court and its judges cannot be so free of external pressure that they are at liberty to make decisions that do not adhere to the ‘legal steadying factors’ without consequences. Accordingly, a legal system must also ensure accountability for ‘unjudicial’ behaviour. Where an appropriate balance is struck between judicial independence and accountability, this balance will constitute an ‘external extra-legal steadying factor’.

Part Two moves to analysis of ‘external extra-legal steadying factors’: that is, those ‘steadying factors’ that arise from the dynamics of the Court’s (and its Judges’) relationships with external actors, and which serve further to reinforce adherence to the ‘legal steadying factors’. The ‘internal’ and ‘external extra-

legal steadying factors’ may at this point be described as a ‘belt and braces’ assurance of the Court’s adherence to the ‘legal steadying factors’: even if the Judges’ internalised value of such adherence were not present or were to waver, the ‘external extra-legal steadying factors’ would play their part in ensuring that the Court acts ‘judicially’.¹

Part Two commences with a description of Llewellyn’s eleventh ‘steadying factor’: ‘judicial security and honesty’.² The following hypothesis, derived from this ‘steadying factor’, is then presented:

- The Court and its Judges enjoy sufficient independence and security to deliver preliminary rulings which adhere to the ‘legal steadying factors’, even where such rulings are adverse to the interests of their ‘countervailing powers’;
- Simultaneously, the Court is sufficiently accountable to certain ‘countervailing powers’³, in particular referring national courts and tribunals, that the Court is disincentivised significantly from ignoring the pressures of the ‘legal steadying factors’.

This author argues that this placing of the Court in a sphere between independence and accountability⁴ promotes ‘reckonability’ of preliminary

¹ That is not to say, however, that the ‘external extra-legal steadying factors’ would remedy completely the problems the lack of an internalised judicial acceptance of the normative character of ‘legal doctrine’ would have on ‘reckonability’ of outcome: a person who behaves well because he/she believes it is the morally correct thing to do is more trustworthy than a person who behaves well merely to escape chastisement.

² Llewellyn, K.N, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960), pp. 32-33.

³ The concept of a ‘countervailing power’ has been drawn from Rasmussen’s book *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986). In this dissertation, it is understood to refer to any actor that can place limits on the power of the Court of Justice. The concept is discussed in detail *infra* n. 170-n. 177.

⁴ Chalmers in his discussion of “Judicial Performance and the False Dilemma of Judicial Independence and Accountability” has argued that this balance “need not be a static one.” Rather, he suggests that the balance might change with the workload of the Court or where there are “[b]lockages in the Council.” It is beyond the scope of this dissertation to enter into a discussion of where the parameters of the sphere between independence and accountability lie. It is not denied that they may shift. However, it is argued that in order for the Court’s rulings to be ‘reckonable’, the Court will have to be sufficiently autonomous to deliver rulings which are in accordance with the ‘legal steadying factors’, even where against ‘countervailing power’ interests, and sufficiently accountable so that it may not discard adherence to the ‘legal steadying factors’. See Chalmers, D., “Judicial Performance, Membership, and Design of the Court of Justice” in Bobek, M. (ed.), *Selecting Europe’s Judges: A Critical Review of the*

reference outcomes by reinforcing the pressures of the ‘legal steadying factors’; in other words, narrowing the number of prospective outcomes to those that adhere to the ‘legal steadying factors’.⁵

In order to test⁶ the hypothesis, formalist and realist analyses⁷ of the purported legal guarantees of the independence of the Court and the security of its Judges are undertaken. The formalist analysis identifies and describes the legal rules which purport to protect the institutional independence of the Court and the security of its individual Judges, as well as the legal rules which confer on its ‘countervailing powers’ mechanisms to hold it accountable for non-adherence to the ‘legal steadying factors’. This author acknowledges that an analysis of these legal rules in a vacuum will not be determinative of the question as to whether the Court resides in the hypothesised territory between independence and accountability. The realist analysis seeks to complete the picture by examining these legal rules in practice, focussing in particular on the Court’s ‘countervailing powers’ and the effectiveness in practice of these legal guarantees in:

Appointment Procedures to the European Courts (Oxford: Oxford University Press, 2015), p. 51, pp. 53-54.

⁵ Once again, it must be acknowledged that there may be significant leeway within the legitimate utilisations of ‘legal doctrine’ and doctrinal techniques, which may contribute to uncertainty in the individual case. However, the reinforcement of the control or guidance of the ‘legal steadying factors’ does allow the lawyer seeking to predict prospective rulings take ‘legal doctrine’ into account, limits the decisional discretion of the Court, and decreases the significance of the personal preferences of the individual Judges. The ‘steadying effect’ of the independence-accountability balance should also promote ‘reckonability’ by reinforcing the Judges’ ‘law conditioning’, i.e. their internalised acceptance of the normative character of law. Again, this assertion is based on the assumption that ‘law conditioning’ does lead to the internalisation of this value.

⁶ Part Two of this dissertation does not labour under the same limitation as Part One: the need to reply on an assumption. Part Two is able to evaluate Llewellyn’s assertions about the independence-accountability balance (even if those assertions are developed further by this author) as a ‘steadying factor’ by conceptualising four adjudicative ‘scenarios’ and testing, utilising political science theories, the likelihood of the consequences for the Court in each (the realist analysis).

⁷ The terms ‘formalist’ and ‘realist’ are used in this connection to signify a distinction between legal formalism and legal realism, i.e. the suggestion is that a pure analysis of the legal rules will not provide an adequate understanding of the *de facto* extent of the independence and accountability of the Court of Justice. The realist analysis, therefore, will take a more multidisciplinary approach, as advocated by American legal realists such as Llewellyn, taking into account, in particular, political science accounts of the relationship dynamics between the Court of Justice and its ‘countervailing powers’. The term ‘realism’ in the context of international relations, however, connotes a view that “supranational organizations are ineffectual at forcing upon sovereign states a pace of integration that does not conform to the states’ own interests and priorities.” (Mattli, W. and Slaughter, A.-M., “Revisiting the European Court of Justice”, (1998) 52(1) *International Organization* 177, at 179-180). Intergovernmentalism, therefore, is a realist theory in international relations.

- Insulating the Court from repercussions from its ‘countervailing powers’ where it makes a ruling which is adverse to the interests of these powers, but where the ruling is within the limits of the ‘legal steadying factors’;
- Ensuring that the Court is accountable to its ‘countervailing powers’, where it makes a ruling that is outside of the limits of the ‘legal steadying factors’.

B. Llewellyn’s Eleventh ‘Steadying Factor’: ‘Judicial Security and Honesty’

Llewellyn identified ‘judicial security and honesty’ as the eleventh of his ‘steadying factors’.⁸ Referring to judicial security, Llewellyn recognised two aspects of the concept: firstly, that the decision of the highest appellate tribunal could not be upset⁹; and, secondly, “appellate judge and appellate court are given institutional guaranty against repercussions or retaliations because some person or persons may dislike the decision or find it wrong.”¹⁰ Llewellyn argued that both of these aspects of judicial security contributed to ‘reckonability’ in the American appellate courts “by eliminating the incidence of fear or hope or secret favour.”¹¹ Fear of penalisation for passing “wrong judgment”, Llewellyn reasoned, “increases chanciness of outcome”¹²:

“If a boss will fine, fire, exile, or kill for a vote or judgment which annoys him, but may award the willing, then in any case in which his interest is not obvious, one big weight in the scales may drop blind until one knows the whether and the which-way of the fix.”¹³

Thus, while Llewellyn acknowledged that judicial subservience to or dependence upon the executive power could lead to greater certainty of outcome where the will or preference of executive power was clear, in lesser cases (presumably the majority of cases) where the preference of the executive

⁸ Llewellyn, K.N., *supra* n. 2, pp. 32-33.

⁹ Llewellyn, K.N., *supra* n. 2, p. 32.

¹⁰ Llewellyn, K.N., *supra* n. 2, p. 32.

¹¹ Llewellyn, K.N., *supra* n. 2, p. 32.

¹² Llewellyn, K.N., *supra* n. 2, p. 32.

¹³ Llewellyn, K.N., *supra* n. 2, p. 32.

power was not so clear, judicial servility produced “not only injustice but a day-to-day unreckonability.”¹⁴ Llewellyn viewed “[t]he immunity of court and judge from attack because of their judgments”¹⁵ as resulting in greater ‘reckonability’ because “it presses the major factors which motivate decision so largely into the open...”¹⁶ However, for Llewellyn, this result was a mere by-product of the chief purpose of judicial security: prevention of “the perversion of judgment”.¹⁷ Therefore, it would appear that Llewellyn saw judicial security as promoting ‘reckonability’ in two ways:

- Judicial security prevented what he termed ‘the perversion of judgment’, i.e. the judges had sufficient immunity to decide cases in the proper manner, within the ‘legal steady factors’;
- Judicial security enabled more open and transparent decision-making, i.e. the judges had sufficient immunity to decide cases in accordance with their own honest judgment, which allows a more honest and open account of the reasoning behind that decision in the eventual written opinion than would be the case where the judge or court is attempting to justify a decision which was in fact made to please or avoid displeasing another party, whose motivations may not be publicly apparent.

By way of arguments *per contra*, Llewellyn acknowledged the view that these positive effects of judicial security in terms of ‘reckonability’ could also be undermined by factors in specific circumstances such as “re-elections ahead, or of intermediate judges’ ambitions, or of yen in the occasional notorious case for popularity or prestige, or of felt need to oversteer oneself against such a yen”.¹⁸ However, Llewellyn viewed such influences as “too minor in quantitative incidence to affect seriously our general picture; indeed, where present at all, they tend to be plain enough in the situation and in the known character of the man to be somewhat taken into account in advance.”¹⁹

¹⁴ Llewellyn, K.N., *supra* n. 2, p. 33.

¹⁵ Llewellyn, K.N., *supra* n. 2, p. 32.

¹⁶ Llewellyn, K.N., *supra* n. 2, p. 32.

¹⁷ Llewellyn, K.N., *supra* n. 2, p. 32.

¹⁸ Llewellyn, K.N., *supra* n. 2, p. 33.

¹⁹ Llewellyn, K.N., *supra* n. 2, p. 33.

Llewellyn also recognised that too great a judicial security could have the effect of over-insulating the judges “from the felt needs of the law-consumer”.²⁰ He, unfortunately, did not develop fully the implications of this observation: if the judges and courts are insulated from repercussions to too great an extent, the first way in which judicial security promotes ‘reckonability’ (the prevention of the perversion of judgment) may be negated since the judges will be empowered to act arbitrarily and outside of the bounds of the ‘legal steadying factors’.²¹ Llewellyn did, however, recognise that the American legal system had attempted to counter the possibility of judicial over-insulation in a number of ways: he cited the practice of popular elections to the bench, as well as the practice of allowing judges only short terms in office as an attempt to “restrain or cure” it.²² Llewellyn regarded the practice of popular elections as “dubious”²³, and viewed short terms in office as hampering, rather than helping the courts meet the felt needs of the ‘law-

²⁰ Llewellyn, K.N., *supra* n. 2, p. 33, fn. 24.

²¹ Though of course if the Judges are ‘law conditioned’ and have internalised an acceptance of the normative character of ‘legal doctrine’, they should not need the threat of repercussions, immediate or remote, to recognise and respect the pressures of the ‘legal steadying factors’. Some, albeit remote, inducement or threat to act within the ‘legal steadying factors’ may, therefore, be needed as an insurance policy to ensure such adherence.

²² Llewellyn, K.N., *supra* n. 2, p. 33, fn. 24.

²³ Llewellyn, K.N., *supra* n. 2, p. 33, fn. 24. Llewellyn argued that the Missouri Nonpartisan Court Plan, which was a response to the perceived over-politicisation of judicial office in Missouri in the 1930s, was “as good a general substitute model as has yet been devised” for judicial appointments. The introduction of the Plan in 1940, through an amendment to the Constitution of Missouri, resulted in the creation of Nonpartisan Judicial Commissions. The role of these Commissions is to review applications for judicial office, interview and select candidates. The current composition of the Commission depends on the court to which a judge is being appointed. For appointments to the Missouri Supreme Court and courts of appeals, the Commission consists of three lawyers elected by the lawyers of The Missouri Bar (the organisation of all lawyers licensed in the state), three citizens selected by the governor and the chief justice, who serves as chair. The Commission, having reviewed the applications and interviewed the candidates then submits three candidates to the Governor, who selects from among these three candidates (if the Governor does not do so with sixty days, the Commission appoints one of the candidates). Once a judge has served a year or more in office, he/she is subject to popular re-election at the next general election. The performance of judges in office is rated by judicial performance evaluation committees, made up of both lawyers and non-lawyers, who “evaluate objective criteria including decisions written by judges on the retention ballot as well as surveys completed by lawyers and jurors who have direct and personal knowledge of the judges. The judges are rated according to judicial performance review criteria, including whether they: administer justice impartially and uniformly; make decisions based on competent legal analysis and proper application of the law; issue rulings and decisions that can be understood clearly; effectively and efficiently manage their courtrooms and the administrative duties of their office, including whether they issue decisions promptly; and act ethically and with dignity, integrity and patience. The results of these judicial performance evaluations then are distributed to the public via the media, the League of Women Voters and the Internet.” (<http://www.courts.mo.gov/page.jsp?id=297>) (last accessed at 09:10 on Thursday, the 17th March 2016).

consumer’, because “it leaves them more cautious than is healthy in dealing with the bar.”²⁴

In the section that follows, Llewellyn’s ideas on the concept of judicial security as promoting ‘reckonability’ are employed and developed to describe a hypothesis explaining the manner in which the rules and practices which relate to judicial independence and security at the Court of Justice, as well as accountability of the Court to ‘countervailing powers’, promote the ‘reckonability’ of preliminary rulings.

C. Between Judicial Independence and Security from and Accountability to ‘Countervailing Powers’: A Hypothesis

Although not developed explicitly by Llewellyn in his account of the impact of his eleventh ‘steadying factor’ on ‘reckonability’, it is implicit in Llewellyn’s writing that he recognised that judicial independence could only promote ‘reckonability’ if it were balanced. This balancing of judicial independence would, it is implied, involve providing the judiciary with sufficient institutional independence and individual security to avoid being pressurised by third parties into perverting its duty to the law, whilst at once ensuring that the judiciary is not so independent as to be unaccountable. Lord Acton’s axiom²⁵ comes to mind in the latter context: a judiciary with a completely free hand could abandon completely its adherence to the ‘legal steadying factors’, and arrive at legally perverse decisions. Such perversion is not only troubling in a moral sense; it also causes decision-making to become unpredictable, since decisions will not be consonant with ‘legal doctrine’ or be ‘judicially arguable’, and the lawyer cannot place confidence in gaining any assistance from legal rules or principles in attempting to forecast outcomes.²⁶ Although judicial

²⁴ Llewellyn, K.N., *supra* n. 2, pp. 33-34, fn. 24.

²⁵ “Power tends to corrupt, and absolute power corrupts absolutely...” (Lord Acton, letter to Bishop Mandell Creighton, 1887).

²⁶ To reiterate, this author is not maintaining that prospective judicial decisions can be predicted by recourse to ‘legal doctrine’ alone. Extra-legal factors such as individual judicial personalities and preferences, case facts, etc. may have to be taken into account. Only the most zealous legal formalist would deny such an assertion. That is not to say, however, that ‘legal doctrine’ does not perform any pressurising role on judicial decision: it is, in this author’s

independence and accountability of a judiciary, particularly democratic accountability, are often seen as “stand[ing] in irreconcilable tension with one another”²⁷, it is also almost universally acknowledged that there must be some constraint on judicial power.²⁸ The appropriate levels of independence and accountability, however, cannot always be agreed.²⁹

The hypothesis presented herein is that the Court of Justice when deciding preliminary references is disincentivised to a significant degree from abandoning its adherence to the ‘legal steadying factors’ by the double-edged sword that is the rules and practices concerning the Court’s institutional independence (and its individual Judges’ security) and its accountability to ‘countervailing powers’. It is hypothesised that the Court resides in a region between sufficient independence to make rulings that are within the confines of the ‘legal steadying factors’, even if adverse to the interests of other actors, and sufficient accountability to other actors to compel the Court to retain its adherence to these ‘legal steadying factors’, or at least disincentivise it from abandoning its duty to them. In other words, the threat of repercussions for the Court and its Judges are insignificant³⁰ where the Court delivers a substantive ruling which runs counter to powerful interests, so long as that decision adheres to the ‘legal steadying factors’. However, once the Court ceases to

view, the most significant pressure as judicial decisions, whatever their motivation, will have to at least be justified by reference to, in Llewellyn’s words, “some part of that body of legal doctrine” (Llewellyn, K.N., *supra* n. 2, p. 20). ‘Legal doctrine’ may, therefore, be seen as imposing an outer-limit constraint on judicial decision and one which plays a significant part in reducing, though never eliminating completely, the ‘obstacles’ to ‘legal certainty’.

²⁷ Ferejohn, J.A. and Kramer, L.D., “Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint”, (2002) 77 *New York University Law Review* 962, at 962.

²⁸ Ferejohn, J.A. and Kramer, L.D., *supra* n. 27, at 962.

²⁹ Ferejohn, J.A. and Kramer, L.D., *supra* n. 27, at 962-964. See also, Arnall, A., *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2nd ed., 2006), p. 24; Posner, R., *How Judges Think* (Cambridge: Harvard University Press, 2010), pp. 125-126. It is beyond the scope of this dissertation to attempt to identify where the appropriate lines ought to be drawn in the case of the Court of Justice, given that this is essentially a question of political morality.

³⁰ That is not to say, however, that there are not extreme scenarios where the reasoning of the Court of Justice might be, in Bengoetxea, MacCormick and Moral Soriano’s words, ‘internally justified’, but not ‘externally justified’ and still lead to a revolt which could be damaging to the Court of Justice (such scenarios were the concerns of Rasmussen in the context of judicial activism, and Phelan in the context of the continuing expansion by the Court of the constitutional boundaries of EU law leading to a clash with the jurisdiction of national courts). (Rasmussen, H., *supra* n. 3 and Phelan, D.R., *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Dublin: Round Hall Sweet & Maxwell, 1997)). However, the neofunctionalist view that such scenarios are remote, as long as the Court of Justice continues to justify its decisions within ‘legal doctrine’ and by reference to accepted doctrinal techniques, is maintained in this dissertation (*infra* n. 183-n. 211).

respect the normative character of the ‘legal steady factors’, the threat to its effectiveness and that of its Judges becomes very real.³¹

The sections that follow examine the question of whether the Court of Justice, when operating in the preliminary reference procedure, resides in this territory between independence and accountability. This examination entails both a formalist analysis and a realist analysis of the legal rules that purport to guarantee both the institutional independence of the Court (and the security of the Judges) and its accountability. The formalist analysis identifies and describes the relevant legal rules, before questioning whether there is sufficient normative protection to allow the Court to decide in a manner, which while within the limits of the ‘legal steady factors’, is adverse to the Court’s ‘countervailing powers’. The realist analysis concerns itself with the effectiveness of these legal guarantees in practice in enforcing the Court’s adherence to the ‘legal steady factors’ through the push and pull factors of independence and accountability. Specifically, the realist analysis identifies the Court’s ‘countervailing powers’ before proceeding, by reference to existing theories of the Court’s relationship with these ‘countervailing powers’, primarily neofunctionalism and intergovernmentalism, to identify the extent to which the Court is independent of and accountable to these powers.

D. Independence from and Accountability to ‘Countervailing Powers’: A Formalist Analysis

I. Introduction

The institutional role of the CJEU as defined by the second clause of Article 19(1) TEU makes it clear that the CJEU in its adjudication is required to perform that function within the confines of ‘legal doctrine’: “It shall ensure that in the interpretation and application of the Treaties the law is observed.” In accordance with Llewellyn’s thought, the ability of the CJEU to perform this function faithfully depends upon its institutional independence and the security

³¹ See generally, Lenaerts, K., “How the ECJ Thinks: A Study on Judicial Legitimacy”, (2013) 36 *Fordham International Law Journal* 1302, in particular his views on internal and external legitimacy (at 1305-1310).

of its individual Judges from the repercussions of other actors where it delivers a ruling that is adverse to those actors' interests. This section analyses the legal rules and practices which purport to grant the CJEU and its Judges this protection.³² It analyses both legal rules and practices that purport to guarantee the institutional independence of the CJEU, as well as those that purport to provide security to its individual Judges.³³

II. Institutional Independence and Judicial Security

1. Institutional Independence of the CJEU

A number of legal rules purport to guarantee the CJEU institutional independence. In the next paragraphs, those legal rules are categorised as follows: (1) general normative requirements of the judicial independence of the CJEU; (2) the significance of the finality of the preliminary rulings of the Court of Justice; (3) the significance of the institutional location of the CJEU; (4) the significance of independence as a qualification for judicial office, and its reinforcement through the judicial oath and the requirement of impartiality; (5) protections against court-destroying, court-curbing and court-packing; and, (6) the significance of the judicial independence of the national courts.

a) Normative Requirements of Judicial Independence of the CJEU

Since the entry into force of the Treaty of Lisbon³⁴, the CFREU has enjoyed, in accordance with Article 6(1) TEU, “the same legal value as the Treaties.” The second clause of Article 47 CFREU, which echoes Article 6(1) ECHR³⁵, guarantees judicial independence in the EU legal order:

³² As this dissertation relates to the ‘reckonability’ of preliminary references, over which the Court of Justice has sole jurisdiction at present (*infra* n. 70), the analysis of the judicial security of the Judges is limited to a consideration of the Judges of the Court of Justice only.

³³ This is not necessarily a clean distinction as many of the rules and practices which purport to guarantee the security of individual judges will also ensure the institutional independence of the CJEU.

³⁴ On the 1st December 2009.

³⁵ Article 6(1) ECHR: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Similar provisions are also contained in international human rights instruments. Article 10 UDHR provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”

Given that Article 52(3) CFREU provides that where CFREU rights correspond with ECHR rights, the meaning and scope of those rights “shall be the same as laid down by the [ECHR]”, it is obvious that the case law of the ECtHR on the meaning and scope of the term “independent and impartial tribunal” in Article 6(1) ECHR will determine same under Article 47 CFREU. The leading case of the ECtHR in this regard is *Bryan v United Kingdom*³⁶, in which it ruled that “[i]n order to establish whether a body can be considered ‘independent’, regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.”³⁷ The independence of the CJEU is, therefore, since the coming into force of the Treaty of Lisbon, an express legal requirement, rather than a possible general principle of EU law or a desirable reality.

Leaving aside rights-based guarantees of judicial independence in the EU legal order, the institutional architecture devised by the Treaties would appear to create a pragmatic judicial independence for the CJEU. Although the Treaties do not create a pure separation of powers³⁸, the Treaties do confer powers on each of the Union’s institutions and confine the institutions to those powers conferred upon them³⁹: Article 13(1) TEU lists the institutions of the Union⁴⁰ and Article 13(2) TEU provides that “[e]ach institution shall act within the

charge against him.” The second clause of Article 14(1) ICCPR provides: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

³⁶ *Bryan v United Kingdom* (1995) 21 EHRR 342.

³⁷ *Bryan v United Kingdom* (1995) 21 EHRR 342, para 37.

³⁸ “The EU does not ... conform to a rigid separation-of-powers principle of the sort that has shaped certain domestic systems.” (Craig, P. and de Búrca, G., *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 6th ed., 2015), p. 30). See also, Conway, G., *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012), pp. 172-200. Although Conway agrees that the Treaties have not established a tripartite separation of powers, he argues there is no reason why such a concept could not be applied in the EU.

³⁹ The orthodox view in EU law scholarship is that the CJEU enjoys a *compétence d’attribution*, i.e. the Court’s jurisdiction extends only so far as the Treaty provides. This view has been questioned by Arnall, however, who has argued that the Court has demonstrated in numerous cases that it enjoys an inherent jurisdiction (Arnall, A., “Does the Court of Justice have Inherent Jurisdiction?”, (1990) 27 *Common Market Law Review* 683).

⁴⁰ The European Parliament, the European Council, the Council, the European Commission, the CJEU, the European Central Bank and the Court of Auditors.

limits of the powers conferred on it in the Treaties...” Articles 14-19 TEU describe the powers and roles of the European Parliament, the European Council, the Council, the European Commission and the CJEU in overview, with Articles 223-334 TFEU, the institutional and financial provisions, governing the powers and roles of the institutions in detail. A cursory reading of these provisions reveals that, as aforementioned, there is no clean separation of legislative, executive and judicial power in the EU, with the Commission, for instance, exercising powers in all three domains.⁴¹ Nevertheless, the Treaties do, with some minor exceptions, concentrate judicial power in the CJEU. Article 19(1) TEU describes the role of the CJEU (comprising the Court of Justice, the General Court and specialised courts) as follows:

“It shall ensure that in the interpretation and application of the Treaties the law is observed.”

Article 19(3) TEU describes the jurisdiction of the CJEU in less abstract terms:

“The Court of Justice of the European Union shall, in accordance with the Treaties:

- (a) rule on actions brought by a Member State, an institution or natural or legal person;
- (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
- (c) rule in other cases provided for in the Treaties.”

Articles 251-281 TFEU provide closer detail on the CJEU, with Articles 258-280 TFEU describing its jurisdiction. The CJEU does not, however, exercise all powers that could be described as ‘judicial’ under the Treaties. At Union level⁴², it is evident that the Commission exercises powers that could be described as judicial, or at least quasi-judicial, in nature.⁴³ More specifically,

⁴¹ See Craig, P. and de Búrca, G., *supra* n. 38, pp. 36-38.

⁴² At national level, of course, courts and tribunals play an important role in the interpretation and application of EU law. Nevertheless, the dynamic created by the Article 267 TFEU preliminary reference procedure has been to create a division of competences among the Court of Justice and the referring national courts and tribunals, with the former occupying a *de facto* hierarchical role vis-à-vis the latter when it comes to ruling on the validity or interpretation of EU law. This is discussed in greater detail in Part Three.

⁴³ The second and third clauses of Article 17(1) TEU provide a legal basis for the Commission’s exercise of judicial powers: “[The Commission] shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.”

the Commission performs a number of investigatory, decision-making and enforcement functions that might well be described as judicial.⁴⁴ The involvement of the Commission in judicial or quasi-judicial functions does not usurp, however, any of the judicial powers assigned to the CJEU, nor does it detract from the position of the CJEU as the Union's arch-judicial power. The very wording of both institutions' powers in Article 17(1) TEU, in the case of the Commission, and Article 19(1) TEU, in the case of the CJEU, signify this. One of the Commission's roles is to "oversee the application of Union law"; the Court is to ensure "that in the ... application of the Treaties the law is observed." There is a certain overlap, but there is a nuance in the wording that suggests the Commission's role is more executive and less judicial than that of

Other institutions, bodies, offices and agencies of the EU also enjoy what might be termed judicial or quasi-judicial powers. The European Parliament, for instance, enjoys a supervisory power, which could conceivably be described as judicial or quasi-judicial. Article 14(1) TEU provides that the Parliament, in addition to its legislative powers, which it performs jointly with the Council, "shall exercise functions of political control and consultation as laid down in the Treaties." More particularly, Article 226 TFEU empowers the European Parliament to establish a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of Union law, with the existence of such a committee expiring on submission of its report. However, the primacy of the courts in such matters is recognised: such an inquiry may not take place "where the alleged facts are being examined before a court and while the case is still subject to legal proceedings". Connected to the role of the European Parliament is that of the European Ombudsman. Article 228(1) TFEU provides that the Parliament may elect a European Ombudsman who "shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies..." The Ombudsman is obliged by Article 228(1) to examine such complaints and report on them. However, even the Ombudsman procedure identifies the judicial independence of the CJEU: Article 228(1) TFEU provides that the Ombudsman may not receive complaints concerning maladministration in the activities "of the Court of Justice of the European Union acting in its judicial role."

⁴⁴ This is certainly the case in civil law jurisdictions where judiciaries commonly enjoy investigatory powers. Under Article 258 TFEU, the Commission investigates an infringement of a Treaty obligation by a Member State. Article 258 TFEU further empowers the Commission to deliver a reasoned opinion on the matter, after giving the State concerned an opportunity to submit observations. The Commission is also empowered to deliver a reasoned opinion in the Article 259 TFEU procedure where one Member State alleges that another has failed to fulfil an obligation in the Treaties. This opinion acts as a sort of first instance judgment, in that if the Commission makes an adverse finding against the Member State, the opinion may specify measures to be taken by the Member State to end the infringement of the Treaties. The provisions of the TFEU relating to competition law and state aid also confer upon the Commission such investigatory and decision-making powers. Article 105(1) TFEU allows the Commission on application by a Member State, or on its own initiative, and in cooperation with national competent authorities, to investigate cases of suspected infringement of Articles 101 TFEU (anti-competitive practices) and Article 102 TFEU (abuse of a dominant position) by undertakings. In the event that the Commission decides that there is such an infringement, Article 105(1) TFEU also empowers the Commission to "propose appropriate measures to bring it to an end." Article 108(2) TFEU grants the Commission jurisdiction to decide that a Member State should, within a time period specified by the Commission, abolish or alter a state aid which the Commission views as contrary to the Article 107 TFEU prohibition of anti-competitive Member State aids. The second clause of Article 108(2) confers jurisdiction upon the Commission to refer the matter to the Court of Justice, where the Member State concerned does not comply with the Commission's decision within the prescribed time.

the CJEU: the Commission oversees the application of Union law like police force or prosecutor, while the CJEU ensures this application conforms with law. Article 17(1) underscores this hierarchical relationship in judicial matters by stipulating that the Commission shall oversee the application of Union law “under the control of the [CJEU].” This is further reflected in the individual judicial powers held by the Commission: there is no judicial function that may be exercised by the Commission that will not be amenable to review by the CJEU.⁴⁵ More importantly, owing to the requirement in Article 13(2) TEU that no institution act outside the limits of the powers conferred upon it by the Treaties, it is evident that the Commission in the exercise of its judicial powers may not usurp those powers that are conferred upon the CJEU.

In summary, both normative guarantees of judicial independence and the institutional architecture of the Union in the Treaties serve to provide the CJEU with institutional independence. Article 47 CFREU, as well as Article 6(1) ECHR, provide a rights-based guarantee of independence. The Treaties provide for a division of competences amongst the Union institutions in which those institutions are limited to exercising those powers conferred upon them by the Treaties. The CJEU is assigned the most important of the judicial powers in the Union’s legal system, in particular, given the context of this dissertation, the power to make preliminary rulings under Article 267 TFEU. In the case of judicial powers assigned to other institutions, such as those conferred upon the Commission, the Court’s review powers under Article 263 TFEU and, more indirectly, under Article 267 TFEU mean that exercise of these powers is ultimately subject to the supervision of the CJEU. As such, the CJEU enjoys normative institutional independence in the exercise of the judicial powers conferred upon it by the Treaties. Whether this formal independence can be undermined in practice by the Court’s ‘countervailing powers’ is examined in the realist analysis of these rules.

⁴⁵ Under Article 258 TFEU, it is ultimately to the CJEU that the Commission must turn where its opinion has not been heeded by the Member State. Decisions of the Commission pursuant to Article 105 TFEU, Article 108 TFEU, and indeed Articles 258 and 260 TFEU, may be subject to direct review by the CJEU under Article 263 TFEU, and indirectly, though usually more effectively, through the Article 267 TFEU preliminary reference procedure.

b) The Finality of the Preliminary Rulings of the Court of Justice

Llewellyn indicated that one of the main guarantees of institutional independence was the fact that the decisions of the American appellate courts could not be upset.⁴⁶ A by-product of the Union's institutional architecture is that preliminary rulings are final, and form the definitive interpretation of EU law, which must be applied by all Member State courts and tribunals.⁴⁷ There is, of course, the possibility of override by other EU institutions through Treaty change or legislation, or undermining by the Court's 'countervailing powers' of its rulings through non-compliance. However, the finality of the Court's rulings reinforces its position as the ultimate judicial power in the EU legal order. Suggestions that a political body should have the power to overturn decisions of the Court were raised by some in the UK in the 1990s, but came to nothing in the face of anticipated opposition by other Member States.⁴⁸ Such an attempt today would sit uneasily with Article 47 CFREU.

c) Institutional Location

Article 341 TFEU provides that "[t]he seat of the institutions of the Union shall be determined by common accord of the governments of the Member States."

⁴⁶ Llewellyn, K.N., *supra* n. 2, p 32.

⁴⁷ Equally important in this regard is the division of competences between the Court of Justice and the referring national courts and tribunals implicit in Article 267 TFEU: the Court of Justice provides a ruling on the interpretation of an EU law and the national referring court or tribunal applies this ruling to the proceedings before it. The Court's development of a doctrine of precedent in the Article 267 TFEU preliminary reference procedure in cases such as Cases 28-30/62 *Da Costa en Schaake NV and Others v Nederlandse Belastingadministratie* [1963] ECR 31, Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry for Health* [1982] ECR 3415 and Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199 and national judicial acceptance of this development has consolidated the Court's position at the apex of the Union judicial system when it comes to the adjudication on the validity of or the interpretation of EU law. As to the operation of the doctrine of precedent at the Court of Justice, see: Craig, P. and de Búrca, G., *supra* n. 38, pp. 499-501; Brown, L.N. and Kennedy, T., *Brown & Jacobs: The Court of Justice of the European Communities* (London: Sweet and Maxwell, 5th ed., 2000), pp. 369-381. Burley and Mattli have also demonstrated that the Court of Justice is concerned with precedent: Burley, A.-M. and Mattli, W., "Europe before the Court: A Political Theory of Legal Integration", (1993) 47(1) *International Organization* 41. Beck includes the 'normative constraint of precedent' among his 'legal steadying factors' (Beck, G., *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2012), pp. 339-341).

⁴⁸ Brown, B., "Government to demand curb on the European Court", *Financial Times*, 2nd February, 1995, p. 9 (cited by Alter, K., "Who are the 'Masters of the Treaty'? European Governments and the European Court of Justice", (1998) 52(1) *International Organization* 121, at 140).

By virtue of Protocol (No 6), the CJEU has its seat in Luxembourg.⁴⁹ Article 14 of the Statute⁵⁰ also requires that the Judges reside “at the place where the Court of Justice has its seat.”⁵¹ The geographical location of the CJEU is important in presenting an appearance of independence. While the European Parliament is seated primarily in Strasbourg⁵², the Council primarily in Brussels⁵³ and the Commission also primarily in Brussels⁵⁴, the CJEU is ensconced geographically between in the world’s last remaining Grand Duchy, the existence of which as an independent entity is owing largely to the decision of France and Prussia to deny each other control of it in the Second Treaty of London in 1867. Notwithstanding Germany’s violation of its sovereignty in both World Wars, Luxembourg has functioned as a neutral political entity sandwiched between the great European powers of France and Germany, while also sharing a border with more modest Belgium. It is difficult to conceive of a more apt location for an independent CJEU.⁵⁵

Traditionally, the non-metropolitan location of the CJEU in Luxembourg was regarded as insulating the Court from political, media and public scrutiny, and

⁴⁹ Protocol (No 6) on the Location of the Seats of the Institutions and of Certain Bodies, Offices, Agencies and Departments of the European Union, hereinafter, ‘Protocol (No 6)’. Article 23 RP provides, however: “The Court may choose to hold one or more specific sittings in a place other than that in which it has its seat.” Wägenbauer states: “It is unclear whether the Court ever made use of this possibility, which is now limited to ‘specific’ sittings.” (Wägenbauer, B., *Court of Justice of the EU: Commentary on Statute and Rules of Procedure* (München: C.H. Beck Verlag, 2013), p. 227).

⁵⁰ Protocol (No 3) on the Statute of the Court of Justice of the European Union (hereinafter, the ‘Statute’).

⁵¹ Wägenbauer has stated that a literal interpretation of Article 14 of the Statute would lead to the conclusion that members of the Court would have to reside in Luxembourg City or even on the Kirchberg. However, Wägenbauer suggests that such an interpretation would be overly restrictive, preferring to read into Article 14 a requirement that Judges live “reasonably close to the place where the Court of Justice has its seat”. He adds: “This leaves some room for interpretation, in the absence of any published rules, but it is normally a matter to be sorted out internally.” (Wägenbauer, B., *supra* n. 49, pp. 29-30).

⁵² Although the Parliament’s seat is in Strasbourg, it also sits in Brussels, and has some presence in Luxembourg. The Sole Article (a) of Protocol (No 6) provides: “The European Parliament shall have its seat in Strasbourg where the 12 periods of monthly plenary sessions, including the budget session, shall be held. The periods of additional plenary sessions shall be held in Brussels. The committees of the European Parliament shall meet in Brussels. The General Secretariat of the European Parliament and its departments shall remain in Luxembourg.”

⁵³ Although the seat of the Council is in Brussels, in the months of April, June and October it holds its meetings in Luxembourg (Sole Article (b) of Protocol (No 6)).

⁵⁴ Although the seat of the Commission is in Brussels, some of its departments, for instance, the Publications Office are based in Luxembourg (Sole Article (b) of Protocol (No 6) and Articles 7, 8 and 9 of the Decision of the representatives of the governments of the Member States of 8 April 1965 on the provisional location of certain institutions and departments of the Communities (67/446/EEC)).

⁵⁵ Luxembourg is also the birthplace of perhaps the most famous father of European integration, French statesman Robert Schuman (1886-1963).

creating an independent institutional *esprit de corps*. Writing in 1981, Stein described the Court as “[t]ucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media.”⁵⁶

The idea of the CJEU being ‘tucked away’ in Luxembourg is perhaps not so relevant in an age when awareness of its activity is not limited to those physically present at the institution or directly interested in proceedings. Judgments and orders are nowadays through modern technology available to the media and public within a few days of delivery, opening the CJEU up to far more media and public scrutiny than was the case in the 1980s when Stein was writing.

In summary, the location of the CJEU as required by Protocol (No 6) plays a role in presenting an image of the CJEU as an independent institution, while also playing a role, at least in the past, of insulating it somewhat from the glare of the media and public. The perception of separateness is in itself important to establishing the Court’s independence, with the Strasbourg Court in *Bryan v*

⁵⁶ Stein, E., “Lawyers, Judges, and the Making of a Transnational Constitution”, (1981) 75 *American Journal of International Law* 1, at 1. Judge Mancini, writing in 1989, appeared to agree with Stein’s sentiments: “The combination of being, as it were, out of sight and out of mind by virtue of its location in the fairy-tale Grand Duchy of Luxembourg and the benign neglect of the media has certainly contributed to its ability to create a sense of belonging on the part of its independent-minded members and, where necessary, to convert them into confirmed Europeans.” (Mancini, G.F., “The Making of a Constitution for Europe”, (1989) 26 *Common Market Law Review* 595, at 597). See also, Forrester, I.S., “The Judicial Function in European Law and Pleading in the European Courts”, (2006-2007) 81 *Tulane Law Review* 647, at 659-661. Brown and Kennedy have stated similarly: “That Luxembourg, the mini-State among the twelve, should have become the judicial centre of the Communities, has consequences that may escape the notice of anyone unfamiliar with the Grand Duchy and its capital. The City of Luxembourg, where the Court has sat since its inception, numbers barely 90,000 inhabitants and has very much the atmosphere of a pleasant provincial town. There is neither the bustle of Brussels nor the sophistication of Strasbourg... There are no frivolities and few distractions, apart from the quiet charm of the surrounding countryside. Expatriates who work at the Court tend to entertain each other in their homes and to restrict their social life to a small circle of colleagues. This helps to produce a sense of camaraderie and of loyalty to the Court that transcends national differences.” (Brown, L.N. and Kennedy, T., *supra* n. 47, pp. 15-16). The observations of Mancini and Brown and Kennedy present an opportunity for a brief *excursus* from the discussion on judicial independence as an ‘external extra-legal steadying factor’. The aforementioned authors appear to suggest that the Court’s environment and location in Luxembourg creates a more uniform judicial outlook, indeed one which to paraphrase the purpose of the institutional framework of the Union expressed in Article 13(1) TEU aims to promote the values and serve the interests of the Union. Seen as such, the atmosphere and environment around the Court of Justice play a part in consolidating and reinforcing the ‘law conditioning’ of its members and the legal doctrinal purpose of the Court. This observation in many ways resembles Llewellyn’s ideas on ‘professional judicial office’ as a ‘steadying factor’.

*United Kingdom*⁵⁷ placing store, when determining a court's independence, on the question of "whether the body presents an appearance of independence..."⁵⁸

*d) Independence as a Qualification for Judicial Office and its
Reinforcement: The Judicial Oath and the Requirement of Impartiality*

The Treaties detail the qualifications required for appointment as a member of the CJEU. Article 19(2) TEU provides that the Judges of the Court of Justice and the General Court "shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 [TFEU]." Article 253 TFEU, which relates to the Judges and Advocates General of the Court of Justice, repeats the independence requirement.⁵⁹ That independence is a requirement for the maintenance as well as the acquisition of office is implied by Article 6 of the Statute, which provides that one of the conditions for the removal of a Judge is "where he no longer fulfils the requisite conditions or meets the obligations arising from his office."⁶⁰ Several other rules⁶¹, as well as provisions of the Court's Code of Conduct⁶², reinforce the requirement of individual judicial independence. Firstly, there is the judicial oath taken by newly appointed Judges prior to their taking up of duties at the Court.⁶³ Secondly, the Judges are prevented from engaging in activities

⁵⁷ *Bryan v United Kingdom* (1995) 21 EHRR 342.

⁵⁸ *Bryan v United Kingdom* (1995) 21 EHRR 342, para 37.

⁵⁹ Article 253 TFEU: "The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt..."

⁶⁰ Wägenbaur, B., *supra* n. 49, p. 23.

⁶¹ See generally, Arnall, A., *supra* n. 29, pp. 21-22. This reinforcement is further enhanced by the fact that many of these legal rules are entrenched: Title I (Articles 2-8) and Article 64 of the Statute may not be amended in the same way as the other provisions of the Statute (that is, by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure).

⁶² *Code of Conduct of the Court of Justice* (2007/C 223/01), hereinafter 'the Code of Conduct'.

⁶³ Article 2 of the Statute provides: "Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court." The wording of the oath is provided for in Article 4 RP: "Before taking up his duties, a Judge or Advocate General shall, at the first public sitting of the Court which he attends after his appointment, take the following oath provided for in Article 2 of the Statute: 'I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court.'" One of the curious aspects of holding judicial office in Luxembourg is that a Judge will often be appointed from a national judicial role and return to such a role after his/her term of office at the CJEU ends. This will also mean that a Judge will have taken an oath of loyalty to a national legal system, the values of which may to some extent conflict with the values of the EU legal system. See Phelan, D.R., "The Weakening of Allegiance to the Polity in the Institutional Practices of European Judges and Courts" in

outside of their work at the Court that could lead them into a conflict of interests with their duties as Judges.⁶⁴ Thirdly, Article 18 of the Statute seeks to maintain the Court's independence by preventing the emergence of conflicts of interest.⁶⁵ Furthermore, Article 4(1) of the Code of Conduct requires Judges on taking up their duties to submit a declaration of their financial interests to the President of the Court.⁶⁶ Fourthly, the role of the CJEU as an EU institution, as defined by Articles 13(1) and 19(1) TEU, requires it to be independent, particularly of the national interests of the Judge's own Member State. Article 13(1) TEU, it will be recalled, places the CJEU in an institutional framework the aim of which is to promote the values, advance the objectives and serve the interests of the Union, of its citizens and its Member States. This expectation that the Judge advance the Court's doctrinal purpose, rather than the interests

Bradley, K., Travers, N. and Whelan, A., *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Oxford: Hart, 2014), p. 397.

⁶⁴ Article 4 of the Statute prohibits the Judges from holding any political or administrative office or from engaging "in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority." This requirement is also reinforced by the fact that the Judges, when taking up their duties, are required by Article 4 of the Statute to give "a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits." Article 5 RP provides: "Immediately after taking the oath, a Judge or Advocate General shall sign a declaration by which he gives the solemn undertaking provided for in the third paragraph of Article 4 of the Statute." Article 5 of the Code of Conduct further provides: "1. Members who wish to take part in an external activity shall request prior authorisation from the Court or Tribunal of which they are a Member. They shall undertake, however, to comply with their obligation to be available so as to devote themselves fully to the performance of their duties. 2. Members may be authorised to participate in teaching activities, conferences, seminars or symposia, but may not receive any uncustomary financial remuneration for doing so. 3. Members may also be authorised to engage in activities of an academic nature and to assume unremunerated honorary duties in foundations or similar bodies in the cultural, artistic, social, sporting or charitable fields and in teaching or research establishments. In that connection, they shall undertake not to engage in any managerial or administrative activities which might compromise their independence or their availability or which might give rise to a conflict of interest. The expression 'foundations or similar bodies' means non-profit-making establishments or associations which carry out activities in the general interest in the fields referred to."

⁶⁵ The first paragraph of Article 18 provides: "No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity." The second paragraph of Article 18 provides: "If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly." The Code of Conduct also requires the integrity and impartiality of the Judges. Article 2 of the Code of Conduct provides: "Members shall not accept gifts of any kind which might call into question their independence." Article 3 of the Code of Conduct provides: "Members shall avoid any situation which may give rise to a conflict of interest."

⁶⁶ Article 4(2) of the Code of Conduct provides that the declaration must be worded as follows: "I declare that I have no interest in any property or asset which might compromise my impartiality and my independence in the performance of my duties."

of his/her Member State is reinforced by the fourth paragraph of Article 18 of the Statute, which prohibits a party in proceedings before the CJEU from applying for a change in the Court's composition or of one of its chambers "on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party."

There is, therefore, a normative requirement that each of the Judges of the Court of Justice be independent of the Court's 'countervailing powers' and that they maintain this independence.

e) Protections against Court-Destroying, Court-Curbing and Court-Packing

Rasmussen in his examination of judicial activism at the Court of Justice sought to analyse activism by focussing on the responses of the Court's 'countervailing powers' to its jurisprudence.⁶⁷ Rasmussen anticipated that if the Court's 'countervailing powers' perceived it as being too activist and involving itself in political affairs, it would lead to these 'powers' "launching court-curbing or even court-destroying initiatives."⁶⁸ There are a number of ways in which the Court's 'countervailing powers', in particular, the Member States, other Union institutions and national judiciaries could damage the functioning and effectiveness of the Court and its rulings. Most obviously, these 'countervailing powers' could choose to ignore the Court's rulings. On a purely formalist analysis, however, this ought not to happen, because the Court, as discussed previously, resides at the apex of the Union's judicial architecture under Article 267 TFEU.⁶⁹ Other obvious ways in which the Court could be harmed by its 'countervailing powers' would be through the introduction of legal rules to remove or reduce aspects of its jurisdiction, or increase the power of the General Court⁷⁰ or national courts at the expense of the Court of

⁶⁷ Rasmussen, H., *supra* n. 3, pp. 7-8.

⁶⁸ Rasmussen, H., *supra* n. 3, p. 17.

⁶⁹ Whether this can happen in reality is discussed in the realist analysis in this part of the dissertation.

⁷⁰ One obvious way in which this could be done would be to reward the General Court with a wide jurisdiction to hear and determine Article 267 TFEU preliminary references. Article 256(3) TFEU confers upon the General Court jurisdiction "to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the

Justice⁷¹, or to create obstacles for those seeking access to the Court. There is also the possibility of so-called ‘court packing’: increasing the number of Judges at the Court, and appointing Judges more sympathetic to the appointers’ interests.⁷² There is also, of course, the nuclear option for disgruntled ‘countervailing powers’: simply abolishing the Court of Justice.

The Treaties and other EU legal rules protect the Court of Justice against the types of court-harming measures identified above in a number of ways. Firstly, there are the rights-based guarantees of judicial independence in the EU such as Article 47 CFREU. Secondly, the jurisdiction of the CJEU is set out in the Treaties, meaning that any removal or reduction of any aspect of the Court’s jurisdiction will require Treaty amendment, which pursuant to Article 48(4) TEU requires ratification by all Member States. The number of Judges at the Court is also fixed by Article 19(2) TEU, meaning that any court-packing initiative would also require Treaty change.⁷³ There are also rules that seek to protect the CJEU from interference by its ‘countervailing powers’ with the Court’s organisation and procedures. Such interference is conceivably possible by means of amendment of the Statute or the Rules of Procedure. The TFEU

Statute.” No such areas have, as of yet, been provided for in the Statute, meaning that the General Court has no jurisdiction to hear and determine preliminary references.

⁷¹ For instance, there are reportedly plans in the UK to extend power to the UK Supreme Court to review the compatibility of Court of Justice decisions with fundamental principles of the British constitution. See Landale, J., “EU referendum: Cameron’s options for enhancing sovereignty”, 10th February 2016 (available at <http://www.bbc.co.uk/news/uk-politics-eu-referendum-35539860>) (last accessed at 10:15 on Thursday, the 18th February 2016).

⁷² The most infamous example being US President Frank D. Roosevelt’s Judicial Procedures Reform Bill of 1937, commonly referred to as the court-packing plan. Roosevelt sought to increase the number of US Supreme Court Justices, ostensibly so that he could appoint judges more in favour of his ‘New Deal’ programmes, following the Supreme Court’s rulings of unconstitutionality in respect of a number of his reforms. The Bill, ultimately, never became law. Rasmussen states that in the period before the accession of Greece, the French government proposed an increase in number of Judges at the Court of Justice, with the larger Member States being afforded the opportunity to appoint two Judges. Rasmussen clearly considers this to be a court packing attempt motivated by French chagrin following the decision of the Court of Justice in the *Sheep Meat* case (Case 232/78 *Commission v France* [1979] ECR 2729). Rasmussen adds that to his knowledge “the French court-packing proposal was given serious consideration among the Member States”, but in the end was not adopted. (Rasmussen, H., *supra* n. 3, p. 356).

⁷³ The Constitution of the USA, in contrast, does not define the number of Justices of the Supreme Court. A court-packing initiative at the General Court does not require Treaty change: Article 1 of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union has amended Article 48 of the Statute so that from the 25th December 2015 the General Court has forty Judges. According to Article 48 of the Statute, this number will climb to forty-seven from the 1st September 2016, and to two Judges for each Member State from the 1st September 2019. The reason for the increase has been the workload of the General Court, rather than a politically-motivated court-packing plan.

does, however, provide the CJEU with some protection against such possibilities:

- Article 281 TFEU entrenches Title I (Articles 2-8) and Article 64 of the Statute: the European Parliament and Council, acting through the ordinary legislative procedure, may not amend these provisions as they may the remaining provisions of the Statute. Since Article 51 TEU provides that the Protocols and Annexes to the Treaties form an integral part of the Treaties, an amendment to these entrenched provisions of the Statute is possible only through Treaty amendment. This is important because Title I of the Statute provides many of the important rules that underscore the independence of the Court and its Judges.⁷⁴
- Article 281 TFEU provides some protection for the CJEU from amendments by the Parliament and Council to provisions of the Statute other than those in Title I and Article 64 by requiring the involvement of the Court of Justice in the procedure for amendment. Article 281 TFEU prohibits the Parliament and Council from amending the Statute on their own initiative. Only two alternative circumstances in which these institutions may act in this way exist: firstly, at the request of the Court of Justice and after consultation with the Commission; or, secondly, on a proposal of the Commission and after consultation with the Court. In the former situation, the Court itself has requested the change and in the latter, the Court is at least to be consulted, if not heeded. In the latter case, the real protection lies perhaps in the fact that it is only the Commission, an institution that is charged with promoting the general interest of the Union, that may propose amendment. Since the Parliament and Council may amend the balance of the Statute through the ordinary legislative procedure, these are important protections. There is potential scope for significant interference by those ‘countervailing powers’ with the operation of the Court. Title II of the Statute provides for the organisation of the Court of Justice, which, *inter alia*, provides for the division of the Court into chambers

⁷⁴ For instance, Article 2 (the judicial oath); Article 3 (immunity of the Judges from legal proceedings); Article 4 (prohibition of political or administrative office); Article 5 (termination of office); Article 6 (removal from office).

(Article 16) and the quora for the validity of judgments (Article 17), and Title III provides for procedure before the Court of Justice, specifically for the preliminary reference procedure in Article 23.

- Article 253 TFEU entrusts the Court of Justice with responsibility for the establishment of its own Rules of Procedure. The sole limit on the Court's power to determine its own Rules of Procedure is that the Rules established require the approval of the Council. However, it is apparent that none of the Court's 'countervailing powers' may effect change to the Rules of Procedure or indeed initiate any amendments.

Therefore, the Treaties and the Statute do provide a degree of normative protection to the Court of Justice from court-curbing, -destroying or -packing measures that its 'countervailing powers' could pursue. The realist analysis of these rules examines the extent of this protection in a *de facto* sense.

f) The Judicial Independence of the National Courts

The Court of Justice in its development of the preliminary reference procedure has enlisted the national courts as the enforcers of its rulings in the Member States.⁷⁵ This is a role that the Court cannot perform itself given the jurisdictional constraints placed upon it in Article 267 TFEU, which limit the Court's role to ruling on the validity of Union acts or on the interpretation of the Treaties or Union acts, and prevent it from initiating references. The Court, therefore, depends on national courts and tribunals for orders for reference and for the faithful application of its rulings.⁷⁶ Seen in this light, the Court of Justice and national courts and tribunals are part of a contiguous judicial network. Accordingly, the securing of the independence of the Court of Justice from other institutional actors would be meaningless if the national courts and tribunals that refer questions to the Court under Article 267 TFEU were not

⁷⁵ Craig and de Búrca have observed: "The development of the preliminary ruling system has ... enrolled the national courts as part of the EU judicial system broadly conceived, with both the power and duty to apply EU law in cases that come before them." (Craig, P. and de Búrca, G., *supra* n. 38, p. 501).

⁷⁶ See Cappelletti, M., *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989), pp. 350-351.

sufficiently independent from their own ‘countervailing powers’ at national level to apply preliminary rulings without fear or favour.

That the Court has been aware of this fact in the development of its jurisprudence around the Article 267 TFEU procedure seems evident. Article 267 TFEU confines the right to make references to the Court to “any court or tribunal of a Member State”. The Treaties do not define the meaning of ‘court or tribunal’, leaving the interpretation of the term to the Court of Justice. It is understood that the question of whether a body is a ‘court or tribunal’ for the purposes of Article 267 TFEU must be decided by reference to an EU law definition, rather than one of national law.⁷⁷ As Lenaerts, Maselis and Gutman point out, the question of whether a national court or tribunal constitutes a ‘court or tribunal’ for the purposes of Article 267 TFEU will generally not raise a difficulty where a Member State regards it as such⁷⁸: the Court assumes that such a body may make a reference.⁷⁹ The Court will, however, examine the question as to whether a body seeking to make a reference is a ‘court or tribunal’ where national law does not consider that body as such. The Court of Justice first set out the factors to be considered in this context in *Vaassen*.⁸⁰ However, the criteria identified in *Vaassen* (a body of permanent character established by law, which uses an adversary procedure) have not proven to be exhaustive, and the Court has identified further characteristics on a case-by-case basis.⁸¹ One of the criteria emphasised by the Court in subsequent cases is that the body be independent.⁸² What is evident from this case-law is that it is

⁷⁷ Opinion of Advocate General Reischl in Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311. This is a rather obvious necessity: if the definition were a matter for national authorities to decide, a narrow definition could be adopted in national law, restricting national court or tribunal access to the Court of Justice.

⁷⁸ Lenaerts, K., Maselis, I. and Gutman, K., *EU Procedural Law* (Oxford: Oxford University Press, 2014), p. 52. Whether such assumptions are appropriate in light of what arguably have been interferences with judicial independence in Hungary by the executive of that country is debatable (see Gyulavári, T. and Hős, N., “Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts”, (2013) 42(3) *Industrial Law Journal* 298).

⁷⁹ Broberg, M. and Fenger, N., *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2nd ed., 2014), p. 73.

⁸⁰ Case 61/65 *Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261, at 273.

⁸¹ Broberg and Fenger point out that the Court of Justice has failed to provide an abstract definition of what is meant by ‘court or tribunal’. The Court’s failure in this regard was criticised by Advocate General Colomer in his Opinion in Case C-17/00 *De Coster* [2001] ECR I-9445 (Broberg, M. and Fenger, N., *supra* n. 79, pp. 72-73).

⁸² Case 14/86 *Pretore di Salò v Persons Unknown* [1987] ECR 2545; Case 338/85 *Pardini* [1988] ECR 204; Case C-24/92 *Corbiau* [1993] ECR I-1277; Case C-54/96 *Dorsch Consult*

now a condition precedent that a body seeking to refer a question to the Court of Justice under Article 267 TFEU be independent. The Court in *Wilson*⁸³ and in *Pilato*⁸⁴ has made it clear that independence in this context means that such a body is protected against external pressures. Therefore, the Court has entrusted the application of its rulings to bodies that are free from interference by national executives and legislatures only. The scrutiny of the Court of Justice in this regard, allied with national law guarantees of judicial independence, is crucial to the Court's independence for the reason identified at the outset of this discussion: the Court's institutional independence would be a dead letter if the national courts and tribunals were not free from repercussions from legislative and executive powers at national level for simply referring questions and applying Court of Justice rulings faithfully.

Having identified the legal protections of the institutional independence of the CJEU, it is now necessary to discuss the protections of the security of the individual Judges that make up the Court of Justice.

2. Individual Judicial Security

There are a number of legal rules that guarantee the Judges of the CJEU security from repercussions where the CJEU delivers a decision that is contrary to the interests of one or more of its 'countervailing powers', or an individual Judge is perceived to be acting in such a manner. These legal rules are discussed hereafter under the following headings: (1) the significance of a set term in office and the procedure for removal from office; (2) the significance of judicial immunity; (3) the significance of judicial anonymity; and, (4) the significance of protections of salaries, privileges and other benefits.

[1997] ECR I-4961; Case C-516/99 *Schmid* [2002] ECR I-4573; Case C-53/03 *Syfait* [2005] ECR I-4609; Case C-506/04 *Wilson* [2006] ECR I-8613, which related to the meaning of "court or tribunal" in Article 9 of Directive 98/5/EC; Case C-109/07 *Pilato* [2008] ECR I-3503; Case C-517/09 *RTL Belgium* [2010] ECR I-14093. See generally, Broberg, M. and Fenger, N., *supra* n. 79, pp. 63-66; Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 52-62; Tridimas, T., "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure", (2003) 40 *Common Market Law Review* 9.

⁸³ Case C-506/04 *Wilson* [2006] ECR I-8613.

⁸⁴ Case C-109/07 *Pilato* [2008] ECR I-3503. This case related specifically to the definition of 'court or tribunal' in Article 267 TFEU. The Court applied the definition of the same term in Article 9 of Directive 98/5/EC set out in Case C-506/04 *Wilson* [2006] ECR I-8613.

a) A Set Term in Office and the Procedure for Removal from Office

Some of the more obvious normative protections the individual Judges enjoy against repercussions, or immediate repercussions at least, from the Court's 'countervailing powers' are the legal rules which determine the Judges' term in office and establish the procedures for removal from office.⁸⁵

Article 19(2) TEU provides that the Judges shall be appointed by common accord of the Member State governments "for six years".⁸⁶ Both Articles 19(2) TFEU and 253 TFEU also provide that retiring Judges may be reappointed. Articles 5 and 6 of the Statute provide for the only three ways in which a Judge's tenure can end before the expiration of the six-year term.⁸⁷ Article 5 provides:

"Apart from normal replacement, or death, the duties of a Judge shall end when he resigns...

Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties."

Article 6 of the Statute establishes the procedure for the removal of an individual Judge during his/her term of office:

"A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned."⁸⁸

⁸⁵ For a discussion of this issue in the American federal context, see Posner, R., *supra* n. 29, pp. 158-173.

⁸⁶ Article 253 TFEU further provides that the Judges shall be appointed "for a term of six years".

⁸⁷ Although it should be noted that pursuant to Article 7 of the Statute a Judge who is to replace a member of the Court whose term of office has not expired "shall be appointed for the remainder of his predecessor's term."

⁸⁸ It should be emphasised that pursuant to Article 281 TFEU, Title I (Articles 2-8) and Article 64 of the Statute may not be amended by the Parliament and Council using the ordinary legislative procedure. Article 6 RP further provides: "Where the Court is called upon, pursuant to Article 6 of the Statute, to decide whether a Judge or Advocate General no longer fulfils the requisite conditions or no longer meets the obligations arising from his office, the President shall invite the Judge or Advocate General concerned to make representations. The Court shall give a decision in the absence of the Registrar."

Therefore, apart from the ability of the Member State governments not to renew the term in office of a sitting Judge, there is no legal mechanism through which any of the Court's 'countervailing powers' can remove a Judge in any circumstance.⁸⁹ The Judges are guaranteed their six years in office once appointed barring death, resignation or removal. Removal, however, is not a matter for the Court's 'countervailing powers': the Court under Article 6 of the Statute retains sole jurisdiction over the process, and a Judge may only be removed from office by a unanimous decision of all the Judges and Advocates General of the Court, excluding the impugned Judge.⁹⁰ The grounds for removal of a Judge under Article 6 of the Statute are also limited⁹¹: (1) the Judge no longer fulfils the requisite conditions, or (2) the Judge no longer meets the obligations arising from his/her office. It should also be reiterated that by virtue of Article 281 TFEU, Article 6 of the Statute is entrenched in that the European Parliament and Council using the ordinary legislative procedure cannot amend it.

In summary, short of Treaty amendment, there is no *de jure* mechanism by which the Court's 'countervailing powers' may remove a Judge from office during his/her term.⁹² The realist analysis considers the extent to which this six-year term, given the spectre of non-reappointment at the end of it, provides actual security for the Judges.⁹³

⁸⁹ In the far flung regions of one's imagination, one could conceive of assassination or coercion to resign.

⁹⁰ This trial-by-one's-peers procedure was copied from the ICJ (Brown, L.N. and Kennedy, T., *supra* n. 47, p. 51). Wägenbaur has pointed out that this requirement of unanimity, due to the increase in numbers at the Court, requires a consensus of thirty-six persons (now thirty-nine, since the addition of three Advocates General), a fact which makes a unanimous decision "increasingly unrealistic" (Wägenbaur, B., *supra* n. 49, p. 24).

⁹¹ However, Wägenbaur is not incorrect in pointing out that these conditions are "rather vague" (Wägenbaur, B., *supra* n. 49, p. 23).

⁹² See Pollack, M., "Delegation, Agency, and Agenda Setting in the European Community", (1997) 51 *International Organization* 99, at 121.

⁹³ The six-year term in office and the Member States' control over re-appointment are also considered as accountability mechanisms in the formalist analysis of the legal rules (*infra* n. 414-n. 434).

b) Immunity

The Statute also insulates the Judges against another potential type of attack by ‘countervailing powers’: legal proceedings. Article 3⁹⁴ confers upon the Judges immunity from legal proceedings.⁹⁵ Immunity extends to Judges who have ceased to hold office, but only “in respect of any acts performed by them in their official capacity, including words spoken or written.”⁹⁶ However, pursuant to Article 3(2), the Court of Justice sitting as a full court may waive these immunities.⁹⁷ Article 3 of the Statute does not state the reasons for waiver of a Judge’s immunity, though Wägenbaur has opined:

“A Judge suspected of a criminal offence is likely to cause immunity to be waived, regardless of whether the offence is serious or not. It would seem that the ECJ’s discretionary power is rather limited, since in order to preserve the independence and image of the judiciary it can hardly afford to maintain the immunity of a Judge in case of tangible suspicions of criminal offence, which would furthermore amount to ignoring a request coming from the authorities of a Member States [sic], as the case may be. But it is less clear if this also applies to offences of a non-criminal nature.”⁹⁸

⁹⁴ Article 3 is a constituent provision of Title I of the Statute and therefore not amenable to amendment by the European Parliament and Council through the ordinary legislative procedure.

⁹⁵ Lasok has characterised the Judge’s immunity while in office as a total immunity (Lasok, K.P.E., *The European Court of Justice: Practice and Procedure* (London: Butterworths, 1994), p. 17). However, Wägenbaur takes the view that the immunity may only protect the Judge acting in his/her professional sphere as opposed to private sphere, although he does acknowledge the difficulty of separating the two (Wägenbaur, B., *supra* n. 49, p. 14). The immunity would appear to apply to all types of legal proceedings whether criminal, civil or administrative (Wägenbaur, B., *supra* n. 49, p. 14).

⁹⁶ Article 3 of the Statute. Article 3 further provides that Articles 11-14 and 17 of Protocol (No 7) on the Privileges and Immunities of the European Union shall apply to the Judges. Article 11(a) of Protocol (No 7) confers, subject to the Treaties, upon officials and other servants of the Union immunity “from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written.” Article 17 of Protocol (No 7), however, envisages that privileges and immunities may be waived: “Privileges, immunities and facilities shall be accorded to officials and other servants of the Union solely in the interests of the Union. Each institution of the Union shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union.”

⁹⁷ Wägenbaur rather reasonably assumes that this consideration will take place without the Judge concerned. He also points out that unlike the position where a Judge is being removed from the Court, unanimity is not required to waive immunity (Wägenbaur, B., *supra* n. 49, p. 15).

⁹⁸ Wägenbaur, B., *supra* n. 49, p. 15. From the wilder side of the imagination, this does, however, raise the spectre of a Member State fabricating or using trumped up charges against a Judge.

In summary, the Judges are protected against the use by ‘countervailing powers’ of legal proceedings against individual Judges as a repercussion for a decision or decisions against the interests of these powers.

c) Anonymity: Chambers, Quora and the Secrecy of Deliberations

It has been acknowledged widely that one of the elements of the Court’s procedure that has insulated individual Judges from the attention of ‘countervailing powers’ has been the requirement that the Court produce a collegiate decision, allied to the requirement that deliberations remain secret.⁹⁹ These rules ensure that no single Judge will ever have to take individual responsibility for a decision of the Court. The TFEU, the Statute and the Rules of Procedure provide for the various formations in which the Court may sit, ranging from a full Court, that is, all twenty-eight Judges; to a Grand Chamber, consisting of fifteen Judges; to a Chamber of five Judges or a Chamber of three Judges.¹⁰⁰ Article 17 of the Statute provides that decisions of the full Court shall only be valid if seventeen Judges are sitting; decisions of the Grand Chamber where eleven Judges are sitting; and, decisions of Chambers of five or three Judges where taken by three Judges. In all cases, Article 17 stipulates that an uneven number of Judges must take part in the deliberations. Accordingly, a decision will never be taken in a preliminary reference, or any proceeding for that matter, by fewer than three Judges.

As to the secrecy of deliberations, Article 339 TFEU provides that the members of Union institutions, which include the Judges of the Court of Justice:

“... shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.”¹⁰¹

⁹⁹ See, for instance, Burley, A.-M. and Mattli, W., *supra* n. 47, at 58; Solanke, I., “Diversity and Independence in the European Court of Justice”, (2008-2009) 15 *Columbia Journal of European Law* 89, at 92; Scheingold, S.A., *The Rule of Law in European Integration* (New Haven: Yale University Press, 1965), p. 28; Pollack, M., *supra* n. 92, at 121.

¹⁰⁰ Article 251 TFEU; Article 16 of the Statute; Article 11 RP.

¹⁰¹ Article 6(1) of the Code of Conduct provides: “After ceasing to hold office, Members shall continue to be bound by the duty of discretion.”

Further, Article 35 of the Statute provides that the Court's deliberations shall be and shall remain secret.¹⁰² Articles 32-35 RP provide in detail the procedures for deliberation.¹⁰³ In particular, Article 32(4) provides that "[t]he conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court."¹⁰⁴ As such, individual Judges are insulated from criticism since it is not possible to identify whether an individual Judge formed part of the majority or minority.¹⁰⁵ The realist analysis considers the extent to which this supposed anonymity may comfort the Judges.

d) Salaries, Privileges and Other Benefits

A potential avenue of attack for disgruntled 'countervailing powers' against the Court and its Judges might be the removal or reduction of salary or other benefits.¹⁰⁶ Notwithstanding any internalised 'law-conditioned' values of the Judges, the risk of impecunious judges to judicial independence should be obvious. Article 243 TFEU confers upon the Council power to set judicial salaries.¹⁰⁷ Regulation No 422/67/EEC regulates the Judges' salaries,

¹⁰² This is reiterated in Article 32(1) RP.

¹⁰³ Article 32(2) provides that only Judges who participated in a hearing and, where relevant, the Assistant Rapporteur responsible for the consideration of the case shall take part in the deliberations. Article 32(3) requires every Judge taking part in the deliberations to state his/her opinion and the reasons for it. Article 13 of the Statute and Article 17 RP allow for the appointment of Assistant Rapporteurs to assist the Judge Rapporteur. Assistant Rapporteurs would not be Judges, though Article 13(2) of the Statute requires those appointed to the office should be persons "whose independence is beyond doubt". To date, use has not been made of these provisions (see Wägenbaur, B., *supra* n. 49, pp. 28-29).

¹⁰⁴ It will be recalled that Article 2 of the Statute requires Judges when taking up their duties to take an oath in open court to, *inter alia*, "preserve the secrecy of the deliberations of the Court." The wording of the oath is contained in Article 4 RP (*supra* n. 63).

¹⁰⁵ Advocates General do not benefit from such anonymity. Nor do they have the ability to hide behind the deductive style of the Court's judgments. When one considers that several Advocates General have subsequently become Judges, this lack of anonymity may be a factor not only in influencing the Advocate General's Opinion, but also in identifying a former Advocate General's likely approach to decision-making if he/she subsequently is made a Judge.

¹⁰⁶ For a discussion of this issue in the American federal context, see Posner, R., *supra* n. 29, pp. 158-173.

¹⁰⁷ Article 243 TFEU provides: "The Council shall determine the salaries, allowances and pensions of the President of the European Council, the President of the Commission, the High Representative of the Union for Foreign Affairs and Security Policy, the Members of the Commission, the Presidents, Members and Registrars of the Court of Justice of the European Union, and the Secretary-General of the Council. It shall also determine any payment to be made instead of remuneration."

allowances and pensions in detail.¹⁰⁸ Article 1 of Regulation No 422/67/EEC guarantees the Judges their salaries while in office:

“From the date of taking up their duties until the last day of the month in which they cease to hold office, members of the Commission and members of the Court shall be entitled to a basic salary, family allowances and other allowances.”

Article 2(2) of Regulation No 422/67/EEC fixes the monthly salary of a Judge of the Court of Justice at 112.5% compared to the basic salary of an official of the European Communities on the third step of grade 16¹⁰⁹, “the most senior community official on the last step of his/her salary scale”, according to Brown and Kennedy.¹¹⁰ As of the 1st January 2015, pursuant to Article 66 of Regulation No 31/62/EEC, as amended¹¹¹, the basic monthly salary of an official on the third step of grade 16 was €18,517.81, meaning that the annual salary of a Judge was €249,990.44.¹¹² That judicial salaries at the Court are generous has been noted since the early history of the Court: Feld, writing in 1963, stated that salaries at the Court “exceed those normally paid in Continental Europe for such positions”¹¹³, adding that “their size can be assumed to bolster judicial independence.”¹¹⁴ Regulation No 422/67/EEC confers further pecuniary benefits upon the Judges.¹¹⁵ In addition to these pecuniary benefits, the Judges enjoy a number of immunities and privileges.¹¹⁶

¹⁰⁸ Regulation No 422/67/EEC, No 5/67/Euratom of The Council of 25 July 1967 determining the emoluments of the President and Members of the Commission, of the President, Judges, Advocates-General and Registrar of the Court of Justice, of the President, Members and Registrar of the General Court and of the President, Members and Registrar of the European Union Civil Service Tribunal. The Regulation has been amended on twenty-seven occasions, the latest being in 2012.

¹⁰⁹ The salary of the President of the Court of Justice is fixed at 138% and the salary of the Vice-President of the Court at 125% compared to the basic salary of an official of the European Communities on the third step of grade 16 (Article 2(2) of Regulation No 422/67/EEC, as amended).

¹¹⁰ Brown, L.N. and Kennedy, T., *supra* n. 47, p. 53, fn. 8. Judges are, therefore, paid the same amount as ordinary members of the Commission (see Article 2(1) of Regulation No 422/67/EEC).

¹¹¹ Regulation No 31/62/EEC laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community. The Regulation has been amended one hundred and thirty seven times, the latest amendment being in 2014.

¹¹² The annual salary of the President of the Court was, therefore, at the 1st January 2015, €306,654.93 and that of the Vice-President €277,767.15.

¹¹³ Feld, W., “The Judges of the Court of Justice of the European Communities”, (1963) 9 *Villanova Law Review* 37, at 51.

¹¹⁴ Feld, W., *supra* n. 113, at 51.

¹¹⁵ Article 3 provides that the Judges are entitled to family allowances and Article 4(1) entitles members of the Court to “a residence allowance equal to 15% of their basic salary.” Article

The foregoing demonstrates that the Judges currently enjoy generous remuneration and conditions of office, a fact that should contribute to their security. It is noteworthy, however, that there is no express constitutional protection of the Judges' salaries while they are in office, given that it is the Council which sets the Judges' salaries, currently fixed by way of a Regulation, which could be amended or replaced by the Council pursuant to Article 243 TFEU.¹¹⁷ There is, of course, the normative protection of Article 47 CFREU, which would invalidate any reduction of the salaries and other benefits of the Judges, if such a measure were considered an attack on judicial independence. The realist analysis considers the extent of the danger in real terms of the Council using its Article 243 TFEU power to exercise pressure on the Judges.

4(3) entitles the Judges to a monthly entertainment allowance amounting to €607.71, with the Vice-President of the Court entitled to €911.38 and the President of the Court entitled to €1,408.07. Article 4(3) further provides: "Presiding Judges of Chambers of the Court and the First Advocate-General shall in addition receive during their term of office a special duty allowance of €810.74 per month." Article 6 entitles a Judge of the Court to certain expenses when required in the course of his/her duties to travel away from the provisional seat of the Court. Article 7 entitles Judges who have ceased to hold office to a monthly transitional allowance for a period of three years after cessation of office, the amount of which ranges from forty percent to sixty-five percent of the relevant Judge's salary at the date on which he/she ceased being in office, the percentage being dependent on how long the Judge was in office. Article 8(1) confers upon Judges who have ceased to hold office the entitlement to "a pension for life payable from the date when they reached the age of sixty-five years." Article 8(2) allows for the drawing of the pension from age sixty, subject to the application of the coefficients provided for in that section. Article 9 provides how the amount of the pension is to be calculated. Article 15 entitles the surviving spouse and children dependent at the time of death of a Judge of the Court to whom pension rights have accrued at the time of his or death to a survivor's pension. Article 11 entitles the Judges of the Court to "to sickness, occupational disease, industrial accident and birth and death benefits under the social security scheme provided for in the Staff Regulations of Officials of the European Communities." Article 14 provides: "Where a member of ... Court dies during his term of office, the surviving spouse or dependent children shall be entitled, until the end of the third month following that in which death occurs, to the remuneration to which the member of the Commission or of the Court would have been entitled under Articles ... 3 and 4 (1)."

¹¹⁶ Article 3 of the Statute provides that Articles 11 to 14 and 17 of Protocol (No 7) on the Privileges and Immunities of the European Union shall apply to the Judges of the CJEU. Of most relevance to the present discussion is Article 12 of Protocol (No 7), which provides for the taxation of the salaries of officials and other servants of the Union. Article 12, therefore, exempts the Judges of the Court of Justice from national taxes on "salaries, wages and emoluments paid by the Union." Instead, pursuant to Article 12, the Judges are liable to a tax for the benefit of the Union on the salaries and emoluments paid by the Union. This tax is levied progressively with the highest rate being at forty-five percent. (http://ec.europa.eu/civil_service/job/official/index_en.htm) (last accessed at 10:08 on Thursday, the 17th March 2016). See also, Brown, L.N. and Kennedy, T., *supra* n. 47, p. 53.

¹¹⁷ Article 243 TFEU provides: "The Council shall determine the salaries, allowances and pensions of the President of the European Council, the President of the Commission, the High Representative of the Union for Foreign Affairs and Security Policy, the Members of the Commission, the Presidents, Members and Registrars of the Court of Justice of the European Union, and the Secretary-General of the Council. It shall also determine any payment to be made instead of remuneration."

Having discussed the legal protections of the institutional independence of the CJEU and of the security of the Judges of the Court of Justice, it is now necessary to undertake the second aspect of the formalist analysis: the identification of the rules that purport to ensure the accountability of the Court of Justice where it fails to adhere to the ‘legal steadying factors’.

III. Accountability of the Court of Justice to ‘Countervailing Powers’

There are a number of rules in the Union’s legal order which would allow some of the Court’s ‘countervailing powers’, namely, the European Parliament, the Council, the Member State governments and national courts and tribunals, a number of accountability mechanisms to hold the Court to account if it delivered rulings which were not within the ‘legal steadying factors’ or ‘judicially arguable’. These rules are discussed hereafter in the following categories: (1) the availability of court-destroying or court-harming measures through Treaty change and legislation; (2) the availability of override of CJEU decisions through Treaty change and legislation; (3) the availability of the judicial appointments and re-appointments processes to the Member State governments, and the short terms in office of the Judges; and, (4) the significance of the voluntary nature of participation in the Article 267 TFEU procedure for most national courts and tribunals.

As the discussion progresses, it will become apparent of course that these mechanisms could also, in theory, be utilised by these ‘countervailing powers’ to exert pressure on the Court and its Judges in a situation where the Court, although making decisions which are justifiable in a legal-doctrinal sense, are against the interests of a ‘countervailing power’ or ‘powers’. The realist analysis examines whether the ‘countervailing powers’ could use these legal rules in the latter situation.

1. Court-Destroying and Court-Curbing: Treaty Change and Legislation

The EU legal order contains within it sources of law which rank hierarchically, the Treaties and the CFREU being at the apex and, in descending order

thereafter, general principles of law, legislative acts, delegated acts and implementing acts.¹¹⁸ The CJEU is a creature of this order: it owes its existence in its present or any form to these sources. The protections afforded to the CJEU, which guarantee its institutional independence and the security of its Judges, owe their existence in the same way to the legal rules within the aforementioned legal sources. Moreover, each of these sources of law are amenable to repeal, replacement or amendment by the Court's 'countervailing powers'. The Treaties (including the CFREU) may be amended by way of the ordinary revision procedure established in Article 48 TEU, a procedure that is ultimately controlled by the Member States, and requires all Member States to ratify the amendments. This procedure could, in theory, be used to exert very significant pressure on the CJEU and/or its constituent courts.¹¹⁹ At present, Article 281 TFEU prevents the amendment by legislative means of Articles 2 to 8 and 64 of the Statute, meaning that the ordinary revision procedure in Article 48 TEU could be used by the Member States to, *inter alia*, remove the immunity of the Judges from legal proceedings¹²⁰ and transfer to the Court's 'countervailing powers' the jurisdiction to remove Judges.¹²¹ Short of Treaty change, there are numerous other legal avenues of attack to which the Court could be subjected.¹²² The foregoing demonstrates that notwithstanding legal

¹¹⁸ Craig, P. and de Búrca, *supra* n. 38, p. 105.

¹¹⁹ Article 48 TEU could be utilised, *inter alia*, to abolish the CJEU outright; reduce substantially the jurisdiction of the Court of Justice (by, for instance, abolishing the Article 267 TFEU preliminary reference procedure, or limiting the Court's jurisdiction to limited areas of law, or limiting the national courts and tribunals that may refer); increase the judicial powers of its 'countervailing powers' at its expense, remove the Article 47 CFREU protection of judicial independence in the Union's legal order, or repeal the CFREU outright; remove all references in the Treaties to the ECHR, alter the qualifications requirements for the Judges (the requirement of independence, for instance); reduce the Judges' term in office or remove from the Court its power to establish its own Rules of Procedure or increase the powers of the Court's 'countervailing powers' to amend the Statute.

¹²⁰ And/or remove the privileges and immunities to which the Judges by virtue of Article 3 of the Statute are entitled to under Articles 11 to 14 and 17 of Protocol (No 7).

¹²¹ And/or liberalise the grounds upon which a Judge may be removed.

¹²² The European Parliament and the Council could on a proposal from the Commission and after mere consultation with the Court use the ordinary legislative procedure to amend any of the provisions of the Statute save for Articles 2 to 8 and 64. This could allow profound interference with the Court's organisation and procedure. The Statute could be amended, possibly without the need for Treaty change, to abolish the requirement of secrecy of deliberations, require individual judicial opinions instead of the existing collegiate judgment, and/or alter the formations of the Court to allow one Judge sitting alone to hear and determine cases. The author says *possibly* without the need for Treaty change because there would be a number of arguments which could be made to the contrary in respect of each of the theorised amendments. Although the Treaties do not require the secrecy of deliberations, the oath taken by the Judges of the Court as set out in Article 2 of the Statute requires the Judges before taking up their duties to swear to uphold the secrecy of the deliberations of the Court. Article 2 as part of Title I of the Statute must, of course, pursuant to Article 281 TFEU, be amended

guarantees of the institutional independence of the CJEU and the security of individual Judges, the Treaties do allow theoretical legal avenues through which ‘countervailing powers’ could harm the Court or curb its power. The realist analysis considers the extent to which these avenues could be utilised in practice.

2. Override of the Decisions of the CJEU: Treaty Change and Legislation

It should be without controversy that the Court’s judgments form a source of law in the EU legal order. This is particularly obvious in the preliminary reference procedure where the Court’s rulings provide a determinative interpretation of Union law to be applied by the referring court or tribunal, and which owing to their *de facto* precedential value, should also be applied by all Member State courts and tribunals. Some of the Court’s ‘countervailing powers’ do, however, enjoy the power to override individual rulings by way of Treaty change or legislative acts, which rank above the Court’s decisions in the Union’s hierarchy of norms. The override of a ruling or series of rulings that would require Treaty change could be achieved by means of the Article 48 TEU ordinary revision procedure. The European Parliament and Council could effect override of other rulings, those not requiring Treaty change, through the joint adoption of regulations, directives or decisions, by way of the ordinary legislative procedure.¹²³ Of course, these procedures could conceivably be used

using the ordinary revision procedure in Article 48 TEU. A removal of the requirement to keep the deliberations of the Court of Justice in Article 35 of the Statute without amendment of the oath would create a conflict, which the Court of Justice could resolve in its own favour. The same observations apply to any attempt to add any requirement to the Statute that the Judges publish individual judgments. An amendment of the Statute to allow a Judge sitting alone to hear and determine cases could also run into difficulty with Article 251 TFEU, or at least one very literal interpretation thereof, which provides: “The Court of Justice shall sit *in chambers* or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union. When provided for in the Statute, the Court of Justice may also sit as a full Court.” (Emphasis added). The Council also, under Article 243 TFEU, enjoys the power to determine the salaries, allowances and pensions of the Judges, a power which could, in theory, be used to exert pressure on the Judges and compromise the Court’s independence. The Council and Parliament could similarly use their involvement in the determination of the Union’s five-year and annual budgets under Articles 312 and 314 TFEU respectively to deprive the CJEU of funding or reduce its funding as an external pressure. However, it must be reiterated that any legislative measure short of Treaty change which compromises the independence of the CJEU and its Judges would fall foul of Article 47 CFREU.

¹²³ See Articles 289 and 294 TFEU. Articles 289 and 294 TFEU provide that the European Parliament and Council act on a proposal of the Commission, which might in isolation imply that the Commission enjoys exclusive right of initiation. However, Article 241 TFEU affords the Council the power to impose significant pressure on the Commission to issue a proposal:

to reverse a ruling or rulings which are merely adverse to the interests of the relevant ‘countervailing powers’, or alternatively, to undo rulings of the Court which do not adhere to the ‘legal steadying factors’. The realist analysis considers the extent to which they are likely to be used in practice.

3. Appointment and Re-Appointment of Judges and Short Terms in Office

The method by which judges are selected for a court will be central to the institutional independence of that court.¹²⁴ Feld has pointed out reasonably, however, that the requirement of personal independence to obtain office as a Judge, and the rules and practices reinforcing this requirement, such as the oath, are “primarily programmatic exhortations and guidelines”¹²⁵ and that “they cannot assure a judge’s independence.”¹²⁶ It is for this reason that the practicalities around judicial selection are of such importance. *Prima facie*, there is cause for concern that the selection and nomination process for Judges does not ensure, or at least give the perception of, independence of the Court of Justice from the Member States. The first reason for such concern is the fact that the number of Judges is tied to the number of Member States and, what is more, Article 19(1) TEU specifies that the Court shall consist of one judge from each Member State.¹²⁷ This requirement creates a link between Judge and Member State, which undermines the perception of independence.¹²⁸ However,

“The Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons.” Craig and de Búrca state that the Council is “*de facto* the catalyst for many legislative initiatives.” (Craig, P. and de Búrca, G., *supra* n. 38, p. 36).

¹²⁴ Introducing a discussion on judicial independence at the nascent Court of Justice, Feld wrote: “...[T]he methods of selection have a significant bearing on the judges’ independence. Possibly, the problem of selection has caused more difficulty than any other in the staffing of international tribunals.” (Feld, W., *supra* n. 113, at 51). Indeed, the ECtHR Rights in *Bryan v United Kingdom* when listing the factors to be considered when determining whether a judicial body is independent pointed to the manner in which its members are appointed as one such factor (*Bryan v United Kingdom* (1995) 21 EHRR 342, para 37).

¹²⁵ Feld, W., *supra* n. 113, p. 51.

¹²⁶ Feld, W., *supra* n. 113, p. 51.

¹²⁷ The manifold possible interpretations of this requirement were discussed in Part One (n. 57- n. 62), in which it was concluded that each Member State has a right to nominate and have appointed a suitably qualified candidate (subject to the agreement of all Member States on the suitability of the nominee), the nationality of the appointee being irrelevant.

¹²⁸ The former President of the Court of Justice Skouris has indeed argued for the abolition of the link between the Judges and the Member States. (Skouris, V., „Höchste Gerichte an ihren Grenzen: Bemerkungen aus der Perspektive des Gerichtshofs der Europäischen Gemeinschafts“ in Hilf, M., Kämmerer, J.A. and König, D, *Höchste Gerichte an ihren Grenzen*, (Berlin: Duncker & Humblot, 2007), pp. 19-38 (cited by Kalbheim, J., “The Influence of the Members of the European Court of Justice on its Jurisprudence: An Empirical-

this link between Judges and Member States may be important in creating an impression that the Court represents all legal traditions of the EU.¹²⁹ Arnall has also suggested that the presence of one Judge for each Member State lends the Court legitimacy and insulates it from attack by Member States.¹³⁰

Notwithstanding the requirement that Judges appointed to the Court be independent and the presence of several additional rules and practices to reinforce this requirement, Member State control over the nomination and appointment of Judges has long been held an obstacle to full judicial independence.¹³¹ Article 19(2) TEU provides that the Judges of the CJEU “shall be appointed by common accord of the Member States...”, a formula that Article 253 TFEU repeats. This provision requires unanimity, meaning that one Member State could block another’s nominee.¹³² Apart from the involvement of the Article 255 TFEU Panel and the qualifications required by the Judges to take office in Article 253 TFEU, there are no rules or guidelines as to the procedure Member States should adopt when deciding on the identity of nominees.¹³³ There is often very little transparency in the nomination process at national level¹³⁴, and no information is made public regarding the Member States’ voting on nominees. Concerns have been expressed that it cannot be discounted that vacancies are not being used by governments “to reward allies, to compensate those who have been passed over for another post, to remove individuals from the glare of politically unwelcome publicity or

Statistical Analysis”, unpublished paper presented at the Annual Society of Legal Scholars Conference at the University of Nottingham, Friday, the 12th September, 2014)).

¹²⁹ In this regard, Lasok has pointed out: “It is ... advantageous that the legal systems of the member states should be fully represented on the bench, not merely in order to cope with the problem of understanding points of national law that may arise in a case, but also to give a balanced view of the legal traditions of the member states, particularly when dealing with questions concerning the principles of law on which the Treaties are based.” (Lasok, K.P.E., *supra* n. 95, p. 15).

¹³⁰ Arnall, A., *supra* n. 29, p. 24.

¹³¹ See, for instance, the early criticism by Scheingold, S.A., *supra* n. 99, pp. 28-35.

¹³² Arnall, A., *supra* n. 29, p. 20.

¹³³ Lasok, K.P.E., *supra* n. 95, pp. 13-14.

¹³⁴ In the UK, it would appear to be the Government that makes the selection, specifically the Foreign and Commonwealth Office (the advertisement, no longer available, posted in respect of the last UK vacancy on the Court in 2011 on the website of the Judicial Appointments Commission (JAC), made it clear that the JAC had no involvement in the recruitment process) (<http://jac.judiciary.gov.uk/about-jac/1569.htm>) (last accessed at 16:03 on Thursday, the 18th September, 2014). Nominations in Ireland also appear to be made by the Government without the involvement of the Judicial Appointments Advisory Board (JAAB). See the Annual Reports of the JAAB 2002-2014 (<http://www.jaab.ie/en/JAAB/Pages/WP08000099>) (last accessed at 10:24 on Thursday, the 17th March, 2016).

simply to influence the development of the case law.”¹³⁵ There have been rumours that Member States have blocked the nominations of other Member States¹³⁶, but fears have also been voiced that the common accord of the Member States is a mere rubber-stamping process.¹³⁷ The European Parliament had long lobbied for involvement in the selection of candidates, resolving in 1995 in the lead up to the Intergovernmental Conference that its assent should be required for all judicial appointments.¹³⁸ The Court in its own report on the functioning of the TEU opposed the Parliament’s suggestion, the spectre of American-style confirmation hearings seeming to loom large in its views.¹³⁹ In the end, it was the suggestion put forward in the final report of the Discussion Circle on the Court of Justice set up by the Convention on the Future of Europe¹⁴⁰ that was implemented by the Treaty of Lisbon: appointments to the Court would remain by common accord of the Member States, but the Member States would be required to consult with an advisory panel prior to making appointments. Article 255 TFEU now provides for the establishment of this panel and its composition, and Article 253 TFEU provides that the Member States must consult with it prior to appointing Judges.

Despite concerns about continued Member State control over the appointments process¹⁴¹, the process may not have in itself any effect on the decision-making of the Judges once in office. If there are sufficient guarantees of institutional

¹³⁵ Arnall, A., *supra* n. 29, p. 23. See also, Kenney, S.J., “Breaking the Silence: Gender Mainstreaming and the Composition of the Court of Justice”, (2002) 10 *Feminist Legal Studies* 257, at 260.

¹³⁶ Arnall, A., *supra* n. 29, p. 23.

¹³⁷ Scheingold, in 1965: “According to Article 32, appointment of the judges and advocates is to be ‘by agreement among the governments of the member states.’ In fact, it is common knowledge that each member government is free to choose its own appointees; the ‘agreement among the governments’ has become a formality.” (Scheingold, S.A., *supra* n. 99, pp. 28-29).

¹³⁸ A4-0102/95 Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference – Implementation and development of the Union, point 23(ii) (OJ 1995 C151/56). See also, Arnall, A., *supra* n. 29, p. 21.

¹³⁹ Arnall, A., *supra* n. 29, p. 21. See also, Kapteyn, P.J.G., “Reflections on the Future of the Judicial System of the European Union after Nice”, (2001) 20 *Yearbook of European Law* 173, at 189-90.

¹⁴⁰ CONV 636/03, para 6.

¹⁴¹ Although a recent study on the operation of the Article 255 TFEU Panel has asserted that it has had “a chilling effect on a number of national nominations [and] also indirectly influenced the selection processes in some Member States, thus limiting arbitrariness.” (Dumbrovský, T., Petkova, B. and Van Der Sluis, M., “Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States”, (2014) 51(2) *Common Market Law Review* 455, at 455). See also, de Waele, H., “Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union” in Bobek, M. (ed.), *supra* n. 4, p. 24, pp. 44-47; Sauv , J.-M., “Selecting the European Union’s Judges: The Practice of the Article 255 Panel” in Bobek, M. (ed.), *supra* n. 4, p. 78.

independence and security for the Judges once installed, it should not be possible for a Member State to exert such pressure on a Judge that he/she could be coerced into abandoning adherence to the ‘legal steadying factors’. There is, of course, the fact that an individual Judge may sympathise with the interests of or feel a sense of loyalty or gratitude to his/her patron, but there are numerous other ‘extra-legal steadying factors’ which may militate against this potential problem.¹⁴² Therefore, however lacking the initial appointments process may be in terms of creating a perception of independence at the Court, this initial appointments process does not in itself allow the Member States an opportunity to hold the Judges accountable.

Of more use to the Member States as a measure of accountability is the re-appointments process, made possible by the six-year terms that the Judges serve pursuant to Article 19(2) TEU and Article 253 TFEU.¹⁴³ Not only is a Judge’s term in office six years, but pursuant to Article 253 TFEU and Article 9 of the Statute, half of the Judges are replaced alternately every three years.¹⁴⁴ The Treaties and Statute, therefore, empower the Member States acting collectively to interfere significantly and relatively frequently with the Court’s composition to the extent that if a concerted effort were made the Court’s independence could be compromised seriously. Llewellyn was opposed to short terms in office as a method of providing judicial accountability to the “felt needs of the law-consumer.”¹⁴⁵ In the specific context of the Court of

¹⁴² For instance: the ‘law-conditioned’ nature of the vast majority of the Judges and the membership of most of their number in a transnational elite of European lawyers, group decision and the secrecy of deliberations, institutional environment, etc. Recent unpublished research indicates, however, that the policy preferences of Advocates General and Judges does impact on their behaviour at the Court, in voting in the case of the former and in citations in the case of the latter: see Frankenreiter, J., “Are Advocates General Political? Policy preferences of EU member state governments and the voting behavior of members of the European Court of Justice”, Working paper, ETH Zurich, Center for Law and Economics, 11th May 2016; Frankenreiter, J., “The Politics of Citations at the ECJ: Policy preferences of EU Member State governments and the citation behavior of members of the European Court of Justice”, Working paper, ETH Zurich, Center for Law and Economics, 11th May 2016.

¹⁴³ By way of comparison, the term of office for a Judge of the ECtHR is a non-renewable nine years (Article 23(1) ECHR). Pursuant to Article 13(1) of the Statute of the ICJ, Judges of the ICJ are elected also to a term of nine years, which is, however, renewable.

¹⁴⁴ The second paragraph of Article 253 TFEU provides: “Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.” The first paragraph of Article 9 of the Statute provides: “When, every three years, the Judges are partially replaced, one half of the number of Judges shall be replaced. If the number of Judges is an uneven number, the number of Judges who shall be replaced shall alternately be the number which is the next above one half of the number of Judges and the number which is next below one half.”

¹⁴⁵ Llewellyn, K.N., *supra* n. 2, pp. 33-34, fn. 24.

Justice, much concern has been conveyed regarding the Judges' six-year term and the process of re-appointment.¹⁴⁶ There can be no doubt that the re-appointments process in the Treaties and the Statute could in theory be used not only to ensure the accountability of the Judges and their adherence to the 'legal steadying factors', but also to undermine seriously the Court's independence and the security of its Judges. The realist analysis considers whether, pragmatically, it could be used in both or either ways.

4. The Division of Competences in Article 267 TFEU: The Preliminary Reference as a Voluntary Procedure

One of the more noteworthy aspects of the Article 267 TFEU preliminary reference procedure is that it is largely a procedure with which national courts and tribunals engage voluntarily. Pursuant to Article 267 TFEU, it is only Member State courts or tribunals "against whose decisions there is no judicial remedy under national law" that must refer a question on the interpretation of the Treaties or the validity of and interpretation of EU acts to the Court.¹⁴⁷ National courts and tribunals subject to this duty include the highest national courts of general jurisdiction, such as the UK Supreme Court, and the highest courts within specialised jurisdictions, such as the Dutch Tariefcommissie voor Belastingzaken¹⁴⁸, as well as lower courts where the court in question has the power to grant leave to appeal its decisions and is minded to refuse such

¹⁴⁶ Early criticism came from Scheingold: "It is at once apparent that six-year renewable terms do not offer the members of the Court the secure tenure usually associated with high judicial office. There is no evidence that the governments have tried to take advantage of the leverage of limited tenure to influence the decisions of the Court. However, the system does enable the member states to retain ultimate and arbitrary power over the Court. Since no provision is made for dissenting opinions, the anonymity which attaches to judgments offers considerable protection to individual judges. However, the Court itself could be easily – and rather unobtrusively – decimated by dissatisfied national governments." (Scheingold, S.A., *supra* n. 99, p. 28). (See also, Brown, L.N. and Kennedy, T., *supra* n. 47, pp. 50-51; Arnall, A., *supra* n. 29, pp. 22-23). Rasmussen was in no doubt that the framers of the Treaties created the Judges' six-year terms in office to prevent judicial activism of the sort associated with the US Supreme Court, the Justices of which enjoy life tenure: "The draftsmen deliberately sought to avoid EC-judicial terms of office long enough to create the sense of security and aloofness which might nurture policymaking ambitions on the part of the Members of the Court (that is, in the image of a US Supreme Court, known to the drafters). The Supreme Court's activism matured ... under protection of life tenure. The only reasonable interpretation on this is that the Member States did not wish to deprive themselves of the possibility of intervening in the course of the Court's jurisprudence by means of the appointment-process if signs of anything of the kind emerged." (Rasmussen, H., *supra* n. 3, p. 214.)

¹⁴⁷ If it considers that a decision is necessary to enable it to give judgment in the proceedings before it.

¹⁴⁸ Case 26/62 *Van Gend en Loos* [1963] ECR 1. See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, p. 95.

leave.¹⁴⁹ However, the case-law of the Court of Justice has established that there are situations where the duty to refer relevant questions under the third paragraph of Article 267 TFEU will not apply: firstly, where the question is “materially identical with a question which has already been the subject of a preliminary ruling in a similar case”¹⁵⁰; secondly, where the *acte éclairé* exception applies¹⁵¹; and, thirdly, where the *acte clair* exception applies.¹⁵² Moreover, where a national court or tribunal to which the duty to refer applies breaches this duty, it has been acknowledged that there will be difficulties in enforcing the obligation.¹⁵³

Apart from the third paragraph of Article 267 TFEU, there is another legal rule established by the Court’s case-law that may have the effect of compelling a national court or tribunal to refer a question: in the case of *Foto-Frost*¹⁵⁴, the Court ruled that it enjoys the sole jurisdiction to declare EU acts invalid. The result is that any national court or tribunal that believes that such an act is invalid, and the question as the validity or invalidity of the act in question must be resolved for the determination of the main proceedings, is compelled to refer.

Other than the situations provided in the foregoing paragraphs, a national court or tribunal is not compelled to refer, even if it takes the view that a decision on the question is necessary to enable it to give judgment in the proceedings before it. The second paragraph of Article 267 TFEU clearly expresses the decision to refer as a voluntary one:

¹⁴⁹ *Obiter* in Case 6/64 *Costa v ENEL* [1964] ECR 585. See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, p. 95.

¹⁵⁰ Joined Cases 28/62 to 30/62 *Da Costa en Schaake and Others* [1963] ECR 31, at 38. See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, p. 98.

¹⁵¹ This arises “where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical” (Case 283/81 *CILFIT* [1982] ECR 3415, para 14). See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 98-99.

¹⁵² This arises where “the correct application of [Union] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved” and the national court or tribunal is “convinced that the matter is equally obvious to the courts of other Member States and the Court of Justice.” (Case 283/81 *CILFIT* [1982] ECR 3415, para 16). See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 99-101.

¹⁵³ See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 102-104.

¹⁵⁴ Case 314/85 *Foto-Frost* [1987] ECR 4199.

“Where such a question is raised before any court or tribunal of a Member State, that court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”¹⁵⁵

The largely voluntary nature of engagement with the preliminary reference procedure described heretofore is of relevance to the accountability of the Court to one of its ‘countervailing powers’, specifically, national courts and tribunals. The development of the Article 267 TFEU procedure by the Court of Justice and the importance of the cooperative relationship between the Court and national courts or tribunals for its functioning is discussed below¹⁵⁶, but at this juncture it is sufficient to state that the Court’s effectiveness in advancing the effectiveness and uniformity of EU law is dependent on the continuation of this cooperation.¹⁵⁷ The Court can only continue in its role at the apex of the EU legal order as long as it continues to receive references from national courts and tribunals. Due to the fact that the procedure is for most referring courts and tribunals a voluntary one, national courts and tribunals not subject to the duty to refer could simply vote with their feet and not make references if the Court of Justice began to rule outside of the bounds of the ‘legal steady factors’. This possibility would appear to be one through which certain national courts and tribunals could ensure that the Court adhere to the ‘legal steady factors’. The realist analysis considers the potential for the use of this accountability mechanism.

¹⁵⁵ Emphasis added. Broberg and Fenger in discussing this largely voluntary aspect of national judicial engagement with the Court of Justice by means of the preliminary reference procedure have pointed to the fact that there are alternative avenues through which Member State courts and tribunals could obtain guidance on the interpretation of Union law. Firstly, the authors raise the possibility of national courts and tribunals asking the Commission for guidance on questions on competition and state aid law, pursuant to Regulation 1/2003 and the Commission’s Notice on the co-operation between the Commission and courts of the EU member States in the application of Articles 81 and 82 EC [now Articles 101 and 102 TFEU]. Secondly, Broberg and Fenger point to the fact that there is scope for national courts or tribunals to seek assistance from the Commission when deciding disputes involving EU law other than that of competition or state aid law. However, in the latter circumstance, on the rare occasions where it has arisen, the Commission has confined its assistance to guidance on factual issues and has generally abstained from providing interpretations of EU law. (Broberg, M. and Fenger, N., *supra* n. 79, pp. 16-23).

¹⁵⁶ *Infra* n. 182-n. 210.

¹⁵⁷ President of the Court Lenaerts writing extra-judicially has argued that the Court’s ‘internal legitimacy’ depends upon it refraining from encroaching upon the prerogatives of national courts (Lenaerts, K., *supra* n. 31, at 1305).

IV. Interim Conclusion: A Normative Balance of Independence and Accountability?

From the formalist analysis of the legal rules, this author concludes that there are a wide range of rules in the EU legal order that purport to establish and maintain the institutional independence of the CJEU:

- Article 47 CFREU provides a rights-based protection of judicial independence and impartiality in the Union’s legal order, which applies to the Court of Justice. The Treaties also confer exclusively upon the Court the most significant judicial powers of the Union’s legal order, including the delivering of preliminary rulings and place the Court at the apex of that legal order. As a consequence, the decisions of the Court are final and not subject to veto by any political¹⁵⁸ or other judicial power¹⁵⁹;
- The placing of the Court’s seat in Luxembourg also serves to create a perception of institutional separateness. Traditionally, the location of the Court has been considered as insulating the Court somewhat from political and media attention, as well as creating an *esprit de corps* among its members and officials;
- The requirement of independence is also a condition precedent for appointment to the Court as a member, and loss of such independence is a ground for removal from office. This requirement of independence is also reinforced by several other legal rules, such as those that relate to the oath taken by Judges before taking office and those that relate to the maintenance of impartiality;
- The Union’s legal order also attempts to protect the Court against court-destroying or court-curbing measures by its ‘countervailing powers’ by

¹⁵⁸ Leaving aside the possibility of override by Treaty change or legislation.

¹⁵⁹ The one exception perhaps to this observation is the assertion by some national courts of a power to review the competence of the Court of Justice to make certain rulings, of which the position taken by German *Bundesverfassungsgericht* is the most obvious example. See Bast, J., “Don’t Act Beyond your Powers: The Perils and Pitfalls of the German Constitutional Court’s *Ultra Vires* Review”, (2014) 15 *German Law Journal* 167.

entrenching in the Treaties, CFREU and in Title I (Articles 2-8) of the Statute the most important normative protections of its independence and of the security of its Judges;

- In the specific context of the preliminary reference procedure, the existence of judicial independence in the national legal orders of the Member States and the Court's reception of references from independent national bodies only is an important aspect of institutional independence since it enables the faithful application of the Court's rulings at national level without external pressure being brought to bear by national legislative and executive arms of government.

There are a wide range of rules that purport to establish and maintain the individual security of the Court's Judges:

- Once appointed, the Judges enjoy a set term of six years in office which may end only upon death, resignation or removal;
- Moreover, the procedure for removal is controlled by the Court itself and removal is a remote possibility: all of the Judges and Advocates General, excepting of course the member whom it is proposed to remove, must vote for removal and the grounds for removal are limited;
- The Judges are also conferred with immunity from legal proceedings for acts performed by them in their official capacity, which insulates them and their decisions against attack through criminal, civil or administrative proceedings;
- The legal rules concerning the Court's organisation and procedure ensure that no one Judge will ever be individually responsible and create relative anonymity for the Judges: cases are decided by at least three Judges, who produce a collegiate decision, with their deliberations remaining secret. Finally, the Judges are conferred with generous salaries, privileges and other benefits that one may assume reinforce their security.

However, it has also been evident from the formalist legal analysis that the existing rules in the Union legal order extend to the Court's 'countervailing powers', at least as a matter of pure legalism, significant power over the Court:

- Each of the legal rules which purport to protect the Court's independence and the security of its Judges are capable of removal, replacement or alteration by these 'countervailing powers', specifically, the Member State governments, the Council and the European Parliament. It is true that most of the protections outlined above are constitutionalised or entrenched in the sense that they are contained in the Treaties, CFREU and Title I (Articles 2-8) and Article 64 of the Statute, and are therefore subject to the ordinary revision procedure in Article 48 TEU, which requires that all Member States ratify such amendments. However, these protections are not entrenched in the same way as Articles 1 and 20 of the German *Grundgesetz*.¹⁶⁰ There is, therefore, for instance, scope for the Member State governments to take court-destroying or court-curbing measures such as abolition of the Court or reduction of its competences;
- Short of Treaty change, there are also alternative ways in which the 'countervailing powers' could utilise their legal powers to curb the Court's power or impose pressure on its individual Judges. The Council and European Parliament could after a proposal from the Commission and mere consultation with the Court amend, by way of the ordinary legislative procedure, any provision of the Statute other than Title I (Articles 2-8) and Article 64, which could amount to significant external interference with the Court's organisation and procedure. Moreover, the Council and Parliament enjoy significant financial powers in respect of the Court and its Judges: Article 243 TFEU empowers the Council to determine the salaries, allowances and pensions of the Judges, and Articles 312 and 314 TFEU confer upon the

¹⁶⁰ Article 79(3) of the *Grundgesetz* (Basic Law) provides that Articles 1 and 20 may not be amended or removed. Article 1, *inter alia*, acknowledges human rights. Article 20 describes the basic characteristics of the State: that it is a federal republic, democratic, social state, with a separation of powers and respect for the rule of law in which the people are sovereign.

Council and Parliament the power to determine the multiannual and annual budgets of the Union and its institutions, including the CJEU;

- As regards the Court's substantive decisions, some of the 'countervailing powers' are empowered by the legal order to override those decisions: as aforementioned, Article 48 TEU allows the Member States acting unanimously to amend the Treaties, and Articles 293-299 TFEU confer law-making functions on the Council and European Parliament exclusively;
- Leaving aside the use of law-making powers by the Court's 'countervailing powers', the relatively short term of office of the Judges and the Member States' control over re-appointments present an opportunity to the Member States to effectively dismiss Judges;
- Finally, and specifically in the context of the preliminary reference procedure, Article 267 TFEU has created a procedure in which participation is for most national courts and tribunals voluntary. Consequently, the Court relies in most cases upon national courts or tribunals to elect to make a reference, meaning that in such cases a court or tribunal could exercise its discretion not to refer and attempt to resolve the interpretation of Union law itself, an approach which could be damaging to not only the effectiveness and uniformity of EU law, but also to the Court's own effectiveness in fulfilling its role.

What is apparent from the above is that notwithstanding the many legal guarantees and protections of the Court's independence and the security of its Judges, the rules afford such apparent leeway to the 'countervailing powers' to undermine the Court's independence that it is impossible to conclude from this formalist analysis of the rules alone whether there is a balance between independence and accountability. That a formalist analysis of the legal rules concerning a court's jurisdiction is not determinative in this way has been recognised by others¹⁶¹. Dean Rusk, for instance, is reputed to have said:

¹⁶¹ Chalmers has also pointed to legal rules that promote independence and accountability at the Court and observed: "This agnosticism offers little guidance as to the balance between independence and accountability." (Chalmers, D., *supra* n. 4, p. 53).

“[T]he limits on court power in government are not set by either constitutional theory or discoverable law, but rather by the tolerance of the countervailing powers.”¹⁶²

It therefore remains to test the extent to which the ‘countervailing powers’ may wield their powers to destroy, harm, curb and/or hold accountable the Court in practice. ‘Countervailing powers’ may have the *opportunity* and the *motive* to take such measures against the Court of Justice.¹⁶³ The effectiveness of such measures, if they are to constrain the future action of the Court, will “correlate positively with the difficulty of implementing them.”¹⁶⁴ A number of questions remain open therefore. For instance, to what degree is it likely that the Member States would utilise Treaty change to undermine the Court of Justice or override its decisions? Likewise, to what degree could Member States use the reappointments process to hold Judges accountable, and has the process been used this way in the past? It is for this reason that the realist analysis that follows is necessary.

E. Independence of and Accountability to ‘Countervailing Powers’: A Realist Analysis

I. Introduction

The foregoing analysis of the legal rules which purport to guarantee institutional independence and judicial security has demonstrated that the Court of Justice, as a constituent of the CJEU, and its Judges enjoy many guarantees which should prevent it and its Judges from having external pressure placed upon them to such a degree that they could be compelled to abandon adherence to the ‘legal steadying factors’. Conversely, however, the same analysis demonstrated that there are many legal avenues open to the Court’s

¹⁶² Neely, R., *How Courts Govern America* (New Haven: Yale University Press, 1981), p. 216 (cited by Rasmussen, H., *supra* n. 3, p. 17).

¹⁶³ Carrubba, C.J. and Gabel, M., “Do Governments Sway European Court of Justice Decision-Making? Evidence from Government Court Briefs”, Institute for Federalism & Intergovernmental Relations, IFIR Working Paper No. 2005-06, pp. 5-7, in the context of Member State governments.

¹⁶⁴ Garrett, G., Kelemen, R.D. and Schulz, H., “The European Court of Justice, National Governments, and Legal Integration in the European Union”, (1998) 52(1) *International Organization* 149, at 150.

‘countervailing powers’ which could allow these powers not only to hold the Court and its Judges accountable for decisions not adhering to the ‘legal steadying factors’, but also to damage to varying degrees the Court’s independence, and the security of its Judges. The preceding formalist analysis was not, in itself, therefore, able to provide any conclusions as to how this tension between independence and accountability would play out in reality. It is clear that the ‘countervailing powers’ possess, theoretically, very wide-ranging powers over the Court. The questions that remain, however, are to what extent the ‘countervailing powers’ are in reality free to utilise these mechanisms against the Court, and, more specifically, in which circumstances would the ‘countervailing powers’ utilise them? The analysis that follows, the realist analysis, seeks to answer these questions by examining the extent to which the ‘countervailing powers’ may take measures against the Court in each of the following four ‘scenarios’:

- Where the Court delivers rulings which adhere to the ‘legal steadying factors’ and are not adverse to the interests of any of its ‘countervailing powers’ (‘scenario 1’);
- Where the Court delivers rulings which adhere to the ‘legal steadying factors’, but are adverse to the interests of one or more of its ‘countervailing powers’ (‘scenario 2’);
- Where the Court delivers rulings which do not adhere to the ‘legal steadying factors’, but are not adverse to the interests of any of its ‘countervailing powers’ (‘scenario 3’);
- Where the Court delivers rulings which do not adhere to the ‘legal steadying factors’ and are adverse to the interests of one or more of its ‘countervailing powers’ (‘scenario 4’).¹⁶⁵

¹⁶⁵ It should be acknowledged that these ‘scenarios’ are intended as rather broad categories and that the Court of Justice will, of course, have a range of interpretative outcomes within and across these ‘scenarios’. The four interpretative outcome ‘scenarios’ are intended merely as a rather blunt instrument to demonstrate the extent to which the Court of Justice is at once free to reach decisions which are legally justifiable, and is also sufficiently accountable that it must do so, or is at least disincentivised significantly from doing otherwise.

It will be recalled that the hypothesis to be tested in Part Two is that the Court resides in a territory between sufficient independence to deliver rulings which adhere to the ‘legal steadying factors’ without fear of ‘countervailing power’ reprisal and sufficient accountability to those ‘powers’ that it may not suspend this adherence without repercussion. If this hypothesis were to be correct, then one would expect the examination of the above scenarios to reveal the following:

- The ‘countervailing powers’ will be unable to utilise, or will encounter significant difficulty in utilising, accountability mechanisms, legitimate or illegitimate¹⁶⁶, where the Court’s rulings adhere to the ‘legal steadying factors’, even where adverse to ‘countervailing power’ interests (‘scenarios 1’ and ‘2’);¹⁶⁷
- The accountability mechanisms will be utilised where the Court delivers rulings which do not adhere to the ‘legal steadying factors’ (‘scenarios 3’ and ‘4’).¹⁶⁸

To assist with this examination, this author considers the main political science accounts of the relationships between the Court and its ‘countervailing powers’ and the development of the preliminary reference procedure, particularly, neofunctionalism and intergovernmentalism. Armed with an understanding of the *de facto* relationship dynamics between the Court and its ‘countervailing powers’, conclusions are drawn as to the extent to which the Court is independent and its Judges secure, as well as to the extent to which its ‘countervailing powers’ may hold the Court accountable.¹⁶⁹ Before moving on

¹⁶⁶ It emerges in the realist analysis that there are, as well as the legal accountability mechanisms identified in the formalist analysis, a number of illegitimate ways in which the ‘countervailing powers’ could harm the Court of Justice. In order for the Court to enjoy sufficient independence, it must also be insulated against these attacks.

¹⁶⁷ It should be acknowledged from the outset that the ‘countervailing powers’ should not possess the motivation to take any action against the Court for ‘scenario 1’ rulings.

¹⁶⁸ It might be assumed that the ‘countervailing powers’ might not possess the motivation to take action against the Court for ‘scenario 3’ rulings. However, it is questioned below (*infra* n. 510-n. 516) whether such rulings, particularly when made on a plurality of occasions can ever be in accordance with the interests of ‘countervailing powers’.

¹⁶⁹ Kelemen undertook a similar analysis in a 2012 article in which he theorised the extent to which the Court is insulated from a variety of “court curbing” mechanisms where it “overstep[s] the boundaries that countervailing powers or the public are willing to accept...” (Kelemen, R.D., “The Political Foundations of Judicial Independence in the European Union”, (2012) 19(1) *Journal of European Public Policy* 43, at 43). Though Kelemen’s conclusions

to this analysis, however, it is first necessary to consider the identity of the ‘countervailing powers’.

II. Identifying the Court’s ‘Countervailing Powers’

Before presuming to discuss the dynamics of the Court’s relationship with its ‘countervailing powers’, thought must first be given as to how these ‘countervailing powers’ should be identified. This author has borrowed the concept of a ‘countervailing power’ from Rasmussen.¹⁷⁰ Rasmussen at no stage provides an abstract definition of a ‘countervailing power’, or an exhaustive list of the Court’s ‘countervailing powers’. In respect of the former, it would seem, given Rasmussen’s adoption of the term from Rusk, that a ‘countervailing power’ of a court is any actor that can place limits on its power.¹⁷¹ In respect of the latter, however, Rasmussen appears to confirm that other Union institutions or Member State governments, including the judicial branches of these governments are ‘countervailing powers’ of the Court.¹⁷² From the formalist analysis, it is apparent that the Commission, the European Parliament, the Council, the Member State governments and national courts and tribunals are capable *de jure*, whether alone or in coordination with another of the ‘powers’, of placing limits on the Court’s power. It is equally apparent, therefore, that each of these institutional actors is a ‘countervailing power’.

There are other actors that while not having a concrete legal avenue for placing limits on the Court could conceivably do so by interfering with its effectiveness and, in particular, with the preliminary reference procedure. It has been mentioned previously that the procedure is doctrinally a largely voluntary one:

chime with those in this dissertation, in comparison to the analysis undertaken in this part of the dissertation, Kelemen’s analysis is terse and, in many respects, incomplete. The analysis undertaken in Part Two is more comprehensive in terms of its consideration of the potential court-curbing mechanisms that could be adopted. Moreover, Part Two, unlike Kelemen’s analysis accepts that counter-Court measures may also operate as accountability mechanisms where the Court abandons adherence to the ‘legal steadying factors’, and seeks to theorise the availability of these mechanisms in response to the four ‘scenarios’ of rulings described above. Furthermore, Kelemen’s analysis considers only rulings adverse to Member State and public interests, and not those adverse to the interests of supranational actors, such as the Commission and European Parliament, and subnational actors, such as national courts and tribunals.

¹⁷⁰ It is drawn “indirectly” from Rasmussen, because he draws the concept from Dean Rusk as quoted by Richard Neely (Neely, R., *supra* n. 162, p. 216, cited by Rasmussen, H., *supra* n. 3, p. 17).

¹⁷¹ Neely, R., *supra* n. 162, p. 216. Cited by Rasmussen, H., *supra* n. 3, p. 17.

¹⁷² Rasmussen, H., *supra* n. 3, p. 7.

national courts and tribunals by and large have a choice as to whether to refer. Just as the Court of Justice depends on national courts and tribunals to refer where no duty to refer exists, the Court depends also on national and legal persons to litigate EU law matters¹⁷³ and, perhaps to motion national courts and tribunals to make references.¹⁷⁴ By extension, the Court depends similarly on the lawyers representing these litigants. National litigants and lawyers must by this token be considered ‘countervailing powers’, since their withdrawal from the use of the preliminary reference procedure would limit significantly the Court’s effectiveness and influence.¹⁷⁵

One should also consider commentators on the Court’s work such as politicians, academics and the media, all of which have the capacity to form opinion on its legitimacy and the correctness or quality of its decisions. While these commentators could conceivably mobilise the aforementioned institutional actors to take measures against the Court, it would be an exaggeration to list them among the Court’s ‘countervailing powers’ since there is no legal mechanism through which they can limit the Court’s power.¹⁷⁶

In summary, for the purposes of this part of the dissertation the following actors, in no particular order, are considered ‘countervailing powers’:

¹⁷³ The important role of litigants in legitimising the preliminary rulings of the Court of Justice through voluntary implementation has been noted by Nyikos (Nyikos, S.A., “The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment”, (2003) 4 *European Union Politics* 397). In this connection, it may be necessary to differentiate litigants who are ‘repeat-players’ from those who are ‘one-shotters’, the former being of more influence (see Granger, M.-P., “States as Successful Litigants before the European Court of Justice: Lessons from the ‘Repeat Players’ of European Integration”, (2006) 2 *Croatian Yearbook of European Law and Policy* 27).

¹⁷⁴ The question as to whether to refer remains, of course, a matter solely for the court or tribunal, regardless of the wishes of the parties in the main proceedings (Case 283/81 *CILFIT* [1982] ECR 3415, para 9). The national court or tribunal may also make a reference of its own motion. Nevertheless, litigants play an important role in the process: if one or more of the parties requests the national court or tribunal to make a reference, it may open to the court or tribunal an option which it had not previously considered. Moreover, the national court or tribunal not minded to make a reference may feel the need to justify this decision and may find difficulty doing so in the process, perhaps even to the extent that the court relents and makes the reference.

¹⁷⁵ As to the importance of litigants to the Court of Justice in the preliminary reference procedure, see Nyikos, S.A., *supra* n. 173; as to the importance of national lawyers to the power and prestige of the Court of Justice, see Schermers, H., “Special Foreword”, (1990) 27 *Common Market Law Review* 637.

¹⁷⁶ That said academic commentators have played a very important role in legitimising the approach of the Court of Justice. The role of EU law professors in bolstering the legitimacy of the Court has been noted by Schermers, H., *supra* n. 175, and Burley, A.-M. and Mattli, W., *supra* n. 47, at 59.

- The Member State governments;
- The Council (the European Council and the Councils of Ministers);
- The European Parliament;
- The Commission;
- National courts and tribunals¹⁷⁷;
- National litigants and lawyers.

The paragraphs that follow, with a view to testing the aforementioned hypothesis, consider the extent to which the Court is independent from and accountable to the above-named ‘countervailing powers’ in practice.

III. A Realist Appraisal of the Independence-Accountability Balance at the Court of Justice: The *De Facto* Likelihood and Extent of ‘Countervailing Power’ Measures against the Court of Justice

1. ‘Scenario 1’: Adherence to the ‘Legal Steadying Factors’ and Substantively Acceptable to all of the ‘Countervailing Powers’ of the Court of Justice

An adjudicative approach to rulings that adheres to the ‘legal steadying factors’ and ensures substantive acceptability of outcome for all of the Court’s ‘countervailing powers’ may be imagined to serve as the gold standard of adjudication for both purely legal as well as pragmatic reasons.

¹⁷⁷ A brief comment may also be made about the relationship of the Court of Justice with the ECtHR. At present, the decisions of the Court of Justice are not open to review by the ECtHR. However, Article 6(2) TEU provides that the EU shall accede to the ECHR. Once this accession has taken place, the CJEU “will no longer be the final arbiter of the lawfulness of EU action with human rights.” (Craig, P. and de Búrca, G., *supra* n. 38, p. 420).

a) The Normative Preference for ‘Scenario 1’: Legalism

As a matter of pure legalism, there is on the one hand the duty of the CJEU to “ensure in the interpretation and application of the Treaties the law is observed”¹⁷⁸, and, on the other, the principle of sincere mutual cooperation, which requires the Union and the Member States “in full mutual respect, [to] assist each other in carrying out tasks which flow from the Treaties.”¹⁷⁹ The normatively preferable adjudicative outcome should, therefore, where possible, be one which accords with the ‘legal steadying factors’, while at the same time ensuring harmony with the ‘countervailing powers’.¹⁸⁰ In choosing an interpretative outcome in practice, however, the achievement of a balance may become difficult, if not impossible, to achieve. Even if these purely doctrinal reasons are not in themselves sufficient to ensure this approach, there may be pragmatic motivations that disincentivise the Court from taking another approach.

b) Pragmatic Preference for ‘Scenario 1’: Political Science

A preliminary ruling which accords with ‘scenario 1’ consists, of course, of two characteristics: (1) adherence to the ‘legal steadying factors’; and, (2) not being adverse to the interests of any ‘countervailing powers’. For pragmatic reasons, it may be argued that the Court will seek, where possible, to achieve an outcome that accords with both components. For political scientists, particularly neofunctionalists, as will become evident below, it is these

¹⁷⁸ Article 19(1) TEU. Current President of the Court Lenaerts equates this duty to a duty to uphold the rule of law: Lenaerts, K., *supra* n. 31, at 1306-1307.

¹⁷⁹ Article 4(3) TEU. Article 13(2) TEU provides also that the institutions of the Union “shall practice sincere mutual cooperation”.

¹⁸⁰ President of the Court Lenaerts has confirmed this in his extra-judicial writings: “[The Court] is constantly seeking to strike the balance imposed by the rule of law among the different interests at stake in a multilayer system of governance.” (Lenaerts, K., *supra* n. 31, at 1304). Lenaerts divides legitimacy into ‘external’ and ‘internal legitimacy’, the former of which requires the Court to confine its role to interpreting and applying the law, and not intruding into the political process, and the latter of which requires, *inter alia*, sound legal reasoning (Lenaerts, K., *supra* n. 31, at 1305-1306). The Court’s aim of achieving both implies a preference for ‘scenario 1’ rulings, although it does not discount ‘scenario 2’ rulings. Lenaerts demonstrates also the Court’s deference to the EU legislature (Lenaerts, K., *supra* n. 31, at 1310-1326). See also, Lenaerts, K., “The Court’s Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice” in Adams, M., de Waele, H., Meeusen, J. and Straetmans, G., *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart, 2015), p. 13. See generally, Micklitz, H.-W. and de Witte, B. (eds.), *The European Court of Justice and the Autonomy of the Member States* (Cambridge: Intersentia, 2012).

pragmatic reasons, and not pure legalistic reasons¹⁸¹ or internalised value-based reasons, which motivate the Court to adhere to the ‘legal steadying factors’. This dissertation, in contrast, sees these ‘steadying factors’ as working in an interconnected manner: first and foremost, the Court has a duty to deliver rulings that respect the normative character of ‘legal doctrine’, a duty that may be reinforced by internalised values of its Judges; second, this duty is reinforced by the Court’s pragmatic self-interest, since its rulings to be *effective* must be perceived as *legitimate*, that is, be justified by way of some connection with ‘legal doctrine’.

aa) Pragmatic Preference for Adherence to the ‘Legal Steadying Factors’

There are a number of competing political science theories that have sought to explain the phenomenon of European integration and more particularly, the role of the Court of Justice in this process vis-à-vis its ‘countervailing powers’. The most significant of these theories historically have been neofunctionalism and intergovernmentalism.¹⁸²

¹⁸¹ Many commentators on the Court of Justice such as Burley and Mattli, and Rasmussen have pointed to the dominance of a legalistic approach to assessment of the Court’s decisions by EU law scholars (Burley, A.-M. and Mattli, W., *supra* n. 47, at 42; Rasmussen, H., *supra* n. 3, pp. 34-38). This legalistic approach to the study of the Court “denies the existence of ideological and sociological influences on the Court’s jurisdiction” (Burley, A.-M. and Mattli, W., *supra* n. 47, at 45). Shapiro has stated that this approach presents “the case law [of the Court] as the inevitable working out of the correct implications of the constitutional text...” (Shapiro, M., “Comparative Law and Comparative Politics”, (1980) 53 *Southern California Law Review* 538, cited by Burley, A.-M. and Mattli, W., *supra* n. 47, at 45).

¹⁸² These are, of course, not the only two accounts of the process. While neofunctionalism and intergovernmentalism stand in opposition to one another in that neofunctionalism perceives supranational institutions as the primary drivers of integration, and intergovernmentalism perceives supranational institutions, such as the Court of Justice, as agents of the Member States, the newer theory of multi-level governance, takes account of “the wide range of actors and institutions involved at different levels in lawmaking and policy-making in the European Union.” (Craig, P. and de Búrca, G., *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 5th ed., 2011), p. 3). However, multi-level governance may be seen as a theory of governance rather than a theory of integration (even if it does have implications for integration). (Craig, P., “Integration, Democracy, and Legitimacy” in Craig, P. and de Búrca, G. (eds.), *The Evolution of EU law* (Oxford: Oxford University Press, 2nd ed., 2011), p. 21). Given that more sophisticated accounts of neofunctionalism such as that of Burley and Mattli take full account of the integrative role of subnational actors, it may argued that this ‘third way’ is a reaction to intergovernmentalism, rather than being in opposition to neofunctionalism.

(1) Neofunctionalism

Neofunctionalism¹⁸³ presents the Court as a self-interested actor, whose decisions and pattern of behaviour can be understood as motivated by a desire to enhance its own power and significance.¹⁸⁴ The neofunctionalist account of integration holds that its drivers are supranational and subnational actors, i.e. those actors situated above and below the Member State governments.¹⁸⁵ In the specific context of legal integration, it has been argued that the Court and the Commission¹⁸⁶ have served as the supranational actors driving legal integration, along with national courts and tribunals, as well as litigants and national lawyers, who have served as the integrative subnational actors.¹⁸⁷ The element common to neofunctionalist theories in terms of explaining why these supra- and subnational actors have engaged in this process is self-interest.¹⁸⁸ The self-interest of national courts and tribunals, particularly that of lower courts and tribunals, has been triggered through their empowerment by the Court of Justice.¹⁸⁹ The self-interest of national lawyers and litigants has been

¹⁸³ The original neofunctionalist account of European integration was that of Haas, although Haas saw the language of economics rather than that of law as, using the terminology of Burley and Mattli, the ‘mask’ which rendered integration apolitical (Haas, E.B., *The Uniting of Europe* (Stanford: Stanford University Press, 1958)). See Burley, A.-M. and Mattli, W., *supra* n. 47 for an account of neofunctionalist theories on European legal integration. See also, Stone Sweet, A. and Brunell, T.L., “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community”, (1998) 92 *American Political Science Review* 63; Alter, K., “The European Court’s Political Power”, (1996) 19 *West European Politics* 458; Alter, K., *supra* n. 48; Golub, J., “The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice”, (1996) 19 *West European Politics* 360.

¹⁸⁴ Burley, A.-M. and Mattli, W., *supra* n. 47, at 54-55.

¹⁸⁵ Burley, A.-M. and Mattli, W., *supra* n. 47, at 54.

¹⁸⁶ Burley and Mattli have stated that the Court of Justice uses the Commission as a “political bellwether”, looking to the Commission’s position as an indicator of the political acceptability of a particular result or line of reasoning to the Member States. (Burley, A.-M. and Mattli, W. *supra* n. 47, at 71). This account chimes with Judge Pescatore’s recognition of the Commission as “auxiliary of justice” (Pescatore, P., *The Law of Integration: Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Leiden: A.W. Sijthoff, 1974), p. 80).

¹⁸⁷ Burley, A.-M. and Mattli, W., *supra* n. 47, at 58-59.

¹⁸⁸ Burley and Mattli have summarised this cogently: “The glue that binds this community of supra- and subnational actors is self-interest.” (Burley, A.-M. and Mattli, W., *supra* n. 47, at 60).

¹⁸⁹ The so-called ‘judicial empowerment’ thesis. This judicial empowerment thesis originates with legal scholars, most notably Weiler (Weiler, J.H.H., “The Transformation of Europe”, (1991) 100(8) *Yale Law Journal* 2403). Judge Mancini’s extra-judicial writings may also be seen as a fairly candid admission of the Court’s ‘courting’ of the national courts (Mancini, G.F., *supra* n. 56) (see Burley, A.-M. and Mattli, W., *supra* n. 47, at 62). However, it was perhaps Judge Pescatore who was the first to recognise the phenomenon in writing (Pescatore, P., *supra* n. 186, pp. 90-92). This thesis is demonstrated well by the ruling of the Court of Justice in *Cartesio* (Case C-210/06 *Cartesio* [2008] ECR I-9641), in which the Court ruled that although national legal systems may allow for an appeal of a lower court decision to refer, it

triggered by giving individual litigants a “personal stake” in EU law, through the granting of access to the Court, and through the creation of individually enforceable rights.¹⁹⁰ The empowerment of the national courts and individual litigants, and their lawyers, it is argued, has increased the Court’s effectiveness in terms of its perceived legitimacy and its ability to have its rulings implemented effectively in the Member States. Burley and Mattli have referred to this process of empowerment as “reciprocal empowerment”: anything which enhances the effectiveness of EU law raises the Court’s prestige and power.¹⁹¹ In accordance with the neofunctionalist account, the reciprocal empowerment of the Court of Justice and the national courts, as well as national lawyers and litigants, has taken place at the expense of the Member State governments’ power.¹⁹²

A key component of this reciprocal empowerment, and parallel disempowerment of the Member States, has been the Court’s utilisation of the preliminary reference procedure.¹⁹³ In 2015, nearly sixty-six percent of the cases completed by the Court were preliminary rulings, as opposed to the eleven percent, which were direct actions.¹⁹⁴ The dominance of the preliminary reference procedure must be contrasted with the position of procedures such as

remains solely for the referring court to determine whether a reference is necessary, and what the terms of the Order for Reference should be. (See Broberg, M, and Fenger, N., *supra* n. 79, pp. 328-329).

¹⁹⁰ Burley, A.-M. and Mattli, W., *supra* n. 47, at 60-62.

¹⁹¹ Burley, A.-M. and Mattli, W., *supra* n. 47, at 64.

¹⁹² Burley, A.-M. and Mattli, W., *supra* n. 47, at 54. That it is the Member States that the Court has considered its chief ‘countervailing power’ is, as Burley and Mattli have pointed out, evident from the writings of Judge Everling, who has placed emphasis on the tension between the Member States and the Union (Everling, U., “The Member States of the European Community Before Their Court of Justice”, (1984) 9 *European Law Review* 219) (see Burley, A.-M. and Mattli, W., *supra* n. 47, at 42). This conclusion echoes Stein’s earlier legalist study of the influence of Member State briefs before the Court of Justice in eleven cases of constitutional importance, such as those on direct effect and supremacy, in which he found that none of the Member States that intervened had supported the ultimate decisions of the Court, while the Court’s decision had accorded with the Commission’s submissions in nine of the cases: Stein, E., *supra* n. 56. For a table of the cases and the positions taken by each of the parties, see p. 25 of the same article.

¹⁹³ “In practice, the Article 177 [now Article 267 TFEU] procedure has provided a framework for links between the Court and subnational actors – private litigants, their lawyers, and lower national courts.” (Burley, A.-M. and Mattli, W., *supra* n. 47, at 58). See also Judge Pescatore’s account of the importance of the preliminary reference procedure in establishing a practical means of cooperation between the Court of Justice and the national courts and tribunals (Pescatore, P., *supra* n. 186, pp. 98-100).

¹⁹⁴ 404 preliminary rulings were completed in 2015 out of a total of 616 cases completed. Seventy direct actions were completed in the same year. (Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2016), p. 79).

the Articles 258 and 259 TFEU infringement procedures and the Article 263 judicial review procedure, all of which appear to have been born equally in the Treaties.¹⁹⁵ Article 267 TFEU, however, has become the primary procedure through which national laws are in a *de facto* sense reviewed judicially for compatibility with EU law.¹⁹⁶ The effect has been to allow national courts and individual litigants the power to challenge national measures, a power that would originally have appeared to reside with the Commission under Article 258 TFEU and the Member States under Article 259 TFEU only, transforming the Member State citizenry and courts into watchdogs of national compliance with EU law.¹⁹⁷ Of course, it has not escaped the notice of scholars that this power has not been extended to individual litigants where they seek to review the legality of measures of the EU institutions (assumed to be integrative in nature).¹⁹⁸ in one of the Court's earliest decisions, *Plaumann & Co v Commission*¹⁹⁹, it erected significant barriers to access to the Court for non-privileged applicants under Article 263 TFEU.²⁰⁰ However, it should be noted

¹⁹⁵ Burley and Mattli describe the Article 177 (now Article 267 TFEU) procedure as an “afterthought” (Burley, A.-M. and Mattli, W., *supra* n. 47, at 58).

¹⁹⁶ *De facto* because Article 267 TFEU does not permit the Court of Justice to interpret national law, a matter which is the sole preserve of the Member States. The role of the Court of Justice is limited to interpreting EU law or deciding on its validity. However, that the Court of Justice effectively decides on the validity of national measures has been acknowledged by Judge Mancini: “It bears repeating that under Article 177 national judges can *only* request the Court of Justice to interpret a Community measure. The Court never told them they were entitled to overstep that bound: in fact, whenever they did so – for example, whenever they asked if national rule A is in violation of Community Regulation B or Directive C -, the Court answered that its only power is to explain what B or C actually mean. But, having played lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the Court usually went on to indicate to what extent a *certain type* of national legislation can be regarded as compatible with that measure. The national judge is thus led hand in hand to the door; crossing the threshold is his job, but now a job no harder than child’s play.” (Mancini, G.F., *supra* n. 56, at 606).

¹⁹⁷ See Alter, K., *supra* n. 48, pp. 133-135.

¹⁹⁸ See Burley, A.-M. and Mattli, W., *supra* n. 47, at 60; Rasmussen, H., “Why is Article 173 Interpreted Against Private Plaintiffs?”, (1980) 5 *European Law Review* 112.

¹⁹⁹ Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.

²⁰⁰ Article 263 TFEU creates distinctions between privileged applicants, quasi-privileged applicants and non-privileged applicants. The privileged applicants listed in the second paragraph of Article 263 TFEU enjoy an automatic right of review; they are: the Member States, the European Parliament, the Council and the Commission. The quasi-privileged applicants enjoy a qualified right to bring proceedings under Article 263 TFEU. Pursuant to the third paragraph of Article 263 TFEU quasi-privileged applicants may only bring proceedings “for the purpose of protecting their prerogatives.” The quasi-privileged applicants, in accordance with the third paragraph of Article 263 TFEU, are the Court of Auditors, the European Central Bank and the Committee of the Regions. All other applicants are non-privileged applicants. The fourth paragraph of Article 263 TFEU sets out the circumstances in which a non-privileged applicant may bring proceedings: “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

that Article 267 TFEU allows individual litigants an indirect route to challenge the legality of EU acts, a route that has not been restricted to the same extent.²⁰¹ The neofunctionalist theory of conscious empowerment at supra- and subnational level provides a compelling argument as to the Court's motivations in its differing treatment of these procedures. Article 258 TFEU involves a supranational institution, the Commission, suing a Member State, and Article 259 TFEU involves one Member State suing another. Neither procedure allows for the involvement of subnational actors, save perhaps the national lawyers representing the Member States, assuming that they are not themselves government officials. Article 263 TFEU will generally involve a Member State or a Union institution suing another EU institution, although there is some narrow scope for individuals to sue if they can meet the direct and individual concern test, as interpreted very narrowly in *Plaumann & Co v Commission*.²⁰² Even in the limited situations in which an individual does have *locus standi* under Article 263 TFEU, the dynamic is bilateral: individual versus EU institution. The preliminary reference procedure, in contrast, brings into play a whole host of subnational actors: national courts and tribunals, two or more private national litigants and their national lawyers. The result is an increase in the perceived legitimacy and effectiveness of the Court's rulings: rulings that are adverse politically are not decisions from a supranational court on high; rather they are rulings that are applied by the national courts. A disgruntled Member State government may conceivably refuse to comply with the Court's Article 258 and 260 TFEU judgments without causing constitutional turmoil within its own borders, particularly if the judgment is unpopular. However, in order to forego compliance with a preliminary ruling that its own national courts have applied faithfully, a Member State government will have to ignore the jurisdiction of its own courts.²⁰³ The insistence of the Court of Justice in cases such as *Pilato*²⁰⁴ that references be made by independent courts and tribunals only makes a great deal of sense when this is considered.

²⁰¹ That said, the Court of Justice in the *TWD* case restricted access to the Article 267 TFEU preliminary procedure for the purposes of questioning the validity of an EU act where the matter could have been raised by a person who had *locus standi* to bring Article 263 TFEU proceedings and had been aware of the matter within the limitation period for an action pursuant to that provision (Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Germany* [1994] ECR I-833).

²⁰² Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.

²⁰³ Alter, K., *supra* n. 48, at 122-123.

²⁰⁴ Case C-109/07 *Pilato* [2008] ECR I-3503.

That the Member States have been marginalised somewhat by this process of reciprocal empowerment is not to say, however, that they are powerless completely. Burley and Mattli see the national governments as playing a “creatively responsive” role: Member State governments are the holders of ultimate political power and may accept, sidestep, ignore or sabotage the decisions of federal authorities.²⁰⁵ However, according to the neofunctionalist account, the Member State governments have largely been unable to wield their political power against the Court. This inability, according to Burley and Mattli, has been the result of the Court’s framing of decisions with political significance in the language of law.²⁰⁶ This has allowed the creation and perpetuation of the ‘judicial myth’ that Rasmussen has written about: that the Court is practising law rather than politics.²⁰⁷ The Member State governments, and indeed one may assume other ‘countervailing powers’, are unable to wield their political power against the Court as long as it retains its adherence to the law. Burley and Mattli have described this phenomenon in the following terms:

“At a minimum, the margin of insulation necessary to promote integration requires the judges themselves appear to be practising law rather than politics. Their political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning.”²⁰⁸

Therefore, the Court as a self-interested rational actor has an interest in maintaining fidelity to the ‘legal steadying factors’, since it is this adherence that protects it against attack by its ‘countervailing powers’.²⁰⁹ There are of

²⁰⁵ Burley, A.-M. and Mattli, W., *supra* n. 47, at 54.

²⁰⁶ Burley, A.-M. and Mattli, W., *supra* n. 47, at 69-73. Again, the use of the preliminary reference procedure has been important in this regard. Burley and Mattli have summarised this significance cogently: “The increased use of Article 177 [now Article 267 TFEU] shifted the vanguard of Community law enforcement (and creation) to cases involving primarily *private* parties. It thus further removed the Court from the overtly political sphere of direct conflicts between member states, or even between the Commission and member states. The political implications of private legal disputes, while potentially very important, often require a lawyer’s eye to discern.” (Burley, A.-M. and Mattli, W., *supra* n. 47, at 72).

²⁰⁷ Rasmussen, H., *supra* n. 3, pp. 34-38.

²⁰⁸ Burley, A.-M. and Mattli, W., *supra* n. 47, at 44.

²⁰⁹ “[L]aw functions both as mask and shield. It hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere. In specifying this dual relationship between law and politics, we also uncover a striking paradox. Law can only perform this dual political function to the extent it is accepted as law. A ‘legal’ decision that is transparently ‘political,’ in the sense that it departs too far from the principles and methods of the law, will invite direct political attack. It will thus fail both as mask and shield. Conversely, a court seeking to advance its own political agenda must accept the independent constraints of legal reasoning, even when such constraints require it to reach a

course normative reasons as well as other ‘extra-legal steadying factors’ which cause the Court to maintain this adherence. However, the threat of counter-Court political action by ‘countervailing powers’ acts as an ‘extra-legal external steadying factor’ which reinforces adherence to the ‘legal steadying factors’. In this respect, it should be noted that Burley and Mattli, unusually for political scientists, while viewing law as a mask, recognise that adherence to substantive law (‘legal doctrine’) and the methodological constraints imposed by legal reasoning (‘known doctrinal techniques’) serve as a constraint on the Court’s discretion. In fact, their language on the constraining effect of the law and doctrinal techniques²¹⁰ echoes closely Llewellyn’s views on those same matters.²¹¹

(2) Intergovernmentalism

If neofunctionalism takes the view that the Member States have been unable to prevent the drive of the supranational and subnational actors towards further legal integration, proponents of intergovernmentalism²¹² take a view which is diametrically opposed²¹³: namely, that the Court is an agent of the Member

result that is far narrower than the one it might deem politically optimal.” (Burley, A.-M. and Mattli, W., *supra* n. 47, at 73).

²¹⁰ “Their political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning.” (Burley, A.-M. and Mattli, W., *supra* n. 47, at 44).

²¹¹ “[T]he deciding should strive to remain moderately consonant with the language and also with the spirit of some part of that body of doctrine.” (Llewellyn, K.N., *supra* n. 2, p. 20).

²¹² For intergovernmentalist perspectives of European legal integration, see Garrett, G. and Weingast, B.R., “Ideas, Interests and Institutions: Constructing the European Community’s Internal Market” in Goldstein, J. and Keohane, R.O. (eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca: Cornell University Press, 1993), p. 173; Garrett, G., “The Politics of Legal Integration in the European Union”, (1995) 49 *International Organization* 171; Garrett, G., “International Cooperation and Institutional Choice: The European Community’s Internal Market”, (1992) 46(2) *International Organization* 533.

²¹³ In their originally-stated forms at least. There has in recent years been some convergence in the theories as neofunctionalists have recognised the extent of Member State influence over the Court of Justice and intergovernmentalists have acknowledged to a greater degree the level of autonomy enjoyed by the Court (Mattli, W. and Slaughter, A.-M., *supra* n. 7, at 178). The fact that the two theories remain useful outline accounts of the Court’s role is demonstrated in the more recent statistical studies seeking to underpin both as competing accounts (Carrubba, C.J., Gabel, M. and Hankla, C., “Judicial Behavior under Political Constraints: Evidence from the European Court of Justice”, (2008) 102(4) *American Political Science Review* 435; Stone Sweet, A. and Brunell, T.L., “How the European Union’s Legal System Works – and Does Not Work: Response to Carrubba, Gabel and Hankla”, (2010) *Faculty Scholarship Series* – paper 68). The latter paper was subsequently published in truncated form in 2012: Stone Sweet, A. and Brunell, T.L., “The European Court of Justice, State Noncompliance, and the Politics of Override”, (2012) 106(1) *American Political Science Review* 204. Part Two refers hereafter to the unpublished paper, which is referenced by the authors in the published version, since the former contains a qualitative analysis of case-law as well as an empirical analysis.

States and operates under Member State control.²¹⁴ The intergovernmentalist theory of European legal integration has been summarised neatly by Granger:

“[Intergovernmentalists] take the view that, overall, the Court acts consistently with (powerful) Member States’ preferences, within the limits allowed by legal reasoning. This is so because governments have sufficient means of control over the Court (e.g., technique of political appointment, imposition of budgetary restrictions, curtailment or limitations of the Court’s powers or jurisdictions, reversal of adverse judicial decisions through Treaty or legislative amendment, limitation of judicial discretion through more restrictive drafting of legal instruments, etc.)”²¹⁵

Garrett, both alone and with Weingast, has presented the main arguments in favour of the intergovernmentalist account of European legal integration.²¹⁶

Garrett and Weingast present the Member States as a group of actors “wishing to engage in stable cooperation” in the complex supranational environment of the EU.²¹⁷ Attributed to the Member States is a desire to construct “institutions that monitor the behaviour of participants, identify transgressions, and apply the general rules of the game to the myriad unanticipated contingencies.”²¹⁸

Garrett and Weingast suggest that without the existence of a European legal system, compliance with the set of general rules would not be high.²¹⁹

According to this account, the Member States have delegated authority to the Court to ensure the creation and maintenance of a system of legal enforcement of the legal rules.²²⁰ According to Garrett and Weingast, if this delegation of authority is to be in the interests of EU members, “the Court must faithfully implement the spirit of the internal market rules to which they agreed.”²²¹ The intergovernmentalist disagrees with the fundamental premise of the

²¹⁴ Interestingly, Posner in his discussion of external constraints on judging in the American federal context utilises the principal-agent analogy also, although he does admit some difficulty in identifying the principal to the courts’ agent (Posner, R., *supra* n. 29, p. 126).

²¹⁵ Granger, M.-P., *supra* n. 173, at 32.

²¹⁶ *Supra* n. 212.

²¹⁷ Garrett, G. and Weingast, B.R., *supra* n. 212, p. 197.

²¹⁸ Garrett, G. and Weingast, B.R., *supra* n. 212, p. 197.

²¹⁹ Garrett, G. and Weingast, B.R., *supra* n. 212, pp. 197-198.

²²⁰ See also, Craig, P., “Competence and Member State Autonomy: Causality, Consequence and Legitimacy” in Micklitz, H.-W. and de Witte, B. (eds.), *supra* n. 180, pp. 9-34. Alter puts forward a compelling argument that throws the assertion of the intergovernmentalists that the Member State governments delegated this power to the Court of Justice voluntarily. Alter argues that the Treaty of Rome in fact weakened the enforcement capabilities of supranational actors such as the Court and Commission comparable to those enjoyed under the ECSC. The Court has, according to this view, acquired its powers in a manner not envisaged or supported by the Member State governments. (Alter, K., *supra* n. 48, at 127-128).

²²¹ Garrett, G. and Weingast, B.R., *supra* n. 212, p. 199.

neofunctionalist that the Court acts in a manner that furthers its own preferences rather than those of the Member States.²²² On the contrary, the intergovernmentalist views the Court as attuned to the political positions of the Member States due to its awareness of its vulnerability to attack from the Member States if its decisions do not remain within “an area of acceptable latitude” to the Member States.²²³ While it is accepted by Garrett and Weingast that the opprobrium of individual Member States will not make the Court vulnerable to such attack, the authors take the view that a threat to the Court’s authority could arise where its decisions run counter to an interest of such salience to such a significant number of Member States that legislative override, whether by qualified majority voting or unanimity, as the case requires, would be achievable.²²⁴ The existence of this threat therefore acts as a constraint on the Court, which must endeavour to anticipate the outer-bounds of political acceptability of its decisions and remain within these bounds in order to maintain its authority and independence.²²⁵

Garrett and Weingast’s intergovernmentalist account of the role and power of the Court vis-à-vis the Member State governments does not in as explicit a manner as Burley and Mattli’s neofunctionalist account examine the extent to which ‘legal doctrine’ and accepted doctrinal techniques constrain the Court: there is, as such, no express recognition of the normative character of ‘legal doctrine’. Rather, the intergovernmentalist account appears to view judicial decisions in terms of their political, rather than legal legitimacy. However, implicit within the intergovernmentalist account is a conflation of political legitimacy with legal legitimacy: it would appear that in order for a judicial decision to be politically acceptable, it must as a prerequisite remain within the outer-limits of ‘legal doctrine’ and acceptable doctrinal techniques. Hence,

²²² Garrett, G. and Weingast, B.R., *supra* n. 212, pp. 199-200.

²²³ Garrett, G. and Weingast, B.R., *supra* n. 212, p. 201.

²²⁴ Garrett, G. and Weingast, B.R., *supra* n. 212, pp. 201-202.

²²⁵ Garrett, G. and Weingast, B.R., *supra* n. 212, p. 201. The intergovernmentalist viewpoint has found legal scholarly support from Beck, who has argued that an ‘extra-legal steadying factor’ in the legal reasoning of the Court is judicial deference in areas of constitutional, political and budgetary sensitivity to Member States. (Beck, G., *supra* n. 47, pp. 350-390). Beck when referring to Member States is referring to both national governments and national courts (p. 350). Like the intergovernmentalists, Beck sees the reasons for this deference as relating to the Court’s vulnerability vis-à-vis its ‘countervailing powers’: “The principal reasons for deference are national political, especially constitutional sensitivities over particular issues, the possible budgetary implications or in combination with either, a risk of non-compliance by Member States, especially their constitutional courts.” (p. 355).

Garrett and Weingast's insistence that the Court must implement faithfully the spirit of the rules of the internal market²²⁶ and Granger's assertion that intergovernmentalism holds that the Court of Justice decides in line with the Member States' preferences "within the limits allowed by legal reasoning."²²⁷ Seen as such, the intergovernmentalist like the neofunctionalist sees the authority of the Court of Justice as linked inextricably to its adherence to the 'legal steadying factors'. Accordingly, the accountability of the Court to the Member States by virtue of its position as agent for the Member States limits it to decision within the 'legal steadying factors'. This has been recognised more explicitly in Garrett's later work with Kelemen and Schulz, in which the authors, seeking to abandon the neofunctionalism-intergovernmentalism dichotomy in favour of a more balanced and empirical approach based on game theory, recognise that "the Court's legitimacy is contingent on its being seen as enforcing the law impartially by following the rules of precedent."²²⁸

(3) Interim Conclusion

The foregoing discussion may be synthesised as follows:

- It is apparent that there is a fundamental disagreement between neofunctionalists and intergovernmentalists as to the identity of the ultimate drivers of European legal integration. The neofunctionalists take the view that it is the Court and the Commission, as supranational actors, and the national courts and individual national litigants and their lawyers, as subnational actors, who have been the driving force for legal integration, a process which has taken place at the expense of Member State governments, and against which the Member State governments have to a very great extent been powerless. The intergovernmentalists, conversely, take the view that the promotion of European integration has been at the behest of the Member State governments, who despite having a range of powers to attack the Court's authority, have chosen not to because, ultimately, there is a consensus among the Member States that the internal market is a utility

²²⁶ Garrett, G. and Weingast, B.R., *supra* n. 212, p. 199.

²²⁷ Granger, M.-P., *supra* n. 173, at 32.

²²⁸ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 174.

and that a more integrated European legal system is necessary to establish and maintain compliance of the members of the club with its rules.

- Both theories, as a result, offer different accounts of the extent of the Court's discretion. The neofunctionalists see it as relatively free of the constraints of the Member State governments, though they do recognise a reliance upon the national courts because of the dynamics of the preliminary reference procedure. Burley and Mattli suggest that the Court will be insulated from attacks to its authority by the Member State governments so long as it adheres to the 'legal steadying factors', thereby presenting those decisions as 'legal' in character rather than 'political'. Seen thusly, the acceptability to the Member States of the substance of the decisions is not majorly relevant as long as the decisions are perceived to remain within the legal domain. The intergovernmentalists, however, view the Court as vulnerable to controls by the Member State governments and to attack by those governments to its authority. In order to retain its authority and independence, the Court recognises that it cannot make decisions that run counter to the Member States' political positions.

- There is, however, one aspect that is common to both theories: the Court must in its own interests adhere to the 'legal steadying factors'. The neofunctionalist views the Court's continued success in insulating itself from attacks to its authority as dependent upon its ability to mask its politically significant rulings by adherence to the 'legal steadying factors'. The intergovernmentalist views the Court as an agent to which the Member State governments have delegated power to create and maintain a European legal system that ensures the adherence of the Member States to the rules of the internal market, there being a consensus that the internal market and adherence to its rules are utilities. Implicit in this view is that the Court itself, in order to continue in this role without interference from the Member States, must do so in a manner that adheres to the rules of the internal market, or in a legally legitimate manner, a phenomenon recognised more explicitly by Garrett

in his subsequent writing with Kelemen and Schulz.²²⁹ In summary, whether one adopts either of these accounts of European legal integration, one is left with the conclusion that the institutional position of the Court at the very least disincentivises significantly any abandonment by it of adherence to the ‘legal steady factors’. Accountability to ‘countervailing powers’ pursuant to both accounts may, accordingly, be seen as an ‘external extra-legal steady factor’ which reinforces the ‘legal steady factors’.

A question remains, however, as to whether adherence to the ‘legal steady factors’ can be shaken where the normative duty and pragmatic interest to keep its rulings within the ‘legal steady factors’ run into conflict with the interests of the Court’s ‘countervailing powers’: in other words, in real terms, whether the Court and its Judges enjoy sufficient pragmatic independence from ‘countervailing powers’ to deliver rulings which are within the ‘legal steady factors’, but adverse to the interests of the ‘countervailing powers’. This conflict is analysed in the discussion of ‘scenario 2’ below.²³⁰

bb) Pragmatic Preference for an Adjudicative Outcome not Adverse to the Interests of the ‘Countervailing Powers’ of the Court of Justice

It does not follow from the foregoing interim conclusion (that there are legalistic and pragmatic reasons for the Court of Justice to retain adherence to the ‘legal steady factors’ in its preliminary rulings), that the Court and its Judges, having recognised and retained fidelity to the ‘legal steady factors’, will feel under considerable or equal pressure to reach a ruling that is not adverse to one or more of the ‘countervailing powers’. Whereas neofunctionalists and intergovernmentalists agree, albeit for different reasons, that the Court’s authority depends on its adherence to the ‘legal steady factors’, the two accounts differ sharply in terms of the Court’s freedom to reach adverse substantive decisions vis-à-vis its various ‘countervailing powers’.

²²⁹ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164.

²³⁰ *Infra* n. 268-n. 509.

For the neofunctionalist, the Court will retain its authority as long as it maintains its adherence to the ‘legal steadying factors’, and will be insulated against coordinated countermeasures by the Member States. However, according to the same account, this circumvention of the Member States has been enabled by a corresponding empowerment of subnational actors, specifically and most importantly, the national courts through the preliminary reference procedure. Seen from this perspective, the Court is far more dependent upon the national courts than it is upon the Member State governments: it depends upon these courts for references in the first place and for the faithful application of its rulings in the national legal systems. There is abundant evidence that the Court is and has been historically²³¹ very concerned about retaining a cordial relationship with the national courts: Judge Mancini details with astonishing transparency the empowerment and courting of the national courts by the Court of Justice, as well as the Court’s concern as to the damage which could be done by national judicial revolt against its reasoning.²³² The Court has on a number of occasions taken obvious substantive decisional measures to avoid running into conflict with the national courts.²³³ The interpretation by the Court of procedural aspects of the preliminary ruling process has also demonstrated a concern for the maintenance of a cooperative relationship with national courts.²³⁴

²³¹ See, for instance, the Opinion of Advocate General Lagrange in Case 6/64 *Costa v ENEL* [1964] ECR 585, at 602, where the Advocate General refers to “the desire of the Court to show complete respect for the jurisdiction of national courts...”

²³² Mancini, G.F., *supra* n. 56, pp. 609-611.

²³³ Key examples being the decisions of the Court of Justice in *Stauder v City of Ulm* and *Nold v Commission* in which the Court of Justice, in response to a ruling by the German Bundesverfassungsgericht (BVERGE, 1967, 223) that Community law could not deprive German citizens of their rights under the *Grundgesetz*, ruled that the protection of fundamental rights formed a general principle of EU law (Case 29/69 *Stauder v City of Ulm v Commission* [1969] ECR 585 and Case 4/73 *Nold v Commission* [1974] ECR 491). That *Nold v Commission* was motivated by a perceived threat to the legitimacy and authority of the Court is obvious from Judge Mancini’s extra judicial writing: Mancini, G.F., *supra* n. 56, pp. 609-611.

²³⁴ Take, for instance, the initial liberal approach of the Court of Justice to the receipt of references, as opposed to the more restrictive approach taken latterly. Until the late 1970s, the Court of Justice accepted references from national courts and tribunals even where the reference did not provide the reasons as to why it was made or the facts upon which it was based (Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 117/77 *Bestuur van het Algemeen Ziekenfonds, Drenthe Platteland v G Pierik* [1978] ECR 825; Case 35/76 *Simmmenthal SpA v Ministero delle Finanze* [1976] ECR 1871). The Court of Justice was even prepared to correct improperly framed references in order to admit them (Case 6/64 *Costa v ENEL* [1964] ECR 585). However, since the Court’s rulings in the *Foglia* cases (Case 104/79 *Foglia v Novello* [1980] ECR 745; Case 244/80 *Foglia v Novello (No 2)* [1981] ECR 3045), in which it decided that it would not entertain hypothetical references, the Court of Justice has taken a much more authoritative role over the referring courts and tribunals as to the question of admissibility of references: for instance, in *Bacardi-Martini*, the Court of Justice refused to admit a question which had not been articulated clearly enough, and in *Telemarsicabruzzo* the Court of Justice

There are a number of aspects about the choice by the Court of Justice of the national courts as ally, at the expense of the Member State governments, which have escaped, at least explicitly, the notice of neofunctionalists. Firstly, the national courts (like the Court itself) operate in the ‘legal’, rather than ‘political’ sphere, in that their judges also work in the language and techniques of the law and will, by and large, in Llewellyn’s language, be ‘law conditioned’. These courts should, therefore, have a more ingrained sense of the normative character of the Court’s rulings and are, as such, less likely to avoid complying with those rulings than purely political actors such as the Member State governments. Secondly, it may be assumed that the national courts are more interested in the utility of the Court’s rulings in helping them to resolve the EU law problem necessary to achieve a determination in the main proceedings before them than they are in the desirability or correctness of that ruling: put simply, in the vast majority of the cases, the referring courts or tribunals do not themselves possess any interest in the Court’s substantive ruling. There will, of course, be exceptions to this general observation: there may be principles or concepts of national law, particularly national constitutional law, of such salience to national court judges that their adherence to the Court’s substantive preliminary rulings, even when within the confines of the ‘legal steadying factors’, may be tested. In this regard, Phelan was correct to point to the danger of a clash between national constitutional law and EU law in national courts.²³⁵ That this clash has not occurred is due chiefly to the apparent awareness of the Court of its potential, and the Court’s success in acting to avoid it: consider the back-and-forth dialogue between the Court and the Bundesverfassungsgericht in the aftermath of the Court’s ruling in *Internationale Handelsgesellschaft*.²³⁶ Save for these rare cases of very marked national constitutional salience, however, the national courts make a far safer and less fickle ally than the Member State governments would have made,

ruled that the facts stated in the Order for Reference must be sufficiently clear to enable the Court to give a ruling (Case C-318/00 *Bacardi-Martini SAS and Cellier des Dauphins v Newcastle United Football Club* [2003] ECR I-905; Cases C-320-322/90 *Telemarsicabruzzo SpA v Circostel, Ministero Poste e Telecomunicazioni and Ministero della Difesa* [1993] ECR I-393). See generally, Craig, P. and de Búrca, G., *supra* n. 38, pp. 484-496. The motivation for the Court’s differential approach may conceivably be attributed to the Court’s increased workload due to its success in convincing the national courts and tribunals to make references. Once it was felt that the procedure was established well enough and the Court of Justice was in receipt of a sufficient number of references, it would appear that the Court moved to tighten up its admissibility requirements.

²³⁵ Phelan, D.R., *supra* n. 30.

²³⁶ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

since the latter do not have as strong an internalised acceptance of the normative character of the Court's rulings as the former, and possess a greater interest in the substance of the Court's interpretative outcomes than the former.

For the intergovernmentalist, the Court is, of course, the agent of the Member State governments, meaning that in making its decisions it must remain within an area of substantive acceptable latitude for the governments, lest it incur their wrath. For the intergovernmentalist, therefore, the Court is constrained to act not only within the limits of the 'legal steadying factors', but also within a sphere of substantive political acceptability set by the Member State governments.

That simplistic or caricatured versions of the neofunctionalist and intergovernmentalist accounts do not in themselves explain fully the process of European legal integration and the Court's role in that process should be evident.²³⁷ It would, for instance, take a neofunctionalist of fundamentalist zeal to maintain that the preferences of the Member State governments do not play *any* part in influencing the Court's substantive decisions: scholars have noted the Court's use of tactics to introduce legal concepts, such as supremacy, adverse to the interests of the Member State governments.²³⁸ While it is evident that both accounts of the Court's role vis-à-vis its 'countervailing powers', particularly the Member State governments, cannot be reconciled completely,

²³⁷ A point which has also been made by Alter: "Both accounts contain significant elements of truth. The legal nature of ECJ decisions does afford the Court some protection against political attacks, but member states have significant tools to influence the Court." (Alter, K., *supra* n. 48, at 122).

²³⁸ Hartley has commented on the Court's tendency to introduce such concepts over time: "A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle, but suggest that it is subject to various qualifications; the Court may find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established." (Hartley, T.C., *The Foundations of European Community Law* (Oxford: Clarendon Press, 3rd ed., 1994), p. 87). This view would tend to lend credence to Alter's argument that one of the reasons the Court of Justice has escaped the control of Member State governments has been its use of the different time horizons in which courts and politicians operate (Alter, K., *supra* n. 48, at 130-133). It has been remarked how in *Costa v ENEL* (Case 6/64 *Costa v ENEL* [1964] ECR 58), the Court of Justice although developing the concept of supremacy, in the case in hand made a substantive finding in favour of the Member State government involved, Italy. This tactic has been compared to that of the US Supreme Court in *Marbury v Madison* (*Marbury v Madison* 5 US 137, 2 L Ed 60 (Supreme Court) 1803), where the Supreme Court ruled that State legislation could be reviewed for constitutionality by the Supreme Court, but in the case at bar ruled that the statute was constitutional (Kouroutakis, A.E., "Judges and Policy Making Authority in the United States and the European Union", (2014) 8(2) *Vienna Journal of International Constitutional Law* 186, at 195-196).

it may be argued, even from the a neofunctionalist perspective, that it would not be in the interests of the Court to go out of its way to antagonise Member State governments where this can be avoided without sacrificing its duty to ensure that in the interpretation of the Treaties the law is observed.²³⁹ Whether this self-interest is so significant as to cause the Court to substitute a ‘scenario 1’ ruling for a ‘scenario 2’ ruling is considered below.²⁴⁰

cc) The Achievability of ‘Scenario 1’ Outcomes

The first observation that could be made is that a ‘scenario 1’ outcome (one that adheres to the ‘legal steadying factors’ and is substantively acceptable to *all* of the ‘countervailing powers’) is never, or at any rate, rarely possible: it may be difficult to conceive of an outcome, the substance of which will not be against the interests of at least one of the ‘countervailing powers’.

²³⁹ Here we must differentiate the ability of the Member State governments to *influence* the rulings of the Court of Justice from an ability to *constrain* the Court of Justice to rule in accordance with the preference of those governments. Attempts by Member State governments to influence the Court of Justice will generally take place, according to the neofunctionalist line, within the legal forum, i.e. through written submissions to and oral advocacy before the Court (see, for instance, Weiler, J.H.H., *supra* n. 189, at 2425; Burley, A.-M. and Mattli, W., *supra* n. 47, at 67-69). Granger has demonstrated that certain Member State governments have been more successful than others in pursuing their interests through intervention in preliminary rulings (Granger, M.-P., *supra* n. 173; Granger, M.-P., “When Governments go to Luxembourg: The Influence of Governments on the Court of Justice”, (2004) *European Law Review* 3). Maduro in his analysis of post-*Cassis de Dijon* cases on the free movement of goods has presented the thesis that the Court of Justice takes part in ‘majoritarian activism’, i.e. striking down as contrary to Article 34 TFEU any national rule which is inconsistent with the rules governing the same issue in the majority of Member States (Maduro, M.P., *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart, 1998)). There is also some evidence that the Court of Justice historically has been willing to employ tactics to ensure the longer term achievement of a legal doctrinal aim, tactics which may involve sacrificing the optimal solution in the case before it, so as not to endanger the longer term achievement by provoking Member State retribution (*supra* n. 238). It has also been observed that the Court has moved to limit the impact of rulings unpopular with Member State governments in subsequent rulings, the qualification of the Court’s ruling on state liability in *Francovich* (Cases C-6/90-C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5537) in the subsequent case of *Brasserie du Pêcheur* (Case C-46/93-C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029) being one such example. Such tactics have not, however, resulted in the Court of Justice operating outside the outer-limits of the ‘legal steadying factors’. Lenaerts, writing extra-judicially, has also discussed the Court’s welcoming of ‘value diversity’, which he describes as follows: “In the absence of EU harmonizing measures, the ECJ strikes that balance where a Member State relies on national identity or on public health considerations with a view to derogating from the Treaty provisions on free movement and EU citizenship. By contrast, when EU harmonizing measures have been adopted, the ECJ weighs national interests against the objectives pursued by the EU legislator.” (Lenaerts., K., *supra* n. 31, at 1326-1327).

²⁴⁰ *Infra* n. 268-n. 509.

This author has recognised already in this part of the dissertation that national litigants and their lawyers are ‘countervailing powers’. Since the rulings in the *Foglia* references²⁴¹, it has been the case that the Court will not accept questions where there is an absence of a genuine dispute. The result has been that the main proceedings in preliminary references will generally be adversarial in nature with the outcome dependant on the Court’s ruling.²⁴² As such, even in a run-of-the-mill preliminary reference - that is, one that is not sufficiently salient to excite the Member States or competent institutions to intervene before the Court - there will generally be at least one loser; that is, one party and lawyer(s) to whom the ruling is adverse. This party and his/her or its legal representative(s), however, do not constitute a ‘countervailing power’ or ‘powers’: rather, national litigants and lawyers as classes constitute ‘countervailing powers’, since a disgruntled losing party or parties in an individual reference will generally not be in a position to take measures which could place limits on the Court’s powers.²⁴³ The same goes for a losing Member State or a small number of losing Member States, where the issue is not of salience to Member State governments more generally.²⁴⁴

The question, therefore, is: how many cases may be regarded as being of such salience that a substantive ruling runs the risk of being adverse to a ‘countervailing power’? There is, of course, an understandable tendency in EU law scholarship to concentrate on the preliminary rulings that have had what

²⁴¹ Case 104/79 *Foglia v Novello* [1980] ECR 745 and Case 244/80 *Foglia v Novello (No 2)* [1981] ECR 3045.

²⁴² The second paragraph of Article 267 TFEU requires that the referring court or tribunal consider that a decision on the question to be referred be necessary to enable it to give judgment in the main proceedings before it decides to make a reference. As a result of *Foglia (No 2)*, the Court of Justice has effectively empowered itself to determine whether the reference was necessary to this end (Case 244/80 *Foglia v Novello (No 2)* [1981] ECR 3045).

²⁴³ It should be reiterated that the context being discussed here is one in which none of the Member States (or perhaps a small few) saw fit to make submissions before the Court of Justice. While it is conceivable that an influential individual losing party could lobby for political reaction to the ruling of the Court, it may be assumed that in such circumstances the salience of the case would not be sufficient to engage a reaction by even a majority of the Member States.

²⁴⁴ This is, of course, to ignore momentarily the neofunctionalist viewpoint that the Member State governments will be unable to take retributive action against the Court of Justice where it retains adherence to the strictures of the ‘legal steadying factors’. One exception to the observation made above might be where a Member State legislature ‘courts’ its own national superior court, perhaps giving it a power to review the constitutionality/legality of Court of Justice rulings. Such an approach is being mooted in the UK (*supra* n. 71) and might well lead to a stand-off between the Court of Justice and the UK Supreme Court.

may be considered constitutional consequences.²⁴⁵ However, the Court's remit under Article 267 TFEU is so wide that it requires it to wear different hats depending on the nature of the substantive question referred: the Court's role may range from supreme constitutional court to specialist on a niche legal subject-area. It is perhaps inaccurate in any case to equate the constitutional character of a case with salience or to exclude non-constitutional cases from consideration as salient. There is, therefore, no hard and fast way of identifying how many cases may be sufficiently salient. There are, however, a number of aspects in the Article 267 TFEU procedure that may act as indicators of such salience from the Court's perspective, and/or that of its 'countervailing powers'. One such indicator is the use by the Member States and Commission of their right "to submit statements of case or written observations to the Court".²⁴⁶ Statistical studies would tend to indicate that in a significant number of cases the questions will not be so salient as to attract participation by the Member States.²⁴⁷ Another such indicator, suggestive of the view of the Court

²⁴⁵ Take, for instance, Stein's account of the relationship between the Court of Justice and the Member State governments, which focusses on the case-law that established core EU constitutional principles such as supremacy (Stein, E., *supra* n. 56).

²⁴⁶ The second paragraph of Article 23 of the Statute provides: "Within two months of this notification [of the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice], the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court." The reliability of the decision of a Member State government to make submissions in a preliminary reference as an indicator of salience may, however, for a number of reasons be open to question. Firstly, it has been acknowledged that for a long period of time, Member State governments neglected Luxembourg: most famously, in *Costa v ENEL*, only one of the six then Member State governments submitted observations and that government was Italy, the country from which the reference originated (*Costa v ENEL* [1964] ECR 585). Even in *Internationale Handelsgesellschaft*, only two Member State governments made submissions, Germany and the Netherlands, and the case originated in the courts of the former (Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125); in *Simmenthal*, only the Italian government made submissions, the case originating in the courts of that Member State (Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629); in *Factortame*, only the UK and Ireland made submissions, the case originating in the courts of the former (Case C-213/89 *R v Secretary of State for Transport, ex p Factortame and Others* [1990] ECR I-2433). Secondly, Granger has demonstrated that different Member States have adopted different strategies of intervention in preliminary reference proceedings before the Court of Justice, with some more prepared than others to intervene. Nevertheless, intervention by Member State governments of sufficient number to adopt a measure by qualified majority vote in Council might be considered a crude indicator of salience. Finally, the significance of a judgment may be realised in some cases only after the proceedings. As to these issues, see generally, Granger, M.-P., *supra* n. 239; Granger, M.-P., *supra* n. 173; Broberg, M. and Fenger, N., *supra* n. 79, pp. 357-358; Stein, E., *supra* n. 56.

²⁴⁷ Granger's statistics on Member State government observations in preliminary references from 1995 to 1999 and 2005 indicate that despite a general rise in the number of Member State written observations relative to the number of preliminary references (as noted by Nyikos), there will be few cases which will excite a significant number of Member States to intervene. In 2005, for instance, a total of 254 preliminary references were completed by the Court. In that same year, according to Granger, a total aggregate number of 414 observations were

of Justice, and in some cases of the Member States and EU institutions, of the reference's importance and/or difficulty is the nature of the formation of the Court assigned to hear it. Preliminary references may be heard by four alternative formations: a full Court, that is, all twenty-eight Judges; a Grand Chamber, which consists of fifteen Judges and is presided over by the President of the Court²⁴⁸; a chamber of five Judges; or, a chamber of three Judges.²⁴⁹ The Court of Justice may decide, where it considers that a case before it is of exceptional importance, after hearing the Advocate General, to refer the case to a full Court.²⁵⁰ The Court of Justice very rarely sits as a full Court: in cases completed from 2011 to 2015, it sat as a full Court only three times.²⁵¹ The Court of Justice must sit as a Grand Chamber when a Member State or an EU institution that is a party to the proceedings so requests.²⁵² The Court may also assign a case to a Grand Chamber where the difficulty or importance of the case requires it.²⁵³ Again, the use of the Grand Chamber formation is the exception rather than the rule.²⁵⁴ The formation of the Court

submitted to the Court, meaning that on average fewer than two written observations were submitted by Member States per reference in that year. The Netherlands submitted the most observations relating to references decided in 2005 with 44 observations, but 55% of these observations were submitted in cases which originated in the courts or tribunals of that Member State. Carrubba, Gabel and Hankla's analysis of the decisions of the Court from 1987 to 1997 revealed that out of 2,048 questions referred in that period, no Member States filed submissions in 1,122 (nearly 55% of all questions referred). (See Granger, M.-P., *supra* n. 173, at 47-49; Nyikos, S., "The European Courts and National Courts: Strategic Interaction within the EU judicial Process", Paper presented at Washington University at St. Louis on Comparative Constitutional Courts, eds. Epstein, L. and Paulsen, S.L., 2001, <http://law.wustl.edu/harris/conferences/constitutionalconf/Nyikos2.pdf> (last accessed at 13:14 on Thursday, the 17th March 2016); *Court of Justice of the European Communities Annual Report 2005: Synopsis of the Work of the Court of Justice and the Court of First Instance of the European Communities* (Luxembourg, 2006), p. 192 (http://aei.pitt.edu/42285/1/2005_Court.pdf) (last accessed at 13:16 on Thursday, the 17th March 2016); Carrubba, C.J., Gabel, M. and Hankla, C., *supra* n. 213; Stone Sweet, A. and Brunell, T.L., *supra* n. 213, p. 15. See also, de la Mare, T. and Donnelly, C., "Preliminary Rulings and EU Integration: Evolution and Stasis" in Craig, P. and de Búrca, G., *The Evolution of EU Law* (Oxford: Oxford University Press, 2nd ed., 2011), p. 363, pp. 378-381.

²⁴⁸ Article 16(2) of the Statute.

²⁴⁹ Article 16 of the Statute; Article 60 RP. The Court must sit as a full Court where cases are brought before it pursuant to Articles 288(2), 245(2), 247 or 286(6) TFEU (Article 16(4) of the Statute). Article 228(2) TFEU concerns proceedings to dismiss the European Ombudsman; Article 245(2) and Article 247 TFEU concern disciplinary proceedings against members of the European Commission; Article 286(6) TFEU concerns proceedings to deprive members of the Court of Auditors of benefits. See generally, Wägenbaur, B., *supra* n. 49, pp. 34-35.

²⁵⁰ Article 16(5) of the Statute; Article 60(2) of the RP.

²⁵¹ Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2016), p. 81.

²⁵² Article 16(3) of the Statute; Article 60(1) RP.

²⁵³ Article 60(1) RP.

²⁵⁴ In 2011, sixty-two out of 544 cases completed that year were heard by a Grand Chamber; in 2012, forty-seven out of 523 cases; in 2013, fifty-two out of 620; in 2014, fifty-four out of 624; and, in 2015, forty-seven out of 554: Court of Justice of the European Union, *Court of Justice*

utilised most often is the chamber of five Judges.²⁵⁵ Also commonly utilised, though less frequently than the chambers of five Judges, are the three-Judge chambers.²⁵⁶ Strikingly, there is no guidance in the Statute or the Rules of Procedure as to when a case should be heard by a three-Judge formation or five-Judge formation, but it would seem reasonable to assume that a three-Judge formation would be utilised for especially straightforward cases. Altogether, in the five-year period from 2011 to 2015, three- or five-Judge panels dealt with nearly ninety percent of the cases completed by the Court. While the statistics relate to all actions, not preliminary rulings specifically, they suggest, since preliminary rulings constitute the largest share of the workload of the Court²⁵⁷, that a vast majority of preliminary references are not decided by the full Court or the Grand Chamber, meaning that the Court and/or the Members States and EU institutions do not view these references as of particular difficulty or importance. Another variable element of the procedure before the Court in preliminary references that may indicate perceptions of the difficulty of a case is the question of whether or not an oral hearing will take place.²⁵⁸ In 2013, thirty-one preliminary references completed were decided by

of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal (Luxembourg, 2016), p. 81.

²⁵⁵ In 2010, five-Judge chambers dealt with 290 of the 444 cases completed; in 2011, 300 of the cases completed; in 2012, 283 of the cases completed; in 2013, 366 of the cases completed; and in 2014, 340 of the cases completed (Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2015), p. 100). In 2015, 318 of the 554 cases completed were dealt with by five-Judge chambers: Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2016), p. 81.

²⁵⁶ In 2010, 132 of the cases completed that year were dealt with by three-Judge chambers; in 2011, 177 cases; in 2012, 180 cases; in 2013, 197 cases; and, in 2014, 228 cases (Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2015), p. 100). In 2015, 182 of the 554 cases completed were dealt with by three-Judge chambers: Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2016), p. 81.

²⁵⁷ *Supra* n. 194.

²⁵⁸ Article 99 RP permits the Court at any stage of the proceedings, on a proposal from the Judge-Rapporteur and after the hearing the Advocate General, to decide to rule by reasoned order rather than deliver a written judgment. Article 99 may be utilised by the Court of Justice in three situations: (1) where the question referred is identical to one on which the Court has already ruled; (2) where the reply to the question referred may be clearly deduced from existing case-law; or, (3) where the answer to the question referred admits of no reasonable doubt. The use of a reply by reasoned order results in the Court of Justice being able to dispense with the requirement of having an oral hearing and an opinion of the Advocate General (Wägenbaur, B., *supra* n. 49, p. 338).

way of reasoned order.²⁵⁹ A final variable element of procedure indicative of the complexity and importance of a case is the question of the Advocate General's involvement. Article 20(5) of the Statute permits the Court, after hearing the Advocate General, to determine a case without a submission from the Advocate General, where the Court considers that the case raises no new point of law. According to the Court of Justice, about 43% of the Judgments delivered in 2015 were delivered without an Opinion of the Advocate General.²⁶⁰

Taken together the above indicators of the complexity and/or importance of the cases before the Court of Justice suggest that a considerable number of the cases are considered so straightforward that they may be dealt with by way of reasoned order or without hearing the Opinion of the Advocate General. Furthermore, they demonstrate that the vast majority of cases are not of such importance to the Court and/or the 'countervailing powers' that a hearing before a full Court or Grand Chamber is necessary. A 'Scenario 1' ruling will be, therefore, capable of achievement and, arguably, will be achieved in the vast majority of cases.

dd) Cases in which more than one 'Scenario 1' Adjudicative Outcome is Possible²⁶¹

It should be acknowledged that the vast majority of preliminary references will not present the Court with a binary option between 'scenario 1' adjudicative outcomes and 'scenario 2' adjudicative outcomes. Rather, in the majority of cases, the Court will be faced with a choice between two or more interpretative options which are within the 'legal steadying factors' and which are not of such salience as to be unacceptable substantively to one or more of the

²⁵⁹ Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2015), p. 10.

²⁶⁰ Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2016), p. 10.

²⁶¹ This discussion is again not of direct relevance to the hypothesis being tested, since all interpretative choices within 'scenario 1' rulings will adhere to the 'legal steadying factors'. The hypothesis posits that the Court cannot be shaken from this adherence, i.e. be pressured into making 'scenario 3' or '4' rulings. Nevertheless, that 'countervailing powers' may have preferences with the menu of possible 'scenario 1' outcomes should be acknowledged.

‘countervailing powers’. However, ‘countervailing powers’ may have a *preferred* outcome or outcomes within the range of *acceptable* substantive adjudicative outcomes, i.e. outcomes which are not adverse to the interests of any of the ‘powers’. A question may be posed as to how independent the Court is in such a situation to reach the adjudicative outcome it perceives to be the optimum one. To anyone concerned with the prediction of outcomes of preliminary references before the Court of Justice, this is an important question. If the Court of Justice is compelled to arrive at a decision that is the preferred decision of a ‘countervailing power’ or a number of ‘countervailing powers’, there will be a resultant loss of transparency in the rulings made by the Court, since the reasons behind the Court’s ruling will not be recorded on the face of its judgment or order and, therefore, will not be visible to the lawyer attempting to predict the Court’s future behaviour by reference to its own recorded justifications of its past behaviour (not to the lawyer unattuned to this dynamic at any rate). Stated more bluntly, the Court would enjoy practically no independence if it were compelled to decide in such a manner, as it would involve the Court being motivated primarily by a desire to please its ‘countervailing powers’, placing this desire over the achievement of an optimal legal adjudicative solution. That the Court is not so compelled should be obvious for a number of reasons. Firstly, the Court’s ‘countervailing powers’ represent a multitude of interests (supranational, national and subnational, for instance, with further divisions within these interests) and it may be difficult to conceive of an adjudicative solution which could be *preferred* by all.²⁶² Indeed, neofunctionalist scholars hold as a basic tenet that the Court’s rulings are insulated against override by Member States because “on virtually any issue on which the Court will take a legal position, the Member States themselves are likely to be divided...”²⁶³ Secondly, even the intergovernmentalist account, which holds the Court’s freedom to be more circumscribed than any other account, views the Court as enjoying autonomy as long as it makes rulings which the Member State governments “do not frequently reject.”²⁶⁴ In their game theory-driven account of the Court’s power as against the Member

²⁶² For instance, in most cases of salience to the Member States as a class, it may be imagined that preservation of national sovereignty will be a theme. In such cases, the interests of the Commission as an integrative power (and the ‘political bellwether’ of the Court of Justice (*supra* n. 186)) will run counter to those of the Member States.

²⁶³ Stone Sweet, A. and Brunell, T.L., *supra* n. 213, p. 8.

²⁶⁴ Garrett, G. and Weingast, B.R., *supra* n. 212, p. 200.

States, Garrett, Kelemen and Schulz argue that the Court, while seeking “to maintain its status as an independent arbiter”²⁶⁵, will also “seek to avoid making decisions that it anticipates governments will defy.”²⁶⁶ *Acceptability* of the ruling is the key, therefore: Member State governments will not be moved to take measures against the Court where it arrives at a ruling within a number of *acceptable* substantive outcomes, even if it is not the *preferred* substantive outcome. Consequently, all accounts of the Court’s role in the institutional framework of the EU appear to agree that the Court will not be constrained by the mere *preference* of ‘countervailing powers’ where the adjudicative outcome reached is within a range of substantive *acceptability*.²⁶⁷

There will also be cases, albeit a minority, where a ‘scenario 1’ compromise is not possible at all or perhaps not perceived as desirable by the Court. The extent to which the Court is sufficiently independent in such situations to maintain its adherence to the ‘legal steadying factors’, or, from another perspective, sufficiently accountable to its ‘countervailing powers’ that it must do so, is examined in the balance of Part Two.

2. ‘Scenario 2’: Adherence to the ‘Legal Steadying Factors’, but Substantively Unacceptable to One or More of the ‘Countervailing Powers’ of the Court of Justice

In the analysis of ‘scenario 1’, it was concluded that for reasons of legalism and of rational self-interest, the Court in preliminary references will adhere to the ‘legal steadying factors’, or at the very least be disincentivised significantly from departing from them. It was further demonstrated that the various political science accounts of the Court’s role vis-à-vis its ‘countervailing powers’,

²⁶⁵ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 151.

²⁶⁶ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 151.

²⁶⁷ That is not to say, however, that the Court of Justice will not be *influenced* by the preferences of ‘countervailing powers’. As argued previously, there should be a legal and pragmatic preference for ‘scenario 1’ rulings. It follows that the Court will consider the preferences of ‘countervailing powers’ such as the EU legislator or the Member States, and will seek to arrive at a ruling that can reconcile these with the ‘legal steadying factors’. Lenaerts, writing extra-judicially, has demonstrated the contemporaneous Court’s desire not to “replace the choices made by the [EU] legislature by its own.” Similarly, Lenaerts has argued that the Court “strives to accommodate, *as far as possible*, national interests.” The italicised words in the latter sentence, which are this author’s emphasis, are revealing of an important distinction: the Court will strive to make rulings that accommodate national interests, but where this cannot be done the Court will not shy away from what it views to be the optimal ruling in accordance with its duty under Article 19 TEU. See Lenaerts, K., *supra* n. 31, at 1309.

particularly the Member State governments, agree on this proposition. Consequently, it may be concluded that the Court is pressured by the ‘legal steadying factors’, since failure to adhere to them will, even according to the neofunctionalist account, which attributes far greater autonomy to the Court from external influences, result in the Court’s ‘countervailing powers’ taking measures against it, which may be harmful to its authority and legitimacy: in the other words, the Court is accountable to its ‘countervailing powers’ where it acts ‘unjudicially’, and this accountability is an ‘external extra-legal steadying factor’ that reinforces the ‘legal steadying factors’. However, this conclusion paints but half of the picture: the question remains as to whether the Court is sufficiently independent from its ‘countervailing powers’ to arrive at adjudicative outcomes in preliminary references which adhere to the ‘legal steadying factors’, but are substantively unacceptable to one or more of its ‘countervailing powers’. If accountability measures may be taken against the Court in such circumstances, there will, in accordance with Llewellyn’s theories on judicial security as a ‘steadying factor’, be consequences for the ‘reckonability’ of preliminary reference outcomes: (1) the Court of Justice may feel compelled in its own self-interest to abandon adherence to the ‘legal steadying factors’ in order to achieve an outcome that pleases one or more of its ‘countervailing powers’²⁶⁸; and/or, (2) the Court, in a situation where there are a number of alternative adjudicative outcomes, all of which would adhere to the ‘legal steadying factors’, but one or more of which would be substantively acceptable to the ‘countervailing powers’ and one more or more which would not, may be *compelled* to adopt one which is agreeable to one or more of its ‘countervailing powers’.²⁶⁹ Both of these consequences are negative

²⁶⁸ This would arise where the preferred adjudicative outcome of the Court of Justice is a ‘scenario 2’ outcome (i.e. within the ‘legal steadying factors’, but substantively unacceptable to one or more of the Court’s ‘countervailing powers’), but the Court is compelled by reason of the threat of harm to its authority and legitimacy by the ‘countervailing powers’ to adopt a ‘scenario 3’ adjudicative outcome (i.e. outside the ‘legal steadying factors’, but substantively acceptable to the ‘countervailing power’ or ‘powers’ wielding the threat). This situation assumes that a ‘scenario 1’ adjudicative outcome is not available.

²⁶⁹ This would arise where the preferred adjudicative outcome of the Court of Justice is a ‘scenario 2’ outcome (i.e. within the ‘legal steadying factors’, but substantively unacceptable to one or more of the Court’s ‘countervailing powers’), but the Court is compelled by reason of the threat of harm to its authority and legitimacy by the ‘countervailing powers’ to adopt a ‘scenario 1’ adjudicative outcome (i.e. within the ‘legal steadying factors’, and substantively acceptable to all the ‘countervailing powers’). Again, the italicised word *compelled* is important: it is not suggested that it is ‘unjudicial’ for the Court to consider ‘countervailing power’ preferences: in fact, it could be ‘unjudicial’ for the Court not to. However, the Court should not be forced into choosing one solution over another merely because of ‘countervailing power’ preferences (as long as both solutions adhere to the ‘legal steadying factors’).

in terms of ‘reckonability’, though the first will be more corrosive. The first will cause ‘legal doctrine’ to lose its normative character, thereby stripping it of its utility to the lawyer seeking to predict a prospective reference. The second will render the Court’s decision-making less transparent to the lawyer, at least the lawyer not attuned to this dynamic, since the *real* reason for the Court’s adjudicative choice will not appear on the face of the Court’s already terse and deductive judgments, thereby widening the gap between ‘discovery’ and ‘justification’, and reducing the usefulness of the Court’s past decisions as aids to predicting the Court’s prospective behaviour.

In order to establish the extent of the independence of the Court and its Judges from its ‘countervailing powers’, the paragraphs that follow, utilising a mixture of legal analysis and the political science theories of neofunctionalism and intergovernmentalism²⁷⁰, examine the *de facto* extent to which the ‘countervailing powers’ may utilise court-destroying, -harming, -curbing or accountability measures where the Court adheres to the ‘legal steadying factors’, but arrives at outcomes which are adverse to one or more of these ‘countervailing powers’ (‘scenario 2’).²⁷¹ It was argued in the discussion of ‘scenario 1’ outcomes (outcomes which both adhere to the ‘legal steadying factors’ and are substantively acceptable to all of the ‘countervailing powers’) that such outcomes will be achieved in the vast majority of preliminary rulings, since it will be rare for the substance of a ruling to be of salience to a ‘countervailing power’. Accordingly, situations in which the Court will possess a ‘scenario 2’ adjudicative outcome option will be in the minority. It will emerge in the paragraphs that follow that while neofunctionalists and intergovernmentalists appear to agree that the Court, albeit for differing reasons, maintains adherence to the ‘legal steadying factors’, both theories are opposed as to the extent to which the Court is free to arrive at rulings which are substantively unacceptable to its ‘countervailing powers’. Before proceeding to this analysis, however, it is necessary to reiterate the potential legal and non-legal Court-destroying, -harming, -curbing and accountability measures available theoretically to the ‘countervailing powers’ to deter the Court from

²⁷⁰ As well as the more nuanced latter approach of Garrett, Kelemen and Schulz (*supra* n. 228).

²⁷¹ This analysis will assist in determining whether the Court of Justice may be compelled by its ‘countervailing powers’ or any constellation thereof to arrive at ‘scenario 1’ or ‘scenario 3’ adjudicative outcomes where its own preferred outcome is a ‘scenario 2’ outcome.

reaching what are merely substantively unfavourable decisions, or punish it retrospectively for taking such decisions.

*a) The Legal Court-Destroying, -Harming, -Curbing and
Accountability Measures Available to the 'Countervailing Powers' of
the Court of Justice to Deter and/or Punish 'Scenario 2' Adjudicative
Outcomes*

It was previously determined in the formalist analysis that there are a number of rules in the EU legal order that could, in theory, be utilised by the 'countervailing powers' to exert pressure on the Court, even where it retained adherence to the 'legal steadying factors'. This analysis categorised those rules as follows:

- Treaty/legislative change to destroy the Court, curb its jurisdiction or otherwise harm its effectiveness;
- Treaty/legislative change to override the Court's rulings;
- Utilisation of the Article 253 TFEU judicial appointments and re-appointments procedures;
- Voluntary non-utilisation of the preliminary reference procedure by national courts or tribunals not compelled to refer;
- Voluntary non-utilisation of EU law by litigants before national courts or tribunals.

However, there are also a number of *de facto* illegitimate mechanisms that the 'countervailing powers' could adopt.

*b) The Non-Legal Court-Destroying, -Harming, -Curbing and
Accountability Measures Available to the ‘Countervailing Powers’ of the
Court of Justice to Deter and/or Punish ‘Scenario 2’ Adjudicative
Outcomes*

In theory, it is not merely through legally permissible means that the ‘countervailing powers’ may harm the Court’s authority. Political scientists studying the Court point to the various non-legal, or perhaps more accurately illegal, means by which these ‘powers’ may undermine rulings which are substantively unacceptable to them. The ‘countervailing power’ written about most often in this connection is the Member State governments. Carrubba and Gabel in their empirical intergovernmentalist account of the relationship between the Court and the Member State governments identify evasion of the Court’s rulings as an ‘extra-legal’ means through which governments may circumvent undesirable Court rulings.²⁷² This evasion, according to the authors, may “[range] from anything as overt as blatantly ignoring a decision, to abiding by the decision only as it applies to that particular case, trying to appear as if they are complying fully, while really avoiding the substance of the ruling”.²⁷³ Taylor goes further, asserting that national legislatures have the power, should they wish to exercise it, to positively re-establish national court loyalty to national authorities over the duty to comply with rulings of the Court of Justice if this intention is made sufficiently clear.²⁷⁴ Burley and Mattli recognise that even the father of the neofunctionalist account of European integration, Haas, acknowledged the theoretical ability of the Member State governments to “sidestep, ignore, or sabotage the decisions of federal authorities.”²⁷⁵ It would appear that there is no reason to exclude the Court’s supranational and subnational ‘countervailing powers’ from the theoretical utilisation of this means of harming the Court’s authority: indeed, in the context of national courts and tribunals specifically, Nyikos has identified

²⁷² Carrubba, C.J. and Gabel, M., *supra* n. 163, pp. 7-10.

²⁷³ Carrubba, C.J. and Gabel, M., *supra* n. 163, p. 7.

²⁷⁴ Taylor, P., *The Limits of European Integration* (New York: Columbia University Press, 1983), p. 280. See Burley, A.-M. and Mattli, W., *supra* n. 47, at 49. Again, such a plan is being mooted currently in the UK (*supra* n. 71). From a *communautaire* perspective, such a plan would be ‘illegal’ since it is contrary to the idea of the supremacy of EU law as stated by the Court of Justice.

²⁷⁵ Burley, A.-M. and Mattli, W., *supra* n. 47, at 54.

evasion and non-implementation as ways in which such bodies may do so.²⁷⁶ In theory, the Commission and European Parliament could choose to evade or refuse to implement a ruling. It will be recalled that while the making of preliminary references is voluntary for most national courts or tribunals, the third paragraph of Article 267 TFEU requires national courts or tribunals “against whose decisions there is no judicial remedy under national law”, where the requirements of the second paragraph are met, to refer a question. Non-utilisation by such courts or tribunals of the preliminary reference procedure in a manner that is inconsistent with the third paragraph of Article 267 TFEU is a non-legal means by which such national courts or tribunals could cause harm to the Court’s authority, where it makes rulings or is perceived to be likely to make substantive rulings adverse to these courts or tribunals. In summary, the ‘countervailing powers’ may take the following non-legal (or illegal) measures against the Court to deter and/or punish it for substantively unacceptable adjudicative outcomes:

- Evasion and non-implementation of rulings;
- Non-utilisation of the preliminary reference procedure by national courts or tribunals compelled to refer.

The extent to which, if any, these legal and non-legal measures may in practice be utilised against the Court to deter and/or punish its adoption of ‘scenario 2’ adjudicative outcomes in preliminary references is considered in the paragraphs that follow.

²⁷⁶ Nyikos, S.A., *supra* n. 173, at 399-401.

c) The Extent to which, if any, the Legal and Non-Legal Court-Destroying, -Harming, -Curbing and Accountability Measures Available to the ‘Countervailing Powers’ of the Court of Justice to Deter and/or Punish ‘Scenario 2’ Adjudicative Outcomes may be Utilised

aa) Legal Measures

(1) Treaty/Legislative Change to Destroy the Court of Justice, Curb its Jurisdiction or Otherwise Harm its Effectiveness

The nuclear legal measure that the Member State governments could take against the Court would be the effecting of such amendments to the Treaties and CFREU as would result in its abolition.²⁷⁷ It has been demonstrated that the ‘countervailing powers’ could through Treaty change²⁷⁸ and the adoption of secondary legislation take legal measures to harm the Court or curb its power.²⁷⁹ It has also already been asserted that rulings which will be of salience to all Member States as a class and will be adverse to their interests as a class will be rare.²⁸⁰ The potential for the use of the Member States’ power to amend the Treaties in circumstances where a ruling is in accordance with the ‘legal steadying factors’, but contrary to their interests, even after a pattern of such rulings, will be unlikely. Such amendments to the Treaties and CFREU would not only be extensive in nature, requiring the removal of any provision pertaining to the Court, but would require the ordinary²⁸¹ revision procedure, a procedure which, pursuant to Article 48(4) TEU requires amendments to be ratified by all Member States “in accordance with their respective constitutional requirements”. Apart from the difficulty in achieving unanimity among the Member State governments, it is highly probable that such changes would have to be approved in some Member States by legislative assemblies and popular referendum.²⁸¹ Any attempt to amend the Treaties therefore

²⁷⁷ Pollack, M., *supra* n. 92, at 119.

²⁷⁸ *Supra* n. 119.

²⁷⁹ *Supra* n. 122.

²⁸⁰ This is a neofunctionalist viewpoint which underpins the position that override of the rulings of the Court of Justice is not a credible threat (Stone Sweet, A. and Brunell, T.L., *supra* n. 213, p. 8).

²⁸¹ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 160; Davies, G., “Legislative Control of the European Court of Justice”, (2014) 51 *Common Market Law Review* 1579, at 202

encounters what Scharpf called the ‘joint decision trap’.²⁸² The neofunctionalist will, of course, view such attacks on the Court for one or a series of ‘scenario 2’ rulings adverse to all the Member States as remote, since such a ruling retains the legitimising ‘mask’ of adherence to legal reasoning. Further to this account, any such attack on the Court by displeased ‘countervailing powers’ will appear to be political sour grapes and an illegitimate attack on judicial independence. That some of those opposed politically to the Court’s rulings have been aware of this is evident from the fact that attempts have often been made to justify attempted attacks on the Court by presenting undesired rulings as illegal, rather than just incorrect.²⁸³ It is well established that certain Member States are especially protective of the Court’s independence and, therefore, unlikely to engage in behaviour perceived to be damaging to this independence.²⁸⁴ Viewing the problem through intergovernmentalist spectacles, the possibility of the use of the nuclear option of abolition of the Court is negligible in the extreme, unless the Member States lose interest in the EU project in its entirety.²⁸⁵ It will be recalled that according to the

1582; Caldeira and Gibson’s analysis of surveys conducted between the 21st September and the 15th October 1992 revealed that a greater number of persons in each of the then twelve Member States supported the judicial independence of the Court of Justice than did not support it when the following proposition was put to them: “The political independence of the European Court of Justice is essential. Therefore, no other European institution should be able to override Court opinions even if it thinks they are harmful to the European Community.” In seven of the Member States, a majority of those asked supported the judicial independence of the Court, including France and the Netherlands, two countries where any change to the Treaties to abolish the Court might be expected to be put to the people. However, commitment to the Court of Justice appeared weak, with more persons not supportive of the Court than supportive in all Member States, save the Netherlands (Caldeira, G.A. and Gibson, J.L., “The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support”, (1995) 89(2) *The American Political Science Review* 356, at 363-365).

²⁸² Scharpf, F.W., “The Joint-Decision Trap: Lessons from German Federalism and European Integration”, (1988) 66 *Public Administration* 239. See also, Pollack, M., *supra* n. 92, p. 119; Stone Sweet, A., *Governing with Judges* (Oxford: Oxford University Press, 2000).

²⁸³ In response to the Court’s ruling in the *Sheep Meat* case (Case 232/78 *Commission v France* [1979] ECR 2729), the then President of France, Valéry Giscard d’Estaing, is said to have encouraged his colleagues at the May 1980 Dublin meeting of the European Council to cooperate to “do something about the European Court and its illegal decisions.” (Rasmussen, H., *supra* n. 3, p. 354).

²⁸⁴ Kenney has noted, for instance, that Belgium does not replace Judges at the Court of Justice until a Judge retires (Kenney, S.J., “The Members of the Court of Justice of the European Communities”, (1998-1999) 5 *Columbia Journal of European Law* 101, at 108-109). Alter has also noted the value placed by the Benelux countries and Germany on the judicial independence of the Court of Justice (Alter, K., *supra* n. 48, at 137).

²⁸⁵ There is certainly some scope for a view that Member State governments may not be as supportive of further integrationist jurisprudence. Chalmers, who divides the Court’s history into four periods, argues that the Court “now sits at a crossroads ... [since] the wider political and institutional environment which allowed it to carve out these agendas becomes less supportive.” (Chalmers, D., *supra* n. 4, p. 52). However, the Court’s role may also be changing, and its understanding of its role of ensuring respect for the law may be evolving. Lenaerts suggests that the Court is now “the constitutional court of a more mature legal order”

intergovernmentalist account of the relationship between the Court of Justice and the Member State governments, the Member States view participation in the internal market as a utility and view the creation of a strong legal system headed by a legal rather than political body as necessary to ensure compliance with the rules of the internal market, since it is assumed that compliance would not be high if such a legal system and legal body did not exist.²⁸⁶ Therefore, as long as the Member State governments view membership and effective participation in the internal market as a utility, it is not in the interests of the States to abolish the Court as a legal authority or to damage that authority; in other words, there will be no utility in retaining the Union without an effective legal authority to oversee compliance with its rules. Accordingly, one may conclude that there is no reasonable prospect of the Member State governments as a ‘countervailing power’ utilising Article 48 TEU to affect abolition of the Court. Such Treaty change is, therefore, not a credible threat to the Court’s independence, as long as the Court adheres to the ‘legal steadying factors’. This means that the Court enjoys sufficient autonomy to make rulings that are adverse substantively to Member States without fear of this theoretical threat being realised, as long, of course, as adherence to the ‘legal steadying factors’ is maintained.²⁸⁷

As regards Treaty change to curb the Court’s existing jurisdiction, much of the previous discussion on the likelihood of Treaty change being utilised by the Member States to abolish the Court applies: from a neofunctionalist viewpoint, unanimity will be difficult to achieve, especially where the rulings are within the ‘legal steadying factors’, since an attempt to curb the Court’s existing jurisdiction will be perceived as an attack on judicial independence; an intergovernmentalist will view the threat of legal court-harming or –curbing measures as a more immediate one, though even from this perspective any

and that it “now tends to be less assertive in the development of EU law.” While this does not, in Lenaert’s opinion, “prevent the ECJ from taking a more proactive stand in some areas of EU law”, “overall [the Court] displays greater deference to the preferences of the EU legislator, or as the case may be, to those of the Member States.” (Lenaerts, K., *supra* n. 31, at 1307). See also, Kelemen, R.D., “The Court of Justice of the European Union in the Twenty-First Century”, (2016) 79 *Law and Contemporary Problems* 17.

²⁸⁶ Garrett, G. and Weingast, B.R., *supra* n. 212, pp. 197-199.

²⁸⁷ The flipside of this coin is that a threat of Treaty amendment to abolish the Court of Justice could in theory be utilised as an accountability constraint to ensure compliance with the ‘legal steadying factors’ if the Court of Justice were flouting them habitually. It would, of course, again be the nuclear option.

harm caused to the Court's power may also cause harm to valued enforcement mechanisms, which disincentivises such attacks on the Court. Perhaps the greatest and simplest measure of the unlikelihood of Treaty change being used by the Member States to curb the Court's jurisdiction or interfere with the legal protections of its judicial independence is the fact that despite a number of tense standoffs between the Court and powerful Member States, the Court has never had an *existing*²⁸⁸ jurisdiction curbed or experienced interference with the legal protections of its independence through Treaty change.²⁸⁹ If anything

²⁸⁸ The jurisdiction of the Court of Justice over new areas of EU law, however, has in the past been circumscribed markedly. When the Member States agreed the Convention on Enforcement and Judgments in Civil and Criminal Matters (1968), they chose not to replicate the then Article 177 preliminary reference procedure, instead giving the Court of Justice a more circumscribed interpretative power. Rasmussen viewed this as a disapproval of the Court's integrative jurisprudence (Rasmussen, H., *supra* n. 3, pp. 336-338). Under the Treaty of Maastricht, asylum and immigration matters became part of the EU legal framework (the so-called third pillar, which required intergovernmental cooperation). Prior to the Treaty of Lisbon, the Court of Justice, pursuant to Article 68 of the EC Treaty had no competence to rule on preliminary references in this area, unless the matter was referred by a national court "against whose decisions there is no judicial remedy under national law." The Treaty of Maastricht also introduced the area of police and judicial cooperation in criminal matters. However, prior to the Treaty of Lisbon, Article 35(2) TEU provided that national courts could only send references in this area to the Court of Justice where the Member State in question had made a declaration accepting the jurisdiction of the Court. Where Member States chose to make such a declaration, Article 35 TEU also allowed them to limit the competence to make a reference to courts of final instance only (see generally, Broberg, M. and Fenger, N., *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 1st ed., 2010), pp. 8-10)). That the limitations on the Court's jurisdiction in these new areas of EU law was motivated by a desire among the Member State governments to prevent the Court taking an activist approach to these areas of particular salience has been observed (see Alter, K., *supra* n. 48, at 141). Initially, it appeared that the Court of Justice had taken note of the displeasure of the Member State governments and had begun to take a less activist and integrationist approach in its decisions; the then President of the Court of Justice Rodriguez Iglesias wrote that the task of the Court was to act as a guardian of the Treaties, rather than as a "motor of intergration" (Rodriguez Iglesias, G.C., "Le pouvoir judiciaire de la Communauté européenne au stade actuel de l'évolution de l'Union", Jean Monnet Chair Papers, no. 41, Robert Schuman Centre at the European University Institute, Florence, p. 11). Dehousse also noted greater restraint in the Court's decision-making in the years following the Treaty of Maastricht (Dehousse, R. *The European Court of Justice* (London: MacMillan Press, 1998), pp. 148-176). However, while these restrictions on the preliminary reference jurisdiction of the Court of Justice were removed by the Treaty of Lisbon, some limitations of the Court's competences remain: under Article 275 TFEU, the CJEU does not have jurisdiction "with respect to the provisions relating to the common foreign and security policy nor with respect to the acts adopted on the basis of these provisions."; under Article 276 TFEU, "[i]n exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union [has] no jurisdiction to 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."

²⁸⁹ At the Intergovernmental Conference in 1996, held at the behest of the UK government to discuss the powers of the institutions of the EU, the British suggested a number of proposed reforms to clip the wings of the Court through Treaty change: the establishment of a Court of Justice appeals procedure which would allow the Court to reconsider its decisions where Member State displeasure became known; the limitation of *Francovich* liability in cases where the Member State acted in good faith; an explicit jurisdiction for the Court to limit the

political scientists and legal scholars have had to wrestle with the seeming paradox of “individual Member State governments occasionally complain[ing] about judgments of the Court of Justice ..., [while] the collectivity of the Member State governments have agreed, in each Treaty revision so far, to confirm and extend the far-reaching powers which the Court of Justice possesses for enforcing EU law.”²⁹⁰

However, as has been demonstrated already, there are legal methods through which the ‘countervailing powers’ could at least attempt to harm the Court’s authority and effectiveness short of Treaty change.²⁹¹ Any such legislative changes would, however, encounter similar difficulties to Treaty changes with comparable motives. Firstly, legislative change in the EU requires the cooperation of a constellation of ‘countervailing powers’: the ordinary legislative procedure requires the involvement of the Commission, Council and Parliament, each of which represent differing interests and are, therefore, unlikely to agree on any attempts to emasculate the Court for merely making adverse rulings which are ‘judicially arguable’.²⁹² Pursuant to Article 281 TFEU, any amendment to the Statute²⁹³ must be “either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.” The Commission, perceived as sharing the Court’s mission, is unlikely to propose changes to the Statute designed to harm or which would cause harm to the Court’s independence. Under Article 243 TFEU, the Council controls the salaries, allowances and pensions of the Court of Justice, which are regulated currently by Regulation No 31/62/EEC, as amended. The present salary regime in Article 66 of the Regulation ties the pay of the Judges to that of an official on the third step of grade 16, meaning that any attempt to amend this

retrospective effect of its judgments. However, the British proposals were rejected by the other Member States; in fact, early on in negotiations, the Netherlands, France, Germany and the Commission’s legal advisors agreed that the Court’s jurisdiction as *per* the Treaty of Maastricht should not be disturbed (see Alter, K., *supra* n. 48, pp. 140-141; Garrett, G., Kelemen, R.D and Schulz, H., *supra* n. 164, at 171-172). The episode demonstrates the difficulty in mobilising any attack on the independence of the Court of Justice.

²⁹⁰ Abstract for H.-W. Micklitz and de Witte, B. (eds.), *supra* n. 180. Within this edited collection, it is perhaps Craig’s contribution that best explains this phenomenon: Craig, P., *supra* n. 220.

²⁹¹ *Supra* n. 122.

²⁹² Kelemen argues that “the Parliament is generally sympathetic to controversial ECJ rulings that extend the scope or depth of European integration...” (Kelemen, R.D., *supra* n. 169, at 46).

²⁹³ Other than Part I or Article 64 thereof.

Regulation to reduce the remuneration of the Judges would involve either a commensurate reduction of the pay of EU civil servants generally²⁹⁴ or would have to target the Judges specifically. The former would be difficult politically in the absence of strong economic justification, and the latter would be a very transparent attack on judicial independence. While legislative amendments to the Statute and reductions of the remuneration of the Judges do not require unanimous voting in Council, achieving the necessary consensus in Council to harm the Court's independence would still face difficulties under the system of qualified majority voting.²⁹⁵ This is a voting system that protects the interests of smaller Member States, precluding the possibility of larger Member States adopting legislation on the basis of their population sizes. Alter has summarised cogently the reasons why it is unlikely that small Member States will agree to a measure that seeks to override the Court's rulings; her observations hold even truer in relation to measures that seek to harm the Court's independence:

“Small states have an interest in a strong EU legal system. In front of the ECJ, political power is equalized, and within the ECJ, small states have disproportionate voice, since each judge has one vote, and decisions are taken by simple majority. The Benelux states are unlikely to agree to anything they perceive will weaken the legal system's foundations and thus compromise their own interests. The small states are not alone in their defense of the ECJ. The Germans from the outset wanted a ‘United States of Europe,’ and considered a more federal-looking EU legal system a step in the right direction. Although sometimes critical of the ECJ, the German government is also a supporter of a European *Rechtstaat*. Germany and the Benelux countries tend to block attempts to weaken ECJ authority, and they try to extend its authority as the EU expands into new legal areas whenever the political possibility exists.”²⁹⁶

While the Benelux countries and Germany no longer as a result of the expansion of the Union from fifteen to twenty-eight states possess the power as a collective to veto the adoption of legislation under the ordinary legislative procedure, as they did at Alter's time of writing, most of the Member States that have joined since 2004 may be assumed to share the Benelux countries'

²⁹⁴ Kelemen, R.D., *supra* n. 169, at 46.

²⁹⁵ Pursuant to Article 16(4) TEU, since the 1st November 2014, a qualified majority is defined as “at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.” Pursuant to the same provision, a blocking minority must include at least four Council members.

²⁹⁶ Alter, K., *supra* n. 48, at 137.

interest in a strong legal system.²⁹⁷ Accordingly, a ‘joint decision trap’ remains where Member State governments seek to curb the Court’s power through legislative change. A final factor that makes legislative attack on the Court’s independence unlikely is the introduction of Article 47 CFREU into the EU constitutional order by virtue of the Treaty of Lisbon: any such legislative attack would fall foul of the Union’s constitutional protection of judicial independence.

In summary, the Court is insulated from attacks to its independence by means of Treaty change or legislative amendment as long as it retains adherence to the ‘legal steadying factors’. The theoretical threat of such action by the ‘countervailing powers’ would appear not to be of sufficient credibility to compel the Court to making rulings that would accord with the interests of its ‘countervailing powers’.

(2) Treaty/Legislative Change to Override Rulings of the Court of Justice

Intergovernmentalists place much emphasis on the threat of override as one of the methods through which the Court is controlled by the preferences of the Member State governments. According to Garrett and Weingast, courts wish to maintain their authority, legitimacy and independence, and in order to do so, “they must strive to act in ways that elected officials do not frequently reject.”²⁹⁸ Garrett and Weingast describe the adverse consequences for a court’s authority and independence in such circumstances:

“Courts whose rulings are consistently overturned typically find themselves and their role in the political system weakened. As a consequence, the actions of courts are fundamentally ‘political’ in that they must anticipate the possible reactions of other political actors in order to avoid their intervention.”²⁹⁹

²⁹⁷ The Netherlands currently has thirteen votes in Council, Belgium has twelve and Luxembourg has four. Of the thirteen countries that have joined since 2004, only two, Poland (twenty-seven votes) and Romania (fourteen votes), have a greater number of votes than the Netherlands. See Chalmers, D., Davies, G. and Monti, G., *European Union Law* (Cambridge: Cambridge University Press, 3rd ed., 2014), p. 83.

²⁹⁸ Garrett, G. and Weingast, B., *supra* n. 212, p. 200.

²⁹⁹ Garrett, G. and Weingast, B., *supra* n. 212, p. 200.

In the specific context of the Court of Justice and its relationship with the Member State governments, Garrett and Weingast hold that the Court will remain within an area of acceptable latitude to the Member State governments, since a “serious threat to the ECJ’s authority would arise if it were to incite a qualified majority in the Council of Ministers to write detailed directives that would more tightly circumscribe the court’s autonomy, despite the efficiency costs in doing so.”³⁰⁰ Ultimately, the ability of the threat of override by the Member State governments to constrain the Court will depend on the credibility of this threat³⁰¹, and neofunctionalists and intergovernmentalists disagree on the credibility of the threat.

In a statistical study of the effect of the threat of override of and non-compliance with Court of Justice rulings by Member State governments, Carrubba, Gabel and Hankla found support for the intergovernmentalist account that the Court is constrained systematically by the threat of override of its rulings.³⁰² In their study, the authors examined the influence of submissions and observations made by Member State governments and the Commission before the Court in the period January 1987-December 1997 on a total of 3,176 legal questions. Upon analysing the Court’s decisions in these matters, they concluded that the Court had been constrained systematically by the threat of override. Carrubba, Gabel and Hankla’s empirical study, covering as it did all legal questions ruled upon by the Court over an eleven-year period, contradicted Stein’s 1981 study of Member State government and Commission briefs in eleven Court of Justice decisions of constitutional significance³⁰³, and provoked a strong reaction from two neofunctionalist political scientists, Stone Sweet and Brunell.³⁰⁴ On the question of override, Stone Sweet and Brunell accepted Carrubba, Gabel and Hankla’s first hypothesis: “The more credible

³⁰⁰ Garrett, G. and Weingast, B., *supra* n. 212, pp. 200-201.

³⁰¹ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 161.

³⁰² Carrubba, C.J., Gabel, M. and Hankla, C., *supra* n. 213.

³⁰³ Stein, E., *supra* n. 56.

³⁰⁴ Stone Sweet, A. and Brunell, T., *supra* n. 213. As mentioned at n. 213, a version of this paper was subsequently published in the *American Political Science Review* in 2012. The published version, which does not differ in terms of its conclusions, is truncated and omits the qualitative analysis of the unpublished paper, which is analysed herein. The authors’ references to the unpublished version in their 2012 publication would appear to suggest that it may be relied upon. Carrubba, Gabel and Hankla responded to the published article of Stone Sweet and Brunell in the same 2012 edition of the *American Political Science Review*, keeping to their 2008 arguments (Carrubba, C.J., Gabel, M., and Hankla, C., “Understanding the Role of the Court of Justice in European Integration”, (2012) 106(1) *American Political Science Review* 214).

the threat of override ... the more likely the court is to rule in favor of the governments' favored position."³⁰⁵ However, Stone Sweet and Brunell, as neofunctionalists, differ with Carrubba, Gabel and Hankla, as intergovernmentalists, on the extent to which the threat of override is credible. While Carrubba, Gabel and Hankla conceded that they were unable to "easily distinguish which legal issues can be overridden by qualified-majority voting and which require unanimity support"³⁰⁶, Stone Sweet and Brunell, examining every Article 258 TFEU ruling and every Article 267 TFEU ruling in Carrubba, Gabel and Hankla's dataset in which at least one Member State filed observations, found that for over 90% of the judgments the override rule was unanimity, rather than qualified majority.³⁰⁷ However, changes made to the Treaties since 1997, particularly those made in the Treaties of Nice and Lisbon, have increased significantly the number of areas in which the override rule is qualified majority voting, meaning that the threat of override is conceivably greater than it was in the timeframe of Carrubba, Gabel and Hankla's dataset.³⁰⁸ Other problems with the threat of override as a constraint on the Court are noted by Stone Sweet and Brunell however: they point to the fact that Carrubba, Gabel and Hankla were unable to describe a single case in which a threat of override had actually been made³⁰⁹; they highlight the failure of Carrubba, Gabel and Hankla "to theorize or stipulate a threshold point at which the threat of override could be said, implicitly, to have been made"³¹⁰ or to provide a "stylized" example of how this mechanism would work.³¹¹

³⁰⁵ Carrubba, C.J., Gabel, M. and Hankla, C., *supra* n. 213, at 439; Stone Sweet, A. and Brunell, T., *supra* n. 213, p. 9.

³⁰⁶ Carrubba, C.J., Gabel, M. and Hankla, C., *supra* n. 213, at 440.

³⁰⁷ Stone Sweet, A. and Brunell, T., *supra* n. 213, p. 10.

³⁰⁸ It is unfortunately beyond the scope of this dissertation to re-examine the Article 258 TFEU and Article 267 TFEU rulings referred to by Stone Sweet and Brunell to determine what percentage of rulings would require unanimity to be overridden. Prior to the entry into force of the Treaty of Lisbon, a study did argue that the passage of legislation through Council would become easier post-Lisbon when compared to the regime post-Nice: Baldwin, R. and Widgrén, M., "Council Voting in the Constitutional Treaty: Devil in the Details", *CEPS Policy Brief* (No 53, July 2004), pp. 6-7.

³⁰⁹ Stone Sweet, A. and Brunell, T., *supra* n. 213, p. 10.

³¹⁰ Stone Sweet, A. and Brunell, T., *supra* n. 213, p. 10. In a similar vein, Garrett, Kelemen and Schulz have argued that "the ECJ-member state game is not one of complete information." In other words, the Court will sometimes make decisions which are adverse to salient interests of powerful Member States and which should have been expected to evoke a strong Member State reaction, because the Court did not anticipate this reaction. (Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 168). This argument suggests that the Member State governments have difficulty in communicating any threat of override to the Court, which opens to question the effectiveness of such a threat.

³¹¹ Stone Sweet, A. and Brunell, T., *supra* n. 213, p. 10.

Other studies on the threat of override have been qualitative, rather than quantitative, in nature. Garrett, Kelemen and Schulz³¹² have posed three hypotheses, which they then analysed by examining three series of cases in different areas of EU law before the Court of Justice involving rulings adverse to national interests:

- “The greater the clarity of EU treaties, case precedent, and legal norms in support of an adverse judgment, the greater the likelihood that the ECJ will rule against a litigant government.”³¹³
- “The greater the domestic costs of an ECJ ruling to a litigant government, the lesser the likelihood that the government will abide by an adverse ECJ decision.”³¹⁴
- “The greater the potential costs of a case, the larger the number of governments potentially affected by it, and the larger the number of adverse decisions the ECJ makes in similar areas of the law, the greater the likelihood that the EU member governments will respond collectively to restrain EU activism.”³¹⁵

The first series of cases analysed by the authors concerned import bans on agricultural products.³¹⁶ In the three decisions analysed by the authors in this series (*Charmasson*³¹⁷, the *Potato case*³¹⁸ and the *Sheep Meat case*³¹⁹), the Court took decisions that were adverse to British and French national interests; very salient interests in the case of the latter Member State. The *Charmasson*³²⁰

³¹² Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164. For other studies, see Davies, G., *supra* n. 281; Conant, L., *Justice Contained: Law and Politics in the European Union* (Ithaca: Cornell University Press, 2002); Wasserfallen, F., “The Judiciary as Legislator? How the European Court of Justice shapes Policy-Making in the European Union”, (2010) 17 *Journal of European Public Policy* 1128.

³¹³ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 158. This is an acknowledgment of Burley and Mattli’s assertion (Burley, A.-M. and Mattli, W., *supra* n. 47) that “legal precedent greatly concerns the ECJ.” (Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 157). See also Stone Sweet, A., *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004), pp. 9-10, pp. 30-35 and pp. 40-41.

³¹⁴ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 159.

³¹⁵ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 161.

³¹⁶ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 162-165.

³¹⁷ Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383.

³¹⁸ Case 231/78 *Commission v United Kingdom* [1979] ECR 1447.

³¹⁹ Case 232/78 *Commission v France* [1979] ECR 2729.

³²⁰ Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383.

case involved a challenge to a French national measure which imposed a quota on the import of bananas, which was adopted shortly before the end of the transitional period prescribed by the Treaty of Rome for the abolition of extant trade quotas (the 31st December 1969). The Court, using what Garrett, Kelemen and Schulz observe to be classic *Marbury v Madison* tactics³²¹ ruled that since a national marketing organisation for bananas had been in place prior to 1958, the (now) Article 34 TFEU prohibition on quantitative restrictions on imports did not apply to the banana quota at issue, a ruling that favoured France. However, the Court also ruled that after the 31st December 1969, Article 34 TFEU would apply without exception, a ruling that the authors termed “a bold pro-integration interpretation”³²² of the relationship between the Treaty articles on the free movement of goods and agriculture. Garrett, Kelemen and Schulz conclude that the Court’s ruling in this case demonstrates that it was prepared to make such a bold pro-integrative ruling, despite knowing that it was likely to provoke French defiance because, consistent with their third hypothesis, “the ECJ had little reason to expect a collective response from the member governments”³²³, and, because the decision in *Charmasson*³²⁴ involved the interpretation of Treaty articles, “overturning the decision would require unanimous member state support for a treaty revision”.³²⁵ In the *Potato*³²⁶ case, the Court essentially applied the *Charmasson*³²⁷ ruling in a case where the Commission challenged the UK’s national organisation, which restricted imports of potatoes. Garrett, Kelemen and Schulz explain this adverse finding against a Member State as consistent with their first hypothesis: once the Court had established a legal precedent as it had in *Charmasson*³²⁸, it was much more likely to rule in a manner adverse to a Member State in a subsequent case.³²⁹ By the time the third case in the series, the *Sheep Meat* case³³⁰, came before the Court, it was threatened with non-

³²¹ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 163. See *supra* n. 238.

³²² Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 162.

³²³ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 163.

³²⁴ Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383.

³²⁵ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 163.

³²⁶ Case 231/78 *Commission v United Kingdom* [1979] ECR 1447.

³²⁷ Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383.

³²⁸ Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383.

³²⁹ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 163.

³³⁰ Case 232/78 *Commission v France* [1979] ECR 2729.

compliance³³¹ by France, which would indicate French acceptance that override was not likely.

The second series of cases analysed by Garrett, Kelemen and Schulz concerned equal treatment of the sexes under what is now Article 157 TFEU.³³² It is this second series of cases that perhaps illustrates best the effectiveness, or lack thereof, of the threat of override in constraining the Court, because it contains rare examples of the Court effectively overruling the Council, and the Member States effectively revising elements of, if not completely overriding, the Court's rulings. Garrett, Kelemen and Schulz appear to view the ruling of the Court in *Bilka*³³³, in which it ruled that occupational pensions constituted pay for the purposes of Article 157 TFEU, as strategic ineptitude on the Court's part, since it was obvious that this decision would be costly to the Member States and national employers, and, in the authors' view, it was also obvious that these costs would in turn cause a "collective restraining response" from the Member State governments.³³⁴ Garrett, Kelemen and Schulz argue that the Member State governments did in fact react to the *Bilka*³³⁵ ruling by adopting Directive 86/378/EEC³³⁶, which attempted to control some of the damage caused by the ruling to Member State interests.³³⁷ The Court continued this dialogue by means of its decision in *Barber*³³⁸, in which it ruled that "benefits paid by an employer to a worker in connection with the latter's compulsory redundancy fall within the scope of the second paragraph of Article [157 TFEU], whether they are paid under a contract of employment, by virtue of

³³¹ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 164; Gormley, L., *Prohibiting Restrictions on Trade within the EC* (Amsterdam: Elsevier Science Publishers, 1985), p. 25; Buffet-Tchakaloff, M.F., *La France devant la cour de justice des Communautés Européennes* (Marseille: Presses Universitaires d'Aix-Marseille, 1983), p. 182. Non-compliance as a counter-Court tactic is discussed later in this part of the dissertation (*infra* n. 460-n. 509).

³³² Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 165-168.

³³³ Case 170/84 *Bilka Kaufhaus GmbH v von Hartz* [1986] ECR 1607.

³³⁴ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 163-164.

³³⁵ Case 170/84 *Bilka Kaufhaus GmbH v von Hartz* [1986] ECR 1607.

³³⁶ Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes. The Directive contrary to the decision in *Bilka* considered "occupational pensions to be a matter of social security rather than pay". (Craig, P. and de Búrca, G., *supra* n. 38, p. 900).

³³⁷ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 166. Although the authors neglect rather curiously to mention that this Directive was before Council in the lead up to the judgment in *Bilka* and was adopted in spite of, and not as a reaction to, the judgment (see Craig, P. and de Búrca, G., *supra* n. 38, p. 900).

³³⁸ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

legislative provisions or on a voluntary basis.”³³⁹ Garrett, Kelemen and Schulz view this decision as an effective overruling of Directive 86/378/EEC.³⁴⁰ The Court, however, in accordance with the Commission’s urging in its written observations and oral argument, and in response to arguments expressed by the UK regarding “the serious financial consequences of such a ruling”³⁴¹, restricted the effect of the judgment *ratione temporis*, ruling:

“[T]he direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.”³⁴²

Garrett, Kelemen and Schulz argue that this retrospective limitation of the effect was too ambiguous, in that the argument could be made that “the equal treatment principle [would apply] to future pension payments for all workers regardless of when they joined.”³⁴³ This ambiguity, according to the authors, was so unsettling to the Member State governments that they reacted by adding the so-called Barber Protocol to the Treaty of Maastricht³⁴⁴, which limited the application of the judgment to periods of employment after the date of the judgment; essentially, the most conservative interpretation of the *Barber*³⁴⁵ ruling possible. After the Protocol was adopted, but before it came into effect, the Court in *Ten Oever*³⁴⁶ had the opportunity to clarify the extent of the retrospective limitation in *Barber*³⁴⁷. In *Ten Oever*³⁴⁸, the Court, without any

³³⁹ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889, para 20.

³⁴⁰ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 166. See also, Curtin, D., “Scalping the Community Legislator: Occupational Pensions and *Barber*”, (1990) 27 *Common Market Law Review* 475.

³⁴¹ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889, para 40.

³⁴² Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889, para 45.

³⁴³ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 166.

³⁴⁴ Protocol concerning Article 119 of the Treaty establishing the European Community: “For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.”

³⁴⁵ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

³⁴⁶ Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879.

³⁴⁷ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

reference to the pending Protocol in its judgment, ruled that the *rationae temporis* portion of its judgment in *Barber*³⁴⁹ was to be interpreted to mean that Article 157 TFEU could be relied upon “for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990”³⁵⁰, a ruling that was consistent with the Barber Protocol. Garrett, Kelemen and Schulz view the decision in *Ten Oever*³⁵¹ as an attempt by the Court to avoid a “messy battle” with the Member State governments.³⁵² However, the authors concede that in cases subsequent to the adoption of the Protocol, the Court “arguably challenged” it³⁵³: in *Fisscher*³⁵⁴ and *Vroege*³⁵⁵, the Court adopted a narrow interpretation of the Protocol to limit its application to benefits and not to the right to join or belong to an occupational pension scheme.³⁵⁶

Garrett, Kelemen and Schulz interpret this series of cases on the definition of pay under Article 157 TFEU to bear out their three hypotheses. Of relevance to the impact of override on the Court, the authors conclude:

“[A]s [the third hypothesis] suggests, Court decisions with costly domestic ramifications for all member governments are likely to provoke collective responses to rein in the Court. In this instance government responses escalated over time with the increasing potential costs associated with ECJ rulings. The member governments responded to *Bilka* by passing a directive on occupational pensions. After the *Barber* decision they went a step further by agreeing to a treaty protocol. In this line of cases the ECJ was willing to circumvent secondary legislation passed by the Council. Once the governments

³⁴⁸ Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879.

³⁴⁹ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

³⁵⁰ Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879, para 20.

³⁵¹ Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879.

³⁵² Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 167. It is curious that in *Barber* only the UK made any observations before the Court and in *Ten Oever* only the Netherlands and the UK made observations. The former case originated in the UK, the latter in the Netherlands. It is conceivable that Member States may have conferred with these two Member States and presented their arguments through them.

³⁵³ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 167.

³⁵⁴ Case C-128/93 *Fisscher v Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583.

³⁵⁵ Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting and Stichting Pensioenfonds NCIV* [1994] ECR I-4541.

³⁵⁶ See Craig, P. and de Búrca, G., *supra* n. 38, p. 902.

clearly signaled their resolve through a treaty revision, however, the Court retreated.”³⁵⁷

However, the authors appear to acknowledge that any constraining effect of override on the Court in this series of cases occurred after rather than before the Union’s legislature took action: they argue the Court would not have made the ruling in *Barber*³⁵⁸ if it had known that the ruling would have provoked a unanimous Member State response.³⁵⁹

The third series of cases analysed by Garrett, Kelemen and Schulz related to state liability for the violation of EU law³⁶⁰, the operative part of that analysis for present purposes being the ruling in *Francovich*³⁶¹, and the behaviour of the Court and the Member States in its aftermath. In *Francovich*³⁶², the Court famously ruled that Member States may be liable to pay compensation to individuals for losses resulting from a failure to implement a Directive properly or at all, even where the Directive is not directly effective. This was, of course, a decision of major potential cost to all the Member States³⁶³ and, in accordance, with Garrett, Kelemen and Schulz’s third hypothesis, should have resulted in a greater likelihood of coordinated Member State response, whether through non-compliance with or overriding of the Court’s ruling. The authors outline the UK government’s attempts first to mobilise the Member States to take action to contain the ruling in *Francovich*³⁶⁴ and then its attempts to mobilise an attack on the Court’s institutional independence at the 1996 Intergovernmental Conference, all of which failed to gain traction. However, Garrett, Kelemen and Schulz examining the Court’s subsequent jurisprudence on the state liability doctrine, particularly *Brasserie du Pêcheur*³⁶⁵ and *Factortame*³⁶⁶, in which the Court, in a manner consistent with the expressed

³⁵⁷ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 168.

³⁵⁸ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

³⁵⁹ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 168.

³⁶⁰ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 168-174.

³⁶¹ Cases C-6/90-C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5537.

³⁶² Cases C-6/90-C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5537.

³⁶³ Again, rather curiously, only three Member State governments made observations before the Court: Italy, the Netherlands and the UK.

³⁶⁴ Cases C-6/90-C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5537.

³⁶⁵ Case C-46/93-C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029.

³⁶⁶ Case C-213/89 *R v Secretary of State for Transport, ex p Factortame and Others* [1990] ECR I-2433.

wishes of the Member States, limited the application of *Francovich*³⁶⁷ to “manifest and grave” violations of EU law, conclude that this apparent narrowing of state liability suggests “that the ECJ is willing to tailor its state liability rulings in ways that the core member governments, particularly France and Germany, wish.”³⁶⁸

In their reply to the quantitative analysis of Carrubba, Gabel and Hankla³⁶⁹ of the Court’s decisions from 1987-1997, Stone Sweet and Brunell also conduct a qualitative analysis of selected series of decisions made by the Court in order to contest Carrubba, Gabel and Hankla’s intergovernmentalist argument that their study supports the view that the Court is controlled systematically by the threat of override and non-compliance.³⁷⁰ Coincidentally, two of the series of decisions examined by Stone Sweet and Brunell were the second and third series of cases studied by Garrett, Kelemen and Schulz, i.e. the case-law on equal treatment of the sexes under Article 157 TFEU and on state liability for violations of EU law. Stone Sweet and Brunell, however, interpret these cases, in terms of what they reveal about the relationship between the Court and the Member State governments in a very different manner. Rather than seeing the decision in *Ten Oever*³⁷¹ as a cowed Court’s reaction to the Barber Protocol, which they in any event do not view as a reversal of *Barber*³⁷², Stone Sweet and Brunell argue that the Court in *Ten Oever*³⁷³ had no reason to reject the Member States’ more restrictive interpretation of *Barber*³⁷⁴ as expressed in the Protocol.³⁷⁵ Hence, the Court in *Ten Oever*³⁷⁶ decided as it did not because the Protocol served as a constraint on the Court, but because the Court chose autonomously to interpret its own case-law in this way. The post-Protocol decisions such as *Vroege*³⁷⁷, which were glossed over by Garrett, Kelemen and

³⁶⁷ Cases C-6/90-C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5537.

³⁶⁸ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 173.

³⁶⁹ Carrubba, C.J., Gabel, M. and Hankla, C., *supra* n. 213.

³⁷⁰ Stone Sweet, A. and Brunell, T.L., *supra* n. 213, pp. 17-25.

³⁷¹ Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879.

³⁷² Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

³⁷³ Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879.

³⁷⁴ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

³⁷⁵ Stone Sweet, A. and Brunell, T.L., *supra* n. 213, p. 20.

³⁷⁶ Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879.

³⁷⁷ Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting and Stichting Pensioenfonds NCIV* [1994] ECR I-4541.

Schulz as representing the Court as having “arguably challenged”³⁷⁸ the Protocol, demonstrate for Stone Sweet and Brunell that “neither the *Barber*³⁷⁹ Protocol nor the briefed preferences of the Member States induced the ECJ to abandon its pre-Protocol case law.”³⁸⁰ While Garrett, Kelemen and Schulz interpreted the rulings in *Brasserie du Pêcheur*³⁸¹ and *Factortame*³⁸² as demonstrating the Court’s willingness to adapt its rulings to accord with the preferences of the core Member State governments, Stone Sweet and Brunell do not find evidence for such an assertion. On the contrary, Stone Sweet and Brunell point to the fact that in *Brasserie du Pêcheur*³⁸³ eight Member States and the Commission filed briefs on a wide range of issues and that the Court rejected arguments advanced by those Member States; for instance, the Court rejected an argument advanced by the German government that the *Francovich*³⁸⁴ right to reparation should be created by legislation only, and in so rejecting this argument, the Court, according to Stone Sweet and Brunell, made it clear that it is “the authoritative interpreter of the Treaty, not the Member States”.³⁸⁵ Furthermore, Stone Sweet and Brunell point to the Court’s rejection of the briefed position of France, Germany, Ireland and the UK to the effect that EU law may not require remedies that do not exist already in national legal systems.³⁸⁶

In the previous discussion on the credibility of the threat of Treaty and/or legislative change to destroy the Court, curb its jurisdiction or otherwise harm it, it was possible without much difficulty to conclude that such threats were highly unlikely for a number of reasons, *inter alia*, the interests of the Member States, particularly smaller Member States, in maintaining a strong legal system in the EU, the consistent position of Germany and the Benelux countries in protecting the Court’s independence, the ‘joint decision trap’, as well as the fact that any such attacks would be transparently aimed at attacking judicial independence. Many of these factors apply *mutantis mutandi* to

³⁷⁸ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 167.

³⁷⁹ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

³⁸⁰ Stone Sweet, A. and Brunell, T.L., *supra* n. 213, p. 20.

³⁸¹ Case C-46/93-C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029.

³⁸² Case C-213/89 *R v Secretary of State for Transport, ex p Factortame and Others* [1990] ECR I-2433.

³⁸³ Case C-46/93-C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029.

³⁸⁴ Cases C-6/90-C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5537.

³⁸⁵ Stone Sweet, A. and Brunell, T.L., *supra* n. 213, p. 24.

³⁸⁶ Stone Sweet, A. and Brunell, T.L., *supra* n. 213, pp. 24-25.

override of the Court's rulings by Treaty change or legislation. If the intergovernmentalists are correct in asserting that frequent override causes harm to the legitimacy and effectiveness of a judicial body, then it should follow that if the legal reasoning of that body has retained adherence to 'legal doctrine' and 'known doctrinal techniques', frequent use of override will, even within the intergovernmentalist conception of the relationship dynamic between the Member State governments and the Court, result in a lack of stability and respect for the rule of law, and a commensurate loss of the Court's authority, none of which is in the interests of the Member States.³⁸⁷ It is noteworthy that when the UK suggested more formalised methods for overriding the rulings of the Court of Justice in the lead up to the 1996 Intergovernmental Conference, such as the empowerment of a political body to overturn rulings of the Court³⁸⁸ or the introduction of a power to require a recalcitrant Court to reconsider its ruling in light of Member State displeasure³⁸⁹, such methods were dismissed out of hand. Nevertheless, measuring the threat of legislative override has, particularly after the Treaties of Nice and Lisbon, become more complicated as more areas of EU competence are governed by qualified majority voting rather than unanimity. Whereas Stone Sweet and Brunell were once able to damage the credibility of Carrubba, Gabel and Hankla's quantitative study on the effectiveness of the threat of override in constraining the Court between 1987 to 1997 by pointing out that the override rule was unanimity in 90% of the cases analysed by those authors³⁹⁰, a fact which had not been considered in the study of Carrubba, Gabel and Hankla, the same cannot be said post-Lisbon. It is evident, therefore, that an updated quantitative study along the lines of that undertaken by Carrubba, Gabel and Hankla, but adjusted to take account of the override rule in each case, as well as the increased involvement of the European Parliament in the legislative process, would be necessary to measure the credibility of the

³⁸⁷ That is not to exclude the possibility that such support for the Court might not diminish in the future. Chalmer's argument that the Court is at a crossroads and may not be able to rely upon a continuing supportive institutional and political environment is germane in this context (Chalmers. D., *supra* n. 4, p. 62).

³⁸⁸ *Supra* n. 48.

³⁸⁹ See Alter, K., *supra* n. 48, pp. 140-141.

³⁹⁰ Stone Sweet, A. and Brunell, T.L., *supra* n. 213, p. 10.

threat of override since December 2009. It is, unfortunately, beyond the scope of this dissertation to perform such a study.³⁹¹

Notwithstanding, the difficulty of quantifying the threat of override, there are other weaknesses in the arguments made those who advocate the view that such a threat constrains the Court systematically. Firstly, as Stone Sweet and Brunell have recognised, those such as Carrubba, Gabel and Hankla who argue that the threat of override constrains the Court systematically are unable to identify the manner in which Member State governments make a threat of override.³⁹² The implication in Carrubba, Gabel and Hankla's argument is that the Member State governments signal this intent through submissions before the Court. However, even in clearly salient cases, very often a small number of Member States make submissions. In *Barber*³⁹³, which according to Garrett, Kelemen and Schulz led to an override of a Court ruling in the form of a Protocol to the Treaty of Maastricht³⁹⁴, only the UK and the Commission filed observations. How was the Court to anticipate a credible threat of override?³⁹⁵ Secondly, in making submissions before the Court, Member States are engaging in a 'legal', rather than overtly 'political' process. They are therefore playing the 'law game' as it were, trying to influence the Court through the language of the law, the very stock in which the Court deals.³⁹⁶ The significance of this fact is that the Member State governments in making written and oral submissions are seeking to *influence* the Court. Those who see Member State briefs as constraining the Court do not account adequately for a distinction between *constraint* and *influence*: just because the Court may in

³⁹¹ Davies suggests that since most of the Court's "most important and controversial judgments have been interpretations of the Treaties, or even of the general principles which the Court finds to be inherent in those Treaties", the undoing of such decisions will have to be effected through Treaty change (Davies, G., *supra* n. 281, at 1582).

³⁹² Stone Sweet, A. and Brunell, T., *supra* n. 213, p. 10.

³⁹³ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

³⁹⁴ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 166.

³⁹⁵ Beck has sought to answer this question, arguing that although a case where the Court of Justice has been motivated by deference to Member States will not be evident on the face of the judgment, "it can be inferred from a number of factors which include the number of Member State interventions in a case, the contents of their submissions, an objective assessment of the financial and political sensitivity of the questions in issue based on indicators such as the degree of accompanying political or public controversy, adverse reception in Member States of relevant previous ECJ judgments, judicial debate or intensive lobbying by the well-organised political interests engaged, and, finally and in particular, from the increased weight the Court would in such cases attach to particular *topoi* which favour a deferential outcome." (Beck, G., *supra* n. 47, p. 195).

³⁹⁶ See Granger, M.-P., *supra* n. 239.

some cases decide in a manner that accords with Member State legal positions as recorded on their briefs is not in itself evidence of the Court being compelled to make such a ruling. Take Garrett, Kelemen and Schulz's assertion that the Court in *Barber*³⁹⁷ left its retrospective limitation on Article 157 TFEU claims so ambiguous because it was concerned about Member State governments' reactions³⁹⁸: the authors do not consider the fact that the Court issues collegiate judgments that may be the result of a compromise, which could explain such ambiguous language.³⁹⁹ Carrubba, Gabel and Hankla's argument that Member State briefs constrain the Court systematically is in any case undermined by Stone Sweet and Brunell's empirical analysis, which reveals that Member States' briefs chime most with the eventual ruling of the Court where they join the Commission in its position, i.e. Member State governments have more success before the Court where they seek to enable, rather than constrain it.⁴⁰⁰ Thirdly, in many of the most salient policy areas and in constitutional matters, i.e. matters concerning the Treaties, the override rule remains unanimity.⁴⁰¹ This means that some of the most salient areas of national interest, and one can assume that these areas are of particular salience, the 'joint decision trap' continues to be relevant.⁴⁰²

That there is very little evidence of the Court being *constrained* systematically by the preferences of Member State governments is not to say, however, that the Court has not been *influenced* by these preferences. Garrett, Kelemen and Schulz assert that both neofunctionalists and intergovernmentalists "agree on one common assumption: the ECJ is a strategic actor that is sensitive to the preferences of EU member governments."⁴⁰³ There is some interpretative

³⁹⁷ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889.

³⁹⁸ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 166.

³⁹⁹ It is conceivable that the Judges of the Court could not, for instance, agree on a determinative or closer statement of the law and chose to postpone its development until more cases on point came before the Court.

⁴⁰⁰ Stone Sweet, A. and Brunell, T., *supra* n. 213, pp. 25-31.

⁴⁰¹ In fact, unanimity remains the rule in over seventy areas, for instance non-discrimination and citizenship (see Craig, P. and de Búrca, G., *supra* n. 38, p. 135).

⁴⁰² There is, of course, a certain irony in this since it would imply that the Court has more leeway and freedom in constitutional areas and areas of such salience, since the threat of override is less credible than it would be in areas where the override rule is a qualified majority.

⁴⁰³ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 150. This is not, as the political scientists would have it, solely a matter of self-interest or self-preservation. The Court's self-interest in promoting integration is tied to its normative mission as an institution of the EU; Article 13(1) TEU states that the Court as an institution of the EU must "aim to promote [the EU's] values, advance its objectives, serve its interests, those of its citizens and those of the

evidence of the Court adopting certain tactics to ensure the successful introduction of a legal doctrine adverse to Member State government interests in such a way that organised opposition to a ruling is avoided. Garrett, Kelemen and Schulz highlight the *Marbury v Madison* tactics adopted by the Court in *Charmasson*⁴⁰⁴; that is, deciding the case at hand in favour of the Member State government, but establishing a wider legal principle or doctrine to which the Member State is opposed.⁴⁰⁵ Of course, once again, there is no way of proving that it was sensitivity to Member State government preferences that influenced these decisions: it may well be that the rulings were not motivated by these factors. If one does accept the tactics premise, then it is evident that the Court may be influenced, or perhaps even constrained, by a threat of override or other form of retribution to act in a manner different to how it would have acted without such threat, since one is concluding that the principles announced by the Court in cases such as *Costa v ENEL*⁴⁰⁶, *Van Duyn*⁴⁰⁷ and *Charmasson*⁴⁰⁸ would also have been applied substantively against the defendant Member State had the Court felt it was not at least strategically disadvantageous to do so. Viewed in such terms, it could be argued that the

Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.” That the balancing and achievement of these objectives might involve strategy is obvious. Davies acknowledges that the Court is “overtly policy-driven” and that “there are many cases where it makes concessions to national measures which are clearly of particular local sensitivity, or importance [citing Case 379/87 *Groener v Minister for Education* [1989] ECR I-3967 as one example], and even a few cases where it may have bowed to an awareness of Member State anger.” However, Davies surmises that the Court shows such deference not from fear of override, but because “it considers it legally appropriate to take account of legitimate interests, and in these cases it was persuaded of that legitimacy.” (Davies, G., *supra* n. 281, at 1606).

⁴⁰⁴ Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383; Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 163.

⁴⁰⁵ The use of this tactic by the Court of Justice has been noted in other cases, most famously *Costa v ENEL* (Case 6/64 *Costa v ENEL* [1964] ECR 585) (see Kouroutakis, A.E., *supra* n. 238, at 195-196). For a detailed discussion on the Court’s use of such tactics, especially in the early years of its existence, see Alter, K., *supra* n. 48, at 130-133. Alter’s central argument is that the Court managed to escape Member State government control by taking advantage of politicians’ different time horizons: “The short-term focus of politicians explains why they often fail to act decisively when doctrine that is counter to their long-term interest is first established. The ECJ took advantage of this political fixation on the material consequences of cases to construct legal precedent without arousing political concern. Following a well-known judicial practice, the ECJ expanded its jurisdictional authority by establishing legal principles but not applying the principles to the cases at hand.” (at 131). See also, Lenaerts’ account of the Court’s EU citizenship case-law and its use of a “stone-by-stone” approach: Lenaerts argues that the Court “does not take ‘long jumps’ when expounding the rationale underpinning the solution given to novel questions of constitutional law.” He adds: “On the contrary, the persuasiveness of its argumentative discourse is built up progressively, i.e. ‘stone-by-stone’.” (Lenaerts, K., *supra* n. 69, at 1351).

⁴⁰⁶ Case 6/64 *Costa v ENEL* [1964] ECR 58.

⁴⁰⁷ Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

⁴⁰⁸ Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383.

Court of Justice in these cases wished to make a ‘scenario 2’ ruling, i.e. one adhering to the ‘legal steady factors’, but adverse substantively to the interests of one or more of the Member States, but instead made a ‘scenario 1’ ruling, that is, one adhering to the ‘legal steady factors’ and acceptable substantively to all of the Court’s ‘countervailing powers’. However, to refer to the precedents established in these rulings as acceptable substantively to the Member State governments would be fanciful; it may well be that the significance of these rulings, particularly *Costa v ENEL*⁴⁰⁹, was not fully understood contemporaneously, but the rulings were undoubtedly adverse to the interests of national governments seeking to protect their sovereignty. Therefore, even if one accepts that the Court was adopting tactics in these cases to ensure the passage of a novel integrative doctrine under national government radar, such rulings did not involve the Court adopting a ‘scenario 1’ interpretative outcome in lieu of a preferred ‘scenario 2’ outcome; rather, the Court of Justice is adopting one ‘scenario 2’ outcome over another, the former being the lesser of two evils from a Member State perspective. Most importantly of all, there is no indication or evidence in these cases of an abandonment of adherence to the ‘legal steady factors’. In fact, in the series of cases on import bans on agricultural products, specifically in the *Sheep Meat* case⁴¹⁰, Garrett, Kelemen and Schulz conclude that the Court prioritised this adherence ahead of potential Member State retribution:

“[T]he ECJ knew that if it violated its own clear and recent precedents under pressure from the French, it would lose legitimacy as an impartial arbiter in the eyes of other member governments.”⁴¹¹

It may be concluded, therefore, that even if the threat of override of the Court’s rulings may influence it to act more strategically to ensure the effectiveness of those rulings, an argument which cannot really be proven definitively, there would appear to be no evidence that this threat has operated in such a way as to shake the Court from its adherence to the ‘legal steady factors’. Indeed, as Garrett, Kelemen and Schulz suggest the abandonment of such adherence would cause greater damage to the Court’s legitimacy than rulings adverse to ‘countervailing powers’. Moreover, there appears to be no evidence in any of

⁴⁰⁹ Case 6/64 *Costa v ENEL* [1964] ECR 58.

⁴¹⁰ Case 232/78 *Commission v France* [1979] ECR 2729.

⁴¹¹ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 164.

the qualitative studies of the threat of override as a means of constraint that this threat has operated to motivate the Court to adopt a ‘scenario 1’ interpretative outcome where the Court desired to adopt a ‘scenario 2’ outcome, though in some cases the line between ‘scenario 1’ and ‘2’ may be blurred.⁴¹² At most, the Court has acted strategically to adopt, from its perspective, one less desirable ‘scenario 2’ outcome over another. The Court, therefore, would appear to be sufficiently autonomous to arrive at ‘scenario 2’ rulings despite a threat of override from the Member States.⁴¹³

(3) Utilisation of the Article 253 TFEU Judicial Appointments and Re-Appointments Procedure⁴¹⁴

In theory, the control of the Member State governments over judicial appointments and re-appointments is a Damoclean sword, which the Member States may hold over the Court in order to constrain decisions that are adverse to their interests. Certainly, Scheingold and Rasmussen were of the view that the mode of appointment and the short term in office mandated by the Treaties were included by design rather than accident.⁴¹⁵ Scheingold, writing in 1965, suggested that up to that point there had been “no evidence that the governments [had] tried to take advantage of the leverage of limited tenure to influence the decisions of the Court.”⁴¹⁶ Kenney, writing in the 1990s, argued similarly that there had been little evidence of use of appointments to affect case outcomes.⁴¹⁷ Although it may be difficult to point to examples of the Member States using appointment powers to influence the doctrinal direction of the Court’s case-law, Dehousse has argued that political pressure was brought to bear on the German Judge Zuleeg during his time in office: in 1990, Chancellor Kohl criticised the Court publicly for its decisions in the area of social security, criticism which Dehousse argued must have “placed some

⁴¹² Specifically, where a Member State or Member States do not notice, fully understand, or care contemporaneously that a ruling is adverse to its or their interests.

⁴¹³ Davies has questioned, in any event, the effectiveness of legislative override as a method of constraining the Court. He points to the fact that there are three techniques through which the Court can undermine overriding legislation and re-impose its own preferred interpretation: annulment of the legislation, emasculatory interpretation of the legislation and avoidance (Davies, G., *supra* n. 281, at 1591-1605).

⁴¹⁴ See generally, Bobek, M. (ed.), *supra* n. 4.

⁴¹⁵ Scheingold, S.A., *supra* n. 99, p. 28; Rasmussen, H., *supra* n. 3, p. 214.

⁴¹⁶ Scheingold, S.A., *supra* n. 99, p. 28.

⁴¹⁷ Kenney, S.J., *supra* n. 284, at 128.

pressure on the German judge.”⁴¹⁸ Dehousse also surmised that these public criticisms may only have been “the tip of the iceberg” and pointed to the fact Judge Zuleeg’s tenure was not renewed in 1994.⁴¹⁹ Kenney has also acknowledged that “[a]ppointment to the Court is political in the sense that personal connections to the appointing executive and party credentials are paramount, even if the appointments are not motivated by specific policy goals”⁴²⁰ and that “[a]ppointments are not made strictly on merit”.⁴²¹

Notwithstanding the theoretical use of appointments and re-appointments to constrain the Court, there are a number of reasons why their systematic use may not be a threat of sufficient credibility to cause the Court to abandon adherence to the ‘legal steady factors’ or tailor its rulings to accord with Member State preferences. Firstly, the motivation behind an appointment or re-appointment may not be a factor once the Judges are appointed, since they are required legally to leave national allegiances at the door, a fact reinforced by several ‘extra-legal steady factors’, such as the judicial environment into which newly-appointed Judges are introduced, which restrict a Judge minded to depart from the Court’s mission from doing so.⁴²² Secondly, such use of appointments and re-appointments, in Rasmussen’s words, “may be a long-drawn process, especially if a substantial majority of a court’s judges favours policy-change.”⁴²³ The fact that appointments are staggered also gives the Court a measure of protection. In accordance with Article 253 TFEU and Article 9 of the Statute, half of the Judges are either retired or re-appointed every three years. As Brown and Kennedy have pointed out this staggering of appointments “guarantees a measure of continuity of membership even if new appointments were always made.”⁴²⁴ Alter has attributed some of the Court’s success in advancing its pro-integration mission to the different time horizons

⁴¹⁸ Dehousse, R., *supra* n. 288, p. 12.

⁴¹⁹ Dehousse, R., *supra* n. 288, p. 12. This observation ignores, however, the then German practice of appointing Judges for one term only.

⁴²⁰ Kenney, S.J., *supra* n. 135, at 260.

⁴²¹ Kenney, S.J., *supra* n. 135, at 260.

⁴²² This observation is consistent with the argument made by Llewellyn that professional judicial office and its trappings serve to constrain the behaviour of judges; professional judicial office was Llewellyn’s fourteenth ‘steady factor’ (see Llewellyn, K.N., *supra* n. 2, pp. 45-51).

⁴²³ Rasmussen, H., *supra* n. 3, p. 81.

⁴²⁴ Brown, L.N. and Kennedy, T., *supra* n. 47, p. 51. However, Brown and Kennedy acknowledge that too rapid a turnover could be “extremely disruptive” and point to Lord Mackenzie Stuart’s farewell address in 1988, when the Member States replaced six members of the Court (p. 51).

of politicians⁴²⁵, and it would take a long-term concerted effort for national governments to achieve a change in direction of the Court's jurisprudence by means of the appointments process alone. Thirdly, there is the fact that while in accordance with Article 19(2) TEU and Article 253 TFEU appointments are made "by common accord of the governments of the Member States", in reality, each Member State government nominates one of its own nationals for appointment or re-appointment, which is "in practice accepted by the other governments even though they might have second-thoughts about the policy-orientation of the incumbent."⁴²⁶ The removal by one Member State of a Judge to whom it has attributed a role in judgments adverse to its interests will not necessarily have the effect of sending a message to the Judges nominated by other Member States: in order for the threat of retirement to work, a concerted effort would have to be made by a large number of Member States⁴²⁷, a point that has been advanced by Alter.⁴²⁸ The expansion of the EU to twenty-eight Member States and the resultant growth in the Court's composition has served to magnify the remoteness of such a concerted attack by the Member State governments.⁴²⁹ There is also the argument that certain Member States such as the Benelux states and Germany have traditionally been perceived as protective of the Court's independence⁴³⁰, and as such might be more likely to use their power to veto the nominees of other Member State governments if such nominations were perceived as an attack on that independence. Fourthly, the Judges, once appointed, are to an extent anonymised and insulated from individual attack in that decisions of the Court are never taken by fewer than three Judges, who produce a composite judgment, with the secrecy of the

⁴²⁵ Alter, K., *supra* n. 48, pp. 130-133.

⁴²⁶ Rasmussen, H., *supra* n. 3, p. 81.

⁴²⁷ There is also the moral pressure of the Article 255 TFEU Panel.

⁴²⁸ "The joint-decision trap also affects the ability of member states to control the ECJ through the appointment process. The relevant EU institutional feature is that decision making takes place in the subunit of the member state. Using appointments to influence judicial positions is never a sure thing, but without a concerted appointment strategy on the part of a majority of member states, such a strategy is extremely unlikely to succeed. Each state has its own selection criteria for EU justices, and high-level political appointments are governed by a variety of political considerations, including party affiliation and political connections. A judge's opinion on EU legal matters is seldom the determining factor, and only a few member states have even attempted to use a judge's views regarding European integration as a factor in the selection process." (Alter, K., *supra* n. 48, at 139).

⁴²⁹ Kelemen argues persuasively that the appointment of a number of Eurosceptic Judges would have a limited effect on the direction of the Court's jurisprudence, since in more significant or salient cases, the Court will sit as a Grand Chamber: Kelemen, R.D., *supra* n. 169, at 51-52.

⁴³⁰ Alter, K., *supra* n. 48, at 137.

deliberations that led to that decision maintained.⁴³¹ The result is that it should, in theory, be difficult for Member State governments to identify those Judges who have voted against their interests. Finally, Alter has pointed out that the threat of retirement for the Judges may not be as intimidating a prospect as one might imagine, given that Judges are likely to be well provided for afterward.⁴³²

In summary, the Judges' short six-year terms and Member State government control of the processes of appointment and re-appointment allow the national governments to exercise leverage to influence the Court's decisions: as Scheingold has stated, "the system does enable the member states to retain ultimate and arbitrary power over the Court."⁴³³ It is undoubtedly the case that the Court's independence would be better protected by a longer period of tenure, perhaps the nine-year terms enjoyed by the judges of the ECtHR⁴³⁴, and power being invested in an independent body such as the Article 255 TFEU Panel to veto Member State nominations. Nevertheless, to this day, there remains little evidence that the Member State governments have utilised the appointments and re-appointments processes in a concerted manner to change the direction of the Court's jurisprudence. Furthermore, notwithstanding the theoretical manner in which these processes could be put to effect by national governments to constrain the Court, there are also a number of factors, identified above, that serve to reduce the credibility of that threat. Accordingly, it would appear that the short terms in office and Member State government control of the appointment and re-appointment processes are not in themselves sufficient to cause the Court to abandon adherence to the 'legal steadying factors' or adopt a 'scenario 1' adjudicative outcome where its preferred outcome would be a 'scenario 2' one.

⁴³¹ Solanke, I., *supra* n. 99, at 92, n. 23; Kelemen, R.D., *supra* n. 169, at 50. The need for this secrecy to be maintained permanently has been criticised, with the suggestion being made that the deliberations in historical cases such as Case 6/64 *Costa v ENEL* [1964] ECR 585 should now be disclosed (JHR and MC, "For History's Sake: On *Costa v ENEL*, André Donner and the Eternal Secret of the Court of Justice's Deliberations", (2014) 10 *European Constitutional Law Review* 191).

⁴³² "[I]n most European member states the judiciary is a civil bureaucracy, and judges have all the job protection of civil servants. If an ECJ judicial appointee came from the judiciary (or academia), which many do, they are virtually guaranteed that a job will be awaiting them on their return." (Alter, K., *supra* n. 48, at 139).

⁴³³ Scheingold, S.A., *supra* n. 99, p. 28. See also, Chalmers, D., *supra* n. 4, p. 51.

⁴³⁴ As argued for in the Rothley Report for the European Parliament, Session Document A3-0228/93 (cited by Chalmers, D., *supra* n. 4, p. 51, fn. 3). However, these terms are non-renewable.

(4) Voluntary Non-Utilisation of the Preliminary Reference Procedure by National Courts or Tribunals not Compelled to Refer

The neofunctionalist account of the relationship between the Court and national governments provides a convincing narrative of the Court's use of the preliminary reference procedure to empower lower national courts, that is, national courts and tribunals that are not obliged to make references under Article 267 TFEU. While this reciprocal empowerment had the effect of making the Court largely autonomous from the national governments⁴³⁵, it did at the same time mean that the Court depends upon the cooperation of national courts not only in terms compliance with its rulings, but also on their continued willingness to make references. Judge Mancini, writing extra-judicially, has described very candidly the Court's reliance on the cooperation of national courts in making references in allowing it to pursue its integrative mission effectively. That this cooperation could not be presumed is evident from the lack of obligation placed on national courts and tribunals to refer under Article 267 TFEU. Instead, this cooperation had to be won, and Judge Mancini acknowledged that this was a conscious and often difficult effort on the Court's part.⁴³⁶ Burley and Mattli have referred to the Court in its early years making a very conscious effort to convince national courts as to the utility of making references, "through seminars, dinners, regular invitations to Luxembourg, and visits around the community".⁴³⁷ The Court's approach to the admissibility of Orders for Reference in the early stages of its development also demonstrated not only deference to national courts when it came to the question of whether to refer, but also a level of patience with national courts when they referred poorly-expressed questions.⁴³⁸ That these strategies were successful is

⁴³⁵ In a way this was confirmed by the national governments themselves in their decision initially to restrict the right to make references in the areas of asylum and immigration to national courts and tribunals of final instance (see Broberg, M. and Fenger, N., *supra* n. 288, p. 9).

⁴³⁶ "The Court's first preoccupation was therefore to win that co-operation and that goodwill. The early results were frustrating. It took almost four years before the first reference made by a national judicial body - the *Gerechtshof* in The Hague - was received at the Court and legend has it that on that day there was abundant popping of champagne corks in the deliberation room." (Mancini, G.F., *supra* n. 56, at 605).

⁴³⁷ Burley, A.-M. and Mattli, W., *supra* n. 47, at 62. See also, De Visser, M. and Claes, M., "Courts United? On European Judicial Networks" in Vauchez, A. and de Witte (eds.), *Lawyering Europe: European Law as a Transnational Social Field* (Oxford: Hart, 2013), p. 75.

⁴³⁸ This was also acknowledged openly by Judge Mancini: "[The Judges of the Court of Justice] developed a style that may be drab and repetitive, but explains as well as declares the law and they showed unlimited patience vis-à-vis the national judges, reformulating questions

evidenced by the sheer growth in the number of references.⁴³⁹ In fact, it is now argued that the Court, and the preliminary reference procedure in particular, has become a victim of its success⁴⁴⁰, with the Court's ever-increasing workload perceived to be a threat to the uniformity of EU law.⁴⁴¹ One might be forgiven, therefore, for assuming that the threat of voluntary non-engagement with the preliminary reference procedure is no longer a danger, and that the Court has established conditions to ensure a steady supply of references from national courts. However, the procedure remains voluntary as far as lower courts and tribunals are concerned. Broberg and Fenger have even suggested that national authorities seeking guidance on the interpretation of EU law could pursue alternative avenues.⁴⁴² It is also evident that the Court's prestige and effectiveness depend on continued utilisation of the preliminary reference procedure by these national courts and tribunals. Voluntary non-utilisation of the procedure by lower national courts and tribunals, especially if such non-utilisation were systemic or concerted, would harm the Court. It is, therefore, theoretically a threat that could be utilised by the national courts or tribunals to constrain the Court's behaviour. The real question is the extent to which the threat would be credible.

A consideration of this threat must involve contemplation of what might motivate such behaviour, whether in isolated instances or as part of a wider phenomenon, as well as legal and pragmatic factors that might serve to prevent or disincentivise such behaviour. Variations have been perceived in terms of the frequency of use of the preliminary reference procedure by the courts and tribunals of different Member States.⁴⁴³ Various structural factors which might

couched in imprecise terms or extracting from the documents concerning the main proceedings the elements of Community law which needed to be interpreted with regard to the subject matter of the dispute.” (Mancini. G.F., *supra* n. 56, at 606).

⁴³⁹ For statistics on the growth of the use of the preliminary reference procedure from 1961-1994, see Stone Sweet, A., and Brunell, T.L., “The European Court and the national courts: a statistical analysis of preliminary references, 1961-95”, (1998) 5(1) *Journal of European Public Policy* 66; see, in particular, figure 1, at 74.

⁴⁴⁰ Galetta, D.-U., “European Court of Justice and preliminary reference procedure today: national judges, please behave!” in Becker U., Hatje, A., Potacs, M. and Wunderlich, N. (eds.), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Baden-Baden: Nomos Verlag, 2014), pp. 674-691).

⁴⁴¹ Lenaerts, K., “The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited” in Pernice, I., Stöbener, P., Kokott, J., Mall, J. and Saunders, C. (eds.), *The Future of the European Judicial System in a Comparative Perspective* (Berlin: Nomos Verlag, 2005), p. 211.

⁴⁴² Broberg, M. and Fenger, N., *supra* n. 79, pp. 16-23.

⁴⁴³ See generally, Broberg, M. and Fenger, N., *supra* n. 79, chapter 2 (pp. 34-59).

serve to determine national courts' abilities to make preliminary references, such as differences in the population sizes of the Member States, different litigation patterns in the different Member States, relative levels of compliance by the Member States with EU law, and unique characteristics of the national judicial systems have been advanced as causes of these variations.⁴⁴⁴ Broberg and Fenger conclude that the perceived variations in the use of the preliminary reference procedure can be attributed to these structural factors, "rather than be seen merely as a reflection of the willingness of different Member State courts to make use of Article 267 TFEU".⁴⁴⁵ However, the authors do proceed to consider the effect of behavioural factors influencing national courts' willingness to refer, such as the constitutional traditions of the Member States (majoritarian democracies versus constitutional democracies), the policy preferences of the national courts, and inter-court competition.⁴⁴⁶ Broberg and Fenger appear to dismiss the possibility of these behavioural factors having influence on the decision of national courts to refer. They suggest that national judges are not concerned with the Court's substantive rulings and the policy interests they are perceived to advance; rather, national judges are concerned solely with the utility of a ruling to them in their effort to determine the main proceedings before them. Drawing on Korte⁴⁴⁷, Broberg and Fenger conclude:

"[F]or most courts the principal interest is to obtain a clear-cut interpretation by the Court of Justice rather than to start a discussion about the most desirable interpretation of EU law."⁴⁴⁸

This observation would appear consistent with the argument that the Court chose strategically to ally itself with national courts and tribunals, rather than national governments, because such institutions populated as they are by, it is assumed, fellow 'law-conditioned officials' enjoying independence from national executive power, are more likely to judge the Court's decisional output in terms of its normative character, rather than policy preferences, making these courts and tribunals a far less fair-weather ally. This observation

⁴⁴⁴ Broberg, M. and Fenger, N., *supra* n. 79, pp. 37-49.

⁴⁴⁵ Broberg, M. and Fenger, N., *supra* n. 79, p. 49.

⁴⁴⁶ Broberg, M. and Fenger, N., *supra* n. 79, pp. 49-58.

⁴⁴⁷ Korte, J., *Primus Inter Pares: the European Court and national courts: the follow-up by national courts of preliminary rulings ex Art. 177 of the Treaty of Rome: a report on the situation in the Netherlands* (Baden-Baden, Nomos, 1991).

⁴⁴⁸ Broberg, M. and Fenger, N., *supra* n. 79, p. 57.

applies *a fortiori* to national courts and tribunals not under a duty to refer under Article 267 TFEU, since they will not, it is assumed, be dealing to the same extent with matters of high policy and national interest as constitutional courts and other courts of final instance under an obligation to refer.⁴⁴⁹ An important aspect of this observation is that this acceptance of the Court's rulings by lower national courts and tribunals depends on the rulings being perceived as being 'legal' in nature: the death of such a perception would most likely lead to systemic non-involvement by the national judiciaries with the Article 267 TFEU process. Put simply, once again, it is not in the Court's interests to abandon adherence to the 'legal steadying factors', as such abandonment would strip rulings of their normative character in the eyes of the national courts. If national courts not under an obligation to refer may be taken to be unconcerned in a general sense with the substance of the Court's rulings, then it would appear that it will be their utility to the court or tribunal considering making a reference, in terms of deciding the main proceedings, that will be the chief determinant of whether a reference will be made. That the Court has been aware of the importance of the utility of its rulings to national courts and tribunals has been obvious from the Court's practice when it comes to the admissibility of references: Judge Mancini is correct to refer to the patience demonstrated by the Court in its early days, when it was prepared to reformulate imprecisely expressed questions. However, once the Court's workload increased and it felt itself sufficiently secure in terms of the amount of references it was receiving, it took a far more prescriptive approach to the contents of an Order for Reference, and generally took greater control over admissibility.⁴⁵⁰ In more recent times, it is not a concern about a lack of references, but the opposite, the considerable workload placed upon the Court, which has led to concerns for the maintenance of the cooperative relationship between the Court and the national judiciaries, upon which the procedure relies.⁴⁵¹ When a national court is considering whether to make a reference, it will have to suspend the main proceedings to await the Court's ruling. The possibility that a response will not be forthcoming for a long period of time reduces the utility of the procedure considerably, and might tip the balance in

⁴⁴⁹ In the case of these courts, the spectre of non-compliance with rulings may occur, a matter which is discussed later in Part Two (*infra* n. 472-n. 509).

⁴⁵⁰ *Supra* n. 234.

⁴⁵¹ Lenaerts, K., *supra* n. 441, p. 211.

favour of the national court tackling an EU law interpretative problem itself, where otherwise it would have referred.⁴⁵²

In summary, the threat of voluntary non-utilisation of the preliminary reference procedure by national courts and tribunals not under an obligation to refer is not a credible one as long as the Court ensures that its rulings adhere to the ‘legal steadying factors’, are timely and otherwise of utility to the referring national judicial body. The substance of a ruling and the policy preferences it is perceived to advance will very rarely be of such salience as to interfere with the loyalty and cooperation of national judiciaries. Accordingly, the Court, while dependant on these national courts and tribunals for the receipt of references, is sufficiently autonomous of these bodies to arrive at ‘scenario 1’ and ‘2’ adjudicative outcomes at its own discretion.

(5) Voluntary Non-Utilisation of EU law by Litigants before National Courts or Tribunals

De jure, the decision to make a preliminary reference is that of a national court or tribunal alone: a national judicial body may make a reference of its own motion even where the parties to the proceedings have not relied upon EU law.⁴⁵³ *De facto*, however, litigants play an important role in ensuring that their cases are referred.⁴⁵⁴ The neofunctionalist account of the Court’s role in European legal integration, which of course places the preliminary reference procedure at the heart of the Court’s self-interested strategy, acknowledges the

⁴⁵² The European Parliament has argued as much in a resolution adopted in 2008 (European Parliament Resolution of 9 July 2008 on the role of the national judge in the European judicial system (A6-0224/2008)). See Broberg, M. and Fenger, N., *supra* n. 79, p. 6.

⁴⁵³ Case 126/80 *Salonia* [1981] ECR 1563. See also, Broberg M. and Fenger N., *supra* n. 79, p. 280.

⁴⁵⁴ A point summarised best by Broberg and Fenger: “In practice, ... the parties to the main proceedings play an important role in the national court’s decision of whether or not to refer. Often, the initiative of suggesting that a reference should be made comes from one of the parties, although national practice varies considerably in this respect. Especially in those legal systems where the role of counsel in clarifying the case is considerable, such as Great Britain, Ireland, and Denmark, references for preliminary rulings are generally made at the initiative of the parties. This has even led some to argue that, in the UK at least, the reality behind the preliminary procedure is closer to a litigant-Court of Justice relationship (with the national court acting as a relay between the two) than a national court-Court of Justice dialogue as frequently proclaimed by the Court of Justice.” (Broberg, M. and Fenger, N., *supra* n. 79, pp. 280-281). The authors cite Chalmers as the maker of the argument discussed in the final sentence of the quote above (Chalmers, D., “The Much Ado about Judicial Politics in the United Kingdom: A Statistical Analysis of Reported Decisions of United Kingdom Courts Invoking EU Law 1973-1988”, Harvard Jean Monnet Working Paper 1/00, points I and VII).

role of individual litigants and their lawyers in this phenomenon. According to Burley and Mattli, not only did the Court of Justice ‘court’ the national courts and judges, it also through doctrines such as direct effect gave individual litigants a personal stake in EU law.⁴⁵⁵ Given that in many Member States litigants play an important *de facto* role in shaping a national court or tribunal’s decision to refer, as well as assisting in the drafting of the Order for Reference, voluntary non-utilisation by litigants and their lawyers of EU law arguments would result in a greater number of questions not being referred. Such litigant behaviour would be particularly troublesome where national judiciaries were not sufficiently versed in EU law to raise such questions without the assistance of counsel.

In order to examine the credibility of a threat of voluntary non-utilisation by litigants and their lawyers of EU law, one must consider what might motivate these parties to act thusly. What must be acknowledged at the outset is that litigants will for the most part be less interested, in a one-off case at least, in the quality of the Court’s reasoning, and more interested in the utility of its substantive judgment in helping it to achieve a desired outcome in the main proceedings. Because a reference may be made only in circumstances where a ruling is necessary to enable the national court to give judgment, and there is a genuine dispute between the parties⁴⁵⁶, the procedure in most cases becomes an adversarial one in practice. Litigants and their lawyers, therefore, are extremely unlikely to neglect to raise an EU law argument if it could assist them in achieving a successful outcome.⁴⁵⁷ Even if a litigant wishes to avoid a reference because of a perception that the Court will decide in a manner adverse to that litigant’s interests, the opposing litigant should by definition be pressing the national court to refer. The substantive direction of the Court’s rulings, therefore, is unlikely to result in a downward trend in litigants having recourse to EU law arguments, since it is difficult if not impossible to alienate all litigants and lawyers as a class while remaining within the ‘legal steady

⁴⁵⁵ Burley, A.-M. and Mattli, W., *supra* n. 47, at 60-62. See also, Scharpf, F.W., “Perpetual Momentum: Directed and Unconstrained?”, (2012) 19(1) *Journal of European Public Policy* 127.

⁴⁵⁶ Case 104/79 *Foglia v Novello* [1980] ECR 745; Case 244/80 *Foglia v Novello (No 2)* [1981] ECR 3045.

⁴⁵⁷ This is assuming of course that the lawyers in question are versed sufficiently in EU law to recognise the argument.

factors'.⁴⁵⁸ As with the national courts, however, the utility of the preliminary reference procedure to the economic and other interests of litigants and their lawyers will be of major importance. If the Court begins a trend of deciding references without adherence to the 'legal steadying factors', not only would reputational damage be suffered by the Court, but an inherent unsteadiness resulting from arbitrariness would lead to grave unpredictability. Such unpredictability added to delays caused by the Court's workload might cause litigants and their lawyers to seek to avoid preliminary references.⁴⁵⁹

In summary, the threat of voluntary non-reliance by national litigants on EU law arguments before their national judicial bodies is not a credible one as long as the Court retains its adherence to the 'legal steadying factors', and the procedure, in terms of its mechanics, continues to be of utility to national litigants and their lawyers.

bb) Non-Legal Measures

(1) Evasion and Non-Implementation of Court of Justice Rulings

The analysis of the legal measures available to the Court's 'countervailing powers' to deter the Court from or punish it for 'scenario 2' rulings suggests that the use of such measures is unlikely as long as the Court retains its adherence to the 'legal steadying factors', a conclusion that would be consistent with the hypothesis presented at the outset. However, there may also be as a matter of *realpolitik* non-legal (or illegal) measures available to the 'countervailing powers'.

Political scientists who study the Court, particularly intergovernmentalists, see its behaviour as being controlled by political constraints. Carrubba, Gabel and

⁴⁵⁸ There is one important qualification to this observation: commentators such as Stein (Stein, E., *supra* n. 56), and Burley and Mattli (Burley, A.-M. and Mattli, W., *supra* n. 47) have referred to the use by the Court of Justice of doctrines like direct effect to empower litigants and transform them into enforcers of EU law against their own Member State governments. Obviously, any reversal of this empowerment or the growth of a perception that the Court of Justice does not defend EU law against Member State misbehaviour might arrest litigant use of EU law and the preliminary reference procedure.

⁴⁵⁹ See de la Mare, T. and Donnelly, C., *supra* n. 247, pp. 389-391; Rasmussen, H., "Remedying the Crumbling EC Judicial System", (2000) 37 *Common Market Law Review* 1071.

Hankla recognise two such political constraints: firstly, the threat of override; and, secondly, threats of non-compliance.⁴⁶⁰ This dissertation has classified the threat of override as a legal measure since it can be executed in accordance with law. However, non-compliance with rulings is a non-legal or, perhaps more correctly, illegal means through which ‘countervailing powers’ can harm the Court’s effectiveness. Intergovernmentalist accounts of the Court’s role have unsurprisingly focussed on the threat of non-compliance by Member State governments as a constraint on the Court. However, in theory, the threat of non-compliance may be utilised by any of the Court’s ‘countervailing powers’, both at supranational and subnational level. In the paragraphs that follow, the simplistic dichotomy created by the neofunctionalist versus intergovernmentalist debate between, on the one hand, national (the Member State governments) and, on the other, supra- and subnational actors is used to assess the credibility of the utilisation of threats of non-compliance by the ‘countervailing powers’.

(α) Evasion and Non-Implementation by Member State Governments

In the same manner that they have asserted that the threat of override by Member State governments has acted to constrain the Court’s ability to make decisions adverse to the interests of these governments, intergovernmentalists have argued that the threat of non-compliance with the Court’s rulings by the same actors has achieved the same effect. In their empirical study of Court decisions from January 1987 to the end of 1997, Carrubba, Gabel and Hankla concluded that threats of override and non-compliance had “a systematic and substantively important impact on ECJ decisions.”⁴⁶¹ However, based on their empirical findings, of these two ‘political constraints’ the authors attribute a greater significance to the threat of non-compliance in terms of influence on the Court, a finding they attribute “to the ease with which threats of non-compliance can be executed compared to threats of override.”⁴⁶² Notwithstanding Carrubba, Gabel and Hankla’s findings on the threat of non-compliance, there are a number of arguments that may be advanced to support an assertion that such a threat is not credible, or is at best very remote. Garrett,

⁴⁶⁰ Carrubba, C.J., Gabel, M. and Hankla, C., *supra* n. 213, p. 449.

⁴⁶¹ Carrubba, C.J., Gabel, M. and Hankla, C., *supra* n. 213, p. 435.

⁴⁶² Carrubba, C.J., Gabel, M. and Hankla, C., *supra* n. 213, p. 449.

Kelemen and Schulz, attempting to move past the neofunctionalist-intergovernmentalist debate, expressed the likelihood of the threat of non-compliance in the form of their three hypotheses.⁴⁶³ The authors' strategic history of the Court's case-law suggests a number of reasons why Member State governments would have difficulty in bringing the threat of non-compliance to bear on the Court. Firstly, there is the issue, common to use of the threat of override, of communicating that threat. The authors have acknowledged that "the ECJ-member state game is not one of complete information"⁴⁶⁴ in seeking to explain why the Court has made rulings adverse to salient Member State interests. Carrubba, Gabel and Hankla's empirical study suggests that a threat of non-compliance can be communicated through Member State government briefs before the Court, but the authors do not demonstrate how this mechanism would work. Secondly, Garrett, Kelemen and Schulz's case studies reveal the remoteness of all three of their hypotheses occurring in such alignment as to constrain the Court. Of particular significance in this regard is their third hypothesis, which suggests that a collective response of the Member State governments will be more likely the more Member States are affected adversely by the Court's ruling. In fact, the authors explain the Court's pro-integrative decisions in the cases concerning import bans on agricultural products such as *Charmasson*⁴⁶⁵, which the Court might have anticipated as significantly adverse to French national interests, as enabled by the Court's calculation that a collective response from a large number of Member States was not likely.⁴⁶⁶ It is evident, therefore, that a threat of non-compliance by a single Member State government, assuming it were communicated successfully to the Court prior to its ruling, will not be sufficient to cause the Court to arrive at a 'scenario 1' outcome, where it wishes to make a 'scenario 2' ruling. Moreover, such threats would not suffice

⁴⁶³ (1) "The greater the clarity of EU treaties, case precedent, and legal norms in support of an adverse judgment, the greater the likelihood that the ECJ will rule against a litigant government."

(2) "The greater the domestic costs of an ECJ ruling to a litigant government, the lesser the likelihood that the government will abide by an adverse ECJ decision."

(3) "The greater the potential costs of a case, the larger the number of governments potentially affected by it, and the larger the number of adverse decisions the ECJ makes in similar areas of the law, the greater the likelihood that the EU member governments will respond collectively to restrain EU activism."

(Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 157-161).

⁴⁶⁴ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 168.

⁴⁶⁵ Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383.

⁴⁶⁶ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 163.

to cause the Court to abandon its adherence to the ‘legal steadying factors’, since such an approach would in the words of Garrett, Kelemen and Schulz cause the Court to “lose legitimacy as an impartial arbiter in the eyes of other member governments.”⁴⁶⁷ Moreover, the enforcement regime established by the Treaties and developed by the Court ensures that isolated instances of Member State government non-compliance with rulings will be unprofitable.⁴⁶⁸ Widespread non-compliance by a larger number of Member States will, therefore, be required according to Garrett, Kelemen and Schulz’s third hypothesis. However, there are also several factors that mitigate the likelihood of regular widespread non-compliance by Member State governments. Firstly, as Alter⁴⁶⁹ has argued and Garrett, Kelemen and Schulz⁴⁷⁰ have acknowledged, certain Member States, particularly smaller ones, have a rational motive to recognise the Court’s rulings even where they are adverse to their own interests, because the Court is viewed as an institution that can place limits on abuse of power by the larger Member States. Secondly, the effectiveness of the Treaties’ legal enforcement mechanisms and those developed by the Court should not be underestimated, even in the event of more multilateral non-compliance by Member State governments: even if the Commission is cowed and does not wish to take action against the recalcitrant Member States, the doctrine of supremacy should ensure that national courts and tribunals continue to apply the Court’s rulings faithfully against national governments, and the preliminary reference procedure, as well as the doctrines of direct effect and state liability, will provide avenues through which national litigants and their lawyers can compel their governments to comply.⁴⁷¹

⁴⁶⁷ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 164.

⁴⁶⁸ Such a Member State may face attack from a number of directions: the Commission may launch Article 258 TFEU infringement proceedings and Article 260 TFEU sanctions proceedings; individual litigants may sue their governments for compensation in their own national courts for breaches of EU law; and, national courts and tribunals are obliged by the doctrine of supremacy of EU law to abide by the rulings of the Court of Justice against the national governments (see generally, Pollack, M., *supra* n. 92).

⁴⁶⁹ Alter, K., *supra* n. 48, at 137.

⁴⁷⁰ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 171.

⁴⁷¹ The one possible, though limited, exception to this rule might be where a Member State government empowers a national senior court to overrule the Court of Justice on the basis of national constitutional values. A plan to give the UK Supreme Court such a power has been suggested (*supra* n. 71). In such a scenario, a ruling of the Court of Justice might become unenforceable nationally (although lower-court loyalty to the Court of Justice could add another complication), which would lead to a stand-off between the Court of Justice and the Member State. The Court’s history would lead one to believe the Court of Justice would seek to avoid such a conflict (*supra* n. 233).

In summary, therefore, a threat of non-compliance by Member State governments would appear to be of limited utility to such governments as a method of coercing the Court to adopt ‘scenario 1’ adjudicative outcomes where the Court’s preferred interpretative outcome is one adverse to the interests of Member States.

(β) Evasion and Non-Implementation by Supranational and Subnational Actors

The analysis heretofore has concluded that the theoretical legal and non-legal methods through which ‘countervailing powers’ could constrain the Court’s case-law are not credible threats as long as the Court retains its fidelity to the ‘legal steadying factors’. To this extent, the conclusions drawn up to now have been more consistent with the neofunctionalist end of the European legal integration debate spectrum, which identifies supranational and subnational actors as the drivers of integration, than with the intergovernmentalist end. However, the consequence of such a conclusion is that while the Court may enjoy a significant amount of autonomy from the Member State governments to make rulings that are adverse to their interests, the Court is dependant greatly upon the supra- and subnational actors that make this autonomy possible. The spectre of non-compliance with Court rulings by the Commission and/or national courts and tribunals, therefore, should be of more concern to the Court.

There are again, however, a number of reasons why the threat of non-compliance by these supra- and subnational actors may not be a credible threat to the Court’s effectiveness. As regards the Court’s most important supranational ally, the Commission, upon which it relies for the bringing of Article 258 and Article 260 TFEU proceedings before it, and upon which it relies for the quality of its submissions in proceedings before it, there are a number of very good reasons why the Commission would be highly unlikely to behave in a non-compliant manner, systematic or otherwise, with the Court’s rulings where they retain their ‘legal’ character. Firstly, the Commission shares not only normative aims with the Court; it shares also the Court’s self-interest in ensuring the success of the European project, and, therefore, the effectiveness and uniformity of EU law. Secondly, such non-compliance would

most likely run counter to the interests of another of the Court's 'countervailing powers', whether another EU institution, a Member State government or a number of governments or national litigants. In such a case, the recalcitrance of the Commission would not be beyond judicial control, since judicial review proceedings pursuant to Articles 263 and 265 TFEU could be brought against it. Moreover, the Commission would not be beyond political control for defiance of the Court's rulings: in particular, the European Parliament may censure and remove the Commission under Article 234 TFEU, and the Council may apply to the Court, pursuant to Article 247 TFEU, to have an individual Commissioner removed if he/she no longer fulfils the conditions for performance of the position, or for serious misconduct.⁴⁷²

As for the Court's subnational allies, the most significant is the national courts, since the effectiveness of the Court's rulings and its ability to retain its autonomy from national governments depends upon the faithful application of these rulings by national judicial institutions. That the Court is concerned by such a breakdown in its relationship with national courts is obvious from Judge Mancini's account of the conflict which existed between the Court of Justice and the German Bundesverfassungsgericht over the relationship between the fundamental rights in the *Grundgesetz* and EU law: the author acknowledges that the judgment of the Court of Justice in *Nold*⁴⁷³, in which it recognised that fundamental rights formed an integral part of the general principles of EU law, was "forced on the Court ... [by] German, and later, the Italian Constitutional Courts."⁴⁷⁴ This is strong evidence for the proposition that the Court of Justice is willing to tailor its rulings to accord with the preferences of powerful national courts in order to preserve the cooperative relationship that exists: Nyikos has suggested that national courts may avoid compliance with the preliminary rulings through either evasion or non-implementation.⁴⁷⁵ Nyikos describes evasion as the adoption of "procedural measures to bypass an ECJ

⁴⁷² See generally, Craig, P. and de Búrca, G., *supra* n. 38, p. 34 and pp. 54-55.

⁴⁷³ Case 4/73 *Nold v Commission* [1974] ECR 491. See also Davies' account of the judicial dialogue between the Court and the German judiciary, which appears to support Judge Mancini's views: Davies, B., "Pushing Back: What Happens when Member States Resist the Court of Justice? A Multi-Modal Approach to the History of European Law", (2012) 21(3) *Contemporary European History* 417.

⁴⁷⁴ Mancini, G.F., *supra* n. 56, at 611.

⁴⁷⁵ Nyikos, S.A., *supra* n. 173, at 399.

decision”⁴⁷⁶ and points to two main methods of such evasion: firstly, to refer a case again; and, secondly, to “reinterpret the facts such that the ECJ ruling does not apply.”⁴⁷⁷ As regards non-implementation, where a national court rules contrary to a Court of Justice ruling, Nyikos opines that “[f]ew if any domestic courts ever state explicitly that the ECJ is wrong and thus non-implementation is warranted.”⁴⁷⁸ However, Nyikos acknowledges that there is “a handful of examples in which the national court disagreed with the ECJ and refused to apply its decision”, providing the decision of the French Cour de Cassation in *Vito Inzirillo v Caisse d’Allocations Familiales de l’Arrondissement de Lyon*⁴⁷⁹ as one such example. Notwithstanding the fact, however, that national courts may and sometimes do avoid abiding by rulings⁴⁸⁰, Nyikos reports that existing studies that have been conducted on the question of national court implementation of the Court’s rulings indicate that the level of such implementation is high.⁴⁸¹

There are a number of reasons, many of which are common to the threat of national court voluntary non-engagement with the preliminary reference procedure, why it may be argued that the threat of evasion of and non-

⁴⁷⁶ Nyikos, S.A., *supra* n. 173, at 399.

⁴⁷⁷ Nyikos, S.A., *supra* n. 173, at 399.

⁴⁷⁸ Nyikos, S.A., *supra* n. 173, at 401.

⁴⁷⁹ Case 63/76 *Vito Inzirillo v Caisse d’Allocations Familiales de l’Arrondissement de Lyon* [1976] ECR 2057. See Nyikos, S.A., *supra* n. 173, at 401.

⁴⁸⁰ There has, of course, since Nyikos’ time of writing, been an explicit ruling by a national court that a preliminary ruling of the Court of Justice was *ultra vires*: in 2012, the Czech Constitutional Court in *Holubec* (Judgment of the Czech Constitutional Court of the 31st January 2012, Pl. ÚS 5/12), declared the Court’s ruling in *Landtová* (Case C-399/09 *Landtová* [2011] ECR I-5573) outside of the Court’s jurisdiction. The main proceedings concerned essentially a sensitive question of Czech pensions law, which had arisen from the breakup of Czechoslovakia. The decision and its background are set out in a compelling narrative by Bobek, M., “*Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure*”, (2014) 10 *European Constitutional Law Review* 54. See also, Komárek, J., “Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*”, (2012) 8 *European Constitutional Law Review* 323. However, even this affront to the Court has since been dismissed convincingly as a “revolt that did not take place”: Bobek characterises the decision of the Czech Constitutional Court as an unreasoned one, which was aimed not at the Court of Justice or EU institutions, but at the domestic administrative courts with which the Constitutional Court had been feuding for over a decade, with the Court being caught in the crossfire. Though it has been asserted that this decision is symptomatic of greater national court criticism of the Court of Justice in recent times (Chalmers, D., *supra* n. 4, p. 51, fn. 1), the short number of intervening years would seem to confirm the effect of Bobek’s analysis that the ruling is an unprincipled anomaly.

⁴⁸¹ Nyikos, S.A., *supra* n. 173, at 402-403. Nyikos is here drawing upon studies of implementation carried out in the 1980s as part of the *Primus Inter Pares* research project, the results of which were published in Korte, J., *supra* n. 447 (in respect of the Netherlands) and Schwarze, J., *Die Befolgung von Vorabentscheidungen des Europäischen Gerichtshofs durch deutsche Gerichte* (Baden-Baden: Nomos, 1988) (in respect of Germany).

implementation with the Court's rulings, particularly such behaviour on a wide scale⁴⁸², is not a credible threat to the effectiveness and legitimacy of those rulings as long as they retain adherence to the 'legal steadying factors'. Firstly, as a general rule, national courts are inhabited by 'law-conditioned officials' who should recognise the normative character of the rulings: more so than the politicians that inhabit the Member State governments. National courts are, therefore, less interested in the question of whose interests the Court's substantive interpretation advances: rather, national judicial bodies will test the Court's rulings as 'legal' or 'illegal', helpful or not helpful to their efforts to determine the main proceedings, all of which make national courts far less fair-weather allies than national governments. Secondly, at least where national court recalcitrance is limited to a small number of lower courts in one Member State or an insignificant number of States, there are enforcement mechanisms both in national law and EU law: litigants may appeal to a higher national court where they may get a better result in terms of compliance with EU law; the Commission may take Article 258 TFEU infringement proceedings and Article 260 TFEU sanctions proceedings against a Member State, since the Court of Justice has in the past held Member States responsible for the acts or omissions of their national courts.⁴⁸³

There are, of course, exceptions to the above assertions and the most obvious one applies where the Court makes a ruling or series of rulings which offend against a deeply-felt need of national courts to protect a national legal principle of salience, and Member State courts are willing to challenge the supremacy of EU law to protect it. This situation will more often than not manifest itself as a conflict between the Court of Justice and higher, often constitutional, national courts. As mentioned above, Judge Mancini has admitted that such conflicts have caused the Court great concern⁴⁸⁴, and in the 1990s, Phelan warned of a revolt by national courts against the Court of Justice if it continued to pursue its integrationist aims at the expense of national constitutional principles.⁴⁸⁵ The

⁴⁸² There is some evidence that there has been a rise in the incidences of national judicial dissent (Chalmers, D., *supra* n. 4, p. 51, fn. 1 with citations).

⁴⁸³ See, for instance, Case C-154/08 *Commission v Spain* [2009] ECR I-187. See generally, Chalmers, D., Davies, G. and Monti, G., *supra* n. 297, pp. 352-355 and Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 201-202. However, this approach would not be without problems. This issue is discussed in greater detail in the paragraph that follows.

⁴⁸⁴ Mancini, G.F., *supra* n. 56, pp. 609-611.

⁴⁸⁵ Phelan, D.R., *supra* n. 30.

reasons for these concerns are not without grounds, since enforcement of the Court's rulings in such circumstances would not be without problems. Attempts by lower national courts to apply Court rulings faithfully in a manner contrary to their own national superior courts could be undone on appeal. There is the possibility of the use by the Commission of Article 258 TFEU infringement proceedings against the Member State in question. However, this solution may be of limited value where the Member State government stands united with its national courts⁴⁸⁶ (although sanctions might soon put paid to such a principled stand if the Member State stands isolated from others that do not share its outlook on the issue). An Article 258 TFEU ruling in such circumstances is also undesirable since it involves EU institutions, the Commission and the Court requiring a Member State government to ensure that its courts end a violation of EU law, which might require perceived interference with the independence of the national judiciary, and the principle of *res judicata*.⁴⁸⁷ That such conflicts have by and large been avoided is most probably as a result of tactics adopted by the Court: the deference noted by Beck in areas of constitutional sensitivity⁴⁸⁸; the tendency to draw general principles of EU law from national constitutional traditions to legitimise decision⁴⁸⁹; the use by the Court of what Maduro refers to as 'majoritarian activism' in developing principles in the law concerning the free movement of goods⁴⁹⁰, etc. There is also the fact that the possibility of a contemporaneous

⁴⁸⁶ Bobek, M., *supra* n. 480, at 72. Bobek suggests that the Commission was wise in the aftermath of the Czech Constitutional Court's intransigence in its *Holubec* judgment not to launch infringement proceedings, which might have served to provoke the Czech Government to support its Court. What transpired instead was the isolation of the Constitutional Court with the Administrative Courts following the ruling of the Court of Justice and defying the Constitutional Court, and the latter receiving no support from the legislative or executive. The mumblings of a plan by the UK to empower the UK Supreme Court to test the 'constitutionality' of Court of Justice rulings raises the potential spectre of a conflict between the Court of Justice and the Commission on one side and the UK Supreme Court and government on the other (*supra* n. 71).

⁴⁸⁷ Chalmers, D., Davies, G. and Monti, G., *supra* n. 297, pp. 352-355; Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 102-103.

⁴⁸⁸ Beck, G., *supra* n. 47, pp. 350-390. In fact, Beck argues that this deference is an 'extra-legal steadying factor' that constrains the discretion of the Court. See also, Pech, L., "Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Domínguez*", (2012) 49 *Common Market Law Review* 1841.

⁴⁸⁹ Of which *Nold* (Case 4/73 *Nold v Commission* [1974] ECR 491) is a classic example. See Lenaerts, K., *supra* n. 31, at 1307; Lenaerts, K. and Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU Law", (2010) 47 *Common Market Law Review* 1629.

⁴⁹⁰ 'Majoritarian activism', according to Maduro, involves that Court of Justice measuring the compatibility of national rules with Article 34 TFEU by reference to their consistency with the rules governing the same issue in the majority of Member States (Maduro, M.P., *supra* n. 239).

constitutional clash with the higher courts of a number of Member States is a remote one.⁴⁹¹

Another set of important subnational allies of the Court are litigants, and by extension, their lawyers. This author has already observed that litigants and their lawyers play an important role in the preliminary reference procedure in making arguments relying on EU law, and in encouraging national courts to make references. There is also evidence that litigants play an important role in the enforcement of preliminary rulings: Nyikos has identified a phenomenon whereby litigants voluntarily implement rulings without waiting for a national court determination, particularly where the rulings are sufficiently clear to achieve a higher level of legal certainty.⁴⁹² However, there are a number of reasons why litigant evasion or non-implementation of the Court's preliminary rulings may not be a credible threat to the Court. Firstly, the Court's *Foglia*⁴⁹³ jurisprudence requires in the main that proceedings subject to a preliminary reference be adversarial in nature: as such, the failure of one party to abide by a ruling will most likely be challenged by the other in the national courts. Secondly, the arguments that militated against the credibility of the threat of voluntary non-utilisation by litigants and their lawyers of EU law arguments before national courts will apply *mutatis mutandi* to the threat of litigant/lawyer evasion or non-implementation of preliminary rulings.

In summary, as long as the Court's rulings maintain their adherence to the 'legal steadying factors', there is limited credibility of a threat of evasion or non-implementation by supra- or subnational 'countervailing powers' due to disagreement with the substance of such rulings. A notable exception to this general assumption is where a higher national court, particularly a constitutional court of one of the larger Member States, stands in opposition to the Court of Justice either overtly or less obviously due to a perceived inconsistency between EU law and a national constitutional principle which the national court feels duty-bound to protect. The concern of the Court of Justice

⁴⁹¹ Although Judge Mancini's observations would suggest that a conflict with a constitutional court of one of the larger Member States such as Germany or Italy is in itself enough cause for concern (Mancini, G.F., *supra* n. 56).

⁴⁹² Nyikos, S.A., *supra* n. 173, at 414.

⁴⁹³ Case 104/79 *Foglia v Novello* [1980] ECR 745 and Case 244/80 *Foglia v Novello (No 2)* [1981] ECR 3045.

about the effect of such conflicts on its effectiveness has undoubtedly forced it to adopt solutions to avoid them: this suggests that national constitutional courts can constrain the Court to the extent that it may, in very rare cases, be compelled to adopt a ‘scenario 1’ outcome, that is, one acceptable to the national constitutional courts in question, where the Court, uninhibited by such a constraint might have preferred a ‘scenario 2’ outcome, i.e. one which was adverse to the relevant national courts’ interests or preferences. Judge Mancini seems to characterise the Court’s *Nold*⁴⁹⁴ ruling in those terms, and Beck appears to suggest that the Court is willing to sacrifice short-term integrative developments of legal doctrine out of deference to national courts on issues of constitutional significance. The Court’s rather ingenious response to this dynamic of course has been to claim such fundamental national constitutional principles for EU law⁴⁹⁵, and the Court in more recent times has generally been able to navigate away from such conflicts⁴⁹⁶, though the national constitutional court Damoclean sword remains *in situ* with a number of such courts expressing either the qualified nature of the supremacy of EU law⁴⁹⁷ or espousing its non-existence⁴⁹⁸ in the recent past.⁴⁹⁹

(2) Non-Utilisation of the Preliminary Reference Procedure by National Courts or Tribunals Compelled to Refer

There are two circumstances in which a national court or tribunal is compelled to send a question for preliminary ruling. The first arises by virtue of the third paragraph of Article 267 TFEU, which provides that where a question

⁴⁹⁴ Case 4/73 *Nold v Commission* [1974] ECR 491.

⁴⁹⁵ Although this approach can lead to criticism where there is a lack of consensus as to the status of a principle as a general principle of EU law: see Herzog, R. and Gerken, L, “Stop the European Court of Justice”, <http://euobserver.com/opinion/26714> (last accessed at 15:12 on Thursday, the 17th March, 2016), a criticism of the Court’s ruling in Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981, in particular, in which the Court recognised protection against age discrimination as a general principle of EU law.

⁴⁹⁶ It is noteworthy that where national constitutional court assertiveness has occurred it has generally been in response to Treaty change, e.g. the German Bundesverfassungsgericht in 2 *BvR 2661/06*, of the 6th July 2010, which occurred in the shadow of the Treaty of Lisbon. See generally, Craig, P., and de Búrca, G., *supra* n. 38, pp. 279-290.

⁴⁹⁷ In 2 *BvR 2661/06*, of the 6th July 2010, the German Bundesverfassungsgericht ruled that EU law enjoys supremacy over the *Grundgesetz*, save where it is inconsistent with German constitutional identity. See generally, Craig, P., and de Búrca, G., *supra* n. 38, pp. 279-290.

⁴⁹⁸ In *K 18/04*, of the 11th May 2005 and *K 32/09*, the Polish Constitutional Tribunal refused to recognise the supremacy of EU law over the Polish constitution. See generally, Craig, P., and de Búrca, G., *supra* n. 38, pp. 305-307.

⁴⁹⁹ For an overview of national superior court conceptions of the doctrine of supremacy of EU law, see generally, Craig, P., and de Búrca, G., *supra* n. 38, pp. 278-309.

concerning the interpretation of EU law or the validity of acts of the institutions, bodies, offices, or agencies of the Union is raised in a national court, and the national court considers that a decision on the question is necessary to enable it to give judgment, it is bound to refer the question to the Court where “there is no judicial remedy under national law” against the decisions of the national court.⁵⁰⁰ The second applies to all national courts and tribunals and relates to the duty imposed upon them by the Court in *Foto-Frost*⁵⁰¹ to refer any question relating to the validity of an act of a Union institution, body or office or agency where the national court or tribunal perceives the act in question to be invalid.⁵⁰² In all cases not falling within the exceptions described above, national courts and tribunals enjoy discretion as to whether or not to refer, meaning that engagement with the preliminary reference procedure will generally be voluntary, and national courts and tribunals may choose, within EU law, not to refer. However, a threat not to refer by national courts where obliged by EU law to refer will involve a breach of EU law and will, therefore, be an illegal method of seeking to constrain or influence the Court’s jurisprudence.

The parallel and widespread utilisation of this threat by multiple national courts and tribunals of final instance may be a remote possibility as long as the Court’s rulings retain adherence to the ‘legal steadying factors’, and remain of utility to these national judicial bodies in assisting them in the determination of proceedings before them. However, it may well be imagined that such judicial institutions, dealing as they often do with fundamental national constitutional issues, and other hallowed legal principles peculiar to their legal systems, might wish to avoid the risk of subjecting these principles to the Court’s scrutiny, especially since such courts tend to be disempowered rather than empowered by their interaction with the Court, in contrast to the experience of

⁵⁰⁰ See generally, Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 94-104. There are a number of exceptions to this general duty: firstly, where the question is “materially identical with a question which has already been the subject of a preliminary ruling in a similar case” (Joined Cases 28/62 to 30/62 *Da Costa en Schaake and Others* [1963] ECR 31, at 38) (see Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, p. 98); secondly, where the *acte éclairé* exception applies (Case 283/81 *CILFIT* [1982] ECR 3415, para 14) (see Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 98-99); and, thirdly, where the *acte clair* exception applies (Case 283/81 *CILFIT* [1982] ECR 3415, para 16) (see Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 99-101).

⁵⁰¹ Case 314/85 *Foto-Frost* [1987] ECR 4199.

⁵⁰² See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 104-106.

their lower-court brethren. The threat to the Court of Justice of such behaviour by these courts and tribunals would be of concern to the Court in much the same way as a threat of evasion of or non-implementation with its rulings by the same entities. However, it is not as credible a threat because, at least since the ruling in *Cartesio*⁵⁰³, superior courts cannot control the decision by lower courts to refer: accordingly, there is nothing to prevent lower national courts referring questions that their superiors refuse to refer. There is also the possibility of the Commission utilising Article 258 TFEU to enforce a national court's duty to refer, but it has been acknowledged that such an approach would run into difficulties owing to the fact it could result in a Member State executive having to interfere with the judicial independence of its national courts.⁵⁰⁴ However, Lenaerts, Maselis and Gutman have pointed to the Commission's successful infringement proceedings against Italy, where its Supreme Court repeatedly refused to "disown a widely held judicial construction concerning rules of evidence applying to claims of disbursement of charges paid but not due"⁵⁰⁵ which was contrary to EU law, as demonstrative of the fact that the Commission will not shrink from acting where national court recalcitrance is such that it threatens the "efficient collaboration"⁵⁰⁶ on which the EU legal system depends.⁵⁰⁷ Moreover, although the Court itself has not required the creation of such a national rule, seemingly out of concern for the preservation of the principle of *res judicata*, some national superior courts have ruled that a national judicial decision reached in circumstances where the court proceeded to judgment when it should have referred will be invalid.⁵⁰⁸ Broberg and Fenger point also to the

⁵⁰³ Case C-210/06 *Cartesio* [2008] ECR I-9641. In this case the Court of Justice, while upholding, in principle the rule that national legal systems could provide for an appeal to a superior national court against a decision by a lower national court to make a reference, ruled that the decision to refer and the decision on what question to refer should remain that of the lower court (effectively reducing the decision of the higher court to that of an advisory opinion) (see Broberg, M., and Fenger, N., *supra* n. 79, pp. 328-329).

⁵⁰⁴ Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, pp. 102-103.

⁵⁰⁵ Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, p. 103.

⁵⁰⁶ Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 78, p. 103.

⁵⁰⁷ The case in question is Case C-129/00 *Commission v Italy* [2003] ECR I-14637. The Court of Justice avoided the embarrassment of having to censure the Italian Supreme Court and compelling the Italian Government into having to take measures to ensure that the Supreme Court complied with EU law by suggesting that it was, in the words of Chalmers, Davies and Monti, the result of "poorly drafted Italian legislation rather than ... judicial practice." (Chalmers, D., Davies, G. and Monti, G., *supra* n. 297, p. 353).

⁵⁰⁸ The German Bundesverfassungsgericht so ruled in *I BvR 1036/99*, of the 9th January 2001. The Bundesverfassungsgericht's reasoning was that a refusal to refer in such circumstances constituted a breach of the German constitutional principle that "no one may be deprived of the

fact that individuals affected adversely by national court non-compliance with the duty to refer might also have the right to claim damages under state liability rules, though the authors acknowledge practical difficulties with this approach, not least the fact that it would involve a lower national court having to rule on the behaviour of a superior court.⁵⁰⁹

Having analysed the freedom of the Court of Justice to arrive at the two types of ruling within the ‘legal steadying factors’, ‘scenarios 1’ and ‘2’, it is now necessary to examine the extent to which the Court is free to make rulings which would not adhere to these ‘steadying factors’: ‘scenario 3’ and ‘4’ rulings.

3. ‘Scenario 3’: Lack of Adherence to the ‘Legal Steadying Factors’, but Substantively Acceptable to all of the ‘Countervailing Powers’ of the Court of Justice

In the analysis of ‘scenario 1’ adjudicative outcomes, that is outcomes that both adhere to the ‘legal steadying factors’ and are not adverse to the interests of the Court’s ‘countervailing powers’, it was argued that for both legalistic and pragmatic reasons the Court is disincentivised significantly from abandoning adherence to the ‘legal steadying factors’. Normatively, the Court is tasked with ensuring that in the interpretation and application of the Treaties the law is observed. Pragmatically, legal scholars and political scientists on either side of the traditional neofunctionalist versus intergovernmentalist dichotomy agree that the Court’s effectiveness and legitimacy depends upon its adherence to accepted methods of legal reasoning. Accordingly, where the Court abandons adherence to the ‘legal steadying factors’, it will lose its identity as a ‘legal’ institution and will become susceptible to legal and non-legal measures by all or any of its ‘countervailing powers’ aimed at holding it accountable for

protection of the courts established by law.” (Broberg, M., and Fenger, N., *supra* n. 79, p. 267). Broberg and Fenger point out that similar reasoning has been used by the Czech and Austrian constitutional courts (Broberg, M., and Fenger, N., *supra* n. 79, p. 267). Of course, such an approach will be of limited use in the case of courts of final instance due to the operation of the principle of *res judicata*.

⁵⁰⁹ Broberg, M., and Fenger, N., *supra* n. 79, p. 269. The authors also point to the hurdle of having to prove bad faith on the part of the Member State to establish a case in state liability (p. 270). They further argue that a failure to refer where there is an obligation to do so might be a breach of Article 6 ECHR (pp. 271-273).

such misbehaviour and deterring it in the future.⁵¹⁰ This, however, begs the question of whether such measures would be taken if a decision while lacking adherence to the ‘legal steadying factors’ was acceptable substantively to the ‘countervailing powers’ (a ‘scenario 3’ adjudication).

The first observation in this connection is that it is not immediately evident that such an adjudicative outcome is *de facto* possible. Bengoetxea, MacCormick and Moral Soriano see a distinction between ‘internal justification’, which can be equated with adherence to the ‘legal steadying factors’, and ‘external justification’, the claim that “the decision is the right answer, not only in law but also in political morality.”⁵¹¹ The authors, however, view the justification of legal decisions as being in all cases contingent upon the decision being justified internally: “[A] decision that is not internally justified will not be externally justified either...”⁵¹² The authors must be correct to the extent that any ruling of the Court which is not ‘internally justified’ will involve it acting in a manner contrary to its Article 19(1) TEU duty or, in other words, undermining the rule of law. This, in itself, is harmful because it will mean that the Court is no longer respecting the bounds placed upon it by the Treaties, and even its supranational allies, most notably the Commission, and subnational allies, national courts and tribunals, as well as litigants and their lawyers, will no longer be incentivised to protect its effectiveness. This will be even more so were the Court to adopt such an adjudicative approach over a series of rulings. While it is conceivable that the Court might avoid serious consequences for a one-off or very rare ruling which did not accord with the ‘legal steadying factors’, but brought about what was fairly universally regarded as a just outcome⁵¹³, such adjudication as a practice would harm the Court’s

⁵¹⁰ The neofunctionalist would take this view because decisions of a court which do not adhere to the ‘legal steadying factors’ result in such decisions not benefitting from the ‘mask’ that legal reasoning provides in terms of legitimising what are in fact political decisions (Burley, A.-M. and Mattli, W., *supra* n. 47). The intergovernmentalist would take this view because the Member States as master have delegated authority to the Court of Justice as its agent on the understanding that the Court will referee in accordance with the legal rules (Garrett, G. and Weingast, B.R., *supra* n. 212).

⁵¹¹ Bengoetxea, J., MacCormick, N. and Moral Soriano, L., “Integration and Integrity in the Legal Reasoning of the European Court of Justice” in de Búrca, G. and Weiler, J.H.H., *The European Court of Justice* (Oxford: Oxford University Press, 2001), p. 61.

⁵¹² Bengoetxea, J., MacCormick, N. and Moral Soriano, L., *supra* n. 511, p. 61.

⁵¹³ Akin perhaps to a criminal court admitting unconstitutionally obtained evidence to ensure the conviction of an obviously guilty and serious criminal. Llewellyn argued that courts when adjudicating a case should place the factual nexus of the case in a ‘type-situation’ and create a rule which could assist in the deciding of similar ‘type-situations’. Llewellyn, regarded a

effectiveness and legitimacy. Particular damage would be done to the cooperative relationship between the Court of Justice and the national courts, since national court reception of preliminary rulings depends to a large degree on their perception of such rulings as normative in character, and rulings which do not adhere with the ‘legal steadying factors’ would by their nature be so erratic that they would begin to cease being of utility to referring courts seeking to determine the main proceedings.⁵¹⁴ This would according to the neofunctionalist account dismantle the relationships that the Court has created and fostered, and strip it of much of its autonomy from the Member State governments, since the Commission and national courts, the Court’s usual line of defence against Member State government counter-Court measures would abandon their posts, no longer having any reason to defend the Court. Harm would also be done to other supra- and subnational clients’ (such as the Commission and national litigants [and their lawyers]) perceptions of the Court, who might choose to avoid the risk of engaging with it, and might cease to view the rulings as binding or normative in character.⁵¹⁵ For these reasons, ‘scenario 3’ adjudicative outcomes, particularly when they become more than a rarity, are more harmful and corrosive to the Court than ‘scenario 2’ adjudicative outcomes, since the latter will retain their normative character, which reinforces the Court against attacks on its autonomy.⁵¹⁶

tendency to decide ‘hard cases’ in a manner which ignored any attempt at placing them into a ‘type-situation’, that is, deciding such cases by reference to the particular facts in that case (‘the fireside equities’) to bring a fair and just outcome with no or little regard to the implications of the ruling in future cases, as resulting in bad law (Llewellyn, K.N., *supra* n. 2, pp. 268-285).

⁵¹⁴ See Lenaerts, K., *supra* n. 31, at 1305-1306. Accountability mechanisms such as non-compliance or non-engagement with the preliminary reference procedure might in such circumstances become a reality.

⁵¹⁵ Accountability mechanisms such as non-compliance with preliminary rulings and non-compliance with the procedure might come into play in such circumstances.

⁵¹⁶ This argument is consistent with one of Garrett, Kelemen and Schulz’s conclusions as to why the Court of Justice ruled against France in the *Sheep Meat* case (Case 232/78 *Commission v France* [1979] ECR 2729) despite being able to anticipate a strong likelihood of adverse French reaction: the Court had already made a number of decisions in the same area of law (import bans on agricultural products), such as that in *Charmasson* (Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1983] ECR 1383), and “knew that if it violated its own clear and recent precedents under pressure from the French, it would lose legitimacy as an impartial arbiter in the eyes of the other member governments.” (Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 164).

4. ‘Scenario 4’: Lack of Adherence to the ‘Legal Steadying Factors’ and Substantively Unacceptable to One or More of the ‘Countervailing Powers’ of the Court of Justice

The reasoning applied in the discussion of ‘scenario 3’ adjudicative outcomes applies *a fortiori* in this context: not only will the Court’s rulings lose their ‘legal character’, particularly where such adjudication becomes a habit, meaning that the Court will be susceptible to the legal and non-legal accountability measures of its ‘countervailing powers’, one or more of the ‘countervailing powers’ will have added incentive to take such measures owing to the fact that the decisions are substantively against their interests. Therefore, the threat of accountability measures by its ‘countervailing powers’ limits the Court to the extent that it is at least disincentivised significantly from reaching ‘scenario 4’ rulings.

5. Interim Conclusion

From the foregoing realist examination of the balance between the Court’s independence from and accountability to its ‘countervailing powers’, a general conclusion may be drawn that the Court of Justice enjoys sufficient independence from its ‘countervailing powers’ to make rulings that are adverse to the interests of those powers, so long as the rulings retain adherence to the ‘legal steadying factors’. Simultaneously, if the Court is to cease this adherence, particularly on a plurality of occasions, the insulation afforded by this independence will wane, and the Court will become vulnerable to counter-Court mechanisms that will hold it accountable for its transgressions. This general conclusion is based on the following reasoning:

- There are legal and pragmatic reasons to conclude that it is preferable for the Court to arrive at rulings that are within the bounds of the ‘legal steadying factors’ and acceptable to its ‘countervailing powers’ (‘scenario 1’ rulings). Those at both extremes of the neofunctionalist and intergovernmentalist dichotomy agree, albeit for different reasons, that the Court’s freedom of action depends upon its adherence to accepted methods of legal reasoning. Moreover, it may be assumed that

the Court will not wish to antagonise ‘countervailing powers’ merely for the sake of doing so;

- It can be concluded from a number of salience indicators, *inter alia*, the low number of references in which Member State governments submit written observations, the formations in which the Court rules on references, and the number of cases in which the Court rules by reasoned order, that ‘scenario 1’ outcomes will be achievable in the great majority of cases, since most rulings will not be *unacceptable* to a ‘countervailing power’;
- The Court may also decide between a menu of ‘scenario 1’ outcomes in a given reference, and will have the autonomy from ‘countervailing powers’ to do so, since any one of these rulings will remain *acceptable* to the ‘countervailing powers’;
- The opposite ends of the neofunctionalist-intergovernmentalist spectrum disagree, however, as to the freedom enjoyed by the Court to make rulings which adhere to the ‘legal steadying factors’, but are adverse to countervailing power interests (‘scenario 2’ rulings). The intergovernmentalists view the Court as an agent of the Member State governments, and, as such, see it as constrained by the threat of legal and non-legal counter-Court measures. In contrast, the neofunctionalists see the Court as having insulated itself against repercussions by national-level actors, such as the Member State governments⁵¹⁷, through a process of reciprocal empowerment of sub-national actors, specifically lower national courts and tribunals, and individual litigants;

⁵¹⁷ Kelemen in his consideration of the Court’s independence from Member State and public preferences has concluded also that the Court is well insulated against counter-Court mechanisms: “The ECJ’s remarkable degree of independence has strong political foundations. The ECJ is well insulated against the range of court curbing mechanisms that political actors have been known to deploy in other democratic polities. Together, the large number of member states, the high degree of political fragmentation among EU legislative actors, the judicial appointment process, the internal organization of the Court and the high degree of public support for the ECJ make it exceedingly difficult for political actors to directly curb the court or to indirectly cow it into submission by signaling shifts in public support. Ultimately, of course, the ECJ is deeply embedded in and responsive to the EU’s political system. Member governments control the appointment of judges to the ECJ, and political actors in the Council of Ministers, the European Parliament and the Commission shape the legal norms that the ECJ must interpret and enforce. But within this very broad set of political constraints, the ECJ enjoys a remarkable degree of independence.” (Kelemen, R.D., *supra* n. 169, at 54).

- This insulation of the Court renders legal and non-legal counter-Court measures remote, so long as the Court retains adherence to the ‘legal steadying factors’. This is because the effectiveness of such measures in constraining the Court will “correlate positively with the difficulty of implementing them.”⁵¹⁸ As a general rule, so long as the Court retains adherence to the ‘legal steadying factors’, the Member State governments will encounter very significant obstacles in attempting to take counter-Court measures;

- Although the Member State governments enjoy a number of legal accountability mechanisms such as the power by way of Treaty or legislative amendment to destroy, curb, or harm the Court, as well as override its rulings, there are a number of legal and pragmatic obstacles that mean that even where these actors possess the *motive*, they will not have the *opportunity* to utilise, without very significant difficulty at least, these counter-Court measures. These obstacles include the ‘joint-decision trap’, the interest of smaller Member States in protecting the Court’s independence, and the legal protection of judicial independence in Article 47 CFREU. This analysis is also borne out by the Court’s past: even in circumstances where the Court has made rulings against the interests of a substantial number of powerful Member State governments, *Francovich*⁵¹⁹ being an obvious example, the Member States have been unwilling or unable to realise counter-Court measures;

- The Member States will encounter similar difficulties if they attempt to utilise non-legal, or illegal, counter-Court measures to punish or deter ‘scenario 2’ rulings, *inter alia*, difficulty in communicating such a threat to the Court as a means of deterrence; the unlikelihood of concerted non-compliance by a large number of Member States or by more influential Member States; the enforcement mechanisms in the EU legal system, such as Articles 258 and 267 TFEU, which allow supra- and sub-national actors to ensure Member State compliance with EU law, etc.;

⁵¹⁸ Garrett, G., Kelemen, R.D. and Schulz, H., *supra* n. 164, at 150.

⁵¹⁹ Cases C-6/90-C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5537.

- However, the reciprocal empowerment thesis implies that the achievement of the Court's independence from Member State governments was bought at the price of dependence upon supra- and sub-national actors. These actors also enjoy, in theory, the ability to engage legal and non-legal counter-Court mechanisms, such as evasion or non-implementation of rulings, where the Court adopts rulings, which although adhering to the 'legal steadying factors', are adverse to their interests. However, once again, the spectre of these mechanisms being utilised is remote in the extreme due to, *inter alia*, the relative disinterest of these actors in the significance of the Court's rulings beyond their utility in the main proceedings (making sub-national actors a far less fair-weather ally than Member State governments), and the unlikelihood of concerted action being mobilised by these disparate and disconnected actors;

- One notable exception to this general rule may be the relative instability of the Court's relationship with national superior and constitutional courts, who may choose to disengage with the preliminary reference procedure, or evade or defy rulings that they view as a threat to a constitutional or other salient principle of national law. It seems evident from the Court's rulings, extra-judicial writings, and analysis of legal scholars that the Court has been concerned enough about this possibility to exercise deference to national superior courts and tactical nous in these areas. This deferential and tactical approach of the Court, allied with the unlikelihood of concerted cross-border non-compliance, has made such revolt remote;

- Although it is questionable whether, beyond pure theory, the Court could make a ruling or series of rulings which lacked adherence to the 'legal steadying factors' and accorded to the interests of all 'countervailing powers' ('scenario 3' rulings), the Court will not be insulated from counter-Court measures by its 'countervailing powers' where its rulings do not adhere to the 'legal steadying factors' ('scenario 3' or '4' rulings), since none of its usual protectors will possess the motive to continue that protection. The Court will be particularly vulnerable where it arrives at rulings that are adverse to

‘countervailing power’ interests, and are not in accordance with the ‘legal steadying factors’ (‘scenario 4’ rulings).

F. Conclusion

The conclusion to Part Two is divided into two sections. The first, in furtherance of the demonstration of the thesis, discusses the contribution of the interplay between independence and accountability to the ‘reckonability’ of preliminary reference outcomes, i.e. its status as an ‘external extra-legal steadying factor’. The second section, which relates to the ‘applicability by-product’ of the thesis, discusses the extent to which Llewellyn’s eleventh ‘steadying factor’ is of application in the Court of Justice context.

I. Independence and Accountability as an ‘External Extra-Legal Steadying Factor’

Part Two has argued that a balance between independence and accountability exists in the Court’s relationships with its ‘countervailing powers’, which results in the Court being sufficiently accountable to these powers so that it is disincentivised significantly from abandoning adherence to the ‘legal steadying factors’, but sufficiently autonomous to arrive at rulings which are adverse to the interests of these ‘countervailing powers’.

Part Two has attempted to support the foregoing hypothesis by conducting a two-part analysis of the rules and practices that purport to guarantee the Court’s independence, and the security of its Judges, and those that purport to ensure that the Court is accountable to its ‘countervailing powers’ where it does not retain its fidelity to the ‘legal steadying factors’. In the formalist analysis, it was concluded, in a manner consistent with legal realist thinking, that while there were a number of legal protections of judicial independence and security, as well as legal assurances of judicial accountability, a purely formalist analysis of these legal norms could not, in the absence of consideration as to their operation or likely operation in practice, be determinative of whether or not a sufficient balance between independence and

accountability persists. Accordingly, a further analysis, a realist analysis, was undertaken which drew upon political science accounts of the Court's role in European legal integration, in particular neofunctionalism, which views the Court as largely autonomous of its 'countervailing powers', and intergovernmentalism, which sees the Court as an agent of the Member State governments.

The realist analysis divided the Court's rulings into four 'scenarios': (1) rulings adhering to the 'legal steady factors' and consistent with the interests of 'countervailing powers' ('scenario 1' rulings); (2) rulings adhering to the 'legal steady factors', but adverse to the interests of one or more 'countervailing powers' ('scenario 2' rulings); (3) rulings not adhering to the 'legal steady factors', but consistent with the interests of the 'countervailing powers' ('scenario 3' rulings); and, (4) rulings neither adhering to the 'legal steady factors' nor consistent with the interests of the 'countervailing powers' ('scenario 4' rulings). The realist analysis demonstrated that both neofunctionalist and intergovernmentalist accounts of the Court's relationships with its 'countervailing powers' agree that the Court must adhere to the 'legal steady factors' in order to retain insulation against counter-Court attacks. Accordingly, it was concluded that the Court is at least disincentivised significantly from making rulings other than 'scenario 1' and '2' rulings. Moreover, consistent more with the neofunctionalist account of the Court's power vis-à-vis its 'countervailing powers', it was concluded that although the Court may have a legal and pragmatic preference for 'scenario 1' rulings, it is insulated sufficiently from counter-Court attacks to make 'scenario 2' rulings where it views such rulings as the optimal outcome. Part Two has adopted the neofunctionalist argument that this insulation has occurred owing to the Court's empowerment of supra- and sub-national actors, in the latter category national lower courts and tribunals in particular, an empowerment that has taken place at the commensurate expense of the Member State governments' power over the Court. Although the Member State governments have at their disposal a number of legal and non-legal mechanisms to hold the Court accountable where it ceases to adhere to the 'legal steady factors', mechanisms that could also be utilised as simple counter-Court measures to deter or punish rulings against their interests, it was demonstrated that there are

significant obstacles, legal and pragmatic, to the utilisation of these mechanisms where the Court retains adherence to the ‘legal steadying factors’. Despite the Court’s greater dependence on sub-national allies, such as national lower courts and tribunals, and litigants, it was concluded that the possibility of legal and non-legal counter-Court measures being engaged by these powers was remote so long as the Court retained adherence to the ‘legal steadying factors’, since these powers are more interested in the utility of the Court’s rulings in the cases in which they are involved, and as a disparate collection of relatively unconnected actors are unlikely to engage in concerted action against the Court. The one possible exception to this general observation was the relative fragility of the Court’s relationship with constitutional and other superior national courts: where the Court makes rulings that cause a conflict with a national constitutional principle or other salient principle of national law, the spectre of revolt by these courts is raised. Indeed, it would appear that there is a level of consensus that the Court has used a mixture of deference to such principles and tactics to ensure the avoidance of such conflicts.

In summary, it was concluded, as a general rule, that the Court enjoys sufficient independence to choose any solution to a request for a preliminary ruling, so long as the ruling adheres to the ‘legal steadying factors’.⁵²⁰ As such, the Court is not subservient to the interests or preferences of the ‘countervailing powers’. However, were the Court to make rulings, particularly on a plurality of occasions that do not so adhere, the Court’s autonomy would wane and ‘countervailing powers’ would be free to utilise the legal and non-legal counter-Court measures described in Part Two as accountability mechanisms. Seen as such the Court’s institutional positioning serves as an ‘external extra-legal steadying factor’ in that it reinforces the normative character of the ‘legal steadying factors’ by narrowing the number of potential outcomes to those that are ‘judicially arguable’. Consequently, the influence of individual personal preferences, a factor leading to greater decisional indeterminacy, is lessened, and lawyers attempting to anticipate prospective outcomes in preliminary rulings have the comfort of utilising existing ‘legal doctrine’, including the Court’s previous rulings to assist them in their task.

⁵²⁰ The ruling will also have to respect the jurisdictional limitations placed on the Court by the Article 267 TFEU procedure (discussed in Part Three).

Moreover, as long as the Court retains adherence to the ‘legal steadying factors’, it cannot be pressurised into making rulings that accord with ‘countervailing power’ interests against its own judgment, save for perhaps where it shows deference to national constitutional and superior courts. Although it must be acknowledged that judicial servility to ‘countervailing power’ interests could conceivably promote ‘reckonability’ where those interests were limited, constant and transparent, in the context of the legal system of the EU, it should be obvious that decisions controlled or guided by ‘legal doctrine’ will be more honest and predictable than those determined by the sometimes less-than-transparent and shifting interests of a constellation of ‘countervailing powers’.

II. Extent of the Applicability of Llewellyn’s Eleventh ‘Steadying Factor’ to the Preliminary Reference Procedure

Although the hypothesis concerning the balance between independence and accountability presented in Part Two was not espoused explicitly by Llewellyn in his treatment of his eleventh ‘steadying factor’, the analyses in Part Two indicate that Llewellyn’s eleventh ‘steadying factor’ is of almost direct application in the Court of Justice context. Llewellyn’s basic premise that a court that is servile to the interests of third parties is more likely to produce decisions that are unpredictable due to their arbitrariness and probable lack of transparency is one that is applicable to courts universally. Llewellyn’s observation that too great an independence from third party interests could cause a court to become divorced from the needs of ‘law-consumers’ is equally germane. From these premises, Part Two has extrapolated a hypothesis that the Court of Justice resides in a sphere between sufficient independence and accountability, with the result that the possibility of arbitrary decision can largely be discounted. Llewellyn’s statement that the fact that the decision of a highest appellate tribunal may not be upset insulates it from attack is also of relevance to the Court of Justice, since the Court stands at the apex of the EU legal system. Similarly, Llewellyn’s insistence on the role of guarantees of institutional and individual judicial security has been demonstrably relevant in the Court of Justice context, with numerous legal and pragmatic mechanisms of protection being identified. Finally, Llewellyn’s discussion in the American

context of the possible undermining of judicial security by the spectre of re-election has also been shown to be of some relevance in the EU context, with the possibility of the Member State governments utilising their control over the re-appointment of Judges at the end of their six-year terms being used as a counter-Court mechanism. As regards the last issue, however, it was concluded that the use of this mechanism to constrain the Court where it adhered to the ‘legal steadying factors’ would face a number of legal and pragmatic obstacles that rendered its utilisation in such circumstances a remote possibility.

‘Procedural Extra-Legal Steadying Factors’

A. Introduction

The sum of the conclusions reached in Parts One and Two is that the ‘reconability’ of preliminary rulings is promoted by the operation of ‘internal’ and ‘external extra-legal steadying factors’ in the procedure: (1) the ‘law-conditioned’ Judges share, it is assumed, as an internalised value, a recognition of the normative character of the ‘legal steadying factors’, which serves to reinforce these ‘steadying factors’; and, (2) the balance that exists between the independence of the Court of Justice from its ‘countervailing powers’ and its accountability to those ‘powers’ serves to disincentivise it significantly from abandoning adherence to the ‘legal steadying factors’, which serves also to reinforce these ‘steadying factors’. Further ‘obstacles’ to ‘legal certainty’ will remain, however, *within* the ‘legal doctrine’, and these ‘legal obstacles’ may be heightened by ‘procedural extra-legal obstacles’, most obviously, uncertainty owing to the vagaries of fact-finding.

Part Three analyses the manner in which the procedural rules that govern the preliminary reference procedure, as well as the practices adopted by the actors involved in that procedure, promote ‘reconability’ and serve, therefore, to undermine ‘procedural extra-legal obstacles’ to ‘legal certainty’. This part of the dissertation categorises six of Llewellyn’s fourteen ‘steadying factors’ as ‘procedural extra-legal steadying factors’, and attempts to apply these factors, with alterations where necessary, to the preliminary reference procedure to determine the extent to which they may serve to promote ‘reconability’ in that context.¹ The six procedural ‘extra-legal steadying factors’ in question are:

¹ Part Three, like Part Two, does not as Part One did rely upon any assumptions as to the correctness of Llewellyn’s assertions. In Part Three, each of status of Llewellyn’s factors as ‘steadying factors’ in the Article 267 TFEU context is tested by application of the factor to discover if and how it promotes ‘reconability’ of rulings.

- ‘Issues limited, sharpened, and phrased in advance’²;
- ‘A frozen record from below’³;
- ‘Adversary argument by counsel’⁴;
- ‘A known bench’⁵;
- ‘An opinion of the court’⁶;
- ‘Group decision’.⁷

These ‘steading factors’ are divided into two sub-categories relating to the stage in the preliminary reference procedure at which they occur and the manner in which they promote ‘reconability’: the first four ‘steading factors’ relate to the stage in proceedings from the point in time where the national court or tribunal makes a decision to make a reference to the delivery of the Opinion of the Advocate General, if any; the latter two ‘steading factors’ relate to the stage in the procedure in which the Court deliberates on the reference and delivers its ruling. This author argues that these six procedural ‘extra-legal steading factors’ in combination promote ‘reconability’ by:

- Progressively narrowing, by constraint or influence, the Court’s decisional competence, thereby reducing the legitimate lines of decision and the number of conceivable outcomes;
- Reinforcing the pressures exerted by the ‘legal steading factors’;
- Providing to the lawyer ‘signposts’ to the Court’s likely ruling.

² Llewellyn, K.N., *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960), p. 29.

³ Llewellyn, K.N., *supra* n. 2, p. 28.

⁴ Llewellyn, K.N., *supra* n. 2, pp. 29-31.

⁵ Llewellyn, K.N., *supra* n. 2, pp. 31-32.

⁶ Llewellyn, K.N., *supra* n. 2, pp. 26-27.

⁷ Llewellyn, K.N., *supra* n. 2, pp. 31-32.

B. The Procedure before the National Court or Tribunal and the Procedure before the Court of Justice

I. Introduction

In this section, four of Llewellyn's 'steadying factors' are considered in the context of the preliminary reference procedure. Each of these are factors that appear, *prima facie*, to be relevant in the stages of the preliminary reference procedure prior to the point where the Court begins its deliberations. Firstly, the eighth of Llewellyn's factors, the fact that in an appeal the issues are 'limited, sharpened, and phrased in advance' is transposed to the Article 267 TFEU setting. Although there are obvious differences between an appellate procedure before American state and federal courts and the preliminary reference procedure, the Order for Reference, the document through which a Member State court or tribunal requests a preliminary ruling, is proposed as the device which embodies the Court's limited jurisdiction under Article 267 TFEU, and confines the procedural and substantive scope of the Court's enquiries. Secondly, Llewellyn's seventh factor, the fact that in an appeal on a point of law an appellate court has no jurisdiction over fact-finding, a factor that narrows the number of legal interpretative outcomes, is explored. Again, the Order for Reference is considered as the document which represents the Court's lack of jurisdiction over the facts in the main proceedings, and which provides a 'frozen record' of the facts against which the Court must provide its ruling. Thirdly, this section, basing its enquiry on Llewellyn's ninth 'steadying factor', 'adversary argument by counsel', asks whether the written observations of the parties and interested persons under Article 23 of the Statute, as well as the arguments made at the oral hearing, serve to narrow the scope of the Court's deliberations, thereby reducing the number of possible outcomes. Finally, the twelfth 'steadying factor' is examined: whether the Court can be characterised as a 'known bench', i.e. whether a lawyer acting in a prospective preliminary reference can identify the Court's likely direction based on his/her knowledge of the judicial personnel.

II. 'Issues Limited, Sharpened, and Phrased in Advance'

1. Llewellyn's Eighth 'Steadying Factor': 'Issues Limited, Sharpened, and Phrased in Advance'

As his eighth 'steadying factor' Llewellyn argued that the matters that arrive before an appellate court, whether the ultimate matter as to affirm or reverse the lower court finding, or the individual issues relevant to this determination, are presented to the court "already drawn, drawn by lawyers, drawn against a background of legal doctrine and procedure, and drawn largely in frozen, printed words."⁸ This, according to Llewellyn, contributed to 'reckonability' by narrowing the matters to be considered by the appellate court:

"This tends powerfully both to focus and to limit discussion, thinking, and lines of deciding. And a choice between two alternatives is vastly more predictable than one among a welter. Betting on a football game is risky, but not as risky as betting on a steeplechase."⁹

Per contra this argument, Llewellyn acknowledged that the lines drawn by the predetermined issues did not always confine the considerations of appellate courts, observing that such a court "in a quest of justice can do (and often has done) more reformulating of ill-drawn issues than is generally realized even by lawyers"¹⁰ However, he determined that such occasions were rare for two reasons: firstly, such re-drawing occurred as "a function of peculiarly sharp pressure from felt need"¹¹; and, secondly, particularly in legal systems where re-hearings are a rarity, judges were likely to view it as unfair to rest a decision on a ground that losing counsel had not been afforded an opportunity to address.¹²

⁸ Llewellyn, K.N., *supra* n. 2, p. 29.

⁹ Llewellyn, K.N., *supra* n. 2, p. 29.

¹⁰ Llewellyn, K.N., *supra* n. 2, p. 29.

¹¹ Llewellyn, K.N., *supra* n. 2, p. 29.

¹² Llewellyn, K.N., *supra* n. 2, p. 29.

2. Llewellyn's Eighth 'Steadying Factor' in the Context of the Preliminary Reference Procedure

Llewellyn's central premise in his discussion of his eighth 'steadying factor' is, that an appellate court, when dealing with cases other than full *de novo* appeals, must, or at least should, firstly, decide the basic question of whether to affirm or reverse the lower court decision, and secondly, make this decision within the strictures of the points of appeal and other written pleadings of the parties. The application of this 'steadying factor' to the preliminary reference procedure would seem, *prima facie*, problematic. The Court when exercising its jurisdiction to hear and determine preliminary references is not an appellate court; rather, its mission is to answer a question or a set of questions relating to the interpretation of EU law set by a national court or tribunal, or to determine the validity of an EU act.

The consequences of this distinction are twofold. Firstly, the Court in determining a preliminary reference on a question of interpretation is not presented with the binary choice of affirm or reverse; rather, it encounters an interpretative question or number of such questions which are relatively open-ended in nature, meaning that there may be more than two possible solutions open to it. To adopt Llewellyn's gambling analogy, betting on a preliminary reference, unlike on an appeal, will be more akin to betting on a steeplechase than a football game. Secondly, the preliminary reference procedure is not *de jure* an *inter partes* adversarial procedure. In the appellate procedure in which Llewellyn's discussion finds its context, it is the lawyers acting for the party disaffected by the lower court judgment through the drafting of points of appeal that frame the issues to be decided. The preliminary reference procedure is an exercise in judicial cooperation between national judiciaries and the Court of Justice: it is the national court or tribunal that has exclusive competence to draft the questions on which the Court is to provide its interpretation.¹³

Notwithstanding the fact that the Order for Reference submitted by the national court or tribunal on a question of interpretation does not confine the Court to a

¹³ In this sense, a preliminary reference is akin to the case stated procedure which exists in many common law jurisdictions.

binary choice, there is much scope for the application of Llewellyn's 'steading factor', with some modifications. Although the lawyers do not *stricto sensu* define the issues in written pleadings in the same way as an appeal before the American appellate courts, the Order for Reference does define the interpretative question or questions to be determined by the Court, and moreover draws them in "frozen, printed words".¹⁴ The role of the Order for Reference in "focus[ing] and ... limit[ing] discussion, thinking, and lines of deciding"¹⁵ is considered below.¹⁶

Before moving to this issue, however, two further elements of the preliminary reference procedure, related to Llewellyn's eighth 'steading factor', which serve to enhance 'reckonability' should be considered. Both elements are consequences of the division of competences that exists in the procedure and which serves to place jurisdictional limits on the Court. The first element relates to an issue that is implied by Llewellyn, though not explored: that courts generally are receptors, rather than initiators. The second element of the procedure is even more specific to the preliminary reference context: that the Court's adjudicative role pursuant to Article 267 TFEU is restricted to considering the interpretation and/or validity of a circumscribed body of 'legal doctrine' (in the case of rulings on validity, the acts of the institutions, bodies, offices or agencies of the Union; in the case of rulings on interpretation, the same acts, as well as the Treaties). In addition, Articles 275 and 276 TFEU further limit the Court's adjudicative role.

The following paragraphs consider in turn each of these elements of the preliminary reference procedure and their contribution to the steadying of outcomes.

¹⁴ Llewellyn, K.N., *supra* n. 2, p. 29.

¹⁵ Llewellyn, K.N., *supra* n. 2, p. 29.

¹⁶ *Infra* n. 83ff.

*a) Jurisdictional Limitations and the Division of Competences in the
Article 267 TFEU Preliminary Reference Procedure: The Court of
Justice as Receptor, not Initiator*

The significance of Llewellyn's eighth 'steadying factor' is that it serves to constrain an appellate court from considering matters that are not within the confines of the issues predefined by the lawyers involved. An appellate court, therefore, does not define the scope of its enquiry and must answer the questions placed before it. This leads to what one might term a trite observation, but it is what Llewellyn might have called the "neglected obvious"¹⁷: courts are constrained to the extent that they must, if they wish to advance policy agendas divorced of a basis in 'legal doctrine' do so within a limited menu of cases that originate with others: litigants, other courts, etc.¹⁸ Courts, therefore, unlike legislative and executive actors, are receptors, rather than initiators.¹⁹ There may be some qualifications to this general observation. In some jurisdictions, judicial actors have the power to initiate and perform investigations into suspected criminal conduct. Even in the case of a court which does not have any power of initiative, it may be empowered by methods of docket control, which permit it to choose cases that allow the pursuance of its policy objectives and to exclude from consideration those that do not.²⁰ However, even where a court possesses docket control competence, such a court is limited still to choosing preferentially among a closed menu of cases.

Although the Court of Justice is not an appellate court when it is ruling on a preliminary reference, it is *prima facie* constrained to the following extent:

- It has no role in the initiation of preliminary references;
- The circumstances in which it can receive a reference for a ruling are limited by Article 267 TFEU and related procedural rules;

¹⁷ Llewellyn, K.N., *supra* n. 2, p. 339.

¹⁸ In any case, it may be argued that in a court where a minimum of three judges must participate in each decision, as is the case at the Court of Justice, it will be difficult for that court to develop a singular ideological preference divorced of a basis in 'legal doctrine'.

¹⁹ See also, Beck, G., *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2012), p. 348.

²⁰ Rasmussen, H., *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986), p. 465.

- When a reference is made, the Court must provide a ruling on that reference as long as it has been made within the Article 267 TFEU criteria for admissibility, the relevant rules of the Statute and the Rules of Procedure, as well as the Court’s case-law.

Each of these constraints on the ability of the Court to engineer cases in which it could advance an extra-legal policy objective are now considered in turn.²¹

aa) The Passive Role of the Court of Justice in the Article 267 TFEU Preliminary Reference Procedure: National Judicial Control over the Decision to Refer

Notwithstanding three exceptions²², *de jure* and *de facto*, the preliminary reference procedure, for a number of reasons, remains one that is characterised largely by voluntary national judicial participation.

Firstly, the exceptions to the general rule must be understood to apply to a minority of cases referred: a cursory glance at the data available from the CJEU on the national courts and tribunals from which preliminary references originate reveals that the vast majority of references come from national judicial bodies other than the courts and tribunals of final instance obliged to refer.²³ Moreover, one must assume, in absence of readily available statistics

²¹ In Bengoetxea’s words, the Court is “*reactive*, always reacting to the cases brought before it.” (Bengoetxea, J., “Text and Telos in the European Court of Justice”, (2015) 11 *European Constitutional Law Review* 184, at 188).

²² These three exceptions are: (1) where a question concerning the interpretation the Treaties and/or acts of the institutions, bodies, offices, or agencies of the Union is raised in a case pending before a final instance national court or tribunal (pursuant to the third paragraph of Article 267 TFEU); (2) where a question concerning the validity of any act of the institutions, bodies, offices, or agencies of the Union is raised before any court or tribunal of a Member State, and the court or tribunal, were it so empowered, would be minded to declare the act in question invalid (314/85 *Foto-Frost* [1987] ECR 4199); (3) where the national court or tribunal is minded to deviate from a previous ruling of the CJEU (see Broberg, M. and Fenger, N., *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2nd ed., 2014), p. 265). See generally, Broberg, M. and Fenger, N., *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2nd ed., 2014), pp. 222-273; Lenaerts, K., Maselis, I. and Gutman, K., *EU Procedural Law* (Oxford: Oxford University Press, 2014), pp. 94-97 and 468.

²³ The 2014 Annual Report of the CJEU provides a table on trends on new references for a preliminary ruling by Member State and by court or tribunal from 1952-2014. This table divides the number of references originating in each Member State by originating court or tribunal. References from Ireland, for instance, are divided into those originating from the Supreme Court, High Court, and “other courts or tribunals”. This designation is not very scientific in terms of paragraph three of Article 267 TFEU, which it will be recalled places an

on the question, that the vast majority of the questions referred relate to the interpretation of the Treaties and/or EU legal acts, rather than to the validity of the latter measures (questions concerning validity must be referred). Secondly, in all cases not covered by the three exceptions, the Court has reiterated robustly that it is within the exclusive competence of a national court or tribunal to decide whether to make a reference.²⁴ Although it has been acknowledged that the lawyers arguing on behalf of the parties before the national court or tribunal may play an important part in convincing the court or tribunal to make a reference²⁵, and may play an equally important role in the framing of the Order for Reference²⁶, the Court of Justice has emphasised that the decision to refer is that of the national court or tribunal²⁷ and that the parties to the proceedings and their lawyers may not usurp this role.²⁸ The

obligation on national courts and tribunals of final instance to make references: a lower court against which there is no judicial remedy under national law will also be obliged to refer (Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 95). The result is that in many circumstances the “other courts and tribunals” may well be courts or tribunals of final instance for the purposes of the third paragraph of Article 267 TFEU. Nevertheless, the data provides an indicative picture. Of the 8,710 references made between 1952 and 2014, 5,844 (67%) were from “other courts or tribunals”. In only nine Member States did references from named courts or tribunals exceed those from “other courts or tribunals”: Czech Republic, Ireland, Cyprus, Latvia, Lithuania, the Netherlands, Romania, Slovenia and Finland. In the case of Poland, 37 references originated from named courts and 37 from “other courts or tribunals”. This data suggests that the vast majority of the references made to the Court of Justice originate from national courts or tribunals that are not obliged to refer under the third paragraph of Article 267 TFEU. See Court of Justice of the European Union, *Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2015), pp. 117-119.

²⁴ Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711. See Arnall, A., *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2nd ed., 2006), p. 114.

²⁵ See Anderson, D.W.K. and Demetriou, M., *References to the European Court* (London: Sweet & Maxwell, 2nd ed., 2002), p. 86. Concerns have been expressed about the danger of national courts and tribunals becoming a mere conduit for the parties to the main proceedings, a *de facto* situation which would undermine the sole jurisdiction of the national court or tribunal in making the decision to refer. In *Portsmouth City Council v Richards and Quietlynn* [1989] 1 CMLR 673, at 708, Kerr LJ (as he was then) expressed this concern: “...references by consent should not creep into our practice. All references must be made by the court. The court itself must be satisfied of the need for a reference...” (see Lenaerts, K., Maselis, I. and Gutman, K., *EU Procedural Law* (Oxford: Oxford University Press, 2014), p. 65).

²⁶ The Court of Justice has ruled that a referring national court or tribunal “is at liberty to request the parties to the dispute before it to suggest wording suitable for the question to be referred” (Case C-104/10 *Kelly* [2011] ECR I-6813, para 65). See also, Wägenbaur, B., *Court of Justice of the EU: Commentary on Statute and Rules of Procedure* (Oxford: Hart, 2013), p. 319.

²⁷ See, for instance, the Court’s *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01), at Point 10.

²⁸ It was established early in the history of the preliminary reference procedure that the parties to the proceedings could not bypass the national court or tribunal and make a direct request for a preliminary ruling: Joined Cases 31/62 and 33/62 *Wöhrmann v Commission* [1962] ECR 965. Moreover, the Court of Justice has ruled that the parties may not require a national judge to make a reference: Case 283/81 *CILFIT v Ministero della Sanità* [1982] ECR 3415, para 9. See Wägenbaur, B., *supra* n. 26, p. 318.

Court has also ruled that a national court or tribunal may make a reference of its own motion.²⁹ Thirdly, the Court has ruled that the obligation imposed on national courts and tribunals of final instance by the third paragraph of Article 267 TFEU is not an absolute one.³⁰ Finally, despite the *de facto* position that there are circumstances where EU law requires a reference be made, it has been acknowledged that there are very significant obstacles to the enforcement of this obligation.³¹

In summary, the right of initiative in the preliminary reference procedure is firmly within the exclusive competence of the national courts and tribunals, and the Court of Justice has no power to initiate questions, even in circumstances where a national court or tribunal is obligated to make a reference. The Court's passive role in this regard should be understood as 'steadying' preliminary reference outcomes in that the Court is restricted to the extent that it cannot initiate questions with the intention of providing answers that assist in the pursuit of any policy or ideological agenda divorced of a basis in 'legal doctrine'.

This constraint may not be all that significant, however, for a number of reasons. Firstly, the Court has in the past four years of available statistics received more than four hundred references for a preliminary ruling per annum³²: consequently, one may argue that the Court will have more than

²⁹ Case 126/80 *Salonia v Poidomani e Giglio* [1981] ECR 1563, para 7. See Wagenbaur, B., *supra* n. 26, pp. 318-319; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 86-87; Geiger, R., Khan, D.-E. and Kotzur, M., *European Union Treaties: A Commentary* (Oxford: Hart, 2015), pp. 896-897.

³⁰ The case-law of the Court of Justice has established that there are situations where the duty to refer relevant questions under the third paragraph of Article 267 TFEU will not apply: firstly, where the question is "materially identical with a question which has already been the subject of a preliminary ruling in a similar case" (Joined Cases 28/62 to 30/62 *Da Costa en Schaake and Others* [1963] ECR 31, at 38); secondly, where the *acte éclairé* exception applies (Case 283/81 *CILFIT* [1982] ECR 3415, para 14); and, thirdly, where the *acte clair* exception applies (Case 283/81 *CILFIT* [1982] ECR 3415, para 16). See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 25, pp. 98-101.

³¹ Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 25, pp. 102-104; Broberg, M. and Fenger, N., *supra* n. 22, pp. 266-273.

³² The Court of Justice received 423 references for a preliminary ruling in 2011, 404 in 2012, and 450 in 2013, 428 in 2014 (Court of Justice of the European Union, *Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2015), p. 94). The Court received 436 references in 2015 (In 2015, 318 of the 554 cases completed were dealt with by five-Judge chambers: Court of Justice of the European Union, *Court of Justice of the European Union Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg, 2016), p. 76).

enough opportunity to advance any policy or ideological agenda within the constraints of questions referred to it. Secondly, as is discussed below³³, the Court has shown itself to be willing in limited circumstances to reformulate questions referred to it by national courts and tribunals³⁴, which potentially creates scope for the Court to reformulate a question to allow it to provide itself an opportunity to make a desired ruling. Finally, much has been made of the efforts made by the Court of Justice to ‘court’ national courts and tribunals³⁵: those of a particularly conspiratorial mind-set might conceive of the Court encouraging national judges to make references on certain points of law that might allow it to pursue a particular ideological preference. Similarly, the Court might informally lobby lawyers working in the national legal systems to encourage national court references on particular points of law.

Notwithstanding these factors, the inability of the Court to initiate references retains some of its constraining power over its decisional discretion for a number of reasons. Firstly, while the Court may have considerable scope to pursue policy or ideological agendas divorced of a basis in ‘legal doctrine’ within the considerable menu of preliminary references sent to it, it would have to do so *within* this menu: the Court does not have access to an infinite number of legal questions. Secondly, as is discussed below in detail³⁶, the resulting dependence of the Court on national courts and tribunals to make references, and the legal doctrinal and pragmatic need for the Court to maintain a cooperative relationship with national judiciaries, disincentivises significantly serious and systematic abuse by the Court of its jurisdiction to reformulate questions referred.³⁷ Finally, as regards the lobbying of national judiciaries and

³³ *Infra* n. 117ff.

³⁴ See generally, Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 25, pp. 69-73 and pp. 235-237; Broberg, M. and Fenger, N., *supra* n. 22, pp. 412-428.

³⁵ See, for instance, Judge Mancini’s statement that “[t]he Court’s first preoccupation was ... to win [the] co-operation and ... goodwill [of the national courts].” (Mancini, G.F., “The Making of a Constitution for Europe”, (1989) 26 *Common Market Law Review* 595, at 605). See also, Burley and Mattli’s account of the Court of Justice in its early years making a very conscious effort to convince national courts as to the utility of making references to the Court of Justice, “through seminars, dinners, regular invitations to Luxembourg, and visits around the community”. (Burley, A.-M. and Mattli, W., “Europe Before the Court: A Political Theory of European Integration”, (1993) 47(1) *International Organisation* 41, at 62).

³⁶ *Infra* n. 117ff.

³⁷ Llewellyn’s own view in the context of the American appellate courts that re-drawing of issues by judges is rare since it will arise as “a function of peculiarly sharp pressure from felt need” is equally germane in the context of preliminary references (Llewellyn, K.N., *supra* n. 11).

lawyers, such an effort, even if not received as untoward, would carry no guarantee of success, since most national courts and tribunals are constrained similarly by an inability to initiate proceedings. Moreover, with reference to the possibility of lawyers concocting references on specific questions as desired by the Court, there are a number of checks on such a use of the procedure. There is, of course, the fact that lawyers by themselves should not be able to ensure that a reference is made: as discussed above, the question to refer remains solely in the hands of the national court or tribunal.³⁸ Furthermore, lawyers will have to act within a menu of available cases or fact patterns, and from the Court's existing jurisprudence, it is evident that the Court will not provide rulings on hypothetical or contrived cases.³⁹

bb) The Circumstances in which the Court of Justice may Receive
References are Limited by Article 267 TFEU and Related Procedural
Rules

The foregoing discussion has demonstrated that the Court will be constrained from pursuing ideological or policy preferences that are divorced from a basis in 'legal doctrine' to the extent that it is not empowered to initiate references. The Court must therefore engage in any such pursuit within the menu of cases referred to it by national judges. However, it is apparent that the Court is further constrained within this menu of references in that admissibility rules, some provided for expressly by Article 267 TFEU and others developed by the Court itself, will deprive the Court of access to every question referred. Thus, while the Court has emphasised that the decision to refer rests solely with the national court or tribunal, it has, ostensibly to ensure that it does not exceed its own jurisdiction under Article 267 TFEU⁴⁰, asserted a jurisdiction to examine the admissibility of references. Based upon the wording of Article 267 TFEU, and the Court's existing jurisprudence, the Court cannot or will not provide rulings in the following circumstances⁴¹:

³⁸ *Supra* n. 24-n. 29.

³⁹ Case 104/79 *Foglia I* [1980] ECR 745; Case 244/80 *Foglia II* [1981] ECR 3045. See Broberg, M. and Fenger, N., *supra* n. 22, pp. 203-211.

⁴⁰ However, the real reason for the Court's assertion of control over the admissibility of references has been concern over workload: see Barnard, C. and Sharpston, E., "The Changing Face of Article 177 References", (1997) 34 *Common Market Law Review* 1113, at 1157-1168.

⁴¹ See generally, Broberg M. and Fenger, N., *supra* n. 22, chapter 5, pp. 156-221. de la Mare and Donnelly refer to 'valve factors' that act to restrict the number of references received by

- Where the reference does not concern the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union⁴²;
- Where the reference does not originate from a “court or tribunal of a Member State”⁴³;

the Court: de la Mare, T. and Donnelly, C., “Preliminary Rulings and EU Legal Integration: Evolution and Stasis” in Craig, P. and de Búrca, G. (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2nd ed., 2011), p. 363, pp. 365-376.

⁴² This admissibility requirement is evident from the wording of Article 267 TFEU which confers on the Court of Justice jurisdiction to provide rulings on questions concerning “(a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union”. Therefore, any question which does not relate to these matters cannot be dealt with by the Court of Justice. The increased use by the Court of Justice of this criterion in the 1990s was noted by Barnard and Sharpston, who provide a concise commentary on the case-law (Barnard, C. and Sharpston, E., *supra* n. 40, at 1127-1133). The manner in which this admissibility requirement limits the decisional role of the Court of Justice in preliminary references and assists in making outcomes more ‘reckonable’ is considered below (*infra* n. 70-n. 82). See also, Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 57-86, pp. 107-108 and pp. 118-119; Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 216-231 and pp. 457-468.

⁴³ Again, this admissibility requirement is evident from the text of Article 267 TFEU. While generally the Court of Justice will accept a body as a ‘court or tribunal’ where a Member State considers it as such (Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 52-53), the Court has assumed jurisdiction to decide whether a referring body is a ‘court or tribunal of a Member State’ for the purposes of Article 267. It should be obvious that the Court of Justice had to assume the competence to define what is meant by ‘a court or tribunal’ in order to ensure the effectiveness of the procedure: the opposite conclusion would have allowed Member States to provide their own national law definition as to what constituted ‘a court or tribunal’, thereby depriving certain national bodies of the right to make a reference. Hence, the assertion of Advocate General Reischl in Case 246/80 *Broekmeulen* [1981] ECR 2311 that “[i]n examining the question whether a decision-making body is to be regarded as a court or tribunal within the meaning of [Article 267 TFEU], the general rule must prevail that the concepts of [Union] law are to be classified within the independent legal order of the [Union] and thus fall to be interpreted according to the general scheme, requirements and objectives of the [Union]” (at 2335-2336). The Court of Justice has been unable to provide an abstract definition of what is meant by a ‘court or tribunal’, a failure that has been criticised by Advocate General Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 14 (see also, Broberg, M. and Fenger, N., *supra* n. 22, pp. 72-73; Tridimas, T., “Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure”, (2003) 40 *Common Market Law Review* 9, at 30ff). The Court of Justice has, however, in a series of cases identified several characteristics that identify a ‘court or tribunal’. Lenaerts, Maselis and Gutman have summarised these characteristics as follows: it must be “(1) a body (2) which is established by law, (3) permanent and independent; (4) and charged with the settlement of disputes defined in general terms (5) which is bound by rules governing *inter partes* proceedings similar to those used by ordinary courts of law, (6) insofar as it acts as the ‘proper judicial body’ for the disputes in question, which means that parties must be required to apply to the court or tribunal for the settlement of their dispute and its determination must be binding, and (7) is bound to apply rules of law.” (Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 24, p. 53). See the rulings of the Court of Justice in Case 61/65 *Vaasen-Göbbels* [1966] ECR 261 and in Case C-54/96 *Dorsch Consult* [1997] ECR I-4961. The case-law of the Court of Justice would suggest that differential weight is accorded to each of these characteristics in terms of importance (see generally, Broberg, M. and Fenger, N., *supra* n. 22, pp. 72-74). Of course, it is not sufficient for a referring body to be a mere ‘court or tribunal’ it must be a ‘court or tribunal of a Member State’ (emphasis added), as to which: see Broberg, M. and Fenger, N., *supra* n. 22, pp. 97-101. See also, Anderson, D.W.K. and Demetriou, M., *supra* n. 25, chapter 2, pp. 31-56.

- Where the referring court or tribunal is not able to apply the Court’s ruling to the main proceedings⁴⁴;
- Where the question referred does not relate to the facts and circumstances of the main proceedings⁴⁵;
- Where the question referred is contrived⁴⁶;
- Where the reference is being used to circumvent the Article 263 TFEU limitation period.⁴⁷

The Court has, therefore, in its interpretation of Article 267 TFEU imposed a number of *de jure* limitations on its ability to receive references. There is, however, a convincing *per contra* argument to an assertion that these limitations ‘steady’ the Court’s rulings, an argument which has its roots in the

⁴⁴ This admissibility requirement is implied by the wording Article 267 TFEU, which provides that a national court or tribunal may make a reference only where a ruling on that question is “necessary to enable it to give judgment.” While it would appear *prima facie* to be solely within the jurisdiction of the national court to decide whether or not a ruling is necessary, the Court of Justice has increasingly exercised competence over the question of whether a reference is necessary (see Broberg, M. and Fenger, N., *supra* n. 22, pp. 161-171 for a full account of the case-law). In connection with this requirement, the Court of Justice, as noted by Barnard and Sharpston, began in the 1990s to reject references more often on the ground that the national court had not provided adequate information in the Order for Reference (Barnard, C. and Sharpston, E., *supra* n. 40, at 1145-1153). See also, Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 87-97 and p. 114.

⁴⁵ Again this requirement is implicit in Article 267 TFEU in that a ruling on the question must be necessary to enable the referring court or tribunal to give judgment in the matter. Broberg and Fenger provide a detailed commentary on this admissibility requirement: Broberg, M. and Fenger, N., *supra* n. 22, pp. 171-203; Barnard, C. and Sharpston, E., *supra* n. 40, at 1153-1157; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 108-114.

⁴⁶ As with the previous admissibility requirements, the Court’s development of this limitation has been based on the requirement in Article 267 TFEU that a ruling be necessary to enable the referring court or tribunal to give judgment in the matter. It was, of course, in the famed *Foglia* cases (Case 104/79 *Foglia I* [1980] ECR 745 and Case 244/80 *Foglia II* [1981] ECR 3045) that the Court ruled that it would not consider questions where there was no genuine dispute. In the subsequent case of *Meilicke* (Case C-83/91 *Meilicke v Meyer* [1992] ECR I-4871), the Court of Justice refused to answer a hypothetical question despite the fact that it arose in a genuine dispute. Again, for further detail on this requirement, see Broberg, M. and Fenger, N., *supra* n. 22, pp. 203-211; Barnard, C. and Sharpston, E., *supra* n. 40, at 1141-1145; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 114-118.

⁴⁷ The so-called *TWD* doctrine, named after Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833. This estoppel doctrine prevents the use of Article 267 TFEU to question the validity of an EU act where the two-month time period provided for in Article 263 TFEU proceedings has expired. See Broberg, M. and Fenger, N., *supra* n. 22, pp. 212-221; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 127-129.

fact that these limitations are to some degree self-imposed.⁴⁸ While Article 267 TFEU defines the scope of the Court’s jurisdiction to make preliminary rulings in a broad sense, it is the Court as the ultimate arbiter of the Treaties that defines the precise boundaries of that jurisdiction through its case-law.⁴⁹ It is, therefore, conceivable that the Court could (either systematically or in individual cases) disregard its own previously imposed admissibility requirements or re-draw those requirements in such a way as to allow it to rule on otherwise inadmissible references. This could, in turn, permit the Court to pursue an ideological agenda. The Court’s treatment of admissibility requirements has evolved over time in line with perceived need, in particular, its workload.⁵⁰ It is uncontroversial that in the early years of the Court’s history it took a much more relaxed approach to admissibility requirements so as not to discourage national courts and tribunals from making much-needed references.⁵¹ As the Court’s workload grew to such an extent that it became a threat to its effectiveness, the Court began to take a much more prescriptive and restrictive approach to admissibility.⁵² Moreover, case-law reveals that the

⁴⁸ This fact has been pointed out by Peers: Peers, S., “Who’s Judging the Watchmen? The Judicial System of the Area of Freedom Security and Justice”, (2000) 18 *Yearbook of European Law* 337.

⁴⁹ This premise is expressed as a truism by Barnard and Sharpston: “All courts retain inherent jurisdiction over their own jurisdiction. This fact is perhaps self-evident: but it is very easily overlooked against the general background of the early Article 177 case law.” (Barnard, C. and Sharpston, E., *supra* n. 40, at 1157). See also, Arnall, A., “Does the Court of Justice have Inherent Jurisdiction?”, (1990) 27 *Common Market Law* 683.

⁵⁰ Tridimas, T., *supra* n. 43, at 21-22.

⁵¹ It has been noted that this treatment has been extended to references originating from courts or tribunals of new Member States even in later years where the Court has taken a more restrictive approach generally: see Barnard, C. and Sharpston, C., *supra* n. 40, at 1119, citing the Court’s treatment of initial references following the accession of Spain and Portugal. The same permissiveness was, however, not as evident in the Court’s treatment of initial references from the 2004 accession States: see Bobek, M., “Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice”, (2008) 45 *Common Market Law Review* 1611, at 1611-1620.

⁵² The tightening of admissibility requirements is most obvious in the case of the Court’s definition of a ‘court or tribunal of a Member State’ and its latter-day preparedness to consider the relevance of a question referred. Barnard and Sharpston’s study of the phases of the Court’s approach to the admissibility of preliminary references is an excellent treatment of the phenomenon. Barnard and Sharpston, writing in 1997, identified four phases in the Court’s approach: (1) phase one: great willingness to receive references; (2) phase two: greater intervention by the Court: rejecting the first non-genuine dispute; (3) phase three: *acte clair* doctrine; and (4) phase four: tighter control by the Court of Justice of its own jurisdiction (see Barnard, C. and Sharpston, E., *supra* n. 40, at 1117-1141). Some of these developments required the Court to break with a literal interpretation of the division of competences in Article 267 TFEU. The most notable example of this was the Court’s assertion of a jurisdiction to examine the question of whether a reference arose in the context of a genuine dispute in the *Foglia* jurisprudence (Case 104/79 *Foglia I* [1980] ECR 745 and Case 244/80 *Foglia II* [1981] ECR 3045), since Article 267 TFEU states that a national court or tribunal may refer if *it* considers a ruling of the Court of Justice necessary (emphasis added). Unsurprisingly, the decision came in for considerable criticism: see, for example: Bebr, G., “The Existence of a

Court has been vague in its definition of some of its admissibility requirements, which has led to some uncertainty.⁵³ Furthermore, the Court has indicated that its jurisdiction to rule on preliminary references must be interpreted in light of the fundamental right to effective judicial protection.⁵⁴ The historical fluidity of the admissibility requirements, as well as the Court's avowed position of interpreting them in light of the overarching principle of effective judicial protection, implies a degree of latitude for the Court in deciding whether to admit individual cases. It is undoubtedly the case that these admissibility requirements could be relaxed in individual cases to admit cases of ideological salience for ruling.⁵⁵ However, this danger should not be overstated. The Court's effectiveness and prestige depend on its maintenance of a cooperative relationship with national courts and tribunals, and this relationship will only persist so long as the Court is perceived by national judicial bodies as adhering to the 'legal steadying factors'. When interpreting the admissibility requirements in Article 267 TFEU, the Court must, therefore, do so in a manner that is 'judicially arguable'. Such an approach has been evident in the Court's development of its preliminary ruling jurisdiction: the increasing oversight by the Court of the relevance of questions referred to it is underpinned by the wording of Article 267 TFEU, which requires that "a decision on the question [be] necessary" to enable the referring court or

Genuine Dispute: An Indispensable Precondition for the Jurisdiction of the Court under Article 177 EEC Treaty", (1980) 17 *Common Market Law Review* 525.

⁵³ Again, the treatment by the Court of Justice of the requirement that a reference be made by a 'court or tribunal of a Member State' is demonstrative of this. The Court of Justice has failed to provide a singular definition of what is meant by a 'court or tribunal'. Instead the Court has in its case-law recognised a number of criteria to be met by a referring body to qualify as a 'court or tribunal', without, however, attaching any weight to these different criteria. This approach was criticised in very strong terms by AG Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 14 (see Broberg, M. and Fenger, N., *supra* n. 22, pp. 72-73). Barnard and Sharpston point out that the requirement that the national court provide adequate information has also not been applied in a consistent manner (Barnard, C. and Sharpston, E., *supra* n. 40, at 1150-1153). Barnard and Sharpston also conclude that the inconsistency of the Court's approach "has sent a confusing signal to national courts..." (at 1169).

⁵⁴ Case C-354/04 P *Gestoras Pro Amnistía* [2007] ECR I-1579. See Broberg, M. and Fenger, N., *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 1st ed., 2010), pp. 111-113. Again, this chimes with assertions by Barnard and Sharpston and by Arnull of the Court's inherent jurisdiction (*supra* n. 49).

⁵⁵ The fluidity of the admissibility criteria and the Court's *de facto* control over them has led to some concern that the Court could utilise them differentially to admit certain cases. Barnard and Sharpston have given expression to a suspicion that the Court of Justice will find a way to answer a reference if it "raises an interesting question or an important point of law..." (Barnard, C. and Sharpston, E., *supra* n. 40, at 1144). The authors argue that the Court of Justice has accepted references it might otherwise have rejected for lack of adequate information in the Order for Reference because the cases raised issues to which the Court wanted to respond (at 1149).

tribunal to give judgment.⁵⁶ Furthermore, even in the case of more malleable admissibility requirements such as the definition of a ‘court or tribunal’, the Court has established over half a century of case-law on its jurisdiction. While precedent does not bind the Court in any *de jure* sense, both legal scholars and political scientists have acknowledged that precedent does constitute a significant constraint or pressure on the Court.⁵⁷ Regular departures from existing case-law doctrine by the Court would not only impact negatively on ‘legal certainty’, but also upon perceptions of the Court’s adherence to the ‘legal steadying factors’. At the very least, one may argue that the pressures imposed on the Court by the necessity for it to maintain a cordial working relationship with national courts preclude it from ruling systematically on manifestly inadmissible references, even where the subject-matter of the case may be of ideological salience to the Judges. These limitations on the Court’s ability to abuse admissibility requirements are also strengthened by the fact that the Court must justify its decision to rule a reference inadmissible: Article 53(2) RP provides that any such decision must be made by reasoned order, after the Court has heard the Advocate General, and Article 89(2) RP provides that in such orders the grounds for the decision must be provided.⁵⁸ The pursuit of judicial ideological preferences divorced of a legal-doctrinal basis is, therefore, further inhibited.⁵⁹

⁵⁶ See, for instance, the Opinion of AG Lenz in Case C-415/93 *Bosman* [1995] ECR I-4921, para 80. The necessity of the Court of Justice remaining faithful to the division of competences in Article 267 TFEU so as not to damage its relationship with national courts was recognised early on: see Advocate General Lagrange’s warning to the Court in Case 6/64 *Costa v ENEL* [1964] ECR 585, at 601-602.

⁵⁷ It must, however, be acknowledged that precedent will impose differential pressures based on the clarity or prescriptiveness of previous judgments.

⁵⁸ This observation echoes Llewellyn’s argument that the requirement for a court to follow up and justify its decision in the form of a written opinion serves to limit its decisional discretion (Llewellyn, K.N., *supra* n. 2, pp. 26-27). This ‘steadying factor’, Llewellyn’s sixth, is discussed in the context of the preliminary reference procedure at a later point in this part of the dissertation (*infra* n. 407-n. 410).

⁵⁹ Arnall has written of the damage that can be done to the relationship with national courts where the Court of Justice appears to transgress “the limits it has itself imposed on its own jurisdiction.” He utilises Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273 as a case in point. In that case, the Court of Justice appeared to make a finding of fact which was inconsistent with the findings as set out in the Order for Reference. When delivering judgment in the main proceedings following the preliminary ruling, the referring judge (Laddie J of the High Court of England and Wales) decided in a manner inconsistent with the ruling on the basis that the Court of Justice had exceeded its Article 267 TFEU jurisdiction. Although the Court of Appeal subsequently overturned the High Court decision, Arnall rightly states that the case “emphasises the delicate nature of the relationship between the Court of Justice and the national courts and the care the Court of Justice needs to take when drafting preliminary rulings.” (Arnall, A., *supra* n. 24, pp. 105-106). See also, Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 328-330.

cc) The Court of Justice Must Accept Validly Referred Questions and Possesses no Method of Docket Control⁶⁰

Heretofore, this author has argued that the Court's Judges are prevented from freely advancing ideological preferences due to the fact (1) that the Court has no power to initiate references, and (2) that Article 267 TFEU admissibility requirements inhibit the Court from ruling on inadmissible cases. However, the admissibility requirements perform a further restraint on the advancement of judicial personal ideological preferences: the Court may not reject from consideration validly referred cases. In other words, the Court does not enjoy the docket control power enjoyed by the US Supreme Court, which allows that court almost complete discretion to refuse to hear cases without having to disclose the reasons for its choices.⁶¹ The effect is to prevent the Judges of the Court of Justice being able to weed out the cases that will not assist the advancement of ideological preferences.⁶²

However, a number of arguments *per contra* the above assertion must be considered. Firstly, as a corollary of the argument made previously, the Court as ultimate interpreter of the Treaties could conceivably interpret its Article 267 TFEU jurisdiction either systematically or in individual cases to exclude references for purely ideological reasons.⁶³ However, as was acknowledged

⁶⁰ For a sceptical account of this factor, see Rasmussen, H., *supra* n. 20, pp. 465-497.

⁶¹ This system of docket control is known as *certiorari*. Smith argues that the introduction of the Supreme Court Case Selection Act which came into force in 1988 "all but abolished the Court's obligatory appellate jurisdiction." (Smith, K.H., "Certiorari and the Supreme Court Agenda: An Empirical Analysis", (2001) 54 *Oklahoma Law Review* 727, at 735). Rule 10 of the Rules of the Supreme Court of the United States provides some insight into the width of discretion enjoyed by the Supreme Court: while it does list three characters of reasons that may be taken into account, it emphasises that these neither control nor fully measure the Court's jurisdiction. The Supreme Court is afforded such leeway and secrecy that at least one author has said that it could be assumed the Court's agenda-setting process is arbitrary and random: see Ulmer, S.S., "The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable", (1984) 78 *American Political Science Review* 901, at 901. Many authors have argued persuasively that the creation of such a filtering discretion for the Court of Justice in the preliminary reference procedure would undermine the cooperative relationship between the Court and national judicial bodies on which the procedure is built (Barnard, C. and Sharpston, E., *supra* n. 40, at 1165-1166; Broberg, M. and Fenger, N., *supra* n. 22, pp. 29-31; Arnall, A., "Judicial Architecture or Judicial Folly? The Challenge Facing the EU" in Dashwood, A. and Johnston, A.C. (eds.), *The Future of the Judicial System of the European Union* (Cambridge: Hart Publishing, 2001), p. 1; Rasmussen, H., *supra* n. 20, pp. 465-497).

⁶² Smith asserts that there is abundant anecdotal and empirical evidence to suggest that the US Supreme Court and its individual Justices make docket control decisions on the basis of ideology (Smith, K.H., *supra* n. 61, at 742). The author cites a number of studies at fn. 65 and fn. 66.

⁶³ For an argument to this effect, see Rasmussen, H., *supra* n. 20, pp. 475-497.

previously, the need for the Court to be perceived by national judicial bodies as adhering to the ‘legal steadying factors’ reduces the likelihood of such an approach. This observation applies *a fortiori* in the current context since it may be presumed that the abuse of admissibility requirements to exclude validly referred questions would be more likely to incur national judicial ire than such an abuse to rule on an inadmissible question.⁶⁴ Secondly, even if there are restrictions placed by the admissibility requirements on the Court’s ability to reject cases that do not enable the advancement of ideological preferences, the Statute and the Rules of Procedure do allow the Court to treat certain admissible preliminary references preferentially in a procedural sense, with such differences in treatment being based, loosely speaking, on the perceived importance and/or difficulty of the case.⁶⁵ However, in each case, although the Court may be empowered to dispense with elements of the procedure such as the oral hearing or the submission of the Advocate General, it will be unable to avoid ruling on admissible cases that do not advance a particular ideological agenda. The Court will, at the very least, be compelled in all cases to provide a ruling by way of reasoned order, and such orders, like judgments, are required to contain the grounds upon which the decision is based. Thirdly, the Court has conferred upon itself a limited jurisdiction to reformulate questions that have been referred to it. This acquired competence could conceivably be utilised to allow the Court to adapt the question into one that allows the Judges to advance ideological preferences. However, such an abuse of this competence in an

⁶⁴ Again, it should be recalled that a decision to dismiss a reference on the grounds of manifest inadmissibility will have to be justified in a reasoned order (Article 53(2) RP) (*supra* n. 58). Barnard and Sharpston have acknowledged the potentially corrosive effect on refusals to admit references on the preliminary ruling process itself: “National judges are scarcely encouraged to co-operate in the application of EC law if their requests for preliminary rulings are sent back as inadmissible. They are more likely to play a full and responsible part if – when they do need help – it is forthcoming from the Court of Justice as required.” (Barnard, C. and Sharpston, E., *supra* n. 40, at 1169).

⁶⁵ For instance, Article 60(1) RP provides that the Court shall assign cases to the Chambers of three and of five Judges unless “the difficulty or importance of the case or particular circumstances” are not such that it should be assigned to the Grand Chamber. Furthermore, the Court can indicate its perception of the importance or difficulty of a case in its decision as to whether or not an oral hearing and/or a submission by the Advocate General is required: most significantly, pursuant to Article 99 RP, the Court of Justice can dispense with both elements of the procedure and reply to a preliminary reference by reasoned order. de la Mare and Donnelly are particularly critical of the Court’s use of this provision as a method of *de facto* docket control (de la Mare, T. and Donnelly, C., *supra* n. 41, p. 373). Article 53(2) RP accords the President of the Court an explicit power “in special circumstances” to decide that a case be given priority over others. The Statute and Rules of Procedure provide further for expedited and urgent procedures, both of which allow for abridged time periods for service of written observations (indeed in the case of the latter procedure, which applies only in cases concerning the areas of freedom, justice and security, the written procedure may be dispensed with completely).

individual case might result in the transformation of the question into one whose answer will not be of assistance to the national court that referred it in deciding the dispute before it. Moreover, systematic abuse of this competence would undermine the cooperative relationship and division of competences that underpin the Article 267 TFEU procedure, and could lead ultimately to national courts disengaging from the procedure.⁶⁶ Tridimas, who emphasises the dependence of the Court on national courts⁶⁷, concluded in 2003 that “[d]espite fears to the contrary, the ECJ has not used its power to control the admissibility of references as a means of introducing *certiorari* by the back door.”⁶⁸

In summary, notwithstanding the Court’s ability to expedite certain references over others, or to dispense with elements of the usual procedure, the Court is prevented from avoiding validly made references that do not assist a particular ideological agenda.

dd) Interim Conclusion

The arguments outlined above demonstrate that Article 267 TFEU, the Statute and the Rules of Procedure, specifically the division of competences between the Court of Justice and national courts that underpins the preliminary reference procedure, contribute to ‘reckonability’. The preliminary reference procedure places the decision to make a reference within the exclusive competence of national courts and tribunals. The Court of Justice is constrained, therefore, from initiating references that might serve the advancement of extra-legal ideological interests. Further limits are placed upon the Court’s ability to pursue ideological interests within the cases that are

⁶⁶ It will also be difficult for the Court of Justice to justify a purely ideologically driven reformulation of a reference given that Article 101 RP provides that the Court may make a request for clarification from the national court or tribunal (see Wägenbaur, B., *supra* n. 26, pp. 340-342; Broberg, M. and Fenger, N., *supra* n. 22, pp. 318-319). The Court may also invite the interested persons referred to in Article 23 of the Statute “to answer certain questions in writing, within the time-limit laid down by the Court, or at the hearing”, which must be communicated to the other interested persons: Article 61(1) RP. Article 62(1) RP permits the Judge-Rapporteur or the Advocate General to request the interested persons “to submit within a specified time-limit all such information relating to facts, and all such documents or other particulars, as they may consider relevant.” (see Wägenbaur, B., *supra* n. 26, pp. 284-286; Broberg, M. and Fenger, N., *supra* n. 22, p. 319).

⁶⁷ Tridimas, T., *supra* n. 43, at 37.

⁶⁸ Tridimas, T., *supra* n. 43, at 22; Broberg, M. and Fenger, N., *supra* n. 22, p. 304.

referred: admissibility criteria provide that the Court may not rule on inadmissible cases, and provide that it must give a ruling on each validly-referred case. However, these constraints are not fixed. The Court, as ultimate interpreter of the Treaties, is responsible ultimately for the interpretation of the scope of its own jurisdiction. The Court has ruled that it will interpret its jurisdiction in light of the fundamental right of effective judicial protection, and one legal scholar has gone as far as to suggest that the Court enjoys an inherent jurisdiction.⁶⁹ That the Article 267 TFEU admissibility criteria have evolved as the Court's workload has increased is obvious. That some criteria permit wider interpretation than others is equally clear. Consequently, it is evident that there is scope for the Court to adapt admissibility criteria systematically or in individual cases in order to admit ideologically salient cases that would be otherwise inadmissible, and to dismiss references that would otherwise be admissible. However, the effectiveness of the preliminary reference procedure, and by extension of the Court itself, depends upon the maintenance of a cooperative relationship with national courts. Perceived abuse of admissibility criteria and the legal uncertainty that would entail could jeopardise this relationship.

In conclusion, Article 267 TFEU admissibility requirements do limit the Court's ability, or that of a significant number of its Judges, to advance extra-legal ideological interests. However, it is difficult to quantify the weight of this constraint. Moreover, the Court and its Judges may still have significant leeway within the menu of references they must consider. The section that follows posits that the division of competences within the Article 267 TFEU procedure further inhibits the advancement of ideological interests by limiting or narrowing the Court's decisional role in ruling on the substantive question or questions referred.

⁶⁹ Arnall, A., *supra* n. 49.

b) Jurisdictional Limitations and the Division of Competences in the Article 267 TFEU Preliminary Reference Procedure: The Limited Adjudicative Role of the Court of Justice and Body of 'Legal Doctrine' Available to the Court

It has been concluded that the Article 267 TFEU admissibility criteria inhibit the Court's ability to make a decision to admit or dismiss references based on extra-legal ideological preference. These criteria are underpinned by the division of competences between the Court and the national judiciaries, and the necessity to maintain a cooperative working relationship with national courts and tribunals.⁷⁰ This does not imply, however, that the Court or its Judges are free to pursue extra-legal ideological preferences in their determination of the references to which they must provide a ruling. On the contrary, the preliminary reference procedure, depending as it does on a division of competences between the Court of Justice and the national courts, limits the scope of the Court's decisional competence. Article 267 TFEU confines the Court's decisional jurisdiction to "giv[ing] rulings concerning (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union."⁷¹ Implicit in this definition of the Court's jurisdiction are two limitations on its decisional competence.

Firstly, the fact that the Court is restricted to making determinations on the validity or interpretation of EU acts places the determination of the facts in the main proceedings within the exclusive competence of the referring court or tribunal. As is discussed below⁷², the uncertainty of judicial fact-finding is a factor that contributes significantly to unpredictability of outcomes, given that the choice of legal principles to apply and how they are to be applied may depend on the version of the facts as determined by the decision-maker. The narrowing of the Court's scope of enquiry must in turn narrow the menu of possible outcomes, though it must be acknowledged that cases concerning

⁷⁰ President of the Court Lenaerts, writing extra-judicially, has emphasised that the Court's 'internal legitimacy' is dependant upon it refraining from "encroach[ing] upon the prerogatives of national courts." (Lenaerts, K., "How the ECJ Thinks: A Study on Judicial Legitimacy", (2013) 36 *Fordham International Law Journal* 1302, at 1305).

⁷¹ See generally, Geiger, R., Khan, D.-E. and Kotzur, M., *supra* n. 29, pp. 894-896.

⁷² *Infra* n. 132-n. 146.

interpretation will, to use Llewellyn's analogy, be more akin to betting on a steeplechase⁷³, and cases concerning the validity of an EU act will be the proverbial two-horse race.

Secondly, the Court is limited to delivering rulings which concern an expressly circumscribed body of 'legal doctrine': the Court may deliver rulings on the interpretation of (1) the Treaties and/or (2) acts of the institutions, bodies, offices or agencies of the Union only, and may deliver rulings on the validity of the latter only.⁷⁴ The most significant result of this restriction is that it prevents the Court ruling on the interpretation of national law or making decisions as to the compatibility of national law with EU law: such matters lie within the exclusive competence of the national courts. Moreover, the Treaties themselves place further restrictions on the Court's substantive legal jurisdiction. Article 275 TFEU, for instance, provides that the CJEU has no jurisdiction "with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions."⁷⁵

The circumscribing of the Court's decisional competence in Article 267 TFEU contributes to 'reckonability' in two ways. Firstly, the narrowing of the scope of Court's enquiry lessens the degree of uncertainty: the enquiry is either 'valid or invalid' or will concern the correct interpretation of, in Llewellyn's terms, a limited body of 'doctrine'. As aforementioned, the Court has no jurisdiction to determine the fact pattern underpinning the question: it is the indeterminacies of fact-finding that can make the outcome of a full trial of an action infinitely more difficult to predict than the outcome of an appeal where the facts arrive pre-determined. Secondly, the fact that the Court is limited to pronouncing

⁷³ Llewellyn, K.N., *supra* n. 9.

⁷⁴ As to what is meant by the Treaties and acts of Union institutions, bodies, offices or agencies in this context, see Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 216-231. de la Mare and Donnelly summarise the Court's treatment of its substantive jurisdiction under Article 267 TFEU pithily: "To date the CJEU has approached the question of substantive referability in the widest of fashions." (de la Mare, T. and Donnelly, C., *supra* n. 41, pp. 367-370).

⁷⁵ Article 276 TFEU places a further limitation on the Court's substantive jurisdiction: "In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to 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."

upon the validity of and/or interpretation of a limited body of EU law further restricts the scope of the Court's enquiry, thereby narrowing further the number of conceivable outcomes.⁷⁶

However, it may be argued that the *de jure* position presented heretofore does not represent the complete *de facto* position and that the Court's adjudicative jurisdiction in preliminary references is not as limited as a literal reading of the relevant rules would indicate. Firstly, and this point is developed further in the application of Llewellyn's seventh 'steadying factor' to the Order for Reference, the Court does in exceptional circumstances enjoy a jurisdiction to depart from the facts as found by the referring court or tribunal. The Court will also be free to emphasise or de-emphasise certain elements of the fact-pattern that may allow it to tailor its ruling to accord with an extra-legal ideological preference.⁷⁷ Secondly, and again exceptionally, the Court may depart from the interpretation of national law provided by the national court.⁷⁸ Thirdly, as has been noted by de la Mare and Donnelly, the Court has adopted a wide understanding of the term "act of an institution", thereby expanding its substantive jurisdiction under Article 267 TFEU beyond what a literal interpretation might indicate.⁷⁹ Fourthly, the mere fact that the Court is limited to ruling on the validity of or interpreting a limited body of EU law does not prevent it from drawing upon other sources of law to aid its interpretation of EU law: the Court has, for instance, utilised international law and the law of

⁷⁶ See generally, Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 233-235.

⁷⁷ Tridimas has, for instance, pointed out that the Court of Justice enjoys a discretion to determine the level of specificity of its rulings: "It may give an answer so specific that it leaves the referring court no margin for maneuver and it provides it with a ready-made solution to the dispute (outcome cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary (deference cases)." (Tridimas, T., "Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction", (2011) 9(3-4) *International Journal of Constitutional Law* 737, at 737). See also, Lenaerts, K., *supra* n. 70, at 1344. See also, Pech's identification of a "growing tendency of the Court to favour judicial minimalism in preliminary reference cases": Pech, L., "Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Domínguez*", (2012) 49 *Common Market Law Review* 1841, at 1843.

⁷⁸ See, for instance, Case C-88/99 *Roquette Frères* [2000] ECR I-10465 (see Broberg, M. and Fenger, N., *supra* n. 22, pp. 373-374).

⁷⁹ de la Mare, T. and Donnelly, C., *supra* n. 41, p. 367. The authors point to, *inter alia*, the extension of the concept of "act of an institution" to include international agreements that are acts of the Council (Cases 267-269/81 *Amministrazione delle Finanze dello Stato v SPI SpA* [1983] ECR 801); recommendations (Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407); national laws based on EU laws though applied in areas beyond the scope of EU law (Case C-197/89 *Dzodzi v Belgium* [1990] ECR I-3763) (de la Mare, T. and Donnelly, C., *supra* n. 41, pp. 367-370).

the Member States to identify general principles of EU law.⁸⁰ Fifthly, there are circumstances where the Court has effectively involved itself in the interpretation of national law: for instance, it has expressed a view as to whether a harmonious interpretation of national law with EU law was possible.⁸¹ Finally, while the Court asserts, in accordance with the proper division of competences in Article 267 TFEU, that it cannot rule on the question of whether a national law is compatible with EU law, there are often occasions where its rulings are so detailed as to effectively amount to the same thing.⁸²

⁸⁰ The Court of Justice has, for instance, derived general principles of EU law from the national law of the Member States (see Tridimas, T., *The General Principles of EC Law* (Oxford: Oxford University Press, 1999), pp. 4-9). Furthermore, Maduro has argued that the Court of Justice in determining whether a national measure is inconsistent with the Article 34 TFEU prohibition on quantitative restrictions or measures having equivalent effect to quantitative restrictions on imports considers whether the rule exists in the majority of Member States, an approach he dubs ‘majoritarian activism’ (Maduro, M.P., *We The Court: The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 EC* (Oxford: Hart, 1998). This, of course, implies interpreting Article 34 TFEU in line with the law of the Member States.

⁸¹ For instance, in Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial* [1993] ECR I-6911, the Court accepted that Spanish rules could not be interpreted to achieve the effect sought by the applicants in the case. Although the Court of Justice has deferred to the national courts on the decision as to whether an interpretation of national rules in line with EU law is possible, in Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285, the Court suggested that the relevant national rules could be interpreted in a manner consistent with the directive in question (see Craig, P. and de Búrca, G., *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 6th ed., 2015), pp. 213-214). Moreover, the Court of Justice in *Dzodzi v Belgium* (Case C-197/89 *Dzodzi v Belgium* [1990] ECR I-3763) has extended its jurisdiction to the consideration of EU rules which are being applied in national law in a manner outside the scope of EU law (i.e. where a national legislature adopts an EU rule in an area of national law which is purely within the competence of national authorities) (see Arnull, *supra* n. 24, pp. 107-114). The Court of Justice has also in at least two cases identified by Broberg and Fenger engaged in *de facto* deviation from the version of the relevant national rules provided by the referring court (see Broberg, M. and Fenger, N., *supra* n. 22, pp. 373-374, discussing Case C-88/99 *Roquette Frères* [2000] ECR I-10465 and Case C-315/02 *Lenz* [2004] ECR I-7063).

⁸² Tridimas refers to these cases as ‘outcome cases’: where the Court provides “an answer so specific that it leaves the referring court no margin for maneuver and provides it with a ready-made solution to the dispute” (Tridimas, T., *supra* n. 77, at 737). Judge Mancini had previously observed this phenomenon in his slightly impish fashion: “It bears repeating that under Article 177 national judges can only request the Court of Justice to interpret a Community measure. The Court never told them they were entitled to overstep that bound: in fact, whenever they did so – for example, whenever they asked if national rule A is in violation of Community Regulation B or Directive C -, the Court answered that its only power is to explain what B or C actually mean. But, having played lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the Court usually went on to indicate to what extent a certain type of national legislation can be regarded as compatible with that measure. The national judge is thus led hand in hand to the door; crossing the threshold is his job, but now a job no harder than child’s play.” (Mancini, G.F., *supra* n. 35, at 606). See also, Barnard, C. and Sharpston, E., *supra* n. 40, at 1116, fn. 12; Barnard, C., “Sunday Trading: A Drama in Five Acts”, (1994) 57 *Modern Law Review* 449.

These adjustments, however, are the exception rather than the rule, and as with previous limitations to the Court’s jurisdiction in preliminary references, the restrictions placed on the Court’s scope of substantive adjudicative enquiry are reinforced by the normative and practical necessity for it to retain a cooperative working relationship with national courts. The narrowing of the Court’s scope of enquiry by the division of competences in Article 267 TFEU has a role in promoting ‘reckonability’ by narrowing in turn the number of prospective outcomes.

c) The Order for Reference as an Advance Limitation, Sharpening, and Phrasing of the Issues, and as ‘Steadying Factor’

aa) Introduction

It will be recalled that in the context of the American appellate courts, Llewellyn argued that that the matters to be decided and the issues relevant to those matters arrived before the court “already drawn, drawn by lawyers, drawn against a background of legal doctrine and procedure, and drawn largely in frozen printed words”⁸³ which “tend[ed] powerfully both to focus and to limit discussion, thinking, and lines of deciding.”⁸⁴ While in an appeal, the instrument that performs this function will generally be the written pleadings of the lawyers, in particular, the appellant’s notice of appeal, in the context of the preliminary reference procedure, it is the Order for Reference that defines the matters for ruling. Before considering the role of this document in promoting ‘reckonability’, it is necessary to describe the procedural rules and practices surrounding it.

bb) The Order for Reference: Procedure and Practice⁸⁵

In accordance with Article 23(1) of the Statute, the preliminary reference procedure commences when a court or tribunal of a Member State notifies the

⁸³ Llewellyn, K.N., *supra* n. 8.

⁸⁴ Llewellyn, K.N., *supra* n. 9.

⁸⁵ See generally, Wägenbaur, B., *supra* n. 26, pp. 326-332; Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 783-785; Geiger, R., Khan, D.-E. and Kotzur, M., *supra* n. 29, pp. 899-900; Broberg, M. and Fenger, N., *supra* n. 22, chapter 8, pp. 296-323; Anderson, D.W.K. and Demetriou, M., *supra* n. 21, pp. 195-203.

Court of Justice of its decision to suspend its proceedings and refer the case to the Court.⁸⁶ Article 94 RP prescribes the contents of the request for a preliminary ruling:

“In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

- (a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;⁸⁷
- (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;⁸⁸
- (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law⁸⁹, and the relationship between those provisions and the national legislation applicable to the main proceedings.”⁹⁰

From the Court’s case-law, it is evident that the questions referred “should be sufficiently clear and precise to avoid any risk of misunderstanding...”⁹¹

Where, for instance, a question is overly generic in nature, the Court has refused to provide a ruling.⁹² Other than Article 94 RP and case-law, there is no other legal norm relating to the contents of an Order for Reference. However,

⁸⁶ This decision can be made at any stage of the proceedings where the national court decides that a ruling of the Court of Justice on the validity or interpretation of EU law is necessary to allow it to give judgment. While emphasising that it is for the national court to decide at what stage of the proceedings a reference should be made, the Court has recommended that it is desirable that a reference be made at a stage where “the referring court or tribunal is able to define the legal and factual context of the case, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings.” The Court also suggests that it is desirable for both sides to have been heard before a reference is made (Points 18 and 19 of *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01)). See also, Broberg, M. and Fenger, N., *supra* n. 22, p. 297.

⁸⁷ See Lasok, K.P.E., *The European Court of Justice: Practice and Procedure* (London: Butterworths, 2nd ed., 1994), p. 99, n. 48.

⁸⁸ See Lasok, K.P.E., *supra* n. 87, p. 99, n. 48.

⁸⁹ Case C-613/10 *Dibiasi* (not published in the ECR); Case C-378/93 *La Pyramide* [1994] ECR I-3999 (see Wägenbaur, B., *supra* n. 26, p. 329); Case C-167/94 *Grau Gomis* [1995] ECR I-1023. This latter requirement is to allow the Court of Justice to ascertain whether it can deliver a ruling capable of being applied in the main proceedings (Broberg, M. and Fenger, N., *supra* n. 22, p. 300). For a discussion of the Court’s case-law on this requirement, see Broberg, M. and Fenger, N., *supra* n. 22, pp. 300-309. See also, Barnard, C. and Sharpston, E., *supra* n. 40, pp. 1145-1153.

⁹⁰ Case 244/80 *Foglia v Novello (No 2)* [1981] ECR 3045 (see Lasok, K.P.E., *supra* n. 87, pp. 99-100, fn. 50); Case C-613/10 *Dibiasi* (not published in the ECR) (see Wägenbaur, B., *supra* n. 26, p. 329); Case C-386/07 *Hospital Consulting* [2008] ECR I-67 (see Broberg, M. and Fenger, N., *supra* n. 22, p. 306); Lane, R., “Article 234: A Few Rough Edges Still” in Hoskins, M. and Robinson, W. (eds.), *A True European: Essays for Judge David Edward* (Oxford: Hart, 2004), p. 327; Barnard, C. and Sharpston, E., *supra* n. 40, pp. 1153-1157.

⁹¹ Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 201.

⁹² Case 14/86 *Pretore di Salò v Persons Unknown* [1987] ECR 2545 (see Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 202, fn. 12).

the Court has issued guidelines to assist national courts, entitled *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*.⁹³ In terms of the substantive contents of the Order for Reference, the Court reminds national courts that the Order for Reference will be “the document which will serve as the basis of the proceedings before the Court”: as such, the Order should “contain such information as will enable the Court to give a reply which is of assistance to the referring court or tribunal.”⁹⁴ The *Recommendations* also allude to the fact that the Order will be the only document which will be notified to the interested persons under Article 23 of the Statute⁹⁵ and, therefore, “must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings.”⁹⁶ Point 23 of the *Recommendations* suggests that the EU law provisions relevant

⁹³ *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01). These recommendations in accordance with Point 6 thereof are not binding but intended to supplement the Rules of Procedure. Points 20-28 deal with the form and content of a request for a preliminary ruling. Anderson and Demetriou, both experienced barristers before the Court of Justice, also provide some helpful practical tips: Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 198.

⁹⁴ Point 20 of the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01). See Case C-320/90 *Circostel* [1993] ECR I-939 (see also, Geiger, R., Khan, D.-E. and Kotzur, M., *supra* n. 29, p. 899; Broberg, M. and Fenger, N., *supra* n. 22, pp. 300-302).

⁹⁵ Once the request has been notified to the Court of Justice, the Registrar of the Court notifies the decision to the parties, the Member States, the Commission, and to the institution, body, office or agency of the EU which adopted the act the validity or interpretation of which is in dispute (Article 23(1) RP). The Member States are provided with the original version of the Order for Reference as well as a translation of the original into the official language of the State to which it is addressed, or a translated summary where appropriate due to the length of the original reference. However, the contents of such a summary are prescribed tightly: it must include the full text of the question or questions referred, the subject matter of the main proceedings, a succinct presentation of the reasons for the reference, and the case-law and provisions of national law and EU law relied on (Article 98(1) RP). Article 98(3) provides for the notification of the Order for Reference to non-Member States: again non-Member States must receive the original version of the Order, which must be accompanied by a translation, or where appropriate a translation of a summary. However, it is for the non-Member State party to choose the language into which it wishes the translation to be made (as long as the language is one of those referred to in Article 36 RP).

⁹⁶ Point 22 of the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01); Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393 (see Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 197, fn. 77; Broberg, M. and Fenger, N., *supra* n. 22, pp. 302-304 and pp. 315-322; Arnall, A., “Case Note on the *Telemarsicabruzzo* Case”, (1994) 31(2) *Common Market Law Review* 377). According to Broberg and Fenger, as a rule, the annexes to the Order for Reference “are not translated and will not necessarily be presented to the Judges who are going to rule on the preliminary reference other than the Judge-Rapporteur and the Advocate General.” (Broberg, M. and Fenger, N., *supra* n. 22, p. 315). See also, Barnard, C. and Sharpston, E., *supra* n. 40, pp. 1138-1141.

to the case should be identified as accurately as possible⁹⁷ and that the Order should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings.⁹⁸ Furthermore, the Court invites the referring court or tribunal to briefly state its own view on the answer to be given to the questions referred.⁹⁹ As for the format of the document, the Court suggests that an Order for Reference can be made “in any form allowed by national law as regards procedural steps.”¹⁰⁰ However, the Court recommends that “[a]bout 10 pages is sufficient to set out in a proper manner the context of a request for a preliminary ruling”¹⁰¹, and suggests that the questions for ruling “should appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end”, and that it should be possible to understand those questions on their own terms, without referring to the statement of grounds for the request.¹⁰²

The Court’s case-law indicates that a failure to meet the requirements of Article 94 RP may lead to a reference being deemed inadmissible.¹⁰³ Although,

⁹⁷ However, a failure to refer to the relevant EU law provisions will not necessarily result in a finding of inadmissibility, particularly where this information can be gleaned from the Order for Reference in its totality: Case C-436/08 *Haribo* [2011] ECR I-305 (see Broberg, M. and Fenger, N., *supra* n. 22, p. 306, fn. 34 for a list of authorities on this point).

⁹⁸ An Order for Reference that merely refers to the arguments of the parties in the main proceedings has been deemed to be inadmissible (Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905) (see Wägenbaur, B., *supra* n. 26, p. 328; Broberg, M. and Fenger, N., *supra* n. 22, p. 302).

⁹⁹ Point 24 of the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01). The Court suggests these views may be of particular utility where it is called upon to give a ruling in an expedited or urgent procedure (see also, Article 107(2) RP). Broberg and Fenger note that this is not a requirement however, and that “whilst German and Dutch courts often put forward their own view as to the answer to be given to the referred questions most other Member States have been cautious in this respect.” (Broberg, M. and Fenger, N., *supra* n. 22, p. 308). Nyikos calculated that the referring court provided a suggested solution in 41.3% of cases (from a sample of 574 references made between 1961 and 1995): Nyikos, S.A., *The European Court and National Courts* (University of Virginia, 2000), p. 116. However, Broberg and Fenger are correct to point out that this figure is not representative of Member State court practice since half of Nyikos’ data material related to references from German courts (Broberg, M. and Fenger, N., *supra* n. 22, p. 308, fn. 40).

¹⁰⁰ Point 20 of the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01). The Court of Justice has ruled that it is for the national court to decide whether the Order for Reference accords with national procedural rules (Case 65/81 *Reina v Landeskreditanstalt Baden-Württemberg* [1982] ECR 33) (see Wägenbaur, B., *supra* n. 26, p. 326). See also, Broberg, M. and Fenger, N., *supra* n. 22, pp. 298-299.

¹⁰¹ Point 22 of the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01).

¹⁰² Point 26 of the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01).

¹⁰³ Wägenbaur provides, among others, the following circumstances, where the Court of Justice has ruled references inadmissible: where insufficient detail is provided in the Order for

as aforementioned¹⁰⁴, the *Recommendations* are not binding, failure to heed the suggestions contained therein may result in a determination that the requirements of Article 94 RP have not been met, and inadmissibility.¹⁰⁵

The following paragraphs consider the role, if any, of the Order for Reference in promoting the ‘reckonability’ of preliminary reference outcomes.

cc) The Order for Reference as ‘Steadying Factor’: ‘Issues Limited, Sharpened, and Phrased in Advance’

The Order for Reference is, to adopt Llewellyn’s words out of context, ‘drawn against a background of legal doctrine and procedure’ and therefore manifests the jurisdictional limitations placed upon the Court by Article 267 TFEU and related procedure rules. So, it is the referring court or tribunal, which must be a ‘court or tribunal of a Member State’, that drafts the reference and therefore defines the questions to be decided, and not the Court. The Order for Reference will be admissible only if it refers a question or questions that concern the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU; the Order for Reference therefore serves to limit the Court’s decisional jurisdiction to interpretation or decisions on validity, and its substantive jurisdiction to consideration of the Treaties and/or EU acts.¹⁰⁶ Furthermore, Article 94 RP serves to reinforce the

Reference (Case C-167/94 *Grau Gomis and others* [1995] ECR I-1023); where the national court refers only to the wording of the national law (Case C-257/95 *Bresle* [1996] ECR I-233); where the national court merely refers to the arguments of the parties in the main proceedings (Case C-318/00 *Baccardi-Martini and Cellier des Dauphins* [2003] ECR I-905); where the Order for Reference contains the questions for ruling only (Case C-386/92 *Monin* [1993] ECR I-2049) (Wägenbaur, B., *supra* n. 26, p. 328).

¹⁰⁴ *Supra* n. 93.

¹⁰⁵ This is unsurprising given that many of the recommendations are based on the Court’s findings in cases where admissibility became an issue. However, the Court of Justice has shown itself willing to search the Order for Reference, accompanying documentation and even written pleadings in order to provide a useful reply. Broberg and Fenger describe the boundary between admissible and inadmissible cases where references are less than thorough as “functional”, i.e. “a reference will not be dismissed as inadmissible if an otherwise brief or incomplete presentation does not prevent the Court of Justice from understanding the legal questions referred to it.” (Broberg, M. and Fenger, N., *supra* n. 22, p. 320). Barnard and Sharpston, on the other hand, are not as confident in the Court’s motives in this regard, entertaining the argument that the Court finds ways to answer questions that raise an interesting point of law (Barnard, C. and Sharpston, E., *supra* n. 34, at 1144).

¹⁰⁶ Broberg, M. and Fenger, N., *supra* n. 22, p. 306. Although the Court of Justice has asserted on a number of occasions that it will not entertain submissions to the effect that the referring court has provided a mistaken account of the relevant national law (Joined Cases C-482/01 and 483/01 *Orfanopoulos* [2004] ECR I-5257; Case C-136/03 *Dörr* [2005] ECR I-4759 [for further

fact that the Court has no jurisdiction to make determinations on national law: it is the referring court that sets out “the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law”.¹⁰⁷ The Order for Reference, therefore, serves to remind the Court of its limited decisional and substantive jurisdiction.

More significant than its general symbolism of the division of competences between the Court of Justice and the national judges is the function of the Order for Reference in the individual case in pre-defining the issues to be decided. It is, of course, the referring court or tribunal that possesses exclusive jurisdiction to determine the subject matter of the questions¹⁰⁸, and as Lasok states, the Court of Justice “does not have jurisdiction to go outside the terms of the reference and answer questions or problems that have not been put to it...”¹⁰⁹ The specific question or questions referred by the national court or tribunal, therefore, frame the scope of the Court’s enquiry, closing down avenues of enquiry that it or its individual Judges may wish to explore: to paraphrase Llewellyn, discussion, thinking, and lines of deciding are focussed

authorities, see Broberg, M. and Fenger, N., *supra* n. 22, p. 372, fn. 84]), it has on very rare occasions provided rulings based on its own differing understanding of the national law. Broberg and Fenger identify two such cases: Case C-88/99 *Roquette Frères* [2000] ECR I-10465 and Case C-315/02 *Lenz* [2004] ECR I-7063. However, Broberg and Fenger see these cases as the Court of Justice exercising pragmatism in attempting to provide a useful ruling, rather than an attempt to systematically expand its jurisdiction over the interpretation of national law (Broberg, M. and Fenger, N., *supra* n. 22, pp. 373-374).

¹⁰⁷ The Order for Reference serves, therefore, as a ‘frozen record’ of the relevant national law provisions as it were.

¹⁰⁸ Though, again, it must be acknowledged that the lawyers acting for the parties in the main proceedings may play a significant role in the framing of the Order for Reference (*supra* n. 26). In fact, Anderson and Demetriou go as far as to assert that in common law jurisdictions, “the involvement of the court in drafting questions for the European Court is usually limited.” However, the authors, citing an experienced French advocate, acknowledge that the national judge is not expected to draft the reference alone in every civil law jurisdiction (Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 86, citing Desmazières de Séchelles, A., “Experiences and Problems in Applying the Preliminary Proceedings of Article 177 of the Treaty of Rome, as seen by a French Advocate” in Schermers, H. (ed.), *Article 177: Experiences and Problems* (Amsterdam: TMC Asser Institut, 1987), p. 155). This differs somewhat from the understanding of Broberg and Fenger, who state that “the Austrian Administrative Court, the Belgian Council of State, the German Federal Administrative Courts, the French Council of State, and the Supreme Court of Spain all draft a preliminary reference without much involvement of the parties...” (Broberg, M. and Fenger, N., *supra* n. 22, p. 297). Broberg and Fenger cite Kamminen, H., Association of the Councils of State and Supreme Administrative Jurisdiction of the European Union, 18th Colloquium 2002, General Report on the Colloquium Subject “The preliminary Reference to the Court of Justice of the European Communities”, p. 29.

¹⁰⁹ Lasok, K.P.E., *supra* n. 87, p. 98, fn. 43. The interested persons cannot through their observations “amend or expand, or for that matter narrow, the content of the question.” (Broberg, M. and Fenger, N., *supra* n. 22, p. 359, fn. 43, citing a number of cases including Case C-174 *Bulk Oil* [1986] ECR 559).

and limited, and this focussing and limitation will promote ‘reckonability’ by narrowing the number of conceivable outcomes and reducing the possibilities for advancement of extra-legal ideological preferences. In the case of a question concerning the validity of an EU law, the choice is reduced to a binary one (as in the American appellate courts). The Order for Reference containing a question concerning the interpretation of a primary or secondary EU law does not constrain the Court so: the Court will retain a more open-ended menu of interpretative choices. Nevertheless, the context for consideration and interpretation of the issue will have been set by the questions in the Order for Reference, and the Court’s decisional scope narrowed.

However, it must be acknowledged that the apparent restraints of the Order for Reference may not fetter the Court absolutely. Most obviously, there is no real equivalent concept of *obiter dictum* at the Court of Justice, and the Court has in the past made pronouncements in rulings that were not relevant to the main proceedings, but which established important principles in EU law.¹¹⁰ However, there are also less obvious ways in which the Court may exceed the questions in the Order for Reference. It will be recalled that in the context of the American appellate courts, Llewellyn observed that such courts could, and often did, reformulate ill-drawn issues.¹¹¹ While *de jure* the Court of Justice is confined to deciding within the lines set by the question or questions contained in the Order for Reference and may not alter the contents of the Order¹¹², there are at least two ways in which it can take the scope of consideration and decision outside of these lines. Firstly, there is the simple matter of interpretation: while the question or questions in the Order for Reference are expressed in “frozen, printed words”, and should in accordance with the Court’s own case-law be “precise and unambiguous”¹¹³, there may still be

¹¹⁰ One such case is Case 152/84 *Marshall v Southampton and South-West Area Health Authority (No 1)* [1986] ECR 723, where the Court of Justice stated that directives could not enjoy horizontal direct effect despite the fact that the national court had already ruled that the health authority was a public authority (see generally, Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 312-315).

¹¹¹ Llewellyn, K.N., *supra* n. 10.

¹¹² Wägenbaur, B., *supra* n. 26, pp. 330-331 (citing the judgment of the Court of Justice in Case C-352/95 *Phyteron International* [1997] ECR I-1729).

¹¹³ Wägenbaur, B., *supra* n. 26, p. 330 (citing the judgment of the Court of Justice in Case C-185/12 *Ciampaglia* [2012] (not published in the ECR)).

scope for the Court to place a more desired interpretation on the question.¹¹⁴ Although the Court in its *Recommendations* emphasises the importance of drafting the Order for Reference “simply, clearly and precisely, avoiding superfluous detail”, a suggestion motivated expressly by the need to translate the Order into all of the official languages of the EU¹¹⁵, it has to be acknowledged that translation and the involvement of Judges from different linguistic backgrounds will afford greater scope for ambiguity and interpretative creativity than might exist in a mono-linguistic legal environment. Moreover, the fact that the Court is restricted to deciding within the lines of the questions concerned does not prevent it from considering and interpreting provisions of EU law, notwithstanding the fact that the Order for Reference may not refer to such provisions.¹¹⁶ Secondly, the Court does in limited circumstances engage in *de facto* reformulation of questions.¹¹⁷ This could *in extremis* effectively allow the Court to answer a question that was not posed and/or avoid ruling on a question that was posed.¹¹⁸ One circumstance in which reformulation has occurred is where the question referred is improperly formulated or would require the Court to exceed its Article 267 TFEU jurisdiction: the Court may choose to glean a sensible question from the written material before it, the answer to which it judges would assist the referring court in determining the main proceedings.¹¹⁹ The Court has also converted

¹¹⁴ Broberg and Fenger acknowledge that the referring court’s question may place differential constraints on the decisional scope of the Court of Justice: “There are substantial differences as to how closely national courts link the formulation of a question to the actual facts of the case. There is nothing to stop a national court from choosing to formulate the question for a preliminary ruling relatively openly and abstractly, while giving the necessary information to enable the Court of Justice to understand the facts of the case and national law background in the reasons given for the question.” (Broberg, M. and Fenger, N., *supra* n. 22, p. 305). The same authors further point out that “the more technical and less abstract the question, the more precise and concrete the answer will be...” (Broberg, M. and Fenger, N., *supra* n. 22, p. 431). See also, Lenaerts, K., *supra* n. 70, at 1344-1345.

¹¹⁵ Point 21 of the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01).

¹¹⁶ Case C-462/01 *Hammarsten* [2003] ECR I-781 (see Wägenbaur, B., *supra* n. 26, p. 331); see generally, Broberg, M. and Fenger, N., *supra* n. 22, pp. 417-420, with references at p. 417, fn. 30.

¹¹⁷ See generally, Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 235-237; Voss, K., “But That’s Not What I Asked! The Reformulation of Questions Asked in Preliminary Rulings”, (2016) 18(4) *Europarättslig tidskrift* 939.

¹¹⁸ Barnard and Sharpston provide Joined Cases C-171/94 and C-172/94 *Mercks and Neuhuys v Ford Motors* [1996] ECR I-1253 as an example of the Court ruling on a question not posed by the referring court (Barnard, C. and Sharpston, C., *supra* n. 40, at 1119, fn. 29).

¹¹⁹ Case 249/84 *Ministère Public and Ministry of Finance v Profant* [1985] ECR 3237; Case 35/85 *Procureur de la République v Tissier* [1986] ECR 1207; Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091 (see Lasok, K.P.E., *supra* n. 87, p. 98; Wägenbaur, B., *supra* n. 26, p. 331).

questions concerning the interpretation of an EU secondary law into questions concerning validity where it detects that the true purpose of the question concerned validity rather than interpretation.¹²⁰ Moreover, the Court has considerable latitude where an Order for Reference contains a number of questions: the Court may conclude in light of “logic or economy of proceedings”¹²¹ that it does not need to answer each question referred.¹²² However, there are also cases where the Court has reformulated questions that do not fit comfortably into the foregoing categories: in *Roquette Frères*¹²³, for instance, it reformulated a question referred by a French district court so that the answer accorded with the Court’s understanding of the relevant national law, rather than that as set out in the Order for Reference.¹²⁴ Indeed, at least one political scientist has argued that the Court’s jurisdiction to reformulate questions has been used by the Court to pursue its “own policy agenda” of integration.¹²⁵

Nevertheless, the Court’s ability to reformulate questions or interpret them broadly is tied inextricably to the limitations placed on the Court’s jurisdiction inherent in the division of competences between it and the national courts in

¹²⁰ Case 16/65 *Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 1081 (see Wägenbaur, B., *supra* n. 26, p. 331); Case 20/85 *Roviello v Landesversicherungsanstalt Schwaben* [1988] ECR 2085 (see Lasok, K.P.E., *supra* n. 87, p. 99, fn. 44). See also, Broberg, M. and Fenger, N., *supra* n. 22, pp. 426-428.

¹²¹ Wägenbaur, B., *supra* n. 26, p. 331.

¹²² Case C-244/02 *Kaupatalo Hansel* [2003] ECR I-12139 (see Wägenbaur, B., *supra* n. 26, p. 331). The Court will sometimes telescope a number of questions into fewer questions or one question: Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911 (see Barnard, C. and Sharpston, E., *supra* n. 40, p. 1120). Former Judge Koopmans has blamed a tendency on overly-complicated references with excessive questions on the over-involvement of lawyers in the drafting of references: Koopmans, T., “The Technique of the Preliminary Question – A View from the Court of Justice” in Schermers, H., *supra* n. 108, p. 328 (see Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 199). See also, Broberg, M. and Fenger, N., *supra* n. 22, p. 297; Due, O., “Danish Preliminary References” in O’Keefe D. and Bavasso, A. (eds.), *Judicial Review in European Union Law* (Dordrecht: Kluwer, 2000), p. 363; Edward, D. and Bellamy, C., “Views from the European Courts” in Barling, G. and Brealey, M., (eds.), *Practitioners’ Handbook of EC Law* (London: Trenton Publishing, 1998), p. 36.

¹²³ Case C-88/99 *Roquette Frères* [2000] ECR I-10465.

¹²⁴ For a discussion of this case, see Broberg, M. and Fenger, N., *supra* n. 22, pp. 373-374. However, this case may also be interpreted as an attempt by the Court of Justice not to exceed its jurisdiction by providing an answer to a question which would not be necessary to determine the main proceedings. Nevertheless, the patriarchal overtones and *de facto* interpretation of national law do not sit well with the spirit of the preliminary reference procedure: see also, O’Keefe, D., “Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility”, (1998) 23 *European Law Review* 509; Johnston, A., “Judicial Reform and the Treaty of Nice”, (2001) 38 *Common Market Law Review* 499.

¹²⁵ Nyikos, S., *supra* n. 98, p. 8, p. 35 and pp. 124-126 (see Broberg, M. and Fenger, N., *supra* n. 22, p. 413). This author disagrees with the representation of European integration as a ‘policy agenda’: there is very much a legal basis in the Treaties for the advancement of European legal integration.

the preliminary reference procedure. The potential for abuse by the Court of its jurisdiction to interpret the questions referred or reformulate them to answer an ideologically expedient question should not be overstated, therefore, for a number of reasons. Firstly, the Court's interpretation of the question referred or reformulation of that question will have to remain, to borrow Llewellyn's phraseology, 'moderately consonant' with the language of the Order for Reference: providing answers to questions that could not be deduced reasonably from an Order for Reference, especially if a systematic practice, will be corrosive to the Court's reputation and the relationship it enjoys with national courts. Secondly, the Court's own treatment of the Orders for Reference it has received, as well as its own *Recommendations*, are evidence of its concern that its rulings be helpful to the referring court in the main proceedings. Therefore, even in cases where there may be some ambiguity¹²⁶ in the terms of the question referred that may allow the Court some scope to embark on an ideologically preferable enquiry, the ruling provided should still be of some utility to the referring court in the main proceedings. Therefore, it is not only the wording of the questions themselves that constrain the substantive enquiry, but also the factual nexus in which the question has arisen. Granted, there is scope for a national court to refer more or less abstract questions and for the Court to provide more or less abstract rulings¹²⁷; however, even rulings on the more abstract end of the spectrum should still be capable of application by the referring court in the main proceedings. This constraint will apply even where the Court seeks to reformulate the question. Of course, one could argue in retort that there is *de facto* nothing to prevent the Court from flouting this need to provide a helpful ruling and indulging an enquiry with no particular connection with the main proceedings. However, again, such an approach would not only be anathema to the Judges' assumed 'law-conditioned' natures, it would be damaging to the cooperative relationship it enjoys with the national courts, and thereby detrimental to the effectiveness of the preliminary reference procedure in achieving the uniformity of EU law, and ultimately to the Court's effectiveness and prestige. There are indeed examples where the Court's

¹²⁶ Again, it should be recalled that if the questions are too ambiguous, the Court of Justice will declare the request for a ruling inadmissible (*supra* n. 91 and n. 92).

¹²⁷ The latter phenomenon has been noted by Tridimas: Tridimas, T., *supra* n. 77.

reformulation of questions has led to problems with national courts.¹²⁸ However, in the Court's case-law, taken in its totality, there is little evidence of a systematic attempt by the Court to expand its jurisdiction to advance any extra-legal ideological or policy agendas¹²⁹; rather, the Court's broad interpretation and reformulation of questions has been motivated by a desire to provide helpful answers to referring national courts in an attempt to foster and maintain the cooperative relationship between the supranational court and national courts upon which the effectiveness of the preliminary reference procedure relies.¹³⁰ Thirdly, there is an argument that echoes Llewellyn's observation in the context of the American appellate courts that "the bench is likely to share the feeling of the bar that there is something unfair in putting a decision on a ground which losing counsel has had no opportunity to meet."¹³¹

3. Conclusion

From the foregoing consideration of Llewellyn's eighth 'steadying factor' in the context of preliminary references, a general conclusion may be drawn that the issues to be decided by the Court do arrive before it drawn and limited in

¹²⁸ Barnard and Sharpston provide the example of Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911, where the Court's reformulation of the questions referred led to answers so unclear that the Employment Appeals Tribunal chose to apply national law to determine the dispute (Barnard, C. and Sharpston, E., *supra* n. 40, p. 1120).

¹²⁹ Broberg and Fenger rightly dismiss political science theories such as those of Nyikos (*supra* n. 125) as "conspiracy theories" without any serious documentation underpinning them (Broberg, M. and Fenger, N., *supra* n. 22, p. 413). However, there are cases where the Court of Justice appears to have been itchy to rule on a point of law of interest and in order to do so has expanded the question to the point that it has provided "a wider clarification of the law than [was] necessary for the purpose of deciding the main proceedings." (Broberg, M. and Fenger, N., *supra* n. 22, p. 425). Perhaps the most storied example is the seminal case of *Keck and Mithouard* (Joined Cases C-267/91 and C-268/92 *Keck and Mithouard* [1993] ECR I-6097), in which the Court of Justice *de facto* converted a question on free movement of goods, services and capital, free competition and non-discrimination on the grounds of nationality into one concerning solely the free movement of goods. The Court of Justice provided the express justification that this was to provide a helpful ruling to the referring court (para 10). See Broberg, M. and Fenger, N., *supra* n. 22, pp. 425-426.

¹³⁰ Broberg, M. and Fenger, N., *supra* n. 22, pp. 413-414; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 200, fn. 91 and pp. 328-330.

¹³¹ Llewellyn, K.N., *supra* n. 2, p. 29. Broberg and Fenger put this argument best in the context of the preliminary reference procedure: "... [I]f the Court were to change the content of a preliminary question, it would effectively undermine the right of the Member States, as well as those of EU institutions and others that are entitled to submit observations before the Court under Article 23 of the Statute..." (Broberg, M. and Fenger, N., *supra* n. 22, p. 423). See also, Bebr, G., "The Preliminary Proceedings of Article 177 EEC: Problems and Suggestions for Improvement" in Schermers, H. (ed), *supra* n. 108, p. 345. Broberg and Fenger also acknowledge that such an approach by the Court of Justice risks providing problematic rulings, as the Court will often not be apprised with enough information on the facts or national law to foresee all the consequences of ruling on an expanded question (Broberg, M. and Fenger, N., *supra* n. 22, p. 423).

advance in the form of an Order for Reference by the referring court or tribunal, which serves to narrow the scope of the Court's decisional competence and substantive legal enquiry. As a result, the number of conceivable interpretative outcomes, as well as the scope for the Court or its Judges advancing extra-legal policy preferences, is reduced. The Order for Reference will, of course, perform a differential 'steading effect', which will depend on how abstractly its questions are drafted and how much information the referring court or tribunal provides on, *inter alia*, the facts in the main proceedings, the provisions of national law relevant to the case, and the reasons for seeking the preliminary ruling. This general conclusion is drawn based on the following sub-conclusions:

- Article 267 TFEU, and the division of competences between the Court of Justice and the national courts and tribunals which underpins the provision, places a number of limitations upon the Court that serve to ensure that preliminary references arrive before it with a pre-determined and limited scope within which the Court must confine its deliberations and decision;
- In particular, the division of competences places the decision to refer within the exclusive jurisdiction of the national courts and tribunals. As such, the Court has no jurisdiction to initiate references and is reliant on national judges, and therefore cannot set an extra-legal ideological agenda with full independence;
- Moreover, the division of competences, and the legal rules such as the Statute and Rules of Procedure that reinforce it, means that the Court is *de jure* prevented from admitting cases, which would be otherwise admissible, for the purposes of making a ruling that would advance an extra-legal ideological or policy preference of the Court or its Judges;
- Simultaneously, the same division of competences acts to prevent the Court refusing to provide rulings in cases which might not assist it in advancing a pre-conceived extra-legal ideological agenda;

- In addition, Article 267 TFEU limits the Court’s decisional jurisdiction to making determinations on validity or interpretation. By the same token, the Court’s substantive jurisdiction is limited to adjudication on a limited body of ‘legal doctrine’, namely: the Treaties (interpretation only) and/or acts of the institutions, bodies, offices, or agencies of the EU (interpretation and validity);
- The foregoing limitations placed on the Court’s jurisdiction are manifested in the Order for Reference. This document provides the questions that the referring court or tribunal wishes the Court to provide a ruling on, as well as, *inter alia*, an account of the facts in the main proceedings, and an account of the relevant provisions of national law. It is the referring court or tribunal that has sole jurisdiction to decide the Order’s content, and the Court, *de jure*, must confine its ruling to the boundaries set by the Order;
- However, the limitations placed on the Court’s jurisdiction and the wording of the Order for Reference do not place a uniform constraint upon the Court’s decisional and legal substantive jurisdictions under Article 267 TFEU, and there may be latitude for the Court to expand or contract its competences. For instance, a question on the validity of an EU act, with its binary choice of valid or invalid, places a greater restraint on the scope of the Court’s decisional competence than a question on the interpretation of the Treaties or an EU act, which entails a more open-ended enquiry. Moreover, the Court is the ultimate arbiter of the rules concerning its own jurisdiction and has not always interpreted Article 267 TFEU admissibility requirements consistently, leading to accusations that it may apply these rules to admit salient cases for ruling. There are also undoubtedly cases in which the Court has trespassed onto exclusive competences of the national courts by, *inter alia*, reformulating questions. Finally, it must be acknowledged that the wording of individual questions in Orders for Reference will provide a differential constraint on the Court’s scope of enquiry, with more abstract or ambiguous questions providing greater flexibility;

- Nevertheless, the Order for Reference, in particular the questions for ruling, will to some extent in each case limit and narrow the scope of the Court's deliberations and decision, even in more open-ended cases of interpretation. The Court is constrained from abusing the latitude that it enjoys to expand and contract its Article 267 TFEU jurisdiction by virtue of the fact that the effectiveness of the procedure, upon which the effectiveness and uniformity of EU law, as well as the effectiveness and prestige of the Court depend, relies in turn on the maintenance of a cooperative relationship with national referring judges. Rulings that are overly abstract or do not respect the confines of the questions in the Order are unlikely to be helpful to the referring court in determining the main proceedings, leading to a diminution in the Court's prestige and a greater unwillingness amongst national judges to make references;
- Moreover, there is very little evidence to substantiate an argument that the Court has exceeded its Article 267 TFEU jurisdiction in a systematic way to allow it to advance extra-legal ideological or policy preferences. The vast majority of cases where the Court has apparently stepped into the jurisdictional shoes of the referring court can be classified as being motivated by a desire to foster and promote a cooperative relationship with referring courts by providing a ruling of utility that may assist in the determination of the main proceedings.

In the paragraphs that follow, the lack of fact-finding competence possessed by the Court of Justice in preliminary references, and in particular the role of the Order for Reference in providing a 'frozen record' of the facts in the main proceedings, is considered as a 'steady factor'.

III. 'A Frozen Record from Below'

1. Llewellyn's Seventh 'Steadying Factor': 'A Frozen Record from Below'

a) Llewellyn as 'Rule Sceptic': Jerome Frank on the Indeterminacy of Fact-Finding in Trial Courts

One of the most notable aspects of *The Common Law Tradition* was Llewellyn's decision to limit the scope of his study to appellate courts. That Frank's writings on the indeterminacy caused by the process of fact-finding at trial level caused this circumspection would appear obvious.

In *Law and the Modern Mind*¹³², Frank, himself a realist, differentiated between two groups of realist.¹³³ The first group, of which he recognised Llewellyn "as perhaps the outstanding representative"¹³⁴, Frank dubbed the 'rule sceptics'.¹³⁵ The 'rule sceptics', according to Frank, thought it "socially desirable that lawyers should be able predict to their clients the decisions in most lawsuits not yet commenced."¹³⁶ The 'rule sceptics' accepted that the formal legal rules (or 'paper rules') were often unreliable guides to the prediction of judicial outcomes, and sought to look beyond these rules to find patterns in judicial behaviour which might act as 'real rules' to "serve as more reliable prediction-instruments, yielding a large measure of workable predictability of the outcome of future suits."¹³⁷ From Frank's perspective, these 'rule sceptics' largely ignored the concerns expressed by other realists as to the indeterminacy caused by fact-finding and confined their enquiries to appellate courts, thereby "cold-shoulder[ing] the trial courts".¹³⁸ Frank appeared to see this approach as particularly concerning because in most instances the 'rule sceptics' did "not inform their readers that they were writing

¹³² Frank, J., *Law and the Modern Mind* (New York: Bretano's, 1930). References in this dissertation are to the sixth printing: Frank, J., *Law and the Modern Mind* (London, Stevens & Sons, 1949).

¹³³ Frank, J., *supra* n. 132, "Preface to Sixth Printing", pp. vi-xxvii.

¹³⁴ Frank, J., *supra* n. 132, p. viii.

¹³⁵ Frank, J., *supra* n. 132, p. viii. 'Rule sceptics' in Frank's American spelling.

¹³⁶ Frank, J. *supra* n. 132, p. viii.

¹³⁷ Frank, J., *supra* n. 132, p. viii.

¹³⁸ Frank, J., *supra* n. 132, pp. viii-ix.

chiefly of upper courts.”¹³⁹ Standing in opposition to the ‘rule sceptics’, according to Frank, were those realists who, while sharing the ‘rule sceptics’ distrust of pure reliance on ‘paper rules’, sought to go further and study the behaviour of trial courts.¹⁴⁰ For Frank, the ‘fact sceptics’ embraced the fact that most prospective lawsuits were incapable of accurate prediction: the discovery of the patterns the ‘rule sceptics’ toiled to find could not assist in predictability “because of the elusiveness of the facts on which decisions turn”.¹⁴¹

Llewellyn’s reaction to Frank’s characterisation of him as a ‘rule sceptic’ appears to have been to accept it. While Llewellyn argued that ‘reckonability’ of outcome will differ depending on where one places “the baseline of reckoning”¹⁴², with ‘reckonability’ increasing as the action progresses, since “documents, witnesses, prospective testimony, prospective forum, counsel, and even opposing counsel are all growing definite”¹⁴³, he also accepted that “the accidents of trial and the vagaries of the trier or triers of fact”¹⁴⁴ distort the picture. As regards this latter observation, Llewellyn paid tribute to Frank’s “insistence and persistence in severing the problems of trial for their due separate focus and emphasis”.¹⁴⁵ Llewellyn was, therefore, keen to emphasise that his ‘steadying factors’ are limited to the appellate courts only, where the vagaries of fact-finding will not play a role in the same way as at trial, in order to avoid any criticism that his readers were misled as to the scope of his study.¹⁴⁶ Llewellyn’s seventh ‘steadying factor’ may also be seen as a direct acknowledgment of Frank’s ideas on the vagaries of fact determination, while at the same time a reiteration by Llewellyn that Frank’s concerns will not have the same resonance in appellate courts.

¹³⁹ Frank, J., *supra* n. 132, p. ix.

¹⁴⁰ Frank, J., *supra* n. 132, p. ix.

¹⁴¹ Frank, J., *supra* n. 132, p. ix.

¹⁴² Llewellyn, K.N., *supra* n. 2, pp. 17-18.

¹⁴³ Llewellyn, K.N., *supra* n. 2, p. 18.

¹⁴⁴ Llewellyn, K.N., *supra* n. 2, p. 18.

¹⁴⁵ Llewellyn, K.N., *supra* n. 2, p. 18.

¹⁴⁶ Llewellyn, K.N., *supra* n. 2, p. 18: “[W]e should be able to hope for that level of reckonability by the time one reaches the stage under primary discussion in this study, where, with the trial over, with the record and the technical points for possible appeal frozen, a lawyer turns to sizing up the advisability, as a legal venture, of pressing an appeal.”

b) Llewellyn on his Seventh ‘Steadying Factor’: ‘A Frozen Record from Below’

If the elusiveness of facts is a major contributor to uncertainty in trial courts¹⁴⁷, Llewellyn pointed to the absence or limitation of this problem in appeals as a factor contributing to ‘reckonability’. Although Llewellyn adopted a wide understanding of what he meant by ‘facts’ in this context, stating that they include “common knowledge about things in general”¹⁴⁸ and “a sometimes startling selection from what the court sees in the kaleidoscope of life outside”¹⁴⁹, he emphasised that “[t]he fact material which the appellate judicial tribunal has official liberty to consider in making its decision is largely walled in”¹⁵⁰ and that “no new facts about the particular case are supposed to disturb, distract, or change the picture.”¹⁵¹ Furthermore, Llewellyn stated that where the appropriate decision-maker at trial, whether judge or jury, has made a determination on conflicting facts, the appellate court “is supposed to abdicate its own judgment on the matter if any man could in reason reach the result the trial tribunal did reach.”¹⁵² Thus, Frank’s concern about the influence of factual indeterminacy as rendering judicial decision unpredictable is largely abated. However, Llewellyn recognised that the fact material from the lower court may not be completely ‘walled in’:

“[T]hough [the frozen record of the facts] regularly controls official discussion and also enlists sustained effort on the part of appellate judges, [it] is yet colored in operation by the appellate court’s duty to justice and by its experienced ‘feel’ for what may lie, unspoken, underneath the record.”¹⁵³

Llewellyn appears here to be recognising that different appellate procedures and traditions will afford appellate judges greater leeway to look, if not outside of the fact material presented by the lower court, behind that material in the pursuit of a just outcome. He referred specifically to varying procedures of appeal in the American legal system, such as full *de novo* appeals and a tradition of free review of facts, “a leeway left for the court to react to its

¹⁴⁷ A ‘procedural extra-legal obstacle’ to ‘legal certainty’.

¹⁴⁸ Llewellyn, K.N., *supra* n. 2, p. 28.

¹⁴⁹ Llewellyn, K.N., *supra* n. 2, p. 28.

¹⁵⁰ Llewellyn, K.N., *supra* n. 2, p. 28.

¹⁵¹ Llewellyn, K.N., *supra* n. 2, p. 28.

¹⁵² Llewellyn, K.N., *supra* n. 2, p. 28.

¹⁵³ Llewellyn, K.N., *supra* n. 2, p. 28.

feeling for net sound result.”¹⁵⁴ Llewellyn, however, and very relevantly in the context of this dissertation, contrasted this American tradition with the approach taken in France, where it “[is sought] systematically to avoid an undercover influence of fact-views other than those ‘found’ below by limiting high appeals to ‘abstract’ questions of law, somewhat in the manner of a question certified.”¹⁵⁵

The paragraphs that follow consider whether Llewellyn’s seventh ‘steadying factor’ can play a similar role in promoting ‘reckonability’ in the preliminary reference procedure.

2. The Order for Reference as a ‘Frozen Record’ of the Facts and ‘Steadying Factor’

This author has heretofore placed much emphasis on the fact the Article 267 TFEU procedure is underpinned by a division of labour between the Court of Justice and referring courts or tribunals. A key component of this division is the exclusive competence enjoyed by the national court to provide the definitive account of the facts in the main proceedings, leaving the Court of Justice no fact-finding or fact-assessing competence.¹⁵⁶ The consequence for the Court is that it is served, in Llewellyn’s words, a ‘frozen record’¹⁵⁷ of the facts on the face of the Order for Reference.¹⁵⁸ Deprived of a jurisdiction to determine the facts for itself, the Court must decide the validity of an EU secondary law, or provide an interpretation of the Treaties and/or a secondary

¹⁵⁴ Llewellyn, K.N., *supra* n. 2, p. 28, fn. 20.

¹⁵⁵ Llewellyn, K.N., *supra* n. 2, p. 28, fn. 20.

¹⁵⁶ Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243 (see Wägenbaur, B., *supra* n. 26, p. 68); Case C-232/09 *Danosa* [2010] ECR I-11405; Case C-310/09 *Accor* [2011] ECR I-8115 (see Lenaerts, K. Maselis, I. and Gutman, K., *supra* n. 22, p. 233, fn. 92). The Court of Justice has also acknowledged this limitation on its own jurisdiction in preliminary references at Point 7 of its *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01). See also, Barnard, C. and Sharpston, E., *supra* n. 40, at 1145 and fn. 165. Moreover, the fact that it is for the referring court to apply the ruling to decide the main proceedings means that the referring court will not be bound by any findings of fact made by the Court of Justice.

¹⁵⁷ Llewellyn, K.N., *supra* n. 2, p. 28.

¹⁵⁸ It will be recalled that Article 94(a) RP requires the referring court or tribunal to set out in the Order for Reference “a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based...”

EU law, in the factual context that has been provided to it.¹⁵⁹ *Prima facie*, this makes the preliminary reference procedure differ from a direct action and analogous with the appeal described by Llewellyn: the fact material that may be considered by the Court is ‘walled in’¹⁶⁰, and it “is supposed to abdicate its own judgment on the matter.”¹⁶¹ This has a profound effect on ‘reckonability’ since the lawyer can concentrate on attempting to predict, and of course influence, the rules to be applied to the factual nexus, and how the Court is likely to interpret and apply them to that nexus. This differs dramatically from the trial context, where the lawyer operates from a different ‘baseline of reckoning’¹⁶²: in order to predict a trial outcome, the lawyer must predict the version of facts a court will settle on, before setting about prediction of the appropriate rules to be interpreted and applied to that factual determination.¹⁶³ As Frank argues powerfully, the prediction of factual determinations is notoriously difficult due to, *inter alia*, the vagaries of witness testimony and the prejudices, sometimes subconscious, of decision makers. The *de jure* absence of fact-finding jurisdiction for the Court in preliminary references therefore promotes ‘reckonability’ by narrowing the scope of the Court’s enquiries and deliberations and, thereby, reducing the influence of individual judicial ideological or other prejudices on the outcome.

However, there are a number of aspects of the Court’s exercise of its jurisdiction that may undermine the ‘steadying effect’ of the ‘frozen record’ of the facts in the Order for Reference, or at the very least render its ‘steadying effect’ a differential one on a case by case basis.

Firstly, it bears repeating that the Court as the ultimate interpreter of EU rules is in a position to interpret the boundaries of its own jurisdiction under the Treaties. Although the general rule is that the Court plays no role in the

¹⁵⁹ It should also be noted that the Court of Justice cannot simply ignore the factual context altogether, since it should provide a ruling that can be applied by the referring court in the main proceedings.

¹⁶⁰ Llewellyn, K.N., *supra* n. 2, p. 28.

¹⁶¹ Llewellyn, K.N., *supra* n. 2, p. 28.

¹⁶² Llewellyn, K.N., *supra* n. 2, pp. 17-18.

¹⁶³ However, prediction may be even more difficult than that: “According to the conventional description, judging in a trial court is made up of two components which, initially distinct, are logically combined to produce a decision. Those components, it is said, are (1) the determination of the facts and (2) the determination of what rules should be applied to the facts. In reality, however, those components often are not distinct but intertwine in the thought processes of the trial judge or jury.” (Frank, J., *supra* n. 132, p. xi).

determination or assessment of the facts in the main proceedings, and even maintains this position where a party to the main proceedings provides a persuasive argument that the facts as provided in the Order for Reference are not accurate¹⁶⁴, there have been circumstances in which the Court has been willing to supplement or depart from the facts as provided in the Order.¹⁶⁵ The Court has, for instance, shown itself willing to utilise the written observations and oral argument of the parties and interested persons under Article 23 of the Statute to supplement the facts provided in the Order for Reference.¹⁶⁶ In addition to relying on written and oral argument, the Court has also employed the case file submitted with the Order for Reference to supplement the version of the facts contained in the Order.¹⁶⁷ Moreover, the Court may also supplement the facts provided in the Order for Reference through measures of organisation and inquiry¹⁶⁸, or by requesting an expert opinion.¹⁶⁹ While such

¹⁶⁴ Broberg, M. and Fenger, N., *supra* n. 22, pp. 362-363, citing Case C-352/95 *Phytheron International* [1997] ECR I-1729 and Case C-235/95 *Dumon and Fromont* [1998] ECR I-4531; see also, Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 234. The Court of Justice extends this position to the situation where all of the parties to the main proceedings taking part in the proceedings before the Court of Justice agree that the account of the facts contained in the reference is incorrect, but one or more parties to the main proceedings does not take part in the proceedings before the Court of Justice (Broberg, M. and Fenger, N., *supra* n. 22, p. 368).

¹⁶⁵ See generally, Broberg, M. and Fenger, N., *supra* n. 22, pp. 364-372.

¹⁶⁶ Barnard and Sharpston provide the example of Case C-18/93 *Corsica Ferries v Porto di Genova* [1994] ECR I-1783, where “the Court said that the statement of facts was inadequate but the written and oral observations contained enough information to enable it to give a helpful answer.” (Barnard, C. and Sharpston, E., *supra* n. 40, p. 1150). Broberg and Fenger add that the Court is more likely to look to the observations of the parties to the main proceedings “where the referring court has framed its questions in general terms...” (Broberg, M. and Fenger, N., *supra* n. 22, p. 364). Broberg and Fenger point out that there is nothing in the Rules of Procedure to preclude the parties in the main proceedings from introducing new evidence in written observations. They also point to Point B.9 of the *Notes for the Guidance of Counsel in Written and Oral Proceedings before the Court of Justice of the European Communities* (February 2009). These *Notes* have now been superseded by the *Practice Directions to Parties Concerning Cases Brought before the Court* of the 31st January 2014 (hereinafter, the “*Practice Directions*”), Article 11 of which provides: “Although the statement must be complete and include, in particular, the arguments on which the Court may base its answer to the questions referred, it is not necessary, on the other hand, to repeat the factual and legal background of the dispute set out in the order for reference, unless it requires further comment.” It will be recalled that Llewellyn acknowledged in the context of the American appellate courts that although the ‘frozen record’ of the facts may regularly control discussion, there was some scope for a court to “‘feel’ for what may lie, unspoken, underneath the record.” (Llewellyn, K.N., *supra* n. 2, p. 28).

¹⁶⁷ Again, Barnard and Sharpston provide the example of Case C-316/93 *Vaneetveld v Le Foyer* [1994] ECR I-763 (Barnard, C. and Sharpston, E., *supra* n. 40, p. 1150).

¹⁶⁸ Article 24(1) of the Statute provides that the Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Article 24(2) RP allows the Court to require the Member States and EU institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings. These matters are regulated more closely by Articles 61-75 RP. Article 61 RP allows the Court to invite the parties or the interested persons under Article 23 of the Statute to answer certain questions in writing or at the oral hearing. Article 62 RP grants similar powers to the Advocate General and Judge-Rapporteur.

measures will not be appropriate in references concerning interpretation of EU law, given that fact-finding is outside of the Court's competence, in a case concerning the validity of an EU secondary law, the Court could, according to President of the Court Lenaerts and his co-authors, be compelled to order a measure of inquiry.¹⁷⁰ However, the use of these powers will only be excusable in real terms where the information sought cannot be obtained from the referring court by way of a request for clarification pursuant to Article 101 RP.¹⁷¹ The Court's supplementation of facts from sources other than the Order for Reference does undoubtedly undermine the status of the Order as the supposed exclusive source of the factual nexus of the main proceedings. However, supplementation is not contradiction, and would appear to be undertaken by the Court in order to assist the referring court in the main proceedings. Broberg and Fenger state that the Court is "more reticent accepting information that casts doubt on the referring court's understanding of the facts in the main proceedings, or even contradicts the order for reference."¹⁷² However, the authors do recognise four very limited categories of circumstances where the Court has departed from the facts as drawn by the referring court:

- Where the referring court has not taken any special measures to obtain evidence and the conflicting evidence presented to the Court of Justice seems to be indisputable;¹⁷³

¹⁶⁹ Article 25 of the Statute allows the Court to "at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion." See also, Article 73 RP.

¹⁷⁰ Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 792-793. The authors provide an example of the Court ordering a measure of inquiry in a preliminary case concerning validity: Case C-338/10 *GLS* (2011, not reported in the ECR) (Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 793, fn. 72, and p. 471).

¹⁷¹ However, Wägenbaur warns that the Article 101 request for clarification "is not intended to remedy a national judge's initial omission to provide the ECJ with the relevant minimum factual and legal context of the judicial proceedings." (Wägenbaur, B., *supra* n. 26, p. 341).

¹⁷² Broberg, M. and Fenger, N., *supra* n. 22, p. 365.

¹⁷³ Broberg, M. and Fenger, N., *supra* n. 22, pp. 365-366. However, the authors point out that this approach has not been taken often by the Court. They cite Case C-179/98 *Mesbah* [1999] ECR I-7955 as an example of this approach. In that case, both the Belgian government and the respondent disagreed with the assertion in the Order for Reference that the respondent had acquired Belgian citizenship. The Court framed its answer taking the extra evidence provided by both parties in their written observations into account (Broberg, M. and Fenger, N., *supra* n. 22, p. 366).

- Where the parties to the main proceedings are in agreement about factual circumstances that have arisen after the request for a ruling has been made;¹⁷⁴
- Where one of the parties to the main proceedings corrects information on the facts against its own interests;¹⁷⁵
- Where the reference concerns the validity of EU rules rather than interpretation.¹⁷⁶

Very few cases fall outside of these four categories where the Court of Justice has departed from the facts provided by the national court. However, Broberg and Fenger have identified the case of *Casa Uno*¹⁷⁷ as an example of the Court disregarding a finding of fact contained in an Order for Reference despite a lack of consent from all parties in the main proceedings.¹⁷⁸ In that case, an Italian court requested a ruling on the question of whether national rules on business opening hours were contrary to Article 34 TFEU. The referring court maintained in the Order for Reference that a ruling was necessary as, due to

¹⁷⁴ Case C-360/97 *Nijhuis* [1999] ECR I-1919 (see Broberg, M. and Fenger, N., *supra* n. 22, pp. 366-367). Broberg and Fenger state that this approach will normally be taken without consultation with the referring court.

¹⁷⁵ Case C-284/96 *Tabouillot* [1997] ECR I-7471 (see Broberg, M. and Fenger, N., *supra* n. 22, pp. 367-368). Again, the authors point out that this approach is used sparingly: “[I]f on the basis of the information presented to the Court of Justice, it is both undisputed and apparent that the referring court, without having looked into the matter in any detail, has overlooked some important factual information, the Court of Justice has at times been willing to reformulate the preliminary question so that it is cohesive with its own understanding of the facts, and thereby to provide the referring court with an answer that is useful for the resolution of the dispute in the main proceedings.” (Broberg, M. and Fenger, N., *supra* n. 22, p. 367).

¹⁷⁶ This is perhaps the most significant circumstance in which the Court of Justice is prepared to supplement and/or disregard the version of the facts as provided in the reference. The Court of Justice has ruled expressly that in cases concerning invalidity, it does not consider itself bound by the facts as set out in the Order for Reference. As such, the Court has gathered additional evidence in a number of references on invalidity: Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753; Case C-131/77 *Milac* [1978] ECR 1050; Case C-212/91 *Angelopharm* [1994] ECR I-171 (see Broberg, M. and Fenger, N., *supra* n. 22, p. 370, fn. 76). The rationale for this approach is sensible: in cases concerning validity, the Court has to consider the effects of the rule under scrutiny and the referring court cannot provide all such information. In such cases, the written observations of the parties and the interested persons under Article 23 of the Statute, in particular those of the Commission, will be of great assistance to the Court of Justice. However, the Court’s attention will be on the likely effects of the rule in an abstract sense, rather than on the facts in the main proceedings (see Broberg, M. and Fenger, N., *supra* n. 22, pp. 370-371).

¹⁷⁷ Joined Cases C-418/93, C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93; C-9/94, C-10/94, C11/94, C-14/94, C-15/94, C-23/94, C-24/94, and C-332/94 *Casa Uno* [1996] ECR I-2975.

¹⁷⁸ Broberg, M. and Fenger, N., *supra* n. 22, pp. 368-370.

peculiarities in the Italian market, the impugned rules impacted more negatively on foreign goods. The Court ruled, however, that there was no evidence that the Italian rules could lead to unequal treatment. Although acknowledging criticism of the judgment as a trespass on the competences of the national court¹⁷⁹, and describing the Court's approach as remarkable given that it adopted it without having taken any evidence, Broberg and Fenger do distinguish the case on the grounds that "the disputed information did not relate to the facts *stricto sensu*, but rather to an *assessment* of the likely factual general effects of a given piece of legislation."¹⁸⁰ A more convincing, if slightly more troubling argument, might be to locate this case within an anomalous group of cases including and related to the Court's judgment in *Keck and Mithouard*.¹⁸¹ While the Court has generally been protective of the exclusive competence of the referring court to set the questions for ruling and the description of the facts in the main proceedings, with incursions being exceptional and capable of relatively easy categorisation, the Court appears to have abandoned its customary reticence in this regard in *Keck and Mithouard*¹⁸² and subsequent connected cases. In *Keck and Mithouard*¹⁸³, the Court was willing *de facto* to reformulate the questions in the Order for Reference in such a manner that it is difficult to draw any conclusion but that the Court wanted to provide a ruling that would settle once and for all a vexed question of law concerning the application of Article 34 TFEU on the free movement of goods to selling arrangements.¹⁸⁴ Seen in this context, the decision in *Casa Uno*¹⁸⁵ would appear to be motivated simply by a desire to avoid having to re-open *Keck and Mithouard*.¹⁸⁶

¹⁷⁹ Lane, R., *supra* n. 90.

¹⁸⁰ Broberg, M. and Fenger, N., *supra* n. 22, p. 369.

¹⁸¹ Joined Cases C-267/91 and C-268/92 *Keck and Mithouard* [1993] ECR I-6097 (*supra* n. 129).

¹⁸² Joined Cases C-267/91 and C-268/92 *Keck and Mithouard* [1993] ECR I-6097.

¹⁸³ Joined Cases C-267/91 and C-268/92 *Keck and Mithouard* [1993] ECR I-6097.

¹⁸⁴ Barnard and Sharpston appear to categorise Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179 as an example of the Court's post-*Keck and Mithouard* eagerness to take an opportunity to clarify its ruling in that case. Despite the fact that the parties in *Leclerc-Siplec* were agreed as to the result, the Court ruled that a genuine dispute existed (Barnard, C. and Sharpston, E., *supra* n. 40, pp. 1142-1144). The authors, however, do not confine this trend to cases related to *Keck and Mithouard* and conclude, based on cases such as Case C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921, that the Court finds ways to admit cases upon which it wishes to rule.

¹⁸⁵ Joined Cases C-418/93, C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93; C-9/94, C-10/94, C11/94, C-14/94, C-15/94, C-23/94, C-24/94, and C-332/94 *Casa Uno* [1996] ECR I-2975.

¹⁸⁶ Joined Cases C-267/91 and C-268/92 *Keck and Mithouard* [1993] ECR I-6097.

Secondly, even without obvious supplementation of or departure from the facts in the Order for Reference, there may still be scope for the Court through interpretation of those facts to choose between a number of alternative versions of those facts, upon which the Court can then base its ruling. Although, as a general rule, the Court requires referring courts and tribunals to provide sufficient facts on the main proceedings to allow it to provide a useful ruling, as is the case with the questions for ruling¹⁸⁷, the facts as recorded in the reference may be of differential detail and precision, which in turn will allow the Court greater or lesser leeway to assert its own version within the scope of allowable possibilities. Where the national court describes the factual nexus more closely, the Court of Justice may be more likely to provide a ruling that applies more specifically to those facts and *vice versa*.¹⁸⁸ And, again as with the questions for ruling, this scope for interpretation may be wider given the multilingual nature of the proceedings.¹⁸⁹ Moreover, even while remaining within the terms of the Order for Reference, the Court may emphasise or de-emphasise certain elements of the facts presented in order to tailor a ruling to the more desirable version of the facts.

¹⁸⁷ See, for instance, Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393 (*supra* n. 96). In cases concerning highly technical areas of law such as competition law, the Court of Justice tends to place a higher standard on the referring court in terms of the factual detail required in the Order for Reference (see Barnard, C. and Sharpston E., *supra* n. 40, p. 1146, fn. 166; Tridimas, T., *supra* n. 43, p. 25, fn. 69; Broberg, M. and Fenger, N., *supra* n. 22, p. 313).

¹⁸⁸ Tridimas, T., *supra* n. 77, p. 739 and p. 749; Broberg, M. and Fenger, N., *supra* n. 22, pp. 431-434.

¹⁸⁹ Case C-149/94 *Vergy* [1996] ECR I299 provides a good example of the chaos and scope for interpretation that may be caused by an imprecise Order for Reference and translation. The main proceedings in that case related to a prosecution of Mr Vergy in the French courts for offering for sale and selling a black Canada goose (“bernache noire du Canada”). The Order for Reference, however, described the species as “bernache noir du Canada”. All sides of the dispute before the Court of Justice agreed that the description in the Order for Reference was a typographical error, with the Commission and French Government suggesting various alternatives, and Counsel for Mr Vergy arguing that the Order for Reference intended to refer to a dwarf Canada goose (“bernache naine du Canada”). Advocate General Fennelly, in a delicious pun, stated that the issue of identification had led the parties “on something of a wild-goose chase”, but opined that the question was one for the national court and a ruling could be provided without the Court taking a view on the identity of the species (paragraphs 2-7). To rather underscore this author’s point, the German version of Advocate General Fennelly’s Opinion translates “wild-goose chase” into “wildgansjagd”, which conveys the literal, but not idiomatic meaning. In some cases in order to escape such problems, the Court of Justice has delivered alternative rulings: for instance, Case C-439/01 *Cipra and Knasnicka* [2003] ECR I-745 (see generally, Broberg, M. and Fenger, N., *supra* n. 22, pp. 422-423). This author wishes to thank Judge Bradley of the Civil Service Tribunal for bringing the *Vergy* case to his attention.

Though the foregoing demonstrates that the facts as expressed in the Order for Reference perform a differential limitation on the scope of the Court's enquiries, and that there are means through which the Court can supplement or depart from those facts, there are also aspects that prevent it abusing this latitude. These aspects are broadly similar to those described in the context of the questions referred for ruling. Firstly, the Court's interpretation of the facts should remain at least 'moderately consonant' with those contained in the reference if the Court is to maintain its cooperative relationship with the national judiciaries.¹⁹⁰ Secondly, if the Court's assessment of the facts strays too far from those contained in the reference, the resultant ruling may not be of utility to the referring court in determining the main proceedings, which will be damaging to the preliminary reference procedure and the Court's prestige, since it may result in the referring court choosing not to apply the Court's ruling¹⁹¹, and may result in greater reticence in referring questions. Thirdly, reliance on factual material drawn from outside the Order for Reference may be viewed as unfair since the case file is not made available to the interested persons under Article 23 of the Statute.¹⁹² This is particularly so given the fact that the Report for Hearing is no longer part of the preliminary reference procedure.¹⁹³ That the Court has been unable, or at least unwilling, to abuse the latitude afforded to it to supplement or contradict the facts as expressed in the Order for Reference has been evident in the case-law. It has been only in the exceptional and very limited circumstances described by Broberg and Fenger that the Court has been prepared to look beyond the facts as stated in the Order for Reference, whether through supplementation of or departure from those

¹⁹⁰ Indeed the Court has been criticised for this reason where it has trespassed on this aspect of the national courts' competences (*supra* n. 179 and n. 180). Not to forget, of course, that 'law-conditioned officials' should have internalised the ideal of deciding within 'legal doctrine'.

¹⁹¹ Arnulf utilises Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273 as a cautionary tale in this regard (*supra* n. 59); see also, Tridimas, T., *supra* n. 77, at 755.

¹⁹² Barnard, C. and Sharpston, E., *supra* n. 40, at 1150-1151; Tridimas, T., *supra* n. 40, pp. 24-25; Broberg, M. and Fenger, N., *supra* 22, p. 363, fn. 54.

¹⁹³ See Tridimas' discussion of Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, in which the Court ruled that the extra material had been made available to the parties and interested persons through, *inter alia*, the Report for the Hearing: Tridimas, T., *supra* n. 40, at 25. Prior to the adoption of the current Rules of Procedure in 2012, the Judge-Rapporteur was responsible for the Preparation of a Report for the Hearing, which was "a summary of the facts and history of the case and written observations of the parties and any of the interveners." (Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 271). This report was sent to the parties approximately three weeks before the hearing, and was published in the *European Court Reports* until 1994 (see generally, Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 271-272). The Report for the Hearing was long considered to add unduly to the work of the Court and was eliminated by the new Rules of Procedure.

facts, and in each of those circumstances the Court's concern has been to balance the need to provide the referring court with a helpful ruling with the requirement to protect the rights of defence of the parties and interested persons.¹⁹⁴

3. Conclusion

It may be concluded as a general rule that the fact that the Court of Justice must rely solely on the facts as provided by the referring court or tribunal in the Order for Reference is a 'steadying factor' in the Article 267 TFEU procedure. The 'frozen record' of the facts as detailed in the Order for Reference promotes 'reconability' by reducing, if not eliminating, the effect of the vagaries of fact-finding. The resultant limited scope of the Court's decisional role narrows the number of conceivable interpretative outcomes, allowing lawyers in prospective references to confine their predictions to how the Court will rule on the validity of an EU rule or on its interpretation, a far more predictable and transparent endeavour. This general conclusion is based upon the following set of sub-conclusions:

- The division of competences that underpins the Article 267 TFEU procedure places the finding of facts in the main proceedings within the sole jurisdiction of the referring court;
- Accordingly, the general rule is that the Court of Justice may not second guess the account of the facts in the main proceedings contained in the Order for Reference, and should create a ruling which is capable of being utilised to assist the referring court in determining the dispute in the main proceedings;
- The limitation placed by this general rule upon the Court of Justice will aid 'reconability', and may therefore be recognised as a 'steadying factor' in the preliminary reference procedure, because it removes, by and large, a factor that causes great uncertainty in prospective judicial

¹⁹⁴ Notwithstanding the *Keck and Mithouard*-related anomaly described above (*supra* n. 181-n. 186).

outcomes: the prediction of judicial factual determinations. The narrowing of the judicial enquiry to decision on the validity or interpretation of a rule with reference to a pre-determined and transparent set of facts makes the outcome significantly more predictable by a lawyer than would be the case if the Court possessed fact-finding competence in the preliminary reference procedure;

- However, this ‘steadying factor’ does not operate as an absolute limitation upon the Court. The Court has asserted a jurisdiction to supplement the facts in the main proceedings by relying upon sources outside the Order for Reference such as the case file and the parties’ written pleadings. The Court has also in very limited and exceptional circumstances substituted its own understanding of the facts for those contained in the Order;
- Moreover, this ‘steadying factor’ does not operate in a uniform manner in each case, meaning that it will limit the Court to a differing extent in each individual reference. The precision and detail with which the Order for Reference describes the facts will often determine the extent to which the Court can provide its own interpretation of those facts. Furthermore, the Court may have scope to emphasise or de-emphasise elements of the factual circumstances provided in the Order in framing its ruling;
- However, with the possible exception of the *Keck and Mithouard*¹⁹⁵ line of cases, the Court has been unable, or at least unwilling, to abuse the latitude it has afforded itself to supplement, depart from, or interpret the facts as provided by the Order for Reference. The necessity of fostering and maintaining a cooperative relationship with national courts has meant that the Court of Justice should interpret the facts contained in the Order in a manner that is at least ‘moderately consonant’ with the wording in the Order. Moreover, for the same reason, the Court should not stray too far from the set of facts provided in the Order since it should provide a ruling that is capable of assisting

¹⁹⁵ Joined Cases C-267/91 and C-268/92 *Keck and Mithouard* [1993] ECR I-6097.

the referring court in determining the main proceedings. Lastly, the Court should take into account the rights of defence of the interested persons under Article 23 of the Statute who will not have access to documents such as the case file: a determination by the Court of the factual circumstances based on sources outside of the Order itself may be perceived as contrary to these rights.

In the paragraphs that follow the role of legal argument as a ‘steady factor’ in the preliminary reference procedure is considered.

IV. ‘Adversary Argument by Counsel’

1. Llewellyn’s Ninth ‘Steady Factor’: ‘Adversary Argument by Counsel’

Under the heading of his ninth ‘steady factor’, Llewellyn argued that the adversary argument of counsel promoted ‘reckonability’ largely by (1) further focussing and limiting the court’s decisional scope that had already been narrowed by the pre-drawing of the issues for decision, and the ‘frozen record’ of the facts from the trial court¹⁹⁶; and, (2) reminding the court of its duty to remain within the outer bounds of ‘legal doctrine’. Llewellyn commenced this argument by pointing out that the judicial tribunal will only proceed to deliberation after argument by trained counsel, argument that will always be written and usually oral as well.¹⁹⁷ Llewellyn maintained that this aspect of the procedure contributed to ‘reckonability’ because, like prior limitation of the issues for decision and the freezing of the factual nexus by the court below, the process of argument served to focus the scope of the court’s decisional enquiry further.¹⁹⁸

¹⁹⁶ Llewellyn, K.N., *supra* n. 2, pp. 29-31. Llewellyn was cognisant of the fact “that there can be and has been purely written argument (as, often, in Continental history) or purely oral argument (as, still, in the English courts of appeal) or 3-hour or 3-day orals with *briefs* as maps (as in our earlier days), or half-hour orals with ‘briefs’ doing the heavy work”. Llewellyn viewed “*some* oral argument to be functionally of superior value.” (Llewellyn, K.N., *supra* n. 2, p. 31, fn. 22). In fact, later in *The Common Law Tradition* he explains the full worth of oral hearing and states: “In any but freak situations, oral argument is a must.” (Llewellyn, K.N., *supra* n. 2, p. 240).

¹⁹⁷ Llewellyn, K.N., *supra* n. 2, p. 29.

¹⁹⁸ Llewellyn, K.N., *supra* n. 2, pp. 29-30.

“[T]he regime of argument renders the deciding also a process oriented partly from without by analysis, by arrangement of data, and by persuasion: oriented, however, not by judicially-minded helpful consultants but by adversaries to each of whom the tribunal serves either as an obstacle or a tool, or, more commonly, as both at once. If counsel are skilful and reasonably in balance, I see argument as greatly furthering predictability by finding and pointing the significant issues, by gathering and focusing the crucial authorities, making the fact-picture clear and vivid, illuminating the probable consequences of the divergent decisions contended for, and by phrasing with power the most appealing of the divers possible solving rules.”¹⁹⁹

Llewellyn then emphasised the role of the adversary bar in ensuring “that the court shall be confronted with and pressed by the authorities, reinforcing that factor of continuity and reckonability which legal doctrine affords.”²⁰⁰

In his discussion of this ‘steadying factor’, Llewellyn placed emphasis on two matters: firstly, that the argument before the American appellate courts was adversary, and secondly, that the ‘steadying effect’ of the factor, if any at all, would be dependent on the skill and reasonableness of the lawyers, and the level of trust placed in them by the court. Indeed, Llewellyn proceeded to qualify his argument by stating that in the contemporaneous climate in the American appellate courts adversary argument could in fact be detrimental to ‘reckonability’ if one were relying on “the formed record, the given authorities, and the court, without yet seeing the respective briefs or even knowing who the respective counsel will be.”²⁰¹ Llewellyn proffered two reasons for this. First, Llewellyn’s reading of court records caused him dismay “at the frequency with which the relevant briefs miss or obscure telling points, choose foreseeably losing ground, or mismanage promising positions.”²⁰² Llewellyn explained how such poor quality of argument could contribute to uncertainty of outcome:

“[A]ny poor handling of arguments sets up roadblocks for the court as they read and feel their way into the record, and chanciness of outcome is of necessity increased by an increased difficulty in seeing and setting things straight – whether on the ‘law’ side or on the side of what the

¹⁹⁹ Llewellyn, K.N., *supra* n. 2, p. 30. See also Llewellyn’s comments on the role of oral argument: Llewellyn, K.N., *supra* n. 2, p. 240.

²⁰⁰ Llewellyn, K.N., *supra* n. 2, p. 30. Llewellyn here draws upon the wisdom of Maitland who “urged that our system of precedent itself drives far less from the bench than, once the courts had taken up a fixed site at Westminster, from the sergeants who would not let the bench forget what they had done before.” (Llewellyn, K.N., *supra* n. 2, p. 30).

²⁰¹ Llewellyn, K.N., *supra* n. 2, p. 30.

²⁰² Llewellyn, K.N., *supra* n. 2, p. 30.

essential fact-picture is or on the side of what is a fair and wise result to strive for in either the general situation or the particular case.”²⁰³

Second, Llewellyn opined that different levels of skill on each side of an argument “terrifyingly weights the scales of judgment” and “throws off all prediction which has as its base line merely the completed trial...”²⁰⁴

The following paragraphs discuss Llewellyn’s ninth ‘steadying factor’ in the preliminary reference procedure context.

2. Llewellyn’s Ninth ‘Steadying Factor’ in the Context of the Preliminary Reference Procedure

Before proceeding to consider Llewellyn’s ninth ‘steadying factor’ in the preliminary reference procedure context, it is necessary to describe briefly the practice and procedure for argument before the Court of Justice in Article 267 TFEU proceedings.

²⁰³ Llewellyn, K.N., *supra* n. 2, pp. 30-31.

²⁰⁴ Llewellyn, K.N., *supra* n. 2, p. 31.

As soon as is possible after receipt of the Order for Reference, the President of the Court must designate a Judge to act as Judge-Rapporteur in the case.²⁰⁶ In accordance with Article 16(1) RP, the First Advocate General will also assign the reference to an Advocate General, which can be done before or after the designation of the Judge-Rapporteur.²⁰⁷ In the event that it is clear that the Court has no jurisdiction to hear and determine the reference or the request is manifestly inadmissible, “the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.”²⁰⁸ In addition, Article 99 RP provides that the Court may at any time²⁰⁹, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide a preliminary reference by reasoned order where the Court considers that (1) the question referred is identical to a question on which the Court has already ruled, or (2) the reply may be clearly deduced from existing case-law, or (3) the answer to the question admits of no reasonable doubt.²¹⁰ Certain requests for a ruling, which (1) owing to the main

²⁰⁵ See generally, Wägenbaur, B., *supra* n. 26, pp. 45-97, pp. 217-219, p. 229, pp. 247-256, pp. 284-311, pp. 333-339, pp. 345-350, pp. 356-358; Geiger, R., Khan, D.-E. and Kotzur, M., *supra* n. 29, pp. 900-901; Brown, L.N. and Kennedy T., *Brown and Jacobs: The Court of Justice of the European Communities* (London: Sweet & Maxwell, 5th ed., 2000), pp. 19-26, pp. 33-44, pp. 64-74, pp. 269-283, pp. 292-309; Lasok, K.P.E., *supra* n. 87, pp. 46-48, pp. 101-107, pp. 120-143, pp. 300-304, pp. 342-343, pp. 364-403; Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 22-24, pp. 743-747, pp. 755-757, pp. 760-797; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 224-228, pp. 233-284; Broberg, M. and Fenger, N., *supra* n. 22, pp. 349-409; *Practice Directions* of the 31st January 2014; Lenz, C.O., “The Role and Mechanism of the Preliminary Ruling Procedure”, (1994) 18(2) *Fordham International Law Journal* 388; Edward, D., “How the Court of Justice Works”, (1995) 20 *European Law Review* 539; Burrows, N. and Greaves, R., *The Advocate General and EC Law* (Oxford: Oxford University Press, 2007); Mortelmans, K.J.M., “Observations in the Cases Governed by Article 177 of the EEC Treaty: Procedure and Practice”, (1979) 16 *Common Market Law Review* 557; Barling, G., “Presenting the Case Orally – the Advocate’s View” in Vaughan, D. (ed.), *Butterworths European Court Practice* (London: Butterworths, 1993), Introductory Notes, p. xii; Due, O., “Presenting the Case Orally – the Judge’s View” in Vaughan, D. (ed.), *Butterworths European Court Practice* (London: Butterworths, 1993), introductory notes, p. ii; Sharpston, E., “The Changing Role of the Advocate General” in Arnall, A., Eeckhout, P. and Tridimas, T. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), p. 20; Vaughan, D. and Gray, M., “Litigating in Luxembourg and the Role of the Advocate at the Court of Justice” in Arnall, A., Eeckhout, P. and Tridimas, T. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), p. 48.

²⁰⁶ Article 15(1) RP.

²⁰⁷ Wägenbaur, B., *supra* n. 26, p. 218.

²⁰⁸ Article 53(2) RP (see Wägenbaur, B., *supra* n. 26, pp. 263-268).

²⁰⁹ This means, for instance, that the Court does not need to first hear from the parties (Wägenbaur, B., *supra* n. 26, p. 339).

²¹⁰ The use of this approach will mean that the Opinion of the Advocate General and an oral hearing will be dispensed with.

proceedings need to be dealt with within a short period of time, or which (2) raise one or more questions concerning the provisions of the TFEU relating to the area of freedom, security and justice, may be dealt with by means of the expedited procedure or urgent preliminary reference procedure respectively.²¹¹

Pursuant to Article 20(1) of the Statute, the procedure before the Court consists of two parts: written and oral.²¹² In the case of the preliminary reference process, the written procedure commences with the notification by the Registrar of the Court to the parties and the interested persons under Article 23 of the Statute²¹³ of the decision by the national court or tribunal to make a reference.²¹⁴ The parties and interested persons²¹⁵ are entitled within two

²¹¹ Article 23a of the Statute provides: “(1) The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure. (2) Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General. (3) In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.” Article 53(4) RP permits a case to be dealt with under an expedited procedure in accordance with the conditions provided by the Rules of Procedure, with Article 53(5) providing similarly in respect of an urgent procedure. The procedures are regulated in detail by Articles 105 and 106 (expedited procedure) and Articles 107-114 (urgent procedure) RP. See generally, Wägenbaur, B., *supra* n. 26, pp. 84-88 and pp. 345-359.

²¹² See also, Article 53(1) RP.

²¹³ The identity of the parties in the main proceedings is settled by reference to the national rules of procedure of the referring court or tribunal (Article 97(1) RP). The identity of the interested persons is determined by reference to Article 23(1), (2) and (3) of the Statute and Article 96(1) RP. In each case the parties, the Member States and the Commission will be entitled to submit written observations. Other institutions, bodies, offices or agencies of the Union may submit observations where they adopted the act, the validity or interpretation of which is in dispute. Non-Member States that are parties to the EEA Agreement and the EFTA Surveillance Authority may also submit written observations where a reference concerns one of the fields of application of that Agreement. Non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement provides that the state in question may participate in preliminary reference proceedings, may also participate where a question concerning that agreement is referred by a court or tribunal of a Member State.

²¹⁴ Article 20(2) and Article 23(1) of the Statute. See *supra* n. 95 for further detail on the notification process.

²¹⁵ Article 19(1) of the Statute requires Member States and EU institutions to be represented before the Court by “an agent appointed for each case”, who may be “assisted by an adviser or by a lawyer”. The same rule applies to EEA states and the EFTA Surveillance Authority (Article 19(2) of the Statute). There is no requirement that an agent be a lawyer. Article 19(3) requires all other parties to be represented by a lawyer. The Statute allows only lawyers that are authorised to practice before a court of a Member State or an EEA state to represent or assist a party before the Court (Article 19(4)). However, Article 19(7) accords “[u]niversity teachers being nationals of a Member State whose law accords them a right of audience ... the same rights before the Court as are accorded ... to lawyers.” See also, Articles 43-47 RP and Articles 2-4 of the *Practice Directions*. While as a general rule, the party may not represent himself or herself before the Court, there is an exception in the case of preliminary rulings, where the national rules permit self-representation in the main proceedings (see Wägenbaur, B., *supra* n.

months of this notification to submit statements of case or written observations to the Court.²¹⁶ The written part of the procedure takes place as a rule, save for where the Court decides to dispose of the case by way of reasoned order at the earliest stage²¹⁷, or in cases of extreme urgency, where the urgent preliminary reference procedure is adopted.²¹⁸ The Rules of Procedure provide very few requirements regarding the format of statements of case or written observations²¹⁹, though Article 58 RP confers upon the Court a power to set the maximum length of written pleadings or observations lodged before it by way of decision. Greater detail on the format and substance of written observations is provided in the *Practice Directions*, which provide, *inter alia*, that written observations should not exceed twenty pages.²²⁰ While the language of preliminary reference proceedings will be the language in which the Order for Reference was drafted²²¹, Member States are permitted use their own official language when taking part in preliminary reference proceedings (for both written observations and oral submissions)²²², and non-Member States may be

26, pp. 45-55; Lasok, K.P.E., *supra* n. 87, p. 121; Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 744; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 250-251).

²¹⁶ Article 23(2) of the Statute. For the calculation of times limits, see Article 45 of the Statute and Articles 49-52 RP. For the procedure for the service and lodgement of documents, see Articles 48 and 57 RP. In the event that the expedited procedure is adopted, the President immediately fixes the date for the hearing which is communicated to the interested persons when the request for the ruling is served (Article 105(2) RP). The President also prescribes a time-limit for the lodgement of written observations, which shall not be less than fifteen days (Article 105(3)). In the event that the urgent procedure is adopted, the Court shall in the decision in which it adopts the procedure prescribe the time limit within which the parties can lodge written observations (Article 109(2) RP). It should be noted, however, that the referring court, the parties in the main proceedings, the Member State from whose courts the reference has originated, the Commission and the institution that adopted the act under question will be informed of the decision to adopt the urgent procedure before the other interested persons (Article 109(2) and (4)). See also, Article 10 of the *Practice Directions*. See generally, Wägenbaur, B., *supra* n. 26, p. 79.

²¹⁷ Article 99 RP. *Supra* n. 209.

²¹⁸ Article 111 RP.

²¹⁹ See Article 57 RP. “Statements of case” and “written observations” are interchangeable terms (see Wägenbaur, B., *supra* n. 26, p. 80; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 258). Indeed, Article 10 of the *Practice Directions* acknowledges that the lodging of the written observations “does not involve any specific formalities.” Where the expedited procedure is adopted, the President may request that the interested persons restrict the matters addressed in their written observations to the essential points of law raised by the request for a ruling (Article 105(3) RP). Similarly, where the urgent procedure is adopted, the Court “may specify the matters of law to which such statements of case or written observations must relate and may specify the maximum length of those documents.” (Article 109(2) RP).

²²⁰ Article 11 of the *Practice Directions*. Specifics on the form and structure of procedural documents are contained in Articles 34-39.

²²¹ As long as it is one of the languages listed in Article 36 RP.

²²² Article 38(3) RP. Non-EU EEA Member States and the EFTA Surveillance Authority must receive authorisation of the Court to use one of the languages set out in Article 36 RP.

authorised to plead in any one of the procedural languages of the Court.²²³ In each case, however, the Registrar of the Court must arrange for the translation of the observations into the language of the case.²²⁴ At the close of the written part of the procedure, the Court then forwards the observations to the parties and interested persons.²²⁵

The parties and interested persons then have three weeks within notification of the close of the written part of the proceedings to send a reasoned request for a hearing to the Court.²²⁶ Once the written part of the procedure is closed, the President fixes a date on which the Judge-Rapporteur presents a preliminary report to the general meeting of the Court.²²⁷ The preliminary report is an internal working document, which is not made available to the parties or interested persons.²²⁸ The general meeting is a closed session at which all the Judges and Advocates General attend and have a vote.²²⁹ Article 59(2) RP prescribes the contents of the preliminary report. First, the Judge-Rapporteur must provide proposals as to whether any measures of organisation and/or any measures of inquiry should be taken, and as to whether further clarification should be sought from the referring court or tribunal under Article 101 RP.²³⁰ Second, the Judge-Rapporteur must make a proposal as to the formation to which the case should be assigned.²³¹ Third, the preliminary report must contain the Judge-Rapporteur's proposals, if any, as to whether to dispense with a hearing.²³² Finally, the report must contain any proposals the Rapporteur

²²³ Article 38(6) RP. The twenty-four procedural languages are set out in Article 36 RP. French is, of course, the working language of the Court.

²²⁴ Article 38(4)-(8) RP.

²²⁵ This is not stated expressly in the Rules of Procedure, but see Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 265. See also, Article 39 RP.

²²⁶ Article 76(1) RP. Article 46 of the *Practice Directions* states that this request should not exceed three pages, and should "be based on a real assessment of the benefit of a hearing to the party and must indicate the documentary elements or arguments which the party considers it necessary to develop or disprove more fully at the hearing."

²²⁷ Article 59(1) RP. Article 25 RP provides: "Decisions concerning administrative issues or the action to be taken upon the proposals to be contained in the preliminary report referred to in Article 59 of these rules shall be taken by the Court at the general meeting in which all the Judges and Advocates General shall take part and have a vote. The Registrar shall be present, unless the Court decides to the contrary."

²²⁸ Wägenbaur, B., *supra* n. 26, p. 281.

²²⁹ Article 25 RP; Wägenbaur, B., *supra* n. 26, p. 229.

²³⁰ *Supra* n. 168.

²³¹ Whether the reference should be decided by the full Court, the Grand Chamber or a chamber of three or five Judges (see Article 16 of the Statute and Articles 11, 27-31 and 60 RP).

²³² Article 76(2) RP allows the Court on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to decide not to hold an oral hearing if it considers, on reading

may have to dispense with an Opinion of the Advocate General pursuant to Article 20(5) of the Statute.²³³ In accordance with Article 59(3) RP, the Court decides in general meeting, after having heard from the Advocate General, what action to take on the Judge-Rapporteur's proposals.

Assuming that the Court has decided against taking any measures of organisation or measures of inquiry, or seeking any further clarification from the referring court or tribunal, and has decided that a hearing is necessary, the case will then proceed to the oral procedure. Article 20(4) of the Statute provides that the oral procedure consists of "the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate General, as well as the hearing, if any of witnesses and experts." Once the Court decides to hold a hearing, it fixes a date and a time for that hearing, and the Registry sends the parties and interested persons a letter of notice to attend, which will also inform them as to the composition of the formation of the Court to which the case has been designated, as well as whether an Opinion of the Advocate General will be required.²³⁴ Parties or interested persons should reply to this letter "within a short period", advising the Court as to whether they intend to attend, and, if so, supplying the Court with the identity of the agent or lawyer who will be representing them.²³⁵ Hearings must take place in public, "unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons."²³⁶ Before the beginning of the hearing, the members of the formation of the Court hearing the case normally have a short meeting with the representatives of the parties and interested persons, at which the Judge-Rapporteur and the Advocate-General "may invite the representatives to provide, at the hearing, further information on certain questions or to develop

the written observations, that it has sufficient information to give a ruling. However, Article 76(3) RP prevents the Court from exercising this power where an interested person who did not participate in the written procedure makes a reasoned request for a hearing under Article 76(1) RP. Article 96(1) RP provides that non-participation in the written procedure does not preclude participation in the oral part of the procedure. It is notable that where the expedited procedure is adopted, an oral hearing must take place (Article 105(2) and (4) RP), as is the case in the urgent procedure (Article 109(5)).

²³³ Article 20(5) of the Statute allows the Court, after hearing from the Advocate General, to decide that a case should be determined without a submission from the Advocate General if the Court considers that the case raises no new point of law. Again, it is noteworthy that where the expedited procedure is adopted, the Court may rule only after hearing the Advocate General (Article 105(5) RP).

²³⁴ Article 47 of the *Practice Directions*.

²³⁵ Article 47 of the *Practice Directions*.

²³⁶ Article 31 of the Statute. See Wägenbaur, B., *supra* n. 26, pp. 94-96.

one or more specific aspects of the case at issue.”²³⁷ The Rules of Procedure themselves provide little detail on the running of oral hearings, save that the proceedings shall be opened by the President, who shall be responsible for the proper conduct of the hearing²³⁸; that the members of the formation of the Court and the Advocate General, if any, are permitted to put questions to the representatives of the parties or interested persons²³⁹; and that the President shall declare the hearing closed after the parties and interested persons have presented oral argument.²⁴⁰ The *Practice Directions*, however, provide significantly more detail, dividing the hearing into three separate parts: the oral submissions proper, questions from the members of the Court, and replies²⁴¹, usually in that order.²⁴² The President of the Court, after consulting the Judge-Rapporteur, and the Advocate General, if applicable, fixes the speaking time for the oral submissions: as a general rule it is fixed at fifteen minutes²⁴³, though it may be made longer or shorter depending on, *inter alia*, “the nature or the specific complexity of the case.”²⁴⁴ Each party or interested person’s oral submissions must be made by one person only, although the Court may in exceptional circumstances, “where the nature and specific complexity of the case” warrants it, authorise a second person to deliver submissions, although this will not result in an extension to the speaking time, meaning that the two

²³⁷ Article 48 of the *Practice Directions*. See Wägenbaur, B., *supra* n. 26, p. 300.

²³⁸ Article 78 RP.

²³⁹ Article 80 RP.

²⁴⁰ Article 81 RP.

²⁴¹ Article 49 of the *Practice Directions*.

²⁴² Article 50 of the *Practice Directions*.

²⁴³ The Court at Article 51 of the *Practice Directions* provides advice to advocates as to how make best use of this short time: “In the light of the knowledge which the Court already has of the case following the written part of the procedure, it is not necessary, at the hearing, to recall the content of the written pleadings or observations lodged or, in particular, the factual or legal background to the case. Only the decisive points for the purposes of the Court’s decision must be brought to its attention. It must none the less be stated that where, before the hearing, the Court has requested the parties or the abovementioned interested persons to concentrate in their submissions on a question or a particular aspect of the case, in general only that question or that aspect should be addressed during those submissions. As far as possible, participants in the hearing who are advocating the same line of argument or adopting the same position must also liaise before the hearing to avoid repeating arguments which have already been submitted.” It should be noted that such constraints are not unheard of in common law jurisdictions: the US Supreme Court gives each side half an hour (Roberts, J.G., “Oral Advocacy and the Re-Emergence of a Supreme Court Bar”, (2005) 30(1) *Journal of Supreme Court History* 68, at 68).

²⁴⁴ Article 52 of the *Practice Directions*. A party or interested person may also make an application to the Court for an extension of the speaking time in its reply to the letter of notice to attend. Such an application must be reasoned, and must reach the Court at least two weeks before the actual date of hearing (Article 52).

advocates will have to share the time allocated to their client.²⁴⁵ The lawyers for the parties will, as a general rule, make their oral submissions in the language of the case, the representatives for the Member States will make theirs in an official language of their State, and non-Member States, such as the Commission, theirs in the language of the case, or where authorised by the Court, another of the procedural languages of the Court.²⁴⁶ The members of the formation of the Court and the Advocate General, if applicable, may also address questions to the lawyers, both during the oral submissions and in the second stage of the hearing, using any of the Court's procedural languages. This inheritance of Babel requires the Court's language service to provide simultaneous interpretation, the implications and constraints of which the Court acknowledges in its *Practice Directions*.²⁴⁷ Although, as aforementioned, the Judges and Advocate General are not precluded from asking questions of the advocates during their oral submissions²⁴⁸, the second stage of the procedure provides the best opportunity to the Court to afford the chance to the lawyers to answer "additional questions from the members of the Court."²⁴⁹ As the final stage of the oral hearing, the representatives are afforded the opportunity, if they consider it necessary, of replying to the submissions of the other parties or interested persons. These replies must comply with a five-minute time limit, and may not be utilised as a second set of submissions.²⁵⁰ Where applicable, the Opinion of the Advocate General is delivered after the close of the oral

²⁴⁵ Article 53 of the *Practice Directions*. The Court will grant such an authorisation in response to a duly reasoned application from the party or interested person only. The application must be made in the reply to the letter of notice to attend, and must reach the Court at least two weeks before the actual date of hearing (Article 53).

²⁴⁶ *Supra* n. 221-n. 223.

²⁴⁷ Articles 56 and 57 of the *Practice Directions*. In order to assist the interpretation directorate, the Court advises that representatives forward in advance "a text, ... however short, of notes for the oral submissions or an outline of their argument" to the directorate. The representatives are in no way confined by these notes, which are not made available to the members of the Court (Article 56). Lawyers are advised, however, not to read out a text, and are recommended "to speak freely on the basis of properly structured notes." The *Practice Directions* also emphasise that "it is essential to speak directly into the microphone, at a natural pace and not too quickly, stating in advance the outline of the argument made and using short and simple sentences as a matter of course." (Article 57). See also the document entitled *Advice to counsel appearing before the Court*, available at: http://curia.europa.eu/jcms/jcms/Jo2_7031/ (last accessed at 09:54 on Tuesday, the 22nd March, 2016); Broberg, M. and Fenger, N., *supra* n. 22, pp. 391-393.

²⁴⁸ Article 80 RP; Article 54 of the *Practice Directions*.

²⁴⁹ Article 80 RP; Article 54 of the *Practice Directions*. Wägenbaur suggests that such questions "are by far not the rule", and often when hearing preliminary references the Court poses no questions at all (Wägenbaur, B., *supra* n. 26, p. 303).

²⁵⁰ Article 55 of the *Practice Directions*. If the Court has authorised two lawyers to speak on behalf of one party or interested person, only one of them may speak in reply (Article 55).

hearing²⁵¹, with the President declaring thereafter that the oral part of the procedure is closed.²⁵²

b) Argument before the Court of Justice as ‘Steadying Factor’

aa) *Prima Facie* Difficulties in Applying Llewellyn’s Ninth ‘Steadying Factor’ to the Preliminary Reference Procedure

The application of Llewellyn’s ninth ‘steadying factor’ to the preliminary reference procedure would *prima facie* appear to be highly problematic for a number of reasons.

Firstly, Llewellyn places great emphasis on the adversarial nature of the procedure before the American appellate courts. The preliminary reference is not, however, at least in a *de jure* sense, adversarial: rather, it is “an instrument of cooperation and coordination between the ECJ and the national courts and tribunals, based on a strict division of labour for the implementation of EU law.”²⁵³ The preliminary reference procedure has also been described as a “dialogue of judges”²⁵⁴, i.e. the Court replies to a question on the validity or interpretation of EU rules from a national court or tribunal, and the referring judicial body then applies that ruling in the determination of the main proceedings. This is underscored by the fact that there is no requirement for the parties or any interested persons to lodge written observations or attend an oral hearing: the Court would proceed to give a ruling without an intervention.²⁵⁵ However, there are a number of aspects of the procedure that will render the

²⁵¹ Article 82(1) RP. As Wägenbaur points out, this does not mean immediately after or at the same time as the close of the oral hearing. This is obvious when Article 82(1) is compared with the old Article 59(1), which stated that the Opinion had to be delivered “at the end of the oral procedure”. (Wägenbaur, B., *supra* n. 26, p. 306).

²⁵² Article 82(2) RP. Article 58 of the *Practice Directions*: “The active participation of the parties or interested persons referred to in Article 23 of the Statute comes to an end at the end of the hearing. Subject to the exceptional situation in which the oral part of the procedure is reopened, pursuant to Article 83 RP, the parties or abovementioned interested persons are no longer authorised to put forward written or oral observations, in particular in response to the Advocate General’s Opinion, once the President of the formation of the Court has declared the hearing closed.” See also, Case C-17/98 *Emesa Sugar* [2000] ECR I-665. The hearing can be re-opened in limited circumstances, as to which see Article 83 RP; Wägenbaur, B., *supra* n. 26, pp. 307-311; Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, pp. 776-778; Broberg, M. and Fenger, N., *supra* n. 22, pp. 405-409.

²⁵³ Wägenbaur, B., *supra* n. 26, p. 67.

²⁵⁴ Geiger, R., Khan, D.-E. and Kotzur, M., *supra* n. 29, p. 894.

²⁵⁵ Article 23(2) of the Statute creates a mere entitlement to submit written observations.

vast majority of references, *de facto*, contentious in nature. First, while not a prerequisite for the making of a reference²⁵⁶, the fact that a referring body adopts an adversarial procedure “will usually be an argument in favour of the body being considered a national court.”²⁵⁷ Second, and more important, is the requirement in the text of Article 267 TFEU that the referring court or tribunal must consider that a decision on the question is necessary to enable it to give judgment, a requirement that has been interpreted by the Court to mean that it has no jurisdiction to rule on hypothetical questions²⁵⁸ or in cases where there is no genuine dispute.²⁵⁹ While these admissibility requirements imply that in most cases the parties in the main proceedings will have an interest in advancing oppositional arguments before the Court, particularly in references concerning the interpretation of EU rules, the Court has confirmed in a number of cases that a case will not be hypothetical or contrived merely because the parties in the main proceedings agree on what the ruling should be.²⁶⁰ Nevertheless, the fact that the parties will, *de facto*, exercise a great degree of control over the decision to refer, and that a national court may have very real concerns about the costs and delay caused by a reference, means that the making of a reference will be much less likely unless the question concerns the validity of an EU rule, or indirectly, a national rule.²⁶¹ Therefore, most references will be contentious in nature, as far as the parties to the main proceedings are concerned at least, so the *de jure* inquisitorial nature of proceedings may not be as significant an obstacle to application of Llewellyn’s ninth ‘steadying factor’ as first appears.²⁶² In truth, the preliminary reference

²⁵⁶ Case 70/77 *Simmenthal* [1978] ECR 1453 (see Broberg, M. and Fenger, N., *supra* n. 22, p. 67).

²⁵⁷ Broberg, M. and Fenger, N., *supra* n. 22, p. 67, citing Case 61/65 *Vaassen-Göbbels* [1966] ECR 261.

²⁵⁸ Case C-83/91 *Meilicke* [1992] ECR I-4871 (see Geiger, R., Khan, D.-E. and Kotzur, M., *supra* n. 29, p. 897).

²⁵⁹ Case 104/79 *Foglia v Novello I* [1980] ECR 745; Case 244/80 *Foglia v Novello II* [1981] ECR 3045 (see Geiger, R., Khan, D.-E. and Kotzur, M., *supra* n. 29, p. 897).

²⁶⁰ Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179; Case C-341/01 *Plato Plastik Robert Frank* [2004] ECR I-4883; Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-458/06 *Gourmet Classic* [2008] ECR I-420 (see Broberg, M. and Fenger, N., *supra* n. 22, p. 208, fn. 158); see also, Barnard, C. and Sharpston, E., *supra* n. 40, p. 1142, fn. 148 and p. 1145, fn. 161.

²⁶¹ Each of the cases cited *supra* n. 260 are examples of the latter circumstance.

²⁶² Broberg and Fenger acknowledge that there is “a distinct adversarial feel to a preliminary proceeding...” (Broberg, M. and Fenger, N., *supra* n. 22, p. 359). Lenaerts, Maselis and Gutman state that the “so-called non-contentious nature of preliminary proceedings appears to be no more than a fiction.” (Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 787). Consider also the curious wording of Article 23(1) of the Statute which refers to “the act the validity or interpretation of which is *in dispute*.” (This author’s emphasis). That said, the

procedure may be most accurately described as a hybrid adversarial-inquisitorial procedure.

Secondly, again related to the characterisation of the preliminary reference procedure as a judicial dialogue, the arguments of the parties and interested persons do not frame the deliberations and decision of the Court as they do in the American appellate courts, or indeed, as they do in direct actions before the CJEU.²⁶³ As such, the concept of decision *ultra petita* does not exist in the same way in the preliminary reference procedure: while it is evident that the Court does take the *ultra petita* concept seriously in the context of direct actions²⁶⁴, it is *de jure* the Order for Reference, rather than the written and oral argument of the parties and interested persons, that defines the scope of decision in preliminary references.²⁶⁵ Broberg and Fenger summarise the dynamic adroitly: “[The parties and interested persons] are merely invited to share their view and may thus be likened to *amici curiae*.”²⁶⁶ Judge Edward, writing extra-judicially, recognised further reasons why the parties’ arguments should not confine the Court:

“First, while the reference is made, and the arguments presented, in the context of a particular national litigation, the Court’s task is to interpret the law to be applied throughout the Community. Second, it quite often happens that the party or the Member State which could provide the greatest help chooses not to lodge written observations. Quite apart from the maxim *curia novit iura* (‘the court knows the law’) which applies in most Member States, the Community-wide interpretation of the law could not depend on the accident of who appears in the particular case that raises the point or what arguments they choose to put forward.”²⁶⁷

written part of the procedure before the Court does not follow the back-and-forth exchange of pleadings associated with adversarial procedure (see Article 9 of the *Practice Directions*). However, the oral hearing, where it does take place, allows the representatives of the parties and interested persons to argue having regard to the written observations submitted by others (see Articles 50 and 55 of the *Practice Directions*).

²⁶³ See Brown, L.N. and Kennedy, T., *supra* n. 205, p. 296.

²⁶⁴ Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 630, fn. 31 and p. 808, fn. 72 with references.

²⁶⁵ In fact, the Court of Justice has ruled that the parties or interested persons cannot “amend, or expand, or for that matter narrow, the content of the question.” (Broberg, M. and Fenger, N., *supra* n. 22, p. 359, fn. 43, citing, *inter alia*, Case C-174/84 *Bulk Oil* [1986] ECR 559).

²⁶⁶ Broberg, M. and Fenger, N., *supra* n. 22, p. 359.

²⁶⁷ Edward, D., *supra* n. 205, at 545.

Therefore, it is evident that the Court is not “oriented partly from without”²⁶⁸ by advocacy in the same manner that Llewellyn maintained is the case in the American appellate courts. That is not to say, however, that the Court will as its default position disregard the arguments of the parties and interested persons²⁶⁹; it is merely to say that it will not allow those arguments to confine its deliberations: indeed Judge Edward acknowledges the Court’s heavy dependence on the quality of the observations of the parties and interested persons, in particular those of the Commission.²⁷⁰ The role of legal-cultural background is important in this context: as Judge Edward states, an advocate “bred in the common law tradition ... [will be] shocked if the case is decided on a point not argued”,²⁷¹ but this will not be the case for the advocate from the civil law tradition with its maxim *curia novit iura*.²⁷² Whichever way one looks at the problem, it is evident that the argument of the parties and interested persons in the procedure does not narrow the lines of the Court’s deliberations and decision as adversarial argument does in a direct action.

Moreover, many of the reservations expressed by Llewellyn as to the ‘steadying effect’ of advocacy may also be relevant in the preliminary reference context.

Firstly, Llewellyn’s observations on the balance between written submission and oral argument are germane.²⁷³ As Llewellyn pointed out, there is a difference between the Continental tradition with its emphasis on written proceedings and de-emphasising of oral argument, and the procedure for argumentation in the common law tradition with its greater emphasis on oral hearing.²⁷⁴ The procedures before the Court of Justice, originating in the civil code jurisdictions, particularly France and Germany, attach much greater

²⁶⁸ *Supra* n. 199.

²⁶⁹ In fact, it is evident that in some cases the Court will rely on the arguments of the parties and interested persons, both written and oral, to supplement the legal and factual background to the main proceedings (*supra* n. 166 and n. 176). As Llewellyn states, the argument of counsel may often assist by “making the fact-picture clear and vivid...” (Llewellyn, *supra* n. 2, p. 30). See also, Barnard, C. and Sharpston, E., *supra* n. 40, pp. 1150-1151 on the Court’s use of written observations to clarify poorly-drawn Orders for Reference.

²⁷⁰ Edward, D., *supra* n. 205, at 549.

²⁷¹ Edward, D., *supra* n. 205, at 549.

²⁷² Edward, D., *supra* n. 205, at 549.

²⁷³ *Supra* n. 196.

²⁷⁴ Llewellyn, K.N., *supra* n. 2, p. 31, fn. 21.

significance to written pleading than they do to oral argument.²⁷⁵ This observation applies *a fortiori* to the preliminary reference procedure, which appears to have been based on similar procedures existing in Germany, Italy and France.²⁷⁶ The preponderance of the written part of proceedings in the procedure is evident in many aspects of the Court's procedural rules and practice. First, there is the fact that unlike the written part of the procedure, which proceeds always save in cases of extreme urgency in the urgent preliminary ruling procedure²⁷⁷, the oral hearing does not take place as a rule.²⁷⁸ Second, it is evident that while the purpose of the written part of the procedure is to enable the Court "to acquire a detailed and accurate idea of the subject-matter of the case before it and the issues raised by that case"²⁷⁹, the aim of oral submissions should be to focus on "decisive points for the purposes of the Court's decision..."²⁸⁰, to develop arguments contained in the written observations²⁸¹, and to respond to any requests by the Court to concentrate on specific issues.²⁸² Indeed, Wägenbaur suggests that the oral proceedings play a rather ancillary role and that the Court may sometimes even have a draft judgment prepared before the hearing.²⁸³ Third, there are the constraints placed upon the oral hearing owing to time pressure and the need for simultaneous interpretation that may hamper the lawyer's customary advocacy style or flourishes.²⁸⁴

²⁷⁵ See Wägenbaur, B., *supra* n. 26, p. 57; Brown, L.N. and Kennedy, T., *supra* n. 205, pp. 269-270.

²⁷⁶ Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 5-6. However, the procedure is not dissimilar to the consultative case stated procedures found in many common law jurisdictions.

²⁷⁷ *Supra* n. 218.

²⁷⁸ *Supra* n. 210 and n. 232.

²⁷⁹ Article 9 of the *Practice Directions*.

²⁸⁰ Article 51 of the *Practice Directions*. Indeed, Article 45 of the *Practice Directions* states that the Court will arrange a hearing "whenever it is likely to contribute to a better understanding of the case..."

²⁸¹ See Article 46 of the *Practice Directions*.

²⁸² Article 50 of the *Practice Directions*. These issues could be identified in the meeting immediately before the hearing, or through measures of organisation prescribed by the Court under Article 61 RP or the Judge-Rapporteur or Advocate General under Article 62 RP. See also, Koopmans, T., "The Future of the Court of Justice of the European Communities", (1991) *Yearbook of European Law* 15, at 23.

²⁸³ Wägenbaur, B., *supra* n. 26, p. 297.

²⁸⁴ *Supra* n. 241-n. 250. See also, Brown, L.N. and Kennedy, T., *supra* n. 205, p. 296; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 280; Forrester, I.S., "The Judicial Function in European Law and Pleading in the European Courts", (2006-2007) 81 *Tulane Law Review* 647, at 708-709. It is conceivable that written observations may lose some of their impact in translation, albeit not to the same extent that oral advocacy may suffer in simultaneous interpretation, notwithstanding the skill and best efforts of the interpretation directorate.

Secondly, Llewellyn's concerns about the differential skill levels of counsel and their effect on 'reckonability' are also of potential relevance in the preliminary reference procedure.²⁸⁵ First, there may be a difference in skill between those lawyers representing the parties in the main proceedings, and those agents or lawyers representing the interested persons such as the Member States and EU institutions.²⁸⁶ While the interested persons are 'repeat players', and therefore more likely to be represented by advocates with prior experience of the Court, the parties may be 'one-shotters', represented by the same lawyers that commenced the main proceedings in the national court, and who are not in possession of these attributes.²⁸⁷ The skill differential may not be the exclusive result of mere gaps in specialist knowledge of relevant substantive law. A more insurmountable problem may be the legal-cultural background of the lawyer: a mono-linguistic, parochial national lawyer²⁸⁸ unaccustomed to multilingual proceedings, and unused to the peculiarities of the Court's procedure and practice, may struggle to make effective use of the written and oral proceedings, and may be unattuned to the Court's methods and

²⁸⁵ In the USA, scholarly work has demonstrated a link between variation in the quality of advocacy and litigant success. See generally, Haire, S.B., Lindquist, S.A. and Hartley, R., "Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeal", (1999) 33(3) *Law & Society Review* 667.

²⁸⁶ Brown and Kennedy acknowledge this, stating: "The standard of counsel appearing before the Court is extremely varied, the right of audience very wide, ... and forensic traditions and advocacy styles varying considerably among the Member States." (Brown, L.N. and Kennedy, T., *supra* n. 205, p. 69). See also, Beck on 'more favoured' categories of litigant: Beck, G., *supra* n. 16, p. 432.

²⁸⁷ There is evidence from studies in the USA that the skill levels of lawyers do impact on the chances of litigant success, and much has been made of the success of 'repeat players' over 'one-shotters'. See, for instance: Haire, S.B., Hartley, R. and Lindquist, S.A., *supra* n. 285; McGuire, K., "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in the Litigation Process", (1995) 57(1) *The Journal of Politics* 187. For a discussion of 'repeat players' in the Court of Justice, particularly the role of the Member States, see Granger, M.-P., "When Governments go to Luxembourg ... The Influence of Governments on the Court of Justice", (2004) 29(1) *European Law Review* 3; Granger, M.-P., "States as Successful Litigants before the European Court of Justice: Lessons from the 'Repeat Players' of European Litigation", (2006) 2 *Croatian Yearbook of European Law and Policy* 27; Granger, M.-P., "From the Margins on the European Legal Field: The Governments' Agents and their Influence on the Development of European Union Law" in Vauchez, A. and de Witte, B. (eds.), *Lawyerizing Europe: European Law as a Transnational Social Field* (Oxford: Hart, 2013), p. 55. See also, Vaughan, D. and Gray, M., *supra* n. 205, pp. 51-54.

²⁸⁸ That is to say, a lawyer that may not be termed a member of an elite set of lawyers dubbed 'Euro-lawyers' by Vauchez (Vauchez, A., "How to become a Transnational Elite: Lawyers' Politics at the Genesis of the European Communities (1950-1970)" in Petersen, H., Kjær, A.-L., Krunke, H., and Madsen, M. (eds.), *Paradoxes of European Legal Integration* (Aldershot: Ashgate, 2008), p. 129; Marchand, C. and Vauchez, A., "Counting Lawyers that Count: A Sociology of the Lawyers Pleading to the European Court of Justice (1952-1977)", Paper presented at the law and society conference, Berlin, July 2007).

preferences.²⁸⁹ The difference between the parties and the interested persons in terms of representation is also underscored by the fact that while the latter must be represented by an agent who may be assisted by a lawyer or adviser, the parties in the main proceedings may represent themselves where allowed to do so in the main proceedings by national procedural rules.²⁹⁰ Second, since the right of audience before the Court is attached to a right of audience before the courts of a Member State, it is conceivable that there may be differences in the quality of lawyers from state to state.²⁹¹

However, there are also aspects of the preliminary reference procedure that may serve to assuage some of the concerns Llewellyn had about the ‘steadying effect’ of advocacy on decision in the American appellate court context.

Firstly, to return to the maxim *curia novit iura*, the Court of Justice is not reliant to the same degree on the written and oral argument of lawyers as Llewellyn would appear to suggest is the case in American appellate courts. This maxim manifests itself in the Court’s procedure and practice in the greater independent investigation by the Court of legal problems and their practical consequences, as well as the considerable self-sufficiency afforded to the Court in this regard by the institutional support it possesses. The role of the Judge-Rapporteur may be of particular importance in this connection.²⁹² Ostensibly, the chief role of the Judge-Rapporteur is to oversee the administrative progress of the preliminary reference to which he/she has been designated, a role that is performed largely through the preparation of a preliminary report presented to a general meeting of the Court.²⁹³ However, *de facto*, it is the Judge-Rapporteur who will be expected to pay most attention to the case, as it will be he/she who summarises the legal and factual background of the case, as well as the written observations in the preliminary report²⁹⁴: indeed, the Judge-

²⁸⁹ One is reminded of Judge Edward’s wise words: “[K]now your court; know your procedure; and know what you are trying to achieve.” (Edward, D., *supra* n. 122, at 3.1.1) (see Vaughan, D. and Gray, M., *supra* n. 205, p. 48). As to the difficulties of arguing before the Court of Justice, see Brown, L.N. and Kennedy, T., *supra* n. 205, pp. 196-197; Vaughan, D. and Gray, M., *supra* n. 205, p. 48ff.

²⁹⁰ *Supra* n. 215.

²⁹¹ *Supra* n. 215. There has been praise directed towards the lawyers from the common law jurisdictions for their approach before the Court: see Due, O., *supra* n. 205, p. ii.

²⁹² As to the rules concerning the designation of the Judge-Rapporteur, see *supra* n. 206.

²⁹³ *Supra* n. 237-n. 244.

²⁹⁴ Edward, D., *supra* n. 205, at 551-552.

Rapporteur may indicate the direction he/she believes the Court should take in providing a substantive answer to the reference.²⁹⁵ Moreover, it will, in practice, be the Judge-Rapporteur, along with the Advocate General, who addresses questions to the advocates at the oral hearing.²⁹⁶ Most significantly, however, it will be the Judge-Rapporteur who will provide the first draft of the Court's judgment.²⁹⁷ The Judge-Rapporteur, as the name suggests, will in accordance with the *curia novit iura* maxim, take a more pro-active approach to his/her work on the case, and in this regard will, like each Judge and Advocate General, be supported by the staff of his/her *cabinet*, which will include three or four legal secretaries (*référéndaires*). The importance of these *référéndaires* is deserving of emphasis: they may conduct research independent of the lines suggested by the arguments of the parties and interested persons, and it is a *référéndaire* who will draft the judgment for approval and revision by the Judge-Rapporteur, and ultimately the other members of the Court's formation.²⁹⁸ The Judge-Rapporteur, as well as the other Judges and Advocates General, may also avail of the Research and Documentation Division, again staffed by lawyers, which may provide research assistance on questions of EU or national law.²⁹⁹

Secondly, the number of parties and interested persons in the preliminary reference procedure, and their differing roles and perspectives, means that not all lawyers arguing before the Court, in writing or orally, should, to paraphrase Llewellyn, be regarded as obstacles.³⁰⁰ It is true that in many cases, the parties to the main proceedings may be arguing in narrow self-interest, their focus

²⁹⁵ Edward, D., *supra* n. 205, at 552. However, as early as 1995, Judge Edward was suggesting that the preliminary report was no longer of such detail.

²⁹⁶ Wägenbaur, B., *supra* n. 26, p. 303.

²⁹⁷ Edward, D., *supra* n. 205, p. 555.

²⁹⁸ See generally, Brown, L.N. and Kennedy, T., *supra* n. 205, pp. 23-24; Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 24; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 226. The *référéndaires* will have a legal background, and by convention, one of the *référéndaires* in each *cabinet* will be from a Francophone country. The role of the *référéndaire* has been compared to that played by law clerks who assist judges in American appellate courts: see Kenney, S.J., "Beyond Principals and Agents: Seeing Courts as Organizations by Comparing 'Référéndaires' at the European Court of Justice and Law Clerks at the United States Supreme Court", (2000) 33(5) *Comparative Political Studies* 593. For a discussion on the influence of law clerks in the USA, see Kenney, S.J., "Puppeteers or Agents? What Lazarus's *Closed Chambers* Adds to our Understanding of Law Clerks at the U.S. Supreme Court", (2000) 25(1) *Law and Social Inquiry* 185.

²⁹⁹ Brown, L.N. and Kennedy, T., *supra* n. 205, pp. 34-35; Lasok, K.P.E., *supra* n. 87, pp. 46-47; Edward, D., *supra* n. 205, p. 549.

³⁰⁰ *Supra* n. 199.

being on winning the main proceedings, and not more abstract concerns such as the uniformity of EU law. Similarly, because Member States choose to take part in preliminary references for varying reasons³⁰¹, the Court may have to consider the Member States' arguments as expressing specific national interests that do not accord with the Court's integrative mission.³⁰² There may even be cases where the Court will have to be wary of the motivations of EU institutions, including the Commission, particularly where there may be inter-institutional conflict.³⁰³ In such cases, the arguments of the parties and the interested persons may be narrow in focus and of limited assistance to the Court. When considered as such from the Court's perspective, it is evident why, as a general rule, the written observations and oral argument of the EU institutions, in particular those of the Commission, are of such utility. Brown and Kennedy claim that the Court quite often adopts the interpretation of EU law proposed by the Commission³⁰⁴, and in addition to the Commission's expertise, proffers the following reasons for this:

“The Commission ... always submits observations in references from national courts, and can assist the Court by explaining the background to the particular Community instrument in question, which it will usually have been responsible for drafting. It can also supply information on the economic context of a provision, or on the way in which it has been implemented in the Member States.”³⁰⁵

Seen as such, and taking its role as custodian of the Treaties into account³⁰⁶, the Commission may be termed, in Llewellyn's words, a 'judicially-minded

³⁰¹ See Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 244-247 as to the reasons why Member States may choose to participate in a preliminary reference.

³⁰² Broberg, M. and Fenger, N., *supra* n. 22, pp. 356-358. There may also be cases where the Member States do not submit observations, and this can occur in what would appear to be very significant cases: see Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 244-245; Broberg, M. and Fenger, N., *supra* n. 22, pp. 356-357; Nyikos, S.A., *supra* n. 99.

³⁰³ Broberg, M. and Fenger, N., *supra* n. 22, p. 355, fn. 29.

³⁰⁴ Stein found in his 1981 study of eleven of the Court's most important constitutional decisions that the Court has taken the approach suggested by the Commission on nine occasions without qualification, once with qualifications, with only one parting of ways (Stein, E., “Lawyers, Judges, and the Making of a Transnational Constitution”, (1981) 75 *American Journal of International Law* 1, at 25).

³⁰⁵ Brown, L.N. and Kennedy, T., *supra* n. 205, p. 300. The reliance of the Court on the quality of the Commission's submissions has been recognised by Judge Edward: Edward, D., *supra* n. 205, at 549. The role of the Commission as an apparently impartial expert information provider may be compared to that of the Solicitor-General before the US Supreme Court (for an account of the impact of the Solicitor-General in the US Supreme Court, see Bailey, M.A., Kamoie, B. and Maltzman, F., “Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making”, (2005) 49(1) *American Journal of Political Science* 72).

³⁰⁶ Wägenbaur, B., *supra* n. 26, p. 81.

helpful consultant³⁰⁷, rather than an obstacle. However, the Commission need not be the sole bearer of this epithet: there will be scope for the parties and other interested persons, such as the Member States, to act tactically in their pleadings by providing information on national law, as well as other information, that will assist the Court in understanding the practical consequences of varying interpretations, etc.³⁰⁸ While in general it will be difficult, due to the deductive nature of the Court's rulings, to determine the extent to which the arguments influenced the outcome, there are cases where Member State submissions have clearly had an impact on the Court's reasoning and ruling.³⁰⁹

Thirdly, and perhaps most significantly, the contribution of the Advocate General frees the Court from the vagaries of sub-par pleading and oral advocacy.³¹⁰ While it is difficult to quantify the Advocate General's influence

³⁰⁷ *Supra* n. 199. This is demonstrated by the order of appearance in the oral hearing: the Commission's representative is always heard at the end after the parties and other interested persons have been heard (Vaughan, D. and Gray, M., *supra* n. 205, p. 52). It should also be mentioned that the Commission will typically be represented by a member of the Commission's legal service (Brown, L.N. and Kennedy, T., *supra* n. 205, p. 300), which must contribute to the credibility of the arguments advanced on its behalf.

³⁰⁸ Stone Sweet and Brunell argue that Member State governments have tended to be successful before the Court of Justice where they have joined with the Commission and sought to enable rather than constrain the Court: Stone Sweet, A. and Brunell, T.L., "How the European Union's Legal System Works – and Does Not Work: Response to Carrubba, Gabel and Hankla", (2010) *Faculty Scholarship Series* – paper 68, pp. 25-31. For further detail on successful tactical use by Member States of pleading and advocacy before the Court, see Granger, M.-P., "When Governments go to Luxembourg ... The Influence of Governments on the Court of Justice", (2004) 29(1) *European Law Review* 3; Granger, M.-P., "States as Successful Litigants before the European Court of Justice: Lessons from the 'Repeat Players' of European Litigation", (2006) 2 *Croatian Yearbook of European Law and Policy* 27. Maduro's 'majoritarian activism' theory, in which he argues that the Court has developed its Article 34 TFEU jurisprudence around market rules and conditions in the majority of the Member States, implies that the submissions of the Member States in this regard will be of some import (see Maduro, M.P., *supra* n. 80).

³⁰⁹ See Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 247, citing cases where the Court has referred expressly to the helpfulness of the submissions of specific Member States: Case 43/75 *Defrenne v S.A. Belge de Navigation Aérienne Sabena* [1976] ECR 455, where the compliments were paid to the UK and Ireland, and the *Foglia* cases (Case 104/79 *Foglia I* [1980] ECR 745 and Case 244/80 *Foglia II* [1981] ECR 3045), where France and Denmark were successful.

³¹⁰ That is, where the Advocate General is tasked with providing an Opinion (*supra* n. 210 and n. 233). Of the cases completed in 2015, approximately 43% were completed without an Opinion of an Advocate General: Court of Justice of the European Union, *Annual Report 2015: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg: 2016), p. 10. For discussions on the role and influence of the Advocates General, see generally: Salmi-Tolonen, T., "Persuasion in Judicial Argumentation: The Opinions of the Advocates General at the European Court of Justice" in Halmari, H. and Virtanen, T. (eds.), *Persuasion Across Genres: A Linguistic Approach* (Amsterdam: John Benjamins, 2005), p. 59; Moser, P. and Sawyer, K. (eds.), *Making Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice* (Cheltenham: Elgar,

on the Court³¹¹, it is safe to say that the contribution of the Advocates General to the development of EU law has been significant.³¹² Although the Advocate General's Opinion does not bind the Court in any way, it is evident for a number of reasons that, as a general rule, the Court will pay very close attention to it. First, the Treaties set the Advocate General apart from the lawyers arguing for the parties and interested persons, and equate the office more with that of Judge: indeed, the qualifications required for the office of Judge and Advocate General are the same.³¹³ Given the Advocate General's equal expertise, the requirement that they be independent³¹⁴, and that their role is to *assist* the Court³¹⁵, it is evident that the Court can place greater trust in the

2008); Fennelly, N., "Reflections of an Irish Advocate General", (1996) 5(1) *Irish Journal of European Law* 5; Vranken, M., "Role of the Advocate General in the Law-making Process of the European Community", (1996) 25(1) *Anglo-American Law Review* 39; Darmon, M., "The Role of the Advocate General at the European Court of Justice" in Shetreet (ed.), *The Role of Courts in Society* (Dordrecht: Martinus Nijhoff, 1988); Dashwood, A., "The Advocate General in the Court of Justice of the European Communities", (1982) 2 *Legal Studies* 202; Borgsmidt, K., "The Advocate General at the European Court of Justice: A Comparative Study", (1988) 13 *European Law Review* 106; Jacobs, F., "Advocates General and Judges in the European Court of Justice: Some Personal Reflections" in O'Keefe, D. and Adenas, M. (eds.), *Liber Amicorum for Lord Slynn: Judicial Review in European Law* (Amsterdam: Kluwer, 2000); Tridimas, T., "The Role of the Advocate General in the Development of Community Law: Some Reflections", (1997) 34 *Common Market Law Review* 1349; Burrows, N. and Greaves, R., *supra* n. 205; Mortelmans, K.J.M., "The Court under the Influence of its Advocates General", (2005) *Yearbook of European Law* 127; Pavlopoulos, A., *The Advocate General's Office and its Contribution to the Development of the Law and the Judicial Machinery of the European Communities* (Athens: Komotini, 1986); Ritter, C., "The Role and Impact of the Advocate General", (2006) 12 *Columbia Journal of European Law* 1; Sharpston, *supra* n. 205. For a full list of materials, including those in languages other than English, see: Greaves, R., "Reforming Some Aspects of the Role of the Advocates General" in Arnull, A., Barnard, C., Dougan, M. and Spaventa, E. (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart, 2011), p. 161, at p. 162, fn. 1.

³¹¹ Tridimas, T., *supra* n. 310, at 1362-1365; Arnull, A., *supra* n. 24, pp. 15-16; Brown, L.N. and Kennedy, T., *supra* n. 205, pp. 70-71; Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 234-235; Burrows, N. and Greaves, R., *supra* n. 205, p. 8 and pp. 158-161.

³¹² In a study of the judgments of the Court in the first half of 1996, Tridimas concluded that the Court followed the Opinion of the Advocate General in 88% of cases (Tridimas, T., *supra* n. 310, at 1362). In Stein's 1981 study of eleven of the Court's most important constitutional decisions, Stein found that the Court had taken the same position as the Advocate in General in nine of the cases (Stein, E., *supra* n. 304, at 25).

³¹³ Article 19(2) TEU and Article 253 TFEU. Advocates General also take the same oath on taking up their duties (Article 4 RP). It is worthy of note here that seven persons have served as both an Advocate General and Judge of the Court, with two serving as Advocate General after having spent time in office as Judges (Judge Trabucchi and Judge Capotorti, both Italian). The role of the Advocate General was clarified by the Court of Justice in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, where the Court confirmed that Advocates General "have the same status as the Judges" (para 11). The Court also stated that the Opinion "constitutes the individual reasoned opinion, expressed in open court, of a member of the Court of Justice itself." (para 14). As Ritter states, the Advocate General is not an entity outside the Court and cannot be compared to an *amicus* (Ritter, C., *supra* n. 310, at 757). See also, Jacobs, F., *supra* n. 310, p. 18; Léger, P., "Law in the European Union: The Role of the Advocate General", 10(1) *The Journal of Legislative Studies* 1, at 2.

³¹⁴ Article 19(2) TEU and Article 253 TFEU. Léger describes the Advocate General as "the Advocate of European law." (Léger, P., *supra* n. 313, at 3).

³¹⁵ Article 19(2) TEU and Article 253 TFEU.

Advocate General's Opinion than it may in the often self-interested parties and interested persons. Second, the Court's practice and procedure reflects the Advocate General's esteem and influence.³¹⁶ For instance, the Advocate General's Opinion is not a part of the oral hearing, and therefore not to be equated with the submissions of the parties and interested persons: the Opinion is part of the oral procedure, but it is delivered *after* the close of the hearing.³¹⁷ Given that the Opinion will be delivered generally between three to four months after the hearing, and that the Court will not begin its deliberations until the close of the oral proceedings, the Court will begin the process of deciding with the Opinion fresh on its (collective) mind.³¹⁸ Moreover, and perhaps most significantly of all, it is well known that the Opinion serves as a "starting point for the Court's deliberation..."³¹⁹ As aforementioned³²⁰, the Advocate General in the preparation of his/her Opinion will have the same support afforded to the Judge-Rapporteur in terms of *référéndaires* and use of the Research and Documentation Division, and therefore will not be reliant solely on legal submissions.³²¹ In fact, it is considered an aspect of the Advocate General's role to look beyond those submissions and to consider the matter independently.³²² Indeed, an Advocate General may have a draft Opinion prepared by the time of the oral hearing.³²³ The fact that the Court will

³¹⁶ For instance, at hearing the Advocate General will sit with the members of the formation of the Court, albeit to the extreme left of the Judges (positionally, not politically) from the advocates' perspective (see Brown, L.N. and Kennedy, T., *supra* n. 205, p. 66).

³¹⁷ Article 82(1) RP (*supra* n. 251).

³¹⁸ Wägenbaur, B., *supra* n. 26, p. 306. Former Advocate General Fennelly has stated that the Advocate General will often forward his/her Opinion to the Judge-Rapporteur a few weeks before its delivery (Fennelly, N., *supra* n. 310, at 13).

³¹⁹ Edward, D., *supra* n. 205, at 555. See also, Fennelly, N., *supra* n. 310, at 19; Burrows, N. and Greaves, R., *supra* n. 205, p. 30. Burrows and Greaves point out that since it will be a *référéndaire* in the *cabinet* of the Judge-Rapporteur that will be charged with drafting the Judgment, the Opinion of the Advocate General is likely to have "a significant impact on the minds of these young, bright but relatively inexperienced jurists." (Burrows, N. and Greaves, R., *supra* n. 205, p. 290).

³²⁰ *Supra* n. 299.

³²¹ Brown and Kennedy suggest that the Advocate General will have an even closer working relationship with his/her *référéndaires* than will be the case with the Judges and theirs since the Judges may discuss cases with other Judges, a luxury not available to the Advocate General (Brown, L.N. and Kennedy, T., *supra* n. 205, p. 68).

³²² Ritter states that one of the advantages of the Opinion is that it is not "restricted to the bare minimum which is necessary to rule on the matter", and points out that "AGs commonly analyze and criticize the case-law in order to ensure consistency and clarity and steer the case-law in the direction which they believe is correct." (Ritter, C., *supra* n. 310, at 759). Furthermore, in direct actions the Advocate General "may recommend that the Court go beyond the parties' claims." (Ritter, C., *supra* n. 310, at 759, citing Case C-64/88 *Commission v France* [1991] ECR I-2727).

³²³ Vaughan, D. and Gray, M., *supra* n. 205, p. 62.

have at its disposal a ready-made solution to the preliminary reference³²⁴, drafted by a member of the Court, who has independently of the submissions researched the legal and factual issues, and approached the matter in the interest of EU law as a whole, clearly negates much of the damage to ‘reckonability’ that may be inflicted by poor lawyering.

As well as negating the impact of sub-par legal argument on ‘reckonability’, the Advocate General’s Opinion may also in itself positively promote ‘reckonability’. First, the Opinion may, in the same way as high-quality written observations and oral argument, serve to synthesise and focus the issues raised by the question referred. However, this will have a differential ‘steadying effect’ for a number of reasons, and will be of little utility since there is no scope for the parties or interested persons to reply to the Opinion once delivered.³²⁵ Second, and more importantly, is the Opinion’s status as a reinforcement of the ‘legal steadying factors’. One of the central purposes of the Advocate General’s Opinion is the setting out of the Court’s previous case-law and how the reference should be solved within the lines of that ‘doctrine’, so that the Court’s case-law retains consistency and promotes the uniformity of EU law.³²⁶ The Opinion therefore serves as a public and generally well-reasoned reminder by a member of the Court of the pressures of ‘legal doctrine’. The absence of an Opinion should not affect ‘reckonability’ adversely, since the Opinion may be dispensed with only where the Court “considers that the case raises no new point of law”³²⁷, or the Court decides to rule by reasoned order³²⁸; that is, cases where there should be little difficulty in predicting an outcome.³²⁹

It is evident therefore that due to the comparative lack of dependence placed by the Court in legal argument in the preliminary reference procedure that

³²⁴ Brown, L.N. and Kennedy, T., *supra* n. 205, p. 69.

³²⁵ Case C-17/98 *Emesa Sugar* [2000] ECR I-665.

³²⁶ Wägenbaur, B., *supra* n. 26, pp. 306-307; Burrows, N. and Greaves, R., *supra* n. 205, p. 5 and p. 595.

³²⁷ Article 20(5) of the Statute.

³²⁸ Article 99 RP.

³²⁹ This, of course, seems to be a contradiction since the referring court or tribunal either perceived a doubt as to the validity or interpretation of an EU rule, or disapproved of a previous decision of the Court. However, in 2014, a total of 31 preliminary references were dealt with by way of reasoned order pursuant to Article 99 RP: Court of Justice of the European Union, *Annual Report 2014: Synopsis of the Work of the Court of Justice, the General Court and the Civil Service Tribunal* (Luxembourg: 2015), p. 10.

Llewellyn's concerns regarding the negative effect of sub-standard argument will not be as relevant in that context. The paragraphs that follow discuss the contribution, if any, made by written observations and oral argument in preliminary references to 'reckonability'.

bb) The 'Steadying Effect' of the Written Observations

Given that it is the Order for Reference that frames the Court's decisional competence in preliminary rulings, and not the submissions of the parties and interested persons, it would be inaccurate to describe written observations as being a *constraint* on the Court. However, written observations, where of high quality³³⁰ and assistance to the Court, may *influence*³³¹ the decision by lending focus and clarity to the matters to be decided³³², thereby narrowing the scope of the oral hearing³³³, and ultimately the number of conceivable outcomes. This will be the case particularly where written observations can provide the Court with solutions to the questions for ruling that transcend the dispute in the main proceedings.³³⁴ This narrowing role of the written pleadings will be heightened by the Judge-Rapporteur's preliminary report, which will summarise the written observations of the parties and interested persons for the other Judges.³³⁵ This synthesis of the issues in the preliminary report may, therefore, in itself contribute to greater 'reckonability'. However, because the preliminary

³³⁰ The influence of written observations which are not drafted in accordance with the suggestions contained in the *Practice Directions* may be reduced: for instance, observations which are not written in a clear and precise manner may lose their impact upon translation.

³³¹ As is the case with the Opinion of the Advocate General (*supra* n. 311), it is difficult to gauge the influence of written observations on the Court from its deductive judgments. There are, however, cases where such an influence has been acknowledged expressly by the Court (*supra* n. 309). See also, Vaughan, D. and Gray, M., *supra* n. 205, pp. 65-66.

³³² See generally, Broberg, M. and Fenger, N., *supra* n. 22, pp. 359-376.

³³³ There is, however, nothing to prevent new information and arguments being presented at the hearing: Broberg, M. and Fenger, N., *supra* n. 18, p. 390; Barents, R. and von Holstein, H. (eds.), *European Courts Procedure* (London: Sweet and Maxwell, 2004), paragraph 31.113; Lasok, K.P.E., *supra* n. 87, p. 343. However, according to Judge Edward "the Court is reluctant ... to hear oral argument on points that are not at least foreshadowed in the written pleadings." (Edward, D. in Barling, G. and Brealey, M., (eds.), *Practitioners' Handbook of EC Law* (London: Trenton Publishing, 1998), para 3.1.5.4).

³³⁴ Hence the importance and success of the Commission in preliminary references (*supra* n. 300-n. 309).

³³⁵ It is conceivable that the other Judges on the formation ruling on the questions could confine their reading of the positions of the parties and interested persons to the summary prepared by the Judge Rapporteur. Anderson and Demetriou have acknowledged the effect of the summary of written observations in the erstwhile Report for the Hearing: "It can be a chastening experience for those who have elaborated their pleadings at length to see how briefly but accurately their points have been summarised." (Anderson, D.W.K., *supra* n. 25, p. 271).

report is an internal document, the parties and interested persons will not know how the Judge-Rapporteur has characterised their submissions, and will therefore be unable to address any inaccuracies in the report or concentrate their advocacy in light of the Judge-Rapporteur's characterisation of the case, unless these matters are communicated by way of measures of organisation or at the meeting immediately prior to the hearing.³³⁶ A second way in which written observations may promote 'reckonability' is by reinforcing the 'legal steadying factors'; that is, by confronting the Court with its own previous case-law, for instance. However, the 'steadying effect' of the written observations will, as a general rule, not be as significant in this respect as the Advocate General's Opinion for two reasons. First, the written observations are not made public³³⁷, and therefore do not serve to hold the Court accountable in the same way. Second, as previously discussed, the Court will be aware of the self-interest of the parties and interested persons, and may be wary of biased and selective use of legal authorities.³³⁸

cc) The 'Steadying Effect' of Oral Argument

The contention that the written observations of the parties and interested persons will not act as a *constraint* upon the Court will apply to their oral argument *mutatis mutandis*. However, as with the written observations, there is scope for the oral argument to *influence* the lines of deciding, and to promote 'reckonability'.

Firstly, when oral hearings are scheduled³³⁹, it is their purpose "to contribute to a better understanding of the case and the issues raised by it..."³⁴⁰ As such, the

³³⁶ The preliminary report therefore differs from the former Report for the Hearing which was prepared by the Judge-Rapporteur at the same time as the preliminary report. The Report for the Hearing also summarised the written observations of the parties and interested persons, but was furnished to the parties and interested persons prior to the hearing, allowing them to address any inaccuracies contained in the Report (see Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 271-272).

³³⁷ Formerly the written observations were summarised by the Judge-Rapporteur in the Report for the Hearing, which was published along with the eventual judgment and Opinion of the Advocate General in the *European Court Reports*. However, after 1994 the Report was no longer published. (Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 271).

³³⁸ Barristers from the common law jurisdictions may fare better in this regard due to the practice of directing a court's attention to authorities that go against the argument being advanced.

³³⁹ There is of course no requirement for an oral hearing to take place in preliminary reference proceedings, which begs the question as to how the absence of a hearing may impact upon

advocates are presented with an opportunity to focus further the lines of decision and to concentrate on matters that concern, in particular, the Judge-Rapporteur and Advocate General. However, the usefulness of the oral hearing in this regard may depend on the extent to which the Court directs argument³⁴¹, as well as the skill of the advocates in addressing the Court's concerns. The difficulties that the oral procedure before the Court presents to advocates have been detailed above.³⁴²

Secondly, just as with the written observations, the oral hearing can promote 'reconability' by reinforcing the 'legal steadying factors', reminding the Court of existing 'legal doctrine', especially its own previous decisions.³⁴³ In fact, oral argument may in this regard be more influential than the written observations since it will be a public and unavoidable confrontation of the Court with its own authorities.³⁴⁴

However, there is at least one aspect of the procedure before the Court, in addition to those already identified, that may dampen the 'steady effect' and

'reconability'. In preliminary references, the Court may choose to dispense with an oral hearing where it rules the request manifestly inadmissible (Article 53(2) RP) or where it considers that the request may be ruled upon by way of reasoned order (Article 99 RP). In these events, it is difficult to see how an oral hearing could affect the outcome. The Court may also pursuant to Article 76(2) RP choose to dispense with the oral hearing where it considers that it has sufficient information to give a ruling. While this provision could conceivably be used to deprive a party or interested person of an opportunity to develop an argument at oral hearing that might influence the outcome, it is unlikely that the Court would not accede to a reasoned request by such a party or interested person for an oral hearing under Article 76(1) RP (in fact, Article 76(3) RP requires an oral hearing where one is requested by an interested person that has not participated in the written procedure). It is, therefore, unlikely that the absence of an oral hearing would be injurious to 'reconability', since the oral hearing, by definition, should not contribute anything in such cases. Indeed, Judge Edward has commented that there is no evidence that the Court has overlooked any vital points in consequence of dispensing with an oral hearing (Edward, D., *supra* n. 205, at 555).

³⁴⁰ Article 45 of the *Practice Directions*.

³⁴¹ Or, alternatively, the ability of the advocates to anticipate the Court's concerns. Forrester, an experienced advocate before the Court of Justice, and now Judge of the General Court, has voiced frustration at the regular failure of the Court to address questions to counsel or to direct oral submissions (Forrester, I.S., *supra* n. 284, at 714-715).

³⁴² *Supra* n. 241-n. 250 and n. 284. In addition, concern has been expressed that Member States can often exercise a large degree of control over what their advocates say before the Court (Vaughan, D. and Gray, M., *supra* n. 205, p. 62). This may have an injurious effect on the ability of advocates to address the Court's concerns at oral hearing.

³⁴³ See Llewellyn, K.N., *supra* n. 2, p. 30 (*supra* n. 200).

³⁴⁴ The public nature of the oral hearing as being central to its role has been emphasised by Forrester (Forrester, I.S., *supra* n. 284, at 714). It has been suggested that although the common law doctrine of precedent does not apply at the Court of Justice, this is not the same thing as saying that the Court does not regard itself as being bound by its previous case-law (Vaughan, D. and Gray, M., *supra* n. 205, p. 64). See also, Arnall, A., "Interpretation and Precedent in European Community Law" in Andenas, M. and Jacobs, F. (eds.), *European Community Law in the English Courts* (Oxford: Oxford University Press, 1998), pp. 125-129.

influence of the oral hearing. In the context of American appellate courts, Chief Justice Roberts, writing extra-judicially, has stated:

“Oral argument matters... It is the organizing point for the entire judicial process... The voting conference is held right after the oral argument – immediately after it in the court of appeals, shortly after it in the Supreme Court. And without disputing in any way the briefing in the decisional process, it is natural, with the voting coming so closely on the heels of oral argument, that the discussion at conference is going to focus on what took place at argument.”³⁴⁵

Advocates at the Court of Justice enjoy no such temporal advantage: the Judges do not begin their deliberations until after the Advocate General’s Opinion has been heard³⁴⁶, and that may be a number of months after the oral hearing, by which time “the drama of the oral hearing is likely to have faded in the memory.”³⁴⁷ Moreover, it will be the *référéndaires* at the *cabinet* of the Judge-Rapporteur who will busy themselves with the drafting of the judgment, and it may well be that these individuals were not present at the oral hearing. Furthermore, while they will have a neat written record of the Advocate General’s Opinion to work with, they will have no such record of the oral submissions, unless they care to engage with the minutes of the hearing.³⁴⁸

As is the case with written observations and the Opinion of the Advocate General, it is difficult to divine from the Court’s deductive judgments what impact oral advocacy may have on influencing the lines of decision, and on ‘reckonability’. While there are those who argue that “the oral hearing appears to have little effect on the overall outcome of a case...”³⁴⁹, it is evident that if utilised with skill, and with a nose for the Court’s methods and preferences, oral argument “can contribute to the judges’ understanding of the issues.”³⁵⁰ The significance of the oral hearing is perhaps best expressed by a former Advocate General who is reputed to have said that “he never attended an oral

³⁴⁵ Roberts, J.G., *supra* n. 243, at 70.

³⁴⁶ *Supra* n. 318.

³⁴⁷ Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 269.

³⁴⁸ It has been suggested by one lawyer experienced in appearing before the Court that the Opinion of the Advocate General be delivered two weeks before the oral hearing in order to address the imbalance in influence: Forrester, I.S., *supra* n. 205, at 717.

³⁴⁹ Burrows, N. and Greaves, R., *supra* n. 205, p. 27, citing Judge Edward’s assertion at *supra* n. 339.

³⁵⁰ Burrows, N. and Greaves, R., *supra* n. 205, p. 27. See also, Vaughan, D. and Gray, M., *supra* n. 205, p. 61.

hearing without a draft of his Opinion already prepared, but never left an oral hearing without wishing to change at least something in the draft.”³⁵¹

3. Conclusion

The analysis of Llewellyn’s ninth ‘steadying factor’ in the context of the preliminary reference procedure does not permit an uncomplicated conclusion. The conclusion drawn herein is that the written and oral procedures are not an ever-present ‘steadying factor’; rather, those procedures have the potential in individual cases to contribute to ‘reckonability’, though even then their ‘steadying effect’ will be differential. The reasons for this general conclusion are as follows:

- Unlike the previous two ‘steadying factors’ which performed an ever-present, if differential, ‘steadying effect’ by limiting the scope of the Court’s decisional competence, adversary argument by counsel does not constitute a *constraint* upon the Court in preliminary references. This is because the procedure, while containing adversarial elements, is ultimately a dialogue between the referring court or tribunal and the Court of Justice, with the parties and interested persons as interlocutors: in procedural terms, it is the Order for Reference that defines the scope of the Court’s decisional task, a role that cannot be usurped by the written observations or oral argument of the parties or interested persons. As a result, decision outside of the scope of the advocates’ written and oral argument, but within the outer-limits of the national court’s questions, will not be *ultra petita*;
- The fact that the written and oral procedures do not necessarily contribute to ‘reckonability’ does not, however, exclude the possibility of their *influence* in practice to contribute to ‘reckonability’ through (1) the *de facto* further limiting and focussing of the lines of decision, drawn already in the Order for Reference, and (2) reinforcement of the ‘legal steadying factors’ through confrontation of the Court with

³⁵¹ Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 269. The former Advocate General in question is not identified.

relevant ‘legal doctrine’ that should control or guide its decision, especially its previous rulings;

- However, the ‘steadying effect’ of the arguments of the parties and interested persons, where relevant, will be of differential significance, depending on, *inter alia*, the skill and experience of the legal representatives presenting the arguments. Moreover, as a general rule, the arguments of certain interested persons will carry more influence with the Court. This is especially true in the case of the ever-present arguments of the Commission, which will be advanced by specialised and experienced legal representatives, and which will generally be advanced from the Commission’s perspective as custodian of the Treaties, rather than from a position of narrow self-interest in the outcome of the main proceedings;
- The contributions of the written procedure and the oral hearing to ‘reckonability’ are also likely to be different. The preliminary reference procedure places more emphasis on the written procedure, with the oral hearing not being a compulsory part of the process. It is from the written observations of the parties and interested persons that the Judge-Rapporteur will summarise their arguments in the preliminary report. This summary may serve to narrow the issues to be concentrated upon at the oral hearing, if any. The oral hearing may also serve to narrow the lines of deciding if it is utilised effectively: this will depend on the extent to which the Court directs the hearing, and the extent to which the advocates can overcome linguistic and other obstacles presented by the hearing. The oral hearing may serve as a more effective opportunity for the advocates to confront the Court with legal authorities, and thereby remind it of its duty to adhere to the ‘legal steadying factors’, since, unlike the written procedure, it takes place in public. However, it may lose its impact due to the effluxion of time between the hearing and the Judges’ deliberations;
- Although sub-par advocacy may have an injurious effect on ‘reckonability’ in purely adversarial procedures due to the reliance

placed by a court on the information presented by the lawyers, the inquisitorial elements of the preliminary reference procedure, and the self-sufficiency of the Court of Justice, serve to reduce significantly any ill-effects of sub-standard argument. The Judge-Rapporteur, who like all of the Judges and Advocates General will be supported by three or four *référéndaires* and, if required, the Research and Documentation Division, will not consider himself or herself bound by the lines suggested by the written observations, and will research the legal issues raised independently and proactively;

- The Advocate General's Opinion, where delivered, may in itself promote 'reckonability' through the presentation to the Judges of a pre-prepared solution to the request for a ruling, which will serve as a starting point for the Court's deliberations. Moreover, the Opinion will set out the relevant 'legal doctrine', including the Court's previous case-law, which should control or guide the Court's ruling. The Opinion therefore has the potential to steady preliminary rulings by narrowing the Court's lines of deciding, and through the public reinforcement of the Judges' duty to adhere to the 'legal steadying factors' by an independent member of the Court at the very last stage of the oral procedure. By the same token, however, the Opinion may in fact widen the scope of the Court's considerations beyond those suggested by the arguments of the parties and interested persons (though they must still remain within the limits permitted by the Order for Reference), and the Court is ultimately not bound by the Opinion.

The paragraphs that follow discuss whether the Court of Justice (or its varying compositions) can be identified as a 'known bench', and if so, whether such identification is a 'steadying factor' in the preliminary reference procedure.

V. 'A Known Bench'

1. Llewellyn's Twelfth 'Steadying Factor': A 'Known Bench'

In his discussion of his twelfth 'steadying factor', Llewellyn argued that the "ore in the published opinion"³⁵² of the American appellate courts had predictive value that could be utilised by advocates to focus their argument.³⁵³ In particular, Llewellyn stated that a five-year, or even one-year, study of judicial opinions would reveal a court's "ways of looking at things, ways of sizing things up, ways of handling authorities, attitudes in one area of life conflict and another."³⁵⁴ Llewellyn opined that a bench will develop "a characteristic going tradition not only of ways of work but of outlook, and of working attitudes of one judge toward another."³⁵⁵ According to Llewellyn, incoming judges tend to adjust to the tradition of the bench, though the tradition may change over time, with this change tending to be evident from the court's published opinions.³⁵⁶ Moreover, Llewellyn stressed the importance of the individual published opinions of the judges that allow "particular study of the judges one by one..."³⁵⁷

However, Llewellyn acknowledged a number of aspects that tended to dilute, though not eliminate, the 'steadying effect' of the 'known bench'.³⁵⁸ First, there was the possibility that one or more of the judges might dominate decision, and "it may not be possible to know in advance which of the personnel will move into the driver's seat."³⁵⁹ Second, Llewellyn pointed to changing formations of a bench as a factor upsetting continuity:

"Some courts commonly sit in divisions whose personnel, tone, and tendencies are far from identical; some, like the Circuit Courts of Appeal, sit in benches not even permanent, but reshuffled continually.

³⁵² Llewellyn, K.N., *supra* n. 2, pp. 56-59.

³⁵³ Llewellyn, K.N., *supra* n. 2, pp. 34-35 and fn. 28.

³⁵⁴ Llewellyn, K.N., *supra* n. 2, p. 34.

³⁵⁵ Llewellyn, K.N., *supra* n. 2, p. 34.

³⁵⁶ Llewellyn, K.N., *supra* n. 2, pp. 34-35.

³⁵⁷ Llewellyn, K.N., *supra* n. 2, p. 35. Llewellyn acknowledges the dissenting opinion as "unusual ... among developed states": "I have talked with serious Continental lawyers who felt strongly that anything but a unanimous front would destroy public respect for either court or law..." (Llewellyn, K.N., *supra* n. 2, p. 35, fn. 26).

³⁵⁸ Llewellyn, K.N., *supra* n. 2, p. 35.

³⁵⁹ Llewellyn, K.N., *supra* n. 2, p. 35.

There are new arrivals on the bench, sometimes completely unknowable; at long intervals, a whole batch at a time.”³⁶⁰

Third, Llewellyn highlighted the short terms in judicial office in certain states, which tended to impact negatively on the ability of the bar to become familiar with individual judges.³⁶¹

The paragraphs that follow discuss Llewellyn’s twelfth ‘steading factor’ in the context of the preliminary reference procedure.

2. The Court of Justice or the Formation of the Court as a ‘Known Bench’

This ‘steading factor’, if it is to play a role in contributing to the ‘reckonability’ of references, will do so in a very different manner to the three previous ‘procedural extra-legal steading factors’. Whereas the previous factors related to the narrowing of the lines of decision and the reinforcement of the ‘legal steading factors’, whether by way of *constraint* or *influence*, this factor will contribute by acting as a ‘signpost’ for the lawyer to the Court’s likely lines of deciding.

There are again, however, some obvious issues, *prima facie*, with the application of this factor in the preliminary reference procedure context.

Firstly, there is the question of identifying what the ‘bench’ is in the context of the Court of Justice: is it the Court of Justice as a constituent court of the CJEU, or is it the particular formation of the Court that will rule on a particular preliminary reference? It would appear evident from Llewellyn’s discussion of his twelfth ‘steading factor’ that he envisages courts with fewer judicial personnel than the Court of Justice.³⁶² While the Court was once a singular

³⁶⁰ Llewellyn, K.N., *supra* n. 2, p. 35. Llewellyn develops this point later in the book: Llewellyn, K.N., *supra* n. 2, pp. 250-254.

³⁶¹ Llewellyn, K.N., *supra* n. 2, p. 35.

³⁶² This is unsurprising given that the number of US Supreme Court Justices is fixed at one Chief Justice and eight associate Justices by the Judiciary Act of 1869 (16 Stat. 44). The Supreme Court of the most populous state, California, contains seven judges: <http://www.courts.ca.gov/3014.htm> (last accessed at 10:40 on Tuesday, the 22nd March 2016). By way of comparison, the Supreme Court of the least populous state, Alaska, contains five judges: <http://www.courts.alaska.gov/ctinfo.htm> (last accessed at 10:41 on Tuesday, the 22nd March 2016). Federal and state courts of appeal do, however, tend to be more densely populated. The federal appellate courts, divided into thirteen circuits, contain an average of just

chamber amenable to such a study, the Court's current size with its twenty-eight Judges, divided into ten chambers³⁶³, may make it a difficult, if not impossible, task to gain predictive knowledge of its work generally.³⁶⁴

Secondly, Llewellyn's advancement of this 'steadying factor' is dependent completely upon the reading of previously published judicial opinions. A few key points of difference between the common law tradition and the Court's practice come into focus here. First, while a common law judicial opinion may be more revealing of the deliberative process undertaken by its author, and even have the potential to reveal much of its author's personality, the Court's judgments tend to be relatively brief, formal, impersonal and deductive statements of grounds upon which the decision is based.³⁶⁵ There may be, therefore, little in the judgment that reveals the Court's "ways of looking at things, ways of sizing things up, ways of handling authorities, attitudes in one area of life conflict and another."³⁶⁶ Second, Llewellyn's discussion places great emphasis on the availability of individual and dissenting opinions to the lawyer in his/her study of a court. However, the Court of Justice, which always makes its rulings with at least three Judges participating, delivers a collegiate ruling, with deliberations made in secret.³⁶⁷ There should be, therefore, little or

under fourteen judges per circuit: the largest court is the ninth circuit which has twenty-nine judges; the smallest being the first circuit with six judges (the number of judges in each circuit is fixed by Title 28 (Judiciary and Judicial Procedure) of the Code of Laws of the United States of America, §44). Similarly, the Courts of Appeal of California are divided into six districts, the largest being the 2nd District which consists of thirty-two judges, divided into eight divisions of four; the smallest being the sixth division, which contains seven judges: http://www.courts.ca.gov/courts_of_appeal.htm (last accessed at 10:43 on Tuesday, the 22nd March 2016).

³⁶³ http://curia.europa.eu/jcms/jcms/Jo2_7029/ (last accessed at 10:44 on Tuesday, the 22nd March 2016). See also, Article 16 of the Statute and Articles 11 and 27-31 RP.

³⁶⁴ This problem may be even greater in the context of the Court of Justice due to the small number of lawyers who appear before the Court on such a regular basis. It is, therefore, unlikely that many lawyers would take the trouble of reading Court judgments in the indiscriminate and generalised manner suggested by Llewellyn. Llewellyn's methodology for judgment-reading, which would appear rather onerous for the time-pressed practitioner, is explained at: Llewellyn, K.N., *supra* n. 2, p. 158.

³⁶⁵ See Schiemann, K., "From Common Law Judge to European Judge", (2005) 13 *Zeitschrift für Europarechtliche Studien* 741, at 745-748 (cited by Lenaerts, K., *supra* n. 70, at 1303-1304).

³⁶⁶ *Supra* n. 354.

³⁶⁷ Article 35 of the Statute; Article 32 RP. See also the wording of the Oath in Article 4 RP. Article 32(2) RP provide that only the Judges who participated at the hearing can take part in the deliberations, i.e. the Advocate General, *référéndaires* and other staff at the Court (including interpreters) are excluded. The provision does allow for an Assistant Rapporteur to be present, but thus far none have been appointed (see Article 13 of the Statute and Article 17 RP: Wägenbaur, B., *supra* n. 26, p. 29). While Judgments and reasoned opinions must contain a list of the names of Judges who participated in the deliberations (Article 36 of the Statute and

any scope for a lawyer to learn “the working attitudes of one judge toward another”³⁶⁸ or to engage in “particular studies of the judges one by one...”³⁶⁹

Thirdly, there is an aspect of the procedure of decision-preparation that Llewellyn does not refer to: the role played by law clerks, in the US context, and *référéndaires*. While it should not be suggested that they are proxy decision-makers, these behind-the-scenes actors will nevertheless have an influence on the workings and style of the published decision, which may be difficult to separate from those of the Judges whose names appear on the Judgment.³⁷⁰ This is especially pertinent in the case of the Court of Justice where it will be a *référéndaire* in the Judge-Rapporteur’s *cabinet* who will be tasked with the actual drafting of the judgment.

One must also acknowledge Llewellyn’s *per contra* arguments, which may apply *a fortiori* in the Court of Justice context.

Firstly, Llewellyn’s observation regarding the influence of strong personalities on the eventual outcome is also especially significant in the Court of Justice³⁷¹, because the contribution of individual Judges in persuading the majority of the Court to adopt the eventual decision will not be evident on the face of the

Articles 87 and 89 RP), no indication of whether they concur with the ruling is made. For a brief account of the advantages and disadvantages of the Court’s collegiate Judgments, see Wägenbaur, B., *supra* n. 26, p. 235. See also, Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 22, fn. 62; Azizi, J., “Unveiling the EU Courts’ Internal Decision-making Process: A Case for Dissenting Opinions?”, (2010) ERA-Forum 49; Arnull, A., *supra* n. 24, pp. 10-12; Slynn, G., *Introducing a European Legal Order* (London: Sweet & Maxwell, 1992), p. 160; Weiler, J.H.H., “Epilogue: The Judicial *Après Nice*” in de Búrca, G. and Weiler, J.H.H., *The European Court of Justice* (Oxford: Oxford University Press, 2001), p. 215, at 225; Edward, D., *supra* n. 205, at 557-558; Forrester, I.S., *supra* n. 284, at 703-705; Besson, S., “From European Integration to European Integrity: Should European Law Speak with Just One Voice?”, (2004) 10(3) *European Law Journal* 257. In contrast to the Court of Justice, dissenting opinions are permitted at the ECtHR, as to which see: White, R.C.A. and Boussiakou, I., “Separate Opinions in the European Court of Human Rights”, (2009) 9 *Human Rights Law Review* 37. For discussions on the merits and effects of dissenting opinions more generally, see Alder, J., “Dissents in Courts of Last Resort: Tragic Choices?”, (2000) 20(2) *Oxford Journal of Legal Studies* 221; Munday, R., “‘All for One and One for All’: the Rise to Prominence of the Composite Judgment within the Civil Division of the Court of Appeal”, (2002) 61(2) *Cambridge Law Journal* 321; Ginsburg, R.B., “Remarks on Writing Separately”, (1990) 65 *Washington Law Review* 133.

³⁶⁸ *Supra* n. 355.

³⁶⁹ *Supra* n. 357.

³⁷⁰ Article 87 RP provides that the names of the President and of the Judges that took part in the deliberations must be contained in the Judgment. Article 89 RP provides the same in respect of reasoned orders.

³⁷¹ Vaughan and Gray have acknowledged this phenomenon in the context of the Court of Justice: Vaughan, D. and Gray, M., *supra* n. 205, p. 55.

written record of that decision due to the lack of individual opinions and the aforementioned deductive formality of rulings.³⁷²

Secondly, Llewellyn's comments about the dilution of 'reckonability' where courts sit in divisions have a particular resonance in the Court of Justice context. As aforementioned, the Court currently possesses ten chambers: the first chamber consisting of six judges, the second to sixth chambers consisting of five, and the seventh to tenth of four.³⁷³ These chambers may sit in formations of three or five Judges.³⁷⁴ In addition, the Court may sit as a full Court of twenty-eight Judges³⁷⁵ or as a Grand Chamber of fifteen Judges.³⁷⁶ Although the President will designate one of the Judges to act as Judge-Rapporteur to the reference soon after its receipt by the Court³⁷⁷, which will effectively decide the chamber to which the case will be assigned³⁷⁸, the parties and interested persons will not find out the identity of the chamber until they are in receipt of the letter notifying them of the oral hearing, which may only be a few weeks prior to the hearing.³⁷⁹ Although there is some scope for interested persons to influence the question of whether the case is ruled upon by a Grand Chamber or a chamber of three or five Judges³⁸⁰, the parties and interested persons should be unable to divine the likely panel of Judges since, *de jure*, cases are not to be assigned on the basis of any perceived specialisms within the chambers. In the event that the Court decides to dispense with the oral part of the procedure, the parties and interested persons will have made all of their arguments without any knowledge of the identity of the Judges to whom they were addressed.³⁸¹ Moreover, even were a lawyer able to acquire knowledge of the manner in which a given chamber works, the benefit of such knowledge could be upset by a number of factors: first, there is the frequency

³⁷² Brown, L.N. and Kennedy, T., *supra* n. 205, pp. 56-57; Arnall, A., *supra* n. 24, pp. 12-14.

³⁷³ *Supra* n. 363.

³⁷⁴ Article 16(1) of the Statute.

³⁷⁵ Article 251 TFEU; Article 16(4) and Article 16(5) of the Statute; Article 60(2) RP.

³⁷⁶ Article 251 TFEU; Article 16(2) of the Statute.

³⁷⁷ Article 15(1) RP.

³⁷⁸ Wägenbaur, B., *supra* n. 26, p. 218.

³⁷⁹ Broberg, M. and Fenger, N., *supra* n. 22, p. 387.

³⁸⁰ Article 16(3) of the Statute provides that the Court must sit in a Grand Chamber where a Member State or institution of the Union that is a party to the proceedings requests that it do so. Though the use of the word 'party' in this provision is unfortunate, the provision does apply to preliminary references. See also, Article 60(1) RP.

³⁸¹ Llewellyn acknowledges this as a problem, decrying the lack of a "concrete target" for the advocate as provided at the oral hearing, and provides some advice for the lawyer who finds himself or herself in this position: Llewellyn, K.N., *supra* n. 2, p. 250-254.

with which the chambers are re-organised. Second, there is no requirement that each member of a given chamber be involved in each case assigned to that chamber or participate in each deliberation, as long as the requisite quorum is reached.³⁸² Third, the Statute and Rules of Procedure provide for Judges from other chambers to fill in where a Judge becomes unavailable.³⁸³

Thirdly, Llewellyn's concern about the negative impact of judges' short terms in office on the ability of lawyers to accustom themselves to the workings of a court is of heightened substance in the context of the Court. The renewable six-year term in office³⁸⁴ and the replacement or re-appointment of half of the Court every three years³⁸⁵, allied with the frequent re-organisation of its chambers³⁸⁶, must serve to disorientate any lawyer attempting to gain an appreciation of the workings of the Court or any of its chambers.³⁸⁷

Notwithstanding the obvious issues with applying Llewellyn's twelfth 'steadying factor' to the Court, there may, for a number of reasons, be some scope for the Court's case-law and practice to be utilised by the lawyer as an, albeit limited, predictive 'signpost'.

Firstly, while it may be difficult to gain an understanding of the workings of the individual Judges, or even its discrete chambers, that is not to say that the Court as a constituent of the CJEU has not developed readily identifiable traditions, ways of working, and methods of interpretation driven by clear principles underpinning EU 'legal doctrine'. These traditions and modes of work have resulted in a relatively consistent and enduring approach by the

³⁸² Decisions of a chamber of three or five Judges must be taken by three Judges (Article 17(2) of the Statute). Decisions of the Grand Chamber must be taken by eleven Judges (Article 17(3) of the Statute), and decisions of the full Court by seventeen Judges (Article 17(4) of the Statute). The composition of the Grand Chamber is governed by Article 27 RP.

³⁸³ Article 17(5) of the Statute; Article 31 RP. However, Article 31 when read in conjunction with Articles 27 and 28 RP allows one to identify the Judge in line to replace any unavailable Judge.

³⁸⁴ Article 20(2) TEU and Article 253 TFEU.

³⁸⁵ Article 9(1) of the Statute.

³⁸⁶ Article 16(1) of the Statute and Article 28 RP provide that the Presidents of the Chambers of five Judges are elected for three years and may be re-elected once. Article 16 of the Statute and Article 12(1) RP provide that the Chambers of three Judges are elected for a term of one year. See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 20.

³⁸⁷ For a study on the impact of changes in personnel on court behaviour in the context of American appellate courts, see Kaheny, E.B., Haire, S.B. and Benesh, S.C., "Change over Tenure: Voting, Variance, and Decision Making on the U.S. Courts of Appeals", (2008) 52(3) *American Journal of Political Science* 490.

Court.³⁸⁸ The development and maintenance of these traditions despite the threat of fragmentation caused by the division of the CJEU into constituent courts, and the further division of the Court of Justice into chambers, may be attributed to a number of factors. First, the relatively small size of the first Court, together with the relative congruence of the legal-cultural traditions of the original Member States, a factor that was strengthened by the legal cross-cultural backgrounds of the Court's members, allied to their integrationist zeal³⁸⁹, assisted in creating a synthesised judicial method. Second, as new Judges joined the Court, they entered a collegiate institution with group decision and secrecy of deliberation, where individual idiosyncrasies could make limited impact. Moreover, they entered a Court with pre-existing traditions and ways of working: in particular, a specific method of deciding and justifying decision. Judges newly arrived had to adapt to those traditions and practices.³⁹⁰ Third, the replacement of the personnel at the Court tended to take place in a staggered manner, which served to ensure this continuity.³⁹¹ Fourth, and perhaps most important of all, has been the role played by the Advocate General in ensuring the consistency of the case-law of the CJEU across its constituent courts and across the various chambers of the Court of Justice. Even more overlooked in this regard has been the role of the *référéndaires* who assist the Judges and Advocates General. Although a Judge may select their own *référéndaires*, Judges will often inherit one or more *référéndaires* from a predecessor. These *référéndaires* may play an invaluable role in assisting such a Judge in learning and adapting to judicial practice at the Court. By convention, at least one *référéndaire* in each *cabinet* will have a Francophone

³⁸⁸ There is nascent research which implies that some fragmentation may be occurring: Malecki in an empirical study argues that there is evidence of divergent preferences from different chambers of the Court: Malecki, M., "Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers", (2012) 19(1) *Journal of European Public Policy* 59. However, in this author's view, the study is based on too many suppositions to support its conclusions: it relies upon the left-right political divide to impute Europhilic or Eurosceptic views upon Judges based on the identity of the political party or parties in government that nominated them. It also fails to take account of 'law conditioning' or the normative character of 'legal doctrine'. The threat of a larger court to the consistency of the case-law of the Court of Justice has always concerned the Court: "Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union", *Weekly Bulletin on the Activities of the Court and the Court of First Instance*, No. 15/95, at 18 (see Kapteyn, P.J.G., "Reflections of the Future of the Judicial System of the European Union after Nice", (2001) 20(1) *Yearbook of European Law* 173, at 186).

³⁸⁹ Underpinned, of course, by integrationist 'legal doctrine': namely, the founding Treaties.

³⁹⁰ Llewellyn's arguments on the 'steadying effect' of 'group decision' (discussed in the context of the preliminary reference procedure, *infra* n. 451-n. 478) and 'professional judicial office' are relevant in this regard (Llewellyn, K.N., *supra* n. 2, pp. 31-32 and pp. 45-50).

³⁹¹ Wägenbaur, B., *supra* n. 26, p. 25.

legal background. Given the influence of French legal method and writing on the development of the Court's tradition, this ensures a level of continuity of practice and writing style across the Court, irrespective of the national or legal-cultural background of the Judges whose names appear on the ruling.

Secondly, the role played by the Advocate General, where relevant, may contribute to the lawyer's ability to develop an understanding of the Court's approach based on its past work. Although it has been acknowledged that it is difficult to ascertain the level of influence that the Opinions of the Advocates General exercise upon the Court's eventual judgments, it is also understood that the level of influence is significant.³⁹² It has also been suggested that the more discursive and less formal Opinions may also provide valuable insight into the issues that concerned the Court and motivated its Judgment.³⁹³ The Opinion, where available, may therefore be read in tandem with the Judgment to supplement an incomplete picture. Nevertheless, such an approach is not without its difficulties since it will not always be evident from the face of the Judgment whether the Court adopted a conclusion of the Advocate General for the same reasons or for its own uncommunicated reasons.³⁹⁴

Thirdly, though there are evidently obstacles to knowing the workings of the individual Judges of a formation of the Court, there may be roundabout, if not entirely reliable, ways of identifying actors that may exert significant influence on the eventual outcome, and dedicating energy to enlisting them to the advocate's side through oral argument. First, one may assume that the Judge-Rapporteur, being the Judge who in the normal course will have looked most closely at the case and the submissions of the parties and interested persons, will exert a significant influence on the direction of the outcome.³⁹⁵ However,

³⁹² *Supra* n. 311-n. 312.

³⁹³ Anderson, D.W.K. and Demetriou, M., *supra* n. 25, pp. 234-235; Brown, L.N. and Kennedy, T., *supra* n. 205, p. 55.

³⁹⁴ *Supra* n. 311-n. 312.

³⁹⁵ Beck, G., *supra* n. 19, pp. 432-433. Frankenreiter has presented empirical evidence of a correlation between the political preferences he attributes to Judges-Rapporteur and their behaviour in citing case-law, which would tend to suggest that the Judge-Rapporteur does exert significant influence on the written justification of the decision at least (Frankenreiter, J., "The Politics of Citations at the ECJ: Policy preferences of EU Member State governments and the citation behavior of members of the European Court of Justice", Working paper, ETH Zurich, Center for Law and Economics, 11th May 2016). Justice of the US Supreme Court, Ruth Bader Ginsburg has also asserted the importance of the influence of reporting judges in civil law countries, stating that "[i]n most cases, as one might expect, the reporter's recommendation

this may not always be a safe assumption to make since other members of the formation could override the Judge-Rapporteur³⁹⁶, and in any case, the Judge-Rapporteur's previous work and preferences, unless he/she served previously as an Advocate General, will be buried within the Court's relatively unilluminating collegiate Judgments.³⁹⁷ Overconcentration on winning over one member of a judicial panel is not only inherently risky, because of dangerous assumptions about the dynamics of the group that may be unknowable³⁹⁸; it also runs the risk of alienating those not so courted. Second, the lawyer to improve his/her chances of success could also use the widely acknowledged influence of the Advocates General on the Court's jurisprudence. Since there are a maximum of eleven Advocates General and they tend to write in a more reasoned and freer style than the Court³⁹⁹, there is scope for the lawyer to acquire knowledge of the methods and preferences of individual Advocates General.⁴⁰⁰ There is, therefore, the possibility of oral arguments being tailored with a specific Advocate General in mind, since the

carries the day." (Ginsburg, R.B., *supra* n. 367, at 137, citing Kommers, D.P., *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* (Beverly Hills: Sage Publications, 1976), p. 52). Similarly, Llewellyn acknowledges the variable influence that may be wielded by a reporting judge in the context of American appellate courts: Llewellyn, K.N., *supra* n. 2, p. 251. For studies of individual judges leading the court in the context of the US Supreme Court, see Schwartz, B., *Decision: How the Supreme Court Decides Cases* (New York: Oxford University Press, 1996), pp. 155-177.

³⁹⁶ Vaughan, D. and Gray, M., *supra* n. 205, p. 55; Llewellyn, K.N., *supra* n. 2, pp. 251-252. It should also be noted that Article 32(3) RP requires that "[e]very Judge taking part in the deliberations shall state his opinion and the reasons for it." Anderson and Demetriou suggest that in cases of difficulty a roundtable discussion will be held to gauge the views of the formation so that the Judge-Rapporteur can draft a Judgment based on the mood of the Judges (Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 307). See also, Edward, D., *supra* n. 205, pp. 555-557; Lasok, K.P.E., *supra* n. 87, p. 489-493.

³⁹⁷ The Judgments of the Court of Justice, however, do identify the Judge that acted as Judge-Rapporteur in each case (Articles 87 and 89 RP require as much for Judgments and reasoned orders respectively) (see also, Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 233). The thought occurs that if the lawyer appearing before the Court of Justice is to have any knowledge of the likely preferences of an individual Judge, such awareness is more likely to be gleaned from the Judge's questions and general demeanour in the Court. In addition, the Judge's background or previous career may help, particularly if the Judge has a judicial background. However, the former awareness is not likely to be acquired by those not practising habitually before the Court, and the latter is unlikely to be acquired by those who are not from the Judge's Member State without further inquiry. There is, of course, the risk that any impressions gained thusly may simply be unfounded prejudices in any case.

³⁹⁸ In Llewellyn's words, "it may not be possible to know in advance which of the personnel will move into the driver's seat." (*Supra* n. 359).

³⁹⁹ Brown, L.N. and Kennedy, T., *supra* n. 205, p. 67.

⁴⁰⁰ This is demonstrated empirically by Frankenreiter, who has traced a connection between the political background which he attributes to an individual Advocate General and the voting behaviour of that Advocate General: Frankenreiter, J., Frankenreiter, J., "Are Advocates General Political? Policy preferences of EU member state governments and the voting behavior of members of the European Court of Justice", Working paper, ETH Zurich, Center for Law and Economics, 11th May 2016.

perception might be that the lawyer may ‘piggy back’ on the Advocate General’s influence with the Court. However, the taking of such an approach might be to overestimate the influence of the Advocate General and might, as with argument focussed on winning over the Judge-Rapporteur, be taken at the risk of alienating a significant portion of the actual decision-maker: the formation of the Court. Third, there is emerging very detailed empirical academic work, which would seem to be able to identify the relative importance of the work of individual Judges.⁴⁰¹

Fourthly, notwithstanding the Court’s avowed position of allocating cases to the chambers on the basis of workload with the aim of not allowing specialisations to occur⁴⁰², there is some evidence that references that relate to certain subject areas have been allocated to Advocates General⁴⁰³ and chambers of the Court⁴⁰⁴ in a manner that might suggest the allocation was

⁴⁰¹ Kalbheim, J., “The Influence of the Members of the European Court of Justice on its Jurisprudence: An Empirical-Statistical Analysis”, unpublished paper presented at the Annual Society of Legal Scholars Conference at the University of Nottingham, Friday, the 12th September, 2014); Malecki, M., “Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers”, (2012) 19(1) *Journal of European Public Policy* 59; Frankenreiter, J., “The Politics of Citations at the ECJ: Policy preferences of EU Member State governments and the citation behavior of members of the European Court of Justice”, *supra* n. 395.

⁴⁰² Brown, L.N. and Kennedy, T., *supra* n. 205, p. 65; Mortelmans, K.J.M., *supra* n. 310, at 132.

⁴⁰³ See Burrows and Greave’s study of Advocate General Jacob’s influence on the Court’s trade mark case-law. The authors conclude that such cases may have been allocated to Advocate General Jacobs on the basis of his expertise in the area (Burrows, N. and Greaves, R., *supra* n. 205, p. 157).

⁴⁰⁴ An examination of the personnel involved in the series of preliminary rulings concerning the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation insofar as it relates to age discrimination creates also the impression that Advocates General and Judges-Rapporteur, and by extension chambers, are chosen on the basis of expertise or prior experience. As of the 24th August 2015, the Court had issued twenty-six such Judgments, all but one of which were preliminary references: Case C-144/04 *Mangold v Helm* [2005] ECR I-9981; Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-7245; Case C-388/07 *Age Concern England* [2009] ECR I-1569; Case C-555/07 *Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365; Case C-88/08 *Hütter v Technische Universität Graz* [2009] ECR I-5325; C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] ECR I-1; Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47; Case 499/08 *Ingeniørforeningen i Danmark v Region Syddanmark* [2010] ECR I-9343; Case C-45/09 *Rosenblatt v Oellerking Gebäudereinigungsgesellschaft mbH* [2010] ECR I-9391; Joined Cases C-268/09, C-250/09, C-268/09 *Georgiev v Tehniceski universitet - Sofia, filial Plovdiv* [2010] ECR I-11869; Case C-447/09 *Prigge, Fromm and Lambach v Deutsche Lufthansa AG* [2011] ECR I-8003; Joined cases C-159/10 and C-160/10 *Fuchs and Köhler v Land Hessen* [2011] ECR I-6919; Joined cases C-297/10 and C-298/10 *Hennigs v Eisenbahn-Bundesamt and Land Berlin v Mai* [2011] ECR I-7965; C-246/09 *Bulicke v Deutsche Büro Service GmbH* [2010] ECR I-7003; Case C-141/11 *Hörnfeldt v Posten Meddelande AB* [2012] IRLR 785; Case 132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat*

based on those actors having previously delivered Opinions and made rulings respectively in those areas.⁴⁰⁵ This *de facto* practice may contribute to ‘reckonability’ in two ways. First, it may allow a lawyer, assuming that the question for ruling can be categorised easily, to predict the identity of the Advocate General and chamber that may be assigned to the case at any earlier point in the proceedings, perhaps before the submission of written observations. Predicating argument based on such assumptions, however, would run into many of the difficulties identified previously. Second, in such circumstances, the advocate may have a bank of previously decided cases to rely upon to predict the outcome. However, if the request for ruling is so easily categorised, it may well be that the Court will choose to dispose of it by way of reasoned order without the need for any argument, written or oral, from the parties or interested persons.⁴⁰⁶

Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH [2012] IRLR 781; Case C-476/11 *HK Danmark v Experian A/S* [2014] 1 CMLR 42; Case C-546/11 *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet* [2013] WLR (D) 360; Case C-286/12 *Commission v Hungary* [2013] 1 CMLR 44; Joined cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht and Others v Germany*; Case C-416/13 *Vital Pérez v Ayuntamiento de Oviedo* [2015] IRLR 158; Case C-530/13 *Schmitzer v Bundesministerin für Inneres* [2015] IRLR 331; Case C-417/13 *ÖBB Personenverkehr AG v Starjakob* [2015] not published in the *European Court Reports*; Case C-515/13 *Ingeniørforeningen i Danmark v Tekniq* [2015] not published in the *European Court Reports*; Case C-262/14 *Sindicatul Cadrelor Militare Disponibilizate în rezervă și în retragere (SCMD) v Ministerul Finanțelor Publice* [2015] not published in the *European Court Reports*. A total of eight Advocates General have been involved in these cases, but Advocate General Bot appears to be the ‘go-to’ Advocate General, delivering Opinions in thirteen of the twenty-six cases. In terms of designation of cases to Judges to act as Rapporteur, an even clearer pattern emerges: prior to her leaving the Court of Justice in 2011, Judge Lindh was generally designated these cases, clocking up twelve of the first fourteen. Her mantle was passed to her colleague on the second chamber at the time, Judge Arabadjiev, who since 2012 has acted as Judge-Rapporteur in eight of the twelve cases. Designation to the chambers has of necessity followed the identity of the Advocate General with the second chamber, containing both Judge Lindh and latterly Judge Arabadjiev ruling on eleven of the cases. One might therefore have grounds to imagine that if such a case arises again in the near future, there is a good chance that Advocate General Bot will act as Advocate General, Judge Arabadjiev as Judge-Rapporteur, and that the case will be decided by either the first or sixth chambers (the chambers of which Judge Arabadjiev is a member as of the 22nd March 2016). One can never be sure, however. See also Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 236 on patterns in the designation of the milk quota cases in the early 1990s.

⁴⁰⁵ Frankenreiter suggests that the Court’s system of case assignment has been used by the majority of the Court’s Judges to reduce the influence of Judges with preferences contrary to those of the majority: Frankenreiter, J., “Informal Judicial Hierarchies: Case assignment and chamber composition at the European Court of Justice”, Working paper, ETH Zurich, Center for Law and Economics, 11th May 2016.

⁴⁰⁶ Article 99 RP. *Supra* n. 209.

3. Conclusion

The conclusion to be drawn from the foregoing discussion of Llewellyn's twelfth 'steadying factor' in the context of the preliminary reference procedure may be seen as an apparent oxymoron: while Llewellyn's characterisation of American appellate court benches as 'known benches' owed itself largely to the ability of American lawyers to gain knowledge of the workings of individual judges and how they relate to one another, in the context of the Court of Justice, it may be that it is the stifling of such individuality that contributes most to 'reconability'. However, in the context of this dissertation, such a conclusion is not a contradiction: one of the ways in which the 'steadying factors' operate individually and collectively to promote 'reconability' is through the reduction in influence of the vagaries of individual idiosyncrasies and preferences on outcomes. However, beyond a very general knowledge of how the Court of Justice approaches interpretative problems and utilises 'legal doctrine', there is little opportunity for a lawyer in a prospective preliminary reference to tailor arguments to appeal to preferences of specific members of the Court. Therefore, while the Court is a 'known bench' in a very wide sense, this fact does not contribute much beyond a trite observation that lawyers should pay attention to the Court's previous decisions in terms of what they may tell us about its working methods, what the relevant law is, and how these decisions might guide us as to the Court's probable substantive solutions in prospective cases. This conclusion is based on the following sub-conclusions:

- There are many obstacles that prevent a lawyer acquiring knowledge of the Court's working and interpretative methods, and more specifically its Judges, through study of its decisions: the Court is divided into ten chambers; turnover of personnel in these chambers can upset continuity of approach; its Judgments and reasoned opinions tend to be terse, formalistic and deductive, and therefore unrevealing; the Court's collegiate Judgments render the extent of the influence of individual Judges and *référéndaires* on decisions largely unknowable;

- Moreover, such knowledge, even where it may be acquired, will be of limited assistance to the lawyer arguing in a prospective preliminary reference as he/she will not find out the identity of the formation of the Court, the Judge-Rapporteur or the Advocate General until shortly before the oral hearing;
- There may be some ‘signposts’ for the lawyers as to the identity of the formation of the Court, the Judge-Rapporteur and the Advocate General prior to notification of same, as there is some evidence that, despite assurances to the contrary, cases are assigned to Advocates General and Judges-Rapporteur, and by extension chambers, on the basis of expertise and prior experience. Reliance on such patterns, however, is not without risk;
- Where the Advocate General in a prospective reference is identifiable, it may be possible to utilise this fact to improve ‘reconability’. Past Opinions, which generally are far more revealing of preferences and working methods, may be used to tailor argument to appeal to the individual Advocate General. Such an approach may be viewed as wise given the obvious influence of the Advocates General on the Court. However, such an approach, if adopted at the oral hearing, will carry the significant risk of alienating the judicial personnel who are in no way bound by the Opinion;
- Where the Judge-Rapporteur in a prospective reference is identifiable, it could conceivably be possible to employ this knowledge to promote ‘reconability’. However, the study of past Judgments where the individual Judge acted as Rapporteur may not provide a reliable ‘signpost’ to that Judge’s methods and preferences since there is no way of knowing from the Court’s collegiate Judgment the extent of the Rapporteur’s influence in the individual case;
- While the individual preferences and methods of the Court’s members may be largely unknowable, and incapable of reliable utilisation where they are glimpsed, it may well be the elements of the Court’s practice

and procedure that stifle their appearance and influence that contribute the most to the consistency of the Court's approach, and therefore 'reckonability' of its decisions. The discussion of Llewellyn's tenth 'steadying factor', 'group decision', develops this sub-conclusion further in the context of the Court.

The section that follows discusses the application of two of Llewellyn's 'steadying factors', 'an opinion of the court', and 'group decision', in the context of the deliberation and decision stage of preliminary references.

C. Deliberations and Decision

I. Introduction

The previous section examined the relevance of four of Llewellyn's 'steadying factors' in the context of preliminary references. That examination focussed on the procedure before the referring court or tribunal, and the written and oral parts of the procedure before the Court of Justice. This section concerns the stage in proceedings following the close of the procedure before the Court: the deliberation and decision stage. In this section, the final two of Llewellyn's 'steadying factors' that have been categorised as 'procedural extra-legal steadying factors' are applied: first, the requirement that a court follow up its decision with a published opinion (Llewellyn's sixth 'steadying factor'); and second, the use of 'group decision' (Llewellyn's tenth 'steadying factor'). These factors are discussed in turn.

II. 'An Opinion of the Court'

1. Llewellyn's Sixth 'Steadying Factor': 'An Opinion of the Court'

Under the heading of his sixth 'steadying factor', Llewellyn argued that the "felt pressure or even compulsion"⁴⁰⁷ to follow up the decision with a published opinion promoted 'reckonability' in three ways. Firstly, it would

⁴⁰⁷ Llewellyn, K.N., *supra* n. 2, p. 26.

appear that Llewellyn was suggesting that the need to publish a written opinion necessitated a reasoned justification of the court's decision, which in turn acted as a constraint as it closed off certain avenues of deciding, in particular, those that did not accord with the 'legal steadying factors'.⁴⁰⁸ Secondly, Llewellyn suggested that the forward-looking function of the opinion, that is, its role in providing guidance as a precedent in future cases, while remaining consistent with the case-law that had gone before it, created a level of consistency in the common law.⁴⁰⁹ The need for the court to contemplate carefully the effect of the decision in the future beyond the immediate case at bar also encouraged a greater degree of caution in decision, and necessarily narrowed the lines of deciding in the immediate case.⁴¹⁰ Implicit in this reasoning also is the availability of past decisions to the lawyer to assist prediction of the future direction of a court.⁴¹¹ Thirdly, foreshadowing his argument on his tenth 'steadying factor', 'group decision', Llewellyn argued that the effort to create agreement among the members of the bench resulted in a "process of consultation and vote"⁴¹², which went "some distance to smooth the

⁴⁰⁸ "The deciding is, in the main, done under felt pressure or even compulsion to follow up with a published 'opinion' which tells any interested person what the cause is and why the decision – under the authorities – is rights, and perhaps why it is wise." (Llewellyn, K.N., *supra* n. 2, p. 26).

⁴⁰⁹ "In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the case at hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the result which otherwise seems good)... [The opinion's] preparation affords not only back-check and cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of effects ahead." (Llewellyn, K.N., *supra* n. 2, p. 26).

⁴¹⁰ "If I cannot give a reason I should be willing to stand to, I must shrink from the result which otherwise seems good." (*Supra* n. 409).

⁴¹¹ "[The opinion's] preparation affords not only back-check and cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of effects ahead." (*supra* n. 409). However, Llewellyn, as realist and sceptic, also acknowledged that the opinion might not be an accurate reflection of the real motivations behind the decision. Nevertheless, he warned that any attempt "to reach for signs and actual motivation of process by watching say tone of language or manner of stress and arrangement or the like is surely, urges the skeptic, to do blind amateur pseudo-psychoanalytical guesswork on data that is so intangible and scanty as to make a professional lose his lunch." Llewellyn describes such guesswork as "lightheaded and unwarranted when it is practiced by jejune or jaundiced jibbers at the courts." Rather, opinions should be read, in the traditional manner, as "an official authoritative light not on the birth-pangs of the decision, but on ... what, on the relevant point is the prevailing state of correct legal doctrine." (Llewellyn, K.N., *supra* n. 2, p. 56). However, Llewellyn is not suggesting a regression to a purely formalistic understanding of judicial decisions: he maintains that lawyers can predict a court where they supplement this approach by reading opinions "for the 'flavor' that could indicate how far that court, tomorrow would stand to today's decision or would expand it." This involves realist-style study of the context of the past opinion, of the decision-makers and the current context. (Llewellyn, K.N., *supra* n. 2, pp. 57-58).

⁴¹² Llewellyn, K.N., *supra* n. 2, p. 26.

unevenness of individual temper and training into a moving average more predictable than the decisions of diverse judges.”⁴¹³ Conversely, Llewellyn recognised the ‘steadying effect’ of dissent or its possibility: in situations where a member suspected that a court was threatening to breach its duty of adherence to the ‘legal steadying factors’, or the “law of leeways”⁴¹⁴, that member could through the threat of a public dissent, help “to keep constant the due observance of that law.”⁴¹⁵

However, Llewellyn also acknowledged two arguments *per contra* the ‘steadying effect’ of the opinion.⁴¹⁶ Firstly, he opined that the pressure to adhere to the ‘law of leeways’ did not eliminate completely the utilisation of dishonest practices by a court to dampen the ‘steadying effect’ of the opinion: in particular, he related the danger of courts obscuring “from any but the few experts in a field the doctrinal novelty of a decision...”⁴¹⁷, the ignoring of controlling doctrine, the misrepresentation of existing doctrine, as well as the twisting of vital facts in the record.⁴¹⁸ Nevertheless, Llewellyn viewed such dishonesty as very rare owing to the judges’ felt need to do justice.⁴¹⁹

⁴¹³ Llewellyn, K.N., *supra* n. 2, p. 26. See also, Beck, G., *supra* n. 19, p. 24.

⁴¹⁴ Llewellyn, K.N., *supra* n. 2, p. 26.

⁴¹⁵ Llewellyn, K.N., *supra* n. 2, p. 26. Llewellyn develops this argument further: “[T]he recognized possibility of a published dissent is as useful a measure to ensure against secret (and fitful) unconscionable action by a bench as ever has been devised. It has rarely been needed, but it is there for use, and ... its presence is as valuable as is the audit of an honest banker’s books.” (Llewellyn, K.N., *supra* n. 2, p. 27, fn. 19). Llewellyn also pointed to the utility of the dissent in calling attention to other misleading devices in the opinion such as the skewing of emphasis and weight on certain factors: Llewellyn, K.N., *supra* n. 2, p. 56.

⁴¹⁶ Llewellyn, K.N., *supra* n. 2, p. 27.

⁴¹⁷ Llewellyn, K.N., *supra* n. 2, p. 27.

⁴¹⁸ Llewellyn, K.N., *supra* n. 2, p. 27, fn. 18. Llewellyn also acknowledged that “only by happenstance will an opinion accurately report the process of deciding.” He continued: “If the opinion is a justification, may a ‘mere rationalization’ of a decision already reached, a justification intended ‘only’ for public consumption, its ‘light’ can be contrived delusion. Vital factors may go unmentioned; pseudo factors may be put forward; emphasis and weighing of factors may be hugely skewed; any statements of policy may be not for revelation but merely for consumption; the very alleged statement of ‘the facts’ may be only a lawyer’s argumentative arranged selection, omission, emphasis, distortion, all flavored to make the result tolerable or toothsome.” (Llewellyn, K.N., *supra* n. 2, p. 56). These observations accord with the differentiation made by Bengoetxea, MacCormick and Moral Soriano between the processes of ‘discovery’ (the rationale for the decision not evident on the record of the decision) and ‘justification’ (the recorded reasons for the decision) in the context of the Court of Justice: Bengoetxea, J., MacCormick, N. and Moral Soriano, L., “Integration and Integrity in the Legal Reasoning of the European Court of Justice” in de Búrca, G. and Weiler, J.H.H., *supra* n. 367, p. 43, pp. 48-50. See also, Bengoetxea, J., *The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon Press, 1993); Bengoetxea, J., *supra* n. 21, at 186. For a defence of the Court’s style, see Lenaerts, K., *supra* n. 70, at 1350-1369.

⁴¹⁹ Llewellyn, K.N., *supra* n. 2, p. 27. This is Llewellyn’s fourth ‘steadying factor’ (Llewellyn, K.N., *supra* n. 2, pp. 23-24). This factor, which is categorised as an ‘internalised extra-legal steadying factor’ in this dissertation, is not discussed in any detail due to that fact it is a mere

Secondly, Llewellyn perceived the use of terse written justifications of decisions (“memoranda or mere announcements of result”⁴²⁰) as a threat to the steadying effect of the “old-style full opinion.”⁴²¹

The paragraphs that follow discuss Llewellyn’s sixth ‘steadying factor’ in the preliminary reference procedure context.

2. The Requirement for Written Justification of the Rulings as ‘Steadying Factor’

As has been the case with many of Llewellyn’s ‘steadying factors’ in this dissertation, the application of this factor to the preliminary reference procedure runs, *prima facie*, into a number of obstacles.

Firstly, Llewellyn’s concerns about the value of the published opinion, given its *de facto* status as a “mere rationalization”⁴²² of the decision, may apply *a fortiori* to the Court of Justice. Several aspects may make study of Court decisions even more difficult in terms of the ‘discovery’⁴²³ process than is the case with common law opinions. First, there is the fact, discussed briefly under the heading of the previous ‘steadying factor’⁴²⁴, that the Court’s Judgments and reasoned orders, based as they are on French-style judicial pronouncements, are terse and deductive relative to the generally less formal, more discursive common law-style judgment.⁴²⁵ Like ‘memoranda or mere announcements of result’ that Llewellyn feared might dilute the ‘steadying’

assertion on the part of Llewellyn that is incapable of reasoned application to the Court of Justice. The Court’s ‘law-conditioned’ character, another ‘internal extra-legal steadying factor’, should ensure an internalised sense of duty to adhere to the ‘legal steadying factors’. This, however, as Llewellyn points out may not prevent dishonest use of the Judgment within the ‘legal steadying factors’.

⁴²⁰ Llewellyn, K.N., *supra* n. 2, p. 27.

⁴²¹ Llewellyn, K.N., *supra* n. 2, p. 27.

⁴²² Llewellyn, K.N., *supra* n. 2, p. 56 (*supra* n. 418).

⁴²³ Bengoetxea, J., MacCormick, N. and Moral Soriano, L., *supra* n. 418, pp. 48-50.

⁴²⁴ *Supra* n. 372.

⁴²⁵ The Court’s style has, however, become somewhat clearer over the years. Until 1979, the Court tended to write its judgments in the French-style of a single sentence through ‘attendus’ (consideration reasons). Arnall has suggested that the Court may have been pressured by the need to provide clearer rulings to national judges, as well as the accession of the common law countries which brought British and Irish Judges and lawyers to the Court. See Wägenbaur, B., *supra* n. 26, p. 313; Brown, L.N. and Kennedy, T., *supra* n. 205, p. 55; Arnall, A., *supra* n. 24, p. 622-625.

effect of the ‘old-style full opinion’⁴²⁶, the Court’s published rulings may reveal little about the considerations that led it to its publicly-avowed conclusions. Moreover, the pithy and declaratory style of the Court’s rulings may exacerbate the concern that the Court could obfuscate its treatment of ‘legal doctrine’ by, *inter alia*, ignoring or misusing existing controlling authority.⁴²⁷ It would seem rare in fact for the Court when departing from its previous case-law to acknowledge the fact, even if the authority in question was not, *stricto sensu*, controlling.⁴²⁸ This latter observation also brings into focus sharply the possible *sui generis* nature of Llewellyn’s sixth ‘steadying factor’: so much of Llewellyn’s emphasis on the ‘steadying effect’ of the published opinion is predicated on the controlling effect of existing precedent; however, the Court is not controlled by precedent to the extent a common law court is by the *stare decisis* concept.⁴²⁹ The use of Court of Justice Judgments and reasoned orders as reports of the current state of ‘legal doctrine’ that may ‘signpost’ future doctrinal development may, therefore, be more undependable. Second, the considerations that lead to the published conclusions may be obscured by another aspect of the Court’s procedure and practice that will not be operative in the American appellate courts: the compromise necessitated by collegiate decision.⁴³⁰

Secondly, Llewellyn’s emphasis on the ‘steadying effect’ of the dissenting opinion in pressuring a recalcitrant majority into adherence to the ‘legal

⁴²⁶ Llewellyn, K.N., *supra* n. 2, p. 27 (*supra* n. 421).

⁴²⁷ Llewellyn, K.N., *supra* n. 2, p. 27, fn. 18 (*supra* n. 418). Beck has provided numerous examples of the Court of Justice failing to cite previous case-law: Beck, G., *supra* n. 19, pp. 255-257.

⁴²⁸ Brown and Kennedy suggest that it is only on rare occasions that the Court will depart expressly from its own previous case-law: Brown, L.N. and Kennedy, T., *supra* n. 205, p. 369-372. See also, Arnall, A., “Owning up to Fallibility: Precedent and the Court of Justice”, (1993) 30 *Common Market Law Review* 247.

⁴²⁹ Brown, L.N. and Kennedy, T., *supra* n. 205, p. 369; Beck, G., *supra* n. 19, p. 238.

⁴³⁰ Judge Edward has summarised this phenomenon well: “A disadvantage of the collegiate approach is that the judgment may simply cloak an inability to reach a clear decision. A camel is said to be a horse designed by a committee, and some judgments of the Court of Justice are camels.” (Edward, D., *supra* n. 205, at 557). Former Advocate General and Judge of the Court of Justice, and latterly Lord Slynn has suggested that the introduction of dissenting opinions might improve the clarity of the Court’s judgments (Slynn, G., *supra* n. 367). However, former Advocate General Jacobs argued that the publishing of concurring or dissenting opinions would be injurious to the Court’s *communautaire* approach (Sharpston, E., *supra* n. 205, p. 23), and Edward believed they would serve to slow down the Court’s work (Edward, D., *supra* n. 205, at 557). Forrester, who is also against the introduction of individual judgments at the Court, points out convincingly that several strongly expressed opinions might only serve to confuse a referring court (Forrester, I.S., *supra* n. 284, at 703). For further reading on the debate surrounding the utility of an introduction of dissenting opinions to the procedure and practice of the Court of Justice, see the citations at n. 367 *supra*.

steadying factors’ finds no direct comparator in the Court’s procedure and practice.⁴³¹ The result may be that there will be no intra-Court mechanism⁴³² to pressure wayward Judges to remain within the bounds of the ‘legal steadying factors’ since the composite nature of the Judgment, and the anonymity afforded by it, will shield individual Judges from scrutiny.⁴³³ This phenomenon will apply *a fortiori* the more populous the Court’s formation.

Notwithstanding the foregoing issues, there are also aspects of the Court’s published rulings that allow some application of Llewellyn’s sixth ‘steadying factor’.

Firstly, the Court is required by law to communicate its decisions publicly⁴³⁴, with the requirements of the content of Judgments and reasoned orders prescribed similarly by law.⁴³⁵ Of greatest significance in the current context is

⁴³¹ Llewellyn, K.N., *supra* n. 2, p. 26 and p. 27, fn. 19 (*supra* n. 415).

⁴³² Even if there are no intra-Court mechanisms (and it is submitted that the Opinion of the Advocate General will provide one such pressure on the Court), there are of course other mechanisms that have been discussed in this dissertation: ‘internal extra-legal steadying factors’, such as the ‘law-conditioned’ nature of the Judges; ‘external extra-legal steadying factors’ such as the Court’s independence from and accountability to ‘countervailing powers’; and, the ‘procedural extra-legal steadying factors’ discussed in this part of the dissertation. That is not to forget also the normative pressures of the ‘legal steadying factors’ themselves.

⁴³³ This may not be strictly accurate, however. Judge Edward suggests that the minority may have “as active a role as the majority in testing the soundness of the legal reasoning in the draft.” (Edward, D., *supra* n. 205, at 556). He continues that “collegiality” means that “[a]ll members of the Court are responsible, up to the last minute, for making the judgment as good as it can be, even if they disagree with the result.” (Edward, D., *supra* n. 205, p. 556). However, Frankenreiter suggests that the majority of Judges may use the allocation of cases to reduce the influence of those Judges holding views contrary to those of the majority on the Court’s case-law (Frankenreiter, J., “Informal Judicial Hierarchies: Case assignment and chamber composition at the European Court of Justice”, *supra* n. 405).

⁴³⁴ Article 37 of the Statute requires Judgments to be signed by the President and Registrar, and requires Judgments be read in open Court (see also, Article 88(1) RP). Article 86 RP requires the parties or interested persons be informed of the date of delivery of Judgment, which will normally be four to six weeks prior to the date of delivery (Wägenbaur, B., *supra* n. 26, p. 311). In accordance with Article 88(2) RP, the original of the Judgment must be signed by the President and the Judges who took part in the deliberations, as well as by the Registrar, and must be sealed and deposited at the Registry, with certified copies served on the parties, interested persons, and the referring court or tribunal. The same applies to reasoned orders (see Article 90 RP). Article 92 RP further requires that a “notice containing the date and the operative part of the judgment or order of the Court which closes the proceedings” be published in the *Official Journal of the European Union*.

⁴³⁵ Article 36 of the Statute requires that Judgments must state the reasons on which they are based, and must contain the names of the Judges who took part in the deliberations. Article 87 RP provides more specific detail on the required content of a Judgment: “A judgment shall contain: (a) a statement that it is the judgment of the Court, (b) an indication as to the formation of the Court, (c) the date of delivery, (d) the names of the President and of the Judges who took part in the deliberations, with an indication as to the name of the Judge-Rapporteur, (e) the name of the Advocate General, (f) the name of the Registrar, (g) a description of the parties or of the interested persons referred to in Article 23 of the Statute

the requirement that Judgments and reasoned orders contain “the grounds for the decision...”⁴³⁶ There is, therefore, a legal pressure on the Court to justify its rulings publicly, and to the parties and interested persons in particular.⁴³⁷

Secondly, although the Court is not bound *de jure* by a doctrine of precedent, the evolution of the preliminary reference procedure from a bilateral one, in which rulings are addressed to the referring court or tribunal, into a multilateral one, where rulings are addressed to all national courts, means that like Llewellyn’s common law opinions the Court’s rulings have a measure of *de facto* precedential value.⁴³⁸ Moreover, since the uniformity and effectiveness of EU law is at the heart of the Court’s doctrinal mission, and since legal certainty is a general principle of EU law, the Court, to ensure consistency of approach, should as a general rule place its rulings within the guiding lines suggested by its past rulings⁴³⁹, while simultaneously providing a ruling that can be utilised by the referring court or tribunal in the main proceedings, and if possible, by

who participated in the proceedings, (h) the names of their representatives, (i) in the case of direct actions and appeals, a statement of the forms of order sought by the parties, (j) where applicable, the date of the hearing, (k) a statement that the Advocate General has been heard and, where applicable, the date of his Opinion, (l) a summary of the facts, (m) the grounds for the decision, (n) the operative part of the judgment, including, where appropriate, the decision as to costs.” Article 89 RP prescribes the content of orders and reasoned orders: “1. An order shall contain: (a) a statement that it is the order of the Court, (b) an indication as to the formation of the Court, (c) the date of its adoption, (d) an indication as to the legal basis of the order, (e) the names of the President and, where applicable, the Judges who took part in the deliberations, with an indication as to the name of the Judge-Rapporteur, (f) the name of the Advocate General, (g) the name of the Registrar, (h) a description of the parties or of the parties to the main proceedings, (i) the names of their representatives, (j) a statement that the Advocate General has been heard, (k) the operative part of the order, including, where appropriate, the decision as to costs. 2. Where, in accordance with these Rules, an order must be reasoned, it shall in addition contain: (a) in the case of direct actions and appeals, a statement of the forms of order sought by the parties, (b) a summary of the facts, (c) the grounds for the decision.”

⁴³⁶ Articles 87 and 89(2) RP; see also, Article 36 of the Statute (*supra* n. 435).

⁴³⁷ Former Chief Justice of the Supreme Court of California Roger Traynor once described the constraint imposed by the writing of an opinion as follows: “I have not found a better test than its articulation in writing, which is thinking at its hardest. A judge ... often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.” (Traynor, R., “Some Open Questions on the Work of State Appellate Courts”, (1957) 24 *University of Chicago Law Review* 211, at 218, cited by Ginsburg, R.B., *supra* n. 367, at 139).

⁴³⁸ See Craig, P. and de Búrca, G., *supra* n. 81, pp. 442-443 and pp. 475-477; Brown, L.N. and Kennedy, T., *supra* n. 205, pp. 377-381; McCormick, N. and Summers, R., *Interpreting Precedents* (Dartmouth: Ashgate, 1991), quoting Slynn at p. 415; Beck, G., *supra* n. 19, p. 238; Stone Sweet, A., *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004), p. 12; Arnall, A., *supra* n. 24, p. 622 and pp. 625-633; Lenz, C.O., *supra* n. 205, at 403.

⁴³⁹ Nevertheless, it has to be acknowledged that there may be very considerable scope for uncertainty within the lines of precedent. For accounts of these difficulties in the context of the Court of Justice, see Brown, L.N. and Kennedy, T., *supra* n. 205, pp. 321-344; Beck, G., *supra* n. 19, pp. 234-277. See generally, Conway, G., *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012).

other national judges more generally.⁴⁴⁰ In fact, the multilateral aspect of the procedure may serve to amplify the forward-looking element of the ruling. These dual pressures of consistency of approach and utility of ruling limit the Court's lines of decision.⁴⁴¹ Moreover, they assign to the Court's Judgments and reasoned orders predictive value. As the common law judicial opinion can be consulted to discern the current state of the law, so can the Court's published rulings, particularly when analysed in light of the Court's doctrinal mission to achieve solutions that promote uniformity and effectiveness.⁴⁴² The laconic and collegiate natures of the Court's rulings may serve, however, to undermine their predictive value.⁴⁴³ That said, the argument for dissenting judgments at the Court, especially in the context of preliminary rulings, may not be convincing since a plethora of distinct judicial opinions in one case could serve to cause difficulty in identifying with precision the Court's ruling, depriving it of its utility to the referring court and also of its guidance for future cases.⁴⁴⁴

⁴⁴⁰ This observation is related to the 'external extra-legal steadying factor' discussed in Part Two, independence from and accountability to 'countervailing powers': the need for the Court of Justice to foster and maintain its cooperative relationship with the national courts also requires the maintenance of a minimal depth and quality of reasoning in its rulings. Although it has been noted that the detail of the ruling will differ depending on the nature of the case (see Tridimas, T., *supra* n. 77).

⁴⁴¹ On the importance of coherence in Court of Justice decision-making, see Bengoetxea, J., MacCormick, N. and Moral Soriano, L., *supra* n. 418.

⁴⁴² The Court's doctrinal mission will be especially important in what might be termed constitutional cases. Rasmussen, writing in 1986, went as far as to suggest that the Court's decisions might well be predictable where one simply took what he termed the Court's "pro-Community policy bias" into account: Rasmussen, H., *supra* n. 20, p. 36. While this author maintains that the Court's integrative mission is based on legal norms rather than a policy bias, the main tenet of this observation may well continue to be true, since the motivations in such cases have been very evident in the Judgments of the Court. However, in preliminary references relating to more technical sub-constitutional areas of law, such considerations may not be all that helpful since it may be imagined that the legal rules will exercise greater control over decision.

⁴⁴³ However, the fact that the ruling will have to be of utility to the referring court or tribunal, and may also be of guidance to other courts and tribunals, implies a minimal amount of exposition and detail: see Arnall, A., *supra* n. 24, p. 624. That said, it must be acknowledged that in a minority of cases a ruling may lack quality of reasoning. Bengoetxea suggests that Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177 is one such case, "where the reasoning is so scarce that there is no supporting structure of argumentation." (Bengoetxea, J., *supra* n. 21, at 188, fn. 11). However, it has been argued that omissions or *silences* in the Court's justifications may in themselves be an indication of the Court's thinking in what Bengoetxea would term the 'discovery' process (Sankari, S., *European Court of Justice Legal Reasoning in Context* (Groningen: Europa Law Publishing, 2013), pp. 214-223).

⁴⁴⁴ See the thoughts of Jacobs and Forrester to this effect (*supra* n. 430). It would seem highly impractical to require a referring court to read a number of Judgments of individual Judges of the Court of Justice and discern which portions represent the applicable ruling. This can often be a problem for lawyers reading decisions of the highest court in the UK, who "[have] often to pick [their] way through as many as five judgments to find the highest common factor binding on lower courts." (Blom-Cooper, L. and Drewry, G., *Final Appeal: A Study of the House of*

Thirdly, the Advocate General's Opinion, where delivered, may serve to ameliorate to some extent any frustration of 'reckonability' caused by the Court's composite and relatively unilluminating rulings, and the lack of public dissent. First, as identified previously, the Opinion may provide insight into the motivations and considerations underpinning the Court's rulings⁴⁴⁵, though reservations must be expressed as to the absolute dependability of this approach.⁴⁴⁶ Second, the Opinion tends to contain far greater detail on previous rulings, and can also provide very useful insights into the manner in which the Court may develop the law in subsequent cases.⁴⁴⁷ Third, by way of extension of the second observation, the Opinion may play the same role in the Court of Justice that Llewellyn assigns to the dissent or the threat of dissent in the American appellate court context.⁴⁴⁸ A well-reasoned and detailed public Opinion which accords with the 'legal steadying factors' may serve to call attention to the corresponding lack of such adherence by the Court, the effect of which may be to encourage or pressure the Court into such adherence. Similarly, the Opinion may by its quality expose effectively any dishonest interpretative methods or incomplete reasoning of the Court. The fact that the Advocate General is a member of the Court lends his/her Opinion esteem, but the Opinion also has the advantage over individual judicial opinions in that it will not cause any confusion in terms of identification of the binding ruling.

Fourthly, there is the fact that the Judge who has been designated the role of administering the case and drafting the Court's ruling is identifiable on the face of that ruling, since the name of the Judge-Rapporteur must be indicated on the Judgment or reasoned order.⁴⁴⁹ This is of some significance since it at the very

Lords in its Judicial Capacity (Oxford: Oxford University Press, 1972), p. 90, cited by Ginsburg, R.B., *supra* n. 367, at 149).

⁴⁴⁵ *Supra* n. 393. See also the thoughts of former Advocate General Jacobs as reported by Advocate General Sharpston (Sharpston, E., n. 205, p. 23). Vaughan and Gray point to the importance of the Opinion in giving a fuller account of the proceedings and the arguments made in the case: Vaughan, D. and Gray, M., *supra* n. 205, p. 56.

⁴⁴⁶ *Supra* n. 311.

⁴⁴⁷ Brown, L.N. and Kennedy, T., *supra* n. 205, p. 70.

⁴⁴⁸ *Supra* n. 415. See, for instance, former Advocate General Jacob's views in this connection as reported by Advocate General Sharpston: "Francis also highlighted the part played by the Advocate General's opinion within a system that delivers single judgment to resolve any case, rather than allowing for single judgments. He emphasised that Community law often synthesizes principles of differing national legal systems, through consensual judicial discussion, in order to develop the EU's own legal system. A true *communautaire* approach is therefore needed. The existence of separate concurring or dissenting judgments would weaken this." (Sharpston, E., *supra* n. 205, pp. 22-23).

⁴⁴⁹ Articles 87 and 89(1) RP respectively (*supra* n. 435).

least ensures that the decision may be associated with one particular Judge. This may allow one to speculate that there may be at least one Judge on the formation who may feel more vulnerable to criticism than the other members, and may therefore press for adherence to the ‘legal steadying factors’. However, the anonymity afforded by the composite judgment and secrecy of deliberations may also negate its effect absolutely.

Fifthly, Llewellyn’s assertion that the drive for agreement among a panel of judges could go “some distance to smooth the unevenness of individual temper and training into a moving average more predictable than the decisions of diverse judges”⁴⁵⁰ would also seem to be applicable to the Court’s deliberative process. The ‘steadying effect’, if any, however, of ‘group decision’ is discussed under the heading of Llewellyn’s tenth ‘steadying factor’.

3. Conclusion

From the above analysis, this author concludes that Llewellyn’s sixth ‘steadying factor’ may enjoy application in the preliminary reference procedure context. However, as with many of the previous ‘steadying factors’, it will apply in a different manner to how Llewellyn perceived it serving to promote ‘reckonability’ in the American context. In his discussion of his twelfth ‘steadying factor’, a ‘known bench’, Llewellyn placed emphasis on individuality, in particular the role that a threat of individual dissent may play in reining in a court’s wayward members. Llewellyn also wrote with the common law-style opinion, with its comparatively conversational and deliberative characteristics, in mind. In the context of the Court of Justice, however, the apparent oxymoron discussed in the conclusion to the discussion on the previous ‘steadying factor’ rears its head again: it may, in fact, be the stifling of individual idiosyncrasies in the judicial style of the Court’s Judgments and reasoned orders that render its rulings more ‘reckonable’. In summation, it is concluded that the requirement for the Court to justify its rulings in a published Judgment or reasoned order does serve to promote ‘reckonability’ by (1) narrowing the number of conceivable interpretative outcomes; (2) enhancing the accountability pressures imposed by the Court’s

⁴⁵⁰ Llewellyn, K.N., *supra* n. 2, p. 29 (*supra* n. 413).

relationships with its ‘countervailing powers’ in Part Two, which are dependent on the Court’s adherence to the ‘legal steadying factors’; and, (3) resulting in published rulings that can be used as ‘signposts’ for prediction of prospective references. This conclusion is based on the following sub-conclusions:

- Although the Court is required by law to contain within its Judgments and reasoned orders the grounds for its decisions, in the context of preliminary rulings there is another pressure that compels a minimal level of depth and quality of reasoning in the ruling: the Court’s accountability to national courts. In order to foster and maintain this cooperative relationship upon which the preliminary reference procedure relies, the Court must provide rulings that are sufficiently clear to be applied by the referring court in the main proceedings. Moreover, due to the multilateral aspect of preliminary rulings, interpretative rulings must also be capable of providing clear future guidance to other national courts and tribunals, lest the uniformity and effectiveness of EU law be threatened;
- The need for the Court to ensure uniformity and effectiveness in turn requires coherence and consistency in its reasoning. As a result, the Court has established a *de facto* system of precedent, even if it does not follow the full strictures of *stare decisis*. This affords the Court’s rulings predictive value, in that they may be read by the lawyer as a record of the current state of ‘legal doctrine’, and may also provide guidance as to the approach the Court might take in future rulings. This function of the Judgment or reasoned order may, however, be undermined by the terse, formalistic and deductive nature of the Court’s rulings when compared to their common law counterparts. However, the Advocate General’s Opinion, where available, may serve a role in providing some of this omitted detail;
- Although there is always a risk that a published decision is a ‘mere rationalization’ of the decision which hides from ‘discovery’ the actual reasons that motivated it, the very fact that the Court is required to

follow up its rulings with a published written justification narrows the lines of deciding by closing off the ‘judicially unarguable’;

- It will also be the written account of the Court’s rulings against which its ‘countervailing powers’ will measure the Court’s adherence to the ‘legal steadying factors’. The requirement to justify the decision in writing therefore heightens the ‘steadying effect’ of the Court’s accountability to its ‘countervailing powers’ (an ‘external extra-legal steadying factor’);
- Although the intra-court accountability mechanism of the threat of dissent does not operate at the Court of Justice in the same way as in the American appellate courts, since the Court issues a collegiate opinion with deliberations remaining secret, the Advocate General’s Opinion, where relevant, may fulfil this function. The Judges may be less inclined to adopt lines of decision that are outside the ‘legal steadying factors’ where a publicly available well-reasoned Opinion by an independent member of the Court which is respectful of those pressures may call attention to the Court’s misbehaviour. Moreover, since the Advocate General’s Opinion is not a Judgment or reasoned order it does not carry the problems that can be associated with individual judicial opinions: namely, confusion of the state of ‘legal doctrine’.

The paragraphs that follow discuss Llewellyn’s tenth ‘steadying factor’, ‘group decision’, in the context of the preliminary reference procedure.

III. ‘Group Decision’

1. Llewellyn’s Tenth ‘Steadying Factor’: ‘Group Decision’

Llewellyn in the discussion of his sixth ‘steadying factor’, ‘an opinion of the court’, alluded to the ‘steadying effect’ of the opinion as a group expression.⁴⁵¹

⁴⁵¹ Llewellyn, K.N., *supra* n. 2, p. 26 (*supra* n. 413).

He expanded upon this idea in his treatment of his tenth ‘steadying factor’, ‘group decision’:

“It is trite that a group all of whom take full part is likely to produce a net view with wider perspective and fewer extremes than can an individual; and it is a fair proposition also that continuity is likely to be greater with a group: prior action, attitudes, and unrecorded doubts or reservations which an individual can easily overlook are likely to be recalled and revived by some other group member.”⁴⁵²

Llewellyn was also of the view that “the drive for a written group opinion” could promote stabilisation and ‘reckonability’ in the deciding process, since some members of a court’s formation might be concerned with ensuring that the decision fitted within the existing ‘legal doctrine’, while others might be concerned about the future effects of the decision.⁴⁵³ Moreover, Llewellyn noted the importance of ‘group decision’ in providing “safety factors against bias, effective corruption or improper influence, overhaste, slackness, etc.”⁴⁵⁴

However, Llewellyn also advanced four points *per contra* the ‘steadying effect’ of ‘group decision’. Firstly, there was the danger that the working of a judicial formation could be undermined where one judge dominates the whole group.⁴⁵⁵ Secondly, Llewellyn suggested that the practice in some courts might

⁴⁵² Llewellyn, K.N., *supra* n. 2, p. 31. Addressing the American context specifically, Llewellyn added that stasis within a group could not lead to “total inaction or indefinite postponement” as it could in “[t]he medieval day...” (Llewellyn, K.N., *supra* n. 2, p. 31). Llewellyn’s views on the contribution of group decision are remarkably similar to those of Benjamin Cardozo, who wrote that the different perspectives of the members of an appellate bench “balance one another.” Cardozo also argued that “out of the *attrition* of diverse minds there is *beaten* something which has a constancy and uniformity and average value greater than its component elements.” (Cardozo, B.N., *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 176-177 cited in Edwards, H.T., “The Effects of Collegiality on Judicial Decision Making”, (2003) 151(5) *University of Pennsylvania Law Review* 1639, at 1639-1640). Former Chief Judge of the Washington D.C. Circuit, Harry T. Edwards, has also written an article confirming the importance of collegiality and group decision in “mitigat[ing] judges’ ideological preferences and enabl[ing] [them] to find common ground and reach better decisions.” (Edwards, H.T., “The Effects of Collegiality on Judicial Decision Making”, (2003) 151(5) *University of Pennsylvania Law Review* 1639, at 1641). See also, Beck, G., *supra* n. 19, p. 34.

⁴⁵³ Llewellyn, K.N., *supra* n. 2, p. 32.

⁴⁵⁴ Llewellyn, K.N., *supra* n. 2, p. 32, fn. 23. “This pattern has seemed to justify itself across nations and centuries; and non-judicial experience is in accord.” (Llewellyn, K.N., *supra* n. 2, p. 32, fn. 23). See also, Beck, G., *supra* n. 19, p. 24.

⁴⁵⁵ Llewellyn, K.N., *supra* n. 2, p. 32. Llewellyn provides Lord Mansfield as one of his examples. Munday in his study of composite opinions at the Civil Division of the Court of Appeal of England and Wales notes that Lord Mansfield CJ took “undisguised pride in the fact that under his durable and illustrious presidency the judges of the Court of King’s Bench almost never entered a dissent.” (Munday, R., *supra* n. 367, at 341). It would seem that his Lordship generally got his way.

be for cases to be assigned to one judge who does most of the work “without real participation by most of the group.”⁴⁵⁶ Thirdly, there was the additional peril of “discretionary assignment by the chief”, which might cause “a five-to-nine man court [to] function in spots as if it had only one or two judges.”⁴⁵⁷ Finally, Llewellyn identified possible intra-court sensitivities as undermining the effectiveness of true group work:

“One thinks also of courts whose practice has been to be so delicate about pride of authorship that drafts of opinions are almost regularly approved without comment.”⁴⁵⁸

However, Llewellyn suggested that these issues merely cause the “reckonability-effects of having a bench [to] pale”, rather than vanish completely.⁴⁵⁹

The paragraphs that follow discuss Llewellyn’s tenth ‘steadying factor’ in the context of the preliminary reference procedure.

2. ‘Group Decision’ as ‘Steadying Factor’

Unlike others factors discussed in Part Three, all of which, *prima facie*, presented some problems of application, Llewellyn’s tenth ‘steadying factor’ would appear to apply *a fortiori* to the Court’s decision-making. Not only is there an effort or a drive to make the ruling a ruling of the Court, the absence of individual judgments make some form of group work an absolute necessity. This is underscored by the fact that the Court’s procedural rules require a quorum of Judges to participate in deliberations in the case of each formation⁴⁶⁰, and moreover require a minimum level of active participation in deliberations: every Judge taking part “must state his opinion and the reasons for it.”⁴⁶¹ In the end, it is the conclusion reached “by the majority of the Judges

⁴⁵⁶ Llewellyn, K.N., *supra* n. 2, p. 32.

⁴⁵⁷ Llewellyn, K.N., *supra* n. 2, p. 32.

⁴⁵⁸ Llewellyn, K.N., *supra* n. 2, p. 32.

⁴⁵⁹ Llewellyn, K.N., *supra* n. 2, p. 32.

⁴⁶⁰ Article 17(1) of the Statute provides that decisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in deliberations. Article 17(2)-(4) of the Statute and Articles 34 RP set out the quora for the various formations of the Court.

⁴⁶¹ Article 32(3) RP.

after final discussion [that] determine[s] the decision of the Court.”⁴⁶² That is not to say, however, that the minority will not play their role in the formulation of the ruling.⁴⁶³ The role of the group in promoting stabilisation of ‘doctrine’ and method also has particular resonance in the Court of Justice where the relatively frequent turnover of personnel through appointments and re-organisation might impact negatively on such continuity.

Notwithstanding these initial observations, there are a number of aspects in the Court’s deliberative processes that may serve to undermine the ‘steady effect’ of ‘group decision’ alleged by Llewellyn, most of which were identified in his own *per contra* assertions.⁴⁶⁴

Firstly, the possibility of one or more personalities dominating decision and undermining the work of the group is always a possibility.⁴⁶⁵ This may be caused by the relative strength of the personalities involved as well as other aspects of character and relationship dynamics within the judicial formation⁴⁶⁶: a newly appointed Judge, for instance, may feel less inclined to upset existing power balances or practices, or depending on his/her level of expertise in EU law, the solutions proposed by other, more experienced Judges.⁴⁶⁷ Proficiency

⁴⁶² Article 32(4) RP.

⁴⁶³ Edward, D., *supra* n. 205, p. 556. Judge Edward suggests that those in the minority may have a role in testing the soundness of the legal reasoning and suggesting that the language of the draft be made clearer.

⁴⁶⁴ Llewellyn, K.N., *supra* n. 2, p. 32 (*supra* n. 455-n. 459).

⁴⁶⁵ No less a figure than Thomas Jefferson, who was highly critical of the Marshall Supreme Court, voiced such worries: “An opinion is huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning.” (Ginsburg, R.B., *supra* n. 367, at 138, citing ZoBell, K.M., “Division of Opinion in the Supreme Court”, (1959) 44 *Cornell Law Quarterly* 186, at 194, who in turn was quoting a letter from Jefferson to Thomas Ritchie (25th December, 1820) printed in Ford, P., *The Works of Thomas Jefferson* (New York: G.P. Putnam’s Sons, 1905), pp. 175-179).

⁴⁶⁶ See Vaughan and Gray’s reference to the importance of rallying the Judge-Rapporteur, “or another tenacious member of the formation...” (Vaughan, D. and Gray, M., *supra* n. 205, p. 55). As Llewellyn points out in his discussion of his twelfth ‘steady factor’, there may be no way of knowing which is the dominant judge in deliberations (Llewellyn, K.N., *supra* n. 2, p. 35) (*supra* n. 359).

⁴⁶⁷ Edwards suggests that these concerns are supported by social science studies on group composition and decision making: “Unfamiliar group members ... are likely to be concerned with social acceptance within the group. This leads to a tendency to conform: unfamiliar group members are apprehensive about how they will be evaluated, which leads them to suppress ‘alternative perspectives and judgments’ and to ‘behave like other group members, regardless of the nature of their private beliefs.’” (Edwards, H.T., *supra* n. 452, at 1647, citing Asch, S.E., *Social Psychology* (New York: Prentice-Hall, 1952); Nemeth, C.J., “Differential Contributions of Majority and Minority Influence”, (1986) 93 *Psychology Review* 23; Schacter, S. and Singer, J.E., “Cognitive, Social, and Psychological Determinants of Emotional State”, (1962)

in the French language may also impact upon a Judge's ability to partake fully in deliberations.⁴⁶⁸ Secondly, the Court's working practices or the formation's workload may serve to weaken true collegiate work: as a time-saving device or because of perceptions of superior expertise, Judges may show deference to the draft Judgments of Judges-Rapporteur or Opinions of the Advocates General. This problem may be exacerbated where references are assigned to Judges or Advocates General on the basis of perceived expertise or experience in a legal subject-area.⁴⁶⁹ Moreover, there is the possibility that in more populous formations such as the full Court or the Grand Chamber there may be more opportunity for Judges not to involve themselves actively. Finally, there is the observation that the requirement of compromise to achieve a ruling that can rally majority support may result in dilution of clarity in the finished work that may harm its utility as a predictive 'signpost',⁴⁷⁰ even if this argument is unconvincing in the preliminary reference context due to the lack of credible alternatives.⁴⁷¹

In truth, it is difficult to ascertain the extent to which these aspects of the deliberations process may undermine, if at all, the 'reckonability' afforded by

69 *Psychology Review* 379; Schacter, S., *The Psychology of Affiliation: Experimental Studies of the Sources of Gregariousness* (Stanford: Stanford University Press, 1959); Deutsch, M., "A Theory of Co-operation and Competition", (1949) 2 *Human Relations* 129; Carver, S. and Schier, M.F., "The Self-Attention-Induced Feedback Loop and Social Facilitation", (1981) 17 *Journal of Experimental Social Psychology* 545; Sanna, L.J. and Shotland, R.L., "Valence of Anticipated Evaluation and Social Facilitation", (1990) 26 *Journal of Experimental Social Psychology* 82; Davis, J.H., "Group Decision and Social Interaction: A Theory of Social Decision Schemes", (1973) 80 *Psychology Review* 97; Tanford, S. and Penrod, S., "Social Influence Model: A Formal Integration of Research on Majority and Minority Influences", (1984) 95 *Psychology Bulletin* 189. See also Kaheny, Haire and Benesh's study of the effects of seniority on decision: Kaheny, E.B., Haire, S.B. and Benesh, S.C., *supra* n. 386, at 491-493. The voting practice at the Court of Justice has sought to mitigate this problem: Brown and Kennedy assert that where the Court takes a vote, votes are cast in reverse order of precedence of the Judges, a practice which Schermers claims "is designed to prevent the votes of the more experienced judges from influencing their younger colleagues." (Brown, L.N. and Kennedy, T., *supra* n. 205, p. 284; Schermers, H., *Judicial Protection in the European Communities* (The Hague: Kluwer, 4th ed., 1987), p. 449).

⁴⁶⁸ Kenney notes that not all members of the Court will be equally proficient in French: "While all members need French to function at the ECJ, clearly the proficiency of the members varies from native speaker, to those who are truly bilingual, to fluency, to merely adequate." (Kenney, S.J., "The Members of the Court of Justice of the European Communities", (1998-1999) 5 *Columbia Journal of European Law* 101, at 103). Anderson and Demetriou assert that chambers of the Court have deliberated in German or English (Anderson, D.W.K. and Demetriou, M., *supra* n. 25, p. 307).

⁴⁶⁹ For evidence that this is in fact occurring, see n. 403 and n. 404.

⁴⁷⁰ *Supra* n. 430. See, however, Lenaerts' insistence that the Court's judgments before and after a landmark ruling should be read in tandem to gain an appreciation of the Court's "stone-by-stone" approach (Lenaerts, K., *supra* n. 70, at 1351).

⁴⁷¹ *Supra* n. 444.

‘group decision’. Owing to the secrecy of deliberations, there is no way of knowing how the Court’s deliberations work in reality. We may have regard to the extra-judicial writings of Judges on the question, but the sceptic may have cause to question their accuracy.⁴⁷² Judge Edward has assured us that the neither the Judge-Rapporteur nor the Advocate General control the deciding.⁴⁷³ He comforts us also when he states that there are often heated disagreements in deliberations⁴⁷⁴, making Llewellyn’s worry about judicial over-sensitivity appear immaterial.⁴⁷⁵

Ultimately, Llewellyn’s general observations, which by his own admission are trite, are applicable to all panel courts, including the Court of Justice: decisions made by a group (1) are more likely to iron out the extra-legal extremes, preferences, errors and idiosyncrasies that might infect individual decision⁴⁷⁶; (2) are more likely to take a wider perspective on decision⁴⁷⁷; and, (3) are more likely to adhere to the ‘legal steadying factors’.⁴⁷⁸

D. Conclusion

The conclusion to Part Three is divided into two sections. The first, in furtherance of the demonstration of the thesis argument, discusses the contribution of the ‘steadying factors’ discussed to ‘reckonability’ of preliminary references, i.e. their status as ‘procedural extra-legal steadying

⁴⁷² To paraphrase the oft misquoted version of Mandy Rice-Davies’ quip: ‘they would say that, wouldn’t they?’

⁴⁷³ Edward, D., *supra* n. 205, pp. 555-557.

⁴⁷⁴ Edward, D., *supra* n. 205, p. 556.

⁴⁷⁵ Llewellyn’s concern about judgment being postponed or avoided where decision cannot be reached (*supra* n. 452) should also not be a concern in the case of the Court of Justice since Article 6(1) ECHR entitles everyone to a fair legal process, a component of which is decision within a reasonable period. See Lenaerts, K., Maselis, I. and Gutman, K., *supra* n. 22, p. 780 and fn. 282 with citations.

⁴⁷⁶ As former Chief Judge Edwards of the D.C. Circuit has written: “[I]t is my contention that collegiality plays an important part in *mitigating* the role of partisan politics and personal ideology by allowing judges of different perspectives and philosophies to communicate, listen to, and ultimately influence one another in constructive and law-abiding ways.” (Edwards, H.T., *supra* n. 452, at 1645). Edwards also recognises the value of collegiality as “a safety net and check against error”, as well as a device that can cure ambiguity in the reasoning or writing of the individual (Edwards, H.T., *supra* n. 452, at 1650).

⁴⁷⁷ Cardozo, B.N., *supra* n. 452, pp. 176-177.

⁴⁷⁸ “The more collegial the court, the more likely it is that the cases that come before it will be determined solely on their legal merits.” (Edwards, H.T., *supra* n. 452, at 1645). In a break with the structural convention adopted heretofore, there is no distinct ‘conclusion’ paragraph due to the brevity of the discussion of this ‘steadying factor’.

factors'. The second section, which relates to the 'applicability by-product' of the thesis, discusses the extent to which Llewellyn's six 'steadying factors' analysed in Part Three are of application in the preliminary reference procedure context.

I. The Discussed Factors as 'Procedural Extra-Legal Steadying Factors'

It is concluded as a general rule that the six 'procedural extra-legal steadying factors' will contribute in sum and in isolation to the 'reckonability' of preliminary reference outcomes by:

- Progressively narrowing by constraint or influence the Court's decisional competence, thereby reducing the legitimate lines of decision and the number of conceivable outcomes;
- Reinforcing the pressures exerted by the 'legal steadying factors';
- Providing to the lawyer 'signposts' to the Court's likely ruling.

The manner in which these contributions are made is summarised in the paragraphs that follow.

1. Progressive Narrowing of the Decisional Competence of the Court of Justice

It has been demonstrated in Part Three that the Court's decisional competence is limited in a number of ways: the Court of Justice has no means of initiating questions for rulings, and is completely reliant on national courts or tribunals in that regard; it must deliver rulings on all admissible references and simultaneously has no jurisdiction to admit inadmissible references; it is limited to the task of legal interpretation or determinations of validity of legal provisions; it is limited to these tasks in respect of a limited menu of 'legal doctrine' (the Treaties and EU acts). Inherent in these restrictions is the

removal of ‘procedural extra-legal obstacles’ to ‘legal certainty’ such as fact-finding and -determination from the Court’s jurisdiction, as well as findings on the interpretation of other sources of law, such as international law and national law. These limitations are imposed by the division of competences between the referring national courts and tribunals and the Court of Justice contained in Article 267 TFEU, as well as the Statute and Rules of Procedure. While these limitations are not absolute or uniform, and it has been demonstrated that there is some scope for them to be undermined by the Court, their integrity is, as a general rule, maintained not only by the normative character of ‘legal doctrine’ and the Judges’ assumed ‘law-conditioned’ natures, but also by the ‘external extra-legal steadying factor’ of the Court’s accountability to national judiciaries: the Court’s prestige and functioning in its role as guarantor of the effectiveness and uniformity of EU law depends on the maintenance of a cooperative relationship with national courts, which in turn depends on the Court’s adherence to the ‘legal steadying factors’, and in particular, the limits placed upon its decisional jurisdiction. These limitations are made manifest in each preliminary reference in the Order for Reference, which, to paraphrase Llewellyn, ‘limits, sharpens, and phrases’ the issues to be decided in advance: as a general rule, the Court must keep its considerations within these bounds. What is evident, therefore, is a progressive narrowing of the Court’s scope of decision: it must decide within the menu of cases referred; within that menu it may only rule on admissible questions; within those cases it must confine its rulings to answering those questions referred. The most significant aspect of this pruning of the Court’s decisional competence is the removal of the vagaries of fact-finding and -determination from the procedure: it is perhaps the difficulty in predicting how a court will determine the facts, upon which it will apply any legal rules, that contributes the greatest uncertainty to the work of trial courts.

While *de jure* the scope of the Court’s decision is defined by the framework of the Order for Reference, there is the *de facto* possibility of the Court’s considerations being narrowed further after receipt of the Order. The preliminary reference procedure affords to the parties in the main proceedings, as well as certain interested persons, the opportunity to submit written observations to and, where relevant, make oral arguments before the Court.

These written and oral arguments, particularly where attuned to the Court's mission and methods, can certainly influence and narrow the likely lines of its deciding. However, these arguments are not a constraint: the Court may ignore the lines of enquiry suggested in this argumentation. As long as the Court remains within the outer-bounds of the questions referred, its decision will not be *ultra petita* even if outside of the reasons argued by the parties and interested persons. Furthermore, while these arguments may be influential, the Court operating as it does in the *curia novit iura* tradition, and having the assistance of the Judge-Rapporteur, *référéndaires*, and, where relevant, the Advocate General, is not as reliant on argumentation as judges in adversarial systems. However, this latter fact may also contribute to 'reconability' by removing the caprices of uneven legal representation.

The Court's deliberative and decisional processes may also contribute to the narrowing of the number of conceivable outcomes. Firstly, the Court is required by law, and by reason of the need to provide useful guidance to national courts, to follow its ruling with a published written record of its reasoning. While the Court's Judgments and reasoned orders are famously brief, formalistic and deductive when compared to the common law opinion, the need to justify the ruling may serve to remove outlying, doctrinally unjustifiable rulings from consideration. This is particularly so given the adoption by the Court of a *de facto* doctrine of precedent. This limitation is again reinforced by the Court's accountability to 'countervailing powers': it will through examination of the written ruling that these powers will test the Court's adherence to the 'legal steadying factors'. Moreover, the need to provide a ruling of utility to the referring court also requires a minimal level of depth and quality of reasoning. Although the threat of published dissenting judicial opinions is not operative, the prior Opinion of the Advocate General will, assuming it is well reasoned and calls the relevant authorities to the Court's attention, performs an analogous role. Secondly, the fact that all deliberations at the Court must in each case be taken by a minimum of three Judges should operate to make rulings less likely to be affected by errors or extremes, thereby contributing to a narrowing of likely outcomes.

2. Reinforcement of the ‘Legal Steadying Factors’

While it is in no way claimed that the leeways that remain within the ‘legal steadying factors’ may not be wide and render outcomes difficult to predict, it is nevertheless the case, as a general rule, that the ‘procedural extra-legal steadying factors’ combine to push the Court of Justice to deliberation and decision within these leeways.

As has been discussed in the previous paragraphs, the Court has no way of initiating questions for ruling and is confined to ruling on an abstract legal problem (validity or interpretation) concerning a limited body of ‘legal doctrine’. Opportunities for advancement of extra-legal ideological or other preferences are therefore contained by the Order for Reference. Argument before the Court also plays a significant role in confronting the Court with legal authority, in particular its own previous rulings. The publicity and immediacy of oral argument may make it a superior device over written observations in this regard. Moreover, the Advocate General’s Opinion, where appropriate, will be of particular importance: a published, written Opinion by an independent member of the Court that is well-reasoned and contains a detailed account of the ‘legal doctrine’ that should control or guide the ruling should operate to deter the Court from ignoring the strictures of the leeways of ‘doctrine’, since the contrast between Opinion and ruling will only serve to heighten any unjudicial behaviour by the Court. The requirement for the Court to provide the grounds for decision in its Judgments and reasoned orders also deters departure from adherence to the ‘legal steadying factors’, since it should deter the making of ‘judicially unarguable’ rulings. Finally, ‘group decision’ should play a significant role in ensuring adherence to the ‘legal steadying factors’: a decision made by a group should be far less likely to be plagued by individual idiosyncrasies, extra-legal preferences or judicially dishonest methods.

3. ‘Signposts’ to the Ruling

Most of the discussion in Part Three has related to the procedure subsequent to the receipt by the Court of Justice of the Order for Reference. It should be the

case that the narrowing of the potential outcomes described above should assist the lawyer in gaining increasing predictive power as the procedure before the Court of Justice develops. However, if the ‘steading factors’ discussed herein are to be of maximum benefit to the lawyer seeking to predict a prospective reference outcome then their wisdom must be offered at the earliest possible stage of the proceedings, preferably at the point where the issues in the Order for Reference take shape. Such knowledge can then be utilised to frame and concentrate written observations in a manner that can wield maximum influence in focussing the lines of the Court’s deliberations. At that stage of the procedure the participating lawyer has some tools at his/her disposal: the pre-phrased and limited questions for decision which will confine the lines for consideration; existing ‘legal doctrine’ in the legal subject area, including previous decisions of the Court and Opinions of the Advocates General (perhaps); knowledge of the Court’s working methods, approach and preferences, etc. However, when compared to other courts, such as the American appellate courts Llewellyn was writing about, a number of ‘signposts’ may at the earlier stages of the procedure be obscured from view. The parties and interested persons, for instance, will not be informed of the identity of the formation of the Court, Judge-Rapporteur, or Advocate General, if applicable, until after the close of written proceedings. Moreover, there is very limited opportunity to acquire knowledge of the preferences or working methods of individual Judges, given the Court’s collegiate rulings. Once again, the terse and deductive traits of the rulings are relevant: they may contain less evidence of preferences and method than the more conversational common law judicial opinion, and may also provide less guidance as to likely prospective doctrinal development. However, there is a fundamental drive in the EU legal system for coherence and uniformity, which suggests a role for judicial precedent and consistency. Further, the Court’s role under Article 267 TFEU is to provide a ruling that will offer some level of guidance to national judiciaries and ensure uniform application of EU law. This fact, together with the necessity of maintaining its cooperative relationship with national courts, implies a minimal level of reasoning, which ought to reveal the Court’s preferences and methods, if not those of its individual Judges. There is also, of course, the potential for the Opinions of the Advocates General to be utilised, with some caution, to lend greater understanding of the Court’s reasoning.

II. Extent of the Applicability of Llewellyn’s ‘Procedural Extra-Legal Steadying Factors’ to the Preliminary Reference Procedure

The attempts to apply those of Llewellyn’s ‘steadying factors’ identified as ‘procedural extra-legal steadying factors’ have revealed difficulties in applying most in the Article 267 TFEU context. This should not be surprising, not least because of the differences between the purely adversarial appellate procedure to which Llewellyn’s work applied and the *de facto* mixed inquisitorial-adversarial nature of preliminary references, added to other legal-cultural differences. Notwithstanding these initial difficulties however, all six, this author has concluded, enjoy some application, even if (1) they required some modification; (2) appeared to promote ‘reckonability’ in a different manner; or, (3) had greater or lesser application than they did in the context in which they were envisaged originally.

The first ‘steadying factor’ discussed, Llewellyn’s eighth, ‘issues limited, sharpened, and phrased in advance’, required significant modification to permit application to the preliminary reference context. Although the issues to be decided by the Court of Justice are ‘limited, sharpened, and phrased in advance’, they are so defined not by a notice of appeal or other documents lodged by the parties as in adversarial appeals systems, but by the Order for Reference drafted exclusively by the referring national court. However, the contribution to ‘reckonability’ of this ‘steadying factor’ as described by Llewellyn was germane in the preliminary reference procedure, perhaps even in an *a fortiori* sense, since the division of competences that underpins the procedure places a further pressure on the Court to respect the outer bounds of the issues as framed in the Order.

At the conclusion to the discussion of Llewellyn’s seventh steadying factor, ‘a frozen record from below’, it was maintained that this factor operates in a similar way to that described by Llewellyn, since the Court of Justice is deprived of any fact-finding or determination competence in the preliminary reference procedure, a fact that operates as a general rule to narrow the number

of possible interpretative outcomes and to remove or, at least, reduce significantly the vagaries of fact-finding.

The next 'steadying factor' addressed, 'adversary argument by counsel', again operated differently to the manner described by Llewellyn. As the preliminary reference procedure is a conversation between national judiciaries and the Court of Justice, and not strictly speaking adversarial, no *ultra petita* concept comparable to that operating in a purely adversarial system operates. This was because the matters to be decided by the Court are framed by the Order for Reference and not by the written or oral argument of the parties or interested persons. However, this did not discount the possibility that argument could be utilised effectively to influence the lines of decision. Moreover, it was the partly inquisitive nature of the procedure, underlined by the relevance of the maxim *curia novit iura*, that served to mitigate the ill-effects caused by sub-par legal representation to 'reconability' that concerned Llewellyn in the American context: the ability of the Court of Justice to make its own enquiries and conduct its own research through the Judge-Rapporteur and, *inter alia*, the staff of its *cabinets*, liberates it from the level of reliance placed by purely adversarial courts on argument. Similarly, the Court of Justice, in most cases, has the advantage of an Opinion by a fully independent member of the Court, an Advocate General.

The analysis of the latter three of 'procedural extra-legal steadying factors' ('a known bench', 'an opinion of the court', and 'group decision') revealed a general divergence in the manner in which these factors could be argued to contribute to 'reconability' in the American appellate courts and how they might do so in preliminary references. For Llewellyn, it was what was revealed about individual judges' working methods and preferences that aided the predictive abilities of lawyers; however, in the case of the Court of Justice, it was argued that it was the very stifling of these idiosyncrasies, and the creation and maintenance of a consistent and uniform judicial method that promotes 'reconability'. In this regard, it was suggested that the traditions at the Court, as well as the Advocates General and their focus on consistent doctrine, the work of *référéndaires*, and the requirement of 'group decision' all play a role in promoting this relatively steady outlook and method.

I. Introduction

This dissertation has sought to demonstrate the thesis that there are ‘extra-legal steadying factors’ in the EU legal system and the preliminary reference procedure that serve to reduce significantly the impact of obstacles to ‘legal certainty’, or put differently, promote ‘reckonability’ in the Article 267 TFEU preliminary reference procedure. Moreover, the dissertation has placed emphasis on a significant by-product of this thesis (the ‘applicability by-product’), namely that Llewellyn’s ‘steadying factors’, or at least those examined in this dissertation, are capable of application to courts outside of the American appellate court context in which Llewellyn enumerated them.

The paragraphs that follow discuss the demonstration of the thesis in this dissertation, as well as the extent to which Llewellyn’s ‘steadying factors’ have been applicable in the preliminary reference procedure context.

II. ‘Extra-Legal Steadying Factors’ in the Article 267 TFEU Preliminary Reference Procedure (the Thesis)

The dissertation commenced by recognising the importance of the concept of ‘legal certainty’ in the EU legal system and its *a fortiori* significance in the preliminary reference procedure. It was acknowledged, however, that ‘legal certainty’ in an absolute sense, in terms of the prediction of judicial outcomes, is not achievable due to the existence of ‘legal’ and ‘extra-legal obstacles’, and that these ‘obstacles’ were of even greater import in preliminary references. Nonetheless, it was argued that this conclusion was not probative of ‘radical indeterminacy’ in the procedure. While the dissertation has stopped short of asserting that preliminary rulings are predictable or ‘reckonable’, it was suggested, based on Llewellyn’s ‘descriptive thesis’ in *The Common Law Tradition*, that there may be ‘steadying factors’ in the preliminary reference procedure that contribute to reducing the impact of ‘obstacles’ to ‘legal certainty’ or, put differently, promote ‘reckonability’. It was further maintained

that ‘steadying factors’ identified by Llewellyn, who was writing in the specific context of American appellate courts, are present in the preliminary reference procedure, even if they would require restatement or refinement to be applied in this dissertation, and even though they could contribute to ‘reckonability’ in a manner different to how they might do in the context in which Llewellyn devised them. In harmony with the prior differentiation of the ‘obstacles’ to ‘legal certainty’ (and consonant with Beck’s demarcation), Llewellyn’s ‘steadying factors’ were re-categorised as ‘legal’ and ‘extra-legal steadying factors’.

Two of Llewellyn’s ‘steadying factors’ were characterised as ‘legal steadying factors’: ‘legal doctrine’ and ‘known doctrinal techniques’. Having considered Beck’s rationalisation of Llewellyn’s ‘legal steadying factors’, it was argued, as a matter of first principle, that these factors (which are based essentially on the normative character of principles, legal rules and doctrinal techniques) denote the first and most important pressures on judicial discretion, since they serve to confine a court to what Beck refers to as the ‘judicially arguable’. It was asserted that this confinement promotes ‘reckonability’ since it serves to reduce the number of conceivable rulings and permits lawyers to rely upon their knowledge of ‘legal doctrine’ and ‘known doctrinal techniques’ to attempt prediction of outcomes: rulings are thus, at the very least, ‘legal’ in character, even if there is still scope for considerable uncertainty *within* the body of ‘legal doctrine’. The pressures placed by the ‘legal steadying factors’ on judges also serve to reduce, though not eliminate completely, the negative influence of individual judicial ideologies, and other subjectivities and vagaries, on ‘reckonability’ of outcomes. This author has acknowledged that the veracity of the thesis does rely upon acceptance of these ‘first principles’, although it has been submitted that an argument contrary to these principles would entail a claim of ‘radical indeterminacy’, a claim that other scholarly work has discredited.

The remaining twelve of Llewellyn’s ‘steadying factors’ were categorised as ‘extra-legal steadying factors’. These factors were further divided into three sub-categories (‘internal’, ‘external’ and ‘procedural’), based on the manner in which they combat the ‘obstacles’ to ‘legal certainty’, with Part One of the

dissertation considering the relevance of the ‘internal extra-legal steadying factors’ in the Court of Justice context; Part Two, the ‘external’ factors; and, Part Three, the ‘procedural’. Throughout the dissertation, this author has argued that these ‘extra-legal steadying factors’ promote ‘reckonability’ by, *inter alia*,

- Reinforcing the pressures of the ‘legal steadying factors’;
- Narrowing the number of conceivable outcomes; and,
- Providing various ‘signposts’ to the lawyer attempting to forecast prospective judicial interpretations.

This argument is synthesised in the following paragraphs.

1. The Role of the ‘Extra-Legal Steadying Factors’ in Reinforcing the Pressures of the ‘Legal Steadying Factors’

It has been argued as a matter of first principle that the first and most significant ‘steadying factors’ in preliminary references are the pressures imposed upon the Judges by the normative character of the ‘legal steadying factors’. However, this dissertation has further asserted, also as a matter of first principle, that this normative character is not freestanding: rather, the ‘steadying effect’ of the ‘legal steadying factors’ is dependent on the reinforcement of those factors by the ‘extra-legal steadying factors’. The three parts of this dissertation have argued that the ‘extra-legal steadying factors’ examined herein serve to reinforce the ‘legal steadying factors’ as follows:

- It was demonstrated in Part One, which discussed ‘internal extra-legal steadying factors’, that all but two of the sixty-nine former Judges appointed to the Court of Justice since its foundation have been, and all of the Judges of the present Court are, ‘law-conditioned officials’. Accepting, with some reservation, Llewellyn’s assertion that ‘law-conditioned officials’ have an internalised understanding of the normative character of ‘legal doctrine’, it may be surmised that the

Judges accept the normative character of the ‘legal steadying factors’, which serves to reinforce their ‘steadying effect’;

- It was demonstrated in Part Two, which discussed ‘external extra-legal steadying factors’, that even if the Judges’ internalised duty of adherence to the ‘legal steadying factors’ were non-existent or were to falter, the Court of Justice is disincentivised significantly from abandoning this adherence. From the formalist and realist analyses conducted in Part Two, it was concluded that the Court and its Judges enjoy significant legal and pragmatic protections against countermeasures by ‘countervailing powers’ as long as they retain adherence to the ‘legal steadying factors’, even where their rulings are contrary to ‘countervailing power’ interests. Conversely, were the Court to abandon adherence to the ‘legal steadying factors’, especially in a repeated manner, these protections would diminish, and the Court would be exposed to countermeasures by its ‘countervailing powers’. Therefore, the Court’s residence in a space between independence and accountability, as well as institutional self-interest, serve to reinforce the normative character of the ‘legal steadying factors’;
- In Part Three, which discussed ‘procedural extra-legal steadying factors’, it was demonstrated that several procedural rules and practices in the preliminary reference procedure serve to reinforce the ‘steadying effect’ of ‘legal doctrine’ and ‘known doctrinal techniques’. In particular, the jurisdiction of the Court of Justice is limited to ruling on an abstract legal problem, the authorship of which it has no control over. Moreover, legal argument and the Advocate General’s Opinion (where relevant) serve to confront the Court with legal authority, in particular its former rulings, which reminds the Court of its duty to the ‘legal steadying factors’. The requirement that the Court record the grounds for its rulings in a written Judgment or reasoned order also deters departure from the ‘legal steadying factors’. Finally, the fact that rulings are made by a group of Judges serves as an insurance against individual ‘unjudicial’ conduct.

2. The Role of the ‘Extra-Legal Steadying Factors’ in Narrowing the Number of Conceivable Outcomes

Given that the ‘legal steadying factors’ should confine the Court of Justice to rulings that are ‘judicially arguable’, and that the ‘extra-legal steadying factors’ reinforce this pressure, it is apparent that the ‘extra-legal steadying factors’ contribute to eliminating, or reducing significantly, the likelihood of ‘judicially unarguable’ outcomes. Nevertheless, in terms of the prediction of a prospective ruling, this may not be that noteworthy: significant interpretative leeway may remain *within* the ‘legal steadying factors’. However, this dissertation has demonstrated that the ‘extra-legal steadying factors’ play a further role in narrowing the number of conceivable outcomes *within* this leeway:

- In Part One, it was argued that the examination of the Judges’ educational and professional backgrounds revealed significant commonalities suggestive of an ‘EU lawyer’ typology. The Judges are more likely, therefore, to share certain internalised understandings of EU legal principles such as the importance of uniformity and effectiveness, which should in turn lead to more consistent approaches to legal interpretative problems, making some outcomes more likely than others;
- In Part Three, it was demonstrated that the procedural rules and practices in preliminary references ensure that the number of conceivable outcomes becomes ever narrower as the procedure progresses. The decisional competence of the Court of Justice is limited by the Order for Reference which ties it to answering a pre-prepared legal problem, which may relate to a limited body of ‘legal doctrine’ only (the Treaties and EU acts); and, the Court’s role is to interpret law or determine its validity (it has no competence over fact-finding or determination, perhaps the greatest source of judicial unpredictability). While the Court is not bound by the *ultra petita* maxim in preliminary references, legal argument, as well as the assistance of the Judge-Rapporteur, *référéndaires* and the Advocate General (where relevant), may play an influential, if not constraining, role in narrowing further

the scope of the issues for decision. The need to justify the ruling in writing may serve to remove certain outlying doctrinal possibilities, and group decision may serve to reduce the likelihood of human error or ‘judicially unarguable’ positions.

3. The Role of the ‘Extra-Legal Steadying Factors’ in Providing Various ‘Signposts’ to the Lawyer Attempting to Forecast Prospective Judicial Interpretations

The ‘extra-legal steadying factors’ discussed in this dissertation have also been demonstrated as playing a role in ‘signposting’ more likely rulings within the menu of ‘judicially arguable’ and conceivable outcomes. This ‘signposting’ role, which overlaps in part with the ‘narrowing’ role summarised in the previous paragraphs, is one of the contributions of the ‘procedural extra-legal steadying factors’. It was acknowledged that for these ‘signposts’ to be of maximum utility to the lawyer attempting to forecast prospective outcomes, they should be operational at the earliest stages of litigation to allow the lawyer to frame his/her arguments to wield maximum influence with a court. It was conceded that in the preliminary reference procedure many of the ‘signposts’ that would be available before other courts at any early stage are obscured from view until late in the procedure: for instance, the parties and interested persons are not informed of the formation of the Court of Justice that will rule on the reference until after the close of the written proceedings. Moreover, the use of the Court’s past rulings to decipher its preferences or methods, or those of its individual Judges or formations, may have its problems. Firstly, the Court’s Judgments are terse and deductive when compared to the more discursive style of common law opinions. Secondly, the Court’s Judgments are collegiate, with no dissenting opinions published, and deliberations remaining secret. Thirdly, the Court, now consisting of ten chambers, which are re-shuffled regularly, has become more fragmented with possible consequences for prediction of its approach.

Notwithstanding these very significant ‘obstacles’, it has been concluded that the Court’s past Judgments can play some role as ‘signposts’ to prospective rulings, not in spite of but perhaps because of these traits in its Judgments: the

Court's practices and procedures have established relatively uniform judicial methods and interpretative approaches that serve to reduce significantly the influence of individual methodological idiosyncrasies, and signpost more likely interpretative outcomes. Guarantors of this relatively uniform approach include, *inter alia*, the role played by the Advocate General (where relevant) and lawyers in reminding the Court of its past rulings; *référéndaires* in maintaining a consistent judicial method; the staggered replacement of Judges which ensures continuity; and, the annual re-constitution of the chambers, which should prevent entrenchment of idiosyncratic or chamber-specific approaches and methods.

III. Applicability of Llewellyn's 'Steadying Factors' (the 'Applicability By-Product')

The demonstration of the application of eight of Llewellyn's 'steading factors' in the context of preliminary rulings proves, in respect of those factors analysed at least, that Llewellyn's 'descriptive thesis' in *The Common Law Tradition* is of relevance beyond the context in which the 'steading factors' were enumerated, the American appellate courts. This would imply that Llewellyn's 'steading factors' enjoy a degree of universality. As expected, however, many of Llewellyn's 'steading factors' required some adjustment or refinement to be applied in this dissertation. This was the case, for instance, with Llewellyn's first 'steading factor', 'law-conditioned officials': not only did Llewellyn's opaque terminology require refinement, but his insistence on the unifying effect of the judges being *American* lawyers caused this author to ponder the question as to whether the Judges of the Court of Justice were 'EU lawyers' who shared certain internalised values. Furthermore, the application of the 'law-conditioned officials' 'steading factor' was also reliant on an assumption that Llewellyn was correct in asserting that 'law conditioning' resulted in judicial internalisation of these values. Moreover, many of the 'steading factors' contributed to 'reckonability' in preliminary references in a manner different to what Llewellyn suggested they would in his context. This has been the case, in particular, with the 'procedural extra-legal steading factors', since Llewellyn's 'descriptive thesis' was developed in the context of a purely adversarial appellate procedure with a differing 'baseline of

reckoning'. Nevertheless, 'steady factors' such as 'issues sharpened, limited, and phrased in advance' and a 'a frozen record from below' have found relatively easy application to the preliminary reference procedure through the role of the Order for Reference.

Ultimately, what this dissertation should demonstrate is that Llewellyn's reluctance to suggest that his 'steady factors' could enjoy application beyond the American appellate courts was unnecessary. Indeed, it may not be stretching the argument too far to suggest that Llewellyn's 'steady factors' could be capable of application to any legal adjudicative procedure that excludes from consideration the determination of facts, and where the decision-makers are 'law-conditioned officials', who are suitably independent of and accountable to their 'countervailing powers'.

IV. Concluding Remarks

At the time of writing, the EU exists in a period of uncertainty: it faces unprecedented and ongoing financial and migration crises, and the spectre of disintegration looms. The honeymoon period of the relationship between the Court of Justice and national judiciaries and legal academics may also be coming to an end as the Court's reasoning, generally and in specific cases, educes greater criticism. There may well be individual rulings that contain poor-quality legal reasoning, and there may well be a diminution in the calibre of the Court's work, even if a 'crisis in confidence' cannot be asserted. However, this dissertation has not been concerned with such transient phenomena. Rather, this dissertation has sought to demonstrate a more timeless argument, namely that, in a *macro* sense, stepping back from the day-to-day rulings of the Court, there are factors at work at the Court and in the preliminary reference procedure that promote the 'reckonability' or 'steadiness' of preliminary rulings.

As work on this dissertation progressed, it became apparent to this author that, whether by accident or design, the Court of Justice and the Article 267 TFEU procedure have been constituted remarkably well to promote such 'steadiness' in the Court's preliminary rulings. The drafters of the Treaties must take some

of the credit for establishing balanced institutional relationships between the Court and its ‘countervailing powers’, and for limiting the Court’s decisional competences under what is now Article 267 TFEU. The Court and its Judges should be praised for their development of the preliminary reference procedure, careful fostering of their cooperative connection with national judiciaries, and the Court’s internal organisation. The Member States should be acknowledged for the quality of judicial appointments to the Court. Beck has argued previously that the Court of Justice is constrained by ‘legal steadying factors’, essentially the normative character of ‘legal doctrine’ and ‘known doctrinal techniques’, which confine the Court to making ‘judicially arguable’ rulings. Perhaps the primary contribution of this dissertation has been to demonstrate that the ‘extra-legal steadying factors’ discussed, ‘internal’, ‘external’ and ‘procedural’, reinforce these ‘legal steadying factors’. Significant interpretational leeway may remain for the Court *within* the body of ‘legal doctrine’, and this may lead to some uncertainty: a degree of doctrinal uncertainty is inevitable in a procedure that is supposed to determine ‘hard cases’. However, the fact that the Court is prevented largely from abandoning adherence to the ‘legal steadying factors’ means, to paraphrase Llewellyn, ‘moderate consonance’ with the strictures of ‘legal doctrine’, as well as the exclusion of arbitrary decision-making. Preliminary rulings, therefore, are not ‘radically indeterminate’, and they assume the character of ‘law’, meaning a lawyer attempting to predict a prospective ruling can place reliance upon his/her legal skills to do so.

Another theme that emerged during the course of this dissertation was the continuity of the Court’s institutional character. The Court of Justice is organised in a manner that causes it to transcend the individuals that hold judicial office there: the relatively short terms in office for Judges, the replacement of half of the Judges every three years, the annual re-shuffle of the Court’s chambers, the role of the Advocate Generals and *référéndaires*, the standardised style of judgment, and collegiate decision all serve in unison to reduce the impact of individual idiosyncrasies and to create uniformity, coherence and continuity in the Court’s working methods. The significance of the nouns ‘uniformity’, ‘coherence’ and ‘continuity’ in the context of preliminary rulings should require no further exposition.

APPENDIX 1: LEGAL EDUCATION AND TRAINING OF THE JUDGES OF THE COURT OF JUSTICE APPOINTED PURSUANT TO ARTICLE 32 ECSCⁱ

Name	Service	Nationality	Legal Education	Professional Legal Qualification
Massimo PILOTTI	1952-1958 (President 1952-1958)	Italy	Doctor of Laws	Judge
Petrus SERRARENS	1952-1958	Netherlands	<i>None</i>	<i>None</i>
Otto RIESE	1952-1958 (Court of Justice of the ECSC) 1958-1963 (Court of Justice)	Germany	Doctor of Laws	Judge
Louis DELVAUX	1952-1958 (Court of Justice of the ECSC) 1958-1967 (Court of Justice)	Belgium	Doctor of Laws	Lawyer
Jacques RUEFF	1952-1958 (Court of Justice of the ECSC) 1958-1962 (Court of Justice)	France	<i>None</i>	<i>None</i>
Charles Léon HAMMES	1952-1958 (Court of Justice of the ECSC) 1958-1967 (Court of Justice) (President 1964-1967)	Luxembourg	Doctor of Laws	Lawyer
Adrianus VAN KLEFFENS	1952-1958	Netherlands	Law degree	Judge

ⁱ All information contained in this table has been taken from the biographical details of the former members of the Court of Justice on the Court's website. Where information has been gleaned from additional sources, this is indicated in the endnotes: http://curia.europa.eu/jcms/jcms/Jo2_9606/?hlText=former+members (last accessed at 15:24 on Tuesday, the 22nd March 2016).

**APPENDIX 2: LEGAL EDUCATION AND TRAINING OF THE FORMER JUDGES
OF THE COURT OF JUSTICE APPOINTED PURSUANT TO NOW ARTICLE 253
TFEUⁱ**

Name	Service	Nationality	Legal Education	Professional Legal Qualification
Rino ROSSI	1958-1964	Italy	<i>Unclear</i> ⁱⁱ	Judge
Andreas Matthias DONNER	1958-1979 (President 1958-1964)	Netherlands	Doctor of Laws	<i>Unclear</i> ⁱⁱⁱ
Nicola CATALANO	1958-1962	Italy	Doctor of Laws	Lawyer
Alberto TRABUCCHI	1962-1972 ^{iv}	Italy	Doctor of Laws	<i>Unclear</i> ^v
Robert LECOURT	1962-1976 (President 1967-1976)	France	Doctor of Laws	Lawyer
Walter STRAUSS	1963-1970	Germany	Doctor of Laws	Lawyer ^{vi}
Riccardo MONACO	1964-1976	Italy	Doctor of Laws	Judge
Josse J. MERTENS DE WILMARS	1967-1984 (President 1980-1984)	Belgium	Doctor of Laws	Lawyer
Pierre PESCATORE	1967-1985	Luxembourg	Doctor of Laws	<i>Unclear</i> ^{vii}
Hans KUTSCHER	1970-1976	Germany	Doctor of Laws	Judge
Cearbhall Ó DÁLAIGH	1973-1974	Ireland	Diploma in Legal Studies	Lawyer
Max SØRENSEN	1973-1979	Denmark	Doctor of Laws	<i>Unclear</i> ^{viii}
Alexander J. MACKENZIE STUART	1973-1988 (President 1984-1988)	United Kingdom	Law Degree ^{ix}	Lawyer
Andreas O'KEEFFE	1975-1985	Ireland	Law degree	Lawyer
Francesco CAPOTORTI	1976 ^x	Italy	Law degree	<i>Unclear</i> ^{xi}
Giacinto BOSCO	1976-1988	Italy	Law degree	Judge ^{xii}
Adolphe TOUFFAIT	1976-1982	France	Master's Degree in Private Law	Judge
Thymen KOOPMANS	1979-1990	Netherlands	Doctor of Laws	Lawyer
Ole DUE	1979-1994 (President 1988-1994)	Denmark	Law degree ^{xiii}	Judge ^{xiv}
Ulrich EVERLING	1980-1988	Germany	Doctor of Laws	Lawyer ^{xv}
Alexandros CHLOROS	1981-1982	Greece	Doctor of Laws	<i>Unclear</i> ^{xvi}
Gordon SLYNN	1988-1992 ^{xvii}	United Kingdom	<i>Unclear</i> ^{xviii}	Lawyer
Fernand GRÉVISSE	1981-1982 and 1988- 1994	France	<i>Unclear</i> ^{xix}	Judge

Name	Service	Nationality	Legal Education	Professional Legal Qualification
Kai BAHLMANN	1982-1988	Germany	Law degree (Legal studies in Cologne, Bonn, and Freiburg)	Lawyer ^{xx}
G. Federico MANCINI	1988-1999 ^{xxi}	Italy	Law degree ^{xxii}	Judge
Yves GALMOT	1982-1988	France	Law degree	Judge
Constantinos KAKOURIS	1983-1997	Greece	Law degree ^{xxiii}	Lawyer
René JOLIET	1984-1995	Belgium	Doctor of Laws ^{xxiv}	<i>Unclear</i>
Thomas Francis O'HIGGINS	1985-1991	Ireland	Law degree	Lawyer
Fernand SCHOCKWEILER	1985-1996	Luxembourg	Doctor of Laws ^{xxv}	Judge
José Carlos DE CARVALHO MOITINHO DE ALMEIDA	1986-2000	Portugal	Law degree ^{xxvi}	<i>Unclear</i>
Gil Carlos RODRIGUEZ IGLÉSIAS	1986-2003 (President 1994-2003)	Spain	Doctor of Laws ^{xxvii}	<i>Unclear</i> ^{xxviii}
Manuel DIEZ DE VELASCO	1988-1994	Spain	Doctor of Laws ^{xxix}	Lawyer ^{xxx}
Manfred ZULEEG	1988-1994	Germany	Doctor of Laws ^{xxxi}	Lawyer ^{xxxii}
Paul Joan George KAPTEYN	1990-2000	Netherlands	Doctor of Laws ^{xxxiii}	<i>Unclear</i>
Claus Christian GULMANN	1994-2006 ^{xxxiv}	Denmark	Doctor of Laws ^{xxxv}	Lawyer
John L. MURRAY	1991-1999	Ireland	<i>Unclear</i>	Lawyer
David Alexander Ogilvy EDWARD	1992-2004 ^{xxxvi}	United Kingdom	Law degree ^{xxxvii}	Lawyer
Antonio Mario LA PERGOLA	1994 and 1999-2006 ^{xxxviii}	Italy	<i>Unclear</i>	Judge
Jean-Pierre PUISSOCHET	1994-2006	France	Doctor of Laws ^{xxxix}	Judge
Günter HIRSCH	1994-2000	Germany	Doctor of Laws ^{xl}	Lawyer ^{xli}
Peter JANN	1995-2009	Austria	Doctor of Laws	Judge
Hans RAGNEMALM	1995-2000	Sweden	Doctor of Laws	Judge
Leif SEVÓN	1995-2002	Finland	Doctor of Laws	<i>Unclear</i>
Melchior WATHELET	1995-2003 ^{xlii}	Belgium	Master of Laws	Lawyer
Romain SCHINTGEN	1996-2008 ^{xliii}	Luxembourg	Doctor of Laws	Lawyer
Krateros IOANNOU	1997-1999	Greece	Doctor of Laws	Lawyer
Vassilios SKOURIS	1999-2015 (President 2003-2015)	Greece	Doctor of Laws	<i>Unclear</i>
Fidelma O'KELLY MACKEN	1999-2004	Ireland	Master of Laws ^{xliv}	Lawyer

Name	Service	Nationality	Legal Education	Professional Legal Qualification
Ninon COLNERIC	2000-2006	Germany	Doctor of Laws	Lawyer ^{xlv}
Stig VON BAHR	2000-2006	Sweden	Law degree ^{xlvi}	Judge
José Narciso DA CUNHA RODRIGUES	2000-2012	Portugal	Law degree ^{xlvii}	Judge
Christiaan Willem Anton TIMMERMANS	2000-2010	Netherlands	Doctor of Laws ^{xlviii}	Judge
Konrad Hermann Theodor SCHIEMANN	2004-2012	United Kingdom	Law degrees	Lawyer
Jerzy MAKARCZYK	2004-2009	Poland	Doctor of Laws	<i>Unclear</i>
Ján KLUČKA	2004-2009	Slovakia	Doctor of Laws	Judge
Pranas KŪRIS	2004-2010	Lithuania	Doctor of Laws	<i>Unclear</i>
George ARESTIS	2004-2014	Cyprus	Law degree	Lawyer
Aindrias Ó CAOIMH	2004-2015	Ireland	Law degree	Lawyer
Uno LÕHMUS	2004-2013	Estonia	Doctor of Laws	Lawyer
Pernilla LINDH	2006-2011 ^{xlix}	Sweden	Law degree	Judge
Jean-Jacques KASEL	2008-2013	Luxembourg	Doctor of Laws	Lawyer

ⁱ All information contained in this table has been taken from the biographical details of the former members of the Court of Justice on the Court's website. Where information has been gleaned from additional sources, this is indicated in the endnotes: http://curia.europa.eu/jcms/jcms/Jo2_9606/?hlText=former+members (last accessed at 15:24 on Tuesday, the 22nd March 2016).

ⁱⁱ Judge Rossi's biographical details as provided on the website of the Court of Justice do not provide any details on his legal education. It must be assumed, given the number of judicial offices that he held in Italy, that he had a university education in law.

ⁱⁱⁱ Judge Donner's biographical details as provided on the website of the Court of Justice do not provide details on his legal qualifications. Given that Judge Donner held a Doctor of Laws degree in the Netherlands, it is very likely he was a qualified lawyer.

^{iv} Judge Trabucchi later served as an Advocate General at the Court (1973-1976).

^v Judge Trabucchi's biographical details as provided on the website of the Court of Justice or in *Audience Solennelles 1959-1963* (Luxembourg: 1963), p. 25 do not indicate whether he was qualified to practice law. However, given his law professorships at the University of Padua, it is highly unlikely that he was not so qualified.

^{vi} This is not mentioned explicitly in the biographical details provided on the Court's website. However, Judge Strauss' biographical details as provided in *Audiences Solennelles 1959-1963, supra* n. v, p. 61 refer to the Judge having passed his "Referendarexamen" in 1923, which would have made him a qualified lawyer.

^{vii} There is no explicit mention of legal professional qualifications in Judge Pescatore's biographical note on the Court's website. However, given his role as a legal adviser at the Ministry for Foreign Affairs and his legal professorship, it is unlikely he was not qualified to practice law.

^{viii} There is no explicit mention in the biographical notes on the Court's website or in *Audience Solennelle 9 Janvier 1973* (Luxembourg: 1973), p. 56 of Judge Sørensen having obtained a legal professional qualification. He did possess a law degree and a Doctor of Laws degree, and did occupy a number of international judicial posts, all of which would suggest a legal professional qualification.

^{ix} According to Judge Mackenzie Stuart's *curriculum vitae* as contained in *Audience Solennelle 9 Janvier 1973, supra* n. viii, p. 57, he obtained law degrees from the Universities of Cambridge and Edinburgh, a fact not mentioned explicitly in the biographical note contained on the Court's website.

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- ^x Judge Capotorti subsequently served as an Advocate General from 1976-1982.
- ^{xi} Even the detailed biographical note on Judge Capotorti in *Formal Hearings of the Court of Justice of the European Communities 1976* (Luxembourg: 1977), pp. 21-22 does not state categorically that Judge Capotorti was qualified to practice law. However, his list of subsequent professorships would indicate such a qualification.
- ^{xii} Although not mentioned in the biographical note on the Court's website, Judge Bosco was appointed an honorary magistrate in 1926 (*Formal Hearings of the Court of Justice of the European Communities 1976*, *supra* n. xi, pp. 41-42).
- ^{xiii} Judge Due's biographical note on the website of the Court is extremely scant on detail, and omits his legal education. See, however, *Formal Hearings of the Court of Justice of the European Communities 1978 and 1979* (Luxembourg: 1980), pp. 39-40.
- ^{xiv} *Formal Hearings of the Court of Justice of the European Communities 1978 and 1979*, *supra* n. xiii, pp. 39-40.
- ^{xv} Although not mentioned in the biographical note on the Court's website, President Kutscher's speech on the occasion of Judge Everling taking up his seat at the Court mentions that Judge Everling had passed both of his Staatsexamen (*Formal Hearings of the Court of Justice of the European Communities 1980 and 1981* (Luxembourg: 1982), p. 17).
- ^{xvi} None of the available sources (the biographical note on the Court's website and the *Formal Hearings of the Court of Justice of the European Communities 1980 and 1981*, *supra* n. xv, pp. 43-46) refer specifically to the question of whether Judge Chloros obtained a legal professional qualification.
- ^{xvii} Judge Slynn had been an Advocate General (1981-88) prior to his appointment as Judge. Article 7(1) RP provides: "The seniority of Judges and Advocates General shall be calculated without distinction according to the date on which they took up their duties." (See Wägenbauer, B., *Court of Justice of the EU: Commentary of Statute and Rules of Procedure* (Munich: C.H. Beck, 2013), pp. 211-212). This list follows the order of the list of former members on the website of the Court of Justice, which lists the Court's members in order of precedence according to the aforementioned rule. Hence, Judge Slynn appointed as a Judge of the Court in 1988 appears in this list as if appointed in 1981, the date he was appointed an Advocate General. The same also applies to Judges Mancini, Gulmann and Tizzano.
- ^{xviii} Judge Slynn's *curriculum vitae* merely indicates that he studied at Cambridge University without mentioning the discipline (*Formal Hearings of the Court of Justice of the European Communities 1980 and 1981*, *supra* n. xv, p. 70).
- ^{xix} Neither Judge Grevisse's biographical note on the Court's website nor *Formal Hearings of the Court of Justice of the European Communities 1980 and 1981*, *supra* n. xv, pp. 86-87 and p. 91 provide much detail on his education, save that he "graduated first in the class of 1950 from the Ecole Nationale d'Administration." His subsequent career as legal adviser and judge would imply a legal educational background.
- ^{xx} Judge Bahlmann's *curriculum vitae* in *Formal Hearings of the Court of Justice of the European Communities 1982 and 1983* (Luxembourg: 1984), p. 31 confirms that he passed both Staatsexamen.
- ^{xxi} Judge Mancini served as an Advocate General (1982-1988) prior to taking office as a Judge.
- ^{xxii} This is not mentioned specifically in the biographical note on the Court's website. However, Judge Mancini's *curriculum vitae* in *Formal Hearings of the Court of Justice of the European Communities 1982 and 1983*, *supra* n. xx, p. 33 confirms that he graduated in law from the University of Bologna.
- ^{xxiii} *Formal Hearings of the Court of Justice of the European Communities 1982 and 1983*, *supra* n. xx, p. 53.
- ^{xxiv} *Synopsis of the Work of the Court of Justice of the European Communities in 1984 and 1985 and Record of Formal Sitzings in 1984 and 1985* (Luxembourg: 1986), p. 131.
- ^{xxv} The biographical note on Judge Schockweiler on the Court's website is particularly scant. Biographical information on Judge Schockweiler has been taken from his *curriculum vitae* as published in *Synopsis of the Work of the Court of Justice of the European Communities in 1984 and 1985 and Record of Formal Sitzings in 1984 and 1985*, *supra* n. xxiv, p. 177.
- ^{xxvi} *Synopsis of the Work of the Court of Justice of the European Communities in 1986 and 1987 and Record of Formal Sitzings in 1986 and 1987* (Luxembourg: 1988), p. 187.
- ^{xxvii} *Synopsis of the Work of the Court of Justice of the European Communities in 1986 and 1987 and Record of Formal Sitzings in 1986 and 1987*, *supra* n. xxvi, p. 195.
- ^{xxviii} However, Judge Rodriguez Iglésias did hold a licenciante in law, which most likely carried an entitlement to practice (*Synopsis of the Work of the Court of Justice of the European Communities in 1986 and 1987 and Record of Formal Sitzings in 1986 and 1987*, *supra* n. xxvi, p. 195).

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- ^{xxix} *Synopsis of the Work of the Court of Justice of the European Communities in 1988 and 1989 and Record of Formal Sitzings in 1988 and 1989* (Luxembourg: 1990), p. 215.
- ^{xxx} *Synopsis of the Work of the Court of Justice of the European Communities in 1988 and 1989 and Record of Formal Sitzings in 1988 and 1989*, *supra* n. xxix, p. 215.
- ^{xxxi} *Synopsis of the Work of the Court of Justice of the European Communities in 1988 and 1989 and Record of Formal Sitzings in 1988 and 1989*, *supra* n. xxix, p. 219.
- ^{xxxii} *Synopsis of the Work of the Court of Justice of the European Communities in 1988 and 1989 and Record of Formal Sitzings in 1988 and 1989*, *supra* n. xxix, p. 219.
- ^{xxxiii} *Synopsis of the Work of the Court of Justice and the Court of First Instance of the European Communities in 1990 and Record of Formal Sitzings in 1990* (Luxembourg: 1991), p. 63.
- ^{xxxiv} Judge Gulmann was an Advocate General (1991-1994) prior to appointment as a Judge.
- ^{xxxv} *Synopsis of the Work of the Court of Justice and the Court of First Instance of the European Communities: Annual Report 1991* (Luxembourg: 1993), p. 89.
- ^{xxxvi} Judge Edward had served as a Judge of the Court of First Instance from 1989-1992.
- ^{xxxvii} Judge Edward's *curriculum vitae* as provided in Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/lv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:33 on Tuesday, the 22nd March 2016) states that he received an LLB degree from the University of Edinburgh.
- ^{xxxviii} Judge La Pergola was an Advocate General between his two spells as Judge (1995-1999).
- ^{xxxix} Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/lv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:33 on Tuesday, the 22nd March 2016).
- ^{xl} Judge Hirsch's *curriculum vitae* as published on the website of the Bundesgerichtshof provides much greater detail than that contained on the website of the Court of Justice: http://www.bundesgerichtshof.de/EN/TheCourt/Presidents/Hirsch/hirsch_node.html (last accessed at 15:35 on Tuesday, the 22nd March 2016).
- ^{xli} According to his *curriculum vitae* as published on the website of the Bundesgerichtshof, Judge Hirsch passed both Staatsexamen.
- ^{xlii} Judge Wathelet has been an Advocate General at the Court since 2012.
- ^{xliii} Judge Schintgen had previously been a Judge at the Court of First Instance (1989-1996).
- ^{xliv} Judge Macken's *curriculum vitae* as provided on the Brick Court Chambers website: <http://www.brickcourt.co.uk/people/profile/judge-fidema-macken-sc> (last accessed at 15:36 on Tuesday, the 22nd March 2016).
- ^{xlv} According to the more detailed *curriculum vitae* provided in Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/lv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:33 on Tuesday, the 22nd March 2016), Judge Colneric passed both Staatsexamen.
- ^{xlvi} According to the more detailed *curriculum vitae* provided in Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/lv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:33 on Tuesday, the 22nd March 2016).
- ^{xlvii} According to the more detailed *curriculum vitae* provided in Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/lv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:33 on Tuesday, the 22nd March 2016).
- ^{xlviii} According to the more detailed *curriculum vitae* provided in Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/lv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:33 on Tuesday, the 22nd March 2016).
- ^{xlix} Judge Lindh had been a Judge at the Court of First Instance (1995-2006) prior to her appointment to the Court of Justice.

**APPENDIX 3: LEGAL EDUCATION AND TRAINING OF THE CURRENT JUDGES
OF THE COURT OF JUSTICE APPOINTED PURSUANT TO NOW ARTICLE 253
TFEUⁱ**

Name	Service	Nationality	Legal Education	Professional Legal Qualification
Koen LENAERTS	2003- ⁱⁱ (President 2015-)	Belgium	Doctor of Laws	Lawyer
Antonio TIZZANO	2006- ⁱⁱⁱ (Vice- President 2015-)	Italy	Law degree ^{iv}	Lawyer
Allan ROSAS	2002-	Finland	Doctor of Laws	<i>Unclear</i>
Rosario Silva DE LAPUERTA	2003-	Spain	Law degree	Lawyer
Endre JUHÁSZ	2004-	Hungary	Law degree	Lawyer
Anthony BORG BARTHET	2004-	Malta	Doctor of Laws	Lawyer
Marko ILEŠIČ	2004-	Slovenia	Doctor of Laws	Judge
Jiří MALENOVSKÝ	2004-	Czech Republic	Doctor of Laws	Judge
Egils LEVITS	2004-	Latvia	Doctor of Laws ^v	<i>Unclear</i>
Lars Bay LARSEN	2006-	Denmark	Law degree	Lawyer
Jean-Claude BONICHOT	2006-	France	Law degree	Judge
Thomas VON DANWITZ	2006-	Germany	Doctor of Laws	Lawyer
Alexander ARABADJIEV	2007-	Bulgaria	Law graduate	Judge
Camelia TOADER	2007-	Romania	Doctor of Laws	Lawyer
Marek SAFJAN	2009-	Poland	Doctor of Laws	Judge
Daniel ŠVÁBY	2009- ^{vi}	Slovakia	Doctor of Laws	Judge
Maria BERGER	2009-	Austria	Doctor of Laws	<i>Unclear</i>
Alexandra (Sacha) PRECHAL	2010-	Netherlands	Doctor of Laws	<i>Unclear</i>
Egidijus JARAŠIŪNAS	2010-	Lithuania	Doctor of Laws	Lawyer
Carl Gustav FERNLUND	2011-	Sweden	Law graduate	Judge
José Luís DA CRUZ VILAÇA	2012- ^{vii}	Portugal	Law graduate	Lawyer
Christopher VAJDA	2012-	United Kingdom	Law degree	Lawyer
Sinisa RODIN	2013-	Croatia	Doctor of Laws	<i>Unclear</i>
François BILTGEN	2013-	Luxembourg	Master of Laws	Lawyer
Küllike JÜRIMÄE	2013- ^{viii}	Estonia	Law degree	<i>Unclear</i>
Constantinos LYCOURGOS	2014-	Cyprus	Doctor of Laws	Lawyer
Mihalis VILARAS	2015- ^{ix}	Greece	<i>Unclear</i>	Lawyer
Eugene REGAN	2015-	Ireland	Master of Laws	Lawyer

ⁱ All information contained in this table has been taken from the biographical details of the current members of the Court of Justice on the Court's website. Where information has been gleaned from additional sources, this is indicated in the endnotes (http://curia.europa.eu/jcms/jcms/Jo2_7026/) (last accessed at 15:24 on Tuesday, the 22nd March 2016).

ⁱⁱ Judge Lenaerts was a Judge at the Court of First Instance from 1989-2003. He was Vice-President of the Court of Justice from 2012-2015.

ⁱⁱⁱ Judge Tizzano had been an Advocate General (2000-2006) prior to his appointment as a Judge at the Court of Justice.

^{iv} As *per* Judge Tizzano's *curriculum vitae* published on the Jean Monnet European and Competition Law website (<http://www.european-law.it/docenti.php?id=14>) (last accessed at 15:38 on Tuesday, the 22nd March 2016).

^v The website of the President of Latvia asserts that Judge Levits possesses a doctoral degree: http://www.president.lv/pk/content/?cat_id=8847&lng=en (last accessed at 15:39 on Tuesday, the 22nd March 2016).

^{vi} Judge Šváby was a Judge at the Court of First Instance from 2004-2009.

^{vii} Judge Da Cruz Vilaça was an Advocate General at the Court of Justice (1986-1988) and President of the Court of First Instance (1989-1995) prior to his appointment as a Judge at the Court of Justice.

^{viii} Judge Jürimäe was a Judge at the General Court (2004-2013).

^{ix} Judge Vilaras was a Judge at the General Court (1998-2010).

APPENDIX 4: POST-EDUCATIONAL ‘ACTIVE WORK IN SOME ASPECT OF THE LAW’ OF THE JUDGES OF THE COURT OF JUSTICE APPOINTED PURSUANT TO ARTICLE 32 ECSCⁱ

Key: LA = Legal Academic
 LP = Legal Practitioner
 Civ Serv/Govt Off = Civil Servant/Government Official
 J = Judge
 I/S Org = International or Supranational Organisation
 Pol = Politician

Name	LA	LP	Civ Serv/Govt Off	J	I/S Org	Pol
Massimo PILOTTI			✓	✓	✓	
Petrus SERRARENS					✓	✓
Otto RIESE	✓		✓	✓	✓	
Louis DELVAUX		✓	✓			✓
Jacques RUEFF			✓		✓	
Charles Léon HAMMES	✓	✓	✓	✓	✓	
Adrianus VAN KLEFFENS			✓	✓	✓	

ⁱ All information contained in this table has been taken from the biographical details of the former members of the Court of Justice on the Court’s website. Where information has been gleaned from additional sources, this is indicated in the endnotes: http://curia.europa.eu/jcms/jcms/Jo2_9606/?hlText=former+members (last accessed at 15:24 on Tuesday, the 22nd March 2016).

APPENDIX 5: POST-EDUCATIONAL ‘ACTIVE WORK IN SOME ASPECT OF THE LAW’ OF THE FORMER JUDGES OF THE COURT OF JUSTICE APPOINTED PURSUANT TO NOW ARTICLE 253 TFEU¹

Key: LA = Legal Academic
 LP = Legal Practitioner
 Civ Serv/Govt Off = Civil Servant/Government Official
 J = Judge
 I/S Org = International or Supranational Organisation
 Pol = Politician

Name	LA	LP	Civ Serv/Govt Off	J	I/S Org	Pol
Rino ROSSI			✓	✓		
Andreas Matthias DONNER	✓					
Nicola CATALANO	✓	✓			✓	
Alberto TRABUCCHI	✓					
Robert LECOURT		✓	✓		✓	✓
Walter STRAUSS			✓	✓		
Riccardo MONACO	✓		✓	✓	✓	
Josse J. MERTENS DE WILMARS	✓	✓				✓
Pierre PESCATORE	✓		✓		✓	
Hans KUTSCHER	✓		✓	✓		
Cearbhall Ó DÁLAIGH		✓	✓	✓		
Max SØRENSEN	✓		✓	✓	✓	
Alexander J. MACKENZIE STUART		✓		✓	✓ ⁱⁱ	
Andreas O’KEEFFE		✓	✓	✓		
Francesco CAPOTORTI	✓				✓	
Giacinto BOSCO	✓		✓	✓	✓	✓
Adolphe TOUFFAIT			✓	✓		
Thymen KOOPMANS	✓	✓	✓	✓	✓	
Ole DUE	✓ ⁱⁱⁱ		✓	✓	✓ ^{iv}	
Ulrich EVERLING	✓		✓			
Alexandros CHLOROS	✓		✓ ^v		✓ ^{vi}	
Gordon SLYNN	✓	✓		✓	✓ ^{vii}	
Fernand GRÉVISSE	✓		✓	✓		
Kai BAHLMANN			✓	✓		
G. Federico MANCINI	✓			✓	✓ ^{viii}	
Yves GALMOT			✓	✓		
Constantinos KAKOURIS	✓	✓	✓	✓	✓ ^{ix}	
René JOLIET	✓					
Thomas Francis O’HIGGINS		✓	✓	✓	✓ ^x	✓

Name	LA	LP	Civ Serv/Govt Off	J	I/S Org	Pol
Fernand SCHOCKWEILER			✓			
José Carlos DE CARVALHO MOITINHO DE ALMEIDA	✓		✓			✓ ^{xi}
Gil Carlos RODRIGUEZ IGLÉSIAS	✓					
Manuel DIEZ DE VELASCO	✓	✓ ^{xii}	✓	✓	✓ ^{xiii}	
Manfred ZULEEG	✓				✓ ^{xiv}	
Paul Joan George KAPTEYN	✓		✓		✓ ^{xv}	
Claus Christian GULMANN	✓		✓		✓ ^{xvi}	
John L. MURRAY		✓	✓			
David Alexander Ogilvy EDWARD	✓	✓		✓ ^{xvii}	✓	
Antonio Mario LA PERGOLA	✓		✓	✓	✓ ^{xviii}	✓
Jean-Pierre PUISSOCHET			✓	✓	✓	
Günter HIRSCH	✓ ^{xix}		✓	✓		
Peter JANN			✓	✓	✓ ^{xx}	
Hans RAGNEMALM	✓		✓	✓	✓ ^{xxi}	
Leif SEVÓN	✓ xxii		✓	✓	✓	
Melchior WATHELET	✓		✓			✓
Romain SCHINTGEN	✓	✓	✓	✓ ^{xxiii}	✓	
Krateros IOANNOU	✓	✓			✓	
Vassilios SKOURIS	✓		✓			
Fidelmá O'KELLY MACKEN	✓	✓		✓		
Ninon COLNERIC	✓			✓		
Stig VON BAHR			✓	✓		
José Narciso DA CUNHA RODRIGUES	✓		✓	✓	✓	
Christiaan Willem Anton TIMMERMANN	✓		✓	✓	✓	
Konrad Hermann Theodor SCHIEMANN		✓		✓		
Jerzy MAKARCZYK	✓		✓	✓	✓	
Ján KLUČKA	✓			✓	✓	
Pranas KŪRIS	✓		✓	✓	✓	
George ARESTIS		✓		✓		
Aindrias Ó CAOIMH	✓	✓		✓		
Uno LÖHMUS	✓	✓		✓		
Pernilla LINDH			✓	✓ ^{xxiv}	✓	

Name	LA	LP	Civ Serv/Govt Off	J	I/S Org	Pol
Jean-Jacques KASEL		✓	✓		✓	

ⁱ All information contained in this table has been taken from the biographical details of the former members of the Court of Justice on the Court's website. Where information has been gleaned from additional sources, this is indicated in the endnotes: http://curia.europa.eu/jcms/jcms/Jo2_9606/?hlText=former+members (last accessed at 15:24 on Tuesday, the 22nd March 2016).

ⁱⁱ Although not mentioned in the biographical note on the Court's website, Judge Mackenzie Stuart was a convener of the Commission du barreau sur les problèmes posés par la CEE (*Audience Solennelle 9 Janvier 1973* (Luxembourg: 1973), p. 57).

ⁱⁱⁱ Judge Due "Head of Course and lecturer for the post-graduate courses in Community law at the Danmarks Juristforbund (Danish Legal Society), at the Danmarks Forvaltningshøjskole (Civil Service Administrative College) and at the Advokatrådet (Council of Lawyers) from 1964 to 1973". He also authored numerous legal publications: *Formal Hearings of the Court of Justice of the European Communities 1978 and 1979* (Luxembourg: 1980), pp. 39-40.

^{iv} According to Judge Due's biography in *Formal Hearings of the Court of Justice of the European Communities 1978 and 1979*, *supra* n. iii, pp. 39-40, he served as "Secretary, and later President, of the Commission on the adaptation of laws prior to the Accession of Denmark to the European Communities from 1962 to 1972", as well as "Permanent delegate to the conferences on the technical adjustments to be made to Community measures in view of the enlargement of the Communities and on drafting the legal provisions in the Treaty of Accession, etc. from 1970 to 1972", and as "Member of the Danish delegation at The Hague Conference on Private International Law from 1964 to 1976."

^v Although not mentioned on the Court's website, Judge Chloros was "one of the five-member task force negotiating Greece's entry into the EEC and has been responsible especially for the legal aspects of the negotiations and for the Treaty of Accession." Furthermore "[f]rom 1979 to 1980 he acted as legal adviser on EEC matters to Minister Contogeorgis, Greek Minister responsible for European Affairs." (*Formal Hearings of the Court of Justice of the European Communities 1980 and 1981* (Luxembourg: 1982), p. 46).

^{vi} Although not mentioned on the Court's website, Judge Chloros "was elected President of the Conference of European Law Faculties under the auspices of the Council of Europe." (*Formal Hearings of the Court of Justice of the European Communities 1980 and 1981*, *supra* n. v, p. 45).

^{vii} Judge Slynn was the Vice-President of the Union Internationale des Avocats from 1973-1976 (*Formal Hearings of the Court of Justice of the European Communities 1980 and 1981*, *supra* n. v, p. 45). He also served as Advocate General prior to his appointment as Judge at the Court.

^{viii} Judge Mancini served as Advocate General prior to taking office as a Judge of the Court.

^{ix} *Formal Hearings of the Court of Justice of the European Communities 1982 and 1983* (Luxembourg: 1984), p. 54: "Representative of the Greek State Council on the Permanent Committee responsible for organizing round table conferences of representatives of the higher instances of administrative law of the Member States of the European Communities."

^x Judge O'Higgins was the Irish Parliament Representative to the consultative assembly of the Council of Europe between 1950 and 1972 (*Synopsis of the Work of the Court of Justice of the European Communities in 1984 and 1985 and Record of Formal Sitings in 1984 and 1985* (Luxembourg: 1986), p. 151).

^{xi} *Synopsis of the Work of the Court of Justice of the European Communities in 1986 and 1987 and Record of Formal Sitings in 1986 and 1987* (Luxembourg: 1988), p. 187: "Deputy in the Assembly of the Republic and Vice-President of the Christian-Democrat Parliamentary Group, member of the Executive Committee (1983) and Vice-President of the C.D.S. Congress - Social Democratic Party (1985)."

^{xii} "Member of the Bars of Barcelona (1964) and Madrid (1971)" (*Synopsis of the Work of the Court of Justice of the European Communities in 1988 and 1989 and Record of Formal Sitings in 1988 and 1989* (Luxembourg: 1990), p. 215).

^{xiii} "Member of the Institut de Droit International (as from 1979)" (*Synopsis of the Work of the Court of Justice of the European Communities in 1988 and 1989 and Record of Formal Sitings in 1988 and 1989*, *supra* n. xii, p. 215).

^{xiv} "Deputy Chairman of the Board of the Arbeitskreis Europäische eV [Study Group on European Integration] from 1975 to 1985, Chairman from 1985 to 1988." (*Synopsis of the*

Work of the Court of Justice of the European Communities in 1988 and 1989 and Record of Formal Sittings in 1988 and 1989, supra n. xii, p. 219).

^{xv} “Member of the European Commission’s Advisory Committee on the Powers of the European Parliament (the Vedel Committee)” (*Synopsis of the Work of the Court of Justice and the Court of First Instance of the European Communities in 1990 and Record of Formal Sittings in 1990* (Luxembourg: 1991), p. 63).

^{xvi} Judge Gulmann had previously acted as Legal Secretary to Judge Sørensen, and as an Advocate General.

^{xvii} Judge Edward had been a Judge at the Court of First Instance (1989-1992).

^{xviii} Judge La Pergola had been an Advocate General (1995-1999) prior to appointment as Judge.

^{xix} Research Assistant, Chair of Criminal Law at the University of Erlangen (1969-1973) (http://www.bundesgerichtshof.de/EN/TheCourt/Presidents/Hirsch/hirsch_node.html) (last accessed at 15:47 on Tuesday, the 22nd March 2016).

^{xx} According to his *curriculum vitae* as published in Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/iv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:24 on Tuesday, the 22nd March 2016), Judge Jann while “[a]ttached to the International Affairs Department of the Federal Ministry of Justice, participat[ed] in international treaty negotiations, and in the Council of Europe (in working committees); [and] also represented the Federal Government before the European Commission of Human Rights.”

^{xxi} According to his *curriculum vitae* as published in Press Release 4061/95 (Presse 2-G) (available at <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=Rcg0Sz8JDmwJK2p6FzQJftKdLK1whhXyym2Tv71sh51j17rQTMLb!1452305345?docId=249419&cardId=249419>) (last accessed at 15:48 on Tuesday, the 22nd March 2016), p. 14, Judge Ragnemalm was “Sweden’s representative in the European Commission for Democracy through Law since 1990.”

^{xxii} According to his *curriculum vitae* as published in Press Release 4061/95 (Presse 2-G) (available at <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=Rcg0Sz8JDmwJK2p6FzQJftKdLK1whhXyym2Tv71sh51j17rQTMLb!1452305345?docId=249419&cardId=249419>) (last accessed at 15:48 on Tuesday, the 22nd March 2016), p. 11, Judge Sevón was an assistant at the University of Helsinki from 1966-1971, and assistant professor at the same institution from 1971-1972 and 1974.

^{xxiii} Judge Schintgen served as Judge at the Court of First Instance prior to his appointment as Judge at the Court of Justice.

^{xxiv} Judge Lindh had been a Judge at the Court of First Instance prior to taking her seat at the Court of Justice.

APPENDIX 6: POST-EDUCATIONAL ‘ACTIVE WORK IN SOME ASPECT OF THE LAW’ OF THE CURRENT JUDGES OF THE COURT OF JUSTICE APPOINTED PURSUANT TO NOW ARTICLE 253 TFEU¹

Key: LA = Legal Academic
 LP = Legal Practitioner
 Civ Serv/Govt Off = Civil Servant/Government Official
 J = Judge
 I/S Org = International or Supranational Organisation
 Pol = Politician

Name	LA	LP	Civ Serv/Govt Off	J	I/S Org	Pol
Koen LENAERTS	✓	✓		✓ ⁱⁱ	✓	
Antonio TIZZANO	✓	✓	✓		✓	
Allan ROSAS	✓		✓		✓	
Rosario Silva DE LAPUERTA	✓		✓		✓	
Endre JUHÁSZ			✓		✓	
Anthony BORG BARTHET	✓		✓			
Marko ILEŠIĆ	✓			✓	✓	
Jiří MALENOVSKÝ	✓		✓	✓	✓	
Egils LEVITS	✓		✓	✓	✓	
Lars Bay LARSEN	✓		✓	✓	✓	
Jean-Claude BONICHOT	✓		✓	✓	✓	
Thomas VON DANWITZ	✓					
Alexander ARABADJIEV				✓	✓	✓
Camelia TOADER	✓	✓	✓	✓		
Marek SAFJAN	✓			✓	✓	
Daniel ŠVÁBY			✓	✓ ⁱⁱⁱ	✓	
Maria BERGER	✓		✓		✓	✓
Alexandra (Sacha) PRECHAL	✓				✓	
Egidijus JARAŠIŪNAS	✓	✓		✓	✓	✓
Carl Gustav FERNLUND			✓	✓		
José Luís DA CRUZ VILAÇA	✓	✓	✓	✓	✓	✓
Christopher VAJDA		✓		✓		
Sinisa RODIN	✓				✓	
François BILTGEN		✓	✓		✓	✓
Küllike JÜRIMÄE			✓	✓	✓ ^{iv}	
Constantinos LYCOURGOS	✓	✓	✓		✓	
Mihalis VILARAS	✓	✓	✓	✓ ^v	✓	
Eugene REGAN		✓			✓	✓

ⁱ All information contained in this table has been taken from the biographical details of the current members of the Court of Justice on the Court's website. Where information has been gleaned from additional sources, this is indicated in the endnotes (http://curia.europa.eu/jcms/jcms/Jo2_7026/) (last accessed at 15:24 on Tuesday, the 22nd March 2016).

ⁱⁱ Judge Lenaerts was a Judge at the Court of First Instance prior to being appointed as a Judge at the Court of Justice.

ⁱⁱⁱ Judge Šváby was a Judge at the Court of First Instance prior to being appointed as a Judge at the Court of Justice.

^{iv} Judge Jürimäe was a Judge of the General Court prior to being appointed as a Judge at the Court of Justice.

^v Judge Vilaras was a Judge of the General Court prior to being appointed as a Judge at the Court of Justice.

APPENDIX 7: APPROXIMATE LENGTH OF POST-EDUCATIONAL ‘ACTIVE WORK IN SOME ASPECT OF THE LAW’ OF THE JUDGES OF THE COURT OF JUSTICE APPOINTED PURSUANT TO ARTICLE 32 ECSC AT THE DATE OF APPOINTMENTⁱ

Name	Years
Massimo PILOTTI	40+
Petrus SERRARENS	30+
Otto RIESE	20+
Louis DELVAUX	30+
Jacques RUEFF	20+
Charles Léon HAMMES	20+
Adrianus VAN KLEFFENS	10+ ⁱⁱ

ⁱ All information contained in this table has been taken from the biographical details of the former members of the Court of Justice on the Court’s website. Where information has been gleaned from additional sources, this is indicated in the endnotes: http://curia.europa.eu/jcms/jcms/Jo2_9606/?hlText=former+members (last accessed at 15:24 on Tuesday, the 22nd March 2016).

ⁱⁱ Due to a paucity of biographical detail for Judge Van Kleffens on the Court’s website, it is difficult to estimate the length of time he spent in his various posts. He was certainly at the Ministry for Economic Affairs from 1934 until some point in the early 1940s when he was taken as a prisoner of war. He resumed this post in 1945 and it would appear he continued in it until 1952. However, given the fact that he was born in 1899, and he served in a number of positions prior to joining the Ministry of Economic Affairs, it can be assumed that he would have had a twenty-year-plus professional career in 1952.

APPENDIX 8: APPROXIMATE LENGTH OF POST-EDUCATIONAL ‘ACTIVE WORK IN SOME ASPECT OF THE LAW’ OF THE FORMER JUDGES OF THE COURT OF JUSTICE APPOINTED PURSUANT TO NOW ARTICLE 253 TFEU AT THE DATE OF APPOINTMENTⁱ

Name	Years
Rino ROSSI	30+
Andreas Matthias DONNER	10+
Nicola CATALANO	20+
Alberto TRABUCCHI	30+
Robert LECOURT	30+ ⁱⁱ
Walter STRAUSS	30+
Riccardo MONACO	40+
Josse J. MERTENS DE WILMARS	30+
Pierre PESCATORE	20+
Hans KUTSCHER	20+
Cearbhall Ó DÁLAIGH	30+
Max SØRENSEN	30+
Alexander J. MACKENZIE STUART	20+
ANDREAS O’KEEFFE	30+
Francesco CAPOTORTI	20+
Giacinto BOSCO	40+
Adolphe TOUFFAIT	40+
Thymen KOOPMANS	20+
Ole DUE	20+
Ulrich EVERLING	20+
Alexandros CHLOROS	20+
Gordon SLYNN	20+
Fernand GRÉVISSE	20+
Kai BAHLMANN	20+
G. Federico MANCINI	30+
Yves GALMOT	20+
Constantinos KAKOURIS	20+
René JOLIET	10+
Thomas Francis O’HIGGINS	40+
Fernand SCHOCKWEILER	20+
José Carlos DE CARVALHO MOITINHO DE ALMEIDA	10+
Gil Carlos RODRIGUEZ IGLÉSIAS	10+
Manuel DIEZ DE VELASCO	20+
Manfred ZULEEG	20+
Paul Joan George KAPTEYN	30+
Claus Christian GULMANN	20+ ⁱⁱⁱ
John L. MURRAY	20+
David Alexander Ogilvy EDWARD	20+ ^{iv}
Antonio Mario LA PERGOLA	20+
Jean-Pierre PUISSOCHET	20+
Günther HIRSCH	20+
Peter JANN	30+
Hans RAGNEMALM	30+ ^v
Leif SEVÓN	20+ ^{vi}
Melchior WATHELET	10+
Romain SCHINTGEN	30+
Krateros IOANNOU	30+
Vassilios SKOURIS	20+
Fidelma O’KELLY MACKEN	20+
Ninon COLNERIC	20+ ^{vii}
Stig VON BAHR	30+ ^{viii}
José Narciso DA CUNHA RODRIGUES	30+
Christiaan Willem Anton TIMMERMANN	30+

Name	Years
Konrad Hermann Theodor SCHIEMANN	30+
Jerzy MAKARCZYK	30+
Ján KLUČKA	20+
Pranas KŪRIS	30+
George ARESTIS	30+
Aindrias Ó CAOIMH	30+
Uno LÕHMUS	20+
Pernilla LINDH	30+
Jean-Jacques KASEL	30+

ⁱ All information contained in this table has been taken from the biographical details of the former members of the Court of Justice on the Court's website. Where information has been gleaned from additional sources, this is indicated in the endnotes: http://curia.europa.eu/jcms/jcms/Jo2_9606/?hlText=former+members (last accessed at 15:24 on Tuesday, the 22nd March 2016).

ⁱⁱ *Audiences Solennelles 1959-1963* (Luxembourg, 1963), p. 41 provides much more detail than the biographical note on the Court's website, particularly as it relates to Judge Lecourt's pre-World War II legal career.

ⁱⁱⁱ According to his *curriculum vitae* in *Synopsis of the Work of the Court of Justice and the Court of First Instance of the European Communities: Annual Report 1991* (Luxembourg: 1993), p. 89, Judge Gulmann commenced work at the Ministry of Justice in 1965.

^{iv} According to his *curriculum vitae* at http://www.blackstonechambers.com/people/barristers/sir_david_edward_qc.html, (last accessed at 15:54 on Tuesday, the 22nd March 2016), Judge Edward was called to the Bar in 1962.

^v Press Release 4061/95 (Presse 2-G) (available at <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=Rcg0Sz8JDmwJK2p6FzQJftKdLK1whhXym2Tv71sh51j17rQTMLb!1452305345?docId=249419&cardId=249419>) (last accessed at 15:56 on Tuesday, the 22nd March 2016), p. 14.

^{vi} Press Release 4061/95 (Presse 2-G) (available at <http://ec.europa.eu/dorie/fileDownload.do;jsessionid=Rcg0Sz8JDmwJK2p6FzQJftKdLK1whhXym2Tv71sh51j17rQTMLb!1452305345?docId=249419&cardId=249419>) (last accessed at 15:56 on Tuesday, the 22nd March 2016), p. 11.

^{vii} Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/lv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:57 on Tuesday, the 22nd March 2016).

^{viii} According to the more detailed *curriculum vitae* provided in Press Release 10181/00 (Presse 258) of the 26th July 2000 (available at http://www.consilium.europa.eu/lv/uedocs/cms_data/docs/pressdata/fr/misc/acf114.html) (last accessed at 15:57 on Tuesday, the 22nd March 2016).

APPENDIX 9: APPROXIMATE LENGTH OF POST-EDUCATIONAL ‘ACTIVE WORK IN SOME ASPECT OF THE LAW’ OF THE CURRENT JUDGES OF THE COURT OF JUSTICE APPOINTED PURSUANT TO NOW ARTICLE 253 TFEU AT THE DATE OF APPOINTMENTⁱ

Name	Years
Koen LENAERTS	20+
Antonio TIZZANO	30+
Allan ROSAS	20+
Rosario Silva DE LAPUERTA	20+ ⁱⁱ
Endre JUHÁSZ	30+
Anthony BORG BARTHET	20+
Marko ILEŠIČ	20+
Jiří MALENOVSKÝ	20+
Egils LEVITS	10+
Lars Bay LARSEN	20+
Jean-Claude BONICHOT	20+
Thomas VON DANWITZ	10+
Alexander ARABADJIEV	30+
Camelia TOADER	20+
Marek SAFJAN	20+
Daniel ŠVÁBY	30+ ⁱⁱⁱ
Maria BERGER	20+
Alexandra (Sacha) PRECHAL	20+
Egidijus JARAŠIŪNAS	30+
Carl Gustav FERNLUND	30+
José Luís DA CRUZ VILAÇA	40+
Christopher VAJDA	30+
Sinisa RODIN	20+
François BILTGEN	20+
Küllike JÜRIMÄE	20+
Constantinos LYCOURGOS	20+
Mihalis VILARAS	40+
Eugene REGAN	30+

ⁱ All information contained in this table has been taken from the biographical details of the current members of the Court of Justice on the Court’s website. Where information has been gleaned from additional sources, this is indicated in the endnotes (http://curia.europa.eu/jcms/jcms/Jo2_7026/) (last accessed at 15:24 on Tuesday, the 22nd March 2016).

ⁱⁱ Press Release C/03/217 Bruxelles, den 25. Juli 2003 11604/03 (Presse 217), p. 25.

ⁱⁱⁱ Discernible from Judge Šváby’s *curriculum vitae* as published in Council Document 5488/09 of the 23rd January 2009 (available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205488%202009%20INIT>) (last accessed at 15:58 on Tuesday, the 22nd March 2016).

APPENDIX 10: LEVEL OF 'LAW CONDITIONING' OF THE JUDGES OF THE COURT OF JUSTICE (1952-PRESENT)

Name	Level 1	Level 2	Level 3
Massimo PILOTTI			✓
Petrus SERRARENS	x		
Otto RIESE			✓
Louis DELVAUX			✓
Jacques RUEFF	x		
Charles Léon HAMMES			✓
Adrianus VAN KLEFFENS ¹		✓	
Rino ROSSI			✓
Andreas Matthias DONNER		✓	
Nicola CATALANO			✓
Alberto TRABUCCHI			✓
Robert LECOURT			✓
Walter STRAUSS			✓
Riccardo MONACO			✓
Josse J. MERTENS DE WILMARS			✓
Pierre PESCATORE			✓
Hans KUTSCHER			✓
Cearbhall Ó DÁLAIGH			✓
Max SØRENSEN			✓
Alexander J. MACKENZIE STUART			✓
ANDREAS O'KEEFFE			✓
Francesco CAPOTORTI			✓
Giacinto BOSCO			✓
Adolphe TOUFFAIT			✓
Thymen KOOPMANS			✓
Ole DUE			✓
Ulrich EVERLING			✓
Alexandros CHLOROS			✓
Gordon SLYNN			✓
Fernand GRÉVISSE			✓
Kai BAHLMANN			✓
G. Federico MANCINI			✓
Yves GALMOT			✓
Constantinos KAKOURIS			✓
René JOLIET		✓	
Thomas Francis O'HIGGINS			✓
Fernand SCHOCKWEILER			✓
José Carlos DE CARVALHO MOITINHO DE ALMEIDA		✓	
Gil Carlos RODRIGUEZ IGLÉSIAS		✓	
Manuel DIEZ DE VELASCO			✓

Name	Level 1	Level 2	Level 3
Manfred ZULEEG			✓
Paul Joan George KAPTEYN			✓
Claus Christian GULMANN			✓
John L. MURRAY			✓
David Alexander Ogilvy EDWARD			✓
Antonio Mario LA PERGOLA			✓
Jean-Pierre PUISSOCHET			✓
Günther HIRSCH			✓
Peter JANN			✓
Hans RAGNEMALM			✓
Leif SEVÓN			✓
Melchior WATHELET		✓	
Romain SCHINTGEN			✓
Krateros IOANNOU			✓
Vassilios SKOURIS			✓
Fidelma O'KELLY MACKEN			✓
Ninon COLNERIC			✓
Stig VON BAHR			✓
José Narciso DA CUNHA RODRIGUES			✓
Christiaan Willem Anton TIMMERMANN			✓
Konrad Hermann Theodor SCHIEMANN			✓
Jerzy MAKARCZYK			✓
Ján KLUČKA			✓
Pranas KŪRIS			✓
George ARESTIS			✓
Aindrias Ó CAOIMH			✓
Uno LÖHMUS			✓
Pernilla LINDH			✓
Jean-Jacques KASEL ⁱⁱ			✓
Koen LENAERTS			✓
Antonio TIZZANO			✓
Allan ROSAS			✓
Rosario Silva DE LAPUERTA			✓
Endre JUHÁSZ			✓
Anthony BORG BARTHET			✓
Marko ILEŠIČ			✓
Jiří MALENOVSKÝ			✓
Egils LEVITS			✓
Lars Bay LARSEN		✓	
Jean-Claude BONICHOT			✓
Thomas VON DANWITZ		✓	
Alexander ARABADJIEV			✓
Camelia TOADER			✓
Marek SAFJAN			✓

Name	Level 1	Level 2	Level 3
Daniel ŠVÁBY			✓
Maria BERGER			✓
Alexandra (Sacha) PRECHAL			✓
Egidijus JARAŠIŪNAS			✓
Carl Gustav FERNLUND			✓
José Luís DA CRUZ VILAÇA			✓
Christopher VAJDA			✓
Sinisa RODIN			✓
François BILTGEN			✓
Küllike JÜRIMÄE			✓
Constantinos LYCOURGOS			✓
Mihalis VILARAS			✓
Eugene REGAN ⁱⁱⁱ			✓

ⁱ Judges Pilotti, Serrarens, Riese, Delvaux, Rueff, Hammes and van Kleffens were appointed pursuant to Article 32 ECSC.

ⁱⁱ The Judges listed from Judge Rossi to Judge Kasel inclusive are former Judges appointed to the Court of Justice pursuant to now Article 253 TFEU.

ⁱⁱⁱ The Judges listed from Judge Lenaerts to Judge Regan inclusive are the Judges at the current Court of Justice.

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