IGC Issues:
The European Court of Justice

Research Paper 96/57

30 April 1996

This paper is the first in a series devoted to issues arising at the Intergovernmental Conference (IGC) which opened in Turin on 29 March 1996. It looks at the role and procedures of the European Court of Justice and considers whether it is biased in favour of European integration. It also looks at proposals for reform which are being submitted to the IGC.

The Court of First Instance and the Court of Auditors are not discussed here, although some matters concerning the Court of Justice could also apply to the Court of First Instance.

Vaughne Miller
International Affairs and Defence Section

House of Commons Library

Contents

Introduction

The European Court of Justice (ECJ) in Luxembourg is the court of the European Communities. It rules on alleged breaches of the Treaties and of EC law by the governments of the member states, companies, individuals and the EU institutions. It is a unique creation of the Communities, originally established under the European Coal and Steel Community (ECSC) Treaty in 1951, mainly to handle appeals to it by coal and steel enterprises. In 1957, a single Court of Justice was set up under the Treaty of Rome which established the European Economic Community to replace the Court of Justice of the ECSC. The ECJ was thereby given jurisdiction over the three European Communities: the ECSC, EEC and the European Atomic Energy Community (Euratom). The Treaty on European Union (TEU), which came into force in November 1993, introduced a three-pillared structure to the new European Union. This consisted of a strengthened European Community, provisions for a common foreign and security policy (CFSP) and co-operation in justice and home affairs (JHA). The Community pillar replaced the European Economic Community and remained subject to EC law making and enforcement procedures. The latter two are intergovernmental and although they make some use of the Commission and of EC procedures, they are not subject to the adjudication of the ECJ.

The ECJ is often confused with the European Court of Human Rights, which is a Council of Europe body dealing with alleged breaches of the European Convention on Human Rights. The two institutions and the treaties under which they were established are completely different, although there is some overlap in their activities.[1]

The European Court of Justice is referred to either as the Court or the ECJ. The European Union is described as the EC, the EU or the EC/EU, depending on the historical and legal context.

I Role and Remit of the Court

The powers and functions of the Court are set out in Articles 164 -188 of the Treaty of Rome as amended by the Treaty on European Union (TEU). Article 164 provides that :

> The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

---

[1] The European Court of Human Rights is discussed in Library Research Paper 94/10, *International Human Rights Conventions*, 18 January 1994.

ECJ judgments settle particular matters of conflict between the laws of the member states and Community law or actions, and they spell out the precise interpretation of disputed Treaty Articles in order to clarify and interpret them. The judgments of the ECJ are binding on those they address. The Court can levy fines on firms found to be in breach of the Treaties or of EC legislation and it may also fine governments which fail to carry out Treaty obligations.[2]

The ECJ has a number of functions which correspond in the legal systems of the member states to the constitutional courts, courts of general jurisdiction, administrative courts and tribunals. However, unlike the superior courts of England and Wales and the national courts in other member states, the ECJ has no inherent jurisdiction. Its powers are confined to those matters over which it has jurisdiction under the Treaties These are:

- complaints that a particular member state has failed to fulfil its obligations under the Treaty (Articles 169 and 170);

- reviews of the legality of the actions of the Council and the Commission other than recommendations or opinions (Article 173);

- complaints that the Council or Commission have failed to act and so contravened the Treaty (Article 175);

- preliminary rulings on questions raised before the courts or tribunals of member states on the interpretation of the Treaty, the validity and interpretation of acts of the EU institutions and the interpretation of the statutes of bodies established by an act of the Council where those statutes so provide where it is necessary for the national court to reach a judgment (Article 177);

- disputes between the Union and its servants concerning staff regulations and conditions of employment (Article 179);

- disputes about various matters concerning the European Investment Bank (Article 180);

- arbitration clauses in contracts concluded by or on behalf of the Community (Article 181);

[2] Article 171 of Treaty. The authority to fine member state governments was introduced by Article G(51) of the TEU but has not yet been used.

- disputes between member states concerning matters under the Treaty (Article 182);

- cases of non-contractual liability (Article 215).

Other aspects of the Court's jurisdiction are covered by Article 171 and 172 (the imposition of penalties on a member state government for non-compliance with a judgment and actions to review penalties), Article 168a (appeals from the Court of First Instance) and Article 228(6) (opinions on international agreements between the EC and member states or international organisations).

Changes to the Treaty might bring additional subjects within the Court's jurisdiction and administrative changes in the Court would then probably be needed to allow for the increase in the number of cases brought about by any extension of the Court's jurisdiction. Some of these issues are discussed in more detail below.

II Composition of the Court

The ECJ is composed of judges and advocates-general appointed "from persons whose independence is beyond doubt and who possess the qualifications necessary required for appointment to the highest judicial office in their respective countries or are jurisconsults of recognised competence".[3] In practice, the ECJ is composed of a mixture of former judges, law professors, lawyers in private practice and government legal advisers.

ECJ judges are appointed unanimously by the governments of the member states and hold six-yearly renewable terms of office with a partial replacement every three years. Their role and terms of office are set out in the Statute of the Court of Justice contained in the Protocol to the Treaty.[4]

In the Union of 12, each member state had a judge of its own nationality at the Court, with a thirteenth held in rotation by the five larger states, Germany, France, Britain, Italy and Spain, in order to maintain the uneven number of judges needed to facilitate a majority vote. With enlargement of the Union to include Austria, Finland and Sweden, the number of judges was increased to 15 by the unanimous agreement of the Council under Treaty Article 165. There was no longer any need for the extra judge but since the position had already been

---

[3] Article 167 of Treaty.
[4] Protocol B, Cm 3151, p.177.

approved with a view to four new member states (Norway rejected membership in 1994), it was agreed in a Council Decision that the extra post would be transferred to a ninth advocate-general for a specified period.[5]

The advocates-general must have the same professional qualifications as the judges and their term of office is also six years renewable. The four large member states each have one advocate-general and four are held in rotation by the smaller states and Spain. There is no exact equivalent of the advocate-general in the English legal system, although it is central to the French and other continental systems. Under Article 166 of the Treaty advocates-general are required to "make reasoned submissions in open court, with complete impartiality and independence". They analyze the facts and arguments of the case and propose a solution before the ECJ, linking their proposal to the general trend of existing case law and indicating where possible the likely development of case law in the area in question. Their opinions are not binding on the Court which may agree or disagree with their legal arguments. As the Foreign Office Minister David Davis has pointed out, Court judgments can "be contrary to elements of an opinion without overturning it entirely".[6] The *Industrial Relations Legal Information Bulletin* has commented that "Although the Advocate General's opinion is in no way binding on the Court, it is still an authoritative document. It is often referred to by UK courts when applying decisions of the European Court".[7]

The current composition of the ECJ is given in Appendix I.

III Procedures of the Court

The ECJ sits either in plenary session with a quorum of nine judges (usually 9,11,13 or 15 judges) or in chambers of three to five judges. It sits in plenary when requested to do so by a member state or by one of the institutions of the Union. The Court's procedures are set out in its Rules of Procedure[8] and in the Statute attached to the Treaty.[9] The written submissions of parties are the most important part of the procedure, although the Court may also examine witnesses as part of a preparatory inquiry.

---

[5] Decision of the Council adjusting the instruments concerning the accession of new member states to the European Union, OJL 1, 1 January 1995.

[6] HC Deb, 18 March 1996, c.13W.

[7] *Industrial Relations Legal Information Bulletin*, 399, 19 April 1990.

[8] *OJL* 176, 4 July 1991, amended *OJL* 44, 28 February 1995.

[9] Protocol (No. B) on the Statute of the Court of Justice of the European Community, Cm 3151, Treaty Series No. 29 (1996).

In a direct action under Article 173, for example, the applicant addresses an application to the Registrar with the facts and a statement of the legal submissions and arguments. The President of the Court then appoints a judge-rapporteur and an advocate-general to the case. The defendant submits his defence setting out the facts, legal submissions and arguments. The applicant may reply to the defence and the defendant can respond in a rejoinder. Time limits are set for these submissions but extensions are often granted by the President. Member states and the EU institutions can intervene in support of any of the submissions and others may intervene if they can show a sufficient interest in the outcome of the case. After all the submissions have been made, the judge-rapporteur draws up a preliminary report, summarising the case and making recommendations for further action (eg further questioning or other preliminary enquiries, the assignment of the case to either the full Court or to a Chamber). Once the written procedure has finished, the Court may order, though rarely does so, preparatory enquiries, including oral testimony or the production of documents or experts' reports.

In the oral procedure the judge-rapporteur prepares a Report for the Hearing, summarising the facts, issues and arguments of all the parties. This is notionally read at the Hearing and parties and interveners may address the Court. Members of the Court question the parties and they may reply to new points raised during the Hearing.

Four to six weeks later, the Advocate-General delivers an Opinion to the Court which completes the first stage of the proceedings. The judges then meet to deliberate.

> The deliberations of the Court are secret. Unlike the UK legal system, there is no concept of binding precedent in its case law. Nevertheless, it is likely to follow the main principles of previous decisions for the sake of stability, unless it considers it necessary to distinguish the previous decisions on the facts. A draft judgment is prepared by the judge rapporteur for the Court's consideration. The final judgment bears the name of all the judges involved - no dissenting opinions are allowed. The judgment states the reasons upon which it is based, but is often quite brief and strictly limited to the findings which were necessary for its decision. In the case of preliminary rulings, the Court's judgment will be sent to the national court which asked for the ruling. It will then be up to the national court to apply the ruling to the case before it.[10]

With a preliminary ruling, once a case is referred to the Court by a national court or tribunal with a summary of the facts and stating the legal issues and the questions to be settled, the other member states, the Commission and Council are notified of the action. They then have two months in which to submit written observations. The oral stage which follows is similar to that for a direct action and consists of a public hearing at which a judge-rapporteur presents

---

[10] *Industrial Relations Legal Information Bulletin*, ibid.

a report on the facts and the submissions of the parties involved. The parties concerned as well as those who have submitted written observations may also present oral arguments to the Court.

An application for interim measures might be made for urgent cases. These are usually dealt with by the President of the Court under Article 55(2) of the Court's Rules of Procedure.

Under Article 29 of the Rules of Procedure, the language of the case itself may be in one of the languages of the Union, chosen by the applicant, although the Court deliberates in the working language of the Court, which for historical reasons is French. Judgments are reported in the European Court Reports (ECR) and consist of the Opinion of the Advocate-General and the Judgment of the Court.

IV Access by Individuals to the Court

Individuals, firms or other private parties whose interests have been harmed by a member state's failure to implement Community law or by incorrect implementation cannot approach the Court directly. Proceedings against the government of a member state for a ruling that it has not complied with its Treaty obligations can only be brought by the Commission or by another member state after certain conditions have been met. There are limited courses of action available to individuals, however, which might result in an action being brought to the Court. One would be to lodge a complaint with the EC Commission, which could lead to the initiation of proceedings under Article 169 of the Treaty:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission the latter may bring the matter before the Court of Justice.

Although claims that the law-making bodies, the Council or Commission, have acted illegally through lack of competence, infringement of the Treaty or EC laws, or through misuse of powers can be brought by natural or legal persons under Article 173 of the Treaty, an individual may only bring proceedings "against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former". This would be a direct action for annulment of a Community act and because the Court has construed this provision strictly, it is relatively rare for these provisions to be relied upon except where a decision is addressed directly to the individual.

The most commonly used method whereby an individual may bring an action before the ECJ is under Article 177 of the Treaty:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> a) The interpretation of this Treaty;
>
> b) the validity and interpretation of acts of the institutions of the Community;
>
> c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> 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 of Justice to give a ruling thereon.

A reference for a preliminary ruling may come from any national court or tribunal and a question is referred to the ECJ if a decision on it is considered "necessary" for the national body to give judgment. If there is no further judicial remedy (eg appeal or judicial review) in national law against the decision of the court which has the final say on an issue (eg the House of Lords), that court must refer a question of EC law to the ECJ if this is necessary for it to give judgment. A preliminary ruling usually takes 1-2 years from the time of reference.

Legal aid is not available before social security tribunals in the UK, so a complainant whose case is referred to the ECJ from such a tribunal could apply to the ECJ for legal aid to meet costs. The Court's legal aid provisions are set out in Article 76 of the Rules of Procedure. The position regarding costs and legal aid can be summarised as follows:

> In the case of a referral the costs are a matter for the national court. In direct actions the Court gives a decision as to costs in its final judgment, or in the order which closes the proceedings, provided that the successful party has asked for them in his pleadings; the loser usually pays all the costs.
>
> In the case of a referral in a criminal legal case legal aid will extend to proceedings before the Court of Justice. ... In the case of a civil action, a legally aided party will need to apply to the Legal Aid Authority for an extension of the legal aid certificate, to cover a referral to the Court of Justice. Under Reg. 51 of the Civil Legal Aid (General) Regulations 1989 S.I. No 1989/339, the Area Director can amend a certificate where "it has become desirable for the certificate to extend to ... proceedings in the Court of Justice of the European Communities on a reference to that Court for a preliminary ruling; or representation by an EEC lawyer". In the case of direct actions there is no provision in the Legal Aid Act 1988 for legal aid to be provided.

> The European Court has its own power to grant legal aid. This is quite separate from the ordinary national arrangements with regard to legal aid. An application has to be accompanied by "a document from the competent authority certifying his lack of means". The Court makes the order without giving reasons, and there is no appeal. After the hearing, in its decision on costs, the Court can order the assisted party to repay some or all of the legal aid back to the Court.[11]

V The Primacy of EC Law over National Law

It is a customary rule of international law that treaties are legally binding. In this there is an assumption of the supremacy of treaty obligations over national laws. The Vienna Convention on the Law of Treaties of 1969 stipulated in Article 26 that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith", and in Article 27 that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In joining the EC/EU member states have not only accepted international Treaty obligations under the terms of the Vienna Convention but also the unique obligations of the legal order created by the European Community Treaties, *inter alia* the direct applicability of the EC Treaties and the supremacy of binding instruments of Community law (regulations, directives and decisions), which remain distinctively Community law even though they are enforced by national courts.

Although the primacy of EC law is not made explicit in the Treaty, it has been acknowledged by the ECJ in a number of rulings, one of the earliest of which in 1964, stated:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[12]

The EU is unique compared with other international organisations in possessing such a wide range of policy areas in which it is in some way involved. The extent of involvement varies but in areas such as agriculture and fisheries, competition policy and external trade, significant initiating and decision-making powers have been transferred from national legislatures to EU

---

[11] David Medhurst, *A Brief and Practical Guide to EC Law*, 1990.

[12] Costa v ENEL [1964] ECR 585, and confirmed in *Simmenthal*, 1978, *Factortame*, 1990, and *Francovich*, 1991.

bodies. These matters are said to be within the "exclusive competence" of the EU, although this is misleading, since not every aspect of these areas is covered by EC legislation.

Incorporation of EC law into UK law was achieved by Section 2(1) of the *European Communities Act 1972* to the effect that where a statute refers to the law of any part of the UK, the reference includes EC law. Section 2(4) provide that past or future laws shall be construed and have effect subject to the provisions of Section 2 (ie including those providing for the direct effect of EC law).

All the member states except the UK have written constitutions which provide for the transfer of sovereignty to international organisations and/or specifically to the EC/EU. Provision is made for limitations on national sovereignty in the interests of international cooperation.[13]

There have been some suggestions in the UK that ECJ rulings should not be allowed to overturn national law. British critics of the ECJ have pointed to the French and German constitutions, which, they maintain, have a superior status to EC law and rulings of the ECJ. The Foreign Office Minister David Davis was asked in a parliamentary exchange about Germany's apparent disregard for ECJ judgments, and replied:

> ... they do not get away with it. The German Federal Republic loses a large number of European Court of Justice cases. That may make it think a little more about the operation of the Court.[14]

The constitutional positions of Germany and France with regard to EC law and the ECJ are considered below.

A. Germany

In 1993, as part of the German procedure to ratify the TEU, a new Article 23 was inserted in the German Constitution, the Basic Law, in order to provide for the transfer of sovereign powers to the European Union "with a view to establishing a united Europe" and "with the

---

[13] Articles 23 and 24(1) of Germany's Basic Law, Preamble to 1946 French Constitution and Articles 55 and 88 of the present Constitution, Article 92 of the Netherlands Constitution, Article 29 of the 1972 Irish Constitution, Article 11 of the Italian Constitution, Article 20 of the Danish Constitution, Article 25 bis of the Belgian Constitution, Article 49a of the Luxembourg Constitution, Article 28 (2) and (3) of the Greek Constitution, Article 8(3) of the Portuguese Constitution, Article 93 of the Spanish Constitution, Article 9(2) of the Austrian Constitution, Article 33a of the Finnish Constitution and Chapter 10, Article 5 of the Swedish Instrument of Government.

[14] HC Deb, 3 April 1996, c383.

consent of the Bundesrat". It stipulated that the united Europe must respect the principles of democracy, the rule of law, the "social, federal state," and the principle of subsidiarity. It also had to guarantee the protection of fundamental rights substantially comparable with those of the Basic Law.

Article 25 of the Basic Law provides that the "general rules of international law shall form part of federal law; they shall take precedence over the laws and create rights and duties directly applicable to the inhabitants of the territory of the federation". Some lawyers have argued that international treaties have the force of an ordinary federal law but not of a constitutional law. However, the supremacy of EC law over German law has been established in spite of attempts in the national courts to challenge this.

The issue was settled in a ruling of the Second Senate of the Federal Constitutional Court of 12 October 1993 on ratification of the TEU. The ruling did not state that the ECJ was subordinate to the German Court, but that if there were to be subsequent later amendments to the Treaties, substantially increasing the authority of the Union to act, then these would not be covered by the law approving the Treaty. The Court also reserved the right to check whether legal acts made by the EC institutions remained within the limits of the sovereign rights granted to them. It would exercise this jurisdiction in a "relationship of cooperation" with the ECJ.[15]

According to the ruling, the ECJ guaranteed the protection of basic rights in every particular case for the whole of the European Community and the Constitutional Court could therefore limit itself to a general guarantee of the "inalienable standard of basic rights". In this respect the ruling resembled a "*solange*" or "on condition that..." decision of the Constitutional Court in 1986. On this occasion, the Court ruled that the existing protection of rights under the German Constitution might not apply if instead a recognition of basic rights was guaranteed by the ECJ which in its content and effectiveness was essentially similar to the protection of rights in the German constitution. The German Court decided that this was the case at European level: as long as the EC and the judgments of the ECJ in particular guaranteed effective protection of basic rights against the sovereign powers of the Community, the Constitutional Court would not exercise its jurisdiction over the applicability of derived Community law and would not examine this according to the basic rights guaranteed by the Basic Law.

The 1993 Constitutional Court ruling concluded that the principle of democracy did not prevent the Federal Republic from belonging to a supra-national, inter-state community, as long as it too was democratic. Within this community there had to be a guarantee of legitimation and influence by the people, and a guarantee that the people would have a say

---

[15] Headnotes on Judgment of Second Senate of 12 October 1993, para. 7 (translation).

in their membership of this inter-state community, its development and future. The Court recognised that the transfer of sovereign powers to this Union meant that fulfilment of the democratic principle no longer depended on the member state alone, but to see this as a violation of the democratic principle contradicted the desire for integration also enshrined in Article 23 of the Basic Law. In this context, the Court explained that the validity and applicability of European law in Germany then and in the future depended on the legal obligation to apply the agreement to be part of a community of states and not a state based on a European nation. Thus, not only is being part of a supra-national organisation not incompatible with the democratic principle; it is a constitutional requirement of it.

This concept has been challenged. A leading German Constitutional Court judge, Professor Paul Kirchhof, challenged the supremacy of EC law in a paper published in 1995 by two independent think-tanks, the European Policy Forum and the Frankfurter Institut. In this paper Professor Kirchhof emphasised the importance of national parliaments in upholding the Treaty and maintained that the application of EC law in the member states was dependent on the decisions of national parliaments.

B. France

In France as in Germany the national courts have on occasions challenged the notion of the supremacy of EC law, although D.Lasok concluded that a "selection of more recent cases confirms that the French judiciary at all levels strives to uphold Community law".[16] Under Title VI Article 55 of the 1958 Constitution international treaties and agreements have a superior status to French laws and treaty obligations depend on reciprocity, ie. non-performance by another party would relieve France of its obligations of performance. There was no mention of EC law in the 1958 Constitution, which was amended by a constitutional law of 25 June 1992 to take account of the TEU. Article 88-I defines the relationship between France and the EU, stating:

> The Republic participates in the European Communities and in the European Union, composed of states which have freely chosen, in accordance with the treaties that established them, to exercise jointly certain of their competences.

In a National Assembly EU Committee report[17] the Gaullist rapporteur Pierre Mazeaud (Rassemblement pour la République) considers the question of EC Treaty obligations and secondary legislation (ie laws as opposed to Treaty articles) which are found to be in conflict with the French Constitution. Mazeaud's position is not the legal position adopted by the French courts, which like those in other member states are bound to respect the primacy of

---

[16] *Law and Institutions of the European Union*, 1994.

[17] *Droit communautaire et constitutions nationales*, 11 March 1996.

EC law, but he raises questions about law and sovereignty which have still to be fully resolved.

International treaties have an inferior status to the Constitution itself: under Article 54, if a potential treaty obligation is found to be in conflict with the Constitution, the Treaty cannot be ratified until the Constitution has been amended. If the Constitution is not amended, the international instrument will have no effect. According to Mazeaud these rules apply to the EC Treaties and in consequence to laws deriving from those Treaties. "This then raises the question of secondary Community legislation containing a provision contrary to the Constitution". He is of the opinion that "the question of conflict with a constitutional rule or principle does not appear to have been properly resolved". He agrees that one interpretation of the position could be, like the German view, that "the presumption of constitutionality could fail if an essential condition of the exercise of national sovereignty or a constitutional principle were brought into question to a degree beyond what may have been accepted during ratification of the source treaty".

The Conseil d'Etat and the Cour de Cassation are the bodies which monitor the constitutionality of actions of the law-making authorities. Mazeaud does not think that they are able to resolve the conflict between EC legislation and the Constitution. This is a "veritable breach" in French law "which means that Community secondary legislation has attained a position of near-impunity as far as respect for the 'supreme rule' is concerned and is 'impregnating' the law as it applies in our country to an ever greater extent" (He notes that the Community now introduces more regulations in France than the French Government at a rate of 54% against 46%). Mazeaud concludes that the answer to the conflict "can only lie in respecting the sovereignty of the people, which provides the only legitimacy for our political actions, rather than in theoretical debates and more or less controversial legal precedents".

VI Britain at the ECJ

A. Judgments in Article 169 Cases

Article 169 provides for the Commission to deliver a "reasoned opinion" on an alleged failure of a member state to fulfil its obligations under the Treaties. A question frequently asked in the British Parliament is how often Britain has failed to fulfil its obligations or has been taken to the ECJ compared with other EU member states. This is difficult to calculate with any great accuracy because ECJ judgments may rule in favour in some aspects of a case and against in others. The final judgment cannot therefore always be interpreted either as a clear case for or against the member state. A ruling against the state will almost always mean that the national law has to be amended in order to make it compatible with EC law.

Since 1984 the Commission has published an annual report "Monitoring the Application of Community Law" which gives *inter alia* figures for actions brought by the Commission under Article 169 procedure. The following table, compiled from the Commission's reports, shows how often ECJ judgments in Article 169 cases went in favour of the Commission or for the member state for the period 1981-1994:

Country	For Commission	For member state
Belgium	49	4
Denmark	8	1
Germany	22	1
Greece	22	1
Spain[18]	9	0
France	20	5
Ireland	14	1
Italy	92	13
Luxembourg	6	1
Netherlands	16	1
Portugal[18]	2	0
United Kingdom	16	1

B. Article 177 Cases

Under Article 177, a matter is referred to the ECJ by a national court for a preliminary ruling on a point of EC law. According to the Commission's *Twelfth annual report on monitoring the application of Community law - 1994*[19] the number of cases referred from 1990 to 1995 was as follows:

1990: 142 cases

1991: 186 cases

1992: 162 cases

1993: 204 cases

1994: 203 cases

1995: 251 cases[20]

---

[18] Spain and Portugal did not join the EC until 1986.

[19] OJC 254, 29 September 1995.

[20] Figures for 1995 are from a preliminary draft of the Commission's annual monitoring report, "Statistiques judiciaires: Activités de la Cour de Justice, Année 1995", 15 January 1996.

The number of references per member state in 1993, 1994 and 1995 was as follows:

Country	1993	1994	1995[20]
Austria	-	-	2
Belgium	22	19	14
Denmark	7	4	8
Finland	-	-	-
Germany	57	44	51
Greece	5	0	10
Spain	7	13	10
France	22	36	43
Ireland	1	2	3
Italy	24	46	58
Luxembourg	1	1	2
Netherlands	43	13	19
Portugal	3	1	5
Sweden	-	-	6
UK	12	24	20

C. Examples of UK Cases at the ECJ

A number of landmark ECJ rulings involving the British Government have challenged the notion of British parliamentary sovereignty and given rise to acute controversy. Some recent UK cases at the ECJ are considered below, with particular emphasis on the case of *Factortame*.

1. Factortame

The *Factortame* case[21] concerned Britain's obligation, under EC law and the terms of the 1985 Act of Accession by which Spain joined the Community, to allow Spanish fishermen to fish in UK waters within the prescribed EC quotas. Britain enacted laws under which, to be entitled to fish in UK waters, the vessel would have to register as a British vessel. To bring about these restrictions changes were made to the *Merchant Shipping Act 1988* and the *Merchant Shipping (Registration of Fishing Vessels) Regulations 1988*, both of which came into force on 1 December 1988. All fishing vessels registered under the earlier 1984 Act had to re-register before 31 March 1989 in order to qualify for fishing rights.

[21]Case C-221/89.

Factortame involved 95 vessels which could not satisfy one or more of the conditions of the new legislation. The conditions were challenged by the owners of a boat called "Factortame" and 94 other boats on the grounds that the UK Acts were incompatible with the Treaty of Rome and the Common Fisheries Policy. In the following Parliamentary Written Answer the Attorney-General set out the background and juridical implications of the case:

> *The Context*
>
> Owners and operators of certain fishing vessels formerly registered as British have claimed that some of the registration conditions contained in part II of the Merchant Shipping Act 1988 are incompatible with Community law. They have applied to the High Court for judicial review.
>
> The divisional court has referred the relevant questions of Community law to the European Court of Justice for a ruling. But the applicants also asked the divisional court for interim relief to protect their claimed rights in the meantime, by disapplying the relevant provisions of the Act pending final judgment.
>
> The Secretary of State for Transport has opposed this application strongly.
>
> The divisional court decided to grant the interim relief that was asked for. It ordered that the relevant part of the 1988 Act should be disapplied, so as to allow all previous registrations to remain in effect pending the European Court's ruling.
>
> The Secretary of State appealed. The Court of Appeal reversed that order, and the House of Lords upheld the Court of Appeal. It held that, as a matter of national law, the divisional court had no jurisdiction to make any such order.
>
> The House of Lords itself, however, referred to the European Court the separate question whether in the circumstances of the case Community law either obliged the national court to grant interim relief by suspending the application of a national measure, or alternatively gave it power to grant such interim protection of the rights claimed; and, if so, upon the application of what criteria.
>
> *The immediate effect*
>
> The United Kingdom argued before the European Court that Community law neither obliged nor enabled a national court to grant interim relief suspending the application of a national measure where the national court was debarred by national law from doing so. The court has, however, ruled that, where a national court would have

granted such interim relief in order to protect directly effective Community law rights had it not been for a rule of its national law prohibiting it from so doing, it must as a matter of Community law set aside that rule.

In consequence the application for judicial review now returns to the English courts for decision as to whether interim relief should now be granted and, if so, on what terms. The Secretary of State will make submissions as to the general criteria to be applied and will argue strongly that interim relief ought not to be granted in the present case.. but since the matter is *sub judice* it would be wrong to say more. Meanwhile, the practical position as regards fishing rights remains unchanged pending resolution of this issue.

The juridical significance

When a country joins the Community it is obliged to reconcile its constitution, whether written or unwritten, with Community membership. It has to provide for the application of Community law within its territory, which means providing for Community law to have supremacy over any conflicting provisions of its own national law.

Community law requires that directly effective Community law rights must be fully and uniformly applied in all the member states. If the provisions of any national law might prevent, even temporarily, Community rules from having such force and effect as Community law requires, national courts shall be able to set them aside. This requirement derives from article 5 of the treaty of Rome. It is Parliament that has given effect to requirements such as this, by means of the provisions of section 2(1) of the European Communities Act 1972:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly..."

In Factortame the Court of Justice held that the full effectiveness of Community law would be impaired if a jurisdictional rule in the law of a member state prevented its national courts from granting interim relief so as to preserve directly effective rights claimed under Community law, where the national courts would otherwise consider it appropriate to do so. The House of Lords is accordingly now

> under a Community law obligation to give effect to the ruling, because that ruling is automatically brought into English law by the operation of section 2(1) of the 1972 Act. Moreover, by virtue of section 2(4) of the Act, Parliament has provided that an Act of Parliament such as the 1988 Act is to be construed and have effect subject to the obligations and powers which arise under section S2(1):
>
> "[S2(4)] ... and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section . . ."
>
> Finally, it is important to note that the ruling of the Court of Justice applies equally to the national courts of every member state.[22]

At this point the ECJ had ruled only on the question of interim relief. However, in its judgment on 25 July 1991 on the substantive issue, the ECJ ruled that the UK Acts were incompatible with Article 52 of the Treaty of Rome and with the Common Fisheries Policy by discriminating against non-UK EC nationals and stipulating that those who worked on the fishing boats had to reside in the UK.[23]

In compliance with the Interim Order of the President of the ECJ against the UK[24], the British Government had amended section 14 of the Merchant Shipping Act 1988 (Eligibility for registration as British fishing vessel) with effect from 2 November 1989.

The significance of the *Factortame* case has been variously interpreted. In an article entitled "Did the Factortame Ruling Cut United Kingdom Sovereignty Further?" Amir Majid concluded:

> The Factortame decision does not mark any new development in law. As analyzed above, it was all along understood that under the pledge of reciprocity with other members of the EEC, the United Kingdom had to keep within the Community law. Like other institutions Parliament was also expected to curb its capacity of "action at pleasure" to conform with the Community law. The Parliaments of the other eleven member states are obliged to do likewise. The United Kingdom had recognised and fully appreciated it at the time of entry and the principles acknowledged by the European Communities act 1972 reflect this understanding.
>
> No further diminution than automatically implied by the EEC membership has occurred in the United Kingdom sovereignty. Indeed, perfectly in accordance with the ECA 1972 provisions, the United Kingdom Court of Appeal and House of Lords

---

[22] *HC Deb*, 26 June 1990, cc141-143W.

[23] *OJC* 220, 23 August 1991 and *Times Law Report*, 16 September 1991.

[24] Case 246/89.

> could take a more robust approach to review the irreconcilability of the Merchant Shipping Act 1988. The European Communities Act 1972 requires the United Kingdom courts to confom to ECJ rulings in European Community matters. In the Simmenthal case, the ECJ had said that the municipal courts "within their jurisdictional limits" should give primacy to the EEC law and should reject any conflicting national legislation without awaiting a ruling from a superior court of that country. A fortiori a municipal court should not wait for a ruling from the ECJ if it can resolve the conflict itself.
>
> In the Factortame case, Neill LJ and Hodgson J, in the Divisional Court, gave some effect to the Simmenthal principle when they granted interim relief against the Crown on 10 March 1989. But they were overruled by the Court of Appeal, whose decision was upheld by the House of Lords. The House of Lords reversed this decision when it was presented with the 19 June 1990 ruling of the ECJ, producing the result of restoring the interim relief given by Neill LJ and Hodgson J. Perhaps, if the House of Lords had taken a more progressive approach, the United Kingdom need not have been in the media headlines as a violator of the rule of law within the supranational legal order of the EEC.[25]

Martin Howe of the Society of Conservative Lawyers argued differently:

> On the substantive issue, the overall conclusion of the case can only give rise to concern as to the basic fairness of what has occurred. Having agreed with its Community partners on a system of fishing quotas which would supposedly give fair protection to its fishing industry, the United Kingdom has then found itself in the position that other Treaty provisions have been successfully used to circumvent and to undermine that protection. It would be right to say that the effect of the ECJ's interpretation of the Treaty provisions has been that a different bargain has been delivered from that entered into.
>
> The broader issues thrown up by the case relating to the powers of the Courts and the position of Acts of Parliament are of even greater importance. Are Courts the right bodies to exercise a power to suspend Acts whose validity is contested? Does our constitution and history fit them to perfom this role? How far does this power extend: in the ultimate, could the Courts even suspend or "disapply" an Act repealing or modifying the European Communities Act 1972?[26]

The Government accepted the judgments of the ECJ and acted accordingly. A question in the House of Lords as to whether Britain would try to regain its sovereign power in this particular case was answered as follows:

---

[25] Dr Amir Majid, Barrister at Law, *Commonwealth Law Bulletin*, April 1992.
[26] *Europe and the Constitution After Maastricht*, Martin Howe, June 1992.

> **Lord Stoddart of Swindon** asked her Majesty's Government:
> Whether, in the light of the decision of the European Court of Justice in the *Factortame* case that the Merchant Shipping Act 1988 is in breach of European law, they will amend the European Communities Act 1972, so as to ensure that no body other than the British Parliament has the power to declare one of its Acts null and void?
>
> **The Minister of State, Foreign and Commonwealth Office (The Earl of Caithness):** The Government have no plans to amend the European Communities Act 1972 as a result of the European Court's judgment in the *Factortame* case, as it does not raise any new constitutional issues.[27]

The question of compensation to Spanish fishermen was not fully settled by the Court for another five years. On 28 November 1995 the Advocate-General delivered an Opinion that national Governments were liable to pay damages to individuals where the legislature had passed a national law which was incompatible with EC law, provided that the obligation imposed on the state from which the individual's right was derived was clear. This opinion was upheld by the ECJ in a judgment on 5 March 1996 which ruled that the 1988 Act was a manifest disregard of EC law by the British Government. Interim compensation would have to be paid to the Spanish fishermen whose vessels were removed from the register. The figure of £30 million was quoted in the press based on claims of between £250,000 to £600,000 for more than 90 vessels, although the UK courts will have to determine the amount in each individual case.

The consequences of the ECJ rulings in the *Factortame* case are far-reaching and have become intertwined with the issue of fishing rights under the Common Fisheries Policy. In the debate on the Common Fisheries Policy in March 1996 the Minister for Agriculture, Fisheries and Food, Douglas Hogg, commented on the ECJ judgment:

> The Court has come to its judgment as a consequence not just of the Common Fisheries Policy, but of the general Treaty provisions that provide for other member state nationals to set up business in the United Kingdom. It is the overlap between the CFP and the Treaty of Rome, and not the Single European Act, which has given particular difficulty in this case.

He continued:

> If we put the Factortame question to one side for a moment, there is much in the judgment that we would welcome in the context of pursuing the single market,

---

[27] HL Deb, 14 October 1991, WA 89.

> notably the fact that it enables nationals of member states whose rights are infringed by another member state's legislature to seek compensation for damage.
>
> ...
>
> ... the problem lies essentially not with the European Court, but with the Treaty. The Court is there to interpret the Treaty, so if we are to remedy the problem, we must seek to change the Treaty itself, either by amendment or by protocol.[28]

The judgment could have serious economic and conservation implications which have yet to be fully clarified, but among UK fishermen who have been forced to abandon their work because of quotas already filled and competition from the Spanish fishermen, the issue is unlikely to rest.

An interesting comparison might be made with the *British Telecommunications* judgment of 26 March 1996 concerning the implementation of the public procurement in telecommunications directive. On this occasion the ECJ ruled that although a directive "had been incorrectly transposed into English law, compensation was not payable for loss allegedly suffered as a result, as there was not a sufficiently serious breach of Community law".[29] It made clear that it there was an ambiguity in a directive and the government had not adopted an unreasonable interpretation, the Government should not be liable for failure to implement it properly.

2. Barber

In the case of *Barber v Guardian Royal Exchange Assurance*,[30] the ECJ held that pensions paid under a contracted-out occupational scheme fell within the scope of Article 119 of the Treaty, which sets out the principle of equal pay for equal work for men and women. A condition of payment based on different provisions for men and women was ruled contrary to the Treaty. The Court recognised the potentially serious financial consequences of its judgment and therefore decided to impose a limit on the temporal effect of the judgment, ruling that Article 119 could not be relied upon "to claim entitlement to a pension with effect from a date prior to that of this judgment", unless the claim had been lodged before this date.[31]

---

[28] HC Deb, 6 March 1996, cc347-348.

[29] Case C-392/93; *Times Law Report*, 16 April 1996.

[30] Case 262/88, judgment 17 May 1990.

[31] The Barber case and its implications for the UK are discussed in Library Research Note 92/42, *Europe - the Next Phase: Maastricht and the Barber Case*, 14 May 1992.

The Barber judgment has had significant implications for subsequent cases concerning pension schemes. These include the *Coloroll case* (Case C-200/91) and the *Constance Smith case* (C-408/92).

3. Webb v EMO Cargo (UK) Ltd

In the case of *Webb v EMO Cargo (UK) Ltd*,[32] the Court ruled that the dismissal of a female employee who became pregnant while replacing another employee away on maternity leave constituted discrimination on the grounds of sex.

4. Schindler

The case of *HM Customs and Excise v Schindler*,[33] involved a public lottery run by the Schindlers in Germany. They sent advertisements and application forms to UK nationals inviting them to take part in the lottery which were confiscated by Customs officials on the grounds that their importation was in breach of UK law. The Schindlers took their case to the High Court, arguing that this action was incompatible with the Treaty's freedom of services provisions in Article 59.

The Court accepted that the Schindlers' activities were in line with Article 59 and that UK laws which prohibited, with certain exceptions, the holding of lotteries was an obstacle to the freedom to provide services. However, it ruled also that restrictions on the provision of lottery services were justified by concerns about social policy and the prevention of crime and fraud. Such restrictions were not therefore precluded by the Treaty.

5. Richardson: prescription charges[34]

The Queen's Bench Divisional Court referred a question to the ECJ for a preliminary ruling under Article 177 on the setting of different ages for exemption from prescription charges for men and women, to correspond with the different pensionable ages for men and women for granting pensions. The ECJ ruled that this was not allowed by Directive 79/7/EEC, which deals with the progressive implementation of the principle of equal treatment for men and women in matters of social security.

---

[32] Case C-32/93, judgment 14 July 1994.
[33] Case C-275/92, judgment 24 March 1994.
[34] Case C-137/94, judgment 19 October 1995.

6. Gallagher (Advocate-General's Opinion)[35]

This case, brought by Irishman John Gallagher, challenged the procedures used by the UK to expel suspected terrorists. He had been arrested in 1991 under the Prevention of Terrorism (Temporary Provisions) Act 1989 and was expelled from the UK on the grounds that the Home Secretary was satisfied that he had been involved with the commission, preparation or instigation of acts of terrorism connected with the situation in Northern Ireland. The notification given to Mr Gallagher did not specify the grounds for the decision. Mr Gallagher had agreed to return to Ireland for family reasons but subsequently exercised his right under the act to make representations.

The case was sent by the Court of Appeal to the ECJ for a preliminary ruling. The English Court asked the ECJ for a ruling as to the meaning of certain provisions contained in a Directive concerning restrictions on the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

The Advocate-General said that member states should obtain the opinion of a competent, independent authority before taking any decision to expel a person on grounds of public policy, public security or public health.

7. Working Time Directive (Advocate-General's Opinion)[36]

In most of the cases discussed so far, it was the legality of the British Government's or Parliament's action which was challenged at the ECJ. However, the Government has also challenged the legality of actions taken by the EU institutions, including the choice of Treaty base for particular directives. This choice can often have important implications because it dictates the use of either qualified majority voting or unanimity in the voting method in the Council of Ministers.

The British Government brought an action under Article 173 of the EC Treaty for the annulment of the whole of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, and alternatively for the annulment of certain provisions of that directive. The scope of the directive extends to minimum periods of daily rest, weekly rest and annual leave, as well as breaks and maximum weekly working time, and certain aspects of night work, shift work and patterns of work.

---

[35] C-175/94, Opinion 12 October 1995.
[36] C-84/94, Opinion 12 March 1996.

The central UK complaint was that the working time directive had been adopted by qualified majority vote as a health and safety measure under Article 118A, whereas it concerned working conditions and ought to have been subject to a unanimous vote under Article 100 or 235.[37] In support of its application, the UK thus alleged lack of competence, defective legal basis, breach of the principle of proportionality, misuse of powers and infringement of essential procedural requirements. It also asked that the Council should be ordered to pay the costs.

The Advocate-General dismissed the pleas submitted by the UK and the final judgment is expected around June 1996.

D. The Cost of ECJ Judgments

Several ECJ judgments against the UK have been in the area of equal treatment of men and women with regard to retirement ages and pension rights, and employment rights with regard to unfair dismissal and part-time workers. These rulings have resulted in large amounts of compensation payments to individuals who have successfully proved that they have been victims of Britain's failure to adhere to EC laws. They have also cleared the way for other compensation actions to be brought on similar grounds.

The Attorney-General Sir Nicholas Lyell recalled the potential costs of the Barber judgment which "looked likely to cost £50 billion of public and private moneys in this country and many billions in other member states" and reminded the House how:

> the member states, exercising their democratic will, put forward a protocol to remedy the decision of the Court [in the Barber judgment] - in fact the court subsequently remedied the problem itself. The way to overcome such problems is for member states to act collectively through the IGC.[38]

In the same answer Sir Nicholas stated that the 95 cases at the ECJ and Court of First Instance in which the UK had participated for two years ending 16 October 1995 had cost £412,447 (inclusive of VAT) in lawyers' fees.

Another Parliamentary Written Answer gave details of cases at the ECJ from October 1993 to October 1995 in which UK departments had participated and the cost to UK public funds.

---

[37] The working time directive is discussed in Library Research Papers 94/52 and 95/92.
[38] HC Deb, 30 October 1995, c13.

This Answer, which shows a mixture of lawyers' fees and costs, can be found in Appendix II.

VII The Nature and Methods of the Court

The Court has been criticised on practical, methodological and ideological grounds. The time it can take from a reference to a ruling can be a few years, largely due to the ever-increasing workload of both the ECJ and the Court of First Instance. The workload and the number of judges will continue to increase as the Union expands. The latter was one problem identified by the Commission in its Opinion on the IGC, in which it stated that "The prospect of seeing some sixty judges at the Court of Justice and the Court of First Instance is a good ground for examining the consequences".[39]

British criticism of the Court has tended to focus on a few key areas: the appointment of judges, the bias or "activism" of the Court towards upholding Community aims against the interests of member states, the different legal instruments and the different approach to legal interpretation in Britain compared with continental Europe (France in particular) from which ECJ procedures are derived. The translation of legal instruments into all eleven languages of the Community means that in the individual member states there will inevitably be some variations in interpretation.

The European Research Group has claimed that the ECJ "defines its success in terms of promoting integration".[40] Against these criticisms the Court maintains that it is simply doing its job. The President of the ECJ, Gil Carlos Rodriguez Iglesias, has argued that "states will always interpret their obligations on international agreements in a minimalist way and ... the strength of the EU lies in its ability through an independent judiciary to resolve such differences".[41]

A. The Court's Methods of Interpretation

The *European Union Handbook* identifies four interpretive methods used by the Court:

> (a) literal interpretation, that is, the construction of words or phrases in order to ascertain their natural and ordinary meaning; (b) historical interpretation, that is, the

---

[39] Commission Opinion, "Reinforcing Political Union and Preparing for Enlargement", EC/MISC/1996/1.

[40] *1996: Britain's Negotiating Options*, submission by the European Research Group to the Government in advance of the publication of a White Paper on the 1996 Intergovernmental Conference, 27 February 1996.

[41] Quoted in *Irish Times*, 20 May 1995.

> quest for the subjective intention of the authors of the legislative text at the time of its drafting; (c) contextual or systematic interpretation, that is, the interpretation of the words or phrases within their legal context; and (d) teleological or purposive interpretation, that is, interpretation in the light of the objectives of the text facing the Court. The Court's approach to interpretation appears to be more akin to that followed in the Civil Law systems and differs from the Common Law approach in that the Court is more willing to depart from literal interpretation and may be led to disregard even the plainest of wording in order to give effect to the overriding aims and objectives of the Community system.[42]

A teleological approach may mean that in the interest of a policy objective, the Court's interpretation goes beyond the strict sense of the wording of the Treaty or legal text. Critics have argued that the Court is increasingly straining the sense of EC law to promote the strengthening of the Community and European integration as against the national authorities of individual member states.

Part of the problem for Britain lies in its different legal traditions compared with most of continental Europe. UK law arises from statute and common law and is based on narrowly interpreted legal principles. It does not try to apply the universal principles of written constitutions to individual cases. The constitutional courts of other EU member states, by contrast, are more accustomed to working around wider interpretations, deriving conclusions from universal principles of human and material rights which are enshrined in their domestic legal systems and constitutions.

The British Government would like to see some reform of the role and methods of the ECJ, and claims support from the French Prime Minister Alain Juppé, who said in a speech in March 1996 that the Court was gradually becoming a kind of European supreme court which if extended would lead to the acceptance of a federal European constitution.[43] The Opinion on the working time directive was particularly badly received by the Government which alleged that the case had centred on a "misuse of Article 118a".[44] In the light of this alleged misuse Mr Davis summed up the Government's position on the Court as follows:

> It is our contention that the Court is perfectly capable of concentrating on the law, interpreting the law and enforcing the law. It does not have to extend the law, and that is our major point.[45]

---

[42] "The Legal System of the European Union", Meropi Voyatzi, *The European Handbook*, edited by Philippe Barbour, 1996.

[43] Speech to European Democratic Union, 13 March 1996.

[44] David Davis, HC Deb, 3 April 1996, c. 382. Article 118a concerns the harmonisation of conditions in the area of health and safety of workers.

[45] *ibid*. c.383.

Those wary of the encroachment of the ECJ have called for sensitive decisions of the Court to be referred to the Council of Ministers which could be empowered to overrule the Court (an idea proposed by the Government in 1995 but not pursued in its subsequent submission on the Court, see below). They also believe that judges should sign their rulings and publish dissenting opinions rather than issue anonymous collective rulings after secret deliberations. Some have objected to the protocol by which Court proceedings are carried out under French legal procedures. The appointment of ECJ judges has been viewed by some as a political decision which might be better handed over to an independent judicial appointments board. According to a Harris poll carried out by *The Independent*, "Most Conservative MPs want the Government to act to curb the power of the European Court of Justice".[46]

In a Ten Minute Rule Bill introduced on 23 April 1996 to amend the European Communities Act 1972 to provide for the disapplication of ECJ judgments in the UK, Iain Duncan-Smith MP condemned what he described as the "driving ethos" of the Court and its perceived role as "the architect of European integration":

> In making its judgments, the European Court of Justice often divines the intentions of the Governments who signed it into being many years ago, which gives the Court huge licence to make legislation that national Governments must obey. It so often does all of that by guessing at previous political intentions.[47]

B. Is the Court biased?

Controversy over the extent to which the European Court is biased in favour of the Community is not new. Accusations by some legal commentators in the 1980s that it was "running wild"[48] have been countered by more communitarian views emphasising the importance of policy over wording in order to achieve a Community/Union objective, but the debate continues and is likely to be taken up at the Intergovernmental Conference.

Dr Conor Gearty, reader in law at King's College, London, wrote of the "larceny of our sovereignty" with reference to ECJ rulings in August 1995 on the equal treatment of men and women and the responsibilities of holiday tour operators.[49] An editorial in the *European Journal* has commented on the appointment and duties of the judges:

> The judges are politically appointed, but why are they invariably federalists when there is deep unease in so many member states on this issue? Why is no judicial

---

[46] *Independent*, 8 February 1996.
[47] HC Deb, 23 April 1996, c 198. The Bill was negatived on Division.
[48] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: a comparative study in judicial policy making*, 1986.
[49] *Times*, 6 August 1995.

> experience required of them? Some have only held academic, political or administrative office, or merely been in private practice. Why is there no age of retirement?
>
> There is also the question of secrecy. The judges swear secrecy of deliberation so that no one is to know how they have voted individually. There is only one judgment - no separate concurring, named attributable or dissenting judgment - nor any appeal against their conclusions
>
> Even less acceptable is that they go beyond the parameters of the Treaty of Rome, making a mockery of the duty they are supposed to observe , under Article 4, to act within the limits of the powers conferred on the court.[50]

The writer concludes:

> At the 1996 Intergovernmental Conference the competences of the European Union must be reduced and the judicial activism of the court prohibited by requiring the judges simply to interpret the law, rather than making decisions aimed at greater integration.

In January 1995 Sir Patrick Neill QC of All Souls College, Oxford, submitted to the House of Lords Select Committee on the European Communities a paper entitled "The European Court of Justice: A Case Study in Judicial Activism"[51] in which he argued that the Court had indulged in "creative jurisprudence" on many occasions. He argued:

> The Treaty texts and directives agreed between the member states may at any time be given by the Court a meaning and impetus that may not have been contemplated by the negotiators. The national law of the member states is subject to annulment, not only in the light of the Court's interpretation of these texts, but also pursuant to general principles of law developed by the Court on its own initiative (eg. the doctrine of proportionality).

In his view the Court, which he believes took on the role of a supreme court in the EC at its inception, has now developed a still more prominent role and has "interpreted Treaty provisions so as to take more power into its own hands and to reduce the power of the national courts". Illustrating his arguments with some seminal rulings,[52] Neill draws a number of conclusions about the judicial nature of the Court. One is that the Court's methods of interpretation of EC law "appear to have liberated [it] from the customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning of the language of the relevant

---

[50] Editorial, *European Journa*l, Vol. 3 No. 2, November 1995.

[51] 18th Report, *1996 Inter-Governmental Conference*, HL Paper 88, 1994-95.

[52] These include *Van Gend en Loos*, Case 26/62 [1963] ECR 1; *Costa v. ENEL*, [1964] ECR 585; *Factortame* 1 and 2; *Internationales Handelsgesellschaft*, Case 11/70 [1970] ECR 1125, 1134.

provision". Neill agrees with the view that the ECJ's teleological approach has given it a legitimacy and capacity beyond the confines of the original Treaty objectives.

According to Neill the unreliability of accepted methods of interpretation by the ECJ has made it difficult for UK lawyers to advise clients in matters of EC law. They would have to forecast how the ECJ might rule in order to advance its own role and "the coherence of the Community legal system".[53] Judges in national courts were also faced with the problem of having to apply the "doctrines of the ECJ (such as proportionality and legal certainty) and its methods of interpretation". The fundamental issue identified by Neill is that:

> The methods by which some member states select judges to serve on the ECJ, the case law of the Court itself and some aspects of its working methods (such as the absence of dissenting judgments) have tended to create the impression that the Court consists of an elite cadre entrusted with a special mission.[54]

In this he sees the danger of the:

> uncontrollable judicial power of a Court which "forms its own view as to the desirable scope of its own jurisdiction, as to the new remedies which should be created to benefit individuals, and as to the general principles which should be imported into Community law and used as a standard against which to assess the validity of national laws. There is no appeal and no challenge available in the national courts against excess of jurisdiction.

Bill Cash MP, giving evidence to the Lords Committee, concurred in the view that the Court pursued a political policy which was "incompatible with the democracy claimed for the Treaty on European Union".[55] He proposed the introduction of an "Action for a Declaration" which would allow a party to challenge legislative proposals considered to be *ultra vires* before they were adopted, rather than afterwards under Article 177 of the Treaty, and also suggested a radical reversal of the presumption of supremacy of EC law over national law.

Some witnesses to the Committee argued the opposite case, maintaining that the ECJ was a mystery only to the British and that it could not operate like a British court "construing a detailed statute".[56] A.A Dashwood refuted many of Neill's conclusions in his memorandum to the Committee, arguing that:

---

[53] HL Paper 88, p. 244.
[54] *ibid*, p.245.
[55] *ibid*, p.345.
[56] Sir Leon Brittan, HL Paper 105, p.40.

> The Court has the vital task (not "mission") of maintaining the balance between Community and member state interests and between the powers of rival institutions; and it has performed that task with extraordinary skill - above all in the difficult times of economic recession when member states' political will has faltered.[57]

Drawing attention to three ECJ decisions which did not support the Neill thesis of communitarisation by the ECJ, Dashwood concludes that:

> The approach taken by the ECJ in those cases seems nicely attuned to the spirit of the TEU, in which much greater emphasis than previously is placed on clarifying the demarcation between Community and member state powers. The cases also show how thoroughly the principle of subsidiarity has permeated the thinking of the Court.[58]

He proposes, however, that an independent body composed of the most senior members of the judiciary in the member states should be involved in selecting ECJ and Court of First Instance members, but with no change in the terms of office or in the rule allowing reappointment, which Neill had recommended.

K.P.E. Lasok commented, however:

> Despite the fact that the current practice of nomination to the ECJ and the CFI [Court of First Instance] may be criticised for not being on any legal principle, it does possess certain advantages. A member of the Court is not a delegate or representative of the state nominating him: the first condition for appointment, independence, makes this clear. It is, however, 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.[59]

Francis Jacobs, an advocate-general at the Court, has rejected many of the allegations of activism, maintaining that the ECJ has been:

> vigilant in curbing the excesses of other EU institutions in recent years. It has often ruled against the Commission for exceeding its powers - most recently over its claim that it could ratify the World Trade Organisation agreement on behalf of member

---

[57] Professor of European Law and Director of the Centre for European Legal Studies in the University of Cambridge, Evidence to Lords report on IGC, p.257-8.

[58] The cases are: *Hag No 2*, Case 10/89, [1990] ECR I-37II; *Keck and Mithouard*, Case C-267/91 and C-278/91, [1993] ECR I-6097; *WTO Opinion* of 15 November 1994.

[59] K.P.E.Lasok, *The European Court of Justice: practice and procedure*, 1994.

> states. It has also acted to stop the Union adopting protectionist tactics such as anti-dumping measures.[60]

In an article entitled *Judicial Activism - Myth or Reality? Van Gend en Loos, Costa v ENEL and the Van Duyn family revisited*,[61] the British ECJ Judge David Edward counters many of Neill's arguments. He rejects the idea that the Court has an agenda and suggests that the many judges and advocates-general who have been appointed over the years have been "inveigled ... into the web of an on-going conspiracy" which, he notes, "seems to have achieved some credibility in Britain" in spite of the tenuous probabilities. Looking at some early and other more recent judgments of the Court, Judge Edward analyses its reasoning in cases involving the direct effect of directives and rulings which confirmed that the state should not be able to take advantage of its own failure to comply with Community law. In supporting the decision of the Court in these cases, Edward rejects Neill's claims of judicial activism. In his view the Court could not have reasonably acted in any other way. Indeed it would have been wrong to do so in view of its obligations as the interpreter of EC law and the Treaties, and the precedents upon which judgments have been based. He concludes:

> The purpose of *this* case study has been to show how, in practice, the Court of Justice came to reach some of the decisions that are now denounced as "logically flawed or skewed by doctrinal or idiosyncratic policy considerations". The Court did not launch these decisions on an unsuspecting world. They grew out of previously established case law in response to questions put to the Court which it was the Court's function and duty to answer.

VIII New Areas of ECJ Competence?

If new areas of EC competence are added to the Treaty as a result of the Intergovernmental Conference, the powers and jurisdiction of the Court will be extended. Proposals have been put forward for the inclusion of a catalogue of human rights in the Treaty or for EC accession to the European Convention on Human Rights, either of which would give the ECJ jurisdiction in an area already subject to international law under the European Convention on Human Rights and various UN human rights instruments. Other proposals have been submitted to bring matters in the "third pillar" of the TEU (Co-operation in Justice and Home Affairs) into the competence of the EC pillar, making them subject to EC law-making procedures and to the jurisdiction of the Court.

---

[60] Andrew Adonis and Robert Rice, *Financial Times*, 3 April 1995.

[61] March 1996; an article shortly to be published by Trenton Publishing.

A. Human Rights

Although the EU regards itself as the guardian of respect for human rights within the Union and the TEU includes an undertaking that member states should respect the European Convention on Human Rights, the Convention is not part of EC law. The ECJ cannot therefore examine the compatibility of member states' national laws with the European Convention, which remains a matter for the enforcement mechanism set up under that Convention. If the European Community acceded to the Convention, this would present a potential conflict of jurisdiction between the ECJ or the Court of Human Rights. The British Government is opposed to EC accession and to the inclusion of a bill of rights in the Treaty.

Under Article 228(6) of the Treaty the Council asked the ECJ for an Opinion on the question: "Would the accession of the European Community to the Convention be compatible with the Treaty establishing the European Community?". In a response on 28 March 1996 the Court maintained:

> While respect for human rights was a condition of the lawfulness of Community acts, accession to the Convention would entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international system as well as integration of all the provisions of the Convention into the Community legal order.[62]

It concluded that:

> As Community law at present stood, the Community had no competence to accede to the Convention ...

Such a move would go beyond the scope of Article 235, which provides for action to achieve a Community objective where there is no Treaty provision, and could be brought about only by Treaty amendment. Some member states will attempt to do this at the IGC.

B. Third Pillar Areas

The third pillar areas are those covered by Title VI of the TEU and include: asylum policy, external border controls, immigration policy and the entry of third country nationals, drug trafficking, fraud and international crime, civil, criminal and customs policing. Decisions on action in these areas are made unanimously on the basis of intergovernmental negotiation and

---

[62] Opinion 2/94, 28 March 1996, *Times Law Report*, 16 April 1996.

co-operation. They are not currently governed by EC law and are not subject to the jurisdiction of the ECJ. There is no provision for judicial review by the ECJ of decisions taken intergovernmentally.

However, there is already provision in the Treaty for ECJ competence in conventions recommended to the member states by the Council of Ministers under Article K.3(2)(c) of Title VI which states:

> Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down.

In its Report on the TEU the Council commented that the question of ECJ jurisdiction in disputes over the interpretation of the conventions had been "the subject of differences between the member states" and continued:

> Some feel that, if the Court of Justice is not given such powers, the uniform application provided for in the conventions will remain inadequate for want of a common interpretation. Others hold that it is not necessary to give the Court such powers.[63]

So far only the Convention on Simplified Extradition Procedures between the Member States of the European Union[64] has been ratified under this procedure and this convention does not grant jurisdiction to the ECJ. Neither does the Convention on Improving Extradition Procedures Between Member States of the EU, which is expected to be signed in June 1996. Ratification of the European Police Office or Europol Convention has been delayed because of disagreement over the issue of ECJ jurisdiction. All EU member state governments except for the British Government believe that the ECJ should have a role in monitoring the new organisation.

The suggestion that the Schengen Agreement on the abolition of common frontier controls, which has so far been signed by ten member states and implemented by seven, be incorporated into the TEU has been rejected by the British Government.

---

[63] Report of the Council of Ministers on the Functioning of the Treaty on European Union, adopted 10 April 1995, Cm 2866.

[64] Council Act of 10 March 1995, OJC 78, 30 March 1995.

IX The ECJ and the Intergovernmental Conference: Proposals for Reform

A. UK Submission to the IGC Reflection Group, David Davis, September 1995

David Davis, the UK member of the Reflection Group, submitted to the Reflection Group a paper on improving the procedures and efficiency of the European Court of Justice.[65] The paper notes the unanimous support for retaining the functions of the ECJ but notes some worrying trends:

> Concerns ... have been expressed about some ECJ judgments on the grounds that they have led to significant unforeseen consequences for member states, have been disproportionate in their effect and have created severe practical problems.

In recent years the UK Government has been found in breach of various EC directives concerning equal pay, pension rights and discrimination which have had serious financial consequences.[66]

Mr Davis put forward some ideas to meet UK concerns. He proposed that there be limits to the liability of member states in damages for the breach of a Treaty obligation. Recalling that the principle of state damages for failure to implement had been established by the Francovich case[67], he suggested that:

> a distinction might be drawn between cases of grave and manifest disregard of a Community obligation, and instances where a member state has acted in good faith. A Treaty amendment could limit liability in damages to the former.

The BT judgment of 26 March made this point.

Mr Davis also proposed that judgments should not normally have retrospective effects, in order to avoid disproportionate consequences for member states. This could be made explicit in the Treaty. He also called for national time limits to be set to restrict damages claims in cases where a member state had not implemented a directive properly. At the moment this

---

[65] HINF 95/2259, 1 September 1995

[66] These include Case 262/88 Barber v Guardian Royal Exchange Assurance [1990] ECR 1-1889 and subsequent cases such as *Coloroll*, C-200/91; Case C-32/93 *Webb v EMO Cargo (UK) Ltd*, 14 July 1994. See also Section VI C.

[67] Francovich and Bonifaci v Italy: C-6 9/90 (1991).

only applies to cases involving the implementation of Treaty obligations and regulations and does not apply to directives:

> A Treaty amendment could be made clear that national time limits should apply except in cases of grave and manifest disregard of a Community obligation.

In a section on practical and procedural options the Minister suggested creating an internal appeals system within the ECJ and facilitating "the rapid amendment of Community legislation in cases where the legislature believe that the Court has interpreted a provision in a way not initially intended". Another proposal which would not require Treaty amendment would be the introduction of "an accelerated procedure for time-sensitive cases ... to minimise uncertainty and practical difficulties". This could be done by amending the Court's Rules of Procedure. Delays in the Court's proceedings could be reduced by improving the ECJ translation service.

B. Reflection Group's Final Report[68]

The final report of the Reflection Group established to prepare for the IGC[69] concluded that the Court needed to be strengthened in its role of "ensuring legal uniformity in the interpretation of Community law and in guaranteeing the protection of individual citizens' rights." The report continued:

> A majority of representatives are in favour of stepping up its [ECJ] role in the fields of justice and home affairs on grounds of legal certainty, in order to ensure the protection of individual rights which might be affected in those fields.

It noted that one member state (assumed to be the UK) had argued against this proposal on the grounds that "ECJ judgments can lead to consequences that are considered disproportionate in their effect".

A majority of the Group was in favour of extending the term of office of judges from six to nine years with no reappointment. There was some disagreement over the composition of the Court, with some recommending fewer judges than the number of member states in the interests of efficiency and consistency, while others thought that all states should have a judge so that all legal systems were represented.

---

[68] *Reflection Group's Report*, 5 December 1995, para. 120.

[69] The background to and deliberations of the Reflection Group are considered in a number of Library Research Papers including 94/115, 95/27, 95/45, 95/76, 95/123.

C. British Government's White Paper

The White Paper setting out the Government's views on the IGC, *A Partnership of Nations*,[70] was published shortly after the ECJ ruling on the Factortame interim relief case and the Opinion on the 48-hour week.

In the section on the ECJ it states that the "Government is committed to a strong, independent Court without which it would be impossible to ensure even application of Community law, and to prevent abuse of power by the Community institutions". It goes on to cite cases in which the Court has acted in a manner of which it approved. The Government also confirms the proposals put forward in its submission to the Reflection Group for limits on retrospective application of judgments, the principle of liability only for serious and manifest breaches of EC obligations, an internal appeals procedure, procedures to amend laws interpreted in a way not intended by the Council, a rapid procedure for time-sensitive cases and clarification of subsidiarity.

The Government is shortly to publish a detailed memorandum on its proposed reforms.

D. Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union - Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference[71]

In May 1995 the ECJ submitted to the Reflection Group a report on its own functions, together with comments on proposals for reform and its suggestions for reform.

The Court was firm on the need for its rulings to be respected as binding:

> Any decision affecting the structure of the judicial system must ... ensure that the courts remain independent and their judgments binding. Were that not to be the case, the very foundations of the Community legal order would be undermined.[72]

---

[70] Cm 3181.
[71] No 15/95, 22 to 26 May 1995.
[72] p.4.

The Court identified a need for its position vis-a-vis third pillar matters to be clarified at the IGC in order to avoid legal problems:

> ... it is obvious that judicial protection of individuals affected by the activities of the Union, especially in the context of cooperation in the fields of justice and home affairs, must be guaranteed and structured in such a way as to ensure consistent interpretation and application both of Community law and of the provisions adopted within the framework of such cooperation.[73]

The Court wanted a relaxation of the current requirement for the unanimous approval of the Council of Ministers in order to amend its Rules of Procedure. This would allow it to take measures to improve efficiency and productivity and would not require Treaty amendments.

Proposals for reform to which the Court had no technical but more of a practical objection were those to amend Article 173 of the Treaty to allow the EP to bring actions for annulment without having to establish an interest, and to give the EP the right to request the Court's opinion on international agreements under Article 228(6). The Court saw no need to alter its structure or tasks (or those of the Court of First Instance) unless an evaluation on their capacity to deal with the volume of litigation were to be found inadequate. If the volume of work did increase with enlargement and closer integration, the Court suggested that there might be a need for the Court of First Instance to become specialised or alternatively for new specialised Community courts to be established to deal with the extra workload.

In connection with the prospective enlargement, the Court wanted the IGC to consider the matter of "maintaining the link between the number of judges and the number of member states, even though the Treaties do not provide for any link between nationality and membership of the Court". The Court noted on the one hand that an increase in the number of judges "would cross the invisible boundary between a collegiate court and a deliberative assembly" which could "pose a threat to the consistency of the case-law", and on the other that "the presence of members from all the national legal systems ... is undoubtedly conducive to harmonious development of Community case-law, taking into account concepts regarded as fundamental in the various member states and thus enhancing the acceptability of the solutions arrived at".[74]

On the appointment of judges, the ECJ was concerned to retain "its independence and the continuity of its case-law" but did not object to a proposal to increase their length of term of office from six to nine years while making it non-renewable. The Court objected to a

---

[73] p.5.
[74] p.10-11.

proposal for a hearing of each nominee by an EP committee[75] since "Prospective appointees would be unable adequately to answer the questions put to them without betraying the discretion incumbent upon persons whose independence must ... be beyond doubt".[76] It reiterated a suggestion to allow advocates-general as well as judges to participate in the election of the president of the Court from among the judges since the status of the two is identical under the Treaties.

The Court considered the introduction of a "hierarchy of norms" (ie. a hierarchy of legislative acts giving some more weight than others) and a human rights element into the Treaty, together with the implications of this for any review mechanism that would need to be introduced to ensure observance. It made no detailed observations but wished to be involved in any deliberations on these matters.

X Conclusion

The IGC will tackle proposals put forward by the member states, the EU institutions and the Reflection Group on the role and powers of the Court with a view to the future enlargement of the Union. A Union of 25-30 members with an established legal order but an overburdened legal control mechanism could hinder the Court in its tasks. Few would challenge the validity of the Court's right to determine whether or not EC law has been breached. Some, including the British and perhaps the French Governments, however, are critical of what they see as an insidious federalisation in the extent of the Court's current jurisdiction under the Treaties and in proposals to extend this into new areas. Any move in this direction would be controversial because of the sensitivity of the issues and concerns about national sovereignty.

Plans to reduce the powers of the ECJ, on the other hand, have also been criticised:

> It is inconceivable that the member states will agree in 1996 to remove, or even to diminish, the binding force of the European Court's judgments. Were the UK to propose any such reform, it would find it difficult to gain support from any other member state. It is widely acknowledged throughout Europe that one of the EU's most remarkable features is the extent to which the Court has developed fundamental principles, such as the primacy of Community law

---

[75] See also European Parliament Opinion on the Intergovernmental Conference, *EP Minutes*, 13 March 1996: "The European Parliament should be given a reinforced role, with assent as regards appointments to the Court of Auditors and the Court of Justice".

[76] p.11.

> and its direct effect in national courts, to bind together different nations and distinct legal tradition, in a manner which has secured general agreement.[77]

Even if the powers of the Court are not greatly enhanced at the IGC, less controversial administrative changes and modifications to the legal instruments themselves might be agreed which in the short term at least could improve the effective functioning of the Court.

VM/JML

---

[77] David Pannick, QC, *Times*, 15 August 1995.

Appendix 1

Current Composition of the ECJ[78]

President

Judge Gil Carlos Rodriguez Iglesias (Spain)

Judges

G.N. Kakouris (Greece)
David Edward (UK)
J-P. Puissochet (France)
Gunter Hirsch (Germany)
G.F. Mancini (Italy)
A. Schockweiler (Luxembourg)
J.C. Moitinho de Almeida (Portugal)
Paul Joan Kapteyn (Netherlands)
Claus Gulman (Denmark)
J.L. Murray (Ireland)
Peter Jann (Austria)
Hans Ragnemalm (Sweden)
Leif Sevon (Finland)
M.Wathelet (Belgium)

Advocates-General

Guiseppe Tesauro (Italy)
C.O. Lenz (Germany)
Francis Jacobs (UK)
A.M. La Pergola (Italy)
Georgio Cosmas (Greece)
Philippe Leger (France)
Michael Elmer (Denmark)
Nial Fennelly (Ireland)
Dàmaso Ruiz-Jarabo Colomer (Spain)

Registrar

R.Grass (France)

---

[78] Vacher's *European Companion*, Number 95, February 1996.

Appendix 2

Judgements in cases before the European Court of Justice and the European Court of Human Rights in which United Kingdom Departments have participated since 16 October 1993

European Court of Justice

Date of ECJ Judgement	*Reference*	*Case description*	*Cost to UK Public Funds (excluding the cost of Government counsel)*
5 May 1994	C38/93	H. J. Glawe Spiel und Unterhaltungsgerate Aufstellungsgesellschaft mbH and Co. KG v. Finanzamt Hamburg-Barmbeck-Uhlenhorst	None
19 May 1994	T2/93	Air France v. Commission	None
2 June 1994	C313/92	Van Swieten	None
2 June 1994	C401 & 402/92	Criminal proceedings against tankstation't heukske vof and j.b.E Boermans	None
2 June 1994	C69 & 258/93	Punta Casa	None
2 June 1994	C356/93	Techmada Internationale Medizinisch-Technische Marketing und Handels GMBH and Co. KG V. Oberfinanzdirektion Koeln	None
9 June 1994	C153/93	Delta Schiffahrts	None
22 June 1994	C9/93	Ideal Standard	None
3 July 1994	C432/92	The Queen v. the Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasio (Pissouri) Ltd. and others	£179,000
7 July 1994	C420/92	Elizabeth Bramhill v. Chief Adjourdication Officer	None
14 July 1994	C91/92	Dori v. Recreb	None
14 July 1994	C32/93	Webb v. Emo Air Cargo	None[1]
9 August 1994	C43/93	Raymond Vander Elst v. Office des Migrations Internationals	None at present
9 August 1994	C396/92	Bund Naturschutz in bayern e V Richard Stahnsdorf and Others v. Freistaat Bayern	None
15 September 1994	C293/93	Houtwipper	None
28 September 1994	C128/93	Madame G.C. Fisscher v. 1 Voorhuis Hengelo BV and 2. Stichting Bedrijfspensioenfonds	Eventual capital cost of up to £15 million. Figure represents estimated maximum likely capital costs of judgements for public service pension schemes
28 September 1994	C28/93	Van den Akker v. Shell	None
28 September 1994	C57/93	Mme A. A. Vroeg v. 1 NCIV Institut voor Volkshuisvesting BV and 2. Pensioenfonds NCIV	Included in C128/93 (Fisscher)
28 September 1994	C200/91	Coloroll Pension Scheme Trustees Ltd. v. Russell and others	None
28 September 1994	C408/92	Constance Christina Ellen Smith and others *v.* Avdel Systems Ltd.	None
28 September 1994	C7/93	Bestuur van het Alegmeen Burgerlijk Pensioenfonds Pensions *v.* G.A. Beune	None
5 October 1994	C280/93	Federal Republic of Germany *v.* Council of the European Union	None
5 October 1994	C96/94	Centro Servizi Spediporto	None
5 October 1994	C165/91	S.J.M van Munster *v.* Rijksdienst Voor Pensioenen	None
15 November 1994	Opinion 1/94	World Trade Organisation	None
6 December 1994	C410/92	Elsie Rita Johnson *v.* Chief Adjudication Officer	None
15 December 1994	C399/92	Helmig *v.* Stadt Lengerich	None
15 December 1994	C409/92	Schmidt *v.* Deutsche angestellten-krankenkasse	None
15 December 1994	C425/92	Herzog *v.* Arbeiter-samariter-bund landverband hamburg	None
15 December 1994	C34/93	Lange *v.* bundesknappschaft bochum	None
15 December 1994	C50/93	Kussfeld *v.* Firma detlef bogdol gmbh	None
15 December 1994	C78/93	Ludvig *v.* Kreis Segeberg	None
14 February 1995	C279/93	Finanzamt Koln-Altstadt *v.* Roland Schumackers	None

European Court of Justice

Date of ECJ Judgement	*Reference*	*Case description*	*Cost to UK Public Funds (excluding the cost of Government counsel)*
16 February 1995	C425/93	Firma Calle Grenzshop Andresen GmbH and Co. KG *v.* Allegmeine Ortskranken-kasse fur den Kreis Schleswig-FlensburgNone	
23 February 1995	C358/93 and 416/93	(Joined Cases) Criminal proceedings against Aldo Bordessa, Vicente Mari Mellado and Concepcion Barbero Maestre *v.* Audiencia Nacional Spain	None
24 March 1995	Opinion 2/92	OECD National Treatment Instrument	None
20 October 1993	C92/92	Colins v. Imrat Handelsgesellschaft	None
27 October 1993	C338/91	Mme H Steenhorst-Neerings v. Bestuur van de Bedrijfsver eniging voor Detailhandel Ambachten en Huisvrouwen	None
27 October 1993	C337/91	Mme A M van Gemert-Derks v. Bestuur van de Nieuwe Industriele Bedrijfsverenigine	None
27 October 1993	C93/91	Evrard	None
27 October 1993	C69/91	Decoster	None
27 October 1993	C92/91	Taillandier	None
27 October 1993	C127/92	Enderby v. Frenchay Health Authority	None[1]
10 November 1993	C48/91	Kingdom of the Netherlands v. Commission of the European Communities	None
10 November 1993	C60/92	Otto v. Postbank	None
17 November 1993	C2/91	Meng	None
17 November 1993	C185/91	Reiff	None
17 November 1993	C245/91	Ohra	None
29 November 1993	C132/92	Birds Eye Walls Ltd. v. Friedal M. Roberts	None
30 November 1993	C317/91	Renault v. Audi	None
14 December 1993	C110/91	M. Moroni v. Firma Collo GMBH	None
15 December 1993	C116/92	Huyton and others	None
15 December 1993	C63/92 and C33/93	Lubbock Fine and Co. v. Commissioners of Customs and Excise/Empire Stores v. Commissioners of Customs and Excise. (Date of judgment 2 June 1994)	Costs directly attributable to these two cases are estimated at between £500,000 and £1 million. In both cases, as a result of ECJ judgments, there will have been a marginal reuction in the overall estimated future revenue yield.
16 December 1993	C275/92	Schindler	None
22 December 1993	C152/91	David Neath v. Hugh Steeper Ltd.	None
19 January 1994	C364/92	Eurocontrol	None
25 January 1994	C212/91	Angelopharm GmbH v. Freie und Hanses Tadt Hamburg	None
27 January 1994	C287/92	Alison Mainland Toosey v. Chief Adjudication Officer	None
23 February 1994	C236/92	Comitato di coordinamento per la Difesa della Cava and others v. Regione Lombardia and OthersNone	
24 February 1994	C368/92	Administration des Duanes v. Solange Chiffre	None
24 March 1994	T3/93	Air France v. Commission	None
24 March 1994	C80/92	Commission v. Belgium	None
13 April 1994	C128/92	H. J. Banks and Co. v. British Coal Corporation	None
24 April 1994	C2/92	The Queen v. the Minister for Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock	None
24 April 1994	C40/92	Commission v. United Kingdom (supervision of Milk Marketing Boards)	None
5 May 1994	C21/92	Marlies and Heinz Bernd Kamp v. Hauptzollamt Wuppertal	None
5 May 1994	C421/92	Habermann Beltermann v. Arbeiterwohlfahrt Bezirksuerband	None

European Court of Justice

Date of ECJ Judgement	*Reference*	*Case description*	*Cost to UK Public Funds (excluding the cost of Government counsel)*
28 March 1995	C324/93	R *v.* Secretary of State for the Home Department ex parte Evans Medical Ltd., intervener: Generics (UK) Ltd.None at present	
30 March 1995	C65/93	European Parliament *v.* Council of the European Union	None
5 April 1995	C103/94	Zoulika Krid *v.* Caisse National D'Assurance Vieillesse des travailleurs Salaries	None
6 April 1995	C4/94	BLP Group plc *v.* Commissioners of Customs and Excise	None
10 May 1995	C384/93	Alpine Investments	None
31 May 1995	C400/93	Specialarbejderforbundet 1 Danmark v. Industri	None
9 June 1995	C394/92	Michielsen	None
13 July 1995	C116/94	Jennifer Meyers *v.* Adjudication Officer	Not yet known. Case referred back to Social Security Commissioner. Costs will depend on his decision
11 August 1995	C92/94	1. Secretary of State for Social Security 2. Chief Adjudication Officer *v.* Mrs. Rose Graham and others	None
5 October 1995	C440/93	Regina *v.* Licensing Authority of the Department of Health and Norgine. Ex parte: Scotia Pharmaceuticals Ltd.None	
12 October 1995	C85/94	V.Z.W.P.I.A.G.E.M.E and others *v.* B.V.B.A. Peeters	None
19 October 1995	C137/94	Richardson	£44 million per annum, plus a cost of £11 million for respective claims going back 3 months.

[1] For these cases the annual costs to public funds will depend on how many public sector employeer now succeed in sex discrimination or equal pay claims which would, before the decision of the court, have failed. Government lawyers estimate that any such costs should be very low.

I refer the hon. Gentleman to the reply given by the Attorney General on 30 October, *Official Report*, column *12-14*. This answer included nine cases concerning the 1968 Convention on Jurisdiction and the Enforcement of Judgments in which the UK chose to submit written observations. In none of these cases was the UK a party and there was therefore no question of paying legal costs to another party, or compensation.

HC Deb, 7 November 1995, cc.697-702W

Recent Research Papers on related subjects include:

96/41	**Towards the IGC: Approaching Turin**	**19.03.96**
95/123	**Towards the IGC: Weighing the Options**	**05.12.95**
95/76	**Towards the IGC: Enter the Reflection Group**	**20.06.95**
95/45	**Towards the IGC: Developing a Common Defence Policy**	**06.04.95**
95/27	**Towards the IGC: The Emerging Agenda**	**28.02.95**