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ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – SECOND PART

edited by Marise Cremona, Claire Kilpatrick and Joanne Scott

A “EUROPE OF LAWYERS”? THE MAKING OF A DATABASE ON CASES AND LAWYERS OF THE CJEU

LOLA AVRIL* AND CONSTANTIN BRISSAUD**

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ABSTRACT: This *Article* presents a database of lawyers being built within the Court of Justice in the Archives project. Recent studies, relying on actor-centred approaches, have fostered a renewed interest in European lawyers. While visits of these lawyers in Luxembourg have fostered the development of transnational legal networks and participated to the acculturation of the Court's informal and formal rules, they remain largely under-studied. We therefore suggest to analyse the Court as a “place of confluence”, where different professional groups meet during the course of the proceedings. The database precisely aims at mapping the networks of lawyers that take shape in Luxembourg. Providing statistical analysis of the structuration and evolutions of the Europe of lawyers (agents of the European institutions or Member States, law professors or private practitioners), we suggest that the database could contribute to a better understanding of transformations in the European legal field.

KEYWORDS: quantitative research – database – Court of Justice – lawyers – webscraping – transversal analysis.

I. INTRODUCTION: WHY A DATABASE OF LAWYERS AT THE COURT OF JUSTICE IS AN IMPORTANT NEW TOOL FOR SOCIO-LEGAL INQUIRY

On 26 November 1996, for the 10th anniversary of the Union of European Lawyers (*Union des avocats européens*, UAE), Bertrand Favreau, President and Founder of the association,

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gave a speech in the courtroom of the Court of Justice of the European Union (CJEU). He justified the creation of the UAE as a response to the need to foster a “Europe of lawyers”.¹ But the very existence of a Europe of lawyers remains largely a subject of academic debate.

Whether in history, law, or political science, the literature on the European legal integration process has identified a European community of lawyers. Vauchez² has traced the action of “Euro-lawyers”, “jurisconsults-diplomats, corporate lawyers, EU institutions’ legal advisers, ‘politicians of the law’, institution-builders, academics” outside the Court, acting as “knowledge producers” and “standard bearers” in various arenas. Studying publications in major European law journals, Schepel and Wesseling³ pointed to the role of a “community of EU lawyers” – law professors, judges, clerks, officials of the European Commission and national governments, private practitioners – in the building and expansion of the CJEU’s authority. Overall, scholars insist on “the variety of parts lawyers actually play in European affairs”,⁴ Euro-lawyers being portrayed as spokespersons for the Court in external forums, disseminating and interpreting its judgments,⁵ or as activists using court proceedings for political purposes.⁶

This interest for the role of legal actors outside the Court and national referring courts is the product of major disciplinary changes: the socio-historical and empirical turn within European studies since the end of the 1990s,⁷ as well as the development of the “law in context” approach in legal academia, which fosters trans-disciplinary approaches.⁸ This made it possible to go beyond the legal analysis of the Court’s judgments, to consider its actors and the processes that shape its role. Adopting a sociological point of view on legal matters, scholars insist on the fact that EU legal integration could not have been achieved without external allies, either in the academic world with institutions such as International Federation of European law (FIDE),⁹ in the legal service of the European

¹ Speech by Bertrand Favreau, ‘1986-2006: l’Union des Avocats Européens. 20 ans de congrès et d’activités sans frontières au profit de l’Europe des avocats’ UAE (26 November 1996) www.favreaucivilise.com.

² A Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

³ H Schepel and R Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’ (1997) *ELJ* 165.

⁴ A Cohen and A Vauchez (eds), ‘Symposium: Law, Lawyers, and Transnational Politics in the Production of Europe’ (2007) *Law and Social Inquiry* 75, 78.

⁵ H Schepel and R Wesseling, ‘The Legal Community’ *cit.*

⁶ RA Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007).

⁷ A Favell and V Guiraudon, *Sociology of the European Union* (Palgrave Macmillan 2011).

⁸ B Davies and F Nicola (eds), *EU Law Stories: Contextual and Critical Histories in European Jurisprudence* (Cambridge University Press 2019).

⁹ R Byberg, ‘A Miscellaneous Network: The History of FIDE 1961-94’ (2017) *American Journal of Legal History* 142.

Commission¹⁰ or within national legal professions.¹¹ A growing body of research has thus emphasized the role of interdependent networks – national legal communities, law professors, meetings in and out of the Court – in the elaboration of CJEU decisions.¹² Altogether, throughout these works, a community of jurists forming a "transnational legal field"¹³ involved in the preparation, dissemination and interpretation of the Court's judgments is taking shape. However, it is the activity of this transnational community of lawyers outside the Court that has attracted the most attention. These studies indeed reveal a process of mutual legitimation, and co-constitution dynamics between a discipline (European law), an institution (the Court of Justice), and a professional group seeking dominant positions in the European polity. If these works show an interest in the repeat players who plead before the Court, it is mainly for their other activities: those of brokers in Brussels, between the European institutions and companies, those of missionaries of European rules or entrepreneurs of Europe. It is as if there was not much worthy of note happening in the activities taking place inside the Court's premises in Luxembourg.

This heuristic approach to examine the Court as embedded in complex multi-level institutional and professional configurations therefore introduces a bias: what happens inside the Court remains largely outside of the scope of these studies. Researchers have attempted to open up the walls of the Court of Justice. Christoph Krenn¹⁴ for example, studied how procedural and organizational law of the Court was shaped to enhance its legitimacy and authority. More actor-focused studies have shed light on governments' EU litigation strategies¹⁵ and the lawyers who represent parties in preliminary rulings.¹⁶ However, these studies, drawing upon an American literature on the US Supreme Court,¹⁷ mainly aim to identify repeat players/one-shotters and assess their chance of success in court. Hence, to date, there is no systematic or long-term research on lawyers who appear before the CJEU. The black box of decision-making processes for judgements, the actors involved in them, and the rules governing their interactions is still very much

¹⁰ J Bailleux, *Penser l'Europe par le Droit : L'Invention du Droit Communautaire en France* (Dalloz 2014).

¹¹ T Pavone, *The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press forthcoming).

¹² M Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment' (2014) *ICON* 136.

¹³ A Vauchez and B de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Hart 2013).

¹⁴ C Krenn, *Legitimacy in the Making. The Procedural and Organization Law of the European Court of Justice*, Ph.D. Dissertation (Goethe University 2017).

¹⁵ MP Granger, 'States as Successful Litigants before the European Court of Justice: Lessons from the "Repeat Players" of European Litigation' (2006) *Croatian Yearbook of European Law and Policy* 27.

¹⁶ J Hoevenaars, *A People's Court? A Bottom-Up Approach to Litigation Before the Court of Justice of the European Union* (Eleven International 2018).

¹⁷ M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) *Law and Society Review* 95; KT McGuire, 'Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success' (1995) *The Journal of Politics* 187.

sealed off from researchers. Yet these lawyers, whether they are agents of governments or European institutions, law professors or practitioners, have contributed to the development of common practices and perceptions of the CJEU. They have done so in spite of their different national legal professions, administrative cultures and legal traditions. We would like to move the research focus from the decisions to the interactions in the decision-making process. Drawing upon the previous actor-centred studies of the Court's players, we would like to go beyond their involvement outside the Court, and take a closer look at the activities of the members of the European legal community inside the Court.

It is to assess the role of the Court in this "Europe of lawyers" that our database project was born,¹⁸ gathering together all the actors who have appeared before the Court of the Justice of the CJEU since its creation. Agents of the Member States, law professors, lawyers, members of the legal services of the Commission or the Council, judges and advocates general appear in the analysis of the *dossiers* carried out within the framework of the Court of Justice in the Archives project. Although these actors are omnipresent and the actor-centred approaches of the EU have been fruitful, we still lack a comprehensive sociological stance on CJEU actors. It is this gap that our database aims to fill. The choice of this methodology was guided by the results obtained from pioneering research in the field of European studies, which have made it possible to objectivise both the European field of power and the flows crossing it. Following a sociological turning point in European studies at the beginning of the 2000s, studies adopted an actor-centred approach,¹⁹ crossing sociology of institutions and professions. Applied to the Court, this political sociology of the EU tried to go beyond a neo-functionalist analysis focusing on the progressive constitutionalisation of the treaties. In line with this work, an ambitious research group on the role of lawyers in the European polity has been set up in France. In particular, it included a database containing the socio-professional profiles of all the actors of the "European legal field": judges, advocates-general of the European judicial institutions, *référéndaires*, members of the legal services of the European Commission, the European Parliament and the Council, as well as private practitioners, law professors and members of the European parliament from the legal affairs committee. From the outset of the project, its members pointed out the value of such an approach, the aim of which was to "grasp the logic of structuring and interdependence linking together the relatively dispersed populations that make up the European legal field".²⁰ With our project, we intend to turn the proposition around. The idea is no longer to start from the actors, defined by the knowledge they master, but rather from an institution where they cross paths. By

¹⁸ The database has benefitted from the Court of Justice in the Archives Project, ecjarchives.eu.

¹⁹ M Mangenot and J Rowell (eds), *A political sociology of the European Union. Reassessing Constructivism* (Manchester University Press 2010); D Georgakakis and J Rowell (eds), *The Field of Eurocracy. Mapping EU Actors and Professionals* (Palgrave Macmillan 2013).

²⁰ A Mégie and G Sacriste, 'Polillexes: Champ Juridique Européen et Polity Communautaire' (2009) *Politique européenne* 157, 159.

focusing on the Court of Justice and what happens there, we want to show that what is at stake in the Court's courtrooms is precisely the encounter of diverse professional groups that make up the Europe of lawyers. As historians have long shown, a database is never a neutral view of the world, but a point of view. It is a set of hypotheses on the relational structure of the world.²¹ This is why this database is understood as a tool for a better sociological understanding of this group. It will provide an original overview of the transformations of the Europe of lawyers throughout the European integration process.

II. THE CONSTRUCTION OF THE DATABASE

To build this database, we have scraped the CJEU website.²² Every case from 1954 to 2020 has been coded extracting the following data: the Celex number of the case, its keywords as put in the judgement, the names of the parties (defendant, applicant but also intervening parties) and whether they were a private company, a public authority, such as a government, or a European institution. The names and statuses of the representatives of the parties (agent of a public institution, private practitioner, professor), the functions/positions of these representatives, and the composition of the Court have also been added. It finally must be noted that preliminary ruling cases are missing since they are dealt with by a team from the University of Oslo²³ which shares the same questions and therefore has entered in its database properties that are in line with ours. Staff cases are also not included in the database since we considered them to be “niche” cases, poorly valued within the Court.

Overall, our database includes 2500 cases. It covers mostly actions against Member States for failure to fulfil obligations (infringement cases), actions for annulment/and appeals of Commission decisions. Policy areas covered range from competition to environmental legislation.

²¹ P Bourdieu and M De Saint Martin, ‘Le Patronat’ (1978) *Actes de la Recherche en Sciences Sociales* 3.

²² On the website, each case has a URL that follows a regular pattern that contains the case's Celex number. Since each Celex is also constructed following a regular pattern, we first have constructed an index of all the Celex numbers. Rvest, a package of the R software then allowed us to store in the computer every page that refers to a case, and to take advantage of the nodes that structure the HTML page to extract every case's preamble, where the information of interest is gathered. Then several regular expressions extracted the precise information and pasted it into a spreadsheet. We then cleaned the spreadsheet using Stringr, a set of text management packages in R. The columns that contain names were cleaned a second time using OpenRefine, a free (and now open-source) piece of Google-initiated software for data wrangling. The facet function of OpenRefine applies several detection algorithms to every cell in a given row, providing the user with the nearest neighbours in terms of lexical differences among the various names written in the row. It therefore allows us to “hand clean” the misspelled names.

²³ T Pavone and S Hermansen, ‘Instrument of Power or Weapon of the Weak? Litigation and Legal Representation Before the European Court of Justice’ (paper presented at the American Political Science Association Annual Conference 2020 on file with Authors).

III. THE COURT AS A PLACE OF CONFLUENCE

This database is designed as a tool for researchers working on the Court of Justice *dossiers de procédure*. The database is intended to foster cross-cases insights. It allows, among other things, for researchers to identify a new judge, a first case for an advocate general, the actors facing each other, the repeat players, or the specialized legal issues involved in the case. These data therefore make it possible to place the case and its actors in a network of other cases and other actors, not through judicial quotations – which have been widely studied²⁴ – but following an actor-centred approach, through the network of actors involved. The database thus contributes to restoring the visibility of the Court's actors. We hope to stimulate reflection on the way in which the Court's jurisprudence is analysed. In particular, the chronological coverage of the database invites us to think about the transformations of the Court and the actors who intervene in it over the long term.

The CJEU has been largely analysed as embedded in a complex configuration of institutions and networks of actors. But the Court itself, because it gathers members of the Europe of lawyers, is a place of confluence. As such, it can be seen as a place “where interdependencies between public and private actors in the public space are consolidated, where rules for collective action are negotiated, where lasting balances are formed between organized groups”.²⁵ Our database aims to provide statistical data about *all* the actors that represented parties in the Court: lawyers, professors, but also agents from national governments and EU institutions as well as judges assigned to the cases and advocates general. It is designed to answer a set of questions - in our view in a more exhaustive way than other bodies of work on the Court. We then hope to contribute to answering long-running questions on the CJEU: who are the repeat players of the Court? What are the Member States defence strategies? How do they use law professors and external private practitioners to strengthen their defences? Who meets whom and on what occasions? Furthermore, coding the keywords allows us to track specialization on certain topics: do lawyers specialize in specific matters, for example, on the Common Agricultural Policy or competition policy? Are certain lawyers specialized in the defence of public or private parties? Finally, as we have a preliminary knowledge of the CJEU, the database aims at verifying the evolutionary properties of these variables among time-periods.

We therefore hope to contribute to the stream of work that aims to characterize the European legal field while taking into account both actors and practices. The database can help to provide a better understanding of who the Euro-lawyers are.²⁶ Drawing upon

²⁴ See for example JH Fowler, TR Johnson, JF Spriggs II, S Jeon and PJ Wahlbeck, ‘Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court’ (2007) *Political Analysis* 324; F Tarissan and R Nollez-Goldbach, ‘Analysing the First Case of the International Criminal Court from a Network-Science Perspective’ (2016) *Journal of Complex Networks* 616.

²⁵ O Nay and A Smith, ‘Les Intermédiaires en Politiques Publiques: Médiations et Jeux D’institutions’ in O Nay and A Smith (dir), *Le Gouvernement du compromis. Courtiers et Généralistes dans l'Action Politique* (Economica 2002) 3, 47.

²⁶ A Vauchez, *Brokering Europe* cit.

the sociology of professional groups, statistical analysis can unveil the shared characteristics of these lawyers. Despite the diversity of their positions and of the organizations to which they are affiliated, our hypothesis is that they meet in the courtrooms of the CJEU where they share and shape common knowledge, practices and representation of their role, despite the variety of titles and professional realities. By grasping this group through its successive evolutions and reconfigurations, we intend to take into account those who revolve around the hard core of repeat players, are excluded from it or are included in it as they evolve.²⁷ Hence, instead of wondering whether there is a Europe of lawyers, we hope to show the constant process of redefinition of what a European lawyer is. Circulations of individuals from one role to another have long been identified as strong incentives for advocacy coalitions,²⁸ especially in fields that are so commonly characterized by the weakness of their frontiers.²⁹ That is why our attention will be focused on the different roles played by these lawyers within the court, the different institutions they have represented and the European policies they have dealt with. Circulation is indeed a key component of the Europe of lawyers. Some authors have resorted to the concept of "weak field"³⁰: the "European field of power"³¹ would thus have a shifting structure, characterized by an "extraordinary heteronomy" with other social and political spheres. The European legal field, because it is "weak" and heteronomous, is crossed by exchanges, collusive transactions and circulation that our database aims to map. Finally, by looking closer at who is working with whom and when, we intend to contribute to the broad discussion on the constitution of a "European judicial field" or a "Europe of lawyer", whose emergence and reinforcement must be traced through the interactions and relations between individuals that our database precisely aims to map. The reconfigurations of this Europe of lawyers will be studied after identifying relevant time-periods, corresponding to different moments of the institutional history of the CJEU: the early days of the Court (50s-60s), its growing political role in the 1970s/1980s, and finally the expansion of the Europe lawyers with the expansion of the Court (growing numbers of *référéndaires* and judges, of law firms dealing with European law, of Member States within the jurisdiction of the Court with the enlargements) (90s-00s).

²⁷ L Boltanski, *The Making of a Class: Cadres in French Society* (Cambridge University Press 1987).

²⁸ A Orsini and D Compagnon, 'Lobbying Industriel et Accords Multilatéraux d'Environnement. Illustration par le Changement Climatique et la Biosécurité' (2011) *Revue Française de Science Politique* 231, 243 ff.; P France and A Vauchez, *The Neoliberal Republic: Corporate Lawyers, Statecraft, and the Making of Public-Private France* (Cornell University Press 2021).

²⁹ A Vauchez, 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)' (2008) *International Political Sociology* 128.

³⁰ *Ibid.*

³¹ D Georgakakis and J Rowell (eds), *The Field of Eurocracy* cit.

IV. HOW TO COMPLEMENT THE ANALYSIS?

Although many paths could be traced for extending and deepening the database,³² one example is given here to demonstrate how the database can productively be combined with qualitative analysis such as interviews with key actors.³³

Semi-structured interviews would provide an opportunity to discuss in greater detail the group's representations, practices and values. What does it mean to be a "good lawyer" at the Court? What is a successful pleading? What are the rules regarding the behaviour of each actor involved in the process? This would also allow us to question the development of a homogeneous practice of European law at the CJEU. For example, one of the present authors interviewed a private practitioner (also former *référénaire*) during her PhD research. He recalled how Jeremy Lever became a model of the "great pleader" in the 1980s:

"I really liked to hear him. It was...it was very amusing. I remember one case where we were all pleading a case of dumping and among our group there was a Belgian [...] his baby [was] in the room. And at one point the baby started to cry. And then Jeremy Lever who was pleading stopped 'my lords, I didn't know that my pleading would cause so much sorrow!' So he was...brilliant...he's a...a great pleader. A barrister".³⁴

Interestingly, the same interviewee compared this great pleader with the lawyers less accustomed to the Court's practices: "they pleaded but sometimes it was completely beside the point. Because they had no idea [...] they didn't know what the style of the institution was".³⁵ It is precisely the "style of the institution" that we would like to uncover by linking social properties and involvements in certain networks to certain styles of pleading. Indeed, such socialisation to the culture of the institution also operates through interpersonal relations. For example, big cases, such as the major cartel cases of the 1970s have brought together lawyers from very different background who found a "community of interest"³⁶ in the legal and judicial defence against the European Commission's accusations. During these years of investigations, negotiations, and hearings with officials of DG Competition, as well as in the courtrooms of the Court, lawyers met to coordinate their actions, and to develop strategies and legal arguments beyond national differences. In so

³² Among the options considered, we could perform in-depth descriptive statistics such as Multiple Correspondence Analysis and conduct a network analysis.

³³ Some of the repeat players identified so far are: Dietrich Ehle, Jochim Sedemund, Michel Walbroeck, Jean-François Bellis, Arturo Cottrau, Ivo van Bael, Volker Schiller, Arved Deringer or Jeremy Lever (private practitioners), Luigi Ferrari Bravo, Iva Braguglio, Giuliano Marengo, Oscar Fiumara, Martin Seidel, John Temple Lang or Alberto Prozzillo (agents of governments/EU institutions), Ebehard Grabitz, André de Labaudère, Alberto Trabucchi, Hans Peter Ipsen, Georve van Hecke, Giulio Pasetti-Bombardella or Cesare Grassetti (law professors).

³⁴ Interview with a partner, law firm, Brussels, 24 August 2015 on file with Authors.

³⁵ *Ibid.*

³⁶ Interview with a partner, law firm, Paris, 2 June 2018 on file with Authors.

doing, they drew the contours of the figure of the Euro-lawyer. Here, our database could also serve as a backup, an argument to produce during interviews in order to help actors remember cases or lawyers they had worked with regularly. Combined with interviews and archival work, our database would help to understand the progressive development of “European” pleading strategies, objectivize the links between lawyers and provide an actor-centred approach to the progressive building of this “community of interest”.

V. CONCLUDING REMARKS

Drawing upon the renewed trans-disciplinary interest on legal actors, our database primary aims to be a tool for archival research on the Court of Justice allowing researchers to place the actors appearing in the *dossiers* in a set of relations while helping to have a glimpse on their historical record of activity in the Court.

In recent years, the Court has opened itself to further research, opening first its archives on the *dossiers* and more recently its administrative documents. This new accessibility opens up rich and fascinating opportunities to do research on this institution. We believe the database could complement the study of these archives by providing a unique perspective of the Court as a place of confluence of various professional actors and an arena of socialisation.

By combining quantitative and qualitative analysis, we would then craft a model of institutionalisation of the very special space of practices that the CJEU is. Since actor-centred approaches of international spaces enjoy a renewal of interest, this database could equally give birth to new collaborations with researchers in International Relations that share the same sociological set of questions.³⁷

³⁷ See for example V Pouliot, *International Pecking Orders: The Politics and Practice of Multilateral Diplomacy* (Cambridge University Press 2016); J Go, ‘Global Fields and Imperial Forms: Field Theory and the British and American Empires’ (2008) *Sociological Theory* 201; M Hadjiisky, LA Pal and C Walker (eds), *The Micro-Dynamics and Macro-Effects of Policy Transfers: Beg, Borrow, Steal or Swallow?* (Edward Elgar 2017).

