ABSTRACT

CURRENT CHALLENGES AFFECTING
THE EUROPEAN COURT OF JUSTICE

By Kevin Joseph Van Dyke

This study was designed to determine the significant challenges currently affecting the European Court of Justice (“ECJ”). The challenges researched related not only to structural, operational, and administrative challenges but also to other significant issues. For example, the study researched the extent that EU citizenship rights are limited, the extent of trends in ECJ business law decisions, and how the proposed new EU Constitution will affect the ECJ. This study also examined how the recent enlargement of the EU will affect the ECJ and how and to what extent the ECJ preliminary ruling process is ineffective. The procedures or methods used for this study involved personal interviews with ECJ personnel in Luxembourg, a review of the latest and most authoritative books on the ECJ, and a review of leading articles in political science journals and law journals. Also examined were the ECJ website for the text of actual ECJ decisions and relevant newspaper articles and magazine articles. This study reached several conclusions. The ECJ has an excessively large caseload. National courts only accept conditionally the supremacy of EU law. Language translation problems threaten to undermine the ECJ’s effectiveness because there is an excessive burden of translating 380 two-language combinations based upon the 20 total EU languages. While ECJ cases say that member states can be liable for inadequate implementation of EU law, member states determine their own liability in this regard and award few damages. Recent ECJ decisions have been tilted towards broadening EU citizenship rights only in a very narrow sense, primarily only in the context of free movement rights of an EU citizen. Major recent ECJ decisions on business law have been inconsistent. The proposed new EU Constitution up for ratification will not significantly affect the day-to-day administrative functioning of the ECJ. The legal systems of the new accession states into the EU provide many obstacles to an effective assimilation into the ECJ legal system. The ECJ preliminary reference process, whereby a national court has the ECJ decide an issue of EU law in a national court case, has some serious flaws. ECJ preliminary rulings are not binding legal precedent for future cases with parallel facts and different litigation parties. The reactions of national judges and member states to ECJ decisions are generally to restrictively apply ECJ decisions and to avoid their effects where possible. Treaty-of-Nice efforts to reduce the ECJ’s workload will not solve the workload crisis. A possible solution to the excessive number of cases at the ECJ is for the EU to adopt a certiorari procedure like that of the U.S. Supreme Court whereby the ECJ can decide only the cases it wants to decide.
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INTRODUCTION

A. Background and Context of the Study:

As a Diplomacy and Foreign Affairs major at Miami University, with minors in Latin American Studies and History, my goal is to pursue a diplomacy-related position in government service after Graduate School. Enhanced knowledge about the European Court of Justice and important changes related thereto would give me invaluable, firsthand experience with this international topic that could not be easily duplicated otherwise. The topic is important because the European Court of Justice is the judicial engine of the European Union. The prospects for the EU in the future depend upon the smooth functioning of this ECJ engine and, where appropriate, on an expansion of the ECJ’s EU role and power to best foster further EU integration and to protect and advance the rights of individual EU citizens.

B. Research Questions:

1. How do major structural, operational and administrative challenges currently affect the ECJ?

2. How are EU citizenship rights limited?

3. Are there any trends in recent ECJ decisions relative to business law?

4. How will the proposed new EU Constitution up for ratification affect the ECJ and its work?

5. How will the recent enlargement of EU (including the Communist background of some of the new member states) affect the ECJ?

6. How and to what extent is the ECJ preliminary ruling process ineffective?
7. C. Explanatory Variables:

- **Explanatory Variables for Question 1:** The number of EU languages; caseload of the ECJ; relevant EU laws and treaty provisions for the ECJ; the work and role of ECJ staff employees; and the reactions of member-state national judges and member states to ECJ decisions.

- **Explanatory Variables for Question 2:** Citizenship provisions in EU Treaties and ECJ citizenship legal decisions.

- **Explanatory Variable for Question 3:** Recent ECJ business law decisions.

- **Explanatory Variable for Question 4:** Proposed EU Constitution’s provisions relating to the ECJ.

- **Explanatory Variables for Question 5:** Legal systems of the new member states; accountability of new-member state judiciaries; executive branch control of judges; funding for judicial training; qualifications and competence of judges; and member-state implementation of EU laws.

- **Explanatory Variables for Question 6:** ECJ preliminary reference and ruling process; the legal effect of the preliminary ruling in EU; ECJ cases; EU laws and treaties; the extent of national-court and member-state cooperation; and caseload.

D. Sources:

- The sources for this study are from (1) personal interviews with ECJ personnel in Luxembourg and information from a speech of an ECJ judge in Luxembourg that I attended; (2) the latest and most authoritative books on the ECJ; (3) articles in political science journals and law journals relevant to the ECJ; (4) pertinent ECJ
information from the ECJ website (including the official text of ECJ decisions); (5) relevant material from other internet websites; and (6) relevant newspaper articles and magazine articles.

- Many books and paper copies of journal articles were accessed by visiting Miami’s and other libraries, including undergraduate and law libraries. Journal articles, newspaper articles, and other articles were also accessed online from Miami University research databases such as Electronic Journal Center, Lexis, and Academic Search Premier.

- The dates on the various sources range from 2001 to 2005 with the bulk of the sources going from the present (2005) back to 2003.
Chapter I: Limited EU Citizenship Rights

The staff at the ECJ during my visit there last June eagerly awaited the ECJ’s decision in the “Chinese baby” case, which was viewed as an eventual landmark decision. Relative to vague and general citizenship EU-treaty provisions, the big issue according to ECJ research attorney Bettina Kotschy is what sort of citizenship rights can be based upon the vague language in the treaties. There is no EU legislation which has made the language on citizenship in the treaties more precise. At the moment, the full legal extent of European-citizenship rights is unclear (Kotschy Interview).

After my visit to Luxembourg in June of 2004, the “Chinese baby” case (Case C-200/02) was decided by the ECJ on October 19, 2004. The baby at the center of the Chinese baby case, Catherine Zhu, was born in September 16, 2000 in Belfast to Chinese parents. The mother, Mrs. Chen, already had a son born in China in 1998, and under China's one-child policy, Mrs. Chen could not have another child. She gave birth in Belfast, Northern Ireland so that her baby would have Irish nationality, which would enable herself and her daughter to reside in the UK. Mrs. Chen and Catherine now live in Wales, and Mrs. Chen pays privately for child-care services. Partly in response to this case, Ireland has since tightened up its citizenship laws. Simply being born on the island of Ireland now no longer automatically makes one an Irish citizen. The Court in this case said that every EU citizen has the right to reside in any EU member state as long as he or she has sickness insurance and is not a burden on the host country's social welfare scheme. Catherine had such insurance and was not such a burden. To the ECJ, it did not
matter that Catherine has no income of her own making or that Catherine's mother manufactured the residency right. According to the ECJ, the conditions for acquiring member-state nationality are a matter for each member state, and other member states must respect each member-state’s regime on how to acquire citizenship. The ECJ decided that Catherine's mother should be allowed to accompany her to the UK because Catherine's free-movement right of residence in the UK as an EU citizen would be rendered totally ineffective otherwise (Free Movement). Catherine’s father is a controlling shareholder of a large Chinese chemical company (Rozenberg 11).

When the Advocate General at the European Court of Justice gave his preliminary opinion (not binding on the ECJ) that Mrs. Chen should have the right to live in the UK as the parent of an Irish-born child, he said that “the problem lay with the Irish citizenship regime,” where an automatic right to citizenship was then given to all those born on the island of Ireland. Before the existence of the Chen case, the Irish Supreme Court had ruled that the non-national parents of Irish-born children did not have the automatic right to live in Ireland, reversing a long-standing Irish rule. This ruling is probably the reason why Mrs. Chen and Catherine tried to move to the UK under Catherine’s EU citizen free movement rights. This fact, combined with the ECJ judgment in this case, produced the anomalous situation that such a family has the right to live in any EU state except Ireland. An Irish referendum (caused by this Chinese baby case) removed the automatic right to citizenship to all children born in Ireland and was passed in May of last year. Thus there is no prospect that there will be another such case over a child born in Ireland arising in the future (Ruling Bolsters).
The earlier July, 2002 Carpenter decision of the ECJ, Case C-60/00, involved an Englishman living in the UK who was a self-employed businessman selling advertising space. He had young children from a previous marriage, and he married Mrs. Carpenter, a Philippine national, who overstayed her permitted visa in the UK. Consistent with UK national law, UK authorities refused to allow Mrs. Carpenter to remain in the UK with her husband. Mr. Carpenter sought to establish his wife’s residency in the UK as based upon his EU citizenship rights. The ECJ decided that so long as a national of a member state stays at home (here the UK) and does not exercise a free-movement right to go and live and work in another EU member state, he or she cannot access EU citizenship rights to family life, including having his or her spouse accompany such EU citizen or come and live with such EU citizen. In other words, only when the EU citizen is “a migrant” in another member state can he or she access the EU identity rights attached to EU citizenship in the member state to which he or she has migrated. So long as the matter remains wholly internal to one member state (here internal to the UK), EU rules giving citizenship rights on the legal basis of EU free movement exercise to another member state are inapplicable. According to Elspeth Guild, the problem is that it is these EU citizen rights of free movement to a different member state that give EU citizens much wider rights of family reunification than are found in the national laws of any member state. The right of an EU citizen as a migrant to a different member state includes the right to reunification with a spouse, children up to 21, or children of any age beyond that if dependent upon the worker or his spouse in the member state to which the EU citizen has moved or migrated. Notwithstanding the foregoing, Elspeth Guild notes that the ECJ
decided in favor of Mr. Carpenter (in favor of his wife’s right to live with him in the UK) not based upon his capacity as an EU citizen, but based upon “his identity as an economic actor” in the EU. His right to escape UK national law, which prohibited him from family life with his Philippine wife in the UK, comes exclusively from the “economic fact” that he is self-employed selling advertising space, a significant portion of which is sold to advertisers in other member states. According to Elspeth Guild, the location of Mr. Carpenter’s customers is the key to his wife’s right to live in the UK with him. The ECJ would have ruled against him if all of his customers had been from the UK (Guild 22-23). Although the ECJ found in favor of Mr. Carpenter, it could not do so based upon his right of free movement as an EU citizen because he had not exercised his right to free movement, being domiciled always in his native England. The ECJ found in favor of Mr. Carpenter solely on the basis of his economic activity across member-state lines, which is noteworthy according to Sebastien Gagnon-Messier because of the EU’s stated goal of using European citizenship “as a way of adding a political dimension to the EU’s existing economic integration” (Gagnon-Messier 25).

On another EU citizenship issue, EU prohibitions against discriminating in access to social benefits for migrant EU citizens to another member state according to Lisa Conant relate to early expectations of labor shortages rather than to any serious commitment to equal treatment of migrants. Conant’s research shows that the resistance of member states to an expansion of social benefits to migrants in their member states has been largely successful because migrants cannot generate significant legal or political pressure to promote their interests, and their legal challenges are primarily uncoordinated
(Conant 200-201). While ECJ legal decisions on social benefits did create significant rights for migrants, those rights have been illusory because of this member-state non-compliance. The basis for the member-state non-compliance is that ECJ decisions in this area have potential costs for member states that must finance “new sets of beneficiaries.”

The European Commission has generally failed to have a sustained and comprehensive prosecution program of member states that violate migrant rights. Without any real threat of European Commission prosecution, member states are thus relatively free in their “contained compliance” and in enacting new legislation to overrule or preempt ECJ decisions in the area of migrant EU-citizenship rights (207).

Ms. Conant adds that member states have acted collectively to preempt and avoid future ECJ expansion of migrant rights of EU citizens by eliminating provisions for the equal treatment of migrant workers in all new agreements between member states (196). Those few migrants that can afford to sue can maintain their rights while others without such funds for litigation face relentless discrimination (212).

Norbert Reich relates that the prevailing legal doctrine in the EU is that EU citizenship is merely a derived condition of nationality. Citizenship is not an “autonomous” concept of EU law, but is defined exclusively by the applicable member-state legislation for granting nationality in that member state. Thus there is no EU competence or ability to set up an EU derived legal definition of citizenship or to define and revoke nationality in a member state, which nationality is the sole basis of EU citizenship. If the member state grants an individual citizenship, than that individual is automatically an EU citizen. If a member state pursuant to its laws revokes an
individual’s citizenship in a member state, than that individual automatically is no longer an EU citizen (Reich 4-7). The key right under European Union treaties to European Union citizenship is freedom of movement for a citizen of one member state to go and reside in another member state (11). Reich adds that the ECJ in its recent cases has made limited use of the EU treaty concept of free movement rights to expand the concept of European citizenship. For example, the ECJ has refused to extend EU citizenship rights to third-country nationals lawfully resident and productive in the EU for a long period of time, but who are not nationals of any member state. Reich concludes that beyond the ECJ free-movement cases involving EU citizenship, EU citizenship has not become a genuine source of rights (23). The first express use of EU citizenship in an ECJ legal decision to extend the rights of EU citizens did not take place until 1998. In that case, the ECJ said that under EU citizen free movement rights, Germany could not discriminate in a child benefit allowance against a Spanish resident in Germany. In another 1998 case, an Austrian tourist violated Italian law while in the province of Bolzano, Italy, where German is spoken along with Italian. In that Italian province, German-speaking Italian citizens were entitled to have their legal hearing in German, but the Austrian tourist was not so entitled. The ECJ said that it was illegal discrimination against the free-movement EU citizenship rights to deny German-speaking citizens from Austria or Germany the right to use the German language in their court proceedings in this Italian province when local Italians who also spoke German were allowed to do so (11-12). Except for these types of free-movement cases, the ECJ has not significantly extended or attached additional rights to the concept of EU citizenship (13).
Despite the fact that free movement-of-migrants EU-citizenship rights are difficult to enforce at the member-state level, Gareth Davies observes that ECJ cases on member-state national health systems are important in understanding the potential scope of EU citizenship rights in the long run. For over five years, the ECJ has applied EU law on the free movement of services to medical treatment. Within certain contexts, the ECJ has said that member-state national insurers and health care systems should allow for EU-citizen patients to go abroad to get their treatment and then “to send the bill home.” Since economic reasons under EU law do not justify member states in opposing patients going abroad for treatment, member states instead claim while trying to limit these ECJ decisions that such medical treatment abroad will cause the particular member-state healthcare system involved in a case to become unviable (Davies, Gareth, 94-95). The ECJ, however, has decided that member-state restrictions on patients to only receiving medical treatment from the member-state healthcare system are often contrary to EC Treaty rules on the free movement of services, particularly when the treatment in another member state is not in-patient treatment conducted in a hospital. According to Gareth Davies, ECJ decisions currently indicate that patients needing treatment in a hospital can be confined to their member-state domestic healthcare system when that hospital treatment in the member state can occur without undue delay. It is not enough for the member state to claim that the waiting time to get in the hospital is standard for that member state. To determine whether the delay was excessive, the ECJ said that issues like whether the patient might suffer from the member-state delay should be considered, including whether the patient’s medical condition might deteriorate with a delay, whether
the patient’s employment would be harmed by the delay, and whether the patient had been a victim of earlier delays. However, those patients wanting medical but non-hospital treatment may travel abroad at will for treatment and have their home healthcare authority pay for the treatment (99-101).

Gareth Davies adds that these EU citizenship healthcare cases have wide significance beyond healthcare. The reasoning of these cases is applicable beyond the medical sphere. It potentially opens doors to a radical restructuring of many other member-state welfare activities from pensions and education to unemployment insurance (95). Claimants in future cases based upon the reasoning of these ECJ cases could argue that they should, for example, as EU citizens, be allowed to have their children educated in France and have their member-state government pay for such schooling to the extent that the member state would have paid for similar schooling in the member state. Others might argue that they have the right to stop paying the proportion of their member-state tax that goes to member-state social insurance and then to take out such insurance with a foreign provider in another member state who might offer better terms (104).

According to European law attorney Dimitry Kochenov, the EU Treaty of Accession and the EU Act of Accession that facilitated the accession of the new member states into the EU does not correspond at all to the concept of EU citizenship found in ECJ cases. Kochenov says that the 2003 EU Act of Accession by which the ten new member states became members of the EU imposes limitations on free movement rights relative to citizens of the new member states and creates “second class” citizens within the EU at least temporarily or, in other words, creates EU citizens in the new member
states to which EU citizenship rights do not completely apply during a transition period. This result came about apparently because EU member states thought that the accession of the ten new member states might cause some harm to their labor markets (Kochenov 73). The Treaty of Accession effectively suspended two aspects of the right to freedom of movement for citizens of the new member states: (1) the non-discrimination principle relative to non-discrimination by the other member states against EU citizens of new member state and (2) the right to move to another member state to take a job there (81). According to the annexes to the Treaty of Accession, some freedom of movement does exist immediately, like services involving the temporary movement of workers and some other freedom of movement rights as defined in certain directives. However, the key point according to Kochenov is that the full right of freedom of movement for citizens of the new member states will be introduced only after a temporary transition period of two to seven years. Thus for the first seven years, the application of the free movement right to citizens of new member states is fully controlled by the other member states (91-92). As a result, during the transition period of up to seven years, the scope of free movement rights as applied to citizens of particular new member states will vary considerably. Kochenov states that it is likely that small and economically prosperous new member states like Estonia and Slovenia will only be subjected to the initial two-year transition period while countries like Poland and Latvia run the risk of waiting the full seven years for full free movement rights for their nationals (93).

The prospect of the largest EU enlargement of ten new member states virtually dictated an Intergovernmental Conference in 2000 and the adoption of the Treaty of Nice.
Although the Treaty of Nice does have some provisions relating to substantive fields, the reason for being of the Treaty of Nice was to essentially modify the institutional framework of the EU in order to accommodate the new member states (Goebel 463).
Chapter II: Inconsistent Recent ECJ Decisions Affecting EU Businesses

Another key case that still has serious ramifications is the 1999 ECJ case of Centros Ltd. v. Erhvervs-og Selskabasstyrelsen. According to Laura Jankolovits, from the beginning, the Treaty of Rome included several provisions dedicated to the Freedom of Establishment for businesses in the EU so that a business from one member state could establish itself and do business in any other member state. The goal of the Treaty of Rome was to abolish restrictions on the freedom of establishment of businesses between the member states, and its provisions in this regard ultimately aimed to remove barriers among the member states by insisting that each member state recognize each other's incorporated companies and the right of these companies to transact business in any member state. Article 52 and Article 58 of the Treaty of Rome have been the most effective in allowing free movement of businesses and corporations among and into different member states. Since the signing of the Treaty of Rome, the European Court of Justice has interpreted its freedom of establishment provisions for businesses with increasing leniency, gradually eliminating restrictions toward EU businesses in ECJ decisions. In 1999, the ECJ made a monumental decision (Jankolovits 974) in Centros Ltd. v. Erhvervs-og Selskabasstyrelsen. The Centros Court decided that a member state ("host member state") cannot refuse to register a branch of a company formed in accordance with the laws of another member state even if the company branch incorporated in the different member state carried out its incorporation there only to
avoid the legal requirements of incorporating in the host member state into which it was then trying to expand its business (975).

Jankolovits states that ECJ’s decisions before and after Centros convey the common theme that member states must erase regulations that inhibit the activities and equal treatment of European Community companies. By its decisions, the Court appears to be liberally applying the freedom of establishment ideals and seems to be deciding in line with the ideals of the European Community. However, as of now those ideals of freedom of establishment for businesses in any member state have not been entirely accepted in practice by the member states as evidenced by the inability to pass certain legislation within the European Parliament and within the individual member states. The ECJ is supporting unifying policies concerning freedom of establishment for businesses while the European Parliament has not yet been able to pass parallel legislation because of pressure from party factions and nationalism in member states (991).

According to Jankolovits, the ECJ’s Centros decision has created a potentially disastrous situation, and failure to solve these potential problems may result in several victims. For example, if laws between two member states differ significantly, there is the possibility that a company formed under the laws of one member state and transacting business in another may not have an appropriate structure, like the financial structure to pay creditors or victims of its product hazards, thus damaging the company and/or the citizens of the second member state. The creditors might lose their investments and be victimized mainly because the EU freedom of establishment for businesses allows Centros Ltd. (incorporated outside of Denmark) to operate in Denmark while (1004)
failing to adhere to national regulations in Denmark relative to financial structure and other structural requirements to protect third parties. Denmark, which has a strong interest in protecting creditors from such calamities, will not be able to impose on Centros the requirements it imposes on national companies incorporated in Denmark (1005).

Jankolovits stresses that the only potential solution to the Centros problem is new EU laws that increase required legal uniformity in corporate structure and financial soundness for both public and private companies throughout the EU. Such uniformity if ever adopted by the EU will not only stymie and stop a “race to the bottom,” i.e., to the lowest member-state incorporation business requirements, but it also will create stability and increased certainty for investments and business transactions if all businesses in the EU are required to meet minimum financial soundness requirements. But the Council of Ministers and the European Parliament have hesitated to enact legislation that infringe on local member-state policies. Given the diversity of the member states, it may be impossible to create a uniform law on the financial capital and financial soundness of EU businesses that can work in all of the member-state economies. Jankolovits concludes that it may not be possible to enact a law on the financial structure of businesses that will work in one member state without damaging the local economy of another member state. For instance, corporate financial structure legal requirements that may benefit large and populated member states such as France and Germany may be detrimental to smaller member states such as Denmark and Luxembourg (1005).
Joshua Rosenberg, Nicola Woolcock and Bruce Johnston describe how on May 20, 2003, the ECJ in a surprisingly protectionist decision decided Case 108/01 involving the slicing of Parma ham outside of Parma, Italy. Under EU law, a product manufacturer can get a “PDO” approved by the legislature of its country. (The EU legal background of the PDO is explained in more detail in the next paragraph.) Here the PDO protecting Parma ham was obtained by approval from the legislature in Italy. Under the terms of the PDO approved by the Italian legislature, everything, including the slicing of the Parma ham, had to be done in Parma, Italy. Thus, for example, there could be no slicing of Parma ham in Britain. The ECJ decided that PDOs were proper and that Parma ham cannot be sliced and packaged for sale outside the Italian region where it is produced. The same result goes for Grana Padano, a hard cheese similar to Parmesan, the ECJ added. However, the one exception is that there is no restriction on hams being sliced on delicatessen counters, like in Britain, where consumers can confirm their authenticity. In this limited permitted exception, the customer in Britain would actually see the delicatessen employee pull out a bag of Parma ham from Italy and slice the Parma ham in his or her view at the delicatessen so the customer could be certain it was real Parma ham. However, on the big issue, the ECJ decided that restricting the free movement of goods within Europe with these protectionist PDOs could be justified by EU measures aimed at protecting “the quality of registered foodstuffs.” The ECJ concluded that the producers of Parma ham and Grana Padano cheese are entitled to use a "protected designation of origin" (PDO) covering their products, and these PDOs can contain restrictions on how the products are to be processed and, for example, sliced. The ECJ
considered that "the grating of cheese and slicing of ham and their packaging constitute important operations which may damage the quality and authenticity and consequently the reputation of the PDO if these requirements are not complied with.” But the ECJ stopped short of ruling that all grating, slicing and packaging must take place in a product's region of origin since the restrictions as to slicing and packaging would apply only if they were expressly specified in the PDO. To qualify as Parma ham, the ham must be produced in a sharply defined area in Italy. The PDO is different from copyright and trademark protection because copyrights and trademarks do not cover such routine manual labor as placing ham in a package for sale (in contrast to the writing on the package itself which copyrights and trademarks do protect) or act of simply slicing that ham (Rozenberg, Woolcock and Johnston).

The EU legislative background of the PDO according to Britton Seal is that in 1992, the European Union adopted Council Regulation 2081/92, which established the protection of designations of origin (PDO) for certain agricultural products and foods. The regulation allows Community protection of products that originate from a specific region if the product complies with certain specifications, which specifications include evidence that a product originates from a particular area, the original or local methods of producing the product, and details of the link between the product and the geographic region. Once the PDO specifications have been met, and the PDO has been approved and registered by the Commission, Commission Regulation 2081/92 protects PDOs against commercial use of the registered name by others (Seal 536).
Parma ham is one of over 500 products currently registered as a PDO under Commission Regulation 2081/92. According to Seal, this Parma ham case marks a continuing trend in the ECJ to protect PDOs even when it appears EC Treaty articles 29 and 30, which govern the free movement of goods within member states, do not justify such restrictions because they hinder free trade. PDOs conflict with free movement because routine operations like slicing and packaging of a product should be able to be performed anywhere in the EU (559). According to Seal, this situation is particularly disturbing because of the ease with which countries can create PDOs. PDOs arise out of a member state's national legislation. Companies who may have significant influence in the lawmaking body of the Member State can petition for the creation of a PDO for their product with their member-state legislature. The member state checks to see whether the minimum specifications for the establishment of a PDO are present. After determining that the minimum specifications are present, the member state forwards the application to the governing body of the European Union, which then performs a formal examination of the PDO. The EU goal of such EU examination is only to ensure that the findings of the Member State do not contain obvious mistakes. Seal concludes that the protectionist problem is that this is a very low standard and allows Member States to easily register an enormous variety of products as PDOs (563).
Chapter III: Glitches in the Assimilation of the Judicial Systems of Eastern and Central European New EU Member States into the ECJ Legal System

New judges from the new member countries started new cases last July. Attorney-researcher Hakenberg at the ECJ said that so far the staff at the Court (as of June of 2004) does not think that the Communist history of some of the new member states will create any major problems in the Court, although one can never exclude it (Hakenberg Interview).

The crucial point of this section of this paper is that the effectiveness of the legal system of new member states is crucial to the ECJ’s preliminary-reference process functioning properly. The reason is that member-state judges in the new member states need to cooperate effectively with the ECJ and in national member-state cases refer legal questions to the ECJ for a preliminary ruling where issues of EU law are involved. To the extent that national judges are inadequately trained, are not competent, are influenced by their country’s former Communist status, are uncooperative or to the extent that there are similar problems, the preliminary ruling process will not work properly.

Much of the factual data that follows is from the “monitoring reports” of The EU Accession Monitoring Program from the U.S.-based Open Society Institute. In new member states that have afforded their judiciaries extensive autonomy or judicial self-rule, such as Hungary and Lithuania, the principal concern now is not threats to judicial independence, but rather the risk of “an insufficiently accountable and insular judiciary.” A key to improvement here would be readily available access by the general public to the judiciary’s decisions and administrative processes. In other new member states, the risks
to judicial independence and judicial autonomy appear real. In these states, particularly in Bulgaria, Latvia, and Romania, the executive branch of government continues to exercise undue influence over the administration of the judiciary and the career paths of judges. All the new member states unfortunately continue to employ judicial selection, evaluation, and promotion procedures that are “insufficiently transparent and objective.” Few have adequate judicial training systems (Monitoring 23).

Thus several new-member states according to the Open Society Institute still give the executive considerable latitude in determining a judge’s career path, which presents opportunities for the executive to interfere with a judge’s judicial independence. Where the executive branch controls the promotional and professional development opportunities of a judge, the executive branch may bias and unduly influence a judge’s decision-making authority. There is also a conspicuous tendency to limit the pool of lawyers who are able to become judges in the new member states. All the new member states have given preference to new law graduates or young professionals. This system effectively discourages experienced lawyers from becoming judges. According to the Open Society Institute, when judges themselves control the judicial selection process without effective input from outside the judiciary, the culture is unfavorable to innovation and to social responsiveness to the legal needs of society because the judges are insulated from concerns outside of their judicial world. This insularity problem is particularly severe in the Czech Republic, Hungary, Lithuania, Poland, Slovakia, and to some extent in Bulgaria (29-30).
In a majority of the new member states, the Open Society Institute reports that the criteria for judicial selection and promotion are too general and thus too easily met by unqualified or incompetent judicial candidates. The overly general criteria include requirements of citizenship, legal education, civil capacity, minimum age, a clean criminal record and moral integrity. These too general guidelines allow for overly broad judicial selection discretion unrelated to the merits of the candidate’s legal ability. The process of judicial selection and promotion is also not transparent (the public cannot tell why selection decisions are made) and lacks opportunities for outside input in the judicial selection process. In all the new member states, the judicial selection and promotion procedures and decisions are confined to a small number of officials, mostly untrained judges or Ministry of Justice officials, who are granted considerable discretion to chose whom they want rather than candidates based upon legal merit (28-29, 31-32).

The monitoring reports of the Open Society Institute show that sufficient funding for judicial training is the most decisive factor for ensuring a competently trained judiciary and that in all new member states, financial support for judicial training is low. Such support is even decreasing in Estonia and Poland, and Bulgaria does not provide any such financial support for its magistrates training center. Hungary, Poland, Slovakia, and Slovenia have no permanent judicial training institutions of any kind. The judicial training institutions in other new member states are poorly financed and staffed with their long-term survival unclear. Generally in new member states, any judicial training programs are too narrow in focus and rarely help judges meet judicial-job challenges related to the ongoing transition to democratic judiciaries (38-40). Case backlogs have
greatly delayed users of court services in most new-member states, and this problem is particularly severe in Latvia, Romania, Slovakia, and Bulgaria (49).

Frank Emmert notes that since 1995, the recent new member states of the EU adopted necessary EU-mandated legislation and laws relative to their eventual EU membership. For example, in the field of business competition law as of 2003, the candidate countries adopted national competition laws that are modeled on EU treaties and EU secondary legislation. It is, however, much more difficult to determine whether these new member-state laws are actually applied or meaningful in practice (Emmert 289-290). There have been a lot of problems and glitches with the application of these new laws by administrative and court authorities in Central and Eastern European countries. The transition from Soviet-style planned economies to democratic market economies required that such prospective new member states adopt EU law as their own domestic laws. There was an “avalanche of required legislation” necessary to attempt to bring the new member states’ legal systems to the level achieved over decades by the older member states. There are “methodological weaknesses” in these hastily passed EU laws in the new member states that are part of the Communist heritage, not part of the new laws. According to Emmert, a major problem is that judges in Central and Eastern Europe have little concept of justice in a case in contrast to just knowing law in a memorized, rote fashion that cannot adequately be applied in actual cases, leading to absurd legal results (289-290). Unfortunately, training seminars do not seem to have improved the expertise of these judges in EU law. The majority of judges at these seminars leave bewildered without a real comprehension of the features of EU law,
including not understanding the supremacy of EU law, direct effect and enforceability (305).

Emmert says that judges in Eastern and Central Europe claim their system is not like the U.S. system of stare decisis in which a decision by a U.S. Court has precedence over and determines a later case on parallel facts between new litigation parties in a later U.S. case. Lawyers in Estonia, for example, are advised not to make a reference to established case law or prior decided cases in their legal arguments because Estonian judges might react negatively to such an attempt “at questioning or restricting their judicial independence” by asking such judges to decide a case a certain way just because the exact same case factually but with different parties was decided a certain way in the past, even in the recent past. Judges in these countries generally have refused to look at precedents, even precedents from their own appellate courts, their supreme court or even from a different chamber of their own local court. These judges in these countries occasionally enforce laws that their own supreme court has found unconstitutional. Different judges of the same court can reach a different result in virtually identical cases without any explanation, creating more legal chaos (295). According to Emmert, there are countless examples of citizens being harassed by authorities, pressed to pay bribes, improperly denied permits and licenses, and denied other fundamental rights in all parts of Eastern Europe. Those so harassed do not seek redress in the courts because in the court systems, they will find “a maze of opaque and illogical procedural rules they cannot fulfill or find that various authorities are covering for each other” (296-298). In Central and Eastern Europe after the fall of Communism, these problems exist because having
left the totalitarian state environment, the process of democracy is only under construction “dominated often by unreformed Soviet-style bureaucratic structures and mafia-like public and private structures” (298). One legacy of Soviet-Communist times is a very top-heavy administration where the relevant ministry monopolizes decision-making, and civil servants are hesitant to make decisions without instructions from above (307). In the Soviet period, it was common practice to put pressure on independent judges to become subservient to the state by deluging them with too much work, disciplining them for not getting the work done, and withholding or diminishing budgetary court support. The judiciary in Central and Eastern Europe needs to be self-governing with the right to decide all questions of administration, budgetary implementation, including disciplinary measures for wayward judges (308).

Emmert concludes that even though Central and Eastern European countries have passed EU-mandated member-state legislation, few resources or funds have been authorized for the implementation of these new laws. Many of these member-state laws were amended so many times that even their publication could not keep up with all the amendments, and such new laws are promptly reversed whenever a new government comes to power. The Soviet culture of “using public administration for political ends” has not been completely overcome or defeated (304).

Relative to the recent EU enlargement, pressure from the EU in that regard has somewhat improved the situation of Russian-speaking minorities in the Baltic states, particularly in Estonia and Latvia. However, Christophe Hillion observes that the continuing problem is that many members of these minorities are “non-citizens” or
“stateless.” In other words, they are not even citizens of their own member state. Under EU law these individuals are also non-citizens of the EU since they are not citizens of a member state and thus do not have the same EU rights as their fellow countrymen who are member-state citizens, particularly with regard to free movement rights to other member states and other rights associated with EU citizenship (Hillion 728).

Ms. Bettina Kotschy, an ECJ research attorney whom I interviewed in Luxembourg, said that the ECJ professional challenge with the new member states will be incorporating the judges and staff from new member states with the existing judges and staff to make them a homogeneous group of people. Ms. Kotschy added that it is important that there be harmony and cohesiveness with the judges from new member states and with their staff because many things prefatory to a legal decision are done on an interpersonal basis before the judges come together and discuss the case. It is important that staff of existing judges feel just as comfortable to go over and deal with the staff of new member judges as they have in the past with the staff of long-time judges. It is important for personnel of new member states to be able to communicate with the personnel of older member states. With new member states with different cultures, this communication and assimilation could prove a challenge. Ms. Kotschy believes that the most difficult thing relative to assimilation is the large number of new cases coming from the new member states. However, the ten new ECJ judges from the new member states should be able to help handle this increased workload (Kotschy Interview).
Ms. Kotschy pointed out that the idea of former Communist countries becoming members of the EU is a very emotional issue. Many of her ECJ friends are against former Communist states becoming part of the EU. It is thus an issue, not a non-issue. Ms. Kotschy’s opinion is that it will probably not influence the decisions of the Court except that if some of the new member judges are very liberal from an economic point of view, that factor would play a role in the Court’s decisions. According to Ms. Kotschy, the reason is that many ECJ decisions have an economic background. It thus does make a difference if a judge is more to the left or to the right (Kotschy Interview).

European-Union law expert Takis Tridimas has noted that the new member states are quite different from the other EU member states. They are not at the same level of economic development, and they do not necessarily share the same values as the other member states. These discrepancies could affect future ECJ decisions, in particular as to how the ECJ responds to cases involving economic freedom and cases involving national morality (Del Duca 32).

Because of the recent enlargement, Saulius Kaleda says that the ECJ in the future will get countless cases like the German University case discussed below in which the ECJ will have to determine the extent that EU law applies retroactively to legal situations that took effect before the accession of a new member state into the EU. In many cases, the ECJ decisions and rules relating to such past events and legal arrangements will be very difficult to draw (Kaleda 120).

As a general principle, subject to transitional arrangements with new member states, EU law became fully and immediately applicable to a new member state on the
date of its accession into the EU. However, according to Kaleda, certain situations arising prior to the accession of a new member state will still have to be resolved under the legal regime of that member state existing before accession, not under EU law (Kaleda 102). How the ECJ will handle future cases in new member states relating to this context is best understood by examining similar issues in cases involving earlier accessions of new European Community members before the latest enlargement or involving similar situations (the German university contract case below) unrelated to enlargement. This German university case is analogous because the recent accession of new member states was done by treaty, and the older German university case related to a treaty (unrelated to accession) between Poland and the European Community. A 1994 case in this context involved the applicability of Community law to Poland. Since Poland did not become part of the European Union until last year, this 1994 case involved only the interpretation of a treaty between the European Community and Poland, not an accession of Poland into the European Community. Under this treaty, the European Community among other things agreed to not discriminate against migrant workers from Poland even though Poland, again, was not part of the European Community. A Polish citizen before the effective date of this treaty entered into a four-year employment contract with a German university. When Poland later then entered into this treaty with the European Community, the Polish citizen said that the four-year limited term of her contract was discriminatory against her as a Polish citizen under this new treaty with the European Community even though the four-year contractual provision was legal when initially made before the treaty was effective. According to Kaleda, the ECJ said that
since her four-year contract was still continuing after the treaty became effective, the European Community law in the treaty would govern the employment contact, and the limited four-year term of the contract was unenforceable by the German university. The Polish citizen could work longer than four years at the German university because German citizens had the same right at the university (114). To Kaleda, it appears by analogy from ECJ cases involving expired mortgages that if such an employment contract with the German university had expired or ended before the effective date of the treaty, the Polish citizen would have had no European Community rights against the German university to extend the employment contract because the employment contract under national law would have ended on its own terms (its fixed four-year term would have been up) and would have become legally meaningless before the European Community entered into the nondiscrimination treaty with Poland (115).
Chapter IV: Major Language Impediments at the ECJ

Unlike all other EU institutions, in which English is becoming the working language, the ECJ works mainly in French. However, an ECJ case can be heard in any of the official member-state official languages at the request of the plaintiff or the defendant (McCormick 109). In the EU system, all official legal documents (for example regulations, directives, and judgments) have official versions in all languages of the Union, and all language versions are seen legally as being equally authentic. This result is achieved by translating the original texts into all languages and then declaring all translations to be authentic originals. For the courts, this procedure means that all translated versions have to be treated as original legal documents. The process of translation is a determining factor for statutory interpretation in the EU system (Engberg 1154). For Jan Engberg, the key point is that significant legal confusion and chaos can occur when interpreting ECJ decisions in different languages when they are translated into the 20 official languages of the member states. Thus a multilingual legal system has a major problem because the words of different languages may often not totally match, resulting in a necessary, unpleasant and unsatisfactory choice between different meanings in different languages. These differences in possible meanings of a concept in different languages are often mutually incompatible and in direct linguist conflict. If this translation chaos occurs, the ECJ may have to “invent” a new meaning in one or more of the languages just to decide the case (1139).
Bettina Kotschy, a research attorney for the Austrian judge at the ECJ whom I interviewed while in Luxembourg, reaffirmed that the language-translation issue is quite a big problem at the ECJ because every ECJ new case document first needs to be translated into French (from the member-state language in which it was filed with the court) so that the ECJ can work with it and review it, and every ECJ judgment or decision needs to be translated from French into all the languages so that people in all the member states can read and understand it (Kotschy Interview).

An ECJ translation problem is the lack of availability of previous judgments in all member-state languages. The ECJ and Court-of-First-Instance rulings are supposed to be published immediately in all 20 official EU languages. However, James Nurton reports that in practice this result rarely happens because judgments often only appear at first in just two or three languages and that further translations into the other languages can take many months. This delay-in-translation situation applies to widely-spoken languages such as English as well as to less popular EU languages. The translation demands clearly present a problem for the ECJ because EU law and the interests of open justice require that all judgments be available in all languages (including, for example, Maltese, Latvian and Lithuanian). However, the burden of translating everything into 20 languages is enormous, and the ECJ employs about 420 staff in its translation department who are required to handle all 450 or so cases filed each year. Fewer than 30 people are in the English translation department, and hiring more translators is difficult because each one has to speak three European languages and have a law degree (Nurton).
There is not much complaint about ECJ legal decisions, which are widely regarded as fair, comprehensive and well-reasoned. However, Nurton adds that the ECJ is being fed an increasingly heavy diet of cases from national courts and European institutions with some legal commentators asking if the ECJ is “getting indigestion.” The growth in the number of cases and the resulting backlog of cases mean that parties to litigation have to wait longer than ever for a ruling. Even when that ruling comes, it may not be in a language they can read because of the language-translation pressures on the translation service. The opinion of the Advocate General is even more difficult to find in the language of a party to the litigation. For example, an important Advocate General opinion (which would not be binding on the ECJ) on slogans as trademarks was not available in German (the language of the intellectual-property-right applicant) until about two weeks after its first publication in French (Nurton).

In statutory interpretation in an EU context, the central problem is interpreting words or phrases by reaching a mutual understanding among the judges on the Court. However, as said previously, this problem is aggravated by the fact that not only one, but normally many languages are involved in an ECJ decision (Engberg 1137). As emphasized previously, the European Union has the “dogmatic belief” that every text in every language needs to be seen and interpreted as an authentic original. For example, the Treaty on European Union states in Article 53 that all its language versions are equally authentic (1137 n.2). A 1985 ECJ case, which is discussed at length by Jan Engberg, illustrates the legal confusion with statutory language interpretation in an EU context. Trawlers are fishermen who catch fish with a large
submerged net called a “trawl,” which is dragged along the sea bottom in gathering fish. In the spring of 1980, British trawlers sailed into a fishing zone in the open waters of the Baltic Sea outside Polish and British territorial waters in a location where the Polish government claimed exclusive fishing rights. The British trawlers cast empty nets or trawls in this zone, which nets were later taken over by Polish trawlers after the fish were already trapped in the nets. While the Polish vessels trawled or gathered the nets full of fish, they did not take the nets out of the water at any time. The Polish trawlers thus had nothing to do with the fish getting caught in the nets because the fish were already trapped in the nets when the Polish took over the nets. When the trawl or the collecting of the nets full of fish was completed, the ends of the nets, with the fish trapped in the nets still submerged in the water, were given by the Polish trawlers to the British trawlers (1138). The contents of the nets, including the fish in the nets, were then taken out of the water and aboard British ships by the British trawlers who then took the fish to the UK. The European Commission under European Community law wanted the British trawlers to pay a customs duty on the catch, claiming that the fish had been “caught” by the Polish trawlers and therefore were derived from outside the European Community since Poland was not part of the European Community at the time. If the British trawlers, not the Polish trawlers, were legally deemed to have “caught” the fish, then the British trawlers would owe no customs duty under European Community law. The British trawlers’ argument was that the decisive action constituting a catch of fish under the English text translation of relevant European Community law was the act of the British trawlers in taking the fish
out of the water. Therefore according to this argument, fish caught under these circumstances must count as originating in the UK since the British trawlers took the fish out of the water (1138).

Engberg notes that the main problem in this trawlers case was that the majority of other language versions of this European Community customs-duty obligation, like the French version, used language formulations that exclusively concentrated on the act of catching the fish, not on the act of taking the fish out of the water as did the English translation. The ECJ decided to use the formulation of the customs-duty obligation which focused upon a different "catch" meaning, focusing on the act of constraining the fish from moving freely in the sea. The ECJ reached this decision primarily to support the interpretation that best fit the purpose and the general scheme of the statute since the statute in different languages was not all that clear in its meaning. Since it was the British trawlers who caught the fish by placing nets whereby the freedom of movement of the fish underwater was constrained (in the nets), the British owned no customs duty since the British trawlers in this legal sense caught the fish, not the Polish trawlers. The Polish trawlers took control of the nets after they were full of fish. The act of the Polish trawlers of just pulling the fish in the nets submerged in the water was not catching the fish, nor was the act of the British trawlers of taking the fish out of the water (1138). It is not easy for someone from the United States to comprehend the language problems in the EU justice system since the U.S. historically has had an easy time of it with just one language, English. However,
in Europe, there has been one thousand to two thousand years of differences along with many different languages (Maraite Interview).

ECJ lawyer-translator Serge Maraite whom I interviewed says that there is not much social contact at the ECJ among the different language groups. For example, the Spanish lunch together, the Finnish lunch together, and the other language groups lunch together. People feel more comfortable in their own culture. The ECJ had only 11 languages over the last 10 years until May of last year. Eleven languages means there are 110 two–language combinations. A combination is someone translating Portuguese into Finnish, Finnish into Portuguese, Swedish into French, French into Swedish, etc. When nine more languages were added to reach 20 EU languages in total with the recent enlargement, there are now 380 possible two-language combinations. According to Maraite, this result means that it is impossible in practice to translate all those combinations. The Court has to find a solution to all of these translation combinations and related excessive translation work to find a practical way to function properly. Bulgaria, Croatia, and Romania may become EU members in 2007, and perhaps even Turkey. If three or four more countries join the EU, with three or four more languages, the translation problems will compound even more. Maraite added that the proposed new constitution will not change the translation duties and responsibilities at the Court (Maraite Interview).

Maraite believes that it is important that the court translate its rulings and decisions into all of the EU languages. The translation cost is one billion euros per year
for all of the European Union, not just for the ECJ alone. It would not be possible to
limit the languages for translation to three or five, for example, because the heads-of-state
would have to agree upon such a change. Each head-of-state has the right to veto any
elimination of a language from translation. These veto rights will not change because
the right of a member state to have ECJ decisions translated into that member state’s
language is too sensitive an issue. There are a small number of languages of major
importance in the EU. The first such language in Europe is German as a mother
language. Ninety million people in Europe speak German. Next in major importance are
English, French, Spanish and Italian. From the East, another major language is Polish
(Maraite interview). The Commission translates only the most important documents,
mainly legislation. The Commission does not translate everything, and not all decisions
and recommendations are translated. But with the ECJ, it must be emphasized again that
everything is official, and judgments, in particular, must be translated into the 20
languages. When a member state is being judged by the ECJ, the results from a
translation standpoint are important. When an EU citizen is involved in litigation at the
Court, it may not be as important that the results of an ECJ decision be translated into all
the EU languages because it often is not a strategic thing in terms of overall EU
importance. Nevertheless, the Court translates into all languages, even in cases involving
the individual EU citizen that are of lesser importance because it is very important from
the standpoint of the democratic process that everyone in the EU be able to read and
understand what happens at the Court (Maraite interview).
From the standpoint of the Court’s public relations, Maraite stressed that publication in all languages is also very important. For example, the new members of the EU have to know what the Court does, how it works, and the Court’s powers. At the beginning of EU membership, it is very important that all ECJ decisions be in all EU languages since the lives of many people change after important cases at the Court. The public in the new member states needs to be aware of the cases, which is nearly impossible if the cases are not translated into all EU languages. It is thus absolutely necessary that private EU citizens from all member states be able to come to the Court and review what has happened in their own language. Thus it is unlikely that the procedure of translating into all languages will ever change at the Court (Maraite Interview).

Maraite concluded his observations by noting that the language teachers that train lawyer-translators are usually not lawyers. This situation can be a problem because a translation teacher who is not a lawyer may not exactly understand the language needs of the lawyer-translator at the Court. It is difficult to separate completely the normal language of a country and the language of law of that country. In cases involving competition law, for example, the language can be very mixed in one document in terms of both law language and normal member-country language. A case can present very theoretical law and principles, but it can also contain complex facts. So a lawyer-translator cannot learn the language just specifically for the law language, but must also learn the normal, non-law language to be effective in his or her translation efforts. The most important thing is not that the lawyer-translator speaks fluently all the new
languages, but that he or she be able to know how to read them and to check in the right
dictionary for the right technical legal words (Maraite Interview).

Ms. Watraud Hakenberg, a research attorney for the Austrian judge at the ECJ, had some additional observations on the language issue. Not all judges have an adequate knowledge of French, the language of the Court in ECJ oral arguments, legal briefs, and papers. So an ECJ judge may write on a piece of paper the details in French of his or her position about a case to make sure that the other judges understand that judge’s position on a case well before all the chamber judges sit together in deliberations and talk in French about the case. Otherwise, the judge would have to summarize his or her position on a case orally during deliberations with the other judges, which would not work well for those judges with an inadequate command of French (Hakenberg Interview).

Ms. Bettina Kotschy, another ECJ research attorney, added that from a quality-of-language perspective and clarity, the French version of the judgment will always be the best of the judgments. As said previously, French is the working language of the Court, and the Court’s deliberations and decisions are also in French. No other translation of the ECJ judgment from the original French could ever be as good as the original French version. Most people outside the workings of the court do not realize this point. If one reads the German version of an ECJ judgment, for example, and complains that it is incomprehensible, the reason is that it is a bad or ineffective translation of the French version with French being a language that itself is not easy to master and also not easy to translate exactly into other languages (Kotschy Interview).
A recent front-page Wall Street Journal article by Alexei Barrionuevo highlighted that language translation difficulties are not only a problem for the ECJ but also for the rest of the EU. In May of last year, when the EU expanded to 25 countries, only seven people in the world were qualified to interpret EU debates into Maltese. With about 400,000 citizens and a government that operates in both English and Maltese, Malta as a new member country was entitled to have every EU document and parliamentary speech translated into Maltese. The reason is that the EU (the ECJ in its final judgments and decisions) uses all 20 languages spoken in member countries to avoid offending any of them (Barrionuevo A1). EU laws and regulations have been delayed for months since the EU added ten countries and nine new languages in May of last year, and the current backlog of 60,000 pages of EU documents waiting to be translated is expected to increase to 300,000 pages by 2006. It expected that when even more new member states are added to the EU in the future, the number of possible two-language translation combinations will increase from the current 380 to above 500 (A6).

Barrionuevo discovered that it is very difficult to find interpreters who can translate live debates on the Floor of the EU Parliament. Every plenary session of the EU Parliament requires 57 trilingual interpreters to be ready to translate. A problem, however, is that the EU does not always have the right language specialists readily available, so the statements of members of Parliament are increasingly “bounced” through multiple languages, losing some of their meaning with each translation. For example, because of a shortage of Czech and Lithuanian translators at a recent Parliamentary session, a speech in Czech was translated into German, then into English,
and then finally into Lithuanian. Accuracy suffers greatly when documents have to be routed through two intermediate languages to complete the translation job. Incorrect technical information, for example, could lead to erroneous product recalls (A6).

Barrionuevo’s interviews disclosed that new EU member countries had to spend years translating and ratifying a “nine-foot-high stack of EU laws” in order to join the EU. Until last year, the EU never identified which laws in the nine-foot-high stack of 80,000 pages were still legally relevant in the EU. So Hungary, for example, completed translating 15,000 pages of EU laws that were no longer legally relevant, wasting effort and resources. It will take a generation or more to train enough Maltese translators to cover all EU languages. Another concern is that the Maltese example will spur other multilanguage member states such as Ireland, Luxembourg and Spain to require the EU to do more interpretation of all their languages. The Spanish government has already requested official EU language translations for four of its regional languages, including Catalan and Basque. The Irish have said that they intend to ask that Gaelic be translated as well (A6).
Chapter V: Some Ineffectiveness of the ECJ Preliminary Ruling Process

In a speech that I attended in Luxembourg, ECJ Judge Romain Schintegen gave some key insights into the preliminary ruling process. The treaties empower the Court of Justice to give preliminary rulings on the interpretation of Community law. The national courts are seen as the bridges of the community legal order and secure the enforcement of Community law through dialogue with the Court of Justice. The preliminary ruling is essential for the preservation of the Community character of the law established by the treaty. Any questions arising under the Treaty of Nice can be referred to the Court, which questions may relate to the interpretation of the provisions of the treaty itself or they may be questions concerning Community legislation such as regulations, directives, and international agreements with third states. The ECJ preliminary ruling on the interpretation of EU law may often be necessary where issues of EU law are raised in national courts. The decision of whether a preliminary reference to the ECJ should be made is one for the national court itself. A preliminary-ruling judgment given by the ECJ is binding upon the national court hearing the case in which the preliminary reference was made. All courts and tribunals dealing with the case are obliged to comply with the substance of the judgment within the rules, but only as to this exact case. However, the national courts of some member states are reluctant to refer preliminary ruling questions to the ECJ. When they do, national courts often wait as much as two years for an ECJ preliminary-ruling response. In fact, important cases sometimes take even more than two years for an ECJ preliminary-ruling decision (Schintegen Speech). In this regard, another
ECJ judge, Christian Timmermans, of the ECJ recently said: “Preliminary questions have not been raised [by national court judges] where they should have been raised. Supremacy of Community law has only been accepted by some of the highest national courts subject to important conditions. And of those highest Courts, some have never used the preliminary [reference] procedure or have even explicitly denied being in a position to do so” (Timmermans 399).

George Tridimas and Takis Tridimas have observed that the ECJ has not kept up with the growth of preliminary references by national courts to the ECJ for preliminary rulings. The number of preliminary-ruling judgments given by the ECJ has increased slower than the greater number of references from national courts, and the length of proceedings at the ECJ has continued to increase. In 1992, for example, the difference between the number of new cases brought by national courts to the ECJ for preliminary rulings and the number of preliminary references decided by the ECJ was 32. In 1998, this figure of the difference between references referred and references decided had climbed to 62. The average wait for ECJ preliminary rulings in 1998 was 21.4 months, which is almost double the wait in 1983 when it was just 12 months (Tridimas and Tridimas 130). The total number of preliminary references cases as a percentage of the ECJ’s total caseload increased from below 4% in 1961 to more than 64% in 1998. The recent accession of new member states into the EU will dramatically increase even these numbers (Tridimas, Knocking, 16). ECJ judge Christian Timmermans has recently noted that the inflow of preliminary reference procedures to the ECJ has been such that at present serious concerns exist about the ability of the ECJ to handle these cases
effectively without causing undue delays relative to the outcome of national proceedings which need the ECJ’s preliminary rulings to finish the national cases (Timmermans 401).

In making a decision on whether to refer to the ECJ, lower national courts, which make the overwhelming majority of references, enjoy discretion as to whether to make a preliminary reference to the ECJ. Even national courts of last instance (the highest national court), which in principle are under an ECJ legal obligation to refer EU legal issues to the ECJ for a preliminary ruling, enjoy some discretion as to whether to actually make the referral since there are exceptions to the national-court preliminary referral obligation (Tridimas and Tridimas 134). According to Takis Tridimas and George Tridimas, an economic fact that causes the number of national-court preliminary references to increase unreasonably is that national courts do not bear the “resource cost” of using the preliminary reference system. The reason is that there is an absence of a price constraint for national courts to use the preliminary ruling system. When “the consumers of a service face a zero price, demand will exceed supply.” A familiar response to this no charge or no fee charged to the national court or to the national court litigants for an ECJ preliminary ruling is queuing or the building up of a long waiting list for free preliminary rulings, which in part is responsible for an increasing backlog of pending, preliminary-ruling cases at the ECJ and the resulting lengthening of the time period for the ECJ to decide such a preliminary-reference case (136). However, some argue that if the costs of preliminary references were increased by the imposition of ECJ court fees, such fees would be considered as running counter to “fundamental notions of access to justice and the right to judicial protection” (Tridimas, Knocking, 17).
According to Lisa Conant, a professor of Political Science at the University of Denver, national judges who invoke member-state, European legal provisions in their decisions are often likely to interpret EU treaties, regulations, and directives without any explicit reference to ECJ decisions or interpretations, thereby avoiding what should be a preliminary reference on such EU issues to the ECJ unless EU law is crystal clear beyond doubt. Independent application of EC law by national courts without any preliminary reference on EU issues to the ECJ outpaces preliminary references to ECJ in French, German, and UK courts, for example. Thus national judges consider themselves as able to determine the meaning of EU law on their own even though it is contrary to EU law for them to do so except where EU law is crystal clear beyond doubt. Conant says that this practice of national courts determining EU law on their own without a preliminary reference to the ECJ is very likely to lead to “divergent interpretations” of European law across member-state jurisdictions (Conant 82-83). Supreme administrative courts in Finland and Sweden declined to make preliminary references to the ECJ despite the need to interpret and apply six different EU treaty articles and two EU directives without the guidance of prior ECJ case law to help determine the relevant EU law (83-84).

According to Lisa Conant, another major problem is that ECJ preliminary rulings do not constitute binding legal precedents on other than to the parties of the exact case about which the national court made the preliminary reference. Because ECJ preliminary rulings unfortunately have no binding value as precedent on future cases with the same facts but with different parties to the new case, national courts in cases other than the precise case at hand for which the preliminary ruling was sought can disregard in future
cases with the same facts the legal principles that are articulated in earlier ECJ preliminary-ruling cases. The European legal system lacks the doctrine of *stare decisis*, which doctrine gives legal issues decided in one case binding legal effect in the decision of future cases with parallel facts and different parties. ECJ preliminary rulings have only “*inter partes*” effects or, in other words, “a relative effect binding only between the parties in the particular case” and not to parties to later cases with the same issues and parallel facts. Thus according to Lisa Conant when the ECJ clarifies the meaning of an EU law in a preliminary ruling, the referring national court is bound only to apply the ECJ decision to the facts of the case before it (63-64). National courts may choose to apply legal principles articulated in ECJ case law to related situations or national courts, thereby wasting the ECJ’s time in deciding an issue already decided, may ask for a new preliminary ruling from the ECJ if they want the ECJ to reconsider the issue. National courts are not required to follow previous ECJ rulings and previous ECJ legal principles in new cases until they resubmit the question to the ECJ and receive a different decision or the same result from the ECJ (65). While the extent of direct conflict between national court and ECJ decisions may decline as national judges become more familiar with European law, “inviting” national courts to rely on prior preliminary rulings is not equivalent according to the results of Lisa Conant’s research to “requiring” national courts to use such prior ECJ preliminary rulings as binding precedent (68). Member states, independent of their national judges, do not routinely treat preliminary rulings as binding ECJ policy (69), and Lisa Conant emphasizes that overcoming member-state practices of contained compliance with ECJ case law requires “persistent litigation or
threats of relentless litigation.” Efforts of member states to contain compliance with (avoid compliance with) ECJ rulings will only become ineffective and unsuccessful “in the face of a deluge of copycat cases” (80).

An ECJ delay in the preliminary ruling process was severe enough to inspire a challenge at the European Court of Human Rights on the claim that the delay lengthened domestic civil proceedings long enough to violate the concept of “a fair and public hearing” for the litigants to the national court case. While the European Court of Human Rights decided that a delay of two years, seven months was quite long, it denied the claim that the preliminary ruling process was legally too long because it would “work against the aim of the reference procedure” (89-90).

The Treaty of Nice took a step to take away some of the ECJ’s exclusive jurisdiction over making preliminary rulings. The treaty says that the CFI shall have “jurisdiction to hear and determine questions referred for a preliminary ruling” in specific areas determined later by the EU legislature in a new EU law if such a new law is ever passed. According to Liz Heffernan, this potential new preliminary-ruling role for the CFI marks a significant shift in the traditional thinking that has viewed preliminary references as strictly part of the ECJ’s Constitutional function. The major point here is that it is too early to say whether this possibility of some preliminary references being handled by the CFI will result in a demonstrable change in practice. The Treaty of Nice thus does no more than create the potential or possibility for the CFI to hear some preliminary references. Actual reform to the statute or law governing the courts will have to take place later, if at all, by an amendment to the relevant statute that allows for the
CFI to hear some preliminary references. Such an amendment would have to be approved by a unanimous vote of the Council. Thus the future of any preliminary-reference ability for the CFI remains “on the drawing board.” There is every reason to believe that any eventual role for the CFI in preliminary references will be limited because the CFI’s functional capacity will already be stretched thin to meet its Treaty-of-Nice additional responsibilities over direct actions and over appeals from judicial panels (Heffernan 914). The challenge for the EU in any preliminary reference jurisdictional change is to give the more routine requests for preliminary references to the CFI while retaining the “defining controversies of the day” and the preliminary references related thereto for the ECJ (915). George Goebel cautions that if the Council as allowed by the Treaty of Nice amends the Court’s statutes to transfer some of the fields of law giving rise to preliminary references from the ECJ to the CFI, such a transfer will almost certainly reduce the heavy caseload of the ECJ, but it will create a significant risk of variations and inconsistencies between the rulings of the two courts (Goebel 471). However, Takis Tridimas argues that this potential transfer of some preliminary references from the ECJ to the CFI is a welcome development. It is possible to identify some categories of preliminary references, such as customs classification cases, which ought to be transferred to a lower court than the ECJ (Tridimas, Knocking, 20-21).

Changes were made to the ECJ rules of procedure in July of 2000 to help it manage its cases better. The amended provision introduces an expedited procedure in which in certain defined circumstances the ECJ may dispose of a preliminary reference from a national court by just a court order without an oral hearing on the case. This
possible order to expedite certain preliminary references is applicable to the following type of case: (1) where the question referred by the national court for a preliminary ruling is identical to a question on which the ECJ has already ruled; (2) where the answer can be clearly deduced by the ECJ from existing ECJ case law; and (3) where the answer to the legal question posed by the preliminary reference raises no reasonable doubt. In this type of case, the ECJ replies by way of court order without the parties orally arguing the case before the ECJ and without the Advocate General delivering an opinion (18). Takis Tridimas says that the fact that a national member-state court might disagree with the ECJ’s use of this expedited procedure is not enough to stop the ECJ from using the procedure. Even if the ECJ uses this expedited procedure, it may not be able to answer the national court that made the preliminary reference with an ECJ order in less than a year (19).
Chapter VI: Workload Reduction Changes—New Judicial Panels

The Treaty of Nice seeks to share tasks between the ECJ and the Court of First Instance (CFI) more effectively by expanding the role of the CFI while leaving the ECJ to deal with more important issues. The status of the CFI is changed, separating the CFI from the ECJ, giving the CFI new powers of jurisdiction and introducing judicial panels (Davies, Karen, 13-15).

The problems that the ECJ faces are not new, and in 1997, the CFI warned about the risk that the court system would be flooded with cases. The 2001 Treaty of Nice provides for the CFI to set up "judicial panels" to handle certain specific areas with the treaty specifically envisioning panels to possibly hear intellectual property cases like patents and trademarks (Nurton). Generally, the Treaty of Nice says that the Council “may create judicial panels to hear and determine at first instance certain classes of action or proceedings brought in specific areas.” The judicial panels would be attached to the CFI, not to the ECJ, and the jurisdiction and manner of operating of the judicial panels will be determined at a later date by a decision of Council. The idea of judicial panels was inspired in part by the burden of staff, EU-employee cases that has burdened case management in Luxembourg over the years (Heffernan 912). The CFI would act as an appellate court for appeals from judicial panel decisions, with the ECJ only taking cases on appeal in rare instances to clarify a disputed area of law. In the very near future, it will be necessary to establish at least two judicial panels under the CFI if the CFI is not to
become completely “clogged up.” The CFI faces the prospect of up to 700 new cases each year from 2005 without such necessary judicial panels. Even with 25 judges in the CFI (one CFI judge per member state) with the recent accession of new-member states, there would still be 200 more cases per year than the CFI can adequately handle. In particular, the establishment of a judicial panel with jurisdiction over European staff cases (disputes between EU employees and the EU) and a judicial panel for intellectual property cases is therefore urgent (Nurton). The judicial panels are aimed at increasing the speed at which certain cases in technically difficult areas are heard and processed. The CFI can be considered as a high court dealing with the day-to-day business of European law with any future Council creation of a new tier of judicial panel jurisdiction through the specialist panels (Heim). There will not be one judge per member state assigned to at least one of the judicial panels. Some member states will have no judges on any of the judicial panels. Thus a major political problem in creating the judicial panels will be which member states through their executives are allowed to appoint judges on such panels (Schintegen Speech).

The ECJ and CFI website has the most current information on the status of judicial panels. This website says that in view of the increasing number of cases brought before the CFI in the last five years and to relieve it of some of the caseload, the Treaty of Nice provided for the creation of “judicial panels” by the Council, which would be new, specialized courts to hear and determine specific matters, the decisions of which may be the subject of an appeal to the Court of First Instance. This ECJ and CFI website says that thus far the European Commission has proposed to the Council the creation of a
panel to hear and determine disputes in matters concerning the civil service (disputes between EU employees and the EU) and a panel to deal with Community patents (ECJ and CFI Website).

ECJ research attorney Waltraud Hakenberg said that structure and implementation of new judicial panels is one of the ECJ’s biggest changes because the judicial-panel change will then make the EU justice system a three-level jurisdiction. So far the EU justice system is only a two-level system with the ECJ and the Court of First Instance. She confirmed that the first of the panels will be for the public officials of the European Community, a legal recourse for an EU employee who, for example, has a problem with his or her boss. Currently these EU-employee cases are dealt with before the Court of First Instance (Hakenberg Interview). Currently, the Court of First Instance covers disputes between the Community and its servants, actions brought by natural or legal persons and actions for act or failure to act and actions for damages (Schintegen Speech). In the future, these cases between the EU and its employees will be in this even lower judicial-panel court. As allowed by the Treaty of Nice, Ms. Hakenberg predicted that in the future there also will be such judicial panels for intellectual property rights, like trademarks (Hakenberg Interview).

ECJ research attorney Bettina Kotschy added that the Treaty-of-Nice expansion to judicial panels in specific legal areas is good for cases that are basic because these cases in any future judicial panels can be immediately decided within three weeks rather than waiting for the long Court of Justice process of one or two years. The expansion of the Court of First Instance to allow for a subsidiary tier for judicial panels is necessary
because of the Court of First Instance’s heavy workload and because the specificity of many of the potential judicial-panel cases lend themselves to the creation of a judicial panel that would specialize in such cases every day. Specific panels like these do not deal with difficult legal issues. Disputes between employees and the EU and disputes involving intellectual property rights are usually easy, uncomplicated issues and thus suitable for judicial panels. Judicial panels thus would be better suited to deal with case after case in which are the same or similar and basic and not difficult from a legal point of view, leaving the more important cases to the Court of Justice (Kotschy Interview).
Chapter VII: Administrative Issues—ECJ Advocates General Now Only On Very Important Cases

In my interview with her, Ms. Hakenberg discussed the role of an Advocate General’s position on the Court. She mentioned that with the EU enlargement of ten new countries, the number of the Advocates General did not increase. There will still be only eight Advocates General. At the same time, however, the workload of an Advocate General was reduced considerably because the Advocates General are no longer needed to make opinions on every case. The Advocates General now work only on really important cases. The idea now is that they only will work on the cases that go to the plenary session or to the small plenary session with 13 judges and also to part of the cases handled by a five-judge chamber, but they will not work on cases that are handled in a chamber with three judges. This workload reduction makes life a lot easier for the Advocates General. With their workload greatly reduced, their jobs are more interesting because they will be working exclusively on important cases focusing on “developing new visions, new ideas and new legal concepts.” Thus while they should be happy about the changes, the Advocates General at the Court say that they are still overworked and that it is a scandal that the number of judges increased with the recent enlargement but not the number of Advocates General. Ms. Hakenberg said that while the Advocates General are complaining about this situation, some of the member states, however, think that in these times Advocates General are a luxury that cost a lot of money and that are not absolutely necessary in every single case. She believes that it is possible that in 20 years, the Court will have even fewer Advocates General for this reason. Germany, for
example, is against the Advocate-General concept. The Advocate-General position developed from a French tradition with which Germany, for example, is not sympathetic. Five of the eight Advocates General come from the big countries, France, Germany, England, Italy, and Spain, and the other three rotate among the smaller member states. Austria has an Advocate General for the moment, but Austria knows that for the next many years, it will no longer have one because the three shifting Advocate-General positions for the smaller EU member states are rotated on an annual basis among the 20 countries that are not part of the big five. According to Ms. Hakenberg, Austria would probably greatly prefer to either get rid of the Advocate-General position or to rotate all eight Advocates General among all member states (Hakenberg Interview).

Ms. Hakenberg added that the Advocates General do important work. When she as a research attorney writes the judgments for the ECJ judges based upon how the judges decided a particular case, she finds that it is very helpful to rely on a “big paper” legal opinion on a case from an Advocate General (which opinion is not binding on the ECJ) in which all the problems and issues in the case are neatly prepared and analyzed to assist the Court in reaching the final decision on a case. It is more difficult for her when her judge has to decide a case without an Advocate-General opinion for guidance. However, a major drawback to having an Advocate General on a case is that the entire judicial procedure and process take much longer. According to Ms. Hakenberg, every other court in the world has the court hearing in which the lawyers on both sides argue their positions before the judges, and then the judges promptly thereafter meet and confer together and decide without delay in judicial deliberations which way to decide the case. However,
whenever there is an Advocate General’s input in a case, there cannot be prompt ECJ judicial deliberations to decide the case and to issue an ECJ decision in the case. The reason is that the Advocate General’s opinion on a case (which is not binding upon the ECJ) is not completed and available for the Court to review until an average of two months after the oral hearing on the case in which the lawyers on both sides argue their positions before the Court. After the average two-month wait for the ECJ to receive the Advocate General’s opinion, the ECJ judges only then will get together and start their deliberations. In contrast, Ms. Hakenberg said that every other court in the world has a prompt conference after the case hearing to discuss how they as judges will decide the case, and then the judges promptly decide the case. Enough time can elapse not only before the completion of the Advocate General’s opinion, but also because of prescheduled court recesses and vacations, that some judges understandably when partaking in the final deliberations to decide the case forget what the lawyers on the different sides said a few weeks before at the oral hearing on the case (Hakenberg Interview). It should be noted that Article 222 of the Treaty of Nice authorizes the Council to increase the number of Advocates General by unanimous action of the Council (Goebel 469-470), which unanimity would seem unlikely. Ms. Hakenberg also believes that while ECJ judgments need to be written in all 20 EU languages so that all member states can follow them, all Advocate-General opinions do not necessarily need to be in all languages. In fact, in theory and in practice, it might be preferable to concentrate Advocate General opinions in just 3 or 4 languages (Hakenberg Interview).
ECJ research attorney Bettina Kotschy emphasized that the Advocate General is needed in big cases. The existing limitation to eight Advocates General forces the ECJ to be more selective as to the cases in which the ECJ wants them to participate. The Court also has to be more judicious about how Advocates General are used because if it uses them in cases in which they are not much needed, the important cases will take longer because the Advocates General will not be able to cope with the additional workload of both unimportant and important cases. However, according to Ms. Kotschy, it would be extremely risky to abolish the Advocate-General function. She said that in small cases at the ECJ, there is less need for an Advocate General’s opinion or involvement. There are also cases in which the ECJ judges can say they do not need an Advocate General’s opinion because the Court in these cases possesses good evidence so that an opinion from the Advocate General on how the case should be decided would not be helpful when the evidence and law are crystal clear anyway. For important cases, it is very helpful “if not only one person looks at something intensely but two persons” so that one always has a “double-check” mechanism. In this context, the Advocate General’s contribution with his or her opinion and recommendations on a case improves the quality of the eventual decision and acts as a double-check against wrong first impressions of a case (Kotschy Interview).
Chapter VIII: Minimal Effect of Proposed New EU Constitution on the ECJ

According to ECJ research attorney Waltraud Hakenberg, neither the recent enlargement of the EU nor any proposed new EU Constitution now up for ratification by the member states will affect the smooth functioning of the Court (Hakenberg Interview). Hakenberg added that many at the ECJ feel that the proposed new EU Constitution if approved would not change the way the Court works and is more a political or a public-relations exercise. According to ECJ research attorney Bettina Kotschy, the proposed Constitution will not significantly change the substance of the Court’s process because the substance of the Court’s process is already there in the treaties. Thus any new Constitution according to Ms. Kotschy would not change the established rules. The proposed new Constitution is more of psychological value than practical value as it affects the Court (Kotschy Interview).

Currently, the Constitutional Treaty adopted by member states has to be ratified by each member state according to the Constitutional procedures of each member state. This ratification process by each member state will take a number of years (Del Duca 41). Referendums on the proposed Constitution up for ratification are foreseen in some member states, and whether ratification will be successful or not is unclear (Estella 22). Ratification of the proposed Constitution is essentially the same process as the ratification of earlier EU treaties. Each member state must thus approve the document at the national, member-state level. The proposed Constitution will be effective only when all states have ratified. Any amendments to the proposed Constitution will similarly require
the unanimous consent of all member states, effectively giving each member state a veto on even minor changes to the very detailed document. Although the proposed Constitution does give the EU considerable power to run its own affairs, certain politically sensitive issues are subject to unanimous adoption. For example, a change in the location of EU institutions and any changes in the official use of languages within EU institutions must be adopted unanimously (Sieberson 999-1000).

The proposed Constitution in its English version gives the Court of First Instance the new name of “High Court,” with the ECJ still called the “European Court of Justice.” Under the proposed Constitution, the ECJ will continue to have one judge per member state, and the High Court (the CFI) will have “at least one judge per Member State.” The six year term of judges, which is renewable, is not changed. The proposed Constitution does not alter the relationship of the courts and their respective jurisdictions, which will continue to be governed by the Statute of the Court of Justice. An innovation in the proposed Constitution is for an advisory panel to review the suitability of nominees for judge on the ECJ or the CFI prior to their final appointment as such. The seven-member advisory panel will consist of former Judges of the ECJ and the CFI, member-state national supreme court judges, and EU lawyers of “recognized competence” (Goebel 494-495).

Martin Howe believes that the proposed EU Constitution will significantly widen the power of the ECJ because it includes provisions which are open to a number of different interpretations. It will be up to the ECJ to decide how these provisions are interpreted. The proposed Constitution will assist the ECJ because the Constitution has
in its text a number of key doctrines of the ECJ that previously had no support in the text
of EU treaties. For example, the proposed Constitution specifically gives primacy to EU
law over conflicting member-state law. In this regard, the proposed Constitution says:
“The Constitution, and law adopted by the Union’s Institutions in exercising
competencies conferred on it, shall have primacy over the law of Member States” (Howe
19-21). Also, Juliane Kokott and Alexandra Ruth point out that an important
improvement in the proposed EU Constitution is the extension of the general jurisdiction
of the ECJ to the whole “Area of Freedom, Security, and Justice.” In this regard, not
only are the restrictive conditions of the third pillar abolished, but equally abolished are
those provisions that limit the ECJ’s jurisdiction in the matters of Justice and Home
Affairs that had been previously adopted in the Treaty of Amsterdam. So the current
third pillar has not only been formally incorporated by the proposed Constitution into a
common legal framework, but also materially merged with the first pillar. This important
step will remedy the well-known adverse effects of the present divisions between these
pillars. However, the ECJ’s jurisdiction will continue to be excluded from the second
pillar under the proposed Constitution (Kokott and Ruth 1325-1326).

The proposed Constitution will give full legal force to the EU Charter of
Fundamental Rights. As part of the Constitution, this EU Charter of Fundamental Rights
would prevail over conflicting European laws, directives, and regulations. Also, because
of the Constitutional primacy of EU law, the Charter would prevail over any conflicting
member-state national laws and over any conflicting member-state constitutions. Martin
Howe says that the effect of having the Charter in the Constitution is to increase the
scope and range of political decisions taken by ECJ judges in interpreting the Charter’s general language. Martin Howe says that the EU Charter in the Constitution will in practice effect a huge transfer of power to make choices over economic and social policy from elected representatives to the unelected judges at the ECJ (Howe 20-21).

Stephen Sieberson argues that this incorporation by the proposed Constitution of the Charter of Fundamental Rights of the Union into Union law represents a “potentially profound step in a new direction.” This development gives substance to the belief held by many that the EU must extend its objectives beyond the economic sphere. This inclusion of a human rights charter in the proposed Constitution represents a significant step in this direction. Apart from the Charter, the proposed Constitution requires the EU to “accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” A 1996 ECJ ruling concluded that the EU lacked the then-existing competence to do so. The proposed Constitution also incorporates as “general principles of the Union’s laws” the fundamental rights that resulting “from the constitutional traditions common to the Member States.” This provision will impose upon private parties, EU institutions, and even on the member states themselves the difficult task of studying the laws of all EU member states to discern these common traditions (Sieberson 1016-1017).
Chapter IX: Crucial ECJ Staff--The Job of a Lawyer-Translator at the ECJ

Serge Maraite, a lawyer-translator at the ECJ whom I interviewed, gave me some important insights when I interviewed him last June. He is from France and studied French and Dutch in Belgium and studied German in Germany. He then worked as a lawyer for four years total in Belgium and in Germany. He started three years ago as a civil servant with the Court as a lawyer-translator. There are about 600 lawyer-translators with the ECJ, and about 14 lawyer-translators are involved with French translation. That situation means that this French-translation unit is supposed to be able to translate into French from the 19 other languages of the European Union. Because the Court deliberates and works in French and the ECJ judges write their judgments only in French, the lawyer-translator is supposed to be able to read everything that comes to the Court in French. The other languages of this lawyer-translator besides French are German, Dutch, English, Czech, and Slovak. Teachers come to the ECJ to teach languages to the lawyer-translators, and a lawyer-translator can spend ten hours a week learning new languages. Maraite chose Polish as a new language to learn because it was closest to the Slav languages. The lawyer-translators never meet with judges. They meet with the people that work for the judges. The job of a lawyer-translator is individual work. In the cabinets, the lawyer-translators have a little more teamwork on translations, but they still have to prepare their own translations, and all of them have to write a lot to keep up with all the translation work (Maraite Interview).
For a beginning lawyer-translator, there is a senior lawyer-translator who corrects and edits his or her translations during the beginning lawyer-translator’s first years on the job. There is also the classical French language of the Court that, of course, has to be used. Many documents to be translated come from the highest national court of a member state, so the documents can be very technical. The work as a lawyer-translator also depends upon the field of cases to which the lawyer-translator is assigned. In competition law, for example, the cases involve much technical legal fact, like Microsoft product technical information on marketing and distribution. The lawyer-translator must learn complex technical data-processing jargon in these types of cases, for example, that involve the protection of copyrights, Microsoft, software and/or competition law. From the point of view of the law, very difficult cases can come from the member-state national supreme courts such as from the German Supreme Court or others. Member-state language at the level of the member-state supreme courts (which the ECJ is handed in the preliminary reference process) is very academic and very theoretical and thus very difficult to grasp. So from the very beginning, it is necessary that a senior lawyer-translator review and correct the junior lawyer-translator. Maraite’s lawyer-translator division does not translate the Court’s judgments from French into the other EU languages. However, in the other ECJ translation divisions, in 19 of 20 of them, the biggest job is to translate the ECJ judgments from French into one of the other EU languages (Maraite Interview).

The language teachers that train lawyer-translators are usually not lawyers. This situation can be a problem because a translation teacher who is not a lawyer may not
exactly understand the language needs of the lawyer-translator at the Court. A lawyer-translator cannot learn a new language just specifically for the law language, but must also learn the normal, non-law language to be effective. According to Maraite, the most important thing is not that the lawyer-translator speaks fluently all the new languages, but that he or she be able to read and write them and to check in the right dictionary for the correct technical legal words (Maraite Interview).
Chapter X: Crucial ECJ Staff, The Job of a Research Attorney at the ECJ

Ms. Waltraud Hakenberg has been a research attorney for the Court since 1990. She studied law in Germany, Switzerland and Belgium. She researches not only at the Community-law level but also on the level of the member-state laws and comparative law studies because ECJ cases require this effort (Hakenberg Interview).

Each ECJ judge has three research attorneys who work for him or her directly. Since 1995, she has worked for the Austrian judge. The research lawyers work in a “cabinet” for the Austrian judge. Everything produced by the lawyers, including the written legal pleadings or legal claims in a case, is translated by the lawyer-translators into French, the language of the Court. Then as a research attorney, she studies and reads all the written legal pleadings or claims. Ms. Hakenberg does her EU community-law research and analyzes and determines the extent that the Austrian judge needs to ask clarifying questions to the parties and their attorneys at the ECJ hearing on the case (Hakenberg Interview).

After reviewing a new case, Ms. Hakenberg has to decide to which ECJ judicial chamber the case should be assigned based upon the importance of a case. One option for assignment would be a plenary session in which all EU judges decide the case (an extremely rare situation), and another option would be for 13 judges in a small plenary session to decide the case, which she said is also quite a number of judges. Another option would be an assignment to a chamber of three or five judges to decide the case,
which is more typical. Ms. Hakenberg’s judge, the Austrian judge, is the chief judge of his chamber, which means that he has quite an important role. He was elected for three years as chief judge of his chamber. Part of that important role is for her judge to check what the other chambers are doing in order to get his chamber’s jurisprudence more or less in the same direction as the other ECJ chambers. For example, he has to check with the other chambers to make sure that his chamber’s law is consistent with that produced and decided by the other chambers. As a research attorney, Ms. Hakenberg is significantly involved in this effort. One third of her work is administrative and procedural in dealing with the cases in her chamber. Another third is observing the cases of the other ECJ judges in the other judicial chambers on behalf of her judge to check for consistency of the jurisprudence of those cases in other chambers with those of her judge’s chamber. The research attorneys in her chamber closely follow around 120 cases in this regard in other chambers, approximately 40 cases per research attorney for each of the three research attorneys of her judge, the Austrian judge. The last third of Ms. Hakenberg’s work is her assignment to research all legal issues and all possible legal conclusions in 16 cases per year in her own chamber. In these 16 cases, she participates in writing the judgments and decisions for approval of her judge and in all the written information officially coming from her chamber about the case (Hakenberg Interview).

In a typical case, Ms. Bettina Kotschy, another ECJ research attorney for the Austrian judge whom I interviewed, described how she presents her preliminary legal solution on an ECJ case to the Austrian judge who decides whether her conclusions are complete enough or whether the judge wants to take an entirely different legal position.
If the judge takes a different legal position, Ms. Kotschy must entirely rewrite her preliminary legal solution. Eventually, the Austrian judge during the final judicial deliberations on the case presents his final, proposed solution to the case to the other ECJ judges on the case for discussion. The Austrian judge’s proposed solution is derived in large part from the preliminary opinion of his research attorney on the case as modified by that judge’s final conclusions. The other judges on the case then in deliberation say what they think of the Austrian judge’s proposed solution to the case. Of the three research lawyers for the Austrian judge, only one such lawyer researches any one case so that there is not an inefficient doubling or tripling of legal research effort. On a major case, Ms. Kotschy might discuss her findings with the other two research lawyers for her judge, but they would not duplicate her legal research since it would be extremely inefficient to have more than one research lawyer for a judge research a particular case (Kotschy Interview).
Chapter XI: Major Miscellaneous Structural, Operational and Administrative Influences on the Future of the ECJ

Ms. Hakenberg said that enlargement will have an adverse effect on the number of cases heard by each ECJ member-state judge. There are now three judges who have a better judicial position than the others because they organize their judicial chambers, and they thus have a lot of influence in the jurisprudence of that chamber by virtue of their chief judge position in the chamber. The ECJ may sit as a full Court (all 25 judges on extremely rare occasions), in a “small plenary” chamber of 13 judges or in chambers of three or five judges. The Presidents or chief judges of the five-judge chambers are elected for three years and the Presidents or chief judges of the chambers of three-judge chambers for one year. There is always present the possibility of the 13-judge formation, the small plenary formation. Of the 13 judges assigned to the small plenary chamber, four are always permanently assigned to that court, while the other nine positions rotate periodically among judges from different member states. According to attorney-researcher Hakenberg, the composition of the small plenary chamber creates a problem for member states that do not currently have a judge in this 13-judge formation. The reason for the political problem is that the small plenary chamber decides the most important cases before the ECJ. This rotation policy means that, for example, a judge not on the permanent four on the small plenary formation will only be part of a case in 1/3 of the small plenary cases. Before enlargement, the judge from a member state that did not have one of the permanent four seats was part of many more important cases. For many member states whose judge is one of the rotating nine judges in the small plenary
chamber, Ms. Hakenberg said that this situation is an enormous problem. For example, if one were to go to a country that did not have a judge on one of the permanent four seats and talk to the Minister of Justice there, the minister would say that as long as his or her country has its own ECJ judge in Luxembourg, this judge will always keep an eye on all the important cases which affect his or her country, which absolutely cannot be true anymore. Ms. Hakenberg added that when the pillar member states realize this negative result of enlargement, they will not be very happy because the ECJ small-plenary, 13-judge chamber has very important cases of the member states that can completely change member-state legal provisions and jurisprudence. Ms. Hakenberg emphasized that if people, for example, in another member country see that the Austrian, Slovenian, Italian, Czech and the Polish judges decided a key legal issue affecting their country without a judge from their country taking part in the decision, they are going to be upset with the situation (Hakenberg Interview).

The efficiency of the judicial system as a whole is compromised by the very heavy workload of the ECJ and the CFI (Hunt 104). According to Jo Hunt, the ECJ system is at the breaking point, and a more significant and fundamental reform of the ECJ judicial system may be necessary for the long-term effectiveness of the Court (117).

Under a Maastricht Treaty amendment, the Commission can propose, and the ECJ can impose mandatory fines on member states for noncompliance with an ECJ decision. The ECJ also in its 1991 Francovich decision announced the principle of “state liability,” whereby member states may face financial liability for failure to transpose EC directives into member-state national law (Pollack 176).
Lisa Conant has added that later ECJ cases after the 1991 ECJ Francovich decision reaffirmed the Francovich ruling that member states could be liable for the inadequate implementation of European law into their member-state legal enforcement. Nevertheless, Lisa Conant’s research reveals that establishing member-state liability remains difficult in practice because tests to determine member-state liability rely on the discretion of national courts, which in a sense has the member state in a conflict of interest evaluating violations of EU law by the same member state. Preliminary evidence shows that national courts have awarded few damages to individuals harmed by member-state violations of EU law and that they dismiss more individual claims for compensation than they grant (Conant 58). Another problem is that member-state liability is subject to national rules on damages, which national rules restrict the scope of what constitutes adequate compensation. Reliance on national systems of liability to determine the damages to an individual for a member-state violation of EU law may according to Conant just create a false illusion of a legal remedy when few effective remedies are available in practice (59-60). The potential of an aggrieved party to seek damages and other remedies varies substantially across member-state jurisdictions with the result that parties in identical situations in different member states can face different and greatly contrasting legal results in these different member-state jurisdictions (63).

According to Professor Conant’s research, national courts may avoid ECJ decisions by refusing to submit preliminary references to the Court, relying instead on previous ECJ decisions or the national court’s own interpretation of a treaty provision under the so-called “acte clair” doctrine or crystal clear law doctrine. Under the acte
clair doctrine, the national court can interpret a treaty without a preliminary reference to the ECJ in the unusual situation where the treaty is legally crystal clear and unambiguous. Even when national courts obtain ECJ preliminary rulings and pretend to accept them, the practical application by the national court of the ECJ ruling to the parties in the case may according to Lisa Conant circumvent or largely avoid the intended legal effect of the ECJ decision (Pollack 177-178).

The threat of treaty revisions can be dismissed rather easily as a potential device for member states to constrain the ECJ. The reason is that treaty revisions require the consents of all member-state governments (Carrubba 76). There are three responses identified by Lisa Conant that more accurately reflect responses of member states to avoid ECJ decisions. The first such member-state avoidance response is “contained compliance,” which occurs when member-state governments, not just member-state judges themselves, interpret ECJ rulings narrowly and thereby neglect the broader policy implications of ECJ decisions. The member states themselves, not just the member-state national judges, do this by enforcing individual judgments as to the parties to the judgment only and do not use the ECJ decision for other cases with parallel facts. The next method of avoidance is “restrictive application,” whereby member-state governments place limits and exceptions on ECJ judicial principles in new EU legislation or in new member-state legislation. The third method of avoidance noted by Lisa Conant is “preemption,” whereby member-state governments construct new European law or new domestic member-state law to avoid future judicial interference in particular areas.
Lisa Conant says that full compliance with ECJ rulings is comparatively rare (Pollack 178-179).

While many lower member-state courts have appeared to be cooperative partners with the ECJ, there has been a more hesitant acceptance of the ECJ’s rulings and “pronouncements” from many of the higher member-state courts. There has been somewhat of a reluctance by certain national member-state constitutional courts to accept unconditionally the supremacy of EU law (Hunt 110-111). All member-state legal systems have had to deal with the ECJ assertion of the supremacy of EU law over conflicting member-state national law. In a number of states, there has been great controversy over the ECJ’s supremacy position (Andeweg 16). National courts in their decisions have not, by and large, even when apparently acceding to ECJ law supremacy in a particular case, adopted the ECJ rationale for the supremacy of EU law in their national court legal decisions. Instead, Rudy Andeweg relates that national courts have based their acceptance of EU law upon domestic provisions in their own domestic member-state law. Where they have deemed EU law applicable, they have interpreted domestic law as according priority to EU law in the event of a clash between EU law and national law. In other words, if they had not determined that domestic law as enacted by the member-state legislature granted supremacy to EU law, then they would not have concluded that EU law was supreme over domestic law (35).

An institutional restriction that limits the scope of ECJ decisions beyond just the parties to a particular case is the lack of class-action lawsuits in the European legal system. The ECJ has rejected the idea that groups as representatives of a class could sue
as a class on behalf of entire class of citizens whose rights have been violated. Lisa
Conant says that the ECJ has blocked the path for class actions in the EU. In contrast, in
the United States, class-action lawsuits are allowed so that everyone that was harmed by
an illegal action (not just the main party or parties who filed the lawsuit) is automatically
part of the lawsuit without needing to file a separate lawsuit (Conant 73).

Within the existing areas of jurisdiction, Jo Hunt says that it is expected that the
Court will find itself “drawn in” to arbitrate or mediate disputes between players in the
EU Community process. There has been a growing tendency for losers in the decision-
making process in Europe to run to the ECJ “to undo policy outcomes” that they have
lost. With the extension of qualified voting under the Treaty of Nice, the potential for
such disputes about who makes the decisions in Europe and the potential for the ECJ to
have to mediate such disputes in ECJ cases likely to increase. With the increased powers
that Parliament has to bring judicial review actions before the ECJ, such challenges will
not come only from member-state governments. The ECJ will come under more critical
scrutiny in this increasingly political environment, and there are major concerns about the
ability of the ECJ system to handle the increase in litigation. According to Jo Hunt, recent
EU enlargement makes the ECJ’s caseload unlikely to decrease, placing the ECJ system
near the “breaking-point” (Hunt 117).

The Treaty of Nice enhanced the role of the CFI over direct actions. The new
version of Article 225 of the EU treaties as amended by the Treaty of Nice states that the
CFI shall have jurisdiction over most classes of direct action “with the exception of those
assigned to a judicial panel and those reserved by Statute for the Court of Justice.”
Although this change falls short of declaring the CFI the first and primary judicial forum for all direct actions, Liz Heffernan concludes that trial and adjudication by the CFI will now become the rule rather than the exception. This change will help alleviate some burden on the ECJ. It is important that in the future the ECJ and the CFI pursue their respective “vocations,” with the CFI being a general trial court and the ECJ being an appellate court of final resort (Heffernan 912). It should be noted, however, that the Treaty-of Nice reforms, standing alone, are too modest to guarantee effective, lasting solutions to the workload crisis at the ECJ (933).

Liz Heffernan argues that it may become appropriate for the ECJ to filter and limit its caseload along the lines of the type of “certiorari” jurisdiction that the United States Supreme Court has. A “European certiorari” if adopted for the ECJ would allow the ECJ the discretion and option to accept some preliminary references from national courts and to decline others. Such a certiorari procedure if adopted for the ECJ would enable the ECJ to prioritize its agenda and make maximum use of its time and resources. The Court would then be more free from its excessive caseload and better able to devote time and attention to the pressing Constitutional issues of the day (919-920).

The EU is resource poor, unfortunately spending less than two percent of all public monies. The EU in its deliberations and decisions must consider and aggregate an enormous number of conflicting interests with around 370 million EU citizens. It does not have the benefit of strong Europe-wide political parties, pressure groups or trade unions to serve as support for any ECJ controversial decisions. The ECJ has “an almost impossible job with few means to do it” (Peterson and Bomberg 8). The ECJ has to deal
with not only bias from the member states, but also bias from private interests that are most powerful at the member-state level (27).
Conclusion

The results of this study substantially answer the six research questions posed by this study in the introduction to this paper:

1. How do major structural, operational and administrative challenges currently affect the ECJ? The Court faces major challenges not only from too large a caseload but also from many other factors.

   - The Court faces major administrative challenges from too large a caseload (explanatory variable). There is a large backlog of preliminary ruling cases, and the average wait for a decision is an excessive 21.4 months. Significant fundamental reform is necessary for the long-term effectiveness of the Court.

   - Based upon changes from the Treaty of Nice (explanatory variable), the bulk of EU cases will be decided by the 13-member small plenary chamber or in smaller chambers of 3 to 5 judges. Thus even with 25 judges, the number of judges deciding a case will not become unmanageable with these smaller chambers deciding all but the most sensitive cases.

   - National courts in their reactions (explanatory variable) to ECJ decisions often do not accept the supremacy of EU law unless member state laws have been passed approving such supremacy.

   - The judicial panel system approved in the Treaty of Nice (explanatory variable) has some limited potential in repetitive, uncomplicated cases to
alleviate the excessive caseload of the ECJ and the Court of First Instance but primarily only in EU employee staff cases and in intellectual property cases.

- Language translation problems relative to the 20 EU languages (explanatory variable) have the potential to undermine the ECJ’s effectiveness as much or more than any other factor because of the excessive burden of translating 380 two-language combinations. Different translations of the same ECJ decision are often in direct conflict. All official EU documents have official versions in all EU languages and are equally authentic even though some translations are better than others.

- The Treaty of Nice (explanatory variable) gave some potential for the CFI to handle some preliminary references from national courts, but only in the unlikely event of a unanimous vote by Council approving such a change in EU law.

- The Treaty of Nice (explanatory variable) limited the number of Advocates General to eight and to the more important cases. The Advocates General at the ECJ do important work in recommending to the ECJ how a case should be decided thereby reducing the possibility of the ECJ having a misimpression of a case. However, the position is a luxury that should be used only for the most important cases.

- A description of the jobs of EU staff (explanatory variable) like those of attorney-researcher and lawyer-translator at the ECJ gives key insights into
how the court functions on a day-to-day basis. Because of the 380 two-language translation combinations, the job of the lawyer-translator is crucial to the Court. Because the ECJ relies on the recommendations and research of its attorney-researchers, these employees are crucial to the ECJ decision-making process.

- While the ECJ case law (explanatory variable) says that member states could be liable for inadequate implementation of EU law, member states in their reactions (explanatory variable) to such ECJ decisions determine their own liability and award few damages to individuals harmed by member-state violations of EU law. National courts and member-state governments in their reactions (explanatory variable) often try to limit the effect of ECJ decisions on national policy and to ignore the broader policy implications of ECJ decisions.

- As a result of the Treaty of Nice (explanatory variable) and because of the enlargement, each member state (except for the four permanent positions on the small plenary chamber) will have a judge on the small plenary chamber of 13 judges that decides the most important cases only about one-third of the time, much less often then before the enlargement.

- Under EU law (explanatory variable), ECJ decisions have no legally binding precedent for later cases with parallel facts but with different parties to the litigation.
• EU law (explanatory variable) needs to adopt a certiorari procedure like that of the United States Supreme Court whereby the ECJ can decide only the cases it wants to decide, leaving all other cases for the lower courts.

2. How are EU citizenship rights limited?

• Recent ECJ decisions (explanatory variable) have been tilted towards broadening EU citizenship rights only in a very narrow sense, primarily only in the context of the free movement rights of an EU citizen from one member state to relocate to another member state.

• EU treaties (explanatory variable) give the European Union no right to create or revoke EU citizenship. Under the EU treaties (explanatory variable), if one is a citizen of an EU member state, one is automatically an EU citizen. Under the treaties (explanatory variable), if the member state revokes member-state citizenship, one loses one’s EU citizenship. The reaction of member states (explanatory variable) to any EU expansion of EU citizenship relative to migrant rights and other rights has been hostile.

3. Are there any trends in recent ECJ decisions relative to business law?

• Major recent ECJ decisions (explanatory variable) on business law have been inconsistent.

• The decisions show the court acceding to the protectionist inclinations of member states on the one hand in the Parma ham case which barred production, processing and packaging of EU and member-state legislatively approved PDO products in other member states outside the member state of
origin for the product, while inconsistently in a non-protectionist decision allowing unreasonable free movement of companies with inadequate financial capital to protect creditors in the Centros case.

4. **How will the proposed new Constitution up for ratification affect the ECJ and its work?**

- Based upon my interviews at the ECJ, the proposed new Constitution (explanatory variable) currently up for ratification by the member states will not significantly affect the day-to-day administrative functioning of the ECJ.

- Relative to the Court’s operations, the proposed new Constitution (explanatory variable) merely ratifies existing treaties, including the changes relative to the ECJ already mandated by the Treaty of Nice.

- However, the proposed Constitution (explanatory variable) does confirm and restate some important principles of EU law not in the treaties but developed by the ECJ in ECJ cases such as the supremacy of EU law. It has some vague provisions the interpretation of which may increase the power of the ECJ. The ECJ’s general jurisdiction is extended to the whole “Area of Freedom, Security and Justice,” with the third pillar materially merged with the first pillar. However, the ECJ’s jurisdiction will continue to be excluded from the second pillar.

- The incorporation of the EU Charter of Fundamental Rights into the proposed Constitution (explanatory variable) may result after future ECJ
decisions interpreting these Constitutional provisions in the development of an EU bill of rights similar to the U.S. Bill of Rights.

5. How will the recent enlargement of EU (including the Communist background of some of the new member states) affect the ECJ?

- The legal systems of the new accession states (explanatory variable) provide many impediments to an effective legal accession into the EU and to the effective and proper use of the ECJ preliminary reference procedure by national courts in new member states. These legal systems are quite different from those of other EU member states, making their effective assimilation into the ECJ system quite difficult.

- Other problems are the lack of accountability (explanatory variable) of judges in the new member states for bad or incoherent decisions, the excessive control that the new member-state executive branch (explanatory variable) has over judges, the low funding (explanatory variable) for judicial training, the lack of stringent qualifications (explanatory variable) for judges, the prevalence incompetent judges (explanatory variable), and inadequate or chaotic member-state implementation of EU laws (explanatory variable). Thus the ECJ preliminary reference and ruling process (explanatory variable) will not work well with new member states because they have unaccountable and insular judiciaries, the member-state executive branches have undue influence on judicial decisions, the criteria for selecting judges is vague
and easily met by unqualified candidates, funding for judicial training is inadequate, the training itself is inadequate, voluminous EU laws adopted by member states have not been adopted in an administratively useful fashion, and judges in these countries have little knowledge of EU law and little concept of justice in a case.

6. **How and to what extent is the preliminary ruling process ineffective?**

- The ECJ preliminary reference process (explanatory variable), whereby a national court has the ECJ decide an issue of EU law in a national court case, has some serious flaws that greatly hinder its effectiveness.

- The legal effect of ECJ preliminary rulings (explanatory variable) is minimal because they only apply to parties to that case and have no binding legal effect as precedent on future cases with different parties.

- The reactions of national judges and member states (explanatory variable) are generally to restrictively apply ECJ decisions and to avoid their effects where possible.
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