‘These Luxembourg judges who lay down the law in Europe' from Liaisons Sociales Magazine (January 2001)

Caption: Article, published in January 2001 in the monthly magazine Liaisons Sociales Magazine, on the tasks performed by the Court of Justice and the Court of First Instance. The Court of Justice is responsible for ensuring compliance with Community law, with particular regard to questions referred to it by national courts for a preliminary ruling, which account for 60 % of its cases. In this system of judicial cooperation, the Court of Justice is responsible for indicating the Community law which must be subsequently applied by national courts. In this way, the judges of the Court in Luxembourg contribute to the drawing up of Community law.

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These Luxembourg judges who lay down the law in Europe

What is this little court, 15 judges strong and based in Luxembourg, whose judgments worry governments and irritate our national judges? Answer: the all-powerful Court of Justice of the European Communities, the guardian of Community law, which is asserting itself over national law

By Isabelle Moreau

An individual is appearing at a hearing, before 11 judges all dressed in red. Is it a solemn audience before the *Cour de cassation*? No, the scene is being played out in Luxembourg. Ghislain Leclere is a Belgian, and his judges, two women and nine men on this particular day, are all of different nationalities. This large, modern hall, surrounded by glassed-in interpreters' booths, belongs to the Court of Justice of the European Communities (known as the ECJ), which is located on the Kirchberg plateau, just a few minutes away from the centre of Luxembourg. One thing is unusual on this morning of 22 November: a European national has opted to represent himself. The case concerns a dispute between him and the Luxembourg national family allowance authorities which has been going on for ten years now, and which could just as easily involve an insured person of French, German or Italian nationality.

Mr Leclere, a Belgian citizen living in Belgium, worked in Luxembourg until 1981, the year in which he was the victim of an accident at work. Luxembourg social security therefore pays him an invalidity pension. In 1995, following the birth in Luxembourg of their son, the Lecleres, who do not receive any family allowance in Belgium, applied for the family allowances provided under Luxembourg law. Their application was rejected because they were not resident in Luxembourg. That was the start of Mr Leclere's long battle, a battle which seems to be the fate of any citizen who comes up against a public authority, particularly when it is not an authority in his or her native country. His first application to a Luxembourg court was unsuccessful. He appealed to a higher court, the *Conseil supérieur des assurances sociales du grand-duché de Luxembourg* (Higher Social Security Council of the Grand Duchy of Luxembourg), which asked the ECJ for help in settling the dispute — what is known in Community jargon as a 'reference for a preliminary ruling'. As Jean-Pierre Puissochet, the only French judge at the ECJ, explains, 'This is a system of cooperation between courts. We do not settle the disputes. Our job is merely to give a ruling under Community law, which the national judges then have to apply.' Whatever the substance of the judgment handed down by the ECJ judges in the Leclere case, Luxembourg's *Conseil supérieur* will be obliged to abide by it.

The strong arm of European law

All the national courts are in the same boat. Community law is binding on Member States, and the Court in Luxembourg is its 'strong arm'. Admittedly, a private individual cannot bring a case directly before the Court of Justice, but a national court can (the famous reference for a preliminary ruling, which accounts for 60 % of ECJ cases), as can a Community institution or a Member State. Once the 15 Luxembourg judges have given their ruling, there is no appeal. 'However,' says Jean-Pierre Puissochet, 'the national provisions adopted in order to interpret an ECJ judgment can be contested before the European Court of Human Rights in Strasbourg.' In practice, however, there is not much chance of that happening, since each court happily refers to the case-law of the other. In plain language, when European justice speaks, everyone obeys.

France is in a good position to know this. On the night of 28–29 November last, Members of the French National Assembly, against the wishes of the Communist MPs, adopted an amendment to the bill on equality in employment which lifts the ban on night working for women. That was done in order to comply with a European Directive, adopted as long ago as 1976, on equality in employment between men and women. After a great deal of resistance, France finally surrendered to the European Court. It has to be said that the Luxembourg judges had to make several attempts before they were successful. In 1991 they found that French legislation on night working for women was incompatible with the Directive. In 1997 they ruled that France was guilty of not having transposed the Directive into national law. It was only as a last resort that the French legislation was amended, because with effect from 30 November 2000, the thunderbolts of Europe were poised to strike Paris with a periodic penalty payment (or fine) of 950 000 francs a day.

This is not the first time that France has been fingered by the ECJ. At the beginning of the year, the Luxembourg judges considered that France was acting illegally by making French cross-border workers who worked in another Member State of the EU pay French social insurance contributions, namely the CSG [General social contribution] and the CRDS [Contribution towards repaying the social debt]. 'When it comes to social security,' stresses Hélène Michard, a member of the EU Commission's Legal Service, 'individual cases which were causing enormous problems have been settled by reference to ECJ case-law. This has exerted a highly significant influence in the area of the free movement of workers.'

That was particularly true in the case of the 1998 Kohll and Decker judgments, which landed like a bombshell in the various countries of the European Union. What was it that the Luxembourg Court actually said? It said that national regulations which laid down conditions more stringent than those laid down by Community law, with regard to reimbursement, by the social security, of the cost of medicines or treatment provided in another Member State, constituted an unjustified obstacle to the free movement of goods and freedom to provide services.

In other words, using over-fussy regulations to dissuade people from getting treatment in another State is entirely contrary to Community law. Imagine the damage that this ECJ judgment must have done to national health systems, and the terror that must have been caused in countries such as France by visions of whole regiments of patients marching over the border to take advantage of allowances in other European countries, thereby threatening the precarious equilibrium of the finances of the French social security system.

No more conflicts with Member States

This omnipotence of the European Court of Justice gives rise to as many apprehensions as it does fantasies. For example, at the trade union federation Force Ouvrière (FO), Gérard Noguès, the Deputy General Secretary of FGF-FO, the FO civil servants' union, is worried. 'The Court,' he says, 'has been asked to give rulings on cases concerning the opening up of competition to European nationals based on the principle of the free movement of workers, but we are afraid that internal job competitions will be opened up to European nationals, and that would create an additional external competition, thereby calling into question the principle of the internal promotion of French civil servants.'

Raymond Piganiol, Head of the European and International Affairs Mission within the Directorate-General of Administration and Public Service, tries to be reassuring. He believes that the ECJ's case-law 'does not threaten any State's freedom to organise its civil service as it thinks fit.' However, he also adds, 'We do try to anticipate and, when queries arise, we tell our courts to ask us rather than make a reference for a preliminary ruling, because a judgment by the Court of Justice in Luxembourg could cause a tremendous amount of upheaval.'

Not all the decisions taken by the 15 Luxembourg judges are explosive, but all the same, the national courts are reluctant to consult them, and here French judges are the most unwilling of all. In 1999, France asked the Court for a preliminary ruling 17 times, much less often than Austria (56 times), Germany (49), Italy (43) or even Great Britain (22). 'In the area of social affairs,' explains Marie-Ange Moreau, Professor of Law at the University of Aix-Marseille III, 'French judges, unlike their German or British counterparts who have realised that this could be used as a lever in national law, hardly ever make references for preliminary rulings.' This, she says, is particularly true when it comes to employment law, 'where only 10 % of statutory instruments are of Community origin.'

Jacques Brouillet, a lawyer with the French law firm Cabinet Fidal and President of the IES (a European lawyers' organisation covering social law), agrees. 'In Europe,' he says, 'judges are asked to give rulings because European social law suffers from a lack of statutory instruments. What we are seeing today is a slide towards government by judges. However, I would prefer government by competent judges rather than by incompetent legislators, because European judges are excellent champions of European social law.' A compliment like that would make Jean-Pierre Puissochet blush. 'European judges take a decision,' says this ECJ judge, 'when the relevant laws are unclear, and that is particularly true in the case of social law, where the legislation is highly complex.' The Court in Luxembourg is not inactive, and to prove it, in October 2000

it issued its first major judgment on the interpretation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time. Although, like the French *Cour de cassation*, it ruled that stand-by duty was not working time, unlike the *Chambre sociale* it did not rule out the possibility that it could be rest time.

A member of the *Conseil d'État* at a time when French judges regarded decisions taken in Luxembourg as 'nibbling away at French supremacy', Jean-Pierre Puissochet no longer talks in those terms. 'Times have changed,' he says. 'The Court is now recognised and it is no longer in conflict with Member States.' In France, Marie-Ange Moreau points out that the *Chambre sociale* of the *Cour de cassation* is no longer so reluctant in its attitude towards Luxembourg. 'Since the beginning of the nineties,' she says, 'it has systematically taken Community case-law into account.' Philippe Waquet, a senior adviser to the *Chambre sociale*, tones things down a little. 'We have no power problems with the Community judges,' he says, 'but we do have the right to criticise this or that decision.' For instance, this eminent lawyer would like the Community judges 'not to take 90-degree turns every couple of weeks'. He is thinking, in particular, of cases where 'when countries refer questions on subjects which crop up time and time again, like restructuring, the judges are tempted to alter just a word or a sentence.'

This criticism is roundly rejected by Philippe Léger, the only French national among the nine Advocates General of the ECJ, whose task it is to propose solutions to the Community judges. 'The Court,' he says, 'is careful when it amends its case-law.'

Flies in the ointment of justice

Inevitably, when they interfere in the preserves of the national judges, the ECJ judges are sometimes regarded as flies in the ointment of justice. No doubt there is a certain amount of jealousy behind this criticism. The Luxembourg judges enjoy working conditions that would make most of the national courts green with envy. The Kirchberg offices, served by miles of corridors linking the Court of Justice building to that of the Court of First Instance, are modern and spacious. Each judge has a team of highly competent staff at his or her disposal and can call upon the services of an extremely efficient documentation department. And of course we must not forget a certain lifestyle feature which enables the monotony of life in Luxembourg to be easily forgotten, namely the salary of members of the Court of Justice, which amounts to some 100 000 francs a month.

The President of the Court of Justice for the past six years, the Spaniard Gil Carlos Rodríguez Iglesias, stands solidly at the helm. For him there is not the slightest hesitation: the power of the ECJ is perfectly 'legitimate'. 'It is essential,' he says, 'to have an independent authority which reminds Member States of their obligations.' This pioneer of European law in his own country willingly invites his peers to come to Luxembourg. The Court already receives over a thousand visitors every year, including the lawyers who come to represent their clients there. Among them is Hélène Masse-Dessen, an advocate at the *Conseil d'État* and at the *Cour de cassation*, who is increasingly coming to appreciate the importance of ECJ case-law and who admits that she now refers to it more, 'particularly in the area of gender equality'. This is a subject which often came up in the 550 cases referred to the Luxembourg court in 1999.

Two years to deal with a case

The number of cases continues to increase, at the rate of about fifty additional cases each year, and they are increasingly complex. As a result, says Gil Carlos Rodríguez Iglesias, with some concern, the European Court of Justice is 'literally collapsing under the number of cases'. For the French judge, Jean-Pierre Puissochet, it is quite simple. 'The Court and its members are worn out,' he says. The bottleneck is easy to measure: the average time taken to deal with a case is now two years. In order to relieve the pressure on the Court, the Heads of State or Government of the 15 Member States of the European Union agreed, at the beginning of December 2000 at the European Council in Nice, on a certain number of principles which threaten to make radical changes to the way in which the Court operates at present. Thus there are plans to transfer certain responsibilities to new chambers which will be added to the Court of First Instance. That Court will henceforth be able to handle references for a preliminary ruling, which are currently the

prerogative of the Court of Justice.

While waiting for these measures to be implemented, the ECJ plans to reduce delays in translation by recruiting a further fifty lawyer-linguists this year, thereby bringing the total number to almost 400. This is necessary because, after the deliberation phase, which takes place in French, the language of the proceedings in Luxembourg, a judgment cannot be given until it has been translated into each of the 11 languages of the European Union. This is an enormous task, but it is essential, because the decisions taken by the Kirchberg judges have to filter through to every court in the 15 Member States. In other words, no judge is supposed to be ignorant of the case-law determined by the Luxembourg Court.

A tribunal to help the ECJ

Not as well known as its elder sister, the Court of First Instance, created in 1989 to ease the pressure on the Court of Justice, has since that date been responsible for giving rulings on all appeals (the complexity of which continues to increase and many of which are applications for interim measures) submitted by natural or legal persons and essentially concerned with competition, anti-dumping laws and the Community civil service. Its judgments are subject to appeal before the Court of Justice. This happens in 40 % of cases, and in 80 % of those cases the judgments are confirmed by the latter.

‘Nowadays,’ explains the Frenchman André Potocki, one of the 15 judges of the Court of First Instance, ‘there are two areas which are likely to have extremely serious consequences, namely company mergers and State aid.’ Over a certain threshold, in fact, mergers at European level have to be endorsed by the European Commission, the aim being to avoid the creation of dominant positions and the abuse of market power. ‘At the present time,’ he says, ‘we are seeing an upward spiral in proposed mergers. The Court of First Instance has to give a ruling, as rapidly as possible, on whether or not the Commission was right to refuse such-and-such a merger or to attach special conditions to it. The Court of First Instance does not operate at quite the same rate as the world of economics and finance.’ That is why there are plans to speed up the process as from next year, which will include shortening the procedure for exchanging submissions between the parties. The other major area which is becoming increasingly important is that of State aid. ‘When a Member State grants aid to an undertaking, it is often for reasons linked to employment,’ he explains. There are therefore some very delicate debates to determine whether such aid is compatible with the Common Market. ‘The Court of First Instance’, he predicts, ‘ is going to become a major court of appeal in European business law.’