Transparency that isn't: case assignment at the Court of Justice

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Introduction

Openness and transparency represent underlying principles of the decision-making in the European Union (EU).[1] According to Article 1(1) of the Treaty on European Union (TEU), *'decisions are taken as openly as possible and as closely as possible to the citizen',* and Article 15(1) stipulates that all institutions' *shall conduct their work as openly as possible'*. Even though the third paragraph of this article excludes the Court of Justice of the EU (CJEU) from the scope of a right of access to documents in respect of its judicial tasks,[2] there is no doubt that the CJEU in general has to, in line with the abovementioned provisions, operate in an open and transparent manner and, further, shall establish an active policy ensuring that all its actions are carried out in an accessible and understandable way.[3] It goes hand in hand with the famous legal maxim that *'justice must not only be done, it must also be seen to be done'*.[4]

Informal practises and informal institutions within any organisation, because of their very nature, usually comply neither with openness nor transparency.[5] This paper identifies informal institutions at the European Court of Justice (ECJ) in one of the most crucial procedures beyond judicial decision-making – case assignment. Case assignment is the core business of court administration as it touches on some vital aspects of rendering justice – judicial independence, flexibility and efficiency.[6] The proper organisation of this process hence creates one of the preconditions for public trust in courts and thus increases their institutional legitimacy.[7]

In this paper, I analyse the administration of case assignment at the ECJ from the perspective of transparency and informal institutions. Based on the analysis of procedural rules and

[1] Cf. Paul P Craig, *EU Administrative Law* (Third edition, Oxford University Press 2018) 400; or Deirdre Curtin and Päivi Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU: In-Depth Analysis for the PETI Committee' [2016] Study of the European Parliament, Policy Department of Citizens' rights and Constitutional Affairs, 2016/PE 556.973 4 <https://cadmus.eui.eu/handle/1814/45327> accessed 11 February 2023.

[2] Article 15(3) of the Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C326.

[3] Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (2014) 51 Common Market Law Review 116; and Gijs Jan Brandsma, Deirdre Curtin and Albert Meijer, 'How Transparent Are EU "Comitology" Committees in Practice?' (2008) 14 European Law Journal 819, 827.

[4] Rex v. Sussex Justices ex parte McCarthy (1924), 1 K.B. 256, 259. See James Spigelman, 'Seen to Be Done: The Principle of Open Justice: Part 1' (2000) 74 Australian Law Journal 290, 290.

[5] Cf. Madelene O'Donnell, 'Post-Conflict Corruption: A Rule of Law Agenda?' in Agnes Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law* (Lynne Rienner 2008).

[6] Marco Fabri and Philip M Langbroek, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries' [2007] European Journal of Legal Studies 1, 1.

[7] ibid.

subsequent literature – both doctrinal and empirical, I argue that case management at the ECJ is interwoven with informal practices and institutions. Moreover, I claim that these informal practices and institutions fail to comply with transparency and openness.

The paper proceeds as follows. Firstly, I elucidate definitions of transparency and informal judicial institutions and present the framework on which I build my analysis. Secondly, I explain how case management at the ECJ works. Thirdly, in the explained procedure, I identify informal judicial institutions and practices. Finally, I address the perils of the current settings in regard to transparency.

1. The conceptual framework: transparency and informal judicial institutions

Before the very analysis of procedures, it is necessary, in order to avoid conceptual perplexity, to clarify what I mean by ambiguous terms such as transparency and informal judicial institutions and practices.

As mentioned above, transparency and openness are enshrined in the founding treaties. Nevertheless, their specific definition is lacking. In general, transparency can be viewed as the '*opposite of opaqueness, complexity or even secretiveness'*.[8] For the purposes of this article, I employ the broad definition of transparency by Curtin and Mendes as a possibility to observe the decision-making process; transparency comprises information that reveals the thinking behind a decision or the way in which a decision is made.[9] Openness, in their view, covers transparency as one of its aspects and is defined as the extent to which citizens can monitor and influence administrative processes.[10] Both transparency and openness enhance institutional legitimacy and, in terms of ECJ, also the legitimacy of the proper administration of justice.[11] They can be considered a prerequisite that a diligent court needs to ensure its legitimacy.[12]

Next, informal judicial practices and institutions require a thorough conceptualisation.[13] However, for the purposes of this essay, 'informal' means not codified and usually unwritten,

[8] Sacha Prechal and ME de Leeuw., 'Transparency: A General Principle of EU Law?' in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds), *General Principles of EC Law in a Process of Development* (Wolters Kluwer Law 2008) 202.
[9] Deirdre Curtin and Joana Mendes, 'Transparence et participation : des principes démocratiques pour l'administration de l'union européenne' (2011) 137–138 Revue française d'administration publique 101, 103.
[10] ibid.
[11] Dariusz Adamski, 'How Wide Is "the Widest Possible"? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited' (2009) 46 Common Market Law Review 521, 534; and Alemanno and Stefan (n 3) 104.
[12] Alemanno and Stefan (n 3) 107.
[13] See upcoming paper David Kosař and Katarína Šipulová, 'Informal Judicial Institutions and Democratic Decay' (ECPR 2023) <https://ecpr.eu/Events/Event/PaperDetails/67030> accessed 11 February 2023.

typically not transparent for outsiders.[14] 'Practices' are defined as a routinised type of behaviour; a pattern which can be filled out by a multitude of single and often unique actions reproducing the practice.[15] 'Institutions' needs a higher level of embeddedness. Informal institutions are thus '*socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels.*'[16] 'Judicial' means that these informal institutions and practices operate in the workings of the judiciary.[17]

Given these definitions, it is evident that informal judicial institutions and practices are usually well known to the relevant actors (e.g., judges and clerks inside the court) but invisible for persons staying outside respective organisations – even for professionals in the field (e.g., academics or lawyers), let alone the general public. This obscurity, together with the fact that these socially shared rules mostly lack written form, contradicts the principles of transparency and openness.

2. Case assignment at the ECJ: how it works

Having illuminated the conceptual framework, we can dive into the process that is to be analysed. Administration of case assignment consists of two limbs – allocating the case to reporting judges and distributing the case to judicial formations (chambers).[18] However, the latter is absent from courts where all members usually handle cases (e. g. the U. S. Supreme Court).

Anyway, both limbs are present in the ECJ system. Procedural framework for case management at the ECJ is laid down primarily in Rules of Procedure,[19] partially in Statute.[20] Once a case has been lodged and registered at the ECJ, the Registry and the Department of Research and Documentation (DRD)[21] perform a preliminary analysis of the case. This aims to separate, at the earliest possible stage, cases that will follow the normal procedure from those that will receive the simplified treatment of an order.[22] In the 'subject-matter form' (*fiche object*), the Registry may propose to the President of the ECJ that the case is manifestly inadmissible or flag

[14] Gretchen Helmke and Steven Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda' (2004) 2 Perspectives on Politics 725, 727; and O'Donnell (n 5).
[15] Andreas Reckwitz, 'Toward a Theory of Social Practices: A Development in Culturalist Theorizing' (2002) 5 European Journal of Social Theory 243, 249–250.
[16] Helmke and Levitsky (n 14) 727.
[17] Kosař and Šipulová (n 13).
[18] Christoph Krenn, 'A Sense of Common Purpose: On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice' in Antoine Vauchez, Fernanda Nicola and Mikael Rask Madsen (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022) 189–203.
[19] Rules of Procedure of the Court of Justice [2012] OJ L265/1.
[20] Protocol (No 3) on the Statute of the Court of Justice of the European Union [2010] OJ C202/10.
[21] The DRD creates 'preliminary assessment form', but only for requests for preliminary ruling and certain appeals against the judgment of the General Court.
[22] Paschalis Paschalidis, 'Case Management: European Court of Justice (ECJ)', *The Max Planck Encyclopedias of International Law* (Oxford Public International Law 2017) para 4.

up the potentiality of a reasoned order (so-called 'candidate cases') pursuant to Article 99 of Rules of Procedure. The DRD provides a more substantive preliminary assessment.

Subsequently, it is time for the President of the ECJ. They[23] can either decide on an obvious procedural question or assign the case to a Judge-Rapporteur. The role of a Judge-Rapporteur is crucial. During the written part of the procedure, they may propose to the President of the ECJ to decide on procedural matters set out in Articles 54–56 Rules of the Procedure. And furthermore, the Judge-Rapporteur drafts the so-called 'preliminary report'.[24] This document renders an overview of the case – facts, applicable provisions, observations of the Judge-Rapporteur and their proposal relating to the administration of the case, including to which chamber the case should be allocated, and is presented to the general meeting.[25] The Judge-Rapporteur thus prepares the case, frames the debate, and acts as an agenda setter.[26]

Although the general meeting, where all the judges and advocates general of the ECJ participate, allows all members of the Court (for the first time and last time) to pronounce on every case at hand.[27] Nonetheless, as Hermansen points out, the standard meeting agenda contains 15–20 cases, but only a fraction is subject to a substantive discussion (it often only occurs if the rapporteur and advocate general disagree).[28] Moreover, not all judges have time to study the such amount of cases weekly in depth.[29] Therefore, the Judge-Rapporteur acts with considerable autonomy already at this point.[30]

Following consideration of the Judge-Rapporteur's preliminary report and the Advocate-General's input (in the cases where they participate), the general meeting may assign any case to a five or three judges chamber in which the Judge-Rapporteur is a member or, in circumstances of a significant degree of difficulty or importance, to the Grand Chamber.[31] The role of Judge-Rapporteur thus plays an important role in this stage as not only can they propose the potential formation, but the general meeting shall – respecting 'the snowball effect rule'– assign the case to 'their' chamber.

Furthermore, the relevance of the Judge-Rapporteur increases after the case is assigned to the chamber, as their task is to draft a judgment. It means that they play a central role in the phase

[23] In this paper, I use the gender-neutral pronoun 'they' as a singular pronoun to refer to individuals of unspecified gender. See e.g., https://dictionary.cambridge.org/dictionary/english/they
[24] Article 59 of Rules of Procedure.
[25] Article 59(2) of Rules of Procedure; and Paschalidis (n 22) paras 27–29.
[26] Silje Synnøve Lyder Hermansen, 'Building Legitimacy: Strategic Case Allocations in the Court of Justice of the European Union' (2020) 27 Journal of European Public Policy 1215, 1216.
[27] Article 25 of Rules of Procedure; and Paschalidis (n 22) para 41.
[28] Hermansen (n 26) 1221.
[29] Sophie Turenne, 'Institutional Constraints and Collegiality at the Court of Justice of the European Union: A Sense of Belonging?' (2017) 24 Maastricht Journal of European and Comparative Law 565, 577.
[30] Hermansen (n 26) 1221.
[31] Article 60 of Rules of Procedure; and Koen Lenaerts and others (eds), *EU Procedural Law* (Oxford University Press 2014) 21.

of deliberation, and as the main author of the judgment, they put forward principal legal arguments.[32] We are back to the notion 'agenda-setter'.

That being said, in spite of the significant importance of the Judge-Rapporteur in the process of decision-making, neither Rules of Procedure nor any other published document regulate the process of designation of the Judge-Rapporteur. Article 15(1) of the Rules of Procedure only stipulates that the rapporteur in the case shall be selected by the President of the ECJ as soon as possible after the document initiating proceedings has been lodged. There are no formal rules laying down to whom the case may be assigned, no predetermined schedule, no limits staking out the field. The President of the ECJ enjoys a large discretion in their choice of which judges will hear the case.[33]

3. Informal judicial institutions and practices: how it virtually works

Since the formal rules are missing, during the years of the ECJ's existence, informal institutions and practices have been developed.[34] At least a few of them were already described in the literature. In this part, I therefore provide these examples and identify them as informal judicial institutions and practices.

The first two unwritten rules concern the nationality of the judge. The President shall refrain from designating as rapporteur the judge appointed by the Member State from which the preliminary ruling originates or which is a party to the dispute.[35] Similarly, the Judge-Rapporteur and the Advocate General to a case should not be of the same nationality.[36] Thirdly, for the sake of efficient administration of justice, related cases and questions that a respective judge dealt with in the past are usually assigned to the same judge.[37]

Furthermore, Brekke and others in their empirical research found out that the 'candidate cases' potentially resolved in the simplified procedure by a reasoned order as provided by Article 99 Rules of Procedure[38] are much more likely assigned to chambers with low backlogs to decrease the overall processing time of the ECJ.[39] Even though distribution among chambers is, formally

[32] Jiří Malenovský, 'Judge-Rapporteur: Court of Justice of the European Union (CJEU)', *The Max Planck Encyclopedias of International Law* (Oxford Public International Law 2018) para 25; and Hermansen (n 26) 1221.
[33] Cf. Malenovský (n 32) para 14; Jens Frankenreiter, 'Informal Judicial Hierarchies: Case Assignment and Chamber Composition at the European Court of Justice' [2016] SSRN Electronic Journal 1, 1; or Jan Kalbheim, 'Der Einfluss der Richter des Europäischen Gerichtshofs auf dessen Rechtsprechung – eine empirisch-statistische Analyse der Rolle des Berichterstatters' (2016) 115 Zeitschrift für Vergleichende Rechtswissenschaft 431, 280.
[34] Cf. Paschalidis (n 22) para 16; Malenovský (n 32) para 17.
[35] Malenovský (n 32) para 17.
[36] Paschalidis (n 22) para 16.
[37] ibid 16.
[38] To this mechanism, see above.
[39] Stein Arne Brekke and others, 'That's an Order! How the Quest for Efficiency Is Transforming Judicial Cooperation in Europe' (2023) 61 JCMS: Journal of Common Market Studies 58, 70.

speaking, a business of the general meeting, it must be reiterated that the initial President's selection predetermines the precise chamber.[40]

It follows from the foregoing that although the formal rules intentionally leave nearly unlimited space for the President's discretion, two informal judicial institutions – the first two mentioned rules concerning nationality – were established.[41] These informal institutions constrain the President's leeway. Besides, for the two remaining examples, we can also observe two informal judicial practices – long-term repeated patterns of behaviour concerning the way how through case-assignment improve the efficiency of the decision-making.[42]

These informal judicial institutions and practices emerged because of the incompleteness of formal rules, and as they fill in gaps of formal procedures, they can be categorised as complementary informal institutions and practices.[43] From time to time, complementary informal institutions serve as a foundation for formal institutions.[44]

The abovementioned examples represent only fragments of informalities during the case assignment procedure at the ECJ, but only these few have been revealed or detected thus far. At any rate, it is evident that the ECJ tailors procedural rules governing case assignment to its needs. In some aspects, it is necessary. The prerogative to self-govern and organise the procedures autonomously shields courts from political influence, enhances their independence, and enables them a certain amount of flexibility.[45] Nevertheless, the daily judicial business in this regard cannot be considered transparent but rather obscure and far from democratic oversight and hidden from the public eye.[46]

Observations in this chapter also unfold the fact that even though the ECJ is built on the principle of collegiality,[47] individual decision-makers perform a central role.[48] Either the President of the ECJ or the pertinent Judge-Rapporteur possess effective tools capable of pushing forward their individual agendas.[49]

[40] Malenovský (n 32) para 14.
[41] See Helmke and Levitsky (n 14) 727.
[42] See Reckwitz (n 15) 249–250.
[43] See Helmke and Levitsky (n 14) 728–730.
[44] ibid 728.
[45] Brekke and others (n 39) 61; see also David Kosař, *Perils of Judicial Self-Government in Transitional Societies*, vol L (Cambridge University Press 2016).
[46] Brekke and others (n 39) 61.
[47] Sophie Turenne, 'Institutional Constraints and Collegiality at the Court of Justice of the European Union: A Sense of Belonging?' (2017) 24 Maastricht Journal of European and Comparative Law 565, 576–577.
[48] Hermansen (n 26) 1216.
[49] Krenn (n 18) 208.

4. A GREAT SERVANT BUT A BAD MASTER: TRANSPARENCY, INDEPENDENCE, AND EFFICIENCY

The current settings of case assignment administration on the ECJ do not live up to the principles of transparency and openness. This is because the most important decision in the entire procedure – the designation of the Judge-Rapporteur – hinges upon a large discretion of the President, the lack of clear and explicit rules, and hence the significant influence of informal judicial institutions and practices. Moreover, the following decisions about the case distribution among formations occur at the general meeting, which is not (and cannot be) open to the public.[50]

Case assignment at the ECJ is a top-down process such as, for example, on the U. S. Supreme Court.[51] In many domestic jurisdictions, different systems are used. For example, some courts follow a completely random case assignment, whereby the head of a court controls neither the composition of chambers nor the match between judges and cases.[52] Other countries employ a court schedule which predetermines the random allocation of new cases among judges and their stable chambers. Such a schedule must be regularly approved at the plenary meeting of the respective court or by an external authority such as the judicial councils.[53] While reliance on the discretion of the head of the court is typical for common law countries, German-speaking countries and post-communist states pay more heed to the threat of abuse as they have also usually enshrined the principle of a judge in their constitutions.[54] Also, the fresh memories of the abusive techniques used by the communist regime to control the judiciary manifest themselves in the fact that the right to a lawful judge, i. e. that any case lodged at the court must be assigned on a random basis to one of its judges,[55] composes the right to a fair trial. The European Court on Human Rights (ECtHR) has recently applied a similar approach regarding Article 6 of the Convention.[56]

From this perspective, it is arguable that current case management on the ECJ can jeopardise internal judicial independence and, subsequently, a fair trial.[57] However, as Advocate General Bobek stated, there is no '*only one specific way in which cases might be allocated within a court in order to ensure compliance with the right to a lawful judge or, more broadly, the right to a fair trial*. '[58]

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[50] Alemanno and Stefan (n 3) 115.
[51] Hermansen (n 26) 1217.
[52] E. g. the US appelate courts. ibid 1222.
[53] Fabri and Langbroek (n 6) 14.
[54] ibid; Kosař (n 45) 112, 203–204.
[55] Kosař (n 45) 91–92.
[56] Joost Sillen, 'The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights' (2019) 15 European Constitutional Law Review 104, 119; and Kosař (n 45) 407.
[57] Cf. Thomas Rönnau and Annemarie Hoffmann, '„Vertrauen ist gut, Kontrolle ist besser": Das Prinzip des gesetzlichen Richters am EuGH' (2018) 7 Zeitschrift für Internationale Strafrechtsdogmatik 233; Kalbheim (n 33) 480. To internal judicial independence, see Opinion AG Michal Bobek, joined cases C-748/19 to C-754/19, Prokuratura Rejonowa w Mińsku Mazowieckim v WB [2021], para 174. And also Sillen (n 56).
[58] Bobek (n 57), para 113. See Rönnau and Hoffmann (n 57) 241.

Anyway, leaving aside the judicial independence and right to a fair trial, it does not foster transparency when it might be expected that the non-random case assignment and the considerable discretion of the President at the ECJ lead towards strategic case allocation.[59] There is no doubt that judges of the ECJ do not speak the same voice, and their personalities, worldviews, and life experiences are to the some extent mirrored in the judicial decision-making.[60] Therefore, the President of the ECJ may assign the case to anyone of their 26 colleagues (with the exceptions explained above) to pursue different goals. For instance, in the best case scenario, it can enhance the quality of the potential landmark case through assignment to the most experienced judges (or to the experts in the very specific field), or, on the other hand, smooth integration of the new ECJ judges through gradually assigning them more difficult cases.[61] In the worst case scenario, the President may please their favourite colleague by assigning them potential landmark cases or, even worse, to influence the judgment in their interest.[62] For example, a conservative President may assign a sensitive case to the more conservative judge or, conversely, sideline the most progressive ones.[63] In this vein, Kelemen highlights the peril of limiting the influence of judges with preferences different from those of the majority – and not only by the President in the designation of Judge-Rapporteur, but also by the majority of judges on the general meeting.[64]

Although the worst case scenario does not appear to have happened yet, ways of strategically allocating cases at the ECJ have already been presented by Krenn. In his empirical paper, Krenn shows how the President of the ECJ' *acts as a gatekeeper to the ECJ elite'*.[65] He points out the existence of the informal internal judicial hierarchy and the 'elite group' of judges writing the most important ECJ judgments. Also, he shows the correlation between judges being part of this 'elite group' and being elected to top positions within the Court (President, Vice-President, and President of a Chamber of Five Judges).[66] As the President seeks to be re-elected by fellow judges every three years, discretion in the designation of the Judge-Rapporteur can be an opportunity for them to build up a circle of loyal supporters.

Besides the negative consequences going beyond the scope of this paper (e.g., gender inequality), even just the very possibility of such shady bargaining in the background of the ECJ

[59] Hermansen (n 26) 1221.
[60] See Michael Malecki, 'Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers' (2012) 19 Journal of European Public Policy 59. In general, see also Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (First edition, Farrar, Straus and Giroux 2010); Lee Epstein and Andrew D Martin, 'Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)' 13 Journal of Constitutional Law 263.
[61] Krenn (n 18) 188.
[62] See Adam Blisa and David Kosař, 'Court Presidents: The Missing Piece in the Puzzle of Judicial Governance' (2018) 19 German Law Journal 2031, 2047.
[63] Turenne (n 47) 567.
[64] R Daniel Kelemen, 'The Political Foundations of Judicial Independence in the European Union' (2012) 19 Journal of European Public Policy 43, 52.
[65] Krenn (n 18) 208.
[66] ibid 195.

judicial decision-making conclusively does not contribute to transparency and fails to comply with the principle of being 'as open as possible'.[67] All in all, the President of the ECJ wields a powerful toolkit in the exercise of three basic court presidents' powers: (1) power over judicial careers; (2) administrative power, and (3) jurisprudential power.[68]

Nonetheless, it must be admitted that the flexibility of the current system is also its virtue. The enlightened President and, subsequently, the general meeting can simply distribute cases according to the current workload and backlog. Likewise, the assignment of cases to Judge-Rapporteurs with the specialisation in the pertinent legal questions, as well as the abovementioned option of gradual workload for the new judges. The same applies to the strategic allocation of the candidate cases for reasonable orders. All these things, in an ideal world, can increase procedural efficiency and reduce delays.[69]

Moreover, Malenovský argues that the wider power of the President of the ECJ in designating Judge-Rapporteurs is fully consistent with the generalist profile of judges since all the judges of the ECJ are supposed to be generally competent ratione materiae and can give a ruling on any type of case brought before the ECJ. Further, the Judge-Rapporteur can never act as a single judge and must always respect a majority opinion in the formation to which they belong.[70] Even though this is indisputable, these counterarguments do not challenge the role of the Judge-Rapporteur as an agenda setter and the fact that by their affiliation to the chambers, the final composition of the formation is predetermined. But first and foremost, they do not take into account the significant leverage of informal institutions and practices, which are tightly linked to the lack of transparency and openness.

To conclude, since the legitimacy of the ECJ rests upon both efficiency and transparency, it is necessary to, unsurprisingly, strike a fair balance between these two values. From my point of view, the switch towards a more transparent way how to assign cases, such as random case assignment with exceptional intervention by the President or the general meeting according to the clearly laid down rules, could be a decent trade-off. However, this definitely needs a thorough elaboration going beyond the scope of this paper.

Conclusion

The administration of case assignments at the ECJ is interwoven with informal practices and institutions. They emerged because of the incompleteness of formal rules. In this paper, I provided examples of some of them and presented their main perils. I illuminated the central and underestimated role of the Judge-Rapporteur as well as the large amount of discretion of

[67] Article 1 of the TEU and Article of the TFEU, see the first chapter.
[68] Blisa and Kosař (n 62) 2042–2049.
[69] Cf. Urška Šadl and others, 'Law and Orders: The Orders of the European Court of Justice as a Window in the Judicial Process and Institutional Transformations' (2022) 1 European Law Open 549, 554; Brekke and others (n 39) 58; Krenn (n 18) 187.
[70] Malenovský (n 32) para 16.

the President of the ECJ in the process of case assignment. Even though such a setting provides great flexibility and allows the President to promote the efficiency of the ECJ, it also shelters many pitfalls. Because of that, I argue that this procedure cannot be considered transparent but rather obscure and far from democratic oversight and hidden from the public eye. This is even amplified in the context of other CJEU transparency issues.[71] This, in the long term, undermines the legitimacy of this court, as we must still bear in mind that the CJEU belongs primarily to European citizens.[72]

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[71] See e.g., Alemanno and Stefan (n 3).

[72] Ditlev Tamm, 'The History of the Court of Justice of the European Union Since Its Origin' in Alan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (T M C Asser Press 2013) 14.

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