

THE ROLE OF RÉFÉRENDAIRES AT THE EUROPEAN COURT

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To some extent référendaires at the European Court find a parallel in judicial assistants in the UK House of Lords, or law clerks in the United States judicial system. Like their British and American counterparts, the role of the référendaires is to assist the judges with their work behind the scenes. However, there are also a number of differences. These stem both from the more formalised role occupied by référendaires in the European Court's judicial structure and from the particular characteristics of the European Court and the way in which it works.

Référendaires have been a feature of the European Court from the outset. Each of the fifteen Judges and eight Advocates General have three référendaires. Judges of the Court of First Instance have two référendaires each, though these are supplemented by a Task Force of additional référendaires, attached to the President's Chambers, who have a roving brief, assisting where the need is greatest.

Although employed by the EU, the référendaires are recruited individually by the members of the Court. Practice varies as between judges as to the level of experience they require of their référendaires and so there is a broad range both of age and background. At one end of the spectrum, some are in their mid to late twenties with a couple of year's practical experience behind them; at the other, there are référendaires in their forties or fifties who have been judges or professors in their own Member States. Judge Légal who replaced Judge Potocki at the Court of First Instance in 2001 had, immediately prior to taking up this position, been référendaire to Judge Puissechet at the European Court. By way of contrast, judicial assistants in the UK House of Lords and law clerks in the United States tend to be recruited at an earlier stage in their careers, soon after

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qualification. Further, they usually work for a judge for one year. *Référendaires* usually stay for a period of about three to six years; some stay even longer.

All *référendaires* have EU nationality, but not necessarily the same as that of their judge. When the author worked for Judge Edward, the other two *référendaires* in his chambers were German and Irish, whilst Advocate General Jacobs had British, German and Danish lawyers working for him. There are more French and Belgian lawyers working for judges than any other single nationality because the Court works in French² and many non-native French speaking judges like to have the security of a French-speaking lawyer in their chambers.

The working relationship between *référendaire* and judge is very similar to that between junior Counsel and silk at the UK Bar.

Although cases are heard by panels of three, five, eleven or fifteen judges, each case is assigned initially to a particular judge (the *Rapporteur*) who is responsible for drafting the judgment and other preliminary documents. A judge is responsible as *Rapporteur* for some 45-60 cases at any one time and forms part of the panel which hears several times that number. The cases assigned to a Judge *Rapporteur* are divided between his or her three *référendaires* who are responsible for producing first drafts for the judge, initially of the Report for the Hearing (a document distributed to the parties summarising the issues and arguments in the case) and subsequently the Preliminary Report.

The latter document is an internal report for the purpose of briefing the other judges so that they can make decisions on procedural issues such as the size of panel that will decide the case. The Judge *Rapporteur* advances proposals as to these procedural issues in the Preliminary Report which is then considered by all the judges at their general meeting which takes place every Tuesday evening during term.

Most cases are heard by Chambers of five judges. Very routine cases are determined by a Chamber of three. Cases which raise important and novel points of law or which are politically sensitive are allocated to the Full Court. VAT cases decided over the past year give an indication of how the size of panel is determined. Fifteen judgments were handed down by the Court in VAT cases between 25th October 2001 and 25th October 2002. Of those, twelve were allocated to a Chamber of five judges, two were allocated to a Chamber of three

² Although hearings are conducted in the language of the parties, the Court has a single internal working language which is French. This means that all documents (apart from the Advocate Generals' Opinions, which are drafted in the language of the Advocate General) are drafted in French and the Judges deliberate in French.

judges, and one was heard by the petit plenum of eleven judges. It can be seen that a very high proportion of cases was allocated to a Chamber of five judges. This is because VAT cases usually raise questions of interpretation of the directives rather than more widely applicable constitutional issues. Although such questions might have important consequences, there is already a large body of case law on the directives to assist the Court. By way of contrast, cases raising questions as to the meaning of Article 18 of the Treaty on European Citizenship have usually been allocated to the Full Court.

The next stage in the procedure is the oral hearing. The référendaire attends the hearing having first discussed with the Judge what questions can usefully be asked of the parties. Some six to eight weeks afterwards the Advocate General's Opinion is published.

Having considered the Opinion, the Judge Rapporteur produces a draft judgment for deliberation by all the judges hearing the case. It is the référendaire who writes the first draft of this judgment for the Judge Rapporteur.³ This can be quite a challenge. Not only because the judgment has to be drafted in French and has to conform to the very particular drafting style used by the Court,⁴ but also because the judgment will ultimately have to be signed by all the Judges who have heard the case, which can be as many as fifteen. There are no dissenting or separate opinions. Thus, an important aim when working on the judgment is to produce a first draft which is likely to prove acceptable to the other judges. This may well mean attempting to avoid areas of the law which are known to be controversial between the judges if it is possible to decide the case on a more straightforward basis. This can be frustrating for lawyers hoping that their case will establish a new point of legal principle.

The Judge Rapporteur's draft judgment is then circulated to the other judges hearing the case in preparation for deliberation. Although référendaires are not permitted to attend the judges' oral deliberation, quite a substantial part of the deliberation process takes place in the form of a written debate. Judges involved in the case voice objections or suggest amendments by circulating notes, which their référendaires often help to draft. The deliberation in a difficult, novel or controversial case may be fairly protracted, sometimes necessitating several

³ The fact that référendaires are directly involved in drafting judgments often comes as a surprise to members of the British judiciary. Judicial assistants in the UK do not tend to work directly on judgments. Perhaps one of the reasons why this is less troubling to judges in Luxembourg is that the judgement finally produced is a collegiate judgment and is not published in the sole name of a particular judge.

⁴ In order to ensure that judgments consistently conform to the "house style", they are all checked by one of three native French-speaking lawyers, known as *lecteurs d'arrêts*, who are attached to the Chambers of the President of the Court.

meetings and a series of notes. If agreement on the outcome of a case cannot be reached, a vote may take place. However, those in the minority still have to sign the judgment. This means that they continue to play a full part in the deliberation process and every effort is made to ensure that the final judgment is something they feel content to put their names to. The collegiate nature of the judgment and the consequent compromises that are made explain why the legal reasoning of the European Court is sometimes less explicit than it might otherwise be.

Référendaires quickly become aware of the importance of the identity, in any particular case, of the Judge Rapporteur. Even though the final text of a judgment is one that has been agreed by all the judges hearing the case, it is the Judge Rapporteur who has the opportunity to set the agenda by producing the first draft of the judgment. This leads to different results than would be the case if the judges all sat down to discuss a case with a blank sheet of paper. It means that judges who disagree with the draft judgment tend to frame their suggested amendments in a way which deviates as little as possible from the Judge Rapporteur's draft. It is natural that the other judges should moderate their interference with the Judge Rapporteur's draft given that they, in turn, would prefer their own draft judgments to emerge quickly and painlessly from the deliberation process. As in any court, judges of the European Court have different approaches to the law. Some start from a pro-Member State stance; others are more *communautaire* in outlook. Some take a very purposive, and others a more black-letter, approach to statutory construction. These differences can inevitably affect the outcome of cases.

It is interesting, given the significance of the Judge Rapporteur, to consider how they are appointed. Every case, once it has been registered, goes to the President of the Court. Once a batch of new cases has reached his Chambers, the President then allocates a Judge Rapporteur to each case and distributes the case files accordingly.⁵ There are no rules to determine how the cases are allocated. However, it appears that the President will bear at least two factors in mind. First, he will seek to ensure that the numerical spread of cases amongst the judges is roughly even. Second, and more interestingly, the President will often allocate cases of the same type to the same judge.

There are at least two reasons for doing this. First, the judge may already have a particular expertise in that area of law. Second, once a judge has handled a number of cases in a specialised area of law, it is more efficient for the same judge to deal with similar cases when they arise.

⁵ The President never acts as Judge Rapporteur.

The way case allocation happens in practice can be illustrated by looking at all the cases on taxation that have been decided by the European Court over the past year. There have been seven judgments on Directive 69/335/EEC concerning indirect taxes on the raising of capital. Judge Schintgen was appointed Rapporteur in all seven. Similarly, over the last year, the Fifth Chamber has determined six VAT cases. Judge von Bahr was Rapporteur in three of them. This may well be due in part to the fact that Judge von Bahr was a member of the Supreme Administrative Court of Sweden before his appointment to the European Court. The Supreme Administrative Court hears a large number of cases on taxation; thus Judge von Bahr already had an expertise in the area. The allocation of cases to particular Judge Rapporteurs has a consequential effect on référendaires, who may well in turn be allocated a series of cases in the same field.

In a technical area such as VAT law, the ‘specialisation’ of Judge Rapporteurs and their référendaires described above can have positive consequences. It means that preliminary references from national courts are dealt with more quickly than they otherwise might be, and that there is consistency in the Court’s case law. In tax law, this type of legal certainty is often a particularly important consideration.