The European Court of Justice emerges blinking into the limelight

THOSE who believe that judges should deliberate in isolation from the hurly-burly of the real world would love the European Court of Justice. Situated on a windswept plateau in Luxembourg, the ECJ is so calm that you feel like apologising if you shut a door too loudly. But its quiet life may be about to end. The court's diet of competition and single-market cases has just been supplemented with the hottest of political potatoes. On January 13th the European Commission, the EU's civil service, said that it would sue the Council of Ministers, representing EU governments, for violating the euro area's "stability and growth pact".

In theory, the stability pact limits the budget deficits of the 12 euro-area members to 3% of GDP, on pain of possible fines. This year, France and Germany will have exceeded those limits for three years in a row. Yet when the commission proposed to force the two miscreants to make budget cuts last November, the Council of Ministers overruled it, deciding instead to put the pact "in abeyance". The commission argues that the council had no power to do this. The ECJ's ruling in this case, which may be its most important ever, could fundamentally affect the balance of power between the centre and the member countries.

Vassilios Skouris, a Greek professor who took over as president of the court last October, says that it is not new for the ECJ to be at the cutting-edge of defining the powers of the EU. He notes that "it is no secret that the case law of the court has been a major driving force towards European integration." Over the years court rulings have established such key principles as the supremacy of EU law over national law and the right of citizens to have European law enforced in their domestic courts. Just as decisions of the Supreme Court drove the expansion of federal power in the United States, so the ECJ has helped to establish a federal legal order in Europe. In both cases, an emphasis on removing barriers to trade helped to expand federal powers. And, as with the Supreme Court in its more expansive moods, ECJ decisions have often reflected a clear federalist ideology. Renaud Dehousse, author of a book on the court, concludes that "the ECJ has promoted a pro-integration line for decades."

One result of this orientation has been a steady expansion of EU powers, even into areas traditionally regarded as the preserves of the nation-state, such as tax, education and health care. Frits Bolkestein, the single-market commissioner, wrote recently that the ECJ is "increasingly taking over the role of..."
lawmaker on crucial tax issues in Europe, not least in the area of company taxation.” Gisela Stuart, a former British health minister who helped write the draft EU constitution, complains that “over the last decade a number of court judgments have step-by-step drawn health into the internal market.”

New laws are likely to lead the court into fresh pastures. Fidelma Macken, the ECJ's Irish judge (each member country nominates one), predicts that the expansion of EU powers in justice and home affairs and the creation of a European arrest warrant will mean that “large numbers of lawyers specialising in criminal law will start appearing in our courts.” If the EU ever agrees its new constitution, it is likely to include a Charter of Fundamental Rights, which will mean that the ECJ could be called on to define such things as “unjustified dismissal” or a “high level of consumer protection”. The British government argues that the charter should not lead to a significant expansion in EU powers, because all the rights defined in the charter already exist elsewhere in EU or national law. But Judge Macken warns that it would be “foolish” to assume that the charter will have no impact on the court's jurisprudence. Indeed, some lawyers believe that, in time, the Charter of Fundamental Rights could become as influential as the American Bill of Rights in defining and developing federal power.

**Luxembourg is no Washington**

Judge Skouris acknowledges that the ECJ's role “has been comparable to that of the US Supreme Court.” But he points to two big differences: the ECJ cannot choose which cases to consider; and the appointment of judges is less politicised than in the case of the Supreme Court. “Candidates for the European Court are, to my knowledge, never scrutinised based on their views (ie liberal or conservative) that they have taken on specific legal issues,” he says. Individual voting records of Supreme Court justices are a matter of public controversy, but dissenting opinions within the ECJ are neither publicised nor explained.

These differences, plus the fact that the ECJ is based in sleepy Luxembourg, have meant that the court's role in defining and expanding EU powers has rarely attracted the same attention as Supreme Court rulings. But that period of political invisibility is drawing to a close. In recent years, the court has become a target of criticism for Eurosceptics. Paradoxically, its greater political visibility is coming at a time when it is becoming less reliably federalist. The notion that the ECJ is always in alliance with the commission has been undermined in recent years by a succession of negative judgments on commission decisions in merger and competition cases. That Belgium, France and Germany, the three countries said to be most in favour of “ever closer union”, also head the blacklist of countries that have failed to implement EU directives, and are therefore in danger of court action, further muddies the picture of a straightforward alliance between the court, the commission and ardent federalists.

The commission certainly cannot assume that it will get a satisfactory result on the stability pact. The law is complex, and even if the ECJ decides that the council exceeded its powers, it will struggle to enforce any judgment, still less to fine France or Germany. Ultimately the row over the pact will have to be settled politically, not judiciarily. At any rate, the judges know that this time they will be under the full glare of the media—something they may have to start getting used to.