

Christopher Vajda QC, former UK CJEU Judge, delivered the following keynote speech at the GCR Competition Litigation Conference on 3rd November 2020.

Good morning to you all wherever you are. It is a great pleasure and privilege for me to give the keynote address in opening this conference. When Anthony Maton invited me to give this address at the end of last year, the world looked rather different. The United Kingdom was still a member of the European Union, I was still a judge at the Court of Justice of the EU, and a search on the internet for the words covid 19 would have drawn a blank. Since then, the world has moved on.

What I plan to do this morning is to reflect on my experience of my time at the Court of Justice and then turn to look at how competition law litigation might develop both in the EU and in the United Kingdom.

Let me start with a little bit of my own personal history. The first time I appeared at the Court was as a very Junior Counsel in an application made by Ford in the 1980s to suspend a Commission interim measures decision that imposed a positive supply obligation on Ford for a suspected breach of Article 101 TFEU. As you can imagine, that was a highly controversial decision: did the Commission have power to impose a positive supply obligation in respect of a non-dominant undertaking? Although there were written pleadings, I still today recall the oral hearing which lasted virtually a morning in front of the President who asked advocates on both sides a number of searching questions. It was very similar to an English style hearing. However many hearings involved no interaction between the Court and the advocates. As late as the mid-1990s when I pleaded a case, which was important enough to merit the Grand Chamber of the Court, there was not a single question. After the hearing, my client turned me to ask how I thought the case had gone. I told him I was no wiser than him. Why, one might ask, did the Court attribute the case to the Grand Chamber but have no questions? I should add it was not because they were entirely persuaded by my advocacy as we lost the case.

I am happy to say that such an approach is now part of legal history. When I arrived as a judge in October 2012, the rules of procedure of the Court of Justice had just been revised and the right for the parties to an oral hearing was, in effect, removed. The decision now lies with the Court. The test today is that there should only be an oral hearing where there will be added value to the written pleadings. In other words the question the Reporting Judge (juge rapporteur), and the Advocate General ask themselves is whether, in the light of the written pleadings, the answer to the points

in the case is sufficiently obvious so that there is no need for an oral hearing. There are cases which fall within that category. The same approach guides the Court of Justice in appeals from the General Court. In all the oral hearings that I sat on during my time on the Court, I cannot recall a single case where no questions were asked. My practice when I was the Reporting judge was always to ask the parties in advance in writing either to concentrate on a particular issue and/or ask questions for response at the hearing. Most of my colleagues adopted the same approach. This is particularly important in competition and state aid appeals from the General Court where a large number of points are often taken on appeal. If there is to be an oral hearing, it needs to be limited to the points where the Court requires further assistance.

The importance of advocacy, particularly in its oral form, is probably the greatest contribution that the United Kingdom and its legal profession made to the development of the Court over the last 40 years or so. I am confident that the importance of advocacy is now so well embedded in the DNA of the Court that it will continue undiminished after Brexit.

As I have said, competition and state aid appeals often raise many points on appeal. Indeed, I recall that in an early competition case where I was the Reporting Judge, which was an Article 102 abuse case, the appeal from the General Court's judgment raised more than a hundred points in total. I do not recommend such an approach. It is, in my view, the task of an advocate to winnow out the chaff so as to enable the Court to concentrate on the points of appeal that have a realistic chance of success. Shortly after that case the Court introduced a Practice Direction that appeals should not, save in exceptional cases, be more than 25 pages long.¹ In this context, it is remarkable that even today some advocates do not follow Article 169(2) of the Rules of Procedure and identify the precise paragraph in the General Court's judgment that is said to contain an error of law and to explain succinctly what that error of law is.² The consequence is that one's appeal is inadmissible, to use the rather colourless English translation of the French term, or, as we say more directly in English legal parlance, struck out.

Until 1 May 2019 there was no permission or filter mechanism for the bringing of appeals from the General Court to the Court of Justice. However, a filter system (permission to appeal mechanism) came into effect on 1 May 2019. The system requires an applicant to justify the admissibility of its appeal in a separate request for permission to appeal, in which he needs to set out why the question the appeal raises is fundamental to the uniformity, coherence and development of EU law. It applies to appeals against decisions by the EUIPO and other administrative bodies where the General Court acts as an appeal

¹ See §21 of Practice Directions OJ L42 I/1

² See also *ibid*.

court against decisions, which have already been subject to an appeal to an independent administrative authority. It does not therefore apply to competition and state aid cases where the General Court is the court of first instance. However, there has been in the past discussion as to whether that filter system should be extended to such cases in the future, particularly to deal with what I term “kitchen sink” applications. An appeal that raises ten grounds might be granted permission but only in respect of, say, one ground.

Whether that happens depends, in my view, essentially on whether the volume of cases before the Court of Justice will continue to grow. In 2011, the last full year before I joined the Court, 688 cases were brought. Over 60% were preliminary references and appeals from the General Court accounting for just *under* 25%. Since then there has been an upward trend in incoming cases. The comparable figures for 2019 were nearly 1,000 incoming cases (an increase of around 40 % from 2011), of which appeals accounted for just *over* 25%. However, in 2020 there has been a significant drop in the number of incoming cases. While the drop in the number of references can be attributed to the impact that Covid is having on litigation in the national courts that is unlikely to explain the drop in appeals from the General Court. A more likely explanation is the effect of the filter system, which has now been in operation for over 18 months. No trademark appeal has yet been granted permission to proceed and this may have had the effect of discouraging such appeals. Whatever the cause of the drop in the number of appeals from the General Court, if this drop is sustained it may be unnecessary to extend the filter system to other categories of appeal, such as competition and state aid.

I now will turn to say something about the use of language at the General Court. There has been, so far as I can see, little public debate on this issue.³ While the United Kingdom was a member of the EU and I was the British judge on the Court of Justice, it might have been inappropriate for me to say anything about this in public. However, I feel those constraints now no longer apply to me in quite the same way as they did. More importantly, it is, in my view, in the interest of the stakeholders within the EU judicial system and indeed of the public interest of the European Union that this issue be the subject of public discussion.

It is not a great surprise that most applications to General Court are filed in English. Over the last four full calendar years (2016-2019) between 35% and 40% of all applications were filed in English, which means that English is the language of the case. Cases where French and German have been the language of the case have been running at about half that level. The figures have not

³ But see *The Working Language of the CJEU: Time for a Change?* Professor Anthony Arnall (University of Birmingham), *The Institute of European Law Birmingham Law School University of Birmingham, Working Paper 01/19.*

changed since Brexit. In the first 9 months of 2020 English language cases have accounted for over 40% of new cases, the next language being French which is below 20%. This is not surprising since the majority of cases heard at the General Court are competition and trademark cases and English is the international business language. I would add that the position is different at the Court of Justice where the language of the case is much more diverse, (in fact German is the most used language but it does not have quite the predominance that English has over languages in the General Court), and where many cases concern rights of individuals as opposed to corporations.

But let me return to the General Court. Although most cases are lodged in English, French is the working language of the General Court. This means that all cases have to be translated into French, including English language cases which account, as I have said, for over 40% of such cases. The practice is that it is only when all the translations are ready, that the judicial assistants (*référéndaires*) and judges will start work on the case. While the oral hearing will, in an English language case, be conducted in English the judgment will have to be drafted and agreed in French. Only after that happens can the judgment then be translated into English for delivery in the language of the case. In a big competition case the time taken to translate the pleadings into French and the translation of the judgment into English can add six months or indeed more to the duration of the proceedings.

Let me take the recent judgment in Case T-399/16 CK *Telecoms v. Commission* where CK challenged, successfully as it turned out, a merger prohibition decision of the Commission. The proposed merger was notified to the Commission in September 2015. The Commission adopted its prohibition decision, which ran to 1000 paragraphs, in May 2016. The Commission will have worked in English. As many of you know, the Merger Regulation lays down a strict timetable for the Commission to reach a decision. Most merger cases are completed by the Commission within a year from notification. The General Court, for its part, took almost 4 years to deliver judgment in May 2020. While it is true that the case was complex and there were a large number of confidentiality issues to rule on, a significant part of the time of the time taken is attributable to using French as the working language. It was an eagerly awaited case as it raised the hotly debated question of whether EU merger law would permit a reduction from four to three competitors in the retail and wholesale mobile phone market. Indeed, it was in part for this reason that the Commission rejected the UK's request to transfer the case back to the UK.

The use of French as the working language of the General Court not only has an impact on the speed of judgments of the General Court but also on the composition of judges and judicial assistants.

It is very difficult for non-native French speakers to be recruited as judicial

assistants to the judges. They do not have an essential prerequisite for the job, namely the ability to draft quickly and accurately in French. Hence, it is not surprising that native Francophone judicial assistants predominate. Indeed, some EU nationalities are not represented at all among the judicial assistants. This is unfortunate. Many suitably qualified European lawyers from non-francophone legal traditions are excluded from participating in the largest international court in the world simply on grounds of language. English is the *lingua franca* of the EU legal community. Considerably more EU academics of the age of a judicial assistant (mid 20s to mid-40s) are able to lecture and write in English than in French. The same is true of practitioners. In an era when recruitment from diverse backgrounds is so important, that diversity is lacking at the level of judicial assistants.

The use of French also has an exclusionary effect at the level of the judges. Someone who does not have a good command of French is unlikely to be an effective member of the Court and so, for this reason alone, may not be appointed as a judge. As the Article 255 Committee – the panel that has to produce an Opinion on every judicial candidate put forward by the Member States for appointment as an EU judge - put it in their most recent annual report:

“the ability to acquire proficiency, within a reasonable time, in the working language of the European courts [that is to say French] and thus be in a position to contribute to deliberations with other members of the court, constitutes an important assessment criterion for the panel.”⁴

Even those who make it through the Article 255 Committee may be less effective as a judge than they wish both in supervising the drafting of a judgment in French by the judicial assistants and expressing themselves in French in a *délibéré* when the judges discuss in French a draft judgment written in French. That cannot be in the interest of the Court or the European Union as a whole.

What is then to be done? The use of French as the working language is not required by the Treaties, the Statute or the Rules of Procedure. Rather it is, to use the words of Advocate General Kokott in a 2012 case, *Italy v. Commission*, a “tradition”.⁵ So it is open to the Court to change or modify it. In my view, a sensible and pragmatic step would be for all cases brought in the English language to be dealt with throughout their progress through the General Court

⁴ Page 18 of the Sixth Activity Report dated October 2019.

⁵ See the Opinion of Advocate General Kokott in Case C-566/10P *Italy v. Commission* EU:C:2012:368 at §93. “Conversely, the institutions should confine themselves to a single language only in so far as special circumstances make this absolutely necessary – in the context of the deliberations of the Court of Justice, for example, the tradition since 1954 has been for judgments to be drafted internally only in French.”

in English. No doubt this would require some administrative changes but the gains would be immense, in terms not only of speed of judgments in the English language cases but also making the Court a more open and diverse Institution that better represented all the legal talent available in the outside world. It may be that the increasing sophistication of automatic translation systems means that in a few years' time a number of working languages might be possible. But this, in my view, is not a reason for not tackling the problem now.

As I have explained the current diet of cases before the General Court justifies, in my view, English language cases to be dealt with in English. But the argument is stronger when one glimpses a bit into the future. It is clear that competition law policy makers are now moving away from a less interventionist role, the great triumph of the Chicago school of economists, to a more interventionist stance and one that involves more *ex ante* control. This has been driven by the exponential growth of the so-called Big Tech companies and public concern about some of their business practices. For its part, the European Commission is proposing a number of initiatives to tackle this perceived problem. This includes a Digital Services Act which will put new obligations on digital service providers and a Digital Markets Act, which will examine how a particular market is functioning through a market investigation tool and enable *ex ante* prohibitions to be imposed on digital gatekeepers. If these proposals come to fruition, any Commission intervention must be subject to effective judicial scrutiny. Effective judicial scrutiny in fast moving digital markets requires the courts to act speedily. The General Court will have a key role to play here. It has the resources with some 52 judges all supported by judicial assistants.

The move to growing intervention by the competition authorities is not surprisingly also on the agenda of the UK competition authorities who will no doubt wish to show that in a post Brexit era they are as, if not more, effective than the EU competition authorities. There is nothing like a bit of competition between competition authorities! Judicial challenges to decisions of the UK Competition and Markets Authority go to the Competition Appeal Tribunal, (the CAT). The CAT has established itself as an excellent and efficient competition court. It is able, with fewer resources than the General Court, to produce judgments quickly when it matters. Thus, in *Ecolab* where the CMA blocked the merger and ordered divestiture on 8 October 2019, the CAT delivered judgment on 21 April 2020, so in just under 6 months. I caution against an exact parallel with *CK Telecoms*, the General Court merger case I mentioned earlier. The issues in *Ecolab* were less complicated, there were fewer confidentiality issues and significantly the challenge in the CAT is by way of judicial review rather than a full merits review as before the General Court. But, having said that, the effectiveness of any judicial oversight in fast moving markets reduces the longer judgment take to deliver. Even where there is a full merits review courts should aim, in my view, to deliver a judgment within a year or so.

I do not want to leave you with the impression that I am critical of the work of the General Court. Far from it. There can be absolutely no doubt that in the 30 years of its existence it has fully lived up to the expectation that it would properly scrutinise the competition decisions of the Commission. In doing so, it has made a major and positive impact on the development and practice of EU competition law.

In my view the work of all courts benefits from the oxygen of publicity. The way courts reach decisions is often the subject of uninformed comment and judges are often portrayed as not just old (generally correct but I would hope that with age comes wisdom) but also out of touch. Those of us who are present at an oral hearing are able to witness what an important occasion it is. I recall one of my last cases I did at the Bar was a case before the General Court. The Reporting Judge had mastered all the documents in the case and asked all the advocates detailed questions on a large number of documents. No one who witnessed that hearing could fail to be impressed. However, even in the pre covid era few people travelled to Luxembourg to attend these hearings. In my view covid has strengthened the case for live streaming of hearings. It is a fundamental principle that courts should be open to the public. In the era of covid and remote hearings one needs to look at new ways to achieve this. I would urge the European Courts to embrace live streaming, with appropriate safeguards against abuse. I know that there are technical difficulties at the Court of Justice where there are often a large number of languages spoken at a hearing but I would have thought this is something where the General Court could give the lead given that most of its cases are appeals where generally only one language is used. Live streaming would be able everyone to see how justice is being dispensed and would help bring the Court closer to the citizen, including law makers, practitioners and students.

Crossing the Channel what does the future hold for competition law in the UK post Brexit? The older of you in the audience will recall that for about the first 25 years of UK membership of the EU the UK maintained the extremely formalistic Restrictive Trade Practices Act. I cannot recall that anyone shed a tear when it was buried and replaced by the Competition Act 1998. By that Act Parliament chose to bring modern competition law into UK domestic law by the wholesale importation of Articles 101 and 102 and the accompanying case law of the CJEU. It was a vote of total confidence in the EU competition regime. And by having a uniform regime of domestic and EU competition law it promoted legal certainty. So far as I am aware the Act was regarded broadly as a success not just by lawyers but also the business community, as it provided one set of rules for behavioural conduct and hence promoted legal certainty. Nevertheless, I do recall that the OFT did, in the early years of the noughties, have some reservation about the Commission's application of Article 102 in some dominance cases and for that reason refrained for a while from adopting any dominance decisions under domestic law. Be that as it may, it is obvious

that this regime had to be modified when the UK has left the EU and has no role in any of its Institutions. Hence the replacement of section 60 of the Competition Act by a new 60A which, broadly speaking, preserves the existing body of EU case law pre exit as part of the UK domestic competition regime but permits its development in a different direction if the CMA or a court, to use the language of 60A, “thinks that it is appropriate” having regard to six enumerated factors. However, so far as I can see, there is no guidance on how the CMA propose to apply s60A. Of course having a different domestic regime in respect of conduct that falls entirely within the domestic regime may not matter but it will matter in respect of conduct that is subject both to the UK domestic regime and EU law. Careful thought needs to be given to this. My own view is that it is unlikely that UK competition law will develop in a substantively different way in Article 101 cases but there may be a different approach in some 102 cases. As I have already indicated, the application of Article 102 has always been more controversial than the application of Article 101.

What about the other way round? Will a new UK approach to say Article 102 cases influence the development of EU law? I would anticipate that the Commission will watch developments in the UK not with a view necessarily of following them but rather to see how a European country with a developed and active competition enforcement policy tackles the new problems that arise, particularly in digital markets. Likewise the CAT is a recognized beacon of competition excellence and its judgments are cited in non-UK jurisdictions. Indeed, I recall sitting in an Article 101 case where the Commission cited a judgment of the CAT. As you probably know, it is not practice of the EU courts to cite even judgments from the courts of the Member States, let alone judgments from a third country. But that does not mean that such judgments are of no value outside their own jurisdiction.

In conclusion, I would hope that Brexit acts as a competitive spur to both the administrative and judicial regimes of the UK and the EU to adopt the best practices of the other so as to ensure that both are equally well adapted to meet the competition challenges of the third decade of this century. Thank you very much.