Speech to Law Society. December 3, 2015. London

Your organisers evidently made an error when choosing the speaker for tonight. Although I am in years ancient, I am anything but ancien in seniority. I was surprised to be nominated and for six weeks now have been delighted by my new surroundings and fascinated by them. Tonight, I propose to tell you some facts about the court; note some challenges it faces; and reassure you that there are plenty of competition law problems which deserve expert attention.

Arrivals and Departures

If you look at the family photographs of successive formations of the Court hanging in the hall downstairs, you will see that there are 33, reflecting the frequent arrivals and departures which remain a feature of the Court's life and one of its problems. I am the 69th judge to arrive, and after my arrival a 34th picture will go up on the wall. But as you will hear, 35 and 36 and 37 will follow soon.

Each new nomination and each impending departure affects the court's work. We sit in chambers of 3 and 5, mostly 3. So if Judge Du Pont knows he will retire next September, his case load will be run down and the chamber will avoid including the departing judge in new cases. The work of the chamber is not paralyzed but it is affected.

Now if Judge Du Pont knows there will be elections, and comes from a different party than the current government, the Judge may hope to stay but may not be sure. Some judges are not well treated by their states. They may learn at short notice that they will be replaced. UK judges happily do not face that challenge. I mention this not as a plug for judicial independence, (not necessary to this audience in this city), but to record an undernoted burden on the court. Judicial fluctuation makes it more difficult to be consistent and to plan big cases.

The task of judicial review

The motivation for the Court's creation was to institute a system of judicial review which was more rigorous than what was available from the ECJ. Competition and

antidumping measures were the biggest items on the agenda of the private bar. (One reason advanced against the creation of the new court was that close judicial scrutiny would give aggressive Japanese exporters another weapon to oppress European industry). So, in 1989, the Court of First Instance was established. There were 12 judges. The first president was José Luis da Cruz Vilaça. My old mentor David Edward was the first judge from the UK, and young Bo Vesterdorf was the Dane. In the Court's first year of operation it produced 58 judgements.

Over the years there has been an evolution in the mix of cases. The basic principles of how to do a dumping calculation have been settled following international negotiations rather than judicial review. The Commission's policy on many competition themes has been broadly endorsed. The Court has learned a lot of trademark law: more than 2000 trademark appeals from the Office for Harmonisation in the Internal Market (OHIM) in Alicante. This year the mix of work is 38% intellectual property (trademarks, plant varieties and designs), 11% state aids, 3% trade, 3% *fonction publique* (personnel cases) appeals, 7% sanctions and asset freezing. Antitrust accounts for only 5%.

In the early days of the Court of Justice, in the 50s, out of 80 cases, 37 were in French, 23 in Italian, 17 in German and 3 in Dutch. In 2015, 42.5% of cases before the General Court have been brought in English, 11.1% in French, 14.9% in German and 12.0% in Spanish.

Delays and other problems

If you were planning to lament the terrible delays which afflict the courts, I must disappoint you by revealing the reality. The average turnaround time for all cases is currently 26 months. The backlog has been slimmed down greatly. In 2010 the Court closed 527 cases. In 2014 it closed 824. The current caseload is about 1300 cases, a more or less stable number despite the fact that 912 new cases were introduced in 2014 as opposed to only 636 in 2010.

These figures are difficult to digest when delivered quickly, but I can summarise them. The problem of judicial delay is far less than it used to be. It is not the case that appeals take inordinate time to reach resolution.

In 2010 there were 79 new appeals in antitrust cases. In 2013 there were 13, and in 2014, 41. Year to date in 2015 the figure is 12.

The decline in appeals reflects the preference of Commissioner Almunia to encourage the resolution of cases by negotiated compromise: Commitments to end 102 cases and settlement of cartel cases by granting a 10% discount on the fine. The tendency towards settlements which avoid judicial review is a phenomenon which has troubled some, such as AG Wathelet. I note that Commissioner Vestager has taken a rather different view, recognising the merit of advancing the case law by judicial review.

The success rate of appeals before the two courts may be of interest. I would say that of the totality of antitrust cases initiated after January 2010, one third were successful in whole or in part before the two courts. That is based on a review of the court's records but is not a precise figure.

The reform of the Court

You will be aware that the reform of the structure of the courts forming the Court of Justice of the European Union has been a subject of debate for years.

As at the time of the creation of the Court of First Instance in 1989, the underlying problems of judicial review were caseload, delay, intensity of judicial review, budget and – last but very much not least – the necessity for 12 Member States to agree on every comma and semi-colon. That last challenge gets no easier when there are 28 Member States. As you know, in 2004 the EU grew by 10 new Member States, of which 8 were in Eastern Europe and 2 in the Mediterranean. Bulgaria, Romania and Croatia have also joined. There have been colourful debates about the manpower of the court.

In 2009, recognising that its cases were going too slowly, the General Court made a proposal to the Court of Justice to create a specialised court in trademark cases. In 2011 the Court of Justice proposed legislation to increase the number of judges by 12 at the General Court. The number proposed was then reduced to 9 extra judges. In the meantime the backlog has more or less gone; but year on year the caseload is getting bigger. All these elements were extensively discussed. In any event, the generosity of those politically responsible for such things has delivered us the following increases:

1. During the period up to **September 2016**, 12 judges will join us from Belgium, Cyprus, Czech Republic, Greece, Spain, Hungary, Lithuania,

Luxembourg, Latvia, Poland, Sweden and Slovakia. The countries were chosen by lot.

2. Then the **Civil Service Tribunal** will be folded into the Court, adding 7 new judges.

3. **In September 2019,** 9 more judges will be added and the Court will reach 56 judges.

So judicial review in Luxembourg will not suffer for lack of manpower. The 255 Committee (the Politburo of six national chief justices plus a parliamentarian who verify the credentials of new nominees) will be very busy. I hope that you are minded to challenge lots of EU acts!

The courts in Luxembourg have been too much in the news for not the best reasons over the past three years. That's the bad news. But the debates are over. The decisions have been taken, and the courts are getting ready to implement them intelligently.

Among the **questions on the agenda** are:

1. Is it appropriate to change traditional methods of working?

2. Should there be larger chambers? Should the General Court appoint advocates general as a regular matter for big questions? Should chambers be specialised? Since its creation, the Court has sat with an Advocate General on 18 occasions, but not for some years now. The last and biggest Grand Chamber judgement was Microsoft, ten years ago. There were also orders in two cases on admissibility in environmental protection in 2010.

3. How do we reconcile the need for intense judicial review with the fact that the Treaty did not establish "*pleine jurisdiction*" as the normal standard?

4. How do we reconcile the traditional timelessness of important judgements in big past cases with the fact that competition law evolves, as do markets and technology, so that what used to be clear in law may no longer be so clear in economic theory or in practice? Competition theory and competition law have evolved in many ways. What does that mean for the early cases, the great judicial pillars of the twentieth century?

5. Is there a ceiling upon the fining discretion of the Commission? How should our court review and assess use of that discretion, in the light of the Charter and the Convention?

The General Court is reflecting on how to use its new manpower most successfully and how to use the additional judges to produce jurisprudence which is consistent, rigorous and satisfying to the most important person in the courtroom. Sir Robert Megarry used to ask who that was to students and guests. Can anyone here recollect his response?

Direct and Individual concern

It is not enough to have judges lined up, hungry to do justice. Our jurisdiction is limited. (I used to receive, in my days as a pro bono leader, requests from those who had encountered problems of all arts to take their case to victory in Strasbourg and Luxembourg, two cities and two courts which delivered justice by some miraculous multi-national quality.). The *Tribunal de l'Union européenne*, the General Court, has limited jurisdiction. It is an appellate court for judicial review of the actions (not quite all the actions, as some are not judicially challengeable) of European institutions.

Although a measure was agreed in Brussels and although it was obviously a European measure, and was best challenged in the European courts, the interpretation of "Direct and individual concern" was a major obstacle to direct judicial protection of individual rights. After a lot of debate, the Lisbon Treaty added a new test to Article 263, paragraph 4, enabling individuals to challenge regulatory acts which are of direct concern to them and which do not entail implementing measures.

The idea was to open the doors of the Court more generously to those who were clearly affected by European Law and implementing decisions taken in Brussels. Fishermen, sporran makers, farmers, importers, each have had grounds to say "Why should I not have the right to challenge before a European judge the European rule that will put me out of business?".

The case law in interpreting the new test has been in my academic view rather conservative. For example, in 2013, the Inuit native hunters of the Canadian Arctic were unsuccessful in challenging the Regulation on trade in seal products.

According to the Court of Justice, the concept of "regulatory acts" covers all acts of general application apart from legislative acts.

More recently, in April 2015, an action for annulment brought by a group of EU cane sugar refiners negatively affected by the Commission's sugar quota regulations failed on admissibility grounds. The Court of Justice found that the challenged regulations produced their legal effects only through the measures taken at the national level and entailed therefore "implementing measures" within the meaning of Article 263(4). According to these cases, EU measures continue therefore to be subject to quite stringent admissibility rules.

I expect that the debate will continue over whether the Treaty amendment had the effect of opening the door to direct judicial review or of installing an extra lock on that door.

Languages and words

The Court has challenges, of course. It is faced with 23 languages of procedure plus Irish, and its judges come from 28 countries with a very wide range of legal and administrative traditions. It uses French as the lingua franca. Judgements must be accessible to the citizens of 28 countries in their national languages. Translation is of very high quality but that quality takes time. The more the pages, the more time. It is not surprising that about half of all the staff of the EU courts are engaged in translation.

I know that Brits love oral argument and British lawyers are exceptionally good at it. But the need for interpretation places limits on how far we can go in using oral remarks to debate the case. Oral argument necessarily implies interpretation. The interpretation in my experience thus far is of extremely high quality. But if lawyers speak too fast, the interpreters must omit some phrases or ideas so as not to be left behind. But different interpreters may omit different things. So when you make suggestions, please remember: not everyone speaks the same native language.

Prolixity

There is a related problem and that is prolixity.

The Magill decision by the Commission was 9 pages long and the decision of the ECJ was 31 pages long. That was a big case of big principle. Intel, 25 years later, also a big case of principle, was 518 pages long at the Commission and 328 pages long in the General Court. Servier, still at first instance, received a decision 805 pages long. The new rules of procedure implement the Court's existing practice on page limits, that is, brevity unless there is a good reason. However, as a former practitioner and as current judge, I warmly recommend the public authority when drafting a decision: be brief enough and be clear enough to allow the reader readily to identify what was the problem? I deny that 500 pages are necessary to do that. Indeed I suggest that 500 pages will obscure the problem, not elucidate it. As a member of the ECJ said to me yesterday "*une décision de cinq-cents pages est illisible*".

Competition law hot topics

What are the competition law topics which might emerge in the next 12 months? For those of you who are minded to write a PhD thesis, I suggest the following:

1. Where shall the line be drawn when examining the classic problem of the contract which has restrictive features and pro-competitive features? Is the analysis to be done using the four rather severe tests prescribed in Article 101(3) or is the analysis to be done as if we are in the field of ancillary restraints?

2. The new Damages Directive and the practical experience of the English courts in handling damage claims. For the moment the English courts are leading in the healthy competition between jurisdictions to attract litigation.

3. The sexy subject of "by object" as opposed to "by effect" deserves thoughtful analysis. Should we attach legal weight to moral intention, commercial purpose, email proof of bloodthirsty aggressive intent? Do we condemn because of words on the page (or email screen) or do we condemn because of the actual impact of the conduct? Does it matter? What if parties hoped that their concertation would damage their competitors, but life went on and the plot failed completely?

4. Are there any grounds for believing that competition enforcement by an administration subject to respectful judicial review presents problems in the light of Article 6 of the HR Convention which provides for trial before independent and impartial judges? Putting it differently, is Menarini the last word on the right to independent judges in a criminal case?

I conclude.

You may feel dis-satisfied with the performance of the political leaders of the European Union. Despite the Euro-label on this event, you may feel Eurosceptical, or even – I hope not – Brexitical. You may feel that the amazing achievements of European integration lie too far in the past and that the European tank of goodwill is running low on fuel. As you can imagine, political questions do not fall within our remit. Other questions are however eligible for judicial review.

Judicial review is a vital element of quality control. Courts offer a remedial function; not quite the same as the emergency room in a hospital, but the comparison is not wholly fanciful. As doctors cannot choose their patients, no more do courts choose their workload. If there is a flood of sanctions measures or a new cartel decision, we know there will be a surge in Luxembourg. And just like conscientious hospital staff, we want to be of assistance, by rendering decisions which are convincing and timely. Judges read law reviews and attend conferences and write learned articles. We welcome helpful comments and suggestions, critical or enthusiastic. Our court is aware of the debate. Our court is aware of its supposed imperfections. Just like the National Health Service. It awaits new resources and plans to use them well.

To put it as clearly as I can: we look forward to a post-Christmas rush. Our Court is open for business.