Recent Case Law of the European Court of Justice

I will divide my talk into two parts. The first part will be about the Court of Justice: what it is doing at the moment and what its problems are. This, of course, is relevant to the reform of competition law and the capacity of the Court of Justice to perform the role which that would impose upon it. In the second part, I will mention one or two recent trends in the case law of the Court.

I. General Remarks

First, about the Court in general. The current situation is that about 20% of cases are dealt with by the plenary court and the remaining 80% by chambers of either three or five judges. The selection process depends in the first place on whether the case is considered to be a case of principle - a case raising a new point or a very important point. In that event it remains with the plenary court. If it is a purely technical case, it will be sent to a chamber of three. If it is a more than purely technical but not a major case, it will be sent to a chamber of five on the understanding that a chamber of five does not materially change or depart from the existing jurisprudence.

I would like to emphasize this point at this stage, because people tend to read all the judgments that come out of Luxembourg as if they were of equal value. For anyone accustomed to a case-law system, that is not the way to look at it. So I ask you, when you are looking at the cases, to ask yourselves: Is this a case decided by only three judges, has it been decided by five or has it been decided by the plenary. It is only if the case was decided by the plenary that you should assume that the jurisprudence is perhaps moving in a new or different direction.

This is a particularly important consideration now, because the Court is very seriously overloaded. And it means that - to be quite honest - a judge cannot possibly keep up with what the other chambers are deciding. Once a case has gone to another chamber then it is for that chamber to decide. As a judge, one must rely on one's "référendaires" to tell one what is happening elsewhere. To give you some impression of the current rate of production, in the plenary and in the
chambers in which I sit, we have decided about twenty cases in the last two weeks.

A further difficulty is that we do not have enough translators. The consequence of that shortage is that in only three of those twenty cases will the judgment be delivered in July. Ten judgments will not be delivered until November and the rest either in September or October. And that situation is not getting any better. In fact it is getting worse. With regard to translation into English there are particular difficulties. It is proving almost impossible to find translators into English because you can imagine that if a lawyer is capable of translating - and this is the test - from at least two European languages into English, then he or she probably has a good chance of getting an extremely well paid job in one of the large international law firms.

We try - as far as possible - to get all judgments on to the Internet by four o'clock on the afternoon they are delivered. That also is beginning not to be achievable, but we still try to make it possible. But we have occasional difficulties. For example the loading of the material onto the Internet server is done by the Commission and because of Commission holidays the Court's site is currently incomplete. That is life and we live life just like you do.

Now, on the 1st July 2000, we will have new rules coming into force. These will be of some significance.

First, when dealing with a preliminary reference, the Court will be in a position to ask the national court to give greater details or to answer questions either on the national law or on the facts which are necessary to the Court's understanding of the case.

Second, the Judge Rapporteur and the Advocate General will be able, without the permission of the Court as such, to ask the parties to answer specific questions. That will be of considerable importance for minor points of fact where one simply wants to clarify a particular fact but one doesn't want to spend a lot of time at an oral hearing discussing it.

Third, we will have power to dispose of cases by reasoned Order, not simply as at present when the questions referred are "manifestly identical" to questions already put, but also in cases where the questions put have already been dealt with in previous cases or where there can be no reasonable doubt as to the result. That is a major step as far as the Member States are concerned, permitting us actually to decide whether there is a reasonable doubt about the result before all the parties have been heard.
Fourth, there will be provision also for an accelerated procedure, skipping or greatly reducing the written procedure and going straight to an oral hearing with a minimum statement of case in writing.

All this means that the judges are going to have to alter their work patterns - so to speak - because at the moment, a judge normally starts to examine the case in any detail only when all the translations of all written pleadings are complete. Now we are going to have to look at the cases as they come in to see whether they raise questions which have to be referred back to the national court, to see whether it is appropriate to dispose of the case by order or whether it is appropriate to deal with the case by an accelerated procedure.

Fifth, we will have power not to dispense with oral hearings but to insist that the parties say why they want an oral hearing. At the moment, if a party wishes an oral hearing, then we cannot refuse it. That will still be the position, but at least when they ask for an oral hearing they will have to say why.

We are now proceeding towards a further revision of the rules which would allow lodging of pleadings by fax and possibly by electronic means. The aim is to move towards an electronic dossier, only printing it out when necessary. And there is at the moment a proposal before the Council to transfer competence in state aid cases brought by states and institutions to the Court of First Instance. At the moment there is an unsatisfactory situation in that the company which receives the aid has to go to the Court of First Instance in order to contest a decision of the Commission whereas, if the State contests the aid, the case must go to the Court of Justice. So you have a conflict of jurisdiction which, at the very least, delays the progress of both cases.

In the IGC there are further proposals. Our concern is to get greater flexibility in the Treaty provisions, so that it would be possible thereafter for the Council rather than an intergovernmental conference to change the relationship and the competences of the Court of Justice and the Court of First Instance and in particular to transfer some categories of preliminary reference from the Court of Justice to the Court of First Instance.

Two clouds have appeared on the horizon: One is a general unwillingness to do anything of this at all and the other is an enthusiasm to change everything. So at the moment we are slightly apprehensive as to what will come out of this, but we wait to see.

II. Recent Trends in the Case Law

Now, as regards the case law: It seems to me that a number of trends are discernible. The first trend is that there is far less case law about free movement of
goods and agriculture - what used to be the staple diet of the Court of Justice until the late 1980s. Whether that is because of the decision of the Court in Keck et Mithouard\(^2\) or for other reasons, I do not know. But what is very clear is that there is an equal and opposite tendency for an increase in cases about free movement of persons.

All sorts of aspects of free movement of persons are now coming up, not only in obvious fields such as social security, but also in areas which hitherto were not really perceived (and by some countries are still not perceived) as being part of Community competence including direct taxation both of companies and individuals. Again, in the field of free movement of persons there is undoubtedly a considerable unexplored area of company law. There is, for example, the case about the British company which sought to establish itself in Denmark - Centros\(^3\) - which has raised a considerable amount of noise in Germany, although I must admit I thought we were just interpreting Article 58 of the Treaty. This week we had the hearing in a case involving the notion of citizenship\(^4\), and there are many cases which, as well as individuals and their families, involve companies and the commercial world as well.

In that connection it is worth mentioning an idea attributed to Jean Monnet, namely that the whole Treaty is about competition. Competition comes up, not only in the context of Articles 85, 86 and 90, but in the quite different field of freedom to provide cross-frontier services, where the provision of the service involves using people - particularly in the construction trade. If you go from one country to another to carry out construction work do you, as the employer, have to pay the minimum wage of the host country? If so how is the minimum wage calculated? Does the minimum wage simply consist of what is prescribed as being the minimum hourly rate or do you take into account pension advantages, holiday advantages, social security advantages and everything that goes with being an employee? What records do you have to keep on the site? Do you have to keep records in a book prescribed by the host state or is it enough that you keep your records in the book that you normally have in the state from which you come?\(^5\)

If you are a French security company and you are asked to provide security guards for a supermarket in Belgium and you send a security guard for a shift from eight in the evening till eight in the morning, and another one the next day, and another one the next day, are these workers to be treated as French workers and therefore subject to French social security law and French minimum pay

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\(^3\) Case C-212/97, Centros Ltd/Erhvervs- og Selskabsstyrelsen, [1999] ECR, I-1459.


rules or are they, for this purpose, Belgian. And again how much do you take into account to decide what the rule should be and how it should apply.6

These are - so it seems to me - illustrations of the fact that competition in the broad sense goes well beyond the classical Chapter of the Treaty on competition because really what one is talking about is whether it is worth for an employer on one side of a frontier tendering for a contract on the other side if it involves a complete recalculation not only of the costs in terms of material but also in terms of the labour costs.

Another rather simple example involving Germany is that a German architect employed or arranged to employ a Dutch company to do the tiling in a contract in Germany.7 But the Dutch company was not registered in the trade register in Germany. And it would have taken six to eight weeks for that company to be registered on the trade register. Is that a barrier, an unreasonable barrier, to the freedom to provide services?

That is an illustration, I think, of something of which we are seeing more and more as the internal market progresses. Subsidiarity, the application of national rules to normal situations, can in fact become a barrier to cross-frontier movement and in particular in the field of cross-frontier movement of people and services.

Another example of the same sort of consideration, I think, comes in the field of pensions. There you have the *Albany* case.8 The issue was: Is a collective agreement between employers and employees to set up a ”second pillar” pension fund (additional to the social security pension but less than purely voluntary) an agreement which is struck at by Article 85. The answer of the Court was no, because such an agreement should be seen in the light of the social policy provisions of the Treaty and not in the light of the competition provisions. Nevertheless, having set up the pension fund, that fund itself becomes an undertaking for the purposes of Articles 85 and 86.

That case illustrates something which has not been fully observed since Maastricht. One of the effects of the Maastricht Treaty was to remove from the Treaty the Title heading ”The foundations of the Community”. Before ”Maastricht” the contents of the Treaty beginning with the free movement of goods and going through to Article 100 were called ”The Foundations of the Community”. That heading has now been removed and all those matters are simply ”Policies”. The

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consequence is that you now have a potential conflict between a wide variety of norms, some of which are about the four freedoms, some of which are about competition in the technical sense and some of which are about social policy, health, education, industry, research, environment and so on - a proliferation of norms, which have to applied at the same time without any indication as to which is more important than the other.

An example of that is the Rioja case very recently decided. In 1992 the Court held that it was contrary to the rules on free movement of goods for Spain to prohibit the export in bulk of Rioja for bottling elsewhere. And eventually Belgium took Spain to the Court for failure to comply with the Court's judgement. And the Court held this year - eight years later - that the law had moved on and that the protection of denominations of origin, and consequently of the goodwill enjoyed by producers in a region, is now a consideration which has to be put into the balance against the formal requirements of free movement of goods.

And just one other example of the same sort of thing in quite a different field. A gentleman working in Austria but of Italian origin is bilingual in German and Italian. A bank in Südtirol advertises a post, requiring that candidates must be bilingual, but that the only proof is a certificate which you can get once a year in Südtirol. The Court held, and this is a complete innovation which was therefore decided by the plenary, that Article 48 applies as between private parties. Private employers are required not only not to discriminate on grounds of nationality, but equally not to engage in indirect discrimination.

In the field of "pure" competition perhaps there is one case I should mention which is near to my own heart because I was the Judge Rapporteur. It is the case Company maritime belge or Dafra. In that case we sought to give a fairly clear guidance as to what a collective dominant position is, how it may be acquired and what are the responsibilities of companies that find themselves in a collective dominant position.

Another case which will be interesting and which is still before court, is a case called Masterfoods. Here the question is whether a national court, which is faced with an appeal from a national decision on a competition question, is required to await a decision of the Court of First Instance in a case brought against the Commission which had decided the same point in the opposite way. In other words, does the national appeal court have to wait for the Court of Justice or does

10 Case C-388/95, Belgium/Spain, Judgment 16.5.2000.
13 Case C-344/98, Masterfoods Ltd, Conclusions of the Advocate General Cosmas, 16.5.2000.
the Court of Justice have to wait for the national court or can they both proceed at the same time and maybe arrive at different results?

Just a few other points: Direct effect. I would ask you to note that the law on direct effect has evolved considerably in the light particularly of environmental cases. Direct effect is - one should remember - not an expression that appears in the Treaty. It appeared only very gradually over the years between about 1962 beginning with *Van Gend & Loos*[^14] and the early 1970s, when it seemed to become fixed as an idea concerning the enforceability of rights by individuals.

The environmental cases *Groß-Krotzenburg*,[^15] *Kraaijeveld*[^16] and others have indicated that, even where there is no personal right to a particular solution and thus no "direct effect" in the traditional sense, individuals may have the right to ensure that the correct procedure is followed. This is an extension of the concept of direct effect and I think a better illustration of what it is really about. This was made clear, I think, in the case Portugal against the Commission[^17] and Council[^18] about the textile agreement with India, in which Portugal sought to rely on the WTO agreement. The question was: Did the WTO agreement have direct effect? The way in which the court approached this question (and it was natural to do so since Portugal is not an individual) was to ask itself, is it the effect of the WTO agreement to fix relationships in such a way that the responsibility for deciding outstanding issues has left the province of the executive and the legislature and has passed into the province of the judge?

That is a traditional approach which one can see in American jurisprudence going back to Chief Justice *Marshall* in the 1820s. I think it is a better explanation of what direct effect is about, it is really about separation of powers: has a particular problem passed from the province of legislature or the executive to the province of judiciary so that the judiciary can say what the rule is and apply it.

As regards the European Convention on Human Rights, there was a recent case called *Emesa Sugar*[^19] in which the question arose as to whether the Advocate General in the Court of Justice should be treated in the same way as the "procureur général" in a Belgian case where the Court of Human Rights had said that because the "procureur général" gives an opinion to the judges, this opinion must therefore be open to discussion by the parties before the judges decide. And

[^16]: Case C-72/95, Kraaijeveld, [1996] ECR, I-5403.
[^19]: Case C-17/98, Emesa Sugar (Free Zone) NV/Aruba, [2000] ECR I-675.
our Court held that the reasoning of the Court of Human Rights in that respect did not apply to the Advocate General before the Court of Justice.

More generally, it seems to me that the function of the judge is becoming much less the function of finding a rule and applying it, - even more so if the decentralisation of competition law happens. Nowadays, the function of the judge is much more that of choosing between a number of possible rules and identifying the relative strength of each of them for the decision of the case. Is the environment more important than the free movement of goods? Perhaps the trend started with environmental and consumer protection. But we are now entering a field in which there are many norms of relatively hard or soft law which have to be identified and applied.

The judge is now no longer simply applying an on/off-switch: You find out where the current is, you put on the switch and there is the answer. Now the judge is much more like a disc-jockey in a dancehall operating a synthesizer. You have got a lot of pulses coming through and you have to identify what they are and see what is their relative strength in order to provide a satisfactory solution. That will be a problem for national judges if national judges are called on to apply Article 85(3) and they are required to balance the competitive advantages and the consumer advantages of a particular agreement. And that will not only affect judges, but obviously lawyers as well, since they will have to be in a position to advise their clients how to assess the relative strength of these kind of considerations for the purposes of presenting cases to the courts.