Annual Burrell lecture

London, 9th May 2019

Judge Christopher Vajda, CJEU[1]

Current issues facing the European Court and its users

1 I am delighted to be giving this year's Burrell Lecture. When I received the invitation in the autumn of last year it was not easy, as the British judge on the CJEU, to decide what I should talk on in May 2019, a couple of months after the UK's planned departure from the EU and also my own departure from the CJEU. In discussing a suitable topic with your Chairman, he told me not to worry. I could talk on whatever subject I chose but it would nonetheless be helpful if I could give some tips on how to win a case in Luxembourg.

2 This remark has prompted two observations on my part. First, even after the UK's eventual departure from the EU, many in this audience will continue to appear in cases before the CJEU, either pursuant to the provisions in the Withdrawal Agreement, which provide for a great deal of continuity in the relationship between the UK courts and CJEU, or because they have also become a member of a legal profession in another EU Member State and so continue to enjoy rights of audience in Luxembourg. My second observation was nonetheless one of surprise in that I would have thought that this distinguished audience does not need any advice from me as how to win a case in Luxembourg. However, you may rest assured that I have not ignored the Chairman's suggestion completely.

3 What I propose to do this evening is to begin by focusing on the operation of the preliminary reference procedure - a procedure that is well known to you all - with a particular emphasis on the role of the national judge. Mindful that many of you in the audience will be IP or competition lawyers I will refer to some IP and competition cases. I will then discuss the recent Opinion of the Court in the EU-

[1] All opinions are expressed in a private capacity.

Canada Free Trade Agreement before turning to looking at some current organisational issues facing the Court.

1. *Importance of dialogue between national courts and the ECJ*

4 It is trite to say that the preliminary reference system involves a judicial *dialogue* between the national court and the CJEU. What is perhaps not always appreciated is the importance of the role of the national court in this dialogue. It is the Order for Reference that starts the dialogue. Let me illustrate this by reference to recent examples from the UK and Italy.

5 The first case was *Teva*, a reference made by the High Court in London.[2] It concerned the scope of a Supplementary Protection Certificate (SPC), which grants a supplementary patent protection after the patent of a medicine expires pursuant to Regulation 469/2009 ("the SPC Regulation"). The specific problem in *Teva* was as follows. Gilead marketed a HIV drug under the name Truvada, which contains two active ingredients, TD and emtricitabine. One of the claims of the basic patent mentioned TD expressly as one of the compounds. Another claim, number 27, mentioned a pharmaceutical composition combining one of the expressly stated compounds together with a pharmaceutically acceptable carrier and optionally other therapeutic ingredients. Gilead obtained an SPC based on that claim, that is to say an SPC relating to TD and emtricitabine. Gilead contended that it was sufficient that the product in question fell within the extent of the protection conferred under at least one claim of the patent, which it did because of claim 27. By contrast, Teva said that emtricitabine was not mentioned in claim 27 and therefore the TD/emtricitabine combination could not benefit from an SPC. The relevant provision, Article 3(a) of the SPC Regulation states that an SPC shall be granted when "the product is protected by a basic patent in force".

6 The issue was what is meant by the term "protected". In a careful overview of the case-law of the CJEU, in which the High Court analysed five judgments and three

[2] Judgment of 25 July 2018, Teva UK and Others, C-121/17, EU:C:2018:585.

orders of the CJEU [3] (all of which have been referred by English courts), the High Court concluded that it was still unclear what the meaning of "protected by a basic patent" was. [4]

7 While it was clear that it was not enough for a product to fall within one of the claims in the patent to obtain an SPC and that something more was required, it was not clear what that something more was.[5] This lack of clarity was confirmed by the divergent decisions that had been reached in different courts within Europe as to the interpretation and application of Article 3(a) which were referred to in the Order for reference.[6]

8 The very comprehensive review of the relevant case law both at CJEU and national level by the High Court prompted the Court of Justice to take the unusual step to allocate the *Teva* reference to the Grand Chamber (i.e. 15 judges). It was an unusual step because no SPC case had previously gone to the Grand Chamber.[7] Normally technical cases, such as the cases on the meaning of the SPC Regulation, would go to a Chamber of five or indeed three. So, this is a good

[3] Judgments of 12 December 2013, Eli Lilly and Company, C-493/12, EU:C:2013:835, and of 12 December 2013, Georgetown University, C-484/12, EU:C:2013:828. Order of 25 November 2011, Daiichi Sankyo, C-6/11, EU:C:2011:781, order of 25 November 2011, University of Queensland and CSL, C-630/10, EU:C:2011:780, order of 25 November 2011, Yeda Research and Development Company and Aventis Holdings, C-518/10, EU:C:2011:779.

[4] See *Teva and others v Gilead* [2017] EWHC 13 (Pat) Order for Reference (Arnold J) https://www.bailii.org/ew/cases/EWHC/Patents/2017/13.html.

[64] "it is unclear from *Medeva* and its progeny whether this is sufficient. The judgment suggests that something more is required, but it is not clear whether this is so, or if so what that something more is"

[81] "Although the Court does clearly state that Article 3(a) [of the SPC Regulation] does not preclude a product being protected by a basic patent by virtue of a functional definition, it then says that this is only permitted where the claims "relate, implicitly but necessarily and specifically" to the product in question. What does this mean? How are national authorities supposed to apply this test? The Court does not explain"

[91] "It is also clear that it is necessary that the product falls within at least one claim of the basic patent applying the Extent of Protection Rules. But it is not clear whether that is sufficient. It appears from the case law of the CJEU that it is not sufficient, and that more is required; but it is not clear what more is required.".

[5] Ibid, at para 91.

[6] Ibid, at para 92.

[7] Some Grand Chamber judgments mention the predecessor to the current SPC Regulation. Nonetheless, the SPC aspects in those judgments are only secondary. See the judgments of the Grand Chamber of 11 September 2007, Merck Genéricos — Produtos Farmacêuticos (C-431/05, EU:C:2007:496, points 43 to 45) and of 18 July 2013, Daiichi Sankyo and Sanofi-Aventis Deutschland (C-414/11, EU:C:2013:520, points 74 to 78).

illustration of how the Order for Reference determined the way in which the case was dealt with in Luxembourg.

9 As to the substance, the CJEU confirmed that in order to obtain an SPC it was not sufficient for the product to fall within the scope of application of the basic patent unless that product is expressly mentioned in that patent claim or unless such a claim relates to that product necessarily and specifically. What was required was that the product had to be specifically identified by the person skilled in the art in the light of the description and drawings and the prior art as at the filing date or priority date of the patent and not merely in the light of information which became available later. This was because the purpose of the SPC Regulation to go beyond the results of the research claimed by the original patent. The CJEU observed it was apparent from the Order for Reference that the description of the patent contained no information as to the possibility that the patent invention could relate specifically to a combined effect of TD and emtricitabine for the purpose of treating HIV. Thus, although the final decision was for the High Court, it did not appear that a SPC should be granted in this case.

10 My next example of judicial dialogue comes from Italy. They are the *Taricco*[8] and *MAS* [9] cases. Although in fact two separate references, they raised the same issue. In *Taricco* an Italian district court referred a number of questions on the compatibility with EU law of the shortening of an Italian limitation period, which had the effect of time barring a number of criminal prosecutions of alleged VAT fraud. The basic question was whether such a result was compatible with a number of provisions of EU law. Delivering judgment in 2015 the CJEU stated that Member States are under a duty to provide effective and dissuasive measures to combat VAT fraud. The national court had to determine whether the application of the shortened limitation period would mean that "in a considerable number of cases" the commission of serious VAT fraud would escape criminal punishment because the offences would be time-barred. If this was the case, the national

[8] Judgment of 8 September 2015, Taricco and Others, C-105/14, EU:C:2015:555.
[9] Judgment of 5 December 2017, M.A.S. and M.B., C-42/17, EU:C:2017:936.

provisions were contrary to the relevant provisions of EU law and such national provisions had to be disapplied. The CJEU added that such a result was not contrary to Article 49 of the Charter, which enshrines the principle of legality in EU law, since the disapplication of a limitation period would not lead to a conviction for an act which did not constitute a crime at the time when it was committed.

11 Shortly after the CJEU's judgment in *Taricco* the CJEU received a fresh reference on the same issue but this time from the Italian Constitutional Court which was confronted with a number of cases which raised the question of whether a national court should disapply the national time limit on the basis of *Taricco*. The Constitutional Court pointed out that it had a number of difficulties with *Taricco*. First, it questioned whether the ruling in *Taricco* complied with the requirement that the criminal nature of the infringement and the applicable penalties can be determined clearly beforehand by the person committing the offence. Second, the referring court inquired how a national court is to determine when the new limitation period would lead to a time bar in a "significant number of cases". Thirdly, the Constitutional court pointed out that the CJEU only ruled on the compatibility of *Taricco* with the principle of non-retroactivity in Article 49 of the Charter, and not with the principle that offences and penalties must be defined with sufficient precision by law. The Constitutional Court also voiced concerns about how to apply *Taricco* in the light of overriding principles of the Italian constitutional order. Stripped of the diplomatic language that courts often use when commenting on judgments of other courts, the Constitutional Court was really saying: "we think that your judgment in *Taricco* is wrong in that it overlooked a number of key issues. Please reconsider this judgment."

12 The criticism did not go unheeded. The judgment of the CJEU begins expressly by stating that the reference procedure "sets up a dialogue between" the national courts and the CJEU and then sought to address the concerns of the Italian Constitutional Court. It emphasises the importance, both in EU and national law, of the principle that offences and penalties must be defined by law in respect of

foreseeability, precision and non-retroactivity of criminal law. It first addressed the question of whether the requirement laid down in *Taricco* that the national court had to determine whether the shortening of the limitation period prevented the imposition of criminal penalties in a "significant number of cases" led to a situation of uncertainty. If it did (which was a matter for the Italian Constitutional Court to decide) there was no obligation on any Italian Court to disapply the relevant provisions of Italian law. Secondly, the CJEU stressed that the *Taricco* ruling could not be applied retroactively, i.e. to proceedings that had commenced before the *Taricco* judgment. Thirdly, the CJEU emphasised that there was an obligation on the Italian legislature to amend Italian legislation to put it in line with Italy's obligations under EU law. Thus, while *Taricco* was not overruled, its application was heavily qualified.

13 These cases illustrate the important role that national judges have in shaping the development of EU law. Indeed I would go further. The quality of a reference has a direct bearing on the quality of the judgment of the CJEU. I am sure many in the audience knows of one or more judgments of the CJEU that are not as clear or precise as one would like. They may be a number of reasons for this. But where the national court produces a reference of the quality seen in *Teva* and *MAS* that will make it easier for the CJEU to fulfil its task of producing a judgment that actually gives the national judge what he wants and does so in a manner that is comprehensive and clear.

14 This judicial dialogue applies equally in the field of competition law. In my view, one of the great successes of EU competition law was its decentralisation through the establishment of national competition authorities (NCAs) pursuant to Regulation 1/2003. I am old enough to remember the many sceptics who predicted that the sky would fall in if the European Commission lost its central role in the public enforcement of EU competition law. The sceptics have been proved wrong. Since 2004 the public enforcement of EU competition law has been largely undertaken by NCAs with great success. As the Commission stated in its impact assessment in 2017 "Enforcement of the EU competition rules is now taking place

on a scale which the Commission could never have achieved on its own. Since 2004, the Commission and the NCAs took over 1000 enforcement decisions, with the NCAs being responsible for 85%. Action by a multiplicity of enforcers is a much stronger, more effective and better deterrent for companies that may be tempted to breach the EU competition rules."[10]

15 Naturally, given the contentious society in which we live, one can assume that a significant number of these NCA decisions have been challenged before a national court. Where a national court is faced with a real problem of interpretation of the EU competition rules, a reference can always be made to the CJEU. However, such references have been remarkably few. By my calculation, some 23 in 14 years. This strongly suggests that the rules of competition law can be applied without difficulty across the EU, which, in my view, is good news.

16 In this area of the law, the reference procedure therefore operates as a sort of safety valve in cases of difficulty. Let me briefly give you three examples. *Eturas*[11] was a reference from the Lithuanian Supreme Court where the CJEU was asked about the scope of a concerted practice on limiting discounts found by the NCA involving the operator of an online portal and all travel agents who marketed their holidays on that portal. The key issue was what knowledge an individual travel agent needed to have to be party to that infringement. In 2017 the CJEU ruled in *APVE*[12] on a reference by the French Cour de Cassation where the decision of the French NCA had been successfully challenged before a lower court. The issue there was whether the NCA, in finding certain pricing infringements by agricultural producers' organisations, had correctly interpret certain detailed EU legislation disapplying certain provisions of Article 101 TFEU in the agricultural sector. Lastly, in 2018 the CJEU gave judgment in a reference by an Italian court on an appeal by Hoffmann La Roche and Novartis against a

[10] Commission staff working document, Impact assessment accompanying the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017)114, p. 6.

[11] Judgment of 21 January 2016, Eturas and Others, C-74/14, EU:C:2016:42.

[12] Judgment of 14 November 2017, APVE and Others, C-671/15, EU:C:2017:860.

decision of the Italian NCA in the healthcare sector.[13] The NCA had found a market sharing restriction of competition by object between those companies in their capacity as licensor and licensee of two drugs that had been authorised for very different use. Due to a significant price difference between the drugs, one was being prescribed on so-called "off label" by doctors in Italy for the same medical condition for which the other one had been authorised. The CJEU endorsed the approach of the NCA that, for competition purposes, both drugs could be considered to be part of the same market and that the infringement in question was an Article 101 object restriction of competition.

17 Now I have spoken of the dialogue between national courts and the CJEU but we must not forget the growing dialogue between courts of Member States. This dialogue is becoming increasingly important in the area of freedom, security and justice.

18 A recent example is *Minister for Justice and Equality (Deficiencies in the system of justice)*[14] which concerned the issue of a European Arrest Warrant (EAW) under the Framework Decision 2002/584[15] by a Polish Court in respect of a person charged with drug related crimes. Following his arrest in Ireland the Irish High Court asked the CJEU whether it was obliged to execute this EAW given the proposal made by the Commission at the end of 2017 where it invited the Council, on the basis of Article 7(1) TEU, to determine that there is a clear risk of a serious breach of the rule of law regarding in Poland, in particular regarding threats to the independence of the judiciary. In essence the Irish Court wanted to know whether it could refrain to give effect to the EAW on account of a risk of a breach of the right to a fair trial in Poland contrary to Article 6 ECHR and Article 47 of the Charter.

[13] Judgment of 23 January 2018, F. Hoffmann-La Roche and Others, C-179/16, EU:C:2018:25.

[14] Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586.

[15] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L 190, p. 1.

19 The CJEU started off by recalling Article 2 TEU and by referring to the rule of law as a value common to the Member States.[16] Consequently, there is a presumption that fundamental rights are observed by the other Member States.[17] However that presumption can in exceptional circumstances be rebutted.[18] After having reiterated the importance of the independence of the judiciary to the respect of the rule of law, the CJEU found that the executing judicial authority could refuse to execute the EAW where a real risk that a person in respect of whom an EAW has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal.[19]

20 The need to carry such an individual assessment was not precluded by the Commission having instituted proceedings on the basis of Article 7(1) TEU. This would only occur if the European Council were to adopt a final decision finding a breach of the rule of law and then suspend the Framework Decision in respect of Poland.[20] Such an individual assessment needs to examine, first, to what extent the systemic deficiencies would be liable to have an impact at the level of the courts with jurisdiction over the proceedings to which the requested person would be subject, and secondly, whether there are substantial grounds for believing that that person will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to a fair trial.[21] This requires the executing judicial authority to request from the executing judicial authority, pursuant to Article 15(2) of the Framework Decision, any necessary supplementary information that is required.

16 Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 34.

17 Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 37.

18 Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 43.

19 Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 59.

20 Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 72.

21 Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 75.

21 Shortly after the CJEU judgment in *Minister for Justice and Equality* the CJEU gave judgment in another EAW case from Ireland, *RO*.[22] This time the issuing Member State was the UK and the person subject to the EAW challenged his extradition to Northern Ireland on the basis that following the UK's notification to withdraw from the EU with effect from 29 March 2019 he was at risk of no longer benefitting from specific rights in the FD and the Charter. The CJEU held that mere notification of withdrawal did not justify refusal of the execution of the EAW. Nevertheless, there was an obligation on the Irish Court, consistent with what was said in the *Minister for Justice* case to examine whether the person would be at risk of being deprived of his rights under the FD and the Charter. On the basis of material largely put before it by the UK, the CJEU found that this was unlikely as all the relevant provisions on which RO relied had been incorporated into UK national law.

22 I have spent some time on judicial dialogue within the reference procedure laid down in Article 267 TFEU. I will now turn to dispute resolution mechanisms that fall outside that system.

23 On 30th April the CJEU delivered its Opinion 1/17 on the Comprehensive and Economic Trade Agreement between the EU and Canada (CETA). Put briefly, CETA is a so-called new generation trade and investment agreement between the EU and Canada, which seeks to abolish barriers to trade while at the same time ensuring that high standards of consumer, environmental and health protection can be maintained. CETA contains a Dispute Resolution Mechanism (DRM) which enables Canadian and EU investors, as the case may be, to claim that a Canadian or EU measure is contrary to the substantive provisions of CETA.

24 The CETA DRM consists of the CETA Tribunal, constituted of a lower Tribunal and, in a first of its kind, an appeal body known as Appellate Tribunal.

25 The CETA Tribunal's jurisdiction is limited to awarding damages for alleged breaches of Chapter 8 of CETA (Article 8.18.1, 2, 5). The Tribunal has no power

[22] Judgment of 19 September 2018, RO, C-327/18 PPU, EU:C:2018:733.

to determine the validity of a measure of either Party (Article 8.31.2, first sentence), and must follow the prevailing interpretation of the domestic law of the Parties (Article 8.31.2, third sentence).[23] The Tribunal applies the domestic law of the parties as a matter of fact (Article 8.31.2, second sentence). The interpretation of domestic law retained by the Tribunal is not binding on the parties, although the monetary damages in final award are (Articles 8.31.2, third sentence and 8.41.1).

26 Although the Tribunal would not be called upon directly to resolve a dispute pending before it in the light of EU law or to examine the validity of an act of the European Union, the Tribunal may have to decide how EU law is to be interpreted. For example where the operation of an EU Regulation is challenged as being contrary to CETA. Given that the Tribunal sits outside the national court systems within the EU, the Tribunal would not be able to make a reference to the CJEU. In its request of an Opinion, Belgium expressed doubts as to whether this would be compatible with the basic principles of EU law, notably the principle of autonomy that the CJEU should always be in a position to give a definitive ruling on the interpretation of EU law.

27 In rejecting the concerns of Belgium the CJEU distinguished the DRM in CETA from the one that it had considered the previous year in *Achmea*. The BIT in *Achmea* was between two EU Member States, Slovakia and the Netherlands, which, under Article 4(3) TEU have a duty of sincere cooperation towards the EU and mutual trust and which undertake, pursuant to Article 344 TFEU, not to submit questions relating to the interpretation or application of the Treaties to any method of settlement other than those provided for therein. Since CETA is

[23] For the EU, the domestic law of the parties will most likely be EU law. See, for example, *Achmea* paras 40 and 41
"40 Even if, as Achmea in particular contends, that tribunal, despite the very broad wording of Article 8(1) of the BIT, is called on to rule only on possible infringements of the BIT, the fact remains that in order to do so it must, in accordance with Article 8(6) of the BIT, take account in particular *of the law in force of the contracting party concerned and other relevant agreements between the contracting parties*.
41 Given the nature and characteristics of *EU law* mentioned in paragraph 33 above, that law *must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States*."

concluded between Canada and the EU, there was no conflict with Article 344 TFEU and the issue of mutual trust did not apply.

28 The CJEU also addressed the concerns of Belgium of a so-called 'regulatory chilling effect' that could arise pursuant to damages claims. Let me explain this. Unlike domestic courts, the CETA tribunals have no jurisdiction to declare unlawful or annul regulatory acts. The only remedy available is damages. You will all be aware that in a purely domestic context, the illegality of a legislative act does not of itself entail the award of damages. There is a sound policy reason for this. Thus, if a state is faced with a threat to health, it should not be dissuaded from taking the measures that it thinks are appropriate to protect public health by the risk that if it strikes the balance in a legally incorrect way, it must then automatically pay damages to all those adversely affected.

29 It was this debate which led the CJEU to hold in 1996 in the *Factortame* and *Brasserie du Pêcheur* cases, that a Member State was only liable in damages for legislative measures in breach of EU law, where the breach was sufficiently serious, that is to say where the Member State manifestly and gravely disregarded the limits on its discretion.[24] In 2000, the Court applied the same test where the EU legislation was in breach of EU law in *Bergaderm.*[25]

30 The authors of CETA have in effect introduced a *Factortame – Bergaderm* test where they have said that "except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations" and are not articulated in damages. [26]

[24] Judgment of 5 March 1996, Brasserie du pêcheur and Factortame, C-46/93 and C-48/93, EU:C:1996:79, paragraph 55.

[25] Judgment of 4 July 2000, Bergaderm and Goupil v Commission, C-352/98 P, EU:C:2000:361, paragraph 43.

[26] Annexe 8-A, paragraph 3 to CETA.

31 On the basis of that wording the CJEU concluded "that the Parties [to CETA] have taken care to ensure that [the CETA] tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights".[27]

Increasing case load and its consequences

32 I will now turn to what I termed organisational issues at the outset of this talk. In 2011, the last full year before I joined the Court, 688 cases were brought. The bulk, 423, were preliminary references, appeals from the General Court made up 162, and direct actions 81.[28] Since then there has been a steady upward trend in incoming cases. The comparable figures for 2018 are 849 cases brought (an increase of almost 25 %), of which 568 were references (an increase of almost 35 %), 199 appeals, and 63 direct actions.[29] Despite this very considerable increase in cases the average length of time to give judgment in a reference remains around 16 months.[30] Nevertheless steps have had to be taken to ensure that the Court is able to cope with this increase in its workload.

33 As part of the reforms to the composition of the General Court, the Court was asked to produce a report to the European Parliament, the Council and the Commission by the end of 2017 on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU.

[27] Opinion 1/17 of 30 April 2019, EU:C:2019:341, point 160.

[28] CJEU, *Statistics concerning the judicial activity of the Court of Justice*, 2011, https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_cour_en.pdf, p. 96.

[29] 849 cases brought before the CJEU in 2018, which is 110 (15%) more than in 2017. 760 cases closed in 2018, compared to 699 in 2017. CJEU, *Judicial statistics 2018: the Court of Justice and the General Court establish record productivity with 1,769 cases completed*, Press release N° 39/19, 25 March 2019, available online at https://curia.europa.eu/jcms/jcms/p1_1840873/en/. And 2018 Annual report, available online at https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_pan_2018_en.pdf, p. 42.

[30] Ibid., 2018 annual report, p. 43.

34 While the Report was not in favour of the transfer of any category of references for a preliminary ruling (which now average around some 70 % of the Court's cases)[31] it left the door open for the future transfer of certain categories of references to the General Court. In March 2018 the Court suggested two other changes to the legislature: a filter system for appeals and the transfer of infringement actions to the General Court.[32]

35 The filter system (permission to appeal mechanism) came into effect on 1st May 2019. It applies to appeals against decisions by the EUIPO, the Community Plant Variety Office, the European Chemicals Agency, and the European Union Aviation Safety Agency where the General Court acts as an appeal court against decisions, which have already been subject to an appeal to an independent administrative authority.

36 The filter system is set up by Article 58a of the Statute and Articles 170a and 170b of the Rules of Procedure. 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. I can tell you that the first such request was lodged this week.

37 A special Chamber of the Court, composed of the Vice-President of the Court, the reporting judge and the president of Chamber of the Chamber of three judges to the reporting judge is assigned, will rule on the admissibility of the appeal by way of a reasoned order. The orders will be available in French and in the language of proceedings on the Court's website.

38 If the appeal is admissible in whole or in part, the appeal proceeds according to the ordinary procedure.

In 2017, it was 72%. See footnote 5 of the Report.

32 CJEU, 'Proposed amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union', 26 March 2018, Council document ST 7586/2018.

39 The proposal to transfer the infringement proceedings to the General Court has, however, proved controversial. Although the volume of such cases is not enormous they are often very fact– and hence time-intensive. One thinks particularly of environmental cases concerning, for example, breeding grounds for turtles or water purity levels in a large number of water treatment plants across a Member State. This type of case would, in my view, be well suited to the General Court. However, Member States do not wish to give up the right to have the case heard before the Court of Justice while the Commission is concerned that if it has to bring proceedings in the General Court, the whole infraction process could be dragged out by Member States who would use their right of appeal to the Court of Justice to delay the final decision. There are also some infraction proceedings which raise important constitutional issues where it would be more appropriate for the proceedings to start in the Court of Justice. Consequently this proposal has been shelved until the next review of the reform of the General Court is carried out next year.

40 Happily I am now just left with the task of responding to the Chairman's request for an advocacy tip or two. One of the first cases I was assigned as reporting judge when I arrived at the CJEU was an appeal from the General Court in respect of a Commission decision finding an abuse of a dominant position and imposing a significant fine. The Advocate General observed that the appeal raised several hundred grounds of appeal.[33] Such a method of proceeding is, if I may say so, not to be recommended. In my view, it is incumbent on lawyers representing a client to act as their own form of filter mechanism discarding bad points and ensuring that only points with a real prospect of success are pursued. Also, may I suggest that every appeal is checked that it complies with the Rules of Procedure. You will be surprised how often, for example, points are taken for the first time on appeal or even the alleged error of law in a long judgment of the General Court is not identified by the relevant paragraph numbers. These basic errors will result in the appeal, or relevant parts of it being held inadmissible. There is no reason why

[33] Opinion of Advocate General Wathelet in Telefónica and Telefónica de España v Commission, C-295/12 P, EU:C:2013:619, paragraph 7.

a judge should spend additional time trying to understand precisely what bit of a judgment is being challenged or why.

41 Having sounded a bit like a schoolmaster or perhaps just a crusty old judge, I would like to end on a positive note. The English Bar, or rather the Bars of the United Kingdom have an excellent reputation at the Court. Naturally, I generally enjoy listening to them but I am happy to say that this is a sentiment widely shared by my colleagues.