

Speech at the Colloque in Luxembourg to mark M. Vassilios Skouris's Presidency of the European Court of Justice

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1. As President of this Court, President Vassilios Skouris has served longer than all his predecessors, being elected by fellow judges four times. It has been a key period in the Court's history. The breadth and novelty of the workload of modern courts would have astonished our predecessors – certainly in the UK. When I started as a lawyer, the highest courts spent almost all their time in traditional legal areas: commercial, property, tax, family etc. Today, EU law, ECHR law and international law have transformed our lives – and inter-connected our legal systems.
2. A similar transformation has affected the Court of Justice. Once it could be viewed as essentially a competition court. When Lord Denning said famously, that in “matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers”, this was in a passing-off case, *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401. As to Lord Denning's flowing metaphor, EU law is now not only in the River Thames, it is ashore in the Cities of London and of Westminster, our business and democratic centres – even in the bastions of Her Majesty's Revenue and Customs: witness the Court's decision in *Akerborg-Franssen* C-617/10.
3. During this important period President Skouris has for twelve years presided over the Court. He has been party to emblematic decisions like *Köbler* C-224/01, presiding over its application in *Traghetti del Mediterraneo SpA* C-173/03, and presiding in *Cartesio* C-210/06. All three decisions closely define the relationship of domestic legal systems and courts like mine

to EU law. It would be vain, in every sense, to try to list all his other significant cases as president. They include *Commission v Council* C-176/03 and *Commission v France* C-121/07. seminal decisions making the environment one of the Union's priorities; *Kukukdevici* C-555/07, on the impact of unimplemented directives; *Ruiz-Zambrano* C-34/09 and *Devici* C-256/11, on European citizenship; numerous decisions on the Brussels Regulation, which have had notable implications for commercial law practice, while stimulating some of the recent revisions to that Regulation; *Test-Achats* C-236/09, on discrimination; *Monsanto v Cefetra* C-428/08, on the patentability of derivative products; *Nelson* C-581/10, on air travellers' right to compensation for delay; *Melloni* C-399/11, on the relationship between national constitutional protection and the European Arrest Warrant Framework Decision; *Google Spain v Agencia Espanola* C-131/12, on the right to be forgotten; and *Digital Rights Ireland* C-293/12, declaring a directive on data retention invalid. These are but a few. Not all of these decisions are uncontroversial. But all of them are forthright and clear cut— and who as a judge expects all his or her decisions to be universally welcomed?

4. Vassilios Skouris's presidency has also seen a powerful reaffirmation of the autonomous and binding nature of EU law – witnessed by both *Kadi* cases C-402/005 and C-593/10, as well as by the Court's Opinion No 1/09 on the proposal for a Unified Patent Court, and its recent Opinion No 2/13 on the proposed framework for accession by the EU to the European Convention on Human Rights. By recognising the importance of fundamental rights in cases such as *Kadi*, the Court of Justice continued its successful efforts to address the reservations of constitutional courts that European law might not afford the same protection as domestic constitutions. In the first case ever heard in the UK Supreme Court in October 2009, *HM Treasury v Ahmed* [2010] UKSC 2, we cited *Kadi 1* in the domestic context of a freezing order imposed by Treasury order without Parliamentary scrutiny. We noted that the effect of such an order is not dissimilar to house arrest or virtual

imprisonment. The fundamental right to an effective judicial review, which *Kadi* identified, was derived from constitutional traditions common to member states and the Convention on Human Rights, and is now also enshrined in the Charter of Fundamental Rights.

5. We are within a week of the 800th anniversary of a constitutional pillar which led to the enshrining of the same principle within the UK – the Magna Carta, sealed at Runnymede, on the Thames, on 15 June 1215. This still stands as a symbol worldwide for the core concept of the rule of law – that all power must be exercised under and in accordance with law. When the Consultative Council of European Judges prepared a set of principles for judges in 2010, it was my continental colleagues, not I, who suggested that it be called, as it is, the Magna Carta for Judges. Judges above all must act under and in accordance with the law. Reference has already been made to article 19(1) TEU. In the UK, four provisions of Magna Carta - all still in force in a 1225 version - continue to be basic. They are freedom of the Church, which one can now expand to religion; freedom of the City of London (something all European institutions hear a good deal about) and of other cities; and then the following (in English translation):

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

To no one will we sell, to no one deny or delay right or justice.”

We do not always find the same simplicity and power in modern legislation. In Europe that is sometimes in a form rightly described as Eurish. We do not always achieve it in our

judgments, whether in the Court of Justice's collegiate style or the discursive individual style beloved of common lawyers. A quite separate matter is whether a court issues one judgment or permits separate judgments – and as a common lawyer I must differ from President Andreas Vosskuhle's en passant remark that confidence necessarily depends on speaking with a single voice. Contrast, clarity and confidence can, we believe, be enhanced by well-considered separate judgments. However that may be, we all affirm the importance of the same fundamental values enshrined in the passages from Magna Carta, and reflected in the Court's decisions in *Kadi*.

6. Judge and lawyers across Europe do not, as I have indicated, agree on everything. It would be surprising, indeed unhealthy, if we did in the complex but closely inter-related world of today. The Court of Justice has been working out the Union's relationship to the United Nations and its organs, as well as to the European Convention on Human Rights. At the same time, there remain unresolved - legally perhaps even insoluble - issues regarding the relationship of Union law to national constitutions for which the countries of Europe also claim autonomous value. The UK does not of course have a written "constitution". It has constitutional instruments, such as Magna Carta, the Petition of Rights, the Bill of Rights and the Act of Settlement, and unwritten constitutional concepts, such as Parliamentary sovereignty. These are deeply entrenched in our national life, which may itself explain why they have not at least so far been formalised. They have however been supplemented by more recent measures like the Human Rights Act 1998, the devolution statutes and the Constitutional Reform Act 2005. In this constitutional arena, what is under discussion at the European level remains the degree of delegation or subsidiarity which best fits, first, the wish of European peoples to live in friendship together and, secondly, peoples' natural desire to control their fortunes at the relatively local levels with which we as humans most readily

associate. That said, none can doubt the words of John Donne, lawyer, European traveller, preacher at Lincoln's Inn and later Dean of St Paul's:

“No man is an island, entire of itself; every man is a piece of the Continent, a part of the main; if a Clod be washed away by the Sea, Europe is the less”

The modern common law has developed in the same internationalist spirit, ever since it began first to be shaped into modern form in the 18th century by Lord Chief Justice Mansfield - another member of Lincoln's Inn and youthful European traveller. London remains a jurisdiction of choice for worldwide dispute resolution, with courts, arbitrators and mediators dealing with thousands of cases involving foreign parties based all over the world every year.

7. In the same spirit, the Court, during President Skouris's tenure, has aimed to be accessible and to travel – to meet not only with the jurisdictions of Member States, but with other jurisdictions, including the USA. President Skouris has been an indefatigable speaker and interlocutor. Friendly personal relations have developed between the Court of Justice and national courts and their respective members. This is a good omen that common issues will be negotiated and contained in a spirit of mutual understanding. In the British constitutional case of *Jackson v Attorney General* [2005] UKHL 56, Lord Hope pronounced a recipe for harmonious relations between UK courts and the UK Parliament. It can surely be transposed to a European level. He said:

“In the field of constitutional law the delicate balance between the various institutions - whose sound and lasting quality Dicey likened to the work of bees when

constructing a honeycomb - is maintained to a large degree by the mutual respect which each institution has for the other.”

8. President Skouris has also introduced measures to ensure the smooth throughput of cases in the Court of Justice and the speedy functioning of the reference procedure. Concerns have been addressed by President Skouris with real success by a series of innovations – though procedural expedition can never be an aim in itself, but must always remain subordinate to the ultimate desideratum of a work product of real quality. As courts we serve the interests of the parties, the legal community and the public generally. In our role as implementers and interpreters of the legislature’s intention, it is incumbent on us to make our procedures as well as our reasoning open and accessible, clear and easily applicable.

9. Finally, and also from a personal viewpoint, I refer to the effect, and I believe success, of a measure which has from its outset in 2010 had Vassilios Skouris’s firm and highly influential support. That is the establishment, under the Treaty of Lisbon, of the article 255 TFEU panel, on which I have the privilege to serve. Nominations to this seven-person panel are made after taking the advice of President Skouris. He has shown a very important concern to knit together the Court and domestic legal systems, by nominating in each four year period to date a majority of domestic judges. Our function is of course limited. The article 255 panel only scrutinises individual candidates for their suitability for appointment to the Court of Justice one by one as they are in turn nominated by the governments of member states. It has no choice between candidates; and it cannot shape the overall composition or expertise of the court. Even in the United Kingdom Supreme Court, an element of territorial representation is by statute required to engage the commitment of Scotland, Northern Ireland and increasingly Wales. Under the European Treaties, the nomination of candidates on a national basis remains the universal rule - whatever one might think of the possible

merits of a modified and, on one view perhaps, more European approach. The overall composition of the Court of Justice is thus in a sense a matter of chance, although the Court is doubtless large enough – and will be even more so in the case of the General Court if it is really to double in size – for the law of averages to produce a cross-section of skills. What the article 255 panel can and does do, however, is look closely at the suitability of individual candidates. That can only help further to enhance the reputation of and confidence in the Court and its world-leading contribution as a unique supranational court. It is a quality mark, which has had the warm and welcome support of the Court's most recent president, whom we are here today to celebrate and to congratulate on his term in office. On behalf of the United Kingdom legal system, I wish him, when the date comes, a very happy retirement from this Court. I believe that he will probably not long be allowed to remain inactive in other spheres.