Valedictory address in honour of Judge Christopher Vajda on the departure of the United Kingdom from the European Union

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The duty I have to perform this evening, as we bid farewell to Christopher Vajda, our last British Judge, is among the saddest that I have undertaken since becoming President of the Court of Justice of the European Union, or indeed at any point throughout my professional career.

Successive British members have, over the past 47 years, enriched our institution, both intellectually and personally, bringing to their work the rigorous, case-law based approach that is the hallmark of common law systems, as well as their British pragmatism and common sense, not to mention their inimitable sense of humour. I would like to thank each and every one of them for their service and to say to our esteemed colleague Christopher Vajda that we are extremely saddened by his departure.

I am also conscious of the fact that one of my distinguished predecessors as President of the Court was the British – or more specifically Scottish – Judge, Lord Mackenzie-Stuart. Lord Mackenzie-Stewart was a highly successful President of the Court.

Presiding in the 1980s at a time when increases in the number of official languages, together with an attendant increase in the number of staff, were placing considerable pressure on the institution's resources, he ensured that the Court continued to produce high-quality judgments in good time notwithstanding those pressures and made the preparations that were essential for the Court to continue to function effectively in the future, not least in terms of the steps that he took with respect to the judicial architecture. Indeed, the Court of First Instance, as it then was, came into being the year after he left office.

More generally, the British members of our court have, together with their Irish counterparts, not only contributed to but indeed shaped, the way in which our institution carries out its work. Before the first British and Irish judges arrived in Luxembourg in 1973, there was no general practice of citing previous case-law in the judgments of the Court because such citations did not necessarily form part of the legal traditions of the six original Member States. Since then, our Court has wholeheartedly embraced that practice which has, I believe, significantly enhanced the quality and transparency of our judicial work, by making it possible for stakeholders to identify lines of case law and to follow their development. In some sense, and notwithstanding the absence of a strict rule of *stare decisis*, one might even say that under the influence of the Common law tradition, the Court of Justice has itself become a court of common law, so extensive is the use that we make, quite appropriately, of previous case-law in our reasoning.

The United Kingdom, with its three separate legal systems, has also made a significant contribution to the case law of the Court of Justice through the loyal participation of its courts in the preliminary ruling mechanism, now enshrined in Article 267 TFEU. From *Factortame*,[1] where the Court of Justice set out the extent of the obligations incumbent on national courts by virtue of the primacy of EU law, through the seminal ruling on the application of freedom of establishment to the taxation of non-resident subsidiaries in *Marks and Spencer*,[2] to the constitutionally important judgment that the Court delivered in *Wightman*[3] on a request from the Scottish Court of Session concerning the revocability of a notification under Article 50 TEU, some of the most significant rulings of the past half-century have stemmed from cases sent to us by UK referring courts. We are grateful to them for that and we will continue to answer fully and loyally all of the questions that they put to us this year, as well as certain specific types of question that they may put to us in future, in accordance with the terms of the Withdrawal Agreement.

I would like now to say a few words about the departure of Christopher Vajda. I have known Christopher for many years as an advocate pleading cases before the European Union courts but we have obviously become much closer since he joined the Court of Justice as our colleague, in 2012. He is an extremely able judge with a keen eye for detail and he has been a highly-valued member of this

1 Judgment of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257.
2 Judgment of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763.
3 Judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999.

court for more than seven years. His analysis of complex legal problems is invariably to the point and his outstanding ability to distinguish between matters that are relevant to the specific legal issue that falls to be decided – and those that are not – has been invaluable, given the heavy and increasing workload that we face.

This is neither the time nor the place to give a detailed account of Christopher's judicial work, but I would just like to mention three cases which exemplify his major contribution to the core business of our institution and that will form part of his judicial legacy. As Reporting Judge, Christopher Vajda was responsible for producing the draft judgment in *Telefonica v Commission*,[4] a seminal appeal case where the Court of Justice interpreted the admissibility criterion inserted by the Treaty of Lisbon into the final limb of the fourth paragraph of Article 263 TFEU. As amended, that provision now allows natural and legal persons to seek judicial review of a regulatory act of the EU which is of direct concern to them and does not entail implementing measures, notwithstanding the fact that such a measure is not of *individual* concern to those persons. Under Judge Vajda's guidance, the Court, sitting in Grand Chamber, held that the Commission decision at issue, qualifying a national tax regime as a State aid and declaring it to be incompatible with the internal market, entailed implementing measures and could not therefore be challenged directly under Article 263 TFEU, the correct remedy being a judicial review of the national decision refusing the grant of the tax advantage

[4] Judgment of 19 December 2013, *Telefónica v Commission*, C-274/12 P, EU:C:2013:852.

in question before the competent national court, accompanied by a reference to the Court of Justice under Article 267 TFEU on the issue of the Commission decision's validity.

That Grand Chamber ruling was a significant step in the process of developing the Court's line of case law regarding the concept of "implementing measures" that defines the scope of the new post-Lisbon admissibility criterion that I have mentioned. It epitomises Judge Vajda's wise and prudent approach to judicial decision-making and, in particular, his attitude to the use of case law. Indeed, the case law interpreting that concept, taken as a body, reflects the common law method of legal reasoning. It is underpinned by the view that a new line of case law is often best constructed incrementally, with each new judgment serving as an additional building block that contributes to making a coherent whole, and it has, as I have noted, served the Court of Justice well in many different contexts.

That was again illustrated in *Slovenia v. Croatia*, a very sensitive case in which the Grand Chamber of the Court gave judgment only two weeks ago, benefitting from Christopher's refined legal reasoning as a reporting judge.[5] The case had its roots in a decades old border dispute between those two Member States. The dispute had been submitted to arbitration but in the course of the arbitration proceedings Croatia repudiated the arbitration agreement since it considered that inappropriate communications had taken place between the arbitrator

[5] Judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, EU:C:2020:65.

appointed by Slovenia and that State's Agent. Croatia did therefore not recognise the borders as defined in the arbitral award. Slovenia brought an infringement action against Croatia before the Court, arguing in essence that Croatia's attitude amounted to a violation of various obligations under EU law. Croatia objected that the Court did not have jurisdiction to rule on the case. That gave the Court an opportunity to clarify its earlier case law developed in *Commission v. Belgium*[6], a case which related to Belgium's alleged violation of the Establishment Agreement concerning the European Schools. The Court held that it lacks jurisdiction in infringement actions, that is actions for failure to fulfil obligations arising from EU law, if the infringement at issue is *ancillary* to the alleged failure of the defendant Member State to comply with obligations resulting from an international agreement concluded by Member States 'whose subject matter falls outside the areas of EU competence'. In *Slovenia v Croatia,* the Court therefore lacked jurisdiction since the alleged infringements of EU law were ancillary to the determination of the Member States' borders under international law, an issue which falls outside the areas of EU competence. It emphasized, however, those Member States' duty to strive sincerely to bring about a definitive legal solution to their dispute consistent with international law.

I referred earlier to the pragmatism of our British colleagues and, in that regard, I particularly admire the manner in which Judge Vajda

[6] Judgment of 30 September 2010, *Commission v Belgium*, C-132/09, EU:C:2010:562.

prioritised those cases that required the most pressing attention in order to give an answer to the parties that was of practical use to them.

A fine example is provided by *Mirza*,[7] a case which raised important and delicate questions concerning the determination of the Member State responsible for handling an asylum-seeker's application for international protection and certain of the rules governing the treatment of such an application by that Member State. The Hungarian referring court requested that the urgency procedure be applied, given that the person concerned was in custody, and on a reasoned proposal from Judge Vajda that request was granted. Although the case was received at the Court of Justice in Hungarian just two days before Christmas 2015, the issues were deliberated in French, following a hearing in February 2016, and the judgment delivered in Hungarian in March 2016, less than three months later, thanks to the hard work and dedication of Judge Vajda and his team.

Finally, I will miss Christopher for his human qualities, both as a colleague and as someone whom I have come to consider as a friend. In his judicial work, Judge Vajda is a person who listens to the point of view of others and who is quite prepared, when convinced by the arguments put forward by his colleagues, to nuance or indeed to change the position that he held initially. In a collegiate court such as ours, that intellectual openness and willingness to be persuaded is extremely valuable and it has been fundamental to his success as a

[7] Judgment of 17 March 2016, *Mirza*, C-695/15 PPU, EU:C:2016:188.

judge here. As an individual, Christopher Vajda has always behaved honourably and with great decency, not least over the past three and a half years when the uncertainty surrounding Brexit has made life uncomfortable for all the British members of our institution, as well as their staff. As President, I very much appreciate the restraint and dignity with which Judge Vajda has handled this difficult situation. It may be a *cliché*, but Christopher really is a true English gentleman and the Court of Justice is a poorer place without him.

Christopher, I would like to take this opportunity to thank you publicly for your dedicated service to the European Union and for all that you have brought to our institution in particular. On behalf of the Court of Justice and its members I wish you and Brenda, as well as your son Conrad, all the very best for the future. Your talents and experience will be greatly missed by us here but I have no doubt whatsoever that they will enable you to find success and fulfilment in the new chapter of your professional life that is just beginning.

I would like to leave you with one thought concerning the vision that the great British statesman, Sir Winston Churchill, had for Europe. Churchill is rightly celebrated – including on the European Commission's own website – as one of the founding fathers of Europe, not least because of a highly influential speech that he delivered in Zurich, Switzerland, on 19 September 1946, in which he explicitly called for the creation of a United States of Europe. On the morning after the 2016 Referendum, I looked up that speech in order

to remind myself of the precise terms in which Churchill expressed that idea. I quote:

‘There is no reason why a regional organisation of Europe should in any way conflict with the world organisation of the United Nations. On the contrary, I believe that the larger synthesis will only survive if it is founded upon coherent natural groupings. There is already a natural grouping in the western hemisphere. *We British have our own Commonwealth of Nations*. These do not weaken, on the contrary they strengthen, the world organisation. They are in fact its main support. And why should there not be a European group which could give a sense of enlarged patriotism and common citizenship to the distracted peoples of this turbulent and mighty continent?...’

In other words, the ‘European group’ of which Churchill spoke was not, in his mind, to include Britain. For him, Britain’s place was within ‘our own Commonwealth of Nations’. It will of course be for the UK to find and to determine its own place in the world in the years to come and I would not presume to tell any nation what to do. That said, I am struck, when I hear UK politicians talking about trade deals with Canada, with Australia and with New Zealand, by the impression that their vision of Brexit reflects, to a great extent, that Churchillian vision of the future in which Europe was to be united but the UK was to remain outside that grouping, relying instead on its long-standing ties with English-speaking countries throughout the world.

In spite of our sadness about Brexit, these words spoken more than seventy years ago, should be seen as an encouragement for the twenty-seven Member States to fully empower their European Union to work democratically and effectively so as to contribute to a peaceful and just world order.

In any event, whatever the future may hold, as friends and neighbours we wish the people of the United Kingdom well in the post Brexit era.

Thank you very much.