

European Circuit – Eleanor Sharpston QC - Advocate General of the European Court of Justice (Keynote Address)

1. Eleanor Sharpston QC, the senior Advocate General of the European Court of Justice, gave the keynote address at the 2008 European Circuit of the Bar Annual Conference in Brussels. Under the title "*A year is a long time at the ECJ*" AG Sharpston focused on three questions. What has been happening in the ECJ? Why this has been happening? What will happen in the future?
2. With regard to the first question, AG Sharpston was quick to point out that during the last 12 months the ECJ has not lost its capacity to hand down judgments which create shockwaves. Decisions of the ECJ in cases such as *Kadi* (C 402/05 and 415/05) along with many others have had broad ramifications which have been felt in all Member States as well as further afield.
3. In addressing why this has been happening, AG Sharpston dismissed the theory that there was any "grand sinister plan to take over the world," or at least it was suggested that if there was such a plan the speaker was not aware of it. It was pointed out that a key reason behind the continuing success of the ECJ in handing down "blockbuster judgments" was the increasing adeptness of the legal profession in spotting and developing innovative legal arguments which call into question the fundamentals of the European legal order.
4. Another reason behind the importance of the role played by the ECJ lies in the very nature of EC legislation and the Treaties themselves. Whilst the ECJ has seen an enhancement of its jurisdiction as a result of new legislation and the creation of new legal rights, the role of the ECJ is brought into focus by the ambiguity and open-endedness of much of European law. This lack of precision leaves broad and generous room for legal argument of which the ECJ is the ultimate arbiter. As AG Sharpston put it, the root fact is that "political compromise breeds ambiguity", and it is this ambiguity which creates the raw material which must eventually be ruled upon by the ECJ. However, a warning was given against inferring from the case law emanating from the ECJ any particular agenda on the court's behalf. In particular, unlike many other final courts, the ECJ has no docket control over the cases which appear before it, and so cannot be selective in the manner of the US Supreme Court.
5. It was emphasised that whilst it is correct that many choices are not naturally for a court to make, but are more appropriately decided by the legislator, in cases where the legislator has not made a choice (possibly due to the need for compromise) then the ECJ is obliged to adjudicate. The court has in such cases shown a consistent commitment to the rule of law, which is to be lauded, and it was emphasised that whilst the ECJ is often the subject of considerable criticism, this generally comes from all sides of the debate and does not always come from the same sources all of the time. This should be considered a good indicator that the court is at least doing a reasonable job, and that the time to be concerned would be when criticism always stems from the same direction.

6. As for the future, AG Sharpston's suggestion was that along with the steady flow of mainly technical legal cases, the ECJ would continue to get the blockbuster references that make everyone sit up and listen. It is also inevitable that the Court will continue to have to deal with cases which are ever further removed from its original area of expertise as the court of an economic community.
7. One area where the Court is often criticised is in terms of waiting times. This year, for example, it may take up to 17 months to get an answer from the ECJ, and AG Sharpston was keen to acknowledge that the current delays are clearly unacceptable. Translation difficulties were said to be part of the problem in this respect, but it was also suggested that advocates themselves can help. Advocates appearing before the court should exercise "heroic self-restraint" in their written observations. In particular, advocates should avoid outlining in written observations the legislative and factual background to references where this will already be before the court either in the observations of the party making the reference or in the observations of the Commission. This is especially so for those parties intervening.
8. The debate then opened to the floor and a number of issues were raised. One of the questions asked was whether it would be helpful for counsel to provide their own translations. The answer was a clear negative. The principal reason is that if this became accepted then a new cause of delay would find expression through parties seeking extensions while they waited for their own translations to arrive. Another reason was that this would then give rise to problems based on the quality of the translations, and the centralised scheme at least had the merit of consistent quality control.
9. Another question focused on the role of oral argument at ECJ hearings. AG Sharpston was clear that it is a waste of time to turn up with a written text you then read so fast as to lose the interpreters, and pointed out that it was common for members of the Court to occasionally "channel hop" looking for the interpreters who most able to keep pace. It was also suggested that the ECJ is likely to become more prescriptive about hearings, and that it may become increasingly common for an advocate to be told by the ECJ in a reference case involving a number of questions, which questions the Court wishes the advocate to focus on.
10. Finally, it was suggested that if you plead in English this is a huge advantage as it is a language most members of the Court are familiar with. The familiarity of the Court with English is, however, a reason why advocates in English should be even more careful that they plead sufficiently clearly and attractively and speak at a good pace. This is because it is very likely with English that the advocate will persuade the members of the Court to listen in the original language, which carries huge advantages for those truly hoping to persuade.

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