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Selected Opinions of Lord Slynn as Advocate General

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Abstract

During Lord Gordon Slynn's period in office as the Advocate General at the European Court of Justice ("ECJ" or "Court") in Luxembourg, Lord Slynn delivered opinions in many significant cases covering the whole range of European Communities ("EC") competences, from cases concerning common agricultural policy and civil services to those concerned with the development of the common market and the interpretation of the substantive law of the European Community. Comments on Lord Slynn's opinions in cases concerning the substantive law of the internal market and on state aid cases have been published in other works. In this short Essay, the focus will be on five selected opinions delivered by Lord Slynn in the field of competition and antitrust law, namely the *IBM*, *Pioneer*, *Hasselblad*, *Ford*, and *BAT* cases.

SELECTED OPINIONS OF LORD SLYNN AS ADVOCATE GENERAL

*Rosa Greaves**

INTRODUCTION

In 1981, Lord Gordon Slynn,¹ then known as Sir Gordon Slynn, became Advocate General² at the European Court of Justice (“ECJ” or “Court”) in Luxembourg. Lord Slynn succeeded Jean Pierre Warner, the first Advocate General nominated by the United Kingdom upon its accession to the European Communities (“EC” or “Community”).³ During his period in office, Lord Slynn delivered opinions in many significant cases covering the whole range of EC competences, from cases concerning common agricultural policy and civil service to those concerned with the development of the common

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1. Sir Gordon Slynn was Advocate General from 1981 to 1988 and then became the U.K. judge at the European Court of Justice (“ECJ” or “Court”). In 1992, he returned to the United Kingdom and was appointed to the Judicial Committee of the House of Lords, the highest court in the United Kingdom. Francis G. Jacobs, *Justice: Some Personal Reflections*, in 1 LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY: JUDICIAL REVIEW IN EUROPEAN UNION LAW 17 (David O’Keeffe ed., 2000). From then on he was known as Lord Slynn of Hadley.

2. The Advocate General is a unique feature of the ECJ. The Advocate General is of equal status to an ECJ judge but does not participate in the deliberation of the judgment. The Advocate General delivers an opinion to assist the judges in their deliberations. The opinion officially closes the oral procedure of the hearing in a case before the ECJ. *Id.* at 17–18.

3. The United Kingdom acceded to the then-three “European Communities” (European Atomic Community, European Economic Community, and European Coal and Steel Community) on January 1, 1973. Council Decision Adjusting the Instruments Concerning the Accession of the New Member States of the European Communities, O.J. L 2/1 (1973). There are currently eight advocates general, five of whom are appointed by France, Germany, Italy, Spain, and the United Kingdom. The other advocates general rotate among the remaining Member States. Jo Hunt, *The European Court of Justice and the Court of First Instance*, in UNDERSTANDING EUROPEAN UNION INSTITUTIONS 105 (Alex Warleigh ed., 2002).

market⁴ and the interpretation of the substantive law of the European Community.⁵ Comments on Lord Slynn's opinions in cases concerning the substantive law of the internal market and on state aid cases have been published in other works.⁶ In this short Essay, the focus will be on five selected opinions delivered by Lord Slynn in the field of competition and antitrust law, namely the *IBM*,⁷ *Pioneer*,⁸ *Hasselblad*,⁹ *Ford*,¹⁰ and *BAT*¹¹ cases.

I. THE IBM CASE

IBM v. Commission was important in establishing what actions of the European Commission ("Commission"), when acting as a competition enforcement agency, were subject to judicial review. IBM lawyers challenged a statement of objections¹² issued by the European Commission at the end of its investigation as to whether IBM had violated article 86 of the Treaty Establishing the European Economic Community ("EEC Treaty") (now article 102 of the Treaty on the Functioning of the European Union ("TFEU"))¹³ through conduct considered to be an abuse

4. The term "common market" was replaced in common usage in 1987 by the term "internal market."

5. Since December 1, 2009, when the Lisbon Treaty came into force, the terms "EC" and "European Community" have been replaced by the "EU" and "European Union." However, this Essay uses "EC" and the "European Community."

6. See, e.g., Rosa Greaves, *Judicial Review of Commission Decisions on State Aid to Airlines*, in 1 LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY, *supra* note 1, at 625; Pieter Verloren van Themaat, *Some Opinions of Sir Gordon Slynn as Advocate General*, in 1 LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY, *supra* note 1, at 3 (Professor Verloren van Themaat was a colleague of Sir Gordon Slynn as Advocate General from 1981 to 1986).

7. *Int'l Bus. Mach. Corp. v. Commission (IBM)*, Case 60/81, [1981] E.C.R. 2639.

8. *SA Musique Diffusion Française v. Commission (Pioneer)*, Joined Cases 100-03/80, [1983] E.C.R. 1825.

9. *Hasselblad (GB) Ltd. v. Commission*, Case 86/82, [1984] E.C.R. 883.

10. *Ford of Europe Inc. v. Commission*, Joined Cases 228-29/82, [1984] E.C.R. 1129.

11. *BAT Cigaretten-Fabriken GmbH v. Commission*, Case 35/83, [1985] E.C.R. 363.

12. The statement of objections sets out the evidence in support of the European Commission's conclusion that there has been a breach of the EC competition rules. The undertakings concerned are given an opportunity to reply and to have an oral hearing before a hearing officer who is an official of the Commission, but not a party to the investigation. *IBM*, [1981] E.C.R. 2639, 2642.

13. Consolidated Version of the Treaty on the Functioning of the European Union arts. 101-02, 2008 O.J. C 115/47, at 88-89 [hereinafter TFEU]; Treaty Establishing the European Economic Community arts. 85-86, Mar. 25, 1957, 298 U.N.T.S. 11

of a dominant position within a substantial part of the common market. The IBM lawyers challenged every procedural step taken by the Commission.¹⁴ The ECJ agreed with the opinion of Lord Slynn, which was richly documented with authority arising from earlier case law.¹⁵ He argued that the procedural steps in the European Commission's investigation were purely preparatory acts.¹⁶ He concluded they lacked legal effect as to the interests of the undertakings concerned, and, therefore, were not "acts" within the meaning of the EEC Treaty that would give rise to a direct challenge from natural or legal persons.¹⁷ The statement of objections laid out the Commission's reasoned conclusion that there was evidence to demonstrate that IBM had violated its dominant position by abusive conduct and therefore was in breach of article 86 of the EEC Treaty.¹⁸ The Advocate General and the Court reasoned that only when the Commission issued its final decision would IBM's interests be affected.¹⁹ At that stage, IBM could challenge the Commission's decision before the ECJ and raise any alleged procedural irregularities in respect of the statement of objections.²⁰

This was a very important case because it put an end to attempts to frustrate the Commission's competition procedures by challenging each step in the process of investigating alleged anti-competitive behavior. Furthermore, when the legal systems of the EC Member States adopted similar competition law models, these rules were incorporated into their national legal systems;²¹ therefore, the opinion, and the confirming judgment, not only influenced the development of EC competition law, but also similar national laws.

[hereinafter EEC Treaty]. At the time when the cases mentioned in this Essay were being considered by the European Commission and by the ECJ, the relevant European Economic Community Treaty competition provisions were known as articles 85 and 86. Since December 2009, when the Lisbon Treaty came into force, these articles have been renumbered as articles 101 and 102, respectively. *See* The Treaty of Lisbon, Dec. 13, 2007, art. 5(1), 2007 O.J. C 306/1, at 134

14. *IBM*, [1981] E.C.R. 2639, 2642.

15. Opinion of Advocate General Slynn, *IBM*, [1981] E.C.R. 2639, 2661.

16. *Id.* at 2663.

17. *Id.* 2664.

18. *IBM*, [1981] E.C.R. 2639, ¶ 2.

19. *Id.* ¶ 21; Opinion of Advocate General Slynn, *IBM*, [1981] E.C.R. 2639, 2667.

20. *IBM*, [1981] E.C.R. 2639, ¶ 25.

21. *See, e.g.*, Competition Act, 1998, c. 41, §§ 1-24 (Eng.).

II. THE PIONEER CASE

The *Pioneer* case concerned a Commission decision²² concluding that a concerted practice between several parties breached EEC Treaty article 85 (now TFEU article 101).²³ The European importer of one of the world's leading manufacturers of hi-fi equipment and the exclusive distributors of these products in France, Germany, and the United Kingdom, were alleged to have engaged in concerted practices to restrict cross-border trading by their dealers.²⁴ Prior to this decision, the criteria for determining the amount of a fine imposed on undertakings for breach of the EC competition rules was mainly based on the gravity and duration of the infringement and amounted to a small percentage of the undertakings' annual turnover.²⁵ The decision marked a change in the Commission's policy on fines given that the Commission calculated the fine in this case primarily by reference to the annual turnover of the undertakings concerned. Thus, this was an important case in the development of the European Commission's policy on calculating fines to be imposed on undertakings found to have breached the EC competition rules.²⁶

The parties' main argument was that the Commission had failed, in the course of the administrative procedure, to disclose the criteria upon which it intended to calculate the fine or to inform the parties of the approximate amount of the fine that the Commission was considering.²⁷ It was at a much later stage that the Commission announced the size of the fine, which ranged between two-and-a-half and four percent of the annual turnover of the undertakings concerned.²⁸ This was a considerably larger fine than those imposed in previous cases.²⁹ The parties alleged that the unprecedented severity of the fines

22. Commission Decision No. 80/256/EEC, 1980 O.J. L 60/21 (*Pioneer*).

23. *SA Musique Diffusion Française v. Commission (Pioneer)*, Joined Cases 100–103/80, [1983] E.C.R. 1825, ¶ 1.

24. *Id.*

25. *Id.* ¶¶ 20, 101.

26. Although the case also involved matters of substance and procedure, the analysis in this Essay relates solely to Lord Slynn's opinion on the Commission's policy on fines.

27. *Pioneer*, [1983] E.C.R. 1825, ¶ 20.

28. *Id.* ¶ 103.

29. *Id.* ¶¶ 102–03.

infringed the principle of equality of treatment given that no advance notice of the change of policy had been given to the parties and that in earlier decisions the Commission had imposed lower fines on undertakings where similar infringements had been established.³⁰

Although Lord Slynn opined that the failure to set out the criteria for imposing the fines in the statement of objections did not vitiate the decision, he concluded that the parties were not placed at such a disadvantage to warrant an annulment of the decision.³¹ Furthermore, in his view, the Court itself had given the parties full opportunity to comment on the manner in which the Commission had set the fine.³² Nevertheless, Lord Slynn commented that:

[w]here, however, the Commission proposes to take account of a particular turnover in assessing a fine (as it appears to have done in this instance) it is my view desirable that the Commission should disclose that fact to the parties, in order that they may ascertain that the correct turnover is being used as a basis for the calculation. This is particularly desirable where (as in this instance) the Commission itself takes the view that the amount of the fine is ‘the real issue on this case’ and that amount is, in aggregate, substantially greater than the amount of any other fines imposed by the Commission.³³

Later in the opinion, Lord Slynn commented on the change in the Commission’s policy and how that should have been handled. Lord Slynn started by confirming this was a change of policy—not one of powers—given that Regulation 17/62,³⁴ the procedural regulation governing the implementation of the EC competition rules, permitted fines up to ten percent of the

30. *Id.*

31. Opinion of Advocate General Slynn, *Pioneer*, Joined Cases 100–103/80, [1983] E.C.R. 1825, 1928.

32. *Id.*

33. *Id.*

34. Council Regulation 17/62 has been replaced by Council Regulation 1/2003, but the provisions regarding of the total amount that the European Commission may impose as a fine remain the same. Compare Council Regulation Implementing Articles 85 and 86 of the EEC Treaty, No. 17/62, O.J. Eng. Spec. Ed. 1959–62, at 87, with Council Regulation on the Implementation of the Rules On Competition Laid Down in Articles 81 and 82 of the Treaty, No. 1/2003, 2003 O.J. L 1/1.

relevant turnover or one million European units of account,³⁵ whichever was greater. He strongly supported the view that the Commission should be free to impose the most appropriate level of fines in each case and not be bound by precedent or a requirement to give advance notice.³⁶ He acknowledged that fines may have to be increased as a deterrent, for example, where particular practices become prevalent.³⁷

Nevertheless, Lord Slynn concluded that when increasing the fines, the Commission should have some regard for the level of fines imposed in the past and that “it becomes particularly important to consider the gravity and duration of the infringement and its effects as well as the turnover.”³⁸ He accepted that a deliberate infringement with wide ranging effects may well justify the maximum fine but this was not the case in this situation, as the Commission itself had acknowledged.³⁹ Thus, he concluded that the fine, particularly the one imposed on Pioneer, was greater than was justified.⁴⁰

Another interesting conclusion in this opinion relates to what kind of turnover the Commission should take into account when calculating the fine on the basis of turnover. Should the turnover be by reference to all the markets in which the undertakings operate or only those affected by the infringement? Lord Slynn rejected the submissions of the parties that “turnover” meant the turnover limited to a particular sector, as this would prevent the Commission from being able to impose a fine of sufficient size to amount to a real deterrent where a large conglomerate, with diversified interests, was found to be in infringement of the EC competition rules.⁴¹ Regulation 17/62 was clear that the fine can be imposed up to ten percent of the undertaking’s total turnover.⁴² However, where the Commission expressly states that it used the turnover as a basis for calculating the amount of the fine to be imposed, then in Lord Slynn’s view,

35. Opinion of Advocate General Slynn, *Pioneer*, [1982] E.C.R. 1825, 1946. “Units of account” refers to the European Currency Unit, the precursor to the Euro.

36. *Id.* at 1946–47.

37. *Id.*

38. *Id.* at 1947.

39. *Id.*

40. *Id.*

41. *Id.* at 1949.

42. *Id.* at 1949–50.

the Commission should take account of the extent to which the undertaking's activities are diversified.⁴³ Thus where an undertaking has committed an infringement in only a small sector of its activities, this is likely to be a less grave infringement than if it had taken place in the whole of its activities. In Pioneer's case, Lord Slynn concluded that the Commission had been wrong in calculating the fine on the undertaking's global, rather than European turnover.⁴⁴

Given that Regulation 17/62 did not expressly restrict the Commission's authority to levy fines up to ten percent of the annual turnover, the Court could easily have followed the Commission's interpretation that it was competent to impose a fine based on global turnover. In what was a novel issue for the Court, however, it followed the advice of the Advocate General.

III. *THE HASSELBLAD CASE*

In the *Hasselblad* case, the ECJ reviewed a Commission decision⁴⁵ which had found that a concerted practice existed between a Swedish company which manufactured cameras (Hasselblad cameras) and six of its sole distributors in violation of EEC Treaty article 85(1) (now article 101(1) TFEU).⁴⁶ One of the undertakings concerned was a British company that sought annulment of the decision.⁴⁷ The ECJ reduced the fines substantially, as the Commission had been unable to show that cameras which were the subject of parallel imports had to wait longer for repairs with the applicant than did the same cameras in other Member States.⁴⁸ Thus this conduct could not be regarded as restricting the supply of parallel imports.⁴⁹ In reaching this conclusion, the ECJ no doubt was helped by the detailed analysis of the facts and evidence carried out by Advocate General Slynn.

Advocate General Slynn concluded that that the applicant could not rely on the protection from fines under article 15(6) of

43. *Id.* at 1950.

44. *Id.*

45. Commission Decision No. 82/367/EEC, 1982 O.J. L 161/18, at 34 (*Hasselblad*).

46. *Hasselblad (GB) Ltd. v. Commission*, Case 86/82, [1984] E.C.R. 883, ¶ 20.

47. *Id.* ¶ 1.

48. *Id.* ¶¶ 34, 57.

49. *Id.*

Regulation 17/62 given that the proven concerted practice operated outside the sole distribution agreement which had been notified⁵⁰ to the European Commission.⁵¹ This was so even though the notified agreement did include a prohibition on exports outside the contract territory. Then he proceeded to analyze the evidence and concluded that it had not been established that parallel imported cameras were discriminated against unlawfully.⁵² The opinion is a good illustration of the assistance that the Advocate General can give the Court by acting like a first instance judge and evaluating the evidence in a direct action before the ECJ where the parties seek judicial review of a Commission decision.

IV. THE FORD CASE

The *Ford* case was an important case in determining the scope of the European Commission's powers when issuing an interim decision while carrying out an investigation. The Commission had ordered Ford to continue supplying right-hand-drive cars from its production line to customers in Germany⁵³ while investigating whether a notified selective distribution agreement was incompatible with EEC Treaty article 85(1) and, if so, whether it could benefit from an article 85(3) exemption.⁵⁴

The main contention was that the European Commission had no competence to issue an interim decision requiring an undertaking to take a particular step which could not be

50. Until 2004, there existed a centralized system that required firms to notify the Commission of any concerted practices and agreements whose clauses restricted competition. *See* Council Regulation No. 1/2003, 2003 O.J. L 1/1, at 1.

51. Opinion of Advocate General Slynn, *Hasselblad*, Case 86/82, [1984] E.C.R. 883, 927.

52. *Id.* at 931.

53. Commission Decision No. 82/628/EEC, 1982 O.J. L 256/20.

54. Until the modernization of the enforcement of the EU's competition rules, only the European Commission had the competence to decide that a notified agreement that is incompatible with EEC Treaty article 85(1) (which became article 81(1) EC Treaty and now TFEU article 101(1)) could be exempted as it fulfilled the conditions of EEC Treaty article 85(3) (which became article 81(3) EC Treaty and now TFEU article 101(3)). Thus, an anti-competitive agreement could be granted an "exemption," often for a definitive period of ten years. Since 2004, the notification system has been abolished and now it is for the parties and their legal advisers to evaluate the agreement as to its compatibility with article 101 TFEU as a whole. Thus an agreement that is incompatible with article 101(1) TFEU may now be "excepted" under TFEU article 101(3) if it meets the conditions of this provision.

required in the final decision.⁵⁵ The European Commission could make an article 101(3) exemption conditional on a certain specific action being taken by the undertaking concerned, but it could not order the undertaking to take the action.⁵⁶ Thus the question for the ECJ was whether the Commission could order in an interim decision something which the Commission could not order in a final decision.⁵⁷

Advocate General Slynn was quite clearly of the view that:

Although an order may be different in form in an interim decision from a final order, what is ordered must not exceed in substance what the Commission could do in a final order. There may be situations where the distinction is not entirely clear, but it seems to me to flow from the ancillary nature of interim relief, ancillary that is to the limited powers conferred on the Commission.⁵⁸

He also analyzed other grounds for the annulment of the interim decision and concluded that the interim decision should be annulled “on the grounds that it was not within the Commission’s competence, was not ‘indispensable’ or ‘conservatory’ and was not supported by a sufficiently clear case in law.”⁵⁹

The ECJ followed the reasoning of the Advocate General and annulled the Commission’s decision.⁶⁰

V. *THE BAT CASE*

The last opinion to be considered concerns the relationship between the EC Treaty rules on competition and on the free movement of goods with regard to the protection of industrial and commercial property. As stated in the Introduction, Lord Slynn’s contribution to the development of the substantive law of the internal market was particularly significant. In the *BAT* case the opportunity arose for him to comment on this relationship within the context of a delimitation agreement between two

55. *Ford of Europe Inc. v. Commission*, Joined Cases 228-29/82, [1984] E.C.R. 1129, ¶¶ 15-16, 19-21.

56. *Id.* ¶ 22.

57. *Id.* ¶ 17.

58. Opinion of Advocate General Slynn, *Ford*, [1984] E.C.R. 1129, 1169-70.

59. *Id.* at 1172.

60. *Ford*, [1984] E.C.R. 1129, ¶ 17.

trademark owners. The case concerned an agreement between BAT, a German manufacturer, and Segers, a small Dutch tobacco producer. Segers owned a trademark “Toltecs Special” and was threatened by BAT for violation of its own trademark “Condorcet” on the ground it caused confusion in the German market.⁶¹ In order to avoid expensive litigation, they entered into an agreement restricting Segers’ potential use of its trade mark in Germany and preventing Segers from challenging BAT’s right to use its own trademark even after the expiration of the trademark’s legal validity.⁶² Delimitation trademark agreements were common in Germany and were considered not to violate competition law, including EEC Treaty article 85, which prohibits agreements restricting competition.⁶³

Lord Slynn’s opinion made it clear that such agreements were prohibited by article 85(1) since the objective was to divide up the common market. Since the agreement did not fulfil the conditions of article 85(3), it could not be “exempted.”⁶⁴ The ECJ agreed with the conclusions of Lord Slynn.⁶⁵

CONCLUSION

Lord Slynn became an Advocate General at a time when the European Community was emerging from a decade of legislative inactivity in the 1970s. During that period the ECJ alone seemed to have kept the European dream alive by delivering significant rulings and judgments in the fields of competition and free movement of goods.⁶⁶ During his seven years in office, Lord Slynn witnessed a complete change of political will with the European Union’s adoption of almost 300 proposals for legislation which would ensure that an internal market would become a reality by December 31, 1992. However, the legislative reform or modernization of the EC competition rules did not

61. BAT Cigaretten-Fabriken GmbH v. Commission, Case 35/83, [1985] E.C.R. 363, ¶¶ 7–8.

62. *Id.* at ¶ 11.

63. *Id.* at ¶ 33.

64. *Id.* at 372.

65. *BAT*, [1985] E.C.R. 363, ¶ 41.

66. *See supra* notes 7–11.

take place until 2004,⁶⁷ and therefore the development of EC competition law was very much in the hands of the Court. The competition law opinions mentioned above assisted the ECJ in strengthening the EU's legal order and ensuring that the EU's competition law regime developed in a robust and fair manner. The opinions in these cases concerned issues of competence both in relation to substantive law (*BAT*, *Ford*, *Hasselblad*, and *Pioneer*)⁶⁸ and procedural law (*IBM*).⁶⁹

Although it is outside the scope of this Essay to discuss Lord Slynn's wider contribution to the development and acceptance of EC law by national courts and judges, I cannot avoid making a general observation. I would not be surprised if a future evaluation of Lord Slynn's role in the development of EU law does not conclude that his most significant contribution was after his return to the United Kingdom. As a member of the highest court in the United Kingdom, the Judicial Committee of the House of Lords, Lord Slynn was in an ideal position to influence the acceptance of EU law as part of the domestic law of the United Kingdom and to encourage his brethren to make references to the ECJ seeking interpretation of EU law. But perhaps even more significant may be the role he played in helping to inform, train, and encourage judges, academics, and students from Eastern Europe to embrace EC law.

67. See Council Regulation on the Implementation of the Rules On Competition Laid Down in articles 81 and 82 of the Treaty, No. 1/2003, art. 45, 2003 O.J. L 1/1, at 25.

68. See cases cited *supra* notes 8–11.

69. Int'l Bus. Mach. Corp. v. Commission (*IBM*), Case 60/81, [1981] E.C.R. 2639.