It’s both an honour and a pleasure for me to deliver the King’s College Annual European Law lecture before such a distinguished audience. Unfortunately, it is also challenging, given that my audience consists mainly of British lawyers, academics and practitioners, who possess the reputation of being the wittiest group in the legal world.

However, these rather discomforting worries eased off when I was preparing my speech. I realised that my fortunes today would, in any case, be better than that of the first Englishman who ever visited my home country, Finland. His name was Henry and he was a clergyman from Exeter. In 1155 he joined a Swedish king on a crusade to Finland, with the honourable intention of baptising the pagan Finns and converting them to Christianity. With the new faith, and European civilization, taxation also arrived, something that rather annoyed a local Chieftain by the name of Lalli. He decided to attempt to repatriate the fiscal competences, and chopped off his head with an axe. But in time Henry became Finland’s national saint, and Lalli now spends, according to a legend, his eternity in perdition.

Fortunately, such differences of opinion would render a more peaceful solution today, and preferably a judicial one. For this reason we have established an impressive collection of tribunals at the international and European level, such as the three courts of the European Union and the European Court of Human Rights, and the future European Unitary Patent Court.

My intention today is to discuss some topical issues and future challenges relating to this European judicial landscape. These are well known to British lawyers due to the excellent House of Lords European affairs committee report of 2011 which addresses the workload of Court of Justice. Other issues concerning the judicial architecture of Europe have also been the object of lively political debate in the United Kingdom. Today I will focus on some recent developments in the European
Union judicial system, in other words, the European Court Justice (ECJ) which comprises the EU Court of Justice, the General Court and the Civil Service Tribunal. I’ll also make some observations on other European courts. I will start with some recent developments concerning the system of judicial appointments at the EU level.

As you know, the Lisbon Treaty introduced an EU level vetting system pertaining to appointment of judges and advocates general of the EU Court of Justice and the judges of the General Court. The system did not formally withdraw from the Member States their sovereign power to decide over their candidates, and to make the appointment decision in the form a common accord. However, the introduction of a structure for assessing the candidates proposed by the Member States by a panel, the so-called Article 255 committee, has considerably modified the parameters of this exercise.

The panel consists of seven members appointed by the president of the EU Court of Justice, one of which is proposed by the European Parliament. Members of the panel are from national supreme or constitutional courts, and former members of the ECJ, in addition to the member proposed by the European Parliament. The committee is chaired by M. Jean-Marc Sauvé, vice-president of the French Conseil d’État, and its members include Lord Mance of the UK Supreme Court, who explained in detail the work of the panel in a speech given to the United Kingdom Association for European Law in October 2011.

So far the Article 255 committee has rejected the candidate proposed by a Member State for judge of the General Court in five cases, the latest being the candidate of Sweden. This refusal took place in August of last year. This has led to dissatisfaction by the Member States concerned, and raised doubts with respect to the criteria applied by the panel. Personally I’m convinced that the committee applies standards that are fully objective and justified in view of the qualifications necessary to fulfil the responsibilities of high European Union courts. The panel has provided a useful barrier to candidates that clearly fail to match this standard.

This said, the vetting system has caused an unexpected consequence, which has proven to be quite difficult for the ECJ to manage as an institution. Namely, according to the Statute of the Court, a member shall continue to hold office until his successor takes up his duties. Hence, when the Article 255 committee rejects a candidate the result is an impasse. It may continue for a long time, especially if the Member State concerned, for political reasons, does not want to propose a new candidate within a prompt period of time.
In two cases a member of the ECJ has been obliged to continue to hold office even after the end of mandate because of such a situation. In practical terms this has meant that the person concerned can no longer meaningfully fulfil his or her duties because no new cases can be attributed to them pending the appointment of a successor. This results in a significant waste of the resources of the Court, both financial and in terms of personnel, without mentioning the delicate situation the persons concerned are faced with.

In the light of these difficulties, the Court has accepted a certain measure of leniency in the application of the Statute. Thus, once a member of the Court is unable to fulfil his or her duties at the ECJ, and the Member States have enjoyed a reasonable time for appointment of a successor, the member concerned is within his rights to withdraw the mandate of the sitting member, even if the successor has not taken up his duties.

I will now turn to changes to the Court’s rules of procedure wrought by the November 2012 re-cast of them, the first in the Court’s history. It aimed at modernizing, simplifying and rendering more effective the proceedings on the basis of the practice and case-law gathered over the 60 years of the existence of the institution. The related amendments to the Court’s Statute entered into force on 1 October 2012. These reforms combined have entailed both structural and procedural changes.

I recall that the provisions regulating the ECJ as an institution, along with the activities and procedure of its composite courts, remain scattered throughout the treaties, the Statute of the Court, and the separate Rules of Procedure of the three EU Courts.

It is, of course, impossible for me to give a detailed or exhaustive description of the changes that have been made. Therefore, I have picked some individual points that might be of wider interest to European lawyers.

Of the structural changes brought about by the 2012 amendments the most visible is the establishment of the position of vice-president of the EU Court of Justice. The Vice-president shall exercise the judicial powers of the President with regard to interim measures and suspension of execution of judgments and appeals against decisions of the General Court in similar matters. He also sits as a standing member in the Grand Chamber. The judges have elected judge Koen Lenaerts from Belgium as the first Vice-president of the EU Court of Justice.
The second structural change concerns the composition of the Grand Chamber. Its membership has been widened from 13 to 15, including the President and Vice-president of the Court as well as three presidents of the Chambers of five judges who sit on a rotating basis. This means, in practice, that there is more scope for judges who are not Presidents of Chambers to sit as members of the Grand Chamber. In turn this enhances equality among the judges and their influence in the development of case-law.

As a consequence of these reforms the Court has decided to increase the number of Chambers comprised of five judges from four to five. This implies that, at present, 25 of 27 judges, in other words all judges other than the President and the Vice-president, can simultaneously sit and deliberate in chambers of five judges. The number of three judge chambers has also been increased to five. Previously there were only three. These reforms should considerably increase the number of judgments the Court is able to deliver annually. However, at the same time the reform renders the Court rather vulnerable in terms of absences of judges caused, for example, by sick leave. This is so because there will no longer be any reserve in the chambers, but all judges of a chamber will participate in all cases attributed to it.

I would also make reference to the disappearance of the Report for Hearing, which is no longer prepared and translated into the language of the procedure. The Court is fully aware of the inconvenience this reform may cause for the parties, who now have no written assurance that the reporting judge has correctly understood the factual and legal framework and the substance of their pleadings. However, for the Court this reform has accelerated the organisation of hearings. This is of assistance in meeting the challenge of keeping the average duration of the proceedings as reasonable as possible.

Another issue of interest for practitioners relates to the organisation of hearings where the new Rules of Procedure give the Court more margin of appreciation. This means that the Court may decide to handle a case without a hearing if it considers itself to be sufficiently informed in the light of the written observations submitted by the parties.

The abolition of hearings as of right implies that the representatives of the parties wishing to have a hearing must provide clear reasons to the Court as to why it should not consider itself as sufficiently informed on the basis of the written submissions. Moreover, it is the intention of the Court to rationalize the conduct of hearings by requiring the parties to focus on issues indicated by the Court
beforehand, and by limiting the speaking time available for submissions. In other words, oral submissions merely reiterating what already appears in the written observations serve no useful purpose. In the same spirit, the new Rules of Procedure empower the Court to define maximum length of written submissions, which may be exceeded only with the Court’s permission.

The new Rules of Procedure empower the Court to deliver a judgment in a preliminary ruling case even if the preliminary reference has been withdrawn by the national court after the date of the delivery of the Court’s judgment has been communicated to the national court. This solution aims at combating abuse in the sense of preventing one of the parties to the proceedings from settling the case at the last minute in order to avoid the delivery of a preliminary ruling which it expects, for example, on the basis of the Advocate General’s opinion, to be running against its interests.

The idea of having a judgment without a pending reference represents, admittedly, an anomaly, but the solution has been considered necessary in certain exceptional situations where the litigation strategy of parties causes major inconvenience for the Court. This can take the form of unnecessary deliberations and translation costs. Moreover, this solution enables the European legal audience the benefit of the guidance of the preliminary ruling the Court had already adopted, but not yet published, before the reference was withdrawn.

The EU Court of Justice strives to keep the duration of proceedings at acceptable levels despite the increasing volume of incoming cases. For this reason the new Rules of Procedure extend the circumstances in which recourse can be made to a reasoned order, which in practice means that the case is not communicated to other parties, and that it is decided without either a written or oral procedure by a chamber of three judges.

In preliminary rulings proceedings this option will be available in cases where there is no reasonable doubt of the answer to be given to the preliminary question. At present, a reasoned order may be used only if the question is identical with a question which the Court has already answered, or the answer can be deduced from the existing case-law. In the case of appeals against decisions of the General Court, a reasoned order will be available not only if the appeal is manifestly inadmissible or unfounded, but also when it is manifestly founded.

I will now move on to some political developments.

The EU Court of Justice has recently proposed to the Council that the number of Advocates General be increased by three. This option has been open since the entry into force of the Treaty of Nice in February 2003. In the context of the Lisbon Treaty the Member States adopted a joint declaration to
the effect that if the Court makes such a proposal, Poland would be entitled to propose an Advocate General of Polish nationality on permanent basis whereas the two other posts would be added to the rotation between the so-called smaller Member States. As you know, presently the five big Member States have permanent Advocates General. I recall that the last accessions have augmented the number of judges from 15 to 27 but the number of Advocates General has remained at eight.

Increase in the number of Advocates General was endorsed in 2011 by the House of Lords European Affairs Committee. Last autumn, the Court also came to this conclusion on the basis of a study of an internal working group. The Court has found that the increased number and complexity of the incoming cases can no longer be reasonably dealt with by reference to the solution applied so far, namely by continuous growth in the number of cases decided without an Opinion of an Advocate General. Indeed, at present about 50 per cent of judgments, and of course, all reasoned orders, are delivered without an Advocate General’s opinion.

According to the proposal of the Court, the new Advocate General of Polish nationality would start this year at the same time as the future Croatian judge. The two remaining new posts would be filled in October 2015. This solution would permit a smooth system of rotation amongst the five Advocates General of the smaller Member States, who unlike their colleagues from the big Member States, cannot in practice be reappointed.

The EU Court of Justice has managed to achieve a reasonable average in terms of the turnover of its caseload. At present a preliminary ruling proceedings takes 15 months on average while in 2003 it took over 25 months. This is explained, firstly, by the increase in the number of judges as a consequence of the two last accessions, and secondly by the increasing amount of cases decided without an Advocate General’s opinion. Recourse to reasoned orders and judgments issued by three judge chambers has also been significant in managing the turnover of Court rulings.

Unfortunately, this relatively satisfactory situation is unlikely to continue. The number of pending cases reached 885 at the end of 2012. In other words, the speedier handling of incoming cases will be an insufficient counter-weight to the growth in their number. Without new measures, I envisage that the Court will be faced with great difficulties within four or five years.

The EU Court of Justice has very limited scope for controlling its docket when compared with the highest national courts. Earlier proposals to delegate some preliminary references to the General Court have lost their justification because of the existing workload problems of the General Court. Moreover, no system for limiting the admissibility of preliminary references appears to be
acceptable or useful in view of the paramount constitutional importance of the preliminary reference system for the European Union. Hence, the solution must be sought from other forms of proceedings.

The Court has started to study the best national practices relating to filtration of appeals before the highest courts such as the requirement of leave to appeal or limitations of admissibility of appeals showing no general interest. It is felt that many of the appeals against the decisions of the General Court don’t actually merit examination by the EU Court of Justice, which makes appeals from the General Court the most natural candidate for any docket control system. The same could, of course, be said of many infringement proceedings. Whatever the outcome of the investigations and discussions currently taking place, their implementation would require treaty changes.

The problem of duration of proceedings has become acute in the General Court in the context of state aids and competition cases, and this was discussed in detail in the 2011 House of Lords report. Although some progress has been made, at the end of 2012 there were still 1237 cases pending at the General Court. This backlog cannot be settled without special measures in view of the fact that the difference between decided and incoming cases was only about 70 in 2012.

The General Court has recently taken considerable measures in order to make its internal working methods more efficient. Unfortunately, for the reasons I explained in the beginning of my speech, these efforts have been counteracted by the fact that the General Court has not been able to work in its full composition, due to the delays in the nomination of the judges.

The view that has been taken by the EU Court of Justice on resolving the delay problems in the General Court is the appointment of more judges, a solution also endorsed by the House of Lords report. It is no secret that some members of the General Court would have preferred the establishment of new specialised EU courts such as a trademark court or an IPR court. It is necessary to emphasise that the EU Court of Justice has not excluded that option for the future. Nevertheless, it has not been considered appropriate as a solution to the present critical situation in terms of the backlog of pending cases at the General Court.

Personally I’d like to add that any establishment of new specialised EU courts would require a thorough analysis of its impact in terms of appeals jurisdiction. As you know, presently the General Court deals with appeals against the only specialised EU court, namely the Civil Service Tribunal. Its decision is definitive unless the First Advocate General proposes that the decision of the General
Court should be subject to review by the EU Court of Justice because of a danger to the unity and coherence of EU law.

The establishment of a new specialised court would result in increased numbers of appeals before the General Court. The examination of judgments given in these appeal cases for the purposes of eventual review would unreasonably consume resources of the first Advocate General and the other Advocates General who normally participate in this process. As a matter a principle it can also be questioned whether the appeals jurisdiction in the case of specialised courts should be in the hands of the EU Court of Justice and not the General Court. This would ensure that preliminary references and appeals in the same field are decided by the same court.

The idea of increasing the number of judges of the General Court has been approved by the Member States as a matter of principle. In December 2012 they also reached a consensus by deciding that the number of new judges would be nine, and not twelve as proposed by the Court of Justice. However, unanimity has not been reached as to the method of choosing the nine new judges, and the file has been transferred to the Irish presidency which is currently considering it. Here it can be feared that history might repeat itself. I recall that the idea of increasing the number of the judges of the Court of First Instance that was approved in the 1990’s failed because of the same reason.

In contrast, the Member States have been able to decide that the newcomer within the European judicial system, the Unitary Patent Court, will have seats in four European cities, namely Luxemburg for the court of appeal, and Munich, Paris and London for the divisions of the court of first instance. Because this matter may be brought to the Court for an Opinion, I cannot say anything as to the substance of the package approved by the European Parliament and the Member States. However, a saga, which started in the early 1970’s has revealed an interesting issue that may become even more topical in the future.

It relates to a perceived lack of expertise at the EU Court of Justice in the field of patent law or IPR law in general. Such distrust is well known to many members of national supreme courts who have to sit on appeal cases that have, at a lower instance, been examined by judges specialised in the field concerned. The widening of the scope of EU legislation, and as a consequence the jurisdiction of the EU Court of Justice, highlights this problem, not only in the field of IPR law but also in other
sectors such as, for example, tax law, conflict of laws, international private procedure, criminal law, immigration and asylum and environmental law.

There is no easy answer to this problem. It is possible to emphasise the need for specialisation and expertise. This, however, may result in fragmentation of the legal system and decrease of coherence in terms of principles of law which underpin the whole EU constitutional edifice, such as fundamental rights or general principles of law. On the other hand, it is of course necessary that supreme judicial bodies possess credibility in terms of their capacity to develop the substance of various highly specialised fields of case-law. In this respect they depend, among other things, on the quality of the pleadings and the evidence brought by the parties.

Finally I’d like to say a few words about accession of the European Union to the European Convention of Human Rights. As you may know, the Court addressed this issue in its letter to the Council of May 2010. The Court raised the issue of exhaustion of national remedies with respect to European Union acts allegedly infringing the Convention, if the EU Court of Justice has not examined the validity of such acts beforehand. In so far as I’m correctly informed, this issue has found a satisfactory solution in the negotiations in the form of an expedited reference of the matter to the EU Court of Justice before the Strasbourg Court decides on the case. However, other political reasons seem to delay the progress of this matter. Otherwise the accession does not raise any specific concern at the ECJ, whose cooperation with the Strasbourg Court has developed in good spirit and mutual trust.

In summary, the introduction of a qualification assessment mechanism to the system of appointing members to the ECJ and the reform of the rules of procedure of the EU Court of Justice contribute to making the European judicial system work well. Increase in the number of Advocates General and judges of the General Court would also be helpful. However, if some of earlier difficulties have been overcome, new ones are in sight. Therefore my title “through difficulties towards new difficulties” should not be understood as pessimistic. Rather it describes how life goes on, also for the European judicial system.