Speech of Koen Lenaerts, President of the Court of Justice of the European Union, on the occasion of the 50th anniversary of the accession of Denmark to the European Union

The effective application of EU law in the Member States

Copenhagen University, 9 January 2023

Dear President Neergaard,

Dear Professor Sørensen,

Executive Vice-President Vestager,

Distinguished Guests,

Dear Colleagues and Friends,

It is my great honour and pleasure to take part in this conference organised by the Danish Association of European Law on the occasion of the 50th anniversary of the accession of Denmark to the European Union (the "Union"). I have been reliably informed that "round" birthdays are cause for great celebration in Denmark and today is no exception. I am therefore thrilled to celebrate this important moment in Denmark's and the Union's history here in Copenhagen with you and to share some thoughts on the topic of effective application of Union law in the Member States.

The accession of any candidate State for EU membership is a sovereign act of that State, as it freely decides to be a part of the

European family. It is also a constitutional turning point for that State, all the other Member States and the Union itself. Indeed, it is from that moment onwards that the interlocking of the legal order of the new Member State with the EU legal order and the other Member States' legal orders takes place. It is also from this point and for as long as it remains a member of the Union, that the new Member State commits itself to respecting the common values on which the Union is founded, namely those of "human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", enshrined in Article 2 TEU. A strict control of those values before and up until accession is ensured, inter alia, through the so-called Copenhagen Criteria, laid down at the European Council Summit in this very city in 1993. Those criteria are now codified in Article 49 TEU.

These values, which have at their core the concern for the individual, are not "imposed by Brussels or by Luxembourg". On the contrary, they are the consequence of a 'bottom-up' approach and were thus moulded by the constitutional traditions common to the Member States. They now form part of the very identity of the Union as a common legal order.[1] Once a candidate State for EU membership becomes a Member State, it therefore joins a constitutional structure that is based on the fundamental premiss that 'each Member State shares with all the other Member States, and recognises that they share

[1] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 127, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 145.

with it, a set of common values on which the European Union is founded', and abides by the obligations stemming from them. It is that premiss that justifies the existence of mutual trust within the Union and ensures the equality of all Member States before Union law.[2]

As an essential component of that constitutional structure, the Union's judicial architecture serves to secure the operation of the principle of effective judicial protection of the subjective rights the individuals draw from Union law. As is clear from the seminal *van Gend & Loos* case,[3] the protection of those rights lies not only in the hands of the Commission, by means of its power to bring infringement proceedings against a Member State before the Court, but also in the hands of the national courts. Before the latter, 'individuals have therefore the right to challenge […] the legality of any decision or other national measure which applies to them an act of the Union itself'.[4] Indeed, since the implementation of EU law is largely decentralised, the Treaties and, in particular, Article 19 TEU, require the Member States to 'provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law'.

Article 19 TEU however also makes clear that the Masters of the Treaties tasked the Court of Justice with the mission of ensuring that "in the interpretation and application of the Treaties the law is

[2] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 125 and of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paras. 61 and 62.
[3] Judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1.
[4] See judgment of 24 June 2019, *Commission/Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, para. 46.

observed". In a Union based on the rule of law, there has to be one court, which has the last word on what the law is and guarantees its uniform interpretation and application. Accordingly, when it comes to the interpretation of EU law, the Court of Justice has the *final* say,[5] and when it comes to the validity of that law, it has the *only* say.[6]

This uniformity is made possible by the preliminary reference mechanism, laid down in Article 267 TFEU, which constitutes the "keystone of the Union's judicial system". Its "magic" resides in the possibility for every individual within the Union to raise matters covered by Union law before his or her local court and that the latter, in cooperation with the Court of Justice, may protect the rights conferred upon individuals by Union law against any undue interference. In turn, the interpretation of that law provided by the Court of Justice allows the referring national court to resolve the issue at hand in a manner that complies with Union law, disapplying incompatible national norms, as required by the *Simmenthal* ruling,[7] if necessary. Equally importantly, it also enables any other court in any other Member State seized with a similar dispute, to understand what the requirements of Union law are and thus to provide the same level of protection to EU citizens.

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[5] See, in this regard, judgments of 2 September 2021, *Republic of Moldova*, C-741/19, EU:C:2021:655, para. 45, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, para. 52.

[6] Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, para. 71.

[7] Judgment of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49).

The Union's judicial construction, relying on the principles of direct effect and primacy, therefore strives to guarantee both "procedural" equality, through ease of access to the Union courts for all via the preliminary reference mechanism, as well as "substantive" equality by ensuring that the provisions of Union law have the same meaning and the same force throughout the Union. In this way, European citizens – from Tallinn to Lisbon and from Copenhagen to Nicosia – benefit from equal and effective protection against, for example, measures that degrade their local environment, the consequences of tax fraud or any backsliding in terms of judicial independence.

That is not to say that there is no room for diversity. The Treaties recognize, in Article 4(2) TEU, the requirement for respect, by the Union, of the national identities of its Member States. The Treaties also recognize the so-called "opt-outs" from certain fields of Union law, granted to particular Member States, including Denmark. Furthermore, whilst any candidate State for EU membership must align its own constitution with the values on which the Union is founded in order to become a Member State, Union law does not impose a "particular constitutional model" governing the relationship between the branches of the State, the latter being dependent on the choices made by the people.[8] Finally, the Court of Justice has consistently recalled the primary responsibility of the Member States

[8] See, to that effect, judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, EU:C:2021:311, paras 61 and 62, and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paras 160, 161 and 229.

for the establishment of remedies ensuring the effective application of Union law within the framework of their national procedural autonomy, subject to respect for the twin Union law requirements of equivalence and effectiveness.

Diversity forms part of the Union's identity. Indeed, it is the process of cross-fertilisation between different legal orders, facilitated and enhanced through judicial dialogue, which underpins the complementary nature of national and European identities, while they both rest on a set of common values, shared and treasured by all Europeans. It is also this mutual influence of the Member State and Union legal orders that stimulates a "race to the top" in terms of providing effective protection of the rights stemming from Union law. I would now like to illustrate that point by taking as examples a number of specific rulings of the Court of Justice, most of which have a connection to Denmark. Those rulings necessarily affect the procedural and substantive laws of all the Member States, but they do so, I would suggest, with the laudable aim of benefiting or protecting the European Union citizen.

The first case on which I would like to comment is the Grand Chamber ruling in *Lady & Kid*,[9] which was decided over a decade ago by the Court of Justice upon a reference by the High Court of Eastern Denmark (the Østre Landsret). It remains good law to this day.[10] The

[9] Judgment of 6 September 2011, *Lady & Kid and Others* (C-398/09, EU:C:2011:540).
[10] This judgment was most recently reaffirmed in judgment of 1 March 2018, *Petrotel-Lukoil and Georgescu* (C-76/17, EU:C:2018:139).

questions raised by the referring court concerned the reimbursement of a business tax which had previously been declared by the Court of Justice to be incompatible with the Council directive 77/388 on turnover taxes.[11] The requests for reimbursement of the claimants, all of them active in the retail sector in Denmark, were rejected by the national authorities on the grounds that the amounts paid by the undertakings during the period when they were liable to pay the illegal tax, were offset thanks to the elimination of employers' social security contributions during that same period, which meant that the undertakings in question had already received full compensation for the disputed levy. Repayment of the illegal tax would thus have lead to unjust enrichment of those taxpayers. Thus, the referring court, by its questions, was essentially asking whether such compensatory savings, resulting from the elimination of those employers' contributions, could give rise to the "passing on of an unlawfully charged levy" within the meaning of EU law, which could, in the event of reimbursement of sums wrongly paid under the illegal tax, lead to unjust enrichment of the undertakings concerned, even though those undertakings had not in fact altered the prices at which they sold their products due to competitive pressures on the market.

The Court began by recalling its long-standing case law, according to which the right to a refund of charges levied in breach of Union law rules is the consequence and complement of the rights conferred on

[11] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

individuals by provisions of Union law prohibiting such charges. Member States are therefore in principle required to repay them. Such repayment can, however, be refused where it would entail unjust enrichment of the persons concerned, in particular where it is established that the person required to pay such charges has actually passed them on to other persons, usually consumers. The Court then effected an important clarification, stipulating that since such a refusal of reimbursement of a tax levied on the sale of goods is a limitation of a subjective right derived from the legal order of the Union, it must be interpreted narrowly. Accordingly, the direct passing on to the purchaser of the tax wrongly levied constitutes the *sole exception* to the right to reimbursement of tax levied in breach of Union law.[12] The Member State may not therefore reject an application for reimbursement of an unlawful tax on the ground that the amount of that tax has been set off by the elimination of a lawful levy of an equivalent amount, as such a set-off cannot be regarded, from the point of view of Union law, as an unjust enrichment.[13]

This case brought about a very important clarification on the scope of defences available to a Member State in order to refuse the repayment of levies collected in breach of Union law. Indeed, until this judgment, uncertainty existed as to whether only the defence of "passing on" existed, in which unjust enrichment was simply a criterion, or whether there were several more general "unjust

[12] Judgment of 6 September 2011, Lady & Kid and Others (C-398/09, EU:C:2011:540), para. 20.
[13] *Ibid*, para. 26.

enrichment" defences, of which "passing on" was just one. The Court clearly opted for the former understanding and thus strengthened the rights of individuals, recognized by Union law, to receive the repayment of charges levied in breach of Union law.

The second case I would like to mention, namely the judgment of November 2022, *Deutsche Umwelthilfe*,[14] did not come to the Court of Justice from Denmark, yet it nevertheless has a link to that Member State, since it concerns the interpretation of the Aarhus Convention. The case is borne out of the well-known "dieselgate" scandal, whereby a car manufacturer programmed the software operating the exhaust gas recirculation system in such a way that it detected that testing was taking place and reduced the emissions in order to "defeat" that testing. Under normal conditions of use, however, the vehicles concerned did not comply with the nitrogen oxide (NOx) emission limit values laid down by Union law.[15] The car manufacturer, after removing this software, then updated it by employing a so-called "temperature window", which is notably meant to allow higher emissions when the environment is colder than 15°C, allegedly to protect the engine. The competent German authority adopted a decision approving the use of this updated software, which Deutsche Umwelthilfe, an environmental association, challenged.

[14] Judgment of 8 November 2022, *Deutsche Umwelthilfe (Approval of motor vehicles)* (C-873/19, EU:C:2022:857).

[15] Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

Under German law, Deutsche Umwelthilfe, whilst being generally authorised to bring environmental law cases, did not have standing to bring legal proceedings against the contested decision, as it could not be considered that its individual rights were impaired by it nor that it was an ‘environmental decision’ against which Deutsche Umwelthilfe could bring an action. German law imposed a requirement of individual concern for challenging administrative decisions authorising “products”, such as the one at issue. The question therefore arose whether that association could nevertheless derive such standing directly from Union law, notably from Article 9(3) of the Aarhus Convention, read in conjunction with Article 47(1) of the Charter of fundamental rights of the European Union (“the Charter”).

On a request for a preliminary ruling from a German Court, the Court of Justice recalled, *first*, that an administrative decision such as the one at issue falls within the material scope of Article 9 (3) of the Aarhus Convention, since it constitutes an act of a public authority which is alleged to contravene the provisions of national law relating to the environment. *Second*, the Court recognized that the Member States may, in the exercise of their discretion, establish procedural rules setting out conditions that must be satisfied in order to be able to pursue review procedures within the meaning of Article 9(3) of the Aarhus Convention. However, such rules may not exclude certain categories of provisions of national environmental law from the subject matter of the actions otherwise covered by the material scope of the said provision. *Third*, when Member States lay down rules of

procedural law applicable to the matters covered by the said Article 9(3) they are implementing Union law and must therefore respect the right to an effective remedy, enshrined in Article 47 of the Charter.

Consequently, while Article 9(3) of the Aarhus Convention does not itself produce direct effect and cannot be relied on to disapply a provision of national law that is contrary to it, a combined reading of that provision with Article 47 of the Charter, which does produce such effect, imposes on the Member States an obligation to ensure effective judicial protection of the rights conferred by Union law, in particular the provisions of environmental law. The disputed national law, since it deprived environmental organisations, such as the claimant in the main proceedings, of any right to bring an action against the administrative decision granting or amending a product approval, was considered to be an unjustified limitation of a right to an effective remedy. Therefore, should the referring court reach the conclusion that it could not interpret its national law in conformity with Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, that court would be bound to disapply the provisions of national law precluding an environmental organisation, such as Deutsche Umwelthilfe, from challenging the contested decision.

This ruling is of particular importance for ensuring effective access to justice in environmental matters under Union law. Its impact cannot be underestimated, since it gives environmental associations, the “watchdogs” tasked with the guardianship of the precious values of

human health and a clean environment, a direct Union law basis for accessing national courts in order to safeguard those values, regardless of divergent national procedural laws. To illustrate that point, in the case at hand, the action brought by Deutsche Umwelthilfe allowed the Court of Justice to formulate substantive guidance for the referring judge, who will then be tasked with applying the criteria provided and with deciding whether a "defeat" device, such as the "temperature window", complies with Union environmental norms, or not.

Whilst the *Lady & Kid* judgment strives to safeguard the right of individuals to the reimbursement of sums paid in breach of Union law, and the *Deutche Umwelhilfe* ruling aims to protect the effectiveness of EU environmental norms, certain judgments of the Court pursue a broader, more systemic aim, namely that of protecting the integrity and effectiveness of the preliminary reference procedure itself and, by extension, the very uniformity of Union law.

The Danish Government recognized the importance of this issue and intervened in support of the Commission in the *Commission v Poland (Disciplinary regime for judges)* case.[16] This judgment makes clear that any national rule which exposes national judges to the risk of disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot be allowed, as such a rule would impinge directly on the effective

[16] Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596).

exercise by national courts of the discretion or the duty, as the case may be, to refer a question to the Court of Justice pursuant to Article 267 TFEU. Such rules would also hinder those courts' function as courts responsible for the application of Union law, a function entrusted to the national courts by virtue of that provision.

The Court identified the same "chilling" effect on national courts in circumstances where a supreme court of a Member State declares, following an appeal, that a request for a preliminary ruling which has been submitted to the Court under Article 267 TFEU by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings, even where such a decision does not alter the legal effects of the decision containing that request. As the Court stressed in the *IS (Illegality of the order for reference)* ruling,[17] the principle of the primacy of EU law requires that lower court to disregard such a decision of the national supreme court.[18]

The Court of Justice also recently clarified, in the *RS (Effect of the decisions of a constitutional court)* judgment,[19] that any national rule or practice under which the ordinary courts of a Member State are prevented from examining the compatibility with Union law of national legislation which the constitutional court of that Member

[17] Judgment of 23 November 2021, *IS (Illegality of the order for reference)* (C-564/19, EU:C:2021:949)
[18] *Ibid*, para. 82.
[19] Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99).

State has previously found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of Union law, directly impairs the effectiveness of that latter law. Since such rules have the effect of withholding from the national court the power to do everything necessary at the moment when it comes to apply Union law, in order to disregard a national provision which might prevent directly effective Union rules from having full force and effect, they run counter to requirements which are the very essence of Union law.[20]

Turning now from issues of procedure to the impact of Union rules, as interpreted by the Court of Justice, on substantive national rules and practices, the Court of Justice was, in 2016, called upon by a Danish court to clarify a number of questions concerning abuse of rights and the concept of 'beneficial owner' in the context of a series of particularly complex tax disputes. Indeed, the Danish authorities were confronted with intricate organisational and financial business arrangements which had in common the fact that they all relied on conduit companies established in other Member States for the purpose of benefiting from an exemption from withholding taxes on dividends and interest paid by Danish subsidiaries. Given that the Member States in which these intermediary entities were established did not charge any withholding tax, the payments made by the Danish subsidiaries could avoid any taxation within the Union before being transferred to the ultimate beneficiaries, namely parent companies

[20] *Idem*, para. 63.

established in popular tax havens, such as the Cayman Islands. Against this complex background, the Court was essentially asked to clarify if and, in the affirmative, according to what criteria, the benefit of tax exemptions provided for in the directives on "interest"[21] and on "dividends"[22] could be refused where taxpayers use artificial arrangements of that sort.

The Court of Justice replied in two judgments issued on the same day, namely *N Luxembourg 1 and Others*[23] and *T Danmark and Y Denmark*.[24] Leaving aside the important, but technical, developments relating to the notion of "beneficial owner", two key takeaways concerning the Union's anti-abuse of rights approach can be distilled from these judgments. *Firstly*, the Court of Justice confirmed that even in the absence of national provisions aimed specifically at prohibiting the abuse of rights in the area of direct taxation, reflecting the provisions of the two above-mentioned directives, the general legal principle that Union law cannot be relied on for abusive or fraudulent ends applies, provided that the operation in question falls within the scope of Union law. This principle, whose application is not, contrary to the provision of the directive, subject to a requirement

[21] Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).
[22] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), as amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41).
[23] Judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134).
[24] Judgment of 26 February 2019, *T Danmark and Y Denmark* (C-116/16 and C-117/16, EU:C:2019:135).

of transposition, can therefore be directly relied on against an individual in a tax dispute with an administrative body.[25] *Secondly*, the Court of Justice stressed that the competent national authorities, including national courts, not only have the power to refuse to grant the benefit of an advantage stemming from Union law to a subject of the law where the right in question has been abused, but, moreover, an EU law-based obligation to do so.[26]

The importance of these two rulings is that they have put in place a Union law toolbox for national tax authorities and national courts, allowing them to combat, in an effective manner, cases of abuse of rights in tax matters, even where national law does not provide them with the means to do so. The Court's rulings, while remaining within the limits of its competence and the reach of Union law in direct taxation matters bolster the Member States' capacity to tax companies' revenues effectively and to distribute the burden of taxation in a balanced manner among all taxpayers.

The prohibition of abuse of rights has been recognized in numerous fields of Union law[27] and exists, in one form or another, in virtually all Member States' legal orders. However, when the Court is faced with areas of law in which serious divergences exist among national legal systems , its approach is more circumspect. Indeed, when considering a particular case, the Court of Justice may opt for a slightly less

[25] *Ibid*, paras. 95 to 97.
[26] *Ibid*, paras. 98 and 110.
[27] See, for example, judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134), para. 100.

"ambitious" solution, which takes due account of national constitutional traditions and the sensitivities of certain Member States, whilst still preserving the effectiveness of Union rules.

In the *C.D. and Z.* cases,[28] the Court of Justice was confronted with the question of determining who is entitled to maternity leave as provided for by Directive 92/85.[29] Is it the commissioning mother or the surrogate mother, or both? The laws of the Member States varied significantly in that respect and the Court of Justice, against this background, held that the Directive applies only to women who have been pregnant and have given birth. In other words, it did not apply to the commissioning mother. However, the Court pointed out that the Directive did not oppose value diversity in the Member States, since it only established minimum requirements. It therefore gave leeway to the Member States to grant maternity leave to the commissioning mother also, should they wish to do so.

Paying particular regard to national linguistic sensitivities, the Court of Justice ruled more recently, in case *Boriss Cilevičs*,[30] concerning a reference made by the Latvian Constitutional Court, that it was legitimate for a Member State to protect its national identity by adopting measures that sought to promote and to develop the use of its

[28] Judgments of 18 March 2014, *D.* (C-167/12, EU:C:2014:169) and *Z.* (C-363/12, EU:C:2014:159).
[29] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1)
[30] Judgment of 7 September 2022, *Cilevičs and Others* (C-391/20, EU:C:2022:638).

official language in higher education, despite the fact that they restricted the freedom of establishment.

Finally, as is clear from the judgment in *Bundesrepublik Deutschland (Application for asylum rejected by Denmark)*,[31] the Court is also mindful to acknowledge and to give full effect to the particular arrangements enshrined in the Treaties in favour of certain Member States, such as the special status of Denmark under the Protocol on the position of Denmark in respect of the Title V of Part Three TFEU, which covers, inter alia, policies relating to border control, asylum and immigration.[32]

Though the cases I have mentioned concern a range of different fields of Union law, they appropriately illustrate the point that the concern for effectiveness of Union law rules takes many shapes and forms and that it is continuously moulded by interaction between national legal orders and the Union legal order. European citizens who are the ultimate beneficiaries of this process, also have a key role in driving that process forward, as it is upon their initiative with the assistance of national courts, that their Union law rights receive the protection they deserve. Uniformity of protection is undoubtedly the name of the game in the Union legal order, but the latter nevertheless leaves space for national and regional value diversity.

[31] Judgment of 22 September 2022, Bundesrepublik Deutschland (Application for asylum rejected by Denmark) (C-497/21, EU:C:2022:721).
[32] *Ibid*, paras. 35 and 45.

Significant milestones are an appropriate moment for taking stock of the past and for contemplating the future. As my necessarily selective presentation seeks to illustrate, over the past 50 years, the Danish courts, whose references have resulted in around 200 judgments and orders of the Court of Justice, have made a very important contribution to the development of fundamental principles of Union law, ensuring the effective protection of the rights of Europeans in many areas such as taxation, environmental protection, reimbursement of unduly charged levies, competition law, non-discrimination. Among many other fields. The Danish Government's interventions in cases have also been invaluable in bringing to the debate a fresh, pragmatic, Danish, point of view, which has helped the Court of Justice to refine and strengthen its reasoning. On a personal level, I have had the honour of working with many Danish colleagues over the years, including with my friend Lars Bay Larsen, the current Vice-President of the Court of Justice, and I can say without hesitation that excellence is a characteristic they all share. If the past is any guide to the future, the future of the Union, with Denmark as a Member State, is very bright.

Here is to the next 50 years. Thank you for your attention.

Tillykke med dagen!