



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

www.competitionlawassociation.org.uk

COMPETITION LAW ASSOCIATION

An EU Competition Court

Call for evidence

These comments are submitted on behalf of the Competition Law Association (CLA). The CLA is an association of lawyers and other professionals including economists and intellectual property practitioners. Our members include private practitioners, employed professionals and academics.

With regard to an EU Competition Court, Sub-Committee E of the House of Lords particularly welcomes comments on the following issues:

1. Need for action at Union level

Is there a need for an EU Competition Court distinct from the Court of First Instance (CFI)?

Under the current procedure, the Commission, and more precisely the Competition Directorate General, is responsible for enforcing the competition rules of the Community Treaties in order to ensure that competition in the EU market is not distorted. Appeals against Commission decisions are heard by the Court of First Instance (in Luxembourg) and appeals against CFI judgments can be brought to the European Court of Justice (ECJ). In 2001, a fast-track procedure was created allowing the CFI (and the ECJ) to give priority to specific cases and usually having only one round of written pleadings and a more extensive oral hearing in an attempt to compensate for the abbreviated written proceedings. Cases may be considered under the accelerated procedure where there is a "particular urgency" and depending on the "circumstances of the case".

Member States throughout the European Union have different practices with regard to appeals against first instance decisions in competition matters. For example, in the United Kingdom, OFT Competition Act

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1998 decisions and Competition Commission merger decisions are respectively appealed to, or judicially reviewed by, the Competition Appeal Tribunal (CAT), a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy; whereas in France, decisions of the Conseil de la Concurrence may be appealed before the Paris court of appeal (Chambre économique et financière), a non competition-specialist body. Generally, it takes 8 months for the Paris court of appeal to make a decision from the date the Conseil de la Concurrence gave its decision. The Competition Appeal Tribunal has a target timetable of 6 months from registration of proceedings to judgment on the main issues or termination of the case without a main hearing, although complex and competition cases have taken nearly as long as 16 months. Merger judicial reviews have taken a matter of weeks before the CAT, and the first case (IBA Health) was disposed of by the Court of Appeal as well within a total period of less than 6 months.

Throughout the European Union, therefore, there are appeal tribunals which are specialist competition judicial bodies and others which are simply a part of the judicial system. However, there is an increasing trend in member states where competition and merger law cases are significant in number to allocate these cases to judges with experience in the field if not a specialist court. In the UK, for example, all competition cases must be started or transferred to the Chancery Division, if they are not within the jurisdiction of the CAT.

Another relevant trend, at least in the common law jurisdictions, is case management. Case management is also a feature of the CFI's procedure. But there is no case management conference at the beginning of the process where the target date for the hearing and decision is discussed, as in the CAT.

The lengthy duration and the causes of that delay have been well documented. For example, the annual reports of the ECJ and CFI contain the statistics on the time taken for competition, state aid and merger cases as well as the overall caseload. A recent article¹ by Bo Vesterdorf, CFI President, has discussed the causes of delay in the CFI and debated the merits of the potential solutions.

The main causes of delay can be seen to be translation, case management deficiencies (including the availability of judges with competition law experience) and the workload of the CFI (and ECJ).

It is not the choice of the language of the case by the parties that necessarily results in delay through

¹ Bo Vesterdorf, "Judicial review in EC Competition law: Reflections on the role of the Community Courts in the EC system of competition law enforcement" (Competition Policy International, Vol.1, No.2 Autumn 2005)



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translation. It is rather CFI (and ECJ) convention that the working language of the court is French. This normally requires the translation of every pleading into French. Even when the CFI chamber is capable of using English as its normal language and does so on case by case basis, on appeal to the ECJ, President Vesterdof has indicated that the ECJ requires the CFI to translate its judgment into French for the purposes of the working language of the ECJ.

The present practice of the CFI is understood to favour the allocation of competition cases to a CFI chamber with at least one judge with competition law experience. However, the number of judges in this category is inevitably limited as the selection of judges is a matter for national governments. Consequently, finding a chamber with an appropriate judge without delay, or over-burdening relevant judges, is a problem.

Apart from the language issues, the main cause of delay is the workload of the CFI. The statistics indicate that the workload of the CFI to-day exceeds that of the ECJ when the CFI was created in 1989. With 27 member States in 2007, the workload of both courts can be expected to increase more and more over time. It can be predicted in the longer term that the ECJ will be under pressure to transfer more categories of cases to the CFI, the most likely being certain categories of references. The staff judicial panel has removed a large number of cases, as will the Trade Mark judicial panel. However, these cases are not normally as burdensome as the other cases before the CFI, including competition, state aid and merger cases. In the longer term, therefore, the workload of the CFI can be expected to produce further delays, despite the successful efforts made in the last few years to accelerate its decisions.

Against this background, President Vesterdorf's article has provided a useful starting point for the debate on potential solutions for improving the speed of competition and merger cases in the CFI. The options include doing nothing, creating a special chamber for merger cases or for all competition cases, or establishing a judicial panel with the same scope.

While in an ideal world, a specialist Competition Court would be the ideal solution with the maximum benefits to the CFI appeal system for competition and merger cases at the Community level, in reality this will take time. Institutional changes are political events that require careful discussion and preparation. However, a specialist competition court should be a long term goal. In particular, a specialist competition court can select its own working languages (which can be adopted by the CFI on appeals on a point of law), exploit the efficiencies of case management and take advantage of specialist expertise.

In the meantime, the creation of a specialist competition and merger chamber would be a step in the right



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direction and should be instigated immediately. It should be able to achieve many of the benefits of a specialist competition court but will be dependent for expertise on the current judges appointed to the CFI. As CFI judges are appointed by national governments, the allocation of particular national judges to a specialist chamber might be controversial. The only way to overcome this will be the eventual creation of a new competition judicial panel with the judges chosen regardless of nationality but by reference to expertise.

There is a long term need, therefore, to establish a new EU competition court, which would be distinct from the CFI.

In the meantime, the CLA would welcome the creation of a specialised chamber of the CFI for competition and merger cases. This would help develop judicial expertise in competition matters and especially merger cases and would help streamline the system.

Reform of the CFI

Would reform of the rules and procedures of the CFI be preferable to the establishment of a new court?

In order to create a EU competition court as a judicial panel, the procedure set out in Article 225a of the EC Treaty would have to be followed. Such a procedure requires the Council to act “unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission”. As is clear from the history of the judicial panel for staff cases (and that proposed for patents), this process will take time especially as the creation of a new judicial panel under Article 225a of the EC Treaty, would require the unanimous approval of the 25 Member States.

While the process for creating a competition judicial panel continues, possible reforms of the rules and procedure of the CFI include:

- Reducing the choice of languages of the case: Use of either English or French only as language of the case.
- Improving the fast track procedure and having a set of procedural rules specifically for competition and merger law cases focused on streamlining the process and speed of review (for example, less



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burdensome translation requirements, limiting length of submissions). Eventually the specialist competition court should be capable of relieving the CFI of public procurement and state aid cases.

- Introducing a fee for appeals to the CFI?
- Creating a chamber of the CFI specialised in competition related matters.

2. Jurisdiction of the Competition Court

The Treaty of Nice inserted a new Article 225a in the EC Treaty enabling the creation of “judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas”. The decisions of the judicial panels are subject to appeal on questions of law only to the Court of First Instance and, in exceptional cases, to review by the Court of Justice where there is a serious risk of the unity or consistency of Community law being affected.

In 2003, the Commission proposed the creation of two judicial panels to relieve the CFI of the considerable volume of litigation relating to Community staff and patents: the European Civil Servant Tribunal² and the Court for the Community Patent³. The European Civil Service Tribunal was established by a Council Decision of 2 November 2004 for the adjudication of disputes between the European Union and its civil service. The CFI transferred 117 cases in which written procedure had not been completed to the European Civil Service Tribunal. The creation of a EU competition court under Article 225a would be a judicial panel set up to hear competition cases at first instance .

The CLA supports the creation of a judicial panel in the long term and advocates that a chamber of the CFI specialized in competition matters be developed immediately. The judicial panel for competition law should have jurisdiction over all competition and merger law (Articles 81, 82, 86 EC and ECMR) cases. To limit the specialist court or chamber to merger cases would be to ignore the commercial importance of timely decisions in many competition appeals and fail to fully exploit the expertise and availability of the judges concerned.

3. Composition of the Competition Court

The composition of the judicial panel could imitate that of the European Civil Service Tribunal with the

² COM (2003) 705 final.

³ COM (2003) 828 final.



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expertise of the judges sought being competition law. Nationality will be irrelevant.

4. Appeals from the Competition Court

The creation of a competition judicial panel should not create an additional jurisdictional level at Community level, provided that the rules of procedure make clear that a further appeal from the CFI to the ECJ could not be brought without the permission of the ECJ. The possibility of appeal to the ECJ should be retained for exceptional cases to ensure the uniformity of Community law.

5. Future role of the CFI

Should the CFI be given the jurisdiction to hear preliminary references on community competition law?

Council Decision 2004/407/EC of 26 April 2004 transferred jurisdiction from the ECJ to the CFI with regard to direct actions, other than infringement actions.

Under Article 225(3), the Court of First Instance already has jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, *in specific areas* laid down by the Statute of the Court of Justice ("the Statute"). Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.

National Supreme Courts are necessarily bound by the CFI's preliminary ruling if no review procedure is taken up by the ECJ.

According to the Statute, the reference for review must be made within one-month of delivery of the decision by the CFI and the proposal for review and decisions to open the review procedure do not have suspensory effect. Although the period for review by the ECJ delays the legal certainty of the preliminary ruling of the CFI, this is essential to ensure that the uniformity of Community law may be safeguarded.

The transfer of preliminary ruling competences in relation to competition matters to the Court of First Instance with the possibility of an exceptional review of its decisions by the Court of Justice is likely to be



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the next step to reduce the caseload of the ECJ. This question is independent of the merits of the desirability of a specialist competition and merger law judicial panel. Transfer of preliminary rulings in competition law cases to the CFI, however, would consolidate the expertise in that court which justifies further discussion.

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