



# Proposal for an EU Competition Court: Submission to UK House of Lords

*Prepared by the Commission on Competition*

This paper responds to the UK House of Lord's call for evidence in the context of its inquiry into the need for an EU Competition Court.

This paper uses the following terminology:

- **"Competition Court"** means a new judicial panel established under Article 225a of the EC Treaty (which enables new tribunals to be established as courts of first instance for specific areas). The European Union Civil Service Tribunal, which came into existence last year, is an example of such a judicial panel. Like the EU Civil Service Tribunal, the Competition Court would be distinct from the CFI, although its decisions could be appealed to the CFI and, in exceptional cases, to the ECJ. This is explained more fully in section 3 below.
- **"Specialist Competition Chamber within the CFI" or "Chamber"** means a chamber dedicated to hearing competition/merger cases within the CFI. By way of background, the CFI currently sits in chambers of five or three judges or, in some cases, as a single judge. It may also sit as a Grand Chamber (thirteen judges) or as a full court when the legal complexity or importance of the case justifies it. Cases are currently allocated to chambers as they are registered at the CFI.<sup>1</sup> There is therefore currently no specialist CFI chamber.

## 1. Current Position

- 1.1 Appeals before the CFI take on average 32 months. Even the expedited procedure takes in excess of 7 months. Neither is acceptable in merger cases.<sup>2</sup> The three issues which affect the duration of cases are the official working language of the CFI, caseload and judicial expertise.
- 1.2 *Official working language of the CFI:* Translation of judgments into the official languages of the EU is obviously necessary and does not affect the duration of cases. However, the requirement to translate documents used during the judicial procedure into French (as the official working language of the CFI) is time-consuming. Political issues are thought to prevent removal of this requirement. Parties to the case could provide translations of submissions/other materials up-front in an effort to speed up the process - but this would impose significant additional costs on business.

---

<sup>1</sup> See the criteria published by the CFI in the Official Journal on the criteria for assigning cases to the CFI's chambers [http://eurlex.europa.eu/LexUriServ/site/en/oj/2005/c\\_205/c\\_20520050820en00150016.pdf](http://eurlex.europa.eu/LexUriServ/site/en/oj/2005/c_205/c_20520050820en00150016.pdf)

<sup>2</sup> Views on this point have been sought and received from those businesses which are represented on the UK ICC Competition Committee.

- 1.3 *Caseload*: It is not possible to say with certainty whether the caseload of the CFI will reduce or increase in coming years. On the one hand, civil service disputes have been moved to a judicial panel (the EU Civil Service Tribunal) and there is also a plan to transfer patent cases to a judicial panel, reducing the CFI's case load. On the other hand, the European courts may, in future, be given jurisdiction over police and criminal matters and be required to hear preliminary references from a broader range of sources in respect of asylum, immigration, civil and family justice matters.
- 1.4 *Expertise*: Judges who hear merger cases at the CFI are not specialised in competition law principles and may therefore take longer to reach an outcome. However, cross-fertilisation between knowledge in deciding general EU cases (including procedural issues) and competition cases is a real advantage. For example, experience of due process is a major benefit in the context of a merger appeal.
- 1.5 On a related point, it should also be noted that a lack of cooperation by the parties during the appeal process may have an adverse effect on timing. For example, the use of the expedited procedure may be frustrated when the volume of the submissions made by the parties exceeds the recommended norms for the expedited procedure.<sup>3</sup> A rigorous application of the rules may therefore ensure that more positive results flow from use of the expedited procedure.
- 1.6 Finally, the Annexes to this paper provide a snapshot of the current position and how this may develop. In particular, Annexes 1 and 2 contrast the EU position (as regards merger appeals) with the corresponding UK regime while Annex 3 contains an estimate of how many merger appeals are likely to be brought per annum (by extrapolating from previous cases), whether to a Competition Court or to a Chamber. It will be seen that the maximum likely workload comprises 21-23 appeals per annum and an absolute amount of new appeals lies at around 2 per annum.

## **2. Specialist Competition Chamber within the CFI**

- 2.1 A specialist competition Chamber within the CFI could reduce the duration of cases as judges who sit regularly in the Chamber would develop a level of expertise which should enable them to handle merger/competition cases more quickly. This would avoid the inconsistencies in the judgments delivered by an ordinary judicial body within CFI, which may be composed by judges having a different level of ability in dealing with competition law. The Chamber would also be shielded from any increase in the non-competition caseload of the CFI. In so far as judges were able to sit in the specialist Chamber as well as in other Chambers of the CFI, the Chamber would also benefit from cross-fertilisation between knowledge in deciding general EU and competition cases.
- 2.2 Limiting the matters that the Chamber handled to merger cases would reduce its workload and therefore help reduce the duration of merger cases. However, the synergies between competition (i.e. Article 81 and 82 cases) and merger cases and the fact that the judges who regularly sat in the Chamber would develop an in-depth expertise in competition principles argue in favour of towards having the Chamber handle all merger/competition cases.

---

<sup>3</sup> Case T-464/04 *Impala v Commission*.

- 2.3 Arguably, there is merit in bringing preliminary rulings (involving competition issues) within the jurisdiction of the Specialist Chamber. However, such a development would not be without complication - since preliminary rulings often involve a number of closely-related legal issues (of which competition law may be only one). In addition, preliminary rulings are, generally speaking, unlikely to be a cause of delay to merger appeals (as the most time-sensitive of cases). These points, in our view, militate against the inclusion of preliminary rulings within the jurisdiction of a Specialist Chamber.
- 2.4 If the Chamber were dedicated to merger and competition cases (i.e. Article 81 and 82 cases), its caseload should be tailored so that urgent cases (typically merger appeals) are dealt with on a fast-track basis. The inclusion of Article 81 and 82 cases - which generally involve less urgency than merger cases - should therefore not prejudice the rapid review of merger cases. Given that the Chamber would be part of the existing CFI structure, it may be necessary to modify the existing Rules of Procedure to enable this type of active case-management.
- 2.5 The political issues that prevent the CFI translation issues being tackled wholesale (e.g. by giving the presiding judge the discretion to deal with cases in a working language other than the official working language of the CFI) remain with a specialist competition Chamber. As mentioned above, the parties could provide up-front translations of submissions etc. This would speed up the judicial element of the process but would impose significant additional costs on business.

### **3. Competition Court (a new and distinct judicial panel)**

- 3.1 A judicial panel for competition law cases (a "Competition Court") could be created using the mechanism already contained in Article 225a EC. (This mechanism was used to establish the Civil Service Tribunal for civil service cases.)
- 3.2 As regards the appointment of judges to the new Competition Court, Article 225a requires them to be appointed by the Council, acting unanimously, and to be "persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office". The nationality of judges should not be determinative; professional expertise is the key factor. However, as in the case of the EU Civil Service Tribunal, steps should be taken to ensure that a balanced composition is achieved with judges being drawn "on as broad a geographical basis as possible from among nationals of Member States and with respect to the national legal systems represented".<sup>4</sup> There does not need to be a requirement for judges to be experts in matters of economics or accountancy. Rather, expert evidence on these areas can be adduced.
- 3.3 Limiting the matters that the Competition Court handled to merger cases would reduce its workload and therefore help reduce the duration of merger cases. However, as is the case for the Chamber, the synergies between competition (i.e. Article 81 and 82 cases) and merger cases argue in favour of towards having the Competition Court handle all merger/competition cases.

---

<sup>4</sup> Article 3 of the Annex to the Statute of the Court of Justice.

- 3.4 As is the case for the Chamber, there are arguments in favour of the transfer of preliminary rulings to the Competition Court. However, for the reasons outlined above in paragraph 2.3, it is our view that the Competition Court should not hear preliminary rulings.
- 3.5 If the Chamber were dedicated to merger/competition cases, its caseload should be tailored so that urgent cases (typically merger appeals) are dealt with on a fast-track basis. The inclusion of Article 81 and 82 cases - which generally involve less urgency than merger cases - should therefore not prejudice the rapid review of merger cases. It would be possible to produce tailor-made rules of procedure to enable the Competition Court to engage in active case-management.<sup>5</sup>
- 3.6 Tailor-made procedural rules for the Competition Court could take a more pragmatic approach to the issues which arise in connection with the working language of the CFI.<sup>6</sup> While translation of the Competition Court's judgment into all official EU languages at the end of the appeal process is necessary, steps could be taken to streamline the linguistic arrangements during the process. One possibility would be to model the arrangements on those adopted by the International Criminal Court. This court has six official languages and two working languages. However, there is scope for the President of the court to authorise the use of an official language as the working language of the court when (i) that language is understood and spoken by the majority of those involved in a case before the Court and any of the participants in the proceedings so requests; or (ii) the Prosecutor and the defence request it.<sup>7</sup> Furthermore, the Presidency may authorise the use of an official language of the Court as a working language if it considers that it would facilitate the efficiency of the proceedings.
- 3.7 Specific rules for the Competition Court could also enable it to hear disputes on procedural points that arise in the context of the European Commission's initial investigation. Such disputes are currently dealt with by the Hearing Officer. However, specific rules enabling these disputes to be escalated to the Competition Court would enable "real time" judicial review of procedural issues. This would also be likely to reduce the length of the appeals on substance that ultimately end up in the Competition Court in their entirety (since the procedural aspects would already have been considered by the Competition Court).
- 3.8 Judges who regularly sat in the Competition Court would develop an in-depth level of expertise which should enable them to handle merger/competition cases more quickly. This would, however, be at the expense of cross-fertilisation between knowledge in deciding general EU and competition cases.
- 3.9 As is the case for the Chamber, any increase in the rest of the CFI's caseload would not impact on the merger/competition cases handled by the Competition Court.

---

<sup>5</sup> Any rules established by judicial panels must be approved by the Council, acting by a qualified majority.

<sup>6</sup> Although the EU Civil Service Court adopted the same linguistic arrangements as the CFI, this does not appear to be obligatory.

<sup>7</sup> Rule 41 of the Rules of Procedure and Evidence.

- 3.10 Care would need to be taken to avoid adding an extra layer of appeal. While a judgment of the Competition Court (as a decision of a judicial panel) could be appealed to the CFI and then also to the ECJ, there are two important points to note:
- First, appeals from the Competition Court (as a judicial panel) to the CFI can, and in this case, should, be limited to appeals on points of law.<sup>8</sup>
  - Secondly, as regards a further appeal to the ECJ (from the CFI), there is no automatic right of appeal. Rather, the First Advocate General of the ECJ can propose to the ECJ that the ECJ reviews a CFI judgment where "there is a serious risk of the unity or consistency of Community law being affected".<sup>9</sup> Therefore, any further review by the ECJ is effectively limited to constitutional issues. This is also the case for the existing EU Civil Service Tribunal.
- 3.11 It is likely to take a number of years to establish a Competition Court in concept and in detail - for example the need for the Council to appoint judges unanimously. For example, although the EU Civil Service Tribunal was proposed in a Declaration attached to the Treaty of Nice which came into force on 1 February 2003, it was only constituted into law in December 2005. It is also likely to be more expensive than establishing a specialist Chamber.

#### **4. ICC View**

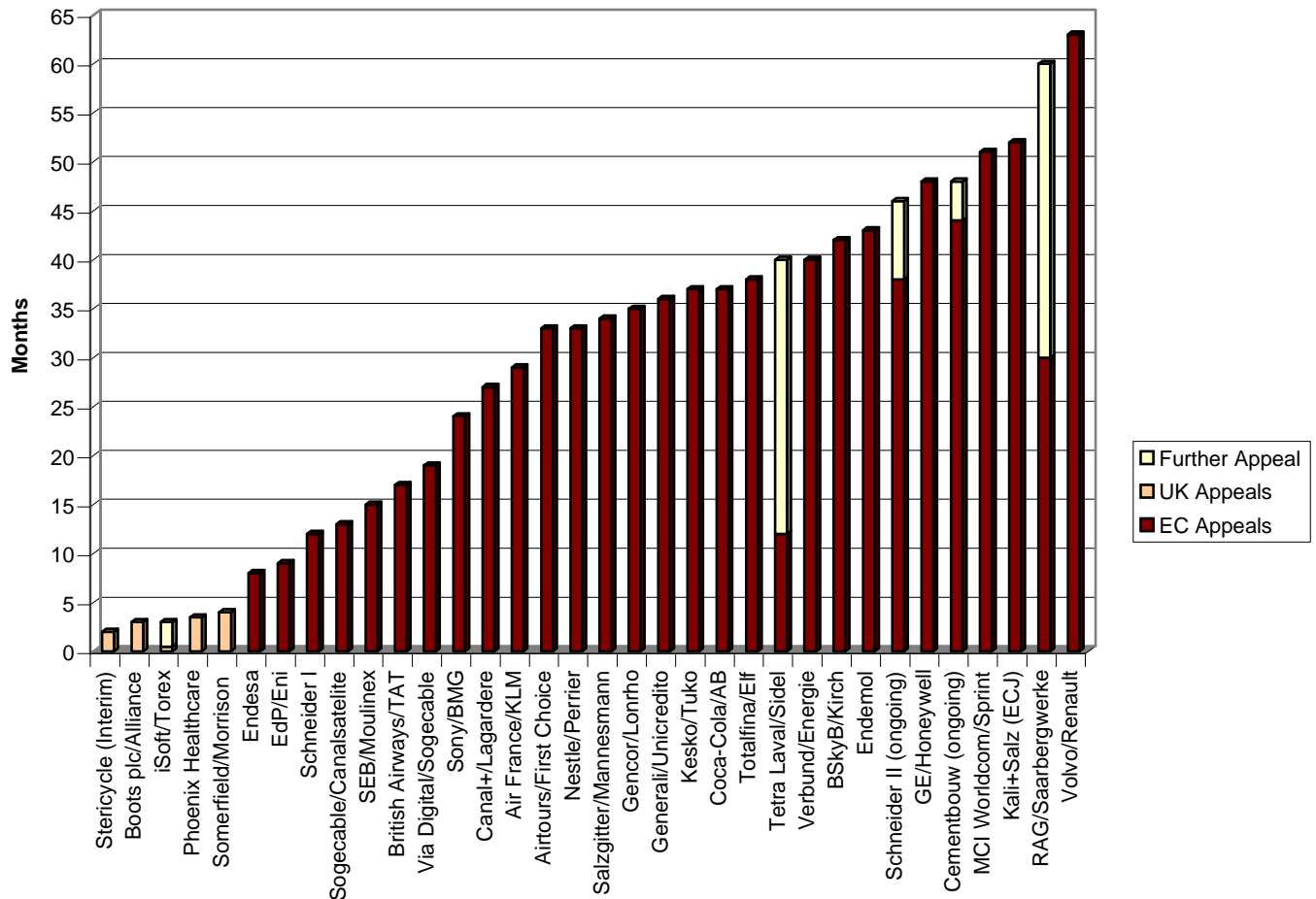
- 4.1 Given that it is likely to take some time to set up a Competition Court and that the Competition Court would be at the expense of cross-fertilisation between general EU cases (including procedural issues) and competition cases, ICC considers that a sensible interim solution to the issue of the length of CFI merger cases would be to establish a specialist Chamber within the CFI for competition (i.e. Article 81 and 82 cases) and merger cases.
- 4.2 Competition cases ought to be within the remit of the Chamber given the synergies between Article 81 and 82 cases and merger cases and the fact that the judges who regularly sat in the Chamber would develop an in-depth expertise in the competition principles which are applicable to both. However, preliminary rulings should not be heard by the Chamber, primarily because these matters often involve non-competition issues.
- 4.3 The option of a Competition Court capable of handling both merger and Article 81/82 cases should be further explored, given its ability to tackle the language issue which is recognised to be the major source of delay in these cases.

---

<sup>8</sup> Under Article 225a EC, the decisions of judicial panels may be appealed on points of law only, or also on matters of fact depending on what is specified in the Council decision bringing the panel into existence. In the case of the EU Civil Service Tribunal, appeals to the CFI were limited by the Council decision to matters of law.

<sup>9</sup> The Court of Justice then has one month in which to decide whether or not to review the CFI's judgment (Article 62 of the Statute of the Court of Justice).

## ANNEX 1 – Overview of EC and UK merger appeals



### Key points:

- In the UK, the CAT has so far managed to dispose of cases in no longer than 5 months.
- The UK average for a first instance appeal is only 2.6 months (albeit a much smaller sample), compared to 32 months at CFI – see below.
- There are only two EC cases below 12 months: Endesa (procedural issues only) and EdP/ENI.
- A similar picture emerges for further appeals: 2.5 months in the UK (Court of Appeal) compared to 29 months for an ECJ appeal.
- An additional further appeal to the ECJ significantly extends the overall case, but some CFI decisions have taken longer than cases that go through both CFI and ECJ appeal.
- Only a very limited number of cases are appealed from CFI to ECJ.

## ANNEX 2 – EC and UK Merger Statistics

### European Courts

Parties to the original case	CFI Appeal	ECJ Appeal	Phase	Decision Type
Sony/BMG	24		Phase II	Unconditional Clearance
Endesa	8		Process	Rejection of Complaint
Air France/KLM	29		Phase I	Conditional Clearance
Cementbouw (ongoing)	44	4	Phase II	Conditional Clearance
GE/Honeywell	48		Phase II	Prohibition
EdP/Eni	9		Phase II	Prohibition
MCI Worldcom/Sprint	51		Phase II	Prohibition
Tetra Laval/Sidel	12	28	Phase II	Prohibition
Schneider/Legrande (I)	12		Phase II	Prohibition
Schneider/Legrande (II) (ongoing)	35	9	Phase II	Prohibition
Volvo/Renault	63		Phase II	Prohibition
Airtours/First Choice	33		Phase II	Prohibition
Kesko/Tuko	37		Phase II	Prohibition
Gencor/Lonrho	35		Phase II	Prohibition
Via Digital/Sogecable	19		Process	Rejection of Complaint
Sogecable/Canalsatelite	13		Process	Article 9 Reference
BSkyB/Kirch	42		Phase II	Conditional Clearance
RAG/Saarbergwerke	30	30	Phase I	Unconditional Clearance
Canal+/Lagardere	27		Process	Amendment of Clearance
Coca-Cola/AB	37		Phase II	Unconditional Clearance
Totalfina/Elf	38		Phase II	Conditional Clearance
SEB/Moulinex	15		Phase I	Conditional Clearance
Salzgitter/Mannesmann	34		Phase I	Unconditional Clearance
Kali+Salz (ECJ only)	-	52	Phase II	Conditional Clearance
Verbund/EnergieAllianz	40		Phase II	Conditional Clearance
Nestle/Perrier	33		Phase II	Conditional Clearance
British Airways/TAT	17		Phase II	Unconditional Clearance
Generali/Unicredito	36		Phase I	Article 6.1.a Decision
Endemol	43		Phase II	Prohibition

<b>Average Duration</b>	<b>32</b>	<b>29</b>
-------------------------	-----------	-----------

*in months*

### UK Courts

Parties to the original case	CAT Appeal	CoA Appeal
Stericycle	2	
Boots plc/Alliance UniChem	3	
Somerfield/Morrison	4	
Phoenix Healthcare	3.5	
iSoft/Torex	0.5	2.5

<b>Average Duration</b>	<b>2.6</b>	<b>2.5</b>
-------------------------	------------	------------

*in months*

## ANNEX 3 – Estimate of potential merger appeals

### A. Ratios of appeals to total cases

	No Appeal	Appeals	Further Appeal	% Appeals	
Phase I Full Clearance	2666	7	1	0.3%	All Phase I Cases 2899 <b>0.3%</b>
Phase I Conditional Clearance	233	3		1%	
Phase II Full Clearance	28	3		10%	All Phase II Cases 105 <b>21%</b>
Phase II Conditional Clearance	69	8	1	10%	
Phase II Prohibitions	8	11	1	58%	
<i>(including pending cases, excl. process)</i>		32	3		

### B. Number of problematic cases

	All Cases		Since 2000	
	Total	Average p.a.	Total	Average p.a.
Phase I Full Clearance	2673	157	1713	245
Phase I Conditional Clearance	236	14	94	13
Phase II Full Clearance	31	2	19	3
Phase II Conditional Clearance	77	5	43	6
Phase II Prohibitions	19	1	8	1
<b>Problematic Cases (b - e above)</b>		<b>21</b>		<b>23</b>

### C. Number of potential cases per annum

	Assuming Ratios from A. above		Realistic maximum estimate		Assumed Appeal Ratio
	All Cases	Since 2000	All Cases	Since 2000	
Phase I Full Clearance	0.4	0.6	0.6	1.0	1%
Phase I Conditional Clearance	0.2	0.2	2.1	2.0	15%
Phase II Full Clearance	0.2	0.3	0.9	1.4	50%
Phase II Conditional Clearance	0.5	0.6	2.3	3.1	50%
Phase II Prohibitions	0.6	0.7	1.1	1.1	100%
<b>Total</b>	<b>1.9</b>	<b>2.4</b>	<b>7.0</b>	<b>8.6</b>	

### Key points:

- The above tables aim to provide some understanding of how many case are likely to come before a competition court. Table A shows that most prohibitions are appealed and some 20% of all Phase II cases while hardly any clearances are appealed.
- Table B shows all 'problematic cases' which are defined as all cases, except unconditional Phase I clearances. This shows that only 21 cases per annum have the potential of reaching the new Competition Court (or 23 if annualised on the basis of cases since 2000 – assuming that cases overall tend involve give rise to more issues). **This means 21-23 appeals per annum is the maximum likely workload.**
- Table C aims to estimate the minimum cases likely to come before the Competition Court i.e. the current amount of problematic cases and the ratios of appeal to date. **This shows that the minimum amount of new merger appeals would be around 2 per annum.**
- Table C also aims to provide **a realistic maximum estimate of cases** that might be appealed. This would estimate the amount of new merger appeals to **between 7 and 9 per annum**. The underlying assumptions are as follows:
  - All prohibitions would in future be appealed (as these are the cases where parties have all to gain from an appeal).

- Half of all Phase II clearances would be appealed. On the part of the parties this would involve largely procedural appeals but there might also be a larger number of complainants who seek to have a clearance reviewed.
- As regards Phase I conditional clearances, we have assumed a fifteen-fold increase. These are likely to be third party complainants seeking harsher remedies or initiation of a Phase II. We believe that parties are less likely to appeal such clearances.
- We do not estimate that the level of unconditional Phase I appeals will rise significantly since these tend to be cases evidently lacking substantive issues. However, we have assumed a two-fold increase in appeals of such cases.

**Document No. 225/636**  
**3 November 2006**