

# Is there a need for an EU Competition Court?

Antonio Bavasso, Visiting Professor, UCL and Partner, Allen & Overy LLP  
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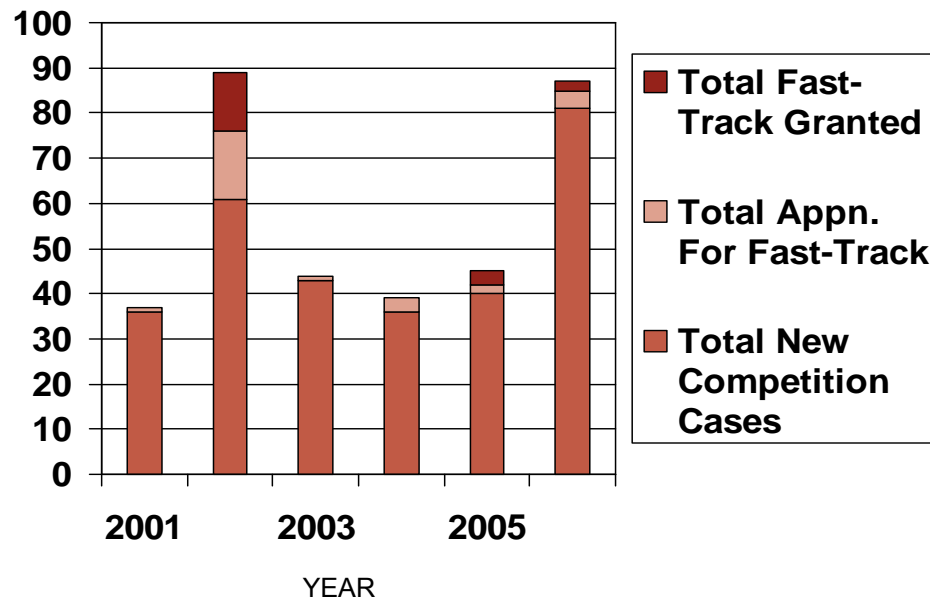
## The Background

- Business dissatisfied with the present system in particular, with regard to large cross-border mergers.
- June 2006 – CBI brings debate to the fore, puts forward a proposal for the establishment of a new EU Competition Court to operate as a judicial panel of the CFI.
- HoL European Committee uses proposal as basis for inquiry into the merits of a separate court (judicial panel under Article 225a EC).

## The CFI's Fast-Track Procedure and Competition Cases

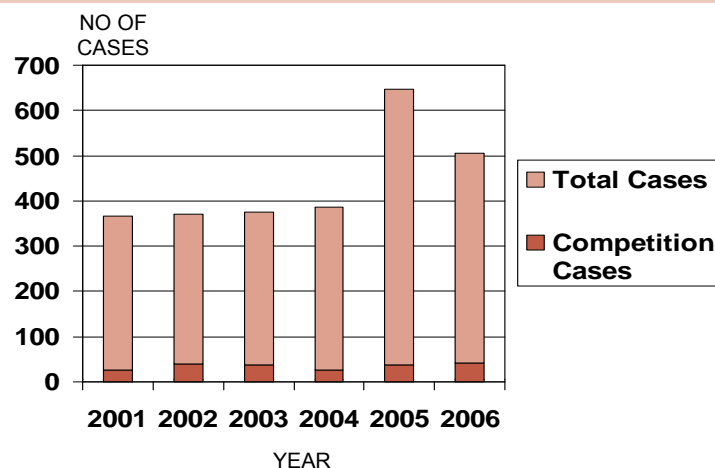
- February 2001 to 31 December 2006
- 297 new competition cases.
- 26 applications for fast-track procedure.
- 18 granted fast-track.

NO OF CASES



Source: CFI's Annual Report 2006

# Are Competition Cases Really a Burden on CFI Workload?



Percentage of cases closed by the CFI that were competition cases

<u>YEAR</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>
Competition cases	27	40	37	26	37	42
Other cases	313	291	302	335	573	394
Total	340	331	339	361	610	436
Proportion	7,9%	12%	11%	7%	6%	9,6%

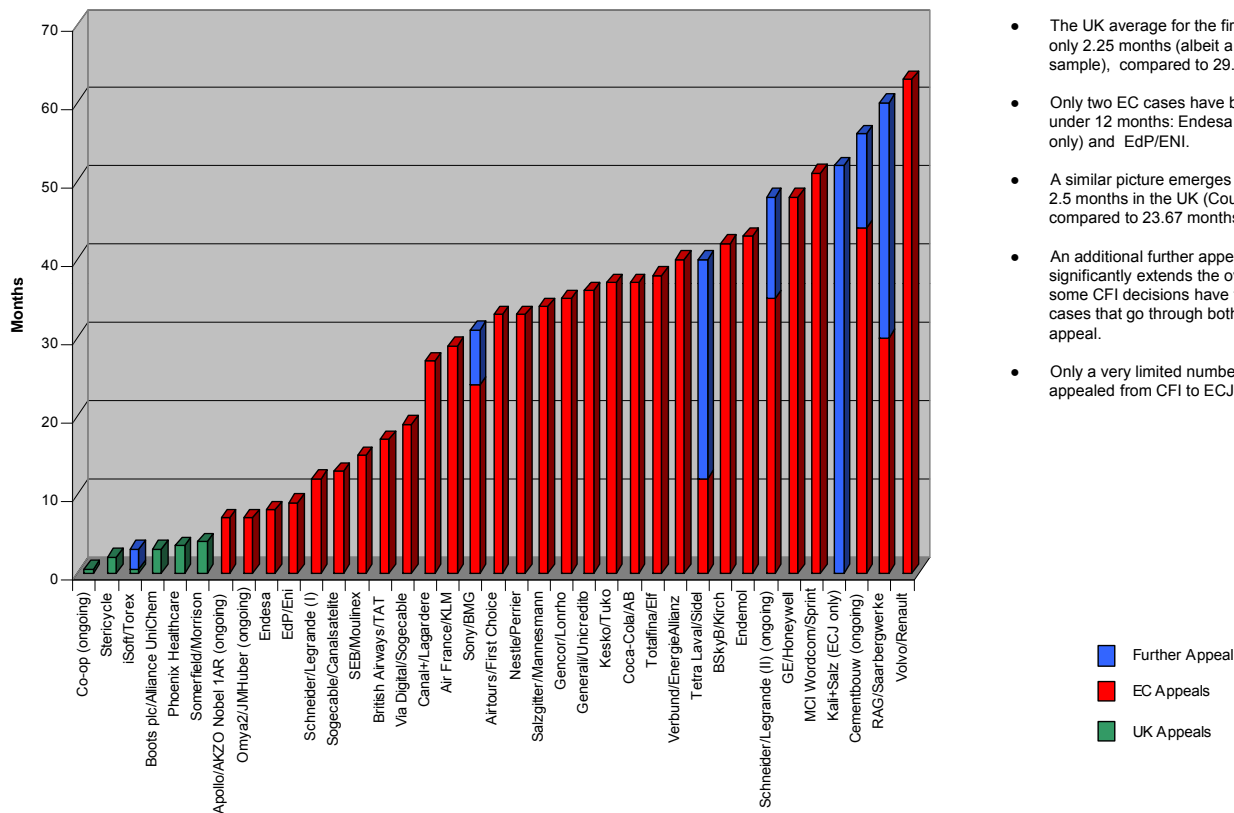
*"In purely numerical terms, the total number of competition cases (excluding state aid) closed in 2006 constituted around 10% of the total number of cases closed by the CFI during that year.*

*However, in terms of real workload, measured in man hours, the weight of those cases is far greater, given their complexity and volume. My personal view is that competition cases in fact represent approximately 40% of the CFI's real workload."*

Source: evidence given to the House of Lords by Judge Bo Vesterdorf, President of the Court of First Instance of the European Communities,

# Appeals are quicker in the UK...

Annex 1  
Overview of EC and UK Merger Appeals



- In the UK, the CAT has so far managed to dispose of cases in no longer than 5 months.
- The UK average for the first instance appeal is only 2.25 months (albeit a much smaller sample), compared to 29.27 months at CFI.
- Only two EC cases have been completed in under 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 23.67 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.

Source: International Chamber of Commerce, Proposal for an EU Competition Court: Submission to the House of Lords. (Updated to date)

# Appeals are quicker in the UK...

Parties to the original case	CFI Appeal	ECJ Appeal	Phase	Decision Type
Apollo/AKZO Nobel 1AR (ongoing)	7		Phase I	Unconditional Clearance
Omya2/JMHuber (ongoing)	7		Phase II	Conditional Clearance
Endesa	8		Process	Rejection of Complaint
EdP/Eni	9		Phase II	Prohibition
Schneider/Legrande (I)	12		Phase II	Prohibition
Sogetec/Canalsatellite	13		Process	Article 9 Reference
SEB/Moulinex	15		Phase I	Conditional Clearance
British Airways/TAT	17		Phase II	Unconditional Clearance
Via Digital/Sogetec	19		Process	Rejection of Complaint
Canal+/Lagardere	27		Process	Amendment of Clearance
Air France/KLM	29		Phase I	Conditional Clearance
Sony/BMG	24	7	Phase II	Unconditional Clearance
Airtours/First Choice	33		Phase II	Prohibition
Nestle/Perrier	33		Phase II	Conditional Clearance
Salzgitter/Mannesmann	34		Phase I	Unconditional Clearance
Gencor/Lonrho	35		Phase II	Prohibition
Generali/Unicredito	36		Phase I	Article 6.1a Decision
Kesko/Tuko	37		Phase II	Prohibition
Coca-Cola/AB	37		Phase II	Unconditional Clearance
Totalfina/Elf	38		Phase II	Conditional Clearance
Verbund/EnergieAllianz	40		Phase II	Conditional Clearance
Tetra Laval/Sidel	12	28	Phase II	Prohibition
BSkyB/Kirch	42		Phase II	Conditional Clearance
Endemol	43		Phase II	Prohibition
Schneider/Legrande (II) (ongoing)	35	13	Phase II	Prohibition
GE/Honeywell	48		Phase II	Prohibition
MCI Wordcom/Sprint	51		Phase II	Prohibition
Kali+Salz (ECJ only)		52	Phase II	Conditional Clearance
Cementbouw (ongoing)	44	12	Phase II	Conditional Clearance
RAG/Saarbergwerke	30	30	Phase I	Unconditional Clearance
Volvo/Renault	63		Phase II	Prohibition

<b>Average Duration</b>	29.27	23.67
<i>in months</i>		

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

<b>Average Duration</b>	2.25	2.5
<i>in months</i>		

Source: International Chamber of Commerce, Proposal for an EU Competition Court: Submission to the House of Lords. (Updated to date.)

## Speed v. Quality Control?

- The main issue with the CFI's examination of merger cases is unacceptable delay.
- The shortest time for review of a merger case by the CFI to date is 7 months (+ 2 month appeal period) in EDP.
- This is attributed to:
  - The need for translation of documents into the working language of the court – French.
  - The CFI is overloaded.
- But also:
  - Inherent complexity of cases.
  - Style of pleading.
  - Case management.
- What about quality control?

## The CBI's Arguments in Favour of a Competition Court

- The proceedings of the Competition Court could be tailor-made and specially cater for the need for a speedy review of mergers.
- The judges would only hear competition cases and so would be expert in competition law.
- The Court could decide to deal with cases in a language other than French.
- The CFI would act as an appeal court from the Competition Court and could deal with preliminary questions on competition law from member states. This would ensure that these matters are dealt with effectively by the judges with the most relevant experience.

## Concerns and alternatives

- Third layer of jurisdiction
  - This could be limited with CFI appeals on point of law only and further ECJ appeal only in exceptional cases
- Tunnel vision of specialists
- Unity within EC law
  
- More judges (difficult politically)
- Specialist chambers (possible knock on effect on CFI's work load – similar tunnel vision concerns?)

## Other views

- French MEDEF and German BDI favoured CFI procedural reforms
- BDI, IBA and ICC thought specialist chamber would be sensible interim solution
- DTI thought chambers would be preferable but does not solve problems of: (i) detachment of competition law; (ii) two tier system; (iii) complexity
- Commission was against the proposal of Specialist Court – case thin – current system sufficient
- Sir David Edward stressed lack of autonomy CFI/ECJ in setting their own procedural rules

## The House of Lords Conclusions

- Competition Court is not the way forward.
- It recommends:
  - Improving on the present procedure, in particular by encouraging **firmer case management** by the judges and stricter deadlines.
  - Reducing the workload of the CFI, principally by transferring trade mark cases to a judicial panel.
  - Seeing whether changes in the Commission's handling of cartel cases can in turn reduce the number and scope of challenges in such cases, removing a substantial workload from the CFI.

## Where Do We Go From Here?

- Is the idea of a separate EU competition court now dead?
- What flexibility exists in the present system to allow the changes required?
- If no Competition Court no urgent need to transfer competition preliminary references to CFI
- Holding pattern to be re-assessed based on impact of trade mark court; cartel enforcement reform; impact of Regulation 1/03
- Clearest message is on strictest case management
- Example of CAT