

Herbert Smith

## European Court Reform – Competition law issues

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*Disclaimer: All views expressed in this presentation are personal views of the author*




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## Contents

**Brief overview of the European Courts**

- The European Court of Justice
- The Court of First Instance
- The European Civil Service Tribunal

**Interesting Statistics**

- General statistics
- Statistics on competition cases
- Data mainly from [www.curia.eu.int](http://www.curia.eu.int) "Annual Report" where more info can be found

**Difficulties/issues to be addressed in the system**

- Role of the Commission/Role of the European Courts
- Evidence
- Procedural delays
  - Speed
  - Procedural particularities (languages)
- Interim relief issues
- Decentralised application of competition law

**Future solutions?**

- Specialised competition tribunal?
- Specialised chambers for competition cases?
- Removing caseload from the Court of First Instance?
- Improving procedures?

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## Overview of European Courts

**European Court of Justice (ECJ)**

- 25 Judges
- 8 Advocate Generals
- Sits as a full court, in a Grand Chamber of 13 judges or in Chambers of three or five judges
- Types of proceedings:
  - infringement proceedings (against Member States)
  - references for preliminary rulings
  - actions for annulment/failure to act (against acts of Community institutions; limited jurisdiction: most of these actions are within competence of CFI)
  - appeals (against CFI judgments and orders)
  - reviews (exceptionally, in civil service cases)

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## Overview of European Courts (Cont)

### Court of First Instance (CFI)

- 25 Judges
- Sits in chambers composed of one, three, five Judges (mainly 3). It may also sit in a Grand Chamber or as a full court
- Types of proceedings:
  - all direct actions brought by individuals and Member States, with the exception of those to be assigned to a 'judicial panel' and those reserved for the ECJ
  - actions for annulment
  - actions for failure to act
  - actions for damages
  - appeals (civil service cases)
- Appeal against CFI's decisions to the ECJ on points of law only

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## Overview of European Courts (Cont)

### European Civil Service Tribunal

- 7 Judges
- Appointed by the Council for a period of 6 years
- Sits in chambers of one, three or five Judges
- Specialised in disputes between the European Union and its civil servants
- Judgments subject to appeal before the CFI on points of law
- Judgments given by the CFI in this area may exceptionally be subject to review by the ECJ

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## Appointment of Judges (ECJ and CFI)

### Requirements:

- Appointed by Member States through "common accord"
  - In practice, each Member State appoints a judge of its own nationality
- Independence and highest qualifications
- Renewable term of 6 years
- Judges elect President for 3 years

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## Importance of EC Courts

**Article 7 EC:** Court of the European Communities is one of the Institutions of the European Union

**Article 220 EC :** Court shall ensure that law is observed

**Article 230 and 233 EC:** Courts review the lawfulness of the contested decision ("judicial review")

**Article 234 EC:** ECJ preliminary rulings ensure uniform application throughout the EU

**Article 288 EC:** Action for damages

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## Statistics

### ECJ

- Pending cases:
  - 740 (end of 2005), 840 (end of 2004), 974 (end of 2003)
- Cases brought before the ECJ:
  - 474 (2005), 531 (2004)
- Completed cases
  - 574 (2005), 665 (2004)
- Duration of proceedings:
  - Preliminary rulings: 20.4 months (2005), 25.5 months (2003)
  - Direct Actions: 21 months (2005), 24.7 months (2003)
  - Appeals: 21 months (2005), 28.7 months (2003)

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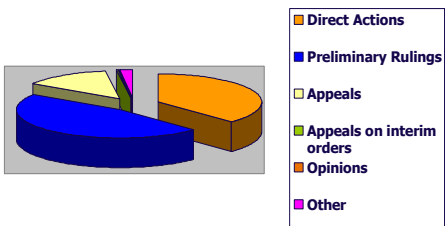
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## ECJ – Types of actions lodged (in 2005)



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## Statistics

### CFI

- Pending cases:
  - 1,033 (end of 2005), 1174 (end of 2004)
- Cases brought before the CFI:
  - 469 (2005), 536 (2004)
- Completed cases:
  - 610 (2005), 361 (2004) but this includes transfer of 117 cases to the European Civil Service Tribunal
- Duration of proceedings:
  - 25.6 months (2005), 22.6 months (2004)

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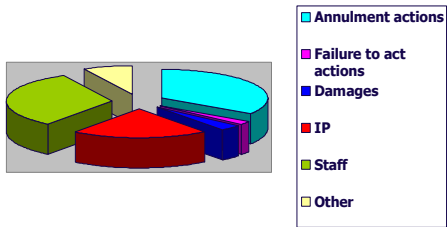
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## CFI – Types of actions lodged (in 2005- NB: before creation of Civil Service Tribunal)



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## Statistics

### Competition

As of end of 2005:

- CFI disposed of 35 competition and 53 State aid cases in 2005
- CFI received 40 new competition cases and 25 new State aid cases in 2005
- 134 pending competition cases and 190 pending State aid cases before the CFI
- Pending competition cases (excluding State aid cases) represent 13% of the total pending caseload of the CFI
- Average time required for the adjudication of competition cases at the CFI is more than 30 months but under 12 months under the expedited procedure (can be even shorter in merger cases)

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## Difficulties and issues to be addressed (1)

### Role of the Commission/Courts in competition enforcement

- Commission investigates, 'prosecutes' and decides cases at first instance (administrative system)
- Right of appeal to the European Courts
  - Effective right of appeal
  - but procedural delays and Courts do not take decision on the merits
- US system: competition authorities must initiate proceedings before Federal Courts e.g. in order to block a merger
- Debate/calls for reform during Commission's recent review of the EC Merger Regulation

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## Difficulties and issues to be addressed (2)

### Role of the Courts

- Role of the Courts is that of judicial review (Art 230 EC)
- No re-examination of a case on the merits (but unlimited jurisdiction in respect of fines)
- The Courts must remit the case back to the Commission which has to take into account the Court's judgment when taking its decision
- Merger cases: Commission has to re-start the procedure taking into account the current market conditions
- More effective if Courts could take a final decision on the merits?

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## Difficulties and issues to be addressed (3)

### Evidentiary issues

- Use of economic evidence
- Expert reports
- Expert testimony
- Witnesses
- Pre-trial management
- Standard of review post-*Tetra Laval*

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## Difficulties and issues to be addressed (4)

### Procedural delays

- Average duration of proceedings (CFI) in 2005: 25.6 months – longer in competition cases
- Length of proceedings could discourage litigation
- Merger cases: speedy adjudication is of crucial importance
- CFI has introduced expedited ("fast track") procedure (Art 76a Rules of Procedure of the CFI) for cases where there is particular urgency
  - CFI has discretion in deciding whether or not to adjudicate under the expedited procedure
- Under the expedited procedure, cases are usually adjudicated in less than a year
  - EDP decided in approximately 7 months

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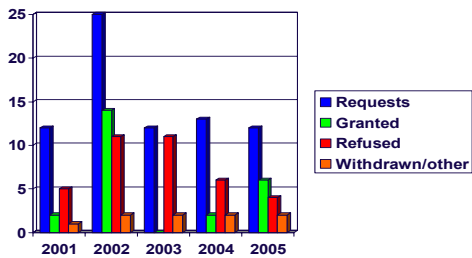
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## CFI – Expedited procedure applications



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## Difficulties and issues to be addressed (5)

### Particularities of a multi-lingual court system

- After enlargement, 9 new working languages
- 21 official languages
- All documents have to be translated into French, working language of the Courts (language for the deliberations)
- Cost of translation and delays

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## Difficulties and issues to be addressed (6)

### Interim measures

- Articles 242 and 243 EC provide for the possibility of interim relief (suspension of operation and other interim measures)
- Is interim relief effective in competition/merger proceedings?
  - *Prima facie* test
  - Urgency
  - Also difficulties with “preliminary” administrative decisions such as disclosure orders, inspections, confidentiality

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## Difficulties and issues to be addressed (7)

### Modernisation and decentralised application of competition law (Regulation 1/2003)

- Greater powers granted to NCAs and greater use of private actions for damages expected to lead to an increase of national competition litigation
- As a result, number of preliminary references to the ECJ may also increase
- Preliminary rulings already represent high percentage of ECJ’s case load
- Delay in preliminary ruling proceedings: 20+ months
- Preliminary rulings procedure not suitable for competition cases?
- Solution: refer more preliminary rulings cases to the CFI under Art 225(3) EC?

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## Possible solutions? (1)

### Specialised Competition Tribunal

- Not necessarily adoption of US model
- Possible under Art 225A EC
- Competent to hear appeals against the Commission’s decisions in competition/mergers
- Appeals would lie to the CFI and exceptionally to the ECJ
- Would reduce CFI’s caseload
- Specialist judges better suited for this type of complex cases
- Example of a specialist court: Competition Appeal Tribunal in the UK

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## Possible solutions? (2)

### Specialised CFI chamber(s)

- Create a specialised chamber or chambers at the CFI
- Could speed up the treatment of competition cases
- Easier to implement than a specialised competition tribunal
- Risk of under-utilisation of the chamber and non-competition cases being allocated to it

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## Possible solutions? (3)

### Removing cases from the CFI's workload

- Create non-competition judicial panels under Art 225A
- Example: European Civil Service Tribunal has decreased annual case-load of the CFI (117 cases transferred)
- Further case-load could be removed through the creation of a trademarks tribunal
- CFI could then deal with competition cases in a more effective way

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## Possible solutions? (4)

### Further procedural improvements

- Tailor-made procedures for competition/merger cases
- Expedited procedure
- Interim measures
- Pre-trial management
- Greater reliance on oral hearing
- Linguistic regime
- Resources

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## Future discussion

### Judicial architecture in general

- Competition cases form a small part of overall case-load
- Discussion on general reform of judicial architecture needed
- Different issues can be debated including:
  - questions on role of ECJ as Supreme Court/Constitutional Court
  - future of preliminary rulings procedure in general
  - creation of a more coherent structure of 3 levels of jurisdiction
  - regional EU courts

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