

**“JUSTICE DELAYED IS JUSTICE DENIED”: THE RULE OF LAW,  
ECONOMIC DEVELOPMENT AND THE FUTURE OF THE  
EUROPEAN COMMUNITY COURTS**

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**A. INTRODUCTION**

This article looks at the recent changes in the European Union (EU) both under the Reform Treaty<sup>1</sup> and in relation to the recognised need to complete the Single Market. In essence, the political intent is agreed and the goals have been set. The Reform Treaty has set a way of working among Member States. By contrast, the EU system of law and the method by which agreed political intent is implemented has not been reviewed, and this is addressed below.

In this introduction the article highlights the importance of the rule of law and outlines the significant role of the European Community courts. Reference is made to recent reviews by the World Bank of the systems of law in different countries. This has established that the legal system can itself enhance or undermine investment, productivity and growth. The idea of the rule of law is often recognised as one that underpins the fabric of democracy. In section A.1, the thinking on the rule of law that goes beyond merely an “instrumental” view is canvassed. Simple legal “instrumentalism” sees law only as a vehicle for implementation of political intentions. This can be contrasted with the view that the legal system is part of the culture of a society through which norms of behaviour are expressed and applied. One issue for investment and GDP growth

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<sup>1</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007/C/306/01. It is due to come into force in 2009, if successfully ratified by all EU Member States, and would carry out most of the reforms previously proposed in the rejected European Constitution. The Treaty of Lisbon amends the Treaty on European Union (TEU) (essentially the Treaty of Maastricht) and the Treaty establishing the European Community (TEC) (essentially the Treaty of Rome), which is renamed the Treaty on the Functioning of the European Union (TFEU).

which arises with the instrumental approach is that it can become a system of decrees and as unpredictable as political whims. States with written constitutions are likely to be more predictable for investment provided basic rights, such as property ownership and personal freedom, are written into the constitution. There is also a worry that even elected representatives can contravene constitutional principles; in states with written constitutions the courts are often called upon to adjudicate between the application of a statute and the application of the law more generally. The instrumental view has also been described as “rule by law” and contrasted with the rule of law since the latter presupposes a more stable system and a societal view that looks at the law in its cultural context and as a sociological tradition based on precedent and practice. Even a system of law with an unwritten constitution can be described as operating within the rule of law. The common law approach is one where precedent is found in the cases and statutes are imposed from time to time but cannot take precedence over certain well-established constitutional principles. The explanation of the rule of law by Lord Bingham in 2007 is now taken as a starting point and the middle ground between the differing points of debate.<sup>2</sup> The essence of the discussion is that the greater certainty and security that can be derived from a predictable system is probably the key when considering investment and GDP growth.

A short analysis of the role of the European Community courts in light of key European policies and principles (with a particular focus on the Lisbon objectives, the EU Reform Treaty and the aims of the Single Market) is also presented. The article takes an investment and business perspective. The Reform Treaty has increased Member State coordination and judicial cooperation in criminal matters under Title V, which covers freedom, security and justice. These aspects are without doubt important and will act as a further impetus for increasingly speeding up the system, but are not addressed further.

Section B (“The Issues—Why is There a Need for Reform?”) provides a critical analysis of the functioning of the current system, and identifies the main aspects of procedure where improvements are necessary. It has a particular focus on the lack of speed in the application of European Union law and how the European Community courts’ workload affects the timeliness of its decisions. The analysis of this particular problem justifies why this aspect of the rule of law is such an important issue and the main focus of this article.

Section C (“Options for Reform”) first reviews previous analyses and thoughts for reform of the EU court system and commentaries of the European Community courts before outlining certain options for future reform.

<sup>2</sup> Lord T Bingham, “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67; BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004); BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006).

## 1. The Important Role of the European Community Courts within the Framework of the Rule of Law<sup>3</sup>

The EU is built on the principle of the rule of law and a single coherent system, at the heart of which lie the European Court of Justice (ECJ) and the Court of First Instance (CFI). These interrelate with the domestic courts of the EU Member States and coherence is achieved, primarily through a system of references on issues of law as well as substantive decisions on many subjects.

It is well established that the rule of law is a cornerstone of democracy and fundamental to the operation of a free and just society. Many have identified freedom and liberty as ultimately intertwined with the precondition of law and justice.<sup>4</sup>

A clear and predictable system of law is generally accepted as a precondition for personal freedom and the central growth of human rights in a democratic system. Predictability and clarity for human rights, however, have tended to overshadow the importance of predictability and clarity for investment. However, it has been a key purpose of the law that it should protect freedom and

<sup>3</sup> See generally, T Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006); Indepen Consulting, *Productivity, Growth and Jobs: How Telecoms Regulation Can Support European Businesses* (London, Indepen Consulting, 2008); T Friedman, *The World is Flat* (New York, Farrar, Straus & Giroux, 2005); D Kaufmann, J Isham and LH Pritchett, "Civil Liberties, Democracy, and the Performance of Government Projects" (2005) 11 *World Bank Economic Review* 219; D Kaufmann and A Kray, "Growth without Governance" (2002) World Bank Policy Research Working Paper No 2928; D Kaufmann, A Kraay and M Mastruzzi, "Governance Matters IV: Governance Indicators for 1996–2006" (2007) World Bank Policy Research Working Paper, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979) (accessed on 12 May 2008); F Hayek, *Law, Legislation and Liberty*, Vol I (University of Chicago Press, 1973); R La Porta, F Lopez-de-Silanes, A Shleifer and R Vishny, *Law and Finance* (University of Chicago Press, 1998); Lord Bingham, *supra* n 2; D North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1991); D Rodrik, A Subramanian and F Trebbi, "Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development" (2002) NBER Working Paper No 9305; A Sen, *Development as Freedom* (Oxford University Press, 1999); A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), available at MetaLibri Digital Library: <http://metalibri.iucubadora.fapesp.br/portal/authors/AnInquiryIntoTheNatureAndCausesOfTheWealthOfNations> (accessed on 12 May 2008); Tamanaha, *On the Rule of Law*, *supra* n 2; Tamanaha, *Law as a Means to an End*, *supra* n 2.

<sup>4</sup> Smith, *supra* n 3, defined freedom as "every man so long as he does not violate the laws of justice [being] left perfectly free to pursue his own interests in his own way"; see also Hayek, *supra* n 3:

"Since the value of freedom rests on the opportunities it provides for unforeseen and unpredictable actions, we will rarely know what we lose through a particular restriction of freedom. Any such restriction, any coercion other than the enforcement of general rules, will aim at the achievements of a particular result, but what is prevented by it will not usually be known".

See, more recently, K Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington DC, Brookings Institution Press, 2006), who criticises the approach toward building of the rule of law by transplanting but accepts the importance of the rule of law for economic growth.

rights to property. Protection of property rights and security for investment was noted in the seventeenth century:

“Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts.”<sup>5</sup>

It is perhaps obvious that arbitrary government creates risks for investors; however, empirical evidence has now been gathered to support the relationship between the two.<sup>6</sup> This is further outlined in Figs 1 and 2.

Figs 1 and 2 illustrate the relationship between GDP per capita and the rule of law index that has been established by World Bank economists. This allows a comparison to be made between a number of countries and correlates the GDP growth per capita with the rule of law.

One question raised from the graphs is the extent to which the correlation can be improved within the EU. As trade barriers have been reduced or eliminated, so the restrictions on trade have changed. Simple restrictions such as

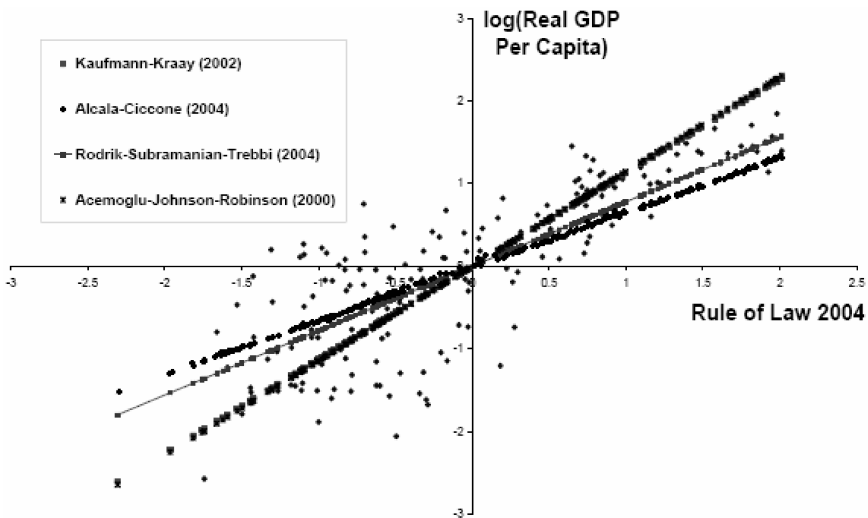


Fig 1 Government Matters: The “Development Dividend” Isolating Causality: From governance to Income. Source: Kaufmann and Kraay, n 6.

<sup>5</sup> Smith, *supra* n 3.

<sup>6</sup> D Kaufmann and A Kraay, *The World Bank*, available at <http://www.worldbank.org/wbi/governance>. Also available at <http://www.govindicators.org> (accessed on 12 May 2008).

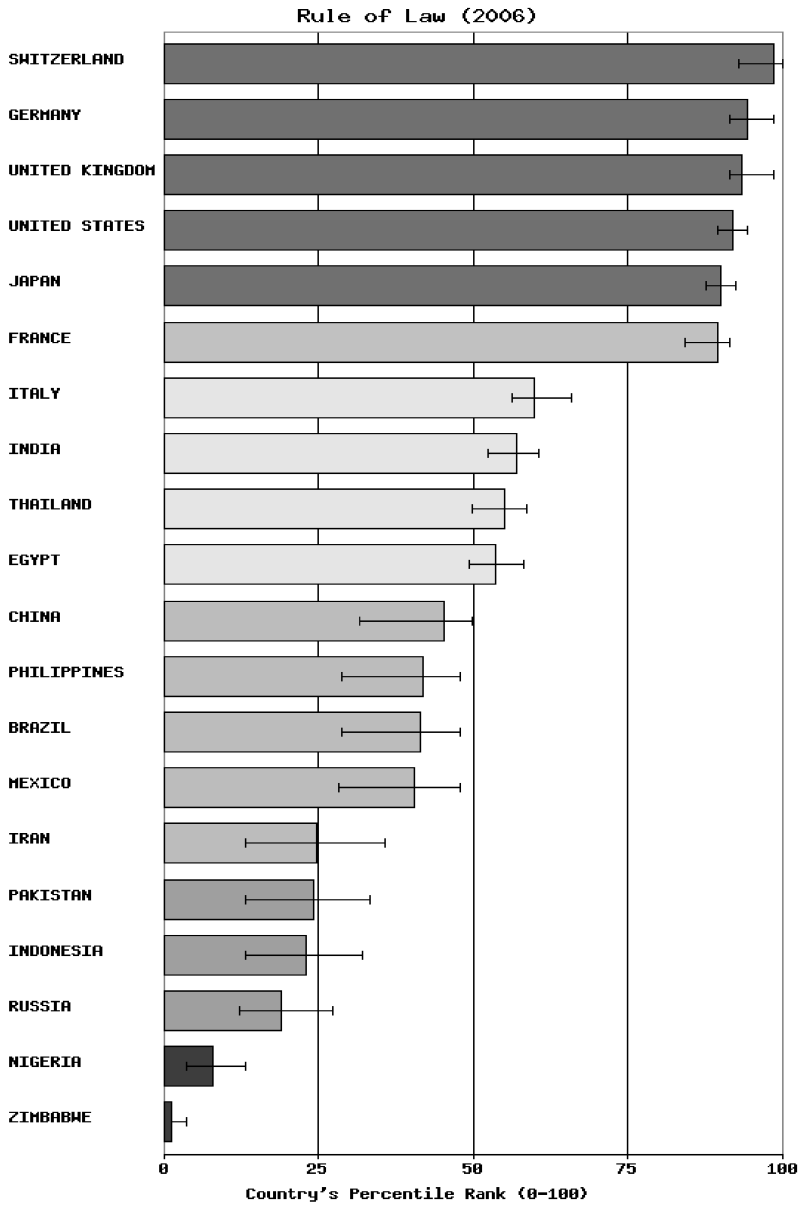


Fig 2 Governance Indicators for 1996–2006. Source: D Kaufmann, A Kraavy and M Mastruzzi, “Governance Matters VI: Governance Indicators for 1996–2006” (2007), World Bank Policy Research Working Paper No. 4280, available online at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979) (accessed on 12 May 2008).

tariff barriers were eliminated under the GATT<sup>7</sup> and various WTO “rounds”. Indirect barriers have been eliminated in various parts of the world, for example through to the establishment of a European Single Market. The gradual elimination of indirect or disguised restrictions has highlighted new areas not perhaps previously thought of as having a significant or material effect on the market. Access to justice and speedy enforcement of the regulatory system may be just such a newly discovered barrier.

Very recently the rule of law has become “a big idea in economics”. This was, for example, noted in *The Economist*:

“The rule of law is usually thought of as a political or legal matter . . . But in the past ten years the rule of law has become important in economics too . . . The rule of law is held to be not only good in itself, because it embodies and encourages a just society, but also as a cause of other good things, notably growth . . .”<sup>8</sup>

Leading the way in quantifying the benefits in terms that many can understand has been the work done by the World Bank, described above. This includes and is especially concerned with “governance” and the accountability of government for its actions as well as the rule of law in terms of the quality of justice and the nature of the legal system. Put simply, good governance provides a framework for economic growth and prosperity; individuals feel safer and countries get richer the better the quality of governance. Indeed, the World Bank has assessed this as a “300% dividend” since, in the long run, a country’s income per capita rises by roughly 300% if it can improve its governance by one standard deviation on the World Bank scale.

Most recently, leading thinkers in development economics and those concerned with establishing laws and regulations have pointed to the deficiencies of transplanting legal systems without establishing a culture of behaving within the law.<sup>9</sup> Leaving aside for the moment the discussion on legislation being the

<sup>7</sup> General Agreement on Tariffs and Trade functions (GATT). The functions of the GATT were taken over by the World Trade Organisation (WTO), which was established during the final round of negotiations in early 1990s.

<sup>8</sup> “Economics and the Rule of Law: Order in the Jungle”, *The Economist*, 13 March 2008, available at: [http://www.economist.co.uk/finance/displaystory.cfm?story\\_id=10849115](http://www.economist.co.uk/finance/displaystory.cfm?story_id=10849115) (accessed on 12 May 2008).

<sup>9</sup> See, eg Carothers, *supra* n 3. Sir John Latham, former Chief Justice of Australia, drew a distinction between continental legal systems and the English common law.

“It is not the English rule of law that whatever is officially done is law, a view adopted by some jurists on the continent of Europe—on the contrary, the principle of English law is that what is done officially must be done in accordance with the law” (*Yates and Co Pty Ltd v The Vegetable Seeds Committee* [1945], 72 CLR 37).

One question that arises is whether the English position has been affected by the EU Reform Treaty and its entrenchment of constitutional rights in its Human Rights provisions, or whether, in accordance with Lord Bingham, certain rights are guaranteed by the common law and safeguarded under the Constitution of Reform Act 2005, where in s 1 it states that it does not adversely affect the existing constitutional principle of the rule of law.

creature of instrumentalism and the importance of enshrining constitutional principles as the basis for an enduring application of the system, a critical analysis of the effectiveness of the legal system in enforcing the law is in itself vital for the efficient functioning of the economy. This is necessarily a matter that needs to be considered in some detail in the EU Single Market, where other trade barriers have been reduced or eliminated.

This introduction identifies the importance of the efficiency of the legal system in two ways: its importance to underpin basic concepts of justice in a free and open society, and its importance to economic development. This is more than the establishment of an idea that “something must be done” on a reasoned basis. As we will see, there is a broad consensus on the need for change and the importance of reform to speed up the EU legal system. Also, the intention in referring to the rule of law at the outset is also to refer to the inherent idea within the rule of law idea of self-limiting principles. So, reform is needed but care must be taken.

There are currently a number of groups attempting to define the rule of law.<sup>10</sup> I consider that one of the simplest and clearest explanations has already been provided by Lord Bingham,<sup>11</sup> who identifies eight principles as being central to the rule of law:

- accessible, intelligible, clear and predictable rules;
- the application of law is prime over the exercise of discretion;
- law should apply equally to all, unless objective justification allows otherwise;
- law must allow adequate protection of fundamental human rights;
- a means of resolving (without prohibitive cost or inordinate delay) bona fide disputes;
- officials must exercise powers reasonably and in good faith, for proper purpose and without exceeding the powers’ limits;
- the state’s adjudicative powers must be fair (eg, independent and impartial judiciary; adequate time to prepare cases etc);
- the state complies with its international law obligations.

The above list addresses a number of factors that are important for the efficient functioning of the system. This article focuses on the “mechanisms” of the rule of law and in particular the need to ensure that the means are in place for resolving disputes without unreasonable delay.

Before turning to speed of process or the lack of it, the first principle of accessibility and intelligibility, clarity and predictability is particularly worth touching on for a moment. For example, in a series of studies the detailed

<sup>10</sup> ABA/IBA World Justice Project (WJP), an initiative to strengthen the rule of law worldwide. The WJP uses four working definitions of the rule of law. Available at <http://www.abanet.org/wjp/> (accessed on 12 May 2008).

<sup>11</sup> Lord Bingham, *supra* n 2.

procedures and clarity of a single EU regulatory system, that of the EU telecommunications (telecoms) legalisation, have been looked at and reviewed for their effect on the economy and therefore their effect on investment.<sup>12</sup>

Fig 3 compares regulatory performance as measured by the ECTA's Regulatory Scorecard against investment records from the Organisation for Economic Co-operation and Development and shows that investment in telecoms is substantially lower where the regulatory approach is weaker. The economic correlation analysis is striking, and it benefits from the "control" that the EU telecommunication regime starts with an identical set of laws; what differs is the national system of law that operates on the application of the same EU legislation.

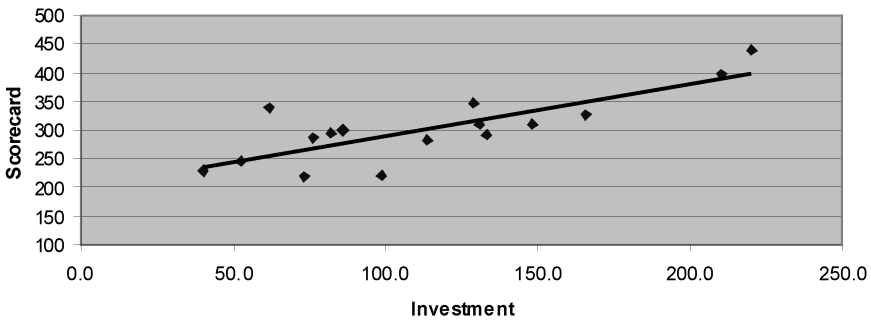


Fig 3 Relationship between Scorecard and Investment per Capita: 2005. Source: ECTA Regulatory Scorecard (2007), note 13.

While the coherent application of law is, as a matter of legal policy, a cornerstone of the European system, different national rules, court traditions and procedures mean that the EU will always have a degree of differential enforcement, which inevitably gives rise to some inconsistency.<sup>13</sup> However,

<sup>12</sup> European Competitive Telecommunications Association (ECTA), *Regulatory Scorecard* (Brussels, ECTA, 2007). The ECTA study compares the regulatory environment in 18 EU Member States and Norway in the electronic communications sector and its effectiveness in promoting the objectives of the EU regulatory framework. Available at <http://www.ectaportal.com/en/basic651.html> (accessed on 12 May 2008).

<sup>13</sup> For a study in the telecommunications area on the extent to which national procedural rules and dispute resolution mechanisms impact on the availability and effectiveness of the underlying substantive telecommunications rules and, ultimately, the creation of a single European telecommunications market, see: British Institute of International and Comparative Law (BIICL), *Effective Access and Procedure in Telecommunications Disputes in Europe* (London, BIICL, 2004), available at [www.biicl.org](http://www.biicl.org) (accessed on 12 May 2008). The study assesses the law and regulatory practice in selected EU Member States with a major focus on the interaction of the domestic legal systems with the European framework legislation for telecommunications and Internal Market rules.

provided that enforcement operates within the accepted margin of appreciation, coherent policy implementation can eventually be achieved. In the ordinary course there are countless legislative and other changes made every year across the EU. While some policies can be implemented over time, with national authorities choosing both the form and method of implementing secondary legislation, urgent economic policy initiatives and the imperatives of improving productivity and further enhancing economic progress (in particular, to achieve the revised Lisbon goals) make the speed of implementation and the coherent enforcement of legislation a much greater priority for the future than it has perhaps been in the past.

This is a significant issue. One recent study has shown that the beneficial impact on the economy of modern business communications systems, if EU rules were consistent and correctly applied, amounts to a net present value of €68 billion over 7 years (rising to €193 billion over 10 years and between €1,100 billion and €1,300 billion over the next 20 years) in the EU (in line with the EU's strategy and 2007 Spring Council declaration on completing the Single Market).<sup>14</sup> Following this logic, and the logic behind the Lisbon goals, it is probable that better enforcement of the EU legal system would have significant, positive and wider economic benefits.

When considering a system of law, it is also possible to consider each component of the judicial system of oversight as a mechanism for the perfection of the regulation or a control of the discretion in the application of the law. One of Lord Bingham's "sub principles" is "that questions of legal insight and liability should actually be resolved by appreciation of the law and not the exercise of discretion" and,

"the broader and more loosely textured discretion, whether conferred on an official or judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. The consequence is that discretions should be narrowly defined and the exercise capable of reasoned justification."

These principles, however, require assessment in a time period that is reasonable and applicable to the pace of the modern economy. What is a reasonable

<sup>14</sup> See Indepen Consulting, *supra* n 3. The study highlights the importance of "ubiquitous access". Ubiquitous access refers to supply conditions such that pan-European communications services providers are able to purchase wholesale access services at competitive supply conditions and offer seamless access to multiple business sites. The study estimates that ubiquitous access—ie provided on a competitive supply basis right across the EU—together with complementary measures, would generate benefits with a net present value of between €1,100 billion and €1,300 billion over the next 20 years. To put these estimates in context: (i) while it might take a decade for the EU economy to feel the full effects of ubiquitous access and complementary measures, the full effect would be to increase EU GDP by 1.6–2% each year from then on; (ii) this increase is equivalent to an increase in wealth of €430–510 per person per year in the long term. These estimates do not include additional potential benefits such as improved macroeconomic stability from better supply chain integration and management, and the potential for businesses to reduce their carbon footprint through better ICT connectivity.

timeframe depends on a number of factors, not least the pace of the economy. Individual examples at a personal level serve as a reminder that modern business decisions proceed in electronic time, not in real time.

This has led, as Bill Gates suggested, to “business at the speed of thought”,<sup>15</sup> As, for example, famously described by Tom Friedman in “The World is Flat”,<sup>16</sup> a Dell laptop computer is created, shipped and delivered from the moment that an order is received in only four days. The total supply chain for a single laptop computer, including suppliers of suppliers, involves about 400 companies in North America, Europe and primarily Asia, with about 30 key components from 44 different companies operating in 130 different countries.<sup>17</sup>

The above example shows how many decisions can be coordinated on a truly multi-national basis to produce everyday items. It is remarkable to note that it takes only four days to produce a single laptop computer from many different parts of the world, but that a decision in a legal case spends on average seven months in translation before the ECJ. Surely, with the application of modern communication infrastructure and a more modern approach to the decision-making process, the system can be speeded up?

According to UNCTAD, 77,000 transnational firms span the global economy today, with some 770,000 subsidiaries, countless affiliates and associates, and millions of suppliers.<sup>18</sup> As John Ruggie, the UN Secretary General’s Special Representative for Business and Human Rights, Kirkpatrick Professor of International Affairs, Director, Center for Business and Government, Kennedy School of Government, Harvard University, has noted,

“For many corporations going global has meant adopting network-based operating models involving multiple corporate entities spread among and within countries. Networks by their very nature involve divesting a certain amount of direct control over significant operations, substituting negotiated relationships for hierarchical structures. This organisational form has enhanced the economic efficiency of firms . . .”

<sup>15</sup> B Gates, *Business @ the Speed of Thought* (New York, Grand Central Publishing, 1999).

<sup>16</sup> Friedman, *supra* n 3, 414–19.

<sup>17</sup> Friedman, *ibid.*

“In an average day, we sell 140,000 to 150,000 computers” (explains Dick Hunter, one of Dell’s three production managers); “Every two hours the Dell factory in Penang sends an email to its suppliers nearby, telling each one what parts and what quantise of those parts they want delivered in the next 90 minutes and not one minute later within 90 minutes trucks from the various supplier logistic centres around Penang pull up to the Dell manufacturing plant and unload the parts needed for all those notebooks ordered in the last two hours, this goes on all day every two hours”.

<sup>18</sup> UNCTAD world investment Report 2006, available at [http://www.unctad.org/en/docs/wir2006\\_en.pdf](http://www.unctad.org/en/docs/wir2006_en.pdf) (accessed on 12 May 2008). WalMart alone is reported to have more than 60,000 suppliers. The WalMart statistics came from H Lee Scott, CEO, Cambridge University Programme for Industry; also available at <http://www3.cpi.cam.ac.uk/pdf/BEP%20London%20Lecture%202007.pdf> (accessed on 12 May 2008).

This comment notes a general change that is taking place worldwide and which is a collaborative organisational model required to adapt modern businesses to internationalisation or globalisation. It has been described as the major event of our time, with the mechanisms that underpin and facilitate interdependence being a major challenge.<sup>19</sup>

One challenge which globalisation faces is whether the legal systems facilitate or impede the agreements that underpin international supply chains. While jurisdiction and the choice of law clauses and arm's-length contract law have allowed many organisations to contract out of and avoid the deficiencies of arbitrary or deficient legal systems, this is increasingly difficult to achieve when investments are truly multinational and non-transitory, and where submission to local laws is unavoidable. Exposure to many different local laws and procedures is a major challenge for any organisation operating across the world, but is a particular issue in operating across the 27 EU Member States. In the EU the possibility exists for a system of law to become more effective and to help support the modern economy. The particular issue today is that, following the accession of the new EU Member States, there is both an opportunity and a need to build a coherent legal culture and rule of law, based on consistent EU decisions, under a single Court of Justice. It is important that this is addressed now since the opportunity for divergence, inconsistent application of the law and incoherent implementation of policy and agreed intent has never been more important.

At present legal systems, traditions and cultures vary widely, and the delays that are experienced in different Member States could impede progress toward agreed political and economic goals. However, one of the preconditions for economic progress in a globalising world is good governance.<sup>20</sup>

As recognised by Lord Bingham, “means must be provided for resolving without prohibitive cost or inordinate delays, bona fide civil disputes which the parties we are ourselves unable to resolve”. The principle is also known as “justice delayed is justice denied”.<sup>21</sup> The issue that then arises is how much the justice system can be speeded up to operate within the principles of the rule of law in a modern economy.

## **2. The European Community courts in Light of Key European Policies, the Reform Treaty and Lisbon Goals**

The experiences of many businesses operating in a multi-domestic or multi-national way across the EU indicate that there is growing concern, particularly

<sup>19</sup> “Clinton Charms Albert Hall Audience”, *BBC News*, 26 September 2006, available at <http://news.bbc.co.uk/1/hi/uk/5383214.stm> (accessed on 12 May 2008).

<sup>20</sup> As noted by Friedman *supra* n 3.

<sup>21</sup> William Gladstone (1809–1898).

about the speed in the application of European Community law.<sup>22</sup> This concern is growing despite the fact that the principles of direct effect<sup>23</sup> and supremacy<sup>24</sup> of European law are well established within the EU.

Under the Treaty establishing the European Community (EC Treaty), national courts have a duty to cooperate with the ECJ.<sup>25</sup> These procedures allow the ECJ to ensure uniform application of European law at the national level and help to promote equal treatment among citizens, reduce distortion of competition and promote economic efficiency.

A coordinated approach is in line with the approach adopted in the Lisbon Treaty. Through the negotiations for the Lisbon Treaty a centralised federal system was rejected in favour of a negotiated relationship. Instead of adopting a system analogous to that of the US, the EU has chosen to move forward in a coordinated and harmonised manner, preferring to increase reliance on the national systems of the Member States. A greater degree of coordination may also be appropriate for the EU court system.

This is recognised as a possibility in the Lisbon objectives,<sup>26</sup> which state the need for a further reform of the European Community courts in order to

<sup>22</sup> See *infra*, section B.1 for statistics on the speed of court proceedings in front of the ECJ and CFI. Furthermore, see (oral/written) evidence by Rufus Ogilvie Smals, Alex Nourry, Tim Cowen, James Flynn QC, Confederation of British Industry; Onno Brouwer, Georg Berrisch, CCBE Permanent Delegation to the Court of Justice and the Court of First Instance of the European Community and the EFTA Court; Dr William Bishop, CRA International; Sir Christopher Bellamy QC, Charles Dhanowa, Competition Appeal Tribunal; Sir David Edward QC; M Michel Petite, Philip Lowe Director General, DG Competition, European Commission; Allen & Overy; BDI (Bundesverband der Deutschen Industrie); Competition Commission; Competition Law Association; Department of Trade and Industry; International Bar Association; International Chamber of Commerce; Joint Competition Law Working Party; MEDEF (Mouvement des Entreprises de France); Office of Fair Trading; Peter Roth QC, Monckton Chambers; Svenskt Näringsliv (Confederation of Swedish Enterprise); John Temple Lang and Robert O'Donoghue. See House of Lords, European Union Committee, 15th Report of Session 2006–2007, *An EU Competition Court—Report with Evidence* (London, The Stationery Office, 2007), HL Paper 75 (hereinafter House of Lords report). The report is also available at [http://www.parliament.uk/parliamentary\\_committees/lords\\_s\\_comm\\_e.cfm](http://www.parliament.uk/parliamentary_committees/lords_s_comm_e.cfm) (accessed on 12 May 2008).

<sup>23</sup> It is a well-established principle of European Community law that provisions of the Treaty can have a direct effect and create individual rights which national courts must protect. See Case 26/62 *van Gend en Loos* [1963] ECR I.

<sup>24</sup> The doctrine of primacy has existed in European law for over 40 years and can be traced back to the judgment of the ECJ in *Costa v ENEL*. See Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>25</sup> Art 234 of the EC Treaty enables the Community court, on a reference from a national court, to give preliminary rulings on the interpretation of Community legislation and on the validity of the acts of the institutions of the Union and of the European Central Bank. This jurisdiction provides a mechanism of judicial cooperation between the Community court and national courts, and is particularly important in maintaining certainty and consistency in the application of Community Law.

<sup>26</sup> The Lisbon Strategy, also known as the Lisbon Agenda or Lisbon Process, is an action and development plan for the EU. Its aim is to make the EU “the most dynamic and competitive knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment by 2010” set against the background of productivity in the EU being below that of the US. It was set out by the European Council in Lisbon on March 2000.

achieve more democracy, legal certainty, transparency, accountability and efficiency, as well as the aims of the Single Market (particularly in the context of references for preliminary rulings, which are a key factor in the proper functioning of the internal market).

In the 2007 Annual Report, President of the Court of Justice, V Skouris notes as follows:

“The year 2007 will doubtless also remain engraved on the memory as the year in which the Treaty of Lisbon was signed, an instrument which is designed to endow the European Union with more effective legislative and administrative structures enhancing its ability to meet the challenges of the beginning of the 21st century.”

The European courts could be reformed to fall in line with this fresh framework of negotiated and collaborative engagement.

It is probable that the political expectation for the completion of the Single Market is that enforcement exists or can be expected. In competition law, which is central to economic development, the expectation is that rigorous application of competition law will deliver growth, productivity, innovation and jobs. There is a level of concern that this is not happening fast enough, that the regime is unbalanced and that the legal system unfairly favours the defendants as enforcement appears to be ineffective.<sup>27</sup>

In the competition law area, the response to the lack of effective enforcement appears to be to consider the issue as one of sanction. Consequentially, the focus, in the EU<sup>28</sup> as well as in the UK,<sup>29</sup> is on the level of sanction and enforcement.

<sup>27</sup> Recent reviews of competition law have noted the differences at national level as an impediment to effective redress. See European Commission, Green Paper—Damages Actions for Breach of EC Antitrust Rules, Brussels, 19 December 2005, COM(2005) 672 final, as well as European Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165, published on 2 April 2008. See also the study by law firm Ashurst, Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, Comparative Report (Brussels, prepared by D Waelbroeck, D Slater and G Even-Shoshan, 2004), available at [http://europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/study.html](http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html) (accessed on 12 May 2008). The study found that levels of private enforcement through damages claims in Europe are very low and found that is not only “total underdevelopment” of actions for damages for breach of EU competition law, but also “astonishing diversity” in the approaches taken by the Member States.

<sup>28</sup> See European Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules, *ibid.* It sets out for public comment a new model for achieving compensation for consumers and businesses which have suffered loss due to breaches of the EC Treaty rules on restrictive agreements and abuse of a dominant market position. The key recommendations of the White Paper are: (a) single damages; (b) collective redress; (c) disclosure (it advocates an EU-wide minimum level of disclosure between the parties in an antitrust damages claim); and (d) binding effect of final decisions (in order to avoid the time and cost of re-litigation, final decisions of Member States’ competition authorities should be considered sufficient proof of an infringement in subsequent actions for damages).

<sup>29</sup> Office of Fair Trading, *Private Actions in Competition Law: Effective Redress for Consumers and Business: Recommendations from the Office of Fair Trading* (London, OFT916resp, November 2007), available at [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft916resp.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf) (accessed on 12 May 2008).

Little time is being spent on the process, or on the speed of enforcement and access to justice.<sup>30</sup> Furthermore, in looking to increase the sanctions and hence the enforcement of competition law, the assumption is that increased sanctions will mean increased compliance with the law. However, the opposite may be an unintended consequence. Where sanctions are increased, defendants would have a greater incentive to challenge the decisions (particularly of an administrative authority) instead of negotiating the payment of the fine, settling and/or complying. To let an administrative decision stand could leave companies vulnerable to “follow-on” damages actions. This may also increase the workload of the courts and lead to enforcement delays.

Finally, the effective enforcement of the law may also be undermined by the enforcement system itself.<sup>31</sup>

## B. THE ISSUES—WHY IS THERE A NEED FOR REFORM?

### 1. Procedural Delays

“The European Court of Justice became a victim of its success.”<sup>32</sup> From the start, the ECJ took an active and important role in the creation of the constitutional order of the European Union and at the same time made every effort not to alienate national courts.<sup>33</sup> That success, however, has its disadvantages. The

<sup>30</sup> It may also well be that increasing the enforcement powers of administrative authorities, and in particular the current proposal by the White Paper on Damages Actions for Breach of EC Antitrust Rules (*supra* n 27) that final decisions of Member States competition authorities should be considered sufficient proof of an infringement in subsequent actions for damages, offends the principle of separation between the administrative and judiciary powers, as well as the principle of judicial independence.

<sup>31</sup> This may, for example, be the case in relation to the operation of the Commission’s leniency programme, which grants immunity from Commission investigation but not from national court actions. Increased risk of sanction can be expected to make organisations think very carefully before making leniency applications, and may reduce the willingness to compromise. Any documentation disclosed in leniency applications may be discoverable in national proceedings. Furthermore, the increase in the opportunity for windfall claims that class actions would bring might increase close scrutiny of a wide range of agreements, many of which may legally be borderline in terms of their compliance with Art 81(3) EU Treaty, but of limited economic consequence. There is a prospect for a dangerous unintended consequence: legally borderline but economically unimportant cases were not a problem in a system where borderline was capable of being safeguarded through a notification process. Without notification there is no safe harbour from the national court process, and borderline cases are more likely to be reviewed in courts and undermine the enforceability and certainty of contracts. This might also increase the risk to businesses considering how to innovate.

<sup>32</sup> See, eg P Jeney, “Victim of Its Own Success—the EU Court in Need of Reform”, available at <http://www.eumap.org/journal/features/2002/aug02/eucourtreform> (accessed on 12 May 2008).

<sup>33</sup> See BIICL, “The Role and Future of the European Court of Justice”, A report by members of the EC Section of the British Institute’s Advisory Board chaired by the Rt Hon the Lord Slynn of Hadley (BIICL, October 1996; hereinafter BIICL report), stating that the ECJ is “in many ways,

Court's wide jurisdiction is a positive force for greater economic convergence and is central to the fulfilment of the economic goals described as the Lisbon goals. The large volume of law of which it is the sole authoritative interpreter has not only increased confidence in the ECJ, but also resulted in an increased workload of cases and consequent delays in the disposal of cases over the years before the Community courts.<sup>34</sup> These developments also threaten ultimately to undermine institutional confidence.

There are at least four factors which have led to the increase in the caseload of the Community courts and which particularly affect the timeliness of procedures. First is the enlargement of the EU; second, the expansion of the areas over the which the EU has competence; third, the very success of EU harmonisation initiatives requiring increased judicial clarification and thereby generating work for the Community judicial system; and fourth, the growing awareness of EU law by lawyers.<sup>35</sup>

In response to the increased workload of the ECJ, a new court, the CFI, was created in 1989 with jurisdiction to hear certain direct actions. The rationale behind this was to set up a court which would be better placed to hear complicated cases in technical areas of law, enabling the ECJ to focus on exercising its unifying jurisdiction under the preliminary reference procedure.<sup>36</sup> This was one of the important institutional reforms of the Single European Act in 1986. Initially it had a limited remit, but over time the CFI's jurisdiction has, in response to demand, been increased,<sup>37</sup> resulting in significant delays also in front of the CFI.<sup>38</sup> Excluding staff cases and special proceedings, the number of cases introduced before the CFI increased by 33%<sup>39</sup> in 2006, from 291 in 2005 to 387 in 2006, and by another 20% in 2007, from 387 to 464.

the most successful international court in the world community; its fundamental function in the Community legal order is now well established".

<sup>34</sup> See BIICL report, *ibid*, 23.

<sup>35</sup> See P Craig, "The Jurisdiction of the Community Courts Reconsidered" in G de Burca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press, 2001), 177, 184.

<sup>36</sup> See, eg Case C-344/98 *Masterfoods and HB v Commission* [2000] ECR I-11369, para 54, stating that judicial review in the field of competition deals with decisions involving

"complex technical and economic assessments which, if they are to be correct, require exhaustive review of the substance by a specialised judicial authority. In order to meet that need . . . Community legislature on constitutional matters was led to set up the Court of First Instance".

<sup>37</sup> In 2007, the CFI closed 397 cases (436 in 2006), received 522 new applications (432 in 2006) and ended the year with a backlog of 1,154 pending cases (1,029 in 2006).

<sup>38</sup> See House of Lords, European Union Committee, 6th Report of Session 2003-2004, *The Future Role of the European Court of Justice*, 10, para 13.

<sup>39</sup> This increase can be divided into two figures: one, regarding trademark cases, is up 46% and the other, regarding all the other cases together, is up 25%. See oral evidence by B Vesterdorf in House of Lords report (*supra* n 22), "Minutes of Evidence", 89, questions 364 and 365.

The number of procedures conducted by the Community courts increased steeply in the mid-eighties and nineties, and as a result the number of actions handled by the ECJ and CFI doubled between 1990 and 2000. It is worth noting that there are also significant cross-country and subject matter variations, which themselves also vary from sub-period to sub-period.<sup>40</sup>

Since the accession of 10 more Member States to the EU in May 2004 and a further two in 2007, the ECJ is now the presiding court for 27 different countries. The courts of the new Member States are also less familiar with EU law and hence request more preliminary rulings from the EU courts. This rapid expansion in size of the EU has also led to the severe delays in the proceedings being recognised as a significant weakness of the system.

As stated by Bo Vesterdorf, the former CFI president: “The main problem with our current system of judicial review is not its effectiveness in terms of how closely the Courts scrutinise the Commission’s decision, but in terms of *the speed of that review*”.<sup>41</sup>

With regards to preliminary rulings, it can be said that Article 234 of the EC Treaty is the most important procedural provision in the Treaty as it facilitates the dialogue between the national courts and the ECJ.<sup>42</sup> By providing the meeting point between Community and national law, it facilitates access to justice by making it clear that Community law is to be applied not only by the ECJ but also by national courts, thus enabling citizens to enforce their Community rights within a national jurisdiction.<sup>43</sup>

<sup>40</sup> Figures by A Stone Sweet and TL Brunell, *Data Set on Preliminary References in EC Law* (Robert Schuman Center, European University Institute, San Domenico di Fiesole, 1999). show that Germany made the largest number of references per year, almost twice as many as the next country (France). On the other hand, Ireland and Luxembourg made the smallest. Stone Sweet and Brunell attributed the growth of references and the cross-country and subject matter variations to demand by private litigants, and offered empirical tests to support this. The essence of their argument is that, as national laws were not designed to resolve disputes arising from transnational transactions, which generate demand for dispute resolution, the void is filled by Community law. National courts recognise the relevance of Community law in facilitating transnational economic activity and accept the competence of the Community courts. Hence, as the volume of economic transactions among the EU countries grows, conflicts between national law and EU law will increase and, consequentially, so will the demand for a proper system of dispute resolution. Moreover, their hypothesis accounts for the cross-country and cross-subject variation in references. See A Stone Sweet and TL Brunell, “The European Court of Justice and the National Courts: A Statistical Analysis of Preliminary Reference 1961–95” (1998) 5 *Journal of European Public Policy* 66. See also G Tridimas and T Tridimas, “National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure”, 13 December 2001, available at <http://polis.unipmn.it/epcs/papers/tridimas.pdf>, 7 (accessed on 12 May 2008).

<sup>41</sup> Emphasis added. B Vesterdorf, “Judicial Review in EC Competition Law: Reflections on the Role of the Community courts in the EC System of Competition Law Enforcement” (2005) 1(2) *Competition Policy International* 22.

<sup>42</sup> Art 234 is even regarded as the “jewel in the crown of the existing regime”. See Craig, *supra* n 35, 181.

<sup>43</sup> For an analysis of the inter-related functions of Art 234, see Tridimas and Tridimas, *supra* n 40.

The ECJ was from the start very eager to encourage national courts to refer matters for interpretation. It facilitated preliminary rulings by, for example, broadly interpreting the notion of a “referring court or tribunal”<sup>44</sup> and by widening the scope of Community Acts that may be the subject of interpretation.<sup>45</sup> In general, the ECJ treated references in a very flexible manner and rarely turned down references.<sup>46</sup> While this proactive judicial purpose of the ECJ to enhance its role in the interpretation of Community law has been a real success story, a significant side effect has been an increasingly burdensome caseload, which has resulted in delayed proceedings.

The recent case law of the ECJ indicates an attempt by the ECJ to reduce its workload by turning down references which it would have accepted in the 1990s. Whilst this might certainly lead to a decrease in the workload and an improvement in the response time by the ECJ, a significant side effect could be the undermining of benefits achieved in terms of cross-border consistency and hence a reduction in ECJ-sponsored harmonisation which may give rise to increased barriers to cross-border trade. This diverges from the ECJ’s previous case law and, if it becomes a trend, it would impact negatively on legal certainty and harmonisation.<sup>47</sup>

<sup>44</sup> See, eg Case 61/65 *Vaassen-Goebbels v Beambtenfonds voor het Mijnbedrijf* [1966] ECR 377, refined in Case 54/96 *Dorsch Consult* [1997] ECR I-4961, 4992–96; Dutch Professional Chamber of Dentists 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311; also Case 61/65 *Vaassen-Goebbels v Beambtenfonds voor het Mijnbedrijf* [1966] ECR 377. Danish industrial tribunal hearing labour disputes case 19/88 *Handels-og Kontorfunktionaerernes Forbund i Danmark* [1989] ECR 3199.

<sup>45</sup> Case 322/88 *Grimaldi* [1989] ECR 4407; Case 181/73 *Haegeman* [1974] ECR 449; Case C-11/70 *Internationale Handelsgesellschaft GmbH* [1970] ECR 1125.

<sup>46</sup> P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2nd edn, 1998), 433–36.

<sup>47</sup> See, eg decision by the ECJ regarding referral of the Austrian National Regulatory Authority for Telecommunications (Telekom-Control Kommission), [2006] OJ C 10/7. The ECJ decided not to answer to the request for a preliminary ruling by the Austrian regulator and declared that it had no jurisdiction to answer the regulator’s question about the validity of the Commission’s veto decision on the wholesale market for transit services in the fixed public telephone network (market 10) because there was no lawsuit pending that would have required the Court’s judicial decision. In another recent case, the ECJ also found that it has no jurisdiction to answer the questions referred by the Greek Competition Commission. See Case 53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v Glaxo-SmithKline* [2005] OJ C 182/06. The ECJ held that the Greek Competition Commission is not a “court or tribunal” within the meaning of Art 234 of the EC Treaty. According to the ECJ, the Greek Competition Commission does not have certain characteristics necessary for it to be classified as a “court or tribunal”, namely independence and the fact of being called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. This will result in a regrettable delay in the final interpretation of Community competition law as national competition authorities cases may now only reach the ECJ when courts reviewing decisions of the national competition authorities refer questions to Luxembourg. Needless to say, this recent approach by the ECJ may also affect the consistent application of European Community law.

As at the end of 2007, the average time for preliminary rulings in front of the ECJ is 19.3 months for direct actions 18.2 months and for appeals 17.8 months.<sup>48</sup> In the year 2007 the average number of months taken for a case to be completed by the CFI was 29.5 months in ordinary procedures.<sup>49</sup> In 2006 the average number of months taken for a case to be completed in expedited procedures was 13 months (9 months in merger cases, with the shortest merger case taking just under 7 months<sup>50</sup>). In that year, the CFI delivered two judgments under the fast-track procedure: one took 19 months<sup>51</sup> and the other 7 months. This clearly indicates that the expedited procedure in itself does not represent a solution to the problems of timeliness of CFI reviews.

In general, it is agreed that this is too long and that such delays deter particularly references of points of Community interest from national courts.<sup>52</sup>

Furthermore, one point in the evidence before the House of Lords was the effect of a slow system on the number of cases brought to appeal. In effect, the lack of cases on appeal could be a sign of the failure of the system to work effectively.<sup>53</sup>

The effect of these procedural delays can have a particularly harmful effect on business and the economy in competition cases. Needless to say, these delays are particularly critical in the field of mergers, where speedy adjudication is of

<sup>48</sup> ECJ statistics (end of 2007): the number of cases pending increased by about 1.4% and the number of cases brought to a close increased by approximately 4% (570 cases closed in 2007, 580 new cases, 741 cases pending at the end of 2007). See further European Court of Justice, *2007 Annual Report*, available at <http://curia.europa.eu/en/plan/index.htm> (accessed on 12 May 2008).

<sup>49</sup> CFI statistics (end of 2007): pending cases: 1154 (competition: 197, state aid: 165); new cases: 522 (competition: 62, state aid: 37); completed cases: 397 (competition: 38, state aid: 36). Appeals: competition: 13 (appeals dismissed), 1 (appeal allowed), 1 (removed from register); state aid: 5 (appeals dismissed). For further statistical information, see European Court of First Instance, *2007 Annual Report*, available at: <http://curia.europa.eu/en/instit/presentationfr/index.htm> (accessed on 12 May 2008). From its establishment in 1989 up to 31 December 2006, 743 competition cases (excluding state aid cases) were introduced before the CFI, of which 559 have been closed. Those 559 cases may be broken down as follows: 428 cases concerning the application of Art 81 EC and 65 ECSC, which have given rise to 160 appeals before the ECJ; 68 cases concerning the application of Art 82 EC, which have given rise to 19 appeals before the ECJ; 58 cases concerning merger control, which have given rise to three appeals before the ECJ; five cases concerning the application of the competition rules, together with Art 86, 87 or 88 EC, which have given rise to three appeals before the ECJ. See, in particular, written evidence by B Vesterdorf, "Minutes of Evidence" of the House of Lords report (*supra* n 22), 17 January 2007, 102ff.

<sup>50</sup> Case T-87/05 *EDP v Commission* [2005], OJ C 281, 22 (action was lodged with the CFI on 25 February 2005).

<sup>51</sup> Case T-464/04 *Independent Music Publishers and Labels Association (Impala) v Commission* [2006] ECR I-2, where the CFI annulled the European Commission's clearance of Sony/Bertelsmann, took 19 months to complete.

<sup>52</sup> See, eg *R v Minister of Agriculture Fisheries and Food ex parte Portman Agrochemicals Limited* [1994] 3 CMLR 18 (QB). Anecdotally, correspondents suggest that this delay acts as deterrent even in the Art 234(4) courts of last instance, where a point is not truly *acte clair*.

<sup>53</sup> According to the CFI Statistics (end of 2007), there were a total of 397 cases completed and a total of 76 appeals, of which 72 were dismissed. See CFI, *2007 Annual Report* <http://curia.europa.eu/en/instit/presentationfr/index.htm> (accessed on 12 May 2008).

crucial importance and where, given the time for appeal, only a few companies can keep the deal alive for such a length of time. For a merger appeal to have any value for business, the maximum time taken to deliver a judgment should be six months.

There is no doubt that mergers play an important role in a market economy and can bring benefits to competition and, in turn, consumers. The importance of mergers for the competitiveness of European industry is also recognised in the Merger Regulation 139/2004.<sup>54</sup> And as the EU Commission has said, combining the activities of different companies may allow the companies to develop new products more efficiently, for example, or to reduce production or distribution costs. Through their increased efficiency the market becomes more competitive, and consumers benefit from higher-quality goods at fair prices.

The world moves swiftly and delays incur huge opportunity costs; for example, in one case alone the business disbenefit of an unconsummated transaction amounted to £100 million per month.<sup>55</sup> There are numerous examples of judicial review of merger decisions that took too long and final judgments came about when the envisaged transactions could no longer be implemented (or no longer made economic sense). In *Kali and Salz*, the ECJ annulled the Commission's decision authorising a concentration with remedies four years later. The *Airtours* judgment came about almost three years after the Commission decision. Also, the *Schneider/Legrand* case serves as a reminder of the lack of effectiveness of the EU system, taking over six years to finally be resolved.<sup>56</sup> Furthermore, the *Microsoft*

<sup>54</sup> Preamble, para 4.

<sup>55</sup> See *British Telecommunications plc / AT&T Corporation*, where the business benefits were set at this level.

<sup>56</sup> Joined Cases C-68/94 and C-30/95, *France v Commission (Kali and Salz)* [1998] ECR I-1375; Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585. Case T-77/02 *Schneider Electric SA v European Commission* [2002] ECR II-4201 (Schneider II). The same day, the Court of First Instance decided also on the case arising on 13 December 2001 (Case T-310/01 [*Schneider I*]), annulling the decision on separation: Case T-310/01 *Schneider Electric SA v Commission of European Community* [2002] ECR II-4071. Background: on 11 July 2007, the the CFI delivered its long-awaited judgment in the appeal of Schneider Electric SA against the decision of the European Commission. The CFI ruled for the first time that a merging party can be compensated (at least in part) for losses sustained as a result of the illegal prohibition of its merger. The case dates back to 2001, when in February of that year Schneider and Legrand, two large French industrial groups, agreed that Schneider would acquire control of Legrand through a transaction that required clearance by the Commission. Subsequent to Schneider's acquisition of Legrand in August 2001, the Commission blocked the merger on the grounds, *inter alia*, that the merged entity would significantly impede effective competition in a number of markets in France. These include the electrical panel-board components sector and various downstream electrical equipment market segments. The Commission also adopted a separate decision ordering the divestment by Schneider of Legrand. Schneider subsequently brought an action for the annulment of both Commission decisions. At the same time, Schneider prepared its divestiture of Legrand. By its judgments of 22 October 2002, the CFI annulled the Commission's prohibition decision. The court held that the Commission had failed to have regard to Schneider's rights of defence, since the Commission had advanced for the first time in the decision an objection to the merger that Schneider had not had an opportunity to comment upon. The objection alleged that Schneider would leverage its dominant position in the electrical panel-board components sector into Legrand's leading position

decision<sup>57</sup> was finally decided by the ECJ in 2007 referring to a factual situation that existed in 2004.

What is important to the companies concerned is not only speed but also finality and legal certainty. It must therefore be predictable for those entering negotiations whether—and, if so, when—their deal can go ahead without further possibility of challenge.

Given these issues, it is clear that something needs to be done in order to avoid a “serious crisis where the average length of proceedings . . . would grow to completely unacceptable levels”.<sup>58</sup>

To “reduce procedures as much as possible while maintaining quality” is also a target and top priority for new CFI president Marc Jaeger,<sup>59</sup> who has already taken the first step in addressing the delays by spreading the tribunal’s 27 judges to eight chambers (instead of the original five).<sup>60</sup>

However, there are various additional factors that will increase the Court’s caseload over the next years, suggesting that national governments need to make the Court more efficient sooner rather than later.

First, the Charter of Fundamental Rights<sup>61</sup> could potentially generate a great deal of litigation in order to test out its limits, interpretation and meaning;<sup>62</sup>

in downstream electrical equipment market segments in France. According to the court, the alleged reinforcement of a dominant position through the dominant firm’s position in related markets (facilitated by its ability to provide a portfolio of products) had not been raised in the Statement of Objections earlier in the proceedings. Accordingly, the Commission had not afforded the merging parties the opportunity to counter such allegations, nor to craft remedies that could address the Commission’s concerns arising from the “portfolio” effect created by the merger. The Commission, however, had not closed its procedure until after the date on which the sale of Legrand had been contractually agreed to take place. This led Schneider to divest Legrand. Subsequently, Schneider brought an action for damages before the CFI.

<sup>57</sup> Case T–201/04 *Microsoft Corp (The Computing Technology Industry Association Inc and Others, intervening) v Commission of the European Communities (Software & Information Industry Association and Others, intervening)* [2007] OJ 2007/C 269/80.

<sup>58</sup> B Vesterdorf, “The Community Court System Ten Years from Now and Beyond: Challenges and Possibilities” (2003) 28 *European Law Review* 309.

<sup>59</sup> M Jaeger took over from B Vesterdorf, who retired after leading the court for 9 years, on 17 September 2007.

<sup>60</sup> See M Jaeger, “New EU Court Head Says Priority Cutting Case Backlog”, *Bloomberg*, October 2007, available at: <http://www.bloomberg.com/apps/news?pid=20601085&sid=ayYfhR7ueZyw&refer=europe> (accessed on 12 May 2008).

<sup>61</sup> Charter of Fundamental Rights: the Presidents of the Commission, European Parliament and Council, signed and solemnly proclaimed the Charter in Strasbourg, 12 December 2007, IP/07/1916.

<sup>62</sup> Through the EU Reform Treaty (or Lisbon Treaty—see *supra* n 1) the Charter of Fundamental Rights becomes binding, having the same legal value as the Treaties, although its text will not be in the Treaties (Art 6(1) TEU; Declaration 1); EU law is to be interpreted in compliance with the Charter. Protocol 7 to the Reform Treaty introduces specific measures for the UK and Poland, seeking to establish national exceptions to the justiciability of the Charter (Protocol on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom; Declarations 61 and 62). The Treaty also provides a new legal basis for the accession of the Union to the European Convention on Human Rights (Art 6(2) TEU and Protocol on the Accession of

Member States have certainly increased the chances of litigation by making the operation and interpretation of the Charter unclear.<sup>63</sup>

Secondly, the complex format of the newly signed Lisbon Treaty,<sup>64</sup> as well as the reforms it sets out, could for a time make the overall EU legal framework more uncertain, which could in turn lead to an increase in disputes requiring the adjudication of the Community courts. History has shown that constitutional engineering on such a scale almost always leads to a period of uncertainty when the new framework comes into operation.

One example of the uncertainty that may arise is the agreement reached by the EU Member States in June 2007 to remove the competition phrase contained in Article 3(1)(g) of the EC Treaty<sup>65</sup> from the Lisbon Treaty and create a “competition protocol” that includes the words from Article 3(1)(g). Some academics have argued that this is likely to have a number of damaging consequences for EC competition law as Member States might seek to use the Lisbon Treaty to weaken the crucial impact of competition law (by expanding the scope for lawful state aid on social and social market grounds, by permitting

the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms; Declaration 2). It is worth pointing out that the UK has been adamant that the Charter does not have legal force. This is reflected by UK’s opt-out in Protocol 7 to the Reform Treaty which states as follows:

“Article 1: 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. Article 2: To the extent that a provision of the Charter refers to national law and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom”.

Essentially, it does not extend the powers of any court—domestic or European—to challenge UK employment and social legislation. The rights vis-à-vis the UK remain enforceable through existing international and European obligations and domestically through the Human Rights Act, the common law and relevant legislation. Protocol 7 clearly states that it does not prejudice the UK’s other duties and obligations under EU law. Nor does it exempt the UK from abiding by the ECJ’s judgments seeking to ensure uniform application of EU law. Fundamentally it appears to the authors that the Protocol is more of a face-saving step to satisfy the eurosceptics at home, since as has already been stated that most of the rights contained in the Charter can be enforced through other routes.

<sup>63</sup> See A Townsend, “Can the EU Achieve an Area of Freedom, Security and Justice”, Centre for European Reform, available at: [http://209.85.129.104/search?q=cache:Xw1192jcg68J:www.cer.org.uk/pdf/opinion\\_at\\_jhaoct.pdf+A+Townsend+Can+the+EU+achieve+an+area+of+freedom,+security+and+justice+Centre+for+European+Reform&hl=en&ct=clnk&cd=1&gl=uk](http://209.85.129.104/search?q=cache:Xw1192jcg68J:www.cer.org.uk/pdf/opinion_at_jhaoct.pdf+A+Townsend+Can+the+EU+achieve+an+area+of+freedom,+security+and+justice+Centre+for+European+Reform&hl=en&ct=clnk&cd=1&gl=uk) (accessed on 12 May 2008).

<sup>64</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (*supra* n 1).

<sup>65</sup> The provision of “a system ensuring that competition in the internal market is not distorted”.

merger clearance on broader industrial policy grounds and by weakening the pressure for market liberalisation, particularly in energy and network services).<sup>66</sup>

In light of the fact that the ECJ has developed a “purposive interpretation” tradition to deal with conflicts,<sup>67</sup> time will tell whether the ECJ will provide the protocol with the same interpretative status in its case law as an article of principle or an objective in the treaty itself,<sup>68</sup> but what is certain is that the changes in the new treaty will raise many questions and hence litigation to test out its meaning and limits.

Thirdly, under the Lisbon Treaty the jurisdiction of the ECJ (renamed under the Lisbon Treaty as “Court of Justice”<sup>69</sup>) will be expanded to all the activities of the EU with the express exception of common foreign and security policy.<sup>70</sup> However, the Court will have oversight in the case of a breach of procedure or a conflict over competence (in effect, patrolling the frontier between the first and second pillars). It will hear appeals against restrictive measures and give an opinion about an international treaty.<sup>71</sup> Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the treaties are revised.<sup>72</sup>

There are a number of other amendments, beyond the scope of this article but of general relevance to improved governance, which may have an indirect effect on the speed of the system.<sup>73</sup>

<sup>66</sup> See A Riley, “The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law” (September 2007), CEPS Policy Brief, No 143. Furthermore, Antonio Bavasso, visiting professor of competition law at University College London and a partner with law firm Allen & Overy, said the following about the changes as a consequences of this deal: “the political significance of the change cannot be overstated . . . The foundations of competition enforcement are now weaker.” For more details on the current status of the discussion, see House of Commons debate on the Treaty of Lisbon, 4th allocated day provisions relating to the Single Market, 6 February 2008. Furthermore, the BIICL hosted a conference on the new European treaty, the Treaty of Lisbon, on 29 February 2008. Speakers included academics, practitioners, political scientists and politicians (Michael Connarty MP; Sir David Edward KCMG QC; Andrew Duff MEP; Xavier Lewis of the Legal Service of the European Commission; Professor Steve Peers; Timothy Kirkhope MEP; Michael Patchett-Joyce of Monckton Chambers; Professor Richard Whitman; Professor Alan Dashwood CBE).

<sup>67</sup> That means that the ECJ considers the objectives and purposes of the EU in deciding which of the conflicting arguments should be given greater weight.

<sup>68</sup> Professor Alan Riley, *supra* n 66, raises his doubts as follows: “No mere protocol can achieve the same interpretative status as the preamble and the first few articles”.

<sup>69</sup> Note: the CFI will be renamed “General Court”, and the term “Court of Justice of the European Union” will officially designate the two levels of jurisdiction taken together.

<sup>70</sup> Arts 9f and 11(1) TEU, *supra* n 1.

<sup>71</sup> Art 240a TFEU, *supra* n 1.

<sup>72</sup> Art 188 n(11) TFEU, *supra* n 1.

<sup>73</sup> Further changes worthy of mention: the appointment process for judges and Advocate Generals of the European Court of Justice will change: a panel will be set up to give an opinion on the suitability of the candidates proposed by the Member States. The panel will comprise seven persons appointed by the Council from among former judges of the European Court of Justice and the General Court, justices of national supreme courts and lawyers of recognised competence, one of whom must be proposed by the European Parliament. The rules of procedure

Finally, as the Single Market broadens its scope and reach into the new Member States, the volume of court cases with a cross-border element is increasing, leading to an increase in the Community courts' workload.

### 3. Language

The linguistic regime is a surprisingly important constraint on the productivity of the Court and the understanding of its judgments.<sup>74</sup> The Court's language regime is laid down in the Rules of Procedure (RP).<sup>75</sup> All languages are treated as being equal, and judges and Advocates General are entitled to use any language and to require translation of any document into the language of choice.

Furthermore, the European Community courts have a special linguistic status compared to the other European institutions because the Rules of Procedure provide the possibility to use a language which is not one of the official languages of the EU in the oral proceedings in the examination of witnesses or experts if the Court's permission is granted.<sup>76</sup> Hence, an Article 234 reference from a Latvian court to the ECJ could therefore be conducted (partially) in

of the panel will be established by the Council. A serious further innovation is a change to Art 226 to enable the European Court of Justice to impose a lump sum or penalty payment on a Member State that has failed to implement a directive without first obtaining a declaratory judgment to that effect. In addition, there's a change to the standing requirements in Art 230 §4 for individuals to challenge acts of the institutions. First, any act will be open to challenge if addressed to the plaintiff, not just decisions. If the act is not addressed to the plaintiff, the plaintiff must show that the act is of direct and individual concern. Secondly, in the case of a regulatory act (a measure of general application), the plaintiff must show that the regulatory act is of direct concern (dispensing with the need to show individual concern) and that the act does not entail implementing measures. The above-outlined change could also lead to a further increase in the Court's caseload. Finally, amendments to the Statute of the Court of Justice will be possible by the ordinary legislative procedure provided the Court is either the initiator of the amendment or is consulted on the amendment.

<sup>74</sup> Also highlighted by D Edward, "The Preliminary Reference Procedure: Constraints and Remedies", in CCBE, College of Europe Colloquium Bruges, 19–20 November 1999, 12, revising the EU's judicial system, assessing the possible solutions, revising the preliminary ruling mechanism.

<sup>75</sup> See Rules of Procedure of the Court of Justice, Arts 29–31. Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, [1991] OJ L 176, 7 and [1992] OJ L 383 (corrigenda). Latest version: Amendments to the Rules of Procedure of the Court of Justice of European Communities of 15 January 2008, [2008] OJ L 24, 39. See Arts 35–37, Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991, [1991] OJ L 136; corrigendum published in [1991] OJ L 317, 34. Latest version: Council Decision of 18 December 2006 amending the Rules of Procedure of the Court of First Instance of the European Communities with regard to languages on 18 December 2006, [2006] OJ L 386, 45. The concept of official languages and working languages was introduced in Art 1 of Reg 1/1958. The Council, in determining the language regime, an indication of an awareness of the importance of the issue, based the Regulation on Art 217 of the EEC Treaty, which provides for unanimous voting.

<sup>76</sup> Art 29 (4) of the Rules of Procedure, *ibid.*

Russian (despite the fact that Russian, unlike Latvian, is not an official language of the EU).

Internally, the Court uses a single working language, which is, largely for historical reasons,<sup>77</sup> French (although this is not specifically stated in the Court's Statute or Rules of Procedure). The difficulties resulting from this are becoming increasingly serious, in particular because French is not widely spoken in the new Member States, which are mostly Central or Eastern European Countries, where English is the prevalent second language. This has led to the fact that English is currently the "unofficial" working language of the Community courts, and in practice many cases heard by chambers in the ECJ will use a reduced number of languages depending on the circumstances and practical requirements. This more or less informal practice is set to grow.<sup>78</sup> During 2006–2007 (at least) one chamber of the CFI worked in English for the practical reason that much of the documentation was in English. Since the CFI was established in 1989, 49.3% of merger cases were introduced in English, 22.5% in French and about 10% each in German and Spanish.<sup>79</sup>

It has also recently been recognised by the European business lobby UNICE that English is "the language of business".<sup>80</sup> Ideally, this reality should be reflected in a modern court system.

The Court published a report on the 23 March 1999 highlighting that the volume of documents to be translated is not under the control of the Court and is rising at an alarming rate. This problem is now exacerbated by the expansion in size of the EU, which has created 12 additional working languages, bringing the total to 23. Consequently, there are over 380 possible different linguistic combinations, as all pleadings, included those submitted by a Member State in its own language, still have to be translated into the language of the case and into the working language of the Community courts.

In broad terms, each additional language involves the recruitment of about 30 translators, interpreters and secretaries.<sup>81</sup> In front of the ECJ, translation is required at approximately five separate stages of the procedure, which cannot proceed to the next stage until the necessary translations have been completed.

<sup>77</sup> When the Court was created in 1953, the procedural rules and the grounds for judicial review in the Treaties were closely aligned on the rules in French administrative law and at that point in time French was the language in which most legal texts and articles intended for an international audience were written. This changed when Denmark, UK and Ireland joined in 1973.

<sup>78</sup> See also M Horspool, "Over the Rainbow: Languages and Law in the Future of the European Union", available at [http://www.sciencedirect.com/science?\\_ob=ArticleURL&\\_udi=B6V65-4GV9SM6-5&\\_user=3962339&\\_rdoc=1&\\_fmt=&\\_orig=search&\\_sort=d&view=c&\\_acct=C000061901&\\_version=1&\\_urlVersion=0&\\_userid=3962339&md5=e928b98ff8cd9fdaa764fc3f8ca8c565#bf16](http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6V65-4GV9SM6-5&_user=3962339&_rdoc=1&_fmt=&_orig=search&_sort=d&view=c&_acct=C000061901&_version=1&_urlVersion=0&_userid=3962339&md5=e928b98ff8cd9fdaa764fc3f8ca8c565#bf16) (accessed on 12 May 2008).

<sup>79</sup> See also oral evidence by B Vesterdorf, the House of Lords report, *supra* n 22, answer to question 429, 17 January 2007.

<sup>80</sup> See "Chirac Flees Summit in a Fury over Use of English", *The Times*, 24 March 2006.

<sup>81</sup> Edward, *supra* n 74, 12.

On average, translation consumes about seven months of the total time taken to process a reference.<sup>82</sup>

There were in the past various attempts to acknowledge this problem. For example, in 1994, the French Minister of Foreign Affairs, Alain Lamassoure, citing the example of the European Trade Mark Office, which works in five languages (English, French, German, Italian and Spanish), proposed that the same practice should be followed in the internal workings of the European Institutions.<sup>83</sup> The European Parliament, however, opposed it, referring to Article 6 (now Article 12) of the EC Treaty, which prohibits any discrimination on grounds of nationality, and to Article 128 (now Article 151) of the Treaty, which refers to the Community's duty to "contribute to the flowering of cultures of the Member States" and, in particular, to the Community's duty to "take cultural aspects into account in its action . . . in particular in order to respect and promote the diversity of its cultures".<sup>84</sup>

The linguistic regime is established by Article 29 of the ECJ Rules of Procedure<sup>85</sup> and Article 35 of the CFI Rules of Procedure,<sup>86</sup> which both state that the language regime may only be changed by unanimous decision of the Council under Article 64 of the Statute. While recognising the political sensitivity, the economic costs of delay will be significant, quite apart from the damage to the credibility of any legal system arising from a basic lack of access to justice.<sup>87</sup>

#### 4. Decentralisation

Recognising the expansion of the EU and the need for swift access to justice in competition cases, the Commission took the step of decentralising by granting greater powers to National Competition Authorities (NCA) and national courts. With effect from May 2004, Regulation 1/2003<sup>88</sup> introduced a system of parallel

<sup>82</sup> *Ibid.*, 8.

<sup>83</sup> Horspool, *supra* n 78.

<sup>84</sup> Art 151(4) EC Treaty.

<sup>85</sup> OJ 1991, L176/7.

<sup>86</sup> See *supra* n 75.

<sup>87</sup> For an analysis of various reform options, see *infra*, section C.

<sup>88</sup> Council Reg (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L 1/1 (hereinafter Reg 1/2003). The main pillars of modernisation are the harmonisation of the substantive competition rules and the decentralised application of European competition law. For the European business community the harmonisation of European competition law has significant advantages. In particular, companies that are active on a pan-European basis benefit from the fact that their contracts no longer need to be assessed on the basis of national laws but that it is sufficient that their contracts are compatible with European competition law. Also, the country in which the agreement or practice is assessed should not be of importance, because all authorities and courts need to apply the same standard. It therefore needs to be ensured by all authorities and all courts that European competition law is applied in a consistent manner in all Member States. See P Lowe, "The Role of

competences with respect to competition authorities such that a competition case affecting trade between Member States can be dealt with by either the European Commission or a single national authority, or various national authorities acting in parallel. Such a system allows the Commission to concentrate its resources on important cases and generally leads to better cooperation and coordination between national authorities and the Commission.

Furthermore, the procedural delays in preliminary ruling proceedings before the ECJ and in direct competition law annulment actions before the CFI encourage recourse to national courts. Hence, greater powers have been given not only to the European Commission and National Competition Authorities, but also to the national courts.

There is a strong claim that a centralised court system is necessary to ensure a common legal culture and uniformity, consistency and coherence in light of the differences in national procedures.<sup>89</sup> The question therefore is whether recourse to national courts driven by decentralisation necessarily means less uniformity and consistency in the application of European law. This will be further analysed below.

Looking at the role of the EU Commission itself, its role to ensure the consistent application of European law is recognised in the Notice on the Cooperation within the Network of Competition Authorities,<sup>90</sup> the EU Treaty itself and Regulation 1/2003, and is secured by the tools at the disposal of the Commission. In this respect, it is worth noting the Commission's training programme for judges, the exchange programme for officials working in the competition authorities, the obligation of the Member States to inform the Commission at least 30 days before a decision is taken of the intended course of action<sup>91</sup> and the possibility for the Commission to make use of a number of instruments, such as taking up cases that raise new issues under Article 10 of Regulation 1/2003.

## **5. Limited Role of Judicial Review in Administrative Competition Law System**

The European Court of Human Rights has held that decision-making powers can be entrusted to administrative authorities as long as they are subject to

the Commission in the Modernisation of EC Competition Law", speech at the UKAEL Conference on Modernisation of EC Competition Law: Uncertainties and Opportunities, 23 January 2004, 2, supporting this advantage for the European Business Community. For reform in the field of mergers, see Council Reg (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1 (hereinafter Merger Reg).

<sup>89</sup> For example, the area of private competition enforcement (eg burden and standard of proof) is currently not fully harmonised throughout the EU.

<sup>90</sup> Commission Notice on Cooperation within the Network of Competition Authorities, [2004] OJ C101/43.

<sup>91</sup> See Art 11(4) of Reg 1/2003, *supra* n 88.

effective judicial review by an independent and impartial tribunal.<sup>92</sup> Hence, it is up to the Community courts to ensure that the administration's decisions are subject to comprehensive judicial review by an independent external tribunal.

Article 230 of the EC Treaty gives the Community courts the competence to review the legality of acts adopted by the institutions, including acts of the Commission. It allows any natural or legal person to seek the annulment of a Commission Decision that is addressed to that person or is of direct and individual concern to it. Hence, appeal of the Commission's Decisions before the CFI and then, on grounds of law only, to the ECJ is possible.

Judicial review under Article 230 of the EC Treaty is limited in scope as there is no full appeal on the merits possible.<sup>93</sup> This reflects the fundamental principle of the institutional balance provided for in the EC Treaty, according to which the,

“division of powers between the Commission and the Community judicature . . . do not allow the judicature to go further, and . . . to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution.”<sup>94</sup>

Furthermore, the grounds for annulment are limited and are those stipulated in Article 230 EC Treaty.<sup>95</sup> The CFI may not substitute its own decision on the merits but must “remit” the case back to the Commission for re-examination. This leads to a situation that is unsatisfactory for both the applicant and the Commission. First, this can lead to a new examination, with the applicant facing the uncertainty of a new review as well as consequential procedural delays. Secondly, it is often not clear what measures the Commission must take following annulment, although there is a general obligation to draw the necessary conclusions from the consequences of the Court's judgment having regard not only to the operative part but also to the Court's reasoning.<sup>96</sup>

<sup>92</sup> See Art 6 of the European Convention of Human Rights as well as, eg Case A/73 *Ozturk v Germany*, Judgment of the European Court of Human Rights of 21 February 1984.

<sup>93</sup> One exception to this restricted role of Community courts in the EC system of competition enforcement is in the case of decisions imposing fines. Art 229 EC enables the grant of unlimited jurisdiction to the courts in the determination of penalties. This is reflected in both the merger field, in Art 16 of the Merger Reg, *supra* n 88, and the antitrust field, in Art 31 of Reg 1/2003, *supra* n 88.

<sup>94</sup> See Case C-12/03 P *Tetra Laval v Commission*, AG Opinion, para 89.

<sup>95</sup> These are namely lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers.

<sup>96</sup> See Art 233 EC, which reads as follows: “The institution . . . whose act has been declared void . . . shall be required to take the necessary measures to comply with the judgment of the Court of Justice”.

The need for an administrative review, court review and then another administrative review and decision all takes time. There would ultimately be greater speed of enforcement, certainty and effectiveness of judicial control if a system of full jurisdiction, i.e. the ability to retake a decision on the merits rather than simply annul the Commission's decision, was introduced. In particular, in the area of mergers,<sup>97</sup> it would be more effective if closure to the litigation could be achieved by the CFI. Such changes might necessitate a change in the provisions of the EC Treaty (in particular Articles 229 and 230 of the EC Treaty).<sup>98</sup>

## C. OPTIONS FOR REFORM

### 1. Introduction

Before considering detailed proposals, it is important to outline the overall aims for any reform process.

The starting point for any reform must be that any changes do not have a negative impact on the effective administration of EU justice. All proposals for reform and ideas on the future of the Community's judicial system must take into account three fundamental requirements,<sup>99</sup> which are important aims in any judicial system:

1. the need to secure the unity of Community law;<sup>100</sup>
2. the need to ensure that the judicial system is transparent, comprehensible and accessible to the public;
3. the need to dispense justice without unacceptable delay ("justice delayed is justice denied").

Any reform proposals or changes that damage the Community courts' ability to resolve disputes, ensure consistency in interpretation and remedy breaches will fundamentally undermine the EU, and this is clearly undesirable in economic terms.

<sup>97</sup> This is in particular important in the light of the Merger Reg, *supra* n 88, stating in its Art 10(5) that the administrative procedure before the Commission restarts, and that the examination must take into account current market conditions. These might have changed in the meantime.

<sup>98</sup> For further reform proposals see *infra*, section C.

<sup>99</sup> See proposals by the ECJ and CFI, *The Future of the Judicial System of the European Union (Proposals and Reflections)* (Brussels, May 1999), 17.

<sup>100</sup> The ECJ and CFI, *ibid*, stated in their proposals that the unity of Community law should be secured "by means of a supreme court". I do not fully share this opinion, as further outlined in my reform proposals below.

Reform proposals to date fall into two distinct categories: those which involve only procedural changes<sup>101</sup> and those which go further and require changes to the judicial structure.<sup>102</sup>

Outlined below are the first summaries of proposals put forward by others. These are then followed by the consideration of some options and recommendations of possible future changes that would enable the European Community courts to deal more effectively and expeditiously, and resolve some of the current failings as outlined above (see *supra*, section B).

## 2. Overview on Previous Reform Proposals and the Status of Discussion

### (a) *BIICL Report*<sup>103</sup>

The BIICL published a seminal report into “The Role & Future of the European Court of Justice”, which was presented by the Rt Hon Lord Slynn of Hadley in 1996. This report considered a number of alternatives that would have improved the administration and working of the Court and the administration of justice on European legal matters more generally across the EU.<sup>104</sup>

The report reviewed the composition and administration of the ECJ, its jurisdiction, procedure, interim measures, enforcement of judgments and mechanisms for reviewing the Court’s decisions. It recognised that the Court is a victim of its own success and

“in many ways, the most successful international court in the world community; its fundamental function in the Community legal order is now well established. That success, however, has its disadvantages. The Court’s wide jurisdiction, the large volume of law of which it is the sole authoritative interpreter and the relatively effective enforcement of its judgments have made it a popular forum for litigation. This has led to an increasing caseload and consequent delays in the disposal of cases over the years both before the ECJ and the CFI.”<sup>105</sup>

<sup>101</sup> The solutions outlined in the BIICL report, *supra* n 33, which would not have involved a new judicial structure, included, for example, an increase of the number of judges, Advocates General and other staff of the Court, a use of chambers and plenum, the possibility of dispensing with or curtailing the hearing, a review of process of infringement cases, a broadening of the *locus standi* under the former Art 173 of the EC Treaty and a general modification of the preliminary reference system. For a summary of the BIICL report see *infra*, section C.2.(a).

<sup>102</sup> See in particular the BIICL report, *ibid*, which reviewed measures adopted to improve the efficiency of the ECJ and identified possible solutions within the judicial structure existing at the time, then considered solutions involving a new judicial structure. For an analysis of the BIICL report, see *infra*, section C.2.(a).

<sup>103</sup> *Supra* n 33.

<sup>104</sup> Note that references in the report are to the articles of the European Treaty at the time, not the latest version of the Treaty; the Treaty articles remain the same but some numbers have changed.

<sup>105</sup> See BIICL Report, *supra* n 33, 23.

The report reviewed measures adopted to improve the efficiency of the ECJ and identified possible solutions within the judicial structure existing at the time, before considering solutions involving a new judicial structure.

Solutions which were canvassed in the review that would not have involved a new judicial structure included<sup>106</sup> an increase in the number of judges, Advocates General and other staff of the Court;<sup>107</sup> the use of chambers and plenum;<sup>108</sup> the possibility of dispensing with or curtailing the hearing;<sup>109</sup> altering the role of the Advocate General;<sup>110</sup> possible extension of the jurisdiction of the CFI;<sup>111</sup> a review of the process of infringement cases;<sup>112</sup> the modification of the preliminary reference system;<sup>113</sup> and broadening the *locus standi* under Article 173.<sup>114</sup>

Solutions which were canvassed in the review which would have involved a new judicial structure included:

#### Option 1—Reform along the Lines of the US Court System<sup>115</sup>

This reform proposal dealt with a possible restructuring of the EU judicial system to create parallel European and national competence. The best known example of a court system acting as umpire between centralising and separatist tendencies is that of the US, with the State courts and the Federal courts having parallel competence. The State courts control state functions, the Federal courts control federal functions. The present court system of the European Community already numbers this task amongst its functions.

By contrast with the US system, a different approach has been adopted by the EU. The national courts may handle any cases involving Community law, except for those cases where the Community courts have been given original jurisdiction. This means that national courts are frequently called upon to apply and enforce Community law at the national level.

The principal method adopted to achieve the objective of uniform interpretation and application of Community law is the preliminary reference procedure. The US's equivalent procedure is the certification procedure for the US Supreme Court.

The report reviewed Option 1 and recognised that the European system had chosen a different path from the United States. In particular,

<sup>106</sup> *Ibid.*, 43–96.

<sup>107</sup> *Ibid.*, 43–47.

<sup>108</sup> *Ibid.*, 48–51.

<sup>109</sup> *Ibid.*, 51–53.

<sup>110</sup> *Ibid.*, 53–55.

<sup>111</sup> *Ibid.*, 55–60.

<sup>112</sup> *Ibid.*, 61–67.

<sup>113</sup> *Ibid.*, 68–87.

<sup>114</sup> *Ibid.*, 94–96.

<sup>115</sup> *Ibid.*, 98–101.

“By an act of faith, which has been found to be largely justified, it entrusts its application and enforcement to the National Courts and uses the reference mechanism as the principal method to achieve unity. This system works well *subject to the problem of the delay between the reference and the ruling*.<sup>116</sup> It is this problem which must be tackled and there is no reason in principle why solutions should not be found”.

The report concluded that major restructuring of the Community judicial system along the lines of the US court system was not, in practical terms, necessary.

#### Option 2—System of Community Regional Courts<sup>117</sup>

Under this option, the proposal of a genuine restructuring of Europe’s judicial architecture by introducing a system of Community regional courts was reviewed (this had previously been reviewed prior to the inter-governmental conference in 1990). The central idea was to propose that the ECJ remains at the apex of the system and is renamed as the European High Court of Justice. Direct access would be limited to a number of specific articles of the treaty. Four or five new Community regional courts could be created to serve a grouping of Member States. Each regional court would have a regional jurisdiction relating to applications by private parties under (former) Article 173 or 175 or non-contractual liability under (former) Article 215 of the Treaty.<sup>118</sup> The regional courts would receive preliminary references from and issue preliminary rulings to national courts, and a number of other specific procedural and jurisdictional matters were also considered.

The BIICL report listed as the advantages of the regional court system that it would<sup>119</sup> bring justice nearer to the likely parties, be more familiar with the legal, economic and social systems of the regions, adopt a simple linguistic regime, function more efficiently and speedily and raise the profile of Community law.

The disadvantages of a regional court system highlighted by the BIICL report were that it might<sup>120</sup> jeopardise the unity and coherence of the community legal system, cause issues of the status of decisions and jeopardise uniform interpretation and application of Community law, increase delays in preliminary references, increase administrative complexity as well as costs and expenses falling on the Community budget, and create regional groupings of Member States.

The report concluded that the creation of a regional court system could not be supported.

<sup>116</sup> Emphasis added.

<sup>117</sup> See BIICL Report, *supra* n 33, 101–104.

<sup>118</sup> Now Arts 230, 232, and 288 of the EU Treaty.

<sup>119</sup> See BIICL Report, *supra* n 33, 102.

<sup>120</sup> *Ibid*, 102–104.

### Option 3—A Two-tier ECJ<sup>121</sup>

One of the critical problems in the court's workload was identified as the delay in deciding (former) Article 177<sup>122</sup> references. This was identified as an issue requiring further resolution under Option 1.<sup>123</sup> An alternative to reducing the number of references was the establishment of a second tier of judges (with no Advocates General) in the ECJ. The idea was that a lower tier of judges would decide most preliminary references, therefore leaving to the higher tier those cases that are currently decided by plenary session.

The higher tier of the ECJ would decide important issues—for example, questions of validity of general community legislation or where the law requires clarification in the light of previous decisions.

Advantages that might be achieved from such a system included speed and access to justice, while enabling judges on the higher tier to concentrate on the more important cases. Disadvantages included the fact that it would be seen to be creating a three-tier structure of courts which might be too elaborate, whilst a two-tier structure would involve considerable expansion of the ECJ and add considerably to the complications of administration and costs of the ECJ.

The report considered that an expansion of the CFI would address the issues identified in this option more effectively.

### Option 4—Creation of Specialised Courts/Tribunals or Specialised Chambers<sup>124</sup>

This option reviewed the development of the CFI into an ordinary administrative court specialising in the judicial protection of private parties against illegal administrative acts by Community institutions, and the parallel development of specialist tribunals, such as the establishment of a staff tribunal to hear at first instance all staff cases, and the establishment of a competition, state aid and anti-dumping tribunal.

The report considered that such a development had a number of disadvantages, in particular the difficulty of defining a structured relationship between all the different tribunals, but also the concern that specialist tribunals would proliferate and would ultimately jeopardise the uniform interpretation and application of EC law.

### Option 5—New Distribution of Jurisdiction between the Community Courts and National Courts<sup>125</sup>

This option reviewed a change to the division of jurisdiction between the domestic courts and the ECJ and CFI. One fundamental difficulty with this

<sup>121</sup> *Ibid*, 104–10.

<sup>122</sup> Now Art 234 of the EU Treaty.

<sup>123</sup> See above, in particular the quotation in italics.

<sup>124</sup> See BIICL Report, *supra* n 33, 106–110.

<sup>125</sup> *Ibid*, 110–13.

approach is that the Community legal system is part of the national legal system. The balance of jurisdictions was reviewed, but the conclusion was that this option would not work in practice and, if adopted, would cause more problems of coordination and uniformity than it would solve.

Option 6—Should the Community Courts be Able to Refuse Jurisdiction?<sup>126</sup>

The benefits and disadvantages of this option were reviewed, and the conclusion was that the introduction of filters or selection mechanisms for the ECJ would be undesirable and difficult to achieve.

In conclusion, the BIICL report's recommendations were that no radical changes to the present judicial structure should be introduced. However, it acknowledged that the ECJ needs to be enabled to cope more efficiently with its actual and prospective caseload, that the CFI should be expanded and that generally proceedings of the Community courts need to be improved.

(b) *House of Lords Sub-Committee Report*<sup>127</sup>

The House of Lords Sub-Committee inquiring into the viability of establishing an EU Competition Court issued their full report at the end of March 2007.<sup>128</sup> In its report, the Sub-Committee rejected the idea of establishing either a separate court or chamber dedicated to competition law. Whilst it accepted that the delay was a significant problem, it felt that the main causes (language and case overload) would continue to plague any new court/chamber.

The Sub-Committee concluded that adding another level of appeal would not be the answer and may in fact lead to further delays. The Sub-Committee stated that its recommendations focused on how to first improve the existing system and procedures. It also emphasised the need to guarantee quality over expediency. Whilst it did not entirely dismiss the possibility of its establishment at a later date, it should be noted that the creation of a new court depends on a proposal from the Commission or on the request of the ECJ. On the basis of the responses by various witnesses to the Sub-Committee during the consultation, and without strong encouragement from Member States, it now appears unlikely in the near future.

The basis of the inquiry was the June 2006 CBI brief proposing the creation of a European Competition Court (on the basis of Article 225a TEC) with specialist judges and tailor-made procedures.<sup>129</sup>

<sup>126</sup> *Ibid*, 113–19.

<sup>127</sup> See *supra* n 22.

<sup>128</sup> While the Sub-Committee reviewed evidence that established that delay is a serious issue, no reform proposals were considered that would resolve the problem. I have clustered the report “something remains to be done”, as it was well established before the enquiry that “something must be done”.

<sup>129</sup> CBI Brief of 15 June 2006, reproduced in the “Minutes of Evidence” of the House of Lords report, *supra* n 22, 1–3.

The first chapter<sup>130</sup> of the Sub-Committee report, introducing the issue, focused in particular on the problem of delay. Together with statistical analysis of the caseload and time frames, the evolution of the EC merger control procedures was also set out. The agreed conclusion was that delay in hearing appeals in merger cases is a problem but that there is no agreed solution.

The second chapter<sup>131</sup> considered the causes of delay, namely the language issue and the question of overload, and set out the proceedings before the CFI, the written procedure, and the oral hearing and fast-track procedures.

In the third chapter<sup>132</sup> the advantages and disadvantages of a new competition court were considered and rejected.

Instead of a new court, it was suggested by some witnesses that a new chamber should be established within the CFI.<sup>133</sup> However, the Sub-Committee noted that without more judges there would be no advantage over the existing structure and that it could therefore lead to further delays and reduced flexibility overall.

Appointing more judges and creating additional chambers would appear to be the obvious response; however, the Sub-Committee noted that there would be serious political difficulties with this proposal.<sup>134</sup>

The Sub-Committee believed that a greater level of autonomy should be given to the CFI and ECJ to changing their rules (accepting that a change of the official language would require political endorsement). It identified several ways in which the practice of the courts under the existing rules could help speed up the process. These included firmer case management by the judges as well as the recommendation to abolish the 10 day “*delai de route*” when lodging an appeal. Furthermore, third-party interveners should have the right to request an accelerated procedure and that the CFI should have the discretion to take a final decision itself (eg no substantial alteration in circumstances).

Appeals against fines imposed by the Commission are time-consuming. The proposal to introduce a system of plea bargaining was welcomed by both the Sub-Committee and Bo Vesterdorf. Whether plea bargaining promotes justice is, however, questionable.

Appeals to the CFI concerning trademarks are proliferating, thereby increasing the Court’s workload. Intellectual property cases were an area identified as clearly distinguishable cases suitable for transfer to a judicial panel. This proposal received a positive response from the Commission and the Court,

<sup>130</sup> See House of Lords report, *ibid*, 9–16, paras 1–24.

<sup>131</sup> *Ibid*, 16–23, paras 24–53.

<sup>132</sup> *Ibid*, 24–31, paras 54–85.

<sup>133</sup> *Ibid*, 36–38, paras 110–23.

<sup>134</sup> For a summary of the conclusion, see *ibid*, 38, para 122.

with the former stating that first an evaluation of the transfer of staff cases would need to be carried out.<sup>135</sup>

Whilst acknowledging the time sensitivity of merger cases, the UK government<sup>136</sup> doubted whether the creation of a competition court or chamber would address the delay issue. Either option would only add another layer of appeal without addressing the true causes of delay, namely language and the need for tighter practice procedures. It could not see the merit of initially submitting summary applications, and was hesitant to fully support proposals which would alter the CFI's jurisdiction, where the CFI itself is better placed to decide or requires fuller evaluation on a political level.

The UK government did, however, respond positively to the Sub-Committee's other recommendations and stated in particular the need for firmer case management by the judges, which included the proposal for them to decide on a case-by-case basis whether to conduct the internal deliberations in the language of the case and to prioritise time-sensitive cases. Furthermore, the UK government stressed the importance of speeding up the lodging and acceptance of cases, of granting a right to third-party interveners to request an accelerated procedure and of allocating trademark cases to a judicial panel.

In terms of the next steps, the UK government stated that it will discuss the options with the Commission and the European Community courts to determine the best way forward.

### (c) Other Submissions

#### 1. Sir David Edward

In his evidence to the House of Lords Enquiry, the report of which I have summarised above, Sir David Edward further commented on the difficulty in defining the scope of any specialist competition court in stating that "in Luxembourg, 'competition cases' do not come neatly packaged and labelled".<sup>137</sup>

He went on to say that,

"some discussion of a Competition Court misunderstands the place of competition law in the context of EU law as a whole. Jean Monnet is reputed to have said that 'The whole Treaty is about competition'. Articles 81 and 82 form part of a wider Chapter that includes the rules relating to public undertakings, services of general economic interest, revenue producing monopolies and, especially, state aids. That

<sup>135</sup> See also *ibid*, 47, para 173: "The transfer of trademark cases could lead to a marked decrease in the CFI's workload and we encourage the Commission to give urgent consideration to this suggestion".

<sup>136</sup> See the response of the UK government, available at <http://www.parliament.uk/documents/upload/govrespeucomp.pdf> (accessed on 14 May 2008).

<sup>137</sup> See Minutes of Evidence to the House of Lords report, *supra* n 22, written evidence by Sir David Edward, page 47, para 1.2. It is worth to note that Sir David Edward is a former judge at the ECJ as well as a former judge at the CFI (from 1989 to 1992).

Chapter is in turn integrally related to the rules on free movement and other policies. EU competition law is not a self-standing legal discipline to the same extent as US antitrust law or even UK competition law which has its own statutory framework.”<sup>138</sup>

In his words,

“References from national courts under Article 234 EC relatively rarely pose questions that are confined to the competition rules in a narrow sense. More frequently, they pose questions about the competition rules combined with other questions about free movement, state aids, transport, social or industrial policy, etc.

[5.4] *Courage v Crehan*, to which reference is made in the call for evidence, was not just about ‘competition law’. The primary issue was a more fundamental ‘constitutional’ one: Does Community law require a national court to set aside a rule of national law that precludes a party to a contract from pleading the unlawfulness of that contract as a basis for seeking damages from the other party?

[5.5.] In short, EU competition law is not an isolated ‘specialist’ subject and ‘competition questions’ do not come to Luxembourg in neatly parcelled and labelled packages. In this respect, competition cases are different from staff cases and patent cases (even if there is an overlap between intellectual property rights and free movement).”<sup>139</sup>

On the question of delay, Sir David Edward highlighted the fact that it is not an exclusive problem of the Community Court system but that “the antecedent investigation and decision-making process before the Commission is itself a source of delay and uncertainty”.<sup>140</sup>

He was therefore sceptical about the need for, or the desirability of, creating a specialist competition court. It seemed, however, “logical” to him that, as the scope of the CFI’s jurisdiction expands, its chambers should become more specialised. Within that context, judges who have substantial knowledge and experience of competition law could be assigned to chambers dealing with competition cases without it being necessary to define precisely what constitutes a “competition case”.

As general points, Sir David Edward stated the need for the European Community courts to be able, on their own initiative, to test out new procedural methods and expedients that would go some way towards achieving greater speed and efficiency.<sup>141</sup> This would help in resolving the current problem that the scope for proactive case management by the Court is extremely limited, as the Rules of Procedure cannot be changed without the approval of the Council.<sup>142</sup>

As regards the possibility of developing “competition references” under Article 234 to the CFI, Sir David Edward favours assigning to the “CFI

<sup>138</sup> See *ibid.*, 50, para 5.1.

<sup>139</sup> See *ibid.*, 50–51, paras 5.3–5.5.

<sup>140</sup> See *ibid.*, 47, para 1.4.

<sup>141</sup> See *ibid.*, 51, para 6.3.

<sup>142</sup> This is a majority approval (with the exception of the language regime).

references where the questions posed by the national court are confined exclusively to questions concerning the interpretation and/or application of Articles 81 and/or 82<sup>3</sup>. He analysed that he would

“favour such a solution for the following reason: a reference whose subject matter is exclusively confined to interpretation or application of Article 81 or 82, is likely to arise in the context of a dispute between private undertakings. It is likely (though not certain) that the issue will turn on the particular facts and circumstances of that dispute, and will be analogous to the issues arising in actions to annul Commission decisions, already devolved to the CFI. If, exceptionally, such a reference were to raise questions of general importance, the First Advocate General could propose that the ECJ should review the decision of the CFI on the ground that ‘there is a serious risk of the unity or consistency of Community law being affected’ (Article 62 of the Statute). This seems to us to represent a rational and workable division of labour between the ECJ and the CFI.”<sup>143</sup>

These comments recognise the difficulty of competition from other cases while also recognising the fact that the process of decision making before the Commission carries issues of delay.

## 2. Bo Vesterdorf

During his time as President of the CFI, but in his own capacity, Bo Vesterdorf wrote widely about the functioning of the European Community courts and areas for reform.

One of his recent articles<sup>144</sup> aptly summarises his views. He first states that, although the courts have exercised their judicial review function effectively, a review of their work reveals certain shortcomings in the current system that lead to thoughts for improvements to the system. In this context, he highlights two aspects of the current system that from his personal point of view may diminish the effectiveness of judicial review: the facts that the CFI lacks full jurisdiction (except in respect of fines) and that judicial review is not always timely.

Having identified speed as the main aspect of the CFI’s procedure that could be the subject of improvement, he outlines some avenues of possible future changes which would enable the CFI to deal more effectively and expeditiously with competition cases. Whilst acknowledging the advantages of both a specialised competition tribunal as well as specialised CFI chambers,<sup>145</sup> Vesterdorf favours as a “more practical and realistic solution” the removal of

<sup>143</sup> See “Minutes of Evidence” to the House of Lords Report, *supra* n 22, written evidence by Sir David Edward, 51, paras 5.8–5.10.

<sup>144</sup> See Vesterdorf, *supra* n 41, and quoted throughout this article.

<sup>145</sup> For Vesterdorf’s analysis of the advantages and disadvantages of the specialised competition tribunal and the specialised CFI chambers, see *ibid*, 25 and 26.

other cases, in particular civil service cases and trademark cases, which together would reduce the caseload by 37%.<sup>146</sup>

Highlighting the important role played by the Community courts, he concluded by quoting Advocate General Cosmas from the *Ladbroke* case:

“a comprehensive review as to the substance . . . does not, of course, supplant the administrative work of the Commission but constitutes a correct exercise of judicial tasks in a legal order-like the Community legal order-governed by the principles of legality and the rule of law”.<sup>147</sup>

The preceding sections of this review consider the following:

- The importance of the judicial system for securing justice and fulfilling the political goals of the EU and the rule of law, as well as improving economic progress.
- The fact that the existing system simply “takes too long” to achieve a result, whether from court statistics, identified procedural issues that require reform, language, the increased collaborative and decentralised nature of the EU, and proposals for reform of the competition law system.
- Various proposals for reform have been canvassed and all are deficient in different ways in failing to fully achieve the EU’s goals while speeding up the system of justice.

All of the witnesses from a widely drawn community<sup>148</sup> have established agreement that “something must be done”.

What might be done to address the issues that have been identified needs to be seen in the context of the EU Reform Treaty and a prevailing political environment which supports a sharing, collaborative and decentralised approach, while ensuring coherence through a single unified system of justice.

### **3. Is it Time for a Long-term Change to the Judicial Structure? A “Nomination System”**

#### *(a) The Impact of Regulation 1/2003*

For some 40 years, enforcement of the Community’s competition rules was centralised. While the competition rules in Articles 81 and 82 could be enforced by national competition authorities (pursuant to Article 84) and applied by national courts (by virtue of direct applicability), the Commission was in practice

<sup>146</sup> The statistics provided were based on the number of cases pending at the end of 2004 (in terms of judgments delivered in relation to civil service cases, which accounted for 30%, and intellectual property cases, which accounted for 22%). *Ibid*, 26.

<sup>147</sup> Case C-83/98 P *France v Ladbroke* [2000], ECR I-3271, para 16.

<sup>148</sup> See witnesses who provided written and oral evidence listed in House of Lords report, *supra* n 22.

the principal and almost sole enforcement agency, its procedure being governed by Regulation 17 of 1962. A major change occurred in May 2004, when modernisation of the application of Articles 81 and 82 was effected by Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.<sup>149</sup>

It is widely expected that the impact of Council Regulation 1/2003 and the trend to increased decentralisation will result in a significant increase in private litigation and consequentially national courts being confronted with complex (competition) law questions. This might be expected to result in a potential increase in preliminary proceedings in front of the ECJ.

Furthermore, former CFI President Bo Vesterdorf stated that,

“it may be more coherent to allow the CFI the power to deal with such preliminary rulings as is possible under Article 225(3) EC. This would, however, inevitably increase the workload of the CFI even further and would be an additional factor to be considered in any discussion of changes with the aim of improving speed in the adjudication of competition cases before the Community courts.”<sup>150</sup>

Taking competition cases, but bearing in mind the comment of Sir David Edward that competition cannot be separated from other provisions of the Treaty, if the CFI is to be granted jurisdiction over competition references from national courts, which would be possible under Article 225 (3) of the EC Treaty, the opportunities for speeding up its proceedings in competition cases will be considerably improved. In light of the competition cases the Community courts have dealt with, I assume that the level of experience with specific competition law cases must be statistically lower at the ECJ than at the CFI. Hence, it would indeed be more coherent to allow the CFI the power to deal with such preliminary rulings. Such a possibility for a preliminary reference to the CFI would depend primarily on how important and time sensitive the case is (which is particularly critical in merger as well as antitrust cases, but perhaps less so in cartel cases).

In light of the European Commission's White Paper on the desirability of encouraging private enforcement actions in the national courts,<sup>151</sup> the role of the national courts and the need for maintaining consistency of interpretation and uniformity in application of EC competition law are becoming even more

<sup>149</sup> Responsibility for applying the competition rules is now shared between the Commission, national competition authorities (NCAs) and national courts. The main features of the regime introduced by Reg 1/2003 are: (1) the end of the notification of agreements to obtain exemption under Art 81(3) and the introduction of self-assessment; (2) decentralisation of enforcement with greater involvement of national courts and competition authorities in enforcing Community competition rules; and (3) a strengthening and clarification of the Commission's enforcement powers.

<sup>150</sup> Vesterdorf, *supra* n 41, 27.

<sup>151</sup> European Commission, Green Paper—Damages Actions for Breach of EC Antitrust Rules and White Paper on Damages Actions for Breach of the EC antitrust rules, *supra* n 27.

crucial. The main reform proposal in the form of the “nomination system” embraces this new role of the national courts.

Indeed, the role of private enforcement actions highlights the need for a new approach to the organisation and structure of the European courts. For example, in competition matters, the European Commission shares the administrative powers of enforcement of EC competition law with the national competition authorities through the European Competition Network, with its system of allocating cases to the best placed national competition authority (or the Commission itself).

This new system of directly applicable EC competition law enables the national courts to exercise powers equivalent to those of the European Commission and/or their national competition authority within the scope of their jurisdiction.

With the new emphasis on private enforcement and damages claims, the national courts will have a parallel, if not more important, role to that of the Community judicature in competition enforcement in Europe. However, divergence of national processes, different procedures and delays could give rise to different application, which would threaten to splinter the system of enforcement and, in turn, the system of law.

A more radical reform may be needed to fully acknowledge this ongoing trend of cooperation and collaboration between Member States of the EU Reform Treaty and decentralisation, as well as to maintain consistency of interpretation and uniformity in the application of European law.

#### *(b) The impact of the Nice Treaty*

In general, changes to the judicial structure have now been made possible by the Nice Treaty.<sup>152</sup> Serious consideration is now needed to speed up the court process if the economic goals, and gains, are to be achieved.

The implementation of a number of the reforms made possible by the Nice Treaty has already begun. Article 225 of the EC Treaty now provides that the CFI is to have jurisdiction to hear and determine at first instance all direct actions with the exception of those assigned to a judicial panel and those reserved in the Statute for the ECJ.<sup>153</sup>

<sup>152</sup> The Nice Treaty entered into effect on 1 February 2003.

<sup>153</sup> Art 225A stipulates as follows:

“The Council, acting 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 may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The decision establishing a judicial panel shall lay down the rules on the organisation of

The European Council has amended the Protocol on the Statute of the Court of Justice and adopted provisions for the establishment of such a “judicial panel”.

First, on 26 April 2004, the Council amended<sup>154</sup> Articles 51 and 54 of the Protocol on the Statute of the Court of Justice in such a way that from 1 June 2004 direct actions for annulment and for failure to act brought by a Member State against an act of, or failure to act by, the Commission fall within the jurisdiction of the CFI. The same is true for actions brought by Member States against decisions of the Council concerning state aid, acts of the Council adopted pursuant to Council regulation concerning measures for trade, acts of the Council by which it exercises implementing powers and acts of the European Central Bank.

Secondly, on 2 November 2004, the Council established the EU Civil Service Tribunal.<sup>155</sup> This new tribunal, consisting of seven judges, is responsible for hearing disputes involving the EU Civil Service. Its decisions will be open to appeal, limited to points of law, before the CFI and, exceptionally, subject to review by the ECJ in the circumstances prescribed by the Protocol on the Statute. The EU Civil Service Tribunal was duly constituted into law on 2 December 2005.

This establishment of the EU Civil Service Tribunal, resulting in the expected removal of civil service cases and reduction of the current caseload of the CFI by approximately 25%,<sup>156</sup> also indicates the need to consider the removal of other cases from the CFI’s workload. For example, the creation of a trademarks tribunal<sup>157</sup> would result in the removal of approximately 33%<sup>158</sup> of the CFI’s current caseload and would enable the CFI to use the expedited procedure more effectively in time-sensitive cases (such as merger cases).

As a result of these changes, only approximately 5% of the ECJ cases were transferred to the CFI in 2004.<sup>159</sup> The CFI has been relieved of about 25% of

the panel and the extent of the jurisdiction conferred upon it. Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact before the Court of First Instance.”

<sup>154</sup> Decision 2004/407/EC, *Euratom*, amending Arts 51 and 54 of the Protocol on the Statute of the Court of Justice, [2004] OJ L 132/5; corrigendum at [2004] OJ L 194/3.

<sup>155</sup> Decision 2004/752/EC, *Euratom*, establishing the European Union Civil Service Tribunal, [2004] OJ L 333/7.

<sup>156</sup> For an overview on the cases pending in front of the European Union Civil Service Tribunal, see <http://www.curia.eu.int/en/content/juris/index.htm> (accessed on 12 May 2008).

<sup>157</sup> The author will propose such a reform solution *infra*, section C.4.(e).

<sup>158</sup> Excluding staff cases and “special forms of procedure” cases, 33.7% of all total claims in front of the CFI are trademark cases.

<sup>159</sup> In 2004, 25 cases pending before the ECJ were transferred to the CFI, mainly concerning state aid and the European Agriculture Guidance and Guarantee Fund.

the cases brought each year, proving that the approach of establishing specialist tribunals and removing workload from the CFI really works.<sup>160</sup>

On the other hand, these low figures (in particular, in relation to the ECJ) also indicate that there is still an urgent need for reform in order to enable the Community courts to deal more effectively and expeditiously with pending cases.

(c) *Introducing a “Nomination System”*

This section suggests that swifter justice does not need to be “summary justice” and that greater effectiveness lies in addressing the procedural issues and delays in the system, in addition to any increases in sanction (if any is really needed). Also, increases in sanctions without addressing the nature and shape of the system are unlikely to achieve lasting results.

From recent discussions three possible alternatives might be considered that would make the system more workable on a pan-European basis. These are: first, a wholesale reform of national legal procedures; secondly, a federal system of courts, which, as an attractive option, has been discussed extensively in the past but not supported at all levels across the EU;<sup>161</sup> and finally, a nomination system, by which each Member State could nominate an existing court to sit as a chamber of the Community courts.

The analysis below focuses on the latter, the nomination system, as it would—in contrast to other reform proposals—go not only part way in reforming or addressing the problems with the current European judicial system but provide a definitive solution. For example, improvements in the system of translation will not finally address the Community courts’ capacity problem in the longer term. The issues with the current system as outlined above are particularly regrettable in the case of references for preliminary rulings, which are a key factor in the proper functioning of the internal market.<sup>162</sup> As rightly stated by the ECJ in 1995,

“Any weakening, even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of

<sup>160</sup> Furthermore, the ECJ was relieved of hearing appeals relating to staff cases accounting for about 10% of its annual caseload.

<sup>161</sup> For a detailed discussion of the advantages and disadvantages of this option, see, *inter alia*, BIICL report, *supra* n 33, 101ff (“Community Regional Courts and a European High Court of Justice”).

<sup>162</sup> See ECJ and CFI, *The Future of the Judicial System*, *supra* n 99, 22, as well as a Report of the Court of Justice on certain aspects of the application of the Treaty on European Union, May 1995, stating as follows:

“The preliminary ruling system is the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community character with a view to guaranteeing that that law has the same effect in all circumstances in all the Member States of the European Union”.

competition and discrimination between economic operators, thus jeopardising equality of opportunity as between those operators and consequently the proper functioning of the internal market.”<sup>163</sup>

A nomination system would ensure central coherence of a single system of law. In this, each Member State “nominates” an existing national court to sit as a chamber of the Community courts. This proposal is in accordance with judicial subsidiarity as well as recognising the fact that EU law enforcement should be brought as close as possible to the national legal systems. Consistency in the application and interpretation is paramount and safeguards would need to be imposed to this end.

The proposal is slightly less radical than a fully federal system of courts, such as applies in the US. This has the advantage of being an EU solution to an EU problem. It also reflects the collaborative approach that is a central feature of the EU Reform Treaty.

Components of a nomination system would be as follows:

1. The national system nominates a court (existing facilities).
2. The national system nominates a presiding judge to the ECJ level of qualification (former Community court judges could automatically qualify).
3. ECJ procedures would apply and the CFI would have case conference and capacity oversight of workload. The case allocation by the Community courts would reflect the increased capacity of the system and secure a harmonised approach (use of appropriate and modern communications infrastructure would facilitate such an approach).
4. The national language would apply.

*(d) The Benefits of the Nomination System*

1. The nomination system would be local to the people it makes judgments about and hence would understand their national, social and cultural needs. In other words, the system would be more familiar with the local legal, economic and social systems. The constraints of cultural diversity as they currently exist in front of the Community courts are difficult to define but are nonetheless real.<sup>164</sup>

Differences in culture and in particular legal culture are as important as language as a point of reference for reform. The different legal systems reflect particular national attitudes, which are themselves the product of history and culture. It is not only the general difference between

<sup>163</sup> *Ibid.*, 22.

<sup>164</sup> So stated by Edward, *supra* n 74, 13.

common law and civil law countries,<sup>165</sup> but also differences in attitude or approach,<sup>166</sup> which can affect the day-to-day working and in particular the process of deliberation of the Community courts.

The proposal would ensure that the legal culture and traditions are fully taken into account at all stages in developing and formulating the judgment. As Community court procedures would apply, the “Community court experience” would need to be transported into the local system.

Also, as a creature of both (the national and ECJ) systems, the proposed judicial system would be closer to the national legal system in which the questions referred to were to be answered than the Community courts.

2. As it would have to be a judge that the local system would nominate, it would have to observe the procedures and disciplines of the Community courts in order to achieve EU level acceptance and coherence.

This proposal fully reflects the provision in the Nice Treaty, which formalised for the very first time the right of each Member State to nominate a judge to the ECJ, thus ensuring representation of all the legal systems in the EU.<sup>167</sup> The key point is that a nominated judge does not need to spend all of his time in the Luxembourg court buildings in order to dispense justice.

The national judges nominated by each Member State would be nominated as members of the Community courts and would be appointed according to clearly defined criteria. These criteria should be qualitative, objective and published. Furthermore, with the Community courts’ agreement, former Community court judges would automatically qualify. This would secure a coherent culture.

The proposal that judges would be appointed according to clearly defined qualitative criteria would also deal with the issue that some national legal systems (for example, the German legal system) attach

<sup>165</sup> However, even this traditional distinction between the common law and Continental systems is not always so profound. Greece, for example, is a Mediterranean country in its administrative habits and political psychology, and comparable to Italy or Portugal in that respect; but its administrative law is very close to the French system, and its Civil Code resembles the German code.

<sup>166</sup> For example, it is well known that German lawyers have a preference for the written procedure, whereas English lawyers prize the oral one.

<sup>167</sup> It is worth mentioning that the British government supported the changes made under the Nice Treaty. See IGC, *Reform for Enlargement: The British Approach to the European Union Intergovernmental Conference 2000* (Cm 4595, February 2000), 21. It has always been accepted by the ECJ that there should be one judge from each Member State. In an earlier paper, prepared for the negotiations which led to the Treaty of Amsterdam, the ECJ addressed the considerations which are of paramount importance in this context. See *Report of the Court of Justice on Certain Aspects of the Treaty on European Union—Contribution of the Court of First Instance for the Purposes of the 1996 Intergovernmental Conference* (May 1995), point 16.

fundamental importance to the principle of “the legal judge”,<sup>168</sup> according to which the rules for composition of the tribunal deciding a case must be known and published in advance.<sup>169</sup>

3. It would operate in the same national language as the country in which it sits but, while looking like a local court, its procedures would be the same as the Community courts.

This proposal would particularly afford the widest possible access to the preliminary ruling procedure by avoiding the congestion resulting from the current need for translation<sup>170</sup> and would also resolve the issue of the status of decision (as heavily discussed in the early 1990’s in relation to the proposed Community Regional Courts<sup>171</sup>).

4. The proposed nomination system would consider references to the ECJ in the normal way following the procedural rules and disciplines of the Community courts on cases started in the local courts. Given the fact that the rules of procedure as well as the competence of the nominated courts are already well established in EU law and in light of the doctrine of primacy,<sup>172</sup> this reform proposal does not violate the core of constitutional provisions as reflected in some Member States. In Germany, for example, the transfer of sovereign rights to international institutions, and also the

<sup>168</sup> In the German language, “gesetzlicher Richter”.

<sup>169</sup> In contrast, under English Law it is regarded as normal to allocate cases as judges become available.

<sup>170</sup> See ECJ/CFI, *supra* n 102, 26, in which the ECJ supported the “benefit gained from a substantial reduction in the translation burden borne by the Court of Justice” when “decentralised judicial bodies responsible for dealing with references for preliminary rulings from courts within their area of territorial jurisdiction” would operate in the language or languages of the State concerned.

<sup>171</sup> The proposal was the introduction of a system of Community regional courts. The central idea of the proposal was that the ECJ remains at the apex of the system, renamed as the European High Court of Justice (EHCJ). Furthermore, the proposal was as follows: (a) four or five regional courts would be created, each to serve a grouping of Member States, to be chosen on the basis of geographical proximity, similar legal traditions and the possibility of having a simplified linguistic regime; (b) direct access would be limited to a number of specific articles of the Treaty; (c) the regional courts would receive preliminary rulings from and issue preliminary rulings to national courts; (d) the CFI would become one of the regional courts; (e) the Commission would retain the right of intervention in all proceedings before the regional courts; (f) the Commission and Member State would be able to request that individual challenges be transferred from a regional court to the EHCJ; (g) decisions or preliminary rulings of the regional courts could be appealed to the EHCJ by any party to the proceedings, and by the Commission, the Council, the Parliament or any Member State as interveners; (h) the EHCJ would have discretion as to whether to admit the appeal; (i) the discretion would be exercised having regard to the importance of the questions raised, a divergence between the case law of the regional courts or a manifest legal error; (j) each regional court would consist of an uneven number of judges (one from each Member State in the region and one or two others from other Member States); (k) oral hearings would take place in the capitals of the Member States in which the case originated; and (l) regional courts would be bound by decisions of the EHCJ. For more details, see BIICL report, *supra* n 33, 101ff (“Community Regional Courts and a European High Court of Justice”).

<sup>172</sup> See, eg Case 106/77 *Simmenthal* [1978] ECR 629.

EU, is restricted by a guarantee of identity.<sup>173</sup> A violation of constitutional provisions (for example, democracy) could therefore be identified by the Federal Constitutional Court as an exercise of supranational sovereign power and be declared inapplicable.

Furthermore, the CFI (instead of the ECJ) could deal with preliminary rulings on competition cases (under the allocation system and watchful eye of the ECJ if necessary). This idea of providing the CFI with the power to deal with preliminary rulings is also supported by the former CFI President Bo Vesterdorf, who stated that,

“[I]t may be more coherent to allow the CFI the power to deal with such preliminary rulings as is possible under Article 225(3) EC. This would, however, inevitably increase the workload of the CFI even further and would be an additional factor to be considered in any discussion of changes with the aim of improving speed in the adjudication of competition cases before the Community courts.”<sup>174</sup>

Sir Christopher Bellamy also saw merit in the idea, particularly as regards

“cases which can be properly identified and isolated as being pure Article 81 and Article 82 cases. Indeed, I think there is some argument for saying that the Court of Justice is not particularly well adapted to doing those kinds of cases in a sort of one-shot way. They tend to be very fact-intensive and the Court of Justice is not geared up really to fact-intensive cases.”<sup>175</sup>

Also, Peter Roth QC, Monckton Chambers, was supportive of such an idea, stating as follows:

“There is something artificial and discordant in the present structure, whereby appeals from Commission decisions are primarily determined by the CFI whereas references from national courts are determined by the ECJ, when these different procedural routes are common strands in the development of competition law jurisprudence.”<sup>176</sup>

As outlined above, preliminary references make up approximately half the cases heard by the ECJ and in practice national courts can expect to wait 20 months for an answer to its questions.

It could also be considered to give the preliminary ruling jurisdiction to the CFI subject to the inclusion of a mechanism for ensuring that the most important questions would always come to the ECJ (after a “triage” review at the ECJ level) and possibly with an increase in the number of judges at the CFI.<sup>177</sup>

<sup>173</sup> Art 23.1 sentence 3 and Art 79.3 of the German Basic Law (*Grundgesetz*).

<sup>174</sup> Vesterdorf, *supra* n 41, 27.

<sup>175</sup> See House of Lords Report, *supra* n 22, 50, para 181.

<sup>176</sup> See *ibid*, 50, para 180.

The opportunities for speeding up these proceedings would be considerably improved and the specialist judges at the CFI could be better suited to deal with complex economic questions. It is also important to recall that the CFI was created in part because there was the need for a Community court to review effectively the complex decisions that the Commission adopts in the field of competition, hence it was from the start established as a specialist competition law court.

This opinion is also shared by CFI president Mark Jaeger, who recently stated as follows:

“The Court of First Instance was originally created to deal with antitrust cases and relieve the European Court of Justice, the EU’s top court. Over the years it has developed expertise in this field and many of its members are now specialists.”<sup>178</sup>

Such a possibility for a preliminary reference to the ECJ, which is either automatically referred to the CFI or is done so after a “triage” review at the ECJ in order to secure that the ECJ, has the “first and last word” would therefore appear appropriate.

5. The proposed nomination system would operate under the authority of the Community courts and the coherence and unity of the community legal culture and single legal system would therefore be preserved. In particular, the increased capacity at national level that would be possible in a nomination system would speed up access to justice and more quickly achieve the benefit of enhanced consistency and uniformity of application. The appointment of national Community court judges by the Member States as a whole in accordance with established Community court procedure, as well as through the nomination of a court in a wider network supervised by the Community courts in Luxembourg to which references and/or appeals may be made as appropriate and subject to the authority of the Community courts, would also preserve the coherence and unity of the Community legal system.

The unity of Community law is even more vital and vulnerable since the enlargement of the EU in May 2004. Without this key feature the proposed nomination system could prove politically controversial because of the concern that the nominated courts could adopt, to a degree, a parochial perspective. The proposal respects these concerns and preserves the unity of the Community law by clearly establishing an operation under the authority of the Community courts.<sup>179</sup>

<sup>177</sup> In 1999 the ECJ also suggested that the CFI might be given a preliminary rulings jurisdiction, *supra* n 99.

<sup>178</sup> See Jaeger, *supra* n 60.

<sup>179</sup> The proposal should not be confused with a proposal made in the past according to which “regional courts” should be presided over by a “Superior Supreme Court” (see, eg *The Future of the*

Knowing that it is not for national courts to declare Community acts invalid but that this is a matter exclusively for the Community Court (as the Court also ruled in *Foto-Frost*<sup>180</sup>), in order to avoid conflicting decisions between the Community and national courts, a nominated court would operate as a chamber of the Community courts and under their authority, and hence address this issue regarding sufficient competence of the nominated courts.

6. It would solve the existing problem of delay and speed up and secure access to justice arising from faster court proceedings, local culture and language, as well as the other benefits outlined above.
7. It avoids the disadvantages of some of the other reform proposals outlined above and, in particular, the difficulty of increasing the community budget would be limited if an existing court was to be nominated, as some of its funding would at least already have been defrayed.
8. It would generally raise the profile of Community law. The proposal would help to resolve any feeling that Community rules are “foreign laws”. The lack of awareness of European law among the legal profession in the Member States and the resulting danger of conflicting judgments undermining the uniform application of EC law are a key problem of the current judicial system.<sup>181</sup> Needless to say, EU law is part of the national legal order and must be enforced as such; the nomination system would reinforce this principle.

As was stated by the EU Commission in 2001:

“despite longstanding co-operation with the European Court of Justice, national lawyers and courts should be made more familiar with Community law, and assume responsibility in ensuring the consistent protection of rights granted by the Treaty and by European legislation. The Commission will continue to support judicial co-operation and the training of lawyers and judges in Community law, but Member States themselves will have to step up their efforts in the field.”<sup>182</sup>

*Judicial System of the European Union, Comments of the Bar European Group of the United Kingdom on the Position Paper of the Court of the Justice of the European Communities* (London, 1999), para 87). Such a construction of a “Superior Supreme Court” would lead to a substantial delay. In contrast, the proposal foresees that those nominated courts have original jurisdiction and not that parties to a preliminary ruling first litigate domestically and then, if a party chooses, in the ECJ, which would not only require a second round of supplementary translation but also heavily delay the proceedings.

<sup>180</sup> Case 314/85 *Foto-Frost v Hauptzollamt Luebeck-Ost* [1987] ECR 4199.

<sup>181</sup> Commission of the European Union, *Reform on European Governance* (Luxembourg: Office for Official Publications of the European Communities, 2003), 37.

<sup>182</sup> Commission of the European Union, *European Governance, A White Paper*, Brussels, 25 July 2001, Com(2001) 428 final, page 25.

Finally, the nomination system would need to extend more broadly than limited reform of competition issues. This is particularly so because there are only a few Member States with specialist competition law courts and because, as referred to by Sir David Edward, the entire EU treaty, and hence the EU Reform Treaty, is about competition.

A further proposal is the introduction of short-term changes to the current system (in particular in relation to the competition law area) until the above-described long-term solution in the form of a “nomination system” can be established. Some of the proposed options are not mutually exclusive, though the time required for their introduction and formal preconditions and political sensitivity may differ widely. Generally, the short-term changes outlined below could be introduced as “quick-fix” solutions; as most of them are in the hands of the European Community courts, they would not result in any change in the judicial structure and would require little, if any, legislative action.

#### **4. Procedural Improvements for the Short Term—in Particular in the Competition Law Area**

##### *(a) Increased Recourse to Expedition Procedures*

Particularly in relation to those areas of the economy which move most quickly, and in the field of competition law, the increased implementation and use of the expedition (“fast track”) procedures should be encouraged.<sup>183</sup> In general, the options could be the granting of priority treatment, the accelerated or expedited procedure, the simplified procedure or the possibility of giving judgment without an opinion of the Advocate General. It would be better to look at making the most of the flexibility available within the existing expedited procedure as this possibility has only been introduced recently. Also, recent developments indicate that the time is right to pursue this increased recourse to expedition procedures. For example, in 2003, the CFI reduced the number of judges required to hear a competition case from five to three in order to shorten the average time in which a case is heard.

Furthermore, recent amendments of the CFI Rules of Procedure provide, where the expedited procedure is to be used, applicants with the possibility to structure their pleading so that an abbreviated version may be taken forward on

<sup>183</sup> Fast-track cases before the CFI are governed by Art 76a of the CFI Rules of Procedure (*supra* n 75), which came into force on 1 February 2001. The ECJ has also similar rules for a fast-track procedure (Art 62a Rules of Procedure, see *supra* n 75). The only criteria explicitly stated in the Rules of Procedure are “the particular urgency” and “the circumstances of the case”, hence leaving the Court a wide scope of discretion.

expedition, but with a longer version available as a fall-back in case the expedition application is rejected.<sup>184</sup>

The CFI Practice Directions<sup>185</sup> already contain one section (G) dealing exclusively with the formal requirements for a fast-track petition. It is particularly required that the application is “confined to a summary of the pleas relied upon” and that “its annexes are limited in number”.<sup>186</sup> A current issue is also that where the CFI Practice Directions regarding the volume and presentation of pleadings as well as the conduct of proceedings have not been complied with, the CFI may decide not to continue with a case under the expedited procedure. In general, parties should limit the length of their pleadings as requested by the CFI Practice Directions (to not exceed 20 pages where possible) and make the most of the flexibility available within the existing expedited procedure.

Although the general request for shortness of the briefs is to be supported, a flexible approach of the Court in relation to this requirement should also be encouraged. Reasons for this are twofold. First, the merger decisions by the Commission have a tendency to be increasingly detailed, which might require a brief by the applicant that is long and precise enough to deliver the message to the Court in the appropriate way and create a full understanding of the complex factual, legal and economic considerations. Secondly, the absence of a second round of briefs can have a negative impact on the chances of the applicant as the Commission has the last word. Hence, this makes it even more important for the Court to apply a flexible approach in this respect and also to not discriminate the applicant against the Commission. This is because the CFI Practice Directions do not currently contain any specific language limiting the length of the Commission’s defence brief.<sup>187</sup>

<sup>184</sup> See amendment of the Rules of Procedure of the CFI adopted on 12 October 2005, [2005] OJ L 298/1. Art 76a, para 1, second subparagraph states as follows:

“That application may state that certain pleas in law or arguments or certain passages of the application initiating the proceedings or the defence are raised only in the event that the case is not decided under an expedited procedure, in particular by enclosing with the application an abbreviated version of the application initiating the proceedings and a list of the annexes which are to be taken into consideration only if the case is decided under an expedited procedure.”

<sup>185</sup> Practice Directions to Parties, [2007] OJ L 232, 7.

<sup>186</sup> According to s G, 61, of the Practice Directions (*ibid*), “an application in respect of which the expedited procedure is requested must not in principle exceed 25 pages”. Experience under the preceding 2002 Practice Direction shows that this requirement can be taken quite seriously by the Court, requiring the briefs to be much shorter than they would be in ordinary proceedings. For example, in the judgment of 21 September 2005 of Case T-87/05 *Energias de Portugal v Commission (EDP)* [2005] OJ C 281, 22, the applicant was required to drop all procedural pleas and to reduce its application to less than 50 pages. See also MF Bay, JR Calzado and A Weitbrecht, “Judicial Review of Mergers in the EU and the ‘Fast Track’ Procedure” (2006) *The European Antitrust Review* 38, 39.

<sup>187</sup> See Bay et al, *ibid*, 39.

Furthermore, the ECJ has introduced deadlines into its internal procedures which are also likely to be transposed into the CFI. It is worth noting that a recent amendment of the CFI Rules of Procedure has already introduced some deadlines in relation to the expedited procedure. It states that, where the applicant has requested that the case should be decided under an expedited procedure, the period prescribed for the lodging of the defence shall be one month. In case the CFI decides not to grant the request, the defendant will be granted an additional period of one month in order to lodge or, as the case may be, supplement the defence.<sup>188</sup> Furthermore, a “super-fast track” procedure so that the appeal process is completed within six months of the Commissions Phase 2 ECMR Decision could be achieved by, for example, abridging the timetable for pleadings, or by not granting an automatic extension to the Commission to the original period of one month allowed for its defence.

Applicants who request the expedited procedure should also have the possibility to include in their application for expedition a request that the language of their case (for example, English instead of the working language of the Community court) should be used by the Community court in its consideration. If the language of a case was English, it might be possible, provided that the language abilities of the judges permit it, to persuade a chamber to use English as the working language, which would save time and the cost of translation.<sup>189</sup>

These changes would hopefully resolve the issues that the fast track procedure may not be appropriate or available in all merger appeal cases and that the fast track procedure is currently not the complete answer to improving the level and speed of effective judicial oversight in merger appeal cases.<sup>190</sup>

Also, the CFI might need additional resources for the fast track procedure to work efficiently and in order to avoid the diversion of resources to fast track procedure cases that will inevitably slow down the review of other cases pending before the Court. Increasing the number of judges in the CFI may raise budgetary problems within the more general Community, but it does not generate the same issues of principle as does an increase in the judges of ECJ (ie

<sup>188</sup> See amendment to the Rules of Procedure of the CFI, *supra* n 184. Art 76a, para 2, second subparagraph states as follows:

“By way of derogation from Article 46(1), where the applicant has requested, in accordance with paragraph 1 of this Article, that the case should be decided under an expedited procedure, the period prescribed for the lodging of the defence shall be one month. If the Court of First Instance decides not to allow the request, the defendant shall be granted an additional period of one month in order to lodge or, at the case may be, supplement the defence. The time-limits laid down in this sub-paragraph may be extended pursuant to Article 46(3)”.

<sup>189</sup> For further reform proposals with regard to the language issues see *infra*, section C.4.(b).

<sup>190</sup> See, eg Cases T-209/01 *Honeywell v Commission* [2006] OJ C 48, 26 and T-210/01 *General Electric v Commission* [2006] OJ C 48, 26.

impact on the unity), nor is the link between nationality and judges as important as it is in the ECJ.<sup>191</sup>

Furthermore, an enabler for the CFI to use the expedited procedure more frequently and more effectively in cases which merit it could be the increased attempt to remove the CFI's jurisdiction from specific areas such as, for example, trademark cases (see also *supra*, section C.4.(e)). I therefore appreciate the recent creation of the EU Civil Service Tribunal,<sup>192</sup> as I expect this tribunal to reduce approximately 25% of the current caseload of the CFI, or around 170 cases a year.<sup>193</sup>

It is unlikely, however, that any of these procedural changes go far enough to make a material impact on speeding up the process whilst retaining consistency in the application of EU rules. This is particularly apparent in the field of mergers. Furthermore, staff cases are of relatively short duration and are normally scheduled between the major cases handled by the CFI. Furthermore, the statistics of the CFI for 2006 indicate that the Court experienced a rise of 33% over all of its cases under its new competence (hence, excluding staff cases). It therefore becomes clear that, despite the creation of the Civil Service Tribunal, the issue is still the same as the CFI still has to deal with almost exactly the same number of cases as before.<sup>194</sup>

#### *(b) Language*

The choice of the language of a case in the Community courts is a politically sensitive issue, but access to justice should be regarded as a higher priority. Any steps and reform proposals to reduce procedural delays in case the Community courts have a working language that is different to the language of the case, especially in English language cases, which form a significant proportion of the caseload, should be encouraged.

As mentioned before, on average, translation consumes about seven months of the total time taken to process a reference. The amount of time and money wasted by translating the submissions of a case into the working language of the Court should be eliminated wherever practicable.

<sup>191</sup> So also Craig, *supra* n 35, 192.

<sup>192</sup> On 2 November 2004 the Council adopted a decision establishing the European Union Civil Service Tribunal. This new specialised tribunal, composed of seven judges, would hear and determine at first instance disputes involving the European civil service. Its decisions would be subject to a right of appeal before the CFI on points of law only. Decisions given by the CFI in this area could exceptionally be subject to review by the ECJ. The European Union Civil Service Tribunal was duly constituted into law on 2 December 2005.

<sup>193</sup> This figure is based on the number of pending cases at the end of 2004, which were 20%, as well as the number of judgments and orders rendered in 2004, which were almost 30%. See Vesterdorf, *supra* n 41, 26.

<sup>194</sup> See also Vesterdorf, *supra* n 22, oral evidence on 17 January 2007, answer to questions 364 and 370, 89.

Considerable savings could be made by sensible expansion and use of the Court's internal languages. Currently (at least) one chamber of the CFI already works in English for the practical reason that much of the documentation may be in English. The wider adoption of such a flexible approach should be very much endorsed. It is worth pointing out that neither the International Court of Justice nor the European Court of Human Rights seem to experience any great difficulty from the fact that their deliberations are in both French and English, and even the Vatican (though not a court, certainly one of the most conservative establishments) has abandoned Latin as the sole language of debate (whilst still retaining its official status).<sup>195</sup>

Furthermore, the expansion of the EU and creation of 12 additional working languages has not only "entrenched the dominance of English"<sup>196</sup> as the working language of all European institutions but also led to the fact that English is already the "unofficial" working language of the Community courts. I would very much endorse the practice to advocate a wider adoption of such a flexible approach. This would also be in line with the already existing acknowledgment that "English is the language of business".<sup>197</sup>

As Margot Horspool stated:

"There is a need to strike a balance between democratic and cultural needs for multilingualism and practical and realistic considerations of language in a world which is increasingly 'globalised' and where the general language of communication is inevitably English. This would call for concessions on the part of the Member States which may be politically difficult to make, but should not be impossible if a realistic attitude prevails over outdated procedures and if, in particular, economic considerations are not forgotten."

My practical proposal would be that other languages should be adopted as second, parallel working languages in the CFI and ECJ where:

1. the documentation suggests this is appropriate; and
2. the linguistic abilities of the judges permit it.

Furthermore, proposals from parties to adopt the language which both parties have agreed should be allowed, again under the condition that the judges have the linguistic abilities to deal with it. The confinement to either one or two languages as the working language(s) in a particular case, whilst reducing both the cost and delay, does not mean that, where deemed either necessary or desirable, the case documents cannot be translated into the other official

<sup>195</sup> Horspool, *supra* n 78.

<sup>196</sup> See "Chirac Flees Summit", *supra* n 80.

<sup>197</sup> See "'Deeply Shocked' Chirac Defends Summit Snub of English Speech"; *EU Business*, 24 March 2006; "Chirac Flees Summit", *ibid.*

languages. The only difference would be that the proceedings are not held up by the translation process.

The savings in terms of the cost to the public purse from reduced translation of documentation would be significant.<sup>198</sup>

(c) *Tighter Case Management*

One logical and realistic option for speeding up the process is tighter case management. With rigorous case management, the European Community courts would be able to deal with cases speedily despite language complexities and even third-party interventions. This option can be achieved within the existing Rules and essentially involves stricter appliance of the time limits by the European Community courts (in particular the judge-rapporteur).

(d) *Creation of One or More Chambers within the European Community Courts for a Certain Class of Proceeding*

A further alternative option for the short-term future would not involve a change to the existing structure but the creation of one or more chambers for a certain class of proceeding, such as those with significant economic consequences, in terms of the established political goals of the Lisbon agenda, or perhaps for competition cases with three or five judges specialised in and focusing on competition cases alone.

Such a proposal is very much supported by industry and legal practitioners<sup>199</sup> and preferred over the creation over the establishment of a new court as it is thought to be “comparatively simple, and carries both legal and practical advantages over the creation of a separate competition court”.<sup>200</sup> It is also supported by some witnesses to the recent House of Lords investigation, which stated that “the move allowing the Council to set up judicial panels . . . is to be welcomed”.<sup>201</sup>

A key advantage is that such a solution could be unilaterally determined by the European Community courts (ie without the need for unanimous agreement in the Council of Ministers), hence such specialised chambers could relatively easily be established within the existing structure of the European Community

<sup>198</sup> See also comments of the Bar European Group of the UK on the position paper of the Court of Justice of the European Communities, *The Future of the Judicial System of the European Union* (London, October 1999), para 46.

<sup>199</sup> Both the BDI and the Confederation of Swedish Enterprise took the view that the creation of specialist competition chambers in the CFI would be preferable to the establishment of a new court. See “Minutes of Evidence” in House of Lords Report, *supra* n 22, 118 and 157.

<sup>200</sup> See the memorandum by the Working Group of the Antitrust Committee of the International Bar Association in “Minutes of Evidence” in House of Lords Report, *supra* n 22, page 137.

<sup>201</sup> See M Heim, in House of Lords, European Union Committee, 3rd Report of Session 2005–2006, *The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence* (7 July 2005), point 16.

courts, would not create an additional level or review (and therefore extend the avenues of appeal) and could therefore certainly improve the speed of treatment of (competition) cases. The current Rules of Procedure could be applied without needing to be changed or tailor-made for these specialised chambers, which would save a lot of time as well as cost.

Furthermore, the International Chamber of Commerce and UNICE considered such a specialist chamber to be a “sensible interim solution”,<sup>202</sup> with the Competition Law Association adding that the creation of a specialist chamber “would be a step in the right direction and should be instigated immediately”.<sup>203</sup>

A disadvantage is certainly that, in the competition law area, for example, it could be difficult to resist a general pressure to allocate non-competition cases to the specialised chambers in times of underutilisation or not to allocate competition cases to other chambers in times of overutilisation.<sup>204</sup>

Nevertheless, the creation of a specialist chamber is an attractive option, but only if additional judges are allocated to the Community courts. Appointing more judges would be a “more economical and satisfactory solution”, especially “if the alternative is the creation of a new court”.<sup>205</sup> Also, the former CFI President Bo Vesterdorf was only recently of the opinion that extra judges on the court would be “evidently something that would be useful”.<sup>206</sup>

#### *(e) Removal of Trademark Cases to a Judicial Panel*

This idea was included in the Commission Work programme for 2005<sup>207</sup> and is also supported by the new CFI president Mark Jaeger, who said in a recent interview that he does not think that creating a separate competition court would significantly cut procedures but that “there are other areas, such as trademarks, that could be moved to a separate court more easily”.<sup>208</sup>

Furthermore, the recent House of Lords report came to the conclusion that “far better” than setting up a new competition court would be “reducing the amount of business of the CFI, principally by transferring trademark cases to a judicial panel”. Finally, trademark cases were one of three types of cases

<sup>202</sup> In “Minutes of Evidence” in House of Lords Report, *supra* n 22, 144 and 163.

<sup>203</sup> *Ibid.*, 127.

<sup>204</sup> See Vesterdorf, *supra* n 44, 26. From a historical perspective it is interesting to note the criticism of the creation of specialised courts/tribunals or specialised chambers made in the BIICL report summarised above (see *supra* section C.2.(a)). The report considered there to be a number of disadvantages, including the difficulty of defining a structured relationship between all the different tribunals, and a concern that specialist tribunals would proliferate and ultimately jeopardise the uniform interpretation and application of Community law.

<sup>205</sup> See Roth, *supra* n 22, para 139.

<sup>206</sup> See Vesterdorf, *supra* n 22, oral evidence on 17 January 2007, answer to question 389, 93.

<sup>207</sup> COM(2005) 15 final.

<sup>208</sup> Jaeger, *supra* n 60.

originally envisaged (by the 1999 Committee of Reflection, preceding the Nice Treaty) as being suitable for transfer to a judicial panel (the other two being staff cases and competition cases).<sup>209</sup>

The increase in trademark cases in recent years is significant, and it is therefore clear that there would not only be sufficient workload for a judicial panel but that it would also help in speeding up the procedures in front of the CFI. In 2006 the CFI experienced a 46% increase, receiving 143 trademark cases (and was expecting around 170 in 2007);<sup>210</sup> and in 2005 there were more than twice as many new applications (98) as regards trademark issues than competition law cases (42). Excluding staff cases and “special forms of procedure” cases, 33.7% of all total claims in front of the CFI were trademark cases, 13.7% were competition, 9.6% were in relation to the law governing the institutions and 8.6% were regarding state aid.<sup>211</sup>

To quote former CFI president Bo Vesterdorf: “Removal of trademark cases would enable it [the CFI] to use the expedited procedure more frequently and more effectively in cases which merit it, including competition and, in particular, merger cases”.<sup>212</sup>

#### D. CONCLUSIONS

The establishment of a nomination system<sup>213</sup> and the implementation of short-term solutions<sup>214</sup> could enable the streamlining of European Community court procedures by overcoming obstacles such as language and translation issues, increased workload, budget hurdles and procedural delays.

Safeguards will be required to ensure consistent application of EU Law. In particular, given the modernisation and decentralisation of European competition law and the policy of giving priority to deterrence and consumer welfare (including compensation), the increased role of national courts in private enforcement militates in favour of their active participation in public enforcement as appellate or referral courts. Implementing a structure parallel to that of the European Competition Network and in line with the EU Reform Treaty should not only enhance the competition culture required to improve the competitiveness of European industry to meet the goals of the Lisbon Agenda but should also guarantee over time a structural uniformity in the system of European law.

<sup>209</sup> See also Vesterdorf, *supra* n 22, oral evidence on 17 January 2007, answers to questions 377 and 379, 90.

<sup>210</sup> So also House of Lords Report, *supra* n 22, para 168.

<sup>211</sup> Highlighted by Roth in his written evidence to the House of Lords enquiry, *supra* n 22, 153ff.

<sup>212</sup> Vesterdorf, *supra* n 22, 26.

<sup>213</sup> See *supra* section C.3.

<sup>214</sup> See *supra* section C.4.

The nomination system outlined above should not be regarded as a form of renationalisation of the Community courts, but should be understood as a responsible mechanism for ensuring consistent enforcement in the interests of policy objectives and, more generally, the economic future of the EU. In this regard, it is potentially an attractive “halfway house” mechanism that may appeal to a wide audience.

If it were to be regarded as a reform that provided speedier access to justice and swifter enforcement at local level, as well as providing greater political engagement with a supra-national legal framework within a multi-domestic setting, the proposed nomination system might achieve a number of ends through the same means.

Limited reform is preferable to no reform. It is widely recognised that the current system is too slow. Streamlining the European judicial system could provide the impetus needed to foster progress in Europe following on from the Lisbon Treaty, which reinforces the respect for national interests and promotes Member States’ coordination towards the EU’s common goals.