

HOUSE OF LORDS
MINUTES OF EVIDENCE
TAKEN BEFORE
THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE E)

AN EU COMPETITION COURT

WEDNESDAY 17 JANUARY 2007

JUDGE BO VESTERDORF, JUDGE FORWOOD, JUDGE COOKE and MR COULON

Evidence heard in Public

Questions 362 - 431

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WEDNESDAY 17 JANUARY 2007

Present

Borrie, L
Bowness, L
Brown of Eaton-under-Heywood, L (Chairman)
Clinton-Davis, L
Jay of Ewelme, L
Kingsmill, B
Leach of Fairford, L
Mance, L

Witnesses: **Judge Bo Vesterdorf**, President of the Court of First Instance of the European Communities, **Judge Nicholas Forwood** and **Judge John Cooke** of the Court of First Instance and **Mr Emmanuel Coulon**, Registrar of the Court of First Instance, examined.

Q362 Chairman: Gentlemen, President, Judge Cooke, Judge Forwood and Mr Coulon, welcome. Thank you all very much for coming. I know that you, President, and you, Judge Forwood, have appeared on earlier occasions before this or other sub-committees and you know the way in which we proceed. For the others, the proceedings are recorded, we are on air and you will get a copy of the transcript and an opportunity to revise it and, if you care to, to add to it. In the meantime it will be on the Web. You have already had in advance the list of proposed questions – there may be one or two supplementary ones, and we may not necessarily stick to that order – and I think you have also had a copy of what by now has already become quite a considerable body of both written and oral evidence. Of course, we also have not merely the original CBI proposals, which I suspect you will have had, but the President, Judge Vesterdorf's, letter to me of 10 October last, which is a helpful part of the background to our inquiry. Perhaps I could start by asking you whether, as a Court, the CFI accepts the basic proposition that the CBI advances that there is a need for some custom-built

new EU Competition Court; in other words, a new 225a creation of one or more panels to deal with at least some competition cases?

Judge Vesterdorf: My Lord Chairman, members of the Committee, thank you very much for the invitation to come here today. Perhaps I should briefly introduce my colleagues. Judge Cooke, our Irish judge who has been on the Court since 1996, Judge Forwood, who you probably know, who has been on the Court since December 1999 and our Registrar, Mr Coulon, who was elected Registrar late 2005. As to your question, my Lord Chairman, when we received this invitation to come to London to give evidence before the Select Committee we decided that of course we had to have a discussion in the Court on the various problems and questions raised by the CBI document. Indeed, we had such a discussion a few days ago in preparation for this meeting. It should be said that what we are about to say today during this meeting does not represent any formal position of the CFI and, on top of that, we have not discussed this type of question with the European Court of Justice, the ECJ. So this is not a formal position but an indication of how the Court's members feel about the various suggestions and proposals. I think, however, it transpired very clearly from the discussions between the members of the Court a couple of days ago that it is not the feeling that there is any immediate need for setting up a new judicial panel to deal with competition law and, in particular, with merger cases; at least, not for the time being and perhaps not for some years yet. The Court indeed finds that it is up to the task before it; also as regards merger cases. The so-called fast track procedure, the accelerated procedure, which you have heard mentioned, has proven in our experience to be a very useful instrument for the Court, and it has, particularly as regards merger cases, allowed the Court to deal with and decide these merger cases much more rapidly than is normally the case for other cases heard by the Court, and I would tend to say – and my colleagues would probably agree with me – probably as rapidly as you could reasonably expect a court to deal with cases of such complex character.

We want, as you wish, to maintain a high level of judicial quality in the work that we are doing. It is, however, very much clear that our Court has, over the last number of years and will continue to do so, considered all proposals that are put to the Court from the outside or from the inside regarding possible changes of our rules for procedure or of our internal working methods. So that if useful proposals are made we will certainly look carefully into such proposals, if they would allow us to further shorten the time it takes to deal with or decide, in particular, merger cases, which seem to be the only worry of the CBI, the time it takes to deal with merger cases. That being said, I think we should underline also that we regard our participation in this meeting mainly as an opportunity for us to give this Committee precise and correct and up to date information on the present situation of the Court, and just also to clarify possible misunderstandings in the submissions that have been submitted to the Committee. We stand therefore quite ready and prepared to answer all your questions and comment on the various ideas and proposals that have been submitted to the Committee, and we are quite prepared to answer all the questions that you may put to us. Your Lordship mentioned the fact that I had sent a letter to you some months ago regarding statistics. We have brought with us a complete update of all these various statistics regarding the cases in general before the Court, in particular the competition cases, and even more particularly regarding merger cases. These are not finalised statistics; we are still only a couple of weeks into the New Year, so therefore we are going to get some more information on the precise numbers and statistics and we would prefer to give it to you orally, and I think that would be of assistance to the Committee in understanding the problems that we face in the Court.

Q363 Chairman: That is very helpful and I am sure we would be very glad to have the written record of the up to date figures. I do not want to go through your letter in any detail but amongst other matters you refer to, in very round figures, that the competition cases

overall represented about 40 per cent of the CFI's real workload, about 20 per cent of the total pending cases, but obviously case for case they are heavier and more time consuming than the average other sort of case. Is that still about the overall size of that part of your work?

Judge Vesterdorf: That is still correct. The very latest statistics and figures give us exactly those figures. I think the precise figure in terms of numbers is 18.6 per cent of the pending cases, which are competition cases, and that they represent roughly something like 35 per cent to 40 per cent of the actual real workload of the Court. That is still correct.

Q364 Chairman: As a whole is the CFI regarded as overloaded? Is there a troubling backlog; is the backlog increasing?

Judge Vesterdorf: Let me put it this way, your Lordship. We have statistics from the general workload of the Court available now and available in effect all the way back to the establishment of the Court of First Instance. The figures for 2006 that we have just got ready show us that we have an increase, the largest increase ever in the number of cases introduced to the Court in 2006, representing a rise of 33 per cent up on all the cases.

Q365 Lord Clinton-Davis: Why?

Judge Vesterdorf: The answer is that the applicants have wanted to go to the court more often in many more case cases than they did before. But I should perhaps underline that this 33 per cent up is divided into two figures: one is 46 per cent up as we got trademark cases, and if we have all other cases compounded together it is a rise of about 25 per cent. So for the trademark cases we see a very significant increase. And the figure, of course, excludes staff cases because since the beginning of 2006 we have no staff cases any more.

Q366 Chairman: So that increase is despite having in fact offloaded staff cases?

Judge Vesterdorf: Yes.

Q367 Chairman: I am not sure that Judge Forwood seems to be in agreement with that.

Judge Vesterdorf: The increase of 33 per cent is an increase regarding the cases that fall under our competence as it is now.

Q368 Chairman: I follow.

Judge Vesterdorf: That is excluding staff cases – staff cases are out of the picture. This is an increase of 33 per cent compared with the same type of competence in 2005.

Q369 Chairman: I follow that, but having offloaded the staff cases how does that increase leave you in net terms?

Judge Vesterdorf: That leaves us with almost exactly the same number of new cases introduced in 2006 as in 2004 and 2005, including staff cases.

Q370 Chairman: So the offloading of the staff cases has not actually improved your net position because of the subsequent increase? It is as simple as that.

Judge Vesterdorf: You can say that the advantage has been swallowed up by the increase in the number of other cases introduced to the Court.

Q371 Chairman: Have there yet been any appeals in any of the staff cases?

Judge Vesterdorf: We have, as of 1 January, received ten appeal cases, and it should be taken into account that the new Civil Service Court entered into function as of 1 January 2006 and started rendering their first judgments and orders towards the middle of 2006, and we had ten appeals before 1 January this year. That is not a very high figure because it is the running-in year, so to speak, of the new Court. Nevertheless, ten appeals, and we would expect in this year, 2007, from the figures we have between the Court of Justice and our own court before the transfer, that the amount of appeals to our courts should be up to about 20 per cent, and in

fact the rate of appeals recently was 22 per cent. That would mean that we should receive something like 40 to 50 appeal cases – at least 40 appeal cases.

Q372 Chairman: Forty appeal cases.

Judge Vesterdorf: A year.

Q373 Chairman: Staff cases.

Judge Vesterdorf: Staff cases a year.

Q374 Chairman: Roughly what proportion of your workload will that represent?

Judge Vesterdorf: If the workload at the end of 2007, as we would expect, would go up to around 480 new cases, or perhaps 500 cases, that would be less than ten per cent.

Q375 Lord Jay of Ewelme: I was very struck by the figure you gave for the increase in trademark cases, up 46 per cent in the year. Are there any special reasons behind that, a particular explanation behind that; or is that something which you expect to see increase exponentially from now on; or is this a spike and then you will go back to something more normal afterwards?

Judge Vesterdorf: Thank you very much for the question. It is useful for us to give the answer. We had a meeting in autumn last year with the new President of la Chambre de la Cour at the Trademark Office in Spain, and over lunch we discussed what the prospects were, how things are going in the Trademark Office. He informed us, first of all, that they now have four appeal chambers within the office and they had strengthened procedures considerably, therefore expecting a considerable increase in the number of cases decided by these Chambres de la Cour or appeal chambers in the Trademark Office, leading us to expect that the increase that we have seen this year will not be a one-off. Perhaps it will not be 46 per cent once again, but we should expect – the actual figures, we received 143 trademark

cases this year – on the basis of our talk with this President that the number might easily this year go up to around 170 or something like that – perhaps a bit more, perhaps a bit less. That is an increase that will continue.

Q376 Chairman: The Commission's evidence was that trademark cases in any event are numerous and pretty routine, and the suggestion is that if you are going to offload another category of work on to newly created panels they are a good candidate and altogether a better candidate than general competition cases. Do you agree with that view?

Judge Vesterdorf: I think both myself and my colleagues on the bench agree with that point of view, that this is an area of law that is clearly distinguishable and can be wrapped up and sent off to a new court whenever the workload for our court becomes such that we cannot deal with all the cases. Therefore, I think there is a general agreement between our colleagues that that is particularly correct.

Q377 Chairman: Do you see any great problem ahead in terms of achieving that?

Judge Vesterdorf: I should not think so. Seven years ago there was a board established called the Comité des Réfléchissons (?) which was set up by the European Commission in 1999 and which was composed of the former President of the Court of Justice, a number of former judges of the Court of Justice and my own court, to discuss the future development and structure of the courts in Luxembourg. They proposed the introduction of the new legal basis for setting up the judicial panels and proposed three specific candidates: a future candidate for areas of law that could be sent or shipped off to a new judiciary panel, the first civil service cases, and that has been done. Secondly, trademark cases or industrial property rights cases – we only have trademark cases in fact, so that has been foreseen and which is also clearly, from our point of view, something that probably ought to be done rather quickly

because we know it takes time before it really gets established, but that is certainly something that probably would much more easily come about.

Q378 Chairman: So really that could be the next priority, rather than competition work, for the creation of new Panels, is that right?

Judge Vesterdorf: Probably, yes.

Q379 Lord Borrie: Could you state the substantive reasons why the Court of First Instance would prefer to offload, for example, trademark cases rather than competition cases and whether merger cases alone or more broadly?

Judge Vesterdorf: I shall pick my words carefully now, but I think it could be put like that. You know of course that our court was set up in 1989 as a court intended to deal specifically with competition cases, and the Court of Justice had difficulties in dealing with those cases. Therefore, our court was set up to deal specifically with these cases and civil service cases. It is therefore perhaps no wonder that the majority of the members of the court still have a certain high degree of affinity for this kind of work and we have found that we have been doing a reasonably good job in that respect. Secondly, that the trademark area of law is, as I said before, an area of law which is very specific, which the cases do not normally touch on points of community law, but is a specific type of law and questions of law. On top of that, it can be clearly distinguished from all other areas of law and therefore something that should not present major problems in shipping them off eventually to a new court.

Chairman: Given that you were, as you say, set up in 1989 specifically above all to deal with competition cases, it would be something of an irony if, because you became so busy, those were the ones you were going to lose. You mentioned staff cases and trademark cases and you did actually say the Comité des Réfléchissons mentioned as a matter of fact, as a third category, competition cases. They mentioned that as the third possible candidate for

shipping off at some point in time to a judicial panel. But they did it in a more circumscribed way and they said that it should probably also at some point in time be considered whether competition cases could be shipped off or given away to a specialist or judicial panel. So they were not quite as adamant as they were about civil service cases and trademark cases.

Q380 Chairman: Realistically, from what you have said thus far it might be thought unlikely that any problem that presently exists in your determination of these competition, and particularly merger, cases is actually going to be solved by the creation of a new competition court by way of Article 225a panels. That seems a little politically unreal as we speak. If that is right what is, do you see, the way ahead to meet such needs as the CBI and perhaps others identify in somehow getting through, first, the Commission and then the Court any challenges on these decisions?

Judge Vesterdorf: If you would allow, your Lordship, I will pass to Judge Forwood, who is one of the judges on our board with us who has had to deal with quite a number of what we call the fast-track procedures and in particular in competition cases, to explain to you how we try under the existing rules of procedure, under the existing working methods to deal as best we can and as swiftly as we can with these cases. We have gone to great lengths to do precisely that.

Q381 Chairman: Of course we are happy to hear from all or any of you. Judge Forwood.

Judge Forwood: Thank you, my Lord Chairman. I think it might be helpful in this context if I give an anecdotal account of the handling of some of these cases, which may give you a flavour of the effect of handling, and then if I make some more general observations. The cases that I have personally handled as a reporting judge in fast-track cases, the accelerated procedure cases vary from a number of merger cases, particularly the EDP being a case which we dealt with in a period of about seven months. A public procurement case, which was in

fact dealt with in a period of ten weeks, moreover the summer vacation – the pleadings arrived at the end of June and we gave our judgment towards the end of September. I have been involved, also, in other compositions. What I have found, certainly in the cases that I have handled, is that by and large the timeframes that have been in general agreed with the parties at the outset of the cases – the practices and the application for an accelerated procedure is made at the same time as the lodging of the substantive application itself – there is in practice almost immediately direct contact between the Commission lawyers and the applicant’s lawyers before the Commission puts in its response to that application. So that by the time the first, if you like, case handling meeting takes place with the parties, first of all the parties have already been able to identify the sort of timeframe within which they would want a judgment for it to be useful for their purposes; secondly, to a certain extent they may have already started to identify the issues that would be dealt with if the case is accepted on an accelerated procedure basis. So if the procedure works well with this element of cooperation there is then sometimes some case handling to be done, perhaps a bit of judicial arm twisting – is it really going to be useful to pursue this point, it may make it difficult for you to meet your time targets, and so on. Thereafter, the timetable, which in some cases I have indicated may even be as short as ten weeks – and that is exceptional – is what we have to work to. If I then move on to the more general observations, from the point of view of a Judge-Rapporteur, particularly at a time when the court is working pretty near its maximum capacity, the implications of accepting cases for accelerated procedure are that there is considerable disruption for the other cases in the pipeline and that is, in a sense, always the trade-off that has to be made at the moment when the chamber decides whether to accept a case for accelerated procedure or not. In the context of the discussions that have taken place already, one of the useful features of the trademark proposal, if that were to be the eventual outcome, is that it would create within the Court of First Instance a degree of flexibility that would

enable us to handle more of these cases – perhaps even more within the acceptable timeframe, which does of course vary from case to case – and without putting at risk the handling of the 99 or 95 per cent of other cases that are not being handled according to the accelerated procedure framework. So, if I may express a personal view, I think that the trademark proposal could indeed be extremely helpful if that is actively pursued and enable us, possibly with other procedural changes that are subject to regular discussions not only with the institutions but also indeed with the CCBE and other parties, to ensure that these cases are properly dealt with.

Q382 Chairman: This fast-track applies mainly in the merger cases, is that right?

Judge Forwood: Yes. The figures that we have had since the new procedure was introduced: 84 applications for fast-track procedures.

Q383 Chairman: Since what date?

Judge Forwood: The beginning of 2001, February 2001; 84 of which a total of 28 have been accepted. However, of those 84 cases 21 have concerned merger cases and of those 21 requests 17 have been accepted. So what you see there is a picture of 17 out of 21 requests for fast-track in merger cases have been accepted, whereas a much smaller percentage have been accepted in other cases.

Q384 Chairman: So it is three or four applications for fast-track in merger cases a year. Does it work out about that?

Judge Forwood: Yes, it does. There were two in 2005, both of which were accepted; two in 2006, one of which was rejected but the other one was accepted and still pending. So it is at that level.

Q385 Chairman: How many chambers does the CFI operate, roughly?

Judge Vesterdorf: We have five chambers of five judges and all those five chambers can sit with five judges in more important cases but they normally sit in formations of three judges, and that means that each five-member chamber can sub-divide into two chambers headed by the same President. By far the vast majority of cases are decided by three-man chambers. So we have five out of which we make in all ten three-man chambers in fact.

Q386 Chairman: Roughly at any given time there would be at most one fast-track case before any particular chamber?

Judge Vesterdorf: At the present time we have 13 merger cases pending, if I am correct, and only a few of them – and one in fact is dealt with under the fast-track procedure, and the other either there has not been any demand for fast-track or we have rejected it.

Q387 Chairman: I was wondering whether this principle of *juge légal* where, as I understand it, it is just by sheer chance as to which particular chamber a new competition case and merger challenge goes to, inhibited the ability to deal with these cases. But on the figures you give I am not sure.

Judge Vesterdorf: It should be known that this principle of *juge légal* is a French concept, which, as far as we see it, stemmed from after the Second World War in Germany, and has been practised by the court in both the Court of Justice and our own Court, which has led us to install a system under which the cases are given to the chambers, but with the exceptions regarding the actual workload of the individual chambers and with the exception to cases of which there is connectivity. So as the President, when I hand out the cases to the chambers in principle I go one to one, unless the workload of the particular chamber is such that that chamber could not take a fast-track procedure in the present circumstances, and then I will look at one of the other chambers to see which of the five chambers has the best possibility to accept, under the present circumstances, to deal with the fast-track case. So there I make an

exception to the *juge légal*. It does not follow the ordinary system, allowing me as the President, to appreciate at one and the same time the capability of each individual chamber and also of the individual Judge-Rapporteur. We have to appoint the Judge-Rapporteur, and therefore we need to make sure that the one who is appointed is one who can actually do it, like Judge Forwood described just a few minutes ago, and therefore it can take a sufficient number of times to concentrate on that case and he can have his chamber do the same. That demands that the other workload allows for it.

Q388 Lord Jay of Ewelme: Following on the same broad theme of the times of cases, can I follow up one point that Judge Forwood made? I think you said that when you were talking to the parties before a case started – and I must apologise to other members of the Committee if my legal terminology betrays the fact that I am not a lawyer – that at an early stage you discuss with the parties, amongst other things, the time which it would, as it were, suit them that the case should take? My question is: does that mean in a sense that you are taking into account the commercial considerations lying behind one of these cases, and if there was a strong commercial argument for a quick decision, even though it might be a complicated case, you would be able to try and solve it within the time that suited the parties?

Judge Vesterdorf: Yes, your Lordship, that is exactly one of the intentions of these informal meetings at a very early stage for the parties to a case. I myself was dealing with two of the infamous cases which led to annulment of a merger decision by the Commission at the end of 2002, the *Schneider Legrand* case and the *Tetra Leval* case. In both of these cases, which were prohibition case decisions by the Commission, there were extremely large sums of money at stake and the parties asked for the application of these fast-track proceedings, and called the parties in as soon as at all possible, and sat down and worked out the timetable with the parties – “Can you agree to a bit on that and that date on the basis that you concentrate on what are the real and important issues of the case and leave aside all the other stuff that you

normally send to the judge?” – and the parties agreed to it and they respected it and we did what we could to respect our sole commitment as to when we could hand down the judgment, and we did just that. So it can be done but it demands the goodwill of the parties and acceptance from the lawyers to come away and then deal with the substantive issues, and they very often accept that.

Q389 Lord Clinton-Davis: Do you think that the situation that you face would be improved by, or do you reject the idea altogether of having additional judges?

Judge Vesterdorf: There is no doubt that in a court which now has seen the number of cases growing continually, and in particular with the enormous growth and increase that we have seen last year, and the workload being as it is, I think Michel Petit and Philip Lowe recognised that the workload is extremely heavy and that a number of extra judges would of course be of interest to the Court, and therefore the idea that you could put extra judges on the Court is evidently something that would be useful, but it should be underlined – and I think it has been said to the Committee – that we have tried it once before, more exactly at the beginning of 1999, when the workload of the Court was less than it is now and we asked for the additional six judges, allowing for two extra chambers to be set up, and the Council of Ministers agreed very quickly as to the necessity and they agreed on the principle, but when it came down to deciding which of the then 15 Member States would have the extra six judges the case died an undignified death before the Council.

Q390 Lord Leach of Fairford: I am struggling a bit with the size of this problem. We have evidence here that since the fast-track procedures were introduced that in fact there have only been three negative merger decisions that were put up for the fast-track procedures, and we have been told that the CBI has identified negative merger decisions as the main problem. Three since 2001 does not seem to me quite proportionate to the discussion we are having,

unless I have misunderstood something. I think one survived, which was *Tetra Leval* and one was abandoned, which was *Schneider*, and one, the Commission's judgment did not survive, if I am not mistaken. I feel that I am missing something in proportion here.

Judge Vesterdorf: I think in answer to that question, your Lordship, is that one of the mistakes that has been made, or perhaps a wrong assessment has been made in some of the submissions, is that only negative merger decisions are something which need a speedy decision of the Court. In my opinion, that is not correct. Positive decisions being attacked by competitors, leaving those who have permission by the Commission, the green light from the Commission, in the uncertainty of whether the accomplished merger will survive or whether they will have to dissolve the companies afterwards, is just as important, and of those we have had quite a number of cases, and of those we have also had cases in which we have accepted the fast-track procedure, simply because it is just as important for the company to know: can it survive or will it die later on?

Q391 Lord Mance: I was going to follow up on the same point. We have had a useful list from Peter Roth, QC – and I do not know if you have seen his submission – and he records that the period stated by the CBI as being the maximum duration for effective judicial review is six months or less, and it is apparent that all the seven cases he gives exceed that, and I would like you to relate that to what you were saying about discussions with the parties to achieve an acceptable time limit, because it does not quite correspond. Your helpful letter gives some statistics – I am not quite sure how they match – and you actually refer to another EDP case – I assume it is a different one, or maybe it is the same one?

Judge Vesterdorf: It is the same one.

Q392 Lord Mance: You refer to the same cases, probably EDP, *Impala* and I think another case, which took seven months, possibly *Endesa*. So there is a problem to my mind. Those, I

assume, are the negative and positive clearances. The second question I would like to raise is, it is suggested by the CBI that there is a freezing effect and also a compromise-inducing effect in the sense that the freezing effect arises because if you know that you cannot appeal then you do not bother because it is not going to be done in sufficient time to make it useful, and the compromise-inducing effect means that if you know that an appeal will take a very long time so as to be relatively useless you may be required pragmatically to arrive at all sorts of compromises and agree conditions that you would not otherwise agree. Would you like to comment on that point as well?

Judge Vesterdorf: I think it should be said that those are among the worries that our courts propose and get the acceptance for the introduction of fast-track procedures, because before that we had no way of giving special priority to that type of case. I see, and I think my colleagues see, that the main problem raised by the CBI is the problem of whether or not one could achieve such a shortening of the time it takes to deal with a case that you get down to these five or six months. You have heard that in our court at least in the EDP case we managed to do it in slightly less than seven months – a couple of days less than seven months – and the other main cases have been around nine to ten months, and then there is one particular case which took far more time. We would of course very much like to be able to meet that worry to the extent that if we can in any possible way reduce the time further we would be perfectly willing to do that. But it must be said that under the existing set-up of the Treaty, on the statute for the Court of Justice there are rules of procedures that make it in practical terms very unlikely that we can get largely below the number of seven months. As you know, the applicants have two months and ten days in principle to introduce a case, and if they want to do it fast-track then they should introduce it immediately after the decision of the Commission and not wait until the very last minute and then ask the Court to cut away those two months - and I recognise that the lawyers cannot normally do that because they need to

have some time to study the decision of the Commission. But we do in practical terms try to achieve that purpose, but it is not always possible. You should also know that there are rights of intervention that the Court must respect. If there is intervention there will be confidentiality issues very often in those cases where there is a green light, and the competitors want to go ahead and stop the merger, and they have all the interest in the world of stopping or slowing down the procedures by creating unnecessary procedural problems regarding confidentiality and other matters. So it is not that simple. But this is once again why we try as soon as possible to sit down with the parties and the intervening parties (if we get an indication early on that there will be intervening parties) and try to impose on the intervening parties that they do not deposit written observations but they limit themselves to giving the oral presentation at the hearing instead of taking time by presenting written pleadings that then might have to be translated into our working language.

Q393 Lord Mance: If you could be freed of some part of the straightjacket, which part would you focus on?

Judge Vesterdorf: I am not sure that I have any real choice because the present set up under the rules that we have do not leave us much opportunity in that regard.

Q394 Lord Mance: Is it procedural freedom which would assist?

Judge Vesterdorf: No, I have seen the number of submissions regarding our lack of procedural freedom. I think our rules of procedure to a very large extent, with the ten modifications that the Court has introduced over the 17 years of its existence, have precisely been aimed at getting more flexibility and less straightjacket into it, and we have by and large always got an agreement in Council on the proposals that we have made. So I do not think there is a real problem there. It does not prevent us from continuing – and we do that – to

regard is there an obstacle that is not really necessary? If there is we will do what we feel is necessary to get rid of the obstacle.

Q395 Lord Bowness: President, previous witnesses here and in writing have referred to the language regime as being a problem, and we had evidence from representatives of the Commission who explained to us the difference between the language of procedure and the internal working language, and the Commission in their written evidence said that, “It appears therefore that any delays due to translation are rather due to the internal working methods of the Court of First Instance. If translation is a real problem it can be tackled by the CFI already,” and they went on to say that the CFI and the ECJ need to have an internal working language, which so far has been French, but the choice of internal working language can of course change by a decision of the courts. Firstly, do you accept that the language regime is a problem, or do you agree with the Commission’s view? Can you tell us whether you are actually free to make those kinds of procedural changes yourselves without going to the Council, because it has been suggested that some of the Articles relating to the Court and the Treaties require you to do that?

Judge Vesterdorf: We have to distinguish what we are talking about. If we talk about the language of the procedure then those rules follow from the statute of the Court and from our rules of procedure, and any change to that procedure requires unanimity within the Council, and that is very hard to get. That is a fact; we cannot change that and, in any event, I would not want to change that because it should be a right of the citizens to introduce a case in their natural language before the Court, any Court, and we are now not talking just about big companies but all sorts of applicants, who should be entitled to introduce their case in one of the official languages. A second question, a quite different question is the question of our internal working language. That internal working language, for historical reasons, is and has always been French, and you should know that the Court of Justice, which is now somewhat

more than 53 years of age – if that is the correct figure – has, for all of these 53 years, based itself in its internal administration and build-up of the administration that French is and has always been the working language, meaning that if you were to change that working language you would have to change considerably, as regards the total administration of the Court, all the various language sections, and that would mean major complications. But formally there is nothing preventing the Court – my Court or the other Court – from deciding either generally to have another working language or in a specific case to have another working language. As to the first part of your question, whether this is a real problem, of course one cannot deny that if you get pleadings introduced in another language other than the working language – German, Danish or Finnish, anything – it has to be translated naturally into our working language and it takes some time. That is inevitable, particularly so since our linguistic divisions of the Court for years have been suffering from under staffing and now the budgeting authorities have given us extra manpower in those divisions. But it obviously takes some time. If we talk more precisely about these cases, the cases that are the precise worry of the CBI, that is the merger cases, and in particular those which are the fast-track cases, it should be known that once there is a decision for a fast-track procedure all of the services in the Court have to give complete priority to pleading those cases. That means that all delays are shortened to the strict minimum all the way round the board, but still there is some time being swallowed up by translation. Of course, towards the end, once the chamber has decided on the outcome of the case it has a draft judgment which has to be sent off for translation if it is in another language. But also that part is given the highest priority in the services. I saw a submission in the paper, I think by the CCBE, Mr Berrisch, or Mr Brouwer, who made a reference to somebody telling him that it quite often took six months after the judges had agreed on the result before the judgments were out of the door. That would be an exception; that would probably be one of the cases where we had 300, 400, 500 pages that needed to be

translated into another language. That is not a normal case and certainly not normal in the fast-track cases. I will give you an example, *Tetra Leval* was interviewed in English and at almost exactly the same time as the case *Schneider Legrand*, which was interviewed in our working language, as it happened. Those two cases, which were similar in importance and complexity, were resolved and decided almost at exactly the same time, one being in the working language, the other being in the language of the case, English. It did not really take much longer. If one were to ask the question, what about the case in which we had decided the merger case in seven, eight months, how much would be saved if we were not to have translation of the judgment at the end of the day? You might in the best circumstances, unless it is a very long or voluminous judgment, shave off two to three weeks or something like that. That is what we are talking about in those types of cases.

Q396 Chairman: But that is at the final stage, that is the publication of the judgment?

Judge Vesterdorf: Yes.

Q397 Chairman: I understood that Sir David Edward to tell us that judgments of the Court can be issued in the language of the case but they almost always have to be translated into at least English and French before being published. Can they not be issued unpublished to start with?

Judge Vesterdorf: It is certainly not our practice and we have not at any point in time had to decide whether the Court could pronounce the positive part of the judgment – the end result and then send out the motivation later on, I think it would be quite inconceivable to my colleagues. It would put precedence as to when would be the delay for introducing an appeal, when would it start to run, and it would probably run from the moment you get the motivation or the reasoning.

Q398 Chairman: Without the reasoning you cannot sensibly decide whether to appeal?

Judge Vesterdorf: No.

Q399 Baroness Kingsmill: I want to ask a very simple question, and that is: is there anything you could suggest that might meet some of the concerns of the CBI, which is principally delay? Is there anything you could suggest that falls short of creating a new court but which would address some of their concerns?

Judge Vesterdorf: I think I should answer this way: you have read all the submissions that have been presented and much has been made of the possibility of creating specialised chambers and specialised chambers being able to some extent at least to get the same efficiency and gain experience and repetition of certain types of cases. That might be done. There are, however, practical problems of a considerable character, and Judge Bellamy mentioned some of those practical problems in his submission to this Committee. One of the problems is, as we know, competition cases and in particular merger cases represent a very, very small part numerically of the cases that we have to deal with. Setting aside a specialised chamber to deal specifically only with merger cases would be a non-starter because one year they might have nothing to do and another year they might have 15 cases arriving at the same time and in that case they would not be able to cope. If we set up more specialised chambers to deal with more general competition cases we would be unable, in practical terms, with the number of judges that we have and the number of chambers that we have, to do that in practical terms. All of the judges at the court at the present time have several competition cases, big cases in which they have 19 to 20 companies going before the court. Imagine that all those cases would be sifted down to only six judges in two chambers, and hoping that these judges would be able to get the case out more swiftly than we can do it is not really realistic. That brings in again the question of should we then have extra judges? If we have extra judges that problem would be less of a problem.

Judge Cooke: If I could add there a related observation? If the concern is about the average time it takes to deal with cases, it is very difficult to identify any one factor because there are a number of factors, whether it is translation or other factors. In my experience one of the elements which contributes most to productivity is the stability of composition. I have been 11 years in the Court and I have had the privilege of sitting for a good number of years with the same two judges in the three judge formation, and one of the things I have noted is that within a year or two of sitting with the same two judges a mutual confidence builds up in the working methods of the other judges. You get the reporting judge's analysis of the problem: if a judge you know and trust tells you that there are 17 grounds of appeal in this case but only five, seven and nine are of any real importance it saves you a huge amount of work. So if you have stability of composition in the chambers, three judges working together produce more over the years they sit together. To be perfectly frank, one of the factors that militates against this is the six-year mandate of the judges. Every three years half of the composition of the Court is subject to a renewal and that has a practical consequence. We are now 27, this year 13 judges are up for renewal. So that really in the last six months leading up to September, an uncertainty hangs over those formations in which judges up for renewal are sitting, and the practice consequence of it is this: that by and large, for most cases other than cases that are being heard in French, from the moment that the reporting judge is ready to go to the chamber conference with his preliminary report and fix a date for the hearing, you really have to allow something between four and six months between that point and the delivery of the judgment because you have to give six weeks' notice to the parties at the hearing and you have the drafting of the judgment and the internal proof reading of the judgment and you inevitably have translation of all the non-French cases. So that really from six months prior to the three-year renewal you have this element of uncertainty coming in. At the moment we have 13 judges up for renewal in September and we know already that two judges will not be

resuming – one is going back to his own country and the other one is retiring. Those two happen to be Presidents of chambers and, as Judge Vesterdorf was saying, in the present working arrangement, with five chambers and five judges, four judges plus a President. The President sits with judges one and two in formation A and three and four in formation B. As a result of the non-renewal of two Presidents you effectively have the work of ten reporting judges in suspension from roughly February/March onwards, because you cannot fix a date for a hearing in the case in confidence that you will agree a judgment, get it translated and deliver it before they depart in September. So this is one of those practical considerations which is operating in the way in which the court is structured. I know it is outside your concerns but if you ask me, from my internal knowledge and experience, what are the sort of factors that affect the time it takes to get through a case, that is one, and I do not think it has been mentioned in the submissions you have.

Q400 Baroness Kingsmill: I have to say, I think that is quite an important one, because how much time do you think that that then takes out of the judicial year for consideration of these cases? It sounds like quite a lot?

Judge Cooke: It can be quite a lot, yes. If you take the practical situation now, we have two chambers and we have ten reporting judges between those two chambers and while they can continue to work those judges who are not being renewed or have been told they will be renewed, and you have two Presidents retiring, then you have a necessary postponement of possible hearings in cases.

Q401 Chairman: I follow that. It sounds a relatively unusual event that you are going to have two Presidents not returning.

Judge Cooke: I should say, there is to some extent a compensating factor in that once you know certain judges are leaving there is an acceleration on the priority given to the work that

is already in that chamber in order to ensure that it is dealt with, but it is the planning of hearings from a certain point onwards that tends to have this depressing effect on the momentum of a chamber's work.

Q402 Chairman: Would that sort of hiccup not be taken into account in the allocation of fast-track cases?

Judge Vesterdorf: It is one of the elements, of course, that plays a role and if I have to give a chamber a fast-track case, I need to avoid a chamber which has that sort of problem.

Q403 Chairman: Quite.

Judge Vesterdorf: One should underline, in supplementing Judge Cooke, that this is not something which we can change, it follows from the Treaty and there is no way we can do it, and it is made even worse by the fact that quite often - which has, of course, been of a certain kind of interest to us - quite a number of the judges from our own Court have been recruited in between to go up to the Court of Justice. Last year we had three judges, in fact, leaving our Court to go to the Court of Justice and that is in between the ordinary three-year periods, so for two years we will be running into these kinds of problems which are of a very practical character and have some impact on other work.

Q404 Chairman: Could I check, are merger cases the only ones in which you operate this fast-track system? What proportion of fast-track cases do merger cases represent? You told us of 28 fast-track applications 17 were mergers, but are the rest competition cases?

Judge Cooke: No. I have done a number, certainly one United Kingdom case on the greenhouse gas emissions regulation. In my experience, one of the crucial factors is, as I think Judge Forwood was saying, the accelerated procedure is only effective if very close to the outset of the case the reporting judge can be confident that taking this sort of short cut is

going to work. You have got to remember that we are getting in cases from more than 27 different legal jurisdictions with different legal systems, lawyers who have different practices and lawyers who may not be familiar with our practice. One of the crucial functions of our system is the report for the hearing, that is, as you know, the reporting judge's analysis of what is at issue in the case, and sometimes we have to use the writing of the report for the hearing in an attempt to impose a discipline on the case because we send it out to the lawyers before the hearing and they are invited to comment upon it, but if they agree the report from the hearing then it becomes the agreed framework for us to analyse and decide the case. In that sense, the crucial step in treating the accelerated hearing is convincing the lawyer - in merger cases it is not too difficult because they are usually specialists who are familiar with the Court but in other cases it may not be so - and you have got to have confidence that they are going to co-operate throughout the case if you say, "Look, so far as the Court can see, it is grounds one, five and nine that are important in this case, do you agree? Can we leave aside the others?" You have got to get that assurance of co-operation at the beginning, otherwise you may close the written procedure and suddenly find you have all sorts of problems springing up that delay matters.

Q405 Lord Mance: I do not want to become embedded in the general point about length of tenure which is a much wider-ranging and important issue that Judge Cooke has raised, but one follow-up question on a more detailed aspect of it is if a case is not finished before the retirement of a judge, what does that mean? As I understand it, the judge cannot return on an *ad hoc* basis for that case. I do not know how difficult it would be to change that and, assuming he cannot return, surely the rest of the panel can go on to issue a decision, can they not?

Judge Vesterdorf: When the case is being heard by a five-man chamber the quorum in such a chamber is three judges, that means if one is leaving and we cannot get the judgment out

before, the remaining three judges can hand down the judgment. The problem is that by far the large majority of our cases are dealt with by three-man chambers and if one is leaving then it does not work, which is why we have either to stop the proceeding and get on with other cases or we have to speed it up considerably so that we can make sure that those three persons are still in the Court and can render or hand down the judgment. In fact, 81 per cent of all our cases are decided by three-man chambers.

Q406 Lord Jay of Ewelme: Why can two not decide?

Judge Vesterdorf: Our rules of procedure are such that there must be at least three judges.

Q407 Lord Jay of Ewelme: Are those rules of procedure which would be in your power to change?

Judge Vesterdorf: They cannot be changed.

Q408 Baroness Kingsmill: On a similar but slightly different point, some of the people who have appeared before us have suggested that an advantage of a new competition court would be the possibility of introducing judges who are not lawyers. Do you see that there is any merit in that at all, given that the nature of competition cases does involve a great deal of economics?

Judge Vesterdorf: I would like to hand the floor to Judge Cooke on that one, but one brief comment in that respect. So far the vast majority and practically all judges in both courts, and now all three courts, have always been lawyers. We have had at the Court of Justice people who have not had what you would call “a traditional law education”, people from the Conseil d’état in France, who have been admitted at the Court of Justice, and we have indeed such a French judge in our Court, but I think - not only think but I know - that in practice in all other

Member States they appoint lawyers to the court. It would seem normally from the ordinary reading of the Treaty that people who are expected to exercise high judicial office ----

Q409 Baroness Kingsmill: Are capable of ----

Judge Vesterdorf: ---- are capable of doing that which would normally be expected by lawyers, but Judge Cooke would have a comment on that, I expect.

Q410 Lord Jay of Ewelme: We do not all quite share that view.

Judge Vesterdorf: No, of course.

Judge Cooke: It is important to bear in mind that what we are called upon to do under the Treaty in the statue of the Court is what you would call “judicial review”. In competition cases, what we have before us is a decision of the European Commission either allowing or prohibiting a merger, imposing fines or finding infringements of Articles 81 and 82. In a sense, the specialised economic decision has already been made in the contentious procedure before the Commission and unlike trademarks and staff cases, which are a discrete area of secondary legislation with their own distinct, pre-contentious procedures, what we are being asked to do in competition cases is to apply the primary law of the Treaty, Articles 81 and 82, to the decisions of the European Commission: has the European Commission, in making this decision, correctly applied 81 and 82; has it misused its powers; has it made manifest errors in its judicial review? Of course, the judges have to have an understanding of economics and most of the judges will have a good understanding of the economic principles that are involved, but it is judging the legality of decisions in accordance with the articles of the Treaty and general principles of Community law. In competition cases, particularly, many of the grounds that are invariably raised are based upon general principles: has access to the file been properly allowed; has there been discriminatory treatment of one of the parties; have the

rights of defence, as they are called, been properly respected? It is important, I think, to bear in mind that it is judicial review which we are called upon to exercise.

Q411 Chairman: What about the scope for using economists, accountants and so forth otherwise and directly as judges? Do you see a role for them as assistant rapporteurs? Apparently, that is envisaged for scientists in the proposed EU patent court.

Judge Cooke: That possibility already exists, assistant rapporteurs are provided for under Article 13 of the statute of the Court and in Article 61, I think, of our rules of procedure under measures of inquiry we have the possibility of appointing experts *ad hoc* for specific cases. In point of fact, it has been very rarely used and I remember coming across it myself some years ago, there was a period of time when we had an in-house economist on the staff of the Court. The idea was that reporting judges dealing with complex competition issues could consult the economist and get a view. In fact, it was very little used because many of the colleagues, particularly the continental colleagues, were very nervous about consulting outside the knowledge of the parties. There was doubt because in this judicial review we are judging the legality of the Commission's decision as of the date it was taken and in accordance with the facts and arguments before the Commission at the time. There was something of a reticence amongst one's continental colleagues to introduce into the case file material which was not part of the Commission's case file. I think I am correct in saying it sort of withered away as an approach.

Judge Vesterdorf: At the end of the contract of this economist we made a survey among all the judges of the two courts to ask, "How many times have you effectively used this economist?" Once we got the answers, there was one question: "What has he been paid for over six years?" and, unfortunately, that was the reality of the thing, then the contract was ended and that was it.

Chairman: I understand.

Q412 Baroness Kingsmill: That may say more about the nature of judges than it does about the nature of economists.

Judge Vesterdorf: Maybe so, but it should be pointed out that whilst only very exceptionally we have appointed our own economic experts to assist the Court, in fact to my knowledge it has only been done once by the ECJ a number of years ago, the reason why is that the parties to the case present us to a very large extent with economic evidence from distinguished professors from all over the world, of course appointed by one party but then the other party will appoint their own experts to tell us why the first one is wrong and on which point they are wrong. We can examine and we do actively put close questions to those experts during the hearing to test their thesis and motivation and see if they are on top of it, if they have got the facts right, before they pronounce themselves on the economics of the case.

Q413 Chairman: Judge Cooke has just described a very conventional, strict approach to judicial review, as a judge here would recognise. That is linked really with the question, would you welcome wider powers to engage in further factual analysis in re-hearing with a view to adopting a decision yourself? If you take the narrow, conventional approach to judicial review at the end of the day the decision either stands or falls, but on the face of it you are not in a position to re-take that decision, you can only remit it, as currently we are given to understand that you would do if you quashed it?

Judge Vesterdorf: This is a question of some interest, of course, and it is a question that has been put very often in discussions at conferences, colloquies and seminars in the competition world with many parties claiming that it would be beneficial to the whole procedure if the Court could take the final decision once the case comes before the Court. That is not possible under the Treaty, it is as simple as that, it cannot be done and, therefore, the only way it could be changed is if Member States were willing to accept that the institutional balance, which has been set up carefully under the Treaty, allowing the Commission as a quasi-administrative

political body to take those decisions, that specific power should be taken away and given to judges. If it was to be given to judges, then the judges would have to have broader powers of an investigatory character, but that is not of actuality because it cannot be done, and I fail to see Member States accepting that as a change.

Q414 Chairman: It would need a Treaty change and it would probably involve longer hearings by you because you would then have to be in a position to take a factual decision yourselves, those would be the downsides, but the benefit, I suppose, would be at least where you are going to be quashing the Commission decision, you do not then have to send it back to them for re-determination and the time consumed by that further process?

Judge Vesterdorf: That is correct, but perhaps it should also be mentioned that these days and over the last couple of years a large majority has been competition cases coming before our Court, in particular those cases in which there has been a fine imposed on the companies in question, Article 81 cases. In that particular area, the Court has a specific power, what we call “*plan d’action*”, meaning that, once it has checked and verified if the Commission has followed and applied the law correctly and assessed the facts correctly, that is the question which occupies the Court far more than other parts of the decisions of the Commission. In reality, most of the cases nowadays primarily concern the fine, should there be a fine, if yes, what is the correct amount of the fine? There we have in principle a complete free hand and we can take the final decision and we do take the final decision on that issue.

Chairman: I see.

Q415 Lord Borrie: Going back to Judge Cooke’s point which, for the purposes of discussion, I fully accept that certainly at this present time the Court is solely concerned with judicial review of the Commission’s decision for or against a merger, but judicial review must include, surely, the consideration sometimes of whether or not the economic arguments before

the Commission have been adequately considered, or ignored, and that economic arguments are bound to be part of the case for judicial review and part of the consideration by the judges of the Court? On that basis, why, especially if the Court is a five-person court, would it not be helpful, certainly not undesirable, that one of the five might have a background of being an economist rather than a lawyer?

Judge Cooke: It is, I suppose, at the end of the day a policy decision. Merely in reply to the question put by Baroness Kingsmill, I was seeking to underline the distinction between judicial review, as it stands, and you are perfectly correct in the way you described it and the danger of substituting another view for that of the Commission. Provided that the economist was alive to the need to respect that principle, it is possibly in theory correct to say that economists could contribute, but, again, we are bound by the provisions of the statute and the Treaty as regards the nominations that are made to the Court.

Judge Vesterdorf: I think Judge Forwood, if you would allow, would like to add some comments on that specific question.

Judge Forwood: Of course, whereas the Court's review of questions of fact is a full review, the nature of the review of the economic conclusions of the Commission, assuming that the factual basis for those conclusions is properly established, is in some ways parallel to the situation of the Court of Appeal in reviewing a finding of fact by the trial judge, that is to say, "Well, we might have come to a different conclusion, but has the trial judge really got it so wrong that we ought to interfere?" In other words, it is never the first assessment but rather saying, "Is that within the range of reasonable choices that could be made and, in this context, is this a reasonable economic assessment that could be made having regard to the facts available?" Therefore, we are looking at the evidence rather than trying to make our own first analysis of what the right economic assessment should be. I think that is reflected in the Treaty balance, as has been explained, and in the way the division of functions has been set

up. More generally, of course, in that exercise it would be very nice to have economists amongst our members, but one has to remember that the members of the Court have a lot of cases to deal with, not all of which involve that sort of economic balancing exercise. I think the risk would be of adding to the team of judges those who, perhaps, were less experienced and able to deal with the ordinary gamut of cases which tend to involve that.

Q416 Baroness Kingsmill: I take that point entirely and I come back to the reason why we are all here today, the CBI's concern about the delays and their solution being a new court. I am simply trying to elicit from you whether or not some of the things which they suggest might help would, in your view, help. It does seem to me though that you feel this is very much the preserve of legally-qualified judges and that really this is not something which would improve the expedition of these cases if there were maybe a wider range of qualified people who were capable of being judges.

Judge Forwood: Yes, that is broadly the point. There are, I think, other factors which, in due course, may well point strongly in favour of a specialised competition court, but I would say that the ability to have economists as members of it is probably not going to be one of the major driving forces for it when eventually it may come about.

Q417 Chairman: Could we pass on to one loose aspect of this. Large cartel cases, we understand, represent a significant part of the overall workload which you have in the field of competition and very often appeals against the fines. One of the Commission's submissions, as you may have raised, is that one could introduce some scheme of plea-bargaining and that way rid you at least of some of that part of the workload. Would you welcome that?

Judge Vesterdorf: Yes, clearly. If it would mean fewer cases brought to the Court because there has been successful plea-bargaining, from our point of view that would be perfectly fine. As a judge in the Court being overloaded, if cases are solved in that way so much the better.

Q418 Chairman: You would be pretty happy with anything that offloaded almost any part of your workload?

Judge Vesterdorf: As long as the rights of the parties are not trod underfoot by the Commission, are respected and well taken care of.

Q419 Chairman: What about receiving other areas of work yourself, do you know whether the Court is considering asking you to take on any further areas of work?

Judge Vesterdorf: I do not think that is a question for the time being, but you should know that, I think it was in 2005, the Court handed down another piece of competence law, namely the cases introduced by Member States against the Commission, and in certain cases even against the Council, and that is an extra workload. Numerically it is not that much, but some of these cases are complicated and important for the Member States, of course. I think in numbers, last year we are talking about something like 30 to 40 cases introduced by Member States and that is another thing to put in the basket. Of course, it is very interesting and we are delighted to deal with that also.

Q420 Chairman: Put in whose basket at the moment, the Court's or yours?

Judge Vesterdorf: The Court of Justice, with the acceptance of governments, has sent that competence to this Court, our Court.

Q421 Chairman: I see. Are these complaints by Member States against Community institutions across a wide field?

Judge Vesterdorf: No, those are cases introduced by Member States against primarily the Commission but in any area of law in which the Commission can take decisions or legal acts that affect the rights of Member States.

Q422 Chairman: So you are not, as I would apprehend, looking for extra work by way of taking preliminary references?

Judge Vesterdorf: I think it should be said that if we talk about preliminary references in particular in regard to competition cases that would be only logical if our own Court were to be the appeal court. As the Court of Justice is now, the Court of Justice is the appeal court and it is quite logical that the appeal court hears the reference cases from national courts. If our Court were to become, after a possible creation of a new competition court, the appeal court it would be, as pointed out in certain submissions, quite logical that we should deal with those cases. Perhaps I should add, the number of references regarding only competition cases before the Court of Justice, which is the competent court today, is extremely low. The figures tell us it is about two to three per cent of the cases.

Q423 Chairman: I see.

Judge Vesterdorf: As a matter of fact, last year the Court of Justice received seven references on competition law, in one year it only received one and the highest number over the last five-year period was 15 references and that was in 2001. That represents two to three per cent of their caseload regarding references so it is not a major problem numerically but, of course, as indicated in some of the submissions, you must recognise that certain of the references concern at one and the same time competition law and perhaps other areas of central Community law, like free movement of capital, goods or other things. Therefore, it might, in certain of these cases, be a question of who should deal with that sort of case.

Q424 Lord Mance: I want to follow up a point you made about specialised chambers, which you discounted in respect of merger cases on the basis that they were a very small part of the work, but I think you described today some blocks of your work and the substantially

expanding trademark block. I have not got a figure down for the percentage of the overall, but competition, I think you said, was 40 per cent of the area overall.

Judge Vesterdorf: The overall workload, but not numerically.

Q425 Lord Mance: Then you described claims by Member States against the Commission coming in, I think, somewhere approaching ten per cent of those figures or perhaps a bit closer to that.

Judge Vesterdorf: Closer to that, yes.

Q426 Lord Mance: To what extent is there scope for some system of specialised chambers within the Court? I know this is not always welcome to judges and I know that in some courts, like the German Supreme Court, it is absolutely invariable, but I wondered whether you thought that might be a way forward, a possibility?

Judge Vesterdorf: Lord Mance, one of the things that has often been mentioned in submissions to you is the desirability to have a high degree of flexibility for the internal workings of the Court. Once you set down a chamber to deal with specific cases, you take away some of the flexibility that exists right now, meaning that chamber cannot deal with other cases even if it is under-employed for the time being and in other cases other chambers cannot deal with that type of case because there is too much work in the specialised area. It takes away a certain degree of flexibility. I should add, of course, when I attribute cases or hand out cases to the chambers, it is on a principle according to one after another, so to speak, but I do take due care of the workload of the individual judges, of the individual chambers and also of the expertise of any given chamber. If we have a case which is particularly urgent or important, if I have a chamber in which there are three completely new judges and they have never done such a case before it might be preferable to hand it over to one of the judges or one of the chambers that has been doing that sort of case more often. There is certain

flexibility even within the *juge légal*, I still have to be very careful with the *juge légal*, but, nevertheless, there is a degree of flexibility which we should maintain and not hinder by way of creating fixed chambers for fixed cases.

Judge Cooke: Could I mention something because it comes back to something you mentioned, my Lord Chairman; the concept of the *juge légal*. I think since their foundation both the Court of Justice and the Court of First Instance have been very conscious internally of the need to avoid putting at risk the confidence of the public in the impartiality of the administration of justice at Community level precisely because we are a jurisdiction made up now of 27 judges from 27 Member States with differing backgrounds. When one is considering the possibility of a specialised chamber or a specialised panel with a fixed, limited number of judges one of the considerations that should be borne in mind is, what consequence would that have at Community level from the public point of view if, for example, in a mergers case you have one of these big mergers with two national champions on either side and the Member State that has a big interest in one of these national champions feels it is not represented on that specialised chamber because of the way in which the rotation of judges has occurred? Although, as President Vesterdorf has said, there is no strict rule about *juge légal*, it has always been an important consideration to ensure that in the allocation of cases there is no manipulation of the allocation in a way that could incur any criticism from the point of view of national sensibilities.

Q427 Chairman: As I understand it, you will not necessarily get a judge representative of the particular national interest, it is sheer chance, sometimes you will, sometimes you will not, quite unlike Strasbourg where, of course, you are required to have a representative to answer the state against whom the complaint is made.

Judge Vesterdorf: The criteria under which we attribute cases to the various chambers must, under our rules of procedure, be published every year in the official journal, setting out under

which criteria that type of case goes to the chambers. We have split the cases up into three types: competition cases, state aid cases and anti-dumping cases in one group; we have trademark cases in another group; and the bulk of the rest in a third group. Within these three groups we have a special role which is the point of departure but with a sufficient degree of flexibility of allowing the President of the Court to make sure that it can actually work in practice once you get down to dealing and handing out the cases.

Q428 Chairman: The broad thrust of what I understand you, as a group, have said this afternoon is that really you have achieved something pretty close to the irreducible minimum time that it is going to take to deal with these cases. Are you able to offer any words of comfort, encouragement, prospect or hope to those who would like shorter periods of determination?

Judge Vesterdorf: I think I have already pointed out that the Court is very open-minded and very carefully studying all useful proposals, all the proposals which we have met and heard about in this context, and we have our internal working group constantly reviewing and checking out whether those rules really are necessary and making them more efficient. It should be said sufficiently clearly that there is a minimum time under which you cannot go even if the case is introduced in our working language, in which case there is no need for any translation at any point in time. There is a strict minimum under which you cannot really go if we are talking about competition merger cases. We have heard Judge Forwood mention that there are certain other cases in which we have used fast-track cases, for example public tender or access to public documents set by the institutions. We have sometimes been able to deal with those cases much swifter, but that is because the questions are much more limited in scope and very few pleas of law are presented and they have none of the importance that the other cases represent.

Q429 Chairman: The only way you can really achieve faster determinations is if you have less work across the board, perhaps most obviously and notably by offloading the trademark work which is a fast-growing area of your workload.

Judge Vesterdorf: That is correct. Could I use the opportunity, as I said at the beginning, perhaps to clarify a few points, for which we have found the information, that perhaps needed small corrections. On one of the points that has been made as regards the use of language, it has been indicated to the Committee that competition cases are, by far, in the majority introduced in your language, English. We looked very closely into the statistics and the statistics are that over the years since our establishment in 1989, competition cases in general represented in English is 35 per cent, the second largest group is French with 23 per cent and the third largest is German. If we look at merger cases in the same period of time we find that the same figure is 49.3 per cent of the cases are introduced in English, 22.5 in French and only about ten per cent in German and ten per cent in Spanish, which is slightly surprising but at least those are the figures, so it is not about three-quarters of the cases introduced, but it is clear that it is a clear majority across the board.

Q430 Chairman: It is clear, as we were told. President, unless you have anything else you, Judge Forwood or Judge Cooke would like to add or any other member of the Committee has any other question, we would, indeed, be grateful to receive your updated figures and I understand you are going to send those to us.

Judge Vesterdorf: We will do that.

Q431 Chairman: That would be very helpful indeed. Thank you again for coming. It has been an enormous assistance.

Judge Vesterdorf: Thank you very much for hearing us.