

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

WEDNESDAY 22 NOVEMBER 2006

MR RUFUS OGILVIE SMALS, MR ALEX NOURRY, MR TIM COWEN and
MR JAMES FLYNN QC

Evidence heard in Public

Questions 1 - 54

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WEDNESDAY 22 NOVEMBER 2006

Present

Borrie, L
Bowness, L
Browne of Eaton-under-Heywood, L, (Chairman)
Clinton-Davis, L
Jay of Ewelme, L
Kingsmill, B
Lester of Herne Hill, L
Lucas, L
Mance, L
Norton of Louth, L

Memorandum submitted by the Confederation of British Industry

Examination of Witnesses

Witnesses: **Mr Rufus Ogilvie Smals, Mr Alex Nourry, Mr Tim Cowen,** and **Mr James Flynn QC**, Confederation of British Industry, examined.

Q1 Chairman: Good afternoon and welcome. Thank you for coming. I know that two of you have given evidence to a sister committee before, so you know the form. The evidence will go on the web in its uncorrected form, but you will have an opportunity to correct your evidence. You have all had copies of the questions around which we shall be inviting your assistance this afternoon. I understand that you have also all been given copies of the written evidence that the committee has already received, I think from 16 bodies so far, yourselves apart. Obviously we have well in mind your brief of 15 June on this proposal on which we thought it sufficiently important to assemble and embark on this inquiry. Mr Ogilvie Smals, you are, so to speak the leader of this team. Could you care to introduce yourselves as you wish?

Mr Ogilvie Smals: I am Rufus Ogilvie Smals. I am Chairman of the CBI Competition Panel and Head of the Legal Department of GKN plc.

Mr Cowen: I am Tim Cowen, General Counsel and Commercial Director of BT's Global Services Ltd.

Mr Nourry: I am Alex Nourry, a partner in the law firm Clifford Chance.

Mr Flynn: I am James Flynn, barrister in private practice.

Q2 Chairman: Perhaps we can start with an overview of the problem, as matters stand, and what it is that you are hoping to achieve. The majority of proposed mergers are, as we know, cleared by the Commission. What proportion is not and how many mergers have actually failed because of the length of proceedings thereafter before the CFI?

Mr Ogilvie Smals: My Lord Chairman, would it be in order if we were to make a very short opening statement, just to put the whole subject in context, and then I think a lot of the detailed questions will follow?

Q3 Chairman: Yes, please do that.

Mr Ogilvie Smals: First, I would like to thank you, on behalf of the CBI, for this opportunity to address the committee and indeed to thank the committee for deciding to conduct this inquiry into what is a key area of concern for business. The CBI Competition Panel identified this topic as a priority area for reform in late 2004, following the Court of First Instance decisions in a series of merger cases, notably *Air Tours* and *First Choice*, overturning in each case the European Commission's decisions to block them. Unfortunately, none of these mergers could be saved, and indeed no merger blocked by the European Commission has ever been revived, notwithstanding successful appeal to the CFI. Why is this? The brief answer is the time currently taken by the appeal process before the CFI. There was a lot of undisputed data about this, but the experience to date is that 10 months is to be expected as the minimum

review period, even under the fast-track procedure, which has been operated by the CFI since 2002. We understand from the CFI itself that no reduction of this period can be expected under existing arrangements. Our members believe that no merger is likely to survive an appeal period in excess of six months, and that three to four months should be aimed at as being the norm. There are a number of reasons for this, not least there is the time value of money. It is just arithmetic to point out that the cost of €1 billion is over €100,000 a day and more than €20 million over six months. This represents a very significant loss for the vendor, and delay also equates of course to increased risk for the purchaser. In the case of large mergers, speed of execution is essential in order to maximise synergies and efficiencies, to maintain customer credibility and to capture market opportunities. Equally, it is essential to minimise the damage caused by uncertainty, such as loss of key executives and contracts, and thus significant losses of corporate value. For all these reasons, mergers only have a limited shelf life. In looking at the responses which the committee has received, there is some variation in views as to the root causes of the timing problem, but we have seen no comment from anyone that the current system is satisfactory. Unusually, there appears to be universal consensus that something needs to be done. The real issue here is what. As this session proceeds, I am sure we will get immersed in the detail of what can be done, but, as a preliminary comment, the view of CBI members is that the reform of the EU court system is unfinished business, long overdue, and it needs to be tackled as a high priority in response not just to this issue but also to other dynamics which are looming. These include: the large number of pending cartel investigations triggered by the Commission's leniency programme, which will find their way through to the CFI in due course; the effect of the *Sony Bartelsman* case, which can be expected to result in an increased number of third party challenges to the European Commission decisions; the expected increase in private remedies cases, which could trigger a significantly higher level of references; and, not least, the significant

enlargement of the EU, which can also trigger more work for the EU court system. For all these reasons, this is the right time for the organisation of the EU court system to be reviewed and its resources reconfigured so as to be more responsive to the increasingly important role they are likely to play in the years ahead. The CBI has consulted widely over the last two years, and has looked at various possible solutions. What the business community is looking for, however, is an effective solution to the current situation in which the time involved deprives the appeal system of any transactional value. The CBI is not wedded to any particular solution, though it does seem to us, from all the consultations that we have participated in, that the creation of a new judicial panel of the CFI offers the only fully effective means of achieving the necessary changes. That is our opening statement.

Q4 Chairman: That is a very helpful statement and a good framework within which to unpack some of it. Roughly what proportion of mergers, and presumably we are talking about mergers that have to be notified under regulations, are actually cleared by the Commission?

Mr Ogilvie Smals: The number of actual mergers cleared in the first phase and second phase is the vast majority. What we have obviously focused on in our consultation exercise is the number of mergers which have been prohibited which, since 1995, I believe is a figure of 19, of which 10 have been the subject of appeals, and of which four have been successful; the mergers did not take place.

Q5 Chairman: All were aborted. I suppose we are only talking about the four because the others failed either at first instance or on appeal.

Mr Ogilvie Smals: Yes, or they were not appealed.

Q6 Lord Lucas: Looking back at those four mergers, have not the companies done better since separately than they would have together?

Mr Ogilvie Smals: We have no particular brief for those companies. The short answer is that I do not know, but I suspect that if Mr Air Tours was here, I do not think they would agree with that. I think they were nearly ruined.

Q7 Chairman: The statistics you have given us are Europe-wide. They are not just ones involving UK companies.

Mr Ogilvie Smals: They are not just UK companies, no. Of the four, I think two were French, one was British and one was American.

Lord Borrie: May I ask Mr Ogilvie Smals, given the statistics which are Europe-wide, as you have explained, we are dealing with cases where *ex hypothesi* the Commission has said that the merger ought not to take place because of significant adverse consequence to competition. We are talking about those cases where the Commission has, as it were, condemned the merger as undesirable. You are saying, perfectly properly, that despite that decision, some of them might be desirable, highly desirable, for the economy of Europe and there is a need for appeal/review, whatever it is, so that the matter could be looked at again. The time factor is the key concern that you have, even if it is a very small number of cases. This is still a question. I am sorry to be lengthy but I am trying to get at what you have been saying in your opening statement. We are dealing with a very small number of cases and you are suggesting a huge, if I may put it that way, solution, which is not improvements in existing procedures but the setting up of a completely new court, a judicial panel, a new composition and all the rest of it. Is that not rather an extreme solution to the smallness, year by year, of the issues you raise?

Lord Clinton-Davis: And will that not lead to further delay?

Q8 Chairman: These are very big questions.

Mr Ogilvie Smals: How much time have I got? I put it this way. I do not think it would be right to assume that it is a very small problem because there are only four cases which were overturned on judicial review. The system we have is more like a judicial inquest than a judicial appeal. The business community knows this and so I am afraid that the actual position is that because it is generally perceived that there is an ineffective and unhelpful judicial review process, people are not actually using it. I think that does raise wider issues of whether that is a desirable position to be in. On the question of making it worse, I take it that the idea that Lord Clinton-Davis had in mind was that there would be a new level of appeal – is that correct – and that instead of having an appeal to the Court of First Instance and then, in exceptional cases, to the European Court of Justice, there would be a hearing before this new competition court and then an appeal to the Court of First Instance, we would suggest on matters of law only, and then, in exceptional cases, to the European Court of Justice as now occurs. We believe that in most cases the prospects of appeal, and it would be presumably by the European Commission, are not great. Certainly, I think the nature of mergers proceedings is that people want to get to a result and then, if that result goes a certain way, the timing factor again comes into play and it is highly unlikely that people are going to pursue endless appeals, given the values involved.

Mr Flynn: From a practitioner's point of view, there are two points. It may be that you will want to come back in more detail to the system of possible appeals. It seems to us that because it is very difficult for parties to bring appeals and to know that they will get a result in a useful time, there is a sort of suppression of appeals, which in turn feeds back into possibly poorer decision making. There is a value to speedy review and the possibility that it should be there to encourage the Commission to come to more balanced decisions. We are talking not only of prohibition decisions but actually also clearance decisions. Mr Ogilvie Smals has mentioned the *Sony* case, which is actually a challenge to an unconditional clearance by the

Commission brought by a third party. I think a more effective judicial review system leads to better decisions in the first place. You will have seen some figures from the ICC in the evidence as to possible future levels of appeal if the system were improved. I think our general feel is that it is hard to be cut and dried about that, but those figures seem accurate.

Q9 Lord Mance: I think my question has really been covered. You are saying that the chilling effect of an ineffective appeals system is not just surmise; there is some evidence of what is said by the ICC?

Mr Ogilvie Smals: Yes. I think they said that they would anticipate the figure of 27 cases, or of that order.

Mr Flynn: It was of that order. They exclude from their calculations certain types of decisions, including those under which the Commission decides whether or not to refer a merger to another national authority, which is a type of decision which is increasingly coming up for appeal.

Q10 Lord Lester of Herne Hill: Obviously later we will come to consider various ways of tackling this problem, including whether there should be a special court. I wonder what you would say about the evidence given by Sir David Edward when he points out that competition lies at the heart of the European Union and that there is no very clear subject just called competition which does not overlap with constitutional and wider issues. If that is right, is there not a problem about creating a new court with a defined jurisdiction, which immediately gets into problems about overlap and conflicts with other parts of the European Court of Justice, and therefore more wasting of time while jurisdictional disputes and conflicts have to be dealt with because of the overlap?

Mr Nourry: We do not believe there will be a difficulty in untangling competition cases from mixed cases. I think Sir David Edward does acknowledge that in his paper, in fact. He does

say on references, for example, from national courts, that those are fairly clear cut. We think that in cases of mergers or other competition cases which have been decided upon by the Commission, those cases will need to be even more clear cut in terms of the subject matter. We do not really see that as a fundamental issue.

Q11 Lord Lucas: I am finding myself confused by the figures. I thought I understood you to say that there were 19 refusals by the Commission, of which 10 were appealed. That seems to me a pretty good rate of appeal and there does not seem to me to be any evidence there that appeals are being put off. To have a greater rate of appeal would sound like a system which was being abused.

Mr Ogilvie Smals: We have to be careful about the statistics because there are various categories. I think that 19 were mergers that have been blocked. There are also other decisions. There are obviously thousands of cases but we were just talking there about mergers actually blocked. There are other mergers which are subject to approval with conditions and all sorts of things.

Mr Nourry: I do not have the figures to hand. There have been about 215 mergers which have been approved conditionally. Some of those have been the subject of appeals. As we said earlier, it is not just the parties themselves to the merger that may be concerned but, as we have seen in *Sony Bartelsman*, you also have third parties bringing actions. We do see the incidence of appeal to be potentially greater than the statistics would suggest. Also, we are looking back over a period since 1990, so it is quite a considerable period, and over that time the incidence has actually been increasing, coinciding I think to some extent with a recognition that the Court of First Instance has shown itself prepared to strike down Commission decisions.

Q12 Chairman: Have any of the proposed mergers or acquisitions in fact aborted during the process of the Commission's inquiries and decision as a result of imposing conditions and so forth?

Mr Nourry: It is very difficult to get statistics on those because those cases are not necessarily counted, but anecdotally we know that cases do get abandoned at the end of phase two. The *MCI WorldCom-Spirit* is one case in particular. That still was appealed on a point of principle.

Q13 Chairman: Of the ten overruled which appealed, are they mostly at the end of phase one or phase two?

Mr Nourry: They are all phase two cases.

Q14 Chairman: How long does it take to get to the end of phase two?

Mr Nourry: It would take five to six months if everything goes according to the clock. Sometimes the clock gets stopped. You have the *Oracle/PeopleSoft* case, for example, which went on for considerably longer than that.

Q15 Lord Jay of Ewelme: Mr Ogilvie Smals, you said in your introductory remarks, for which many thanks, that you were not wedded to any one particular solution but you thought that a judicial panel was the best. I wondered why you had chosen the heaviest mechanism rather than a lighter one, such as possibly the creation of specialist merger chambers within the Court of First Instance, or indeed streamlining or speeding up the operation of the Court of First Instance itself?

Mr Ogilvie Smals: I would predicate my comments by saying that we did not really see our role as being the guys who would come along with an expert solution to the problems. We are coming here really from a business perspective to try and persuade you that there is a very

serious problem here. Having said that, we do have a certain amount of expertise on our team. We have consulted widely. I think the short answer to the question is that, in looking at the various options, we did look at three main solutions here to this problem. The first solution that we considered was some form of improvement to the existing fast-track procedure. We do not set out to change the world unless we have to. We thought that the easiest thing to do is to look at the existing fast-track procedure and see if we can slice some time out of that. We did have an informal meeting with the President of the Court of First Instance. His view to us was most categoric, and I think he subsequently made public statements to the effect, that he could see no scope for any significant reduction in timings under the existing fast-track procedure. Mr Flynn may want to add something as a practitioner.

Mr Flynn: I think that is right. A strong support for this is the fact that the President of the Court of First Instance himself believes the setting up of a Competition Court is going to be the best solution. He has tried very hard, I know from my own experience, to reduce the time available. The record is an appeal seen through in just under seven months, I believe. He has said that he does not think that can be improved. In particular cases, one can chip away.

Mr Ogilvie Smals: It nearly killed them.

Mr Flynn: Yes. You can chip away at length with pleadings and persuading the parties to narrow the issues but ultimately you are going to take six months. On the chamber issues, having a specialist chamber seems to cause immense organisational difficulties. You probably in fact have to have two chambers, and it is quite difficult with their case loads to dedicate those chambers to competition work.

Mr Ogilvie Smals: That is the second option. The terminology is slightly confusing here. People generally refer to creating a chamber of the CFI which would be dedicated to competition matters. That is the second option that we did look at very closely. It seems to

us that the drawback, and I know that you have had a wide range of comments on this, with that solution is that you would still be dealing with the CFI and the CFI's procedural rules. We believe that the root cause of the problem is the CFI's procedural rules. We cannot see how that solution actually offers an answer to the problems we already have. It just seems to be moving the deckchairs on the deck of the sinking ship.

Q16 Chairman: You could change the procedural rules.

Mr Ogilvie Smals: There are difficulties about changing the procedural rules, which are almost as great as the third solution, which is the one we do think seems to offer the most effective solution, which is setting up a judicial panel under 225a, or the provisions of the Nice Treaty, which gives everybody the opportunity to make a fresh start with tailor-made procedures that address the urgency of competition cases.

Mr Nourry: May I add the point that the additional advantage of the panel is that you would also be able to bring in additional resources to the court to deal with the burden of the caseload, which would also contribute to the speeding up of dealing with the cases.

Q17 Lord Norton of Louth: I come back to the issue of costs where you mention there is a serious problem. That might derive not simply from the number of cases but the actual cost of not being allowed to merge. You mentioned a figure earlier, which I think was related to the estimate of the cost resulting from delay. I wonder if there is any wider estimate of the failure of firms not being able to merge because they have had to abort because of the process?

Mr Cowen: One of the points that people tend to dwell on is that this is about mergers, which looks like companies getting bigger. Things that are caught by the merger regime also involve companies being able to restructure and reorganise themselves. If there is a system, as we have at the moment, where that is being done in some ways imperfectly, that is going to

affect how the organisation of the economy is actually taking place. The wider consequences to the economy are very difficult to identify, obviously. In one case that we were involved in, we looked at the synergies on the transaction that would have provided efficiency benefits and from an economic point of view that is something which would naturally be passed through in the process of competition to consumers. The synergies on major transactions can be tens, if not hundred, of millions. You would see that in the form of efficiency gains, in the form of quality improvements, and also in price reductions. Quantifying that is a devilishly difficult task but its one of those things that is quite clearly the case. I would like to pick up on another point which is also about the consequences. I think your point is really about the consequences of delay. It is not simply the case that you have delay within the system on appeal. Obviously the merger regime, particularly as a consequence of globalisation, is one of a number of merger regimes that may be applicable to the transaction, if you span a number of different jurisdictions. Delays in getting to a decision are obviously an issue in the first place. If there is a delay in being able to take an appeal, and on average I think the statistics show something like 33 months, it is little wonder that there are not many appeals. The issue is to keep the transaction and the restructuring and the efficiency benefits, the sorts of things that may well go through, going.

Mr Ogilvie Smals: I do have some statistics which we have managed to get hold of from our supporters, which may be of interest in answering the question as well. In the *Air Tours* case, they have lodged an application for compensation for damage caused to it by the Commission's decision. We are only relying on press reports, I am afraid.

Q18 Chairman: Did they win and then not go ahead?

Mr Ogilvie Smals: Yes. We believe they are suing for compensation and they are claiming three years' lost profits from *First Choice* and abortive bid costs of £10 million. The claim also includes £35 million of annual synergy benefits and interest at 8 per cent. In the

Schneider Legrand case, they have lodged an application for compensation of the staggering figure of €1.6 billion. That is on account to it being forced to unwind its €5.4 billion acquisition of Legrand. The figures are staggering.

Q19 Chairman: These are very large claims. We are not going to decide them, happily. Mr Cowen, your figure of 33 months I think goes way back until before the fast-track procedure. It seemed to me amongst the great deal of evidence we have that one useful thing was the table prepared by Mr Roth, Queens Counsel, of the fast-track procedure cases. This is in fact the 12th item of our evidence. Under the fast track, there is a span of between 7 and 12 months for the last seven cases. Presumably that table would not be disputed. I have seen figures that vary by a month or so, but then these are round figures and you can compute it to different periods, obviously. Is that about fair, is it?

Mr Cowen: I think that is entirely fair.

Q20 Chairman: I want to put this in a modern perspective. We do not want to pretend that the problem is as it was before the fast-track procedures.

Mr Cowen: May I clarify this point? That is entirely fair when it is a fast-track procedure. If you were to look at something like the *MCI WorldCom* case, which took considerably longer, I know that the number is probably in our bundles, and a number of other cases, those have taken considerably longer. It depends on whether the parties are willing to make an application for expedition in some ways. If they have abandoned the transaction in the meantime, perhaps their interest is affected by that.

Mr Ogilvie Smals: We know, for example, in *GE Honeywell* that the period was four years to get to the end of the CFI proceedings. These time limits do depend on the fast-track procedure being granted to the parties.

Q21 Baroness Kingsmill: It seems to me that one of the things you are getting at is the big discrepancy between the judicial timetable and the corporate timetable, that mergers are things which need to take place relatively quickly and there needs to be a relative element of certainty as far as the parties are concerned. In fact, certainty is probably more important than anything else, it seems to me. I wondered if you had had any evidence that the current arrangements had proved any disincentive to people considering mergers at all and the length of time that the whole process was likely to take. That was the first part of the question. The second part of the question is: are there any useful comparisons with the way (and forgive my interest in this) that it compares with the British system, moving from the competition to the CAT, the three bodies (the OFT, Competition Commission and CAT) and if that is a more speedy and efficiency system that provides more certainty to the parties.

Mr Ogilvie Smals: In the first part of your question, you need to take into account the entire system from soup to nuts, which is perhaps a little bit beyond our remit today. At the end of the day, I think parties are deterred by a merger control system which seems unpredictable both as to outcome and as to length. I am not sure I can really make much more of a helpful comment than that. On the second part of your question, are there any lessons to be drawn from the UK experience, the view of the CBI is that the answer to that is yes. We know that there have been some comments in the evidence that it is not an apples-to-apples comparison, but we think there are a lot of good things that have come out of the UK system, which shows that in a sense it can be done. I heard Sir Christopher Bellamy at a public meeting saying not so long ago that at the Competition Appeal Tribunal they are dealing with matters in weeks which takes the European courts months to deal with. We are not seeking to be unfair on the CFI. We know that they have wider problems. They have the language issue. We cannot contend there is not a language issue. British people are not allowed to talk about it, of course, because it is politically sensitive but it is a major problem that the CFI has somehow

to overcome. Quite apart from the language issue, I think in the Competition Evidence to this committee they refer to the five main principles that the Competition Appeal Tribunal follows. I am afraid I cannot recite them off by heart but they are in the evidence. That symbolises or is symptomatic of their approach to the procedural challenges which these sorts of cases create. Somebody has kindly passed me the evidence of the Competition Commission. I will give the sub-titles of those five main principles: one, early disclosure in writing; two, active case management; three, strict timetables; four, effective fact-finding procedures; and, five, short and structured oral hearings. These are all basic principles which are not just hot air. This is the way the court actually operates. There are some lessons to be drawn from there and from which the European Court would benefit.

Q22 Chairman: Is it another major distinction between our own domestic system and the CFI that of course in the European scheme all states have got to be allowed to participate if they want? Is that a major difference? I do not know how far other states do participate in these major merger disputes.

Mr Cowen: I think the answer is yes. There is a question of language, which does cause delay. This partly answers a question raised earlier as to why the suggested solution is perhaps, we think, the better of the ones that have been considered. The language is part of the issue of delay but we think that there are three things that actually cause delay. One is workload, and if there were a panel, you could perhaps have new people and that would give you more capacity, so that would address that sort of issue. The next question is really expertise. Whilst we are not suggesting that the quality gate should be changed, the criteria for becoming a judge should not be changed, if when considering the potential applicants, a decision were made in favour of those that had expertise in the area, that would obviously be an easier thing because those with expertise can deal with things more quickly. Also, with new procedure rules, because we are dealing with a new judicial panel, perhaps they could

tailor the rules to the specifics or the relevant types of procedures that relate to competition matters. The sorts of things that are in the CAT in the UK could then be more relevant, and that would not be the case in relation to other forms of change.

Q23 Lord Lester of Herne Hill: Obviously, to use that horrible word, all stakeholders, including the business community, have a strong interest in improving the procedures of the court, and others could make exactly the case you make in their own areas. Of those who have given evidence to us so far, the one who actually has the inside experience of what is wrong is of course Sir David Edward, since he actually served on the court. In his characteristically precise evidence, what he tells us is that it is quite unacceptable that the courts are in a procedural straightjacket, that it depends upon consent of the Member State to change its rules, and that there are various bottlenecks; many of them, and he thinks the most significant, are attributable to the parties who clutter up the court with unnecessarily long-winded and prolix arguments and documents. His evidence is really an argument for case management, which you have mentioned, and changes in the rules. If one goes back therefore to Lord Jay's question a few moments ago, why is that not a more sensible and proportionate way of tackling the problem than creating yet another chamber, yet another court to add to the existing mess, if I can put it that way?

Mr Ogilvie Smals: I will ask James Flynn, who is a practitioner, to respond to that. He has more direct, hands-on experience of this.

Mr Flynn: I hope not on the basis that I know something about the prolixity! There is, my Lord Chairman, a lot of truth of course in what Sir David Edward says. It is very true that many competition cases are packed with annexes and are extremely lengthy, and there is no doubt that they could be pruned down and the Court of First Instance could be more forceful with parties. I think, though, that what the court is saying, through Mr Vesterdorf, is that even

with all that and in the best case they have been able to manage, it is, as Mr Roth's table says, seven and a half months. Our starting point really is that that is just too long.

Q24 Lord Borrie: Exactly on that point, six months is regarded by the CBI as the maximum period before review if a potentially desirable merger is not to be abandoned. How do you reconcile that period of six months with the inevitable, correctly inevitable, procedural requirements for a fair hearing and preliminaries so that everybody gets a chance to have their say and so the decision at the end of the day is therefore a better decision, plus of course taking into account the risk that there is very often a party to the proceedings who does not want the merger to go ahead and therefore every opportunity to delay will be taken? How can you suggest that a new procedure is going to be any better at keeping within the six months than the expedited attempts of the CFI to achieve such?

Mr Ogilvie Smals: This goes to the root causes of the problem. I think Sir David Edward did allude to this in his evidence that really the language issue is taking up a huge proportion of the case time. The time is not being spent on making sure that people have enough opportunity to raise their arguments and to respond to the arguments of others. A huge proportion of the case time is being taken up by this single issue of language. To us, that is the core issue that has to be addressed here. There are no two ways about it. Just in terms of the timing, we say six months and they say they have done a case in seven months. We do not believe that, and we have been told indeed by the court itself that seven months is a not regularly achievable timeframe. They said that that was absolutely exceptional and they doubted whether they could ever replicate that time. More realistically, we are looking at 10 to 12 months. I would say that, in addition to that 10 to 12 months, you have to remember are some other add-ons because what the CFI process ends with is remittance back to the European Commission for another decision. It is not the end of the story. You have to add on that as well.

Q25 Chairman: That is one of the suggestions, that it could be made the end of the story. The CFI could be given the power themselves to take the decision. That is another story. *Apropos* of what Lord Borrie has raised with you, paragraph 4.6 of Sir David Edward's evidence was that he suggested "parties might be faced with a choice between an expedited hearing on a limited number of arguments and a fuller hearing on every possible argument. This seems to me to be sensible *provided* that no-one has an interest in preventing the merger by delaying the hearing". In the ordinary way, who does have an interest in delaying? Presumably the Commission, who have of course refused in the first instance, are not trying to filibuster; they are not trying to obstruct a fair hearing of the review process upon their decision. Who is trying to do that?

Mr Nourry: In a contested bid situation the target for example may be trying to prevent itself from being taken over, so they would have an interest in opposing a transaction. You also have third parties, in the appeal for example in the Sony/Bertelsmann case, which has resulted in a JP being reopened which was previous cleared up to two years, which is obviously not good for certainty.

Mr Flynn: On a point of information, the option mentioned in that paragraph is one which the CFI already offers. It is already possible for the party to put in a full application and say, "If I have expedition, I only wish to argue grounds one and two".

Q26 Chairman: In the roundest terms, in what proportion of these cases that get before the CFI is somebody trying to delay?

Mr Nourry: They tend to be contested mergers where you have a fairly concentrated market, so in the *GE Honeywell* case, for example, you had two or three interveners.

Q27 Lord Bowness: I do not want to labour this procedural point. If, as I understand it, procedure is the problem, and I equally understood you preferred the idea of setting up

a judicial panel, you were endeavouring to try to change the procedures of the CFI. It seems to me that if you set up a judicial panel, the rules of procedure have got to be agreed by the Court of Justice anyway and then by the Council. If you follow the precedent of the Civil Service Judicial Panel, they follow the rules of the Court of Justice until they have got their own. I do not know what the position is with that. Does that not emphasise the point that if you have got to go through that routine, then you ought to start with the procedure of the CFI? You are going to have the same problem with the judicial panel when you set it up.

Mr Ogilvie Smals: If I may respond to that, under the Treaty of Nice it is not a loophole as such but the one glimmer of light in the proceedings is that if a judicial panel is established, then it has to have its rules of procedure approved by the Council acting by qualified majority vote. You would not have to get unanimity of the entire Council. That is seen as being, in a case like this where there is not a disagreement that something needs to be done, a clear issue. One does not hear anybody anywhere saying that this is not the problem. The real hurdle is for the Council to decide unanimously that a judicial panel needs to be set up, but, once you have got over that first hurdle, one would hope that the procedural rules would be a lesser problem. I think, frankly, if they were just to replicate the CFI procedural rules, then it would be a nonsense. I certainly agree with that. It would be a complete nonsense. We would be getting nowhere fast. We see several benefits of the judicial panel. It can set up its own procedural rules which are tailor made for competition cases and the urgent issues that arise. It would also create, as Mr Cowen was saying, greater expertise in the field of competition law. So there are improvements on several different levels, as well as being much quicker.

Q28 Lord Mance: Going back to the question of language, looking at Sir David Edward's paper, firstly, he does not seem to identify it as one of the major problems, but, secondly, he is quite clear in paragraph 3.1 and the ensuing paragraphs that it would be a very difficult

problem to solve by agreement between Member States and it would be no easier in relation to a Competition Court than it would be in relation to the CFI. It seemed to me also on the subject of procedure that that may apply; a judicial panel can set up its own rules but only within the limits of its statute. If Member States would agree to greater flexibility there, then perhaps they could be persuaded to agree to greater flexibility in relation to the CFI. One is back to the basic point: are there not simply other ways of cracking this nut?

Mr Ogilvie Smals: I assume, and maybe I should not assume, my Lord Chairman, that the committee is going to take evidence from members of the CFI itself. I would urge you to listen to what people such as Judge Vesterdorf actually have to say about this. He has been very clear with us. We were greatly influenced by what he had to say.

Q29 Chairman: Yes, but if ground is given there, you would be as happy as anybody? It is the end product in which you are interested rather than the route by which you get there?

Mr Ogilvie Smals: Exactly so.

Q30 Chairman: As for the composition of the proposed court, we are looking at Article 225a and that requires members of the judicial panel to be chosen “from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office”. What qualifications here is one looking for and should one be looking beyond lawyers as members of this court? Is that a possibility, a good idea, or are we really basically going to be stuck with competition lawyers? That is not for Mr Flynn to answer!

Mr Ogilvie Smals: I will not ask Mr Flynn to answer that. My Lord Chairman, as I read the Treaty of Nice, I do not think it precludes the appointment of non-lawyers to the position of members of the judicial panel but from the point of view of the CBI and as, if you like, a stakeholder in the process, it does seem to us that the primary role of the judicial panel, if it is set up, would be to conduct what is actually a legal judicial process. We believe that people

entrusted with that task need to be selected on merit and to have relevant experience. If that relevant experience can be found outside the realms of competition lawyers, then so be it. In the business community, I do not think we have a particular axe to grind. We do see non-lawyers sitting in competition bodies elsewhere in other countries, and also at the CAT of course.

Q31 Lord Clinton-Davies: What about the possibility of national competition judges being seconded?

Mr Ogilvie Smals: Our response on that is that we do not have a problem with that from a business standpoint. The caveat we would register, though, is that we do not think it would be a good idea for national judges to come and go as they please. If they are going to spend some time, it ought to be for a decent period. What we would have in mind is certainly probably three years or so under secondment. We think that would be a healthy development and that that would be part of the capacity-building in the adjudication of competition law matters, which we think is entirely welcome and helpful.

Q32 Lord Clinton-Davis: Is that secondment based on experience or not?

Mr Ogilvie Smals: It is not based on experience. James, are you aware of any secondments currently that take place?

Mr Flynn: It is not possible in the Community system at the moment. That would be an innovation.

Chairman: I know you have *ad hoc* judges appointed for individual cases in Strasbourg but I think that is all rather different.

Q33 Lord Lester of Herne Hill: When UK judges are sent to European courts, under recent practice the post is advertised and an independent committee interviews them, certainly on

one occasion by you, Lord Chairman, but other Member States do not follow that transparent, merit-based practice when they appoint judges to the two European courts. Are you satisfied that the present process of appointment really does lead to the necessary independence and qualities that are needed on this court, to say nothing about the other European court?

Mr Ogilvie Smals: There is a fairly recent precedent, which I think did work reasonably well, which is the judicial panel that has been set up recently for staff cases. I think that came into being earlier this year, in January 2006. There was a selection process for the judges of that tribunal. I understand that it worked very well. They established a selection committee that comprised a number of people from different countries. I think Sir Christopher Bellamy participated in that. The post was advertised and a large number of applications were received, I believe it was in the hundreds. At the end of their evaluation process, they ended up with a short list of 14 names, which were put in order of merit, if you like, and sent to the Council and the Council chose the first seven names recommended by the panel. I do not believe that anybody has questioned the integrity of that process, if I can put it that way. I would think that now that a process of that sort has been undertaken and completed, that this is how any appointment to this new Competition Court would take place also.

Q34 Chairman: Is that the only instance of judicial panels being appointed under 225a?

Mr Ogilvie Smals: I believe so, yes.

Q35 Chairman: You say there were seven judges?

Mr Ogilvie Smals: There were seven judges in that case, yes.

Q36 Chairman: They sit in two panels of three I think.

Mr Flynn: Yes, I believe so.

Q37 Lord Mance: How far is that likely to be transposable to the present context? It was an admirable process, I agree with you, from what I know of it, but in apolitical context where states did not have an interest, an internal staff tribunal, would that be likely, one asks oneself, and would it be acceptable to Member States in the competition context? I do not know whether you can help on that.

Mr Ogilvie Smals: One does not know but I would think that it would be quite difficult to step away from that procedure. At the end of the day, it is a procedure which, as I understand it, is supervised by the European Court of Justice.

Mr Flynn: It was set up under Council regulation. The competition court also would be a court which would not need one judge from every Member State. There would have to be some method of whittling it down. We think it would probably be, say, nine judges rather than the seven of the staff tribunal. There certainly would not be 27. Some procedure would have to be found.

Q38 Chairman: One question we have raised with you in writing is the possibility of using economists and accountants in some fashion as assistant rapporteurs as apparently envisaged in the EU Patent Court. Do you have any views on that?

Mr Ogilvie Smals: Yes. We do not really see a sound case for that. To the extent that a Competition Court needs to have access to expert advice, then that, as I understand it, is something that is available for them to procure as necessary. If you get into a situation where you have experts who are, if you like, participating in the decision-making as opposed to advising on issues arising in the case, matters become a little confused.

Q39 Chairman: Can we move to the question of appeals? Under Article 225a, any decision by a judicial panel is subject to a right of appeal on points of law or may be specifically provided for by the decision. They can have a right to appeal also on fact to the CFI and

decisions of the CFI are exceptionally subject then to review by the Court of Justice itself. What should be the jurisdiction of the CFI to hear appeals from the Competition Court as you propose? Should it be law only – I think you have already hinted that it probably should – or should there be some scope for fact law review?

Mr Flynn: The view of the delegation is that it should be limited to appeals and it should effectively be the same system that one has at the moment in the system of appeals from the Court of First Instance to the Court of Justice. It would just be shunted down a level and so it would be appeals on points of law only.

Q40 Chairman: Then subject to a further appeal on law to the ECJ? You cannot cut that out?

Mr Flynn: You cannot cut it out but, in the terms of the Treaty, it is exceptional and for matters that go into the consistency of Community law and in general in the public interest. Those conditions have not been defined. Clearly, it would be correct for it to be wholly exceptional.

Q41 Chairman: There is no possibility of a leap-frog direct from the Competition Court to the ECJ bypassing the CFI?

Mr Flynn: That would require a Treaty amendment if it were thought to be a good idea.

Q42 Chairman: It is not available under 225 at the moment?

Mr Flynn: No.

Q43 Chairman: I think we have covered this in a way already. What about the possibility that that could, particularly if you have got those intent on delaying the overall set process, extend the timetable rather than in fact reducing it? Is that a risk?

Mr Flynn: There must be a degree of risk inherent in any appeal process but the courts have developed techniques for getting rid of unmeritorious appeals as either being inadmissible or manifestly not a ground on which they dispose of by order. The further matter of appeal would clearly be in very restricted circumstances and whatever decision is taken on the implementation of that part of 225.

Mr Ogilvie Smals: Just to give some perspective, and I think it is a question that was raised earlier, we have spoken to the European Commission about our concerns and proposals in this area. We were told that the Commission itself has only ever appealed in one case, and it lost. From the comments we have received, I do not think that this is something that features very highly on their agenda as something they would prefer to do.

Q44 Chairman: They appealed on one of the 10 cases?

Mr Ogilvie Smals: They appealed on *Schneider*, the ground case.

Q45 Chairman: This was on one of the four that was appealed. They then in turn appealed.

Mr Ogilvie Smals: Yes, to the European Court of Justice.

Q46 Chairman: The appeal went ahead but it lost. Had it already aborted, as a matter of interest, by then?

Mr Ogilvie Smals: Yes, it had.

Q47 Chairman: Once they have aborted, what is the point of pursuing the process in Luxembourg?

Mr Flynn: One might be the possibility of bringing damages actions, as *Air tours* and *My Travel*, as they are now called, have done. Even if the deal is dead, there might be reasons for pursuing it.

Mr Ogilvie Smals: I believe also that the Commission sought to argue that the scope of the review undertaken by the CFI went beyond what the CFI was entitled to do. So I think there was probably an issue of principle in that particular case.

Q48 Chairman: An issue of principle would not necessary be of much interest to the particular parties to that particular process?

Mr Ogilvie Smals: It would be of interest to the European Commission for its future handling of cases.

Q49 Chairman: They would want to carry it further. Why would it be opposed at greater expense still by the private party whose deal has already gone off?

Mr Ogilvie Smals: I do not know whether it was very strongly opposed.

Mr Flynn: There was no participation in the appeal.

Q50 Chairman: We have probably covered the next question. Dr Bishop raised the possibility of appeal direct from the Competition Court direct to the ECJ. As I think it has already been made plain, under the existing Article 225, they are not possible and it would need Treaty amendment?

Mr Ogilvie Smals: Yes.

Q51 Chairman: We turn briefly and finally to the future role of CFI, assuming it is freed of the burden of hearing first instance competition cases, should it then be given jurisdiction to hear preliminary references from national courts under 225(3)? The suggestion is that the recent decision in *Courage v Crehan* in this House might go to CFI rather than the ECJ? Do you have any views?

Mr Cowen: I think it is certainly a possibility. I would like to make sure that we have drawn a distinction between the judicial panel that would hear cases which were essentially on

appeal from Commission decisions in mergers and possibly other expedited cases. This is really a question of what does the CFI then do if it is freed up, if you like, and has more capacity. The question would then be an appeal from a national court, which would go to the ECJ. Under the system at the moment, it would have to go to the ECJ. National court proceedings, as Sir David Edward has appointed out, can be a much greater mixed question of issues under the Treaty. The first question would be whether or not you could specifically identify something that would be a matter that would be a specific area, I think in the language of Article 234, laid down in the statute that could then be delegated from the ECJ to the CFI. That would be a question that would need to be addressed. It is not really part of our proposal but we see that there is a possibility there.

Chairman: I have a question on *Courage v Crehan*. Lord Mance was in the case, so he would know better than I. I thought the question was whether by reaching a decision here, we were at risk of acting inconsistently in the Luxembourg court.

Lord Mance: The question which went to Luxembourg I think was the consistency of our rules relating to the legality with Community principles in relation to contracts which were contrary to Community law. Could someone who was a party to an illegal contract claim compensation against the other party? Domestic law suggested no but Community law said yes. There was a basic what I think it has been described as a constitutional point in the papers, which, on the face of it, was a very appropriate point, in my view, for the ECJ as the highest court.

Q52 Chairman: Finally, and in a way it is a global question, given that the establishment of a new court, a new judicial panel in the language of Article 225a, would require unanimity, it would take time to negotiate and setting it up would all take time. Meantime, what should the priority be? I appreciate that none of you think that anything short of that will cure the

problem, but, in so far as it is capable of short-term improvement and amelioration, how best to achieve it?

Mr Ogilvie Smals: We have scratched our heads to be able to offer some sort of coherent answer to this question because it is quite difficult to identify any quick fix solutions here. I did mention earlier the Competition Appeal Tribunal's five principles and maybe some review of procedures generally in the context of those five principles might be one thing that could be done. On a purely practical level, we understand that it is within the power of the CFI not to require translations of pleadings and documents in the case, certainly where the language of the case is one of the main languages. Given that the translation issue seems to be so problematic, it does seem to me that it would be a useful step in the right direction if that could be done. That is really all we can suggest as quick fixes. I have three sentences by way of a closing statement that I would like to make before we finish.

Q53 Chairman: Before you get to those, I want to pick you up on the five principles that the Competition Commission set out at page 6, paragraph 21, of their evidence. It seems to me that those are principles obviously that are very appropriate to the Competition Appeal Tribunal process. When you get to effective fact-finding procedures and short and structured oral hearings, are you not miles away from the Luxembourg processes?

Mr Flynn: Yes, that is so, particularly in relation to evidence, but at least live evidence from economists is not uncommon in competition cases. My experience is that some advance notice of the lines of questions that the court would wish to take would assist in the preparation. Naturally, hearings in Luxembourg are short, as you are well aware, but again more liaison with the parties as to what the content of that hearing should be, what points are of interest to the court and what the court has, as it were, got under its belt would be of assistance. I do think these principles, translated as necessary, could be of assistance.

Q54 Chairman: Unless any other member of the committee has any particular questions, perhaps Mr Ogilvie Smals could give his no doubt helpful closing remarks.

Mr Ogilvie Smals: I would like to say straight away that I think this would make an absolutely excellent European Competition Court in this room! Just to summarise and try to bring together what we have been saying, we believe there is not much doubt about the need for reform but it is clear that any reform will have consequences for the judicial architecture of the EU. The CBI does accept that these need to be thought through very carefully, but we believe that the time to start this process is now. We feel that this inquiry has a very important role to play in building a consensus across the EU for early action. We would ask that in its recommendations the committee does suggest that the European Commission should be tasked with preparing a White Paper on reform in this area, preferably before the end of 2007.

Chairman: It remains for me, on behalf of the committee, to thank you all for your assistance. As you probably know, we have six more evidence-gathering sessions here. That is an extremely good start from our point of view. You have set a helpful framework in which we can conduct our inquiry. Thank you very much indeed.