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DISCUSSION

EU COMPETITION LAW AND THE RULE OF LAW II: JUSTICE DELAYED IS JUSTICE DENIED

By Tim Cowen

DOCTOR MARSDEN: Welcome back. Discussion over lunch was interesting and there are so many issues on the table already, but Tim has a contribution for us. You had a chance to look through this. Tim, your views on the rule of law, economic development and the future of the European Community Courts.

MR. COWEN: Somebody asked me why did I come to write something like that. So I thought well, before I get into it, I am going to explain a bit of it.

So a real live point of view. If you go back to the early 1990s and look at what BT did, we started off with an the organization, well-known in the UK providing basic telephone services in the UK. Indeed it was known at the time as the 'land of red telephone box'. Up until about the mid-1990s, the UK was really the extent of the company's opportunity because in this country (the U.S.) BT was defined as an 'alien', and still are, and so I'm now an alien in Boston rather than an alien in New York as the song goes.

Under Section 310(b) of the Federal Communication Act of 1934, BT was defined as an alien and as a result, it was not possible to operate in this country without certain license requirements. And up until the mid 1990s those weren't granted except at the discretion of the FCC. BT made applications and we were instrumental in applying to be entitled to run a telecommunication service in the US as part of the MCI acquisition, so eventually we did gain the right to expand here. And so we sought to expand out of the UK into international markets, and the big chunk of my job at that time was talking to governments about globalization, together with the benefits of liberalization, free market, stimulus to the economy, and actually if you look at BT in the UK, it's at the cutting edge

of the liberalization process.

How did this come about? If you remember the 1980s in the UK there was a certain lady in number ten who was quite keen on liberalization and privatization. Firstly, privatizing parts of the Home Civil Service into the privatized company that became BT. And really is a good example of making money as a regulated entity and at the same time expanding internationally. This wasn't possible in many countries. It wasn't possible in the whole of Europe until we managed to persuade the European Commission and Heads of State that liberalization would be good as a way of stimulating the basic economy and improving GDP growth.

And as part of the liberalization of the EU market program, which I won't go into in any detail, was a series of pieces of legislation that granted the new liberalized market players the rights to provide data services and private voice networks, business services and eventually full liberalization of all communication services throughout the European Union. Incidentally, that legislation is going through another round of refinement from the European Parliament at the moment. So BT expanded across the EU and then we turned our attention to other countries around the world. We most recently gained licenses in places like India and many of the countries in Asia.

So the real live thing is you have a company expanding. You have that company expanding on the back of the regulatory opportunity and seeking to do business in other countries. Now the business is one of providing a data service. That business still depends on the local operator providing you with access to his wires. The buildings in any country will be cabled by the incumbent operator who is also a competitor. They will already be provided with fiber or copper and it's necessary to do a deal with the incumbent operator in order to get access. The incumbent operator is essentially an access monopolist, and that still hasn't really changed in pretty much every country around the world.

And the liberalization legislation which was originally agreed in the 1990s at WTO which applied throughout the world recognized that in seeking to impose what I think many people here would think of as nondiscriminatory access obligations on the incumbent players is a classic antitrust remedy. So if you look at BT's business, it is fundamentally dependent on access obligations to many companies who are essentially our competitors. And that represents a substantial

proportion of the underlying costs. So much of my job actually involves going into countries like Germany, France, Italy, Spain, and saying the incumbent monopoly access operator is either not supplying or supplying on discriminatory terms.

Given a quite hostile environment for investment, we started by doing a piece of work as to which countries in the world would it be worth investing. And to do that analysis, the question was well, "What is the telecommunications regime? Is it possible to enforce nondiscrimination obligations? Can we get nondiscriminatory access and expand the business? That was the first question. You will appreciate that at a glance basically half the countries in the world aren't going to be worth investing in. However we identified a number of countries with regimes that indicated some sort of enforcement pattern where it might be possible to rely on the local regime and expand the business but even if we did so, we had to answer the underlying question of the capabilities and rule of law in the underlying local legal regime.

We were rather optimistic. We thought that across continental Europe, the underlying regime would probably provide the reasonably efficient redress knowing the vagaries on the ground, we realized that you have to have an efficient court system.

So that is the background to why the paper was written; we needed to check and test and question whether the underlying court system could provide remedies to the business issues we faced when dealing with incumbent monopoly access providers.

So what I'm talking about in the paper and here in the slides is perhaps regarded as a bit academic but there is a really serious real live set of issues behind it.

Let me go through it. What I've covered in this slide pack is really the problem with the delays and inconsistencies and the procedural issues at a national level in Europe, and then the question that was raised along the way about the speed of process, and the effective negation of any remedy if you can't get efficient enforcement within a reasonable period of time. And so what I've written down here, in the problem statement is the procedural delays, consequences of delays, raise a significant impact, and I'll come to that in a broader sense than in just in telecommunications.

I refer in the next slide to a number of pieces of work that were done, one of which was a House of Lords Select Committee

inquiry. That followed the report that people at the British Institute did in the early 2000s about the inadequate remedy systems for telecommunications which was confined to just looking at those systems at national level without looking at the underlying court system. If you then look at the court system on top, that is another layer of problem. But there is a big report about that which we generated. There is also a very extensive submission to the House of Lords about the speed of process in the European court from people like the International Chamber of Commerce, IBA, CBI and a number of industry groups.

In the next slides I then go into what the issues are around the process. And I put in here options for reform. As I was talking to somebody last night, actually this is a paper which has taken about eight or nine years to develop, and the thing about the piece at the end that is where I started.

MR. CAMPBELL: You're talking about speed.

PROFESSOR FIRST: Night work.

MR. COWEN: It wasn't really, after all the study it came out this way, I discovered that the problem was lack of speed but—anyway, so the procedure today is the problem. I think it's swiftest to just to read this out for you:

“Bo Vesterdorf said in 2005 the main problem with the current system of judicial review is not its effectiveness in terms of how closely the courts scrutinize the Commission's decision but in terms of the speed of that review. The average time for proceedings in the European Court of Justice on preliminary rulings is 19.3 months. Direct actions is 18.2 months.”

Remember this is from the point of which you've been through the national court process and it's the stat going from national court to ECJ. You don't have a decision at the end but you just get a ruling out of the ECJ. So this is a middle piece of the activity.

The court of first instance is, as Philip mentioned earlier, victim of its own success because the caseload has increased and the resources have not increased, and since the caseload increased, of course it can be expected that it's going to get slower. This is a classic management consultancy problem about flow and speed of activity, and how you manage a process. However I think it does not have to be a completely linear relationship. Process and efficiency improvements could no doubt be made that would speed the system up without costing dramatically more in terms of resource. Here there is something of a strategic issue as the increased caseload will increase delays

in the absence of process improvements.

I started by looking at these issues from a narrow telecom's perspective point of view and in BT we created a correlation analysis measuring the predictability of the system and the extent of investment, which I haven't put in here but which is available on the ECTA website. This statistical correlation analysis really came out of an antitrust analysis. The theory was in saying, "Well, if this judge and this regulatory person makes a discretionary statement and discretionary decisions that will have an impact on investment." It clearly does and the analysis we did allowed us to decide which countries have a legal system that is conducive to investment and which do not. As a matter of analysis the special thing about the telecoms laws is that they were all based on the same EU laws, they were new and we could test what the variables were among all the different countries implementing the same laws. Also telecom is a great example because there hasn't been any investment absent a monopoly. So you can chart that. And so we did.

The thing that is striking is that the real differences are in the underlying legal systems. We correlated the extent of investment by comparison with how discretionary, slow, untransparent, or whatever, the local legal system was. We then got an external economist to do the statistical work. And at BT we've been following that for about eight years. That is now published with a trade association called The European Competitive Telecommunications Association (ETCA) in Europe. It has become a benchmark tool for charting and encouraging regulators to be in a sort of competition with each other—to outdo each other in being more predictable, less black box, more transparent and the like and by charting each we could understand in detail the activities that bear on investment potential.

Having done this work, what was a bit of a surprise was something that I found in the World Bank. The World Bank has been doing some similar work and all the stuff in the World Bank's Rule of Law index demonstrates that the issues that we were facing in telecoms had become much more widely understood in the development community.

This was a breakthrough in thinking for encouraging GDP growth and investment and supported the liberalization process. First in Telecoms but now more broadly applied across thinking about economic development. The thinking in the development and foreign aid communities for many years had

been about providing direct aid, food, that type of thing. And then it went through a phase of development in terms of teaching and institution building. I think more recently the Rule of Law index created by the World Bank has been demonstrating it's actually through institution building that GDP growth and investment takes place and it is the place to start. The example they use, the one about give a man a fish and he eats for a day, teach him to fish and he eats for a lifetime needs amendment. Without the rule of law and institutions to protect it then no development takes place at all. If the fishing rod is stolen by the local terrorists no one gets to catch anything. So you need to have the whole, you need the institutions in place to protect property. And I guess that's what this correlation analysis really starts off with. Recently there has been fascinating economic analysis in Latin America that takes the same perspective. I forget the name of the economist, who did very similar work by creating land rights to protect and establish property rights as the starting point for creating sort of capitalist or home-owning democracy.

PROFESSOR WALLER: I think you're thinking of Hernando DeSoto.

MR. COWEN: Exactly right. Whether it's proven or not is another question but we have shown that it probably works in Telecoms. In the next slide I put in the correlation analysis, which essentially tends to show that the greater the predictability of a legal system, the greater its propensity to increase GDP. That is not fact surprising really. You're not likely to invest in a place where you think you may get all your money stolen.

One comment that has been made to me after I wrote the paper was that this was nonsense, because hot money has gone in and out of developing countries to various different parts of the world over the last two or 300 years and it hasn't done that on the back of a robust legal system. I think the response is that if you look at hot money by definition, it can go in and out very quickly and if there is a problem with a local legal system, hot money leaves fast. This may be more true of financial markets such as exchange rate trading than of long term investments in infrastructure and buildings that have to depend on the local legal system working well. Money and investment that can take place quickly and go in and out, does so very quickly. If you look at the sort of investment that BT has to get involved in, in the telecom business, it's a very sticky sort of investment. When you're digging up roads and installing wires and cables and full

systems, the exit costs are much higher.

And so the rule of law is even more important if you are generating sustainable economic growth. I think there is a powerful point behind this which is the functioning and ability of the system is even more important for serious investment decisions that relate to infrastructure builds of any substantial nature. Rule of law and predictability is critical where there is an ongoing need for the investor to still be there, which is true of the telecom business because the return you get on your investment takes place over a relatively long time. This is not true of other capital spent or high-fixed-cost infrastructure projects that do not have long-term revenues attached. The quality of a legal system is not an issue to somebody who builds a dam and turns it on and gets paid for doing the work.

If you look on the website of the World Bank you can have a lot of fun with different countries. I'll show you on one of the slides. Switzerland is at the top and at the bottom you have Zimbabwe, which is sort of what you would expect, I guess. Switzerland is, after all, widely perceived to be a very predictable, safe, central country in Europe. What is interesting is the United States has slipped. And where various countries are in the list, depending on how you choose them, you can actually search some very interesting things but you can see that better on the website than you can on the slide. I'll leave you to play with that one.

So far that establishes essentially the basic point that rule of law is important for investment. As I said before, I don't think it's really a big surprise that predictability of the legal systems is important for investment. It is something that certainly seems to be forgotten or overlooked by a lot of people making economic decisions. But it is worth thinking about all of the big issues of the day through this lens.

One thought that I had when coming here to Boston was, "Is this part and parcel of something that's gone wrong with financial markets recently?" Perhaps the enforcement side of the rule of law equation is the thing that is missing there. And we can come back to that.

Anyway, turning to the next slide, I reviewed the analysis Lord Bingham made (in the middle of the work) where he came out with his eight principles and that built on a number of very good pieces of work on the definition of the Rule of Law, which are referred to in the paper. The ABA has established a project called the World Justice Project and there are a number

of papers that have been published on definitions on their web site.

For the rule of law system to work and deliver GDP growth, you need the whole system. It is no good if the system exists but works too slowly. The question is what timing is needed in terms of speed? This is where we come to justice delayed being justice denied. I think there is a broad consensus now that the legal systems in the EU are just too slow. One of my colleagues at City University has described the European justice system as having been built in the 1800s and suitable for Jane Austen, but not much use to Bill Gates. And why would we expect it to be suitable in 2000? That is a good way of thinking about it, because it's not just that it needs to be quicker, but it needs to be quicker against the needs of a modern economy.

The modern economy moves very fast. When you look at the telecommunication business, the change is enormous. The first mobile phones were developed less than twenty or so years ago for the UK market and certainly they were a bit bigger than the small ones we have today. Who remembers fax machines? I don't know whether you still use them or not. But these things change very rapidly.

The court system takes the amount of time we're talking about here, when you look at it in this context, it is hopeless in achieving any sort of justice. It is not a reasonable timeframe. If you start with real life in a big company, the time horizon that financial markets allow management is a quarterly period. So, at the moment we're looking at a three-month time horizon within which to increase profitability and revenues; longer than three months is medium term and over a year is over the horizon. Quarterly profits and expectations are driving most every business decision in most of the major businesses around the world. And if I say to a senior businessman, well, it's going to take thirteen months from the point of which we ended up litigating a particular thing before we even get to the door of the court, court and then back again, this is just not going to get any attention. This is an ineffective system.

Whether you win or not is irrelevant. It just takes too long to find out. It is beyond the time horizon of many people in business. I used the expression 'over the horizon' as being longer than a year. I don't think that's understood by the people working in the system. I'm certain that the lack of appreciation of urgency came through from the conclusions of the House of Lords in the Select Committee hearings. The fact that the system takes a

long time seems not to be a particular problem. Indeed, it was recognized by everybody in business who made submissions that the time periods are too long and the Select Committee recognized that as well. I think it was established as a fact. However, what to do about it was not resolved, and it is remarkable that the Select Committee didn't raise any question of urgency to solve the problem.

I've listed a number of reasons for the lack of speed and delays. The reason obviously for doing that, is that if I can identify the issue then that may create a momentum to fix these things. That might speed the system up, enable the rule of law and the system to work effectively and increase GDP.

Now is the time for reform of the court system. In the EU we have had a considerable enlargement but there has not really been any reform of the court system or process. Expansion of areas of competence, increased use of legislation, harmonization, growing awareness of European law and lawyers actually applying the law inevitably increases the size and volume of court cases. When I wrote the paper, it looked like the Lisbon Treaty was going to be implemented. The UK has endorsed and supported it. I don't know whether it's going to be passed into law at the domestic level. The Irish are doing a second or third go around. So it may at some point come into law.

That raises a big question because essentially there is a charter of human rights that are enshrined and established in the Lisbon Treaty. (Whether they apply to individuals directly or not is a moot point.) But one thing that will happen, as happens with all new laws is that it will raise attention, and as attention is raised, there will be more work on those issues, and those issues will be higher up on the agenda. It is likely that there is going to be more questions in relation to a new system. All of which suggests that the court process, which is already creaking might creak further, or slow to a stop altogether.

One major issue that I touch on in the paper and the slides is the amount of time wasted in translation. There are twenty-three working languages and 380 possible different linguistic combinations. I suggested that, in the Select Committee hearings, that if the parties to the case and the judge agreed on the language of the case, then that could become the language of the case. This would make life simpler and easier for all concerned. Then that could become the official language of the decision. That idea was supported in the *Wall Street Journal* in an article by Bo Vesterdorf, at that time a Judge at the ECJ. Not

my idea. It was his. And I believe that it was his practice for some time until the President of the Court reminded him the official language required the translation through the jurist linguist process into French. So he had to stop and that is no longer I believe the practice. So for a period of time there was some speeding up. Now we are back to square one.

Bo Vesterdorf did give evidence to the Select Committee and he was asked about his comments in the *Wall Street Journal*. He responded that those were comments that had been made in his private capacity and in his capacity appearing before the Select Committee he had no further comment to make. I read that very much as being that the official position of the court was that they're not changing anything and not keen on improving the position. There we are. I understand that translation alone adds an additional seven months into the process as far as we can tell, from talking to various judges. This is not business at the speed of thought.

Of course if another language could be chosen, it would be English. I don't see why people are embarrassed to say that. It's not simply because it's my second language. It is many European people's second language. I refer in the paper to the head of the French Chamber of Commerce speaking to the present French President in English and this produced a quick withdrawal by the French President who refused to speak in English. There are some amusing anecdotes about that in the article in more detail. The situation is far too important to let misplaced national pride get in the way of growth and jobs. One thing to do would be to change the language or make it simpler for the system to operate in a single language at the request of the parties.

Turning to 'Options for Reform.' I put them into two categories: procedural changes and changes to the judicial structure. The much more exciting one is the changes to the judicial structure. I am not suggesting that we throw the process or the baby out with the bath water. The obvious point is that any system needs to be predictable and it needs to secure the unity of community of law and needs to be transparent and needs to dispense justice in a sensible way in a meaningful time period to the 21st Century.

One grave worry with tinkering with any part of the judicial system or any form of reform is that it actually might cause more problems than it solves. There is the following queuing issue which has been put to me. If you increase the attractiveness of the court process you're likely to end up with

more cases and this may undermine enforcement. Bigger queues means slower justice and you are not solving the problem along the way. I think that's a pathetic criticism and one that misses the need for speed. More cases means more opportunity to resolve more issues and increase predictability for the people and companies concerned. If there is such a level of pent-up demand for more resolution that indicates a more general failure of legislation; perhaps some weeding out and prioritization would solve that problem. We often hear of politicians taking initiatives to reduce legislation. It is clear that there is a problem and important to remember then actually what you're trying to do is increase justice.

I am not going to go into more on procedure. In looking at a way that would allow more cases to be heard with little incremental cost, I put forward an idea which I think deserves a bit more thought. Which was what I call the "Nomination System" and other people have called it a "Halfway House."

In Europe we have a domestic court system—a lot of different places under different procedures and different substantive laws working to different timeframes. We have a European court system at the top. It would be quite possible to nominate a court that could operate as a chamber of the European Court of Justice. This is now actually feasible under the Nice Treaty. I see no need in the modern, in a diverse, evolved, and open economy that the national courts could not wear a European hat. In the same way they can be virtually present in any national building that deploys the relevant technology. We could have chambers sitting in different jurisdictions and use effective technology and virtually be in any place you want to be.

So you could, for example, nominate the CFI to nominate the Competition court in the UK or an equivalent local court with appropriately qualified judges in any other jurisdiction to sit under the jurisdiction of the CFI. That's a sort of "Halfway House" which would take cases from the national jurisdiction and deal with them locally. It is not just that the court would be physically closer; if a nomination system were adopted, we would actually increase the capacity of the system to deal with cases and thereby reduce the amount of time involved. Justice could be speeded up.

I have gone through some of the benefits in the paper. Perhaps not explicitly written there here, the nomination system would ensure that the cohesiveness of community law is achieved

in another way. It would provide an opportunity for retired judges from the ECJ to work at the national level in the nominated court. This is also a way of increasing both knowledge and experience and capacity and would probably be a very good thing.

Another possibility other than the nomination system would be a circuit court type of system. I know the U.S. has those systems. We have them in the UK or have had them in the past in the UK. There could also be alternatives such as a sort of merry-go-round of judges going around different parts of Europe or some variation of the two. In the context of the Lisbon Treaty, part of the treaty requires greater collaboration between the member states, and there are systems and processes in the treaty that seek to improve decision-making powers. This would be in some ways in parallel to that sort of thinking.

I talked about language. Another thought would be simply fast-track procedures. The issue here is which court process would apply. If an ECJ chamber was operating at the national level and in order to retain the coherence of the entire EU system, it would probably have to apply European court process at the national chamber level. Otherwise, competition between national courts could take place and one set of processes would no doubt be more attractive than another. There are dangers but some degree of competition in the system might be no bad thing. It would clearly make very little sense for a chamber of the ECJ sitting in Barcelona hearing two local Spanish companies that want the case to proceed in Spanish to have to translate everything into French through the juris consults in Luxembourg.

This is a useful example because most of the cases, if not all of them, would be referred from a national court in a national language to a national judge, and deal with the case in front of him in the natural language. I have no problem at all with translation so that people could see what is being done or maybe operate in a language that we all understand. But that is something that possibly doesn't need to hold up the quest for justice.

MR. COWEN: One point. What has happened since putting the suggestions forward is that there has been some movement in the ECJ in terms of pulling some of the cases away from the CFI in creation of the trademark court. The idea is that if the court removes the case from CFI to a judicial panel, then that might do something, but it seems to be very limited in its effect, and there has been no real reduction in delay as far as I

can see.

Another thought that I put in here is the idea of creating individual specialist chambers. We can cover it in discussion if you like. So to conclude, I think we can easily summarize: something must be done and the question really is "What?"

Thank you very much.

DOCTOR MARSDEN: Other than the language issue, obviously quite a few of the issues that you raised will be familiar to scholars of other judicial systems around the world. So why don't we start with Professor Cavanagh who is going to comment on your point and open up the discussion.

PROFESSOR CAVANAGH: I must confess that I had some mixed feelings after Spencer had recruited me. I had tickets for the Yankees for opening day, which I gave up, and thank God they got hammered yesterday 10-2 so this was a better place to be.

Tim, I thought your paper was great. I enjoyed reading it. I can understand why it would take a long time to search the literature very carefully. And that's getting to be a lost art. We have too many scholars who aren't doing the work. The idea is to create what I think exists here, somewhat a treasure trove of ideas that people can cite and that's what we ought to be doing in academic writing. The nice thing here is that this is a good repository for a lot of ideas and that really adds value here. Very thorough discussion. I'm also happy in my other life. I'm a civil procedure professor, so I'm happy to deal with procedural issues, that in this case obviously complements what we are talking about, antitrust.

One thing I wanted to raise that you didn't was the threshold matter. We have been talking here today about rule of law and what does that mean. You make an interesting point. With respect to law is it good because it's a law or is it a law because it's good? Very fundamental jurisprudential question that we ought not to lose sight of when we discuss this.

And you talk about laws instrumentality. The only thing the law does is do what the law giver wants, any dictatorial system wants. Or is the law what I think, and I think should be what you think it should be, is sort of a compilation of what the populous thinks, complication of society deals. Then good, that gets codified and you make that point and I think that's good. And of course that promotes, from that flows freedom of democracy and all of the benefits that we have

been discussing.

You talked about the need for reform, and as an American I am sitting here looking at the statistics, 19.3 months in the European court of justice, 18.2 months for direct actions, 17.8 - that is not so bad for antitrust. Most antitrust in this country, if you're two to three years that is good. Many take that much longer. So I suppose in one sense it's where you come from. Now we have some things, unique problems here in the United States. Speedy Trial Act requires criminal trials to go forward within 120 days. That doesn't always happen, but the point is, in courts like Eastern District of New York where you have a heavy criminal docket, there is a crowding out effect of civil cases, and particularly complex civil cases. The individual assignment system we have. A judge gets assigned to a case, if he has a heavy workload you may get pushed back. And then of course things that you don't have like discovery, which pushes things back on the time line.

But there are different causes I guess for delaying in our system and your system. One problem I see, the language thing may be insoluble, but the merger thing is something I think has to be addressed. We've addressed that in the U.S. through expedited procedures with TROs and preliminary injunctions. And it would be good I think if you could develop a system that was like that. The reform proposals talked a little bit about procedural reforms and actually the article recognizes some of the things we tried to do in the United States. Hands-on management since 1983, the Federal Rules of Civil Procedure require courts to exercise more management. Firm deadlines, faster decisions.

You talk about the United States' system in terms of federal and state courts and power sharing, and I guess that's where we start going in opposite directions because that's not a model that you want with your nomination system, your halfway house. You're introducing a program that is probably uniquely European and maybe it's the way it should be. I'm not sure at the end of the day whether more procedure is going to be successful. And I'll tell you why.

We in the United States have had a lot of procedural reform in the 1980s and 1990s and this grows out of the recognition that pre-trial discovery is very expensive, it often drives outcome, particularly from a defense perspective, it's just too expensive to litigate this in the pre-trial phase. We'll just pay to get out. And the sense that that is somehow a form of highway robbery or extortion has pushed the courts to

do something oddly enough substantively and that's what you're seeing in the *Trinko*¹ and *Twombly* cases.

The sense, particularly you see this in the *Twombly* case, and the Supreme Court citing Judge Easterbrook saying procedural reforms don't work.² And the reason they don't work is because the party is not the court's control of discovery. The party is not the court's control of the pleadings. Judge Easterbrook said that in 1986. That is definitely not true anymore. If it ever was it's certainly not true after the 1993 Federal Civil Rules or the 2000 amendment.

But yet there is a sense now after *Twombly* that the way to deal with delay is not to address it procedurally but to address it substantively. And how do we address it substantively? We cut the case off at a time we know that we survive which is the motion to dismiss stage. Or if you survive the motion to dismiss now after cases after the *Hydrogen Peroxide*³ case in the Third Circuit, *Canadian Export*⁴ in the First Circuit, and *IPO*⁵ in the Second Circuit, if you get through *Twombly* now you get cut off at the class action stage.

So it's interesting that even in the U.S. where we have a lot of procedural law, a lot of procedural protections, the key to swiftness is now being viewed substantively, as a substantive solution not as a procedural solution and in that sense probably we may be going backwards.

Specialized courts, we may have some specialized courts in the United States. Tax courts, court of claims, but generally the concept that you should have on any given day is that federal judges in the United States are generalists, the concept you should have maybe judges specialize in certain areas is not, well, we still want to have the idea, the ideal of the judge is the generalist. There is a lot of pressure in the United States mostly from the judicial conference of the United States, which is the administrative arm of the Supreme Court.

Justice Roberts is not only Chief Justice in the United

¹ *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

² *Twombly*, 550 U.S. 544 at 560.

³ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

⁴ *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 533 F.3d 1 (1st Cir. 2008).

⁵ *In re Initial Public Offering Antitrust Litig.*, 471 F.3d 24 (2d Cir. 2006).

States, he is head of the federal court system. And the administrative conference, they like to push cases. And they like speed, maybe speed for speed's sake. And in that respect I believe antitrust cases have always been viewed as being somewhat generous.

I think your position is antitrust cases are very important to hold them up; hold up business decisions and that's not good. In the United States it's like this is the program. You get it. If you're going to have an antitrust suit it's going to take a long time. Except in the merger context where we do have expedited procedures. But I think at the end of the day I wonder the extent to which given our experience in the U.S., the extent to which procedural devices are going to create speed or if you're going to have to go to something like they've done in the United States which is certainly in my view making a deal with the devil.

PROFESSOR WALLER: We heard a reference to specialized courts. I welcome the thoughts of the people who also specialize in the IP side who have some experience with certain courts for the federal circuit, not as to the substance of the law but as to whether those having a specialized court has brought swifter justice.

PROFESSOR FIRST: I don't do IP law, but the contrast between swiftness and justice was a good one, for the Court of Appeals for the Federal Circuit. But certainly if you're trying to draw on U.S. experience there has been a lot of writing about what the effect is of having that specialized court, but I don't think the writing has been particularly on the speed of the court, but maybe Stacey can say, but more on how it's affected patent law, and I think many people are unhappy with that specialization. That said, there are apparently, my understanding is, that there are district court judges who are now tending to specialize on the trial level in patent litigation, sort of an informal specialization not one done statutorily. So there are always these tensions.

One of the questions I wanted to raise actually, something I picked up in Phillip's paper and yours as well, is that I'm wondering when we're all talking about appeals, if we are talking about the same things. And I thought about it also with Terry's comment. I have a sense of appeals as not being hearings, but just straight on the law. But when I read Philip's paper, talk about, it's not even a full appeal as opposed to what I think of as an appeal. So the context of what the CFI does as an appellate

tribunal and what the DC circuit does—which turned *Microsoft* around in four months after oral argument—you have to think about that sort of comparison is as well. You may even be talking beyond speed, asking what the functions are in this system of review, particularly if you can't count on the fact finder to have really found the facts. I just throw that out.

PROFESSOR DOGAN: I agree that the purpose, and I think the function of the federal circuit had as much to do with substance as with speed, and that it had a pro-patent design and effect. The federal circuit was supposed to bring uniformity to the patent system, and to make the patent more robust. It certainly had the latter effect, probably more than originally intended. Interestingly, from my recent conversations with patent lawyers, the perception is that the Supreme Court's correction in the last couple of years has radically changed things. So we're seeing a pendulum swing in the other direction.

On the point of specialized courts more generally, my reaction whenever someone talks about specialized courts is to ask why this class of cases is entitled to a specialized court as opposed to some other type. Many jurisdictions have specialized intellectual property courts, because lawmakers (with the "encouragement" of the United States Trade Representative) were persuaded of the need for substantive specialization as well as speed in deciding these cases. I think as a policy matter you need to make a persuasive argument as to why your particular business concern is more deserving of the speed of justice than many of the other deserving concerns out there.

MR. CAMPBELL: With respect to specialty courts, Canada has a competition tribunal, which is a specialized entity for the purpose of adjudicating these kinds of cases. It is a first instance tribunal that hears cases, so in a sense it is supervising our competition bureau, which is our enforcement agency.

One lesson is that I think there is scope to use special procedures and get an expert body to do things differently, including faster in areas where that is important. We have struggled over twenty years to do that. We started with a hybrid membership of judges plus economists and other lay experts. The judges in fact tended to control the procedure and we ended up with a very court-like approach that wasn't very much faster. However, over a period of time, there has been some streamlining of rules, procedures, and time limits, as well as proactive case management. I think we could still do more in

these areas.

The second lesson is that you need a critical mass of cases. One of the problems is getting decision-makers who are good quality appointees. Many people in Canada would not take an appointment to the tribunal because they would be sitting around not doing anything. And so case flow is needed for the specialty structure to get quality appointments. The Canadian model is a possible model for people to look at despite its imperfections.

DOCTOR MARSDEN: You can't have specialist competition courts in every jurisdiction because there isn't enough work for them; besides I'm all in favor of them being expert judges first of all, and having experience in any manner of hearings so they maintain high evidential standards, keep cases on schedule, and write clear judgments.

PROFESSOR PATTERSON: To follow up on Stacey's comment. As a patent lawyer the federal circuit is not well thought of. If we think back, between efficiency and accuracy, even if it were efficient, generally you get different panel fits with each other, paying no attention what is being said, Supreme Court constantly backing it whenever it takes a decision. Contrasted with a court chancery which is quite well thought of, and an expert business court and interesting that the federal circuit court of appeals, chancery court is more like trial court and makes you wonder if that has a role in terms of, or maybe the federal circuit is dysfunctional for reasons we don't understand.

PROFESSOR WALLER: One other issue you might want to address before you jump in. Your paper and presentation have convinced me that there is a serious problem, but you haven't convinced me that the problem is as acute in the merger area, which you seem to use as the poster boy. And the reason I say this, not because I also agree with you but that a long court proceeding is often death to a merger without regard to its competition attributes. But my real concern is, correct me if I'm wrong, but that in the real world it seems like the agency decision to challenge is the more frequent death meld to the merger or even to open a second request/phase two sort of investigation. That's where the deals often fall apart. And of course anything that lengthens that process increases the chance. But by the time you're in the court system, the parties have already made one guess about what the competition aspects are. The agency has made another guess, and whether you're the Department of Justice or the FTC seeking an injunction or the firm seeking an

appeal, it's almost too late at that point whether it's six months or eighteen months.

MR. COWEN: The option of a nomination system could increase capacity and should speed up decision-making. I tend to be persuaded that specialized courts could be a problem in EU law. Sir David Edward reminded everyone at the Select Committee that the whole EU treaty is about competition. So how can you possibly divorce one special case of another, and half the patent cases are monopoly and the other side, splitting these things up? I see huge difficulty in a EU context with that. Just increasing capacity in the current system is another thing that could be done. I don't think that would actually be as attractive as perhaps some form of decentralization.

One worry that I've got and which has actually been said by a number of judges off the record is that the capability and quality of the judges in Luxembourg in Competition law has been reduced in recent times given the lack of a history and culture of competition law in many of the newer member states.

To the point about substance solving the procedural problems, I see how that can be done. I am told that one very well-known judge has said that there isn't very much competition in Europe anyway so the easiest way of resolving all these competition cases is not to have cases going to the court. Robust case management is needed to prevent abuse of the system, and I can see that in relation to discovery there may be a temptation for the defense to use broad-based discovery as a way of slowing down cases. However, at some point robust case management raises a question of fairness and justice.

If judges are making decisions to discourage cases because they don't understand them, that's a really big problem. It is likely that there is little of that going on though and the system has many checks and balances so it would be very visible. Alternatively there are cases where the decisions are interrelated with a wider foreign policy objectives and a need to establish huge U.S. national, if not world, champions. There is no doubt that the outgoing US administration talked about the "New American Century" and was keen on *laissez faire* policies that allowed large organizations to become massive multinationals. This rationale has been put forward quite seriously behind the scenes. I think if you look at *Trinko* in particular, that could be seen to be a case where such thinking had influence. As we discussed earlier, this is not sinister in the U.S. system; the economic policies that were referred to by Scalia were prevalent

in the government at the time.

What this paper practice did was to point out the ineffectiveness of the system to actually achieve enforcement of the law. That is a really big problem. I think it's probably a bigger problem today than when I wrote it because we didn't have the same degree of economic concern. The credit crunch should make us more sensitive to the need to make sure that all aspects of the system work in a way that secures and supports economic growth and jobs.

I think that is partly an answer to the question about mergers. If you look at liberalization telecoms, water, and energy gas, which have taken place in Europe over the last twenty years, they have provided a huge focus for the single market and the market has expanded and economic growth has taken place. The speed with which the system keeps the market open is less visible than with mergers. Mergers are a great example of how some developments can be just literally stopped dead in their tracks because of the slowness in the system.

The thing about that, when we were doing evidence to the Select Committee, the question was asked "How many more appeals from the European Commission to the CFI did we think there would be, if the court process were more effective?" The answer is that it is quite a difficult thing to be able to establish. And I think that our response was well, you wouldn't want to generate a large number of appeals. The parties to mergers are not likely to do that because their incentive is to close the deal as quickly as they can.

The real concern which we pointed to on mergers is that parties to a merger will agree to a very large number of things, not because they are the right things to agree to, but because the agencies know that they can force concessions, because of the lack of speedy judicial oversight. If you look at the number of cases where concessions were given (the work was done by the ICC) and you look at the number of cases where concessions had been provided in the second stage or to avoid second-stage mergers, they're really quite substantial. What we didn't know at the time is whether those concessions were regarded as really necessary.

Certainly, my personal experience of mergers is that a number of things get asked for that are totally unrelated to any substantial concern but they give the official the ability to claim a scalp, and it is part of the price to get the deal done that demonstrates at a superficial level that an official is doing

something. Indeed there is an office in DG Comp, it's called the trophy room, where they have all of the different things that they've got as concessions for mergers. And I think that's very telling. In an objective system of justice should anyone be proud of a trophy room? That could be seen as a worrying indication of the culture that you're dealing with.

PROFESSOR GREENE: Fascinating discussion. One thing that interests me about mergers within the U.S. is the long-standing history of antitrust agency promulgated guidelines during which they have morphed, in international law terms, from soft law into something more akin to hard law.

With that as background, my question is two-fold: In the first instance, what have been the EC Guidelines' primary effects upon the procedural and/or substantive review of mergers by enforcement officials? Secondly, have the merger guidelines crystallized or otherwise articulated the law in a manner that has influenced the courts?

MR. COWEN: From my perspective, U.S. merger guidelines or what the European Commission does?

PROFESSOR GREENE: European Commission. Though I would be curious about observations regarding either.

MR. COWEN: Christian can probably comment as well. If you look at the series of procedures that are adopted by the European Commission in merger filings, they particularize those facts that are needed and on the face of it can speed things. On the face of it that can be the case but there is a lot of discretion still built into the system and failure to submit even a small set of facts can in practice be sued to argue to slow things down. Typically parties will prepare the form CO, discuss it with the officials in advance of filing in order to attempt to agree on a relevant fact base. In practice this gives officials more time before the clock starts. And that's become quite widespread in practice. This is not all downside for the parties concerned. I don't know whether it's something that others do or generally do not do, but my experience is that the period before the clock starts provides an opportunity to educate for a considerable period of time before the full procedure starts. This enables the parties to get more done in stage one. In principle, stage one is officially one month but there can be a long lead-in period. This raises the time available for third parties and whether they are getting similar time to present their case to the authorities. This may be a big issue particularly in a merger in a contested case.

I think there are real issues of the amount of time that is

available to the party by comparison with the amount of time available to a third party. I found out during the course of the first week of September 2008 that a transaction was taking place that had been announced on the 15th of August 2008 when most people are on holiday, and as an affected party we hadn't been notified of it by the Commission, and one of the external firms rang me up and said, do you know about this? This is incredible. There is a real issue for third parties to be able to make their comments known during that initial one-month period. Being wise to this, some parties have adopted a bit of a practice of doing things during the summer and the Christmas holidays, which may be pragmatic but not terribly fair.

MR. AHLBORN: I think my guess would be that the biggest impact of the Commission's behavior toward mergers at the cases subsequently brought but I can't sort of put any evidence to it is the quality of the judicial review. And what you saw was in merger cases you had a period where sort of merger did excellent work and then they overreached and so what happened, they were sort of extending theory of worse and worse and GE Honeywell was sort of probably the best example and then came a point when the court said enough is enough. And because you didn't have proper judicial review in terms of it was taking too long, parties were never challenged, the Commission completely went out of control.

You then had the Commission was whacked in 2002 a couple of times on the merger side and since then things have been significantly better. So the quality of judicial review is much more important than whatever guidelines you can possibly have.

And the problem we have at the moment is that the average quality of the judges have gone down dramatically downhill. And so for me the most important thing is how do you select judges, because I do not believe there are no good judges in the new member state—becomes a dumping ground of politically sort of people who need sort of a job and what you have ended up with is a quality of the court which leaves a lot to be desired. So the first issue you need to address is maybe to make self selection.

CFI actually has a role in deciding, determining who is going to be as part of the judges. And I think that question is much more important. Specialist courts, if you have high quality generalist, I prefer that to dumb specialists. And I think the generalist is finely tuned, and you see to some extent debate with the last two commissioners, not at court level but commission level, where you have someone now who, let's

put it this way, is sort of lightly is a generalist but what you know politically very attuned.

So what you have done in terms of positive aspects she has grounded competition policy and sort of what is political acceptable rather than what is particularly brilliant competition policy compared to the previous commissioner who was technically far superior but there you have it between generalist and specialist.

PROFESSOR HYLTON: Just a minor point. It strikes me speed and substance are inevitably linked, and that whether we say the court is making a link or not, they're going to be linked anyway. Suppose you increase the delay in the court system. That's going to have important substantive effects because people on the plaintiff's side will say it takes too long and therefore I am not going to sue, which then gives a shield to potential defendants who face a reduced risk of a lawsuit so there is less of a perceived need on their part to comply with the law. So there is one substantive effect, if you think of substance as a real effect of the law on people's conduct, then that's a way in which delay has a substantive effect.

Another argument is that as you increase the length of proceedings and delay, then people who are sued know that it's more costly to them. That has an effect on them. They say to themselves "once the lawsuit comes it is going to cost me so much no matter what I did, so whether I comply with the law or not I am going to have to pay a whole lot of money." It strikes me that is another way in which we get an unavoidable link between procedure (or speed) and substance. And *Twombly* is a case where the court openly says we're going to recognize that link. We are going to do something about it. They could have gone in either direction.

The Court has been motivated by these error cost arguments lately, particularly by the concern over false positives. *Twombly* reflects that. *Twombly* reflects a reaction to this inevitable link between speed and substance, but moving in a direction that is motivated by the concern about false positives, or false convictions, and therefore cutting off plaintiff's lawsuits quickly. The Court could have gone in the other direction and said we're concerned about false negatives instead.

It strikes me that you are going to have that link no matter what, and instead of seeing *Twombly* as a deal with the devil, I would view it as a court openly saying we are going to do something about this. As I think common law courts have

done for a long time. And there is a debate that people can have over the direction of the court. But to me the link is there. It's up to a court whether to confront it and to that extent I think it's desirable for courts to confront this link.

MR. ALESE: I think your question is whether cases going to the courts in Europe are reduced since the guidelines were issued. My take is that since the EC guidelines, just like the one you have, are not really laws and are not binding on the courts, there should be no increase in the amount of challenged cases.

PROFESSOR GREENE: Give them time.

MR. ALESE: Exactly.

PROFESSOR GREENE: Did it clarify the law in a way where it sort of, did it bring a certain clarity to what it was so people had a different sense of what their odds were going in?

MR. ALESE: I think it does for those in the world competition. But I think lawyers and economists were using most of the concepts in the guidelines before they came in officially – so no net effects, really.

Coming back to part of Tim's paper on the relationship between GDP competitor and rule of law, this is the first time in my life that I see a table in which Nigeria is below Pakistan. Usually, Nigeria always beat Pakistan to the first place in tables relating to corrupt countries and practices across the world – perhaps, we got bribed by the Pakistanis to come below them here. However, there is an importance to this table because we're discussing here antitrust and the rule of reason. GDP competitor relates to economic efficiency. Economic efficiency, on the other hand, is something that can only thrive where there is rule of law. In many developing countries, like Nigeria, the rule of law is not upheld to the same standard you'd find in Western countries. And this goes back, to an extent, to what Keith Hylton was talking about in the morning, when he defined the concept in a narrow sense.

PROFESSOR STUCKE: One thing to pick up on Keith, interplay between procedural and substantive. We were at the antitrust division after Arch Koal and where the court rejected, it required us to do then much more fact-specific inquiry and that then is very costly and very time consuming. And as you move away from presumption, even as you start moving away from the guidelines to have to even bring on tougher showing after *Oracle*,⁶

⁶ United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2005).

that is in turn going to have cost as well. So you are always, I mean to one extent, it goes back to the fundamental question about rule of reason is that yes you might have the times that you can get it correctly but then there may be attendant cost in terms of cost, delay, and the like that you need to be aware of as well.