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COMPETITION COMMITTEE****Global Forum on Competition****JUDICIAL PERSPECTIVES ON COMPETITION LAW****Contribution from United Kingdom****-- Session II --****7-8 December 2017**

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Please contact Ms. Lynn Robertson if you have any questions regarding this document [phone number: +33 1 45 24 18 77 -- E-mail address: [lynn.robertson@oecd.org](mailto:lynn.robertson@oecd.org)].

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## *Judicial Perspectives on Competition Law*

### **-- United Kingdom\* --**

#### **1. Experiences and lessons regarding the use of specialised and generalist courts**

1. A commonly adopted solution to address the difficulties that courts face when addressing competition law cases is to concentrate these cases in a judicial body with a certain amount of competition expertise. Whilst experience across countries demonstrates that effective judicial enforcement of competition law does not necessarily require either specialised or generalist courts or judges, there are advantages to specialisation. Specialist judges – either in the context of specialist courts or as part of a “competition list or chamber” of judges belonging to a generalist court – will, after some training and faced with a more regular stream of cases, become familiar with the economic concepts at the root of the competition law. On the other hand, competition law is applied in the context of a wider legal system, and it is often thought desirable that competition cases be subject to the same generic principles and practices that govern law in a certain jurisdiction, and that the risks of capture of specialist bodies be minimised.

#### **1.1. Do you have experience with generalised or specialised judicial bodies? Have there been developments in this regard in your jurisdiction? Can you provide examples of advantages and drawbacks from your current regime, and/or from past reforms affecting the specialisation of courts in competition matters?**

##### *1.1.1. The CMA’s experience with judicial bodies<sup>1</sup>*

2. The CMA’s enforcement decisions are subject to oversight by the Competition Appeal Tribunal (“CAT”) and the appellate Courts.<sup>2</sup> In addition, applications by the CMA for certain orders supporting its enforcement functions are made to the High Court of England and Wales.<sup>3</sup>

3. The CAT is a specialist judicial body, with a cross-disciplinary expertise in law, economics, business and accountancy. It has a President (Sir Peter Roth), and a group of legally qualified Chairmen (including judges who also sit in the High Court), and a group of other members drawn from academic, administrative and professional backgrounds. Its functions include hearing and deciding appeals of CMA decisions under the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union, and reviews of mergers cases and markets investigations under the Enterprise Act 2002.

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\* Submission from the Competition and Markets Authority.

<sup>1</sup> This refers to our experience in relation to civil enforcement cases, excluding criminal cases and other public law challenges.

<sup>2</sup> The Court of Appeal (England and Wales), the Court of Session (Scotland) and the Supreme Court of the United Kingdom.

<sup>3</sup> And to the Court of Session in Scotland.

4. The appellate Courts are judicial bodies with jurisdiction over appeals on issues of law arising from CAT decisions. Appeals are made on the basis that the decision was either *wrong* or *unjust* because of a serious procedural or other irregularity in the proceedings. Further appeals from judgments of the Court of Appeal are to the Supreme Court, but only where the appeal raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time.

5. The High Court is an ordinary court of first instance, but its judges include competition specialists, namely Sir Peter Roth the President of the CAT and twelve of the CAT's current Chairmen.<sup>4</sup> In relation to the CMA's enforcement functions, the High Court is responsible for the issue of warrants for the inspection of premises during investigations under the Competition Act 1998, as well as the issue of competition disqualification orders under the Company Director Disqualification Act 1986.

### *1.1.2. Developments regarding judicial bodies*

6. The framework for challenging competition enforcement decisions has not materially developed since its inception in 2000. The Competition Commission Appeal Tribunal was set up as a specialist body to deal with appeals from the CMA's predecessors, and became the CAT in 2003. The original CAT Rules 2003 were updated in 2015, but none of the changes specifically relates to appeals against CMA decisions.

7. In contrast, there have been major developments in the CAT's jurisdiction with respect to private claims.<sup>5</sup> The Consumer Rights Act 2015 added significantly to the CAT's functions: the CAT can now (a) hear any claim for damages in respect of an infringement, whether or not there is a prior decision of a competition authority ("stand-alone claim"), (b) hear collective actions on an opt-out basis, and (c) grant injunctions.<sup>6</sup>

8. To support this enhanced jurisdiction the CAT has developed its procedures relating to private cases, including in the 2015 Guide to Proceedings and a Practice Direction relating to the disclosure and inspection of evidence.<sup>7</sup> This year the Tribunal also held a seminar on e-disclosure for Tribunal Chairmen, covering issues in the disclosure process and the presentation of evidence derived from electronic data.

### *1.1.3. Advantages of the current regime*

9. The main advantage of the UK regime is that it includes an internal statutory process for ensuring the accountability of decisions.

10. The CAT is a dedicated specialist tribunal established under the same legislation as the CMA to facilitate a public review of infringement decisions, before the parties have recourse to the appellate Courts. It has wide and flexible jurisdiction to ensure that each

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<sup>4</sup> One Chairman, The Honourable Lord Doherty sits on the Court of Session in Scotland.

<sup>5</sup> The CAT also has jurisdiction for claims for damages for breaches of competition law (brought on an individual or collective basis), applications for injunctions and approving collective settlements.

<sup>6</sup> There is also a new fast track procedure for simpler cases: see *Socrates Training Limited v The Law Society of England and Wales*, 1249/5/7/16.

<sup>7</sup> The Practice Direction aligns the Tribunal's procedures with the requirements of the European Union (EU) Damages Directive (directive 2014/104/EU).

case is dealt with justly, and can make orders amending as well as confirming or quashing the CMA's decisions.

11. The inclusion of a specialist appeal mechanism helps to ensure that the output from powers exercised under the UK's competition legislation is, and is seen to be, legally and economically sound. Whilst the CMA has its own internal processes for ensuring that decisions are taken by independent specialists, a further review by the CAT gives the regime another opportunity to reach the right result, through a transparent judicial process.

**1.2. Have you considered the advantages and disadvantages of judicial specialisation in competition law? If there has been a judicial reform in this regard in your jurisdiction, what was your role in it? Do you have a view on the ideal level of specialisation of courts in competition law matters: (i) concerning the review of administrative decisions; and (ii) concerning private disputes involving competition law matters?**

*1.2.1. Judicial specialisation in competition law*

12. The main advantages of judicial specialisation relate to expertise and experience:

- the expertise of judges in both legal and economic concepts enables them to hear and understand expert evidence and argument, and reach authoritative conclusions,
- expertise acquired from regularly hearing cases on the same area of law creates efficiencies in the decision-making process, and
- an understanding of the overall context enables a specialist court or tribunal to take decisions having regard to the impact upon the system as a whole.

*1.2.2. Developments in the UK*

13. As noted above, there was recently judicial reform in relation to private damages claims, to promote the CAT as the first-tier forum for judicial determination of these cases (see [1.6] above).

14. The CAT now has jurisdiction to hear and decide "stand-alone" claims, in which the claimant needs to establish the infringement in addition to causation and the quantum of damages. This requires the CAT to assess evidence and make findings on the existence of an infringement, just as the CMA does during an investigation leading to a decision. The High Court still retains its inherent jurisdiction to hear these cases, but there are now procedures for the transfer of stand-alone claims commenced in the High Court to encourage parties to make use of the CAT's jurisdiction.

*1.2.3. The ideal level of specialisation*

15. The ideal level of specialisation in competition law is effectively the same for public enforcement and private damages cases: judges need to have knowledge and experience of competition law and economics, as well as a broader understanding of the statutory regime.

16. However, additional expertise is required in private cases — there is now a need to be able to case manage and determine an infringement on a stand-alone basis, involving a process of disclosure and "investigation". Experience case managing

complex and multiparty cases, with implications for third parties, is needed to manage pleadings and disclosure, so that the appropriate issues and evidence are able to be incorporated into the CAT's judgment.

### **1.3. Can the advantages of judicial specialisation be reduced by appeals' mechanisms to generalist courts? Or are such mechanisms beneficial?**

17. Appeal mechanisms to generalist courts are a beneficial part of a statutory appeal process. CMA decisions affect rights and liabilities, and must be subject to the rule of law and scrutiny by the most senior courts. Recourse to the ordinary appellate courts also ensures that competition law is part of and continues to develop with the body of general law in the jurisdiction.

18. However, the two appeal stages should perform different functions. In the UK, the appellate courts assess whether the CAT's decision was wrong in law, rather than re-conducting an in-depth adjudication of facts and evidence. That is, (a) in Competition Act cases, the CAT must decide the appeal on the merits but its decisions may be appealed only on a point of law, and (b) in mergers or markets cases, the standard of review is different, but an appeal of the CAT's decision must also raise a point of law.

19. In both cases the appellate court is limited to reviewing the decision of the CAT based on the material available at trial, and will not normally hear new evidence or arguments on the existence of an infringement. This allows for a degree of deference to the CAT on specialist and technical issues, but gives the appellate court the opportunity to assess whether the decision was reasonable under the general law.

## 2. Evidentiary matters in competition cases before the courts

20. The evaluation of evidence in competition cases – both the amount of evidence and the expertise required to assess it – poses particular challenges for courts. Very often specialised competition agencies are in a better position to evaluate that evidence. However, the rule of law rightly requires courts’ decisions to prevail over competition agencies’ administrative decisions despite the greater expertise of those agencies and the difficulties that courts may have in dealing with complex economic matters.

### 2.1. Does a lack of economic expertise on the part of judges create obstacles to the effective enforcement of competition law? If so, how can those obstacles be addressed?

21. In general, cases in the UK are decided by members of the CAT and High Court with appropriate expertise in economics and competition law. This expertise is necessary given that economic issues and evidence are often relied upon in competition appeals. However, the hearing of expert evidence in adversarial proceedings can nevertheless raise challenges even for expert panels, as illustrated in the CAT’s recent judgment in *British Telecommunications plc v Office of Communications*<sup>8</sup>. For example, the CAT commented on both the excessive volume of evidence, as well as the nature of the evidence having blurred the boundaries between fact, expert opinion and argument.

### 2.2. What mechanisms are there to ensure that economic matters are adequately taken into account in the context of the legal doctrines that courts must apply?

22. The general procedures for appeals in the CAT incorporate a number of mechanisms for addressing economic issues in CMA decisions. In the first instance, it is for the parties to set out their respective cases in pleadings and witness evidence. Based on the case that has been issued, a Chairman and two other members of the panel will be appointed, including an economist or other specialist member.

23. The Chairman, who is a legal member, will be responsible for the case management of evidence during the proceedings, and will consult with the other members as needed. He or she may give directions on the admissibility of evidence or on the provision of a joint statement from a number of experts, and for oral testimony to be given concurrently during trial. During trial, panel members can and generally do ask questions to give guidance on the economic issues they consider need to be addressed in deciding the case.

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<sup>8</sup> At paragraphs 83 to 111 of [2017] CAT 25.

**2.3. Are procedural or institutional solutions to the evidentiary difficulties faced by courts in place, and are these solutions adequate? For example: (i) do courts rely on rules (of thumb) which are easier to apply than detailed economic assessments? (ii) do the rules on burden and standard of proof provide an adequate mechanism to evaluate the aptness of economic assessments? (iii) what tools can be deployed to deal with conflicting sets of economic evidence (e.g. hot-tubbing, court-appointed experts, specialised courts, etc.)?**

24. The CAT's own processes include mechanisms designed to deal with the routine reliance on expert evidence in an appeal. The three-member panel typically includes an economist who participates fully in decision making. The CAT also has broad case management powers to allow or exclude expert evidence, and to issue directions as to how that evidence will be admitted.

25. As in other jurisdictions, there are various rules of thumb applied under UK and EU competition law to reach a starting point. For example, high market shares may create a presumption of dominance or of the illegality of a merger; in some cases these presumptions can avoid detailed analysis of certain economic issues.

26. This does not do away with the need for economic evidence. Evidence from economists and other experts is frequently relied upon, and there are often multiple experts covering overlapping or discrete issues.

27. The CAT is developing its procedures to deal with the expert witnesses on a case by case basis. One new development is the use of joint statements and concurrent evidence, known as a "hot tub".<sup>9</sup> There is also a procedure for the appointment of an independent Assessor under the Civil Procedure Rules (which apply in the ordinary courts but can be utilised in the CAT). Another tool is what is known as a "teach-in", at which an independent expert spends time (perhaps a couple of days) educating the judge on the basic economic concepts relevant to a case.

28. The concurrent evidence process has been used in recent CAT cases.<sup>10</sup> The Tribunal asks questions of the experts who are invited to answer one by one, and to comment on the answers of the others. They are then given the opportunity to ask each other questions, and the lawyers are given the chance to cross-examine. Each expert is asked to concentrate on the key issues between them, and the judge can hear all the experts discussing the same issue at the same time. Where effective, it minimises the degree to which expert evidence is given in an adversarial way, and significantly reduces the time needed to examine the economic issues.

<sup>9</sup> The process was used in the *Pay for Delay* case (*GSK and Ors v CMA*, 1251-1255/1/12/16) earlier this year, and a joint statement between opposing experts was submitted in the *Phenytoin* case (*Pfizer and Flynn v CMA*, 1275-6/1/12/17) (although no "hot-tub" was ordered).

<sup>10</sup> See *GSK and Ors v CMA*, 1251-1255/1/12/16 and see *Socrates Training Limited v The Law Society of England and Wales*, 1249/5/7/16.

#### **2.4. Do standards of review of decisions by competition agencies vary depending on the level of expertise of courts? Should they?**

29. The standard of review should apply consistently within a particular jurisdiction, set by legislation and the general law. However, different standards may apply to different types of decisions, to take account of the nature of the decision and the particular expertise of the decision-maker on certain matters.

30. This is the situation for appeals to the CAT against CMA decisions. Appeals against Competition Act decisions are subject to a full merits review by reference to the grounds of appeal. In mergers and markets cases, however, the CAT must decide the case by applying the same principles as would be applied by a court in an application for judicial review.

31. Whilst merits review focuses on reaching the most correct outcome, judicial review is concerned with the reasonableness and fairness of a decision, giving the decision-maker a margin of appreciation with which the CAT is generally less inclined to interfere. However, the CAT will still examine the soundness of the factual finding — there must be a proper evidential basis for the decision, and the conclusion reached having regard to relevant matters only, must be reasonable and objectively justifiable.

32. It is appropriate that the CMA's decisions are subject to a rigorous review based on the standard set under legislation. Any degree of "judicial deference" on technical matters such as market definition should be consistent with general principles of public law and rules on evidence, and the CAT should be open to finding against the CMA if the applicable standard is not met.

### **3. Interactions between courts and competition authorities**

33. The interaction of competition agencies and courts is a sensitive one. Nonetheless, the assessment of whether such interactions are appropriate will often depend on the specificities of a case. If a case concerns the judicial review of a decision by a competition agency, a court will have to assess that decision and make up its own mind about it. In private disputes, on the other hand, courts may want to rely on the expertise of the competition agency instead. Further, in the context of advocacy, courts and competition agencies may want to actively cooperate.

#### **3.1. Can you provide examples of occasions and projects when the competition authority sought to engage with the judiciary? Regarding which topics (e.g. the handling of competition evidence, confidential information, technical support, etc.) have these engagements taken place?**

34. There is usually some degree of interaction between the CMA and with members of the Tribunal or judiciary through seminars and conferences on competition law, as well as international networks. As explained below, there are other opportunities for interaction in respect of competition enforcement that can also be explored (see [9.2] and [11.2]).



### **3.2. Is cooperation between competition agencies and courts to improve competition law enforcement and awareness appropriate? If so, are there or should there be limits to this cooperation?**

35. Yes, appropriate interaction between competition agencies and courts can improve competition law enforcement and awareness. However, each party continues to perform its functions independently.

36. In the UK, the CMA has a responsibility to reach decisions that achieve the correct result for the relevant markets and consumers, and the CAT's role is to hear and decide appeals of those decisions. There is therefore merit in the CMA and CAT working together within appropriate limits to streamline procedural aspects of cases (e.g., the Tribunal User Group, see [11.2] below). For example, specific guidance from the CAT on procedures for hearing expert evidence during an appeal can streamline the preparation of that evidence during the administrative stage (e.g., as it has done for disclosure in private cases).

37. Any interactions should, however, occur within the limits of the rule of law. That can be achieved by making the interactions transparent, and ensuring that relevant decisions are still taken independently. For example, at the CMA decisions are taken by an independent case decision group, which need not participate in the proposed interactions. Moreover, both the CMA and the CAT would remain accountable to the ordinary courts and Parliament.

### **3.3. Does the interaction between courts and competition agencies raise concerns regarding the separation of powers? What areas of tension are there in this respect? How can these tensions be softened?**

38. The suggested interactions would not involve a genuine separation of powers issue. Members of the judiciary must be seen to be independent from arms of Government and not to prejudge cases. However, appropriate interactions between the CMA and the CAT would not mean that the CAT (or the CMA) would lose its independence or accountability.

39. There would still be continued role clarity and independence, and there is nothing preventing a divergence of views as part of the more cooperative interactions: (a) the CMA and CAT would remain structurally separate bodies, (b) CMA decisions would continue to be taken by independent panel members on the case decision group, who need not be involved in any direct interactions with the judiciary, and (c) the CAT would continue to make its orders and judgments independently.

### **3.4. Are there formal or informal mechanisms for interaction between competition agencies and the judiciary outside the scope of judicial cases (e.g. joint workshops, academic or professional conferences, etc.)?**

40. We would also support the development of mechanisms for interaction with members of the Tribunal and judiciary, in particular, informal networks and rule transparency.

41. One mechanism available is the existing Tribunal User Group which was formed to discuss points relating to the practical operation of the Tribunal. The group consists of representatives drawn from both the public bodies and those legal practitioners who

regularly appear before the Tribunal. It is currently scheduled to meet twice a year and the minutes of those meetings are published on the CAT website.

**3.5. Does competition law play a role in the initial or on-going education and courses attended by judges in your jurisdiction? Have you conducted any previous work aimed at enhancing the capacity of judges in dealing with competition matters?**

42. The Tribunal delivers its own training for Chairmen and Members, including updates on recent legal developments under EU and UK Competition Law and on procedural issues relevant to competition litigation. Those attending include High Court judges allocated to the Competition List. The Tribunal also takes responsibility for the training and exchange of views with competition judges from other jurisdictions, as part of the Association of European Competition Law Judges and by hosting visitors from other jurisdictions.

43. The CMA has not conducted any specific training for judges dealing with competition law cases.