

## **Concurrences Conference - Innovation Economics for Antitrust Lawyers**

**Kings College London**

**Friday 1<sup>st</sup> March 2019**

**Keynote Speech by Peter Freeman<sup>1</sup>**

### **Appeals in Competition Infringement Cases**

#### **The Digital Challenge**

1. I am not going to attempt to deliver a speech on innovation economics. Instead I want to address some higher- level issues, if that does not sound too dismissive of the subject matter of today's conference. Because the specific topics you are addressing today are drawn from the bigger menu of the challenge that the digital economy brings to competition law. Many questions are being asked about whether competition law is 'fit for purpose' in the age of fast-moving innovation, big data and the massive growth of IT based companies.
2. These questions include:-
  - Is competition law focussing on the right issues?
  - Can the competition regime cope with problems specific to high tech industries?
  - Are the authorities able to act nimbly and speedily enough to meet the challenge?
  - Are the authorities sufficiently able to control the activities of Big Tech companies?
3. My answer, incidentally, to all those questions is 'at the moment, probably not', but it is good that these questions are being asked, as they need to be asked.

#### **Broader issues**

4. As if these questions were not difficult enough, there is the related issue of making competition law more understandable and relevant to the issues that face the consumer, the business person and the citizen generally. This means more focus, more simplicity and more directness in decision-making. This in turn overlaps with what is sometimes loosely referred to as the 'fairness agenda', in other words making competition law achieve outcomes that are seen to be 'fair'. Others are addressing this, not least Commissioner Vestager, in a direct and, in my view, very impressive way. And I am most interested to see that the CMA Chairman, Lord Tyrie,

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<sup>1</sup> Chairman, Competition Appeal Tribunal. Any opinions expressed are strictly those of the author.

in his advice to Ministers published earlier this week, appears to be taking a somewhat similar path.<sup>2</sup>

### **The Consumer Green Paper and the ERRA Review**

5. So what is being done in the UK to address these questions? Actually quite a lot. In September 2018, the Chancellor appointed a group of distinguished experts under Professor Jason Furman to look at the challenges of digitalisation for competition policy, and this is due to report fairly soon. And shortly before this, in April 2018, the Department for Business, Energy and Industrial Policy published a Consumer Green Paper<sup>3</sup>. This had a double purpose. First to discuss a wide range of issues relating to consumer law, digital markets, and the regulated sectors; second specifically to consult on the five-year review required by statute of the operation of the 2013 reforms, set out in the Enterprise and Regulatory Reform Act 2013 (ERRA), which had merged the Office of Fair Trading (OFT) and the Competition Commission (CC) to form the Competition and Markets Authority (CMA).
6. The Green Paper as a whole is therefore directed generally at these issues. The specific consultation also seeks to address some of the digital challenges. For example, one of the consultation questions is *'Is the competition regime sufficiently equipped to manage emerging challenges, including the growth of fast-moving digital markets?'* (Qu 20). The Green Paper makes it clear that this question is essentially about substance – concentration, network effects, locking in consumers and leveraging market power onto other markets, on the one hand, and digital platforms, algorithms and agglomeration of businesses and data on the other. And in the two earlier questions (18 and 19)<sup>4</sup>, the focus is on the specific measures that were introduced in 2013 (which were rather specific and limited in their scope) and whether the authorities have sufficient powers to perform their tasks.

### **The Appeal Process**

7. So far, so good. However, things appear to have taken a somewhat unexpected turn.
8. As I said, earlier this week the Chairman of the CMA, Lord Tyrie, announced proposals to 'reinvigorate the UK's competition regime, to safeguard the interests of consumers in the modern economy while improving public confidence in competitive markets'. This was in the form of a letter with an Annex, in response to a request from the Secretary of State for advice. The proposals cover a wide range of issues, but focus essentially on increasing the CMA's commitment to consumer interests and making competition law more relevant to current economic conditions.

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<sup>2</sup> The US Federal Trade Commission and the German Federal Cartel office, amongst others, are pursuing similar initiatives.

<sup>3</sup> *Modernising Consumer Markets*. Department for Business, Energy and Industrial Strategy (BEIS) April 2018

<sup>4</sup> (18) *Have the 2014 reforms to the competition regime helped to deliver competition in the UK economy for the benefit of consumers?* (19) *Does the competition regime provide the CMA and regulators with the tools they currently need to tackle anti-competitive behaviour and promote competition?*

9. Much of this is in line with the material set out in the Green Paper and in my view justifies very serious consideration.
10. But alongside these important questions about the competition regime's fitness for purpose in the digital age there has crept in, yet again, an old chestnut. That is whether the appeal system for competition infringement cases is somehow also not 'fit for purpose'<sup>5</sup> and should be in some way curtailed, or lightened, or reduced<sup>6</sup>. How extraordinary, you may say; what has that got to do with the digital economy, you may equally say. I am not sure I can help you on either of those questions. But before we get too far down this road I think it is sensible to sound a note of warning.
11. I called the issue an 'old chestnut', because there is a perennial tendency in some parts of government, including I regret to say, some parts of the competition and regulatory authorities themselves, to question whether whatever court-based appeal system is currently applicable is 'too heavy' or 'too lengthy' or possibly even whether it is necessary at all. The last time this was done in relation to competition law was in 2013, under the auspices of the Regulatory Appeal Review<sup>7</sup>, conducted by what was then the Department of Business, Innovation and Skills. For a brief period, competition infringement appeals were included in this review of the regulatory regime, before being quietly dropped from consideration in the face of strong criticism.<sup>8</sup> To raise it again now, as part of an attempt to bring competition enforcement into the digital age, does look a little strange.

### **A History Lesson**

12. This is not the place for a point by point refutation of section 7 of the Annex to Lord Tyrie's letter. That will surely come. But to understand why this is such a contentious issue, perhaps we need a short history lesson.
13. From 1956 until 1998, the UK operated a registration-based competition enforcement system, by which particulars of restrictive agreements were furnished to the Registrar, later the Director General of Fair Trading and then the OFT, who placed them on a Register, from which they could be referred to the Restrictive Practices Court (RPC) for adjudication on whether they were against the public interest. It is interesting to note, in passing, that the mode of decision making was prosecutorial with the authority making its case before a specialist court rather than by an administrative process. Many agreements were given dispensation by Ministerial order on grounds of the restrictions having 'no economic significance'.

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<sup>5</sup> See Part 7 of the Annex to the letter from Lord Tyrie to the Secretary of State dated 21<sup>st</sup> February 2019.

<sup>6</sup> I avoid using the term 'streamlining', as this term acquired a somewhat Orwellian significance during the Regulatory Appeal Review, see fn 8 below.

<sup>7</sup> *Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform* BIS 19 June 2013

<sup>8</sup> Acknowledged somewhat grudgingly in the Summary of Stakeholder Views published 6 September 2013 ("*Some stakeholders questioned the inclusion of competition appeals in the Government Consultation...*") (p4). We still do not know for certain what motivated the decision not to proceed with examining competition appeals as the Government never published a formal response to its RAR consultation. The review standard for Communications Act appeals was, however, changed from full merits to judicial review in the Digital Economy Act 2017.

Virtually all those agreements that were referred to the RPC were condemned. There were no fines or penalties save for contempt of court in repeat offender cases.<sup>9</sup>

14. In 1998 we moved to a prohibition system, modelled on EU law - Articles 85 and 86 as they were then. This involved giving the OFT unprecedented (one might almost say 'un-British') powers to investigate, decide and impose fines similar to those enjoyed by the European Commission. No Ministerial decision or approval was required. The OFT was thus newly empowered and operationally independent of Ministers, as was also the newly established Competition Commission - a quite separate and distinct organisation from the OFT - save only for public interest issues in mergers and markets.
15. This was by any standard a major reform but it coincided with another major change, the incorporation into UK law of the European Convention on Human Rights (ECHR). Respect for Human Rights – for companies as for individuals - would no longer be some distant dualist concept but a clear and present priority in public administration.

### **The Establishment of the CAT**

16. All this – newly empowered authorities, withdrawal of Ministers from decision making, Human Rights imperatives - came together to require the creation of a system of accountability that would replace the previous system of Ministers in Parliament, decisions by the specialist RPC and deferential judicial review of other competition decisions by the general courts. The result was the Competition Appeal Tribunal (CAT), using the RPC model of a judge and two 'lay' panel members, and thus essentially carrying on the established English judicial practice, but drawing also on the recent experience of the Court of First Instance (CFI) in Luxembourg, which had been created to oversee the activities of DG IV (Competition) in response to criticism of lack of sufficient judicial control by the increasingly overburdened Court of Justice (ECJ).
17. For merger and market decisions, where the CC acted as an independent 'phase 2' authority, judicial review was deemed to provide a sufficient level of accountability. But for competition infringement appeals, a full merits approach was seen to be needed, given the quasi-criminal nature of infringement decisions and in order to provide the recourse to an impartial and independent tribunal that was required by Article 6 of the ECHR.<sup>10</sup>

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<sup>9</sup> We are talking here only about restrictive agreements. There was, in addition, a special regime for resale price maintenance agreements. For markets and mergers, decisions were taken by Ministers, on the advice of the Monopolies and Mergers Commission (MMC). Applications for judicial review were rare and judges were on the whole reluctant to intervene.

<sup>10</sup> Article 6(1) of the European Convention on Human Rights provides that *"In the determination of...any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."*

18. So that was the 2003 settlement. In return for a major accretion of power, the OFT's decisions were subject to a right of appeal to a specialist statutory tribunal, specifically tasked with developing sufficient expertise and focus to ensure that soundly based and correct decisions would be made.

### **A Dose of Reality**

19. Of course, one should not overplay the weight or grandeur of this new system of accountability. It is sometimes said, mainly I have to say by those who should know better, that this system imposes an unnecessary 'second tier' of substantive assessment, that it allows the CAT to conduct a 'complete re-hearing' of an authority's decision, allowing 'new evidence not available to the authority', with the CAT 'substituting its own decisions for those of the authority', and generally taking up a great deal of time and effort, thus 'thwarting the effectiveness of the enforcement system'.

20. These criticisms are in my view greatly over-stated and simply do not accord with the facts. The CAT is required to determine the appeal 'on the merits by reference to the grounds of appeal'. It is not able to roam freely over the subject matter of the decision; appeals are often on quite narrow and specific points and even on those specific issues, it is certainly not a *re-hearing* as there has never been a hearing before an independent judicial body.

21. The CAT is certainly active in its conduct of cases, but the process is adversarial not inquisitorial, and therefore its approach must be conditioned by the case that is being made to it. Whilst the CAT can substitute its own decision for that of the authority, on the very few occasions when this has happened in the competition field, this has been where the authority had decided there had been no infringement of competition law and the CAT found on the facts before it in the appeal that there had been an infringement.<sup>11</sup> The CAT will also give due weight to an authority's findings that are properly and reliably arrived at. In short, the CAT is not providing a repeat of the decision, but instead is holding the decision-maker to account.

22. The key point, of course, is that unlike judicial review, in merits appeals the CAT can consider not only whether the decision was reached fairly, legally and rationally, but whether it was 'right'. It is that sometimes elusive possibility that provides the essential safety valve for a prohibition system. It must also be remembered that infringement of a prohibition can not only lead to the imposition of substantial quasi-criminal fines, but also – and increasingly – to private damages claims in which the authority's decision is binding on the courts.

23. As I said earlier, authorities do occasionally complain that this system, which is the envy of Europe, if not more widely, prevents them from doing their job effectively.

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<sup>11</sup> One of the few examples of this is the case of *Burgess v OFT* in 2005. This concerned an OFT decision finding no abuse of dominance arising from denial of access to a crematorium. The CAT found that this decision was not supported by the evidence and substituted its own finding of infringement. The case is hardly typical of the CAT's practice, however.

But, with the greatest respect, I think these complaints miss the point. It is an effective appeals system that provides the glue holding the whole system together and enables the system to work effectively. Weaken it or take it away and the concentration of power in the hands of the competition authorities becomes a serious concern. I thought that we had all learned that obvious lesson; but it appears that it may need to be re-learned.

### **What has changed?**

24. You may ask, what has changed since 2003? Well, in one sense quite a lot. Economic conditions have changed; we have had the downturn of 2008, putting in question many happy illusions about the market economy; we see the emergence of 'Tech' and 'Big-Tech'. Indeed, all of the issues being discussed at this Conference have come to the fore.
25. More parochially, as the 'effects-based' system has taken root, competition assessments have become much more sophisticated, driven by more and better data and analytical techniques; competition decisions have become much longer, buttressed by copious economic evidence; cartel behaviour has become more complex and devious; and the economics of market power and abuse have become ever more abstruse. As a consequence, bringing successful competition cases to the point of decision has certainly become more difficult, as has hearing appeals from such decisions.
26. But, in another sense, nothing has changed. The challenge for a competition authority remains just as it was. In general, to act fairly and effectively to promote competition. And in relation to the prohibition system, to undertake a sufficient number of well-considered and soundly based competition infringement cases and bring them to a successful conclusion.
27. Another thing that has not changed is the need for a robust appeal system. Ever more complex issues require ever more careful scrutiny. Greater sophistication of evidence and analysis are challenges for the judges also. The point about appeals providing the essential glue to hold the system together applies with ever greater force. The days of judicial deference by judges unfamiliar with the subject-matter, here or in the EU, are numbered, if not gone altogether.

### **A Prosecutorial System?**

28. Of course, the debate about appeals would be different if in 2012 the Government had adopted a change to the system that it examined with some care, but eventually rejected as too drastic. That change was the move to a prosecutorial system, under which the CMA would present its cases before the CAT for adjudication. The arguments for and against this are interesting, but such a move, by cutting out the stages of administrative decision followed by appeal, would address many of the concerns that are occasionally raised by the authorities about the burden and delay from appeals.

29. It is not at this stage clear whether the Government is still interested in this idea, but it may be noted that if the objection in 2012, namely that it would involve too much structural change, is still relied on as the main reason for not re-opening the issue, that would appear to be rather at odds with the Government's apparent willingness to contemplate other major structural reforms in the context of the current review.

### **The Government's Stated Preference**

30. But it is worth reminding ourselves, particularly in current circumstances, that in 2012, the Government decided to stick with what it called the "enhanced administrative system" ie the then existing system with extra procedural checks and balances, accompanied by full merits appeal. We should also emphasise the terms in which it expressed that decision.

*"The Government accepts the strong consensus...that it would be wrong to reduce the parties' rights and, therefore, intends that full-merits appeal would be maintained in any strengthened administrative system."*<sup>12</sup>

### **The Need for Vigilance**

31. This seems admirably clear. And that is the appeal system we have now. It remains in my view as important as ever. The need for it is in no way diminished by the challenges of applying competition law in the digital economy; if anything, the need is even greater. And I can only repeat what I said at the start, that it is rather curious to find proposals to weaken the rigour of judicial scrutiny appearing in a package of reform proposals intended to address issues from the digital economy and the Big Tech challenge, given how important those issues are.

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<sup>12</sup> *Growth, Competition and the Competition Regime*, BIS March 2012 para 6.18