COMPETITION APPEAL TRIBUNAL CONFERENCE

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The Inaugural Bellamy Lecture

Lord Bellamy KC

The Origins of the CAT

It is indeed a great honour for me to give the first "Bellamy Lecture" to celebrate the 20th anniversary of the United Kingdom Competition Appeal Tribunal - the CAT.

This is a year of anniversaries. It is 50 years since the United Kingdom joined the then European Economic Community, 25 years since the passing of the Competition Act 1998 and 20 years since EU Regulation 1/ 2003 came into force. It is therefore I hope appropriate to speak about how we come to be celebrating today's significant milestone, the 20th birthday of the CAT.

I would like to explore the origins of the CAT, "a long and winding road", in two stages. First, I would like to trace the twists and turns of modern competition law, which now stretch back well over a hundred years. Then, secondly, I would like to speak about the specific origins of the CAT. But please bear in mind that I stepped down from the CAT in 2007, at which point one of the Tribunal Members sensibly reminded me "There is nothing so ex, as an ex-President".

Incidentally, this is also the 50th anniversary of a small work on competition law. I venture to recall that the original price in 1973 of the first edition was £7.75 net. The "net" of course signified that the book was sold under the Net Book Agreement, which imposed resale price maintenance on all books published in the UK. That was at the time a comfort to impecunious young authors, since the royalties depended on the sale price of the book. Nonetheless the irony that in 1973 a book on competition law could only be published subject to RPM, now a *per se* infringement, should not be lost to posterity.

Some Historical Background

From time immemorial in England, the common law judges had, broadly speaking, opposed restraints of trade tending towards monopoly, albeit somewhat erratically, but the traditional common law faced great challenges with the onset of industrialisation in the 19th Century. To illustrate the divergent views, I have

chosen what I suggest is the first modern, and truly global, competition law case to come before the English courts. Heard in London, but concerning events on the other side of the world in China, it took place when, in the words of one of the judges, "in these days of instant communication with all parts of the world competition is the life of trade".

We are of course in 1885; and the events of the *Mogul Steamship* case[1]. The facts, as some of you may know, concerned the then vital and extremely profitable China tea trade. From the tea gardens of Hankow, the tea was shipped 600 miles down the Yangtze River, and then 12,000 miles further on to England. The tea season lasted only six weeks, and if too many ships turned up in Hankow to transport the tea, the exporters could drive down the prices and no shipper could make any money. Hence, in the very short tea seasons of 1885 and 1886 the defendant shipping conference, which consisted of P&O and others, demanded exclusivity from the tea exporters, and cut their shipping prices against outsiders by more than 50 per cent, forcing ships outside the conference to trade unprofitably. These tactics were employed against Mogul, who had refused to join the conference. Mogul sued for damages in the High Court for conspiracy in restraint of trade. But did the action lie?

The case ultimately reached the House of Lords. At common law, all the judges were agreed that a combination in restraint of trade was void and unenforceable as between the parties. But the question was: did the common law confer a right of action on third parties who had been damaged by anti-competitive behaviour?

The House of Lords led by Lord Halsbury answered, "No". At common law, said the judges, traders are free to pursue their own competitive interests, even if it means harming the commercial interests of other traders. After all, competition necessarily harms some other competitors and benefits some but not others. The sole dissentient, who arguably gave the most powerful and most interesting judgment, was that great Master of the Rolls, Lord Esher. He held in the Court of Appeal in 1889[2], that the decisive test at common law was the public welfare. In Lord Esher's view, the defendants had infringed the right of the public to have free competition among traders. In other words, said Lord Esher, at common law the public had the

[1] *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25. The quote in the previous sentence is Lord Morris at p51.
[2] (1889) 23 QBD 598, notably at 609-611

right to insist that traders did not collude to put other traders out of business. Cutting prices to a level at which it was impossible to trade profitably oneself for the sole purpose of driving somebody else out of business was not lawful at common law.

It is interesting that this brilliant lawyer arrived at that conclusion about 100 years before EU and UK competition law arrived at broadly the same result. Lord Esher, as William Brett, had been Solicitor General under Disraeli, before becoming Master of the Rolls, and incidentally, since we are in Cambridge, rowed in the victorious Cambridge boat in the Boat Race of 1839. If his view, that the public had a right at common law to have free competition among traders on public welfare grounds, had been accepted in 1889, arguably history would have been entirely different. We would never have needed much of what became the Restrictive Trade Practices Acts, the Competition Rules of the EU, the Competition Act 1998, the statutory creation of class actions and so on. Indeed, Lord Esher's simple analysis of what we now call predatory pricing, predates by a century the rules developed in such cases as *ECS/AKZO*[3] and *Tetra Pak*[4] - not to mention the very similar fact patterns in cases such as *Compagnie Maritime Belge*[5] in 2004.

So why did the English judges not follow Lord Esher down his farsighted road? I would suggest for two main reasons. First, we are in the 1880s and the 1890s, still the period of Victorian *laissez-faire* and freedom to contract. The then prevailing view was that, overall, it was best for society not to regulate individual economic activity, nor impose legal limitations on business. At least, one might add *sotto voce*, one should not interfere with business as long as the Pax Britannica ruled a globalised world.

However, I suggest that there was a second reason, which I think you see particularly in the House of Lords: namely, a distinct judicial reluctance to undertake the task of deciding what was and was not lawful competition in what was by then a highly industrialised society. Where was the line to be drawn, and were judges equipped to do so? What was a fair price as proposed to an unfair price? Indeed, the question whether the courts can and should be asked to decide what is an unfair, or in modern terms, abusive, price

3 Case C-62/86 [1991] ECR I-3359.

4 Case T-89/91 [1994] ECR II-755.

5 Cases C-395 &396/96P [2000] ECR I-1365.

is still a live issue. In other words, *Mogul* is a precursor to the still continuing debate about the scope, and possible limits, of the role of the courts in competition law cases.

Would *Mogul* be decided differently today? On the one hand, here was an exclusive dealing monopoly cartel pricing below cost against outsiders. On the other hand, with high fixed costs, the risk of overcapacity rendering prices uneconomic for all shippers has been an accepted justification for shipping conferences until very recently, and predatory pricing is notoriously difficult to establish on the facts.

Perhaps the answer should be that given by one of the Mogul judges, Lord Bramwell. In a completely different case, Lord Bramwell, when told that the judgment he had just delivered was contrary to one of his own previous decisions, simply replied, "This matter does not appear to me now as it appears to have appeared to me then.[6]" A judge after one's own heart.

In England, *Mogul* was a turning point where history failed to turn. However, while the common law of restraint of trade petered out quietly, on the distant shores of the Yangtze River, at almost exactly the same time the completely opposite approach was taken in the United States of America, with the adoption of the Sherman Act 1890.

That Act of course made any conspiracy in restraint of trade a felony under Section 1 and any monopolisation or attempt to monopolise a felony under Section 2. Senator John Sherman, who introduced the Act, was incidentally the much younger brother of the Civil War General Sherman – whose burning of Atlanta is for good or ill immortalised in "Gone with the Wind". John Sherman assured Congress and I quote:

> "*This new statute does not announce a new principle of law but applies old and well recognised principles of the common law.[7]"*

That was, I fear, as sometimes is the case with politicians, said with more than a dash of poetic licence. Yes, over the centuries, one can find many common law cases opposing price fixing and monopolies, though the latter cases are more often about the power of the Crown to grant a monopoly than the evils of

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[6] *Andrews v Styrap 26 LT 706 (1872)*. See also Richard A Epstein, *Baron Bramwell at the end of the Nineteenth Century,* Chicago Unbound, 1994, noting that Bramwell always remained a strong proponent of "laissez-faire".

[7] 21 Cong Rec 2456 (1890). See also 20 Cong Rec 1167 (1889).

monopoly in itself. The common law never went so far as to render price fixing or monopolisation a criminal offence as the Sherman Act does. Indeed Mogul, as we have seen, decided precisely the opposite.

What were the intentions of Congress in enacting the Sherman Act? That has been intensively argued ever since. Is anti-trust mainly about consumer welfare, or other factors? In terms of the original intentions of Congress, I have always thought that an important clue lies in the word “anti-trust”. In the US at the time, we are in an era of upheaval, of rough and tumble rapid industrialisation, and railroad expansion. This was often accompanied by the widespread use of trusts, legal devices to conceal the beneficial owner and to hide what were in effect business combinations controlling important industries, concentrating power in fewer and fewer hands. Often, it is alleged, subduing rivals by predatory and other egregious practices.

My own view is that a major driver of the Sherman Act was simply the fear of too much economic power in too few hands. In the face of that risk, the Sherman Act reinforced the role of the courts in enforcing competition through the criminal law. But the history of that Act also raises the still relevant question, what is competition law for, exactly?

In my view, the US debate on the Sherman Act more than a century ago still offers us a deep truth about competition law, so often thought of by practitioners in purely technical terms of efficiency or lower prices, based on economic or econometric analysis. But the overarching impact of competition law is surely much wider, and more important, than that. Too much economic power in too few hands, leads also to a concentration of social power. And social power and economic power together add up to political power. And with political power comes the question of whether the ultimate arbiters in a free society are the voters, acting through democratic institutions, or does political power really lie with other powerful economic actors operating behind the scenes?

Thus, even if one thinks primarily of competition law as bringing lower prices, or greater efficiency or innovation, the broader point is that undue concentration of economic power can ultimately threaten democracy itself - and competition law is one of the important restraints that lessens that risk.

And that of course raises another question, which is whether one can ever take competition law out of politics, free of the political *Zeitgeist* of the times? Whether it is *laissez-faire* as we saw in *Mogul;* whether it is the need to control the Rockefellers or J P Morgans of the time as with the Sherman Act; or whether it is to support and protect the single market of the EU - there is always a political context behind the competition law of the day. The philosophy behind the Enterprise Act 2002, which removed the last survival of the traditional "public interest" approach to UK competition law – to which I will come in a moment - is that one can reduce competition law to largely technical, economic analysis. Whether that is correct, I rather doubt, but that is a question for another day.

Let me return to the historical record. The globalisation of trade of the late 19th Century disintegrated with the coming of World War I, was further damaged by the Great Depression and protectionism of the 1930s, and destroyed altogether in World War II. It is a salutary thought that global trade did not recover its 1913 level until the late 1970s.

In effect, it is only after World War II that we can revert to the modern story of competition law. In 1947, the Allies, led by the US with its Sherman Act experience, introduced decartelisation laws in Germany, effectively sowing the seeds for what later became European competition law. The theory was that cartelisation, through combines such as IG Farben, had given Germany the economic power to wage World War II, and that had to be dismantled.

Imposed by the occupying powers in the US and British zones, those laws were probably the first post-war competition laws in Europe. Similar provisions were included, again at US insistence, in Articles 65 and 66 of the European Coal and the Steel Treaty in 1951, to prevent that Treaty morphing into a giant coal and steel cartel, administered by the High Authority. Then in 1957 Articles 65 and 66 became, in turn, the model for Articles 85 and 86 of the Treaty establishing the European Economic Community, now Articles 101 and 102 of the EU Treaty.

So we have, over what is effectively a couple of centuries, this strange flow and counterflow. The common law of restraint of trade crosses the Atlantic westwards with the early American colonists in the seventeenth and eighteenth centuries. A s an independent country, the United States remains loyal to the common law. Then in the late nineteenth century the US Sherman Act gives the old common law of restraint of trade, its

modern teeth. Then after World War II, the US experience, now moving in the other direction, eastwards, was an important influence on the foundation, with extensive modifications, of what has since become European competition law.

But what meanwhile of the United Kingdom? The UK, ruthlessly assaulted by three fascist empires simultaneously, had survived World War II by the very narrowest of margins. On the home front, those six long years had meant in the UK total state direction of the war effort and *de facto* cartelisation of the entire economy. Ironically, perhaps, it is said that the wartime UK economy was subject to greater state direction and planning than the economies of the Axis powers, a remarkable fact which in turn made a vital contribution to the ultimate outcome.

The end of World War II made it necessary to dismantle all that. To restore at least some competition in the economy, the post-war Labour Government chose the administrative route rather than a judicial one. The Monopolies and Restrictive Practices Act of 1948 established the Monopolies Commission (later the Monopolies and Mergers Commission and later still the Competition Commission), a body that under its various names lasted more than 60 years, until the CMA took over in 2013.

Under the 1948 Act, the Monopolies Commission was empowered to undertake administrative inquisitorial investigations into various industries, on the basis of a reference from the Minister, and was required to report to the Minister on whether what had been found operated, or might be expected to operate, against the public interest. What action to take was then for the Minister to decide. To that framework merger control was added in 1965, and the Monopolies Commission subsequently became the Monopolies and Mergers Commission. Essentially, for monopoly and merger investigations this public interest regime lasted from 1948 to 2003, when the Enterprise Act 2002 substituted an “adverse effect on competition” test for the previous public interest test, and removed Ministers from the decision making process except in narrowly defined circumstances. It is interesting that the public interest regime in the UK lasted much longer than the present competition regime has lasted so far. The main, and indeed only, material change during that period was in 1973, when The Fair Trading Act largely replaced the 1948 Act, created the OFT under the Director General of Fair Trading, and gave the latter an independent power to make monopoly or merger references to the Commission, still for determination under a public interest test.

But I have already run ahead of myself in the story. In fact, the 1948 Act when it was enacted and for some years thereafter did not have very much effect. In 1955, however, the Monopolies Commission produced a seminal General Report on Collective Discrimination, which found restrictive practices and anti-competitive activity absolutely endemic in British industry. That Report recommended that all such practices should be made not only civil wrongs but criminal offences. So we have in 1955, a serious attempt to introduce the criminal law into UK competition law: in effect a UK version of the Sherman Act.

The suggestion of criminality in 1955 produced, as you may imagine, uproar from the business community. The idea of importing the feared, uncertain American anti-trust approach of sending businessmen to prison and criminalising businesses, was a difficult sell in 1950s Britain. It is not much easier today.

Eventually, after long Parliamentary debate, the compromise that emerged was the Restrictive Trade Practices Act of 1956. Under that Act, restrictive agreements were defined in precise technical legal terms, so, as it was hoped, to provide legal certainty. In the 1956 Restrictive Trade Practices Act the word ”competition” does not appear at all. The Act established a Registrar, and businesses were obliged to register their restrictive agreements, as legally defined, with the Registrar. The Registrar was in turn obliged to refer such agreements to a new civil, not criminal, Court - the Restrictive Practices Court. That Court was in turn required to declare the agreement to be against the public interest, unless certain very narrow so-called “gateways” were satisfied.

History relates that, in 1956 as in the 1890s, the judges were by no means happy; was “the public interest” really justiciable? Were the judges being made the fall guys for the government shuffling off the political responsibility, placing the responsibility for decartelising British industry onto the judiciary instead of doing it themselves? As the late Professor Basil Yamey, that great economist who died only quite recently at the age of 102, noted at the time:

> *“The judiciary was reluctantly returned to the field of restrictive agreements from which it had been painfully extricating itself for the previous 60 years[8].”*

[8] See *The Restrictive Practices Court* , RB Stevens and BS Yamey (1965) at p19.

Thus, by this roundabout route, Lord Esher's view that the place for these matters was indeed in the courtroom had prevailed in the end, with the establishment of the Restrictive Practices Court.

Nor should anyone have worried. The judges of the RP court, notably Lords Devlin and Diplock, took vigorously to the task, with a notably pro-competition approach, with the result that during the 1960s most of the anti-competitive agreements on the Register were struck down by the Restrictive Practices Court with a few notable exceptions, including for example the Net Book Agreement mentioned earlier.

The Restrictive Practices Court, which is the CAT's immediate predecessor, was not formally stood down until 2013 - although largely inactive for the latter stages of its life. Nonetheless, that Court had a major impact on the UK economy at the time, effectively destroying formal organised cartels, although the 1956 Act was perhaps not so successful in rooting out secret informal agreements. However, perhaps that Court's greatest achievement was a case that was never in fact heard.

Digressing for a moment, the story is as follows. In 1976, the Restrictive Trade Practices legislation was extended to services. And that brought within its ambit, notably, the rules of the London Stock Exchange (LSE) which then enforced separation of capacity between brokers and market makers, at the time jobbers, and also fixed brokers' minimum commissions. Thus, under the Act, the whole UK capital market structure fell to be justified as being in the public interest, with the burden on the LSE.

The LSE geared up for a fight with the then Director General of Fair Trading, who had taken over the functions of the Registrar under the Fair Trading Act, the late great Sir Gordon Borrie, later Lord Borrie. We are now in 1983, the Court case is underway, with vast pleadings and discovery, and a trial looming. At this point Mrs Thatcher's Government, became seriously alarmed. The LSE was after all central to the City - which was in turn, central to the UK economy. The Government didn't want to risk the instability that might follow an adverse judgment by the Court. Settlement negotiations accordingly took place, between the LSE and the Government. The LSE was prepared to abandon fixed commissions, but not the rules separating brokers and jobbers (then known as 'separate capacity'). The Government was prepared to settle on this basis, and for a while it seemed that all could be resolved. But the parties had reckoned without Sir Gordon Borrie, the Director General who had brought the case. He was the plaintiff, and he was not prepared to settle. Despite all efforts, Sir Gordon still held out. In the end the Government, by

now thoroughly exasperated, and not prepared to risk the future of the City on the uncertain outcome of the Court case, took the only course available: they introduced, and passed, a one page, one section, Act of Parliament, the Restrictive Trade Practices (Stock Exchange) Act 1984. That Act took the Stock Exchange agreements off the Register, and thus brought the case to a close.

This is the only historical example I can think of, of a civil case being forcibly closed by an Act of Parliament. Indeed section 1(2) of the 1984 Act specifically provided that the proceedings in question "shall abate". But the consequences were, I think, not foreseen; in fact a fuse had been lit. The ensuing outburst of competition in the City led inexorably to the Big Bang of 1986, sweeping away not only minimum commissions but the jobbing system, and in time enabling the City to challenge New York as the financial capital of the world. Probably in the end not a bad result for legislation that did not even mention the word "competition".

Some reflections on the CAT

And so we come to the CAT. It is perhaps remarkable that the United Kingdom had been a member of the EU for 25 years before Parliament got round to amending the Restrictive Trade Practices legislation to bring domestic law in line with EU law under the Competition Act 1998. Initially the Bill to do so, presented by the then Conservative Government under John Major, contained only the Chapter 1 prohibition, the Article 101 type prohibition, on the grounds that the existing powers of monopoly investigation under what was by then the Fair Trading Act 1973, made any domestic equivalent to (what is now) Article 102 completely unnecessary. Then in 1997 the Major Government fell. The incoming Labour Government under Tony Blair adopted the Bill but added Chapter 2, thus replicating both Articles 101 and 102 of the EU Treaty; but that was the fortuitous result of that change of government.

Then came another interdepartmental battle. Should the judicial body envisaged by the act, conducting a merits appeal from the decisions of the then Office of Fair Trading, fall under the Lord Chancellor, now the Secretary of State for Justice, or under the Department of Trade and Industry – now the Department for Business and Trade, traditionally responsible for competition law? The latter won, after a Cabinet debate, with the Lord Chancellor, Lord Irvine, on one side, and Margaret Beckett, the then Secretary of State at the DTI, on the other.

So to this day, the CAT does not fall under the care of His Majesty's Courts and Tribunal Service, nor is it subject to the budget of the Ministry of Justice. The fact that the CAT is also uniquely a United Kingdom Tribunal, dealing with non-devolved matters, undoubtedly assisted in the outcome of that particular debate. Moreover, as some of you will remember, the CAT was originally structured as the Competition Commission Appeal Tribunal – i.e. the judicial arm of the Competition Commission. The President of the CCAT was a member of the Competition Commission, appeals at that stage being limited to appeals from OFT decisions under Chapter 1 and Chapter 2. That structure of course had to be changed in 2003, when the reforms under the Enterprise Act already mentioned gave what is now the CAT jurisdiction to review decisions of the Competition Commission on merger and market investigations. So, although this year we rightly celebrate the 20th anniversary of the CAT, much of the features of the latter date from the period of the CCAT, whose jurisdiction commenced on 1st March 2000, with the entering into force of the 1998 Act.

In coming now to the CAT's procedures and how they were originally envisaged, let me first highlight four features which the CAT inherited from the Restrictive Practices Court, and two features that it did not:

First and foremost, the CAT continues the tradition of the RP Court with a legal chairman, typically a High Court judge or lawyer of equivalent stature, assisted by two non-judicial members; typically a businessman, an economist, an accountant or a lawyer, for example. Panel membership is still of course a feature of all CMA merger and market investigations, as it has been under the CMA's predecessors.

In my humble view, competition law is far too important to be left entirely to technical specialists. The non-judicial Members of the CAT, as the President has rightly said, bring wide skills, judgement, and common sense from a whole range of backgrounds. And I would like to take this opportunity to salute and thank, not only the original panel members, but all those who have served in that capacity over the years.

Secondly, in the CAT as in the RP Court, there is a full hearing in open court, indeed now live-streamed and accessible from anywhere in the world. I would argue that one should never underestimate the importance to the system of the parties having their public day in court. It gives confidence to the procedures; it should keep everyone on their toes and in the end make for better decisions. That is so particularly in a system where the competition authority investigates, prosecutes, and decides with all that that involves. The old system of monopoly investigations behind closed doors was much criticised from

that point of view. Many litigants in my experience give as much, if not more, weight to the fairness, impartiality and transparency of the procedure as they do to the actual outcome. Without a sense of fairness and openness any system, however well-intentioned, will fail, in my respectful view.

Thirdly, the CAT also very much concentrates on the facts, as did the old RP Court. What should be the standard of review, merits or otherwise, and what is the practical difference, is not for today. It is relevant however, that the Competition Act 1998 received the Royal Assent on exactly the same day as the Human Rights Act 1998. The debate about the standard and character of judicial review, and the procedure of the CAT, cannot be discussed without taking the Human Rights Act into account.

Then lastly, as with the RP Court, it is important to note the judicial nature of the CAT. The involvement of the High Court, mainly Chancery, Judges, their colleagues from Scotland and Northern Ireland, and the appeal on law to the Court of Appeal, emphasises that competition law is not just some specialised area of policy, but a legal matter that is part of the mainstream justice system in its widest sense. In such a system, competition specialists, such as economists for example, have to adapt to a legal framework, just as lawyers, on the other hand, have to adapt and understand economics. The melding of these two rather different conceptual approaches within the justice system is perhaps still work in progress, but we have come a long way in the last 20 years.

On the other hand, there were two features of the RP Court that have not been carried over into the CAT. First, the RP Court had a reserve power to send someone to prison. Admittedly, this power was indirect, and flowed from the rules of contempt of court, as a sanction for the breach of a previous order of the Court not to enter into an agreement, or an agreement to like effect. I do not think anybody actually went to prison under the Restrictive Trade Practice Acts, but I do know that some businessmen had some very narrow escapes and no doubt sleepless nights. That aspect is perhaps worth some further reflection one of these days.

The other feature of that Court, not inherited by the CAT, was that the case took place without any previous administrative decision or procedure. In the RP Court, the first full pleading was the respondent's statement of case, there was no antecedent statement of objections. The current administrative procedure

in Chapter 1 and Chapter 2 cases derives not from the common law, but from the civil law administrative model of the European Union, of which the United Kingdom is no longer a member.

Whether, at least in penalties cases, one could save time and expense, by reverting to the common law, ceasing to combine the functions of investigation and decision, is again for another day. But perhaps in such cases the statement of objections could simply stand as the CMA's statement of case before the CAT, and the respondent's reply to the SO stand as the defence, and so on, followed by an adversarial procedure. I would only venture one observation. I would have thought in penalties cases many businessmen faced with being cross-examined in open court, would prefer to settle earlier rather than later.

Of the procedure of CAT itself, I first pay heartfelt tribute to the work of Charles Dhanowa, and everyone on the staff over the years, without whom none of this would have been possible. We were given in 1999 a clean sheet of paper and asked to design a suitable system for the implementation of Chapters 1 and 2. I had at the time had the honour to have been the British judge in what was then the Court of First Instance, now the General Court, which hears competition appeals from decisions of the Commission of the European Union, and I should say a little about that Court.

As is inevitable in a multilingual court, the procedure of the General Court is largely in writing. Internally, all the pleadings are translated into French. The Court works and deliberates in French. There is an oral hearing, which is very much shorter than in the common law context. Indeed in the older classic French tradition, it would not at all be good form for the judge to ask a question during the oral hearing. At that stage, in the older civil system, the judge is supposed to be simply receiving the arguments; he should not reveal his train of thought by asking a question of the parties before he has heard them out. In this system, there is hardly any witness evidence, let alone cross-examination. If there is any cross-examination, it is the court that does it, not the parties, or their lawyers, the latter being largely bystanders. Indeed, in some continental traditions, an employee cannot be sworn as a witness against his employer. For that, or so the theory goes, would place the employee in an impossible position of conflict of interest.

So, you can see that in European tradition, there is a rather different approach from the common law. In the General Court, once the relatively short oral hearing is over, the deliberating and drafting of the

judgment are done in French, with a majority vote in the event of disagreement, and no dissenting opinions. Then the final judgment is translated back into the language of the case, English or Finnish or whatever, and delivered in that language.

I have been struck, as the years have gone by, by two opposing features of the procedure I have just described. The first is the usefulness of the written part of the procedure, which is much more informative than the traditional formal pleadings of the common law, and much more akin to the briefs that would be filed in US litigation.

But the second feature, pointing in the other direction, is the relative absence of the familiar fact-finding procedures of witness evidence, cross-examination and Socratic debate that characterise the tradition of the common law. Although the CFI and now the General Court have come much closer to the common law model over the years, it is inevitable that the scope for using the oral hearing to get to the bottom of the case is more limited in that jurisdiction than in the common law equivalent, even leaving aside the problem of the many languages in which the European Courts are expected to operate.

So, when we came to establish the CAT, it was decided, perhaps rather ambitiously, to take the best of both worlds. The full written procedure of the CAT reflects the European tradition whereas, like any common law court, the CAT also has all the tools of witness evidence, cross-examination, oral argument, and so forth at its disposal. A feature of the common law, however that needs to be watched, is that hearings in the common law system can be too long - much, much longer than in Luxembourg and simply sometimes repetitive of points already made.

A further valuable feature of the Luxembourg system is that before the hearing, the Juge Rapporteur, assisted by his référendaire, will already have read the case thoroughly and presented a report, the rapport préalable, to his or her colleagues indicating the main issues and the questions that need to be addressed.

An envisaged feature of the CAT was similarly that the Tribunal should come into court already on top of the case, or nearly on top of the case, and that the hearing should be moulded accordingly, and therefore kept relatively short. It was to assist that process that the Department agreed to adopt another Luxembourg feature just mentioned, namely the use of *référendaires* to assist the judges (akin to law

clerks under the US system), to enable the work of the Tribunal to be fully effective, and the hearings to be shorter.

My own experience is that the fuller the use made by the Tribunal of the *référendaires*, the quicker the CAT process and the shorter the hearings. On the question of timeliness, I should add that in the CAT, case management has a particular importance. What I noticed going from private practice to the bench and then back again, was that, in the world of the judge, there is rarely any external deadline. So, we tried in the CAT, at the outset at least, to set ourselves deadlines. Admittedly, in those days the caseload was much lighter than it is today: but having from the outset an approximate timetable for the case can be a useful aid to case management.

So those were some of the considerations that set the early framework of the Tribunal Rules under the original statutory instrument, SI 2000 n^{o} 261, whose content is still reflected in the current, much extended, 2015 Rules as amended. Of course, the work of the CAT now is much more complex than it was in those distant days. That is, if I may so, a tribute to the development of the CAT since my time, the whole suite of class actions being a notable example of the extra responsibility now shouldered by the CAT.

On the other hand, and this is a problem that affects the whole of the justice system, proceedings are getting longer and, in some ways, slower. Pleadings, skeleton arguments and expert evidence always seem to take longer than they used to, with the consequence that judgments get longer and longer. A supposedly paperless system seems to generate much more paper than was previously the case. I have no idea what the answer is, but everyone I think has to exercise a degree of self-restraint in this matter. Shorter is, generally speaking, better; at least from a judge's point of view.

However, putting those matters to one side, I think I can sum up, perhaps a little nostalgically in this the post-Brexit world , by saying that the CAT, perhaps uniquely, has two parents: one is a civil law parent and the other is a common law parent. Generally speaking, these two traditions very often produce much the same end result, but by procedural routes that are sometimes completely different. As the UK forges its own path into the future, I venture to hope that the idea of drawing on legal traditions other than our own, is not entirely lost sight of.

Like the cats in T S Elliot's poems in *Old Possum's Book of Practical Cats*, and in the famous *Cats* musical based on those poems, the CAT too is intended to be a practical CAT. Which of those cats in the musical comes closest to the CAT? I'm not sure - Mungojerrie and Rumpleteazer were knock about clowns; Macavity was never there; Deuteronomy had buried nine wives; Rum Tum Tigger loved to be the centre of attention; Mistoffolees had magical powers, and so on. For myself, I have always had a soft spot for Skimbleshanks, the Railway Cat - who, if you remember the words of the poem, "was expected by and large to be in charge of all the drivers and the guards, and the bagmen playing cards, ….. and to supervise them all, more or less". I think, with emphasis on the word "more or less", Skimbleshanks probably comes closest to the practical cats of T S Eliot's poems and the aims of the CAT.

May I finally close by emphasising that the CAT is and has always been a team effort. I would like to salute all those staff members, Chairmen, panel members, référendaires, and many others who have contributed to the story. I would also like to salute the hard pressed and no doubt sometimes exasperated Regulators - whether the CMA, their predecessor bodies, the OFT and the Competition Commission, or the other regulators, for their professional determination and high standards. Similarly, the lawyers, economists, and others, all of whom contribute so much to the richness of the proceedings. I would respectfully salute in particular my successors, Sir Gerald Barling, Sir Peter Roth and Sir Marcus Smith - and look forward very much to the next, no doubt absorbing and, I fully expect, extremely dynamic, developments in the competition law of the United Kingdom.

Christopher Bellamy

4th May 2003

- *Judge of the Court of First Instance of the European Communities, now the General Court of the European Union 1992-1999;*
- *President of the Competition Commission Appeal Tribunal, subsequently the Competition Appeal Tribunal, 2000-2007;*
- *Parliamentary Under Secretary of State, Ministry of Justice since June 2022.*