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COMPETITION DECISION MAKING AND JUDICIAL CONTROL - THE ROLE OF THE SPECIALISED TRIBUNAL

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Introduction

Ladies and gentlemen; it is a pleasure to be in Norwich this fine Summer's day and I thank the CCP for their kind invitation to speak. My purpose this afternoon is to focus on the role of the courts, particularly in making and reviewing competition decisions – an important feature of any effective system. In particular I want to consider the case for having a specialised competition tribunal, both for appeals against authority decisions and for hearing private actions, as opposed to relying on the general court system for this purpose. And whilst disclaiming any official endorsement of my remarks, I should declare an obvious interest in this issue.

Some Basic features of Competition Law Enforcement

Before focussing too much on the particular role of a specialised competition court, it may be helpful to remind ourselves of some basic aspects of competition enforcement, or more accurately, competition *law* enforcement, for you cannot enforce competition. The essential ingredients of this are:- clear policy objectives; sound doctrine and analytical methods; a strong legal framework, with clear rules and proper procedures; a means of measuring the benefits; and a sound institutional structure, including an appropriate appeal system. Let me say a little about each of these:-

Clear policy objectives: Setting policy objectives is essentially the task of government. Academics, commentators and practitioners can develop and test the theories, but the government must, as part of its overall economic policy, set the policy framework within which the competition system operates.

Sound doctrine and analysis: Competition law enforcement must be soundly based in economics. Decisions must have a clear economic rationale, and arise from clear analytical methods; any rules and principles must be correctly derived from economic analysis. Without this, enforcement quickly descends into formalism that is self-defeating. The principles, rules and decisions can be always be developed, explained and tested by authorities, courts and commentators, but they must be sound in the first place.

Strong legal framework: Most competition systems rest on prohibitions, of anti-competitive agreements and mergers and abusive practices. These are normally backed by penalties, which can be severe, and may extend to the punishment of individuals. (It should be noted, however, that the UK also emphasises improving competitive conditions in markets by formal Market

¹Chairman, Competition Appeal Tribunal. The views expressed are entirely personal and should not be attributed to the CAT or to any other person or organisation.

Investigations, conducted by the Competition Commission, where the aim is not prohibition and punishment.) The legal framework must cover all of this and set out proper processes for investigation and decision-making and appeal. If this is not done, competition enforcement lacks the necessary element of the “rule of law” and risks becoming oppressive, arbitrary and authoritarian.

Means of Redress: Punishment does not compensate the victim and the authorities will not be able to deal with every case. Private actions are meant to fill both of these gaps. In the USA, with its highly developed litigation system, treble damages and contingency fees, private actions are the norm rather than the exception. In Europe, despite efforts to invigorate it, the system is still patchy. It is now the intention of the EU and national governments to encourage private actions, whilst avoiding what are seen as the excesses of the US system. In the UK, the government has recently published proposals for far-reaching reform, which I will talk about later on.²

Assessment of Benefits: Explaining what competition policy is trying to do helps to establish a framework for measuring its benefits. This in turn helps to justify the policy. Measuring the immediate benefits of, say, breaking up a price fixing cartel is difficult enough. (In a related development, the UK government recently considered establishing a rebuttable presumption of loss of 20% in private damages claims, but dropped the idea after consultation.)³ Measuring dynamic impact on productivity or innovation is even harder as there are many other contributory contenders.

Institutional structure: There is no ideal institutional structure, but there are some key features which any effective structure must have. These are expertise, fairness, impartiality, independence and accountability. Again, I will discuss each of these very briefly.

- *Expertise:* The institutions must know what they are doing. Competition is a technical subject and the necessary level of expertise must be there so that the correct analysis takes place leading to the right decisions.
- *Fairness:* Competition enforcement is also a practical matter. It must have the general acceptance of those to whom it is applied. Fairness, besides being good in itself, is an essential pre-condition for this “buy in”. High handed, secretive or manipulative enforcement will undermine the system, however well based it is in economic theory.
- *Impartiality:* This is not quite the same as fairness. It requires an open-minded approach to evidence and argument. Perception of impartiality is just as important, as justice must also be seen to be done. There must be no appearance of, and certainly no actual, prejudice, hidden agenda or “axe to grind”.
- *Independence:* No competition authority is completely independent of government. What is needed is operational independence i.e. the freedom to set the enforcement agenda and

² See “Private Actions in Competition Law. A Consultation on Options for Reform; Government Response January 2013.”- published 29/01/13 (“Private Actions Response”).

³ See Private Actions Response, para 4.37.

to take decisions “without fear or favour”. Institutions that can be bent, bought or bullied are not independent.

- *Accountability*: Finally there is the need for institutions to account for themselves. In part this is to government, within the policy framework, and to parliament, the media and the public to show they are efficient and not wasteful of public money. But the main aspect of accountability in most competition systems is to the courts – which leads to the main focus of my talk today.

Authorities and Courts

Before examining how the courts hold the competition authorities to account, let us examine the various alternative models for authority decision making.

Administrative or prosecutorial: in the main Member States of the EU, enforcement relies on the so called “administrative model”, in which the authority itself investigates, evaluates and decides a case. From its decision lies appeal to the courts. By contrast in the USA, Australia and some other countries, the authority prosecutes its case in court, where the company accused of the infringement can present its case in reply. The court decides between them, often with a jury, and further appeal lies to the higher courts. The distinction is not absolute; in the UK, for example, the authority does not decide, but instead prosecutes the individual cartel offence in the criminal courts.

Proposals for change: There has been much debate over which system is “better”. In particular the administrative model is criticised for encouraging “confirmation bias” under which the authority tends to come out with the decision that supports its original investigation. On the other hand, the prosecutorial system is said to encourage settlements and plea bargaining, without proper access to justice. In the UK, and to some extent elsewhere in Europe, active consideration has been given to abandoning the administrative model (the recent Consultation on Institutional Reform,⁴ considered, but did not adopt, this option). There has been a related debate as to whether the administrative model meets the requirements of Article 6 ECHR, in combination with available appeal mechanisms, particularly given the very high penalties customary for serious infringements of cartel and abuse of dominance law. The issue now appears to have been resolved, at least for the moment, in the sense that the requirements of Article 6 are met provided the level of judicial scrutiny on appeal is sufficient⁵. However, the problem of confirmation bias in the administrative process *before* any appeal comes into play remains to be solved.

The UK System: In the UK, we have hitherto enjoyed a “double administrative” model, with the Office of Fair Trading (OFT) modelling its procedures very much on those of DG Competition, and applying a purely administrative process, and the Competition Commission (CC) operating a unique commissioner based investigative and deliberative model. These two are now being merged into a new Competition and Markets Authority (CMA) with all the powers of the two separate authorities, but whose internal procedures are still to be finally settled. It is understood

⁴ See Government Response to Consultation March 2012 (Dept for Business, Innovation and Skills) Part 6.

⁵ See *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011 (ECHR), *KME Germany and others v Commission*, Cases C-272/09 P and C-389/10 P, *Chalkor AE Epexergasias Metallon v Commission*, Case C-386/10 P.

that something more than a pure administrative decision making process may be possible as the CMA will have at its disposal a panel of “commissioners” transferred from the CC for mergers and markets work, and whose skill and judgment could be applied also to “antitrust” cases. Presiding over the authorities is the specialised Competition Appeal Tribunal (the “CAT”), which hears appeals against decisions of the OFT and CC as well as those of sectoral regulators. The CAT also has a special jurisdiction to assess damages in so called “follow-on” actions (see below). Besides its important role in the future in relation to appeals from the CMA, a major expansion of the CAT’s role in private actions is now contemplated by the government’s recent reform proposals.

As things stand, the administrative model looks set to remain the norm in the UK. This makes the role of the courts particularly important in providing the necessary degree of accountability and control. But let us first look at the courts’ role in private actions.

The Courts’ Role in Private Actions

Private actions take two forms – “stand-alone” and “follow-on”. In the former, a party proceeds in the courts to establish and prove the infringement, and then seeks redress in the form of a prohibition order and/or damages. Follow-on actions, as their name implies, follow from a decision by an authority establishing the infringement. Their purpose is to establish the harm caused and to provide compensation in damages or other form of redress. The UK government has recently announced proposals for a major boost to both forms of private action in competition cases, with a Bill expected to be published shortly⁶.

Stand-alone actions: The government wants to encourage these in the UK, and to focus them on the CAT, because of its expertise. The evidential requirements for bringing a competition case can be daunting, and the costs risks large, which probably accounts for the paucity of cases brought so far. Evidence in cartel cases is normally sparse and cryptic. Private parties may not easily get access to leniency statements and other “whistleblower” evidence available to the authorities, despite the UK’s far-reaching rules on disclosure of evidence between parties. The government is proposing to give the CAT power to grant injunctions and to encourage the use of accelerated, or “fast-track” procedures, particularly for cases brought by smaller companies. In a case, for example, where a small company risks being driven out of the market, and the authorities are too busy to deal with it, these changes may make a real difference.

Follow-on actions: There has for a long time been pressure to improve ways of compensating victims of competition law infringement. The UK government’s recent proposals are intended to make suing for damages much more attractive, although there are examples of such cases already. In 2003, the CAT was given specific jurisdiction, in addition to the High Court, to hear damages cases.⁷ Follow-on actions rest on the claimant not having to prove the infringement, but “merely” the harm and its consequences. Such actions are not always straightforward, however. Quite apart from issues such as “passing on” defences (where the defendant says the damage has been “passed on” to others by the claimant in the form of higher prices, and the claimant itself has suffered no loss), the separation of harm from infringement is not always so simple. Not only may subsequent evidence indicate a need to re-characterise the finding of infringement (was it

⁶ See Private Actions Response.

⁷ See Competition Act 1998, section 47A.

intentional or innocent, for example), but as more facts come to light, parties may want to add new infringements or extend existing findings. Under the CAT's statutory jurisdiction, a strict line against this is required (reinforced by the Court of Appeal)⁸ but the result for the system as a whole is not optimal.

Relationship with public enforcement: The prime purpose of damages is to compensate. Punishment (normally in the form of financial penalties) is a matter for public authorities; or so the principle goes. Exemplary or punitive damages are an exception to this, as although they are paid to the claimant, their purpose is to punish and deter. In certain limited circumstances for example where fines cannot or possibly have not been imposed⁹, exemplary damages may be justified, but in general they are only awarded with great caution.

Class actions, funding and fees: The viability of private actions is much affected by the conditions of litigation. Normally, the damages recoverable by one individual claimant, particularly an individual consumer, will be too small to justify the risk of litigation. Hence the need for some form of collective redress or "class" action. Various means of encouraging the bringing of collective claims for compensation have been considered, or tried, and the European Union is due to be tabling proposals for collective redress later in 2013.

The UK Reforms: The recent proposals for reform also cover collective actions in competition law.¹⁰ The UK government proposes, somewhat radically, to introduce a system of "opt-out" collective actions, subject to a strict certification procedure operated by the CAT. "Opt-out" is where all those defined in a class of claimants are included in the claim unless they opt not to be. Classes of these kinds are normally much bigger than those where the members must consciously "opt in". The proposals also limit the actions to those who are genuine representatives (trade bodies or consumer groups) and not law firms, third party funders or special purpose groups, set up solely to sue. To further prevent so called US style excesses, there will be no treble or exemplary damages available, nor contingency fees, and the "loser pays all" principle for costs will be kept. Significantly, out of court settlements will be encouraged, subject to CAT approval, and it is clear the government is much encouraged by the Dutch Mass Settlement Act of 2005. Although the inherent difficulty of proving a competition infringement in court will remain, these proposals will make "follow-on" actions for damages much more attractive than now. And class actions of this kind will be the exclusive preserve of the CAT, as they depend for many of their features on the supervision of a specialist court.¹¹

Appeals

Finally, we come to the courts' competition appeal function, i.e. how the authorities are to be held to account. In the UK this is particularly important as the government's merger of the OFT and

⁸ See eg *Enron Coal v EWS* [2011] EWCA Civ 2.

⁹ See *Devenish Nutrition v Sanofi-Aventis* [2008] UKCLR 783, *2 Travel v Cardiff Bus* [2012] UKCLR 211 and *Albion Water v Dwr Cymru* [2013] CAT 6.

¹⁰ see the Private Actions Consultation Response (January 2013) paras 5.1-5.72.

¹¹ Note also that the government intends to activate the so called "Lever Amendment" – s16 EA02 (see April 2012 Private Actions Consultation paras 6.34-46; Private Actions Response para 4.5), by which the High Court can transfer an existing competition case to the CAT.

CC is put through;¹² the creation of a single, powerful authority makes effective court scrutiny even more important.¹³

At the time of consultation on the creation of the CMA, the government considered the degree of scrutiny, in the sense of the standard of review on appeal, in its wish to “streamline” competition enforcement. At the time, it believed that the highest standard of review was necessary, in antitrust cases at least.¹⁴ However, in the recent Budget statement¹⁵ the government announced a further review of regulatory appeal procedures, including competition appeals, seeking once again to see whether appeals could be streamlined. A consultation paper is due out shortly. I will discuss the question of standard of review a little later. Suffice it to say here that the need to have an effective appeal mechanism against the decisions of competition authorities is an essential requirement of any mature competition system and is an important aspect of the Rule of Law. Effective appeals require effective courts, able to understand and deal with not only the economic complexities of any given competition decision, but also the overall context in which any ruling is given. In other words, the court must appreciate what effect its decision in the instant case will have on the efficacy and balance of the enforcement system as a whole.

The role of a specialised Tribunal

We have so far discussed the elements of a good competition enforcement system and found that a strong legal framework, proper institutions and effective appeals play an important part, alongside the sound analytical basis. We have considered various enforcement models, and how they impact on the courts’ functions. We have looked at the UK government’s proposals on enhancing private actions and how they will require supervision by an expert court. We have considered how the courts’ appeal functions should be exercised and noted the government’s wish to streamline enforcement generally, and appeals in particular. The question then arises whether a specialised appeal court or tribunal should carry out these tasks, or whether they should instead be entrusted to the general court system.

There are indeed good arguments for relying on the general courts. After all, the courts are securely established as independent, they are used to trying cases of great complexity, and judges are well known for being able to distinguishing false science from true. What is so different about competition law? In any case, issues are frequently inter-mingled, as for example where a competition law point is pleaded by way of defence or counterclaim in a commercial dispute. Despite these arguments, I believe that the case for a specialised court is equally powerful.

In the first place, competition law really is different, in that it depends for its very identity on economics. Without the ability to hear and understand economic evidence and argument, no competition case can have much substance. So the premium attached to knowledge and experience is large. This applies both to the judges (for example, the CAT has a president, a

¹² See the Enterprise and Regulatory Reform Act 2013.

¹³ For a discussion of appeals in the regulatory, rather than competition, context see the CERRE Study *Enforcement and judicial review of decisions of national regulatory authorities-identification of best practices* Brussels 21 April 2011.

¹⁴ “The government accepts the strong consensus from the consultation that it would be wrong to reduce parties’ rights and, therefore, that full-merits appeal would be maintained in any strengthened administrative system” (Consultation Response March 2012, para 6.18).

¹⁵ 20th March 2013, para 2.237.

group of legally qualified chairmen who chair the case panels of three, and a group of other members drawn from academic, administrative and professional backgrounds) and to the supporting staff (“referendaires” in the CAT, who assist and manage the casework).

Second, an appreciation of the competition enforcement system enables a specialist tribunal to assess the context of any case before it and to appreciate the effect of its decisions on the system as a whole. As an obvious example, if the CAT always reduced on appeal fines imposed by the OFT, this would virtually guarantee the bringing of appeals, with a distorting effect. A specialist court is best placed to weigh the advantages and risks here.

Third, a specialist court can be speedier and more focussed. Quite apart from not having to learn basic concepts afresh each time, it can develop short cuts and “fast-track processes” as a result of its experience. An example in the CAT is the assignment of a case panel to every case right from the start to oversee and manage the case as it goes along.

Fourth, and as a consequence, the specialised court can be more flexible in its procedures, as it can tailor these to competition cases, and does not have to take account of knock on effects on other types of case. Procedures to reconcile apparently conflicting economic evidence are an example of this.

“Going Native”

It is sometimes argued that a specialised court risks “going native” and usurping the function of the authority itself, conducting its own investigations, hearing too much fresh evidence, and “second guessing” the authority’s positions on policy issues. Those claiming this, usually from the ranks of the authorities, may seek a curtailment of the specialised court’s powers as a solution or even question the need for a specialised court at all. This is a potentially very serious criticism, but it is important to see what is really at issue.

I think we would all agree that a specialist court or tribunal should not seek to become in effect a second tier competition authority, far less usurp the functions of the first tier authority and should not seek to “second guess” an authority’s approach to policy. But no-one has produced any serious evidence that this is what is going on, at least in the UK.

Instead the real issue is about the effect, one way or another, of the specialist tribunal fulfilling its proper role, which is to hold the authorities to account and where it finds on the evidence that a particular decision is defective in some material respect to overturn it. The cumulative effect of a number of such findings may indeed make it harder for an authority to carry out its tasks and in that sense upset the operational efficiency of the system. But here are several comments that arise from this.

First, and most obviously, is the response “physician heal thyself”. Good decisions based on sound evidence are generally much less likely to be overturned and there are many examples in the UK of the CAT upholding authorities’ decisions.

Second, it would be quite wrong, and potentially dangerous, to address this perceived threat to operational efficiency by seeking to micro-manage and by implication curtail the court’s powers of review. This might fix the problem in the short term - indeed, on this basis why not abolish appeals altogether? But in the longer term this would set up a whole series of bad incentives for

the authorities, besides risking a grave injustice for the parties against whom the authorities act, and whose right of appeal will have been curtailed.

It is a feature of our democratic system and of our (albeit largely unwritten) constitution that decisions of administrative authorities can be reviewed by the courts. This is particularly necessary in the fact and analysis rich field of competition, where penalties are often severe. Arguments of administrative convenience and efficiency must take second place here. The essential question is :- “Does the citizen have effective recourse against the power of the executive?”. Some form of judicial scrutiny there must be; the question remains what is the appropriate degree of intensity.

The Standard of Review

We mentioned earlier the UK government’s wish to review the standard of scrutiny applied in competition appeals. In the UK we have the slightly unusual position that “antitrust” decisions taken by the OFT (i.e. on cartels and abuse of dominance) are subject to “full merits” appeal, whilst decisions of the OFT and CC on markets and mergers are subject “only” to judicial review. The difference that is usually quoted is that a full merits appeal allows the court to consider whether the decision was “right” as opposed merely to whether it was “reasonable” and, if necessary, substitute its own decision for that of the authority. Judicial review, it is said, by contrast, looks only at the legality, fairness and rationality of the decision and the remedy is a remittal back for a fresh decision. Different countries have different variations. Judicial review in EU law, for example, is something of a hybrid, allowing for more examination of the decision’s merits than may be normal in the UK equivalent, and is itself evolving to meet concerns under the ECHR¹⁶.

Authorities from time to time complain that full merits appeals are excessive and encourage the kind of mischief described above, with the risk of the courts usurping the authority’s role. As I have said, this risk is in my view over-stated, and in any case it misses the point. What matters is not the label attached to different standards of review, but the reality. The courts’ essential task on appeal is to examine the disputed decision and decide whether it “stacks up”. Full merits and judicial review are simply different ways of achieving this. This is not to usurp the authority’s function, merely to establish whether it has been properly discharged. It is the intensity of scrutiny that is the key. This can be heavy or light, according to the nature of the case, regardless of which sort of appeal standard is being applied. And the substitution of a new decision, which full merits appeal allows, can in practice be more “streamlined” than the remittal back for a fresh procedure under judicial review.

Conclusion

So where does this discussion leave us? As may be surmised, I have a strong preference for a specialised competition appeal court or tribunal. The knowledge and experience acquired over time makes deciding both on procedure and substance easier (although such matters will never be easy). Credibility is enhanced and accountability made more secure if applied by courts that cover these matters on a regular and consistent basis. The danger of “going native” is surely over-stated.

¹⁶ See footnote 5 above

Only on the issue of independence is there perhaps some ground for caution and concern. Although governments may complain from time to time, (sometimes quite loudly) no-one ever seriously questions (at least in the Western democracies) the independence of the courts and the judiciary, the need to maintain these essential elements of the separation of powers, and the right of the citizen to have recourse to the courts against the power of the executive. Even in the UK, where very little of this is written down, it seems to be generally accepted.

But a specialised tribunal such as the CAT, however, is a creature of statute, formally a little outside the general court system (and outside the general tribunal system also) dedicated to competition matters. The CAT itself is sponsored not by the Ministry of Justice, but by the Department for Business, Innovation and Skills. Statutes can be altered, as can departmental objectives. If it became the practice that parties, whether they be businesses, consumers or indeed the authorities themselves, habitually lobbied the government to amend, curtail or even abolish the powers of the CAT, simply because the outcome of cases was not to their liking, then the independence and credibility of the specialised tribunal would be impaired and the rule of law threatened. It might be better in those circumstances to have judicial control exercised by the general courts, even if the result might be slower and less clearly suited to the needs of competition law enforcement.

As to the debate on standard of review, I believe this misses the essential point which is that the reality matters more than the label. Authorities that make sound decisions in a fair and reasonable manner will find their decisions upheld, on the whole, and those that do not will not, whatever the form of review to which they are subject.

Judicial control must surely form an essential part of competition law enforcement. In the UK system, with the major expansion proposed for private actions, and the task of holding a new, powerful, merged competition authority to account, the need for a specialised competition appeal tribunal, that is to say the CAT, appears to be stronger than ever.

Thank you for your attention.