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**STRATHCLYDE CENTRE FOR ANTITRUST LAW AND EMPIRICAL STUDY (SCALES)**

**INAUGURAL LECTURE BY PETER FREEMAN.**

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**“A Regular Administration of Justice” – Competition Law and the Judicial Process**

***Introduction***

Many congratulations to Prof. Barry Rodger, albeit belatedly, on establishing this important new body. I am delighted to be able to contribute to its further development[[1]](#footnote-1). Competition law and policy are essential parts of the economic policy of Scotland, of the wider United Kingdom, and indeed of most modern economies. It is important therefore to study them and to discuss how to develop and improve them.

You may ask whether I have any business telling people in Scotland what they should or should not think about competition law. I can only rely on the fact that one of my first assignments in private practice, many decades ago, was to assist the Scotch Whisky Association on the *Distillers* case in Brussels and Luxemburg and I remained as their competition law adviser until I moved to the Competition Commission in 2003. Competition law in the context of Scotland is a subject very dear to my heart.

But I will concentrate, if you will forgive me, less on the substance of competition law and rather more on how it is applied and administered. Even a perfect system (and no-one would pretend that competition law is perfect) is of little use unless it is applied in a clear and effective way, so that its purpose can be readily understood, its benefits appreciated, and the fairness of its application not put in question.

The title of this talk is a quotation from Adam Smith,[[2]](#footnote-2) who is often regarded as the founder of competition policy. There is always a danger of quoting great thinkers out of context, but the principle of having a system of soundly administered justice as the basis for commerce in my view remains unchanged. And I am sure that Adam Smith would approve of the kind of empirical study that SCALES embodies.

I will attempt to explain how this principle applies in a competition context, with a particular emphasis on the essential role of the courts in overseeing the acts of the authorities. I will also point to the dangers of departing from this principle.

But first a quick word about the Competition Appeal Tribunal, the CAT as we call it, and its work in Scotland.

***The CAT and Scotland***

Just before the recent lockdown, CAT heard a case in Scotland concerning the allocation of grants by Creative Scotland. The pursuer was an independent book publisher, and his claim was that the allocation of grants by Creative Scotland had breached competition law.

The case was chaired by the then CAT Chairman, Lord Doherty, with two Scottish panel members. The hearing was in Edinburgh. A thoroughly Scottish proceeding,-- which serves as a reminder that the CAT plays an active role in Scotland.

The CAT’s judgment, issued in April 2020[[3]](#footnote-3), was on the preliminary issue of whether Creative Scotland was an “undertaking” within the meaning of the Competition Act 1998. The CAT held it was not, following an assessment of its role in relation to public administration in Scotland. Accordingly, the question of possible infringement did not arise.

In 2019, the CAT had also ruled[[4]](#footnote-4) that it had no jurisdiction to hear an appeal against Ofcom’s decision to allow the BBC to establish a new TV Channel – BBC Scotland. The problem was that, however interesting the issue might be, the CAT’s appeal jurisdiction was conferred by statute, and this situation fell outside its scope. So, the CAT was unable to decide the legitimacy, far less the wisdom, of establishing this new channel.

If these two instances are cases where the CAT was unable to get involved, a more recent case where the CAT does appear to have jurisdiction, and which is current, is a private action about transportation within the isles of Orkney[[5]](#footnote-5).

I mention these cases because the CAT has a UK-wide jurisdiction and takes its role in Scotland extremely seriously. Some of its most important cases have involved Scottish undertakings. An early example was the *Aberdeen Journals* case[[6]](#footnote-6) where a newspaper group was found to be excluding a competitor. *Claymore Dairies*[[7]](#footnote-7) was a notable early case on what was an appealable decision. The case brought by the *Merger Action Group[[8]](#footnote-8)* against the decision by the Secretary of State to approve the take-over of Halifax/Bank of Scotland by Lloyds was an important example of the CAT adjudicating at great speed on a decision of a Minister (as opposed to one of an authority). A little more recently, the CAT upheld the Scottish firm *Skyscanner’s* appeal[[9]](#footnote-9) against a decision by the Competition and Markets Authority (CMA) involving on-line hotel booking.

My point is that the CAT is present and active in Scotland. It has a nominated Scottish judge (Lord Ericht) and a senior advocate Andrew Young QC amongst its Chairmen, together with five Scottish based Ordinary Members who will normally sit on cases with a Scottish aspect.

Let me now return to the theme of my address, touching first on why we need a competition policy at all.

***Competition - why do we have it and what does it achieve?***

I cover this only briefly as I am assuming, for the purposes of this address, that the need for, and benefits of, competition are generally accepted. To quote from the UK government’s 2001 White Paper “A World Class Competition Regime”[[10]](#footnote-10):

*“Vigorous competition is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate… Competition is a central driver for productivity growth in the economy…”*

Similar statements affirming the importance of competition can be found in many subsequent official publications over the past two decades - most recently in the BEIS consultation paper “Reforming Competition and Consumer Policy” and in the Government’s Response published on 20th April 2022[[11]](#footnote-11):

*“Fair and open competition is the bedrock of the UK economy. The competitive process creates incentives for firms to deliver the deals on goods and services that consumers want and need and to innovate to create new goods and services to win market share from rivals.” (2021)* and:

*“The UK economy thrives because of rigorous support for competitive open markets with high consumer standards.”(2022)*

It is true that there are signs that this consensus may be breaking down. People are questioning whether competition really does deliver the benefits that it claims, or indeed is useful, or even relevant, to our current problems. The COVID-19 experience has shown that competition policy can look very inadequate in a severe crisis.

But discussing these possible trends is happily not my purpose in in this address, which is directed at how competition policy should best be applied.

***How to apply competition policy - by law or by executive action?***

In very simple terms, there are two ways of applying competition policy in the economy, by a system of legal decision making, or by a system of executive action. The UK has tried both approaches, or rather a mixture of the two, before finally settling in 2002 for a law-based approach.

Let me be clear. In one sense both these systems are law-based, in the sense that they operate within a legal framework and are therefore subject to the law. But an executive system, sometimes also described as an ‘administrative’ system[[12]](#footnote-12), places the main emphasis on measures decided on and implemented by Ministers, albeit on advice from specialised bodies, with the legal process playing a lesser role.

Before the major reforms of 1998-2002, the UK had a mixture of law-based and executive-based systems. Although competition played a significant role, the regime was designed to protect ‘the public interest’, an elusive concept offering decision makers a considerable degree of flexibility.

For restrictive agreements (cartels as we tend to call them), judicial control was provided by the Restrictive Practices Court (RPC) whilst the executive contribution came from the Director General of Fair Trading (DGFT) and the Secretary of State for Trade and Industry, who between them decided which cases went to court. Although in principle this was a system operating under judicial control, the executive side predominated as in practice very few cases were sent to the RPC.

Control of monopolies was almost entirely executive in nature. Monopoly situations were referred by the DGFT or the Secretary of State to the Monopolies and Mergers Commission (MMC) which investigated them and recommended executive action by the Secretary of State if this was needed. The system for merger control was constructed in a similar way. Decisions by Ministers were subject to judicial review, but cases, certainly successful cases, were few and far between[[13]](#footnote-13).

***The new system introduced in 1998-2002***

In 1998, after a decade of consulting, the UK adopted the EU style prohibition system. Indeed, it adopted the EU Treaty articles almost word for word. Restrictive agreements and abuse of dominant position were prohibited by law; the newly empowered Office of Fair Trading (OFT) was empowered to take decisions and impose substantial penalties; and a full right of appeal to a specialist tribunal, and beyond that to the appeal courts, was established. The specialist tribunal emerged as the CAT in 2002.

The regimes for monopoly and merger control were retained but were completely recast into a new legal framework. The old public interest test was replaced by a test of SLC (substantial lessening of competition) for mergers and AEC (adverse effect on competition) for markets[[14]](#footnote-14). The power to make competition decisions and impose remedies was transferred from the Secretary of State to the authorities, subject to review by the CAT.

Because the decision making was in two phases, involving the OFT and a newly constituted Competition Commission (CC) as successor to the MMC, decisions in these areas were subject only to judicial review. There were also no penalties for courts to rule on.

A residual power to identify specific public interest grounds was reserved to the Secretary of State, exercised initially only for defence and national security[[15]](#footnote-15) but since extended to certain other fields.

This may all seem like ancient history. But without some appreciation of how our present system came about, we cannot sensibly comment on, far less criticise, it. The four key points to note are these:

**First**, in substance, the new system was founded on competition. Wider public interest issues were henceforth excluded, save in specific, clearly defined, situations. This was because competition, as a branch of economics, was thought to lead to more reliable decisions that were based on the disciplined analysis of evidence, rather than on intuition, prejudice or ministerial preference.

**Second**, there was great emphasis on transparency. Decisions of the OFT and CC had to be clearly reasoned so that they could be readily understood, and parties could challenge them if necessary. Gone were the days when as few reasons as possible were given, to guard against judicial review.

**Third**, whilst Ministers retained overall responsibility for the actions of the authorities, operational control passed to the authorities themselves, who were in this sense “independent*”.*

**Fourth**, this operational independence was subject to requirements of accountability. This was in part to parliament, the media and the public. But in large measure it was to the courts, specifically to the CAT, with further appeal to the higher appeal courts in all parts of the United Kingdom. This provided the essential judicial supervision of the authorities’ activities and an avenue of recourse to those adversely affected by what the newly empowered authorities did.

Over the past twenty years, much has changed in the competition world. Not least the OFT and CC were merged in 2013 to form the new Competition and Markets Authority (CMA), which is now the main competition enforcement authority, in Scotland as elsewhere in the UK.

But in respect of these four key features, not much has changed. The competition enforcement system and the supervision of it remain largely intact.

***Pressure for Change?***

There has been some pressure to depart from what we may call the 1998/2002 “Settlement”. This was in part in reaction to the so called ‘digital challenge’, which I will deal with below, but partly because of a general perception that confidence in competitive markets has diminished.

The conclusion drawn by some, particularly within the competition authorities, was essentially institutional, namely that the current framework was too restrictive, and that, (for example in the context of formal market Investigations and merger control under the 2002 Enterprise Act), a more nimble and less cumbersome approach was needed.

In addition, it was suggested that the appeal system was too heavy, provided too much protection to infringing parties, and was having a ‘chilling effect’ on enforcement.

In February 2019, the then Chairman of the CMA, Lord Tyrie, in a letter to the Secretary of State,[[16]](#footnote-16) put forward a number of quite radical proposals to reform and streamline competition enforcement, which reflected many of these perceptions. In particular, he pressed for a lower level of scrutiny by the CAT of competition appeals. Specifically, he took issue with the full merits appeal standard and the CAT’s approach to so called ‘new’ evidence and examination of witnesses in person.

Some of the suggestions, particularly those relating to speed of process and enforcement in digital markets, gained some traction. Lord Tyrie left the CMA in October 2019, but the CMA continued to press for reform.

In 2020, the Government commissioned an inquiry by John Penrose MP, whose report, published in February 2021[[17]](#footnote-17), contained a number of radical suggestions to make competition enforcement more directly focussed on the consumer. The Government did not commit to implementing any of these proposals, but, later in 2021, itself published the Competition and Consumer Consultation[[18]](#footnote-18) on possible reforms, which in turn provoked a wide range of responses from interested groups.

For market studies and investigations, one proposal aired was to give the CMA greater freedom to take interim enforcement action during an investigation, to prevent obvious “harm” continuing unchecked and to allow for more forceful intervention. Another was to introduce a new single stage market investigation process, with markedly fewer procedural checks and balances.

Both these proposals suggested some impatience with the form of market investigations and a feeling that they should be applied with more vigour. Against that it was argued that the reforms would give too much licence to the CMA to intervene and impose measures without sufficient examination of the evidence. Interestingly the CMA itself argued against changing the structure of the market investigation regime.[[19]](#footnote-19)

In relation to mergers, apart from a similar wish to “speed things up”, the concern was more that the regime was not catching acquisitions, particularly of small start-up companies, where there was no market overlap, but where a threat to future competition was being extinguished.

There had also been suggestions (not from the CMA) that the substantive test should revert to a broader “public interest” review, to enable a range of issues to be considered in addition to competition. The Consultation itself did not propose abandoning the SLC test but thinking along these lines is in part behind the recently introduced controls[[20]](#footnote-20) on strategic investments in certain identified business sectors, although security considerations play the predominant role here. This approach is also consistent with moves to regulate digital markets, which are discussed below.

The Government’s Responseto Consultation[[21]](#footnote-21), which has just been published, is, reassuringly and perhaps surprisingly, unradical in both tone and content. Essentially the markets regime is to be left intact, although interim measures and commitments, subject to appropriate appeal rights, will be introduced during investigations. But the idea of a single investigative ‘tool’ for markets has been quietly dropped.

Merger control jurisdiction will be extended to include situations where established companies acquire small nascent competitors, and jurisdiction based on effects within the UK extended. But the voluntary notification system is retained[[22]](#footnote-22) and no other major changes are envisaged.

Most importantly, the panel system for merger and market investigations will be maintained, possibly with a cadre of more full-time members. A duty to act expeditiously, a central feature of Lord Tyrie’s proposals, will be introduced for the CMA, although it is hard to see this making much difference in practice.

I will examine the government’s response on appeal standards later on, but suffice it to say here that, all in all, it is difficult to regard these proposed improvements to the competition system as anything other than incremental, rather than radical, in nature.

***The Digital Economy***

I will now touch briefly on the so-called ‘digital challenge’.

The emergence of the digital economy and the often very large and powerful companies that operate in it have raised difficult issues both for the substance of competition law and for its enforcement.

Issues such as whether accumulation of data confers market power, or whether services provided free to consumers are nonetheless harmful to competition, provide ample food for debate. The authorities are also aware of the rapid pace of innovation and change.

A case started against a “Big Tech” undertaking may take several years to complete. During that time, markets will have changed, and the outcome may have become irrelevant. Speed and agility are the new enforcement watchwords.

The authorities’ own processes often take a lot of time and no doubt they will seek to speed these processes up wherever possible. But it is not difficult to see how this can play into the argument on appeals. Defending a decision in court takes time and resources. Infringing undertakings have every incentive to defend themselves. The authorities may feel that their efforts are increasingly thwarted by the judicial process.

As the CMA’s Chief Executive said recently[[23]](#footnote-23), referring to the CMA’s existing powers:
*“(T)hese powers are slower and there is a risk that we will end up spending years in litigation, which is what has happened historically with antitrust cases.”*

In order to overcome this difficulty, a new regulatory system is promised, overlaid on the existing competition powers and in 2021 DCMS and BEIS published a consultation paper on likely reforms, following the Furman Report, which recommended major changes both to the substance law and procedure in digital markets [[24]](#footnote-24). A Digital Markets Unit (DMU) is to be set up as part of the CMA, tasked with assigning Strategic Market Status to particular technology-based undertakings, and then applying to them, and overseeing, binding Codes of Conduct and other enforcement measures. It is possible that some digital mergers will need to be notified to the authorities.

It is currently proposed that these measures will be subject only to judicial review, not full merits appeal, on the grounds that this is regulation, not competition, and the regulator needs a nimble appeal regime.

Far be it from me to question the wisdom of this, but could it not equally be said that the novelty and complexity of the issues in the digital age call for greater, rather than less, judicial scrutiny, particularly in the early stages of a new regime? And in relation to speed of process, it is not clear that a speedy, but wrong, decision is always a good outcome.

The Government’s response to the consultation has not yet been published and so these measures have not yet passed into law, although a shadow DMU has been set up within the CMA in anticipation of the new regime.

It is early days, but I for one doubt that this regime once in force will be free from complex appeals and hard-fought litigation, whatever standard of review is provided.

***Moving away from a law-based system?***

This new approach to regulation of “Big Tech “companies is the clearest example yet of controls going beyond the pure competition-based prohibitions and represent a significant departure from the competition law regime of the past two decades. It remains to be seen whether other major policy changes, the most obvious of which is the “Net Zero” policy and wider issues of sustainability and environmental compliance lead to similar pressures[[25]](#footnote-25).

Does this in turn mean that the law-based system that has been in place since 2002 is also under threat?

On the one hand, even if they have not all been adopted, there are the ideas I described earlier in relation to streamlining markets and extending the scope of merger control; and there is the digital challenge. It appears that competition-based interventions are not always seen to be enough to deal with these emerging threats.

Do these pressures add up to a wholesale move away from the law-based system? No-one is seriously suggesting that we should discard the prohibition approach to cartels (although leaving the EU would allow this to happen). Also, the authorities seem curiously reluctant to make full use of the extensive powers contained in the market investigation regime, again no longer restricted by the need to conform with EU law requirements.

Although there does seem to be a noticeable wish to lessen the amount and intensity of judicial control, which is disturbing when placed alongside a desire to provide greater enforcement powers, it is hard to see any serious or concerted attempt to move away from a law-based approach, still with a significant degree of judicial control.

Nor should moves towards politicisation of competition enforcement be exaggerated. The Response to Consultation envisages a greater use of “Strategic Steers” to the CMA, although operational interference is not envisaged. One senses a renewed wish by politicians, if not officially by Ministers, to “get more involved” with competition enforcement and influence overall strategy, if not case selection policy and case results. In one sense this is welcome, as showing greater interest in competition policy generally. We should be watchful, however, of any tendency to influence the CMA’s operational activity.

Perhaps the most important consideration against any significant operational interference is that the capability within government for assessment and decision making in individual cases has been largely outsourced to the competition authorities. Even if Ministers wanted to get more closely involved, they would struggle to inform themselves of the detail.

So, to summarise my view, and I stress it is only a personal view, the Government will *not* seek to play a greater role in competition decision-making, or to re-introduce an executive based model. The competition authorities will themselves also remain committed to a law-based system with a strong element of judicial control, in preference to an executive based system under any active ministerial supervision.

Whether that judicial control will continue to be sufficiently rigorous is the question to which I now turn.

***Private Enforcement – a new role for the courts***

Before we focus on the courts’ review function, I must mention briefly an important new factor, which is the rapid growth of private competition enforcement, operating largely in parallel to the system of public enforcement by the authorities. Whilst apparently separate, they are in fact closely linked.

Private actions may take the form of seeking damages for infringements found by the authorities. Generally, authorities do not find it easy or a good use of their time to award compensation to victims of infringements and leave that task to the courts.

Alternatively, one party can sue another for breach of competition law. These cases were given a major boost in the UK in 2015, when a new system of collective actions was introduced[[26]](#footnote-26).

Of course, these actions are available to businesses, or groups of businesses. But the policy is that they should also be available for consumers, or classes of consumers. The 2015 reforms introduced a new form of “opt-out” collective action, centred exclusively on the CAT, by which a representative can bring a claim on behalf of a whole class of consumers.

So, we are starting to see large-scale damages claims brought on behalf of large groups of consumers, alongside the claims by businesses, either starting from scratch or “following on” from infringement findings by the authorities.[[27]](#footnote-27)

Claims for damages had, until recently, tended to be brought in the general courts rather than the specialist CAT, because the conditions there were less prescriptive. But that has changed. First, the CAT now has the same ability as the general courts to consider all aspects of the infringement; secondly, competition claims brought in the general courts, even if part of a wider action, can now be transferred to the CAT[[28]](#footnote-28). And, finally, as we noted, the new collective actions regime for consumers is the exclusive preserve of the CAT[[29]](#footnote-29).

It is to be hoped that consumers will see some tangible benefit from the prohibition of competition law infringements and the award of compensation to those who have been harmed. This may also help to remind people that competition law has some relevance to them.

The link to public enforcement is this:- the effect of this growth in private enforcement is to put the courts even more centre-stage in the application of competition law. They cannot seriously be accused of not having the relevant knowledge or experience to handle competition cases. In particular, it greatly enhances the CAT’s expertise and knowledge. On the other hand, it does not resolve the issue of what role the courts should play in the enforcement of competition law by the authorities.

***The Courts’ role on appeals***

So let me return to the main theme of this address – the role of the courts in overseeing the actions of the authorities. Here also we are encountering a shift in the consensus that underpinned the 1998-2002 settlement.

***Prohibition decisions and the law on Human Rights***

It was common ground when the prohibition system was introduced that something more than ‘traditional’ judicial review of infringement decisions was needed.

This was in part because of the adoption in UK law of the European Convention on Human Rights (ECHR)[[30]](#footnote-30). This provided, amongst other things, that persons (including for this purpose businesses) who were subjected to criminal-like penalties must be able to defend themselves before an impartial court or tribunal and to question the evidence against them.

The ‘administrative’ decision-making model that was taken and adapted in 1998 from the EU’s own system was generally acknowledged not to fulfil this requirement. The OFT was investigator and judge in its own cause. The parties’ ECHR rights needed to be guaranteed by a right to bring a ‘full merits’ appeal to the CAT.

As a matter of policy, it was decided not to attempt to imitate the EU court system, with its rather specific grounds of review, but to bring in a full merits standard for appeals of the OFT’s decisions under the Competition Act.[[31]](#footnote-31)

This was a matter of the greatest importance. The appeal to the CAT was seen as the infringing parties’ first chance to appear before an impartial tribunal, in which the evidence against them could be examined and witnesses questioned.

***Too heavy a system?***

As we have noted, it is now being suggested by some that this form of appeal is too ‘heavy’ and is in some way ‘chilling’ the authorities’ work by forcing them to spend too much effort on preparing the defence of their decisions against possible appeals.

Some in the CMA, for example, have been talking in these terms quite openly, with the apparent aim of lowering the standard of review from full merits to “ordinary” judicial review, and reducing the amount of evidence considered on appeal, with less or no oral examination of witnesses. The CMA’s recent submission to the Competition and Consumer Consultation[[32]](#footnote-32) took a more moderate line but still pressed for further review and changes to the CAT’s handling of witness evidence.

***Communications Act appeals***

The issue of over-weighty competition appeals has been somewhat complicated by a parallel debate on what is the right standard of review on appeals from certain decisions of the communications regulator Ofcom. These were, in 2003, also made subject to full merits appeal, to comply with the requirements of EU directives that provided for independent review of decisions “taking due account of the merits of the case”.

After a dozen years of argument, and several reviews, the government in 2017[[33]](#footnote-33) lowered the standard from ‘full merits’ to judicial review, stating that this still complied with the requirements of EU law, from which the specific requirement to take due account of the merits derived.[[34]](#footnote-34)

Whatever the rights and wrongs of that debate, it is a different issue from that of appeals under competition law. Quite apart from the continuing requirements of EU law, most regulatory decisions, are not quasi-penal in ECHR terms, ie giving rise to penalties and substantial civil liability.

Moreover, it has yet to be properly established how this new, hybrid, standard of review should actually be applied in practice in the communications context, although the early indications are that the conduct of appeals will not have changed very much.[[35]](#footnote-35) The Penrose Report[[36]](#footnote-36) suggested this could be a template for other appeals, but the particular characteristics of Communications legislation, and its uncertain future status as Retained EU law, make this unattractive.

***Is there an issue?***

Let us return to the question of what degree of judicial control is appropriate in competition cases. And let us examine what is really at stake here.

No one is seriously questioning the need for some degree of judicial supervision of competition decisions. What is at issue is the *degree* of control and the *intensity* of the review by the courts. Here it is necessary to get behind the rhetoric and examine what actually goes on in an appeal.

This means looking briefly at how appeals are brought, who can bring them and how evidence is adduced and considered. Let me take as a first example a ‘full merits’ competition appeal in the CAT.

***An Appeal against an Infringement Decision***

These can be brought by those found to have infringed and others with the requisite interest. The appeal must specify the grounds of appeal, and all further consideration is limited to those grounds.

Although the appeal will be against the authority’s decision, under the presumption of innocence, the burden of proving the infringement remains on the authority.

 This is fundamentally because being found to have infringed competition prohibitions is an extremely serious matter, bringing financial penalties, exposure to private damages suits, possible disqualification for responsible directors and acute reputational damage.

That may all seem to stack the odds against the authority. But this is not the case.

First, although the appeal can be against the substance of the decision, it is limited to what is in the grounds; it is not a complete re-run of the decision; it is not a second trial or a *de novo* examination.

Second, in terms of evidence, the authority’s defence rests essentially on the decision itself and the evidence on which it is based. The appellants may raise evidence in response to that relied on in the decision, and the authority may adduce evidence in response to that. Evidence that could have been put to the authority during the administrative process should not normally be admissible on appeal.

Third, the authority can file its own witness evidence and cross-examine witnesses put forward by the appellants. This process of oral examination is a key part of a merits appeal.

Fourth, the CAT pays appropriate deference to the authority’s expert judgment on policy matters or issues where there are several possible views. The CAT does not normally override the authority on such questions, unless it considers the authority has made a material error.

Finally, if it does think there is such a material error, the CAT can substitute its own decision - ie cure the defect on appeal. It does not have to send the whole case back to the authority for reconsideration[[37]](#footnote-37).

The Court of Appeal in England has recently given an extensive account of the supervisory role of the CAT as a court of first instance in the context of an appeal from a competition infringement decision by the CMA.[[38]](#footnote-38)

*“(i) (F)or a (non-judicial) administrative body lawfully to be able to impose quasi-criminal sanctions there must be a right of challenge; (ii) that right must offer guarantees of a type required by Article 6 {ECHR}; (iii) the subsequent review must be by a judicial body with ‘*full jurisdiction’ *(iv) the judicial body must have the power to quash the decision ‘*in all respects on questions of fact and law’*;(v) the judicial body must have the power to substitute its own appraisal for that of the decision maker;(vi) the judicial body must conduct its evaluation of the legality of the decision* ‘on the basis of theevidence adduced’ *by the appellant; and (vii) the existence of a margin of discretion accorded to a competition authority does not dispense with the requirement for an* ‘in depth review of the law and the facts’ *by the supervising judicial body.”[[39]](#footnote-39)*

Perhaps the last point is the key. An authority enjoys a margin of discretion but the courts must review the substance of the decision (both law and facts) as well as its form.

***Judicial Review***

By contrast, an appeal by way of judicial review in the CAT is much more of an argument supported by written evidence. There is generally little recourse to oral evidence and no cross-examination of witnesses.

In other respects, judicial review is in many ways similar to an appeal on the merits. The appeal is limited to the grounds of appeal and is in no sense a re-taking of the original decision. Evidence that should have been presented to the authority will not normally be admissible in the appeal.

At the moment, judicial review in the CAT is essentially limited to merger control, or market investigation decisions. The evidence in the administrative process, particularly if it is a markets case, may be voluminous. But the review tends to concentrate on whether this was the right evidence, whether it was considered reasonably by the authority and whether a fair process was conducted.

A recent merger illustration is the CAT case *JD Sports v CMA*[[40]](#footnote-40), where the CAT quashed in part the CMA’s decision banning JDS’s proposed merger with Footasylum, on the grounds that it had not properly informed itself *inter alia* about the likely market effects of the Covid lockdown, and as a result had come to insupportable conclusions on the likely effects of the merger. The CAT’s judgment was roundly endorsed by the Court of Appeal in refusing leave to appeal.[[41]](#footnote-41)

The essential differences from a full merits appeal are, first, that the CAT does not have to decide whether the authority’s decision is ‘right’; merely that it was correctly and fairly reached; and, secondly, that it cannot substitute its own decision for that of the authority; it can only remit for further consideration.

***Assessing Evidence***

The value of evidence that is presented orally is a matter of constant debate.

Some question the value of oral evidence of fact, pointing out the defects of memory. For expert evidence, however, it is less a question of recall than of knowledge and expertise. Experts, of course, may disagree, particularly economic experts.

First and foremost, the ability to hear an expert being cross-examined can be very helpful to the court. This is particularly so when different experts appear to hold conflicting views. The CAT tries to deal with this in two ways.

The first is to require each side’s experts to prepare a joint paper clarifying what issues they agree on and where they disagree.

Secondly, where this is feasible, the CAT conducts a contemporaneous examination (a so called ‘hot tub’) where the judges examine the witnesses together, again seeking to clarify the areas of agreement and disagreement. The experts are also allowed to question each other. Often this shows that there is no real disagreement on the economic principles, merely on their interpretation and application to the case, and even these disagreements can be reduced.

***The Government’s Response***

As might have been predicted, the Response to Consultation confirmed that the vast majority of respondents favoured retaining the full merits appeal standard for competition appeals. The Government has decided against any relaxation in the standard of review, and this is very much to be welcomed[[42]](#footnote-42). However, instead of disposing of the issue for the future, the Government has limited itself to making no change “at this time”. This therefore leaves it open for the issue to be raised again in future consultations, and is, in my personal view, unfortunate.

Equally unfortunate is the decision to lower the standard in appeals against interim measures in competition cases to judicial review[[43]](#footnote-43). This is in response to the claim by the authorities that their use of interim powers is inhibited by the possibility of full merits appeals, a proposition for which, given the almost complete absence of case examples, there is no evidence whatsoever.

Time will tell whether this proposal is wise or workable, and we should take comfort, perhaps, from the retention of full merits appeals for competition cases in general.

***A Prosecutorial System?***

There is, of course, a quite different way of addressing this problem. If the objection to the present system is that an authority has to concentrate too much attention on defending its decision on appeal, one obvious solution is to eliminate the administrative decision stage altogether and move straight to court.

This would involve the authority acting as prosecutor in infringement cases, presenting its case before the court (most likely the CAT) in an adversarial process in which the accused infringers could have a full opportunity to defend themselves. Further appeal would then lie to the appeal courts as now.

The advantages of this system, apart from the reduction in overall process length, would be clarity about respective roles and a guarantee of a fair decision that was ECHR compliant. The authority would no longer have to separate its investigation and decision-making activity and could concentrate on preparing the best possible case. Any penalty could either be set directly by the CAT, or indirectly by approving the authority’s proposal.

Against this it is said that this means every case would have to go to court; that softer enforcement measures would tend to be less used; and that US style “plea bargaining” would be the norm.

It is not clear, however, that this would necessarily occur, or if it did, be a drawback. Plea bargaining can be a very effective ‘soft enforcement’ tool and is not, in essence, very different from current settlement and commitments practice.

Prosecutorial systems feature, in one form or another, in the competition systems of Canada, Australia, Hong Kong and, in part, South Africa, as well as the USA and, nearer to home, Ireland and Austria[[44]](#footnote-44).

This proposal was given careful consideration in the consultation prior to the institutional reform of 2013. It was not taken forward then because it would have been a further upheaval, and because it was felt by the then government, not unreasonably, that the new CMA should be given a proper chance to improve its performance on infringement cases.

The proposal was again raised by respondents to the Competition and Consumer Consultation, but with little sign of favour from the Government.

Given the decision to leave the current appeal system broadly intact, this proposal can perhaps once again be shelved. But if in the future If it is again claimed that the current system of appeals is in some way over-burdensome for the authorities, then I would suggest that there is no reason not to bring the prosecutorial system proposal back into consideration also.

***A Regular Administration of Justice***

But this discussion about intensity of scrutiny on appeal is in some senses just a distraction. What the law brings to the enforcement of competition policy is fairness, due process, transparency and the ability to question the validity of a conclusion in the light of the evidence. These features are common to all appeals, indeed to all judgments.

The possibly sad fact is that most (although not all) competition cases are nowadays highly complex, requiring the consideration and sifting of large amounts of economic data. Whilst of course expert authorities cannot flinch from this task, it is in system terms simply not safe to leave their assessments without some proper means of judicial accountability that considers the substance as well as the form of the decision.

Above all, the law provides the framework for all enforcement activity. It provides an essential guarantee that the authority will not exceed the limits of its power and that the State itself will only act within the law. The danger of unbridled and arbitrary exercise of executive power applies in the competition law field as in any other.

***The Creative Scotland case (again)***

I come back to the *Creative Scotland* decision, which I mentioned at the start.[[45]](#footnote-45) What was decided is not the point in this context. What matters is that the CAT gave a clearly reasoned decision on a key issue of jurisdiction. This was in the context of a private claim. Had it been an appeal from a decision by an authority it would have taken a similar approach[[46]](#footnote-46). The CAT ensures that the competition system in Scotland, as in the rest of the UK, operates within the law.

In my submission, it is this wider role as part of Adam Smith’s ‘regular administration of justice’ that gives the entire system of competition law enforcement its legitimacy.

***Conclusion***

In conclusion let me offer some general propositions around the role of the judicial process in competition law.

First; a system based on the rule of law is to be preferred to one based on the rule of the executive. Adam Smith would surely agree.

Second; the need for some degree of judicial supervision of authorities cannot seriously be in doubt. Unaccountable competition authorities would themselves be a threat to competition.

Third; when an authority has extensive powers to investigate, prosecute and decide on competition law infringements, and impose substantial penalties, an appeal system must include a consideration of the merits of the case. Judicial review, however flexible and intrusive, is not enough.

Fourth; competition decisions must be made by drawing appropriate conclusions from evidence. How well that is done determines the excellence or otherwise of the system. Political imperatives or media storms should not be the principal reason for findings of infringement.

Finally; checking whether this exercise has been performed in as reliable a way as possible is most readily done through a judicial process, where evidence and witnesses can be examined and cross-examined. There is no better way of getting at “the truth”, if ever there can be such in competition assessments.

Thank you for your attention.

1. Chairman Competition Appeal Tribunal 2013-2021. All opinions and views expressed in this address are personal to the author and should not be attributed to the Tribunal or to any other person or body. [↑](#footnote-ref-1)
2. “*Wealth of Nations*” (1776) Book V Chapter iii. The full quotation is :“*Commerce and manufacturers can seldom flourish long in any state which does not enjoy a regular administration of justice, in which people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not regularly employed in enforcing the payment of debts from all those who are able to pay.”* [↑](#footnote-ref-2)
3. *Strident Publishing Limited v Creative Scotland* [2020] CAT 11. The hearing in Edinburgh was on 2nd March 2020. [↑](#footnote-ref-3)
4. *David Henry v Office of Communications* [2019] CAT 3. [↑](#footnote-ref-4)
5. *Blue Planet Holdings v Sinclair Haulage, Orkney Ferries and Orkney Islands Council*. (Notice published on 22 November 2021; an Order giving directions was issued on 21st February 2022, and a hearing to consider the parties’ strike-out and summary judgment applications has been listed for 26 and 27 May 2022 in the Court of Session, Edinburgh). [↑](#footnote-ref-5)
6. [2002]CAT 4. [↑](#footnote-ref-6)
7. [2003] CAT 3. [↑](#footnote-ref-7)
8. [2008] CAT 36. [↑](#footnote-ref-8)
9. [2014] CAT16. [↑](#footnote-ref-9)
10. Cm 5233, July 2001 (DTI). [↑](#footnote-ref-10)
11. *Reforming Competition and Consumer Policy – Driving Growth and Delivering Competitive Markets that Work for Consumers* (hereinafter “The Competition and Consumer Consultation”) CP 488 July 2021 para 1.1. and “Government Response to Consultation” (hereinafter the Response to Consultation) CP 656 April 2022 para 0.1. [↑](#footnote-ref-11)
12. This is only partly correct, as the term is also used to contrast with the prosecutorial system – discussed below. [↑](#footnote-ref-12)
13. See eg *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, and *Interbrew**SA and anor v Competition Commission and anor,* [2001] EWHC Admin 367. [↑](#footnote-ref-13)
14. The market Investigation regime could cover matters also caught by the prohibition on abuse of dominance, so, to that extent, the system was a hybrid one. [↑](#footnote-ref-14)
15. Further specific provisions for financial stability and public health during Covid 19 were later added. [↑](#footnote-ref-15)
16. Letter from Rt. Hon. Lord Tyrie to Rt. Hon. Greg Clark MP (Secretary of State for Business) 21st February 2019. See also the CMA’s Submission of 4th October 2021 to the Consultation on Consumer and Competition policy. [↑](#footnote-ref-16)
17. *Power to the People* – a Report by John Penrose MP, February 2021 (“The Penrose Report”) [↑](#footnote-ref-17)
18. See fn 11, above [↑](#footnote-ref-18)
19. See CMA Submission para 2.19. There were also proposals to curtail the use of independent panel members across market and merger investigations. Again, the CMA itself did not favour such changes. [↑](#footnote-ref-19)
20. National Security and Investment Act 2021. [↑](#footnote-ref-20)
21. See fn 11, above [↑](#footnote-ref-21)
22. Some digital mergers may require to be notified – see below. [↑](#footnote-ref-22)
23. HC BEIS Committee Oral Evidence 1st February 2022 Answer 116 (Andrea Coscelli). [↑](#footnote-ref-23)
24. *Unlocking Digital Competition - Report of the Digital Competition Expert Panel* (March 2019) commissioned by HM Treasury and BEIS; *A new Pro-Competition Regime for Digital Markets* - Consultation by DCMS and BEIS July 2021**.** [↑](#footnote-ref-24)
25. See, eg, the discussion in the CMA’s recent paper: *Environmental sustainability and the UK competition and consumer regimes* (CMA Advice to Government 14th March 2022). [↑](#footnote-ref-25)
26. Consumer Rights Act 2015. [↑](#footnote-ref-26)
27. See eg, the *Merricks v Mastercard* and *Gormsen v Meta* collective actions (Cases 1266/7/7/16 and 1433/7/7/22). [↑](#footnote-ref-27)
28. SI 2015 No.1643. [↑](#footnote-ref-28)
29. The Response to Consultation (paras 1.195 and 1.197) also envisages the CAT having the power to grant declaratory relief and to award exemplary damages. [↑](#footnote-ref-29)
30. Human Rights Act 1998. [↑](#footnote-ref-30)
31. Also of sectoral Regulators’ ‘concurrent’ competition decisions. [↑](#footnote-ref-31)
32. CMA Submission 4th October 2021 (loc cit) paras 2.84-2.86. [↑](#footnote-ref-32)
33. Digital Economy Act 2017. [↑](#footnote-ref-33)
34. It is for debate whether this EU retained law requirement will survive the government’s recently announced initiative to remove all vestiges of EU law from the statute book. [↑](#footnote-ref-34)
35. See, most recently, *TalkTalk and Vodafone v Ofcom* [2020] CAT 8. [↑](#footnote-ref-35)
36. See the Penrose Report (loc cit), p19 [↑](#footnote-ref-36)
37. *Burgess & Sons v OFT* [2005] CAT 25 at para 127 et seq. [↑](#footnote-ref-37)
38. See *CMA v Flynn Pharma Ltd and Pfizer Inc* [2020] EWCA Civ 339 per Green LJ (paras 135-147). [↑](#footnote-ref-38)
39. Ibid para 140. [↑](#footnote-ref-39)
40. [2020] CAT 24. [↑](#footnote-ref-40)
41. Order of Lady Justice Simler 3rd March 2021 Ref C3/2021/0252 (unpublished). [↑](#footnote-ref-41)
42. Response para 1.165 [↑](#footnote-ref-42)
43. Response para 1.118 [↑](#footnote-ref-43)
44. The individual cartel offence in the UK is also operated by the authority bringing a prosecution. [↑](#footnote-ref-44)
45. See fn 3, above [↑](#footnote-ref-45)
46. As in the *David Henry* case - see fn 4, above. [↑](#footnote-ref-46)