WHAT'S THE APPEAL? HOW THE GENERAL COURT AND COMPETITION APPEAL TRIBUNAL ARE SHAPING THE EU AND UK ANTITRUST REGIMES

BY PAUL GILBERT [1]

1 Paul Gilbert is Counsel in the London office of Cleary Gottlieb Steen & Hamilton L.L.P. All views expressed are personal and do not necessarily reflect the views of the firm or any of its clients. The author is grateful to Maurits Dolmans, Paul Stuart, Niccolò Torrigiani, and Emmett Saigal for their assistance and critical review of this article.

CPI ANTITRUST CHRONICLE
NOVEMBER 2018

I. INTRODUCTION

In December 2016, the UK Competition and Markets Authority ("CMA") imposed the largest competition law fine it has ever placed on a single company. Pfizer was fined £84 million (just under €100 million) for abusing a dominant position by charging excessive prices for phenytoin sodium capsules, an anti-epilepsy drug. Flynn Pharma, its distributor, was fined a further £5.2 million. Just 18 months later, that decision was overturned by the Competition Appeal Tribunal ("CAT"). The CAT found that the CMA had misapplied the legal test and had failed to consider facts that should have been relevant to its assessment.[2] In other words, the CAT reviewed the legal and economic analysis carried out by the CMA and found it wanting.

Pfizer/Flynn is not a unique case. The CAT has overturned decisions by the UK competition authorities on several occasions, including the following:

- In *Tobacco*, the CAT overturned an antitrust infringement decision by the OFT (the predecessor of the CMA). Relying heavily on witness evidence, the CAT found that the OFT's infringement decision did not accurately represent the facts and so could not stand.[3]

- In *Welsh Water*, the CAT overturned a "no-infringement" decision by Ofwat[4] and replaced that decision with its own finding that there had been an abuse of dominance. The CAT's decision then formed the basis of a successful follow-on damages action.[5]

- In *Hotel Online Booking*, the CAT overturned a decision to accept commitments relating to pricing agreements with online travel agents because the OFT had not given sufficient weight to some of the evidence it had received (which it should have investigated further) and had assumed the wrong competitive counterfactual in its analysis.[6]

- In *GSK*, an ongoing case, the CAT is considering a CMA infringement decision relating to "pay for delay" agreements involving Paroxetine, an antidepressant pharmaceutical product. The appeal has not yet concluded because the CAT has referred questions (including questions on the correct approach to market definition) to the Court of Justice of the European Union.[7] The CAT has, however,

2 *Pfizer v. CMA* and *Flynn Pharma v. CMA*, [2018] CAT 11. The CMA is appealing the CAT's judgment to the Court of Appeal. The CMA is also re-opened its investigation and could issue a new infringement decision in due course.

3 *Imperial Tobacco and others v. OFT*, [2011] CAT 41.

4 Ofwat is the sector regulator for water and sewerage in England and Wales. It has the power to enforce competition law in its sector concurrently with the CMA.

5 *Albion Water v. Water Services Regulatory Authority and others*, [2008] CAT 31.

6 *Skyscanner v. CMA*, [2014] CAT 16.

7 *GSK v. CMA*, [2018] CAT 4.

already issued a 180-page judgment setting out a detailed review of the CMA's legal, factual, and economic analysis.

- The *CAT* was also prepared to overturn parts of the CMA's Final Report in its *Private Healthcare Market Investigation*, effectively reversing the CMA's decision to order a divestment remedy.[8]

These few examples illustrate that the CAT is prepared to pore over every part of the CMA's decisions and is not afraid to overturn them if it disagrees with the CMA's substantive assessment.

The European Commission has investigated far more cases, and the sums at stake in Commission investigations are generally much larger. And yet, it is difficult to think of any Commission antitrust decisions that have been overturned by the European Court on substantive grounds (as opposed to procedural or technical legal grounds). The recent *Intel* judgment is a possible exception.[9] In *Intel*, the Court of Justice criticized the General Court's approach to reviewing the Commission's economic assessment. But even here, the Court of Justice did not engage with the substance, only the legal test, and the appeal has been remitted to the General Court to be considered again. There is no certainty that the Commission's decision will be overturned on remittal, nor whether the General Court will be prepared to grapple with the substance the second time around. The wider point stands in any event: it is rare for the European Court to intervene in Commission decisions on substantive grounds.

The European Commission certainly deals with a greater number (and greater proportion) of "classic" cartel investigations than the CMA. Cartels are "by object" infringements, they raise fewer questions of legal and economic judgment, and they often involve leniency applications and settlement agreements. Appeals in cartel cases more often involve the calculation of fines and attribution of liability than questions of effect or economic assessment. Even so, the Commission cannot be accused of shying away from difficult or controversial cases. For example, its investigations into interest rate benchmarks, foreign currency exchange, multi-lateral interchange fees, Microsoft, Qualcomm, and Google have all raised difficult questions of law and economics, as well as complex facts. And they all involve significant consequences for the parties involved.

This article does not seek to examine the merits of individual cases, but to consider whether there are institutional or procedural reasons why CMA decisions seem more vulnerable to judicial attack than those of the European Commission. Has the CMA given the CAT reason to be so interventionist? Are the CMA's investigative processes less robust than those of the Commission? Or does the General Court give the Commission an easy ride?

II. SMALL BUT SIGNIFICANT DIFFERENCES IN PROCEDURE

When it comes to administrative investigations, the CMA's powers and procedures largely mirror those developed for (and by) the European Commission at the EU level. Both are administrative regimes, in which the authority acts as both investigator and decision-maker.

- The Commission and the CMA can both require parties to produce evidence, and have the power to carry out dawn raids.
- Both are obliged to explain the case against the parties in a statement of objections, and to provide access to documents on the case file.
- Both are required to give the parties the right to respond in writing and at an oral hearing before issuing an infringement decision.
- An infringement decision is a corporate decision by the Commission (through the College of Commissioners) or CMA (through powers delegated by the CMA Board).
- Procedural disputes along the way can be referred to an independent Hearing Officer (EU) or Procedural Officer (UK).
- The authority has to produce a reasoned decision, which is then subject to appeal.

The similarities between the EU and UK regimes are far greater than their differences. As the following examples show, however, the differences are potentially significant.

8 *HCA v. CMA*, [2014] CAT 23.

9 *Intel v. Commission*, Case C-413/14 P, judgment of September 6, 2017.

A. Case Opening and Closing

The European Commission can use investigative powers "in order to carry out the duties assigned to it" under Regulation 1/2003. It can use formal information-gathering powers to collect information about a suspected infringement and decide whether to proceed with a formal investigation based on that material.

The CMA cannot use formal investigation powers *unless* it has concluded that it has reasonable grounds to suspect an infringement and has also decided that the case is an administrative priority under its published Prioritisation Principles.[10] This means that the CMA cannot even begin an investigation until it has already carried out a preliminary fact-finding exercise (without any formal investigation powers). It has to be satisfied not only that there is a suspected infringement and that its impact is sufficiently large to justify the use of CMA resources, but also that there is a reasonable prospect of reaching an infringement decision on the substance and that it would be able to impose remedies in the end. The Commission can – and does – carry out preliminary assessments before opening investigations too. But it can also use formal investigation powers from the outset, while the CMA cannot. Intuitively, the need to satisfy additional tests before the CMA can open a case ought to ensure that its decisions are less susceptible to appeal.

Conversely, while it is harder for the CMA to open an investigation, it is far easier for the CMA to close an investigation than it is for the Commission. The CMA can decide to close a case if it decides there is insufficient evidence of an infringement or that pursuing an investigation would be a disproportionate use of its resources, i.e. if the case ceases to be an administrative priority under the same Prioritisation Principles. The CMA's power to close cases on administrative grounds, even after it has already carried out a lengthy investigation, is long established, following the High Court judgment in *Cityhook*.[11] The ability to close investigations easily also suggests that the cases which the CMA determines should be pursued to an infringement decision are less vulnerable to challenge.

While the European Commission can also close cases on administrative grounds or where there is a "lack of EU interest," this can involve sending rejection letters to complainants, setting out the reasons for the decision, which can then be subject to challenge.

The *Confédération européenne des associations d'horlogers-réparateurs* ("CEAHR") case provides a powerful illustration.[12] CEAHR complained to the European Commission in 2004 that manufacturers of luxury watches were refusing to supply spare parts to independent repairers, in breach of EU competition law. The Commission formally rejected that complaint in 2008, but its rejection decision was annulled by the General Court (because of a failure to provide sufficient reasons). The Commission was forced to carry out a further investigation and rejected the complaint a second time in 2014. This rejection decision was also challenged to the General Court and finally upheld in 2017, some 13 years after the original complaint. When it is so difficult to close a case, there are strong incentives to continue towards an infringement decision.

B. Witness Evidence

The CMA has powers to require individuals connected to the companies under investigation to attend compulsory interviews.[13] Compulsory interviews are now a common feature of UK antitrust investigations and witness evidence can be critical in defending (or challenging) a CMA decision before the CAT. The European Commission does not have powers to conduct compulsory interviews (other than asking limited factual questions in the context of a dawn raid). Its understanding of the facts therefore depends to a large degree on the accounts of complainants and leniency applicants, who may both have incentives to present the facts in ways that are most damaging to the companies under investigation. It is difficult for the Commission to test its theories with the individuals involved in an impartial way.

10 Prioritisation Principles for the CMA (CMA 16), April 2014.

11 *R (ex p. Cityhook) v. OFT*, [2009] EWHC 57.

12 Case T-712/14 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, General Court judgment of October 23, 2017.

13 Competition Act 1998, section 26A.

C. Oral Hearings

Before the European Commission, complainants and other interested third parties are often permitted to attend the parties' oral hearings. The company under investigation is given only a short opportunity to make oral submissions and is then subject to interrogation by the Commission case team and a series of allegations from complainants. The Commissioner does not even attend. It is therefore not uncommon for parties to decline the opportunity for a hearing altogether.

In the UK, hearings are private. The company under investigation has half a day to make its submissions and answer questions directly to the decision-makers. As a result, CMA hearings are rarely avoided by the parties.

D. Decision Making

Under the UK regime, investigations are run by a Senior Responsible Officer ("SRO"), who acts as decision-maker until a Statement of Objections has been issued. There are checks and balances along the way but, ultimately, that decision rests with the SRO. Once a Statement of Objections has been issued, a Case Decision Group ("CDG"), made up of three senior officials who have not been involved in the investigation is appointed to act as decision-maker. The CDG considers the Statement of Objections with a fresh pair of eyes, receives the parties' written responses, and attends the oral hearing. In Sports Bras, for example, the CDG closed the CMA's case once it had considered the Statement of Objections issued by the case team and heard the parties' responses.[14]

The UK Government's intention when introducing this approach was "to increase the robustness of decisions and reduce any perception of confirmation bias by introducing collective judgement in decision-making with separation between responsibility for the investigation of the case and for the final decision."[15]

This decision-making process also helps to ensure that UK antitrust investigations are free from political influences; decisions are taken on technical legal and economic grounds, without any involvement by politicians.[16]

European Commission investigations, on the other hand, are the responsibility of the Competition Commissioner, a political appointee. Investigations are subject to review by the Commission's Legal Service and Chief Economist Team along the way and, in complex cases, the Commission may also establish a peer review panel, known as a "devil's advocate" panel, to provide a fresh perspective. But the decision to proceed always rests with the Competition Commissioner and case team.

Infringement decisions are taken by the full College of Commissioners. The Commissioners are not competition law experts and they are heavily dependent on the advice of the Competition Commissioner and case team on questions of substance. The proposed infringement decision may not be presented to the College of Commissioners until it is ready for adoption – already in final form – giving no meaningful opportunity to engage with the substance. The Commissioners (other than the Competition Commissioner) are not part of the investigation process, and the parties have no right (and usually no opportunity) to put their case directly to these decision-makers.

These are just a few examples of small, but arguably significant, differences in what are ostensibly very similar administrative procedures. They are by no means comprehensive and there is considerable room for debate about whether either regime is "better" than the other for enforcement and deterrence. What these examples suggest, however, is that the UK regime tends to be more cautious in finding an infringement. If true, this again raises the question: why do the UK authorities seem to have a harder time before the CAT than the Commission has before the General Court?

14 Case CE/9610-12, CMA case closure summary of June 13, 2014

15 Growth, Competition and the Competition Regime, Government Response to Consultation, March 2012 (paragraph 6.21).

16 The UK regime allows for some limited political involvement in mergers and markets cases, but not in antitrust investigations.

III. WHEN IS AN APPEAL NOT AN APPEAL?

The first, and perhaps most obvious, reason why CMA decisions have been subject to greater scrutiny is that most antitrust decisions taken by the UK authorities are subject to appeal on the merits. The CAT has full jurisdiction to examine every aspect of the decision, can hear new evidence, and it can substitute its own decision for that of the authority. It has been argued that the CAT should not substitute its own view for a tenable view taken by the authority on a sound factual basis, particularly where there was a range of reasonable conclusions it could have reached.[17] It is debatable whether this is true in practice. The question before the CAT is whether the competition authority got it right, with little deference given to the authority's expertise. The CAT cannot carry out its own investigation and, where additional facts are needed, a case may have to be referred back to the CMA. In *Pfizer*, for example, the CAT overturned the CMA's decision but was unable to reach its own conclusion on whether there had been an abuse without further evidence.[18] The case was therefore sent back to the CMA. But where it has all the facts it needs; the CAT will decide the outcome (see *Welsh Water*).

In contrast, the General Court's jurisdiction is limited to judicial review. It can quash a decision by the European Commission if it identifies an error in its assessment, but it does not have the jurisdiction to substitute its own decision for that of the Commission. If a decision is quashed, it is for the Commission to decide whether to re-open its investigation and bring a new decision. As the EFTA Court explained when applying the same legal threshold in *Posten Norge*, the Court cannot substitute its own decision for that of the authority, "if there can be no legal objection to the assessment […], even if it is not the one which the Court would consider to be preferable."[19]

It is questionable how significant this difference is, at least as a matter of law. Although the General Court is carrying out a judicial review and cannot substitute its own decision for that of the European Commission, it has the power – and sometimes the obligation – to examine the facts underlying a Commission decision.[20] This principle was confirmed by the European Court of Human Rights in *Menarini*.[21] Since antitrust fines are quasi-criminal, the decision should be subject to review by an independent and impartial tribunal with full jurisdiction to review the facts. In *Posten Norge*, the EFTA Court was even more explicit:

> the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision … [the authority] cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review.
>
> … although the Court may not replace [the authority's] assessment by its own …, the Court must nonetheless be convinced that the conclusions drawn by [the authority] are supported by the facts.[22]

17 See, for example, "Appeal and Review in the Competition Appeal Tribunal and High Court" by Dinah Rose QC and Tom Richards (2010), *Judicial Review* 15(3) pages 201 to 219, citing *T-Mobile (UK) Ltd and others v. Ofcom* [2008] CAT 12 and *Albion Water Limited v. Water Services Regulation Authority* [2008] CAT 31.

18 *Pfizer v. CMA* and *Flynn Pharma v. CMA*, [2018] CAT 11 (paragraph 467): "In the present case, however, although our essential finding is that the CMA misapplied the test for unfair pricing, the correct application of that test as we have described it would involve detailed consideration of further information, some of which may need to be obtained and properly tested, and the careful assessment of what normal competitive conditions might have been. A particular example is a better understanding of the evolution of the tablet market and tablet pricing. These are not things that the Tribunal is, in practice, in this case, in a position properly to do."

19 *Posten Norge v. EFTA Surveillance Authority*, Case No. E-15/10, judgment of April 18, 2012 (paragraph 98).

20 See, for example, *Microsoft v. European Commission*, Case T-201/04, judgment of September 17, 2007 (paragraph 89): "while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it."

21 *Menarini Diagnostics v. Italy*, Case No. 43509/08, judgment of September 27, 2011. See also the European Court of Human Rights judgment in *Ortenberg v. Austria* (Case 33/1993/428/507) [1995] 19 EHRR 524.

22 *Posten Norge v. EFTA Surveillance Authority*, Case No. E-15/10, judgment of April 18, 2012 (paragraphs 100 and 101).

This is a difficult balance to strike: a decision will not be quashed just because the court disagrees with the conclusions, but the court has to decide whether the decision is supported by the facts.[23] This is not so different from an appeal on the merits, and yet there are few examples of the General Court intervening on this basis.

In contrast, there are times when the CAT's jurisdiction is limited to judicial review but has nevertheless felt able to grapple with (and criticize) the CMA's substantive assessment. In *Hotel Online Booking*, for example, the CAT was asked to review a decision to accept commitments. It was therefore confined, as a matter of law, to considering whether the decision was unlawful, irrational or procedurally unfair. It could not simply disagree with the CMA's assessment.[24] The CAT nevertheless felt able to examine the substance of the decision in detail: "We are willing to concede a large margin of appreciation to the CMA in cases of this kind … to allow it to exercise its expert judgement. The Tribunal must, however, intervene under the normal principles of judicial review where there has been a clear error."[25] It concluded that there had been an error of judgment and quashed the decision.

Putting aside the legal tests for intervention, there are other differences between the CAT and the General Court. First, the CAT is a specialist competition law tribunal, and the judges are (for the most part) experts in competition law. They are confident intervening in technical matters and show little deference to the competition authority. The CAT's only purpose is to resolve competition law disputes and hold competition authorities to account. The European Court has a far wider role. As it has to deal with disputes concerning all areas of EU law, it may feel less confident interfering with the Commission's expert assessment in competition cases, and it has more than enough cases to process without expanding its competition-law functions.

There are also significant differences in the court process at the UK and EU levels. An appeal to the General Court is decided mostly "on the papers." The oral hearing is short, with parties generally given only a limited opportunity to present their arguments, and it is normal for the overall process to take several years. The General Court's judgment in Intel came five years after the Commission's decision, for example. Its judgment in *MasterCard* came four and a half years after the contested decision.[26] Compare this with the CAT appeal in *Pfizer*. The trial lasted 13 days, and the 152-page judgment was issued just 18 months after the contested decision.

The CAT also relies heavily on witness evidence. Witnesses are important because their evidence can be tested in court. Evidence provided to the CMA during its investigation, even in response to a formal information request, cannot be tested by the court in the same way and so cannot be given the same evidential weight.[27] The importance of witness evidence was first highlighted in the *Tobacco* case (mentioned above), where the OFT's description of the price parity agreements at issue was undermined by witness testimony. The lack of witness evidence in support of the CMA's decision was criticized more recently in *Pfizer* and in *GSK*. In *Pfizer*, the CAT criticized the CMA for failing to call factual witnesses, stating that the failure to produce witnesses "could expose the CMA to the risk that it will fail to convince the Tribunal that it has proven the alleged infringements." In *GSK*, the CAT also criticized the parties for failing to produce more witnesses of fact and instead seeking to rely on statements made by individuals during the original investigation. While statements and transcripts of interviews by the CMA taken during the administrative investigation were admissible in the appeal, the CAT placed limited weight on this evidence because the witnesses could not be cross-examined or tested in court.[28]

---

23 See *Posten Norge v. EFTA Surveillance Authority* (paragraph 102): "the submission that the Court may intervene only if it considers a complex economic assessment of [the authority] to be manifestly wrong must be rejected."

24 The Court of Appeal has confirmed that the standard of judicial review exercised by the CAT is no different in law from the standard that applies to the review of decisions by other public bodies. See, for example, Carnwath LJ's statements in *OFT and others v. IBA Health Limited*, [2004] EWCA Civ 142 (paragraphs 88 to 89): "The Tribunal was required to apply the principles which would be applied 'by a court on an application for judicial review' (s 120(4)). On its face, this seems a clear indication that, notwithstanding the Tribunal's specialised composition, the review was not to take the form of an appeal on the merits, but was limited by the ordinary principles applied in the Administrative Court. The Tribunal expressed their difficulty in interpreting this duty (para 217). In these circumstances, they might have found help in the leading textbooks on the subject."

25 *Skyscanner v. CMA, [2014] CAT 16, judgment of September 26, 2014 (paragraph 173)*. See also Professor Glynn's dissenting judgment in *FIPO v. CMA*, [2015] CAT 8, judgment of April 29, 2015 (paragraphs 77 and 87): "I am also advised that although the principles of judicial review rightly allow a very wide margin of discretion to the CMA, it is not impossible for an application for review on grounds of lack of Wednesbury rationality to succeed." When applying these principles to the economics effect of a fee cap, he stated: "For the CMA to find no AEC [adverse effect on competition] on the ground that consultants 'could' compete below the fee caps did not have regard to the economic realities, and was therefore irrational."

26 Case T-111/08, *MasterCard v. Commission*, General Court judgment of May 24, 2012.

27 See, for example, *Pfizer v. CMA* and *Flynn Pharma v. CMA*, paragraphs 83 to 85.

28 *GSK v. CMA*, paragraphs 69 to 72.

In short, the CMA has a hard time before the CAT because the CAT is prepared to re-examine every aspect of the CMA's analysis. It does so carefully and at length, it accepts new evidence, places considerable weight on witness evidence, and displays little deference to the expertise of the CMA or any other competition authority.

IV. CONCLUSION

The European Commission has been responsible for developing investigation procedures that have been adopted not only in the UK but in many other jurisdictions across Europe and around the world. Fundamental safeguards are built into the system, including the right to know the authority's allegations, the right of reply, access to evidence, publication of a reasoned decision, and review by an independent tribunal. The Commission also led the way with the introduction of an independent Hearing Officer, intended to provide parties with stronger guarantees of procedural fairness (which the UK has copied).

While there are more similarities than differences between the UK and EU regimes, the examples above suggest that, in at least some important aspects, UK procedure goes further to protect parties' rights of defense. When introducing the most recent reforms to the UK regime, the desire to ensure fairer, more robust decision making was at the heart of the Government's thinking: "The Government has decided to embed an enhanced administrative approach to antitrust enforcement, involving improvements to the speed of the process and the robustness of decision-making, addressing perceptions of confirmation bias."

Despite this, the CMA continues to find itself on the receiving end of greater judicial intervention. One possible explanation is that the CMA is simply doing a bad job. Another, more plausible, explanation is that greater intervention by the CAT has stimulated a need (and a desire) for more robust decision making. For an infringement decision to stand, not only does the CMA have to conclude that there was an infringement, the CAT has to agree as well.

In contrast, the European Commission has enjoyed relatively little substantive intervention by the General Court, and its procedures have remained largely unchanged since the regime was introduced. While this article does not specifically consider merger cases, it is notable that the Commission did reform its processes in merger cases following successful appeals of its prohibition decisions in *Airtours/First Choice, Schneider/Legrand*, and *Tetra Laval/Sidel*. Unless the General Court is prepared to intervene more in the substance of antitrust cases, there is a growing risk of confirmation bias and a (relative) weakening of procedural safeguards for parties under investigation, to the detriment of the regime as a whole.

Over the next few years, the General Court will face a number of highly complex cases, including the remitted appeal in *Intel* and appeals of the Commission's abuse of dominance decisions against Qualcomm and Google. All of these cases raise novel questions of law, economics and fact. The General Court will have to decide whether it is ready to grapple with the detail, or defer to the Commission's expertise. The approach it takes could have a significant effect on the way EU antitrust investigations are carried out in future.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.