Institutional architecture of UK competition law

Richard Whish KC

King's College London, London

Abstract

The two most important institutions in United Kingdom competition law are the Competition and Markets Authority (CMA) and Competition Appeal Tribunal (CAT): the CMA decides cases and the CAT hears appeals. However, this apparently simple system is the product of a somewhat complicated past; the position today is somewhat more complicated than the opening sentence of this article suggests; and the UK regime is likely to undergo interesting changes in the near future. This article will explain each of these assertions, concentrating more on the present and future than the past.

Early years

The first legislation in modern times to address competition concerns in the UK was the Monopolies and Restrictive Practices (Inquiries and Control) Act 1948. The Labour Government that came to power at the end of the Second World War was committed to a policy of full employment, and considered that a competitive economy would make a major contribution to this aim. The 1948 law created an investigative system for 'monopoly situations' and restrictive practices: where these existed a government minister – at the time known as the President of the Board of Trade – could refer the industry in question to what was then known as the Monopolies and Restrictive Practices Commission. This commission would investigate the market in which competition appeared to be restricted and make

recommendations to the minister. He or she would then decide what action to take in the public interest. The public interest was not limited to considerations of competition, but could include, for example, protecting employment and promoting the balanced distribution of industry. Extensive powers were available to the minister following the commission's report, as set out in the Act.

In 1956, restrictive practices were removed from this investigative system and subjected to a stricter regime by the Restrictive Trade Practices Act of that year: under this law certain types of anti-competitive agreements had to be registered with the Registrar of Restrictive Trading Agreements. These would then be referred to the Restrictive Practices Court, which had power to prohibit agreements and to order the parties to refrain from entering into similar ones in the future. Disobedience of such an order would amount to contempt of court, for which fines could be imposed and, in theory, individuals sent to prison. The Restrictive Trade Practices Act was tortuously drafted in a highly formalistic way. In 1964, a further layer of legislation was introduced in the form of the Resale Practices Act, which made resale price maintenance unlawful.

The Monopolies and Mergers Act 1965 brought certain mergers within the scope of the investigative system: the minister continued to be the most important figure, both initiating merger investigations and making decisions in the public interest on the outcome of the cases investigated; however, it was the (now-named) Monopolies and Mergers Commission that actually conducted investigations and made recommendations to the minister.

In 1973, the provisions on monopolies and mergers were consolidated in the Fair Trading Act. That Act created the post of the Director General of Fair Trading, an individual in whom many of the relevant functions were vested. The minister remained at the apex of the system, however. From 1973 until 2000, therefore, the UK had one system for monopolies and mergers, and a separate one for restrictive practices. Legislation on restrictive practices was consolidated into the Restrictive Trade Practices Act 1976. In the same year, a new Resale Prices Act was adopted, replacing earlier legislation. By now the most important institutions involved in UK Competition Law were the minister (in modern parlance, the Secretary of State), the Director General of Fair Trading, and the Monopolies and Mergers Commission. Legislation was extremely complicated, and the overall system was perceived to be somewhat ineffective and to lack doctrinal coherence.

Competition Act 1998 and the Enterprise Act 2002[1]

Today the most important substantive provisions of UK competition law are to be found in the Competition Act 1998 and the Enterprise Act 2002, which modernised the law in significant respects.

Competition Act 1998

The UK joined the European Economic Community (EEC, the predecessor of the European Union) in 1973. What are now Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) had direct effect in the UK, and, after the EU Merger Regulation (EUMR) of 1989, mergers having a 'Community dimension' were subject to the jurisdiction of the European Commission in Brussels rather than the Secretary of State and the Monopolies and Mergers Commission in the UK. The contrast between the extremely esoteric domestic law on monopolies and restrictive practices, infringement of which did not attract penalties, and the much more effective antitrust rules of the EU, was stark. This led to the adoption (25 years after accession to the EEC!) of the Competition Act 1998, which repealed the old legislation on restrictive practices and replaced it with domestic versions of Articles 101 and 102. The Director General was given powers analogous to those of the European Commission, including the power to impose significant penalties. The Competition Act entered into force in 2000. From then until Brexit (see below), the EU and UK antitrust rules were broadly the same.

Enterprise Act 2002

The Enterprise Act 2002 replaced the Director General of Fair Trading with a newly created Office of Fair Trading, a corporate entity to which the Director General's powers were transferred. The act also created the Competition Commission, which replaced the earlier Monopolies and Mergers Commission. The Enterprise Act remodelled the rules on market investigations and mergers. The most important change was that, for the most part, the Secretary of State was removed from involvement in cases, except in certain exceptional situations of public interest. These were narrowly defined, and included, for example, national security and the plurality of the media. After the Enterprise Act, market and merger cases would now be decided by the Competition Commission. There was a two-stage procedure for market and merger investigations: the Office of Fair Trading would decide whether to refer a market or merger to the Competition Commission, and the Competition Commission would decide the case. This meant that a 'fresh pair of eyes' (or rather

1 For a general overview of the system of UK competition law see Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) pp 59–77.

fresh pairs of eyes!) would carry out the investigation, free from any 'confirmation bias' that might influence the outcome of a case if the same individuals were to conduct a case from beginning to end. As we will see, the CMA today is configured in such a way that is intended to maintain the benefits of a 'fresh pair of eyes' in the case of market and merger investigations.

Section 188 of the Enterprise Act 2002 established a criminal cartel offence for individuals responsible for 'hard-core' cartels. Serious penalties – up to five years in prison – can be imposed on those found guilty of this offence. Such cases are heard in the Crown Court. Prosecutions may be brought by or with the consent of the CMA, or by the Serious Fraud Office, working in close liaison with the CMA. In Scotland, the prosecution of the criminal offence is the responsibility of the Lord Advocate.[2]

Enterprise and Regulatory Reform Act 2013

An important institutional change was brought about by the Enterprise and Regulatory Reform Act 2013 (the 'ERRA'). This law abolished the Office of Fair Trading and the Competition Commission and replaced them with a new entity: the CMA. This was, in effect, a merger of the two former institutions. The CMA came into existence on 1 April 2014. It has a board that consists of a non-executive Chair, a chief executive, and a number of other executive and non-executive members. On 14 September 2022, the board consisted of a total of ten members, of whom five (apart from the Chair) were non-executive.

The board of the CMA is responsible for the strategic direction, priorities, plans and performance of the CMA, including the adoption of the Annual Plan. It makes the decision whether to publish a market study notice or to make a market investigation reference. Other operational decisions are delegated by the board to the members of the board, staff of the CMA, and board committees and subcommittees. The CMA has an Enforcement Directorate, Markets and Mergers Directorate, and Digital Markets Unit. The CMA's work is supported by the Legal Service, which also handles policy and international work, and the Office of the Chief Economic Adviser.

Decision-making within the CMA

Antitrust cases are decided within the CMA by virtue of powers delegated from the board. However market investigations and mergers are decided differently. As we have seen, prior to the ERRA the Office of Fair Trading referred cases to the Competition Commission. After the ERRA created the CMA, the UK had a

2 For an account of the criminal cartel offence, see n 1 above, pp 446–460.

'unitary' authority in which all the relevant powers were vested. When the reform of UK institutions proposed by the Enterprise and Regulatory Reform Bill was debated, many stakeholders expressed a desire that the 'fresh pair of eyes' aspect of the system, whereby the Office of Fair Trading made a reference to the separate Competition Commission, should be preserved within the new regime. This was achieved by the statutory requirement that market and merger cases should be decided by a group of 'panel members' who would act independently both of the board of the CMA and the persons who took the decision to initiate a market or merger investigation. Members are appointed to the panel by the Secretary of State. As at 14 September 2022, there were 33 panel members. Individual cases are heard by a group of those members, normally four in number. It follows that antitrust cases are ultimately the responsibility of the board of the CMA, albeit that they are actually decided by persons to whom the board has delegated powers, whereas market and merger cases are decided by persons who, by statute, are required to act independently of the board. When a reference is made in a market investigation case, the board of the CMA may provide an 'advisory steer' to the group that will decide the case, and the group is expected to take this steer into account; however, it must make its actual decision independently.[3]

Functions of the CMA

The CMA plays a central role, and has a variety of functions, in relation to competition law and policy in the UK. The CMA's Prioritisation Principles[4] are used to decide which discretionary projects (eg, market studies and market investigations) and cases the CMA will take on across its areas of responsibility. The general functions, as opposed to the enforcement functions, of the CMA include obtaining, compiling and keeping under review information relating to the exercise of its functions; making the public aware of ways in which competition may benefit consumers and the economy; providing information and advice to ministers; and making written recommendations to ministers about the effect of proposed legislation on competition. In February 2020, the Chancellor of the Exchequer and the Secretary of State for the Department for Business, Energy and Industrial Strategy (BEIS) asked the CMA to report annually on the 'state of competition' in the UK. The CMA's first report was published on 30 November 2020 and the second on 29 April 2022.[5]

---

3 See, eg, the advisory steer from the board at the time that *Funerals* were referred for investigation at www.gov.uk/cma accessed 23 September 2022.

4 CMA16, April 2014 www.gov.uk/cma accessed 23 September 2022.

5 See www.gov.uk/cma accessed 23 September 2022.

As far as public enforcement is concerned, the CMA has considerable powers under the Competition Act 1998. It plays the principal role in enforcing the Chapter I and II prohibitions, and has significant powers to obtain information, enter premises to conduct investigations, adopt interim measures, and make final decisions and impose penalties. Many of the decisions of the CMA under the Competition Act 1998 can be appealed on the merits to the CAT. CMA decisions that cannot be appealed to the CAT may, instead, be subject to judicial review by the Administrative Court.

The CMA also conducts market studies, market investigations and merger inquiries under the Enterprise Act 2002.[6] Decisions under the Enterprise Act 2002 in relation to mergers and market investigations are subject to judicial review by the CAT.

It is important to appreciate that the CMA is not only a competition authority but also has consumer protection responsibilities under various pieces of legislation, such as the Consumer Rights (Payment Surcharges) Regulations 2012, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 and Schedule 3 to the Consumer Rights Act 2015.

The CMA also has a role in international competition policy: its statutory duty is to seek to 'promote competition, both within *and outside the UK*, for the benefit of consumers' [emphasis author's own].[7] To that end, the CMA attends meetings on competition policy on behalf of the UK at the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development. It is also an active participant in the International Competition Network.

A significant amount of the CMA's energy goes into raising awareness of competition law on the part of lawyers, small and medium-sized businesses, and local authorities. It may do this by sending warning and advisory letters[8] or by asking local lawyers to share the CMA's competition law compliance materials with their clients.[9]

In response to the coronavirus crisis the CMA established a Covid-19 Taskforce to monitor and respond to consumer and competition problems arising from the pandemic.[10]

---

6 See n 1 above, c 11 (market studies and market investigations) and c 22 (merger inquiries).

7 ERRA, s 25(3); on the CMA's international role see the speech by Lord Currie of 30 June 2014 at www.gov.uk/cma accessed 23 September 2022.

8 A register of warning and advisory letters is available at www.gov.uk/cma accessed 23 September 2022.

9 See, eg, CMA Press Release, South East lawyers asked to help raise competition law awareness, 25 January 2017.

10 See www.gov.uk/government/publications/covid-19-cma-taskforce accessed 23 September 2022.

Brexit

On 31 January 2020, the UK withdrew from the EU. As a result of an agreement entered into between the EU and UK, Articles 101 and 102 of the TFEU and the EUMR ceased to be directly applicable in the UK from 1 January 2021. Brexit means that the CMA no longer participates in the European Competition Network, which joins together the Directorate-General for Competition (DG COMP) at the European Commission with the national competition authorities of the 27 Member States of the EU. Furthermore, there is no formal cooperation agreement between the UK and EU in competition law matters. Today, at a time when considerable tensions continue to exist between the UK and EU, in particular over the so-called 'Northern Ireland Protocol', there seems to be little prospect of such an agreement being entered into in the near future. Since Brexit, however, the CMA has maintained an informal relationship with DG COMP in Brussels. This is evidenced by the fact that various antitrust investigations have been initiated contemporaneously in Brussels and London, an example being the parallel investigations of the 'Jedi Blue' agreement entered into between Google and Meta.[11]

Competition law landscape today

As stated at the beginning of this article, the basic design of the competition law architecture of the UK is that the CMA decides cases and appeals are taken to the CAT. However, the sectoral regulators in the UK also have a role to play in the system, and the CAT today has an important function in relation to private litigation between firms in which competition law issues are relevant.

The CMA

As a result of Brexit, the CMA has acquired new functions, notably a role in relation to 'subsidies' (now that the 'state aid' provisions in Articles 107 to 109 of the TFEU are no longer applicable in the UK). The relevant law is the Subsidy Control Act 2022. Part 4 of the Act deals with referrals of subsidies to the CMA and its functions in relation to them.

The CMA also hosts the Office of the Internal Market, which was created by the Internal Market Act 2020 and launched on 21 September 2021. The Office of the Internal Market's objective is to support the effective operation of the internal market within the UK. It assesses whether the internal market is operating effectively, and provides expert and independent advice to the UK Government and devolved administrations. On 8 August 2022, it accepted a request from the

11 The progress of this case can be followed on both DG COMP's and the CMA's websites.

UK Government to consider the potential impact of a proposed regulatory change whereby the sale of peat would be banned in England, but not in Wales, Scotland and Northern Ireland.[12]

Sectoral regulators

A particular feature of the competition law landscape in the UK is the phenomenon of 'concurrency'.[13] Various sectors in the UK are subject to specific regulatory control, in particular utilities, such as telecoms, energy and water. Sector-specific regulators have numerous regulatory powers that may be exercised in relation to the undertakings subject to their jurisdiction. However, they are also able, within the perimeter of their powers, to apply competition law, and they share these powers concurrently with the CMA. It follows that sectoral regulators can enforce the Chapter I and II prohibitions. They are also able to conduct market studies and make market investigation references to the CMA. Mergers, however, are fully within the remit of the CMA, although regulators will submit their views on cases of interest to them. The regulators with concurrent competition powers in the UK are:

- the Gas and Electricity Markets Authority (OFGEM);
- the Office of Communications (OFCOM);
- the Water Services Regulation Authority (OFWAT);
- the Office of Rail and Road (ORR);
- the Northern Ireland Authority for Utility Regulation (NIAUR);
- the Civil Aviation Authority (CAA);
- Monitor (now part of NHS Improvement);
- the Financial Conduct Authority (FCA); and
- the Payment Systems Regulator (PSR).

These concurrent regulators and the CMA are members of the UK Competition Network (UKCN). Monitor attends the UKCN with observer status. The 'mission' of the UKCN is to promote competition for the benefit of consumers and to prevent anti-competitive behaviour by using competition law powers and developing pro-competitive regulatory frameworks. Arrangements are in place for the coordination of the performance of the concurrent functions under the Act. The UKCN website is a useful source of material.[14] Each of the concurrent regulators has agreed a memorandum of understanding with the CMA, which records the basis on which

12 Details of this case are available at www.gov.uk/cma accessed 23 September 2022.

13 On concurrency, see n 1 above, pp 460–464.

14 See www.gov.uk/government/groups/uk-competition-network accessed 23 September 2022.

the authorities will cooperate and exchange information.[15] An annual Concurrency Report is published by the CMA; the most recent Concurrency Report was published on 27 April 2022.[16]

The CAT

The CAT today has an extremely important role in competition law. The CAT consists of a President, a panel of Chairs appointed by the Lord Chancellor following a recommendation from the Judicial Appointments Commission (judges of the High Court of England and Wales, Court of Session in Scotland and High Court in Northern Ireland have been appointed to this panel) and a panel of ordinary members appointed by the Secretary of State. Cases are heard by a tribunal of three persons, chaired by the President or one person from the panel of Chairs. An important feature of the CAT is that its membership includes numerous economists, many of whom have spent a significant part of their working lives in the private sector working on competition law cases at economic consultancies. The calibre of the membership of the CAT is extremely high.

Appeals in antitrust cases

The CAT hears appeals on the merits in antitrust cases from decisions of the CMA and sectoral regulators; the CAT does not hear cases *de novo*, but it does have the ability to hear evidence from witnesses given on oath, and it has the power to substitute its decision for that of the authority appealed against. Appeals on a point of law or as to the amount of a penalty lie, with permission, from decisions of the CAT to the Court of Appeal in England and Wales, Court of Session in Scotland and Court of Appeal of Northern Ireland in Northern Ireland. A further appeal may be taken, with permission, to the UK Supreme Court.

Appeals in market and mergers cases

The CAT is able to review the decisions of the CMA and sectoral regulators in relation to mergers and market investigations. Although described in legislation as appeals, the CAT's powers in these cases are limited to judicial review grounds; the CAT does not decide markets and mergers cases on the merits.

---

15 The memoranda were signed in 2016 and are available at www.gov.uk/cma accessed 23 September 2022; they may be amended from time to time: eg, a new memorandum was agreed between the CMA and FCA in July 2019.

16 See n 5 above.

ACTIONS FOR DAMAGES

The CAT is able to deal with claims for damages or other sums of money brought by claimants who have suffered loss as a result of an infringement of UK competition law.[17] The CAT may also hear claims for an injunction in England and Wales or Northern Ireland. Damages claims may be brought on a 'standalone' basis, where the claimant must prove the infringement, or may 'follow-on' from a decision of the CMA or a sectoral regulator finding an infringement of competition law. Until 2015, the CAT's jurisdiction was limited to hearing follow-on actions. The Consumers Rights Act of that year extended the jurisdiction to standalone cases, and this has led to a significant increase in its workload. The CAT is currently dealing with several major standalone cases, some in applications for a 'collective proceedings order' (see below), and others in major 'business to business' litigation, such as *Epic Games v Apple Inc*[18] and *Kerilee Investments Ltd v International Tin Association*.[19] Given that the CAT has this important damages jurisdiction, its name, Competition 'Appeal' Tribunal, is now a misnomer.

COLLECTIVE PROCEEDINGS

The Consumer Rights Act 2015 conferred a second important new jurisdiction upon the CAT: the power to make a collective proceedings order in favour of a group representative, who can be authorised to bring a collective action on behalf of a class of persons. Such orders may be made on an 'opt-in' basis, whereby claimants are invited to join the action, or an 'opt-out' basis, where they must choose not to be represented. This jurisdiction has proved to be extremely popular, and the CAT is now dealing with numerous cases. Several collective proceedings orders have now been made, some opt-in,[20] some opt-out,[21] and some 'hybrid', for example, opt-out for UK claimants but opt-in for claimants from outside the UK.[22] No actual awards of damages have yet been made under this regime. It is reasonable to say that there have been more applications for collective proceedings orders than were anticipated when the Consumer Rights Act was adopted. The UK experience is an interesting 'live experiment' for other countries that might be contemplating the adoption of a system of class actions.

---

17 On private competition law actions in the UK, see n 1 above, pp 328–342.
18 Case 1377/5/7/20, not yet decided.
19 Case 1379/5/7/21, not yet decided.
20 Eg, Case 1289/7/7/18 *Road Haulage Association v Man SE* [2022] CAT 25.
21 Eg, Case 1339/7/7/20 *Mark McLaren Class Representative v MOL (Europe Africa) Ltd* [2022] CAT 10.
22 Eg, Case 1382/7/7/21 *Consumers' Association v Qualcomm Inc* [2022] CAT 20.

Civil courts

Actions may be brought in the High Court where there are infringements of Chapter I and II prohibitions. Such actions are usually brought in the Chancery Division, but sometimes may be dealt with by the Commercial Court; both are part of the 'Business and Property Courts of England and Wales'. Provision is made for High Court cases to be transferred to the CAT, and this has happened on numerous occasions.

Criminal courts

The Competition Act 1998 and Enterprise Act 2002 create several criminal offences. Most notably, the Enterprise Act establishes the 'cartel offence', the commission of which could attract a prison sentence of up to five years, as well as a fine.[23] Under the Competition Act, various criminal offences may be committed where investigations are obstructed, where documents are destroyed or falsified, or where false or misleading information is provided. There are also criminal offences under the Enterprise Act.

Next steps

On 20 April 2022, the UK Government published *Reforming competition and consumer policy*.[24] It had consulted on possible changes in the course of 2021, noting that Brexit provided an opportunity for the UK, if it so wished, to develop rules that differ from those of the EU. The most interesting change proposed by the government from an institutional perspective is that it considers that the CMA should be given direct powers to enforce consumer law. At the moment, the CMA's only powers are to take recalcitrant firms to court and request the court to order a change in behaviour. The government's view is that the CMA should have similar powers in relation to consumer law as it has in competition law. If implemented, this would be a major change to the competition and consumer law landscape.

Separately, the UK, along with many other countries, has been grappling with the rise of powerful digital platforms and the complex task of encouraging innovation and dynamic competition, which has delivered enormous benefits to society, while at the same time controlling the harmful effects that such powerful entities can produce. The Furman Review highlighted some of the dangers to competition posed by powerful digital platforms.[25] The CMA published a Digital Markets Strategy in 2019, in which it explained

23 Enterprise Act 2002, s 190; see n 1 above, pp 446–457.

24 See www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response accessed 23 September 2022.

25 *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, March 2019 www.gov.uk accessed 23 September 2022.

its approach to the enforcement of both competition and consumer law in this area. In recent years, the CMA has been very active in this area. At the time of writing, it has open investigations under competition law for Google, Apple, Facebook and Amazon. It has accepted commitments from Google in relation to its 'Privacy Sandbox' proposals[26] and it has prohibited a completed acquisition by Facebook of Giphy.[27]

The UK Government has committed to the establishment of a pro-competition system of regulation for digital markets. On 8 December 2020, the CMA advised the government on the design and implementation of this regime.[28] The CMA has established a Digital Markets Unit, which will take this work forward. It had been anticipated that the government would table legislation to establish a legal basis for this system in 2022, but instead, it announced that this would be postponed to a future session of Parliament. The political upheavals in the UK over the summer of 2022, leading to the appointment of a new Prime Minister and Secretary of State for Business, Energy and Industrial Strategy, make it difficult to predict how this area of competition law and regulation will develop. In the meantime, an important new feature of the institutional landscape is the establishment of the Digital Regulation Cooperation Forum (DRCF), which brings together the CMA, OFCOM, Information Commissioner's Office and FCA. Its terms of reference were published on 5 September 2022.[29]

Conclusion

The institutional landscape of UK competition law has varied over the years, beginning with tentative steps taken in 1948. The most important institutions today are the CMA and CAT. The CAT's jurisdiction has increased significantly in recent years, in particular since acquiring the competence to hear damages actions, both on a standalone and follow-on basis, and since the system of collective proceedings was introduced. The CMA stands at the centre of UK competition law and policy, and has acquired important new functions since Brexit in relation to subsidies and the UK internal market. In the years ahead, its remit may widen further, with direct powers to enforce consumer law and a central role in the regulation of certain digital platforms.

About the author

Richard Whish is Emeritus Professor of Law at King's College London.

26 CMA decision of 11 February 2022 www.gov.uk/cma accessed 23 September 2022.

27 CMA decision of 30 November 2021 www.gov.uk/cma accessed 23 September 2022; this decision was substantially upheld on appeal to the CAT, although it was remitted to the CMA for further consideration due to a procedural error: Case 1429/4/12/21 *Meta Platforms Inc v CMA* [2022] CAT 26.

28 See www.gov.uk/government/news/cma-advises-government-on-new-regulatory-regime-for-tech-giants accessed 23 September 2022.

29 See n 5 above.