

# Beyond ECN+ Directive – Empirical Study Mapping Judicial review of national competition law decisions

## UK Rapporteur Report

Barry Rodger\* and Or Brook\*\*

### 1. Introduction to the competition law enforcement context in the UK

#### *Historical Outline*

The UK entered the then EEC in 1973, the same year the Fair Trading Act came into force. This statute however was not a response to membership of the EEC, but rather a consolidating piece of legislation. Further consolidating legislations were introduced in 1976, regulating anti-competitive agreements: the Restrictive Trade Practices Act 1976, the Restrictive Practices Court Act 1976 and the Resale Prices Act 1976.

Between the late-1980s and 1990s, there was a continuous debate on whether UK competition law should be reformed to mirror the EC provisions.<sup>1</sup> The Competition Act 1998 (“CA98”), which came into force on March 2000, has radically altered UK competition law. New controls known as the Chapter I and Chapter II prohibitions were introduced, virtually identical to Articles 101 and 102 TFEU, respectively. Consistency of interpretation with EU law was ensured by Section 60 of the Act, providing that the determination of any questions of interpretation regarding the prohibitions should be consistent with the treatment of corresponding questions arising under EU law. It is clear from UK enforcement practice and, notably, from the judgments of the UK courts that EU case law has been routinely relied on as underpinning the interpretation of the domestic prohibitions.

The Enterprise Act of 2002, further reformed procedural and institutional aspects of UK competition law enforcement.<sup>2</sup> It created a specialist competition tribunal, the Competition Appeal Tribunal (CAT). As of 1 May 2004, a number of further procedural and institutional changes were made to mirror the changes introduced following modernisation of EU competition law.<sup>3</sup>

Further reforms of UK competition took place in 2013. The Enterprise and Regulatory Reform Act of 2013 (ERRA13), which came into force in April 2014, merged the UK’s two traditional competition authorities (the Office of Fair Trading - OFT and Competition Commission) into a single regulator – the Competition and Markets Authority (CMA). In addition, it introduced other procedural reforms aimed at making the competition regime more streamlined and efficient.<sup>4</sup> The Consumer Rights Act 2015 enhanced the role of the CAT by allowing it to hear stand-alone actions and grant injunctions, introducing an ‘opt-out’ collective action.

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Opening Markets: New Policy on Restrictive Trade Practices, Cm 727, 1989, following the earlier Green Paper, Review of Restrictive Trade Practices Policy, Cm 331, 1988; Abuse of Market Power, Cm 2100, 1992.

2 The Act also reformed the UK merger control regime (which lies outside the scope of this project) by replacing the public interest test with a competition-focused test.

3 See, generally, the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261.

4 Department for Business, Innovation and Skills, ‘Enterprise and Regulatory Reform Act 2013: A guide’, June 2013, London: BIS.

The UK's departure from the EU at the end of 2020 led to further changes to UK competition law. The CMA is now required to take on a significant number of antitrust and merger cases that were previously handled by DG Comp. Moreover, the post-Brexit replacement for Section 60, Section 60A, provides greater flexibility for the UK courts and authorities in interpreting and applying the UK prohibition. While the UK government appears committed to maintaining an effective competition law system in the UK, it is less clear whether that system will remain as aligned to the EU rules as before; however, it is important to stress that the high level of UK alignment was never required by EU law, it was a political choice of successive UK governments.

### *Enforcement framework*

As of 1 April 2014, as mentioned, the CMA took over the previous competition law responsibilities of both the OFT and the Competition Commission. The administrative model of public enforcement, where the CMA investigates and takes final decisions on infringements and sanctions, was retained. A far more radical proposed prosecutorial model of enforcement was rejected during the consultation phase leading up to the ERR Act 2013.

The CMA exercise its powers concurrently with a variety of utility regulators: Office of Gas and Electricity Markets (OFGEM), Office of Communications (OFCOM), Office of Water Services (OFWAT), Office of Rail Regulation (ORR), Civil Aviation Authority (CAA), Financial Conduct Authority (FCA), Payment Services Regulator (PSR), NHS Improvement (NHSI formerly Monitor), and the Utility Regulator, Northern Ireland (NIAUR).<sup>5</sup> The Competition Act 1998 (Concurrency) Regulations 2014<sup>6</sup> were introduced following the ERRA13 to enhance the effectiveness of the concurrency regime.

The CMA has a relatively high discretion to manage investigations. It decides which cases to investigate based on its Prioritisation Principles,<sup>7</sup> and has considerable powers to investigate potential infringements of the domestic prohibitions once a formal investigation has been opened.<sup>8</sup> The CMA has various options in dealing with a case. It can close the investigation on the grounds of administrative priorities or issue a no grounds for action decision. It has the power to accept binding commitments,<sup>9</sup> although the use of this remedy has not been as prevalent as by the EU Commission under the EU competition rules. Most importantly, the CMA can make a formal decision declaring that the rules have been infringed and order the parties in breach to cease the infringing conduct, as well as impose penalties.

The key sanction is the power to impose penalties under Section 36 of the 1998 Act. Section 36(8) provides that no penalty may be imposed which exceeds 10% of the turnover of an undertaking, calculated in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000.<sup>10</sup> Section 44 of the ERRA13 introduced a new section 36(7A) to the CA98, setting out statutory criteria to which the CMA must have regard when fixing the level of a fine for an infringement as follows: (a) the seriousness of the infringement concerned, and (b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from infringing the

5 Section 54 CA98. See, for a detailed consideration of this issue, Dunne N, 'Concurrency', Chapter 10 in Rodger, BJ, Whelan P and MacCulloch, A (eds), *The UK Competition Regime: A Twenty-Year Retrospective*, 2021, Oxford: OUP.

6 The Concurrency Regulations, SI 2014/536, under s 54 CA98, as amended by s 51 of the ERRA13. See CMA10, 'Regulated Industries: Guidance on concurrent application of competition law to regulated industries', March 2014.

7 See CMA16con, 'Prioritisation principles for the CMA', January 2014.

8 See Sections 25–29 generally as amended by paras 10–14 of Schedule 1 to the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261.

9 See para 18 of Schedule 1 to the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261 and Schedule 6A to the Competition Act 1998. See, also, 'Enforcement, incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments', OFT 407.

10 SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

prohibitions. These factors were already a central aspect of the Fines Guidance,<sup>11</sup> and the CAT, under Section 38 of the CA98, is to have regard to the CMA's Fines Guidance in reviewing and setting fines imposed.

The CMA's leniency programme aims to enhance the deterrent effect of the legislation<sup>12</sup> and plays a key role in uncovering secret cartels. The CMA may also consider settlement for any case, provided the evidential standard for giving notice of its proposed infringement decision is met, and the reward for a business which settles is a settlement discount which will be capped at 20% for settlement pre-Statement of Objections and 10% for settlement post-Statement of Objections.<sup>13</sup>

### *Enforcement practices and priorities*

The CMA's predecessor, the OFT, was criticised for its relative inaction during the early 2000s.<sup>14</sup> As elaborated below, even since, very few formal decisions have been issued by the OFT, CMA, and sector regulators enforcing EU and UK competition law.

The most notable aspect, as evidenced by research on enforcement trends in the UK to 2019,<sup>15</sup> is the predominance of cases involving the Chapter I prohibition on anti-competitive agreements. This demonstrates a clear prioritization of investigations relating to anti-competitive agreements. This may reflect various factors: the less discretionary nature of such investigations where leniency applications have been made; the perceived impact on consumers of anti-competitive harm from such arrangements; and the relative ease/difficulty in establishing infringements under the two prohibitions. There has also been a tendency for the CMA to focus on blatant but fairly small scale localized horizontal cartel-arrangements for which only relatively small fines could be imposed. The limited level of fines imposed by the OFT under its competition law powers had earlier been criticized by the National Audit Office. Most infringement cases in the UK have concerned 'by object' anti-competitive agreements that are inevitably more straightforward cases for authorities to successfully establish an infringement. There has also been considerable focus on resale price arrangements, which were mostly handled by warning letters.<sup>16</sup> There has been a more recent focus by the CMA on online vertical competition concerns cases either directly involving online resale price maintenance or where limitations on online advertising were imposed to limit competitive pricing.

The statistics in relation to abuse cases appear to demonstrate a historical reluctance by the UK competition authority to take on abuse cases (or for complaints to be made) and the difficulties in pursuing a case through to an infringement finding. Over the period of 19 years, there were only six infringement decisions in cases in which the abuse prohibitions were applied,<sup>17</sup> albeit there is clear evidence of a renewed vigour in abuse case enforcement in recent years by the CMA, particularly in relation to the pharma sector.

## 2. Review of the competition authority's decisions

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11 CMA 73.

12 See CMA Guidance as to the appropriate amount of a penalty, CMA 73, 18 April 2018. On the use of leniency and settlements in the UK, see Brook, O, 'Do EU and U.K. Antitrust "Bite"?: A Hard Look at "Soft" Enforcement and Negotiated Penalty Settlements' [2023] The Antitrust Bulletin.

13 See Rule 9 and CMA8, Guidance on the CMA's investigation procedures in Competition Act 1998 cases', March 2014, at paras 14.1-14.33.

14 See eg The National Audit Office, Enforcing Competition in Markets, HC 593 Session 2005-06.

15 See Rodger, B 'Application of the domestic and EU antitrust prohibitions: an analysis of the UK competition authority's enforcement practice' 8(1) [2020] Journal of Antitrust Enforcement and Practice 86-123.

16 See Brook The Antitrust Bulletin supra.

17 See Rodger 2020 JAE supra.

In the UK, there is a distinction between the notions of ‘appeal’ and ‘judicial review’. Appeals refer to the merits of the case, allowing the court to substitute the decision of the primary decision-maker. Judicial review, by comparison, is linked to the validity of the decision and decision-making process rather than its merits,<sup>18</sup> and in a competition law context, such a level of review can take place in relation to merger and market investigations (and commitments decisions, see below). For the purpose of this chapter, however, the review of the CMA’s and utility regulators’ competition law enforcement will be collectively labelled as ‘review’.

*First instance appeal: the Competition Appeal Tribunal (CAT)*

Decisions of the competition authorities and utility regulators can be appealed to the CAT, a ‘hyper-specialised’ appeal body.<sup>19</sup> The CAT can hear appeals against the substance of any decision taken by the CMA, including the level of any penalties imposed.<sup>20</sup>

The CAT may confirm, set aside, vary the CMA’s decision, remit the matter to the CMA, or make any other decision that the CMA could have made. Detailed rules concerning the CAT procedure were adopted.<sup>21</sup> The Court of Appeal in England has recently tied these competencies to the quasi-criminal nature of the competition law proceedings, noting:<sup>22</sup>

“(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 the evidence 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.”<sup>23</sup>

The types of appealable decisions were identified in *Bettercare v DGFT*.<sup>24</sup> The CAT made clear that this is a matter of substance, based on the position adopted on the complaint and the stage the investigation has reached.<sup>25</sup> Accordingly, an appeal may also be made where the CMA has not formally issued a decision, but, for instance, advised a complainant informally that it will not proceed with a complaint because it does not appear that either prohibition has been infringed.

The main party or parties against whom the CMA has made decisions can appeal, as can “qualifying third parties” with a sufficient interest in the issue. The qualifying test allows interested consumers and organisations representing such consumers to appeal directly to the CAT.

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18 For a discussion see, Mantzari, Despoina. "Judicial Scrutiny of Regulatory Decisions at the UK's Specialist Competition Appeal Tribunal." *Judicial Review of Administrative Discretion in the Administrative State*. TMC Asser Press, The Hague, 2019. 63-80, 66.

19 Ibid.

20 Enterprise Act 2002, Section 46(1).

21 The Competition Appeal Tribunal Rules 2003, SI 2003/1372, applicable to proceedings commenced after 20 June 2003, replacing the 2000 Rules (SI 2000/261).

22 See *CMA v Flynn Pharma Ltd and Pfizer Inc* [2020] EWCA Civ 339 per Green LJ (paras 135-147).

23 Ibid para 140.

24 *Bettercare v DGFT* [2002] CAT 6. See, also, *Freeserve.com v DGFT* [2002] CAT 8; *Claymore/Express Dairies v DGFT* [2003] CAT 3; and *Pernod Ricard SA and Campbell Distillers Ltd v OFT* [2004] CAT 10.

25 See the fuller discussion in Alese, F, ‘The office burden: making a decision without a decision for a third party’ [2003] ECLR 616.

In relation to penalties, the CAT's primary task is to "determine whether the overall figure for penalty was appropriate in the circumstances".<sup>26</sup> Section 38 CA98 requires the CAT to have regard to the CMA's Fines Guidance in setting appropriate penalties. Accordingly, the CAT stressed in *Napp*<sup>27</sup> that it would make this assessment based on a "broad brush" approach, and then carry out a "cross check" to assess if it was within the parameters of the CMA's Fining Guidance. In *Replica Football Kit*, the CAT held that it had the power to increase the penalty,<sup>28</sup> albeit this power 'should not be exercised lightly'.<sup>29</sup>

Appeals in front of the CAT are heard by a Chairman, who is either the President or a member of the panel of Tribunal Chairmen, and two other appeal panel members.<sup>30</sup> The President must be a senior legally qualified person with appropriate experience and knowledge, whereas ordinary members need not be lawyers, and have varied expertise and background with legal and non-legal expertise in areas such as economics, business, and accountancy.

Although delivered prior to the time frame studied in this project, some of the early appeal rulings by the CAT in relation to the UK and EU prohibitions were influential in terms of judicial pronouncements about the appeal context and intensity of review. It is necessary to recount this earlier period, to emphasise the degree of intensity of review emphasised by the CAT and the number of cases involving fully or partially successful appeals. It may be argued that its role here not only set out the wide parameters of the appeal process and potential scrutiny by the CAT but may also have had a dampening effect on the enforcement activity by the UK competition authorities, wary of subsequent judicial review of their enforcement decision-making.

The very first judgment by the CAT, *Institute of Independent Insurance Brokers v Director General of Fair Trading* of 2001,<sup>31</sup> quashed the competition authority's (at that stage the DGFT) finding that Chapter I prohibition did not apply to the Rules of the General Insurance Council, holding the rules were to be prohibited. In the following year, in *BetterCare Group Limited v Director General of Fair Trading*, the CAT overturned a decision finding that an NHS trust may be acting as an undertaking for the purposes of the Competition Act 1998.<sup>32</sup> In two consecutive rulings in 2002 and 2003 in the matter of *Aberdeen Journals Limited v Director General of Fair Trading*, the CAT set aside the decision and remitted on the issue of the relevant market,<sup>33</sup> and upheld the decision on liability but reduced the penalty imposed by just under 25 per cent.<sup>34</sup> In *NAPP*<sup>35</sup> the CAT upheld the substance of the Director's decision on the question of infringement but reduced the fine from £3.21 million to £2.2 million.<sup>36</sup> An appeal was also partially successful in *Freeserve.com PLC v Director General of Telecommunications* of 2003 where the CAT found that the Director General had given inadequate reasons for rejecting one of the grounds of Freeserve's complaint about BT's actions.<sup>37</sup> The Tribunal set aside this aspect of the decision but dismissed the appeal in all other respects.

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26 *Argos Ltd and Littlewoods Ltd v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, at para 194.

27 See *Napp*, supra n 148, paras 497-503 and *Napp Pharmaceutical Holdings Ltd v DGFT* [2002] EWCA Civ 796.

28 [2005] CAT 22 at paras 208-235.

29 *Ibid.* at para. 218.

30 EA2002, Sections 12 and 14 and Schedule 2.

31 1002/2/1/01 [2001] CAT 4.

32 1006/2/1/01 [2002] CAT 7.

33 1005/1/1/01 [2002] CAT 4.

34 *Aberdeen journals* [2003] CAT 8.

35 [2002] CAT 1.

36 [2002] CAT 1.

37 1007/2/3/02 [2003] CAT 5.

In *Genzyme Limited v Office of Fair Trading* of 2004 the CAT upheld the OFT's decision that there as an abusive margin squeeze but overturned the decision in respect of an alleged abusive bundling and reduced the size of the penalty.<sup>38</sup> [In the same year, in](#) joined cases *Allsports Limited v Office of Fair Trading/JJB Sports PLC v Office of Fair Trading*, the appeal on liability brought by Allsports was dismissed in its entirety and partly allowed in relation to JJB.<sup>39</sup> *Floe Telecom Limited (in liquidation) v Office of Communications* involved an appeal against a decision of the Director General of Telecommunications that Vodafone Limited had not infringed the 1998 Act Chapter II prohibition in which the Director's decision was set aside and the matter remitted to OFCOM.<sup>40</sup> In *Argos Limited, Littlewoods Limited v Office of Fair Trading*, the appeals on liability were dismissed<sup>41</sup> but in a later judgment on penalty, the fines were reduced.<sup>42</sup>

In related judgments in 2005, in the matter of *Apex Asphalt and Paving Co. Limited v Office of Fair Trading* the appeal was dismissed,<sup>43</sup> and in *Richard W. Price (Roofing Contractors) Ltd v Office of Fair Trading* the appeal was dismissed in relation to liability but allowed in relation to the penalty which was reduced from £18,000 to £9,000.<sup>44</sup> In joined cases in the matter of *Umbro Holdings Limited, Manchester United plc, Allsports Ltd and JJB Sports plc v Office of Fair Trading*, the penalties were also reduced in relation to Umbro from £6.641 million to £5.3 million;<sup>45</sup> MU from £1.652 million to £1.5 million, and JJB Sports from £8.373million to £6.7 million while the CAT increased the penalty for the first time in relation to Allsports from £1.35 million to £1.42 million. In another group of joined cases in the matter of the *Racecourse Association & others v Office of Fair Trading/The British Horseracing Board v Office of Fair Trading* the CAT upheld the appeal and set aside the OFT's decision in relation to the relevant media rights,<sup>46</sup> and later in 2005 it also set aside the OFT's decision in *Claymore Dairies Limited and Arla Foods UK PLC v Office of Fair Trading* due to serious doubts as to the adequacy of the OFT's investigation.<sup>47</sup> There were two later Court of Appeal rulings, both of which related to competition authority decisions prior to 1 May 2004. In joined cases *Argos Limited; Littlewoods Limited v Office of Fair Trading/ Sports PLC v Office of Fair Trading*<sup>48</sup> the appeals from the CAT judgments were dismissed in relation to both liability and penalty. Finally, in *Floe Telecom Limited (in liquidation) v Office of Communications*, a complicated process following an appeal by a complainant in relation to alleged abusive behaviour,<sup>49</sup> which resulted in a minor success at appeal, and subsequent partial success at the Court of Appeal by the appellants OFCOM and the alleged infringer.<sup>50</sup> This dispute was particularly significant for the CAT ruling<sup>51</sup> and then Court of Appeal judgment in 2006 on the scope of the CAT's jurisdiction in appeals.<sup>52</sup>

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38 1016/1/1/03 [2004] CAT 4

39 1021/1/1/03 1022/1/1/03 [2004] CAT 17.

40 1024/2/3/04 [2004] CAT 18.

41 1014/1/1/03; 1015/1/1/03 [2004] CAT 24.

42 [2005] CAT 13, in Argos' case from £17.28 million to £15 million and in Littlewoods' case from £5.37 million to 4.5 million.

43 1032/1/1/04 [2005] CAT 4.

44 1033/1/1/04 [2005] CAT 5.

45 1019/1/1/03, 1020/1/1/03, 1021/1/1/03 and 1022/1/1/03 respectively, [2005] CAT 22.

46 1035/1/1/04 1041/2/1/04 [2005] CAT 29.

47 1008/2/1/02 [2005] CAT 30.

48 [2006] EWCA Civ 1318.

49 [2006] CAT 17.

50 [2009] EWCA Civ 47.

51 [2005] CAT 14.

52 [2006] EWCA Civ 768.

Overall, in this earlier period, aside from the interesting dicta, The CAT demonstrated the intensity of review on the merits which resulted in several partially and fully successful challenges to the authority's enforcement practice.

Andreangeli has stressed the importance of Article 6 ECHR for the UK public enforcement framework, and the existence of necessary judicial safeguards to ensure the right to a fair trial.<sup>53</sup> The CAT in *Napp* confirmed that it would ensure the authority established any infringement on the basis of preponderance of probabilities, and 'strong and compelling' evidence was required by the authority due to the presumption of innocence.<sup>54</sup> Moreover, the CAT in *NAPP* understood the ECHR requirement of full jurisdiction as all matter of facts and law requiring the widest possible scrutiny on all matters of fact and law on the merits.

#### *Second appeal: Court of Appeal in England and Wales, the Court of Session in Scotland, and the High Court in Northern Ireland*

Decisions of the CAT can be appealed on a point of law to the Court of Appeal in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland (together in this report – the Court of Appeal).<sup>55</sup> In undertaking its task, the Court of Appeal has expressed its deference to the specialist CAT as follows: 'it seems to us that it is right for the court to recognise that the Tribunal is an expert and specialised body, and that ... the court should hesitate before interfering with the Tribunal's assessment'.<sup>56</sup>

#### *Third appeal: Supreme Court*

Further appeal to the Supreme Court is available on a point of law only. As demonstrated below, there have been no appeals at third instance in cases that fall within the time scope of the project.

### 3. Prior research

Various studies have systematically examined the review of competition law enforcement in the UK.

*Mejia* studied judicial appeals by telecoms and competition regulators in Spain and the UK between 2000 and 2016, to assess the extent to which different legal traditions could lead to differences in the outcomes of judicial challenges to regulators' actions.<sup>57</sup> In particular, he examined the country differences observed in the volume of cases and the scope of review applied by the corresponding appeal courts. That research demonstrated a higher number of appeal judgments against regulatory decisions of Spanish regulators in comparison with the UK. The first theoretical explanation offered by *Mejia* is that these outcomes are consistent with the premises that distinguish judiciary systems of administrative justice under the common law tradition from those rooted in the French *droit administratif* tradition. The latter type of judiciary system, such as the Spanish case where public administration is highly centralized by the state, with greater administrative control, leading to a higher number of legal disputes and litigation over decisions of the government. *Mejia* also pointed to the impact of generalist v specialist court dichotomy: Spanish generalist courts allow a greater degree of deference to agency discretionary decisions and the scope of review is commonly limited to scrutinize procedural aspects. The UK's specialist CAT, by comparison, entails that appeals are

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<sup>53</sup> Andreangeli, A 'Human Rights and the UK Competition Act: Public Enforcement and Due Process' in Rodger, Whelan and MacCulloch (eds) *The UK Competition Regime, a Twenty Year Retrospective* (OUP 2021).

<sup>54</sup> Paras 108-109.

<sup>55</sup> CA1998, Section 49. The requirement for resolution of a point of law limits the potential availability of appeal. See, for instance, *Napp Pharmaceutical Holdings Ltd v DGFT (No 5)* [2002] EWCA Civ 796; [2002] 4 All ER 376.

<sup>56</sup> *Argos*, supra n 175, at para. 165. See also the CA ruling in *CMA v Flynn Pharma*, [202] EWCA Civ 339.

<sup>57</sup> Luis E. Mejia "Judicial review of regulatory decisions: Decoding the contents of appeals against agencies in Spain and the United Kingdom" *Regulation & Governance* 2020.

focused on reviewing the technical discretion granted to regulators.<sup>58</sup> Similar findings of Bernatt concerning judicial review in Poland, suggest that judges with expertise in competition and EU law exercise more intense judicial review.<sup>59</sup>

Brook has systematically studied how the CMA and the reviewing courts have considered non-competition interests (efficiencies and public policy considerations) within the enforcement of Article 101 TFEU and the Section 1 equivalent (2004-2017). Her analysis shows, for example, that while many national courts have shown strong deference to the NCAs' analysis of Article 101(3) TFEU and the national equivalent provisions, the CAT has accepted all of the appeals in which the undertakings raised concerns over the NCA's application of Article 101(3) TFEU during the relevant time period.<sup>60</sup>

Mantzari has explored the CAT's judicial scrutiny of regulatory decisions (that is, excluding competition law).<sup>61</sup> Her study demonstrates that the CAT's scrutiny of regulatory decisions is determined by a tripartite relationship between the expert regulators, the expert CAT, and the generalist Court of Appeal. This gives rise to a varying intensity of review better understood as a continuum: 'On the one end of the continuum lie judgments over primary facts reached following the evaluation of evidence, and discretionary decisions over which the tribunal will exercise a profound and rigorous scrutiny. On the other end of the continuum lie multifaceted policy considerations, which depend on inferences drawn from the evidence. In such cases the CAT is prepared to afford a margin of appreciation to the discretionary assessments of regulators.' Mantzari notes that the original limited review primary means to review any regulatory decisions, although this has itself subsequently accommodated ECHR issues via the Human Rights Act 1998, but it is also important to be aware that the appeal routes vary, and while there are different routes to the CAT, via judicial review and the Communications Act 2003, this project is focused on appeals under the 1998 Act, a specific, but not the only, role of the CAT, and that in the wider context inevitably the processes of review are inconsistent. She considers the CAT's institutional features, notably its membership and expertise and notes the different impact this has on the degree of deference afforded to discretionary assessments, and she stresses that the tribunal has interpreted the reference to an appeal 'on the merits' to mean that it has 'full jurisdiction to find facts, make its own appraisals of economic issues, apply the law to those facts and appraisals, and determine the amount of any penalty'.<sup>62</sup>

#### 4. Quantitative analysis

This section moves to examine the findings resulting from a systematic analysis of review of competition law enforcement between May 2004 and April 2021.

##### Source of information

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<sup>58</sup> Nuria Ruiz Palazuelos, *El control jurisdiccional de la discrecionalidad de los organismos reguladores: Un análisis de casos en los ámbitos de la energía y las telecomunicaciones*, Aranzadi 2018.

<sup>59</sup> M. Bernatt, 'Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference', 2016 9(14) *Yearbook of Antitrust and Regulatory Studies* 97-124 (2016), available via <https://ssrn.com/abstract=2896823>

<sup>60</sup> Yet, those judgements were based on flaws in the assessment procedure, rather than on substantive scrutiny of the application of the Article's conditions. See Brook, *Or. Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU*. Cambridge University Press, 2022, 179-181.

<sup>61</sup> Mantzari *supra*. Also see Mantzari, Despoina. *Courts, Regulators, and the Scrutiny of Economic Evidence*. Oxford University Press, 2022.

<sup>62</sup> It has wide remedial powers *Aberdeen Journals Ltd v DGFT* [2002] CAT 4, at para. 61. And its procedural powers allow it to undertake a detailed examination of findings by the authority/regulator, allowing cross-examination of witnesses and noting that a merits appeal 'provides...a right to call and cross examine witness[es]' per *VIP Communications Ltd v OFCOM* [2007] CAT 3, at para. 43.

All judgments of the relevant courts in the UK are published. Hence, it is anticipated that the UK appeal case-law provides a comprehensive coverage of all relevant appeals during the relevant period. The judgments were identified primary via the CAT’s website, which provides details of all instances of appeal against decisions by the competition authority, and were cross-checked using the Westlaw database.

*Total numbers of judgments and ratio of appeals*

A total of 43 judgments were rendered during the relevant period, from which 37 by the CAT in the first instance and 6 in the second instance by the Court of Appeal. From the 107 appealable actions taken by the UK’s competition authorities (OFT, CMA, and the sector regulators – together the ‘competition authority’) in the relevant period, only 26 decisions of the competition authority were appealed. The ratio of competition authority’s decisions subject to appeal is therefore 24%.

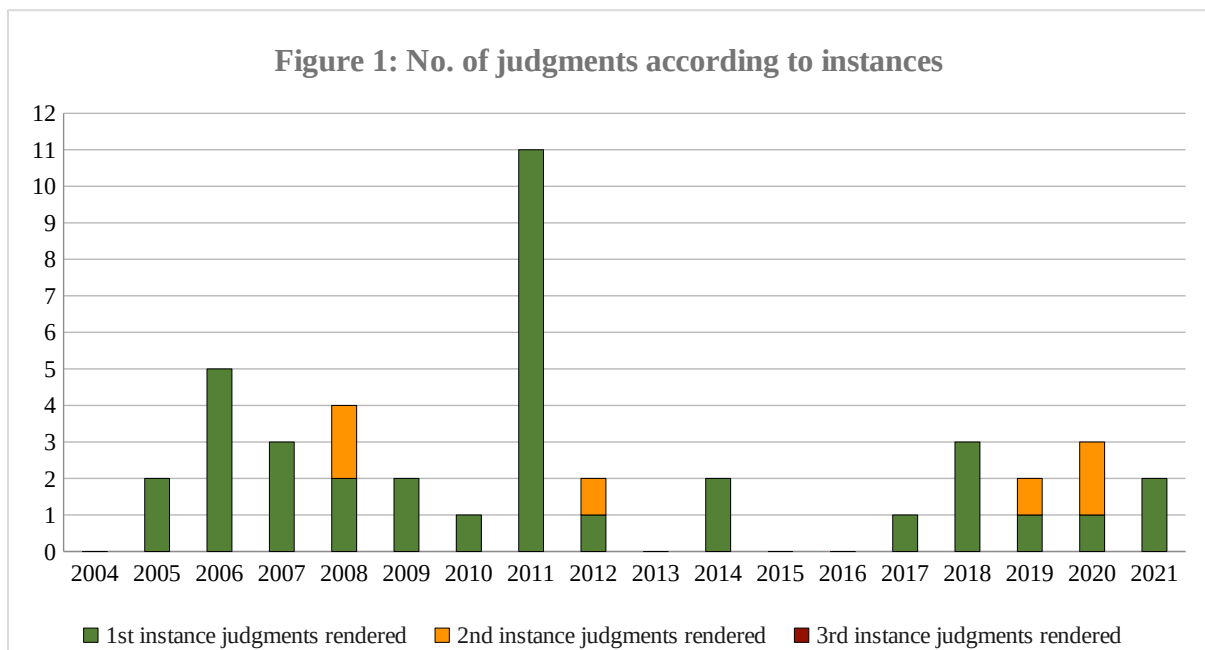
This number of judgments is exceedingly low compared to many EU Member States, especially when one considers the size of the British economy, population, the relatively mature, developed system of competition law enforcement, and the large budget of the CMA and sector regulators. Ultimately, however, this can be primarily explained by the low number of competition authority’s decisions.<sup>63</sup> This conclusion is also supported by comparison to the (relatively high) number of CAT’s judgments relating to its other judicial capacities, notably in relation to private enforcement.<sup>64</sup>

5% of the CAT judgments have been subsequently appealed to the Court of Appeal and no cases have been appealed to the Supreme Court (0%).

*Judgments per year*

Figure 1 summarises the number of judgments issued by the various instances of the UK courts per year.

Figure 1: No. of Judgments According to Instances



63 Rodger JAE 2020 supra; Brook The Antitrust Bulletin supra.

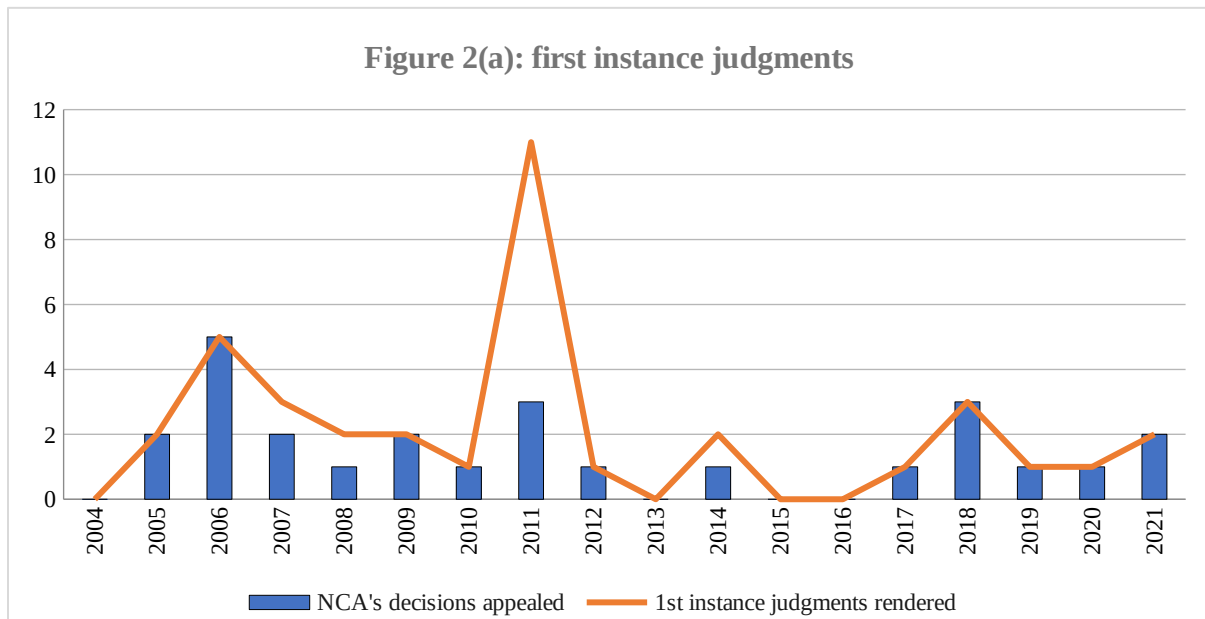
64 For a review of the number of CAT’s private action judgments, see the “Overall Case Activity” section of the CAT’s Annual Report and Accounts, available at: <https://www.catribunal.org.uk/about/publications>.

The findings indicate that the changes in the number of judgments across the years can be explained with reference to the number of the competition authority's decisions issued and the number of the CAT's judgments.

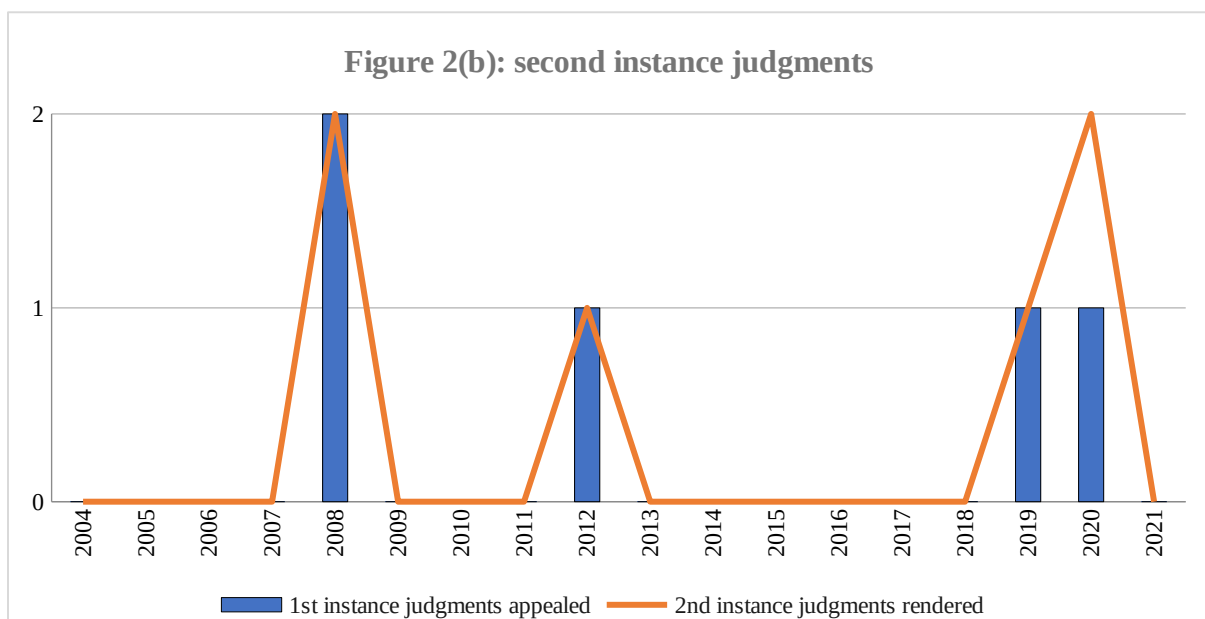
Figure 2 demonstrates that most of the competition authority's decisions that were appealed (bars) were examined within a single CAT judgment (lines), although in some exceptional cases more than one appeal judgment was issued.

Figure 2: judgments according to years

(a) First instance



(b) Second instance



Figures 1 and 2 point out that 2011 was the peak year in terms of the number of judgments issued. This, however, does not mark a substantive trend but rather was the result of the OFT's Construction

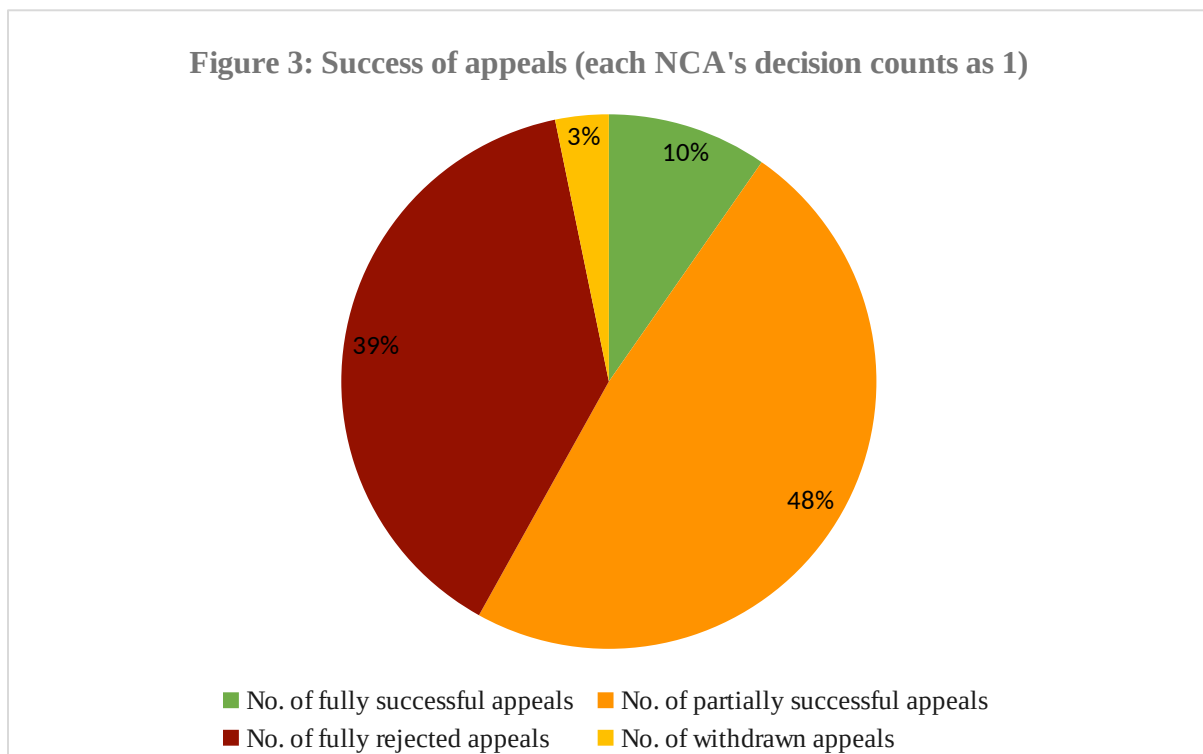
Industry Bid-rigging cases in 2010, in which 102 businesses were fined in relation to an England-wide infringement.

The two figures may suggest an additional trend – namely, a growing number of second instance appeals since 2019. There were 3 appeal rulings during 2019-2020 in the cases of *Balmoral Tanks Ltd v CMA*, *Ping Europe Ltd v CMA and Flynn Pharma Ltd*, and *Pfizer Inc. v CMA*. These numbers are still far from decisive to point to a clear trend. Moreover, as those second instance appeals were mostly unsuccessful (see next section), this may discourage appeals in the future.

#### Success rates and outcomes

Figure 3 presents the success of the appeals, across all instances. Those success rates relate to the outcomes of all appeals, taking into account that separate appeals were aggregated where launched against a single decision of the competition authority. That means that if a single decision was appealed by various parties in separate proceedings, the outcome of all those judgments will be counted as a single case for the purposes of this figure.

Figure 3: success of appeals (each competition authority's decision counts as 1)



The figure indicates a high success rate of appeals in the UK. Appeals launched against 58% of the competition authority's decisions and the CAT's judgments were either partially (48%) or fully (10%) successful. The partially successful category includes cases where either the substantive aspects of the infringement decision were overturned or set aside (or there was a success in some appeals but not other separate appeals in relation to the same infringement decision) and cases where the original penalty was reduced in some way (see discussion below).

The success rates are further elaborated upon by Figure 4, which identifies the outcome of the appeals. Unlike Figure 3, this figure examines each judgment separately, and differs between the appeal's instances.

Figure 4: outcomes

(a) First instance

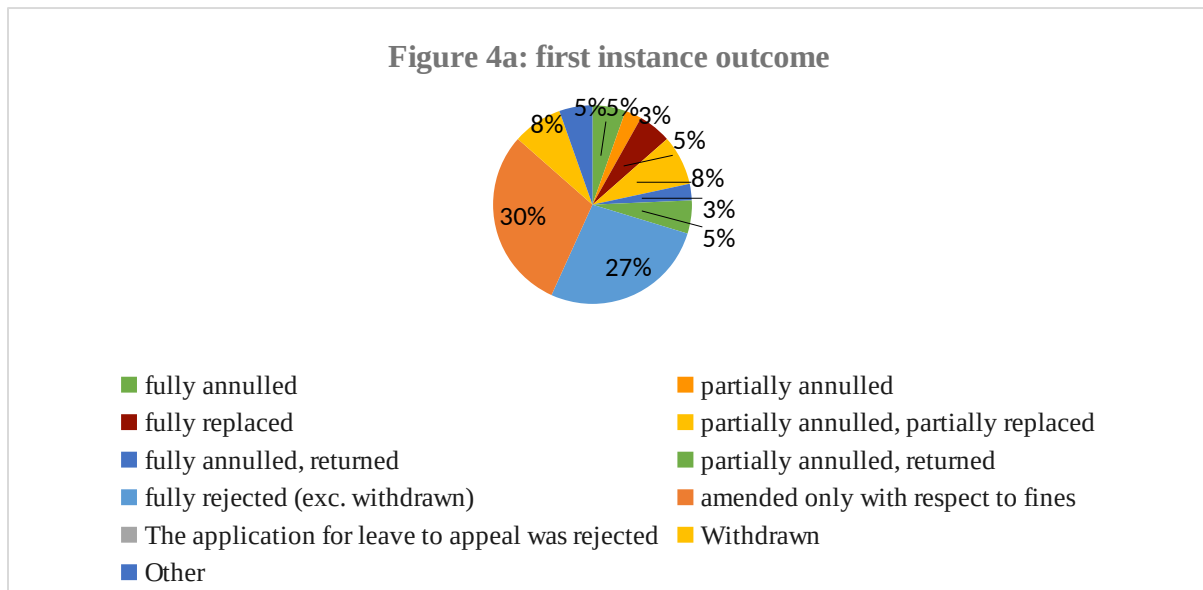


Figure 4(a) shows that in almost half of the CAT's judgments (46%), the tribunal partially changed the CMA's decision. This includes 30% of judgments that amended the competition authority's decision only with respect to the fines, including *Terry Brannigan v OFT*<sup>65</sup> and *Ping Europe Ltd v CMA* (in which the CMA fine of £1.45 million was reduced by £200k).<sup>66</sup> All other cases in this category involved appeals in relation to the construction cartel.<sup>67</sup> 16% of judgments partially annulled the competition authority's decision with respect to matters beyond the fines (including: partially annulled – 3%; partially annulled and partially replaced – 8%; partially annulled and partially returned to the competition authority – 5%).

Only 8% of the CAT's judgments fully annulled the competition authority's decision. This includes *MasterCard UK Members Forum Limited v OFT* (2006),<sup>68</sup> in which the OFT had already agreed to withdraw its decision. In an additional 5% of cases, the CAT fully replaced the competition authority decision. This illustrates the CAT's wide discretion and competencies. The two judgments in that category - *Burgess* (2005)<sup>69</sup> and *Albion Water* (2008)<sup>70</sup> both examined the validity of the competition authority's decisions to reject a complaint alleging abuse of dominance. In both cases, while the competition authority rejected the complainant's allegations of abuse, the CAT in its appeal ruling found an abusive infringement – emphasising that there is 'in principle no difference between an appeal against an infringement decision and an appeal against a non-infringement decision'.<sup>71</sup>

Figure 4(b) summarises the outcome of the cases in front of the Court of Appeal. As mentioned, out of the 6 cases, 3 were unsuccessful, and in 1 an application for appeal was rejected. In *Interclass Holdings Ltd v OFT*, the second appeal was partially accepted with respect to the fine.<sup>72</sup> In *flynn Pharma Ltd and Pfizer Inc. v CMA*,<sup>73</sup> the Court of Appeal mostly upheld the CAT's decision to overturn

65 [2007] CAT 23.

66 [2018] CAT 13.

67 For example, *G F Tomlinson Building Ltd and others v OFT* [2011] CAT 7.

68 [2006] CAT 14.

69 *Burgess and Sons v OFT* [2005] CAT 25.

70 *Albion Water Ltd v Water Services Regulation Authority* [2008] CAT 31.

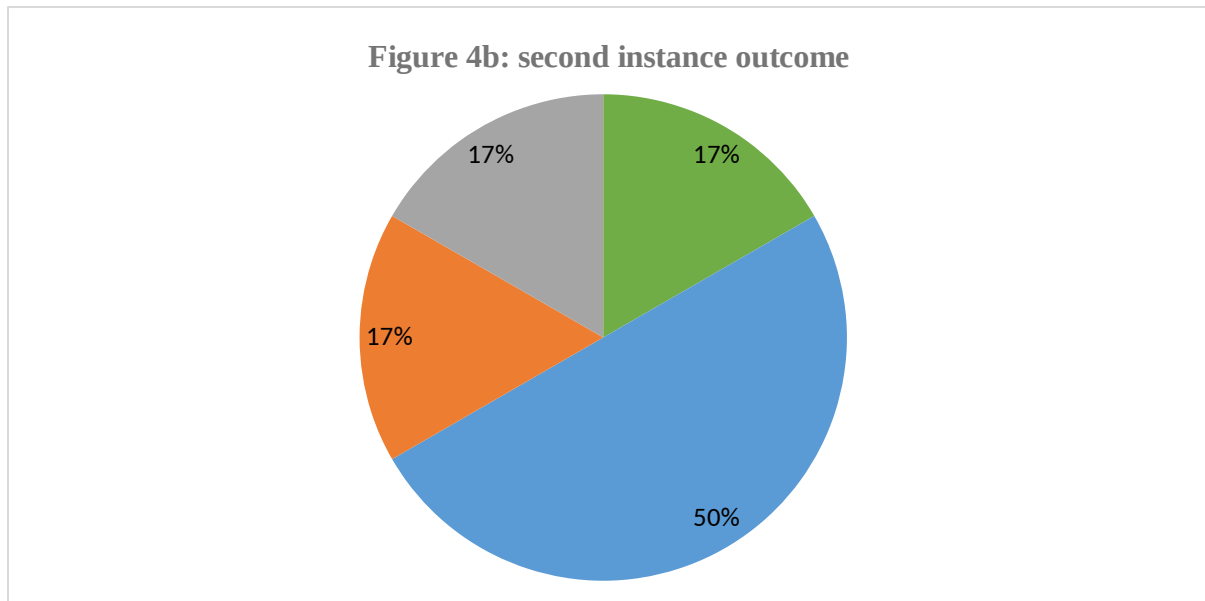
71 *Burgess and Sons v OFT*, supra para 125.

72 *Interclass Holdings Limited v OFT* [2012] EWCA Civ 1056.

73 *Flynn Pharma Ltd and Pfizer Inc. v CMA* [2020] EWCA Civ 339.

the CMA's decision finding that the undertakings had charged excessive pricing. Nonetheless, the case was returned to the CMA for further consideration of the evidence and the level of economic value that should be attributed to the patient benefit.

*(b) Second instance*



*Type of competition authority's decisions subject to appeal*

The empirical findings point out that only limited types of competition law rules are subject to review on appeal. This seems to correspond to a limited range of competition law enforcement by the competition authority, which was reported in earlier findings by Rodger.<sup>74</sup> This may raise concerns as to the effectiveness of the appeal protection in the UK (see discussion below).

*Figure 5: rules being appealed*

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74 Rodger JAE 2020 supra.

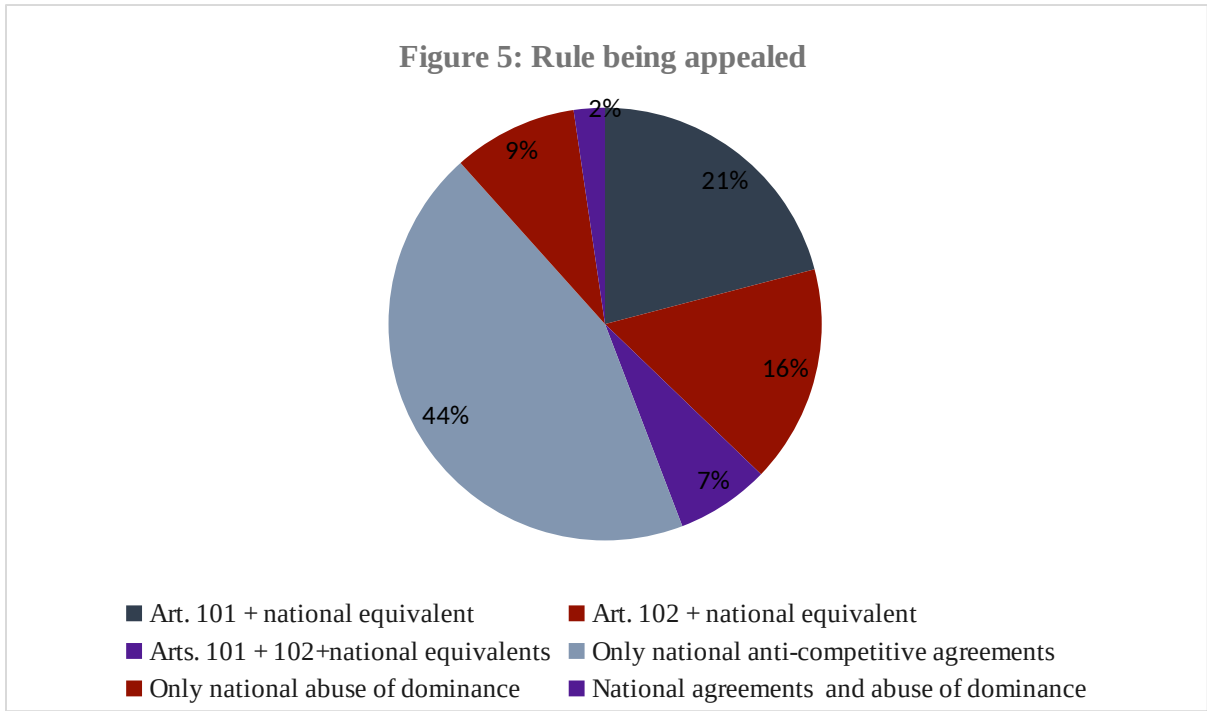
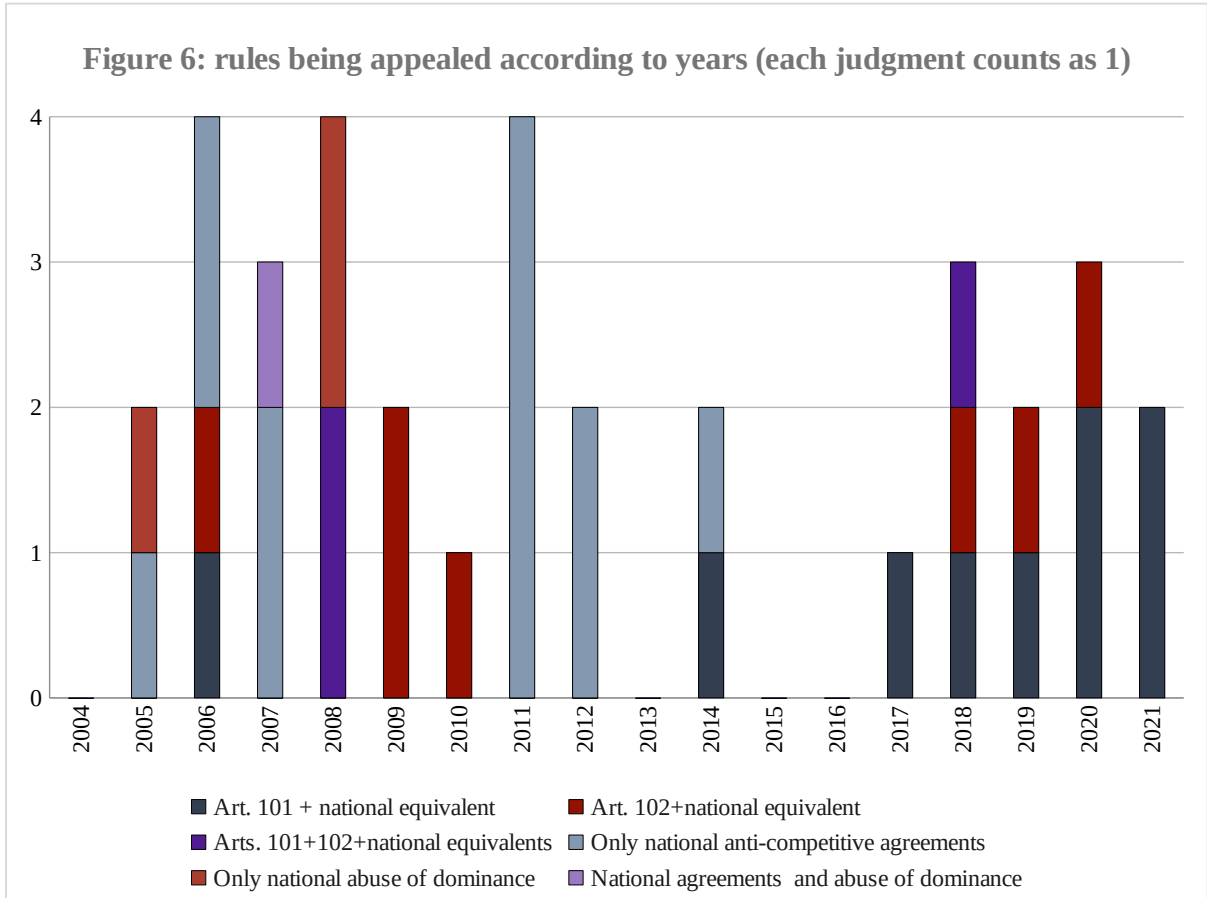


Figure 6: rules being appealed according to years (each judgment counts as 1)



First, Figure 5 demonstrates that appeal judgments in the UK have predominately focused on enforcement of national law alone, even prior to Brexit. Indeed, 56% of appeals concerned the national rules alone. The rest of the proceedings involved a combination of both the EU and UK

prohibitions. Nevertheless, shows that this trend had decreased between 2017-2021 where all appeals involved the EU prohibition.

Second, Figure 5 illustrates that 75% of appeal judgments pertained to the national (54%) and national and EU (21%) prohibitions on anti-competitive agreements. This trend is especially noticeable when examining the type of prohibitions according to years. demonstrates that while there were a fairly significant number of early abuse cases between 2005-2010, these cases did not involve an appeal in relation to a competition authority finding that an abuse of dominance had occurred. Rather, they involved appeals launched by complainants against a decision not to pursue the case on the basis that there was no infringement of the prohibition.<sup>75</sup> After some years of exclusive focus on Article 101 TFEU and Chapter I cases, the UK courts have again more recently dealt with cases involving the abuse prohibitions. While the CAT and Court of Appeal judgments in the matter of *flynn Pharma Ltd and Pfizer Inc. v CMA* in 2018 and 2020 involved an earlier infringement decision, the appeal in *Royal Mail plc v Office of Communications* in 2019 again concerned a decision to reject a complaint.<sup>76</sup>

Third, even in relation to the prohibition of anti-competitive agreements, appeals have examined only a limited range of issues (see Figure 8). Of the 28 appeals related to anti-competitive agreements, 22 (82%) involved horizontal agreements. Figure 8 further points out that 91% of those decisions classified the restrictions as by-object (from which 3% were both by-object and by-effect). Moreover, interestingly, 31% of the appeals involved cases where one or more of the parties successfully submitted a leniency application, and 9% involved a successful settlement application. That means that the UK authorities (and consequently the appealcourts) have almost exclusively focused on enforcement against hard-core cartels, which are likely to raise only limited types of legal and economic challenges.

Fourth, 9 out of the 11 competition authority's decisions on abuse of dominance (82%) related to exclusionary practices.

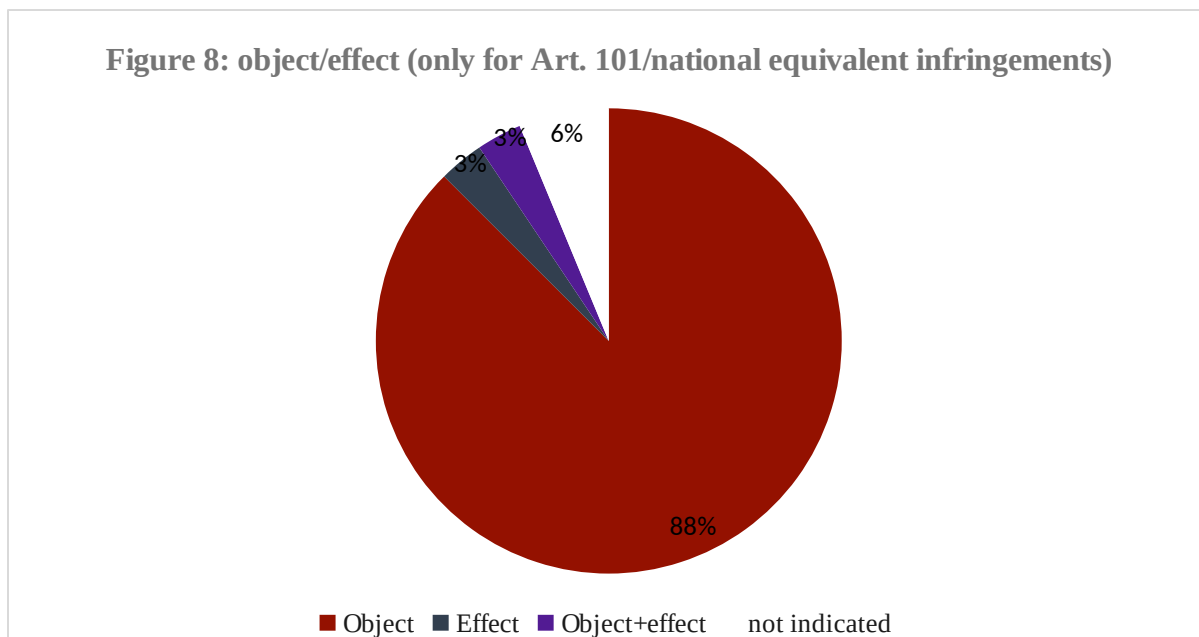
*Figure 7: object/effect (only for cases involving Article 101 and the national equivalent prohibition)*

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<sup>75</sup> 1044/2/1/04 Burgess and Sons v OFT; 1024/2/3/04 Floe Telecom Ltd v Office of Communications; 1046/2/4/04 Albion Water Ltd v Water Services Regulation Authority; C1/2007/0373 and C1/2007/0374 Dwr Cymru Cyfyngedig v Albion Water Ltd; 1046/2/4/04 Albion Water Ltd v Water Services Regulation Authority; A3/2007/0658 and 2007/0665 Floe Telecom Ltd v Office of Communications; 1099/1/02/08 National Grid Plc v Gas and Electricity Markets Authority; C1/2009/1573 National Grid Plc v Gas and Electricity Markets Authority.

<sup>76</sup> 1275-1276/1/12/17 Flynn Pharma Ltd and Pfizer Inc. v CMA; C3/2018/1847 and 1874 flynn Pharma Ltd and Pfizer Inc. v CMA; 1200/1/3/18 Royal Mail plc v Office of Communications.

**Figure 8: object/effect (only for Art. 101/national equivalent infringements)**

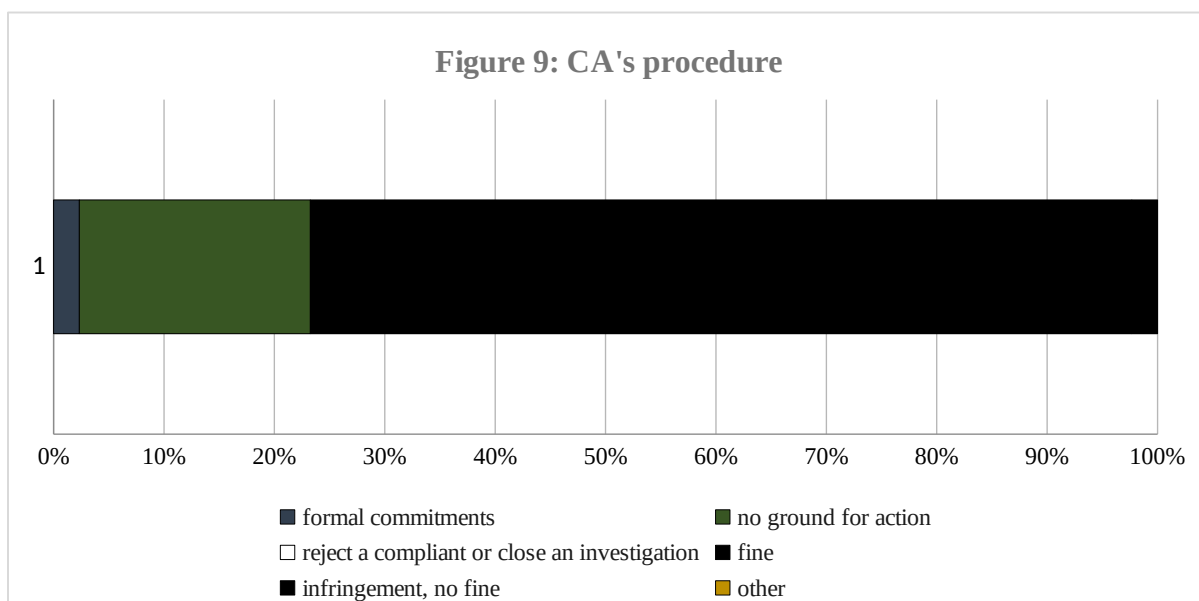


*Type of competition authority's procedure*

Figure 8 summarises the type of competition authority's actions that were subject to appeal. 74% of those decisions involved findings of infringements, together with the imposition of fines. 20% of the decisions were no grounds for action. These typically arose in the period to 2009 (eg *Burgess, Albion water and Floe Telecom*) and involved appeals by complainants in relation to decisions (normally in relation to the abuse of dominance).

The figure also shows that commitments were subject to appeal in the UK in only one case.<sup>77</sup> This corresponds to the seldom use of the commitments remedy by the UK competition authorities.<sup>78</sup> Appeals lunched against commitments involve a different, lower, standard of review and scrutiny, as opposed to appeal on the merits.

*Figure 8: the competition authority's procedure*



<sup>77</sup> *Skyscanner Ltd v CMA* [2014] CAT 16.

<sup>78</sup> Rodger JAE 2020 supra.

### Grounds of appeal

Figure 9 sets out the grounds of appeals raised by the parties, across all instances. The success rates relate to the outcomes of all appeals, taking into account that separate appeals were aggregated where launched against a single decision of the competition authority. That means that if a single decision was appealed by various parties in separate proceedings, the outcome of all those judgments will be counted as a single case for the purposes of this figure. More than one appeal ground has often been invoked in the same case.

Figure 9: grounds of appeal (each competition authority's decision counts as 1)

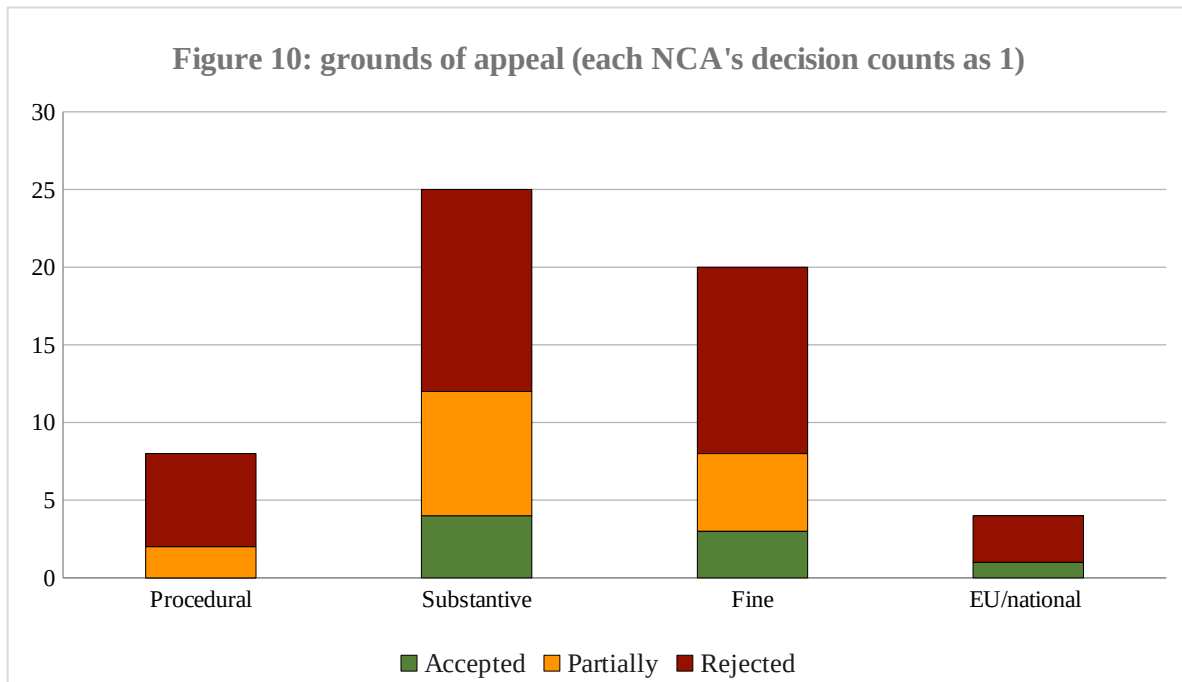
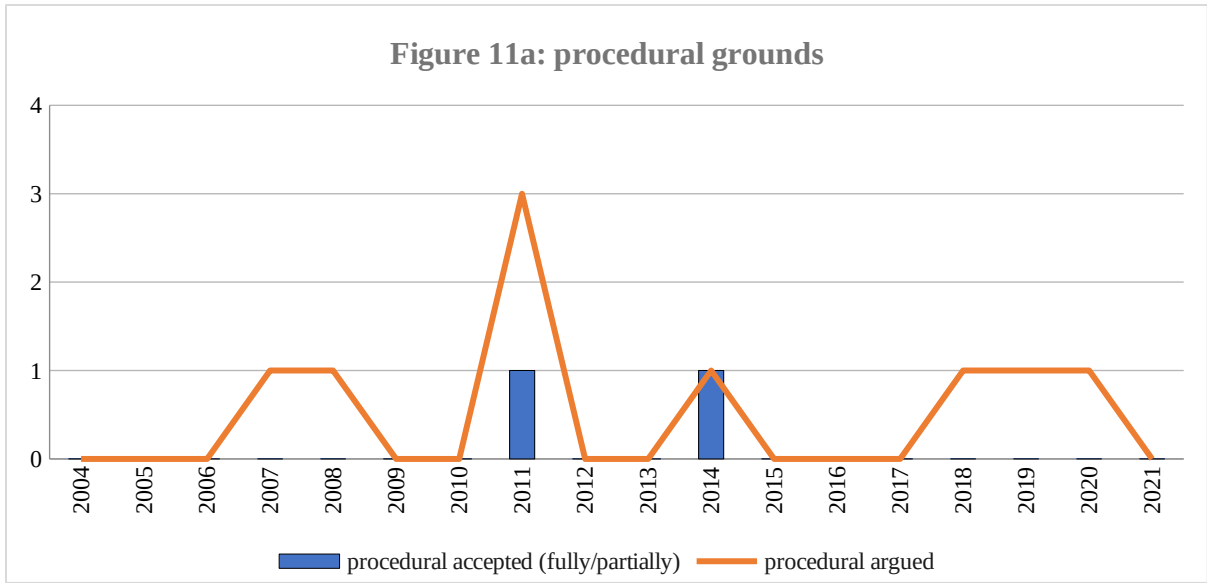


Figure 10 takes a different approach, focusing on the appeal grounds argued and accepted according to years, and counting each court judgment as a single decision, irrespective of whether there were multiple separate appeals in relation to the same competition authority's decision.<sup>79</sup>

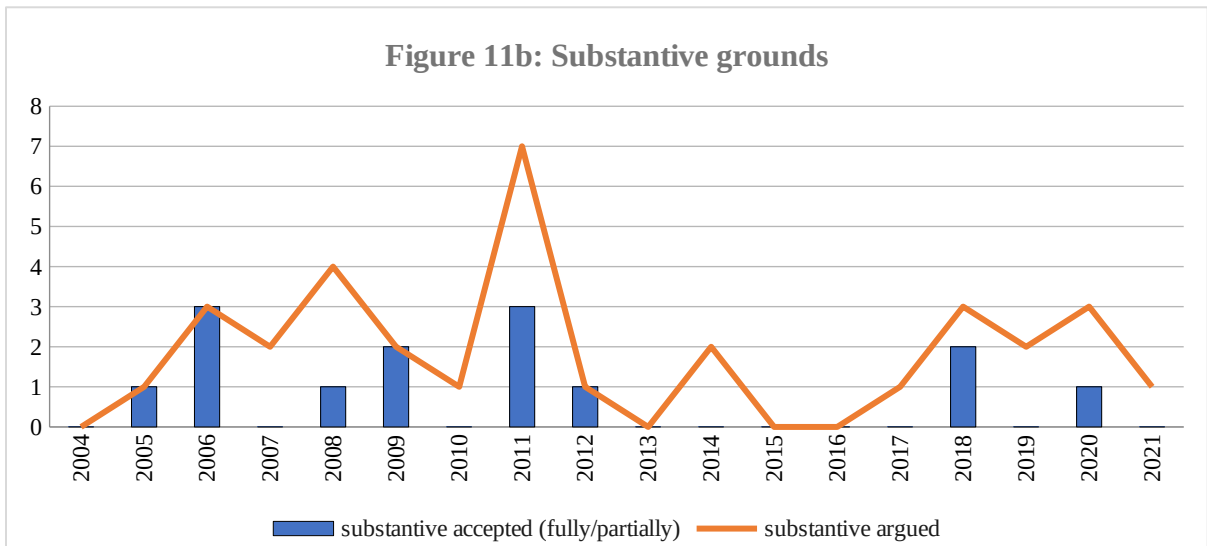
Figure 10: grounds according to years

(a) Procedural grounds

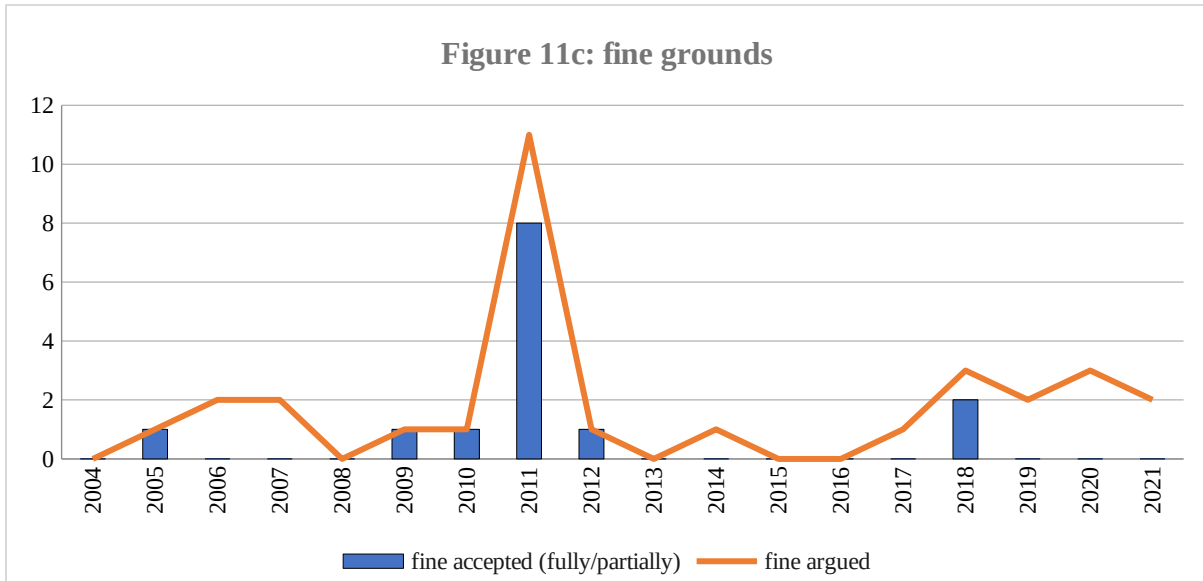
<sup>79</sup> Hence, the apparent inconsistency between Figure 9 and Figure 10(c) can be explained by the fact that many of the fine cases related to the one decision, on the construction cartel, and this accounts for the peak in 2011 in Figure 11(b) and Figure 10(c) in relation to the number of successful appeals on fines by multiple parties in different proceedings in relation to that infringement.



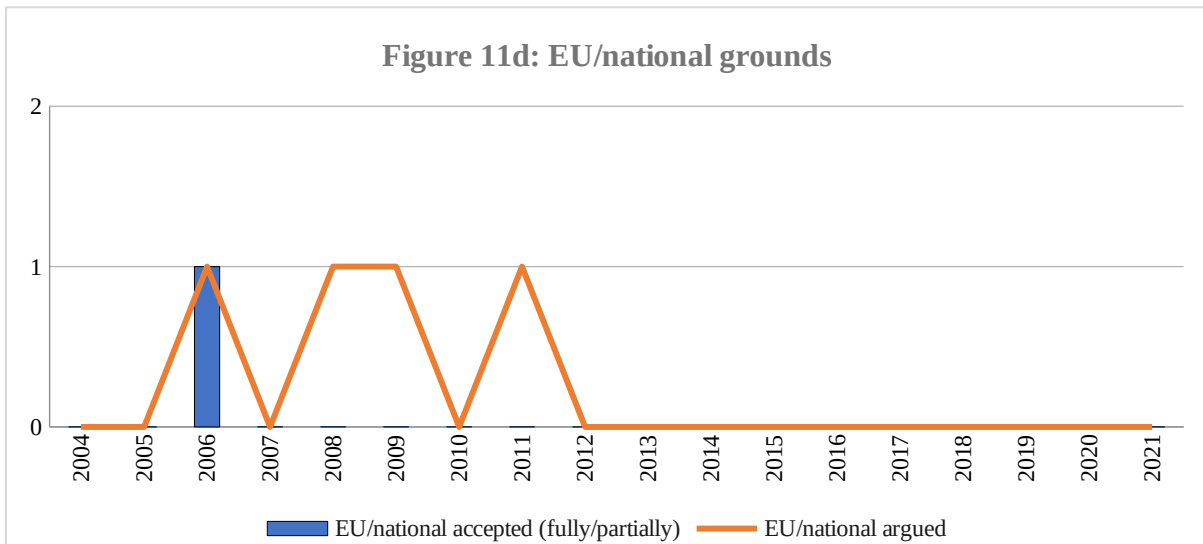
(b) Substantive grounds



(c) Fine grounds



(d) EU/national grounds



Various interesting trends emerge. First, substantive grounds of appeal were the most frequently raised ground by the parties, and the most likely to succeed. Their success rates, however, was not equally distributed across the years, and were practically accepted by the courts between 2004-2012. Many of them involved complainants relating to the abuse prohibition and no grounds for action decisions, e.g., in *Burgess*, *Floe Telecom*, *Albion Water*. There have also been successful appeals on substance in two cases related to the construction cartel in 2011.<sup>80</sup> Some substantive grounds of appeal were partially successful in 2018 and 2020, in *Generics UK v CMA* and *Flynn Pharma v CMA* respectively, and both also relate to the abuse prohibition.

Second, grounds of appeal pertaining to fines imposed have also been frequent and prominent. In addition to the multiple successful appeals on fines by multiple parties in relation to the Construction industry cartel in 2011, there are other notable cases involving appeals on fine calculation with a fine reduction outcome, such as in *Ping Europe UK Ltd v CMA* (CAT (2018) and CoA (2020)).<sup>81</sup>

<sup>80</sup> *Willis & sons Ltd v OFT and GMI Construction Ltd v OFT*, [2011] CAT 9.

<sup>81</sup> [2018] CAT 13 and [2020] EWCA Civ. 13.

Notably, the reference to the appeal ground of fines in Figure 9 and Figure 10(c) only indicates cases where the fine calculation was challenged in itself. They do not include cases where the fine was reduced because the court accepted the substantive ground of appeal. A closer review of the empirical findings, therefore, reveals that the appeal rulings by the UK courts had a considerable impact on the level of fines imposed. Fines were reduced in 43% of the CAT's judgments and 33% of the Court of Appeal's judgments, and the average fine reduction in those cases was 72% for the CAT and 99% for the Court of Appeal. The fine was increased in a single case – that is the CAT's decision in *Roland (U.K.) Ltd and Roland Corporation v CMA* of 2021.<sup>82</sup> The CAT decided that the fine should be calculated without the 20% settlement discount.

Third, Figure 10(a) shows that procedural grounds were seldom argued and rarely successfully. One notable exception was the *Imperial Tobacco Group v OFT* ruling.<sup>83</sup>

Fourth, similarly, the only case where the issues related to the tension between EU and national competition laws raised by all parties were fully accepted was in *Floe Telecom Ltd v Office of Communications* (2006), as will be elaborated in the following section.

#### *Other: third parties' participation*

A range of third parties participated in the UK appeals: in *Burgess and Albion Water* (CAT), the undertakings concerned intervened in an appeal submitted by a complainant; In *Floe Telecom*, interveners supported both the applicant and businesses. In *Albion Water* (Court of Appeal), OFWAT, OFT, and OFCOM joined the procedure.

In other cases, other related businesses intervened, for example Siemens PLC in relation to National Grid, and in the *Skyscanner* commitments case the third party Skoosh International Ltd was granted permission to intervene in support of the undertakings (as were various other third parties, including Booking.Com BV in support of the CMA). In *Flynn Pharma* the European Commission (COMS) intervened before the Court of Appeal and in *FP McCann* at the CAT, the interveners were directors, subject to ongoing director disqualification processes in the Northern Ireland High Court.

#### 5. Qualitative analysis: effectiveness of review

The nature of judicial scrutiny of the CMA's and utility regulators' enforcement is a distinctive feature of the UK competition law system. This section builds on the above quantitative analysis to highlight key dicta of the CAT and Court of Appeal and to explore how the courts have undertaken their appellate function. We will conclude this section with a discussion of recent proposals and consultation processes which have reflected on the enforcement context and made suggestions for review and reform of the court review function in that context. Some of these proposals have suggested that the competition law court appeal system in the UK might have overstepped its appropriate role, in a manner that might hinder the effectiveness of its national competition law enforcement.

#### *Substantive and procedural grounds*

The high rate of successful appeals, and the focus on substantive grounds - can be explained by the CAT's standard of review (see Figures 3,4, and 10 above) and its high level of expertise in competition law matters. The intensity of review of the CMA's (and its predecessor, the OFT) and utility regulators' competition law enforcement by the CAT is considerable. The CAT has the

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<sup>82</sup> *Roland (U.K.) Ltd and Roland Corporation v CMA*, [2021] CAT 8.

<sup>83</sup> *Imperial Tobacco Group v OFT*, [2011] CAT 41.

competence to review any error of law, fact, or discretion; to consider new evidence;<sup>84</sup> to review decisions finding a prohibition, non-prohibition, and the rejection of complaints;<sup>85</sup> and to replace the CMA's and utility regulators' decisions. In contrast to the marginal standard of review followed by the generalist EU Courts when it comes to 'complex economic assessment' by the European Commission, the CAT – as a specialist competition law tribunal – is deeply involved in the consideration of various aspects of the cases appealed.

The depth and intensity of review in the UK as set out in the statutory rules has been repeatedly confirmed and stressed by the CAT. In *Albion Water*, 2008, the CAT discussed at length the approach to the standard of review adopted on appeal:<sup>86</sup>

'The parties were unable to agree upon the correct standard of review in this case. Three approaches were canvassed. The first employs the principles of judicial review, which counsel for Dŵr Cymru argued the Tribunal should apply. He drew an analogy with the position under section 193 of the Communications Act 2003 ("the 2003 Act").

The second approach, favoured by Albion, recognises that the reference to an appeal "on the merits" in paragraph 3(1) of Schedule 8 means that the Tribunal's function is not limited to the review of the Report according to the principles of judicial review. In consequence the Tribunal should decide for itself whether the First Access Price is excessive and, if so, whether it is unfair and thus an abuse of a dominant position.

...third approach lies somewhere between the first two; here the Tribunal would treat the Report as evidence.

... [such an approach] would restrict the Tribunal's role to a limited form of judicial supervision which is inconsistent with the merits jurisdiction prescribed under the Act. We reject so restrictive an approach. The Tribunal's powers in deciding this appeal are set out in paragraph 3(1) of Schedule 8 to the Act. That provision requires the Tribunal to decide the case "on the merits" by reference to the grounds set out in the notice of appeal.

The Tribunal has jurisdiction under paragraph 3(2)(e) of Schedule 8 to the Act to reach its own decision in respect of a matter forming part of the decision under appeal'.

The scope of the CAT's powers on the merit, and in particular its power to take its own decisions on substantive grounds in cases involving non-infringement outcomes, was made evident by the CAT itself in *Burgess v OFT*:<sup>87</sup>

'In deciding whether to take its own decision, the Tribunal is mindful of the fact that it is an appellate tribunal from an administrative decision and should not therefore turn itself into the primary decision-maker without good reason. On the other hand, as the Tribunal's recent judgment in *Floe Telecomm v Office of Communications* [2005] CAT 14 emphasises, the Tribunal's jurisdiction is a merits jurisdiction, and thus wider than a judicial review jurisdiction. The Tribunal referred, in particular, at paragraph 65 of that judgment, to the Ministerial statement of 18 June 1998 during the passage of the Competition Bill: "It is our intention that the tribunal should be primarily concerned

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84 CAT in *Makers Ltd* [2007] CAT 11, para 41. The position is more limited on appeal to the Court of Appeal, see eg *Independent Media Support Ltd v Office of Communications*, [2008] EWCA Civ 1402. The right to adduce new evidence is now controlled under the CAT Rules by rule 9(4)(h) and the power of the CAT to exclude it: rule 21(2)(b)-(c).

85 [2008] CAT 31, para 65-70; *Freeserve* [2003] CAT 5; [2007] CAT 23, para 106.

86 [2008] CAT 31, para 65-70.

87 [2005] CAT 25, para 129.

with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules...”.

The 2012 CAT ruling In Tesco’s appeal in relation to the Dairy market infringements shows the number of witnesses involved, and the detailed level of engagement with the facts and issues by the tribunal in upholding the appeal.<sup>88</sup>

The CAT has linked its high level of involvement to the important public interest function embedded in competition law enforcement. In its 2018 ruling in Flynn Pharma, where the CMA had found an abuse of dominance based on unfair pricing, it noted:<sup>89</sup>

‘Cases of pure unfair pricing are rare in competition law. Authorities find them difficult to bring and are, rightly, wary of casting themselves in the role of price regulators.... In this case, there is much in the Decision with which we agree. However, we find the CMA’s conclusions on abuse of dominance were in error.... The CMA did not correctly apply the legal test for finding that prices were unfair as laid down in the United Brands case.... The importance of this case for the public interest makes it desirable to rectify the errors we have found. In a matter as important for government, for the public as patients and as taxpayers, as well as for the pharmaceutical industry itself, the law should be clear and any decisions made should be soundly based on proper evidence and analysis. It is important that there is a good legal foundation for any future action in this area’.

In other cases, the scope and intensity of the review were vindicated with reference to the protection of fundamental rights. In Flynn Pharma Ltd, for example, the CAT noted: ‘The conferral of a merits jurisdiction upon the Tribunal flows from important legal considerations relating to the rights of defence and access to a court, under fundamental rights such as article 6 of the Convention’.<sup>90</sup>

At the same time, excessive intervention may also hamper the effectiveness of competition law enforcement. Indeed, the CAT had accepted some limits, as to avoid transforming it from an appellate tribunal to a court of trial. In the 2011 ‘tobacco’ case,<sup>91</sup> in which the OFT decisions were quashed, the CAT made interesting remarks regarding the authority’s attempt to change its position during an appeal, and the inherent limits of an appeal process involving an authority’s prior decision:

‘In Aberdeen Journals Ltd v Director General of Fair Trading [2002] CAT 4, for example, the Tribunal said: “... such an approach could give rise to a tendency to transform this tribunal from an essentially appellate tribunal to a court of trial where matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first time at the level of the tribunal when they could and should have been raised in the administrative procedure and dealt with in the decision. We do not think that such a development would be conducive to appropriate rigour in administrative decision making, or to a healthy and fair system of appeals under the [1998] Act.” The Court of Appeal in Office of Communications v Floe Telecom Ltd [2006] EWCA Civ 768 also stated that paragraph 3(1) makes clear that the appeal is on the merits and also “limits the appeal to the points

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88 [2012] CAT 31.

89 [2018] CAT 11, para 462-464.

90 Flynn Pharma Limited and Pfizer Inc. v CMA [2020] EWCA Civ 339, paras 141-145.

91 [2011] CAT 41, para 136.

taken in the notice of appeal” (at paragraph 24). (...) In our judgement, the powers under paragraph 3(2) do not extend the scope of our jurisdiction under paragraph 3(1) and do not enable us to engage in an investigation, independent of the issues raised in the appeal, as to whether other infringements have been committed’.

Such concerns were also voiced by the Court of Appeal. For example, in a relatively early case, the Court of Appeal was critical of the CAT for undertaking multiple and lengthy judgments in relation to the one appeal, albeit it was a particularly complicated context, in *Albion Water*.<sup>92</sup>

In recent appeals, the CAT has provided an updated and comprehensive account of its appellate function in relation to the prohibitions. For instance, in *Lexon UK Ltd v CMA*, in 2021, after noting its broad competencies the CAT added that:<sup>93</sup>

‘The Tribunal should interfere only if it concludes that the decision is wrong in a material respect. Whether an error is material will be a matter of judgment for the Tribunal. It is consistent with a merits appeal for the Tribunal, even having heard the evidence, to conclude that the approach taken by the CMA and its resultant findings are reasonable in all the circumstances and to refrain from interfering upon that basis. If the Tribunal considers that the findings of the CMA are reasonable it might be difficult to say that any findings at which it arrives, which differ from those of the CMA, are material (...)If the Tribunal annulled a decision on the basis of an error that was very slight or de minimis and/or gave no reasoning to justify the annulment that might be considered an error of law’.

In *Flynn Pharma Ltd*, Green LJ in the Court of Appeal, also provided guidance on the scope of the margin of appreciation to be afforded to the CMA, in particular in relation to substantive liability and determinations of the existence of illegal, abusive behaviour. Green LJ indicated that ‘materiality’ should guide the exercise of the Tribunal’s supervisory function:<sup>94</sup>

‘Notwithstanding the above the jurisdiction of the Tribunal is not unfettered. ....The Tribunal should interfere only if it concludes that the decision is wrong in a material respect. ....First, materiality is not an exact science. The Tribunal might be able to do no more than conclude that an error might make a difference to the final outcome or to some significant component thereof; certainty might not be possible. Second, there is no fixed list of errors that the Tribunal might consider material. Case law indicates that the following might be relevant: failing to take account of relevant evidence; taking into account irrelevant evidence; failing properly to construe significant documents or evidence; drawing inferences of fact from evidence about relevant matters which are illogical or unjustified; failing adequately or sufficiently to investigate an issue that the Tribunal considers to be relevant or potentially relevant to the analysis”.<sup>95</sup>

However, it should be noted that in relation to commitment decisions, as stressed by the CAT in *Skyscanner Ltd v CMA*, the CAT exercises a different level of supervisory control based on judicial review rather than appeal on the merits, as emphasised in these key passages:<sup>96</sup>

‘Bearing in mind that the commitments process is meant to provide a rapid solution and to look forward, rather than to make a condemnation of past conduct, the OFT (now CMA) must be allowed

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92 [2008] EWCA Civ 536.

93 [2021] CAT 5; See also *Roland (UK) Ltd v CMA* [2021] CAT 8.

94 *Flynn Pharma Limited and Pfizer Inc. v CMA* [2020] EWCA Civ 339, PARA 141-145.

95 See also eg *Kier Group Plc and others v OFT* [2011] CAT 3.

96 Where the decision was partially quashed, para 158 as ‘the OFT did not acquaint itself with the information needed to answer the statutory questions posed to it’, [2014] CAT 16, para 42-43.

a fair degree of discretion in its assessment of the appropriateness of the commitments to meet the concerns it has expressed. Too heavy a degree of judicial scrutiny would have the effect of making the obtaining of commitments no more rapid and advantageous in terms of time and effort than a normal infringement decision, which would not be consistent with the purpose of the Act in this respect. This is perhaps why commitment decisions are subject under the Act to judicial review whilst infringement decisions are subject to full merits appeal. Nonetheless, the OFT (now CMA) clearly cannot be given a completely free hand to conclude any arrangement that it likes with alleged infringers merely to suit its own administrative convenience. In our view, the normal mechanism of judicial review, as explained above (see in particular paragraphs 31 – 33), is sufficient and appropriate to provide the necessary degree of scrutiny of commitment decisions’.

### *Review of penalties*

The CAT has also been highly involved in reviewing the fines imposed for competition law infringements. As mentioned, fines were reduced in 43% of the CAT’s judgments, and even increased in one judgment. There has been considerable discussion by the CAT about its appellate function and role in relation to the review of penalties- it can reject an appeal on the level of penalty, decrease or indeed increase the level of fine. A key issue guiding the Tribunal through its determination in relation to penalties is the principle of proportionality as stressed in *Kier Group v OFT* in 2011, and reiterated in *Quarmby*:<sup>97</sup>

‘In our view, the Appellants are correct to challenge the proportionality of the overall fine levied on them by the OFT in this case. ....However, we also adopt and agree with the Tribunal’s broader conclusions at paragraph 166 of the Kier Judgment, namely that there was a failure by the OFT to take a step back and ask itself whether in all the circumstances its proposed penalties were necessary and proportionate...’

Like the scope and intensity of substantive and procedural grounds, the intervention with relation to fines was tied to its margin of appreciation argument. In *Eden Brown Ltd and others v OFT* it observed:-

‘Further, the Tribunal has recognised that the OFT enjoys a margin of appreciation, both as to the interpretation of the Guidance and as regards the level of fine the OFT considers appropriate for a particular infringement: *Umbro Holdings Ltd v Office of Fair Trading* (“Replica Kits”) [2005] CAT 22, at [102]. That does not mean that the appellate scrutiny is of the lesser standard applied on an application for judicial review’.<sup>98</sup>

‘In our view in those circumstances the Tribunal should focus primarily on whether the overall penalty imposed is appropriate for the infringements in question. In our view, provided that the OFT has remained within its margin of appreciation in applying the Guidance, the Tribunal’s primary task is to assess the justice of the overall penalty, rather than to consider in minute detail the individual Steps applied by the OFT’<sup>99</sup>

A good example of the ‘rounded’ approach to consideration of penalty assessment is in the CAT’s 2018 ruling in *Ping Europe v CMA* as follows:<sup>100</sup>

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97 [2011] CAT 3.

98 [2011] CAT 8, para 34.

99 *Ibid*, para 106.

100 [2018] CAT 13, para 254.

‘Taking a step back from the detailed arguments on the step-by-step calculation of the fine, we now consider the overall fairness and proportionality of the fine imposed on Ping for this infringement. The Decision imposed on Ping a fine of £1.45 million. This equates to a fine of £290,000 per year of the infringement. In our view, this is within the correct ballpark figure for an infringement of this nature, taking into account the specific circumstances of the infringement ...In our view, however, the fine imposed is slightly too high and a further small reduction is therefore appropriate. Rather than mechanistically applying a 10% reduction to the fine we will take a view in the round. On consideration, we consider that a fair and proportionate fine, taking into account that it was not an ‘aggravated’ infringement, should be £1.25 million. This equates to a fine of £250,000 in each year of the infringement.’ The CAT noted it will ‘have regard’ to the CMA’s Penalty Guidance when reviewing the fines imposed.

The CAT, interestingly, noted it will give regard to the CMA’s Penalty Guidance, but will make its own assessment. This was demonstrated in *FP McCann Ltd v CMA* ruling, which gives an excellent overall appraisal of the CAT’s appellate function:<sup>101</sup>

‘The above authorities establish that: (1) an appellant is entitled to an appeal on the merits, which has been described as a full appeal; the jurisdiction of the Tribunal is not restricted to the jurisdiction which would be appropriate if this process were by way of judicial review; (2) it has been said that if the overall penalty is considered by the Tribunal to be appropriate, it will usually not be necessary to examine minutely the way in which the CMA interpreted and applied the Penalty Guidance at each specific step; (3) however, where an appellant makes specific complaints about particular steps taken by the CMA it will be necessary for the Tribunal to address the specific complaints which have been made; (4) it would not be right to ignore the conclusions and evaluations of the CMA but ultimately the Tribunal must make its own assessment as to the penalty which is appropriate in all the circumstances, having regard to the Penalty Guidance.’

The Court of Appeal, by comparison, does not play a significant role in relation to penalty determinations. This is tied to the standard of review, whereby second appeals are limited to points of law alone and to the expertise of the CAT in competition law matters. In *Tomlinson*, the earlier passage from *Argos* by the Court of appeal was reiterated:<sup>102</sup>

‘In the case of the Court of Appeal, it seems to us that it is right for the court to recognise that the tribunal is an expert and specialised body, and that, subject to any difference in the basis on which the infringements are to be considered as a result of any appeal on liability, the court should hesitate before interfering with the tribunal’s assessment of the appropriate penalty’.

The tribunal went on in *Tomlinson* to stress the deference accorded to the CAT in this context:

‘Given the specialist nature of the tribunal and its obvious expertise in these matters, an appeal against penalty is unlikely to be successful unless it can be shown either that the CAT erred in principle (which can include a failure to take relevant matters into account) or that, looked at overall, the penalties imposed were clearly disproportionate or discriminatory so as to be unjustifiable by any of the matters which the CAT either did or should have taken into account’.<sup>103</sup>

### *Third parties’ rights*

The UK review system provides noticeable rights for third parties, in particular allowing interested third parties to raise appeals under Section 46 (as demonstrated by for example *Burgess v OFT*), and

<sup>101</sup> [2020] CAT 28.

<sup>102</sup> *GF Tomlinson Building Ltd and Others v OFT*, [2011] CAT 7, Para 165.

<sup>103</sup> *Ibid*, para 59.

to intervene in proceedings. Third parties, moreover, may seek to review a commitments decision (e.g., *Skyscanner Ltd v CMA*).

#### *Reflections on Effectiveness and judicial deference*

Despite the expertise of the OFT/CMA and the UK sector regulators, the legal context and judicial dicta examined here have emphasised the full merits approach to the intensity of judicial review on appeal, with the exception of proceedings in relation to commitments. It is also notable that the Court of Appeal, at second instance, has demonstrated both in terms of judicial pronouncements and the data its greater deference to the rulings by the CAT given the latter's specialist competition law expertise.

In relation to the intensity of review or judicial deference across the different types of appeal, Figures 10 and 11a-c show some clear trends in relation to the number of appeals and their judicial treatment. First, substantive grounds of appeal were the most frequently raised by the parties, and most likely to succeed. Many early cases between 2004-2012 involved complainants relating to the abuse prohibition and no grounds for action decisions, where the competition authority did not undertake a comprehensive economic and legal analysis and come to a fully reasoned decision. Nonetheless, there were also successful appeals on substance in two cases related to the construction cartel in 2011<sup>104</sup> and substantive grounds of appeal were partially successful in relation to the abuse prohibition in 2018 and 2020, in *Generics UK v CMA* and *Flynn Pharma v CMA* respectively.

Second, grounds of appeal challenging the fines imposed have also been frequent and prominent. In addition to the multiple successful appeals launched by multiple parties in relation to the Construction industry cartel in 2011, various other appeals have questioned the fine calculation and some were successful.<sup>105</sup> In addition to such cases which directly challenged the fine calculation (summarised by Figure 9 and Figure 10(c)), fines were reduced also where the courts have accepted the substantive ground of appeal raised by the parties. As a result, the courts have had a considerable impact on the level of fines imposed.

Third, the empirical findings indicated that procedural grounds were seldom argued in front of courts and rarely successfully. This may suggest a relatively high level of acceptance both by the party litigants and the courts as to the satisfaction of due process requirements by the competition authorities.

#### *Alignment with EU law (prior to Brexit)*

Prior to Brexit, there was certainly a mixed story in relation to the role of the UK courts in ensuring the effectiveness of EU competition law and the alignment of the national practice with EU law. On the one hand, Figure 5 showed that UK appeals have focused primarily on enforcement of national law. 56% of appeals concerned the national rules alone, and the remainder involved a combination of both the EU and UK prohibitions. This trend had decreased since 2017, when all appeals involved the EU prohibitions. The UK Courts have also had little discussion about the tension between EU and national law. From the entry into force of Regulation 1/2003 and until Brexit, the UK courts sought a preliminary ruling from the European Court of Justice (CJEU) only once in cases within the scope of this project - *Generics UK Ltd and others v CMA* in 2018.<sup>106</sup> This may be reflective of a broader

<sup>104</sup> *Willis & sons Ltd v OFT* and *GMI Construction Ltd v OFT*, [2011] CAT 9.

<sup>105</sup> [2018] CAT 13 and [2020] EWCA Civ. 13.

<sup>106</sup> Case C-307/18.

reticence by the judiciary in the UK to make preliminary rulings in cases involving EU law. In addition, the courts examined the relationship between EU and national competition laws only in four cases, and accepted it only in one case - *Floe Telecom Ltd v Office of Communications*, involving the correct interpretation of national law in light of an EU Directive.

On the other hand, EU competition law has played a key role. Reference to and reliance upon EU competition law jurisprudence established by the General Court and CJEU had been a cornerstone of the judicial practice of the UK Courts prior to Brexit, and notably the CAT. The CAT routinely set out the relevant EU competition law principles through discussion of the relevant EU court case-law. This was not limited to judgments involving Articles 101 and 102 TFEU, but also for cases concerning the national prohibitions alone. This was the result of the consistency of interpretation requirement established by section 60 of the Competition Act, at least until its replacement post-EU withdrawal by new section 60A of that Act.

#### *Governmental Review of the Appeal Process*

As the previous sections demonstrated, the CAT plays a regular and important role in competition law enforcement, and does not shy away from intervention on matters of substance, procedure, and penalties. Various reviews of the UK judicial system have suggested that the CAT might have overstepped in its involvement, in a manner that might hinder the effectiveness of its national competition law enforcement.

In 2012, the UK government's responses to the pre-Enterprise and Regulatory Reform Act consultation<sup>107</sup> expressed its commitment to the existing appeal system. Yet, it encouraged the (then newly created) CMA to improve its internal procedures aiming to limit the number of appeals.<sup>108</sup> Soon after this the government included appeals against competition decisions in its Regulatory Appeal Review,<sup>109</sup> but the response to its proposals to replace full merits appeals with judicial review (or a specific review system) for competition cases was negative and the proposals were dropped.<sup>110</sup> Nonetheless, the matter of appeals remains controversial. The minority view that the CMA is detracted from the performance of its tasks by the appeal system has nonetheless persisted.

Despite the considerably higher number of appeals in many other larger EU Member States, that minority viewpoint considered that a number of appeals was likely to create a chilling of enforcement activity, and in consequence less effective overall enforcement. In early 2019, the Chairman of the CMA, Andrew Tyrie, sent a letter to the then Security of State Greg Clark, requesting new powers to allow it to act quickly and with reduced oversight by the CAT.<sup>111</sup> The Tyrie letter refers to those accused of infringement using "large teams of private sector lawyers" leading to "often years of protracted dispute...far removed from the concerns of ordinary consumers."<sup>112</sup> He also stated: 'The result is a more protracted and cumbersome appeal process than was originally intended for, and by, the CAT. Parties found by the CMA to have breached competition law can exploit this - leading to a situation where, as noted by the National Audit Office in its most recent

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107 Growth, Competition and the Competition Regime, Government Response to Consultation, (BIS) March 2012, (hereafter "The ERRRA Consultation Response").

108 The OFT had already introduced some procedural improvements, including separate case decision groups, which were generally well received - see "Review of OFT's Investigative procedures... Summary of Responses"- OFT 1455 (2012).

109 Streamlining Regulatory and Competition Appeals - Consultation on Options for Reform (BIS 19 June 2013 - hereafter "Regulatory Appeal Review").

110 It has re-emerged more recently - see the later discussion. An amendment to the standard of review in Communications Act cases was introduced by the Digital Economy Act 2017.

111 <https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy> 21<sup>st</sup> February 2019,

112 Tyrie letter page 2.

report on the UK competition regime, many lawyers regard the UK as “the best jurisdiction in the world to defend a competition case”.<sup>113</sup> This entails greater cost, delay and uncertainty than necessary’.<sup>114</sup> Moreover he noted his concern at the ‘second bite at the cherry’ and preferred the need to move away from a full merits standard of appeal.<sup>115</sup> It should be stressed that there was widespread opposition to this viewpoint that the standard of review should be lowered in relation to antitrust enforcement cases in the UK. In light of this general consensus, no changes were subsequently implanted.

In 2021, the Penrose Report, Power to the People,<sup>116</sup> reflected on the UK competition law enforcement framework and recommended a taskforce to seek to effectively speed up the full process, along the way reviewing the merits appeal process, the ECHR justifications and refusing to recommend the introduction of a prosecutorial model of competition law enforcement. Nonetheless, the Report <sup>117</sup> did suggest that the revised merits to judicial review standard for review of certain decisions of the regulator OFCOM<sup>118</sup> could be used as a model for general appeals, despite the specific nature of the legislation and the problematic future status of retained EU law.

In 2022, there was a further UK competition law review consultation process: Reforming Competition and Consumer Policy Driving growth and delivering competitive markets that work for consumers,<sup>119</sup> which again reflected on the process and intensity of appeals before the CAT:

‘However, in recent years there have been calls in the Furman Review, the Penrose Report, and Lord Tyrie’s reform proposals for the standard of review in appeals against Competition Act investigations to be reviewed again.’ It noted ‘It is also unclear whether or not the concerns that have been expressed about the level of scrutiny applied by the Tribunal are borne out in practice.’ And, subsequently: ‘government welcomes views on the appropriate level of judicial scrutiny of the CMA’s decisions in Competition Act investigations’. To date, there has been a clear rejection of the that the current appeal process is too intensive and ‘chills’ the enforcement practice of the authorities by requiring them to undertake too much resources in preparing for appeals, and that the full merits UK approach should be reduced to a more standard judicial review approach, as is the case in relation to commitments. The CMA’s submission to the recent Consultation process adopted a moderate line while urging further review.<sup>120</sup> The Consultation outcome, published in April 2022, did not propose any reforms to the appeal mechanisms in the UK in relation to the competition law prohibitions.<sup>121</sup>

## 6. Concluding remarks

Since 1998 the UK has a highly developed competition law system. Its competition law enforcement institutions, notably the CMA, have gained international recognition for their independence and robust decision-making processes. Moreover, the independent and specialist competition court, the CAT, plays an important part in the enforcement, especially given its broad competence.

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113 National Audit Office report, The UK competition regime, February 2016, paragraph 2.15.

114 Tyrie Letter p35.

115 Ibid pp36-37.

116 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/961665/penrose-report-final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf)

117 See the Penrose Report, p19

118 Digital Economy Act 2017.

119 1 October 2021 CP 488.

120 CMA Submission 4<sup>th</sup> October 2021 (loc cit) paras 2.84-2.86.

121 <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response>.

Unlike many other jurisdictions, the CAT conducts a full on the merits review, which examines both the facts and legal application (except in relation to commitments decisions). Appeals at second instance to the Court of Appeal are on the law alone. Yet, comparatively, the number of judgments is relatively very low. The primary reason appears to be the relative dearth of decisions by the UK competition authorities in relation to the prohibitions over the 17-year period.

Although there have been a number of cases rejecting appeals outright, overall appellants have frequently been successful, at least partially. The data on appeals reflects the prioritisation of the UK authorities on hard-core cartels. The most successful outcome has been a fine reduction, although many of those cases in 2011 relate to the same construction cartel in 2010. A number of appeals were successful on the substance but indeed many of these coincide with the success (at least in the early period) of complainants regarding no grounds for action non-infringement decisions in relation to the abuse prohibitions, which were set aside by the CAT, and in some prominent cases replaced by an infringement finding by the CAT itself. Indeed, those cases in particular, exemplify both the depth and intensity of the review undertaken at the appeal level in the UK, and particularly in comparison with the role of the General Court in appeals at the EU level, the range of potential outcomes which are available to the CAT.

It should also be noted that there is limited deference to the competition authority's decision-making, although it appears to be greater in relation to the decision-making procedure and processes. There are conflicting trends in relation to ensuring the effectiveness of EU competition law in the period, with considerable reliance on EU jurisprudence in CAT (and CoA) rulings on the one hand, yet enforcement - and consequently appeals - that is predominately based on the national prohibitions. The UK judiciary general reticence to make preliminary references may also be reflected in the solitary reference and ruling within the scope of the project, albeit this may also reflect the limited level of EU enforcement action by the authority and the relatively mature level of EU jurisprudence already available to the CAT.

The role of the CAT and intensity of review is also evident from the in-depth analysis in this report of a range of judicial dicta from the CAT and the Court of Appeal over the years. Indeed, as noted, this has led to criticism and the perception that the CAT's role hinders the enforcement process, but despite recent reviews and calls for reform the system remains unchanged. Nonetheless, despite this perception, the prevailing opposite view has led to the UK government rejecting calls to reform the appeals system. Moreover, despite international recognition of the UK competition law enforcement system, indeed this research has demonstrated that at least on a relative basis, there are very few infringement decisions and consequently few appeals in relation to the competition law prohibitions in the UK.