

Intensity of judicial review by the UK's CAT and the UK institutional model for competition law

**CENTRE FOR ANTITRUST AND REGULATORY STUDIES
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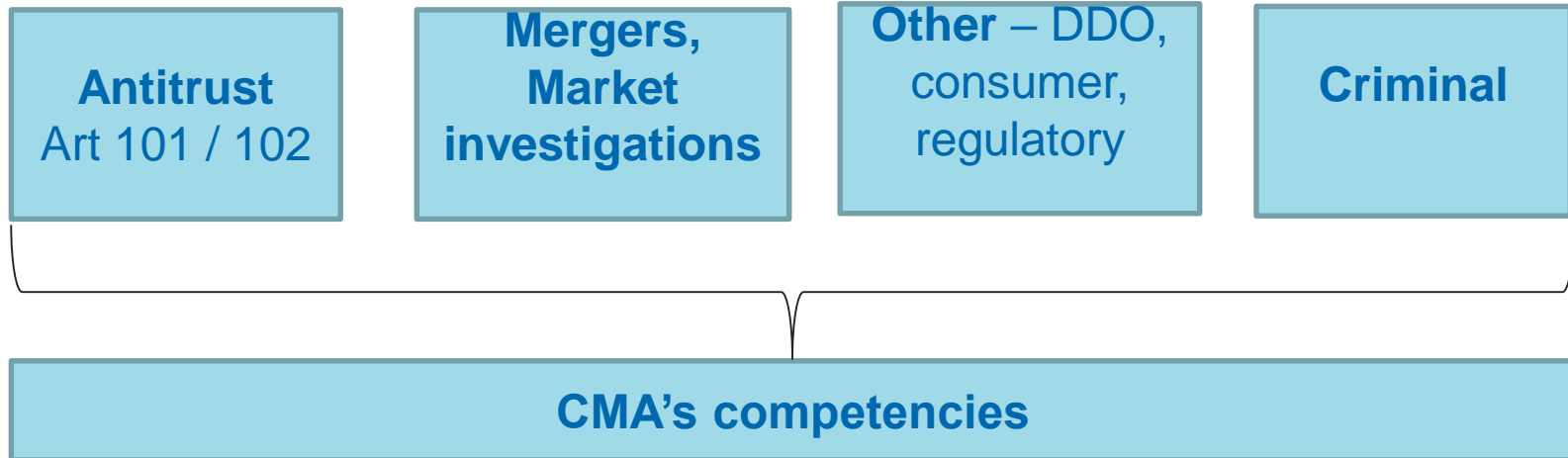
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11 October 2018

(All views expressed are strictly personal)

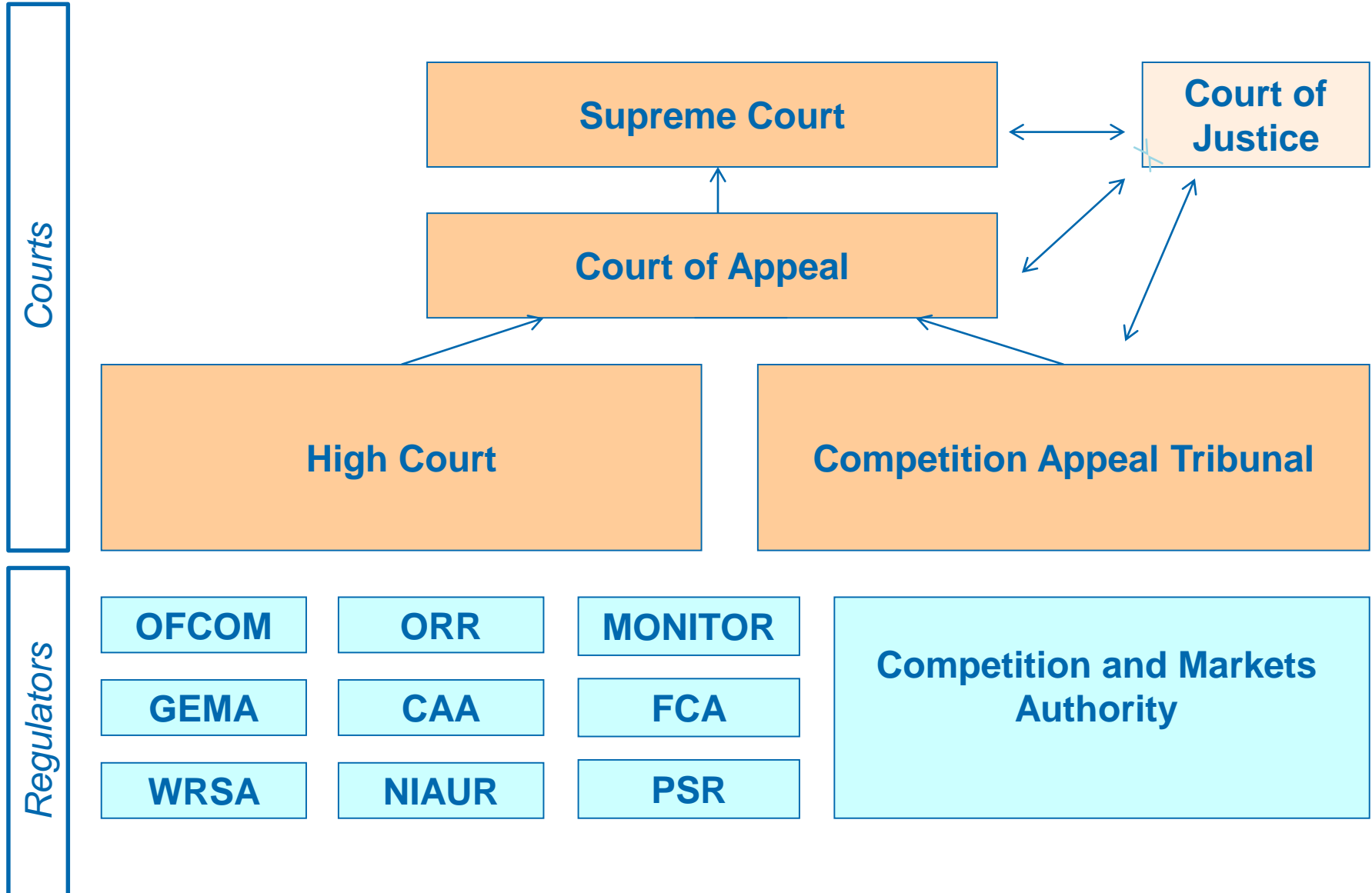
ROLE OF CMA

- **CMA is a non-ministerial department**
- **CMA operational since 1 April 2014, replacing OFT and CC**
- **Numerous competencies:**



- **CAT created in April 2003 by Enterprise Act 2002**
 - Replaced the earlier ‘CCAT’
- **Specialist court**
 - Statutory jurisdiction
 - Appeals from CMA/regulators
 - Private damages actions
 - Multi-disciplinary membership

UK model



INTENSITY OF JUDICIAL REVIEW

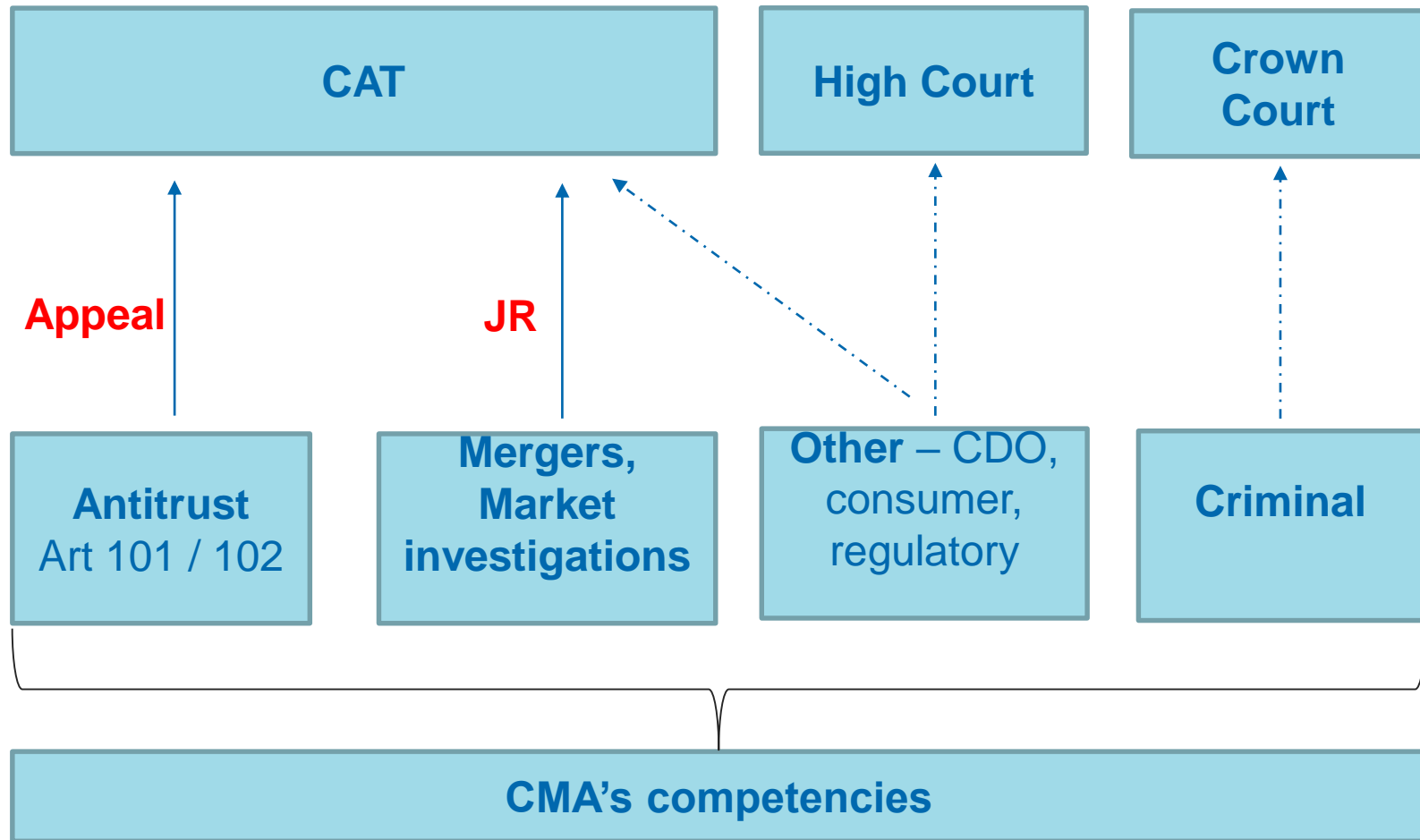
- Intensity of review depends on type of decision
- Terminology:

Appeal 'on the merits'

VS

judicial Review or '**JR**'

ROLE OF CMA AND COURTS



STANDARD OF REVIEW

Standard

- JR examines **legality, fairness and reasonableness** of the decision
- Appeal examines the **correctness** of the decision

NB: → differing approaches to evidence and new evidence

REMEDIES

JR can only **quash** and **remit for reconsideration**
 Appeal can also mean a **new decision** and/or **new penalties**

Judicial review	Appeal
Dismiss application	Confirm decision
Quash decision, remit to decision-maker	Set aside decision, remit to decision-maker
	Make any other decision which the decision-maker could have made
	Impose/revoke/vary the amount of any penalty

STANDARD OF REVIEW: JR

“The grounds on which an administrative act or decision can be called into question by judicial review are well established i.e. the traditional grounds of **illegality, irrationality and procedural impropriety**”

Merger Action Group v BERR [2008] CAT 36

Question: was the decision open to the decision-maker on the evidence before it?

STANDARD OF REVIEW: **APPEAL**

Appeal ‘on the merits’: standard of review

“It is our intention that the tribunal should be primarily concerned 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.”

(Minister for Competition and Consumer Affairs during Competition Bill’s passage through Parliament)

STANDARD OF REVIEW: **APPEAL**

Freeserve v DGT [2003] CAT 5 at [106]:

- (i) not Article 263 TFEU grounds;
- (ii) not UK judicial review either.

Hutchinson v Ofcom [2008] CAT 11 at [164]:

“The question for the Tribunal is ... whether the decision was the right one.”

T-Mobile v Ofcom [2008] EWCA Civ 1373 at [76]:

not a *de novo* re-hearing.

- **JR**
 - Generally limited to material before decision maker
 - New evidence only admitted exceptionally
- **Appeal ‘on the merits’**
 - Tribunal hears ‘live’ evidence
 - Cross-examination
 - ‘Hot-tub’
 - New evidence permitted if necessary for justice

APPEAL VS JR

Judicial Review

On the Merits

Theory

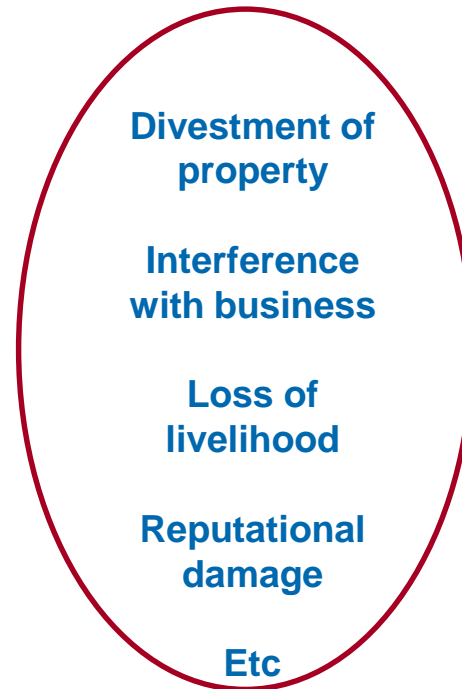
Hands off

Open season

Practice

“the...intensity of review varies with the statutory context. In the present context ... the Tribunal has jurisdiction ... to determine whether the OFT’s conclusions are adequately supported by evidence, that the facts have been properly found, that all material factual considerations have been taken into account and that material facts have not been omitted...”

Unichem v OFT [2005] CAT 8 at [174].



“What is intended is the very reverse of a de novo hearing. [The] decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review.”

BT v Ofcom [2010] CAT 17 at [76].



THANK YOU FOR LISTENING

Questions?