

# Appeal court overturns 'mishandled' OFT decision

UK lawyers have expressed relief following a recent Court of Appeal decision to overturn the two-part merger test. It is the first legal challenge to the country's new merger regime, say **Christopher Vajda** and **Valentina Sloane**

In the first case to consider the UK's new merger regime established by the Enterprise Act 2002 – *Office of Fair Trading v. IBA Health* – the Court of Appeal has provided guidance on two important issues of principle. It is a case which not only has wide-ranging repercussions for decisions in relation to UK mergers, but also reflects a wider debate at Community level as to the proper level of scrutiny to be applied in judicial review by the CFI of merger decisions under the EC Merger Regulation (ECMR).

The case concerned an appeal brought against a decision by the UK's competition authority, the Office of Fair Trading (OFT), not to refer a merger to the Competition Commission for investigation. The appeal was brought by a third party – a competitor to the companies seeking to merge. The appeal was therefore broadly akin to a challenge by a third party of a decision by the European Commission not to proceed to a Phase II investigation under the ECMR. It was heard at first instance by the UK's competition tribunal, the Competition Appeal Tribunal (CAT).

The case raised two important points of principle. Firstly, what is the duty of the OFT to refer cases for investigation by the Competition Commission? The CAT held that where there was "room for two views" on the question of whether the merger might be expected to lead to a substantial lessening of

competition (SLC), the duty to refer arose. As to whether a merger gave rise to "room for two views" the CAT formulated a two-limb test. The OFT had to satisfy itself (i) that as far as it was concerned there was no significant prospect of a SLC; and (ii) that there was no significant prospect of an alternative view being taken in the context of a fuller investigation by the Commission.

The Court of Appeal firmly rejected the CAT's two-limb test. The belief required in order to trigger the duty to refer was the OFT's belief that the merger may be expected to result in a SLC, not that the Commission may in due course reach such a view. The Court provided the following guidance on the statutory test. First, in order for the duty to refer to arise, it was necessary for the OFT to form the relevant belief that the merger may be expected to result in a SLC; a mere suspicion was insufficient. Secondly, that belief must be reasonable and objectively justified by the relevant facts. Thirdly, the degree of likelihood required by the word "may" was higher than fanciful but lower than 50 per cent. In between those two extremes the OFT had a wide margin in which to exercise its judgment.

The Court of Appeal's judgment on this issue has been widely welcomed. The CAT's interpretation would have significantly lowered the threshold for the OFT to refer mergers for in-depth investigation by the Competition Commission.

More references would have tied up companies in long and expensive investigations and could have had a chilling effect on merger activity in the UK.

The second issue of principle concerned the level of scrutiny to be applied by the CAT when judicially reviewing merger decisions. It reflects a parallel debate taking place at EU level, namely the standard of proof which is required before the CFI can be satisfied that the Commission has properly applied the ECMR – a debate which has intensified dramatically since the CFI's annulments of the Commission's decisions in *Airtours*, *Schneider Electric* and *Tetra Laval*. At issue is the balance to be struck between, on the one hand, deference to the competition authority's margin of appreciation when dealing with complex questions of an economic nature and, on the other hand, the need to subject that authority's decisions to effective judicial control.

In *OFT v. IBA Health*, the CAT sought to apply a more intensive standard of review than is ordinarily the case in domestic courts. Its reasoning was that its constitution as a specialist tribunal was in contrast to the more normal situation where a non-specialised court is called upon to review the decision of a specialised decision maker. The Court of Appeal rejected this approach, holding that the principles of review to be applied by the CAT are the "ordinary principles of judicial review". However, the effect of

this in substance is less clear-cut, and certainly less restrictive, than might at first appear. The Court did recognise that the approach of the CAT should reflect the specific context in which it had been created as a specialised tribunal; it differed from the CAT only in considering that the ordinary principles of judicial review are flexible enough to allow for a spectrum of review, with intensity dependent on the particular statutory context.

The judgment in *OFT v. IBA Health* does not, therefore, provide specific guidance on the correct level of intensity to be applied by the CAT from that spectrum, particularly in cases involving complex economic arguments. However, the evident willingness of the CAT to apply an intensive scrutiny to merger decisions and the recognition by the Court of Appeal of the relevance of the CAT's specialised status, suggest that parties seeking to challenge a merger decision under the new regime can expect a materially higher level of scrutiny than could previously be hoped for before the ordinary courts. Further clarity of the proper level of review – both at EU level and, inevitably, in the CAT – can be expected from the determination of the Commission's appeal against the CFI judgment in *Tetra Laval*, currently pending before the ECJ. ■

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