

Unichem Limited v OFT

By Ben Rayment¹

Introduction

This case involved the second full application to the UK Competition Appeal Tribunal (the Tribunal) for a review of a decision of the OFT to clear a merger without a reference to the Competition Commission (CC) under s.120 of the Enterprise Act 2002 (the Act). The first application for review was noted for the legal issues it raised as to the correct test the OFT must apply in deciding whether to make a reference. Most attention in that case was directed to the issue – ultimately determined by the Court of Appeal – as to whether the Tribunal had set the threshold too low for requiring the OFT to make a reference to the CC for an in-depth investigation (see *IBA Health v OFT*²). *Unichem v OFT*³ on the other hand will be noted as a case which turned essentially on factual issues. The contrast between the two cases should not however overshadow their similarities. In particular, both cases demonstrate the firm line that the Tribunal takes towards appropriate procedure being followed both as a matter of fairness and in the interests of robust decision-making (particularly where third party interests are involved). These have been recurring themes in the early years of cases under both the Competition Act 1998 and the Enterprise Act 2002.

The proposed merger

Phoenix is the UK's third largest pharmaceutical wholesaler with a 16 % market share. EAP is a much smaller concern and operates almost entirely in East Anglia. The merged entity would be considerably smaller than the two largest pharmaceutical wholesalers, AAH (with a market share of 35%) and Unichem (with a market share of 27%). Unlike Phoenix/EAP both AAH and Unichem have a number of tied retail pharmacies and also supply supermarkets and other national chains of pharmacies.

The geographic market potentially affected by the merger was a narrow one, namely the supply of ethical pharmaceuticals to independent retail pharmacies and dispensing doctors in East Anglia and in particular the area north of the A14.

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² [2004] EWCA Civ 142

³ [2005] CAT 8.

The OFT's decision

In its decision of 17 December 2004 the OFT's central finding was that the merger would not give rise to any substantial lessening of competition (SLC) under s.33 of the Act. The OFT's overall conclusion was that the merged entity would face sufficient competitive constraints from both AAH and Unichem who both provided deliveries to outlets of all kinds in East Anglia and were therefore relatively well-placed to compete for business throughout East Anglia.

Unichem's application

The application focussed on 4 factual findings underlying the OFT's central overall finding that Unichem could provide a competitive constraint to the merged entity in parts of East Anglia, namely: (i) whether UniChem was able to serve new customers by adding them to existing routes or by adding new routes; (ii) whether UniChem's previous pattern of success showed that it was a credible competitor in parts of East Anglia north of the A14; (iii) whether any conclusions could be properly drawn from spreadsheets provided by the merging parties which suggested that there was little effect on service levels from the distance from a depot (Unichem's depot being further afield than that of Phoenix/EAP); (iv) whether dispensing doctors could be treated the same as any other new customer for the purposes of determining the ease with which they could be supplied.

Unichem also raised an argument that the fact that the OFT had given negative confidential guidance to Unichem in respect of its proposal to acquire EAP 5 years previously and the fact that Phoenix/EAP had similarly received negative guidance, now gave it a legitimate expectation of a reference to the CC being made in respect of the proposed merger (this argument that the OFT was under any form of legal constraint arising from these circumstances was summarily rejected by the Tribunal at the outset of its analysis of the parties' submissions (at para.127)).

The Tribunal's judgment

The Tribunal held that much of the decision was soundly based on uncontested facts and in deciding whether to set the decision aside, the considerations were "finely balanced indeed". However, Unichem's challenge to the OFT's findings of primary fact central to the decision was not "obviously incorrect". The factual findings relied on in the decision were insufficiently supported by the evidence, as a result of which the Tribunal was unable to be satisfied that all material considerations had been taken into account. In any event there had been a failure of procedure of "decisive importance" in not putting those matters to Unichem. The decision should therefore be remitted to the OFT to take into account Unichem's views on the factual issues raised. The Tribunal was careful to mention that it was a matter for the OFT as to whether it accepts or rejects that evidence, the weight to be given to it, whether that evidence is or is not outweighed by other factors and the reasoning to be adopted in a new decision (paras 277 to 279). Interestingly, it was only the part of the decision relating to the matters not put back to Unichem which was remitted to the OFT for reconsideration.

Points of note

Tribunal procedure

In terms of the Tribunal's own procedure the case is of note for practitioners because the already abridged time table for merger cases contained in Part III of the Tribunal's Rules of Procedure⁴ was abridged still further (as happened in *IBA Health*). The key steps in this accelerated procedure were: the lodging of the notice of application (19 January 2005); case management conference (31 January); Phoenix's skeleton argument and witness statement (7 February); OFT's skeleton argument and witness statement (8 February); the hearing (14 and 18 February); judgment (1 April). Moving from the filing of the notice of application to the hearing in under a month is a "challenging" timetable, to say the least.

⁴ S.I. 2003 No. 1372 (as amended)

Issues letters

The OFT will during its investigation send out an Issues Letter “where complex or material competition issues are raised” (Mergers Procedural Guidance (OFT 526), para.5.17). As in *IBA Health* the Tribunal confirmed that the sending of an Issues Letter does not oblige the OFT to refer. However, if the OFT has sent an Issues Letter and then shortly afterwards decides not to refer, then it must be shown that the likelihood of SLC has been removed, and that the material relied on by the OFT can reasonably be regarded as dispelling the uncertainties highlighted by the issues letter. The Tribunal is entitled and bound to inquire whether the rejection of the hypotheses in the Issues Letter was justified (para.201). The Tribunal left open the issue of whether “as a matter of law” the Court of Appeal’s judgment in *IBA Health* was to be interpreted as requiring that third parties should *always* have the opportunity to comment on an Issues Letter (para.267). It seems most unlikely that Court of Appeal’s judgment can be interpreted as requiring third parties to be able to comment on an issues letter as a matter of law. This is because the requirements of administrative fairness depend crucially on the facts of particular cases. That said, where a case merits an issues letter it the OFT will have to have a good reason for not seeking comments on it from third parties, at least on issues which directly concern them.

OFT evidence

In *IBA Health* Lord Justice Carnwarth considered that in cases where the subject matter of an application is complex and the supporting material voluminous, there is no statutory requirement for all the evidence to be set out. In *Unichem* the OFT filed a substantial witness statement setting out the material it had taken into account without any adverse comment by the Tribunal as there had been in *IBA Health*.

Inadequate evidence/procedural fairness

In relation to the factual points raised by Unichem the Tribunal appears to have considered that the evidence relied on by the OFT was inadequate in two overlapping senses. The first was that it was generalised in the sense that it did not deal adequately or at all with specific material issues, for example Unichem’s ability to add extra drops at low incremental cost. Secondly, it considered that the evidence was inadequate because it had not been checked or discussed with the party contesting it. The Tribunal said that in the circumstances of the case the factual issues could easily have been “put back” to Unichem (email, letter, short meeting and phone call were all mentioned). It accepted the OFT’s submission that it was not possible to put back all points to all parties and acknowledged that in some cases the OFT would be receiving a “welter” of submissions. However, where the points raised are material ones that need to be “cross-checked” it is unlikely that this should be taken as meaning that the applicable procedural requirements are lower in such a case. Perhaps in some cases of this nature this will tend to suggest that a reference to the CC may be appropriate as its procedures for investigation and fact-finding are more developed than those of the OFT (see the Tribunal’s views in *IBA Health*).

It is well established that fairness and robust decision-making require matters which are adverse to the interests of a person to be put back to them for comment – at least where the possibility cannot be excluded that they might make a difference to the decision (for an example in the competition sphere see *Interbrew S.A. v Competition Commission* [2001] UKCLR 954, Moses J.). In *Unichem* the Tribunal said (at para. 271) that it was not “every error of assessment or procedural failure” which will lead to the Tribunal remitting a matter to the OFT. However, it pointed out that on an application for review there is a limit to how far the Tribunal can determine whether a procedural defect would have made “no difference” to the outcome. Generally-speaking experience of the Administrative Court suggests that the conclusion that a procedural failure made “no difference” is one judges are reluctant to draw. This reinforces the view that generally-speaking third party views should be sought on an issues letter on matters which affect them because of the potential difficulty which may otherwise arise - when the matter is put in issue - of persuading the Tribunal that to have done so would have made no difference, notwithstanding the

fact that the decision attacked may in many respects appear sound. *Unichem* itself is a case in point as it is clear from the judgment that the Tribunal was far from convinced that the OFT's decision was actually wrong.

Scope of review

The Tribunal must apply the principles that would be applied by the domestic courts on an application for judicial review (s.120(4)). In determining the appropriate approach the Tribunal relied on the Court of Appeal's judgment in *IBA Health*. In response to the OFT's submission that it had a wide discretion as to the evaluation of facts and in forming a view about SLC the Tribunal considered that that submission had the "wrong emphasis". In the Tribunal's view "discretion" connoted policy or political issues. The more appropriate concept in the context of merger control was one of "margin of judgment or evaluation of the facts" (at para.172). The Tribunal noted that the Court of Appeal in *IBA Health* had made plain that the standard of review could properly be more intensive than it would be if issues of policy or politics were involved.

There is of course no duty of consistency with EC law in interpreting the Act as there is in relation to the Competition Act 1998 (see s.60). However, the Tribunal stated (at para.169) that it regarded the approach of the ECJ in Case C-12/03 P *Commission v Tetra Laval* (at para.39) to the scope of review by the CFI as being "close" to that of the Court of Appeal in *IBA Health*, namely:

"Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.

The approach to be taken by the CFI was noted as being of interest by the Tribunal because it is a Court exercising a similar jurisdiction to the Tribunal. Also by virtue of Articles 9 and 22 of the EC Merger Regulation (139/2004) the OFT (and the Tribunal) may be required to deal with mergers falling under the Community system.

Conclusion

In its judgment the Tribunal observed that "not every error of assessment or procedural failure" will lead to the Tribunal remitting a matter to the OFT. In *Unichem* itself the error was procedural. However, in addition to the firm line taken in relation to the procedural rights of third parties the Tribunal was also keen to emphasise in relation to the scope of review that a margin of evaluation is a more restrictive concept than the wide discretion to assess facts and the issue of SLC contended for by the OFT. The concrete effects of this difference in assessing precisely which errors are "fatal" will have to await application in future cases.

Peter Roth QC and Daniel Beard represented the OFT.

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