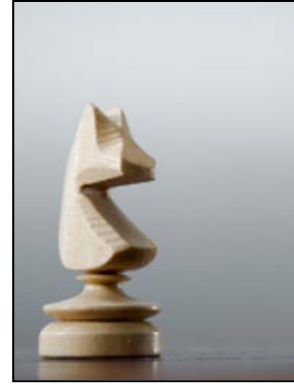


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UK CAT JR in Mergers and Market Investigations: Recent Developments

Comments from Alistair Lindsay

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1. Introduction

This note discusses recent appeals to the Competition Appeal Tribunal (the "**CAT**") under ss. 120 and 179 of the Enterprise Act (the "**Act**") against decisions of the Office of Fair Trading (the "**OFT**") , the Competition Commission (the "**CC**") and the Secretary of State (the "**S/S**") on mergers and market investigations.¹ In both types of case, the CAT applies the same principles as would be applied by a court on an application for judicial review.²

2. Recent trends

Table 1 below summarises the relevant cases, with the most recent listed at the top. Cases under s. 120 (mergers) are in black and those under s. 179 (market investigations) are in **red italics**. Cases involving CC decisions are identified in the third column; all other cases involve OFT decisions except for *Merger Action Group* which involved a decision of the S/S.

¹ It is up to date to 11 February 2010.
² See ss. 120(4) and 179(4) of the Act.

Table 1: Summary of UK CAT JR cases in mergers and market investigations

Applicant won	Applicant lost	CC chair	CAT chair
Eventim (by consent)		C Clarke	Lord Carlile QC
<i>CAMRA (stay, by consent)</i>			<i>V Rose</i>
<i>BAA</i>		<i>C Clarke</i>	<i>Barling J (P)</i>
Sports Direct (by consent)		D Guy	Lord Carlile QC
<i>PPI</i>		<i>P Davis</i>	<i>Briggs J</i>
	MAG – S/S		Barling J (P)
<i>Tesco</i>		<i>P Freeman</i>	<i>Barling J (P)</i>
	BSkyB ³	P Freeman	Barling J (P)
	Co-operative		M Simmons QC
	Stericycle	D Guy	Bellamy (P)
	Celesio		M Simmons QC
	Somerfield	C Clarke	Bellamy (P)
<i>ACS (by consent)</i>			<i>Bellamy (P)</i>
UniChem			Bellamy (P)
IBA			Bellamy (P)

Two trends are evident from Table 1.

(a) Applicants are enjoying a run of success

First, applicants under ss. 120 and 179 are currently enjoying a run of success, in particular in cases involving the CC. The CC's losses in the three market investigation cases – *BAA*,⁴ *PPPI*⁵ and *Tesco*⁶ – attracted a great deal of attention. The CC has responded to those three decisions in particular by:

- (a) seeking leave to appeal the *BAA* judgment to the Court of Appeal;⁷
- (b) appointing an independent panel of three experienced and knowledgeable people to examine the CC's rules and practices in relation to possible conflicts of interest of its members,⁸

³ The S/S was also a respondent in this case. Virgin Media also brought an application which was joined with BSkyB's. Virgin Media won its application to the CAT, but the Court of Appeal reinstated the CC's conclusions on the media plurality issues.

⁴ [2009] CAT 35.

⁵ [2009] CAT 27.

⁶ [2009] CAT 6.

⁷ www.competition-commission.org.uk/press_rel/2010/feb/08-10_cat_baa_appeal.pdf.

⁸ www.competition-commission.org.uk/press_rel/2010/jan/29-10.pdf.

- (c) dealing with concerns about the role of the original chairman of the *Bus Market Inquiry* with great sensitivity⁹ (and, arguably, undue sensitivity);
- (d) appointing three members of the CC to make recommendations to address the fact that the CC's decision and recommendation on remedies were quashed in *PPI* and *Tesco*;¹⁰ it seems likely that the work that has already been done by these members led the CC to set an administrative timetable in the *Bus Market Inquiry* that allocates a significant proportion of time to remedies issues;¹¹ and
- (e) emphasising the challenges involved in reaching decisions and that "a perfect competition decision remains, like the Holy Grail, a somewhat mythical concept".¹²

In *Eventim*, the CC decided not to defend its report clearing unconditionally the *Live Nation / Ticketmaster* merger and agreed, for the first time, to consent to the quashing of a final report without defending it at a final hearing. The merger has therefore been remitted to the CC, with the original decision now treated as a set of provisional findings. The CC has undertaken to issue a revised report within three months.¹³

The prematurity ruling in *Sports Direct*¹⁴ raises the prospect of further applications being brought to the CAT during the course of a CC (or OFT) inquiry. The case involved an appeal against redactions of material from a background working paper. The CAT ruled that an application could be made under s. 120 during the course of a CC inquiry against "something that could form a ground of challenge in the appeal from the ultimate decision if it were not addressed and, if necessary, remedied on an interlocutory basis".¹⁵ The CAT emphasised that its ruling does not mean that review lies in all cases where decisions are disputed and said: "our Judgment should not be taken to imply that the substantive content of working papers, for example, would ordinarily be subject to review".¹⁶ The circumstances in which an application can be brought during an ongoing CC (or OFT) investigation will no doubt be tested in future cases.

Finally, in the ongoing *Stagecoach* case,¹⁷ the CC applied unsuccessfully to strike out Stagecoach's application challenging a merger decision finding an SLC and requiring a divestment.¹⁸ The principal ground for the application was that Stagecoach had indicated that it was in any event proceeding to sell the divestment business and Stagecoach therefore lacked standing to bring a challenge as it was not a "person aggrieved" by the CC's adverse ruling on its merger. The CAT stated that "it is difficult to conceive of a situation where the parties to a merger which the Commission has decided results in an anti-competitive outcome (within the meaning of section 35(2) of the Act) would not be persons aggrieved by that decision"¹⁹ and ruled that Stagecoach had standing to bring its case.

(b) Resolution of cases by consent

The second trend that appears from Table 1 is the resolution of cases by consent. In *The Association of Convenience Stores* in November 2005,²⁰ the OFT's decision not to refer the

⁹ www.competition-commission.org.uk/press_rel/2010/jan/26-10.pdf.

¹⁰ www.competition-commission.org.uk/our_role/speeches/pdf/freeman_holy_grail_jan_2010.pdf, p.7.

¹¹ www.competition-commission.org.uk/inquiries/ref2010/localbus/pdf/administrative_timetable_040210.pdf.

¹² www.competition-commission.org.uk/our_role/speeches/pdf/freeman_holy_grail_jan_2010.pdf.

¹³ [2010] CAT 7.

¹⁴ [2009] CAT 32.

¹⁵ Judgment on prematurity, para. 55.

¹⁶ Para. 59.

¹⁷ The hearing is fixed for 9 March 2010.

¹⁸ [2010] CAT 1.

¹⁹ Para. 12.

²⁰ [2005] CAT 36.

groceries market to the CC was set aside by consent.²¹ Until recently, all other cases under ss. 120 and 179 that were pursued by the applicant were resolved²² through a final ruling by the Tribunal. But we now have three recent cases that have been wholly or partially resolved by consent. In addition to *Eventim*, that was mentioned above, in *Sports Direct*, the CC agreed to the quashing of an interim decision by consent, once it had lost the ruling on prematurity. And in *CAMRA*, the OFT agreed to reconsider its response to the beer tie super-complaint; in the meantime, the application was stayed by consent (and costs were reserved²³). The resolution of cases by consent has obvious advantages, in particular saving time (on any remittal) and money. Indeed, in *Eventim*, the CAT emphasised that: "The Commission followed a proper course by intimating its intentions to the other parties and to the Tribunal at an early stage of the proceedings."²⁴

3. Intensity of review after BSKyB

The Court of Appeal has now delivered its judgment in *BSkyB*²⁵ and BSKyB has reduced its stake in ITV to 7.49 per cent.,²⁶ bringing to an end a case that ran for over three years. One of the issues in *BSkyB* was the old chestnut: are the principles of judicial review to be applied more intensively by the CAT than the Administrative Court? The Court of Appeal ruled that "normal" judicial review principles apply.²⁷ These "normal" principles bring with them the well-recognised "margin of appreciation" for the decision maker.²⁸

Whilst the law is clear, it remains instructive to consider whether the "normal" principles of judicial review are more potent in the hands of an expert tribunal. Of course, members of the CAT have specialist expertise, and in *BSkyB* the CAT itself was clear that it should use that expertise "whenever possible".²⁹ The hypothesis is that an expert is better able to identify, say, those factors which are relevant to a decision within the expert's area of expertise and those which are not relevant. The hypothesis cannot be tested, but it is certainly reasonable to ask, for example, whether the Administrative Court would have reached the conclusion in *PPI*³⁰ that the use of an elasticity of demand factor derived from a single distributor rather than a market-wide calculation was an error that called for review (although this error was found to be not material).³¹

A related question is whether the authority's reasoning is scrutinised more carefully if it relates to a particularly important point. In *Tesco*, the CAT referred³² to a "double proportionality" test: "the more important a particular factor seems likely to be in the overall proportionality assessment, or the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to prove, the more detailed or deeper the investigation of the factor in question may need to be." In *PPI* the CAT clarified³³ that "double proportionality" is no more than a "common sense proposition that, within a wide margin of appreciation, the depth and sophistication of analysis called for in relation to any particular relevant aspect of the inquiry needs to be tailored to the importance or gravity of the issue within the general context of the Commission's task". In that case, the CAT found³⁴ that the point of sale prohibition was a radical and unprecedented

²¹ Outside the context of ss. 120 and 179, see also *MasterCard UK Members Forum Ltd* [2006] CAT 14 and *Association of British Insurers* for cases involving the setting aside of decisions by consent.

²² Subject to appeals.

²³ By contrast, in *Eventim* the applicant was awarded 75 per cent. of its costs and in *Sports Direct* the applicant was awarded its costs (in each case to be assessed if not agreed).

²⁴ [2010] CAT 7, para. 9.

²⁵ *British Sky Broadcasting Plc v. Competition Commission* [2010] EWCA Civ 2.

²⁶ See <http://www.ft.com/cms/s/0/f8aba0de-14d2-11df-8f1d-00144feab49a.html>.

²⁷ See para. 41 of the judgment.

²⁸ See, e.g., *Tesco*, paras 81, 138 and 163 and *PPI*, paras 42 and 153.

²⁹ [2008] CAT 25, para. 63.

³⁰ Para. 174.

³¹ See also paras 158 to 161 finding that some of the CC's modelling was flawed but the flaws were not material.

³² Para. 139.

³³ Para. 21.

³⁴ Para. 128.

proposed remedy with potential to cause disadvantageous side-effects. It therefore "called for rigorous investigation and analysis of its potentially adverse consequences."

Dr Alistair Lindsay represented the applicant (with Paul Lasok QC) in Eventim v. Competition Commission.

He was listed as one of the top 40 antitrust lawyers in the world aged under 40 by Global Competition Review in February 2004 and again in May 2008 and is the author of "The EC Merger Regulation: Substantive Issues" (Sweet & Maxwell, 2003; 3rd ed, 2009, jointly with Alison Berridge).

The views expressed in this note do not necessarily reflect those of Monckton Chambers, its tenants or clients.

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