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Scope for Challenges to UK Merger Control: The case that keeps 'rolling'

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We wrote previously about the UK Competition and Markets Authority's (CMA's) order for the *Cérélia/Jus-Rol* deal to be unwound, highlighting the material risks of opting not to engage with the CMA in relation to M&A activity in the UK.

1 Introduction

After a lengthy (and still ongoing) court battle, the UK Court of Appeal has upheld the CMA's intervention in (and unwinding of) Cérélia's acquisition of Jus-Rol. In doing so, the Court provides valuable colour to the permitted scope of judicial review as well as to the inherent tension between appeals of CMA merger decisions being limited in this way and the specialist nature of the Competition Appeal Tribunal's (CAT's) competition expertise.

Unlike appeals to the EU Courts (and in certain other jurisdictions), CMA merger decisions can only be challenged on judicial review grounds: a standard that is considered a high bar, requiring the appellant to prove that the CMA has acted with illegality, irrationality or procedural impropriety in reaching its decision.

Deal parties will read the Court of Appeal's judgment with interest given the debate that has been re-ignited over recent years as to the precise remit of the CAT to review the CMA's merger control decisions.

This debate is also set to widen given the UK's new Digital Markets, Competition and Consumers Act (DMCC Act) confirms that judicial review will also be the review standard applicable to decisions taken under the CMA's new Digital Markets regime, and given the DMCC Act extends the jurisdictional reach of the CMA to a wide range of M&A transactions in all sectors.

2 Background: Completed deal ordered to be unwound

Cérélia completed its acquisition of the Jus-Rol business in January 2022. It opted to do so without seeking prior merger control approval from the CMA. A month later, the CMA launched an investigation into the completed deal, imposing an 'initial enforcement order' (IEO) preventing the parties from taking

further steps to integrate their businesses (a routine procedural step in completed deals, which can be burdensome and financially costly to adhere to).

Whilst it was clear that the UK's jurisdictional 'Turnover Test' was not met (the Jus-Rol business did not generate more than £70 million of turnover in the UK), the CMA found a horizontal overlap and hence jurisdiction to investigate the completed deal on the basis of the UK's flexible 'Share of Supply Test' (the parties had a combined share of more than 25% in the supply of certain dough products).

One year after completion, the CMA reached its final decision at the conclusion of a Phase 2 inquiry: that the deal would lead to a 'substantial lessening of competition' in the UK (on the basis of a very high combined market share in the wholesale supply of 'ready to bake' dough products to grocery retailers) and that (having considered various remedies put forward) the only effective remedy would be for Cérélia to divest all of the assets of the Jus-Rol business to an independent buyer.

Cérélia appealed the CMA's verdict to the CAT, arguing (amongst other things) that the divestment remedy was irrational and disproportionate. The CAT dismissed Cérélia's appeal in its entirely, reiterating the wide margin of appreciation afforded to the CMA in its merger review function and confirming the requirement on Cérélia to divest the entirety of the Jus-Rol business in the UK (see our earlier briefing here).

Cérélia further appealed to the Court of Appeal on the grounds discussed below. The Court of Appeal has also upheld the CMA's divestment decision.

Rather than being an outlier, this case is the latest in a series of recent examples of the CMA requiring divestments in completed mergers (with the CMA having ordered 7 deal unwinds since 2021, and 10 since 2019).[1]

3 Scope of review of CMA merger decisions and role of the CAT as a specialist tribunal

The precise scope of the CAT's powers to review CMA merger control decisions has been hotly contested over the past two decades. What is clear is that, in determining such an appeal, the CAT is required (by the Enterprise Act 2002) to "*apply the same principles as would be applied by*" an administrative court on an application for judicial review.

A body of established case law has reiterated that the CAT's position as a specialist competition tribunal does not mean that it should apply different principles or a greater intensity of judicial review (see, for example, the Court of Appeal's judgments in *OFT v IBA Health* [2004] and *BSkyB Group v Competition Commission* [2010]). The Courts will not allow a challenge which is, in reality, an attempt to appeal against the full merits of a CMA merger decision under the pretext of a judicial review. Indeed, as stated by the CAT in its 2022 ruling on the *Meta/Giphy* merger, *"it is our task not to consider whether the CMA has "got it right", but whether the decision it made was lawful or not"*.

Without departing from these high level principles, the Court of Appeal has (in *Cérélia/Jus-Rol*) made some important observations which seek to address the relevance of the CAT's specific expertise in these cases and its permitted scope of review.

The CAT's specialist expertise

The Court noted that UK Parliament created the CAT as a tribunal comprising *"specific relevant expertise"* to oversee the decisions of competition regulators (such as the CMA) and that "*in addition to a review of a regulatory decision on questions of vires and law, Parliament entrusted the CAT with the responsibility for reviewing findings of fact and the evaluation of those facts by regulators*".

As a result, the Court emphasised that the CAT can be expected to perform a 'deep dive' into the evidence in order for it to make an informed judgment as to whether the evidence justifies the CMA's decision in a given case.

*"In a given case therefore it may be the task of the CAT to determine whether there is **adequate material** before the CMA to support its conclusion, an exercise the CAT is singularly well equipped to perform. It can be expected to examine closely the complaints made about a decision and its evidential underpinning. Such a **deep dive into the evidence** equips the CAT with the information necessary, then, **to make an informed judgment as to whether the decision under challenge was properly justified by the evidence**. The extent to which the forensic sleeves must be rolled up the judicial arm is not to be confused with the margin of appreciation to be accorded to the decision maker. It is at the point that the CAT is **seized of a detailed understanding of the evidence** that it can then **decide whether the CMA was acting within legitimate bounds** in its determination and evaluation of the facts."* (emphasis added)

The importance of context

The Court also made clear that the degree of deference to be accorded by the CAT to the CMA is "*fact and context specific*" and may vary as between different grounds of challenge. As a result, the Court acknowledged that, because of its expertise, it is quite possible that the CAT will be "*critical of relatively complex evaluations by the [CMA], even where a non-specialist court might not be".* Indeed, *"that is a necessary corollary of the CAT having been instituted as a specialist body tasked to conduct precisely that sort of exercise*".

The Court gives examples of disputes concerning (a) the interpretation of a contract or letter, and (b) the inferences to be drawn from statistical data. It notes that, in these two examples, the views of the CAT on a question of interpretation might be as equally valid as that of the CMA. However, at the other end of the scale, *"if the CMA has evaluated a wide variety of complex evidence, not all of which is consistent, a broader margin will be accorded to the CMA in relation to its findings of fact and the inferences to be drawn therefrom."*

In the Court's judgment, none of this involves the CAT substituting its own view on the merits for that of the CMA: "*It is simply holding the CMA to a proper standard*."

This latter point will be of particular interest to deal parties given the CMA's practice over recent years to routinely request and rely on internal documents from parties (and third parties) to inform its merger review and decisions.

4 Extensions for "Special Reasons"

The Court of Appeal also upheld the CAT's decision that the CMA had been entitled to extend the merger review timetable in this case.

The CMA may extend the deadline to produce its Phase 2 report on a merger (by no more than eight weeks) if it considers that there are "special reasons" for doing so.

Evidence was put before the Court that approximately 50% of merger cases before the CMA now result in an extension (whereas the UK Government, at the time of the merger control regime coming into force, expected the vast majority of cases would be determined without an extension). The procedural changes made to the CMA's Phase 2 processes back in April of this year may be expected to improve that figure. Nevertheless, the Court agreed with the CAT that what amounts to "special" will be fact and context specific, and that the CMA is afforded a relatively broad discretion. By way of example, decisions over extensions will involve a balancing of available resources against the nature and complexity of the work outstanding at any one particular time (in the context of an appreciation by the CMA of the need to be as comprehensive, thorough and fair as it possibly can be within the tight timeframe imposed upon it by Parliament).

5 Key take-aways

So what does this judgment mean for deal-makers in practice?

Appeals of CMA merger decisions remain limited to judicial review grounds: and the so-called high bar in that respect remains. Whilst we don't expect the floodgates to open on successful challenges to CMA merger reviews as a result of this case (and it is worth remembering that the CMA's prohibition decision

in this case was ultimately upheld), the Court of Appeal's judgment does provide important guidance for parties (and third parties with jurisdiction) in seeking to challenge CMA merger decisions. The judgment is also timely given, post-Brexit and with the incoming new merger control thresholds under the DMCC Act, the CMA has jurisdiction over a wider range of, and more complex, merger cases and is expected to engage with increasingly complex evidence and theories of harm.

In short, the judgment endorses the CAT's engagement with the evidential underpinning of merger cases: as a result, parties seeking to challenge CMA decisions, and the CAT itself, should find encouragement within the judgment to engage in (perhaps more robust levels of) evidential review going forward.

The guidance provided around the degree of deference to be accorded to the CMA being "*fact and context specific*" will no doubt be considered carefully by parties seeking to encourage the CAT to engage to a greater extent with the CMA's factual analysis in a given case. Disputes over the interpretation afforded to evidence by the CMA (in particular given the CMA's reliance on parties' internal documents) is also likely to be heavily debated in contested cases.

Cérélia is seeking to appeal onwards to the UK Supreme Court, a rare occurrence in merger control cases.