# UK Court of Appeal Signals Greater Scrutiny of CMA Merger Decisions

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For the first time in two decades, the UK Court of Appeal has ruled on the substantive standard of judicial review to be applied by the Competition Appeal Tribunal (CAT or Tribunal) in UK merger cases.

The Tribunal reviews merger decisions taken by the UK Competition and Markets Authority (CMA). In doing so, it applies a "judicial review" standard rather than a merits rehearing, unlike courts in the European Union or the US, where the regulator's conclusions can be challenged on the merits.

Judicial review is generally considered a high bar. A claimant must prove that the authority acted irrationally, illegally or with an improper procedure. It is a standard of review typically reserved for policy decisions where government decision-makers are shown a high degree of judicial deference.

The Court of Appeal's recent ruling in *Cérélia/Jus-Rol*[1] clarifies some important points relating to the scope and intensity of the Tribunal's review and raises the question of whether CMA decisions could come under more intense scrutiny in future appeals.

- **Limited deference to CMA factual findings:** Although the CAT must adhere to the judicial review standard, it was constituted as a specialist tribunal and is therefore expected to engage in a high degree of scrutiny of the CMA's factual findings in order to determine whether the CMA's analysis is judicially sound.
- **Detailed review of the adequacy of factual and economic evidence:** In particular, the CAT can be expected to closely examine whether a CMA decision was sufficiently supported by documentary or economic evidence.
- **Potential for greater CMA scrutiny:** It remains to be seen whether this will make the CMA more cautious about pursuing dynamic theories of harm, where there is necessarily more limited evidence to support more forward-looking conjectures.

## UK Merger Appeals Remain Challenging

The outcome in *Cérélia/Jus-Rol* is a reminder of how difficult it is for parties to succeed in appealing against merger decisions of the CMA. The Court of Appeal dismissed the appeals brought against the Tribunal's September 2023 judgment and upheld the CMA's decision requiring Cérélia to divest the Jus-Rol business that it had acquired in 2022. Cérélia had appealed to the court on five grounds, all of which were dismissed.

What makes the court's judgement most significant, however, is its discussion of the appropriate scope and intensity of judicial review by the CAT in merger cases.

## The Role of the CAT as a Specialist Tribunal

The CAT is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues.

The CAT has explained that "[i]t is our task not to consider whether the CMA has 'got it right', but whether the decision it made was lawful or not."[2] Under a judicial review

[1] *Cérélia Group Holdings SAS & Anor v Competition and Markets Authority* [2024] EWCA Civ 352

[2] *Meta Platforms Inc v Competition and Markets Authority* [2022] CAT 26, para. 125

standard, the CAT cannot substitute its own decision for that of the CMA; it can only remit for further consideration. In practice, this means that it is challenging for applicants to overturn a UK merger decision.

Related to this, the Court of Appeal in *Cérélia* set out "some basic propositions about the role of the CAT when conducting a judicial review of a decision of the CMA". The court made clear that, in order to determine whether a finding was made properly and the CMA acted legitimately — *i.e.*, in order to conduct the judicial review that the Tribunal is expressly tasked with — the Tribunal will want to develop a detailed understanding of the evidence that was the basis for the CMA's decision: "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".

The court notes that this goes to the heart of why the CAT was set up in its current form:

> Parliament created the CAT as a tribunal comprising specialist lawyers, economists and others with specific relevant expertise, to oversee the decisions of regulators. 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.[3]

The court went on to note that, in practice:

> 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 judgement as to whether the decision under challenge was properly justified by the evidence.

## Fundamental Importance of Internal Documents and Data

The Court of Appeal addresses two points that many merging parties have direct experience of in merger reviews before the CMA: the authority's interpretation of the parties' internal documents and of data.

The CMA, as part of a merger review, will typically ask parties to provide documents that they have generated internally in the ordinary course of business to inform its investigation.[4] How the CMA interprets what it reads in those documents can be fundamental to the path followed in an investigation, and the outcome of a case. Similarly, the conclusions that the CMA case teams draw from the often very substantial data sets are central to the quantitative and qualitative analysis carried out by the CMA.

In *Cérélia*, the court's decision is clear that the Tribunal is justified in considering whether the CMA's interpretation of documents or data in a given case is flawed:

> [T]he degree of deference to be accorded by the CAT to the CMA is fact and context specific, as *IBA*[5] makes clear. If, for example, the dispute concerns the interpretation of a contract or letter then the view of the CAT on a question of interpretation might be as equally valid as that of the CMA. If the issue concerns the inferences to be drawn from statistical data, then the conclusions drawn by the CAT might again be as valid as those drawn by the CMA.[6]

## Willingness of the Tribunal To Engage With the Facts in Past Cases

The question for the Tribunal to determine is whether the CMA had a sufficient basis in light of the totality of the evidence to satisfy itself on the balance of probabilities that there would be harm to competition.

Notwithstanding the CMA's "wide margin of appreciation",[7] the Tribunal has been willing to engage with the substance of the evidence base in cases where the evidence clearly does not support the CMA's theory of harm.

In *Tobii/Smartbox*,[8] the Tribunal found that the CMA had acted irrationally because the totality of the evidence on file did not support a conclusion that the merged entity had the incentive to engage in a partial foreclosure strategy. The Tribunal said, in particular, that the evidence on file related only to a situation in which the competition concern was based on a total foreclosure strategy, and the CMA had not obtained any evidence or conducted any economic analysis to identify whether such a partial foreclosure strategy would be profitable for the merged entity.

In *Meta/Giphy*,[9] the Tribunal was asked to consider whether the CMA acted lawfully when it found a substantial lessening of competition based on the merger eliminating dynamic competition between the merging parties. The CAT refused to answer Meta's calls for a review of the quality of the evidence and the conclusions

[3] *Cérélia*, para. 37

[4] Mergers: Guidance on the CMA's Jurisdiction and Procedure (CMA2 revised), para. 9.8(a)

[5] *IBA Health Limited v Office of Fair Trading* [2004] EWCA Civ 132

[6] *Cérélia*, para. 39

[7] *Tobii AB (publ) v. Competition and Markets Authority* [2020] CAT 1, para. 431

[8] *Ibid.*, paras. 425 to 455

[9] *Meta*

drawn from the available evidence, finding "no hesitation in concluding that the decision made by the CMA was one that it was entitled to make".[10]

In upholding the CMA's assessment in *Meta/Giphy*, the CAT observed that the novel concept of an impairment of dynamic competition (as set out in the revised CMA Merger Assessment Guidelines) was "slippery" and "does very little to create certainty and remove dynamic competition and impairments to it from the realm of 'it is what I say it is'".

The CAT therefore went on to outline a framework for the interpretation and application of the concept of dynamic competition so that "the lawfulness of the decision can properly be tested". The framework articulated by the Tribunal set a relatively low threshold for the CMA to meet and did not touch on the evidence to be considered by the CMA.

Meta's appeal succeeded only in respect of one procedural ground: The CMA should not have redacted third-party information that was part of the reasoning for its decision. The CAT emphasised that consultation with the merging parties is a necessary part of the fair process. In light of that finding, in July 2022 the CMA's decision was quashed and the case remitted to the CMA for reconsideration.

The approach taken by the Tribunal in *Tobii* and *Meta*, as well as the court's stance in *Cérélia*, can ultimately be reconciled with thinking recently expressed by Sir Marcus Smith, Tribunal President. Sir Marcus, writing in a personal capacity, concluded that the outcome of *Meta* — which related to the substance of the CMA's decision concerning dynamic competition, rather than procedure — was not related to a difference between on the merits and judicial review. The case necessitated an understanding of the differences between static, potential and dynamic competition and a consideration of market definition and the CMA's analysis, and the substance of the Tribunal decision would not have been any different under a merits standard.

## Conclusion

The Tribunal itself has acknowledged that "the relevant expertise at its disposal may render the Tribunal a more demanding and/or less deferential tribunal than might otherwise be the case where a court is called upon to review a decision of a specialist regulator".[11]

The court's ruling in *Cérélia* endorses this view. In holding that it is reasonable for the CAT to engage with the substance and interpret evidence where appropriate, the ruling is likely to encourage the CAT to engage with the CMA's factual analysis in future appeals. The CMA will no doubt have taken note, particularly as it pursues more speculative or dynamic theories of harm.

This is important because, ultimately, competition decisions are reached by drawing conclusions from the evidence.

While the court decided to dismiss *Cérélia's* appeal, its discussion of the scope of judicial review by the CAT in merger cases may well strengthen the position of some applicants seeking to challenge a CMA merger decision in future.

[10] *Ibid.*, para. 126.

[11] *BSkyB v Competition Commission* [2008] CAT 25, at para. 61.

Professional support lawyer **Elizabeth Malik** contributed to this article