Neutral citation [2023] CAT 48

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1590/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 July 2023

Before:

SIR MARCUS SMITH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

MICROSOFT, CORP.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

ACTIVISION, INC.

Intervener

Heard at Salisbury Square House on 17 July 2023

RULING (SECOND APPLICATION TO ADJOURN THE SUBSTANTIVE HEARING)

APPEARANCES

Daniel Beard, KC and Robert Palmer, KC (instructed by Weil, Gotshal & Manges (London) LLP) appeared on behalf of the Applicant.

David Bailey, Daisy Mackersie and Richard Howell (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Lord Grabiner, KC, Brian Kennelly, KC and Douglas Paine (instructed by Slaughter and May) appeared on behalf of the Intervener.

1. This is an application made jointly by the Competition and Markets Authority (the "CMA") and by Microsoft Corp. ("Microsoft") – and with the support of the intervener Activision Inc. ("Activision") to adjourn an application made by Microsoft under section 120 of the Enterprise Act 2002 (the "Act") for the review of a decision of the CMA (the "Final Report") dated 26 April 2023. That application (the "JR Application") is due to be heard on Friday 28 July 2023, and for the five days thereafter.

2. The JR Application was listed for 28 July 2023 over the CMA's opposition. There has already been one application to adjourn, as well as resistance to the original date. Just to mention the application to adjourn, that application was made by the CMA on 28 June 2023. It was opposed by Microsoft and was refused by the Tribunal by a judgment delivered on 29 June 2023 under neutral citation [2023] CAT 43.

3. Second applications to adjourn hearings are rare, particularly when they have been expedited, but I appreciate that the grounds for this application, and indeed, Microsoft's (and Activision's) stance in relation to it, are different. It is important to note that whereas the first application to adjourn was made by the CMA alone and was opposed by both Microsoft and Activision, the present application is moved by all parties before me.

4. The question is whether a hearing that has been fixed and that all agree was fixed because of its urgency in the public interest, can and should be adjourned. All of the parties are agreed that this is a judicial decision that must be justified. That is true for any adjournment, but it is particularly true in this case. I had some concern, when I read the written submissions of the CMA and Microsoft, that there was an underlying assumption by the parties that the Tribunal should not be concerned with the reasons for the adjournment, and should simply grant it because the parties were in agreement that it should be granted.

5. I made clear in the course of submissions – and all of the parties ultimately agreed with this – that this is not the right test. Clearly the agreement of the parties to an adjournment is a relevant and material factor, particularly when the parties are otherwise in opposition in regard to the JR Application. But it is now,

I think, common ground that the reasons for the adjournment must outweigh the public interest, on which the Tribunal has already ruled twice, of hearing the JR Application as it has been listed.

6. Decisions to adjourn involve a multi-factorial assessment. In this case, however, of particular importance is the juridical basis for the application to adjourn the JR Application. This requires me to understand why the Final Report is not proceeding – as it ordinarily would – to a final order implementing the Final Report under section 41 of the Act. It is quite clear, from the submissions that I have received, that none of the parties want the final order to be made until there has been further consideration by the CMA of matters that are presently being discussed on a without prejudice basis between the CMA and Microsoft. The deadline for publishing and consulting upon the final order has been put off, to the end of August, and all of the parties want the JR Application to be adjourned so that these discussions can proceed.

7. The problem is that the parties have been remarkably unclear about the basis upon which these discussions are proceeding and how the statutory process leading to a final order is actually to work. It has, accordingly, been largely unclear to me what actually the CMA is proposing in regard to the Final Decision and the final order that would – in the ordinary course – implement it.

8. Multiple juridical bases have been advanced by the parties. At last count it was as many as five. It seems to me that it is very important, if one is seeking to adjourn an urgent application like the JR Application, that one is absolutely clear as to the basis on which that adjournment is being moved, so that the Tribunal can be in a position to determine whether or not it is appropriate to grant the application.

9. So I make no apology for dealing with the juridical basis for the adjournment application, and what needs to be shown in order for that juridical basis to be established, at some length. As I say, these issues are not straightforward, and the course proposed by the parties far from clear. Having dealt with the question of juridical basis, I will then come back to the other, much more straightforward

factors, which in my judgment, very clearly militate in favour of an adjournment. I will be able to deal with those extremely briskly.

10. I turn, then, to the question of juridical basis. In the course of submissions I put to the parties a four-stage approach to the assessment of the juridical basis for an adjournment application in circumstances such as this. All of the parties accepted this as the correct and appropriate framework:

(1) Stage 1. The Tribunal must be satisfied that the course proposed by the CMA - that is to say discussions with Microsoft necessitating an adjournment of the JR Application – have a proper legal foundation. That does not mean that I have to be satisfied as a matter of law that that juridical foundation actually exists. But I do need to satisfy myself that there is some proper juridical basis for what the CMA is doing or proposing to do that justifies this application for an adjournment. In short, I need to know the basis for the departure, by the CMA, from the ordinary course, so that I can understand why the CMA say that what they are proposing is lawful. But I do not need to rule on the question of lawfulness itself – that (if the question arises at all) would be a matter for another court on another day.

(2) Stage 2. As regards each ground advanced as a justification for the CMA's proposed course of conduct, which is the basis and reason for seeking the adjournment, I must be satisfied that, at least arguably, there is a sufficient factual basis that enables the CMA to follow the legal course it is putting forward. It is not enough for the CMA to articulate a bare theoretical justification for a course of conduct, without also showing, on a prima facie basis, that the course of conduct is grounded in reality and not, as I say, simply theoretical. Adjournments are granted where they are needed, and not on hypothetical or theoretical grounds.

(3) Stage 3. Stage 3 draws together the requirements at Stages 1 and 2. Assuming these have been sufficiently articulated, I must further be satisfied that the CMA is indeed seeking an adjournment for these reasons. In other words, given the factual elements at Stage 2, there

needs to be an evidential basis for granting the adjournment. I stress that it is the CMA's consideration, not Microsoft's, that is critical. Microsoft are a pure commercial undertaking, with no public responsibilities – unlike the CMA. Microsoft are interested, quite rightly, only in getting the merger with Activision (which the Final Report prohibits) over the line. They are not tasked with the protection of the public interest that the merger jurisdiction exists to serve. That is the responsibility of the CMA and in this case, the CMA alone. I fully appreciate that Microsoft and Activision have an interest and want to have this adjournment because it serves their interests, and that is something that I must pay due and proper regard to. But when it comes to a question of an adjournment in the public interest, it is the CMA that I must listen to first and foremost. Therefore, it is from the CMA that I require satisfaction that the course that they are proposing is a proper one. Put another way Stage 1 is concerned with the theoretical existence of the jurisdiction, and Stage 2 with its grounding as a matter of reality. An application to adjourn on this basis cannot (or should not) be done without some evidential foundation. It follows that the law, facts and matters that underlie Stages 1 and 2 must be buttressed by a witness statement from the CMA stating that this is, indeed, the juridical and factual basis for the adjournment application.

(4) Stage 4. By way of a negative cross-check, I must be satisfied that there is no obvious problem in the CMA's proposed course that would expose the CMA to an inevitable and successful judicial review if it pursued that course. That is not, I would suggest, a very onerous obligation. If a judicial review of the CMA's course or proposed course comes later down the line, then that is a matter for a court later down the line. What matters is that there is nothing clear and obvious today which is an obvious problem precluding an adjournment. In a very real sense, if Stages 1 to 3 are met, Stage 4 ought to be redundant.

11. That is the four-stage approach that I am minded to adopt as regards the fundamental question of whether there is a basis for properly adjourning the JR Application. I therefore come to the various legal bases that have been

articulated by the parties in order to suggest that an adjournment is justified. These bases were advanced by the parties as alternatives, but I actually consider that in most cases, they are not alternatives at all, but need to be read together. I consider them in this light:

(1) Section 33 of the Act. This involves a new "Phase 1" investigation by the CMA into a new "relevant merger situation", which is the situation defined and described in section 33. What the CMA is suggesting is that as and when Microsoft produce a revised merger structure (rightly, I was told no more about this: this is something covered by the without prejudice privilege, which I absolutely cannot invade) that might constitute a new relevant merger situation (the "New RMS") altogether different from the old relevant merger situation (the "Old RMS") that lead to the Final Report. There are a number of problems with the section 33 argument:

(i) The definition of a relevant merger situation in section 33 is broad, and it is quite difficult to see how a revised proposal from Microsoft could bring the New RMS outside the Old RMS. But, certainly as a matter of theory, and perhaps as a matter of practical reality, this may be possible. I say nothing more on this, and certainly do not say that this is a course not open to the CMA.

(ii) The real problem is that the CMA is in no position to say that they have a proposed new structure that could even arguably be a New RMS. That is because discussions between the CMA and Microsoft are on-going, and as yet the CMA has nothing to enable it to elevate this argument out of the purely theoretical. When it is understood that what is being contemplated by the parties is that Microsoft will at some point in the future put forward a new proposal that is so different from the Old RMS as to amount to a new RMS, it is quite clear that section 33 carries the adjournment application no further. The point is hypothetical, and the CMA can adduce no evidence to enable me to find that Stage 3 is satisfied.

(2) Section 41(3) of the Act. The possibility of a New RMS under section 33 does provide helpful background to understanding the second juridical base, which arises under section 41(3) of the Act. Section 41(3) of the Act provides that the final order (as I have called it – the Act uses rather longer phraseology) must be consistent with the Final Report (to reduce the matter to the facts of this case) unless there has been a material change of circumstances since the preparation of the Final Report or the CMA otherwise has a special reason for deciding differently. So:

(i) The point of section 41(3) is to make clear that, rather like a judgment of a court which is implemented into an order, here too there is a relationship between the Final Report and the final order. Generally speaking, and entirely unsurprisingly, the final order ought to be reflective of and implementing of the Final Report. That is what the opening words of section 41(3) provide.

(ii) However, as all the parties stressed, there are two "carve-outs". The final order does not have to be consistent with the Final Report, where there has (a) been a material change of circumstances or (b) the CMA otherwise has a special reason for deciding differently.

Clearly, the CMA cannot say now whether a final order inconsistent with the Final Report can be made. That would be to prejudge, which would be wholly improper. But if the CMA is relying on section 41(3) in order to satisfy Stage 1 of my process then – before an adjournment can be considered – it must also satisfy Stage 2. I need to understand why the CMA consider that the "carve-outs" in section 41(3) may be triggered, such that a final order not implementing the Final Report may emerge. We are, of course, not talking in terms of decisions (those decisions lie in the future, when the CMA has heard what it needs to hear) but in terms of explaining to the court that the theoretical basis for the adjournment application (Stage 1) is grounded in reality and not hypothetical (Stage 2). Accordingly, I find that (in this case) Stage 1 is

clearly met. I will return to Stage 2 which, I consider, can be satisfied, provided the CMA support the application with appropriate evidence.

(3) Section 37(1) of the Act. The CMA may cancel a reference it has made "if it considers that the proposal to make arrangements of the kind mentioned in the reference has been abandoned." Section 37(1) would be met if the Old RMS had been abandoned. This is a theoretical possibility (Stage 1 is met) but not grounded in reality (as matters stand) and Stage 2 is clearly not met.

(4) Other bases. I can deal with these very quickly. One was a variant on the section 41(3) theme, and I have considered that. The other was a course that I urged upon the CMA (an application to quash the Final Report) under section 120(5) of the Act. The CMA was resolute in its refusal to contemplate this course because, I think, it carried with it the implication of a judicially reviewable error in the Final Report. Since the CMA continues to stand by the Final Report, it can fairly be said that any such implication would be an anathema to the CMA. I do not consider that this quashing jurisdiction is limited to those cases where a judicially reviewable error has been established (*CTS Eventim AG v. Competition Commission*, [2010] CAT 7 would have been decided differently if that were the case). I consider that it is very likely that the jurisdiction extends to those cases (e.g. a material change of circumstance post-dating a decision) where the CMA considers it needs to move away from a decision, and so seeks to have it quashed, even though the decision was unimpeachable at the time it was made. However, since no-one was ready to argue the point, and the CMA made clear that its application was limited to one of adjournment only, I say no more.

12. In conclusion, section 41(3) satisfies Stage 1 and may be capable of satisfying Stages 2 and 3. I therefore need to ask myself whether there exists the evidence which makes the section 41(3) route a more than theoretical route, and, instead, one that is grounded in reality. If these stages are met, it is easy to see the justification for the adjournment: if the CMA has grounds for considering that it may make a final order different in substance from the Final Report that the

final order – in the ordinary course – is supposed to implement, but which requires consideration by the CMA over the coming two months, and which may render the consideration of the Final Report redundant, it is obviously undesirable to spend six days of expensive litigation considering a Final Report that is not, in fact, going to be reflected in a final order. Microsoft make the JR Application not because they want to show that they are right, but because they want a final order than enables the merger with Activision to go ahead. If that end can better be achieved without a hearing (which was the position of all the parties) so much the better.

13. It seems to me that at this stage, I need to conflate Stages 1 and 2. The reason I must do so is because there is, at the moment, no evidence from the CMA to indicate that the "carve out" requirements of section 41(3) are met. In other words, there is no articulation of why the CMA considers there might be a material change of circumstance or what other special reason the CMA might have for deciding differently.

14. Clearly, evidence needs to be produced by the CMA to satisfy Stages 2 and 3. There are also two other matters on which evidence from the CMA is required. The CMA has indicated that it will provide this evidence and – if it does – I will grant the adjournment because my four-stage test is satisfied and because – for reasons that I will go into – the adjournment is obviously the right course to take in the public interest.

15. I am going to require evidence, from Mr Prevett of the CMA, as the responsible legal officer in charge of legal matters at the CMA, in the form of a statement dealing with the following matters:

    (1) By way of general background as to what this statement can generally address, I was referred to a very helpful passage in the *R v. Monopolies and Merger Commission ex parte Argyll Group plc*, [1986] 2 All ER 257, 266, where Sir Donaldson MR set out factors that ought to inform public bodies and good public administration. This is an excellent touchstone for what Mr Prevett's witness statement ought to contain.

(2) More specifically, the evidence from Mr Prevett needs to say the following. First, it needs to explain – and explain with granularity – how section 41(3) (which meets Stage 1) also meets Stage 2. If that is done in a statement, Stage 3 is also satisfied (which is why I am conflating these stages).

(3) Secondly, there is an important need for a clear statement of the consultation process that the CMA is going to embark upon from here on in. I say this not because I question that the CMA will not embark upon a proper consultation process, I am sure that it will, but I have well in mind that this is a process that is principally involving Microsoft and the CMA. Activision clearly are involved, but there are or may be third parties who need to be heard. One of the fragilities of the section 41(3) process is that there is only a form of mandatory consultation once a final order in draft has been approved by the CMA. There is therefore going to be a gap between the point of consultation in relation to the final order and the discussions between the CMA and Microsoft which will ante-date this. This process will need very careful handling in terms of how third parties are to be engaged with. It seems to me important that that is a matter that is dealt with in Mr Prevett's statement, so that any third party will know, if they come to seek to challenge a final order in draft, precisely what has been going on. This evidence is relevant to Stage 4.

(4) Thirdly, I am going to require, as I indicated in argument, an explanation as to why the first adjournment application did not aver to the matters that have been aired before me today. I anticipate, from what Mr Bailey for the CMA told me in submissions, that this is a very straightforward thing to do, but it does seem to me that it is a matter that ought to be on the evidential record, in addition to what was submitted to me by counsel.

(5) Fourthly, the parties are all agreed that what has occurred in the United States – by which I mean the FTC's failure to obtain an interim injunction from the US courts – is an irrelevant and immaterial matter to

this application. I say nothing about its relevance otherwise. Mr Bailey has said in submission that the matter is and was irrelevant to the CMA in the case of this application, and I want that evidenced. The coincidence in timing between events in America, and this application, calls for some explanation, if only to ensure a degree of "Stage 4 resilience".

16. I consider that the CMA would be assisted if there could be a form of backward looking statement from Microsoft, explaining the significance of the Sony transaction that has been reported in the press over the last weekend. I want to stress that I do not want this statement to trespass into any confidential, still less any privileged, materials. But it does seem to me that if one can articulate what has caused the position to change in relation to this deal since the Final Report, that will make Mr Prevett's job of identifying a material change of circumstance or a special reason under section 41(3) that much easier. This is not a precondition of my granting the order adjourning, but it is something which I consider the parties should, since they want an adjournment, consider quite carefully because in my judgment, it will make the decision that I am going to make that much more robust.

17. On this basis, I am satisfied that the four-stage process that I have articulated is met. I can move much more swiftly to the other factors that most clearly indicate that an adjournment is required and desirable in this case:

(1) As both Mr Beard, KC and Lord Grabiner, KC for Microsoft and Activision respectively made clear, this is a case where all of the parties, all well advised, are moving in the same direction. All are saying unequivocally that an adjournment is the way in which one can both protect the public interest most efficiently, deal with events subsequent to the Final Report most effectively and ensure that one has an outcome that properly reflects the public interest as it stands and not as it stood in the past.

(2) Secondly, there is the fact that there is enormous urgency behind this matter. It is well known, from both the documents in this case and more

widely in the press, that there is a deadline between Activision and Microsoft which triggers certain consequences, tomorrow, 18 July 2023. I have no doubt that Microsoft and Activision are being sensible about this – it is a matter for them, of course – but they are entitled to an assurance that matters are being handled as expeditiously as possible. It does seem to me that in this regard, the submissions of Microsoft and the submissions of Activision are entitled to particular weight. When one adds to that the CMA's concurrence that, in its view, the public interest is best served by an adjournment, that is a very powerful factor in favour of adjournment.

(3) Finally, there is the question of cost and the related question of CMA resource to consider. It is obvious that there is no point in incurring the costs of the JR Application, running across at least four and possibly six days in the near future, if that is going to serve no purpose. Over and above this question of cost, there is the question of CMA resource. The fact is the CMA has, entirely understandably, said that they can defend the JR Application or they can deal with the present, on-going, developments. They cannot do both. This is a final and very cogent reason for granting the adjournment.

18. That is what I am going to do, subject to receiving the evidence from the CMA that I have described.

Sir Marcus Smith
President

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 17 July 2023