Neutral citation [2023] CAT 43

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1590/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29 June 2023

Before:

SIR MARCUS SMITH
(President)
PROFESSOR ANTHONY NEUBERGER
BEN TIDSWELL

BETWEEN:

MICROSOFT CORPORATION

Applicant

– and –

COMPETITION AND MARKETS AUTHORITY

Respondent

– and –

ACTIVISION BLIZZARD, INC.

Intervener

RULING (APPLICATION TO ADJOURN THE SUBSTANTIVE HEARING)

---

1. By a decision dated 26 April 2023, entitled *Anticipated acquisition by Microsoft of Activision Blizzard Inc: Final Report* (the "**Decision**"), the United Kingdom Competition and Markets Authority (the "**CMA**") concluded that a proposed merger between Microsoft Corporation ("**Microsoft**") and Activision Blizzard, Inc. ("**Activision**") should be prohibited.[1] In reaching that decision, the CMA rejected the behavioural remedy offered by Microsoft.[2]

2. As is well known, decisions like this one need to be produced by the CMA under considerable pressure of time, with time limits laid down in legislation. Similarly, the time within which a challenge – on judicial review grounds – is brought to a decision like this one is limited. Although of course Microsoft will have been substantially involved in the pre-Decision consultations with the CMA, Microsoft nevertheless had only four weeks in which to decide whether to seek a review of the Decision, and to plead its Notice of Application (the "**Notice**").[3]

3. The Decision is a substantial document, running to some 471 pages, plus eight appendices (Appendices A to H). Whilst we assume that Microsoft will have had some idea of what the Decision might say, and what the reasoning of the CMA might be, we assume that the CMA (as the drafter of the Decision) would have had a rather better understanding of the content of the Decision than Microsoft (no matter how well resourced).

4. Microsoft filed the Notice – also a substantial document – on 24 May 2023, the last day on which the Notice could compliantly be filed. We understand that Microsoft informed the CMA before the Notice was filed that the Decision would be challenged. In addition to the Notice, Microsoft sought to rely upon the evidence of 10 factual witness statements and four expert reports. In due course, before the second Case Management Conference ("**CMC**") in these proceedings, the CMA indicated that it was prepared to allow the admission of

[1] Decision/[11].
[2] Decision/[5].
[3] The Tribunal's *Guide to Proceedings 2015* (the "**Guide**") notes that applications of this sort "must be made within a much shorter time period that other types of proceedings" (2015 Guide/[4.12]) and that time will only be extended in "exceptional circumstances" (2015 Guide/[4.14]).

the 10 factual witness statements *de bene esse* (in other words, without accepting their admissibility or relevance)

5. The CMA can have been in no doubt – from the outset – that an adverse finding in the Decision (in particular, a decision to prohibit the merger) would be challenged by Microsoft. The Decision – as the CMA itself acknowledges – is of enormous significance not only to Microsoft, not only to Activision, not only to the CMA, but the wider market. It is also worth noting that the CMA is but one of many regulators, across the world, looking at this merger. In considering the CMA's application – which we have yet to describe – we want to be clear that we are proceeding on the basis that the Decision is a decision of significance to many – including the CMA as the party making it.

6. In these circumstances, we also proceed on the basis that the CMA, as a responsible regulator, would have ensured that it had in place the legal infrastructure to resist any challenge that Microsoft might mount, appropriately and efficiently in the public interest. We also assume – having litigated many cases before the Tribunal, including many applications to review merger decisions – that the CMA is familiar – as non-users of the Tribunal might not be – that reviews of merger decisions are especially urgent in a Tribunal that regularly deals with urgent matters. The Guide states that the Tribunal will "normally regard applications for review of a decision relating to a merger as meriting a high degree of urgency".[4] The Guide goes on to state:[5]

> "The first CMC in an application for review under section 120 of the 2002 Act is likely to take place quite quickly after the application is filed. The precise timing of the CMC will depend on the urgency of the application but it may well be listed to take place within a few days of the application being filed. For example, in *Sports Direct v. CC* (Case 1116/4/8/09) a CMC was held two working days following the receipt of the notice of application…"

7. In *Tobii v. CMA*, [2020] CAT 1, the Tribunal explained:

> "[13]. The Tribunal endeavours to deal with challenges to merger decisions with as much expedition as practicable."

[4] Guide/[4.67]. Emphasis added.
[5] Guide/[4.68].

8. The first CMC was listed – without reference to convenience of any party – for 2 pm on Tuesday 30 May 2023, the Monday being a Bank Holiday. The parties only had one working day's notice of the hearing, to take place before the President alone. The reason the first CMC was set so quickly was (as the President explained to the parties) not in order to make any specific case management decisions, but to set the broad outlines pursuant to which the case was to be decided. The problem was that unless a speedy grip was taken of the process, a hearing the far side of the summer (e.g. in October 2023) was a distinct possibility. That, given the inevitability of a reserved judgment, would mean that Microsoft's application would likely only be determined in November 2023. That is, of course, around seven months after the promulgation of the Decision in April, and is scarcely consistent with a speedy review on judicial review principles.

9. The parties must have appreciated the Tribunal's thinking. During the course of the hearing, the President noted in terms:[6]

> "Finally, there is the question of the judgment that follows any hearing. It is inevitable that there will be a reserved judgment. This is clearly a complex matter, there cannot be an ex tempore judgment after this. My aspiration would be to seek to have a judgment during the course of the summer, handed down, rather than one that drifts into October and November, when there are a number of other commitments on a number of other chairs, including myself, in the tribunal. So it is not simply a question of picking which chair is the least busy, the fact is that if you want a swift judgment, appropriate to these proceedings, then there are significant advantages in dealing with it at the end of July, than at the end of September."

10. At the end of the first CMC, a two-week period (the weeks commencing 24 July and 31 July 2023) had been ear-marked for the substantive hearing.[7] This was longer than Microsoft's time estimate of four days, and was intended to provide the CMA with a degree of flexibility if there were certain days in that period when their chosen counsel team might be in difficulties, as well as the ability to accommodate a hearing longer than Microsoft's estimate. In the end, this proved

[6] Transcript of the first CMC at p.18.

[7] "Ear-marked" is the right term. The order made on this occasion provided that "[t]he substantive hearing of the application shall be provisionally listed for hearing in a window of two weeks beginning on 24 July 2023. The Tribunal will determine whether that provisional listing should be confirmed at the Second CMC." The Tribunal also listed the Application for a Second CMC on 12 June 2023.

prescient: a longer hearing has been ordered, but it has been possible to schedule the hearing within the window in order at least in part to accommodate the CMA's preferences.

11. The CMA contended for a hearing in October 2023, and Mr Rob Williams, KC, who appeared on this occasion for the CMA, stressed, amongst other things, that the CMA's chosen leading counsel was not available in July/August, but was available for October. The Tribunal is, of course, sympathetic to the need for anyone (in particular, public bodies like the CMA) to instruct counsel who have familiarity with the decision and who may have had involvement in the framing of the decision under review. However, the public interest in the swift disposal of challenges to mergers – let alone mergers as significant as this – will often outweigh considerations as to choice of counsel and that meant that a date before the summer was ear-marked. Microsoft's preferred date for the hearing (17 July 2023) was rejected in preference to a later commencement date.

12. A second CMC was fixed for 12 June 2023. Mr Williams, KC was again instructed for the CMA. The hearing – which lasted all day – concerned only the admissibility of the four (relatively short) expert reports filed by Microsoft. These were admitted *de bene esse* over the CMA's objections. It must be stressed that this was not because the Tribunal ruled that the statements should be admitted, but because (given the complexity of the argument, and the short time before the substantive hearing) the Tribunal (i) considered that the parties were entitled to know the outcome that day, but (ii) did not feel able to rule *ex tempore* judgment dealing with the substance and (iii) did not consider it appropriate to give a decision without reasons.

13. The Tribunal was conscious at the time that this was a somewhat unsatisfactory outcome, but the best (or least worst) one open to it. One material factor that weighed heavily with the Tribunal was Mr Williams, KC's confirmation that the CMA could – without adjournment – deal with the admission of the expert evidence on this basis. Certainly, Mr Williams, KC did not suggest that admission of the expert reports *de bene esse* might prejudice the substantive hearing date: had he done so, this would have been a significant matter for the attention of the Tribunal.

14. The CMA sought to have the substantive hearing commence either at the beginning of the second week or (alternatively) on the Friday of the week before (i.e. 28 July 2023). The Tribunal acceded to the CMA's alternative request. No application to adjourn was either signalled or made by the CMA.

15. Since the second CMC, there have been a number of requests by the CMA for further particularisation of Microsoft's case. The Tribunal has dealt with these as quickly as possible – generally within hours. Directions for steps to be taken leading up to the substantive hearing, including in relation to disclosure (30 June 2023), the filing and service of a defence (6 July 2023), the filing and service of skeleton arguments (17 July and 24 July 2023 respectively), and the filing of bundles for the hearing (25 July 2023) have been made.

16. Without prior warning, on 28 June 2023, the CMA applied to adjourn the substantive hearing date of 28 July to 4 August 2023. The CMA applied for an urgent direction pursuant to Rule 19(1) of the Competition Appeal Tribunal Rules 2015 (the "**Tribunal Rules**") providing for an adjournment of the substantive hearing and for its relisting on 2 October 2023 (the "**Application**"). In support of the Application, the CMA filed a witness statement of Mr Prevett, Interim Counsel at the CMA, dated 27 June 2023, which we have referred to as "**Prevett 1**".

17. The CMA, supported by Prevett 1, contends that the existing hearing date would not be in the interests of justice or proportionate. To the contrary, it would result in prejudice and injustice to the CMA and the public interests it seeks to represent. In particular:

    (1) The CMA has not been able to instruct leading counsel with previous experience of this matter to appear at the substantive hearing. It has also encountered significant difficulty in obtaining suitable alternative representation but has sought to obtain representation to maintain the existing hearing date so far as practically feasible. First Treasury Counsel is now instructed as leading counsel for the CMA. However, First Treasury Counsel has confirmed that it is not possible for the case on behalf of the CMA to be prepared and presented effectively on the

current timescales with a hearing at the end of July. If the hearing goes ahead in the current listing, the CMA will be significantly prejudiced and, furthermore, the Tribunal may not obtain the assistance it will require from the CMA. The unfairness is compounded by the fact that Microsoft, and the Intervener (which is Activision) are represented in these proceedings by seven King's Counsel, each of whom have been instructed for a far longer period, such that the parties will not, by any measure, be on an equal footing.

(2) There have been a range of other developments in relation to the proceedings which either have already, or will soon, divert significant resources of the CMA away from the preparations for the hearing. These include an increase in the scale of work that will be involved in relation to a consultation procedure on a final order in relation to the CMA's merger decision in this case. These developments mean that senior staff who have subject matter expertise in relation to the decision challenged in these proceedings are unlikely to be able to provide sufficient assistance to the CMA's representatives at the times when it will be required if the hearing is to start at the end of July.

18. The CMA submits that the Application has been made as a last resort to protect the public interest in ensuring that the CMA is able fairly to defend the decision at any substantive hearing, and so that the CMA can provide effective assistance to the Tribunal. If the hearing were adjourned to 2 October 2023, the CMA considers it would be able to prepare and present its case.

19. Rule 19(1) of the Tribunal Rules confers on the Tribunal power to make such directions as it thinks fit "to secure that the proceedings are dealt with justly and at proportionate cost". These include directions to adjourn listed hearings.

20. Rule 4 of the Tribunal Rules sets out the governing principles for the CAT's procedure:

> "4(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal."

21. The Tribunal has carefully considered the CMA's application. It has done so overnight, conscious that given the imminence of the substantive hearing, the parties need to know where they stand right away. The Tribunal has done so without considering submissions from Microsoft and Activision, which were received very late (this is no criticism) on 28 June 2023. Had the Tribunal been minded to adjourn, then clearly it would have been necessary to consider these submissions. However, since the Tribunal has formed the clear view, on the CMA's material alone, that it would be contrary to justice and fairness to adjourn, it is unnecessary to consider Microsoft's (and Activision's) submissions and to waste time waiting for the CMA to reply to those submissions. For that reason, this ruling has been made on the basis of the CMA's application and evidence alone. We of course intend no disrespect to Microsoft and Activision in taking this course, and it may be that there are reasons for refusing the application which do not appear in this ruling.

22. The CMA's application is refused. The reasons for reaching this conclusion are as follows:

(1) The CMA is quite right to emphasise the very considerable public interest in the proper disposal of Microsoft's application. The CMA must understand that otherwise merger decisions involve very considerable interference in the lawful business of undertakings. That is why the process for considering whether the merger should be prohibited must be conducted quickly. That includes, we stress, any review of a decision prohibiting the merger. It is in principle wrong, and unfair, to have an expedited process for making a decision, and no expedited process for reviewing it. The Tribunal's practice and guidance are clear in this regard.

(2) The CMA must have known from an early stage (from when Microsoft advised of its intention to challenge the decision) that the October 2023 hearing that it seeks was at the very outer limit of an expedited review process, and that – given the considerable public and private interests at stake – an earlier hearing was likely.

(3) That was what the CMA was told at the first CMC, when the window for the present hearing was provisionally fixed (this CMC took place almost two months before the proposed hearing window). It is important to stress this. The order made at the first CMC made clear that the hearing date would be confirmed at the second CMC, which is what happened. In these circumstances, it is surprising and procedurally potentially quite disruptive that some two weeks after the second CMC an application to adjourn is now made. The application could, and should, have been made on 12 June 2023.

(4) It must, therefore, be asked what can have changed since 12 June 2023. As to this:

    (i) Prevett 1 explains that the CMA's counsel of choice – Ms Demetriou, KC – not being available, "the first port of call for an important, complex and public law case of this nature must be Sir James Eadie KC, First Treasury Counsel. First Treasury Counsel works exclusively for Government and should be used

for matters of particular importance and sensitivity, where a KC might otherwise be used. It is important to recognise that where First Treasury Counsel is available for a hearing, such as the present one, instruction will be accepted".[8]

(ii) With great respect to Mr Prevett, this does not follow at all. Sir James is, of course, highly eminent, although he is not a competition specialist, of which there are a number at the bar of significant seniority. But of course, who the CMA choose to instruct is a matter for them.

(iii) It is a little surprising that the CMA continued to approach Sir James to lead given his other commitments. Mr Prevett says this:

> "It is, of course, necessary to work around the substantial court commitments already in First Treasury Counsel's diary, and these may increase or change if any additional, urgent, court commitments arise, as well as his various other advisory commitments. Given the constraints on First Treasury Counsel's time, along with the specialist nature of merger appeals, it was obvious that he would need to be supported by additional specialist competition KCs."

(iv) One anticipates that a specialist competition KC would be necessary in any event – whatever Sir James' commitments – and the CMA has secured the services of Mr Hanif Mussa, KC, a well-known competition specialist. Clearly, however, the CMA elected to retain Sir James (i) knowing of his other commitments, (ii) knowing of the substantive hearing provisionally fixed and (iii) appreciating that, at the second CMC, the earmarked date would (or, depending on submissions, would not) be confirmed.

(v) It is not explained why the CMA decided to attend the second CMC by way of Mr Williams, KC, without making clear the difficulties it now says it has, and without formally applying to

[8] Prevett 1/13.

adjourn. Of course, such an application would have been difficult to sustain. Anyone arguing the point would have to indicate that an adjournment was being sought despite the CMA having instructed a team comprising Sir James Eadie, KC, Hanif Mussa, KC with two juniors under them.

(vi) We note that CMA sought long and hard to find an appropriate KC support for Sir James.[9]

(vii) Mr Prevett says that it is now the CMA's position that the CMA cannot be ready for a hearing that has been provisionally listed for over a month and firmly listed for over two weeks:

> "The position has now been reached in which First Treasury Counsel's view is as follows: it is not possible for the case to be prepared and presented effectively on behalf of the CMA on the current timescales with the hearing at the end of July (ie four weeks away). The case involves very important points of principle; and a subject matter of considerable importance to the public interest. It is enormously detailed and complex, especially given the very large volume of new factual and expert evidence adduced by Microsoft as noted in paragraph 6 above. Even if a third suitable KC were now to be found, it would not be possible for the necessary preparation to be done effectively."

(viii) With great respect, all of this was known on 12 June 2023 – and probably before that date. There is no change of circumstance sufficiently material to permit a revisiting of a listing decision already made. We are unclear whether the CMA rely upon any other change of circumstance. If the *de bene esse* admission of the factual and expert evidence relied upon by Microsoft is being relied upon by the CMA then this is a bad point. The CMA assented to the admission of the factual evidence (albeit with the provisio that it was not helpful) and said nothing about the risk to the substantive hearing when debating the admissibility of the expert evidence. If the expert evidence was seriously prejudicial to the hearing, the matter should have been raised, and the

[9] Prevett 1/15.

Tribunal would have had the option of debating the implications with Microsoft and the CMA.

(5) Mr Prevett refers to an imbalance between the legal teams instructed by the CMA, and those instructed by Microsoft and Activision. The mismatch is more apparent than real. Lord Grabiner, KC and Lord Pannick, KC are instructed by Activision, the intervener. As they appreciate, their role is secondary to that of Microsoft, and their time for submissions will be appropriately curtailed. Their conduct so far (for instance: Activision deliberately served no written submissions for the second CMC) has shown a clear appreciation of this, and the Tribunal will be astute, at the substantive hearing, to ensure that Activision only appropriately address the Tribunal. The imbalance – in terms of number of advocates - between Microsoft's team and the CMA's present team is much less apparent. It seems to us that the teams are both more than competent to handle this application and its defence.

(6) It is also suggested that the CMA is prejudiced by the fact that all of Microsoft's and Activision's counsel have been "instructed in this case for substantially longer than the CMA's own leading counsel". This is probably true, but misses the point that the CMA itself will know the Decision well and ought to be able to explain anything to its own (newly instructed) legal team.

(7) Finally, it is suggested that the CMA has much other work to do, including in relation to this matter. Prevett 1/[30]*ff* indicates that a great deal of time is being spent by the CMA preparing for the final order consequent on the Decision. The Tribunal wrote shortly in response to the CMA's application making clear that it would adjourn of its own motion the final order, which is obviously significantly less material than this application. According to Mr Prevett, the deadline for the imposition of the final order is 19 July 2023.[10] There is no reason why this cannot be extended to, say, the end of August, and (if an order of

[10] Prevett 1/[36].

the Tribunal is necessary) that is what the Tribunal would be minded to do.

23. We consider that the CMA has not paid sufficient heed to the true public interest in this case – which is the swift resolution of Microsoft's Notice. The CMA has chosen to re-visit a matter already decided (namely, an end July/early August hearing and not an October hearing) when there has been no material change of circumstance. Furthermore, the CMA has made this application indefensibly late, with no explanation. Finally, there has been no attempt by the CMA to explore – either with Microsoft or with the Tribunal – ways in which the burden might be eased. In speedy processes like this, the Tribunal stands ready to assist – where it can – to ensure that inappropriate burdens are lifted. It is disappointing that such dialogue has not taken place in this case.

24. Notwithstanding the foregoing concerns about this application, and the fact that many of the CMA's problems appear to be self-induced, we ask ourselves this: Is there a material risk, given the Tribunal's appreciation that this an expedited process with burdens on all, that the CMA's team is unable properly to represent the CMA at the substantive hearing such that a fair hearing is not realistically possible? We remind ourselves that this team – instructed by the UK's national competition authority, hugely experienced and the drafter of this Decision – comprises a counsel team of Sir James Eadie, KC, Hanif Mussa, KC and no less than two experienced junior counsel. Further, there remains a month from the date of the application (28 June) to the proposed start date for the hearing (28 July). The matter is significant and there is a large amount of material for any new counsel to digest, but we anticipate that a month allows ample time for that to happen – provided the CMA selects counsel with appropriate availability to prepare, especially given the support available from within the CMA and from its existing counsel team. The question answers itself: this is a team that should have sufficient time to ensure that the CMA's defence to the application is appropriately conducted.

25. The application is refused. This ruling is unanimous.

Sir Marcus Smith
President

Prof Anthony Neuberger

Ben Tidswell

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 29 June 2023