



Neutral citation: [2005] CAT 3

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1049/4/1/05

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

31<sup>st</sup> January 2005

Before:  
SIR CHRISTOPHER BELLAMY  
(The President)  
PROFESSOR PAUL STONEMAN  
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

**BETWEEN:**

UNICHEM LIMITED

Applicant

and

OFFICE OF FAIR TRADING

Respondent

supported by

PHOENIX HEALTHCARE DISTRIBUTION LIMITED

Intervener

Miss Maya Lester (instructed by Allen & Overy LLP) appeared for the Applicant

Mr. Peter Roth QC and Mr Daniel Beard (instructed by the Director of Legal Services (Competition) Office of Fair Trading) appeared for the Respondent

Miss Kelyn Bacon (instructed by CMS Cameron McKenna) appeared for the Intervener.

Transcript of the Shorthand notes of  
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**RULING: CONFIDENTIALITY**

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1 THE PRESIDENT:

2 1 In this case the Applicants, Unichem Limited, challenge a Decision of the OFT of 17<sup>th</sup>  
3 December 2004 not to refer to the Competition Commission a proposed acquisition by Phoenix  
4 Healthcare Distribution Limited (“Phoenix”) of East Anglian Pharmaceuticals Limited  
5 (“EAP”).

6  
7 2 A particular problem has arisen in relation to the history of this matter, and in particular the  
8 fact that at one stage certain confidential guidance was sought from the Office of Fair Trading.  
9 The parties, in particular Unichem and the OFT (the principal parties), have arrived at a  
10 solution to the problem with which the Tribunal is in agreement. However, in order to explain  
11 the problem and the solution it is necessary to disclose the background, which I can do in view  
12 of the fact that the solution arrived at by necessary implication involves revealing the original  
13 problem.

14  
15 3 In effect, in the year 2000 Unichem itself applied for confidential guidance from the Secretary  
16 of State under the then applicable legislation as to whether an acquisition of EAP by Unichem  
17 would be referred to the Competition Commission. That application was refused by a letter  
18 from the Office of Fair Trading of 24<sup>th</sup> February 2000, by which I mean that the confidential  
19 guidance was given and the confidential guidance was that it would be likely that an  
20 acquisition by Unichem (in fact Unichem’s predecessor, Alliance Unichem PLC) would be  
21 likely to be referred to the Competition Commission.

22  
23 4 In the present proceedings Unichem now relies, as one of its grounds for seeking review, on  
24 alleged inconsistent treatment between what was done in that application for confidential  
25 guidance in the year 2000, and what has been done in this case, namely, that the OFT has  
26 approved the acquisition by Phoenix of EAP without a reference to the Competition  
27 Commission.

28  
29 5 It had seemed to the Tribunal that it was going to be extremely difficult to conduct this case  
30 without revealing in the course of the proceedings, and certainly in the Tribunal’s judgment,  
31 the fact that there had at an earlier stage been confidential guidance and that that guidance had  
32 been in the negative as regards Unichem. The relevant statutory provisions, which we need not  
33 set out in detail at this stage, are Schedule 4, Part 1, paragraph 1 of the Enterprise Act 2002  
34 governing matters that are to be included or not included in judgments of the Tribunal; and

1 sections 237 onwards of the Enterprise Act which govern general restrictions on information  
2 under that Act. Those provisions have been in force since June 2003. At the relevant time in  
3 2000 there would have been earlier provisions in place under the Fair Trading Act 1973, but it  
4 is not necessary for present purposes to refer to those.  
5

6 6 The attitude of the Office of Fair Trading to this matter has been that it is very important, so far  
7 as possible, to keep confidential confidential guidance that is given under the relevant statutory  
8 provisions – both the fact that such guidance has been applied for and as regards the guidance  
9 actually given. The principal reason for that is that these matters can be extremely market  
10 sensitive, not necessarily just at the relevant time but even a few years' later; the commercial  
11 strategy of the parties (or indeed third parties) may well be influenced by the guidance that has  
12 been given or not given as the case may be. It is therefore very important for the integrity of  
13 the system of confidential guidance that that confidentiality is respected, so far as possible.  
14

15 7 The Tribunal agrees with the OFT that these rather difficult matters should be approached on  
16 a case-by-case basis. The OFT in this particular instance is prepared to agree that annex 2  
17 and annex 3 to Unichem's Notice of Application, which are respectively Unichem's  
18 application for confidential guidance dated 7<sup>th</sup> January 2000 and the confidential guidance  
19 actually given on 24<sup>th</sup> February 2000, should be disclosed to the intervener and, as I  
20 understand it, so far as necessary, referred to in the Tribunal's judgment, so long as that is  
21 done by order of the Tribunal. The OFT in this particular case has had regard to the fact that  
22 it is Unichem, the applicant for confidential guidance, who wishes to disclose the fact of that  
23 guidance. The guidance in fact given is now some five years old, and since it was given there  
24 have been many legislative and procedural changes to the regime governing these matters. So  
25 that in this particular case the OFT is prepared to consent to an order of the Tribunal in the  
26 sense that I have just indicated.  
27

28 8 It seems to us appropriate to make such an order so that these two documents can be  
29 disclosed. In making that order we emphasise that we do so in the light of the particular  
30 circumstances of this case, and that there is no general rule as to how we are likely to deal  
31 with future applications of this kind.  
32

33 9 There will be an order accordingly, directing that annexes 2 and 3 of the Notice of  
34 Application (including all the references to those documents in the Notice of Application),

1 i.e. the original Notice of Application in its original unredacted form, shall now be served  
2 forthwith on the Intervener in this case.  
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