



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No: 1049/4/1/05

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar of the Competition Appeal Tribunal (“the Tribunal”) gives notice of the receipt of a notice of application, on 19 January 2004, under section 120 of the Enterprise Act 2002 (“the Act”), by UniChem Limited (“UniChem”) of UniChem House, Cox Lane, Chessington, Surrey, KT9 1SN, challenging a decision (“the Decision”), by the Office of Fair Trading (“the OFT”), made on 17 December 2004 and published on 23 December 2004, under section 33 of the Act, not to make a reference to the Competition Commission of the anticipated acquisition by Phoenix Healthcare Distribution Limited (“Phoenix”) of East Anglian Pharmaceuticals Limited (“EAP”).¹

In summary, the principal grounds of review on which UniChem relies are that:

1. even on the basis of the facts as found by the OFT, the OFT’s Decision that it was not under a duty to refer the proposed merger to the Competition Commission was irrational and unjustified and/or a misconstruction or misapplication of its duty under section 33.
2. given the serious competition concerns identified by the OFT, the OFT’s reasons for not referring the merger to the Competition Commission were insufficient to justify the Decision, and did not dispel the serious likelihood of a substantial lessening of competition .
3. there are a number of unresolved issues of material fact outstanding, including: the constraining effect of other full-line wholesalers; market share and market concentration issues; the distinction between dispensing doctors and pharmacies; and the competitive constraint offered by Phoenix. In those circumstances the OFT erred in deciding not to refer. Further the OFT acted irrationally in purporting to resolve those issues in the way it did.
4. the OFT failed to take adequate account of its previous decisions, and in doing so breached its duties to act consistently, to take into account relevant considerations, to uphold legitimate expectations, and to give adequate reasons for its decisions.

UniChem seeks an Order from the Tribunal:

1. to quash the Decision, in whole or in part;
2. (if the anticipated merger has not been completed) to refer the matter back to the OFT with a direction to reconsider and make a new decision under section 33 of the Act in accordance with the ruling of the Tribunal, and to include within that ruling a statement that the merger should have been referred to the Competition Commission;
3. (if the anticipated merger has been completed) to refer the matter back to the OFT, directing the OFT: (i) to reconsider and make a new decision under section 33 of the Act in accordance with the ruling of the Tribunal, and to include within that ruling a statement that the merger should have been

¹ The decision may be found at <http://www.oft.gov.uk/Business/Mergers+EA02/Decisions/Clearances+and+referrals/Phoenix.htm>

referred to the Competition Commission; and (ii) to make an order under section 72 of the Act requiring Phoenix to keep separate the businesses carried out by Phoenix and EAP prior to the merger.

4. for costs.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received **no later than 5pm on Thursday 27 January 2005**.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa
Registrar

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