

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1150/4/8/10

Hearing date: 10th February 2010

BETWEEN

CTS EVENTIM AG

Applicant

-v-

COMPETITION COMMISSION

Respondent

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EVENTIM'S SKELETON ARGUMENT

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**A. GROUNDS FOR QUASHING AND APPROPRIATENESS OF REFERRAL BACK**

Grounds for quashing

1. Eventim's first ground of challenge is that it was not given a fair hearing and its second to fourth grounds are that the substance of the CC's Decision was fundamentally flawed when assessed against judicial review principles. Eventim stands by all four of its grounds of challenge. The second to fourth grounds are closely linked to the first: had the CC granted Eventim a fair hearing, it is less likely that the CC's substantive decision would so extensively have infringed the principles of judicial review.
2. Eventim's grounds challenge the Decision as a whole. It is therefore crucial for Eventim that any order quashes the entirety of the CC's Decision on the basis that the CC will carry out a full re-consideration (i.e. any quashing

should not be limited to particular issues or aspects of its Decision and any re-hearing should be a "full" one not limited to the consideration of particular points<sup>1</sup>). In correspondence, the CC has accepted this position,<sup>2</sup> and this acceptance is fundamental to Eventim's willingness to proceed in the way proposed by the CC.

3. More generally, Eventim is content for the Decision to be quashed:
  - (a) without identifying the grounds on which it is quashed; or
  - (b) on the basis of some, but not all, of the grounds (assuming, of course, that the grounds that are omitted are treated simply as "not having been determined").

#### Referral back

4. There is no power under s. 120 of the Enterprise Act 2002 ("**the Act**") for the Tribunal itself to make the decisions that the CC was required to make under s. 36 of the Act. In a case such as this, it is impossible for the Tribunal to predict the outcome of a reconsideration by the CC. Accordingly, the Decision should therefore be quashed and the matter referred back to the CC.

### **B. DIRECTIONS ON ANY REMITTAL**

5. The CC has proposed carrying out a full re-consideration, treating the Decision as, in effect, provisional findings that the merger is not likely to lead to an SLC.<sup>3</sup> Eventim agrees with this proposal.

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<sup>1</sup> For the avoidance of doubt, a "full" review would allow Eventim (and any other interested party) to make submissions on any points relevant to the assessment in what will become the CC's "second set of provisional findings" (formerly the Decision). In its grounds 2 to 4, Eventim identified the respects in which the substantive aspects of the CC's Decision were liable to challenge on judicial review principles. Those grounds did not include Eventim's broader points on the merits that it was unable to put to the CC first time around because it was not granted a fair hearing.

<sup>2</sup> See Treasury Solicitor's letter of 29 January 2010.

<sup>3</sup> See Treasury Solicitor's letters of 28 and 29 January 2010

6. The CC's extended time period under s. 39 of the Act for publication of its report expired on 19 January 2010. The CC therefore needs an order from the Tribunal specifying a period in which the CC is to publish its renewed report. Eventim is content with a period of three months identified by the CC. Eventim suggests that the period should be capable of extension by the Tribunal on an application under "liberty to apply" provisions.
7. Eventim therefore proposes that the Decision of 22 December 2009 is quashed under s. 120(5)(a) of the Act and referred back to the CC with a direction under s. 120(5)(b) to reconsider the matter and make a new decision within three months from the date of the order.<sup>4</sup>

**C. COSTS**

8. Eventim seeks an order that the CC pay Eventim its reasonable costs to be assessed if not agreed by a costs officer of the Senior Courts pursuant to rule 55(3) of the Tribunal's Rules.
9. Eventim's application for costs is made on the following grounds:
  - (a) The principal relief sought by Eventim was an order quashing the CC's Decision and remitting the matter back to the CC for further consideration. If the Tribunal issues such an order, then Eventim will have succeeded on its application.
  - (b) Eventim was forced to bring the current proceedings in order to obtain such relief (if it is granted).
    - (i) Eventim first became aware that the CC had acted in a way giving rise to a potential challenge under s. 120 on 22 December 2009 when the Decision was published to the general public.

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<sup>4</sup> As noted in para. 6, if the order contains a general liberty to apply, this will enable the parties to apply to extend the three month period if necessary.

- (ii) The CC took a final decision on 22 December 2009 and therefore had no power to "agree" to reconsider the matter in the absence of an order from the Tribunal. It was *functus officio*.
- (iii) In any event, even if the CC had such a power, it would have been of no use in this case because the CC's statutory deadline to make its final decision expired on 19 January 2010. An order from the Tribunal is required in order to extend that period.
- (iv) In order for the Tribunal to be seized of the matter and therefore obtain the power to quash the CC's Decision and make an order extending time, it was necessary for Eventim to prepare and file a Notice of Application.

Eventim's costs of these proceedings were therefore directly and wholly caused by the CC issuing a Decision that infringed judicial review principles.

- (c) The Tribunal's previous decisions in judicial review cases where the respondent has chosen not to defend its decision both have involved the respondent being ordered to pay the applicant's costs: see (i) *Sports Direct* (under s. 120);<sup>5</sup> and (ii) *The Association of Convenience Stores* (under the analogous provisions in s. 179).<sup>6</sup> There are no grounds for departing from those precedents in this case.

ALISTAIR LINDSAY  
8 February 2010

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<sup>5</sup> Case No 1116/4/8/09.

<sup>6</sup> [2005] CAT 36.