



Neutral citation [2010] CAT 7

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1150/4/8/10

Victoria House
Bloomsbury Place
London WC1A 2EB

11 February 2010

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
MARCUS SMITH
PROFESSOR ANDREW BAIN OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

CTS EVENTIM AG

Applicant

-v-

COMPETITION COMMISSION

Respondent

-supported by-

LIVE NATION ENTERTAINMENT, INC

Intervener

REPRESENTATION:

Mr. Alastair Lindsay (instructed by Allen & Overy LLP) appeared for the Applicant.

Mr. Daniel Beard and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Mark Hoskins Q.C. (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Intervener.

Heard at Victoria House on 10 February 2010

RULING (SETTING ASIDE OF DECISION)

Introduction

1. On 10 February 2009 Ticketmaster Entertainment, Inc and Live Nation, Inc. announced their proposed merger worth about £550 million. This application, against a decision of the Competition Commission, arises from that Merger. Live Nation is primarily a promoter of live music events and an owner/operator of live music venues. Ticketmaster is primarily a ticket agent, and sells many tickets on behalf of live music promoters and venue operators.
2. The Competition Commission investigated the Merger under Part 3 of the Enterprise Act 2002 (“the Act”), following a reference by the Office of Fair Trading under section 33 of the Act, which deals with anticipated mergers. In its Report, the Commission found that the Merger was unlikely to result in a substantial lessening of competition (“SLC”) in any UK market. The Commission therefore decided to give the Merger unconditional clearance.
3. CTS Eventim AG (“Eventim”) applied for the Commission’s findings to be reviewed by the Tribunal pursuant to section 120 of the Act 2002. Eventim is both a provider of ticketing services and a ticket agent, and a promoter of live music events. Eventim contends that the Commission erred in law in several respects. The first is that the Commission denied Eventim its right to a fair hearing and in particular deprived it of the chance to comment on the Commission’s adverse provisional findings on the Merger. That underlies three other points taken by Eventim, which all concern alleged errors by the Commission in its substantive assessment of the Merger. The Tribunal is required to apply the same principles, on such a review, as would be applied by a court on an application for judicial review: section 120(4).

Proposed final order

4. Having considered the Notice of Application lodged on 20 January 2010 the Treasury Solicitor (on behalf of the Commission) wrote to the Tribunal on 28 January indicating there was consensus between Eventim and itself as to the disposal of the application. The parties agreed about the final order to be made: that the Tribunal should quash the Report and refer the matter back to the Commission under section 120(5)(b) of the Act. Eventim and Live Nation Entertainment Inc have both confirmed that they agreed with the form of the order proposed by the Commission.

5. The need for the Tribunal to make an Order in this matter arises because the Commission cannot unilaterally extend the time it has to consider the Merger. Investigation by the Commission is governed by section 39 of the Act. The Commission has a period of 24 weeks to consider a merger reference and reach its decisions. It can extend this period by up to eight weeks where there are special reasons why it cannot complete its report within the normal period: section 39(3). In the present case the extended time period has expired. The Merger was completed on 25 January 2010, the same day on which the U.S. Department of Justice announced that it had settled the antitrust lawsuit it had brought in relation to the Merger (subject to the U.S. District Court for the District of Columbia finding that the settlement is in the public interest). The merged entity is now known as Live Nation Entertainment, Inc (“Live Nation”) and was granted permission to intervene in these proceedings by Order of 1 February 2010.

Form of the Tribunal’s Order

6. The Tribunal’s power to direct a reconsideration and a new decision is contained in section 120(5) of the Act, which provides as follows:

“(5) The Competition Appeal Tribunal may—

(a) dismiss the application or quash the whole or part of the decision to which it relates; and

(b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal.”

7. So far as the application of section 120(5)(a) to this case is concerned, the parties are agreed that the Report should be quashed. The Commission provided a short statement of the matters relied on as justifying the proposed agreed order (see Commission’s Skeleton Argument dated 8 February 2010). The Commission has explained that Eventim’s first ground of review, based on procedural fairness, was “arguable”, at least in the particular circumstances of the present case. Eventim was not only an interested third party to its investigation: Eventim’s strategy and entry into the UK market formed a key part of the Commission’s assessment of the effects of the Merger. The Commission recognised that the matters upon which Eventim seeks to comment could affect the findings contained in the Report and in particular the conclusion that the Merger was not anti-competitive. Motivated by pragmatic considerations, the

Commission would prefer to hear Eventim's representations now rather than await the Tribunal's final judgment in this matter.

8. So far as section 120(5)(b) of the Act is concerned, the Commission submitted that the Tribunal should refer the relevant matters back to it for reconsideration and the making of a new decision. As matters stand, we have not heard argument on the matters contained in the Notice of Application and there is no ruling of the Tribunal with which any new decision must comply. What is therefore proposed is that, upon referring the matter back, the Commission will treat its Report as Provisional Findings and then reconsider and, at least to some extent, reinvestigate the matters in question. Eventim has agreed to this proposal.
9. The Tribunal has considered the proposed agreed order and is satisfied that the Order should be made for the reasons given in the parties' written and oral submissions. The Commission followed a proper course by intimating its intentions to the other parties and to the Tribunal at an early stage of the proceedings. In our judgment the most efficient and sensible way of dealing with the concerns about procedural fairness raised in the Notice of Application (on which we otherwise express no view) is for the findings in the Report to be quashed and reconsidered. The Commission has accepted that it necessarily follows that it will need to reconsider the substantive matters which were also the subject of the Notice of Application, but we express no view on those matters. Therefore we quash the Report and direct the Commission to reconsider the questions contained in paragraph 2 of the Office of Fair Trading's Terms of Reference dated 10 June 2009, which are the statutory questions which it normally has to decide in relation to anticipated mergers. The Tribunal will deal separately with costs.
10. The Commission offered an undertaking to the Tribunal to reach a new decision pursuant to section 120(5)(b) within a period of three months. Three months was said to be the typical period in which the Commission has found an SLC in recent merger references and so had to answer the statutory questions relating to remedies. Eventim and Live Nation raised no objection to the proposed period of three months. In these circumstances we accept the Commission's undertaking and will recite the undertaking in the Tribunal's order referring the matter back. As we indicated at the oral hearing, we consider that it is in the interests of all who are active in the live music supply chain

that this reconsideration of the effects of the Merger is carried out as quickly as is reasonably possible and we would exhort the Commission to act accordingly.

The Chairman

Marcus Smith

Andrew Bain

Charles Dhanowa
Registrar

Date: 11 February 2010