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Case Nos.: 1216/4/8/13
1217/4/8/13

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

4 December 2013

Before:

MARCUS SMITH Q.C.
(Chairman)
HERIOT CURRIE Q.C.
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

GROUPE EUROTUNNEL S.A.

Applicant

- v -

COMPETITION COMMISSION

Respondent

- and -

SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.
DFDS A/S

Interveners

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GROUPE EUROTUNNEL S.A.
DFDS A/S

Interveners

Heard at Victoria House on 10 and 11 September 2013

JUDGMENT

I. INTRODUCTION

(a) The factual background

1. Groupe Eurotunnel S.A. is the parent of two companies (The Channel Tunnel Group Limited and France Manche S.A.) which have formed a partnership to operate the channel tunnel between Coquelles in the Pas-de-Calais, France, and Folkestone in Kent, England. We shall refer to this group collectively as "Eurotunnel".[1] The concession to operate the tunnel was granted in 1986, although the tunnel itself only opened in 1994. The concession expires in 2086. Eurotunnel provides transport services to passengers and freight through the tunnel, and owns and controls other assets and businesses which are, for present purposes, not material.

2. SeaFrance S.A., which was originally set up in 1945, was a wholly owned subsidiary of Groupe SNCF ("SeaFrance"). Until November 2011, SeaFrance operated ferry services between Calais and Dover. However, from 2008 onwards, SeaFrance's business did not go well and, on 28 April 2010, SeaFrance applied to the French courts (the Tribunal de Commerce de Paris, hereafter the "French Court") for bankruptcy protection from its creditors, and was placed into administration on 30 June 2010. Although in administration, SeaFrance was able to, and did, continue its ferry services.

3. From July 2010 onwards, the French Court administrators sought buyers for SeaFrance's vessels, contracts and staff, as part of a plan to sell the business. Although various offers were received in the period up to February 2012, none of these were regarded as adequate given the perceived value of SeaFrance's assets. On 16 November 2011, the French Court ordered the liquidation of SeaFrance. Although the French Court ruled that SeaFrance could, notwithstanding the onset of the liquidation, continue its activities, ferry services ceased to be operated by SeaFrance from this point in time. On 9 January 2012, the French Court formally ordered SeaFrance to cease operating, and placed the company into liquidation.

[1] Annex 1 contains a glossary of defined terms, together with a statement of where, in the Judgment, each defined term is first used.

Following the liquidation of SeaFrance, SeaFrance's berthing slots in Dover and Calais were surrendered, and its vessels "mothballed". This involved placing them in a state of "hot lay-by", a minimum operating mode designed to maintain the condition of the vessels (for example, by running the engines regularly).

4. The French Court receiver decided (as was his right) that instead of a public auction, SeaFrance's assets should be sold by way of a private sale, involving sealed bids. A deadline of 4 May 2012 was set for the receipt of the sealed bids, and these were allowed to be in any or multiple configurations for the various assets of SeaFrance.

5. Four bids were received. Of these, two need to be described in greater detail:

   (a) *Eurotunnel's bid*. Eurotunnel's bid was for three of SeaFrance's vessels (the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais*) and other tangible and intangible assets. The bid was in the amount of €65 million.

   (b) *DFDS's bid*. DFDS A/S ("DFDS") is, like SeaFrance itself, a ferry operator providing ferry services in the short sea. (The "short sea" is a term of art defined as the area bounded in the north-east by the Ramsgate-Ostend route and in the west by the Newhaven-Dieppe route. Routes in the short sea include Dover-Calais and Dover-Dunkirk, as well as transit via the channel tunnel, even though such services are not provided by ferries.) DFDS operated short sea ferry services on the Dover-Dunkirk route, using three ferries. In early 2012, taking advantage of the freeing of berthing slots in the port of Calais following the liquidation of SeaFrance, DFDS launched a new service on the Dover-Calais route, using two chartered ships. DFDS's channel operations were subsequently transferred into a joint venture with the ferry operations of Louis Dreyfus Armateurs. Nothing turns on this, however, and in this judgment we shall use the term DFDS to embrace DFDS's operations both before and after the commencement of this joint venture. DFDS bid €30 million for the *Berlioz* and €25 million for the *Rodin*, or €50 million if it acquired both vessels. (A subsequent, revised, bid was submitted by DFDS, but because it was received after the deadline it

was not considered, and is irrelevant for present purposes.) Although DFDS's bid was (as we describe) unsuccessful, at the time of this judgment DFDS's Dover-Calais operations continue.

6. Although it had previously expressed an interest in the SeaFrance vessels, The Société Coopérative de Production Sea France S.A. ("the SCOP") did not bid at this time. The SCOP is a workers' co-operative founded on 7 October 2011 by a group of 14 former SeaFrance employees. In 2011, and again on 9 January 2012, the SCOP offered €1 for SeaFrance's business, which offers were rejected. The SCOP did not bid in the sealed bid process described in paragraph 5 above, because it had come to an arrangement (i.e. an understanding that was not necessarily in legally binding form) with Eurotunnel that it would – were Eurotunnel's bid to succeed – provide the labour that would operate the three SeaFrance vessels that Eurotunnel was interested in acquiring (namely, the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais*).

7. In the event, Eurotunnel's bid was successful, and – in addition to the three vessels – Eurotunnel acquired the SeaFrance logos, brand and trade name, computer software, websites and domain names, IT systems, customer records and the inventory of technical and spare parts, as well as IT hardware and office equipment. This transaction completed on 2 July 2012 (the "Acquisition").

8. Thereafter:

   (a) Because the vessels had been out of operation since SeaFrance ceased its short sea crossings in November 2011, Eurotunnel placed the vessels in "flash dock" to prepare them for service again.

   (b) Eurotunnel acquired berthing slots at the ports of Calais and Dover, so as to enable the vessels to operate a Dover-Calais ferry service. (It will be recalled from paragraph 3 above that SeaFrance gave up its berthing slots at these ports, and so these could not be acquired from SeaFrance by Eurotunnel.)

(c) Eurotunnel finalised agreements with the SCOP defining how the operation would be managed and controlled. A key aspect of this is that the SCOP operates the vessels and provides the crews for them. These crews comprise largely – although not exclusively – former SeaFrance employees. Discussions between Eurotunnel and the SCOP as to an arrangement along these lines had occurred since (at least) January 2012 and it was no doubt because of these discussions that the SCOP did not – during the sealed bids process – bid for the vessels. These arrangements were set out in the following documents, which were concluded between the SCOP and either Eurotunnel or a corporate vehicle set up by Eurotunnel (it does not matter which):

(i) A memorandum of understanding dated 29 June 2012 (the "Memorandum of Understanding").

(ii) Three bareboat charters (one each in respect of the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais*) dated 29 June 2012 (the "Bareboat Charters").

(iii) A commercialisation agreement dated 18 July 2012 (the "Commercialisation Agreement").

These documents were all in French, but we were provided with translations.

9. On 20 August 2012, the entity that Eurotunnel established to operate the ferry services, MyFerryLink SAS ("MyFerry"), commenced ferry operations on the Dover-Calais route using the *Rodin* and the *Berlioz*. The *Nord Pas-de-Calais* is a freight only vessel, initially used as a reserve ferry. The vessels are owned by three separate subsidiaries of Eurotunnel, and are chartered to the SCOP by way of three separate charter-parties, namely the Bareboat Charters referenced in paragraph 8(c)(ii) above.

10. The ferry service is marketed using the "MyFerryLink" brand, and not the SeaFrance brand.

11. It is important to note that Eurotunnel obtained the vessels (and the other SeaFrance property) having accepted terms imposed by the French Court. In particular, the French Court imposed an "inalienability clause", prohibiting Eurotunnel from selling the vessels it had acquired for a period of five years (that is, until 11 June 2017).

(b) The reference by the OFT to the Commission

12. The Enterprise Act 2002 (the "Act") provides (amongst other things) for references of completed mergers – which the OFT thought this might be – by the Office of Fair Trading (the "OFT") to the Competition Commission (the "Commission"). Section 22(1) of the Act provides:

> "The OFT shall... make a reference to the Commission if the OFT believes that it is or may be the case that –
>
> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

13. On 29 October 2012, the OFT sent the following reference to the Commission (omitting footnotes[2]):

> "1. In exercise of its duty under section 22(1) of the [Act] to make a reference to the [Commission] in relation to a completed merger, the [OFT] believes that it is or may be the case that:
>
> (a) a relevant merger situation has been created in that:
>
> (i) enterprises carried on by or under the control of [Eurotunnel] have ceased to be distinct from enterprises comprising certain assets of former [SeaFrance]; and
>
> (ii) the condition specified in section 23(3) of the Act is satisfied; and
>
> (b) the creation of that situation has resulted or may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services, including the supply of passenger and freight transport services on the short sea channel crossing.
>
> 2. Therefore, in exercise of its duty under section 22(1) of the Act, the OFT hereby refers to the [Commission], for investigation and report within a period ending on 14 April 2013, on the following questions in accordance with section 35(1) of the Act:

[2] Unless the contrary appears, all quotations omit footnotes.

(a) whether a relevant merger situation has been created; and

(b) if so, whether the creation of that situation has resulted in a substantial lessening of competition within any market or markets in the UK for goods and services."

(c) The Commission's Decision

14. Section 35(1) of the Act provides:

> "Subject to subsections (6) and (7) and section 127(3), the Commission shall, on a reference under section 22, decide the following questions –
>
> (a) whether a relevant merger situation has been created; and
>
> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

15. If a relevant merger situation has been created, which has resulted or may result, in a substantial lessening of competition, then there arises what the Act defines in section 35(2) an "anti-competitive outcome". Where the Commission has decided that an anti-competitive outcome exists, it is further obliged to consider how that outcome may be remedied, mitigated or prevented: section 35(3) of the Act.

16. By a decision made on 6 June 2013, entitled "A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A." (the "Decision"), the Commission determined that:

(a) A relevant merger situation within the meaning of section 23(3) and (4) of the Act had been created: see section 4 of the Decision and, in particular, paragraphs 4.68 to 4.72, 4.73 to 7.76 and 4.79. Paragraph 4.80 of the Decision states:

> "We therefore conclude that the jurisdiction test under the Act is satisfied and that a relevant merger situation has been created."

(b) The merger might be expected to result in a substantial lessening of competition in the market for the supply of transport services to passengers on the short sea and in the market for the supply of transport services to freight customers on the short sea: paragraph 9.8 of the Decision.

As a result of these two decisions, an anti-competitive outcome of the sort described in paragraph 15 above existed. In consequence, the Commission was obliged to consider and determine upon the possible remedies to the anti-competitive outcome.

(c) Pursuant to its powers under the Act, the Commission prohibited Eurotunnel from operating ferry services at the port of Dover from a date six months after the date of the order to implement the remedy and, in the meantime, permitted Eurotunnel to divest two of the three vessels it had acquired – the *Berlioz* and the *Rodin* – to a purchaser satisfactory to the Commission. The Commission did not make the perhaps more usual and certainly more straightforward divestment order because of the inalienability clause (described in paragraph 11 above) imposed by the French Court.

(d) The Applications

17. Section 120(1) of the Act provides that any person aggrieved by a decision of the Commission under Part 3 of the Act (Mergers) (into which Part the Decision falls) may apply to the Tribunal for a review of that decision. Pursuant to section 120(4), the Tribunal is required to decide such applications by applying the "same principles as would be applied by a court on an application for judicial review".

18. By two applications made before this Tribunal, respectively dated 18 June 2013 (the "Eurotunnel Application") and 3 July 2013 (the "SCOP Application"), Eurotunnel and the SCOP sought to review the Decision of the Commission pursuant to section 120 of the Act. We refer to the Eurotunnel Application and the SCOP Application collectively as the "Applications".

19. Given that the Applications both related to the same Decision, it made sense to hear them together, and the Tribunal managed the Applications accordingly.

20. By orders made on 24 June 2013 in the Eurotunnel Application and on 10 July 2013 in the SCOP Application, the following requests for permission to intervene were granted:

(a) Eurotunnel and the SCOP were granted permission to intervene in support of each other in the SCOP Application and the Eurotunnel Application respectively; and

(b) DFDS was granted permission to intervene in support of the Commission in both Applications.

21. The Commission responded to the Applications by way of a combined Defence, and the interveners filed short statements in support of their position. In addition, we received written skeleton arguments from all the parties, and heard oral submissions over two days. Many of the written materials were supplemented by other documents, including witness statements to which we make more specific reference during the course of this judgment.

22. At the outset of the substantive hearing, we heard applications to admit late two witness statements (the statements of Mr. Genin, on behalf of the SCOP, and of Mr. Færge, on behalf of DFDS). Both applications were objected to, and we made it clear during the course of the hearing (Day 1/pages 2 and 4 to 5) that we would grant the applications, but give our reasons later, which we do now. Whilst both applications were made late, this hearing was an expedited one, and the parties all had considerable burdens in preparing for the hearing. In these circumstances, provided that there was no prejudice to other parties, the Tribunal was prepared to grant some latitude to the applicants. In the case of these two statements, we considered that there would be no prejudice to any of the parties if they were admitted. As was noted on Day 1/pages 4 to 5, the fact that these statements were admitted into evidence says nothing as regards the weight that the Tribunal attaches to them.

23. Eurotunnel's and the SCOP's grounds of appeal, as set out in the Applications, are numerous. Eurotunnel advanced five grounds (referred to herein as "Eurotunnel's Grounds 1 to 5") and the SCOP advanced six grounds (referred to herein as "SCOP's Grounds 1 to 6"). These eleven grounds of appeal fall within the following broad groups:

(a) *Jurisdictional challenges*. The SCOP's Grounds 1 to 4 all contend that (for different reasons) the Commission's conclusion that a relevant merger situation had been created was one that would, on an application for judicial review, be set aside. A finding that a relevant merger situation exists is necessary in order for the Commission to have jurisdiction to consider the merger, as the Commission itself rightly recognised in paragraph 4.80 of the Decision. The SCOP's Grounds 1 to 4 all contend that there was no relevant merger situation, and so no jurisdiction in the Commission to consider the merger.

(b) *Natural justice challenges.* It is trite that, as an administrative body, the Commission is subject to the rules of natural justice. Eurotunnel, in its Ground 1, and the SCOP, in its Ground 5, contended that the Decision had been arrived at by the Commission in breach of these rules, and so ought to be set aside. The attack on the Commission's procedures proceeded on two fronts:

(i) First, it was contended by Eurotunnel that the Commission's procedures were unfair and in breach of the rules of natural justice given two recent decisions emanating from the Supreme Court. This was the substance of Eurotunnel's Ground 1.

(ii) Secondly, and much more specifically, it was contended that in a number of cases the Commission had failed to give Eurotunnel and/or the SCOP a fair hearing. This was the substance of Eurotunnel's Ground 1 (which confusingly addressed both the general and the specific) and SCOP's Ground 5.

(c) *Failure to take account of relevant considerations and/or taking into account irrelevant considerations.* By its Grounds 2, 3 and 4, Eurotunnel contended that the Commission had failed to explore certain relevant issues and/or had wrongly failed to take into account matters relevant to its Decision, such that (applying the rules applicable on a judicial review) the Decision ought to be set aside.

(d) *Challenges to the nature of the remedy imposed by the Commission.* On the assumption that the Decision was not susceptible of challenge on the grounds described above, Eurotunnel's Ground 5 and the SCOP's Ground 6 contended that the manner in which the Commission proposed to remedy the anti-competitive outcome was disproportionate, and so liable to be set aside on a judicial review.

24. We consider these groups of challenge in the following sections of this judgment. Section II considers the jurisdictional challenges. Section III considers the general contention advanced by Eurotunnel that the Commission had acted in breach of the rules of natural justice. Section IV considers the specific complaints made in this regard by Eurotunnel and the SCOP. Section V considers Eurotunnel's complaint that the Commission failed to take into account relevant considerations and/or took account of irrelevant considerations. Section VI considers the challenges to the nature of the remedy imposed by the Commission. Each of these Sections sets out, in greater detail, the precise nature of the various challenges to the Decision made by Eurotunnel and the SCOP. Finally, Section VII states our conclusions.

II. JURISDICTIONAL CHALLENGES

(a) Introduction

25. In order to understand the gravamen of the jurisdictional challenges advanced by the SCOP in its Grounds 1 to 4, it is necessary to understand the route by which the Commission came to the conclusion that a relevant merger situation existed in this case. The Commission's reasoning is described in Section II(b) below.

26. Section II(c) describes the four grounds on which SCOP attacks the Commission's reasoning.

27. Section II(d) considers the approach to be taken by the Tribunal when considering a contention that the Commission lacked jurisdiction. Obviously, the Tribunal's fundamental approach is laid down in section 120(4) of the Act, which obliges the Tribunal to apply the "same principles as would be applied by a court on an application for judicial review". However, it is necessary to consider precisely what

principles apply on a judicial review where it is contended that an administrative decision-maker erroneously concluded that it had jurisdiction.

28. Finally, it is necessary to consider whether, applying the test identified in Section II(d), SCOP's Grounds 1 to 4 succeed or not. This is considered in Section II(e) below.

(b) The Commission's reasoning

(i) *The meaning of "relevant merger situation"*

29. According to paragraph 2(a) of the OFT's reference of the Acquisition to the Commission (which is set out in paragraph 13 above, and is set out in paragraph 1 of Appendix A to the Decision), the Commission was obliged to consider – in accordance with section 35(1)(a) of the Act – whether "a relevant merger situation has been created".

30. Section 23 of the Act describes two, distinct, relevant merger situations. The first is stated in section 23(1) of the Act:

> "For the purposes of this Part, a relevant merger situation has been created if –
>
> (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and
>
> (b) the value of the turnover in the United Kingdom of the enterprise being taken over exceeds £70 million."

31. This type of merger situation is referred to as being based on a "turnover test", because the second limb of section 23(1) (i.e. section 23(1)(b)) is based on turnover. The Decision is not based on the turnover test (see paragraph 4.77 of the Decision) and for this reason it is not necessary to consider the turnover test any further.

32. The second type of relevant merger situation is stated in section 23(2) of the Act:

> "For the purposes of this Part, a relevant merger situation has also been created if –
>
> (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and
>
> (b) as a result, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent."

33. Sections 23(3) and (4) state a test based upon share of supply of goods: hence, this type of merger situation is referred to as being based on a "share of supply test".

34. The question of whether a "relevant merger situation" exists is not a straightforward one. In this case, it required the Commission:

(a) To determine whether the "enterprises" in question had ceased to be distinct within the meaning of the Act. Section 26 of the Act defines when enterprises cease to be distinct.

(b) To determine whether these enterprises had ceased to be distinct within the time frame laid down in section 24 of the Act.

(c) To determine whether the "share of supply" test had been met.

Although these questions are inter-related, for the purposes of analysis they need, at least to some extent, to be considered separately. That is what the Commission did in the Decision, and we follow this approach below.

(ii) *Two enterprises ceasing to be distinct within the meaning of section 26*

35. The Commission decided that, within this time frame, two enterprises had ceased to be distinct within the meaning of section 23(2)(a). The Commission's conclusions in this regard were as follows:

> "4.68 In total, the assets purchased and staffing arrangements put in place by [Eurotunnel] to be taken into account for this assessment comprise:
>
> (a) vessels which were of suitable design and of sufficient number to operate a passenger and freight transport business on the short-sea route; these vessels were in a condition from which they were able to be brought into operation within two months of the acquisition taking place;
>
> (b) those former SeaFrance employees who now comprise some three-quarters of the staff engaged in running the [MyFerry] service;
>
> (c) brand and goodwill carrying some, but limited, positive value; and
>
> (d) customer lists, though given the difficulty in assessing their value, we have not attached any weight to these in our assessment.

> 4.69 Together [Eurotunnel] and the SCOP brought these assets under common control for the purposes of section 26 of the Act.
>
> 4.70 On the other hand, [Eurotunnel] did not acquire control of ex-SeaFrance customer and supplier contracts. For the reasons given above, we have concluded that this absence is of some, but limited, relevance to the 'enterprise' assessment.
>
> 4.71 On balance, and taking all of the above factors into account including the length of time between the end of SeaFrance's operations and the start of [MyFerry's] operations, we have concluded that, in the context of the particular industry concerned, the components referred to in paragraph 4.68 above do meet the statutory definition of an 'enterprise', and constitute the activities, or part of the activities, of a business.
>
> 4.72 We are satisfied that the assets acquired from the liquidator are under [Eurotunnel's] control. As described above, we are also satisfied that the ex-SeaFrance staff employed by the SCOP have also ceased to be distinct from [Eurotunnel's] other businesses."

36. In many merger situations, one enterprise (the "acquiring entity") acquires another enterprise (the "acquired entity") in such circumstances that those enterprises cease to be distinct. In this case, because of the role played by the SCOP, it is important to be absolutely clear what was the acquiring entity and what was the acquired entity.

37. The Commission's terms of reference, which are set out in Appendix A to the Decision, make clear that the acquiring entity was Eurotunnel and the acquired entity "certain assets of former SeaFrance S.A." The question is how the SCOP fits into this picture.

38. This was a matter which was the subject of some debate at the hearing, but it is clear from the terms of the Decision that:

    (a) The Commission was aggregating Eurotunnel and SCOP and treating them as a single entity, which we shall refer to as "Eurotunnel/SCOP" (see, for example, paragraphs 4.26 and 4.69 of the Decision); and

    (b) The Commission considered that Eurotunnel/SCOP acquired the assets identified in paragraph 4.68 of the Decision, namely the vessels, the former SeaFrance employees, the brand and goodwill and the customer lists (see, for example, paragraphs 4.3, 4.15, 4.68 and 4.69 of the Decision). We shall refer to these assets as the "SeaFrance Assets".

39. The basis upon which the Commission considered it was able to reach such conclusions was twofold:

(a) First, the Commission concluded that, pursuant to section 127 of the Act, Eurotunnel and the SCOP had acted together as associated persons to secure or exercise control of the SeaFrance Assets (section 127(4)(d)), and so fell to be treated as "one person" for the purposes of section 26 (which lays down the test of when enterprises cease to be distinct): see paragraphs 4.26(a) and 4.30 to 4.40 of the Decision.

(b) Secondly, the Commission concluded that, according to the test of when enterprises cease to be distinct laid down in section 26, Eurotunnel had "material influence" over the SCOP, and therefore its employees: see paragraph 4.26(b) and 4.41 to 4.47 of the Decision.

It seems clear from the terms of the Decision that the Commission regarded these as alternative and/or cumulative bases for its conclusions. In other words, its conclusions could be justified on either ground or both grounds could pertain at the same time.

40. At paragraph 4.47 of the Decision, the Commission said as follows:

> "Overall, we consider that the ex-SeaFrance staff employed by the SCOP fall to be included within the [Commission's] assessment of whether two 'enterprises' have ceased to be distinct, either because [Eurotunnel] and the SCOP acted together to secure control of the liquidation assets and are therefore associated persons, or because [Eurotunnel] has material influence over the SCOP."

(iii) Ceased to be distinct within the section 24 time frame

41. Section 24 of the Act essentially provides that a merger must be referred within four months of the enterprises ceasing to be distinct.

42. In the Decision, the Commission decided that two or more enterprises had ceased to be distinct within the time frame laid down by section 24: see 4.78 to 4.79 of the Decision. The Commission based this conclusion on the date of the completion of the Acquisition on 2 July 2012 (see paragraph 7 above) and on the conclusion of the

Memorandum of Understanding on the same date (see paragraph 8(c)(i) above). Paragraph 4.79 of the Decision states:

> "The transaction was completed on 2 July 2012. On the same date, [Eurotunnel] and the SCOP signed a Memorandum of Understanding. The reference was made to the [Commission] on 29 October 2012. The statutory time limit has therefore been observed."

In fact, the Memorandum of Understanding was signed on 29 June 2012, and not on 2 July 2012.

(iv) *The share of supply test*

43. The Commission found the "share of supply" test within section 23(3) and (4) of the Act to have been satisfied: paragraphs 4.73 to 4.76 of the Decision. No-one challenged this aspect of the Decision, and we consider it no further.

(c) Overview of the SCOP's contentions

44. The SCOP contended that the Commission had no jurisdiction to consider the merger because no relevant merger situation existed and that the Commission's conclusion that such a situation did exist was erroneous. Paragraph 8 of the SCOP Application states as follows:

> "...the SCOP challenges the Commission's finding that it has *jurisdiction* to consider the merger. This is the subject of Grounds 1 to 4. In short:
>
> (1) the Commission erred in concluding that [Eurotunnel] and the SCOP were 'associated persons';
>
> (2) but, if they were 'associated persons', the Commission erred in concluding that two enterprises ceased to be distinct because the 'associated persons' only obtained assets (i.e. the vessels) which did not constitute an enterprise;
>
> (3) alternatively, if they were not 'associated persons', the Commission erred in concluding that [Eurotunnel] had material influence over the SCOP; and
>
> (4) further or alternatively, there was no proper basis for the Commission to find that [Eurotunnel] acquired "*the activities of a business*" (being the definition of an "enterprise" under section 129 of the Act) in circumstances where SeaFrance had ceased all activity some 7½ months before the transaction took place."

45. It will be necessary to consider these various contentions in turn. We do so in Section II(e) below. Before we do so, however, it is necessary to set out the test to

be applied by the Tribunal when considering a contention that the Commission lacks jurisdiction. This we consider in Section II(d). In particular, we need to consider the distinction between questions of fact and questions of law.

(d) Questions of fact and questions of law

46. In his submissions, Mr. Harris Q.C., who appeared for the Commission, at times appeared to contend that whether or not the Commission had correctly determined its jurisdiction turned essentially on questions of fact, where the Commission should be entitled to a large margin of appreciation. Thus, on Day 2/pages 25-28[3], the following exchange took place:

> **Mr. Harris** ...Then still in the same bundle, there is tab 47, the *BSkyB* case. This was, of course, a challenge by both Virgin and BSkyB to a remedy imposed upon BSkyB about its shareholding in ITV, that they bought 17.9%, they were "remedied down" (if I can put it like that) to 7.5%, BSkyB said they should not have been remedied down at all, and Virgin of course predictably said they should have been remedied down to zero. That is the context. Can I pick it up at para 63. This Tribunal was presided over by Mr. Justice Barling, the President, was facing submissions about the principles of judicial review. Can I pick it up half way down 63:
>
> > "As the Commission and the Secretary of State submit, the Tribunal must avoid blurring the distinction which Parliament clearly drew between a section 120 review and an appeal on the merits. We shall need to bear this distinction in mind when we come to deal with the specific points raised by Sky in relation to the factual basis upon which the Commission reached the challenged findings. It is one thing to allege irrationality or perversity, it is another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views for those of the Commission. The latter is not permissible…"
>
> That very succinctly describes a large chunk of the submissions that you are faced with, whether it be on jurisdiction or whether it be upon links in the chain of reasoning as regards DFDS exit or DFDS re-entry having exited. They are, in effect, inviting you to reassess the weight of evidence and effectively to substitute your views for those of the Commission. You cannot do that in this judicial review proceeding.
>
> **The Chairman** I quite take your point as far as the conclusions reached in terms of the anti-competitive effect, but surely when one is determining whether there is jurisdiction the test is rather different?

[3] All references to "Day [●]/page(s) [●]" refer to the transcript for the relevant hearing day, all of which are available at www.catribunal.org.uk

Mr. Harris Jurisdiction is a good example, sir. Take material influence, it is dressed up as misdirection, not understanding the statute, and all the rest of it. We did investigate it, we did have evidence, we assessed it and weighed it, and Mr. Beard on behalf of the SCOP says, "Actually, I do not agree because you did not have a board representation" - this is what it boils down to - "you did not have a shareholding". That is effectively inviting you to reassess the weight of the evidence that we did have, and say it should be outweighed by the fact that you did not have that evidence.

The Chairman Let us take another point though, the meaning of the word "enterprise", and whether there was an enterprise in the form of the three vessels.

Mr. Harris Yes, but even that one on analysis is exactly the same type of approach. What he is saying is, "I am telling you that they were not activities", that is the critical word that he relies upon on the question of enterprise, "I am telling they were not activities because look at this factor and look at that factor". In fact, it is more or less just look one factor, seven and a half months. That is basically what his submission was, seven and a half months, end of story.

It is not the end of the story, because we did have evidence on our side of the scale. We have things like the hot lay-by of the vessels, and a whole rack of others that I will come to when I deal with that. The point is that we assess that and we reach an evaluative judgment based upon that evidence that we had uncovered. We said that our judgment, based upon assessing and evaluating that evidence, is X, and it simply does not matter that Mr. Beard's judgment on behalf of his client would be different. With great respect, it does not matter even if this Tribunal's substantive assessment of those factors in the balance would be different. That is not the sort of thing that can enable this Tribunal to overturn that sort of substantive assessment. To say that it is all about the meaning of "activities" as a matter of law does not advance the debate any further.

The Chairman So you say that the margin of appreciation in the Competition Commission extends to questions of what I would call "jurisdictional fact" - in other words, where you need to find a certain factual situation to arise in order to have jurisdiction in the first place?

Mr. Harris Absolutely, yes.

Mr. Currie Can I just ask you this, Mr. Harris: what would your view be if I suggested to you that the correct approach was that it was for the [Commission] to find the facts in relation to whether or not [Eurotunnel] had acquired the activities or part of the activities of the business, but ultimately, once the [Commission] has found the facts, it is a matter of law whether those facts constitute the activities or part of the activities of a business. Would you agree with that or not?

Mr. Harris My answer to that is that one has to fit in the evaluative assessment that is reached upon the facts by the [Commission] within the words of the statute. There is a cross-relation

between what we come out with at the end of our balancing exercise and whether or not it would be "activities". I do not think there is any sensible doubt - certainly not in our submission - that the factors that we did have regard to are capable of being viewed as activities?

Mr. Currie Surely, ultimately that is a matter of law.

Mr. Harris I accept that is a matter of law as to what the true meaning of the word "activities" is, but what I am saying is that on this challenge what is effectively being said is, "You have had regard to something that could reasonably amount to activities and we have had regard to some other factors that possibly are not some activities". It is really trying to upset the balance. It is dressed up. That is my submission, it is dressed up as, "This does not fit within the meaning of activities". When we come to look at the factors that we did actually rely upon as saying that there was an "enterprise", first of all, we plainly directed ourselves to the answer of the statutory question, that is beyond doubt when we go to the report.

Then my submission will be that on no sensible approach can it be said that the factors we relied upon could not rationally or properly be connected to a conclusion or a judgment that they were "activities".

The Chairman I think you are agreeing that as the list of factors as identified by the [Commission] as constituting "enterprise", we look at those, but the question of whether, having regard to those factors, whether they are not capable of constituting an enterprise is, at the end of the day, a question of law?

Mr. Harris Yes, I do accept that, that is common ground between us. One does not even have to take a full step back, this is just a half a step back. What is really going on in that part of the challenge is it is inviting you to reassess the factors in the balance. That is what he is really doing. That is our submission, and that is what we say is met by the passage from *BSkyB* that I have just drawn your attention to.

47. Whilst Mr. Harris ultimately accepted that the SCOP's jurisdictional questions raised both issues of fact and issues of law, for reasons which we will explain below, we felt that Mr. Harris (as the above passage indicates, and see also Day 2/pages 69 to 70 and 80) over-emphasised the importance of factual questions (and so, the margin of appreciation in the Commission) and under-emphasised the importance of legal questions.

48. The sixth edition of Mr. Fordham Q.C.'s *Judicial Review Handbook* contains, in paragraph 13.2.2, a helpful citation of cases that articulate the distinction between questions of fact and questions of law, which the Tribunal put to Mr. Harris on Day

2. In *R (The Royal Borough of Windsor and Maidenhead) v The East Berkshire Justices* [2010] EWHC 3020 (Admin), the court had to determine whether an object was a "knife" within the meaning of section 141A of the Offensive Weapons Act 1996. Sir Anthony May P stated at [10]:

> "In my judgment this is not a pure question of fact, but rather a mixed question of fact and law. Once it is determined what by description the article is and what are its characteristics it is a matter of law whether it is a knife within the section of the Act..."

49. Similarly, in *R (Thames Water Utilities Limited) v Water Services Regulation Authority* [2012] EWCA Civ 218, Laws LJ stated at [23]:

> "...The water is, however, a little deeper when we consider the nature of the question, a very familiar question, whether a statutory measure applies to a particular set of facts. For this question is ambiguous. It may mean: is the statute to be construed so as to cover the accepted facts? That is a question of law. Or it may mean: are the facts to be judged as falling within the accepted meaning of the statute? That is a question of fact..."

50. We consider that these cases helpfully articulate the distinction between questions of law and questions of fact for the purposes of the SCOP's jurisdictional contentions that we were exploring with Mr. Harris, and inform the test that we seek to apply below.

(e) The SCOP's contentions on jurisdiction

(i) *The SCOP's first ground: Eurotunnel and the SCOP were not "associated persons"*

51. Section 127(4)(d) of the Act states that "two or more persons acting together to secure or exercise control of a body of persons corporate or unincorporate or to secure any enterprise or assets...shall be regarded as associated with one another".

52. By section 127(1), associated persons, and any bodies corporate which they or any of them control, shall be treated as one person for the purpose of deciding under section 26 whether any two enterprises have been brought under common ownership or common control.

53. As we have noted (see paragraph 39(a) above), the Commission concluded that Eurotunnel and the SCOP were associated persons within the meaning of section

127(4)(d). The facts on which the Commission relied in support of this conclusion are set out in paragraph 4.35 of the Decision:

> "We have examined a range of evidence relating to the interactions between [Eurotunnel] and the SCOP leading up to, during and after the transaction took place. In our view, on balance there is a significant body of evidence which taken together indicates that the SCOP acted together with [Eurotunnel] in preparing [Eurotunnel's] bid, and its involvement was instrumental in securing the SeaFrance assets for [Eurotunnel]. In particular:
>
> *(a)* [Eurotunnel] and the SCOP were in advanced discussions over the SeaFrance project from (at least) January 2012.
>
> *(b)* From an early stage, [Eurotunnel] and the SCOP presented a united front in public and to third parties. [Eurotunnel] made several statements to the press referring to its proposed relationship with the SCOP and the importance of that relationship to its bid. Mr Giguet of the SCOP told us that when he first met the President of the Calais Chamber of Commerce (in January/February 2012) he described himself as follows: 'I represent the SCOP but also have the agreement of Eurotunnel'. Mr Giguet also told us that [Eurotunnel] invited him to join them for the meeting at the Court.
>
> *(c)* Mr Giguet was paid by [Eurotunnel] during the period April to June 2012, acting as [Eurotunnel's project director, while at the same time acting (in a voluntary and unpaid position) as member of the directoire for the SCOP (a position he had held since December 2011).
>
> *(d)* [Eurotunnel's] own internal considerations of the proposed acquisition were informed by the SCOP's business plan:
>
> (i) in January 2012 the SCOP's business plan was presented to the [Eurotunnel] board; and
>
> (ii) the document 'Groupe Eurotunnel Newlink Project – Proposed Structure' dated 26 April 2012 states: 'The financial simulations presented are based on the 'BP SCOP' (e.g. the business plan prepared by the former workers of SeaFrance), which has been reviewed only lightly by Eurotunnel to date'.
>
> *(e)* In its offer to the liquidator, [Eurotunnel] made repeated reference to a partnership with the SCOP, for example:
>
> > a partnership is envisaged entered into in the long term between EUROTUNNEL and the SCOP that will specifically reunite the former SEAFRANCE employees; and
> >
> > The project for which Group EUROTUNNEL is signing up is intended, however, to allow a partnership with the former SEAFRANCE employees who will be part of the SCOP, so as to rekindle the operations previously undertaken by SeaFrance.
>
> *(f)* The Court order (the Order) approving [Eurotunnel] as the acquirer of the SeaFrance assets makes reference to the arrangement with the SCOP and in particular states:

> However, Eurotunnel said in its bid that the ships would remain under the French flag and that 535 former SeaFrance employees would be hired by an operating company under the project. The ships would be purchased by a special purpose company and leased to an operating company supported by a previously existing SCOP...without any performance guarantee being provided. While job creation is not a criterion established for the sole realization of assets in liquidation, it remains a significant factor in the subjective assessment.

(g) Completion of the purchase of the liquidation assets took place on 2 July 2012. On the same date, [MyFerry] and the SCOP signed a Memorandum of Understanding."

54. Before proceeding to consider the SCOP's contentions, it is important to make some preliminary observations:

(a) Mr. Beard Q.C., who appeared for the SCOP, made no challenge to these factual findings and, for the purposes of these Applications, we accept them in their entirety.

(b) We note that the opening words of paragraph 4.35 of the Decision ("...up to, during and after the transaction took place...") suggest that "evidence relating to the interactions between [Eurotunnel] and the SCOP leading up to, during and after the transaction took place" may be relevant. Although, in point of fact, the Commission's use of the words "and after" in paragraph 4.35 is redundant in this case, because the facts and matters set out in paragraph 4.35 of the Decision all pre-date the Acquisition (including, as we have noted, the date of the Memorandum of Understanding, which was concluded on 29 June 2012 and not, as the Decision states in paragraph 4.35(g), on 2 July 2012), the question of what time-frame needs to be considered for assessing whether a relevant merger situation exists is important for the purpose of the analysis in paragraphs 62 to 72 below.

(c) The relevant time frame is defined by two sections of the Act, section 24 and section 27. Section 24, as has been described (see paragraph 41 above) sets out a four month window in which mergers can be referred by the OFT to the Commission. Clearly, a merger situation that is "stale" cannot be referred by the OFT to the Commission, and the Commission will have no jurisdiction to consider whether a relevant merger situation has been created.

As we have noted, the Commission concluded that the Acquisition fell within the section 24 time frame.

(d) Section 27, which is entitled "Time when enterprises cease to be distinct" provides as follows:

> "(1) Subsection (2) applies in relation to any arrangements or transaction-
>
> (a) not having immediate effect or having immediate effect only in part; but
>
> (b) under or inconsequence of which any two enterprises cease to be distinct enterprises.
>
> (2) The time when the parties to any such arrangements or transaction become bound to such extent as will result, on effect being given to their obligations, in the enterprises ceasing to be distinct enterprises shall be taken to be the time at which the two enterprises cease to be distinct enterprises."

(e) What section 27 makes clear is that a relevant merger situation is not brought into being by the performance of any merger arrangement or transactions, but when the parties to that arrangement become bound to perform. It follows from this that whilst factors occurring after the relevant merger situation is said to have arisen may be relevant to understanding what, exactly, the merger arrangement or transactions are (for instance, the fact that Eurotunnel and the SCOP concluded the Commercialisation Agreement shortly after the Acquisition sheds light on these parties' pre-Acquisition thinking), we doubt very much whether a subsequent (i.e. post-relevant merger situation) event that is unconnected to such arrangements or transactions can otherwise be material.

55. The SCOP contended that the deeming provision in section 127(4)(d) should be interpreted strictly and not expansively (paragraph 43 of the SCOP Application) and the provision needed to be read in the light of section 26, which defines when any two enterprises have been brought under common ownership or common control (paragraph 40 of the SCOP Application).

56. As a result, the SCOP contended that in order for two or more persons to be "acting together" they must together secure or exercise control of a body of persons

corporate or unincorporate or to secure any enterprise or assets. It is not enough, according to the SCOP, for person *A* to acquire sole control, and for person *B* simply to help person *A* do so (paragraphs 41 to 47 of the SCOP Application). That, according to the SCOP, would draw the net far too wide, so as to include any number of persons who might assist person *A* taking over or merging with an enterprise – for example, banks providing finance or lawyers providing advice. On the SCOP's argument, unless section 127(4)(d) was interpreted restrictively, there was great danger in the provision being over-inclusive. In paragraph 49 of the SCOP Application, the SCOP emphasised this danger of over-inclusivity:

> "If the contrary were true [i.e. if, contrary to the SCOP's contentions, a "wide" construction were adopted], all sorts of entities involved in merger transactions would end up being 'associated persons': the bank (or banks) which entered into financing arrangements with an acquirer – none would have any degree of control over the acquired enterprise but would have been critical to its acquisition by the acquirer. Indeed, advisers who assist an acquirer to acquire a business will have entered into an agreement with the acquirer with a view to securing the acquirer's control of the relevant enterprise. They are plainly not obtaining control and as such should not be treated as 'associated persons'.

57. We reject the SCOP's arguments on this point:

(a) In the first place, as the Commission pointed out (see, e.g., paragraphs 67 to 68 of the Commission's Defence, and Mr. Harris' submissions on Day 2/pages 58 to 59), the SCOP's construction requires the interpolation of a word which does not appear in the statute. Section 127(4)(d) defines an associated person as "two or more persons acting together to secure or exercise control of a body of persons corporate or unincorporate or to secure control of any enterprise or assets". SCOP's construction involves the insertion of another "together" (or, possibly, two "togethers") to make its meaning clear, thus:

> "two or more persons acting together to <u>together</u> secure or exercise control of a body of persons corporate or unincorportate or to <u>together</u> secure control of any enterprise or assets"

The statute makes sense <u>without</u> any interpolation, and we see no need to insert additional language into what is, in fact, a clear and comprehensible provision of the Act.

(b) Nor are we persuaded by the SCOP that such a reading would unduly widen the ambit of the Act's operation. Indeed, we consider that the SCOP's construction runs a real risk of excluding from consideration persons who clearly have assisted another in acquiring control of an enterprise without themselves obtaining any part of, still less a controlling part, of that enterprise. The role of the SCOP in this case is a case in point. On the facts found by the Commission, as set out in paragraphs 6 to 7 above, Eurotunnel's bid was clearly assisted by the SCOP and the prospect that unemployed former SeaFrance employees would be employed through the offices of SCOP if the Eurotunnel bid was successful. It would seem perverse to leave out of account the SCOP's role in the merger, simply because (assuming, for the moment, that to be the case) it did not acquire part of the control of the acquired assets.

(c) The SCOP's concern that the ambit of section 26 would be unduly widened seems to us to be an unreal concern. The effect of section 26, when operating in conjunction with section 127(4)(d), is to cause two entities to be deemed to be "associated with one another" (to use the concluding words of section 127(4)) for the purposes of section 26. This means that when determining whether any two enterprises cease to be distinct, it is necessary to consider, on the one hand the acquiring entity plus anyone acting with it (here: Eurotunnel and the SCOP) and, on the other hand, the acquired entity (here: the SeaFrance Assets). All that section 127(4)(d) does is to expand the juridical nature of the acquiring entity for certain purposes. When one entity is seeking to take control of another, it seems both appropriate and sensible for the Act to take account of all the resources that that entity can deploy, including those of entities acting together with the acquiring entity.

(d) Mr. Harris suggested that the scope of section 127(4)(d) was not as wide as Mr. Beard suggested (see Day 2/pages 59 to 60) because it referred to parties "acting together", rather than one party acting "for" another. Whilst we do not go so far as to say that this distinction will always be an unhelpful one, we suspect that it is too subtle and unclear a distinction to be of any real use in most cases. It seems to us that in many cases, one party will be acting

"for" another (as where, for instance, party *A* acquires partial control of an enterprise at the behest of party *B*), whilst at the same time both parties are "acting together".

(ii) *The SCOP's second ground: even if Eurotunnel and the SCOP were "associated persons", the Commission erred in finding that the transaction brought two enterprises under common control*

58. The SCOP's second ground of challenge assumed – in the event, correctly – that its first ground would be unsuccessful. Its second ground of challenge is set out in paragraph 53 of the SCOP Application:

> "The point is a simple one: if – because of the effect of section 127 – [Eurotunnel] and the SCOP are to be treated as a single person at the time of the acquisition of the vessels, the question for the Commission was whether the enterprise (or enterprises) owned or operated by [Eurotunnel]/SCOP (i.e. the deemed single person) "ceased to be distinct" from another enterprise which [Eurotunnel]/SCOP acquired through the transaction. The answer to that question is plainly: no. That is because, what was acquired by [Eurotunnel]/SCOP through the transaction was not an enterprise."

59. The SCOP's essential point was that even assuming that Eurotunnel and the SCOP were "acting together" for the purposes of section 127(4)(d), all that Eurotunnel/SCOP acquired from SeaFrance was the vessels, the brand and goodwill and the customer lists and not the former SeaFrance employees, and that these assets (the SeaFrance Assets less the former SeaFrance employees) could not amount to an "enterprise" within the meaning of the Act.

60. Clearly, it is necessary, first, to identify exactly what the deemed single person, Eurotunnel/SCOP, acquired. Thereafter, it is necessary to consider whether that which was acquired by the deemed single person amounted to an "enterprise". These two points are considered in turn below.

The first point: What the deemed single person acquired

61. As to the first question, the deemed single person is Eurotunnel plus the SCOP. On this basis, the SCOP contended that, since the former SeaFrance employees were connected with the entity that is the SCOP, they were a part of the acquiring entity (the deemed single person comprising Eurotunnel and the SCOP) and could not be treated as labour that the acquiring entity acquired from SeaFrance. According to

Mr. Beard, the effect of section 127 of the Act was to cause the former SeaFrance employees to fall on the wrong side of the merger equation that the Commission was considering. The Commission, as is clear from paragraph 4.68 of the Decision, was treating the former SeaFrance employees as a part of the acquired entity, whereas, given the deeming effect of section 127, they were in fact a part of the acquiring entity. At Day 1/pages 17 to 18, Mr. Beard put the point as follows:

> "Moving on to Ground 2, SCOP and Eurotunnel are associated persons. Then we assess the question, for the purposes of deciding whether enterprises are brought under common control, SCOP and Eurotunnel are a single person. What is it that has been brought under common control? We say it plainly is those transaction assets, the vessels plus the goodwill and customer lists. There is no finding that those transaction assets alone amount to an enterprise. The finding that an enterprise was acquired depends on the labour also having been acquired. You can see that from para 4.15 of the Report, to which we have already gone in passing, but we can go back to if it is of assistance.
>
> The Commission says that SCOP's Ground 2 is somehow a minute chronological dissection of the detailed mechanics of the transaction. It is not, it is simply looking at what the Commission considered, and the Commission considered the transaction, the acquisition of the vessels and the other limited assets from the liquidation trustee. The Commission found that those enterprises ceased to be distinct - i.e. Eurotunnel and any enterprises that were controlled by Eurotunnel and/or the SCOP at that time, ceased to be distinct with those transaction assets on 2nd July 2012. The reference was then made at the end of October, i.e. three days before the four month deadline for a reference to be made, after the date of the transaction.
>
> The single point here is that when you ask yourself what was brought under the control of the deemed single person, the SCOP Eurotunnel single person, which we hypothesise for the purposes of Ground 2, what was brought under common control as at 2nd July 2012 were the vessels, goodwill and customer lists. What already existed with the deemed single person was Eurotunnel's range of assets and activities, including the tunnel itself, and SCOP's labour. The associated persons already had control of the tunnel and the Eurotunnel staff, and the labour that the SCOP had gathered together.
>
> So what happened was, on 2nd July 2012, assuming there is a single associated person, that single associated person acquired vessels, customer lists and goodwill, and it was brought under common control with tunnel, Eurotunnel staff, SCOP labour. In other words, it was brought under common control with the assets and activities of both Eurotunnel and SCOP, but it was not an enterprise that was brought under common control. What was brought was less than an enterprise. It was the vessels, goodwill and customer lists, which the [Commission] has not found constituted an enterprise, and indeed does not constitute an enterprise.
>
> If we are dealing with it in mathematical terms, essentially what the [Commission] has done wrong here is that it has put the SCOP labour on the wrong side of the equation when it is deciding whether or not two enterprises cease to be distinct. Instead of considering a situation where Eurotunnel acquired labour and vessels and goodwill and customer lists, which may have constituted an enterprise if it had

> actually been active at the time, it looked at a situation where the single deemed person acquired vessels, goodwill and customer lists, and then said, "Because it connects up with activities you already control, in particular, the labour of the SCOP, that means that an enterprise was brought under common control", but it was not, the bringing on 2nd July was of a group of assets that was less than an enterprise. In other words the labour was already with the associated person and only the vessels were brought in. That is plainly what is being assessed in the report, and it is plainly wrong. The bringing in was not of an enterprise, and it is not a matter about chronology, it is about the nature of the transaction which is said to give rise to the relevant merger situation, what was being obtained by whom in the light of the deeming effect of s.127(4)(d)."

62. Attractively put though Mr. Beard's submissions were, they over-simplified the position. The SCOP is not necessarily the same thing as the former SeaFrance employees it (eventually) employed. It is perfectly possible to say that, just as Eurotunnel acquired the vessels, so too did the SCOP "acquire" the employees (if such terms can ever be appropriate when considering people). In this way, it may be said that Eurotunnel/SCOP (viewed as a whole) acquired both vessels and employees.

63. In short, it is necessary to consider in more detail how the SCOP came to employ the former SeaFrance employees, and then to consider how this engagement of these employees falls to be treated for the purposes of sections 127 and 26 of the Act.

64. The corporate history of the SCOP is helpfully set out in the witness statement of Mr. Raphael Doutrebente, the deputy chief executive officer of the SCOP, and is in material detail as follows:

(a) The SCOP was initially created – but not formally registered as a legal entity – on 7 October 2011 by a group of 14 former SeaFrance workers. By this stage, SeaFrance had already undergone a number of restructurings, which had resulted in redundancies (see paragraph 3.8 of the Decision).

(b) The SCOP was formally registered as a non-trading entity (a "société sans exploitation") on 29 December 2011, shortly after SeaFrance entered into liquidation by order of the French Court. At the time of its registration, the SCOP had 827 subscribers. Subscribers are individuals who have expressed

their support for the SCOP and signed up to the SCOP, but without paying any share capital. Instead, they pay a minimum contribution of €50 per person.

(c) The majority of these subscribers were former employees of SeaFrance, subscribing with a view to future employment. Initially, it was anticipated this would be on the basis that the SCOP would acquire the SeaFrance vessels for itself but – as has been described (see paragraphs 6 to 7 above) – from at least January 2012, the SCOP was in discussions with Eurotunnel and, because of those discussions, did not bid for the vessels after 9 January 2012.

(d) The SCOP currently employs 451 employees on permanent contracts. These employees donate a percentage of their monthly salary to the SCOP and are in the main employed on the three vessels operated by the SCOP for MyFerry.

(e) Unsurprisingly, these contracts of employment came into being after the Acquisition. Mr. Beard made this clear on Day 2/pages 65 to 66:

> "...What happened was the SCOP was established – it was established by its founder member subscribers – it then, because it was established, got more subscribers very rapidly so that by December it had a substantial number of subscribers, the majority of whom are ex-SeaFrance employees. It then considered the possibility of getting vessels itself, it was not able to do so. It then looked around for other opportunities by which it could fulfil its commercial objectives which were finding employment for its subscribers. It therefore supported the bid. The transactions goes through whereby Eurotunnel gets the vessels from the liquidator with SCOP supporting it and saying: "We will make sure that our people are available". Then, once commercial arrangements have been put in place there will be employment contracts put in place..."

65. The Commission contended that there was no statutory time limit applicable which served to limit consideration of arrangements or transactions entered into by the SCOP. The Commission's skeleton argument stated:

> "55. The key phrase in section 127(1)(a) is: "*...for the purpose of deciding whether*...". That is a broad and general deeming purpose, not constrained by the minutiae of chronology or transactional mechanics. It involves, or at least permits,

> a sensible and purposive overview of the transaction in question, over a relevant and sensible time period in which the co-ordinated behaviour is taking place.
>
> 56. The time period is set out in sections 23(2)(a) and 9(b), and section 24(1)(a). The only limit is that the actual moment of final cessation of distinction of the two enterprises is both before the date of the reference to the [Commission] by the OFT and within four months of that date. There is no warrant in the language for any suggestion that the [Commission] is precluded from looking at events leading up to that moment of cessation of distinction, nor would there be any sensible purpose for such an approach; it would (i) enable many transactions to avoid scrutiny by mere timing devices and (ii) divorce analysis of a transaction from its relevant context."

66. Whilst, no doubt, the Commission may look to prior events so as to understand transactions or arrangements concluded within the section 24 time frame, it is quite plain from the Act that – so far as acquiring entities are concerned – transactions or arrangements pre-dating the section 24 period cannot be taken into account. Paragraph 56 of the Commission's skeleton argument, quoted above, accepts this in terms.

67. It seems to us that an inevitable consequence of the deeming provision in section 127 is that precisely the same temporal limits apply in respect of "associated persons" like the SCOP. In other words, only transactions or arrangements concluded by the SCOP within the section 24 period can be relevant in determining whether a relevant merger situation has arisen. To allow for a more generous time frame would involve treating Eurotunnel and the SCOP not as "one person" – as section 127(1) requires – but more disadvantageously than if they were "one person".

68. Accordingly, it is necessary to consider the transactions or arrangements in which the SCOP participated between the date of the reference (29 October 2012) and the period beginning four months before that date (29 June 2012).

69. According to this time frame, the following transactions are relevant:

(a) The Memorandum of Understanding;

(b) The Bareboat Charters;

(c) The Commercialisation Agreement; and

(d) The contracts of employment concluded between the SCOP and former SeaFrance employees. As to these, Mr. Doutrebente provides the following information in paragraph 29 of his statement:

> "When [MyFerry] launched operations on 20 August 2012, the SCOP had 256 employees on the ships and a further 126 employees operating at the ports of Dover and Calais, which was enough to launch two ships. The SCOP continued to recruit staff from its subscribers and had sufficient personnel to operate all three ships at full capacity by 13 February 2013. Almost all of the staff now employed by the SCOP were subscribers of the SCOP on its registration in December 2011."

As has been noted, most of the SCOP subscribers and, so, employees, are former SeaFrance employees. It is also clear from the figures provided by Mr. Doutrebente that, of the SCOP's current 451 employees (paragraph 10 of his statement), the vast majority (about 382) were recruited by 20 August 2012.

70. We have considered whether any contracts of employment concluded between the SCOP and former SeaFrance employees after the reference to the Commission can be considered. Clearly, there would have been an intention to continue to employ persons on the ferries operated by the SCOP as necessary and, for the reasons given in paragraph 54(e) above, the subsequent employment of such persons would have demonstrated such an intention. However, we do not in fact know how many such contracts of employment were concluded, nor whether they were concluded with former SeaFrance employees, and so we have left these contracts out of account.

71. The critical agreements for present purposes are the contracts of employment. The other agreements (the Memorandum of Understanding, the Bareboat Charters and the Commercialisation Agreement) were all between the SCOP and Eurotunnel or one of its subsidiaries, and so could not directly relate to the SeaFrance Assets. They do, however, provide important background: for instance, having entered into the Bareboat Charters and the Commercialisation Agreement, the SCOP was committed to providing services to Eurotunnel which required it to have a crew (or crews), and which made the conclusion of these contracts of employment necessary.

72. Assuming, for the moment, that the former SeaFrance employees constituted a part of the SeaFrance Assets, then we find that these employees were "acquired" by the SCOP during the relevant time period (i.e. within the section 24 time frame) and that (to use Mr. Beard's helpful metaphor) they fall on the SeaFrance, and not on the Eurotunnel/SCOP, side of the equation.

The second point: Was what was acquired by Eurotunnel/SCOP an "enterprise"?

73. The second point turns on whether the vessels, the brand and goodwill and the customer lists were nevertheless sufficient to constitute an "enterprise" within the meaning of the Act (i.e. the SeaFrance Assets less the former SeaFrance employees). Given the conclusion we have reached, namely that the acquiring entity that was Eurotunnel/SCOP in fact acquired the SeaFrance Assets including the former SeaFrance employees, that is a question which we need consider no further.

74. The question of whether the SeaFrance Assets correctly understood amounted to an "enterprise" within the meaning of the Act is considered in Section II(e)(iv) below.

(iii) The SCOP's third ground: the Commission erred in finding that Eurotunnel and the SCOP had ceased to be "distinct enterprises" (by reason of Eurotunnel's "material influence") within the meaning of section 26

75. Section 26 provides as follows:

> "(1) For the purposes of this Part any two enterprises cease to be distinct if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control).
>
> (2) Enterprises shall, in particular, be treated as being under common control if they are –
>
> (a) enterprises of interconnected bodies corporate;
>
> (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
>
> (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.
>
> (3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2), be treated as having control of it.

(4) For the purposes of subsection (1), in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if –

(a) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate; or

(b) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy."

76. The Commission concluded that, according to the test of when enterprises cease to be distinct laid down in section 26, Eurotunnel and the SCOP had ceased to be distinct. Paragraph 4.26(b) of the Decision states:

> "The SCOP's economic dependence on [Eurotunnel] is such as to confer on [Eurotunnel] 'material influence' over the SCOP, and therefore its employees. We may treat material influence as amounting to 'control' for the purposes of section 26 of the Act, which would mean that the SCOP's assets were also part of those assets brought under 'common control' with the Eurotunnel business, and therefore relevant for the 'enterprise' test."

77. From this, it is clear that the Commission was considering that Eurotunnel and the SCOP had ceased to exist as distinct enterprises for the purposes of section 26 of the Act, even though on the face of it this was an inquiry into a merger between Eurotunnel and SeaFrance.

78. Section 26 is part of a series of provisions (beginning with section 24) which expand upon and further define what constitutes a "relevant merger situation" for the purposes of section 23. Specifically, section 26 elucidates sections 23(1)(a) and 23(2)(a), which set out the first necessary condition for when a "relevant merger situation" can be said to arise – namely, when "two or more enterprises have ceased to be distinct enterprises...".

79. By itself, the Commission's finding that Eurotunnel and the SCOP had ceased to be distinct goes nowhere, without there also being a finding:

(a) That the section 24 time frame has been met; and

(b) That either the turnover test or the share of supply test has been met.

80. Assuming these conditions pertain, the way is open for the Commission to consider whether there has been a substantial lessening of competition as a result of the merger between Eurotunnel and the SCOP, and, if so, what steps must be taken to remedy that outcome.

81. The Commission, however, only considered the first of these conditions, and then used section 26 as a means of treating Eurotunnel and the SCOP as a single entity for the purposes of considering the relevant merger situation between Eurotunnel and SeaFrance. When considering a merger between Eurotunnel and SeaFrance, it may be that a third party, like the SCOP, is relevant as an "associated person" within the meaning of section 127. However, if a third party like the SCOP is not caught by section 127, then we fail to see how section 26 can be used to rewrite the merger situation under consideration by the Commission so as to make the concept of "associated person" more expansive.

82. Even if, contrary to the view that we have expressed, section 26 is appropriate to consider the relationship between Eurotunnel and the SCOP, the question arises as to whether the Commission was justified in concluding that Eurotunnel had "material influence" over the SCOP within the meaning of section 26(3) of the Act.

83. The basis upon which the Commission concluded that Eurotunnel had "material influence" over the SCOP is contained in the following paragraphs of the Decision:

> "4.41 The important relationship between [Eurotunnel] and the SCOP also raises the question of whether [Eurotunnel] has 'material influence' over the SCOP, and therefore over its employees.
>
> 4.42 The SCOP argues that [Eurotunnel] cannot exercise material influence over the SCOP, because [Eurotunnel] has no equity interest in, nor ability to participate in strategic decisions of, the SCOP, and because its undertakings to the French Competition Authority (FCA) limit [Eurotunnel's] ability to negotiate contracts for the [MyFerry] service.
>
> 4.43 However, as envisaged throughout the bidding process by [Eurotunnel], the SCOP and the Court, when [Eurotunnel] acquired the liquidation assets, at the same time [Eurotunnel] (via [MyFerry]) also entered into contractual arrangements with the SCOP under which the Vessels are

chartered to the SCOP under a bareboat charter, and the SCOP operates the ferry service under a service contract, using staff employed by it.

4.44 Under these arrangements, the SCOP is economically dependent on its relationship with [Eurotunnel] (and/or [Eurotunnel's] subsidiary [MyFerry]). In particular:

(a) The document 'Groupe Eurotunnel NewLink Project-Proposed Structure' describes this reliance as follows: 'given the obvious economic dependence of SCOP vis-à-vis company B [MyFerry], although Eurotunnel is not a shareholder of SCOP, this does not limit the financial responsibility of Eurotunnel [in] case of troubles in SCOP (financial distress, social restructuring, etc'.

(b) [Eurotunnel] told us in early January 2013 that in order to ensure the continued survival of the SCOP, [MyFerry] was providing working capital in the form of paying in advance and non claiming contractual price reductions, though it has since started to recoup the value of these price reductions. The SCOP confirmed that [MyFerry] had been paying for crossings in advance.

(c) The SCOP has no viable source of income other than [Eurotunnel]. The contract between the SCOP and [Eurotunnel] requires the SCOP to undertake its short-sea crossings exclusively for [MyFerry] and not to market any transport service in its own name or on its own behalf for a period of at least three years. [Eurotunnel] disagreed with this interpretation of the contract. It stated that a more appropriate interpretation of the relevant clause was that 'in consideration for [MyFerry's] undertakings, the SCOP will perform the services and will not sell them to the market in its own name'. In this regard, we note first that [Eurotunnel] does not translate the 'et pour son compte' and second that, taken together, clauses 7.1 and 7.2 indicate that the SCOP is effectively required to act exclusively for [MyFerry], at least on the cross-Channel route, as, in addition to the restrictions referred to above, the SCOP may not enter into any bareboat charters with any other vessel owner on the cross-Channel route without the prior agreement of [MyFerry].

(d) Further, it is clear that the SCOP is not in a position to establish its own service. The document 'Groupe Eurotunnel Newlink Project-Proposed Structure' rejected this option because the SCOP would not have been able to raise the necessary finance. The SCOP confirmed that this remained the case and it was likely to continue to do so for three years.

(e) Finally, Jean-Michel Giguet was recruited by [Eurotunnel], and is both the CEO of the SCOP and a manager of [MyFerry].

4.45 Taking into account all of the above factors, we have therefore concluded that, in the light of the SCOP's economic reliance on its arrangements with [Eurotunnel] and [Eurotunnel's] subsidiary [MyFerry], [Eurotunnel] (and/or [MyFerry]) has a degree of influence and/or control over the SCOP, and therefore the SCOP's employees, which is 'material' in the context of its jurisdictional assessment. We consider that, taking into account all the circumstances of this case, it is appropriate to treat this

material influence as amounting to control within the meaning of section 26 of the Act."

84. Although these paragraphs make no reference to material influence of "policy", the Commission made clear in its submissions to us that it was relying upon section 26(3) of the Act, which provides that "[a] person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2), be treated as having control of it".

85. The Commission's "Merger Assessment Guidelines", published in September 2010 (CC2 (Revised)) state as follows:

"'*Material influence'*

3.2.8 The ability to exercise 'material influence' is the lowest level of control that may give rise to a relevant merger situation. In assessing material influence in the context of the Act, the Authorities will conduct a case-by-case analysis, focusing on the overall relationship between the acquirer and the target and on the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target includes its strategic direction and its ability to define and achieve its commercial objectives.

3.2.9 The acquirer's ability to influence the target's policy can arise through the exercise of votes at shareholders' meetings, together with any additional supporting factors that might suggest that the acquiring party exercises an influence disproportionate to its shareholding. Material influence may also arise as a result of the ability to influence the board of the target and/or through other arrangements.

3.2.10 In considering whether material influence may be present by virtue of a shareholding in a particular case, the Authorities will consider not only the ownership of the shareholding but also whether, as a matter of practice, the acquiring party is able to exert influence...

3.2.11 In addition to the ability materially to influence policy through the voting of shares, the Authorities' determination may also turn on whether the acquirer is able materially to influence the policy of the target entity through board representation. Indeed, it is possible that board representation alone could, in certain circumstances, confer material influence.

3.2.12 The Authorities may also consider whether any other factors, such as agreements with the company, enable the acquirer materially to influence policy. These might include the provision of consultancy services to the target or might, in certain circumstances, include agreements between firms that one will cease production and source all its requirements from the other. Financial

> arrangements may in certain circumstances confer material influence where the conditions are such that one party becomes so dependent on the other that the latter gains material influence over the company's commercial policy."

86. The SCOP contended that the Commission's findings on material influence "are fundamentally flawed" (paragraph 63 of the SCOP Application). The Commission, in its Defence, contended that this question was, essentially, a question of fact and degree to be assessed on a case-by-case basis having regard to all the relevant circumstances (paragraph 88) and that the Commission had, in its possession, ample evidence reasonably to conclude that, on the facts of this case, Eurotunnel had material influence over the SCOP (paragraph 93).

87. The distinction between questions of fact and questions of law considered in paragraphs 46 to 50 above applies to section 26 just as it applies to the other statutory provisions considered in this judgment. However, we accept that the concept of material influence over policy is not one that can comprehensively be defined in advance and which is highly fact sensitive. Nevertheless, we consider the following points to be clear:

(a) We do not consider: *(i)* economic dependence between one party and another; *(ii)* the fact that one party may have contracted exclusively with another; nor *(iii)* the fact that there may be close relations between one party and another to be – whether in themselves or collectively – sufficient *per se* to establish a material influence over policy. There will be many cases where one company is economically dependent on another, and no doubt many more cases where companies are fettered in their conduct by the contracts they enter into. But none of this means that there necessarily exists a material influence over policy.

(b) We consider that, for a material influence over policy to be capable of existing, one company or person must be in a position to influence <u>voluntary</u> decisions of another company or person. The distinction may be stated thus: a company may be required to act in a certain way by virtue of a contract it has entered into. The fact that another company – to whom this contractual performance is owed – can demand performance pursuant to the contract

does not mean that this company has a material influence over policy. It has certain contractual rights. On the other hand, the decision to enter into the contract in the first place, or a decision to terminate the contract are both decisions in respect of which a company has freedom of action. If another can influence the decision whether or not to enter into a contract or whether or not to terminate it, that is an influence over policy.

(c) In short, questions of policy arise where a company or a person has a choice between alternative courses; and policy influence arises where one entity can influence the choice being made by another.

88. With these points in mind, we turn to the facts which the Commission considered demonstrated that Eurotunnel could materially influence the policy of the SCOP. As we have noted, these are contained in paragraph 4.44, and comprise five factors, which are set out at paragraph 83 above. Whilst these factors demonstrate a degree, even a high degree, of economic inter-dependence between the SCOP and Eurotunnel, they do not, stated on their own and without more, demonstrate any kind of policy influence. We do not go so far as to say that economic dependence – which is what paragraph 4.44 focuses on – is irrelevant to the question of policy influence. Clearly, it can be relevant – for instance, a threat to withdraw business unless the threatened party behaves in a certain way could clearly amount to an influence over policy. But the Commission has simply found economic dependence, and nothing more.

89. The SCOP, in its submissions to us, made much of the fact that the Decision makes no reference to the key question in section 26(3) – namely, whether there was a material influence over policy. By itself, that is a technical point, but it does highlight the fact that the Commission appears nowhere in its Decision to have asked itself what a "material influence over policy" was or how it arose in this case. Instead, what one has in paragraphs 4.41 to 4.44 of the Decision is a list of facts (all of which, for present purposes, we are prepared to accept as accurate), which then result in a conclusory statement that "material influence" exists, with no effort at tying the facts to the legal test.

90. There is a further issue, which the Commission appears not to have considered at all. Section 26(3) does not mandate the conclusion that two distinct enterprises have been brought under "common control" for the purposes of sections 26(1) and 26(2). The existence of control or material influence over policy entitles ("may") but does not oblige the Commission to conclude that there is common control for the purposes of sections 26(1) and 26(2). Thus, where the Commission has properly found there to be an influence over policy, it must then consider whether that should lead to the conclusion that there is control for the purposes of sections 26(1) and 26(2).

91. Given this deficit of reasoning, whilst we would be reluctant to go so far as to say that the Commission's conclusion that Eurotunnel was able materially to influence the policy of the SCOP was one that was unreasonable or irrational in the judicial review sense, we do consider that the conclusion is an unreasoned one, in that it is impossible, on the face of the Decision, actually to discern why the Commission reached the conclusion that it did.

92. In these circumstances, had we (contrary to the conclusion we have reached in paragraph 81 above) concluded that section 26 was applicable in the circumstances of this case, we would have remitted the question of "material influence" back to the Commission for it to reconsider. As it is, because of our conclusions in relation to the SCOP's Grounds 1 and 2, we have found that the Commission does not need to rely on section 26 in order to found jurisdiction in the present case.

(iv) *The SCOP's fourth ground: Eurotunnel did not acquire the activities of a business*

The parties' contentions

93. The SCOP's Ground 4 is as follows:

> "81. Further, and in the alternative to Grounds 1 to 3, the Commission erred in concluding that there was [a relevant merger situation] since the assets acquired by [Eurotunnel] were not the activities of a business.
>
> 82. ...the Act is concerned with the merger of enterprises. Enterprise is defined under section 129 of the Act as the activities of a business.

> 83. It is clear from this language that the Act is concerned with the acquisition of pre-existing businesses – i.e. ones with activities. What must be acquired are the activities themselves, not merely the elements necessary to carry out the relevant activities. For example, on the basis that the vessels did not by themselves constitute an enterprise, [Eurotunnel] would not have been prevented from acquiring the vessels and manning those vessels by retraining existing staff members (had that been practically possible) or using another manning company."

94. Thus, the SCOP contended that because SeaFrance had been inactive for some 7½ months at the time of the Acquisition, Eurotunnel could not be regarded as acquiring the activities of the SeaFrance business at all (paragraph 87 of the SCOP Application). What Eurotunnel in fact did was acquire assets – the vessels – which it proceeded to use under a completely different brand, with a fresh set of supplier and customer contracts (paragraph 88 of the SCOP Application). The "natural and obvious interpretation of these events is not that [Eurotunnel] acquired the activities of SeaFrance but that [MyFerry] acquired SeaFrance's vessels and used them to establish a new ferry operation of its own" (paragraph 88 of the SCOP Application).

95. As regards the ex-SeaFrance staff, the SCOP made the point that "in no sense did the staff "transfer", either at the date of the acquisition of the liquidation assets or otherwise" (paragraph 86 of the SCOP Application). What in fact happened was that:

(a) The contracts of employment of the employees with SeaFrance terminated at various points over time. The Decision is not specific about when the employment of the SeaFrance employees was terminated, but it is clear from paragraph 3.8 of the Decision that substantial numbers of SeaFrance employees were made redundant over a period of years.

(b) For a period of time, and in some cases this must have been a considerable period of time, these employees were unemployed.

(c) They were then given the opportunity of subscribing (in the manner described in paragraph 64(b) above) to the SCOP and a considerable number of them were employed by the SCOP from about August 2012 (in the manner described in paragraph 64(d) above).

96. The Commission's answer was that what constitutes an "enterprise" for the purposes of the Act is, essentially, one of fact and degree, and a matter for the Commission. The Commission's Defence states:

> "109. A business, especially a business as complex as conducting passenger and freight ferry services, is one that comprises a significant number of activities which require a combination of human and physical assets. Whether a particular combination of such assets that have been brought under common control is sufficient to describe them as comprising the activities of a business, or a part of one, so as to constitute an "*enterprise*" is, therefore, essentially a question of fact and degree that is principally a matter for the [Commission].
>
> 110. This point is made clear in the [Commission's] Guidance, cited at paragraph 4.5 of the [Decision], and at paragraphs 4.13 and 4.14 where the [Commission] states: "*...each assessment is independent and must be considered on its own unique facts...Ultimately, the question of whether any given combination of assets constitutes an 'enterprise' is a commercial assessment, requiring the balancing of competing factors in the context of the industry concerned...*"."

This reflects paragraph 4.14 of the Decision, where the Commission notes that "[u]ltimately, the question of whether any given combination of assets constitutes an 'enterprise' is a commercial assessment, requiring the balancing of competing factors in the context of the industry concerned".

The correct analytical approach

97. For the reasons given in paragraphs 46 to 50 above, we consider the Commission's contention that the meaning of "enterprise" is simply a matter of fact and degree to be incorrect or, at the very least, to ignore the fact that what the Act understands an "enterprise" to be is, in the first instance, a question of law.

98. It may well be that the legal meaning of "enterprise" is one that involves precisely the sort of commercial assessment and balancing of factors that the Commission suggests. But it is necessary to have a grasp of what this term means in order to work out which "competing factors" are relevant and which irrelevant, and what factors are material to a "commercial assessment" and which are not. The term "enterprise" does not mean simply what the Commission says it means: the term "enterprise" must be defined and on this definitional question there is no margin of appreciation.

99. It is not, however, necessary, for the purposes of this judgment, to articulate a comprehensive definition of the term "enterprise". The question before us is a narrow one: is what Eurotunnel acquired, as described above, an "enterprise" within the meaning of the Act? It is to this question that we turn.

The definition of "enterprise" in the Act

100. Central to the definition of what is a merger is the concept of two or more enterprises ceasing to be distinct. It is a necessary condition for a relevant merger situation to exist that "two or more enterprises have ceased to be distinct enterprises" (section 23(1)(a)).

101. An "enterprise" is defined in section 129(1) of the Act as "the activities, or part of the activities, of a business". A "business" is defined by section 129(1) as including "a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge".

102. Essentially, an enterprise is the activities, or part of the activities, of a business.

103. The Act does not further define the term "activities". None of the parties before us was able to refer us to any authorities that might assist. The nearest thing to an authority was a report of the Monopolies and Mergers Commission (the "MMC"), on which Mr. Beard placed reliance, and which was in fact cited in footnote 63 of the Decision. This report was presented to Parliament in May 1992 (the "MMC Report"). The MMC Report considered a merger situation under the regime that preceded the Act between AAH Holdings plc and Medicopharma NV.

104. Before the MMC, it was contended that no merger situation arose because Medicopharma NV's United Kingdom operation "had ceased to trade prior to the acquisition and that AAH had acquired only stock, certain assets and three depots" (see paragraph 6.62 of the MMC Report). However, the period during which the United Kingdom operation had not traded was extremely short – essentially comprising the period between 3 November 1991 (paragraph 6.78 of the MMC Report) and 7-8 November 1991 (paragraph 6.87 of the MMC Report). The MMC

rejected the argument that no merger situation arose (paragraph 6.102 of the MMC Report):

> "In our view, however, although AAH did not in terms acquire the depots as going concerns, in reality it obtained much of the benefit of so acquiring them and it clearly acquired more than bare assets, as described in greater detail above."

105. We find this approach a helpful one. Essentially, the MMC was drawing a distinction between the acquisition of "bare assets" – which would not constitute the activities of a business – and the acquisition of something more than bare assets. The key to distinguishing between "bare assets" and an "enterprise" lies in:

(a) Defining or describing exactly what, over-and-above "bare assets", the acquiring entity obtained; and

(b) Asking whether – and if so how – this placed the acquiring entity in a different position than if it had simply gone out into the market and acquired the assets.

The question, then, is whether this difference is capable of constituting what would otherwise be bare assets into something that may properly be described as the activities of a business. Inevitably, this is a question of fact and degree, and there will be no single criterion giving a clear answer. However, if a guiding principle is sought, then we consider that it lies in an understanding of what an enterprise – the activities or part of the activities of a business – does. An enterprise takes inputs (assets of all forms) and by combining them transforms those inputs into outputs that are provided for gain or reward. It thereby also may generate intangible but valuable assets such as know-how or goodwill. It is in this combination of assets that the essence of an enterprise lies. In those cases where the acquiring entity takes over the business of the acquired entity, the answer will be self-evident: the same enterprise is simply continuing, albeit under different ownership or control. The difficult case arises where the combination of assets is fractured, such that the assets are no longer, or no longer to the same extent, being used in combination. This case is a particularly good one, where what was clearly once an enterprise was wound down: the difficult question is whether, even though the business of SeaFrance had

been wound down to a very considerable extent, there still remained the embers of an enterprise.

106. In this context, it is necessary to make two points:

(a) First, it is perfectly possible for an enterprise to wind down, and to wind down to such an extent that it ceases to be an enterprise. The mere fact that in the past the activities of a business were being carried on by an entity does not necessarily mean that, as at the time of the merger, that entity was an enterprise. Of course, it is also important to recognise that some businesses (e.g. those involved in tourism) trade for some periods and not for others (e.g. during the "low season"). Such a hiatus does not preclude the existence of an enterprise. Continuous trading is not essential.

(b) Secondly, the fact that the acquiring entity emulates the business of the acquired entity, and even uses that entity's assets, does not necessarily mean that the acquiring entity has acquired an enterprise. Mr. Pickford, counsel for DFDS, contended that Eurotunnel had acquired an enterprise for precisely this reason (Day 2/page 97):

> "The second overarching point…is it is not disputed by the SCOP that [Eurotunnel] now operates a freight and passenger ferry service across the short sea, using the same vessels as SeaFrance on the same route, with a large proportion of ex-SeaFrance staff, targeting amongst others ex-SeaFrance customers and which [Eurotunnel] took to be a partnership [with the SCOP]. It is not in dispute that SCOP was formed for the very purpose of continuing the SeaFrance operations in so far as possible, and that it worked towards that objective for the entirety of the seven month pause in trading which took place during mainly the low season of 2011-2012. Nor is it disputed by the SCOP in its application that the transaction could be expected to lead to a substantial lessening of competition.
>
> If we take all those points together, we say it is very difficult to see how the SCOP can sensibly claim that none of the activities of the SeaFrance business came under the control of [Eurotunnel], and that the [Commission] was not therefore empowered to act to prevent what it saw as a lessening of competition."

Mr. Pickford put the point powerfully but we find it to be misconceived:

(i) Mr. Pickford's references to the creation of a situation in which a substantial lessening of competition may result is *nihil ad rem*. It

refers to the question that the OFT and the Commission must answer after there has been a finding that a relevant merger situation has been created (see section 22(1) of the Act in the case of the OFT and section 35(1) of the Act in the case of the Commission). The SCOP's contentions were directed to this, anterior, point. If, as the SCOP contended, no relevant merger situation has been created, then the question of whether there is or may be a substantial lessening of competition simply does not arise.

(ii) As regards the question of whether a relevant merger situation exists, the statutory test is not whether the acquiring entity is carrying out the same activity that was once carried out by the acquired entity, even with the same assets. The statutory test is not satisfied if the acquiring entity reconstructs a business that was once conducted by a different entity, even if the assets of that entity were used to do so. The statutory test in section 26(1) turns on two enterprises ceasing to be distinct because they are brought under common ownership or common control. It is critical that there are two enterprises, not one enterprise (the acquiring enterprise) and a collection of assets. Mr. Pickford's contentions thus address the wrong test.

107. The short, but difficult distinction that we have to draw is that between an asset purchase and the acquisition of an enterprise. Had Eurotunnel simply gone to a shipbuilder and commissioned the building of three vessels identical to the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais* or with similar capabilities and used these vessels to establish a Dover-Calais ferry service using a crew or crews comprising anyone other than ex-SeaFrance employees, then this would not involve the acquisition of an "enterprise". Rather, Eurotunnel would be using assets that it had acquired to create an enterprise. The question we must answer is whether the fact that the vessels were acquired from SeaFrance and the fact that the crews were largely drawn from ex-SeaFrance employees changes this outcome.

The present case and the Commission's factual analysis

108. The Commission carried out an analysis of "what are the relevant assets and do they constitute an enterprise" in paragraphs 4.3 to 4.72 of the Decision. The analysis begins with the statutory definition and the Commission's own Merger Assessment Guidelines (paragraphs 4.4 to 4.5 and, under the heading "Context of the analysis", paragraphs 4.8 to 4.15). Whilst there is much in these paragraphs that is helpful and right, as we have noted, the Commission stopped short of actually formulating the applicable test for differentiating between the sale of a "bare asset" and the sale of an "enterprise".

109. Inevitably, this means that the facts, as found by the Commission in the Decision, are not specifically directed to the difference between the acquisition of "bare assets" – which would not constitute the activities of a business – and the acquisition of something more than bare assets, i.e. the approach described in paragraph 105 above.

110. Nevertheless, it is appropriate to consider whether the facts, as found by the Commission, enable a conclusion that something more than bare assets was acquired.

111. Mr. Harris accepted that the activities carried on by SeaFrance were the provision of ferry services (both passenger and freight) across the short sea, using the vessels that it did and staffed with its crews ("the SeaFrance business was the operation of these vessels with these crews on this route across the Channel": Day 2/page 72). This is uncontroversial. The undertaking carried out for gain or reward by SeaFrance was the ferrying of passengers and freight across the short sea.

112. There are a number of factors identified by the Commission that point towards this being no more than the acquisition of assets by Eurotunnel/SCOP. These are as follows:

(a) SeaFrance ceased its operations on 16 November and was actually prohibited from operating by the French Court on 9 January 2012 (see paragraph 3 above). Until Eurotunnel started its operations anew, in August

2012, no activity (as we have defined it) was carried on by SeaFrance. For the 7½ months preceding the Acquisition, SeaFrance carried out no activity.

(b) SeaFrance's berthing slots in Dover and Calais were surrendered.

(c) SeaFrance's remaining workforce was dismissed and its vessels were placed into hot lay-by.

113. The Commission certainly took these factors into account (see paragraph 4.71 of the Decision), but considered that they were outweighed by the factors identified in paragraph 4.68 of the Decision, which we have quoted in paragraph 35 above. Essentially, the Commission discounted the significance of customer lists (paragraph 4.68(d)), but considered that three other factors outweighed the 7½ month hiatus that we have referred to, namely:

(a) The acquisition, by SeaFrance, of "vessels which were of suitable design and of sufficient number to operate a passenger and freight transport business on the short-sea route; these vessels were in a condition from which they were able to be brought into operation within two months of the acquisition taking place" (paragraph 4.68(a));

(b) The "acquisition" (if that term can be used) by SCOP of "those former SeaFrance employees who now comprise some three-quarters of the staff engaged in running the [MyFerry] service" (paragraph 4.68(b)); and

(c) The acquisition of the brand and goodwill of SeaFrance, "carrying some, but limited, positive value" (paragraph 4.68(c)).

114. We have some doubt whether, formulated as they are by the Commission, the acquisition of the vessels and the SeaFrance employees constituted anything more than an acquisition of assets. Certainly, the vessels acquired by Eurotunnel were appropriate to short-sea crossings, and had been maintained in hot lay-by in order to maintain the condition of the vessels. Incidentally, this had the effect of rendering it possible to bring these vessels into service quickly, but we doubt whether this is

enough to turn these assets into an enterprise, at least without a more detailed explanation of the extent to which this expedited the return of the vessels into service.

115. As regards the ex-SeaFrance employees, on the face of the analysis in Section 4 of the Decision, it is difficult to see how these employees were "acquired" from SeaFrance at all. The (uncontroverted) facts are stated at paragraph 64 above. These employees were made redundant by SeaFrance over a period of time. Their contracts of employment were terminated, with no thought as to how they might be employed in the future. Subject to one, to our minds important, proviso which we consider in paragraphs 117 to 119 below, their relationship with SeaFrance simply came to an end. However, it can easily be said that the formation of the SCOP, and the subscription of a number of ex-SeaFrance employees to the SCOP, and the subsequent employment of some of them by the SCOP, constituted the creation of a new legal relationship, with no element of transfer from SeaFrance to the SCOP.

116. Of course, it is possible to imagine cases where the employment of a workforce by one employer ceases, but that the workforce migrates – as a workforce – to a new employer. That, we consider, could amount to the "acquisition" of that workforce by the new employer, and could amount to the acquisition of a business activity. That might well be the case even if the workforce's contracts of employment were not formally transferred from the old employer to the new one, but terminated and new contracts entered into. If the reality is that a workforce is being transferred, then the fact that wholly new legal relationships are forged as part of that process should not affect the position.

117. In this regard, what might be a material fact emerges from other parts of the Decision. Paragraph 3.29 notes that Eurotunnel "also told us that it was public knowledge in France that under the terms of the liquidation agreed between SeaFrance's owner (SNCF), the Court and the SCOP, the SCOP would receive an indemnity of €25,000 for each SeaFrance employee that it employed. The liquidator agreed to pay these funds and part payment of these funds was made by the liquidator to the SCOP in late January 2013."

118. Paragraph 3.49 of the Decision (which is essentially repeated at paragraph 8.62) notes:

> "…Prior to making its bid, [Eurotunnel] anticipated that [MyFerry] would need funding of €[✂] from 2012 to [✂] to cover negative cash flow (including €[✂] contingency), €10 million of which would be contributed by the former employees of SeaFrance and the balance by [Eurotunnel]."

119. It is not clear from the Decision how much of a contribution the former SeaFrance employees actually made, but it is clear that the sums in question are not insignificant and that (in themselves) they might, if fully explored, provide a cogent reason, on the part of Eurotunnel/SCOP to employ ex-SeaFrance employees. Equally, it is clear that this was a benefit that derived from the fact of the relevant employees' employment by SeaFrance. In short, this seems to be a benefit emanating from employing an ex-SeaFrance employee that would not be gained were an employee from elsewhere to be retained.

120. A further factor that may be relevant is this: it seems clear, both from paragraph 4.68 itself and from the Commission's references to "the context of the industry concerned" (e.g. paragraph 4.15 and 4.71) that the factors considered in paragraph 4.68 are not separate, but to an extent inter-relate. The nature of that inter-relationship, however, is not explored by the Commission in the Decision. The Decision does note that the condition of the vessels was such that they could be brought into operation extremely quickly (see paragraph 4.68(a)), but it does not consider the significance of having a crew (namely, the ex-SeaFrance employees) comprising persons fully familiar with both these particular vessels and their intended operation (across the short sea). It may very well be the case that this combination enabled MyFerry to begin operations much more quickly than it could have done had it acquired crew and vessels from other sources. In short, there may have been a momentum or continuity in the combination between the vessels and workforce that takes this case over the line from an asset acquisition to the acquisition of an enterprise.

121. Were this not a judicial review, but a review "on the merits", we would naturally have explored these matters in the hearing, and would have been obliged to reach a conclusion. But our standard of review is as if this were a judicial review. We

cannot exclude the possibility that the Commission, using the approach that we have described, might properly reach the conclusion that Eurotunnel/SCOP did indeed acquire an enterprise, and not simply assets. But it is not our place to make a determination on this point. Given the approach that we have stated, and the factual matters identified above, it may be open to the Commission to conclude that Eurotunnel/SCOP acquired an enterprise. But whether that is indeed the case, is a matter for the Commission, and not for us.

122. Given the open questions we have identified, and the need to apply judgment to the difficult facts in this case, it would be inappropriate to hold that the Commission reached a correct conclusion on whether or not it had jurisdiction. The Tribunal cannot properly substitute its own view on facts going to a question of jurisdiction: it is for the Commission to reach its own view. In *R (Bushell) v Newcastle Upon Tyne Licensing Justices* [2004] EWHC 446 (Admin) at [29] the Court stated:

> "The court should be slow effectively to validate an invalid decision by refusing relief on the ground that the decision-maker should have taken a particular view of the facts when the decision-maker has not addressed his mind to those facts. In a word the exercise of the jurisdiction should be confined to clear and obvious cases. I cannot possibly conclude that, if properly directed, the Justices would have reached this conclusion...The evidence may well have been available and may be available now, but the position is not sufficiently clear or obvious to justify a refusal of relief."

123. We agree. We consider that it is important for the Commission to consider the question of its own jurisdiction anew, applying the approach that we have set out in paragraph 105 above. For these reasons, we consider that it is appropriate (as Mr. Harris recognised) to remit the question of whether Eurotunnel/SCOP acquired an enterprise to the Commission. To this limited extent, we find that the SCOP's Ground 4 succeeds.

III. EUROTUNNEL'S GROUND 1: THE CONTENTION THAT THE COMMISSION'S PROCEDURES WERE GENERALLY IN BREACH OF THE RULES OF NATURAL JUSTICE

(a) Introduction

124. As was noted in paragraph 23(b), Eurotunnel's Ground 1 contains both a general contention that the Commission's procedures were in breach of the rules of natural

justice, and a series of more specific points that in a number of cases the Commission had failed to give Eurotunnel and/or the SCOP a fair hearing. This Section deals with Eurotunnel's general contention. Section IV deals with the more specific points raised by Eurotunnel.

125. At the heart of both Eurotunnel's general and specific contentions was the point that the Commission had acted unfairly in not providing to Eurotunnel what it said were important parts of its provisional findings and the evidence relied upon by the Commission in support of those findings, thereby materially prejudicing Eurotunnel in its ability to defend itself.

126. Eurotunnel's specific contentions obviously turn on precisely what was being withheld by the Commission during the process up to the making of the Decision. On the other hand, the essence of Eurotunnel's general argument – which really only appeared in its full force in its skeleton argument, rather than in the Eurotunnel Application – was that the Commission's procedures were intrinsically wrong in that the Commission had unlawfully operated what Eurotunnel termed a "closed procedure", in which "parties are excluded from knowing fully what submissions, arguments or evidence were being deployed against them and there was no possibility for that evidence to be challenged or tested" (to quote from paragraph 13 of Eurotunnel's skeleton argument).

127. Eurotunnel contended that two recent Supreme Court decisions – *Al Rawi v The Security Service* [2011] UKSC 34 and *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39 – had fundamentally altered the law in relation to closed procedures.

128. As to the effect of these decisions, Eurotunnel advanced two (alternative) submissions:

(a) Eurotunnel's primary submission was that the effect of these decisions was to subject the Commission to an absolute and unqualified obligation to provide Eurotunnel with all information that it had that was material to Eurotunnel's response to the Provisional Findings, including all "exculpatory" evidence, all "inculpatory" evidence, transcripts, or at least

summaries, of oral evidence and data sets. Mr. Green Q.C., counsel for Eurotunnel, put the point as follows (Day 1/pages 44 to 45):

> "…the net effect of the common law is that in circumstances where you have an adjudicatory process subject to natural justice principles, which includes the Competition Commission as case law has established, that the position now in law is that closed procedures are absolutely prohibited without derogation or exception being permitted, only statute can permit closed procedures, a closed procedure being one where evidence is withheld from the party being investigated, which is relevant to the adjudicatory process."

(b) In the alternative, Eurotunnel made a less extreme submission (Day 1/page 45):

> "Alternatively, if you conclude that the law is not as bright line strict as that, that the recent case law demonstrates that there is a very powerful and fundamental objection to closed procedures, and that guidance given by case law would in almost every case require some form of confidentiality ring."

129. Mr. Harris, in response to the submissions of Eurotunnel, disputed that the Supreme Court's observations on the closed procedures under consideration in *Al Rawi* and *Bank Mellat* were of any application to an inquiry carried out by the Commission, and certainly had not caused the law to shift in the radical manner contended for by Eurotunnel.

130. Clearly, it is necessary to reach a conclusion as to what natural justice requires of the Commission, in the light of *Al Rawi* and *Bank Mellat*, before considering the Commission's actual procedures in this case.

131. However, before we do so, it is necessary briefly to consider an anterior point advanced by the Commission, namely that Eurotunnel's appeal was in any event out of time.

(b) Appeal out of time/limitation

132. In paragraph 146 of its Defence, the Commission contended that Eurotunnel's Ground 1 was an appeal brought out of time. The Commission relied on rule 26 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372/2003, the "Tribunal Rules"), which provides that a challenge under section 120(1) of the Act "must be made within four weeks of the date on which the applicant was notified of the

disputed decision, or the date of publication of the decision, whichever is earlier" (emphasis added).

133. According to the Commission, it notified Eurotunnel of its decision not to use a confidentiality ring on 7 March 2013, which decision it confirmed on 5 April 2013. In effect, this decision made clear that the Commission was not persuaded of Eurotunnel's general contentions. The four-week time limit for any challenge had, therefore, expired by the time Eurotunnel issued its Application. On this basis, the Commission argued that the Tribunal had no jurisdiction to consider Eurotunnel's Ground 1. In short, the Commission contended that the decision being appealed by Eurotunnel is not the Decision of 6 June 2013, but an anterior decision confined to the question of confidentiality rings alone.

134. In answer, Eurotunnel contended that the decision under challenge was in fact the final Decision of 6 June 2013. That Decision was challenged in Eurotunnel's Ground 1 for having been reached using an unfair procedure.

135. As we have noted (in paragraph 23 above), Eurotunnel's Ground 1 addresses both a general point on unfair procedure (considered in this Section), and specific aspects of the Commission's procedures in this case (considered in Section IV below).

136. Both the Commission and Eurotunnel contended that there were practical reasons why their contentions on limitation should be preferred. The Commission contended that, if an out-of-time challenge – as it says Ground 1 is – were allowed to proceed and was successful, much time and resources would have been wasted as an error identified by the Tribunal could have been addressed and rectified months earlier had the application been made in a timely manner. Eurotunnel, by contrast, reasoned that, if the Commission had cleared the merger, it would not have been concerned about the procedural failings disclosed by Ground 1. Accordingly, bringing a challenge in such circumstances part way through the investigation would have been pointless. Eurotunnel further noted the maximum 32-week period for a Commission merger investigation, suggesting that interlocutory challenges could disrupt the Commission's timetable and impair its ability to report within the statutory deadline.

137. There is force in all of these points.

138. The Tribunal has considered similar issues in appeals brought under the dispute resolution provisions in the Communications Act 2003 (the "2003 Act"). In *Orange Personal Communications Services Limited v Office of Communications* [2007] CAT 36, the Tribunal considered whether the two-month time limit for challenging the Office of Communications' ("OFCOM") decision to accept jurisdiction should be extended. In rejecting the need to extend the deadline, the Tribunal reasoned (at [113]) that:

> "A party which brings an appeal against a final determination is entitled to raise in that appeal an allegation that OFCOM lacked jurisdiction to investigate the matter referred to it. That ground may be one of a number of grounds in which the final determination is challenged. But the appellant is not precluded from raising the point by the fact that it could have brought an appeal against the initial decision to assume jurisdiction but chose not to do so." (emphasis added)

139. *Orange* concerned section 192 of the 2003 Act and rule 8(1) of the Tribunal Rules, the latter of which provides that:

> "…an appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier…"

140. While the statutory context is not identical to the instant case, the wording of the applicable rule is very similar to that of rule 26, and many of the considerations which were applied by the Tribunal in *Orange* are relevant to this case.

141. Similarly, in *British Telecommunications PLC v OFCOM (Partial Private Circuits)* [2011] CAT 5 (which also concerned an appeal under the 2003 Act), the Tribunal noted (at [187]) that it would be preferable, in many cases, for certain interlocutory decisions (in that instance, OFCOM's decision to accept a dispute) to be challenged when a final determination had been made.

142. The Tribunal considered the related question of whether an application for review of an interlocutory decision of the Commission issued during the course of its inquiry – rather than following the final report – was premature in *Sports Direct International PLC v Competition Commission* [2009] CAT 32. The Tribunal held

that the challenge to the Commission's refusal to provide information which had been redacted from certain Commission working papers was not premature. In its reasoning, the Tribunal stated (at [55]):

> "In our judgment a decision will normally be covered by section 120(1) if it is something that could form a ground of challenge in the appeal from the ultimate decision if it were not addressed and, if necessary, remedied on an interlocutory basis. No one argued that Sports Direct could not rely on the plea of non-disclosure as a ground of review when challenging the [Commission's] decision in a final report."

143. While the Tribunal in *Sports Direct* did not consider whether a challenge to a procedural decision made during the course of its investigation could be brought against the final decision, there are indications from that judgment that rule 26 of the Tribunal Rules should not be read restrictively.

144. We have also considered the judicial review cases brought under the Civil Procedure Rules ("CPR"). In a similar way to the time limit in rule 26 of the Tribunal Rules, CPR Rule 54(1) requires the claim form to be filed "promptly" and "in any event no later than 3 months after the ground to make the claim first arose". We consider the "grounds to make the claim" requirement in CPR 54(1) to be a useful analogy for the reviewable "decision" requirement in rule 26.

145. In the context of the CPR, in *R v (Eisai) National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, the Court of Appeal considered a challenge on fairness / natural justice grounds to a final decision of NICE, where NICE had failed to disclose a fully executable version of a model 18 months earlier. Richards LJ stated (at [70]) that:

> "I do not accept that the court would have viewed an early challenge in that way. It is more likely that such a challenge would have been considered premature and inappropriate. At the time when NICE refused to release the fully executable version, it was uncertain what the outcome of the appraisal process would be. The Final Appraisal Determination might have proved to be acceptable to Eisai, in which case the issue concerning release of the fully executable version would have been academic. Further, and very importantly, Eisai had a right of appeal to the Appeal Panel against that determination, and the grounds on which such an appeal lay included procedural unfairness. That might well have been viewed as providing an appropriate alternative remedy, rendering a judicial review challenge inappropriate at that stage."

146. For the reasons articulated in the case-law described in the foregoing paragraphs, we consider that whilst issues such as those raised by Eurotunnel's Ground 1 might have been appealed when they arose (i.e. well before the Decision was made), this does not preclude them being raised now. Whilst a decision not to disclose certain material will likely be a "decision" within section 120(1) of the Act, that does not preclude any appeal founded on that procedural error being made on the issue of the final decision. Accordingly, we reject the Commission's contention that Eurotunnel's Ground 1 had been brought out of time.

147. During the hearing in these proceedings, Eurotunnel made, although it did not particularly press it (Day 2/pages 122 to 123), an application for permission to apply after the expiry of the four week time limit in rule 6 of the Tribunal Rules. Nor, to be fair to Eurotunnel, was Mr. Green particularly encouraged to do so (Day 2/page 123). Given our conclusion on the question of limitation, there is no need to consider this application further.

148. We turn to the substance of Eurotunnel's Ground 1, beginning with the applicable legal principles.

(c) The law

(i) Application of an "EU" or "domestic" standard of review

149. As noted above, pursuant to section 120(4) of the Act, the Tribunal is required to decide the Applications applying the same principles as would be applied by a court on an application for judicial review. The Tribunal has considered the principles it should apply on several occasions; for recent examples, see *BAA v Competition Commission* [2012] CAT 3 at [20] and *Akzo Nobel N.V. v Competition Commission* [2013] CAT 13 at [39] to [40].

150. One of the areas of dispute between the parties was whether the Tribunal should apply the "EU" or "domestic" standard of review. Eurotunnel (supported by the SCOP) contended that the Decision interfered with its EU law rights and, therefore, that the EU law principles of judicial review were engaged (see paragraphs 96 to 100 of the Eurotunnel Application). Mr. Green sought to persuade us that this required the Tribunal to apply a stricter standard of review than would otherwise be

applicable under a purely domestic law challenge. The Commission neither accepted that an EU standard of review should apply, nor that such a standard would be higher than the domestic standard of review (paragraph 29 of the Commission's Defence).

151. Eurotunnel's contention that EU standards are applicable was premised on the fact that the "the EU law principle of freedom to provide services applies to maritime transport between Member States" (paragraph 96 of the Eurotunnel Application). Indeed, Regulation 4055/86 provides that Member State nationals have the right to carry passengers or goods by sea between any port of a Member State and any port or off-shore installation of another Member State or of a non-EU country. The Commission, however, contended that the right of freedom to provide services is not engaged as UK merger control does not regulate access to maritime transport services in the UK, but rather regulates the activities of any person wishing to provide such services in the UK without discrimination (paragraph 29(c) of the Commission's Defence).

152. In *Mobile Call Termination* [2012] CAT 11, the Tribunal considered this question in the context of an appeal brought against a decision of OFCOM pursuant to section 192 of the 2003 Act. In its analysis of whether English law recognised proportionality as a head of judicial review, the Tribunal held (at [128] to [129]):

> "128. Absent two important exceptions, we do not therefore consider that it is possible to say, as matters stand at the moment, that proportionality is an independent ground of review under English law for the purposes of section 193(7) of the 2003 Act.
>
> 129. The two exceptions are as follows:
>
> (1) The proportionality ground of review does operate where there are derogations from EU and Human Rights Act rights (e.g. *R v Secretary of State for Health, ex parte Eastside Cheese* [1999] 3 CMLR 123; *Interbrew v Competition Commission* [2001] EWHC 367; *R (Association of British Civilian Internees – Far Eastern Region) v Secretary of State for Defence* [2003] 1 QB 1397 at paragraphs [32] to [37]; *R (Sinclair Collis Limited) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] 2 WLR 304; *BAA Limited v Competition Commission* [2012] CAT 3 at paragraph [20(2)].
>
> (2) Equally, the proportionality ground of review operates when "built into" the legislation pursuant to which a power is exercised

(*Somerville v Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2734 at paragraph [147]).”

153. Having held that the proportionality “built in” exception did not pertain in this case, the Tribunal concluded that Article 1 Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Treaty Series No 73 (1953) Cmd 8969) was engaged (at [139]). Accordingly, proportionality did constitute a basis for review of the decision in that case.

154. In the case of the Applications, whilst the Commission is right to say that UK merger control does not in general regulate access to maritime transport services in the UK, but rather regulates the activities of any person wishing to provide such services in the UK without discrimination, it is certainly the indirect effect of the Decision to affect access to maritime transport services in the UK through merger control. The effect of the Decision is, clearly, significantly to restrict Eurotunnel’s ability to provide maritime transport services in the UK.

155. That might be said to result in an unfortunate distinction between some merger decisions, affecting EU “freedoms”, and others, not affecting such “freedoms”. However, we do not consider that such a distinction arises in such cases, simply because all merger decisions involve the prospect of divestment being imposed as a remedy. Inevitably, where divestment is ordered, this involves a level of expropriation somewhat beyond that which the Tribunal considered, in *MCT*, to be sufficient to engage Article 1 Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, this was precisely the conclusion reached by the Tribunal in *BAA* at [19], which concerned the review of a decision by the Commission that BAA divest itself of Stansted airport. Accordingly, we hold that the Commission’s Decision must be judged by the “EU” standard of review.

156. Quite what this entails for the purposes of Eurotunnel’s Ground 1 is difficult to see. Proportionality provides a structured approach when considering whether a given administrative response is appropriate and necessary to achieve a particular legitimate aim, as can be seen from the statements of the principle in *BAA* at [20(2)] and in earlier case law, such as *R v Secretary of State for the Home Department, ex*

parte Daly [2001] UKHL 26, [2001] 2 AC 532 at [27] and *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [43], [83] and [133]. As such, the principle is clearly relevant to Eurotunnel's Ground 5 and the SCOP's Ground 6, and it is therefore considered in Section VI below. However, we do not consider that the principle adds anything to Eurotunnel's contentions that the rules of natural justice were infringed.

157. We now turn to consider the English law in this area.

(ii) *The English law*

The law prior to *Al Rawi* and *Bank Mellat*

158. It was common ground that the starting point (albeit not the ending point, on which the parties diverged considerably) of the modern law in this area was the decisions of the House of Lords in *Hoffman-La Roche v The Secretary of State for Trade and Industry* [1975] 1 AC 295 and *R v Home Secretary ex parte Doody* [1994] 1 AC 531. In *Hoffmann-La Roche,* Lord Diplock stated at 368 (emphasis added):

> "The basic issue in the investigation by the Monopolies Commission into the prices charged by the appellants in the United Kingdom for Librium and Valium and their derivatives ("the reference drugs") was the extent to which, consistently with the public interest, they should be permitted to recover from the proceeds of sale of these outstandingly successful products contributions to the cost of current research undertaken by the Hoffmann-La Roche group with a view to the discovery of new products and also a high profit margin to compensate for losses or profits at a lower level upon world-wide sales by the group of current or future less successful drugs. It was for the commission to arrive at its own conclusion as to whether the way in which the appellants took account of these two factors in determining the level of the prices at which the reference drugs were supplied in the United Kingdom operated or might be expected to operate against the public interest. The commission makes its own investigation into facts. It does not adjudicate upon a *lis* between contending parties. The adversary procedure followed in a court of law is not appropriate to its investigations. It has a wide discretion as to how they should be conducted. Nevertheless, I would accept that it is the duty of the commissioners to observe the rules of natural justice in the course of their investigation - which means no more than that they must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."

159. In *Doody,* Lord Mustill gave this description of what "fairness" required at 560:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the

> courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

160. In this case, Eurotunnel's principal complaint has related to the extent to which materials were not disclosed at all by the Commission. There have been a number of cases dealing specifically with this question. In particular, we were referred to the following authorities (which we cite in their chronological order, irrespective of which party particularly drew them to our attention).

161. In *R v Monopolies and Mergers Commission, ex parte Elders IXL Ltd* [1987] 1 WLR 1221, Mann J noted (at 1232) that "[f]airness is a flexible concept, whose content is dependent on the situation which is under consideration". He also cited at 1232-1233 a *dictum* of Sachs LJ in *Re Pergamon Press Ltd* [1971] Ch 388 at 403:

> "In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. That need for flexibility has been emphasised in a number of authoritative passages in the judgments cited to this court...
>
> It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate (see *per* Lord Reid in *Wiseman v Borneman*, at p.308) the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective."

Mann J concluded that "[t]here is thus no set of rules of fairness which is applicable to all investigative procedures. There could be no such. In particular

there is no general rule that one party to an investigation should be given all of the material submitted by another" (at 1233).

162. In *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593 at 609, Lord Mustill noted that:

> "...a strong presumption in favour of disclosing to a party any material relating to him or her is the point at which the judge should start. It is true, as frequently emphasised, that the requirements of natural justice are not invariable, and that circumstances must alter cases. Nevertheless the opportunity to know about and respond to adverse materials is at the heart of a fair hearing."

163. *R v The Governing Body of Dunraven School ex parte B* [2000] ELR 156 concerned the exclusion of a pupil from his school under the disciplinary provisions of the Education Act 1996 on the ground that he had stolen a handbag belonging to a teacher. Sedley LJ stated:

> "18. It is a proposition too obvious to require authority that what fairness demands in a particular situation will depend on the circumstances. In relation to permanent exclusion from a grant-maintained school Parliament has made it clear – as the common law would otherwise have done, given what is at stake in such cases – that the parent knows in some adequate form what is being said against the child. Where what is being said has taken at least two different and arguably inconsistent forms, fairness will ordinarily require enough disclosure to reveal the inconsistency.
>
> 19. A second, related, principle is that it is unfair for the decision-maker to have access to damaging material to which the person at risk – here the pupil through his parent – has no access."

164. In *R (M) v Independent Appeal Panel* [2004] EWHC 1831 (Admin), Newman J considered the decision in *Dunraven* and noted (at [15]):

> "It emerged in argument that it was also said to be relevant for the claimant and the Panel to have the previous statements of the witnesses available in order to ascertain whether they had implicated the claimant in their first statements or whether they had said anything about the presence or conduct or actions of the claimant in their first statements. It was never suggested that there was anything in the first statements made by the other witnesses to implicate the claimant. It formed no part of the school's case against the claimant. The Panel could not have believed that there was anything in the first statements which implicated the claimant and, had they considered the issue, they would have been bound to conclude that they did not. Had anything in the statements implicated the claimant, it could hardly have helped the claimant to have it revealed. The next question, therefore, is whether there was anything in the first statements made by the witnesses which exculpated the claimant. Relying upon the case of *R v The Headteacher and Independent Appeal Panel of Dunraven School ex parte B* [2000]

> ELR 156, Mr Underwood submitted there had been unfairness arising out of the failure to disclose the statements to enable the claimant to address the Panel by reference to any exculpation which may have been present in the statements or, as I would understand the argument, any other matter in the statements which could have been prayed in aid of the claimant's position. In my judgment, the case of *Dunraven* cannot assist the claimant in this respect. There was manifest unfairness in *Dunraven* because the Panel were aware of evidence of which the claimant and his advisers were wholly unaware, which it had heard in other cases and which implicated the claimant. The observation made in connection with inconsistent statements must be understood in the context of the facts of that case and gives rise to no general principle that there must be full disclosure of all the statements made by any witness whose evidence is considered by an independent appeal panel. Fairness, when it arises for consideration, must be considered on the facts of each case."

165. *Eisai* (see paragraph 145 above) was a case which concerned the judicial review of guidance issued by NICE in relation to the use of a particular drug. Although NICE's procedures involved "a remarkable degree of disclosure and of transparency in the consultation process" (at [66]), nevertheless the Court of Appeal considered that procedural fairness required the release of still more material – in this case, the release of a fully executable version of an economic model used by NICE, and not merely a "read only" version – so that consultees could fully check and comment on the reliability of the economic model upon which NICE had based its decision (see [49]). Production of the "read only" version limited the ability of Eisai to make an intelligent response on something that was central to NICE's appraisal process.

166. In *Sports Direct International plc v Competition Commission* [2009] CAT 32 the Tribunal stated at [27] that

> "Given the interests at stake, the fair conduct of a merger reference generally requires a party to know what evidence has been given and what statements have been made affecting it, and then it must be given a fair opportunity to respond or correct them. However, what is fair in relation to a particular process, and to a particular situation which is the subject of that process, self-evidently depends on the facts of the case…"

167. We consider the following propositions to emerge from these authorities:

(a) There is a general duty on administrative bodies to act in a procedurally fair way.

(b) What is "fair" is something that is not immutable: it may develop over time in order to adapt to or take account of changing circumstances. It is certainly context sensitive. Above all else, it is a standard that is flexible. By this, we do not mean that the standard of fairness can be sacrificed: in that respect, the rule is much closer to an absolute. However, what is, or is not, "fair" in a given case depends on all of the circumstances. What can be said with confidence is that one standard does not fit all cases.

(c) The standard of fairness has many aspects, one of which – and this is the aspect with which we are principally concerned at the moment – is that a person affected by a decision is entitled to have an opportunity to make representations. That, in turn, means that such a person must know the case against him or her.

(d) As, no doubt, is the case with all aspects of natural justice, this right to make representations is coloured by many factors. These, without seeking to be exclusive, include:

    (i) The statutory framework within which the tribunal operates. Of course, some tribunals (albeit not the Commission) do not operate within a statutory framework at all, and are governed only by the common law. However, the important point to note is that statutory frameworks can be supplemented, and are to be read in the light of, the common law. As was noted in *Lloyd v McMahon* [1987] 1 AC 625 at 702-703, "it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness".

    (ii) Other aspects of context, including in particular the nature of the investigation.

(iii) The significance of any individual item of information in the context of the investigation.

168. There remains the question of how issues of procedural fairness are to be determined. What constitutes a fair process is one for the court (or, here, the Tribunal) as a matter of law. That said, the process taken by the administrative tribunal is entitled to great weight. It is the administrative decision-maker, and not the reviewing court, that stands in the front line when assessing what is procedurally fair, and (to descend to the specific) the Tribunal should be slow to second-guess decisions of the Commission in terms of what needs to be shown to an affected party, how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in *R v Panel on Take-Overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 at 184:

> "Mr. Buckley argued that the correct test is *Wednesbury* unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal *decides* to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr. Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached."

In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission's approach should be given "great weight". We consider this is reflected in the case-law, which repeatedly emphasises that, when considering what is procedurally fair, one size does not fit all.

Al Rawi and *Bank Mellat*

169. We now turn to consider *Al Rawi* and *Bank Mellat*, which Mr. Green contended had fundamentally changed the law in this area.

170. In *Al Rawi*, the claimants brought claims for damages against, amongst others, the UK Security Service, on the ground that it had caused or contributed to detention and ill treatment that they had suffered at the hand of certain foreign governments. The defendants requested the court to adopt a "closed procedure" to hear these claims.

171. Lord Dyson, who gave the leading judgment, described the issue before the Supreme Court as follows (at [1]):

> "The issue that arises on this appeal is whether the court has the power to order a "closed material procedure" as described in the preliminary issue that was tried by Silber J for the whole or part of the trial of a civil claim for damages and, if so, in what circumstances it is appropriate to exercise the power. The preliminary issue was in these terms:
>
> > "Could it be lawful and proper for a court to order that a 'closed material procedure' (as defined below) be adopted in a civil claim for damages? Definition of 'closed material procedure'. A 'closed material procedure' means a procedure in which (a) a party is permitted to (i) comply with his obligations for disclosure of documents, and (ii) rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'), and (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest. For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.""

172. In *Al Rawi*, the Supreme Court held that Parliament alone could introduce a closed material procedure, as defined in the preliminary issue, as a replacement for the existing common law process for dealing with claims for public immunity in ordinary civil claims for damages; and it was not open to the courts to do so. Under the public immunity process, if documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court; whereas under a closed material procedure, closed documents are only available to the party which possesses them, the other side's special advocate and the court.

173. The following passages in the judgment of Lord Dyson were particularly drawn to our attention by Mr. Green:

> "The essential features of a common law trial
>
> 10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259, per Lord Hewart CJ, *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449H-450B, per Lord Diplock, and recently *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2011] QB 218, paras 38-39, per Lord Judge CJ.
>
> 11. The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p476) criticised the decision of the lower court to hold a hearing in camera as constituting "a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security". Lord Haldane LC (p438) said that any judge faced with a demand to depart from the general rule must treat the question "as one of principle, and as turning, not on convenience, but on necessity".
>
> 12. Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. The Privy Council said in the civil case of *Kanda v Government of Malaya* [1962] AC 322, 337:
>
> > "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."
>
> 13. Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594, at para 32: "Confrontation and the opportunity for cross examination is of central significance to the common law adversarial system of trial."

174. In the same case, Lord Kerr stated (at [89]):

> "As I have observed in the associated case of *Tariq v Home Office* [2011] UKSC 35, the right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process. I referred in my judgment in that case to various celebrated expressions of that

> principle and I need not repeat them here. The right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness. Without it, as Upjohn LJ put it in *In re K (Infants)* [1963] Ch 381, a trial between opposing parties cannot lay claim to the marque of judicial proceedings."

175. *Bank Mellat* concerned an application by Bank Mellat, under section 63 of the Counter-Terrorism Act 2008 (the "2008 Act"), to set aside the Financial Restrictions (Iran) Order 2009, which had been made under the 2008 Act and which had the effect of preventing all persons operating in the financial sector in the United Kingdom from entering into or continuing to participate in any transaction or business relationship with the bank. As here, section 63 obliged the reviewing court to apply the principles applicable on an application for judicial review.

176. Lord Neuberger, who gave the judgment of the majority, defined the issue before the court as follows (at [1]):

> "This judgment is concerned with two connected questions: (i) Is it possible in principle for the Supreme Court to adopt a closed material procedure on an appeal? If so, (ii) Is it appropriate to adopt a closed material procedure on this particular appeal? A closed material procedure involves the production of material which is so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing (ie a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present), and to contemplate giving a partly closed judgment (ie a judgment part of which will not be seen by one of the parties)."

177. The Supreme Court decided, by a majority, that, under statute, the court had jurisdiction to entertain a closed material procedure but that, having considered the judge's closed judgment in closed session, the closed material could have no bearing on the outcome of the appeal. On the appeal itself, the court quashed the order.

178. On the question of natural justice, Lord Neuberger said as follows:

> "*Open justice and natural justice*
>
> 2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to

achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum: see, for instance, *A v Independent News and Media Ltd* [2010] 1 WLR 2262, and *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue.

3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the contents of that evidence and those arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions."

4. In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson made it clear that, although "the open justice principle may be abrogated if justice cannot otherwise be achieved" (para 27), the common law would in no circumstances permit a closed material procedure. As he went on to say at [2012] 1 AC 531, para 35, having explained that, in this connection, there was no difference between civil and criminal proceedings:

> "the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that"."

179. On the basis of these authorities, Mr. Green submitted that the prohibition on closed procedures could only be ousted by either an express or an implied statutory requirement, and that there was no such ouster in the case of the Commission under the Act. We will turn to the provisions of the Act in due course, but (as will be seen) the position is certainly not as clear-cut as Mr. Green contended.

180. More generally, it was not clear to us whether Mr. Green was contending, as his primary case (described in paragraph 128(a) above), that the Commission's procedures had to be entirely open – that is, without <u>any</u> protection for confidential information – or whether such information might be accorded some protection, such as by way of the use of a confidentiality ring.

181. Mr. Green's alternative position was that, even if there was no "bright line" prohibition of closed procedures, the recent Supreme Court case law demonstrated that there was a very powerful and fundamental objection to closed procedures, and

that in almost every case fairness would require some form of confidentiality ring into which confidential information could be introduced.

182. The problem with Mr. Green's contentions is that – whichever alternative is adopted – they prove too much. The logical consequence of Mr. Green's submissions is that the principles of natural justice, as they apply in the courtroom, are imported wholesale into every form of administrative process that is subject to the rules of natural justice, without regard to the role of the administrative decision-maker or the type of decision being taken. Essentially, and contrary to literally dozens of authorities, including decisions of the House of Lords, according to Mr. Green, a "one-size fits all" approach would have been imposed by the Supreme Court, without expressly discussing the point, and without overruling, or even disapproving, a single one of these authorities.

183. Mr. Green was well-aware of the extreme nature of his submissions, and he sought to move away from the logical consequences of his contentions. Thus, he did not seek to suggest that cross-examination was essential in all cases of administrative decision-making (Day 1/page 76):

> "I also accepted that you have to modify the procedure for an inquisitorial body - say, for cross-examination. No one is suggesting that you have to have cross-examination, but the bottom line of a closed procedure is that the defending company is not bereft of information that everyone else has and which is adverse to him. The way in which you give that information to the defending company may be myriad. There may be many different ways of doing it. In an inquisitorial procedure it does not have to be tested through cross-examination, the equivalent is that the information is disclosed, perhaps into a ring, and then a right of representation is given on that. There are different ways of achieving natural justice, even under an absolutist rule. You cannot just say that an adversarial court is the same as an inquisitorial tribunal."

184. It was suggested to Mr. Green that much of the Commission's Guidance as to the treatment of confidential information must be unlawful, at least if Mr. Green's primary contention was correct, since it contemplated the withholding of confidential material from parties affected by the Commission's inquiry. Mr. Green declined to accept that this was so (Day 1/pages 71 to 75 and, particularly, 76):

> **Mr. Currie** Mr. Green, can I just ask you this: am I right in understanding that if we take what you call your absolute rule, if that is the law, is it your position that as soon as the Competition Commission looked at its own guidelines on this, it was committing an error

of law?

Mr. Green No. I think, in answer to the Chairman's earlier question, I said it may very well depend upon who it is, whether it is the target or whether it is the third party, whether we are talking about the use of a data room, it may be perfectly justified disclosure subject to restrictions, it may be perfectly proper, there may be irrelevant material, there may be a wide range of considerations which apply, even in relation to the absolute rule, just looking at this here. We are not suggesting that at all, which is why really to give a black and white answer about this list is far too crude an approach, it really is a much more nuanced position. A number of these would, in some circumstances, appear to be consistent with the common law.

185. It is extremely difficult to see how this "nuanced position" fits with Mr. Green's primary case as regards *Al Rawi* and *Bank Mellat*. There is an obvious tension.

186. That tension is resolved when it is appreciated that, in both decisions, the Supreme Court was considering the permissibility of closed procedures (as defined in those decisions) in the context of criminal and civil trials. *Al Rawi* concerned a civil action for damages, and *Bank Mellat* a review of an administrative decision done on a judicial review standard. Both Lord Dyson in *Al Rawi* (see [1], quoted at paragraph 171 above) and Lord Neuberger in *Bank Mellat* (see [1], quoted at paragraph 176 above) made it clear that this was the question before them, not the wider question of what "fairness" required in administrative proceedings generally.

187. There is no suggestion, either express or implied in either decision, that the Supreme Court intended its observations in relation to "closed procedures" to be applied either generally to administrative decisions or in the specific context of the Commission's statutory procedure in this case. Indeed, it is noteworthy that in *Bank Mellat*, Lord Sumption referred to and cited with approval Lord Mustill's speech in *Doody* (see paragraph 159 above) as representing a summary of the case law on the duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is about to be exercised. We consider that *Doody*, and the other decisions set out in paragraphs 158 to 168 above, remain good law, and that the suggestion that the decisions in *Al Rawi* and *Bank Mellat* are to be read across as the new standard to be applied to all administrative decision making procedures is a misreading of those decisions.

188. That disposes of Mr. Green's primary contention. Mr. Green's secondary contention was that the recent Supreme Court case law "demonstrates that there is a very powerful and fundamental objection to closed procedures, and that guidance given by case law would in almost every case require some form of confidentiality ring." We consider that the decisions in *Al Rawi* and *Bank Mellat* say no such thing about the need for confidentiality rings in administrative decisions. At most, in the context of this case, these decisions constitute an important reminder that fairness requires a person affected by a decision to be able to see the material upon which that decision is based, so that that person can, if so advised, appropriately challenge it.

189. Accordingly, we consider that the fairness of the Commission's conduct in relation to disclosure falls to be tested according to the law set out in paragraphs 158 to 168 above.

190. We therefore turn to a consideration of the Commission's procedures in the instant case.

(d) The Commission's procedures

191. This, in the first instance, requires us to consider the statutory framework within which the Commission operates. Before we turn to the relevant provisions of the Act, however, it is necessary to consider how far we are assisted by specific decisions of the EU courts in relation to the European Commission, which were cited to us by Eurotunnel.

(i) *<u>European case law</u>*

192. Mr. Green placed much emphasis on the EU courts' judgments in the Soda Ash cases (Case T-30/91 *Solvay SA v Commission* [1995] ECR II-1775 ("*Solvay No. 1*") and C-110/10P *Solvay SA v Commission* [CMLR] 4 CMLR 81 ("*Solvay No. 2*"), which concerned the European Commission's findings of infringements of Articles 101 and 102 TFEU. In *Solvay No. 1*, which was heard before the statutory right of access to file was introduced into the EU competition law regime, the Court of First Instance (as it then was) described the right to access the file as part of the general principle of "equality of arms" (*Solvay No. 1* at [83]). In *Solvay No. 2*, the European Court of Justice explained that access to file meant that the European Commission

Royal Borough of Kensington and Chelsea, ex p. Bayani (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the [Commission] had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the [Commission] of some probative value on the basis of which the [Commission] could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45];

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion "reasonably, carefully and in good faith", but will include examination "whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'" (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as "relevant and sufficient" depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the [Commission] whether a relevant [adverse effect on competition] exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA is essentially equivalent to that

given by the ordinary domestic standard of rationality. However, we also accept Mr Beard's submission that even if the standards required of the [Commission] by application of Article 1P1 regarding its investigations and the evidential basis for its decisions were more stringent than under the usual test of rationality, the [Commission] would plainly have met those more stringent standards as well;

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the [Commission]: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case). This is of particular significance in the present case where the [Commission] had to assess the extent and impact of the [adverse effect on competition] constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the [Commission] had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

…

(8) Where the [Commission] gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development

"Q [the Commission's inquiry director]: Did you produce a business plan for the new route?

A. (Mr Carlsen [DFDS's Chief Financial Officer]): Actually I'm not sure that we have a formal – for that particular route.

A. (Mr Pedersen [DFDS's Executive Vice President, Shipping]): Not a formal, no.

THE CHAIR: We will find what we have produced –

Q: If you've got some documents which explain the rationale, your expectations, targets, etc, that would be very helpful. Whether they're formal business plans or more notes of meetings, that would be helpful.

A. (Mr Carlsen): We made a business plan to SeaFrance – to the liquidators to show what would happen.

Q: Oh right.

A. (Mr Carlsen): But that was of course in a different context and on a different cost basis. What we had never done is to make a business plan. Well, we have now of course as part of our regular processes of planning. But we never had any – Eurotunnel as a ferry operator into any scenarios because that came when we were beyond – we had already started our service – when that became an option.

Q: Okay. Your business plan as well for the acquisition of the SeaFrance assets would be helpful to us.

A. (Mr Carlsen): Yes, we can –

Q: Anything you have that shows what we think – your thinking was for this route would be really helpful. Thank you very much.

A. (Mr Pedersen): Okay."[4]

352. Eurotunnel also accepts that the Commission asked DFDS the "right question" in its information request of 8 January 2013, which was sent to DFDS following the meeting that had taken place on 4 January 2013. That information request was explicit, in that the Commission requested that DFDS provide any "business plan or other relevant documentation concerning entry onto Dover-Calais" and referenced the above extract from the transcript.

353. Both at the meeting on 4 January 2013 and when responding to the Commission's information request of 8 January 2013, DFDS would have been well aware of the

[4] This excerpt from the transcript was exhibited to the witness statement of Mr. Færge. That version of the transcript included certain proposed amendments (in track changes) to the version of the transcript circulated by the Commission. For the avoidance of doubt, the extract included in this judgment is the version prior to the incorporation of any of DFDS's proposed amendments.

provisions of section 117 of the Act, which makes it a criminal offence knowingly or recklessly to provide false or misleading information to the Commission in connection with any of its functions under the Act.

354. Against this background, we do not find that the Commission acted unreasonably, or failed to carry out relevant and sufficient investigations in relation to this issue. The Commission had been told by DFDS on 4 January 2013 that no formal business plan document existed. It nevertheless pursued the matter further, repeating the request in an email dated 8 January 2013. When DFDS responded by providing the bid document that had been submitted to the French Court, the Commission was entitled to conclude, consistently with what had been said by DFDS at the meeting on 4 January 2013, that this was the only relevant document to this line of enquiry.

355. It is not for the Tribunal to express a view on whether it would have been desirable for the Commission to have further pressed DFDS to look for and to provide it with documents that pre-dated DFDS's entry to the Dover-Calais route. We consider that it was for the Commission to make a judgment as to whether it accepted that DFDS had co-operated fully in relation to the disclosure of documents. There was nothing in its dealings with the FCA, or DFDS itself, which suggested the contrary. Further, in view of the Commission's reliance on objective factors such as the relative incentives of DFDS and MyFerry to persist in operating a loss-making service, we consider that it was open to the Commission, acting reasonably, to conclude that it had gone as far as was necessary in its requests for documents from DFDS.

356. We also consider that the Commission's conduct met the more stringent test of whether it had made relevant and sufficient enquiries.

The contention that the Commission relied on evidence that was unsupported by documents

357. To the extent that the Commission relied on oral evidence from DFDS, which was not vouched for by documents, we consider that it was for the Commission to assess the credibility and reliability of that evidence. Eurotunnel did not identify any basis upon which we consider that we could hold that no reasonable Tribunal could have

accepted that evidence or that it did not have a relevant or sufficient basis for doing so.

358. In paragraph 131(a) of its skeleton argument, Eurotunnel contended that the Commission erred "in failing to take into account, and/or investigate the implications of the obviously important material that it did obtain from DFDS about why it did enter the Dover-Calais route before knowing the outcome of the sale of the ex-SeaFrance vessels". The alleged failure to take account of material obtained from DFDS was not developed either in Eurotunnel's skeleton argument or in its submissions at the hearing.

359. Eurotunnel's complaints in its Application in relation to the failure to give adequate reasons and failure to give Eurotunnel an opportunity to comment as part of its right to a fair hearing were not pursued in its skeleton argument or in its submissions at the hearing.

360. We see no grounds for impugning the Decision on these grounds.

(c) Eurotunnel's Ground 3: Re-entry by DFDS

(i) *Introduction*

361. Eurotunnel's Ground 3 challenges the Commission's finding that, if DFDS were to exit from the Dover-Calais route, it was unlikely to re-enter that route. Eurotunnel submits that this finding was an important part of the Commission's overall conclusion as, in accordance with the Commission's Merger Assessment Guidelines (at paragraph 5.8.3), the Commission would have unconditionally approved the Acquisition if it had found that "re-entry by DFDS on to the Dover-Calais route in response to a rise in prices would have been timely, likely and sufficient to eliminate the increase in price". Eurotunnel submitted that the Commission's finding was flawed as there was no proper basis upon which it could be made having regard to the evidence. It contended that, in fact, DFDS was an obvious re-entrant to the market.

362. Eurotunnel further argued that there were procedural defects in the Commission's decision-making on this issue.

363. We consider these two points separately in the following paragraphs.

(ii) *No proper basis*

364. Paragraph 8.161 of the Decision states:

> "Our view is that re-entry would be unlikely because it would be difficult in these circumstances for DFDS/LD to establish credibility with freight customers[222] that it was committed to the route."
>
> Footnote 222 reads: "Based on the views of freight customers we have received."

365. The Commission's evidence of the importance of establishing credibility with freight customers is set out in paragraph 5 of Appendix H of the Decision (which Appendix is titled "Likelihood of entry"):

> "Several major freight customers told us that critical considerations for them in determining which ferry operator to use were the frequency and reliability of the service because it was important that lorries and drivers were not waiting in port for long periods before the next sailing. They also noted that the credibility of new operators was important because a feature of the freight market was that freight companies and ferry operators agreed annual contracts around the calendar year end, and if the freight companies used a ferry operator that withdrew from the route part way through the year, they might fail to benefit from volume discounts or rebates with one of the remaining operators."

366. Paragraph 5 was, in fact, based on the statements of two freight customers during hearings before the Commission.

367. In paragraph 7(a) of Appendix H, the Commission referred to statements from Eurotunnel, which on the face of it support the freight customers' views:

> "[Eurotunnel] told us that it would take time to build freight traffic as freight customers would delay entering into a contract with a new operator until they were convinced that the operator would provide a reliable service…"

368. Eurotunnel contended that there was an insufficient evidential basis for the Commission's finding that DFDS re-entry would be unlikely.

369. Eurotunnel pointed out that the Commission had surveyed 3,119 freight customers, but had received responses from only 189 of them. At paragraph 6.27 of the Decision, the Commission had described these responses as "potentially unrepresentative" and stated that "the survey results cannot be considered to

provide a reliable guide to the likely behaviour of the broader customer base". Eurotunnel contended that, by the same measure, the Commission should have discounted or disregarded the views of a mere two freight customers. Eurotunnel submitted further that, insofar as these customers had expressed a view, it concerned entry rather than re-entry, which raises different issues.

370. The Commission submitted that that there was a sufficient basis in the evidence for its finding. First, the Commission submitted that its reasoning on whether DFDS could re-expand into the Dover-Calais route was not to be found solely in paragraph 8.161 of the Decision. Rather, the analysis in that paragraph must be read in conjunction with paragraph 8.159 of the Decision (which lists considerations which might affect the ease and likelihood of expansion by an existing operator), the entirety of Appendix H and the remainder of the Decision. According to the Commission, this highlights the significant overcapacity on the route, the incumbency position of P&O, a market that has not accommodated three independent ferry operators in recent years, the perception of the equity market on the number of viable operators, and the availability of vessels. Second, on the specific issue of re-entry, the Commission had evidence not only from the two freight customers referred to in paragraph 5 of Appendix H, but also evidence from Eurotunnel and DFDS regarding customers' perceptions of reliability of, and the risk of withdrawal by, new operators. It also had evidence from the SCOP that freight customers were slow to book with MyFerry because they were waiting to see if MyFerry was committed to the Dover-Calais route.

371. As with Eurotunnel's Ground 2, the relevant law is stated in *BAA*. In this instance we note, in particular, the Tribunal's comments in [20(5)] of *BAA*, in relation to evaluative judgments by an expert body of the character of the Commission. We proceed on the basis that, in order to disturb the finding challenged by Eurotunnel under this ground of appeal, we must find it to be manifestly without reasonable foundation.

372. We do not accept Eurotunnel's submissions, which wrongly attempt (by their reference to the Merger Assessment Guidelines) to raise the uncontroversial issue of credibility on market re-entry to the status of a "make-or-break" point that could

have led to the unconditional clearance of the merger. We consider that on this relatively straightforward issue there was sufficient evidence before the Commission to reach its conclusion, particularly where, as we note below, its provisional findings on this matter were not challenged. It was a matter for the Commission to decide whether the evidence in relation to entry was also relevant in relation to re-entry. In our view it was not obviously irrelevant.

(iii) Procedural deficiency

373. Eurotunnel also contended that the Commission's finding regarding DFDS's potential re-entry to the market was undermined by a fundamental procedural defect. Eurotunnel noted that the Commission had referred to extracts from hearing transcripts at paragraph 173 of its Defence (namely, the hearings that were conducted with the two customers referred to at footnote 222 of the Decision), yet these transcripts had not previously been provided to Eurotunnel for its comment, were not described in the Provisional Findings or Decision, and were not included in the summaries of hearings with customers which the Commission published on its website.

374. For the reasons given in relation to Eurotunnel's Ground 1 in Section III above, in circumstances where the Commission properly communicated the gist of its position on a particular issue, we do not consider that the Commission was required, as a matter of fairness, to go further and provide full disclosure of all the transcripts of its hearings with third parties.

375. Eurotunnel had notice of the Commission's thinking on this point in paragraph 8.126 of the Provisional Findings and Eurotunnel had the opportunity to express and justify its own views. It did, in fact, offer comment in paragraphs 7.70 to 7.71 of its response. Nor did Eurotunnel challenge the proposition that it would be difficult for DFDS to re-establish credibility with freight customers. Rather, it complained that the Commission had not considered the potential for re-entry from other operators.

376. For these reasons we reject Eurotunnel's Ground 3.

VI. CHALLENGES TO THE REMEDY IMPOSED BY THE COMMISSION

(a) Introduction

377. It will be recalled that the Commission prohibited Eurotunnel from operating ferry services at the port of Dover: *(i)* with any vessel for a period of two years; and *(ii)* with the *Berlioz* and the *Rodin* for a period of 10 years (see paragraphs 10.181 – 10.183 of the Decision). This prohibition was to commence on the date six months from the date of the Commission's order implementing the remedy. In the meantime, Eurotunnel was permitted to divest the *Berlioz* and the *Rodin* to a purchaser approved by the Commission (subject to specified anti-avoidance provisions).

378. Both Eurotunnel's Ground 5 and the SCOP's Ground 6 involve challenges to the nature of the remedy imposed by the Commission in order to remedy, mitigate or prevent the substantial lessening of competition identified, or any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.

379. We consider, first, the relevant legal principles and, thereafter, Eurotunnel's Ground 5 and the SCOP's Ground 6.

(b) The relevant legal principles

380. In paragraph 155 above, we concluded that the European law principle of proportionality applied. These were described in *BAA* at [20(2)] as follows:

> "In light of the relevance of the Convention right in Article 1P1 in this context, section 3(1) of the HRA requires that sections 134 and 138 should be read and given effect in a way compatible with that Convention right, which means that any such remedies must satisfy proportionality principles. Also, the [Commission] accepts in its published guidance that any such remedies must satisfy proportionality principles (paragraph 4.9 of the Competition Commission Guidelines on Market Investigation References, June 2003). There was common ground as to the formulation of the proportionality test to be applied by the [Commission] in taking measures under the Act (and by the Tribunal in reviewing its actions):
>
> > "… the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse

> effects which are disproportionate to the aim pursued" (*Tesco plc v Competition Commission* [2009] CAT 6 at [137], drawing on the formulation by the Court of Justice in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food, ex p. Fedesa* [1990] ECR I-4023, para. 13)

In addressing proportionality, the following observation of the Tribunal at para. [135] of its judgment in *Tesco* should particularly be borne in mind:

> "[C]onsideration of the proportionality of a remedy cannot be divorced from the statutory context and framework under which that remedy is being imposed. The governing legislation must be the starting point. Thus the Commission will consider the proportionality of a particular remedy as part and parcel of answering the statutory questions of whether to recommend (or itself take) a measure to remedy, mitigate or prevent the [adverse effect on competition] and its detrimental effects on customers, and if so what measure, having regard to the need to achieve as comprehensive a solution to the [adverse effect on competition] and its effects as is reasonable and practicable.""

381. Accordingly, we proceed on the basis that in deciding on remedy the Commission must comply with the principle of proportionality, as outlined above.

382. We also proceed on the basis that in its assessment of remedy, the Commission is entitled to the margin of appreciation considered at *BAA*, [20(5)]. In making its decisions about remedies, the Commission was necessarily required to make evaluative assessments using its own expertise. To be disturbed, these assessments must be demonstrated to be manifestly without reasonable foundation.

(c) Eurotunnel's Ground 5

(i) Eurotunnel's contentions

383. Eurotunnel contended that, in its Decision, the Commission had imposed a remedy which went beyond that which was needed to address the anti-competitive outcome that it had found to exist, and which was, accordingly, disproportionate. Further, Eurotunnel contended that the Commission had unlawfully reversed the burden of proof, failed properly to investigate necessary matters, and/or made findings for which there was no evidence.

384. Eurotunnel argued that two aspects of the Commission's finding on remedy were disproportionate: *(i)* the divestment of both the *Berlioz* and the *Rodin*; and *(ii)* the prohibition of ferry services at the port of Dover as a whole.

The proportionality of divestment of both the *Berlioz* and the *Rodin*

385. Eurotunnel pointed out that the Commission had found that the minimum efficient scale of operation on the Dover-Calais route was three vessels (two fully operational vessels and access to one additional vessel for back-up). This was inconsistent, argued Eurotunnel, with the Commission's findings in relation to remedy, where the Commission found that it could not be satisfied that there was no realistic prospect of a substantial lessening of competition unless Eurotunnel divested itself of two vessels, the *Berlioz* and the *Rodin*, leaving it with only one vessel on the Dover-Calais route.

386. The Commission's conclusions on the risks of a remedy which required divestment of just one vessel are set out in paragraphs 10.61 to 10.64 of the Decision:

> "10.61 [Eurotunnel] told us that it considered that the divestiture of just one vessel, in particular the *Nord Pas-de-Calais*, would be sufficient to remedy the [substantial lessening of competition] identified by the [Commission]. The basis of [Eurotunnel]'s argument was that, as we have concluded that the minimum efficient scale of operation on the Dover–Calais route requires two fully operational vessels and access to one additional vessel for back-up (see paragraph 8.32), an operator with only two vessels could not be in a position to operate effectively and therefore would not be able to operate a business of sufficient scale to give rise to a [substantial lessening of competition].
>
> 10.62 We do not accept [Eurotunnel]'s argument as a matter of principle. The minimum efficient scale relevant for entry or for operations to be sustainable does not set the parameters for an effective remedy. The Act requires us to seek 'as comprehensive a solution as is reasonable and practicable' to the [substantial lessening of competition] resulting from the merger under consideration, and our starting point for considering the appropriate divestiture package is to reverse the completed merger. The comprehensive nature of the remedy required means that we are not required to make fine judgments over when the [substantial lessening of competition] we have identified has been reduced to merely an 'acceptable' lessening of competition. Further, the guidelines say that the [Commission] will seek remedies that have 'a high degree of certainty of achieving their intended effect', and that third parties should not bear significant risks that remedies will not have the requisite impact on the [substantial lessening of competition] or its adverse effects. In making this assessment, the [Commission] will seek to ensure that there is no realistic prospect of the [substantial lessening of competition] remaining.
>
> 10.63 In this case, reducing the scale of operation to below its minimum efficient scale does not, of itself, preclude any problem arising. For that to be so, we would require to be satisfied on two points:
>
> *(a)* that continued operation at below minimum efficient scale would not give rise to any realistic prospect of the effects of the [substantial lessening of competition] we have identified continuing to be felt; and

(b) that there would be no realistic prospect that the operations conducted using business assets acquired as part of the transaction could, either immediately or at some future stage, be scaled back up so as once more to give rise to the [substantial lessening of competition] we have identified.

10.64 Further, on the facts:

(a) We were not satisfied that the [substantial lessening of competition] would be addressed simply if [MyFerry] ferry services continued to operate at less than their minimum efficient scale:

(i) the internalization effect might be reduced but would not be eliminated as [Eurotunnel] would continue to receive the revenues from the residual [MyFerry] operation; and

(ii) the competition-weakening effect might still materialize if, as a result of [MyFerry]'s continuing operation, DFDS/LD did not expect to achieve sufficient market share to become profitable and exited the Dover–Calais route.

(b) We also considered that it would be easier for [MyFerry] to increase the scale of its operation above the minimum efficient scale at a future point in time if it had continued to have a presence on the Dover–Calais route and customers remained familiar with the brand than if it exited the route. Further, the more business assets that were retained, the less investment that would be required to scale up again."

387. According to Eurotunnel, the Commission's remedy should have been limited to the divestment of a single vessel, as this would have reduced MyFerry to below the minimum efficient scale for Dover-Calais operations. Accordingly, so argued Eurotunnel, the Commission breached the principle of proportionality.

388. In any event, Eurotunnel contended, the Commission had wrongly reversed the burden of proof and/or failed to carry out a sufficient inquiry on this matter in that:

(a) There was no evidence at all that the internalisation or competition-weakening effects would arise if Eurotunnel's operations were confined to below the minimum efficient scale; and/or

(b) The burden of proof was reversed as the Commission stated that, in order to find that reducing the scale of operation to below the minimum efficient scale would be a sufficient remedy, it needed to be satisfied that: *(i)* continued operation below the minimum efficient scale would not give rise to a substantial lessening of competition; and *(ii)* in future Eurotunnel would

not scale up its operations to give rise to a substantial lessening of competition (Decision at paragraph 10.63).

389. Eurotunnel also argued that the Commission's concerns about "scaling-up" went beyond the proper scope of its statutory powers.

The proportionality of the prohibition of ferry services at the port of Dover as a whole

390. In considering whether Eurotunnel should be prohibited from operating ferry services at the port of Dover, the Commission decided that Eurotunnel would be prohibited from operating on the Dover-Dunkirk route, as well as on the Dover-Calais route. This was to avoid an internalisation effect occurring by means of a diversion of freight traffic from the tunnel to the Dover-Dunkirk and /or the Dover-Calais routes. Eurotunnel had contended to the Commission that any remedy should not apply to the port of Dover as a whole but should be limited to the affected route (which Eurotunnel contended was Dover-Calais).

391. Eurotunnel argued that it was disproportionate to prevent Eurotunnel from offering a service at the port of Dover to or from any destination; the remedy should have been limited to operating ferry services at Dover to or from Calais and Dunkirk.

392. Having regard to the minimum efficient scale, Eurotunnel argued that the Commission ought to have limited any prohibition to prohibiting any ferry operation from Dover with three or more vessels.

393. Further, Eurotunnel argued that the Commission erred in that it did not investigate whether the internalisation effect would persist if Eurotunnel were operating on Dover-Dunkirk but not on Dover-Calais.

(ii) The Commission's submissions on Eurotunnel's Ground 5

394. Mr. Harris relied upon section 35(4) of the Act which provides:

> "In deciding the questions mentioned in subsection (3) [i.e. consequential matters to be determined on the finding of an anti-competitive outcome] the Commission shall in particular have regard to the need to achieve as comprehensive a solution

as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

395. It was stressed that the Commission was entitled to consider divestment of the acquired entity as a starting point where an anti-competitive outcome had been found to exist. In *Somerfield plc v Competition Commission* [2006] CAT 4 at [99] to [100], the Tribunal held that, while in terms of the Commission's Merger Remedies Guidelines (CC8) it will seek the least costly and intrusive remedy that will be effective, it is entitled to consider divestment of the entity acquired as a starting point.

396. The Commission also had regard to paragraph 1.8 of its Merger Remedies Guidelines which provides that:

"***Effectiveness***

1.8. The [Commission] will assess the effectiveness of remedies in addressing the [substantial lessening of competition] and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies. Assessing the effectiveness of a remedy will involve several distinct dimensions:

(a) *Impact on [substantial lessening of competition] and resulting adverse effects.* The [Commission] views competition as a dynamic process of rivalry between firms seeking to win customers' business over time. Restoring this process of rivalry through remedies that re-establish the structure of the market expected in the absence of the merger (so-called structural remedies such as divestitures) should be expected to address the adverse effects at source. Such remedies are normally preferable to measures that seek to regulate the ongoing behaviour of the relevant parties (so-called behavioural remedies such as price caps, supply commitments or restrictions on use of long term contracts) as these are unlikely to deal with an [substantial lessening of competition] and its adverse effects as comprehensively as structural remedies and may result in distortions compared with a competitive market outcome.

(b) *Appropriate duration and timing.* Remedies need to address the [substantial lessening of competition] effectively throughout its expected duration. Remedies that act quickly in addressing competitive concerns are preferable to remedies that are expected to have an effect only in the long term or where the timing of the effect is uncertain. The effect of a remedy should also be sustained for the likely duration of the [substantial lessening of competition].

(c) *Practicality.* A practical remedy should be capable of effective implementation, monitoring and enforcement. To enable this to occur, the operation and implications of the remedy need to be clear to the merger parties and other affected parties. The practicality of any

> remedy is likely to be reduced if elaborate and intrusive monitoring and compliance programmes are required. Remedies regulating ongoing behaviour are generally subject to the disadvantage of requiring ongoing monitoring and compliance activity.
>
> *(d)* *Acceptable risk profile*. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the [Commission] will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the [substantial lessening of competition] or its adverse effects."

397. The reference to the "no realistic prospect" standard in paragraph 10.63 of the Decision was derived from the Tribunal's judgment in *BSkyB v Competition Commission* [2008] CAT 25 at [293].

398. The Commission suggested that Eurotunnel's argument based on the minimum efficient scale of operation (see paragraph 386) was wrong in principle. The Commission in fact had to ask itself a different question, which was what remedy would remove any realistic prospect of the substantial lessening of competition being felt.

399. The Commission submitted that if Eurotunnel were prohibited from operating on the short sea, this would be effective because Eurotunnel would have no incentive to raise prices. The Commission considered that the closest substitutes for the tunnel were the services from Dover to Calais and Dunkirk. It concluded, therefore, that it would be sufficient, and effective, to prohibit Eurotunnel from operating services from Dover.

400. Moreover, during the course of the inquiry, Eurotunnel had informed the Commission that it regarded two vessels as sufficient to operate a service (paragraphs 8.27 to 8.28 of the Decision). It had also stated that, if permitted to keep two vessels, it would be willing to continue to provide a service (paragraph 10.119(b) of the Decision). In Eurotunnel Board discussions (see paragraph 8.28 of the Decision), it was observed that at least two ships would be required to maintain operations and that the synergies with the tunnel meant that the tunnel could effectively serve "as a third ship".

401. In these circumstances, the Commission could not be satisfied to the requisite degree of certainty ("no realistic prospect": paragraph 10.63) that the remedy proposed by Eurotunnel – divestment of one ship – would be the most comprehensive remedy that was reasonable and practicable.

402. As to Eurotunnel's submission that the Commission reversed the burden of proof, the Commission contended that having set out its proposals as to remedies, it invited comment from Eurotunnel. The Commission was not persuaded by Eurotunnel's response, which was, in any event, unsupported by evidence, and accordingly adopted the position taken in the Decision.

403. As regards Eurotunnel's contention that the Commission had gone beyond the scope of its statutory powers in its concerns about scaling up, the Commission's position was that there would not have been a comprehensive solution to the risks to competition if Eurotunnel had remained free to scale back up its operations without ever having exited the route.

404. Regarding Eurotunnel's complaint that it should have been left free to run services from Dover to ports other than Calais and Dunkirk, Eurotunnel never at any point during the inquiry raised that as an option that it wished to keep open. Eurotunnel did not, even now, represent that this was a realistic commercial possibility, as opposed to a theoretical one. As is recorded in paragraph 10.89 of the Decision, Eurotunnel informed the Commission that if MyFerry were prohibited from operating on the Dover-Calais route, MyFerry would have to stop all its commercial activities. In any event on the evidence before it, the Commission had no reason to suppose that Dover-Boulogne (the route which Mr. Green suggested Eurotunnel was prevented from operating) was a route that Eurotunnel would wish to operate in isolation.

(iii) *Conclusion*

405. The essence of the Commission's decision on the remedy is the finding that, if Eurotunnel continued to operate services on the short sea, there would still be an incentive for it to raise prices on the tunnel service, because it could reasonably expect that a proportion of lost business would transfer to its Dover short sea ferries

(i.e. the "internalisation effect"). In other words, the substantial lessening of competition (or its adverse effects) the Commission had identified would not be eliminated by a remedy which permitted Eurotunnel's continued operations on the short sea. It was for the Commission to make a judgment as to what level of operations by Eurotunnel would give rise to a significant risk of the internalisation effect.

406. As noted above, the Commission found that the internalisation effect would not be eliminated by a reduction to below the minimum efficient scale and, therefore, the substantial lessening of competition would not be addressed. That is a finding that the Commission was entitled to make in light of all the material before it, including, in particular: *(i)* material from Eurotunnel to the effect that it might operate short sea services from Dover at below the minimum efficient scale (see paragraph 400 above); *(ii)* the Eurotunnel Board's views that the tunnel could operate as a "third ship"; *(iii)* the Commission's unchallenged finding as to Eurotunnel's own objective in launching the service in the first place; and *(iv)* the indications from the Commission's IPR and GUPPI analyses.

407. Given the various factors the Commission considered, on no view can its decision on remedy be deemed to be manifestly without reasonable foundation simply because it went beyond requiring operations to be reduced to below the minimum efficient scale (both in terms of the divestment and prohibition remedies). Indeed, it was entirely reasonable for the Commission to proceed on the basis that the potential adverse effects on competition may be reduced, but not eliminated, with only two vessels.

408. With regard to the other challenges to the divestment remedy raised by Eurotunnel in Ground 5:

(a) *Burden of proof:* we do not accept that the Commission required Eurotunnel to prove that continuing operations at below the minimum scale would not give rise to a substantial lessening of competition. The Commission had material before it to support the view that it reached. It simply was not

ANNEX: GLOSSARY OF DEFINED TERMS

Defined term	Meaning	First Use in the Judgment
2003 Act	Communications Act 2003	138
2008 Act	Counter-Terrorism Act 2008	175
Acquisition	The acquisition by Eurotunnel on 2 July 2012 of the SeaFrance Assets	7
Act	Enterprise Act 2002	12
Bareboat Charters	Three bareboat charters (one each in respect of the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais*) dated 29 June 2012 between the SCOP and either Eurotunnel or a corporate vehicle set up by Eurotunnel	8(c)(ii)
CC7 Guidance	Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973	206
Commercialisation Agreement	A commercialisation agreement dated 18 July 2012 between the SCOP and either Eurotunnel or a corporate vehicle set up by Eurotunnel	8(c)(iii)
Commission	Competition Commission	12
CPR	Civil Procedure Rules	144
Decision	The Commission's report published on 6 June 2013 and entitled "A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A."	16
DFDS	DFDS A/S	5(b)
Eurotunnel	The Groupe Eurotunnel S.A. group	1
Eurotunnel Application	Eurotunnel's application of 18 June 2013	18
Eurotunnel/SCOP	Eurotunnel and the SCOP combined	38(a)

Defined term	Meaning	First Use in the Judgment
FCA	French Competition Authority (l'Autorité de la concurrence)	242(d)
French Court	Tribunal de Commerce de Paris	2
Groups	The groups within the Commission who consider the merger references to the Commission	206
Memorandum of Understanding	A memorandum of understanding dated 29 June 2012 between the SCOP and either Eurotunnel or a corporate vehicle set up by Eurotunnel	8(c)(i)
Merger Implementing Regulation	Commission Regulation 802/2004/EC implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ L 133, 30.4.2004, p. 1	193
Merger Regulation	Council Regulation 139/2004/EC on the control of concentrations between undertakings OJ L 24, 29.1.2004, p. 1	193
MMC	Monopolies and Mergers Commission	103
MMC Report	A report of the MMC, which was presented to Parliament in May 1992	103
MyFerry	MyFerryLink SAS	9
OFCOM	Office of Communications	138
OFT	Office of Fair Trading	12
SCOP	Société Coopérative de Production Sea France S.A.	6
SCOP Application	SCOP's application of 3 July 2013	18
SeaFrance	SeaFrance S.A.	2
SeaFrance Assets	The vessels, the former SeaFrance employees, the brand and goodwill and the customer lists, which were Acquired by Eurotunnel (according to the Decision)	38(b)

Defined term	Meaning	First Use in the Judgment
short sea	The short sea consists of routes between Dover, Folkestone, Ramsgate, Newhaven in the UK and Calais, Dieppe, Boulogne, Dunkirk in France, as well as the tunnel and the route across the Belgian Straits (Ramsgate/Ostend)	5(b)