



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE No. 1222/6/8/13

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the “Rules”), the Registrar gives notice of the receipt on 22 October 2013 of an application for review under section 179(1) of the Enterprise Act 2002 (the “Act”), by Lafarge Tarmac Holdings Limited (“the Applicant”), for a review of a decision made by the Competition Commission (the “Commission”) refusing to grant access to certain information and documents relating to the Commission’s ongoing investigation into the markets for the supply and acquisition of aggregates, cement and ready-mix concrete in Great Britain (the “Investigation”). The Applicant is represented by Kirkland & Ellis International LLP of 30 St Mary Axe, London EC3A 8AF (ref: Shaun Goodman) and Slaughter and May, of 1 Bunhill Row, London EC1Y 8YY (ref: Michael Rowe and Lisa Wright).

The Commission published its provisional findings in the Investigation (the “PFs”) and accompanying notice of possible remedies on 21 May 2013. On 25 June 2013 the Applicant served its response to the PFs, stating amongst other things that it considered that the procedures adopted by the Commission had undermined the Applicant’s ability to respond fully to key aspects of the arguments advanced by the Commission in the PFs.

In view of the Tribunal’s decision dated 2 October 2013 in Case No.: 1218/6/8/13 *BMI Healthcare Limited v Competition Commission*, [2013] CAT 24¹ and the imminent publication of the Commission’s provisional decision on remedies (the “PDR”), the Applicant’s solicitors wrote to the Commission again identifying certain ways in which the consultative procedure for the Investigation had been seriously deficient and prejudicial to the Applicant’s ability to comment effectively on the PFs. The Applicant requested the Commission to take certain remedial steps forthwith, in particular:

1. granting the Applicant’s external advisers access to:
 1. a fully-unredacted version of the PFs;
 2. exculpatory documents (i.e. documents adverse to the Commission’s PFs); and
 3. fully-unredacted (and, where applicable, executable) versions of the Commission’s profitability analysis, the Commission’s paper on “*Estimating the Competitive Price of Cement from Cost and Demand Data*” and associated underlying economic models; and
 2. permitting the Applicant itself access to a version of the PFs that was unredacted insofar as it contained references to (or conclusions drawn from) the Applicant’s own documents and/or to documents of third parties referring to or said to refer to any direct contacts with the Applicant
- (together, the “Requests”).

Further, the Applicant requested:

3. that the Commission defer publication of the PDR.

On 7 October 2013, the Commission informed the Applicant that it would be proceeding to publication of the PDR (i.e. the next stage of the Investigation). An embargoed copy of the PDR was sent to the Applicant

¹ http://www.catribunal.org.uk/files/1218_BMI_Judgment_021013.pdf

later that day. A summary was published on the Commission's website on 8 October 2013, together with a press release entitled "*CC paves way for new cement producer*" (the "Press Release"). On 11 October 2013, the Commission wrote to the Applicant's solicitors declining the Requests.

By this application, the Applicant applies for review of the Commission's decision or decisions to:

1. decline the Requests; and/or
 2. proceed with the Investigation by publishing the PDR notwithstanding the Requests; and/or
 3. publish the Press Release
- (the "Decisions").

In summary, the Applicant contends that the Decisions are in breach of the Commission's duties of consultation arising from section 169(2) of the Act and the rules of natural justice. According to the Applicant, by publishing the Press Release and the PDR, the Commission has progressed its Investigation beyond the formative stage of its thinking on whether there was an adverse effect on competition ("AEC") in the relevant markets and on whether there was a need for divestment to remedy that supposed AEC without first allowing adequate consultation with the Applicant. As a result, any ultimate decision in the Investigation by the Commission's panel as presently constituted is bound to be vitiated by a failure to consult, consequent unfairness and/or apparent bias.

By way of relief, the Applicant seeks an order quashing the Decisions:

1. with the effect that the Investigation ceases;
2. alternatively, if the Tribunal has such power (in particular, the power to extend the statutory deadline) and is so minded, a direction that a new panel of the Commission (with new supporting staff) be constituted to restart the Investigation afresh;
3. in the further alternative, if the Tribunal considers that: (a) there is still time within the existing reference deadline to remedy the procedural failures; or (b) it has the power to extend the reference deadline, a direction that the Requests be granted forthwith.

Further or alternatively, the Applicant seeks an order that the Commission pay the Applicant's costs of the application and such further or other relief as the Tribunal deems fit.

The Applicant states that, as the Investigation is ongoing and must conclude by 17 January 2014, the Tribunal may wish to direct a compressed timetable for these proceedings, so as to reduce the prospect of wasted expenditure of resources on the continuation of an investigation which the Applicant says is fundamentally flawed.

The Applicant is aware that issues regarding disclosure by the Commission of exculpatory documents arise in two cases (heard together) pending before the Tribunal, Cases: 1216/4/8/13 (*Groupe Eurotunnel S.A. v Competition Commission*) and 1217/4/8/13 (*Société Coopérative de Production Sea France S.A. v Competition Commission*). It submits that if judgment in those cases is likely to be handed down shortly, a stay of consideration of such similar issues as arise in the present application pending such judgment may be appropriate.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules. Pursuant to the Tribunal's Order of 31 October 2013, any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received no later than **4pm on 13 November 2013**.

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

Charles Dhanowa OBE, QC (Hon)
Registrar

Published 31 October 2013