



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE NO: 1233/4/12/14

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 July 2014 of an application for review under section 120 of the Enterprise Act 2002 (the “Act”), by Groupe Eurotunnel S.A. (“GET”) of 3 rue La Boétie, 75008 Paris, France against a decision dated 27 June 2014 (the “Decision”) made by the Competition and Markets Authority (“CMA”) titled “Eurotunnel / SeaFrance merger inquiry remittal”. GET is represented by Pinsent Masons LLP of 30 Crown Place, London EC2A 4ES (ref: Guy Lougher / Rhiannon Davies).

By its judgment of 4 December 2013 in *Groupe Eurotunnel S.A. & Or v. Competition Commission* ([2013] CAT 30 (the “December Judgment”)), the Tribunal remitted to the Competition Commission (“CC”) the question of whether GET’s acquisition of certain assets of the former SeaFrance S.A. amounted to enterprises ceasing to be distinct within the meaning of section 26(1) of the Act.

In the Decision, the CMA (which took over the functions of the CC from 1 April 2014) determined that remitted question, and also considered whether there had been a material change of circumstances (“MCC”) since the date of the CC’s original report of 6 June 2013 (the “Original Report”) in relation to the acquisition. The CMA concluded that the collection of tangible and intangible assets (including the transferred ex-SeaFrance employees) acquired by GET and the Société Coopérative de Production SeaFrance S.A. (“SCOP”) (as associated persons) met the legal definition of an enterprise in that together they constituted the activities or part of the activities of a business. The CMA further concluded that there had been no MCC within the meaning of section 41(3) of the Act.

In summary, the principal grounds of review on which GET relies in its notice of application are that:

1. The CMA erred in law in finding that there was a transfer of an “enterprise”, in three specific respects:
 - a. The CMA failed to apply the legal test set by the Tribunal (requiring a definition or description of exactly what assets were acquired over and above “bare assets”), but erroneously looked only at the “bare assets” that were actually acquired.
 - b. The CMA wrongly found that GET / SCOP acquired “much of the benefit” of acquiring the assets as a “going concern” when: (i) there was not a transfer of all or any significant part of the customer base; and (ii) the “commercial operability and coherence of the assets” is immaterial to the this issue.
 - c. The CMA took into account two legally irrelevant considerations, namely: (i) the speed with which GET / SCOP could commence their ferry service; and (ii) GET’s intentions and motivations.
2. The CMA erred in law in finding that the conclusion of the Original Report on issues other than “enterprise” could simply be reinstated in circumstances where the December Judgment had the effect of quashing the entire Original Report.

3. The CMA erred in law and/or wrongly fettered its discretion in finding that it was bound by the findings in the Original Report where these had not been challenged at the Tribunal or had been unsuccessfully challenged.

By way of final relief, GET seeks:

1. An order quashing the whole of the Decision pursuant to section 120(5)(a) of the Act;
2. Either: a declaration pursuant to section 120(4) of the Act that the CMA does not have jurisdiction over the transaction on the basis that it did not involve the acquisition of an enterprise within the meaning of section 129(1);

Or: a declaration pursuant to section 120(4) of the Act that one or more of the grounds of review are well-founded and an order referring the matter back to the CMA with a direction that a differently constituted panel and staff of the CMA reconsider and make a new decision under section 35 of the Act in accordance with the ruling of the Tribunal pursuant to section 120(5)(b) of the Act;

3. An order that the CMA pay GET the costs it has reasonably incurred in bringing its application; and
4. Such further or other relief as is appropriate in all the circumstances.

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. 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 within **three weeks** of the publication of this notice.

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

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