



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No: 1107/4/10/08

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (“the Rules”), the Registrar of the Competition Appeal Tribunal (“the Tribunal”) gives notice of the receipt of a notice of application, on 28 November 2008, under section 120 of the Enterprise Act 2002 (“the Act”), by the Merger Action Group (“the Applicant”), an unincorporated association of persons and businesses established in Scotland, challenging a decision by the Secretary of State for Business, Enterprise & Regulatory Reform (“the Secretary of State”) contained in a document entitled “Decision by Lord Mandelson, the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds TSB Group plc and HBOS plc under Section 45 of the Enterprise Act 2002 dated 31 October 2008” (“the Decision”)¹.

On 18 September 2008, the former Secretary of State, the Rt. Hon. John Hutton, issued a notice to the Office of Fair Trading (“OFT”) pursuant to section 42 of the Act (“the intervention notice”) stating that the stability of the financial system in the United Kingdom ought to be specified as a public interest consideration in section 58 of the Act. The Secretary of State further stated that the stability of the UK financial system may be relevant to a consideration by the OFT of the merger situation arising out of the proposed merger announced by Lloyds TSB Group plc (“Lloyds TSB”) and HBOS plc (“HBOS”) on 18 September 2008 (“the Merger”).

The intervention notice required the OFT to investigate and provide a report to the Secretary of State in accordance with section 44 of the Act within the period ending on 24 October 2008. The intervention notice also indicated that the Secretary of State would lay before Parliament for its approval an affirmative resolution to specify the new public interest consideration under section 58 of the Act. The relevant order completed Parliamentary scrutiny on 23 October 2008 and came into force on 24 October. The new public interest consideration has been added to the Act as section 58(2D).

The OFT produced a report under section 44 of the Act dated 24 October 2008 entitled “Anticipated acquisition by Lloyds TSB plc of HBOS plc” (“the Report”)². The Report includes decisions to the effect that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and the creation of that merger situation may be expected to result in a substantial lessening of competition (“SLC”) within a market or markets in the United Kingdom for goods or services, including personal current accounts, banking services to small and medium enterprises and mortgages such that further inquiry by the Competition Commission (“the CC”) is warranted. The Report also provides that any relevant consumer benefits did not outweigh the SLC and it would not be appropriate to deal with the matter by way of undertakings under paragraph 3 of Schedule 7 to the Act. In deciding whether to make a reference to the CC under section 45 of the Act, the Secretary of State is required, under section 46(2) of the Act, to accept the decisions of the OFT as to the creation of a relevant merger situation which may be expected to result in SLC.

The Decision states that the new public interest consideration contained in section 58(2D) of the Act, the stability of the UK financial system, is relevant to this case and that taking account only of the SLC and the public interest consideration, the Secretary of State believes that the creation of the relevant merger situation is not expected to operate against the public interest. The Secretary of State considers that the Merger will result in significant benefits to the public interest as it relates to ensuring the stability of the UK financial system and that these benefits outweigh the potential for the Merger to result in the anti-competitive outcomes identified by the OFT. The Decision states that no reference will be made to the CC.

¹ The Decision may be found at: www.berr.gov.uk/files/file48745.pdf

² The Report may be found at: www.offt.gov.uk/shared_offt/press_release_attachments/LLloydstsb.pdf

The Applicant states that it is both “aggrieved” (within the meaning of section 120(1) of the Act) by the Decision and is “sufficiently interested” in the application under rule 10(1)(b) of the Rules. The Applicant further submits that the proper place to hear the present proceedings under rule 18 of the Rules is in Edinburgh for the following reasons: the Applicant’s members mainly (though not solely) reside in Scotland; if proceedings were conducted in London, this would significantly add to the expense of the proceedings; it is possible that other interested parties resident in Scotland may wish to intervene in the proceedings; and both Lloyds TSB and HBOS have their registered offices in Scotland.

The Applicant complains that the Merger should have been referred to the CC in accordance with the conclusions of the OFT set out in the Report. Instead, the Secretary of State invoked in the Decision as a justification for not making such a reference an exception which had been freshly inserted into the relevant texts for the sole purpose of avoiding the otherwise applicable legal criteria. Instead of obeying the criteria set forth in law at the time the Merger was announced, the Secretary of State obeyed a new standard which was promulgated in order to avoid respecting the otherwise applicable standards. Further, there was a failure by the Secretary of State to respect the findings of the OFT. The Secretary of State had in effect closed his mind to any outcome other than the one which excluded the application of the competition rules.

In summary, the principal grounds of review on which the Applicant relies are that:

1. On 18 September 2008, the Secretary of State announced that he would clear the Merger on public interest grounds relating to the stability of the UK banking sector, despite the fact that at the time of the announcement no such consideration was a recognised ground of public interest under the Act. In so doing, he unlawfully fettered his discretion and this was reinforced by other public statements on or around 18 September 2008 by senior members of government, most notably the Prime Minister and Chancellor of the Exchequer. Had the Secretary of State kept an open mind, he could have taken the Decision in light of the facts as they stood on 31 October 2008, instead of how they seemed on 18 September 2008, during which period dramatic changes in the approach of governments to the world banking system occurred with a move to direct recapitalisation by injections of public capital. The fetter on the Secretary of State’s discretion led to a disproportionate market outcome in that the Merger was cleared without remedies even though it raised serious competition problems.
2. The Secretary of State, having granted himself the discretion not to refer the Merger to the CC, then proceeded to exercise his discretion unreasonably and irrationally instead of having regard to the circumstances prevailing in late October and being guided by the analysis of the OFT.
3. By preferring the conclusions of the Financial Services Authority (“FSA”) to those of the OFT in relation to the ability of HBOS to provide effective competition as a standalone entity, the Secretary of State has taken account of an irrelevant consideration or has failed to respect section 46(2) of the Act.
4. By relying on the FSA’s inaccurate views as to the provisions regarding aid granted by Member States under the Treaty Establishing the European Community, the Secretary of State has taken into account an irrelevant consideration.
5. The Decision violates the principle of proportionality by not inquiring into the adverse competitive impact of the Merger.

The Applicant seeks the following relief from the Tribunal:

1. an order quashing the Decision pursuant to the power conferred by section 120(5) of the Act;

2. an order referring the OFT's recommendations contained in the Report back to the Secretary of State with a recommendation that he make a decision referring the Merger to the CC for review; and
3. an order that the Secretary of State bear the costs of the proceedings including the costs of the Applicant.

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.

A 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 5pm on 2 December 2008**.

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
Registrar

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