Neutral citation [2015] CAT 1

Case Nos.: 1233/4/12/14
1235/4/12/14

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

9 January 2015

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chairman)
PROFESSOR JOHN BEATH
JOANNE STUART OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

GROUPE EUROTUNNEL S.A.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

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

Interveners

AND BETWEEN:

SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

GROUPE EUROTUNNEL S.A.
DFDS A/S

Interveners

Heard at Victoria House on 24 and 25 November 2014

JUDGMENT

APPEARANCES

Mr. Richard Gordon Q.C. and Mr. Alistair Lindsay (instructed by Pinsent Masons LLP) appeared for Groupe Eurotunnel S.A., the Applicant in Case No. 1233/4/12/14 and an Intervener in Case No. 1235/4/12/14.

Mr. Daniel Beard Q.C. and Mr. Rob Williams (instructed by Reynolds Porter Chamberlain LLP) appeared for the Société Coopérative de Production Sea France S.A., the Applicant in Case No. 1235/4/12/14 and an Intervener in Case No. 1233/4/12/14.

Mr. Paul Harris Q.C., Mr. Ben Rayment and Mr. Thomas Sebastian (instructed by the Treasury Solicitor) appeared for the Competition and Markets Authority, the Respondent in both Cases.

Mr. Meredith Pickford and Ms. Ligia Osepciu (instructed by Hogan Lovells LLP) appeared for DFDS A/S, an Intervener in both Cases.

I. INTRODUCTION

1. This judgment concerns two applications brought under section 120 of the Enterprise Act 2002 ("the Act")[1] for judicial review of a decision of the Competition and Markets Authority ("the CMA") in relation to the completed acquisition by Groupe Eurotunnel S.A. ("Eurotunnel") of certain assets from the liquidator of SeaFrance S.A. ("SeaFrance"). This decision is contained in the CMA's report of 27 June 2014 entitled "Eurotunnel/SeaFrance merger inquiry remittal – Final decision on the question remitted to the Competition and Markets Authority by the Competition Appeal Tribunal on 4 December 2013 and consideration of possible material change of circumstances under section 41(3)" ("the Remittal Report").

2. This is the second time this acquisition has been considered by the Tribunal. A differently constituted Tribunal considered applications for review filed in June and July 2013 by the same applicants, Eurotunnel and the Société Coopérative de Production Sea France S.A. ("the SCOP"), in relation to the report of 6 June 2013 by the Competition Commission ("the CC") entitled "A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A." ("the Original Report"). In the Original Report, the CC decided that Eurotunnel and the SCOP were acting together so as to constitute "associated persons" under the Act and that they thus were to be regarded as a single entity for the purpose of assessing the acquisition; that the acquisition constituted a "relevant merger situation" for the purpose of the Act; that the acquisition may be expected to result in a substantial lessening of competition ("SLC") in the freight and passenger markets on the short sea routes across the Channel;[2] and that in terms of remedy the merger should, in effect, be prohibited.

3. The 2013 applications challenged the decision in the Original Report on a wide range of grounds. By its judgment of 4 December 2013 ([2013] CAT 30) ("*Eurotunnel 1*"), the Tribunal dismissed all the grounds of challenge save for the

[1] All statutory references in this judgment are to the Act unless otherwise stated.

[2] The short sea routes refer to routes via the tunnel, between Dover and Calais, between Dover and Dunkirk and certain other routes across the Channel.

question of jurisdiction. It held that it was unclear whether this was a case of two enterprises ceasing to be distinct within the meaning of section 26(1), such that a relevant merger situation arose within the meaning of section 35(1)(a), which is the statutory foundation of the jurisdiction of the CC to intervene. The Tribunal therefore remitted this question to the CC. It will be necessary to consider in more detail the scope and consequence of the remittal in connection with two grounds of Eurotunnel's present application.

4. On 1 April 2014, the CMA took over the functions previously carried out by the CC and this case was thereupon taken forward by the CMA. By the Remittal Report, the CMA answered the question remitted in the affirmative, concluding therefore that it did have jurisdiction. It further held that there had been no material change of circumstances or other special reason within section 41(3) as regards either the finding of SLC or the decision on remedies in the Original Report: accordingly, the remedies set out in the Original Report continued to apply.

5. We should note that the French competition authority, the *Autorité de la concurrence*, by its decision of 7 November 2012, found that the acquisition was likely adversely to affect competition, through conglomerate effects on the freight transport market and through vertical effects on the cross-channel transport markets. However, the *Autorité* concluded that these risks could be remedied by a series of undertakings and were not such that the acquisition should be prohibited. This very unusual difference in outcome between the application of the UK and French domestic merger regimes to the same transaction gave rise to some comment. However, the present applications have nothing to do with the assessment by the relevant UK competition authority (at the time, the CC) of the effect of the acquisition on competition or its decision as to the remedy to be imposed. These applications concern a question of jurisdiction under the UK regime and (as raised by Eurotunnel's further two grounds) the legal consequences of the decision to remit contained in *Eurotunnel I*. Indeed, on the issue of jurisdiction, we note that the transaction was found by the *Autorité* to fall within the scope of the French merger control regime: see Appendix E to the Remittal Report.

II. LEGAL FRAMEWORK

6. In order for the CMA to have jurisdiction, there must be a "relevant merger situation". This is defined in section 23. A relevant merger situation is created if two requirements are fulfilled. The first requirement is that:

> "two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24": see section 23(1)(a) and 23(2)(a).

The second requirement is that the merger must satisfy either the turnover test at section 23(1)(b) or the share of supply test at section 23(2)(b) – 23(4). Here, there is no dispute that the share of supply test was satisfied, as Eurotunnel previously held more than a 25% share of the supply of passenger and freight services across the short sea, and thus any increment in its share of supply would satisfy the statutory condition.

7. In the present case, the relevant time limit set out in section 24 is provided by section 24(1)(a), as follows:

> "For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if –
>
> (a) the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is to be made and did so not more than four months before that day;"

Here, the reference to the CC was made on 29 October 2012. The statutory time limit therefore ran from 30 June 2012.

8. Section 26(1) sets out when two or more enterprises cease to be distinct:

> "For the purposes of this Part any two enterprises cease to be distinct enterprises 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)."

9. "Enterprise" and "business" are defined in section 129(1) as follows:

> ""enterprise" means the activities, or part of the activities, of a business"
>
> ""business" includes 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"

10. For the purposes of deciding whether two or more enterprises have been brought under common ownership or control pursuant to section 26, "associated persons" are treated as one person under section 127(1)(b). Section 127(4)(d) states that two or more persons acting together to secure or exercise control of a body of persons corporate shall be regarded as associated with one another.

11. Once the CC or, now, the CMA has determined that there is a relevant merger situation, it must then consider whether that situation has resulted, or may be expected to result, in a SLC. Where the CC/CMA identifies such an anti-competitive outcome, it is required to decide whether any, and if so what, action should be taken to remedy, mitigate or prevent the SLC, or the adverse effects that have resulted from the SLC.

12. Section 120(1) provides that any person aggrieved by a decision in relation to a relevant merger situation under Part 3 of the Act 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."

III. FACTUAL BACKGROUND

13. The factual background to these proceedings is summarised at [1]-[16] of *Eurotunnel 1* and set out in great detail in the Original Report as supplemented by the Remittal Report. For our purposes, it is appropriate to note the following key points.

14. SeaFrance was wholly owned by SNCF, the French public railway operator.

15. On 28 April 2010, the Commercial Court (*Tribunal de Commerce*) of Paris ("the Paris Court") opened proceedings for protective measures with regard to SeaFrance because of its seriously deteriorating financial position. On 30 June 2010, those proceedings were converted into receivership proceedings. It has been common ground before us that those proceedings are effectively analogous to the process of

administration under UK insolvency law. The administrators thereupon searched for possible buyers of SeaFrance as a going concern.

16. After a first attempt had proved unsuccessful, on 1 July 2011, the administrators issued a renewed call for bids with a final date of 26 July 2011. One of the bids received was from the SCOP, which was in the course of being established as a workers' cooperative by a group of SeaFrance employees, although its shareholding also included those who were not employed by SeaFrance. It was anticipated that some 700 SeaFrance employees would subscribe to the SCOP. Eurotunnel did not submit a bid at that stage.

17. On 24 October 2011, the proposed injection of capital and loans to SeaFrance by SNCF was held by the European Commission to constitute unlawful State aid. That effectively ruled out the financing of the continuation of SeaFrance by SNCF.

18. By a judgment of 16 November 2011, the Paris Court held that neither of the two extant bids was acceptable. As regards the SCOP bid, which amounted to €1 plus 25% of post-tax profits each year to 31 December 2016, it was in particular unacceptable because the SCOP lacked the financial resources to continue the business. The Court therefore ordered the liquidation of SeaFrance but ruled that the business could continue to 28 January 2012 to permit the presentation of improved bids.

19. Earlier the same day, 16 November 2011, before that ruling was given, SeaFrance ceased operating its ferries.

20. On 9 January 2012, the Paris Court considered a revised offer submitted by the SCOP but found that it differed little from the previous offer and suffered the same deficiency of lack of adequate financing. The Court therefore held that this offer was unacceptable, refused any further adjournment of the period for additional offers and ordered that the period of continuation of the business under the liquidation procedure would end.

21. SeaFrance surrendered its berthing slots in Dover and Calais. It had four operational ferries at the time of the liquidation but one of those, the *Molière*, had been chartered and was returned to its owners. The other three were placed in what is described as "hot lay-by", a minimum operating mode designed to maintain the condition of the vessels (e.g., by running the engines regularly).

22. As a result of the liquidation, the employees of SeaFrance were required by French law to be made redundant within 15 days of the liquidation. There were 820 employees at that time. However, a minority (190) had their redundancy delayed and were employed by the liquidator for periods of between 2.2 and 10.2 months, presumably to assist with the redundancy and liquidation process. Following the court ruling of 9 January 2012 and in accordance with French labour law, within the statutory 15-day period, a job-saving plan ("PSE3") was produced by SeaFrance. The PSE3 set out measures proposed by SeaFrance and to be funded by SNCF to facilitate the return of the redundant employees to work. It provided for various lump sum payments to be made per employee depending on what steps were taken in each case (geographical redeployment; retraining, etc). Much the highest of these lump sum offers of aid was specified as follows:

> "3.3.3 Where the bankruptcy judge in the liquidation of SEAFRANCE has to rule upon an assignment in a final ruling allowing similar operation of the vessels belonging to SEAFRANCE in favour of the [SCOP] or any other company (of any form) in which the employees have a direct interest (share of the equity capital) and indirect interest (employment contract), the company will be paid €25,000 per employee, on receipt of the official documents [verifying that these conditions are fulfilled] …"

23. The Paris Court receiver decided that the assets of SeaFrance would be sold by way of private sale through sealed bids. A deadline of 4 May 2012 was set for the receipt of the bids, and those were allowed to be in multiple configurations for the various assets.

24. On 11 June 2012, the Paris Court, in the minutes attached to its order, recorded that three bids had been received for the SeaFrance vessels.[3] One of those was from Eurotunnel which bid €65 million for all three vessels and other tangible and

[3] There was also a bid by P&O for only intangible assets, in particular the domain names and customer database: Remittal Report at paras 3.192, 3.212.

intangible assets. We consider the various assets more fully below. In the Court minutes, the liquidator reported to the Court receiver on the nature of the Eurotunnel bid in some detail, and stated:

> "The bidder presents a comprehensive, integral bid bearing simultaneously on the ships and other tangible assets and intangible assets whose acquisition is proposed, as part of an industrial project integrating the participation via a SCOP composed of SeaFrance's former employees.…
>
> The project, as it was envisaged, assumes that the production of crossings shall be provided in practice by the SCOP composed mostly of SeaFrance's former employees….
>
> As a reminder, SeaFrance's staff was laid-off by the liquidator, following the liquidation without continuation of the company's activity.
>
> However, the project in which Groupe Eurotunnel is participating is aimed at providing for a partnership with SeaFrance's former employees who shall form a SCOP in order to revive the activities (*de manière à faire renaître les activités*) previously conducted by SeaFrance.
>
> The proposed takeover of SeaFrance's assets by Groupe Eurotunnel therefore favours a partnership with the SCOP including SeaFrance's former employees.
>
> Again, the proposed project provides, through the SCOP, in partnership with Eurotunnel, for the gradual recovery (*reprise*) of about 530 people, it being specified that, to date, nearly 400 of SeaFrance's former employees have applied to the SCOP."

25. It is worth noting that the liquidator prefaced his account of the details of Eurotunnel's bid by describing it (in the translation placed before the Tribunal) as the "takeover of SeaFrance's activities" (*la reprise des activités SeaFrance*).

26. The report also notes that the project based on this bid relies on funding from the SCOP of about €10 million along with funding from Eurotunnel of €20 million if there is no delay in implementation of the plan, or €30 million if there is a six months delay.

27. Based on that report from the liquidator, the Paris Court receiver authorised the acceptance of the Eurotunnel bid.

28. Although the SCOP had previously submitted bids, it did not participate in this sealed bid process. The Tribunal found in *Eurotunnel I* that this was because it had come to an arrangement with Eurotunnel that if Eurotunnel's bid were to succeed,

the SCOP would provide the labour that would operate the three vessels which Eurotunnel would be acquiring. Discussions between Eurotunnel and the SCOP had taken place since at least January 2012 and on 29 June 2012 a memorandum of understanding was concluded between them.

29. The transaction was completed on 2 July 2012. Eurotunnel acquired the following from the liquidator of SeaFrance: three vessels (the *Rodin*, *Berlioz* and *Nord Pas-de-Calais*), 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.

30. Eurotunnel then obtained berthing slots at Dover and Calais so as to enable the three vessels to operate a Dover-Calais ferry service. It finalised agreements with the SCOP as to how the operation would be managed and controlled. Under these arrangements, the SCOP operates the vessels, which it charters from the relevant Eurotunnel subsidiaries, and provides the crews for them, who are employed by the SCOP.

31. Eurotunnel established MyFerryLink SAS ("MyFerry") to operate ferry services under the "MyFerryLink" brand. On 20 August 2012, MyFerry commenced operations on the Dover-Calais route using the *Rodin* and the *Berlioz*. The *Nord Pas-de-Calais* is a freight-only vessel and was initially used as a reserve ferry.

32. At the time of the reference to the CC on 29 October 2012, the SCOP employed over 400 staff, of whom [70-80]% were former SeaFrance employees.

IV. *EUROTUNNEL I*

33. As mentioned above, both Eurotunnel and the SCOP brought proceedings challenging the decision in the Original Report on a number of grounds. Most are irrelevant to the issues now before the Tribunal, but several of the grounds raised

by the SCOP's application went to the issue of the CC's jurisdiction under the Act.[4]

34. The SCOP's first ground of jurisdictional challenge was that the CC was wrong to find that Eurotunnel and the SCOP were "associated persons" within the meaning of section 127. The Tribunal dismissed that ground and held that Eurotunnel and the SCOP were acting together so as to satisfy the statutory term. The acquisition was therefore to be treated as being made by Eurotunnel/SCOP: *Eurotunnel I* at [51]-[57].

35. The SCOP's second ground was to contend that even if Eurotunnel/SCOP are to be treated as a deemed single person, what they acquired could not be an "enterprise" because, in particular, it did not include the former SeaFrance employees. That ground also was rejected. The Tribunal noted that the vast majority (about 382) of the SCOP's employees were recruited by 20 August 2012 when MyFerry launched its operations. The Tribunal expressly found that these employees were "acquired" by the SCOP during the relevant time period (by reference to section 24) and that what for the Act was the acquiring entity, Eurotunnel/SCOP, acquired not only the SeaFrance vessels, brand, goodwill and customer lists but also the former SeaFrance employees: *Eurotunnel I* at [58]-[73].

36. The SCOP's third ground challenged the CC's finding that Eurotunnel had material influence over the SCOP, within section 26(3), and that this provided an alternative reason why the former SeaFrance staff employed by the SCOP fell to be considered as part of the assessment of whether two enterprises ceased to be distinct: see *Eurotunnel I* at [39]. The Tribunal saw considerable force in that challenge and would have remitted the matter to the CC for reconsideration, but did not do so in the light of its conclusions on the first two grounds which meant that it was not necessary to rely on this point: *Eurotunnel I* at [75]-[92].

37. The SCOP's fourth ground of jurisdictional challenge is directly relevant to the present applications. In reliance on the definition of "enterprise" in section 129, the

[4] The application by Eurotunnel on the last occasion did not involve a jurisdictional challenge, but as an intervener in the SCOP application Eurotunnel supported the SCOP's application.

SCOP contended that what was acquired amounted only to the assets of SeaFrance which MyFerry then used to establish a new ferry operation of its own.

38. The CC by its defence submitted that what constitutes an "enterprise" for the purpose of the Act was essentially a question of fact and degree, and thus a matter for the CC.

39. The Tribunal rejected the CC's contention, holding that the issue of what the Act means by an "enterprise" is in the first instance a question of law. Since the Tribunal's ruling on this issue led to the remittal to the CC, and because its reasoning formed the basis of the Remittal Report and much of the argument before us, it is necessary to quote from this part of the judgment in *Eurotunnel I* at some length.

40. The judgment states:

> "98. ... 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."

41. After referring to the statutory definitions, the Tribunal observed that there appeared to be no judicial authority on the point and that the nearest thing to an authority was the 1992 report of the Monopolies and Mergers Commission ("MMC") regarding the merger between AAH Holdings plc ("AAH") and Medicopharma NV ("*AAH*"):

"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.""

42. The Tribunal continued:

"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…. 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….

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."

43. The Tribunal noted that there were a number of factors which pointed towards this being no more than the acquisition of assets by Eurotunnel/SCOP: (a) that for the 7½ months preceding the acquisition SeaFrance carried out no activity; (b) SeaFrance's berthing slots in Dover and Calais were surrendered; and (c) SeaFrance's remaining workforce was dismissed and its vessels placed into hot lay-by.

44. The Tribunal expressed some doubt as to whether, formulated as they were by the CC, the acquisition of the vessels and the SeaFrance employees constituted anything more than an acquisition of assets. The Tribunal added these pertinent observations:

"114…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, … it is difficult to see how these employees were "acquired" from SeaFrance at all.… 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."

45. However, in that regard, the Tribunal suggested that two further matters may on the facts be relevant to the jurisdictional question:

(a) *The indemnity*: the Original Report referred to the SCOP being paid an indemnity of €25,000 for each former SeaFrance employee that it employed: see paragraph 22 above. The Tribunal thought that this might, if fully explored, provide a cogent reason for the employment of ex-SeaFrance employees and that it seemed to constitute a benefit which flowed from the employment of former SeaFrance employees that would not be gained were an employee from elsewhere retained: see *Eurotunnel I* at [117]-[119].

(b) *The inter-relationship between vessels and employees*: the Original Report had not considered the significance of having not only vessels that could be brought into operation quickly but also a crew that was fully familiar with those particular vessels and their intended operation across the short sea. The Tribunal stated, at [120]:

"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."

46. The Tribunal concluded that it could not "exclude the possibility" that using the approach it had described the conclusion could properly be reached that Eurotunnel/SCOP did indeed acquire an enterprise and not simply assets. Since this was a judicial review, the Tribunal accordingly decided to remit the matter for fresh consideration.

V. THE REMITTAL REPORT

47. The CMA concluded that Eurotunnel/SCOP had acquired an enterprise and found accordingly that a relevant merger situation had arisen. In reaching this conclusion, the CMA focussed on the issues emphasised in *Eurotunnel 1*. First, the CMA sought to define exactly what, over and above "bare assets", Eurotunnel/SCOP had acquired. Secondly, it asked for each category of asset whether and if so how this placed Eurotunnel/SCOP in a different position than if it had simply acquired those assets in the market. The CMA then considered the implications of its answers in determining whether Eurotunnel/SCOP could properly be regarded as acquiring the activities, or part of the activities, of the SeaFrance business.

48. The CMA's detailed analysis of these issues is in section 3 of the Remittal Report, which runs to 237 paragraphs. We shall refer to various parts of that analysis in our consideration of the applications. Section 4 of the Remittal Report proceeds to set out and summarise the CMA's conclusions.

49. The CMA's overall conclusions on the question of whether Eurotunnel/SCOP acquired the activities of a business were as follows:

> "4.19 We therefore conclude that:
>
> - The combination of acquired assets (in particular, but not limited to, the vessels and employees) meant that what was acquired was more than a 'bare asset' in that it enabled the acquirer to establish ferry operations, more quickly, more easily, more cheaply and with less risk than if the relevant assets had been otherwise acquired in the market.
>
> - Although, in light of the period of inactivity, [Eurotunnel]/SCOP did not acquire the SeaFrance assets 'as a going concern', in reality they

obtained much of the benefit of so acquiring them. That is because, in our view, the commercial operability and coherence of the assets used by SeaFrance for the Dover–Calais ferry service was actively maintained, and thus impairment minimised, during the period of inactivity.

- The result of the combination of steps taken in relation to the vessels and the staff was that substantially the same business activities as had previously been undertaken by SeaFrance were able to be, and were in fact, resumed within a very short period of time following the acquisition. The intention, for good and understandable commercial and employment reasons, was to seek to preserve the former business or something as closely approximating to it as possible. That intention was achieved.

- Moreover, [Eurotunnel] was significantly motivated to acquire the assets that it did by the advantages of continuity (and the consequent ability to resume substantially the same operations as had previously been undertaken by SeaFrance on the Dover–Calais route) that those steps had preserved.

4.20 We conclude that the collection of tangible and intangible assets (including the transferred ex-SeaFrance employees) that [Eurotunnel]/SCOP acquired meets the legal definition of an enterprise in that together they constitute the activities or part of the activities of a business."

50. The CMA therefore concluded this section of the Remittal Report as follows:

> "4.22 In its judgment, the CAT remitted to the CC the question of whether [Eurotunnel]/SCOP had acquired an 'asset' or an 'enterprise' and to that extent, our decision was quashed. As a result, the only matter on which we are required to make a new decision is this specific jurisdictional point. We have decided that [Eurotunnel]/SCOP have acquired an enterprise, and therefore that a relevant merger situation has arisen. In our view the effect of this is to reinstate the Report on all other matters."

51. As noted above, the CMA also found that there had been no material change of circumstances (or other special reason) since the publication of the Original Report which could lead it to reconsider other aspects of that Report. This part of the Remittal Report was not challenged before us.

VI. THE APPLICATIONS

52. As stated above, there are two applications for judicial review of the decision in the Remittal Report. Eurotunnel and the SCOP were granted permission to intervene in support of each other's applications. DFDS A/S ("DFDS"), which had commenced to operate a ferry service on the Dover-Calais route in February 2012 and which had itself been a party to one of the other bids submitted to the liquidator in May

2012 for some of the SeaFrance vessels, was granted permission to intervene in support of the CMA in both applications.

53. Eurotunnel applies for review on three grounds, its first ground being the central challenge to the CMA's decision, and the other two having received considerably less attention in both the pleadings and at the hearing, although Mr Gordon QC for Eurotunnel stressed that they were not to be seen as less important. The SCOP applies for review on one ground only, which essentially overlaps with Eurotunnel's first ground. However, by its statement of intervention, the SCOP expressed its agreement with and support for Eurotunnel's Grounds 2 and 3. In brief summary, the grounds of review are as follows:

(a) *No "enterprise" (Eurotunnel's Ground 1 and the SCOP's sole Ground)*: Eurotunnel and the SCOP both argue that the CMA erred in law in finding that there was a transfer or acquisition of an "enterprise" and, thus, that the CMA had no jurisdiction to review the acquisition. Eurotunnel and SCOP reasoned their challenges somewhat differently, although Eurotunnel adopted the submissions made by Mr Beard QC for the SCOP.

(b) *Decision to reinstate the rest of the Original Report (Eurotunnel's Ground 2)*: Eurotunnel contends that 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 *Eurotunnel I* had the effect of quashing the Original Report.

(c) *CMA fettered its discretion (Eurotunnel's Ground 3)*: In the alternative to its Ground 2, Eurotunnel contends that 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 those had not been challenged before the Tribunal or had been unsuccessfully challenged.

54. Both Eurotunnel and the SCOP ask the Tribunal to quash the decision in the Remittal Report pursuant to section 120(5)(a). Eurotunnel also raises the possibility that the matter be referred back to the CMA for it to take a new decision under

section 35 in accordance with the Tribunal's judgment pursuant to section 120(5)(b).

VII. NO "ENTERPRISE" (EUROTUNNEL'S GROUND 1 AND THE SCOP'S SOLE GROUND)

55. Both Eurotunnel and the SCOP were parties to the proceedings before the Tribunal in *Eurotunnel I* and there was no appeal against that judgment. Even if we are technically not bound by that judgment, in those circumstances neither Eurotunnel nor the SCOP suggested that we should not apply the interpretation of "enterprise" set out in *Eurotunnel I*, in particular the test elaborated at [105], although Mr Beard, representing the SCOP, in his oral submissions expressed some doubt regarding part of the Tribunal's subsequent elaboration of the test. Given the terms of section 120(5)(b) and that the Remittal Report followed the remittal of the case by the Tribunal with the express direction to apply the approach set out at [105] of the judgment (see at [123]), we take the view that it is not for us to reconsider that approach, as explained in some detail by the Tribunal in *Eurotunnel I.*

56. In the usual case, what is being acquired or brought under common control for the purpose of a merger reference under the Act is an ongoing business, or part of an ongoing business. However, as the Tribunal held in *Eurotunnel I*, and was common ground before us, to constitute an "enterprise" for the purpose of the Act it is not essential that the acquired entity is actually trading at the time of the acquisition.

57. The distinction between the acquisition of an "enterprise" (i.e. the activities of a business) and simply an acquisition of the assets of a business is directly addressed at [105] of the Tribunal's judgment. Mr Gordon focused the challenge by Eurotunnel on the proper interpretation of the test there prescribed. On a correct application of that test, he submitted that the CMA could not properly find that the acquisition here involved anything beyond "bare assets". This was because, he submitted, the key question where an enterprise had ceased trading is whether the effect of the transfer is to transfer a significant part of the former customer base. He argued that this is the critical feature that "necessarily encompasses the transfer of

assets that were engaged in or being used to undertake commercial activities." By "customer base", Mr Gordon made clear that he did not mean specifically customer contracts: there can be a transfer of an enterprise even if those contracts are not transferred. But mere customer lists will not be sufficient since, as we understood the argument, they do not comprise the active engagement between a business and its customers. It is the customer base that makes the assets of a business the subject of commercial activity. Once this key question was posed, it was clear that Eurotunnel did not acquire the former customer base of SeaFrance.

58. Although there is no reference to customer base as the defining criterion or key question in *Eurotunnel I*, Mr Gordon argued that this was implicit from the approval by the Tribunal of the approach of the MMC in *AAH*: see the opening sentence of [105]. It is therefore necessary to consider in a little more detail what was involved in that case. It concerned an acquisition in the pharmaceutical wholesale market. AAH was one of the two leading pharmaceutical wholesalers in the UK. On Sunday, 3 November 1991, the UK companies in the Medicopharma group (Medicopharma UK), ceased trading and redundancy notices were sent to all employees. Immediately thereafter, AAH acquired three of the eight depots used by Medicopharma UK, including the computer equipment, fittings and stock and a number of vans. AAH did not take over customer contracts or indeed acquire customer lists. But the staff of Medicopharma UK were told to report to their place of work despite the redundancy and most were at least temporarily taken on by AAH on the same terms and conditions as previously. The three depots began fully operating again on 7 and 8 November (and would have done so already on 4 November if various transitional arrangements could have been completed in time). AAH told the MMC that it had deliberately tried to structure the arrangements so that they would not constitute a merger within the statutory regime, and that if it had not been for those constraints it would have wished to acquire Medicopharma UK as a going concern.

59. It is appropriate to set out the paragraphs of *AAH* from which the extract quoted in *Eurotunnel I* was taken:

> "6.101. We have considered carefully AAH's argument that it acquired only assets and in this respect we have noted that Medicopharma UK had resolved to cease trading, the depots did not operate fully until 7 or 8 November, Medicopharma UK's wholesaler dealer licences lapsed, no contracts were transferred, outstanding orders were not delivered, customers had to make new arrangements, the supply contracts to the warehouse were terminated and AAH installed its own branch managers at the depots. All of these matters are factors which favour the argument of AAH that it acquired only assets.
>
> 6.102 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. It obtained three depots complete with stocks and fixtures and fittings, which for reasons given in paragraphs 6.82 and 6.83 would have carried with them a certain degree of goodwill. It acquired the computers in those depots to which the computers or terminals of Medicopharma UK's customers had access, and the telephone and fax numbers of those depots. In this industry orders are placed and deliveries are made twice daily and retail pharmacies would need to find an immediate source of supply. The arrangements involved exclusive prior knowledge for AAH (and the other parties directly involved) of the fact and timing of the closure of Medicopharma UK. It was part of the Share Purchase Agreement that there had to be consultation on the timing and content of any announcement relating to the subject matter of the agreement. Other wholesalers were very much taken by surprise by the closure of Medicopharma UK's and as a result were not in a position to recruit a large number of new customers. The way the arrangements were structured also ensured that AAH could take on the employees at the depots it acquired almost as surely as if it had acquired those depots as going concerns. By these means it gained the benefit of those employees' knowledge of Medicopharma UK's customers as well as the benefit of their relationship with those customers…. All the above matters (dealt with in more detail in paragraphs 6.82 and 6.100) affect the three depots acquired by AAH and the continuation of business therefrom although some do not relate exclusively thereto."

60. The reference back to paras 6.82-6.83 of the report is to passages where the MMC noted that, although no contracts with either suppliers or customers were transferred, in the pharmaceutical wholesaling business it is the location of a depot that was important for customers because of the need for frequent and emergency deliveries, and that contact (by telephone and electronically) between a retail pharmacy and the particular depot from which it is supplied is important, so that by acquiring the depots AAH would acquire this element of customer link and goodwill. Those findings were in the context of the prior observations by the MMC in paragraph 6.81 about the importance of creating a contact and connection with the customer in preserving the customer base of a pharmaceutical wholesaling business rather than the formal transfer of existing contracts.

61. While this preservation of the customer base was therefore a significant factor in *AAH*, we think it is clear from para 6.102 that it was only one of a range of factors on which the MMC based its conclusion. We do not consider that even in that case it was held to be the key or critical factor. But in any event, the observation of this Tribunal in *Eurotunnel I* relates to the statement at the outset of para 6.102. We think it is evident from [105] in the judgment that what the Tribunal found helpful in that statement was: (a) the distinction articulated by the MMC between "bare assets" and something more than "bare assets"; and (b) where the acquirer did not take over a going concern, whether it nonetheless obtained much of the benefit of acquiring a going concern. In our view, it is wholly misconceived to read the opening words of [105] as referring to, still less adopting, a test of whether the acquirer took over the customer base. The Tribunal had clearly paid regard to the relevant section of *AAH*, and if the Tribunal had considered that the question of acquisition of the customer base was the key question, it would have said so expressly.

62. Moreover, if acquisition of the customer base is the key question, as Eurotunnel submitted, the answer to that question was clear on the facts before the Tribunal in *Eurotunnel I.* Since SeaFrance had gone into liquidation and not traded for some 7½ months, it was obvious that at the time of the acquisition it had long ceased to have a customer base. The facts could hardly be more different from those in *AAH.* It is telling that in its Notice of Application, Eurotunnel indeed finds the factual support for its argument that SeaFrance's customer base did not transfer to Eurotunnel in the findings of the CC in the Original Report: see the Notice at paras 36-40. Accordingly, if the Tribunal had regarded this as the determining factor, it would not have remitted the matter for further consideration but would have readily been able to conclude that no "enterprise" was acquired. The fact that the Tribunal did remit this question therefore shows that it did not hold that this was the key question. Indeed, contrary to Eurotunnel's argument, the Tribunal stated expressly, at [105], that in determining the difference between bare assets and the activities of a business "there will be no single criterion giving a clear answer."

63. This of course does not mean that the question of a customer base is irrelevant. But as the CMA pointed out in its response, in some industries or circumstances a

customer base will be much more significant than in others. For a pharmaceutical wholesaler such as Medicopharma UK, established links with retail pharmacies, and thus a customer base, was very important to the activity of the business. However, consider the hypothetical example given by Mr Pickford, appearing for DFDS, of the only café on a popular beach that is only open during the summer holiday season. Were this to be sold in the winter months when the café is of course closed, it could properly be described as an "enterprise" even though it is not trading at the time of acquisition. At that point it has no customer base, although it has potential customers in the next and subsequent holiday seasons, its unique location generating that potential. However, from year to year the identity of the set of customers serviced could vary very substantially. These two examples make clear the difference in the significance of customer base as a criterion.

64. We should add that we did not find the reference to various decisions by the Office of Fair Trading concerning retail merger cases summarised in the note submitted by Eurotunnel shortly before the hearing, and which in turn was the subject of a note in reply on behalf of the CMA, of particular assistance on this issue. They are obviously not binding on the Tribunal, but in any event they merely demonstrate that each case in this regard turns on its facts.

65. In the Remittal Report, the CMA considered an aspect of customer base in the context of customer association of the new MyFerry operation with SeaFrance. As to that, the CMA stated:

> "3.194 We note the submission of both the SCOP and [Eurotunnel] that we have not considered whether customers regard the [MyFerry] business as continuing the SeaFrance business. Neither party submitted any evidence to us in this regard. Further, due to the passage of time, it was not possible for us to carry out a customer survey regarding the extent to which customers perceived any such continuity between SeaFrance and [MyFerry] at the critical time (namely, the point at which [MyFerry] launched its services). We have, instead, reached a view on how the period of inactivity impacted on these assets based on other evidence. We also note the views of the SCOP on this point with respect to freight customers, which are cited in paragraph 3.225 below; these suggest that [MyFerry] was affected by its association with the SeaFrance business.
>
> 3.195 Whilst we acknowledge that some of the goodwill associated with the brand and domain names is likely to have dissipated in the period of inactivity, nevertheless, [Eurotunnel's] offer to the French liquidator included €1 million attributable to the trade marks and domain names of SeaFrance. We find it significant that P&O bid separately for the domain names, indicating that it

> attached value to them despite the period of inactivity. We note also that [Eurotunnel] did not withdraw the SeaFrance web page immediately and gained some business as a result of redirected traffic ..."

66. Moreover, in addressing specifically the fact that no customer contracts were acquired, the CMA noted that passenger customers tend to use ferry services for less than one return trip per year and do not enter into contracts with the ferry companies. Accordingly, the CMA found that the absence of ongoing passenger customer contracts is of little relevance in this industry: Remittal Report, para 3.228. As regards freight customers, the CMA found that freight contracts in this industry are not exclusive, that negotiations with freight customers revolve around price, frequency, variability and capacity, and that MyFerry indeed experienced at the outset a negative effect from the perception among freight customers that they were a continuation of the SeaFrance business: paras 3.223-3.227.

67. We think it is clear from the Remittal Report that the CMA addressed the question of what over and above "bare assets" Eurotunnel acquired. Bare assets is not a precise term. But we consider that it would not here be regarded as covering goodwill, trademarks, trade names and domain names, nor does it encompass customer databases or lists. As set out above, Eurotunnel's successful bid included €1 million specifically for the trademarks and trade names, and the domain names and internet sites: see also Appendix B to the Remittal Report. The fact that these had real value is further supported by the fact that P&O, which did not bid for the SeaFrance vessels, nonetheless bid for the SeaFrance domain names and also for the passenger customer database: Remittal Report, paras 3.192 and 3.212. That is even before consideration is given to the ex-SeaFrance employees who, as we have noted, the Tribunal expressly found were acquired by Eurotunnel/SCOP. We return to the relevance of the employees below but would observe that although the employees of a business may be regarded as part of its assets, we think that reference to the acquisition of the "bare assets" of a business would not generally be understood to include any of its staff.

68. For the SCOP, Mr Beard put forward a rather different approach from that of Eurotunnel. He did not adopt the proposition that the key question was the continuation of the customer base, and indeed distinguished *AAH* on the different

basis that it was a very special case on its facts. He stressed that there the interval between the cessation and resumption of trading was a couple of days, and that the arrangements between the parties were deliberately designed to circumvent the application of the UK merger regime. To find that an enterprise was being acquired when the business was no longer a going concern, submitted Mr Beard, was wholly exceptional, and the facts of *AAH* made it just such an exceptional case.

69. The main thrust of Mr Beard's submissions was that there was manifestly no continuity between SeaFrance and the new operation of MyFerry, and that it was irrational for the CMA to find otherwise. Its conclusion that the activities of a business were acquired could not stand up in the light of the facts. All attempts by the administrators to sell SeaFrance as a going concern failed. The company therefore went into liquidation and ceased all trading activity. The vessels were sold to the highest bidder in a sealed auction. The overwhelming majority of the employees were made redundant and were thereafter unemployed. They had to apply to the SCOP in order to be employed in the new business, and to the extent that former SeaFrance employees were hired that occurred only after 2 July 2012 when Eurotunnel's acquisition of the assets was completed. Eurotunnel acquired the vessels 7½ months after they had ceased operating and the MyFerry service commenced 9 months after SeaFrance had closed down. Over a quarter of the staff engaged in running the MyFerry service by the date of the reference were not ex-SeaFrance employees. Accordingly, and unlike *AAH*, this was not an exceptional case where the statutory definition of "enterprise" should apply to a business that had ceased trading.

70. We acknowledge that these are powerful points, but they were all evident, and indeed it appears were all argued, before the Tribunal in *Eurotunnel I*: see especially at [94]-[95] and [112].[5] If they established that there was no enterprise being acquired, the Tribunal would have held accordingly and there would have been no remittal. The problem with the SCOP submission is that it fails to apply the test prescribed by the Tribunal at [105]. In particular, having established what over and above "bare assets" Eurotunnel/SCOP obtained, it is necessary to ask

[5] And [113(b)] for the proportion of MyFerry staff who were ex-SeaFrance.

whether and how that placed them in a different position than if they had gone out in the market and acquired the assets, and then to evaluate that difference.

71. That is the test which the Tribunal held should be applied. And, it seems to us, that is what the CMA proceeded to do, as Mr Harris QC submitted on the CMA's behalf. Moreover, the CMA applied the further guidance which the Tribunal set out in the paragraphs of the judgment following [105] that we have quoted or summarised above. Although Mr Beard expressed reservations regarding some of the Tribunal's observations, those appeared to us to reflect the SCOP's doubt regarding step (b) of the Tribunal's test. However, as we have stated, that is the test which we consider the CMA was bound by *Eurotunnel I* to apply and which is not for reconsideration on the present applications.

72. Mr Beard further challenged some of the CMA's findings in the Remittal Report. In that regard, since this is a judicial review and not an appeal, it is important to distinguish between a question of fact and of law. In *R (Thames Water Utilities Ltd) v Water Services Regulation Authority* [2012] EWCA Civ 218, [2012] PTSR 1147, Laws LJ said in his judgment (with which Tomlinson and Kitchin LJJ agreed):

> "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. The first question arises where there is no contest as to the evaluation of the facts, and the only issue is whether the statute is to be interpreted as covering those facts or not. An example far from the present case might be that of an imitation firearm. The statute prohibits the possession of firearms without defining the term. Does the provision on its true construction include the imitation weapon? The second question arises where there is no contest as to the meaning of the statute, and the only issue (an issue for a factual decision-maker) is whether the facts are to be evaluated as falling within the statutory rubric. An example equally far from the present case might be the statutory criminalisation of dangerous driving: the road traffic legislation uses but does not define the adjective "dangerous". The decision-maker, the criminal court, having found the primary facts, must evaluate them: must decide whether they establish a case of dangerous driving.
>
> 24. This second class of case, where the facts must be evaluated to see whether they fall within the statutory rubric, arises where the legislature has used a term whose factual scope is a matter of judgment, even opinion. It may be a matter upon which reasonable people may disagree. In such a case the debate is not about the

> meaning of the statutory expression, and it will have been the intention of Parliament to consign the issue as to the expression's application in a particular case to the judgment of the appointed decision-maker…."

73. Moreover, although the question of whether an enterprise was acquired by Eurotunnel/SCOP goes to the jurisdiction for merger control, that does not mean that it is a question admitting of only one answer. In *R v Monopolies Commission ex p. S. Yorks Ltd* [1993] 1 WLR 23, the issue also concerned the jurisdiction for merger control. There, the question was the meaning of the statutory expression "a substantial part of the United Kingdom" under the share of supply test (then in the Fair Trading Act 1973). The House of Lords reversed the decision of the Court of Appeal and restored the decision of the MMC. Lord Mustill, giving the reasoned speech with which all other members of the Appellate Committee agreed, said this (at 32F-33A):

> "Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v. Bairstow* [1956] AC 14. The present is such a case. Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment."

74. Here, the question whether and to what extent what Eurotunnel/SCOP acquired placed it in a different position than if it had simply gone out into the market and acquired those assets seems to us clearly a question of fact. And the further and critical question then articulated by the Tribunal in *Eurotunnel I* at [105], whether that turns what would otherwise be bare assets into what can properly be described as the activities of a business was said by the Tribunal to be a question of fact and degree. In our view, it is, to adopt Lord Mustill's language, a matter that calls for the exercise of judgment by the decision-maker for which there is not necessarily a clear-cut answer.

75. As regards the vessels, the Tribunal stated that further consideration should be given to the extent to which the facts that the vessels acquired by Eurotunnel were appropriate to short-sea crossings and maintained in hot lay-by expedited their return to service: *Eurotunnel I* at [114]. That is what the CMA did, and found:

(a) that the two passenger vessels especially had many particular features that made them suitable for the specific requirements of the Dover-Calais route: indeed, the French shipbroker reporting to the Paris Court considered them "hyper-specialised" vessels: Remittal Report, paras 3.116-3.118;

(b) there was a benefit in their being sister ships, thus achieving a consistency of service: Remittal Report, paras 3.120-3.121; and

(c) the fact that the vessels were in hot lay-by enabled the two passenger vessels in particular to be brought into operation within seven weeks of being acquired at a relatively modest cost, whereas there was a lack of alternative vessels that could be obtained to operate this route with its specific requirements: Remittal Report, paras 3.137-3.150.

76. Mr Beard did not really seek to challenge the CMA's conclusions regarding the vessels but directed most of the SCOP's attack at its findings regarding the employees. The Tribunal expressly noted in *Eurotunnel I* that the employees were not acquired from SeaFrance. However, it stated that the critical issue in that regard was whether the terms of the indemnity agreement meant that there was "a cogent reason on the part of Eurotunnel/SCOP to employ ex-SeaFrance employees"; and correspondingly, whether this was a benefit "that would not be gained were an employee from elsewhere to be retained": see at [119]. The CMA accordingly looked into the indemnity arrangement and its role in the Eurotunnel bid in more detail. It found, at paragraph 3.107:

> "In our view, the indemnity demonstrates that it is not the case that SeaFrance's employee contracts of employment were terminated 'with no thought as to how they might be reemployed in future'. The indemnity that SNCF – SeaFrance's parent company at the time – agreed to pay created a strong incentive for ex-SeaFrance employees to be employed on the *SeaFrance Berlioz*, *SeaFrance Rodin* and *SeaFrance Nord Pas-de-Calais* in similar operations to those of SeaFrance. It creates a link between the vessels and the employees and it was aimed at ensuring,

> and ultimately did ensure, to the extent possible given the points that we highlighted in paragraph 3.77 above, that a significant number of employees transferred from SeaFrance to the operator of the vessels. We consider that this shows that a large proportion of the SeaFrance workforce effectively transferred from SeaFrance to the SCOP."

77. We think that legitimate criticism can be directed at the opening sentence of that paragraph, which indeed contradicts the finding of the Tribunal at [115] in *Eurotunnel I*. It appears to fail to take account of the fact that at the time the SeaFrance employees were made redundant by the liquidator, as effectively he was bound to do in the circumstances of the liquidation, it was not at all clear what bids would be received, still less which bid would succeed.

78. However, the CMA took account of the fact that the staff of MyFerry were engaged by the SCOP through an open recruitment and that many ex-SeaFrance employees were not hired. But, it found that in recruiting staff (although not the selection of particular individuals) the SCOP would have been motivated by the prospect of the indemnity payments. That is a finding of fact which quite properly was not challenged before us. From the Remittal Report, it is apparent that around 40% of the 820 SeaFrance employees at the date of liquidation in January 2012 had found employment with the SCOP when MyFerry started operations on 20 August 2012. Moreover, at the latter date 80-90% of the SCOP employees were formerly part of the SeaFrance workforce. Given this data, we do not think that the CMA can be criticised for its use of terms such as "significant number" and "large proportion".

79. It should be recalled also that:

(a) the SCOP was set up with the aim of promoting the employment of a significant number of SeaFrance employees on a ferry service involving the SeaFrance vessels under new ownership;

(b) the indemnity under PSE3 was payable in respect of former SeaFrance employees engaged through a SCOP, or equivalent, in the operation of the SeaFrance vessels;

(c) the SCOP was associated with Eurotunnel in making the acquisition at issue;

(d) it was inherent in the bid by Eurotunnel that the SCOP would provide funding of about €10 million to make the operation viable, and it was evidently envisaged that this would be derived through the indemnity payments under PSE3;

(e) the "assets" acquired by Eurotunnel/SCOP included a significant number of ex-SeaFrance employees who were employed by the SCOP; and

(f) the amount obtained by the SCOP through the indemnity payments was very close to the €10 million figure.

Taking all this into account, we consider that it was clearly open to the CMA to find that the indemnity "creates a link between the vessels and the employees" and had both the purpose and result that a significant number of ex-SeaFrance employees were employed by the SCOP. On the particular circumstances of this case, we do not think it is irrational or fails properly to have regard to the facts for the CMA to have concluded that for those ex-SeaFrance employees who were hired by the SCOP there was in effect (although of course not as a matter of the legal relationship) a transfer of that part of the ex-SeaFrance workforce from SeaFrance to Eurotunnel/SCOP.

80. Responding to the SCOP's argument that there was no TUPE transfer, the CMA acknowledged that where TUPE applies that may be an indicator of the transfer of an enterprise. Mr Beard attacked the CMA for failing to accept the converse, which he submitted should be a relevant consideration. We agree that some of the language used in the Remittal Report (at para 3.110) can be criticised, in that the absence of a TUPE transfer is in our view a relevant factor. But a report of the CMA is not to be subjected to fine textual or legal analysis as if it were a statute: see *R v Monopolies and Mergers Commission, ex p. The National House Building Council* [1993] ECC 388 at [23]. As a matter of substance, the approach of the CMA was to find that the fact that TUPE, or more accurately its French equivalent, did not apply was not decisive and that the particular circumstances required fuller

consideration. The CMA explained why, given the previous problems of the SeaFrance business, in particular as regards over-manning and bad labour relations, a TUPE transfer would have been damaging to the prospect of a viable ferry operation. The CMA stated that "the liquidation avoided a TUPE transfer of employees" and that particular finding was not challenged. The development by Eurotunnel/SCOP of a viable business plan for the operation was substantially dependent on the ability of the SCOP to offer employment to a reduced number of appropriately skilled persons, but drawn substantially from ex-SeaFrance employees (see above as regards the role of the indemnity payment in providing funding). We do not think that the CMA's approach to TUPE, as a matter of substance, was irrational.

81. Further, the CMA found that being substantially staffed by ex-SeaFrance employees was a real benefit. The Remittal Report states at para 3.166:

> "In our view, having [70–80]% of employees, including [60–70]% of officers, who were available, in possession of the relevant skills and training, and were familiar with the vessels and their operation on the Dover–Calais route, was a material advantage to [Eurotunnel]/SCOP, enabling it to restart operations quickly."

Moreover, the CMA found that the fact that the vessels were known to the relevant authorities and that the ex-SeaFrance officers working for MyFerry were familiar with the port materially facilitated the process of obtaining new berthing slots: para 3.179.

82. Finally, the Tribunal stated in *Eurotunnel I* that the *combination* of all that was acquired (the vessels, brand and goodwill, and former SeaFrance employees) should be considered. It observed that the various factors appeared to inter-relate and that it may be that this combination, by enabling MyFerry to begin operations much more quickly than it could have done had it acquired crew and vessels from other sources, gave rise to a continuity that meant that this case amounted to the acquisition of an enterprise and not just of assets: see at [120]. The various findings of the CMA that we have discussed above adequately supported the conclusion that there was indeed an inter-relationship that had this effect: see para 4.19, first bullet, quoted at para 49 above.

83. In the Remittal Report, the CMA also set out an analysis of what it described as the "period of inactivity" between the cessation of ferry operation by SeaFrance on 16 November 2011 and the completion of the acquisition of the liquidated assets on 2 July 2012 and then the start of the MyFerry sailings on 20 August 2012. Various parts of that analysis were strongly criticised by Mr Beard, in particular the finding that a considerable portion of that period was due to "the requirements of the liquidator's sale process" (para 3.47) and that "[c]ontinuity of employment was effectively safeguarded by the formation of the SCOP" (para 3.52). We think that those criticisms are justified and we do not see how those findings can be derived from the facts, properly understood. It cannot be said that the liquidation process delayed what would otherwise have been an earlier recommencement of ferry operations using the SeaFrance vessels: all attempts to sell the business as a going concern had failed and it was only as a result of the liquidation process that the Eurotunnel bid emerged. And while the formation of the SCOP doubtless had the aim of achieving employment for many of the ex-SeaFrance employees, it could not possibly ensure that this aim would be achieved. At the same time, it seems clear that the placing of the vessels in hot lay-by was designed to preserve them in a ready state to be used again in ferry operations by a purchaser; and the formation of the SCOP, in the context of the PSE3, promoted the prospect of ex-SeaFrance employees being engaged in the ferry operations commenced by such a purchaser.

84. We have considered carefully whether the errors in the CMA's analysis of the period of inactivity undermine its conclusion as to the nature of the acquisition. That analysis relates to the background to the transaction. We recognise that the analysis is relied on by the CMA to support its view about "continuity and momentum", fastening on the expression in the final sentence of [120] in *Eurotunnel I.* However, the relevant sections 3-4 of the Remittal Report provide a detailed assessment of all aspects of the transaction, addressing in particular what was and was not acquired and its significance. Looking at these sections as a whole, we do not think that the particular errors to which we have referred vitiate the CMA's application of the test prescribed at [105] of *Eurotunnel I.*

85. Fundamental to this case is the statutory definition of "enterprise", i.e. "the activities, or part of the activities, of a business". That is the basis of the test set

out and explained by the Tribunal in *Eurotunnel I.* We should emphasise that it is not for us to decide whether we would have reached the same conclusion as the CMA, but whether the conclusion which the CMA reached discloses an error of law or was irrational under the established principles for judicial review. On that basis, bearing in mind that the task of the CMA was to apply the approach prescribed in *Eurotunnel I,* we do not see a ground to set aside its decision that the jurisdictional test in the Act was satisfied on the facts.

86. In the Remittal Report, the CMA added what it described as "broader observations on the jurisdictional test": see at paras 4.23-4.30. It there stated that the concept of an enterprise should receive a purposive interpretation, and that the purpose of the legislation here is "to enable the UK competition authorities to review transactions which might substantially lessen competition in a particular market." Mr Beard strongly criticised those passages and we consider that his criticism has considerable force. Control by the competition authority of transactions that restrict competition is achieved by enforcement of the Chapter I prohibition under the Competition Act 1998. The provisions at issue in this case under the Enterprise Act 2002 are concerned with the control of mergers, and we do not consider that they require or should be given an expansive interpretation.

87. However, it is clear that the CMA's "broader observations" are supplementary to the conclusion it reached in the previous sections of its report, on the basis that we have analysed. Accordingly, although we find that the CMA's view regarding an expansive interpretation is misplaced, it does not affect our decision on these grounds of the applications.

VIII. DECISION TO REINSTATE THE REST OF THE ORIGINAL REPORT (EUROTUNNEL'S GROUND 2)

88. Eurotunnel contends that 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 *Eurotunnel I* had the effect of quashing the entire Original Report. This therefore raises the question of what determination was made by the Tribunal in *Eurotunnel I*.

89. Section 120(5) provides as follows:

> "The Competition Appeal Tribunal may—
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

90. Here, the only part of the applications heard in *Eurotunnel I* that was not dismissed concerned the SCOP's challenge to jurisdiction on the "enterprise" point. The case was referred back to the CC on that specific point. The Tribunal stated, at [123]:

> "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 ... to remit the question of whether Eurotunnel/SCOP acquired an enterprise to the Commission."

91. Then, in its overall conclusion and disposition, the Tribunal stated, at [432]:

> "… we unanimously find that the question of whether the Commission has jurisdiction in this case must be remitted to the Commission for its reconsideration. The question is whether this is a case of two enterprises ceasing to be distinct within the meaning of section 26(1) of the Act, such that a relevant merger situation arises within the meaning of section 35(1)(a) of the Act. We consider this question to be an open one: our detailed reasoning is set out in Section II above. Accordingly, and for the reasons given in Section II above, we remit to the Commission the question of whether Eurotunnel/SCOP acquired an "asset" or an "enterprise". *To this extent,* and for that reason alone, we unanimously quash the Decision." [our emphasis]

92. We have no doubt that the Tribunal was accordingly quashing only that part of the decision in the Original Report, in accordance with section 120(5). Having dismissed all the other arguments, any other determination would have been extraordinary. Accordingly, there is no question of the CMA "reinstating" the other parts of the Original Report, such as the finding of a SLC or the remedy. Those parts were never quashed: they simply became contingent upon a finding of jurisdiction. It is in that sense that the CMA correctly said that to the effect of its finding on jurisdiction was to "reinstate" the rest of the Original Report: see at para 4.22 of the Remittal Report.

93. Eurotunnel submitted that irrespective of the Tribunal's judgment, the other parts of the report "fell away" once its "legal underpinning" was removed. We regard that as disingenuous. Clearly, if it was found that there was no jurisdiction, the rest of the report would fall away, but the Tribunal expressly did not reach a conclusion on the jurisdiction question.

IX. CMA FETTERED ITS DISCRETION (EUROTUNNEL'S GROUND 3)

94. If it is wrong in its contention under Ground 2, Eurotunnel submits that 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. On that basis, Eurotunnel contended that it should have had the right to argue again before the CMA the merits of such issues as the question of SLC or the remedy, beyond the narrow confines of section 41(3) (i.e., material change of circumstances or some other special reason). In particular, Eurotunnel wished the CMA to reconsider two specific issues regarding the remedy. The merits of those issues had not been considered by the Tribunal since the previous applications were for judicial review. The CMA therefore had a discretion to consider them afresh.

95. We consider that this argument suffers from the same underlying fallacy as Eurotunnel's Ground 2. It rests on the premise that the basis of jurisdiction of the Original Report had been "removed" by the Tribunal's judgment. However, the Tribunal by its remittal required the jurisdictional issue to be reconsidered: no more and no less. As we have stated above, the other parts of the Original Report were not quashed. Nor can the fact that a party wishes to re-argue part of the case on the merits constitute a "special reason" within section 41(3). In those circumstances, the CMA was entirely correct in its view that it could not hear further argument revisiting matters on which it had reached conclusions in the Original Report, concerning the remedy, aside from the question of whether there had been a material change of circumstances such that the remedy should be reconsidered.

96. We therefore consider Grounds 2 and 3 of Eurotunnel's application to be manifestly misconceived.

X. CONCLUSION

97. For the reasons set out above, we unanimously dismiss the applications for review brought by Eurotunnel and the SCOP.

The Hon Mr Justice Roth | Professor John Beath | Joanne Stuart OBE

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 9 January 2015