COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

Case No: 1326/4/12/19

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Rules"), the Registrar gives notice of the receipt on 14 May 2019 of a notice of application pursuant to section 120 of the Enterprise Act 2002 (the "Act"), by Personnel Hygiene Services Limited (the "Applicant") against a decision of the Competition and Markets Authority (the "CMA") to accept final undertakings dated 16 April 2019 (the "Final Undertakings"). The Applicant is represented by Gibson, Dunn & Crutcher UK LLP of Telephone House, 2-4 Temple Avenue, London, EC4Y 0HB (ref: Ali Nikpay).

According to the application, the Applicant is the leading supplier of washroom services in the UK.[1] In December 2017, the two other major suppliers of washroom services in the UK, Rentokil Initial plc ("Rentokil") and Cannon Hygiene Ltd ("Cannon"), merged (the "Merger").

The Merger was subject to an investigation by the CMA. On 25 January 2019, the CMA issued its final report (the "Report"). It concluded that the Merger *"is likely to result in higher prices or a worse service for customers seeking a single supplier of waster disposal services at multiple locations across the whole or a large part of the UK"*, i.e. a substantial lessening of competition ("SLC") in that market.

On 16 April 2019, the CMA published a notice of the Final Undertakings from Rentokil and Cannon, *"for the purpose of remedying, mitigating or preventing the SLC it has identified and any adverse effects arising from it"* (the "Notice of Acceptance"). The Final Undertakings required the divestiture of Cannon's customer contracts in the markets affected by the SLCs to a purchaser approved by the CMA, on the basis that, *inter alia*, *"an approved Purchaser must have access to appropriate financial resources, expertise and assets to be or to become an effective competitor in the market for supply of washroom services in the UK*."

The Applicant challenges the Final Undertakings and the CMA's decision to accept them on the following three grounds:

1. The CMA erred in law by deciding that an approved purchaser could be an entity which is able *"... to be or to become an effective competitor"* at some identified point in the future. This was contrary to:

    a. The requirements under section 41 of the Act, pursuant to which an action taken by the CMA *"must be such as to remedy or prevent the SLC concerned"*, i.e. a remedy must have an actual and immediate effect rather than just a potential effect at some unspecified point in the future.

    b. The CMA's own guidance on *"Merger remedies"* (the "Remedies Guidance"), which requires that a purchaser have the capability to enable the divested business *"to be an effective competitor"*, rather than just 'becoming' one at a later time.

2. The decision to accept the Final Undertakings was also unlawful and procedurally unfair on the basis that material modifications to the *"Purchaser Approval Criteria"* were included in the Final Undertakings for the first time, namely (i) a new, wider, definition of an approved purchaser, and (ii) fewer restrictions on subcontracting. In doing so, the CMA changed the position from the Report and the draft versions of the Final Undertakings on which it previously invited comments. This was:

[1] Washroom services comprise the supply of services and consumables related to washroom and toilet facilities in public, office and industrial buildings. They typically involve regularly scheduled service visits to a customer, during which the supplier services equipment, replenishes consumables such as toilet paper, and collects waste (from nappy or feminine hygiene units) for disposal.

a. In breach of paragraph 2(4) of Schedule 10 of the Act, as the CMA failed to give notice of the proposed notifications, which could not properly be considered to be *"not material in any respect"*;

b. Unfair, in that it failed to give affected third parties, such as the Applicant, a proper opportunity to make representations on the relevant parts of the Final Undertaking; and/or

c. Unfair, because the CMA failed to give adequate reasons for this decision.

3. In any event, the Final Undertakings failed to take due account of the concerns raised with the CMA and are incapable of reasonably or practicably meeting the requisite statutory purpose of remedying, mitigating or preventing the SLC identified. The CMA therefore acted irrationally in accepting them, in circumstances where there was a more appropriate option.

The Applicant seeks the following relief from the Tribunal:

1. An order quashing:

   a. The Final Undertakings;

   b. The Notice of Acceptance;

   and remitting the matter to the CMA for further consideration;

2. An order that the CMA pay the Applicant the costs reasonably incurred in bringing this application; and/or

3. Any further or other relief which the Tribunal considers appropriate.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules. Pursuant to the Order of the President of the Tribunal abridging time for applying for permission to intervene (made on 16 May 2019), any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received no later than **12 noon on 22 May 2019.**

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 email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

Published 16 May 2019