FERRIES AND FAIR HEARINGS

Groupe Eurotunnel S.A. v Competition Commission; Societe Cooperative de Production Sea France S.A v Competition Commission

Daisy Mackersie*
Pupil, Monckton Chambers
December 2013

**This note reflects the personal views of its author and does not necessarily reflect the views of any member or client of Monckton Chambers.*

In its long awaited ruling on the Eurotunnel case, the Competition Appeal Tribunal has delivered a wide-ranging judgment dealing with almost the whole of the legal framework within which the Competition Commission considers mergers. Two aspects of the judgment are of particular importance. First, the judgment gives detailed consideration to the concept of an "enterprise", and how that concept is to be distinguished from an asset purchase. Secondly, and of even greater importance, the Tribunal considered whether the Commission's procedures, and its management of confidential information, require modification in light of recent decisions of the Supreme Court on closed procedures and the approach taken in EU law (the principle of "access to the file"). In summary, the Tribunal quashed the CC's finding that it had jurisdiction to consider the transaction and remitted that question to the CC. However, the Tribunal rejected the wide ranging criticisms of the CC's procedures and found that there was no breach of natural justice in the particular case.The Tribunal also rejected grounds of review concerned with the CC's assessment of competitive effects and remedies

Background

Eurotunnel operates the channel tunnel between Calais and Folkestone. SeaFrance used to operate ferry services between Calais and Dover. In November 2011, SeaFrance went into liquidation and ceased operating. In July 2012 some of SeaFrance's assets, primarily consisting of its three vessels,[1] were bought by Eurotunnel.

Subsequently, Eurotunnel entered into a formal arrangement with the Societe Cooperative de Production Sea France S.A. ("the SCOP", a workers' cooperative founded in October 2011 by a group of former SeaFrance employees) that the SCOP would provide the labour and operate the vessels. In August 2012, the entity MyFerryLink SAS, established by Eurotunnel to operate the ferry services, started operations on the Dover-Calais under its own brand.

The transaction was referred to the CC by the OFT. The CC decided that a "relevant merger situation" existed which could be expected to result in a substantial lessening of competition ("SLC") in the market for the supply of passenger transport and freight

1. The SeaFrance assets purchased by Eurotunnel also included the SeaFrance brand, customer records and the inventory of spare parts, and IT hardware and office equipment.

services on the short sea. In order to remedy the SLC, the CC decided that Eurotunnel should be prohibited from operating ferry services at the port of Dover. [2]

Both Eurotunnel and the SCOP challenged the CC's decision on a number of different grounds. The Tribunal dealt with the challenges in four broad categories.

I. Jurisdictional challenges

Pursuant to section 23(2)(a) of the Enterprise Act 2002[3] the CC concluded that Eurotunnel and SeaFrance had "ceased to be distinct enterprises" and that therefore a "relevant merger situation" existed for the purposes of its jurisdiction under section 35.[4] In order to reach this conclusion the CC relied on a finding that Eurotunnel had "acquired" the labour force which was provided by the SCOP. It identified two separate and alternative grounds for this finding:

(a) Under section 127(4)(d), Eurotunnel and the SCOP were "associated persons" as they had acted together to secure or exercise control of the SeaFrance assets and so were deemed to be one person.
(b) Eurotunnel had material influence over the SCOP and its employees for the purposes of section 26(3).

The SCOP challenged the CC's jurisdiction on four grounds. The first two challenges concerned the "associated person" argument:

- First, the SCOP argued that Eurotunnel and the SCOP were not "associated persons" because they did not together control the SeaFrance assets – only Eurotunnel had control of the vessels. The Tribunal rejected this argument because it depended on the unnecessary interpolation of a second "together" into section 127(4)(d) and gave the provision an unduly narrow scope.
- Second and alternatively, the SCOP contended that the transaction entered into by Eurotunnel/SCOP had not brought two enterprises under common control because Eurotunnel/SCOP had only acquired the SeaFrance vessels (and other miscellaneous items) and not the former SeaFrance employees, which the SCOP already had in place. The Tribunal rejected this argument because it found on the facts that Eurotunnel/SCOP had acquired both the vessels and the employees within the relevant timeframe.

The third challenge was to the finding of "material influence". SCOP argued that the CC was wrong to find material influence simply on the basis that the SCOP was economically dependent on Eurotunnel. The Tribunal agreed that the facts found by the CC did not demonstrate influence over policy, which was required by the Act, and concluded that

2. The CC could not require Eurotunnel to divest the vessels in the normal way because an inalienability clause inserting by the French Court on the sale of the SeaFrance assets which prohibits Eurotunnel from selling the vessels until June 2017.
3. All references to statutory provisions are reference to provisions in the Act.
4. In reaching the conclusion that a relevant merger situation existed the CC also found that the share or supply test in section 23(2)(b) was met. This finding was not challenged.

the CC had not considered the proper test under section 26(3) or addressed itself to how that test applied in this case. The Tribunal did not, however, remit the question to the CC because its rejection of the SCOP's first two grounds of challenge meant that the CC did not need to rely on section 26(1) to establish control of the labour.

Finally, the SCOP argued that the Commission had erred in finding that two enterprises had ceased to be distinct because the SeaFrance assets acquired by Eurotunnel were not the "activities or part of the activities of a business" [5] and therefore did not in fact amount to an "enterprise". The Tribunal noted that the meaning of "enterprise" is in the first instance a question of law in relation to which the CC has no margin of appreciation. In seeking to define "enterprise" as a matter of law the Tribunal noted the following points of principle: [6]

- The acquisition of the activities of a business constitutes something more than the acquisition of bare assets. Whether there is properly something over-and-above a bare asset purchase will be a question of fact and degree in each case;
- As a guiding principle, the essence of an enterprise is the combination of assets into outputs provided for gain and reward. This may include intangible valuable assets such as know-how or goodwill;
- The fact that an acquiring entity emulates the business of an acquired entity and even uses its assets does not necessarily mean that the acquiring entity acquired an enterprise. In this regard, the Tribunal noted that the statutory test will not be met if an 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 Tribunal concluded that the CC had not considered whether the SeaFrance assets amounted to an "enterprise" in accordance with these principles and it therefore remitted to the CC the question of whether Eurotunnel/SCOP had acquired an enterprise. The Tribunal was careful to confine its judgment to the approach taken by the CC, leaving the substantive question of whether the CC does in fact have jurisdiction in this case for the CC itself to decide.

II. Natural justice challenges

Eurotunnel contended that the CC's procedures in general were a breach of the rules of natural justice on the basis primarily that the recent decisions in *Al Rawi v The Security Service* [20111] UKSC34 and *Bank Mellat v HM Treasury* (No 2) [2013] UKSC 39 meant that the CC was obliged to provide Eurotunnel with all material information, including all "inculpatory" and 'exculpatory' evidence. Eurotunnel and SCOP also challenged the CC's procedure on a number of case specific grounds.

After considering the established and more recent case-law, the Tribunal identified the following relevant points of principle in relation to procedural fairness:

5. The definition of "enterprise" in section 129.
6. In part, these principles were based on the 1992 Monopolies and Mergers Commission Report on the merger between AAH Holdings plc and Medicopharma NV.

- The CC's decision must be judged by the "EU" proportionality standard of review (although the Tribunal suggested that this principle did not add anything in the present case);
- it is well-established that the requirement of procedural fairness, including the need for a person to know the case against them, depends on the circumstances, including any relevant statutory context, and that therefore one standard of procedural fairness will not fit all cases;
- *Al Rawi* and *Bank Mellat* concern the permissibility of closed procedures in the context of criminal and civil trials, and the Supreme Court's observations in those cases were not intended to apply generally to administrative decision-making or in the specific context of the CC's statutory procedure in this case;
- The EU law on access to the file in EU Commission investigations does not override the domestic statutory context so as to import an entirely different procedure into the CC's process;
- The Act establishes a duty in the CC both to consult and to protect confidential information;[7]
- In relation to specific procedural fairness challenges, the relevant test is whether the CC has provided a party with the "gist" of the case against it.[8]

On the basis of the above points, the Tribunal wholly rejected Eurotunnel's general procedural fairness argument and concluded that the CC "appears to have acted with perfect procedural propriety".

In relation to the specific challenges brought by Eurotunnel, the Tribunal took a similarly robust approach and rejected each of the challenges on the facts.[9] In relation to the SCOP's complaint that the CC had unfairly withheld disclosure of its Remedies Working Paper, the Tribunal found that the CC's approach was unfair, notwithstanding that the SCOP was formally a "third party". The Tribunal did not, however, uphold the SCOP's challenge, because as it happened, Eurotunnel had told the SCOP that the CC was intending to adopt a particular remedy, and the SCOP had made a late submission to the CC dealing with the point. The SCOP had therefore addressed the points against it, and so the CC's procedural failings were immaterial.

Limitation

In the context of the natural justice challenges the Tribunal also considered an argument made by the CC that Eurotunnel's complaints were out of time under section 120(1) of the Act.[10] Applying a number of previous decisions, [11] the Tribunal held that the issues raised by Eurotunnel might have been appealed when the complaint arose but this did not preclude them being raised by way of a challenge to the final decision.

7. Following BMI Healthcare Limited v CC [2013] CAT 24 at §39.
8. Following Lord Mustill at §560 in R v Home Secretary ex parte Doody [1994] 1 AC 531
9. Eurotunnel, §§241-263
10. Rule 26 of the Tribunal's rules provides that a challenge under s120(1) must be brought within four weeks of the disputed decision.
11. Orange Personal Communications Services Limited v Office of Communications [2007] CAT 36; BT plc v OFCOM (Partial Private Circuits [2011] CAT 5; Sports Direct International plc v CC [2009] CAT 32; R (Eisai) v NICE [2008] EWCA Civ 438

III. Challenges relating to the SLC

Eurotunnel challenged the CC's SLC findings on the grounds that the CC failed to investigate relevant issues and/or wrongly failed to take into account matters relevant to its decision. Applying the now well known principles applicable set out in *BAA Limited v Competition Commission* [2012] CAT 3 at [20](3) to (8), the Tribunal rejected all of these challenges.

IV. Challenges to the Remedies

Finally, Eurotunnel and the SCOP contended that the remedies imposed by the CC were disproportionate. The Tribunal applied the relevant principles set out in *BAA* at [20](2) and concluded that:

- There were no grounds to challenge the CC's decision that a less onerous remedy would not have been effective. The CC is under a statutory duty to "achieve as comprehensive a solution as is reasonably and practicable to the substantial lessening of competition" (section 35(4)) and its assessment of remedy options was consistent with this duty.
- The CC had not erred by including within its prohibition remedy routes which Eurotunnel had expressed no interest in operating.
- The CC was not required to take into account the impact of its remedy on the SCOP's workers because the SCOP could have decided not to contract with Eurotunnel and in deciding to contract it accepted the risk that its members' jobs might be lost in the event that the merger was blocked.

Conclusion

The Tribunal upheld two of the SCOP's grounds of challenge and found that there were deficiencies in the CC's approach to a third. Nevertheless, the outcome of the case turns essentially on the findings on the "activities" issue.

As to matters of procedure, the judgment is very largely an endorsement of the CC's existing procedures. The requirements of natural justice are context specific. Hence, in line with the recent *BMI* judgment, the question is what is a fair hearing in the context of a merger or market investigation, and this will generally involve detailed disclosure. The Tribunal also emphasised in the context of SCOP's fair hearing challenge the importance of third party rights to disclosure in addition to those of the main parties. Nevertheless, it would appear that the CC's existing practice of publishing its provisional findings (frequently amounting to hundreds of pages, albeit redacted for confidentiality) will satisfy the demands of procedural fairness in most cases without the need for disclosure document by document.

The general procedural fairness argument put forward in *Eurotunnel* has given rise to a number of judicial reviews relying on the same or similar arguments which have been stayed pending this judgment. Absent any appeal, the effect of this ruling is that these and future procedural fairness challenges will have to be made on orthodox administrative law principles and not on the basis of a generalised entitlement to disclosure.

Further, the Tribunal's decision on jurisdiction highlights an important aspect of the merger inquiry rules which has previously received relatively little attention. Although in some ways the facts in *Eurotunnel* are unusual (given the 7½ month period of inactivity between the cessation of SeaFrance operations and the start of "MyFerryLink" operations), the Tribunal has established general principles about what constitutes an "enterprise" which may have broader application.

Beyond this, the *Eurotunnel* decision is a further illustration of the difficulty of making direct challenges to the CC's substantive assessment of the existence of an SLC and its assessment of the effectiveness and proportionality of remedies.

This note reflects the personal views of its author and does not necessarily reflect the views of any other member of Monckton Chambers.

Alistair Lindsay appeared for Groupe Eurotunnel S.A.

Daniel Beard Q.C. and Rob Williams appeared for the Société Coopérative de Production Sea France S.A.

Paul Harris Q.C., Ben Rayment andThomas Sebastian appeared for the Competition Commission

Meredith Pickford appeared for and Ligia Osepciu acted for DFDS A/S

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com