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When will the purchase of assets amount to the acquisition of an enterprise?

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Competition analysis: Matt Evans, partner in the antitrust & competition team at Jones Day, considers the Competition Appeal Tribunal's (CAT) decision in Eurotunnel/SeaFrance.

Original news

Competition Appeal Tribunal: *Eurotunnel and Société Coopérative de Production Sea France v Competition Commission*--Judgment, LNB News 04/12/2013 72

The Competition Appeal Tribunal (CAT) has dismissed the natural justice challenges put forward by the Société Coopérative de Production Sea France (SCOP) and Groupe Eurotunnel against the UK's Competition Commission (CC). Both applicants' challenges to the CC's alleged failure to address certain issues have also been dismissed as have challenges relating to the nature of the remedy imposed by the CC. However, the question of whether the CC has jurisdiction in this case must be remitted to the CC for its reconsideration, the CAT concluded.

For more information on the case see Eurotunnel and Société Coopérative de Production SeaFrance v Competition Commission.

When will the purchase of assets amount to the acquisition of an enterprise under UK merger control rules?

EnA 2002, s 129(1)

The purchase of assets amounts to the acquisition of an enterprise where those assets constitute part of the activities of a business. The Enterprise Act 2002, s 129(1) defines a 'business' as including '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'.

In assessing whether the acquisition of assets amounts to the acquisition of an enterprise one can distinguish between the acquisition of 'bare assets'--which does not constitute the activities of a business--and the acquisition of something more than 'bare assets'. The CAT has held that this involves defining or describing exactly what over and above 'bare assets' the acquirer obtained and whether, and if so how, this placed the acquirer in a different position than if it had simply gone out into the market and acquired the assets. In practice, this involves assessing whether there is a combination of assets being acquired that amounts to a business--for example physical assets, intangible assets such as know-how and goodwill, customer records and employees.

What were the assets acquired in Eurotunnel/Sea France? Why did the CC conclude this amounted to the acquisition of an enterprise?

The assets acquired in this case were:

- o three ferries--described as vessels of suitable design to operate a passenger and freight transport business on the short-sea route (which includes Dover-Calais, Dover-Dunkirk, Ramsgate-Ostend and Newhaven-Dieppe)--the vessels were in a condition from which they were able to be brought into operation within two months of the acquisition taking place
- o the brand and goodwill of SeaFrance 'carrying some, but limited, positive value'
- o computer software, websites, domain names, IT systems, customer records, IT hardware, office equipment and an inventory of technical and spare parts
- o certain former SeaFrance employees

The assets were bought from administrators acting for the French courts which had ordered SeaFrance to cease operating on 9 January 2012 and placed the company into liquidation, following which its vessels were mothballed and its berthing slots in Dover and Calais surrendered.

All of the assets, except for the employees, were acquired by Eurotunnel. The employees were members of a workers' co-operative founded by a group of SeaFrance employees and known as SCOP. The CAT held that SCOP and Eurotunnel were 'associated persons' for the purposes of EA 2002, s 127(4)(d), with the result that SCOP and Eurotunnel are treated as one and the same person.

The CC concluded that the combination of assets listed above amounted to the acquisition of an enterprise, notwithstanding the fact that SeaFrance's berthing slots in Dover and Calais had been surrendered, there was a seven and a half month gap between SeaFrance's operations and Eurotunnel using its assets to launch a new ferry service, the SeaFrance vessels had been mothballed and SeaFrance's workforce had been dismissed.

For more information on the CC's investigation, see Eurotunnel/SeaFrance.

What has the CAT concluded and why has it remitted the question back to the CC?

The CAT has concluded that the CC ought to have carried out an assessment as to whether the assets acquired were merely 'bare assets' or something over and above 'bare assets' which amount to an enterprise. The CAT noted that a difficult question to answer in this case 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'.

The case before the CAT was a judicial review rather than a review on the merits. This precluded the CAT from determining questions of fact. The CAT held that the CC must determine the facts in order to assess whether the acquisition of the assets in this case amounted to the acquisition of an enterprise. That is why it has remitted the question back to the CC.

Will the CAT's judgment have an impact on the number of asset acquisitions caught by UK merger rules?

It is unlikely that the CAT's judgment will have an impact on the number of asset acquisitions caught by UK merger rules. First, it is doubtful whether the CC will reach a different conclusion the second time around. Secondly, in any event, asset acquisitions reviewed by the Office of Fair Trading (OFT) are relatively few and far between--typically fewer than five are reviewed each year.

It should also be recalled that the facts in Eurotunnel/SeaFrance are unusual and unlikely to arise often. In particular, an important element impacting the assessment of whether the assets acquired in that case amounted to an enterprise was the fact that the former SeaFrance assets and employees had stopped operating as a ferry business for seven and a half months prior to Eurotunnel using them to launch a new ferry service. It is worth noting in this regard that in May 2013, the OFT decided that it did not have jurisdiction over an acquisition of assets bought from an administrator, on the grounds that they did not constitute an enterprise. That case involved the acquisition by a consortium of Shell UK Limited, Greenergy International Limited and Vopak Holdings UK Limited of certain land and refinery assets of the former Petroplus Refining and Marketing Limited. The OFT found that after the former refinery had ceased trading,

there was likely to have been one or two months before the acquisition was completed in which no products left the premises being sold. It also found that a considerable amount of works, costs and effort would be needed for the purchasers to use the assets as a business--and that no employees had transferred with the assets, but would need to be hired on the open market. In light of these facts, the OFT concluded that the assets did not constitute an enterprise.

Finally, in terms of immediate impact of the CAT's decision, it should be recalled that in September this year the OFT referred to the CC the acquisition by Breedon Aggregates Ltd of the Scottish assets--mainly active and closed quarries--previously used by a competitor, Aggregate Industries UK Ltd. It will be interesting to see if the CC refers to the CAT's 'bare assets' test in its provisional decision in that case, due in early January 2014 (for more information on this investigation see Breedon Aggregates/Aggregate Industries).

What are the next steps in this case?

The focus now turns to the CC. It could request an appeal of the CAT's decision to the Court of Appeal. Alternatively, or in addition, the CC will re-open its merger investigation specifically to address the question of jurisdiction. The CAT has not imposed or indicated a time limit for the CC to reconsider whether it had jurisdiction over the transaction.

Interviewed by Diana Bentley.

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