Case No 1150/4/8/10

IN THE COMPETITION APPEAL TRIBUNAL
B E T W E E N:

CTS EVENTIM AG

Appellant

and

THE COMPETITION COMMISSION

Respondent

and

LIVE NATION INC

Intervenor

COMPETITION COMMISSION'S SUBMISSIONS
FOR HEARING 10 FEBRUARY 2010

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1. These submissions are served in accordance with the Tribunal's Order of 1 February 2010 that the parties should file brief skeleton arguments for the hearing on 10 February. They address the three issues raised by the Tribunal's letter of that date, namely:

   a. the reasons why the Commission's Report should be quashed and the appropriateness of remitting the matter back to the Commission for reconsideration;

   b. what directions (if any) should be attached to any remittal, including the period of time in which a new decision should be reached; and

c. issues of costs.

2. The Appellant is referred to below as "Eventim". The Competition Commission is referred to as "the Commission".

3. These submissions are made against the background of the Commission's proposal of 28 January 2010, set out in a letter to Eventim and copied to Live Nation and provided to the Tribunal.

Reasons for Quashing Report / Appropriateness of Remittal

4. The Commission addresses the Tribunal's first issue under three headings:

   a. first, the Commission sets out the reasons why it proposes to reconsider its Report in the present case;

   b. secondly, the Commission sets out the reasons why that course of action requires an Order of the Tribunal quashing the Commission's Report and remitting the matter to the Commission.

   c. thirdly, the Commission addresses the scope of the proposed Order as to quashing/ remittal.

Why the Commission Proposes to Reconsider its Report

5. The Commission received Eventim's Notice of Application on 20 January 2010. The Notice of Application represented the first occasion on which Eventim set out the reasons why it considered that the Report should not stand.[1]

6. On receiving the Notice of Application, the Commission gave careful consideration to the issues raised by Eventim's application.

[1] A phone call on 13 January and subsequent email on 14 January from lawyers for Eventim had intimated that they might bring proceedings but no decision had been made and no details were provided.

7. Eventim's application is set out under four grounds which may be divided into two broad categories: procedural challenges - that Eventim has been denied a fair hearing by the Commission (covered in Ground 1 and parts of other Grounds); substantive challenges - alleged errors by the Commission in its substantive assessment of the merger.[2] There is a wide range of particular allegations.

8. The Commission does not accept the wide range of allegations made against it in the Notice. It considers, however, that the challenge based on procedural fairness considerations is arguable, and that the appropriate course is for the Commission to withdraw the decisions made in the Final Report in order to afford Eventim (and other relevant parties) the opportunity to comment further upon the findings set out in the Report.

9. The reasons why the Commission considers that the procedural fairness challenge is arguable flow from the particular circumstances of the present reference inquiry.

10. As is clear from the Final Report, in considering whether the merger between Live Nation and Ticketmaster may result in a substantial lessening of competition, the Commission was particularly concerned about the impact of the merger upon third party entrants to the ticket retailing market in the UK. This issue was a key theory of harm which the Commission considered (amongst other theories of harm) in its Provisional Findings and in its Report.

11. Unlike many merger inquiries where the question of potential entry is dealt with in general terms and without specific focus on a particular entrant, in this case - and given the dynamics of the markets at issue - the focus was, very specifically, on whether Eventim's entry into the UK market would be undermined or limited such as to result in an SLC.

[2] There is overlap between the Grounds, most notably Grounds 1 and 2, in that Eventim alleges (by Grounds 2c and d) that the Commission erred in relation to two particular points on which Eventim would have wished to make further representations to the Commission (Ground 1).

12. Therefore, Eventim is not only an interested third party to the Commission's investigation of the referred merger, the assessment of its position was a key part of the Commission 's inquiry into the competitive effects of the merger.

13. In the earlier part of its inquiry (that is, before publication of the Commission's Provisional Findings or "PFs"), the Commission received evidence and submissions from, in particular, both the merging parties and Eventim.

14. The statutory scheme requires the Commission to consult the merging parties where it proposes to make a decision that is adverse to their interests – s. 104 EA02; and the Commission's Rules of Procedure (Rules 10.1 to 10.8) give effect to this by requiring the publication of provisional findings. In the PFs published on 8 October 2009, the Commission provisionally found that the merger was expected to give rise to an SLC on the basis of the theory of harm relating to Eventim's entry into the UK market, but on no other basis. Eventim's evidence as to the nature of its relationship with Live Nation and other matters was crucial to the position in the PFs.

15. There was, however, a particular difficulty which arose by reason of Eventim's position on confidentiality in the course of the inquiry. Contact was first made with Eventim on 24 June 2009, when it was asked to complete a third party questionnaire. Eventim said that it required the Commission to give it written assurance that the Commission would refrain from disclosing any of Eventim's information without Eventim's prior written consent and that Eventim must have the final say on how its information was used.

16. The Commission said it was unable to give that guarantee, but by way of email to Simon Pritchard on 13 July 2009, and in light of the concerns expressed by Eventim in relation to disclosure of information, the Commission did agree to act outside its usual practice with regard to publication of non-confidential information where Eventim was concerned. As a result, Eventim's initial submission to the Commission was not published or referred to on the Commission's website, nor was a summary of Eventim's hearing with the Group. This meant that Live Nation and Ticketmaster did not have the opportunity to comment on Eventim's submissions to the Commission until the provisional findings report was published on 8 October.

17. As a result it was not until after the PFs that Live Nation and Ticketmaster were put in a position properly to comment on submissions and material assertions that had been made by Eventim. These issues related to, for example, Eventim's assertion that Live Nation would sponsor its entry to the UK market. Live Nation disputed this assertion and submitted evidence on this and other relevant matters *after* the PFs.

18. Having considered the material submitted by the merging parties in response to the submissions of Eventim, the Commission decided that the provisional findings which accepted a number of assertions from Eventim could not be sustained. It was for that reason that in the Final Report (dated 22 December 2009), the Commission changed its views on this key issue from those expressed in the PFs. It found that the merger is not expected to give rise to an SLC on the basis found in the PFs or on any other basis.

19. The Commission was required to carry out its investigation, including to take account of the material received only after publication of the PFs, within a statutory period of 24 weeks with only limited scope for extension - s.39 EA02. This period was extended by 8 weeks[3] (until 19 January 2010) and the Final Report was published on 22 December rather than the original deadline of 24 November.

20. As is normal in the Commission's process, the PFs were published after several months of work, since the publication of PFs requires the Commission to have a sufficient understanding of the markets and relevant information to provide such a proposed decision document. This naturally means that where important information comes to the Commission *after* it has published provisional findings, there is a comparatively limited time in which to digest that material and consider the Commission's decision in the light of it as well as going through the difficult and time consuming process of drafting the final report to be published.

21. It is against this background that Eventim's application has to be considered. In relation to procedural fairness, it complains that it was not afforded the opportunity to comment

[3] Notice of the extension was published on 5 November 2009; the notice referred *inter alia*, to the new evidence that the Commission had received following publication of its PFs. Note that as only one extension of up to 8 weeks is permitted under s39(3) EA02, it is usual practice for an extension of the full 8 weeks to be granted, but the Commission would nevertheless seek to publish its report as soon as possible within this period wherever it can.

upon matters considered in and relied upon in the Report. The matters which Eventim complains about relate particularly to the theory of harm concerning Eventim and findings made in the Report concerning Eventim's position (a number of which differ from the Commission's provisional findings concerning Eventim's position). Some of these matters relate to Eventim's own dealings and strategy and are, therefore, matters upon which (Eventim contends) it has a particular perspective. Eventim contends that, given the Commission's change of position between the Provisional Findings and its Final Report, the Commission should have issued a second set of Provisional Findings setting out its reconsidered view.[4]

22. In considering this challenge, the Commission has had regard to a number of matters including: the fact that the issues under consideration by the Commission were the subject of submission by Eventim during the course of the inquiry; the specific and limited nature of the requirements for provisional decisions to be published pursuant to s.104[5]; the conduct of Eventim in the course of the inquiry and the difficulties to which that gave rise; and the public law requirements of fairness (which must be considered in all the circumstances).

23. Nonetheless, in the very particular circumstances of this case, the Commission considers that concerns raised by Eventim in relation to its opportunity to make further submissions in relation to various matters in the Final Report justify the withdrawal of the Report (or at least the conclusions in relation to SLC). This will ensure that any argument that the final decision was reached on the basis of any unfair procedure is dealt with.

24. The Commission recognises that key findings in the Final Report concerned the position of Eventim. It further recognises that Eventim does have a particular perspective on its position in the market. And the Commission is well aware that findings made in the Final Report depended on assessments of arguments and submissions which were only developed after the PFs.

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[4] See for example fn 63 to Eventim's Notice.

[5] Where a non-hostile merger is to be cleared, Parliament has specifically avoided any requirement for provisional findings although the Commission, in its own rules, does not distinguish between clearance and non-clearance decision as to when provisional findings will be provided.

25. In addition, the Commission recognises that the matters upon which Eventim seeks to comment are not matters in relation to which the Commission could presume that whatever was said by Eventim would have no impact on the decisions reached in the Final Report.

26. The Commission is also conscious of certain pragmatic considerations. For example, the hearing of Eventim's claim is now listed to be heard before the Tribunal on 17 and 18 March 2010. Preparation for that hearing will involve a good deal of work (and cost) for all parties, and there is a risk that at the conclusion of the process, the Commission's Report would be quashed and remitted to it in any event.

27. In contrast, the Commission notes that under its proposal, the time between the hearing on 10 February 2010 and the date on which the Tribunal might hand down its judgment in this matter (unlikely to be before the end of March) can instead be used to progress a substantive consideration of Eventim's representations. Some of the Commission's internal resource which would have been absorbed by the litigation can also be used for that purpose.

28. In the circumstances, the Commission considers that the most efficient and sensible way of dealing with the concerns expressed by Eventim, and which form, in particular, the bases of Grounds 1, 2(c) and 2(d) of Eventim's application, is for the Commission to reconsider its Report. The Commission notes that this is a case in which remittal to the Commission would be the only sensible remedy even if Eventim were to succeed in relation to the whole of its claim.

29. If matters are to take the course proposed by the Commission, it follows that the Commission will necessarily reconsider the substantive matters which are the subject of Grounds 2 to 4 of Eventim's application. That being the case and the Commission being concerned, if it does withdraw the Final Report, to avoid any argument as to the limitations on the scope of permissible further submissions or the scope of its reconsideration, the Commission will reconsider the SLC finding by treating the Final Report as setting out its provisional findings. Given that such a course appears to the Commission appropriate, it would appear that there is no purpose in the parties debating

the merits of Grounds 2 to 4 before the Tribunal, as the challenge in those respects would be academic since they are to be reconsidered in any event.

30. In summary, the Commission has carefully considered the challenge brought by Eventim and, in the very particular circumstances of this case and given the position of Eventim, has decided that withdrawal of the Final Report as a final decision (at least in relation to SLC matters) is the appropriate course to be adopted. Instead the Final Report as drafted will stand as the Commission's provisional view on the merger reference and submissions will be accepted from interested parties including, in particular, Eventim. It goes without saying that the Commission will take the Notice of Application (and witness statements and other material submitted with it) as matters requiring consideration in the course of the remittal process leading to a new final decision.

The Need for an Order of the Tribunal

31. In ordinary circumstances, where, following a judicial review challenge, a decision maker decided to withdraw a decision, it would be entitled to do so without more. In line with CPR 54 PD54A.17, where such a withdrawal was made, the normal course would be for the application for judicial review to be disposed of by way of agreed final order and, although not a necessity, the standard procedure would be for the agreed order to be accompanied by a statement of reasons. Such statements tend to be brief and general and give comfort to the court that a rational and fair (and not unlawful and improper) agreement has been reached.

32. The reasoning set out in the Commission's letter of 28 January would provide a sufficient statement of reasons for the purposes of CPR 54. The more detailed account provided above goes far beyond what is ever seen in such statements.

33. However, as noted above, even if the Commission could when faced with a challenge withdraw its decision (rather than having to defend litigation where it considers it unnecessary or, potentially, wrong to do so), it is clear that the Commission cannot unilaterally extend the time it has to consider the matter before it. In those circumstances, it is necessary where the time limit for the publication of a report by the

Commission has now lapsed for the Tribunal formally to quash the decision (or relevant parts of it) and remit the matter to the Commission.

34. Section 120(5) of the Enterprise Act 2002 provides:

> *(5) 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.*

35. Section 120(5) specifically provides the Tribunal with the power to give directions so as to enable the remittal of the matter to the Commission for reconsideration (the remittal and timing would be "in accordance with the ruling" of the Tribunal).

36. A similar issue arose for consideration in the s.179 challenge to the Groceries sector market investigation. There Tesco was partially successful in its challenge and matters required remittal to the Commission long after the final date by which the market investigation report was required to be published. Tesco argued in that case that no reopening could occur (it is notable that a similar argument in this case would deprive Eventim of a practical remedy). The Tribunal concluded it did have power to remit outside the statutory time limit: see *Tesco Plc v CC* [2009] CAT 9 (the relief judgment) §§6 to 29.)

37. It is for that reason that an order of the Tribunal is not only appropriate in the present case, it is necessary in order for the Commission's proposal to proceed.

Scope of the Proposed Order for Quashing and Remittal

38. The scope of the proposed order should be considered with reference to the Commission's Terms of Reference, which are at Appendix A to the Report. Those Terms of Reference reflect the questions set out in section 36(1) of the Enterprise Act 2002; paragraph 2(a) sets out the "relevant merger situation" question and paragraph 2(b) sets out the "SLC" question.

39. In its letter of 28 January 2009, the Commission proposed that it should reconsider its finding in its Report in respect of the SLC question, as it is that finding which Eventim challenges. The Commission notes that the Tribunal is empowered to quash and remit the whole or part of a decision, and so reconsideration of the SLC question only is one permissible course.

40. In its letter of 28 January 2010 Eventim proposed that the Commission's report should be quashed and remitted in its entirety. The Commission does not consider that such an approach follows from the grounds advanced by Eventim, which relate solely to the Commission's answer to the SLC question.[6]

41. Nevertheless, given that the Commission intends to publish a further Report in full in any event, it is content with the scope of the quashing and remittal proposed by Eventim - i.e. that the Report should be quashed and the entire reference remitted to the Commission.

Directions

42. The Tribunal asks what directions (if any) should be attached to any remittal, including the period of time within which a new decision should be reached.

43. The Commission recognises that in order for this matter to be resolved, it is necessary to establish a clear time frame within which the Commission must publish its final Report. However, the Commission proposes that that issue should be resolved by the Commission giving an *undertaking* to the Tribunal that it will publish its final Report within a specified period, rather than by any direction to that effect. That is because there is an open legal question as to whether the Tribunal is empowered to "direct" a deadline: see Tesco (above) at §§39-44. The giving of an undertaking would avoid the need to resolve this issue (as it did in *Tesco*).

44. In considering the period which should be allowed for the remitted reference, it is necessary to consider what will happen in practice if and when the matter is remitted to the Commission.

[6] Indeed, it is hard to see why Eventim would wish the issue of jurisdiction to be reopened.

45. As indicated above, the Commission intends to reconsider its report taking into account the points made by Eventim in its Notice of Application. However, the Commission also intends to publish a notice on its website stating that it is reconsidering its Report, and that the current Report should be treated, in effect, as the Commission's provisional findings. The Commission intends to invite comments on the Report within the same 21 day period which it allows for comments on its provisional findings in the ordinary course. Within that period Eventim, Live Nation and any other party will be able to submit further representations to the Commission if they so wish.

46. The Commission will, in its usual way, publish non-confidential versions of all the material it receives on its website to enable Eventim, the merging parties and any other interested parties to comment upon that material.

47. The period allowed for the remittal must also enable the Commission to address issues of remedies if the Commission concludes that the merger is expected to give rise to an SLC. The Commission's usual process is to consider issues of remedies in parallel with its consideration of comments received on its provisional findings, and the Commission would propose to take that course in the present case

48. The Commission has reviewed the duration of recent merger references, and has identified that in some three quarters of cases where the Commission has found an SLC and so had to answer the statutory questions relating to remedies,[7] the duration of the period between the publication of PF and the Final Report has been between two and three months. On that basis, the Commission proposes to give an undertaking that it will issue its final Report within a period of three months of any order of the Tribunal remitting the matter to the Commission.

49. The Commission does not consider that it is necessary for the Tribunal to issue directions or for the Commission to give undertakings in connection with any other aspect of the remittal.

Costs

[7] Section 36(2) of the Enterprise Act 2002.

50. The Commission considers that there should be no order in respect of the costs of Eventim's application to the Tribunal.

51. It is to be noted that the Tribunal has recognised that its discretion to award costs under Rule 55 of the Tribunal rules is a discretion which should be exercised having regard to the specific role of the Tribunal in dealing with specialist proceedings. The simple generalised presumptions used in other courts, for example, that costs follow the event, may not be applied or may be attenuated by the Tribunal in its discretion.[8] The Tribunal should, therefore, be particularly sensitive to the nature of the proceedings, the statutory role fulfilled by the Commission and the impact on decision making that onerous costs orders against public bodies may have.

52. In the present case the Commission has acted as swiftly as possible to deal with the challenge to its position made by Eventim. The Commission has dealt with Eventim's application promptly, conscientiously and reasonably, and in such a way as to minimise the costs generated by this matter. (The Commission made its proposal of 28 January 2010 within just over a week of receiving Eventim's Notice of Application)

53. Where a regulatory body conscientiously fulfilling a difficult statutory role recognises that a challenge may have validity and acts so as to rectify any alleged errors and allay concerns, it is acting responsibly in the discharge of its functions. It should not face substantial costs claims in such circumstances. Indeed, were the regulatory bodies to face costs orders against well funded litigants instructing expensive representation, it would reduce the incentive to act quickly to withdraw or otherwise review or correct decisions since the analysis of risk to the public body would have to take into account the possibility that a matter was worth fighting in order to avoid costs.

54. The inappropriateness of costs orders against public bodies who act swiftly to deal with challenges is particularly marked in cases where, as in the present, the principal challenge is procedural. The work done in putting together the challenge can be re-used in the course of the process of reconsideration. To a significant extent the costs incurred in putting together the application are not "stranded" in the litigation but will

[8] See *Merger Action Group v SoS BERR* [2009] CAT 19 at §§16 to 22 esp at §§19 and 21.

have been incurred in producing work that can be re-used in the course of the continuing inquiry. It goes without saying that the costs of a party's participation in an inquiry are not recoverable.

55. Furthermore, the Commission notes that in the present case, the conduct of Eventim has significantly contributed to the costs it has incurred. Following publication of the Report, Eventim did not provide the Commission with any notice of its claim or complaints prior to serving the Notice of Application. Eventim did not therefore provide the Commission with what would be described in the terminology of the CPR as a "pre-action protocol letter". Although there is no specific provision equivalent to the judicial review pre-action protocol (which makes clear a detailed letter before claim should be sent and provides a template) in the present context, it is plain and obvious that such a step should be taken by a party intending to bring judicial review. Under the CPR, the judicial review pre-action protocol,[9] provides inter alia that:

    a. litigation should be a last resort and should not be issued prematurely (§3.1).

    b. before making a claim, the claimant should send a letter to the defendant, the purpose of which is to identify the issues in dispute and to establish whether litigation can be avoided (§8).[10]

    c. if the protocol is not followed the Court must have regard to such conduct when determining costs (§3.1).

56. Thus even where ordinary "costs follow the event" rules are applied by a court the failure to provide a pre-action protocol letter can have significant consequences in costs terms. Failing to alert a potential defendant in advance of the challenge to be brought undermines that defendant's opportunity to do something about the matter under challenge without costs being incurred. Therefore failure to forewarn, in detail, is a serious failing which undermines the proper operation of the judicial review process.

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[9] White Book 2009 vol 1 p 2388.

[10] The Commission recognises that the exact timetable for this letter under the protocol does not work in the context of the time limits imposed by the Tribunal's rules, but the principle obviously holds good; in that regard see the Practice Direction on Pre-Action Conduct which states at paragraph 4.3 the Court will be interested in whether "*the parties have complied in substance with the relevant principles*".

57. There appears no excuse for the failure to provide a pre-action letter in circumstances where a great deal of time and effort from a major city solicitor and multiple counsel has gone into the preparation of the Notice of Application. Events between the issue of the claim and the Commission's proposal of 28 January clearly show that this is a case in which, had Eventim properly given the Commission notice of the gist of its intended claim, the cost incurred by Eventim in preparing its very substantial Notice of Application could have been avoided.

58. In addition, the Commission would also note that Eventim's conduct during the course of the inquiry significantly increased the difficulties in operating the procedure of the inquiry within the statutory timetable. Eventim's own unwillingness to provide non-confidential versions of its submissions which would have enabled Live Nation and Ticketmaster to review and comment on Eventim's representations in advance of the publication of the PFs (on the basis of stated concerns regarding confidentiality) contributed to the problems which arose by reason of submission of important material late in the inquiry timetable. As noted above, because of Eventim's position in that regard, the publication of PFs represented the first occasion on which Live Nation and Ticketmaster were able to respond to the Commission's theory of harm, based as it was on representations from Eventim. Eventim's own conduct is therefore a substantial part of the cause of matters reaching the present stage.

59. In all the circumstances, the Commission invites the Tribunal to make no order as to the costs of this application.

DANIEL BEARD
ROB WILLIAMS

Monckton Chambers

8 February 2010