COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1216/4/8/13

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the "Rules"), the Registrar gives notice of the receipt on 18 June 2013 of an application for review under section 120 of the Enterprise Act 2002 (the "Act"), by Groupe Eurotunnel S.A. ("GET") against a decision dated 6 June 2013 (the "Decision") made by the Competition Commission (the "Commission"). GET is represented by Pinsent Masons LLP of 30 Crown Place, London EC2A 4ES (ref: Guy Lougher).

GET, a company incorporated at the Paris Trade and Companies Registry in France, is the ultimate parent for subsidiaries which, inter alia, operate the Channel Tunnel and provide Eurotunnel Shuttle freight and passenger transport services through the Tunnel between the United Kingdom and France.

On 2 July 2012 GET completed the acquisition of three ferries (the "Vessels") and certain other assets from the liquidator of SeaFrance S.A. which had ceased operating in November 2011. The Vessels are currently used to carry on a passenger and freight ferry business between Dover and Calais by MyFerryLink SAS ("MFL") (which is indirectly a wholly-owned subsidiary of GET) under the "MyFerryLink" brand. The Vessels are on a day-to-day basis maintained and operated on behalf of MFL by a workers' cooperative (the Société Coopérative de Production – SeaFrance ("SCOP")) which employs a number of ex-SeaFrance employees. The completed acquisition by GET (the "Transaction") was referred to the Commission by the Office of Fair Trading on 29 October 2012 for investigation and report under the Act.

According to the application, the Commission found that the Transaction may be expected to result in a substantial lessening of competition in the supply of passenger and freight transport services on the short sea, which comprises the Dover-Calais route and a number of other routes across the English Channel, and determined that GET should be prohibited from operating ferry services at the Port of Dover from a date six months after the date of the order to implement the remedy unless GET has divested two of the three Vessels it acquired – the Berlioz and the Rodin – to a purchaser satisfactory to the Commission. In particular, the Commission found that the Transaction could be expected to result in the exit from the Dover-Calais route of a competitor, DFDS A/S ("DFDS") in the short term. The Commission also found that GET would have an incentive to raise prices for its Eurotunnel Shuttle service because some of the revenue would be retained within the merged group (the "internalisation effect"). The Commission further found that if DFDS exits from the Dover-Calais route, GET will have an incentive to manage MFL so that it competes less aggressively.

In summary, the principal grounds of review on which GET relies are that:

1. The Commission acted unfairly by not providing to GET (through its external legal and economic advisers in a confidentiality ring) important parts of its provisional findings and key evidence it relied upon, thereby materially prejudicing GET's ability to defend itself. The failures concerned critical issues including: (a) whether a supplier of ferry services was likely to exit from the Dover-Calais route and, if so, whether DFDS would exit and when it would exit; and (b) whether an indicative price rise (IPR) analysis and an upward price pressure analysis (GUPPI) provided an indication that any lessening of competition caused by the Transaction was expected to be "substantial".

2. The Commission failed to investigate a relevant issue and/or wrongly failed to take into account matters relevant to its decision. The Commission found that DFDS would exit from the market in the short term, relying significantly upon evidence from DFDS that *prima facie* was self-serving and innately questionable whilst, at the same time, the Commission failed to inquire into or consider evidence (including evidence on the file of the French Competition Authority) that would have cast doubt upon its finding (that DFDS would exit). Alternatively, if the Commission considered and investigated this issue, it wrongly did not provide any reasons for its analysis and/or did not provide GET with an opportunity to comment as part of its right to a fair hearing.

3. The Commission found that if DFDS were to exit from the Dover-Calais route, it was unlikely to re-enter that route. The Commission erred in arriving at a conclusion which was not justified by reference to its own findings and/or the evidence before it. Alternatively, the Commission wrongly failed to put back to GET for its response the central evidence on which the Commission relied in reaching this finding.

4. The Commission arrived at findings which were not justified by the evidence referred to and/or which reflect a failure on the part of the Commission to address relevant issues. The Commission appears to have concluded that the "internalisation effect" would arise even if DFDS did not exit from the Dover-Calais route. However the Commission did not examine or consider how the market would operate if three ferry operators remained. Alternatively, if the Commission investigated this issue, it wrongly did not provide any or sufficient reasons for its analysis and/or did not provide GET with an opportunity to comment as part of its right to a fair hearing

5. The Commission imposed a remedy (including an onerous non-compete restriction) which went beyond that which was needed to address the substantial lessening of competition based upon the Commission's own fact finding and reasoning and, as such, it was disproportionate. Further, the Commission unlawfully reversed the burden of proof, failed properly to investigate necessary matters and/or made findings for which there was no evidence.

By way of final relief, GET seeks:

1. a declaration pursuant to section 120(4) of the Act that the grounds of review are well-founded;

2. an order quashing the Decision pursuant to section 120(5)(a) of the Act;

3. an order referring the matter back to the Commission with a direction to reconsider and make a new decision under section 36 of the Act in accordance with the ruling of the Tribunal pursuant to section 120(5)(b); and

4. an order that the Commission pay GET the costs it has reasonably incurred in bringing its application; and

5. such further or other relief as is appropriate in all the circumstances.

GET submits that the case merits a high degree of urgency since it relates to the review of a merger decision. Moreover, the uncertainty resulting from the novel nature of the remedy which the Commission seeks to impose (cessation of activities from the Port of Dover) justifies a particular degree of urgency in this case.

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 18 June 2013), 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 24 June 2013**.

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 fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

Published 18 June 2013