Cooley

# UK Supreme Court Confirms Merger Control Threshold for Business Acquisitions

January 12, 2016

Shortly before Christmas, the UK Supreme Court issued a judgment that provides important guidance on the legal test for assessing the circumstances in which UK merger control rules apply to the acquisition of business assets. In its judgment of 16 December in *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority*, the Supreme Court ruled that the acquisition by Channel Tunnel operator Eurotunnel of three ferries previously operated by SeaFrance, together with the re-hiring of former SeaFrance employees to operate those ferries, constituted a reviewable merger. In reaching this conclusion, the Supreme Court overturned the judgment of the Court of Appeal and thereby vindicated the approach originally taken by the UK competition authorities when reviewing the transaction.

The Court of Appeal hears competition law appeals from the UK's general courts of first instance and the specialist Competition Appeals Tribunal ('CAT') on a fairly regular basis, as a result of which it has developed substantial expertise in this area. In contrast, it is rare for competition cases to proceed from the Court of Appeal to the Supreme Court. Indeed, since its founding in October 2009 (when it took on the judicial functions of the House of Lords), the Supreme Court has heard only three competition cases, none of which concerned merger control. As a result, the Court's *Eurotunnel* judgment provides an interesting opportunity to examine its approach to such cases.

## Background

This case arose from the collapse of ferry operator SeaFrance (a subsidiary of French state rail operator SNCF), which operated four ferries on the 'short sea' crossing of the English Channel between the UK and France until it ceased trading on 16 November 2011 in the face of insuperable financial difficulties. At that point, one of the ferries was returned to its owners and the remaining three ferries (the passenger ferries *MS Berlioz* and *MS Rodin* and freight ferry *MS Nord Pas-de-Calais*) were placed in 'hot lay-up' (a minimal form of operation that enabled them to be put back into service relatively quickly if a new buyer was found). The competent French court's provisional order for liquidation was confirmed on 9 January 2012, at which point all of SeaFrance's employees were made redundant, except to the extent that they were needed to maintain the ferries in hot lay-up. Soon afterwards, the French court approved a formal job-saving plan, under which SNCF agreed to pay any new employer of each ex-SeaFrance employee a sum of between €3,600 and €25,000, with the highest amount being reserved for re-employment on the former SeaFrance vessels in operations similar to those carried out by SeaFrance before its liquidation.

In July 2012, materially all of SeaFrance's assets, comprising the three remaining ferries together with SeaFrance's brand, customer records, IT systems, office equipment and business records, were acquired from SeaFrance's liquidator by Groupe Eurotunnel SE ('GET'), the operator of the Channel Tunnel. GET also entered into a long-term arrangement with a worker's co-operative formed by former SeaFrance employees (generally referred to by its French acronym, ('SCOP'), under which SCOP agreed to operate the ferries under contract with GET's new subsidiary, MyFerryLink. Under terms imposed by the French court, GET was prohibited from selling the ferries for five years. In August 2012 MyFerryLink commenced its cross-channel ferry service, using the *Rodin* and *Belioz* (with the *Nord Pas-de-Calais* as a reserve vessel) and a workforce almost entirely made up of employees who had previously worked for SeaFrance.

This carefully constructed rescue came unstuck in June 2013, when the UK's Competition Commission ('CC') ruled that the transaction should be prohibited under UK merger control rules, on the grounds that it substantially lessened competition in the provision of 'short sea' cross-channel transport services for passengers and freight. (This conclusion contrasted with that of the French competition authority, which had cleared the transaction, subject to limited conditions, back in November 2012.)

GET and SCOP challenged the CC's decision before the CAT, primarily on the grounds that the transaction did

not amount to a reviewable merger. Following a remittal of the case to the CC, which on 1 April 2014 was absorbed into the new Competition and Markets Authority ('CMA'), the CMA issued a new prohibition decision in June 2014. This was again appealed to the CAT, which ultimately supported the CMA's approach to jurisdiction and upheld the prohibition by order of 9 January 2015, to take effect on 9 July 2015.

Although GET decided not to appeal the CAT's judgment, and proceeded to seek a buyer for the three ferries, SCOP launched an appeal with the Court of Appeal. In its judgment of 15 May 2015 on that appeal, the Court of Appeal overturned the CAT's judgment, on the grounds that the liquidation of the business and dismissal of most employees in January 2012 marked a definitive end to the activities of SeaFrance. Since there could have been no transfer of those activities to MyFerryLink the following July, the Court of Appeal considered that the CMA had been irrational to conclude that a merger had arisen and allowed SCOP's appeal. The CMA promptly appealed the Court of Appeal's judgment to the Supreme Court.

# Legal test

The UK merger control regime is governed by the Enterprise Act 2002 ('EA02'), as amended by the Enterprise and Regulatory Reform Act 2013. The EA02 provides that the CMA is able to examine a transaction's impact on competition only if it involves the acquisition of an 'enterprise', which is defined as "the activities, or part of the activities, of a business".

The central question in this case was thus whether the arrangement by which GET acquired the SeaFrance assets to enable it to operate a ferry service, using ex-SeaFrance employees provided by SCOP, amounted to the transfer of an enterprise (which would be reviewable) or simply the acquisition of "the assets of a defunct enterprise" (or "bare assets") to start a new, albeit similar business (which would not be reviewable). The fact that there was a gap of almost seven months between the French court's final liquidation order in January 2012 and the acquisition, as well as the presence and terms of the formal job-saving plan, complicated the analysis.

# The Supreme Court's analysis

The Supreme Court noted at the outset that it would seriously limit the scope and efficacy of the UK merger control regime if it was not applicable to situations where activities are not being carried on at the moment when the concentration is achieved. In the Court's view, the acquisition of a seasonal business out of season, a business mothballed by liquidators in hope that a buyer can be found or a business whose activities have been temporarily suspended in a deliberate attempt to avoid merger control should all be reviewable. It would undermine the purpose of the legislation if the application of merger control depended on whether the target's activities were being carried on at the precise moment when it is taken over.

Since this could not be the test, the difficult question for the Court to address was whether an acquisition of assets from a business that had ceased trading nevertheless represented the acquisition of what the CAT had referred to as "the embers of an enterprise" that was capable of being revived and continued by its new owner, rather than simply a collection of assets that could just as easily have been acquired on the open market. Put differently, there must be a degree of "economic continuity" between the old and new businesses or, in the words of the Supreme Court, "the whole must be economically greater than the sum of its parts". The Court noted that, although the period of time between cessation of trading and acquisition of the assets will usually be a relevant factor in deciding whether an enterprise has been acquired, it is not decisive.

In applying this analytical framework to the facts, the Court noted that GET had acquired substantially all the assets of SeaFrance, including trademarks, goodwill and specialist vessels designed for the short sea crossing and maintained by the liquidator in a serviceable condition. GET's arrangement with SCOP enabled it to resume the ferry service with substantially the same personnel and the nature of the indemnity payments created a link between the vessels and the employees, on the one hand, and between the old and new employees, on the other. The Court also noted as significant the fact that the liquidation arrangements ensured that "commercial operability and coherence of the assets" was maintained during the cessation of trading. The Court therefore agreed with the CMA's conclusion that these factors demonstrated "considerable continuity and momentum" between the activities of SeaFrance and MyFerryLink and that this was sufficient for merger control to apply. In reaching this conclusion, following a succinct and clearly reasoned analysis, the Court dismissed the approach of the Court of Appeal as "unduly formal" and contrary to the economic substance of the transaction.

# Commentary

The Supreme Court's judgment confirms the broad application of UK merger control to business asset acquisitions. Despite the long and convoluted path to the judgment, this outcome is in fact unsurprising, given the underlying purpose of the law and the clear practice of the CMA. It is nevertheless a useful reminder that the acquisition of a collection of associated assets and employees is likely to be reviewable under the merger control rules, even if there has been a period of inactivity before the acquisition and even if the employees do not transfer directly.

Unsurprisingly, the CMA publicly welcomed the Supreme Court's judgment. The authority will have been particularly relieved by the Court's clear rejection of the Court of Appeal's damning conclusion that it had acted irrationally. CMA officials will also have no doubt been pleased to read the Court's comments concerning the need for appellate courts to exercise caution before overturning the economic judgment of an expert body, particularly in the context of merger reviews given the additional uncertainty and delay that arise as a result. As the Court recognised, such uncertainty is liable to "unsettle markets and damage the prospects of the businesses involved", which is undesirable. By recognising the need for "difficult and complex evaluations of a wide range of factors", rather than "analysis in purely legal or formal terms", the Court has confirmed the significant margin of discretion of the CMA. The Court has nevertheless emphasised that the CMA must still operate within the confines set by statute, as interpreted by the courts, by emphasising that the CMA's "expertise and the specialised nature of its functions do not clothe it with any wider power to determine its statutory jurisdiction than is enjoyed by other administrative decision makers, and its conclusions on the point are entitled to no greater deference on a review or appeal".

As a postscript, it is interesting to note that, as well as helping to clarify the scope of merger control rules, this case is a rare example of a competition law story making national news. Following GET's decision not to contest the prohibition of the transaction, it announced in June 2015 that it had agreed to rent the *MS Berlioz* and *MS Rodin* to the DFDS group, for operation between Dover and Calais, while retaining the remaining freight only ferry, the *MS Nord Pas-de-Calais*. As a result, MyFerryLink ceased operations on 1 July. The ex-SeaFrance employees protested at this outcome by occupying the *Berlioz* and *Rodin* and intermittently blockading Calais harbour with ships' lifeboats and blocking the Channel Tunnel entrance with burning tyres throughout the busy summer season. Traffic seeking to enter the port and tunnel terminal was frequently halted by protestors and illegal immigrants who had congregated outside the terminal sought to board stationary lorries as a way of getting into the UK. Given the rather febrile political atmosphere, the ensuing chaotic scenes made for lurid headlines.

A political deal was ultimately announced on 1 September 2015, under which 402 French ex-SeaFrance employees made redundant by the closure of MyFerryLink were hired by Eurotunnel and DFDS. No such deal was reached for the 70 UK-based workers. At the time of writing, DFDS Seaways continues to operate the *Berlioz* and *Rodin* (renamed the *MS Côte des Flandres* and *MS Côte des Dunes*, respectively) between Dover and Calais. The ultimate fate of the *MS Nord Pas-de-Calais*, which was retained by GET, remains unclear.