The Eurotunnel case continues

When is an enterprise not an enterprise?

*by **Alex Nourry** and **Dan Harrison****

Under the merger control provisions of the Enterprise Act 2002, the UK Competition and Markets Authority (CMA) has no jurisdiction over acquisitions of assets that do not amount to an "enterprise" – ie "the activities, or part of the activities, of a business". The Eurotunnel/SeaFrance merger is the first case in which a court has ruled on what amounts to an enterprise for these purposes. The judgment of the Court of Appeal (CA) in *Société Coopérative de Production SeaFrance (SCOP) v CMA* – the third ruling in the case but possibly not the last – is therefore significant, in particular for sales of assets of insolvent companies.

Facts

SeaFrance provided ferry services across the English Channel using four vessels staffed with employed crews. In June 2010, it entered into administration under French law. The administrators continued to operate SeaFrance's activities while seeking to sell the business as a going concern, but were unable to find a buyer and, on 16 November 2011, SeaFrance entered into compulsory liquidation, ceasing operations. On 9 January 2012, a French court prohibited any further continuation of SeaFrance's business and directed the liquidator to sell its assets. This triggered an obligation under French law to make SeaFrance's employees redundant, except those required to assist with the liquidation. The retained staff maintained SeaFrance's vessels while in storage (called "hot lay-up"), to enable any buyer to put them into service more quickly.

Concurrently, the French court approved the implementation by SeaFrance's parent company, SNCF, of a job-saving PSE3 plan for former SeaFrance employees. The plan, a requirement of the French labour code, contained measures to facilitate the return to work of those employees who could not be redeployed within the SNCF group, including payments to businesses that took on those employees. The highest payment (€25,000) was available to companies employing ex-SeaFrance staff on former SeaFrance vessels in an "operation similar" to that of SeaFrance.

In July 2012, Groupe Eurotunnel (GE) together with SCOP – a workers' co-operative formed to secure employment for SeaFrance's ex-staff through the continuation of its ferry services – acquired from the liquidator three of SeaFrance's four vessels and certain other intangible assets. It then recommenced ferry services as MyFerryLink in August 2012.

GE obtained clearance from the French competition authority for this acquisition, but at a relatively early stage in the proceedings, before SeaFrance had entered into liquidation.

Legal proceedings

In June 2013, following a Phase II investigation, the UK Competition Commission (as it then was) prohibited GE/SCOP's acquisition of the SeaFrance assets, and ordered that GE either cease its ferry service from Dover or divest the MyFerryLink business. While interesting – not least because they conflict with the decision of the French competition authority – the reasons for that prohibition are outside the scope of this article.

On appeal, the UK Competition Appeal Tribunal (CAT) overturned this decision in a judgment of 4 December 2013 (the *Eurotunnel I* judgment). It found that the Commission had not properly considered whether GE/SCOP had acquired an "enterprise", and remitted the matter to the Commission (which shortly thereafter was merged into the CMA) for reconsideration of this point. The CMA did so and, in June 2014, came to the same conclusion and reimposed the cessation/divestment remedy. A key finding was that the financial incentives under the PSE3 plan for re-employment of ex-SeaFrance employees had effects that were similar to a transfer of employees from SeaFrance to GE/SCOP, and had in fact resulted in ex-SeaFrance staff making up 70%-80% of the workforce of the SCOP.

GE/SCOP appealed again. This time, the CAT rejected the appeal (the *Eurotunnel II* judgment), holding that the CMA had adequately considered the points to which it had been directed by *Eurotunnel I* and that there were therefore no judicial review grounds for setting aside its decision. This second judgment was appealed by the SCOP to the CA.

The CA judgment

The CA, in a majority judgment (Lady Justice Arden dissenting), overturned the CAT's *Eurotunnel II* judgment. Emphasising the statutory definition of an enterprise as "the activities, or part of the activities, of a business", Sir Colin Rimer (with whom Lord Justice Tomlinson agreed) considered the key question to be whether GE/SCOP had acquired ownership or control of the activities of SeaFrance – namely, "the provision of ferry services across the short sea, using the four vessels that it did, staffed with the crews that it employed" – or whether it had instead acquired assets that would, or might, enable the setting up of a "new but similar business operation".

In the majority view, SeaFrance's activities could only be continued or resumed by GE/SCOP so long as SeaFrance still retained the employees to carry them out. The question was therefore whether the CMA had come to an irrational conclusion in finding that there had, "in effect", been a transfer of employees from SeaFrance to GE/SCOP, as a result of the PSE3 scheme and the resulting "momentum or continuity" in the combination of vessels and staff. The majority held that it had. As Sir Colin Rimer noted:

> "For all relevant practical purposes, the liquidator's dismissal of the staff rendered irreversible the cessation of SeaFrance's activities ordered on 9 January 2012; and the assertion that the steps taken in relation to the staff were designed to ensure 'continuity' in such non-existent

** Alex Nourry is a partner in – and Dan Harrison is a professional support lawyer with – Clifford Chance LLP*

> activities appears to me to be illogical. The dismissals in fact achieved the reverse of the potential for any sort of continuity, of which since 16 November 2011 [the date SeaFrance entered into liquidation] there had anyway been none. PSE3 obviously achieved a high likelihood of a buyer of SeaFrance's vessels being able to restart like activities by employing many of the ex-SeaFrance staff. That, however, was all it was capable of achieving."

While the length of the period of inactivity (seven and a half months) appears to have influenced the view of Lord Justice Tomlinson, Sir Colin Rimer considered that, in the circumstances, a shorter duration would have made no difference to his conclusions.

In the absence of any transfer of employees, other factors that had been relied on by the CMA were considered insufficient to support its decision. The maintenance of vessels in hot lay-up to enable a more beneficial sale was irrelevant, as it was not suggested that such maintenance operations were the relevant "activities" of SeaFrance. Similarly, even the CMA agreed that the acquisition by GE/SCOP of various intangible assets (including trademarks, brand names, internet sites, customer lists and goodwill) could not, by itself, support a conclusion that a relevant merger situation had arisen.

Implications

The facts of the Eurotunnel/SeaFrance merger were unusual, involving foreign insolvency and employment laws, and a protracted sale process. That the CA's judgment included a rare dissenting opinion – from Lady Justice Arden, who considered that there had been an informal "migration" of employees, even in the absence of any legal mechanism for transfer – shows how open those facts were to differing interpretations, and how close to the borderline of what amounts to an enterprise. Consequently, the precedent value of the judgment may be limited. Nonetheless, some statements in the judgment suggest that the CMA's current, inclusive approach towards the definition of an enterprise may need to be scaled back, at least when it comes to the sale of assets of insolvent companies.

First, the majority agreed with comments made by the CAT that the CMA, while entitled to interpret the definition of an enterprise purposively, is not permitted to construe it expansively.

Second, while the CAT's *Eurotunnel I* judgment was not under appeal, the majority expressed doubts (obiter dicta) about the CAT's guidance in that judgment and, in particular, its description of the relevant questions as being (1) whether the acquisition was of "something more than" bare assets; and (2) whether that "something more" placed the purchaser in a different position than if it had simply acquired the assets in the market.

Sir Colin Rimer expressed the view that, in defining an enterprise by reference to the activities of a business, Parliament's intention had been focused only on the acquisition of a business as a going concern. While he accepted that it is not necessary for the business actually to be trading, he placed weight on the question of whether the target business was capable of resuming its activities at the time of the transaction. So, for example, a seasonal seaside business that shuts for the winter is likely to resume its activities in the summer. Similarly, had SeaFrance been sold as a going concern in the period between 16 November 2011 and 9 January 2012 (after it had ceased trading but before the French court had prohibited further activities), such a sale would have entailed a transfer of employees under the French equivalent of the Transfer of Undertakings (Protection of Employment) Regulations, so enabling a decision that there had been an acquisition of an enterprise.

Third, the majority were not convinced of the usefulness of the 1992 decision of the Monopolies and Mergers Commission (the predecessor of the Competition Commission) in AAH/Medicopharma: a decision that forms the basis for the CMA's current published guidance on the definition of an enterprise. In part, this was because, in deciding that there had been an acquisition of an enterprise, that report did not "offer a very clear statement of the principle that it applied in arriving at such conclusion".

Can the CA judgment therefore be read as meaning that, when assets of an insolvent business are sold, the key determinant for merger control jurisdiction is whether they are sold as a going concern? That would bring increased legal certainty and make it easier for companies to bid for assets of their rivals on a level playing field. As competitors are likely to value such assets more highly than other bidders, this would also benefit creditors.

However, the judgment's implications are not so clear-cut. As mentioned above, many of the relevant comments of Sir Colin Rimer were obiter dicta, so anyone seeking to rely on the absence of a going concern to avoid CMA jurisdiction in the future may need to appeal their way to the CA to hear those views confirmed.

Moreover, one factor emphasised by the majority was that, unlike AAH/Medicopharma, in this case there was an absence of "evasive intent": the acquisition of the SeaFrance assets had clearly "not been designed to avoid merger control". While Lord Justice Tomlinson did state that "this consideration is not decisive of the objective question" that the CMA must resolve, it nonetheless appears to have been an important consideration.

Importing a subjective intent requirement into the definition of an enterprise would create a number of difficulties. Internal evidence of parties' intentions may be obscured by legal privilege. While communications between parties would be disclosable, they may be unnecessary: if a sale to a close rival is likely to secure the highest price for the target assets, an administrator may unilaterally decide that its best strategy is to liquidate the target company in order to avoid CMA jurisdiction, without any agreement with the ultimate buyer to do so. Moreover, even if the buyer were to concede that it would not have acquired the assets if required to undergo a CMA review, is that evidence of evasive intent, or simply a statement of commercial reality?

In proceedings before the CA, the CMA voiced fears that a more restrictive interpretation of the definition of an enterprise would invite gaming of the system. Those fears may explain the CMA's decision to proceed with an appeal to the Supreme Court, citing the "broader legal issues" at stake, notwithstanding GE's recent agreement to divest MyFerryLink to DFDS. If the Supreme Court agrees to hear the appeal, it is hoped that it will take the opportunity to elucidate a clear test for determining the jurisdiction of the CMA over sales of assets of insolvent companies.