

## EUROTUNNEL/SEAFRANCE MERGER INQUIRY REMITTAL

### Conduct of the Remittal

#### Introduction

1. By judgment of the Competition Appeal Tribunal (CAT) dated 4 December 2013, the question whether two enterprises had ceased to be distinct within the meaning of section 26(1) of the Enterprise Act 2002 (the Act), such that a relevant merger situation arose within the meaning of section 35(1)(a) of the Act was remitted back to the CC for its reconsideration.<sup>1</sup> Specifically, the CAT required the Competition Commission (CC) to reconsider whether Groupe Eurotunnel (GET)/Société Coopérative de Production Sea France SA (SCOP) acquired an ‘asset’ or an ‘enterprise’ (the jurisdictional question).<sup>2</sup> To this extent the decision of the CC in its report dated 6 June 2013 (the Decision) was quashed.
2. The CAT dismissed SCOP’s challenge to the CC’s finding that SCOP and GET were ‘associated persons’ within the meaning of section 127(4)(d) of the Act. The CAT also dismissed SCOP’s argument that even if SCOP and GET were ‘associated persons’, the CC erred in finding that the acquisition brought two enterprises within common control. The CAT dismissed the due process challenges brought by GET and SCOP and the CAT also dismissed GET’s and SCOP’s arguments that the remedy was disproportionate.
3. The CC sets out below the way in which it intends to conduct the remittal process, particularly with regard to gathering and considering further evidence.

#### Information gathering and analysis

4. The CC proposes to consider submissions made by parties to the CAT during the course of the appeal proceedings as further evidence on the jurisdictional question and to seek such additional information on the jurisdictional question as it deems appropriate.
5. The CC requests any persons wishing to provide written comments on the jurisdictional question at this stage to do so by 22 January 2014. The CC will consider any submissions made to it, along with any other information or evidence which any interested party wishes to submit relevant to this question provided that such submissions and material are received by this date.
6. The CC proposes to issue a report of its provisional findings on the jurisdictional question and will invite submissions on its provisional findings.

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<sup>1</sup> Groupe Eurotunnel SA v Competition Commission and Société Coopérative De Production Sea France SA v Competition Commission [2013] CAT 30 (the judgment).

<sup>2</sup> Paragraph 432 of the judgment provides:

However, we unanimously find that the question of whether the Commission has jurisdiction in this case must be remitted to the Commission for its reconsideration. The question is whether this is a case of two enterprises ceasing to be distinct within the meaning of section 26(1) of the Act, such that a relevant merger situation arises within the meaning of section 35(1)(a) of the Act. We consider this question to be an open one: our detailed reasoning is set out in Section II above. Accordingly, and for the reasons given in Section II above, we remit to the Commission the question of whether Eurotunnel/SCOP acquired an “asset” or an “enterprise”. To this extent, and for that reason alone, we unanimously quash the Decision.

7. The CC does not propose to hold hearings prior to publication of its provisional findings report, but does propose to hold hearings with parties following receipt of submissions on its provisional findings report.
8. The CC notes that the Decision was only quashed and remitted to it to the extent required to enable it to reconsider the jurisdictional question. Therefore the CC is not proposing to reconsider the competitive assessment in the Decision as part of the remittal process.
9. The CC notes that in the event that on reconsideration the CC decides that GET/SCOP acquired an 'enterprise', and thus a relevant merger situation has been created, since the Decision identified an anti-competitive outcome, the CC would come under a duty under section 41 of the Act to take remedial action, and pursuant to section 41(3) of the Act, the CC's decision on remedial action must be consistent with the decision in its report unless there has been a material change of circumstances since the preparation of the report or the CC otherwise has a special reason for deciding differently. The CC proposes that, in the event that it decides in its provisional findings on the jurisdiction question that a relevant merger situation arose, the CC would at that stage invite submissions and evidence on any such matters.
10. The CC requests, in accordance with its guidance (CC7 (Revised)), all parties making submissions to it to provide both a confidential and non-confidential version of those submissions. The non-confidential submissions will either be published on the CC website (along with a summary of any hearing which the CC holds) or, in cases of sensitivity, will be provided to the main parties and selected third parties.

### **Duration of remittal**

11. The CC proposes to issue a new decision within a period of approximately four months from the date of the publication of this paper. The CC anticipates publishing its provisional findings on the jurisdictional question by the end of February 2014.
12. An administrative timetable is published along with this notice. Compliance with any deadlines we specify will greatly assist us and help to ensure that the timetable is met. Anyone wishing to comment on the timetable should do so by 13 January 2014.
13. Comments should be made, by email or in writing, to:

[Eurotunnel.SeaFrance@cc.gsi.gov.uk](mailto:Eurotunnel.SeaFrance@cc.gsi.gov.uk)

or

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