

GET me some Gumbo

**And other recipes of
Anglo-French **confusion**
cuisine**

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Linklaters

Born on the Bayou

- Many concepts unchanged from FTA 1973
- Regime reform debate 2011-12
- **Mandatory regime, with cliffs**
 - *Gain: clear and objective thresholds (ICN)*
 - *Lose: material influence, share of supply*
- **Or: voluntary regime, keep the mangroves**
 - *Lose: more pain on hold-separates*
 - *Lose: no reduction in fuzziness of jurisdiction*
 - *Retain: voluntary notification, fresh pair of eyes*
- Other moving parts of regime reform, and general content = *no tweaking*

A **bayou** ([/'baɪ.ʊ/](#) or [/'baɪjuː/](#)) is a Franco-English term used in the United States for a body of water typically found in a flat, low-lying area, and can refer either to an extremely slow-moving stream or river (often with a poorly defined shoreline), or to a marshy lake or wetland

Laissez les bons temps rouler

- Material influence
- Associated persons
- Share of supply (the *smörgåsbord*)
- Substantial part of the UK
- s122(4) primacy of EU law / stop-the-clock
- Made public (4-month deadline)
- Article 22 deadline - 'made known'
- s27(5) two-year rule
- s29 control by stages
- Various turnover test nuances
- Number of merger situations

Sky v CC

Eurotunnel 1

?

South Yorks.

Ryanair

(Genus/Local B.)

Les Jeux des «Ping-Pong» *(Bof, tout est bien qui finit bien)*

When I use a word ... it means just what I choose it to mean - neither more nor less. The question is, said Alice, whether you can make words mean so many different things.

- **Bayou** – the CC by its defence submitted that what constitutes a enterprise was essentially a *question of fact and degree*, and thus a matter for the CC. *Eurotunnel II*, ¶38
- **Cliff** – the term enterprise does not simply mean what the [CC] says it means: the term ‘enterprise’ must be defined *and on this definitional question there is no margin of appreciation*. *Eurotunnel I*, ¶98
- **Bayou** – although the question of [enterprise] ... goes to jurisdiction for merger control, that does not mean it is a question admitting of only one answer: *South Yorkshire*. In our view it is, to adopt Lord Mustill’s language, a matter that calls for the *exercise of judgment*. *Eurotunnel II*, ¶74
- **Cliff** – there is no sustainable basis for [employee] ‘*transfer*’ [SeaFrance to GET/SCOP] or by what was said to be ‘*in effect*’ a transfer. That is not what happened as a *matter of law or any rational assessment* of the facts or ... the supposed ‘reality’ CA (Sir Colin Rimer), ¶199
- **Cliff .. no, Bayou** – the test ... is a question of law ... [its] application to particular facts may call for expert economic judgments. But otherwise the [CMA’s expertise and specialist nature] .. do not clothe it with wider power’ (¶31) *but then* ‘... economic continuity ... call[s] for difficult and complex evaluations of a wide range of factors ... cannot usually be reduced to simple points of principle ... in purely legal or formal terms The CA sought to reduce the question of economic continuity to [a] single question ... and led them to take an unduly formal approach ... and to discount the depth of economic analysis’ *Supreme Ct.*, ¶44

The *Smell* test

- How majestic is merger control, and what is Plan B?
- Despite remittal, CMA adds to Report ‘broader observations’ a.k.a. purposive interpretation so that CMA can, in effect, *catch all SLC mergers*
- *Acquirer’s intentions are relevant – deal avoids ferry vs. tunnel price competition if assets fall to rival ferry operator, DFDS (4.30, and fn 206)*
- **Eurotunnel II** – ‘*misplaced*’, but no harm done (¶¶86-7). Chapter I (?)
- **Court of Appeal** – obviously going for ‘wide’ interpretation, which is ‘*wrong*’, ‘*concerning*’, ‘important issue [re] ... hundreds of jobs’ (¶194)
- **Supreme Court** – ‘merger control is the *principal weapon in the law’s armoury* for pre-empting concentrations liable to affect [market structure ... if not applicable to non-trading activities] ... a significant limitation ... *cannot be related to economic rationale ... or any discernible purpose* which the legislature can sensibly be thought to have in mind’ (¶35)

"Gumbo is a veritable art form in Louisiana. There are as many gumbo recipes as there are cooks."

Stir the Pot: The History of Cajun Cuisine, p. 135

South Yorks. Gumbo

- Area worth consideration for purposes of merger control
 - Classic gumbo*: area, population, GDP, sights, sounds ...
 - Shrinkage: South Yorkshire. **Slough**. Haringey. **Eastbourne**. Leicester Sq.
- This is not so much a test as a list of potentially relevant factors. So what is the underlying principle? *Sup. Ct on CMA Juris. Guidance re defunct target* (¶137)
- Margin of appreciation
 - Cannot just list the ingredients, note that CMA has 3-star *Michelin* judgment, assert that this Gumbo is bound to be excellent.
 - Need to see the recipe and explain the food science a bit. Which ingredients bond and why? How long do you cook it? Etc.
 - But unless the recipe has eye of newt and toe of frog ...

* Gumbo is a heavily seasoned soup or stew that combines several varieties of meat or seafood with a sauce or gravy.^[4] Any combination of meat or seafood can be used.^[5] Meat-based gumbo may consist of chicken, duck, squirrel, or rabbit, with oysters occasionally added. Seafood-based gumbo generally has **shrimp**, crabmeat, and sometimes oysters.^[5] **Andouille** sausage is often added to both meat and seafood gumbos to provide "**piquancy**, substance, and an additional layer

Competition – news story

CMA welcomes Supreme Court judgment in Eurotunnel case

From: Competition and Markets Authority
First published: 16 December 2015
Part of: Mergers and Competition

The CMA has welcomed the judgment by the Supreme Court to uphold its appeal in the Eurotunnel case.



In the [judgment handed down today](#), the Supreme Court has ruled that the Competition and Markets Authority (CMA) took the correct approach in assessing whether Eurotunnel's acquisition of 3 ferries and related assets formerly owned by SeaFrance should be treated as a merger under the UK merger control rules.

This ruling provides clarity on an important point of law, which will assist in assessing such transactions in future.