

COMPLETED ACQUISITION BY GROUPE EUROTUNNEL SA OF CERTAIN ASSETS FORMERLY OWNED BY SEAFRANCE SA

Statement of issues

17 December 2012

1. On 29 October 2012, the Office of Fair Trading referred the completed acquisition by Groupe Eurotunnel SA (GET) of certain assets acquired from the liquidator of SeaFrance SA (SeaFrance) to the Competition Commission (CC) for investigation and report.
2. We must decide:
 - (a) whether a relevant merger situation has been created; and
 - (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.
3. In this statement we set out the main issues that we are likely to consider in reaching our decision. This does not preclude the consideration of any other issues that may be identified during the course of our investigation.

Background

4. GET owns and operates the Channel Tunnel, which connects France and the UK between Folkestone and Coquelles, under the terms of a concession granted by the British and French Governments. It receives income from selling its own shuttle services for passenger and freight vehicles¹ and from passenger trains (notably Eurostar) and rail freight services, which also pass through the Channel Tunnel. GET also owns Europorte SAS (Europorte), which has a number of rail freight subsidiaries and is responsible for maintenance at Dunkerque Sea Port.
5. SeaFrance was a wholly-owned subsidiary of Société Nationale des Chemins de fer Français (SNCF), which ran a passenger and freight ferry service between Dover and Calais. SeaFrance was placed in administration by the Tribunal de Commerce in Paris (the Court) on 30 June 2010. Following unsuccessful bids for the SeaFrance business during administration, the Court ordered its liquidation on 16 November 2011, at which point the SeaFrance ferry service between Dover and Calais ceased operating.
6. On 11 June 2012, GET was declared successful in its bid for a substantial part of the assets of the liquidated SeaFrance business. The assets included three out of four ferries (the fourth ferry was not included in the sale as it was chartered), the SeaFrance brand, websites and customer records.
7. GET recommenced operation of two of the vessels on the Dover/Calais route on 20 August 2012, trading under the name MyFerryLink. The operation of the vessels

¹ We use the term 'Eurotunnel' to refer to the businesses within GET responsible for operating and maintaining the Channel Tunnel, and for running freight and passenger shuttle services through the Channel Tunnel.

is carried out, under contract, by a workers' cooperative (the SCOP) formed largely of ex-SeaFrance employees.

8. The transaction has been considered by the French competition authority (the Autorité de la concurrence) which approved it, subject to certain behavioural undertakings, on 8 November 2012.

Relevant merger situation

9. We are required to decide whether a relevant merger situation has been created. We note that GET has argued that the assets purchased do not constitute an 'enterprise' within the meaning of the Enterprise Act 2002.

The markets in which Eurotunnel and MyFerryLink operate

10. Eurotunnel and MyFerryLink both provide cross-Channel transport for accompanied freight and for passengers and their vehicles on the Dover–Calais route.
11. Our initial view is that the relevant product markets are for:
 - freight ferry and tunnel transport services; and
 - passenger vehicle ferry and tunnel transport services.

It may not be necessary to distinguish accompanied and unaccompanied freight. We will consider the extent to which Eurostar passenger services and low-cost airlines exert a competitive constraint on ferry and tunnel services.

12. The Dover–Calais route, along with the other short-distance routes between England and France or Belgium, is known as a 'short-sea' route.² For some journeys Western Channel routes (such as Portsmouth–Le Havre and routes to the west of this) or North Sea routes (such as Harwich–Hook of Holland and routes to the north of this) may be effective substitutes. Our initial view is that for each of the product markets the relevant geographic market is the set of short-sea routes between Great Britain and France; however, we will consider the extent to which services on the Western Channel and North Sea routes exert a competitive constraint.

Counterfactual

13. We will assess the likely effects of the acquisition on competition compared with the degree of competition in the counterfactual situation, ie the competitive situation had the acquisition not taken place.
14. GET has submitted that the appropriate counterfactual is that the acquired vessels would have ceased to operate on the short sea.
15. Given that it was placed into liquidation, we do not consider the continued operation of SeaFrance to be the appropriate counterfactual.

² There is not a standard definition of short-sea routes. We consider these to comprise the Channel Tunnel, routes between Dover, Folkestone, Ramsgate, Newhaven and Calais, Dieppe, Boulogne, Dunkirk and the routes across the Belgian Straits (Ramsgate/Ostend).

16. The Liquidator received bids for some of the SeaFrance assets from several parties other than GET. In particular, a joint venture between DFDS and Louis Dreyfus Armateurs (LDA) made various bids to buy different combinations of the vessels acquired by GET.³ We are considering whether the purchase of some or all of these ships by DFDS/LDA is the appropriate counterfactual.
17. We will consider possible alternative scenarios and decide upon the appropriate counterfactual situation. The decision as to the counterfactual will affect the consideration of the theories of harm.

Theories of harm

18. Our initial view is that there are three ways in which the acquisition could give rise to an SLC (referred to as 'theories of harm'). We may revise our theories of harm as our assessment of the acquisition progresses. The identification of a theory of harm does not preclude an SLC being identified on another basis following further work by us or the receipt of additional evidence.

Theory of harm 1: Horizontal unilateral effects

19. The first theory of harm is that Eurotunnel has an incentive to raise prices as a result of the acquisition because GET would be likely to lose a smaller proportion of its sales as a result of a price rise.
20. If Eurotunnel were to increase prices, it would be likely to lose some business to the ferry operators. Before the acquisition GET would have lost that business entirely. After the acquisition, however, some of the lost customers would be likely to divert to MyFerryLink, retaining some profit within GET. All else equal, this effect gives Eurotunnel an incentive to increase prices on its tunnel services. The scale of this incentive depends on the closeness of competition between Eurotunnel and MyFerryLink and on the businesses' margins.

Theory of harm 2: The acquisition induces exit of a ferry operator

21. The second theory of harm is that the transaction changes the market in the longer term from one with three major operators (GET, DFDS and P&O), as at present, to a duopoly (GET and either DFDS or P&O) and that this may lead to higher prices. The theory hypothesizes that in the long term, alongside Eurotunnel only two strong ferry competitors are viable on the short sea, and thus the purchase of the SeaFrance assets by GET is likely to result in displacement of another operator (most likely DFDS), such that in the longer term there would be two rather than three significant operators, independent from one another (MyFerryLink and Eurotunnel being under common ownership), across the short sea.

Theory of harm 3: Bundling of tunnel- and ferry-based services

22. The third theory of harm is that following the acquisition, GET can sell a bundle of the Eurotunnel shuttle service and the MyFerryLink ferry service. If, for example, GET increases prices for its Eurotunnel shuttle services, and also offers a bundle in which

³ This bid was submitted by the New Channel Company A/S, a joint venture in which DFDS holds an 82 per cent stake and LDA holds an 18 per cent stake.

the MyFerryLink ferry service is sold at a considerable discount to other ferry operators' services, this might disadvantage customers and other ferry operators.

23. We note that the undertakings provided to the French competition authority can be expected to prevent the offering of such bundles for the next five years.

Other potential theories of harm

24. There are interavailability agreements in place between ferry operators on the short sea and Eurotunnel. These provide a form of insurance against unforeseen events that remove or reduce an operator's capacity. These agreements apply to passenger traffic, not to freight. It has been suggested that the acquisition in question may create incentives for Eurotunnel (as the only weather-immune service) to favour MyFerryLink over other ferry operators, or to increase rates for other operators, which may lead to raising costs to rivals. The evidence submitted suggests that these agreements are rarely invoked and the revenue generated by them is minimal. We therefore do not propose to carry out a detailed investigation of this theory.
25. It has been suggested that the acquisition may allow GET to use profits earned by Eurotunnel to subsidize predatory pricing by MyFerryLink and thereby induce exit of DFDS. We think it unlikely that MyFerryLink would be able to provide enough services to harm its ferry competitors significantly and for an extended period of time. We also note that Eurotunnel would be likely either to lose some of its freight and passenger customers or suffer depressed prices as a result of such behaviour, significantly increasing the cost and undermining the viability of such a strategy. Furthermore, we will investigate whether the acquisition might lead to the exit of an otherwise viable competitor as part of investigation of our second theory of harm noted above. For these reasons, we do not propose to carry out a detailed investigation of this theory.
26. It has been suggested that the acquisition may lead to vertical effects arising because of potential vertical links between MyFerryLink and Europorte. There is a particular concern because GET, on behalf of Europorte, has made an application that could lead to it managing the ports of Calais and Boulogne. This, in turn, could give GET the ability to influence the competitive process by favouring MyFerryLink and access to strategic information about competitors. We note that this concern relates to a hypothetical situation. We also note that as a result of the French competition authority's review, GET has undertaken that should it win the tender of the Regional Council of Nord Pas-de-Calais for the managing of the Calais port, to offer transparent, non-discriminatory access conditions to all users of the port infrastructures, in particular the ferry operators. GET has also undertaken that information concerning the users of the port infrastructure would not be transmitted to the GET departments in charge of the rail and sea transport activities. Given this background, we do not propose to carry out a detailed investigation of this theory.

Countervailing factors

27. We will consider whether the following countervailing factors would counteract any loss of competition arising from the acquisition:
- (a) *Entry.* We will consider whether entry to the market would be timely, likely and sufficient to prevent any SLC that might otherwise arise. In particular, we will assess the opportunity for expansion by existing competitors or entities currently operating in related markets.

- (b) *Buyer power.* We will assess whether the customers of MyFerryLink and Eurotunnel have countervailing buyer power and whether any such buyer power of some customers would be sufficient to protect all customers from the effects of an SLC. In this regard, we note the differences between freight and passenger customers. We would also consider what the impact of the acquisition is on any pre-existing countervailing buyer power.
- (c) *Efficiencies.* We will examine any arguments made in relation to efficiencies arising from the acquisition and, in particular, whether these are rivalry-enhancing efficiencies that can be expected to offset the effects of any loss of competition arising from the acquisition.

Possible remedies and relevant customer benefits

28. Should we conclude that the acquisition may be expected to result in an SLC, we will consider whether and, if so, what remedies might be appropriate, and will issue a further statement.
29. In any consideration of possible remedies, we will take into account whether any relevant customer benefits might be expected to arise as a result of the acquisition and, if so, what these benefits are likely to be and which customers would benefit.

Responses to the issues statement

30. Any interested party is invited to respond to the issues statement, in writing, by no later than 4 January 2013. To submit evidence, please email Eurotunnel.SeaFrance@cc.gsi.gov.uk or write to:

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