

REFERENCE RELATING TO THE COMPLETED ACQUISITION BY GROUPE EUROTUNNEL S.A. OF CERTAIN ASSETS OF FORMER SEAFRANCE S.A.

Notice of possible remedies under Rule 11 of the Competition Commission Rules of Procedure

Introduction

1. On 29 October 2012, the Office of Fair Trading (OFT), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC) for investigation and report the completed acquisition by Groupe Eurotunnel S.A. (GET) of certain assets of former SeaFrance S.A. (SeaFrance).
2. In its provisional findings on the reference notified to GET on 19 February 2013, the CC provisionally concluded that the acquisition has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) in the market for transport services to passengers on the short sea and in the market for transport services to freight customers on the short sea, which could be expected to lead to higher prices than would otherwise be the case and could also lead to a worsening in service quality.
3. This notice sets out the actions which the Group considers the CC might take, including any recommendations it might make for action on the part of others, for the purpose of remedying the SLC and any resulting adverse effects identified in the provisional findings. The CC invites comments on possible remedies by **5 March 2013** (see note (i)).

Criteria

4. In choosing appropriate remedial action, the CC shall have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.¹ When deciding on an appropriate remedy, the CC will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies that the CC considers equally effective, it will choose that which imposes the least cost or restriction. The CC will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. For completed mergers, the CC will not normally take account of the costs or losses that will be incurred by the merged parties as a result of a divestiture remedy.²

Possible remedies on which views are sought

5. The CC considers that the divestiture of the MyFerryLink (MFL) business or the assets employed in the business, including the vessels *Berlioz*, *Rodin* and *Nord Pas-de-Calais* (the Vessels), is likely to be effective in addressing the SLC.
6. For the purpose of this Remedies Notice, we define the MFL business as including, but not limited to, (a) the Vessels owned by subsidiaries of GET and (b) the benefit of

¹ Section 35(4) of the Act.

² *Merger Remedies: Competition Commission Guidelines*, CC8, November 2008, paragraph 1.10.

a contract entered into between MyFerryLink SAS, a subsidiary of GET, and the *Société coopérative et participative* (SCOP) for the operation of the Vessels on the short sea.

7. At this stage, the CC considers that divestiture of the MFL business or the assets employed by the MFL business would address the SLC we have found in the relevant markets. This remedy is likely to be a comprehensive solution to all aspects of the SLC. This is because the adverse affects that we identify arise as a result of GET operating the MFL business and shuttle services through the Channel Tunnel.
8. The CC invites views on the effectiveness of this proposed remedy. In assessing effectiveness, the CC will consider:
 - (a) *The structure of the divestiture.* The CC will consider appropriate arrangements for the divestiture of the MFL business or assets employed by the business including the Vessels (*Berlioz, Rodin* and *Nord Pas-de-Calais*), such that the commercial risks and benefits are transferred to a party independent of GET. The CC may also consider whether a charter of the Vessels to an independent third party would be an effective remedy.
 - (b) *The scope of the divestment.* The CC will consider whether the whole of the MFL business or the assets employed by the business, or a subset thereof, should be divested to ensure that the remedy is effective.
 - (c) *The identification of a suitable third party.* In general, as described in the CC's guidance, the CC takes the view that a suitable purchaser should have no significant connection to the merger parties that may compromise the purchaser's incentives to compete; have access to appropriate financial resources, expertise and assets; have an appropriate business plan; and be free from competition concerns.³ At this stage, the Group does not consider that P&O would be a suitable third party due to the scale of its existing short sea operations.
 - (d) *Effective divestiture process.* The CC will consider the appropriate timescale for achieving a divestiture and what procedural safeguards would be needed to minimize the risks associated with this remedy option.
9. The CC considers that behavioural remedies are unlikely to be effective in addressing the SLC and its resulting adverse effects.
10. We do not believe that a price cap on GET's tunnel services operated by Eurotunnel is likely to be effective in a market of this nature. As a result, we consider that it would not be practicable to design a cap on price that would be effective in limiting GET's market power. Any remedy would by necessity be very intrusive, and enforcement and monitoring would be very difficult, making it less likely that such a remedy would be effective.
11. A behavioural remedy, such as arrangements to separate the management of Eurotunnel from the management of MFL, is also not considered likely to be effective in constraining the commercial incentives that GET has to increase prices (given its ownership of the MFL business) and would be very difficult to monitor.

³ *ibid*, paragraph 3.15.

12. The CC invites views on the remedy options and will consider any other practicable remedies—structural or behavioural—that are proposed in order to address the provisional SLC and any resulting adverse effects.

Costs

13. In assessing the costs of the proposed remedy options, the CC will have regard to the implications of any remedy on the SCOP, which employs a number of former SeaFrance employees. The CC will also have regard to the implications of any remedy on third parties.

Relevant customer benefits

14. The CC will have regard to the effects of remedial action on any relevant customer benefits arising from the merger situation within the meaning of section 30 of the Act. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if the CC believes that:
 - (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and
 - (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
15. The CC welcomes submissions with supporting evidence on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent to which these are preserved by the different remedy options being considered.

Next steps

16. GET, SCOP and interested third parties are requested to provide any views in writing, including any practical alternative remedies they wish the CC to consider, by **5 March 2013** (see note (i)).
17. A copy of this notice will be posted on the CC website.

(signed) ALASDAIR SMITH
Group Chairman
19 February 2013

Note

- (i) This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings announced on 19 February 2013. The main parties have until **12 March 2013** to respond to the provisional findings. The CC's findings may alter in response to comments it receives on its provisional findings, in which case the CC may consider other possible remedies, if appropriate.