

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

**Supplementary 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 the supply of transport services to passengers on the short sea and in the market for the supply of transport services to freight customers on the short sea, which could be expected to lead to higher prices, and could also lead to worse service quality, than would otherwise be the case.
3. In its notice of possible remedies issued on 19 February 2013 (the Initial Remedies Notice), the CC invited comments on a number of possible remedies. In the light of the comments received by the CC and the Group's further assessment of those possible remedy options, the CC now wishes to invite comments on the remedy options set out in this supplementary notice.
4. This supplementary notice sets out 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 the possible remedies by **9 April 2013**.

**Criteria**

5. 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.<sup>1</sup> 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 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.<sup>2</sup>

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<sup>1</sup> Section 35(4) of the Act.

<sup>2</sup> *Merger Remedies: Competition Commission Guidelines*, CC8, November 2008, [paragraph 1.10](#).

## Background

6. The CC has received comments from a number of parties on the options set out in the Initial Remedies Notice including GET and the *Société coopérative et participative* (SCOP). Taking into account these comments, the Group has carried out a preliminary assessment of the practicability of a potential divestiture of the MyFerryLink (MFL) business or the assets employed by the MFL business.
7. In particular, the CC has considered the effect of the order made by the Commercial Court of Paris (the Court) on 11 June 2012 which authorized the sale of certain assets of former SeaFrance to GET, including the vessels *Berlioz*, *Rodin* and *Nord Pas-de-Calais* (the Vessels) (the Order).
8. Among other things, the Order states that ‘given the low price offered and the financial consequences of a possible change of flag and to avoid any speculative transaction to the detriment of the creditors, the ships shall be declared inalienable for a period of five years, within the meaning of Article L.642-10 of the French Commercial Code’ (the Inalienability Clause). Referring to the buyer’s labour-related commitments, the Order also requires that ‘GET shall provide a report regarding the labour situation, the level of hiring and operating conditions every 6 months for a period of two years from the date of the Order’.
9. The CC’s current understanding is that the scope and effect of the Inalienability Clause should be considered in the context of the terms of GET’s bid to the Court to acquire the assets. The minutes of the Court<sup>3</sup> describe GET’s bid as ‘a comprehensive, integral bid bearing simultaneously on the ships and other tangible assets and intangible assets whose acquisition is proposed, as part of an industrial project integrating the participation, via a SCOP composed of SeaFrance’s former employees’ and set out the contractual arrangement between GET and the SCOP and GET’s commitment to the operation of the Vessels. The minutes also note that ‘the project in which GET is participating is aimed at providing for a partnership with SeaFrance’s former employees who shall form a SCOP in order to revive the activities previously conducted by SeaFrance’.
10. Accordingly, the CC will take into account the implications of GET’s arrangements with the SCOP to operate the Vessels in assessing whether the effect of the Order, including the Inalienability Clause, is to prohibit only the sale of the Vessels or whether it also prevents GET from chartering the Vessels to another provider and whether its effect is to impose a requirement on GET to operate the Vessels for five years.
11. In this regard, the CC notes that the Inalienability Clause expires on 11 June 2017 and that GET may request the Court to consider a variation to the terms of the Order before that date. The CC recognizes that some of the remedies under consideration may require GET to apply to the Court to lift the Inalienability Clause.
12. The CC invites views on the issues set out above and their implications for the practicability of requiring GET to divest or charter the assets employed in the MFL business before the Inalienability Clause expires.

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<sup>3</sup> Minutes dated 11 June 2012.

## Possible remedies on which views are sought

13. The CC is considering a number of possible remedies. They are grouped in this supplementary notice as follows:
- Part A considers possible divestiture remedies which are likely to require the approval of the Court.
  - Part B considers possible divestiture of the MFL business<sup>4</sup> or assets after expiry of the Inalienability Clause and a possible recommendation for a market investigation.
  - Part C considers possible remedies which require GET to cease operating ferry services on certain routes.
  - Part D considers short-term price controls.
  - Part E considers the remedy proposed by the SCOP in its response to the Initial Remedies Notice.
14. The Initial Remedies Notice set out the CC's view that divestiture of the MFL business or the assets employed in the business is likely to be a comprehensive solution to the SLC because the adverse effects that the CC provisionally identified would arise as a result of GET operating both the MFL business and shuttle services through the Channel Tunnel. The CC continues to hold this provisional view.
15. In identifying a divestiture package, the CC takes as its starting point divestiture of all or part of the acquired business but will consider a divestiture drawn from the acquiring business if this is not subject to greater risk in addressing the SLC.<sup>5</sup> In this case, the CC considers that divestiture by GET of The Channel Tunnel Group Limited and France Manche SA, its two subsidiaries which jointly operate the Fixed Link, would be likely to be an effective solution to the SLC. Given the availability of possible alternative remedies set out in this supplementary notice, the CC is not minded to pursue this remedy option at this time.

### ***Part A: Divestiture remedies which are likely to require Court approval***

16. The CC has considered the arguments raised by GET and the SCOP regarding the practicability of divestiture remedies prior to the expiry of the Inalienability Clause. The CC understands that some remedy options may require the approval of the Court because of the terms and potential scope of the Order, including the Inalienability Clause.
17. The CC's current understanding is that a request to the Court is only likely to be successful if it takes into account the employment prospects of the SCOP members and avoids any speculative transaction to the detriment of the creditors of SeaFrance. For these reasons, the CC considers that a purchaser may need to be identified before a request is made to the Court. The CC has received no evidence to suggest that the consequences of changing the flag of the Vessels remain an issue.<sup>6</sup>

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<sup>4</sup> For the purposes of this supplementary notice, the MFL business is defined as including, but not limited to, (a) the Vessels owned by subsidiaries of GET, and (b) the benefit of a contract between MyFerryLink SAS, a subsidiary of GET, and the SCOP for the operation of the Vessels on the short sea.

<sup>5</sup> *Merger Remedies: Competition Commission Guidelines*, CC8, November 2008, [paragraph 3.6](#).

<sup>6</sup> The Court minutes noted that the reflagging of the Vessels might give rise to a tax liability for the liquidator of SeaFrance.

### *Divestiture of MyFerryLink SAS*

18. The CC considers that a possible remedy would be the divestiture of MyFerryLink SAS (MFL SAS). MFL SAS is the subsidiary of GET which has assumed the commercial risk of the ferry operation and has contracted to purchase ferry crossings from the SCOP and in return receives the income from sales to passenger and freight customers.<sup>7</sup>
19. The Vessels are owned by three separate subsidiaries of GET and are chartered to the SCOP. Therefore, in order to enable the purchaser to acquire the Vessels, this remedy could include an agreement for the purchaser of MFL SAS to purchase or charter the Vessels, either immediately or when the existing charters between the GET subsidiaries and the SCOP terminate.
20. Alternatively, divestiture of MFL SAS could be implemented without the purchaser having a right to purchase or charter the Vessels. In this case, GET would be able to renew the charters to the SCOP but would be required not to enter into any new arrangement with the SCOP or any other party for the operation of the Vessels, and not to operate the Vessels itself. GET would be required to divest the Vessels at the expiry of the Inalienability Clause.
21. The CC invites views on the effectiveness of this remedy. In assessing effectiveness, the CC will consider the factors set out in paragraph 24. In particular, in order to obtain the approval of the Court the CC believes that the purchaser might need to demonstrate that the divestiture would not have severe employment consequences for the members of the SCOP. The CC considers that possible ways in which this could be demonstrated would be for the purchaser to undertake to renew the contract between MFL SAS and the SCOP on expiry or to undertake to employ the SCOP members once it had acquired or chartered the vessels.

### *Divestiture of the MFL business or assets*

22. This possible divestiture package may comprise:
  - (a) the sale by GET of its three subsidiaries which own the Vessels employed in the business and MFL SAS; or
  - (b) the sale of the Vessels employed in the operation of the MFL business and all other assets relevant to the operation of the business;
  - (c) the sale of the Vessels employed in the operation of the MFL business; or
  - (d) the chartering of the Vessels by a third party from GET.
23. The CC believes that divestiture by GET of any of these packages would require approval of the Court because of the nature of GET's bid and because the divestiture packages in paragraph 22(a) to (c) would involve the sale of the Vessels, which is expressly prohibited by the Order. The CC's understanding is that, although chartering does not constitute alienation, the Order may be widely construed by the Court such that chartering is not permitted by the Inalienability Clause.

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<sup>7</sup> Sub-charter and marketing contract between MFL SAS and SCOP–SeaFrance.

## *Divestiture considerations*

24. The CC invites views on the effectiveness of these remedies. 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 such that the commercial risks and benefits are transferred to a party independent of GET.
  - (b) *The scope of the divestiture.* 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.<sup>8</sup> In this case, the CC may consider how a potential purchaser would address the Court's concern for the employment prospects of the SCOP's members. At this stage, the Group does not consider it likely that P&O would be a suitable purchaser due to the scale of its existing short sea ferry 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.

## ***Part B: Divestiture after expiry of the Inalienability Clause and recommendation for a market investigation***

### *Divestiture of the MFL business or assets after expiry of the Inalienability Clause*

25. In the event that the remedies set out in Part A are not practicable, the CC considers that an alternative possible remedy option would be the divestiture after 11 June 2017 (when the Inalienability Clause expires) of the MFL business or the assets employed in the MFL business. The CC considers that the adverse effects of the SLC can be expected to be long-lasting and therefore considers that this may be an appropriate remedy in the long term.
26. To address the anti-competitive effects of the transaction in the short term, the CC considers that it may be appropriate for certain behavioural remedies to apply during the period prior to divestiture. These may include the continuation and strengthening of the interim undertakings currently in place which are designed to hold separate GET's MFL business from its Eurotunnel shuttle business.<sup>9</sup> The interim undertakings include undertakings that:
- (a) the MFL business will be carried on separately and under a separate brand identity from the Eurotunnel business;

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<sup>8</sup> *ibid*, paragraph 3.15.

<sup>9</sup> [www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/eurotunnel\\_interim\\_undertakings.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/eurotunnel_interim_undertakings.pdf).

- (b) no confidential information relating to the MFL business or the former SeaFrance business will pass, directly or indirectly, from the MFL business (or any employees, directors, agents or affiliates associated with that business) to Eurotunnel; and
  - (c) any negotiations with MFL's customers in relation to the MFL business will be carried out by the MFL business alone and Eurotunnel will not negotiate on behalf of MFL or enter into any joint agreements with MFL.
- 27. In addition, the CC considers that during the period prior to divestiture, it may be appropriate to control prices charged on GET's shuttle services operated by Eurotunnel. Price controls are discussed further in paragraphs 36 to 38.
- 28. It is envisaged that the possible divestiture packages would be those set out in paragraph 22(a) to (c).
- 29. The CC invites views on the effectiveness of this remedy. In assessing effectiveness, the CC will consider the factors set out in paragraph 24. The CC acknowledges that in view of the period of time before the disposal would be implemented under this remedy, it would be appropriate for the CC to consider the suitability of each potential purchaser on its own merits at the time of divestiture before approving any potential purchaser.

### *Market investigation*

- 30. In the event that it is not practicable to implement the divestiture remedies described in Part A or in paragraph 25, the CC considers that an alternative remedy would be to recommend to the OFT to open a market study into the supply of transport services to passengers and freight customers on the short sea. The CC would propose that such investigation should commence by January 2015.
- 31. The CC further considers that in these circumstances it may be appropriate for certain behavioural remedies and price controls to apply in the short term, as set out in paragraphs 26 and 27.
- 32. The CC invites views on the effectiveness of this remedy.

### **Part C: Cessation of operations on certain routes**

- 33. The CC is considering the practicability and effectiveness of possible remedies which would require GET to cease operating MFL ferry services on certain routes:
  - (a) *Ceasing operations on the short sea.* The CC considers that if MFL were to cease operations on the short sea, this would address the SLC because MFL would then no longer be operating in the same market as the Eurotunnel shuttle services (see Section 6 of the provisional findings (market definition)).
  - (b) *Ceasing operations on the Dover–Calais route.* The CC considers that if MFL were to cease operations on the Dover–Calais route, the adverse effects of the SLC would be reduced because the Dover–Calais ferry route is a closer substitute for the Eurotunnel services than are other ferry routes on the short sea.
- 34. In considering these possible remedies, the CC will take into account the possible consequences for GET's arrangements with the SCOP.
- 35. The CC invites views on the effectiveness of these remedies.

#### ***Part D: Short-term price controls***

36. The Initial Remedies Notice stated that the CC did not believe that a price cap on GET's Eurotunnel services was likely to be effective. In making this statement, the CC was considering the effectiveness of price controls as a long-term remedy to the SLC that it has provisionally found.
37. The CC will further consider whether price controls could be an effective measure if applied pending a divestiture or market investigation as set out in Part B. A price control mechanism, if employed, would be applied to the prices of Eurotunnel to prevent increases in the price of shuttle services to customers due to the strength of the internalization incentive that results from GET's ownership and operation of the MFL business.
38. It is envisaged that price controls might be implemented by applying an overall average yield cap to each of Eurotunnel's passenger and freight shuttle services. At least two methodologies could be applied. First, a price cap could limit the average yield per vehicle to recent historic levels, with or without an inflation adjustment each year. This approach would be simple to implement, but would not be responsive to changes in market conditions. A second potential approach would limit the (maximum) average yield on the shuttle services so that the ratio of the average yield on the shuttle services to the average yield on ferry services did not exceed a specified target. The target ratio would be calculated initially on the basis of historic ratios observed prior to the operation of MFL and there might need to be an adjustment mechanism to provide for changes in the target ratio to reflect changes in the cost structures of the shuttle and ferry services. The second approach would require more detailed monitoring by the OFT than the first approach, and would probably require the assistance of an independent monitoring trustee.
39. The CC invites views on the effectiveness of price controls in this case.

#### ***Part E: The SCOP remedy proposal***

40. The SCOP has proposed that the SLC could be remedied by the following measures:
  - (a) complete separation of the commercial staff and management of the MFL business from GET by transferring all MFL employees to the SCOP;
  - (b) extension of the existing services contract between MFL SAS and the SCOP; and
  - (c) SCOP to be given an option to renew the services contract or acquire the vessels at the expiry of the contract.
41. The CC's current view is that so long as GET retains the commercial risk of the MFL operation this proposed remedy would not address the SLC, and that it is likely to result in a distortion risk because the SCOP would not have the same incentive to compete as would a ferry operator that was independent of GET.
42. The CC invites views on the effectiveness of the proposed remedy.

#### ***Invitation to submit comments on possible remedy options***

43. The CC invites views on the possible remedy options above 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**

44. As stated in the Initial Remedies Notice, in assessing the costs of the proposed remedy options the CC will have regard to the implications of any remedy for the SCOP, which employs a number of former SeaFrance employees. The CC will also have regard to the implications of any remedy for third parties.

## **Relevant customer benefits**

45. 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.
46. The CC will welcome any further 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**

47. GET, SCOP and interested third parties are requested to provide in writing any views, including any practical alternative remedies they wish the CC to consider, by **9 April 2013**.
48. A copy of this supplementary notice will be posted on the CC website.

*(signed)* ALASDAIR SMITH  
Group Chairman  
2 April 2013